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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**Issues raised on the Copyright
Amendment Bill**

**Presentation to the Portfolio Committee on
Trade and Industry**

31 October 2018

Presenters

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Purpose

The purpose of this presentation is to address the Portfolio Committee (PC) on issues raised by stakeholders during the period in which certain clauses were advertised on the Copyright Amendment Bill (CAB).

Background

- **Certain clauses of the CAB were advertised for public comment by the Trade and Industry PC.**
- **+16 stakeholders made comments as per advertised clause during this period, namely:**
 - Publishers' Association of South Africa (PASA)
 - Recording Industry of South Africa (RISA)
 - South African Music Performance Rights Association (SAMPRA)
 - International Federation of Film Producers (FIAPH)
 - MNet and Multichoice
 - IFPI
 - Music Publishers' Association (MPASA)
 - South African Music Rights Organisation (SAMRO)
 - South African Guild of Actors (SAGA)
 - Denise Nicholson
 - South African National Council of the Blind (SANBC)
 - CAPASSO
 - LIASA
 - National Clothing Federation of South Africa
 - South African Teachers' Union (SAOU)
 - National Professional Teacher's Organisation of South Africa

Background

- **The following clauses were advertised:**
 - Definition of collecting society – Clause 1;
 - Adding the rights of distribution and rental;
 - Requiring recording of acts in respect of audiovisual works and providing for an offence in this regard – Clause 9, Section 8A;
 - Empowering Collecting Societies further – Clause 25, Section 22C;
 - Creating an offence for not providing information to a Collecting Society – Clause 25, Section 22C;
 - Providing for the skills of an administrator to be appointed for a Collecting Society – Clause 25, section 22F; and
 - Clarifying section 28 – Clause 28.

Clause 1-Definitions

Issues raised during publication of CAB

- Replace ‘Collecting Society’ with ‘Collective Management Organisation’ (DALRO/PASA/FIAPF).
- Accreditation of Collecting Society should be absorbed into the CAB (MPASA/FIAPF/PASA/DALRO).
- Definition of Collecting Society aligned with EU directive, definition may exclude joint Collecting Society, definition excludes many stakeholders (SAMPRA/SAMRO).
- SAMPRA: the phrase “neighbouring rights” is not well known in SA. It should either be defined with reference to section 9, or deleted and reference made to copyright works.
- We propose the inclusion of joint collecting societies as currently provided for in the Collecting Societies Regulations (Regulation 3 (1) (c)).”
- MPASA, FIAPF: Publishers, photograph licensing agencies etc should be specifically excluded.
- Capture entities not meant to be captured by the new definition. There is a language by the EU Directive to capture that.

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- The introduction of ‘Collective Management Organisation’ will be in line with treaty language but the term itself is no different from ‘Collecting Society’. The use of Collecting Society as opposed to Collecting Management was a policy position which was communicated to the PC and PC Sub-Committee on several occasions.
- In terms of historical context of needletime and other rights in SA, the preferred term is Collecting Society.
- Accreditation is provided for in the Regulations.
- Joint collecting society can be retained in the Regulations.
- The definition does not have to exclude those proposed. Collecting Societies are member based.

Clause 1-Definitions

Issues raised during publication of CAB	the dti Response
Neighbouring Rights – term is used for the first time and should be defined (SAMPRA);	The wording that can be used is copyright works or related rights as used by WIPO.

Distribution rights

Issues raised during publication of CAB

- Adding words: Qualifying the right of distribution in each case with the following proviso (adapted where needed to meet the context of the introductory text): provided that “distribution” of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic;
- Introduce the new right in section 27.

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The right aligned to the Treaty. Contract conditions can be used to address other issues related to the right.

This right does not seem applicable in section 27.



Clause 9, Section 8A

Issues raised during publication of CAB

- Offences and Penalties – Too harsh/arbitrary(DALRO/PASA/FIAPF/MP ASA);
- There will be duplication of penalties (SAMPRA);
- Welcomes the introduction of offences for persons who intentionally fail to report acts contemplated in section 8 for commercial purposes (SAGA).

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The purpose of fines/penalties is to deter the propagation of certain behaviours. They may be too harsh but that will likely result in industry compliance.

Furthermore, the issue being addressed is however not administrative in nature. The concern is failure to pay royalties and using the absence of a formal recording structure as an excuse.

Clause 9, Section 8A

Issues raised during publication of CAB

- However, the fine proposed for users who do not supply returns in Section 22C(4)(b) (10% of turnover) comes across as very arbitrary, especially considering the administrative nature of the offence.
- Whilst not expressing a view either way, ask that expert opinion, perhaps from the Department of Justice, be obtained in respect of all the penalties proposed in the Bill.
- The Bill has not provided copyright owners with any additional civil remedies, despite entreaties from stakeholders in the South African industry since July 2017. We are extremely concerned that rightsholders and collective management organisations will be left without any remedy if these penalty provisions are held to be unconstitutional.
- Furthermore, the Bill could assist with overseeing the transparency of and accountability by collective societies by requiring these to submit audited statements at least once a year to rights-owners and users.

the dti Response

The penalties are not arbitrary. The information aims to resolve a long standing issue of the payment of royalties.

The various laws have similar penalties. The copyright based industries have existed without consequences to injustices.

The civil remedies exists through the courts and need not be legislated. The Copyright Act has civil remedies.

Section 22 E provides for reports to be prescribed and they could include audited statements.

Clause 9, Section 8A

Issues raised during publication of CAB

- SAGA envisions that this penalty should not be in the form of an offence but, an administrative penalty. The negligent failure to report leaves those with an interest in the royalties or other rights associated with those acts prejudiced.
- There should be a financial penalty against the person who fails to report the acts, in order to incentivise compliance.

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- The activity is so important that it should be made that strict. It will serve as a deterrent. The administrative fines were discussed before.
- The legislation has penalties that are financial in nature. To retain what is in the Bill.

Clause 9, Section 8A

Issues raised during publication of CAB

- Usage Reports/Recordal - Punitive measures for failing to submit reports needs to be reconsidered (Denise Nicholson/LIASA);
- Prescribing a specific type of report to CMOs might result in unusable reports being (CAPASSO);
- Process is burdensome (Mnet and Multichoice)

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- The regulations will provide clarity.
- The process may appear burdensome, but it addresses a more serious challenge, that of authors, performers and copyright holders not having any rights to determine the use of their work.
- According to **the dti** the agreement is in fact not sufficient and authors and performers are not receiving their due, thus requiring a more formal recordal of usage.

Clause 9, Section 8A

Issues raised during publication of CAB

- SAMPRA, NCRF: section 9A(4) is a duplication of 22C(4). The report is also duplicated in these sections. A section 22C charge will be brought by a collecting society, while a section 9A(4) charge would be brought by the regulator. The courts will in any event only making a finding of guilt iro one of the two sections.
- FIAPF, IFLA, SAMRO, PASA, DALRO: Propose that all penalties be referred for a legal opinion (penalties are harsh).
- That Act also allows a discretion – propose this be added to the Bill (Clause 9 – S8A; Clause 11 – S9A; Clause 25 – S22C; Clause 27 – Section 27)
- NCRF: Concern that inputs into regulations (on what should be in the report) will not be considered. This would be unconstitutional on the part of the Department. NCRF: The penalties are harsh Policy decision.

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- It was a policy decision to have both because they are important for Collective Societies and for section 9A(4).
- Minimum and maximum penalties have already been considered iro legal principles. Both are allowed by the Constitution and minimum sentences feature in many Acts (Criminal Law Amendment Act 105 of 1997 section 51).
- Report will be prescribed in the Regulations. The Department will consult on the Regulations.

Clause 9, Section 8A

Issues raised during publication of CAB	the dti Response
<p>D Nicholson, IFLA: reconsider sentences, esp. imprisonment as smaller businesses may be bankrupted. Collecting societies should rather provide education.</p>	<p>The penalties to remain. The situation in the creative industry is so critical that it requires serious penalties.</p>
<p>CAPASSO: Although criminalisation is welcomed, civil action may be more appropriate (FIAPF also called for a civil remedy).</p>	<p>Civil action already exists. It must be implemented.</p>
<p>SAMPRA: The effectiveness of criminal sanction is dependent on an effective investigation. Recommends a presumption that failure to register is presumed to be intentional.</p>	<p>It is important to ensure compliance. The Tribunal can be approached if there are disputes.</p>

Section 22C

Issues raised during publication of CAB

- MPASA, CAPASSO, SAMPRA, SAMRO, PASA, DALRO: The purpose of records is broader than calculating royalties and this description may limit the information that Collecting societies may request. This should rather read “for the purpose of allowing the collecting society to fulfil its mandate”.
- ‘For the purpose of calculating the royalties due and payable by that person’ must be deleted from section 22C(2)(b) and also from section 9A(Aa)(ii).
- **Reciprocity-section 22C(3)(c)**: Amendment does not meet the National Treatment obligations due to the use of the term reciprocal before agreement. The term is bilateral agreement. Section 22C(3)(c) must be withdrawn in its entirety.
- Section 22(C)(2)(e) the correct reference is section 22(C)(2)d.

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Appears to be a reasonable proposal: – Clause 9 – S8A; Clause 11 – S9A; Clause 25 – Section 22C. Supported.

Supported.

Reciprocity is important to be provided for. It addresses a gap that impacts performers in other countries. Wording to be reviewed.

Supported.

Section 22C

Issues raised during publication of CAB

If the latest proposed amendment to section 22C(4)(b) is to be kept, the reference to “collecting society” should be excluded in section 9A. If it is kept, it could be interpreted to require reporting to both the owner of the copyright (or performer) and the collecting society. It appears that this section (section 22C(4)(b)) was inserted without having regard to section 9A.

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It was the policy intention to ensure the Collecting Society receives this report. They require the information for royalty administration.

Section 22F

Issues raised during publication of CAB

The proposals in Items 1 and 6 of this consultation are welcome moves in the right direction, but the provisions for suspension of accreditation in new Section 22F have not been thought through, especially in circumstances that the members of the collective management organisations will be authors, performers or copyright owners and where business rescue is now a prospect to restore a failing collective management organisations to compliance.

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Reference to business rescue was not about the business rescue process but the experience to restructure businesses. A person who restructured a business or institution before would be having the appropriate skills for the Administration process.

Section 22F

Issues raised during publication of CAB

Appointment of a Business Rescue Practitioner - Provisions in the Bill and in the Companies Act are not the same; Companies Act allows for Non Profit Companies (NPC) to be placed under Business Rescue, concerned that provisions in the Companies Act do not meet provisions in the CAB. (MPASA).

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The administrator will be appointed in terms of the Copyright Act, not the Companies Act. Someone with experience of restructuring of an institution including business rescue expertise.

Section 28

Issues raised during publication of CAB

Clause 28 (Parallel Importation) - These amendments still allow parallel importation, which MPASA objects to. Section 12B(6) sufficiently provides for this (MPASA/FIAPF/PASA/DALRO).

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Parallel importation is an 'exception' which is necessary in our context for the acquisition of accessible formats for e.g. the blind and people with learning disabilities.

The concerns about the similarities with the two sections are noted. They were reviewed and we propose they be retained.

Collective Society and B-BBEE

- The Commission has no mandate to ensure compliance with BBBEE (accreditation of BBBEE for e.g) and the companies Act does not clearly spell out the mandate of the Commission on BBBEE.
- The CS are member based organisations that are not enterprises that provide a service with a turnover and meet certain criteria: ownership, management, employment equity, enterprise development, skills development elements. Therefore CS do not qualify as enterprises in the context of the BBBEE legislation.
- It is recommended that this section in the Bill be removed as it does not apply to CS.
- Size is relevant in determining the levels of B-BBEE compliance. All organs of state, public entities and any private enterprise that undertakes business with a public entity must implement the Codes.
- Any business providing goods or services to another business that is subject to BEE (B-BBEE) compliance may also need to provide evidence of its own BEE (B-BBEE) compliance.
- The size of the business is significant in determining the required levels of BEE (B-BBEE) compliance. The Codes provide for three levels of compliance based on the size of your business:
- Exempted Micro Enterprises (EMEs), which are businesses with an annual turnover of less than R10 million. This is a new amendment, EMEs were previously businesses with an annual turnover of less than R300 000 and less than five staff members.
- Qualifying Small Enterprises (QSEs), which are businesses with an annual turnover of between R10 to R50 million.
- Medium to large enterprises (M&Ls), which are businesses with an annual turnover of more than R50 million.



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Thank You