



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

PRESENTATION ON FLAGGED PROVISIONS IN THE COPYRIGHT AMENDMENT BILL

06 JUNE 2018

Presenters

Dr Evelyn Masotja: Deputy Director General, CCRD

Ms Pregoria Mabaso Muvhango: Director, Legislative Drafting

Ms Meshendri Padayachy: Deputy Director, IP Law and Policy

Mr Nkosinathi Mkhonza: Administrative Clerk: IP Law and Policy

Mr Kadi Petje: CIPC

Adv. Lloyd Matseembi: CIPC

Purpose of the Presentation

To present responses to flagged issues in the B Bill.



Clause 1

DAC - we need a definition of “user”

In the introduced Bill there were many references to ‘user’ with ‘user’ as entitled to receiving royalties. The technical clean up of the ‘B’ Bill removed the term ‘user’. Currently reference to ‘user’ made in only two instances in sound recording (9A) and exceptions for libraries, archives and galleries. In each instance the ‘user’ is different and according to other copyright laws the term ‘user’ is not defined.



Clause 3:
Amendment to
Section 5 Work
funded by the State

A concern was raised by the DAC that works owned by the State are being commercially exploited by researchers / made available online: Propose to introduce clear rights management.

Rights Management Information – is information that identifies content protected by copyright or related rights, the rights owners (e.g. State) in such content and the terms and conditions of use associated with it. Rights Management Information often takes the form of electronic water mark placed in protected content. Water marks may also interact with devices that receive and play content.

This is an enforcement matter.

Clause 7 (Section 7B) in conjunction with section 3(1)(a)

the author is a South African citizen ~~or is resident in the Republic~~ a citizen of a designated country.

Section 3(1)(a) of principal Act reads as follows: 'a **person who is a South African citizen or is domiciled or resident in the republic or a citizen of a designated country**'-should be retained.

Clause 7 (section 7B) with regard to Resale Royalty Rights (RRR)

The Minister in consultation with Minister of Arts and Culture will prescribe payable rate. **That rate must be fixed and the increase thereafter will be issued by Notice by the Minister from time to time.**

The clause must be amended to include those changes.



Clause 7 (Section 7C)

Consider a method for artists to register work so that it cannot be adapted later by a company to whom the work was shown and who rejected the work at the time.

There is no policy position on proof of author, if we include it in artistic works there will be a vacuum in other works. There are currently affordable and easy mechanisms to provide proof as author. E.g. send yourself an email as well as registered mail. If we are to include proof of author for all works it will change the entire copyright regime because copyright protection is automatic when copyright requirements are met – work must be original; reduced to material form and done by a qualified person.



Clause 7 (Section 7E)

“indigenous community” – **dti** is of the view that these phrases can be deleted as the reliance will be on the DST Bill. The concern is that the Committee cannot legislate on a Bill that has not yet been passed.

the dti will align with DST Institutional mechanisms when the DST Act comes to effect. Dti proposes removal of ‘National Trust’ and retain ‘Indigenous Community’. This will be provided for in the transitional provisions.



Clause 11: Section
9A

Should failure to report fully be an
offence?

We propose that failure to comply with log sheets be punishable by a fine to be determined by the Act or the Tribunal.

We request PC to consider reviewing the penalty clause (Section 27 of principal Act) e.g. infringement of copyright is a fine of R5000 or 3 years imprisonment or both.



Clause 14

12D – who determines what a reasonable price of a comparative work is where there is a comparative work in the Republic as well as when it is not available in the Republic?

The Market determines what a reasonable price is.



Reciprocity

South Africa pays foreign royalties but there are no reciprocal arrangements with foreign Collecting Societies to pay royalties for South African music played in foreign jurisdictions.

Jurisdictions where South Africa has no reciprocal agreements with Collecting Societies, royalties must not be paid. **the dti** to propose a clause along the proposed position. Collecting Societies should apply the principle of national treatment in accounting for royalties.

Hybrid Model

Hybrid Model

- There is a shift in the Copyright regime moving towards open and flexible exceptions. Most commonwealth countries who have Fair Dealing remained with the name due to the history of the common wealth but opened up their provisions based on the Fair Use provision to allow flexibility of the law.
- In the past decade policy makers and commenters across the world have called for copyright reform based on the fair use model in the US. So far Israel, Liberia, Malaysia, Philippines, Singapore, South Korea, Sri Lanka and Taiwan have adopted fair use regimes or similar variants.
- The B Bill contains a modern general exception in order to create an environment conducive to the development of creative works and also to facilitate greater investment, research and development in copyright industries.
- There is an increasing trend for countries to move towards fair use into their copyright regimes. Australia, Hong Kong, and Kenya are currently amending their legislation to fair use models.
- In 2006 Singapore authorized fair dealing for any purposes thus doing away with lists of purposes.

Hybrid Model

- Mixing fair use with preexisting fair dealing provisions creating a truly hybrid model. An excellent example is Singapore:
- Section 35 of the Singapore Copyright Act- ironically carries the heading fair dealing tracks the fair use provision of the US Copyright Act (s 107).
- Therefore, the Singapore provision is therefore a fair dealing provision in name but a fair use provision in effect this is also similar to the Malaysian Act.
- (Article, Customizing Fair Use Transplants by Peter K Yu. Published 26 February 2018.)

Hybrid Continued....

Singapore Model: [Section 35 (2)]

Fair dealing in relation to works

Section 35. For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 shall include —

The B Bill in section 12A :

“General exceptions from copyright protection 12A. (1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;

Hybrid Continued....

Singapore Model: [Section 35 (2)]

- (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- (b) the nature of the work or adaptation;
- (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

The B Bill in section 12A :

- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums;
and
- (vii) ensuring proper performance of public administration.
- (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
 - (i) the nature of the work in question;

Hybrid Continued....

Singapore Model: [Section 35 (2)]

Fair dealing for purpose of criticism or review

36. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, shall not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made.

The B Bill in section 12A :

- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
- (iv) the substitution effect of the act upon the potential market for the work in question.

Singapore Model: [Section 35 (2)]

Fair dealing for purpose of reporting current events

37. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, shall not constitute an infringement of the copyright in the work if it is for the purpose of, or is associated with, the reporting of current events —

(a) in a newspaper, magazine or similar periodical and a sufficient acknowledgment of the work is made; or
(b) by means of broadcasting or a cable programme service or in a cinematograph film.

The B Bill in section 12A :

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.



Clause 22 (Section 21) –
Commissioned Work

The clause currently provides that if there is not contract governing the relationship, the person who commissions is the copyright owner and the author has a license to do anything with the work that the copyright owner may do.

We are proposing the Canadian model to support DAC proposal where author owns.

Dutch Copyright law also follows the Canadian model.

This was opposed by big companies including broadcasters during public hearings.

Clause 23 (Section 22) –
Assignment and licences in
respect of copyright

We want composers and
publishers to recover
economic benefits from the
assigned copyright works.

We want to limit the
application to composers and
publishers.

We want to ensure that the
life of a contract does not
exceed the assignment
period.

Clause 24 (Section 22A) –
Assignment and licences in
respect of orphan works

The process of identifying
orphan works in the Bill was
cumbersome and awaited
clarity on Fair Use/Fair
Dealing finalisation.

With the hybrid model the fair
use doctrine will be used and
the orphan works can be
used without permission of
the author.

We agree with the proposal
that the author must have
access to the copyright work
immediately when they
resurface.

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.



Clause 25 - Chapter 1A –
(Sections 22A to 22F)
Collecting Societies

Remove “registration” and
retain “accreditation” only
(these are already registered
by CIPC)

Accreditation – current
Regulation on Collecting
Society uses accreditation
and not registration.

Internationally accreditation
is preferred.

Important to distinguish
accreditation and registration
within CIPC so that you do
not register a registered
company.



Clause 25 - Chapter 1A –
(Sections 22A to 22F)
Collecting Societies

Remove “registration” and
retain “accreditation” only
(these are already registered
by CIPC)

Criteria for Accreditation:

There are 3 forms of
accreditation:

- 50 or more copyright owners;
- 50 or more performers;
- 50 or more copyright owners and performers;
- Application must be in writing and lodged with CIPC;
- There must be able to administer rights of their members throughout the Republic;

clause 25 continued...

Clause 25 - Chapter 1A –
(Sections 22A to 22F)
Collecting Societies

Remove “registration” and
retain “accreditation” only
(these are already registered
by CIPC)

Criteria for Accreditation:

- Membership to the
Collecting Society must
be open;
- Members must have an
appropriate right and
opportunity to take part in
decision making;
- The applicant is able to
comply with obligations
set out in chapter 2
(membership structure;
administration of rights;
licensing and distribution)
- Representatives,
managers and members
of the governing body
must be fit and proper
persons;

clause 25 continued...

Clause 25 - Chapter 1A –
(Sections 22A to 22F)
Collecting Societies

Remove “registration” and
retain “accreditation” only
(these are already registered
by CIPC)

Criteria for Accreditation:

- The principal place of business must be within the Republic;
- The accreditation does not conflict with the effective administration of a Collecting Society already accredited.

clause 25 continued...

Clause 25 - Chapter 1A –
(Sections 22A to 22F)
Collecting Societies

One Collecting Society per
right

The accreditation of the applicant does not conflict with, undermine or diminish the adequate, efficient and effective administration of the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978 or section 5(1)(b) of the Performers' Protection Act, 1967, as undertaken by a Collecting Society already accredited and established under the Copyright Act, 1978.

clause 25 continued...

Clause 25 - Chapter 1A –
(Sections 22A to 22F)
Collecting Societies

One Collecting Society per
right

Users will be required to pay
all Collecting Societies on the
same right – this will diminish
efficiency and effectiveness,
consequently weaken the
system.

In most countries they are
using one Collecting Society
per right.

Having more than one
Collecting Society will result
in the user being offered
different tariffs on the same
work and this will be chaotic.

Clause 27 (Section 27)

Technological protection measures (TPM) must be carefully considered because on the one hand they prevent abuses of copyrighted works digitally, but on the other, they clash with the use of exceptions and limitations allowed in copyright law.

the dti relooked at clause and can say balance properly struck between TPM's and exceptions and limitations.

Clause 31 (IP Tribunal)

-**the dti** proposes to remove the establishment of the IP but to strengthen the Copyright Tribunal.

-Should the Tribunal continue under the umbrella of the CIPC, then this clause and related clauses in this chapter will have to be removed.

-Depending on what changes are required to the Bill, this may require advertising to call for comment.

-Propose widening the powers of the Tribunal, empower the Commissioner.

-Dti to confirm if this requires amendment to the Patent Act of 1978.

Minister will be empowered to appoint retired judges, acting judges, senior counsels and senior attorneys to adjudicate on copyright disputes as Commissioners of Copyright Tribunal.

Clause 33

DAC proposed that to assist indigent artists, services of legal aid should be used.

This can be done outside this Bill. DAC can still build an assistance programme linking indigent people with Legal Aid Clinic to be represented in the copyright disputes adjudication process.

Clause 35 (Unenforceable Contracts – section 39B)

This clause protects a vulnerable party who contracted him or herself out of the rights afforded by the Act by allowing that vulnerable party to say – “This is an unenforceable term so I remain protected”. However, paragraphs (b) and (c) allows a settlement agreement and a service licence to exclude the protection afforded by the Act. Is this the policy intention?

Spirit of the clause is catered for in subsection 1, therefore **the dti** proposes deletion of paragraph (b) and (c) in subsection 2.

<p>Other issues: 19C</p>	<p>Galleries</p>	<p>The Bill sufficiently provides for them. The galleries to be retained in line with international best practice.</p>
<p>Section 12</p>	<p>Private copy levy DAC concern with private use and personal use-unauthorised exploitation.</p> <p>Local content</p>	<p>the dti has no policy position on the levy. A levy may affect the Bill and require a Money Bill.</p> <p>Local content not in the Bill. Important for musical works royalties. There is a need for closer collaboration with DOC to ensure alignment. -80% public broadcasters, 60% private broadcasters.</p>

Other issues

There are no collecting societies in other works

Maximum period collecting societies may retain royalties

Research best practice

There may be a need for collecting society in other works.

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, (e.g 3 years).

No clear evidence in countries that fair use has affected industries and growth. There is evidence to the contrary. Contracts are very important in copyright based industries. Education and awareness.



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

THANK YOU