

Copyright Amendment Bill

–Public Comments



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA



2018.10.31



Clause 1: Definition of collecting society

- D Nicholson: Need to change reference to Performers Protection Act because of the Amendment Bill.
 - The principal Act's name is not amended. No change required.
- MPASA, SAMRO, PASA, DALRO: This should rather be a substantive provision in section 22B(1).
 - A definition is read with the relevant sections of the Act. All substantive requirements are contained in Chapter 1A.
- MPASA, FIAPF: Publishers, photograph licensing agencies etc should be specifically excluded.
 - [Dti to advise.](#)
- CAPASSO, SAMRO, PASA, DALRO: Welcome the definition. Propose that the phrase be replaced with the internationally used “collective management organisations” (CMO). Also, the word “rightsholder” should be used to refer to persons who grant mandates to CMOs.
 - [Policy decision](#)
- 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.
 - [Appears to be a reasonable proposal. Can be amended accordingly \(“neighbouring” deleted and replaced with the works\).](#)
- SAMPRA: The definition does not take the current differentiated accreditation under the regulations (i.e. collecting societies in the music industry) into account. There is a need for joint collecting societies as is provided for in regulation 3(1)(c).
 - [Dti to advise.](#)
- SANCB: The manner in which the definition of ‘Collecting Societies’ now reads, excludes many stakeholders whose core function is the provision of services and advocacy in the protection of rights on behalf of and for persons with disabilities.
 - There is a difference between a Collecting Society and a Society “whose core function is the production and authoring of accessible formatted materials for and behalf of persons with disabilities.”

Clauses 4, 6, 8 and 10: Adding the rights of distribution and rental

- MPASA, FIAPF, PASA, DALRO: Welcome these additions. Propose the addition of a proviso to comply with WTO: “provided that ‘distribution’ does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with consent of the copyright owner, or any subsequent importation of such copies into the Republic.”
 - The proviso seems to be iro an exception: These clauses set out the rights of the copyright owner.
- SAMPRA: Welcomes these extensions of the exclusive rights of copyright owners.
- SANCB: These insertions are acceptable.



Clause 9, Section 8A : Recording of acts (audiovisual works) + offence

- D Nicholson, IFLA, LIASA: reconsider sentences, esp. imprisonment as smaller businesses may be bankrupted. Collecting societies should rather provide education.
 - Policy decision
- MPASA, FIAPF, PASA, DALRO: This turns the exclusive right into a remuneration right and is in conflict with Berne.
 - Dti to advise
- MPASA, FIAPF, PASA, DALRO, MNET and Multichoice: The sentence is arbitrary, especially considering that the offence is administrative in nature (failure to submit returns) and that the amount of the fine will be totally out of proportion to the contravention.
 - The mischief being addressed is however not administrative in nature. The mischief is failure to pay royalties and using the absence of a formal recording structure as an excuse.
- FIAPF, MNET and Multichoice: Propose this section is moved to the Performers Protection Amendment Bill
 - This is a policy decision (Will have to be advertised in the Performers' Protection Amendment Bill process). However, as the Copyright Act does include sections 8, 9 and 9A, which also deals with performers, it can be justified to retain section 8A in the same Act as sections 6A, 7A and 9A, which all deal with similar subject matter.
- SAGA: Welcomes the criminalisation. Also request sanction for negligent failure to report in the form of an administrative fine, to be decided on by the Tribunal.
 - This is policy decision
- IFPI: Subsection (6) should only apply to licence holders and subject to the terms of the licence.
 - It only applies to commercial use, which implies licence holders. The requirement sets the minimum standard. Licence terms can extend and refine the requirements.
- MNET and Multichoice, NCRF: the provisions are unclear and will be very burdensome. The performer's agreement with the owner of copyright will be sufficient to address any challenge of recordal
 - 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.
- SANCB: The word "not" should be deleted in subsection (7)(c) as a non natural person is already provided for in (b)
 - No. (c) speaks to (b), and thus has to again refer to a non natural person



Clause 25, Section 22C

Empowering Collecting Societies

- D Nicholson, IFLA, LIASA: Collecting Societies should be obliged to submit audited statements annually
 - As NPC’s they will be obliged to do so.
- 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”.
 - **Appears to be a reasonable proposal: Can be amended accordingly – Clause 9 – S8A; Clause 11 – S9A; Clause 25 – Section 22C.**
- IFLA: We welcome the regulation of collecting societies. The law should empower creators and users by giving them the right to demand information about payments and calculations.
 - As members will be rights-holders, this right will form part of the founding documents of the Collecting Society. Users will be able to ask about calculations in any event as they can refuse to pay without a clear demand.
- SANCB: These insertions are acceptable.
- NCRF: The fee taken by the Collecting Society should be clear – all the terms used “licensing fees”, “tariffs” etc. should be clarified.
 - The terms are regularly used in the industry and thus need not be defined (the terms were suggested by an expert on the technical panel who was concerned that not all types of collections were included). The regulations will in any event provide more information. 5



Clause 25, Section

22C: Offence not to provide information

- D Nicholson, IFLA: reconsider sentences, esp. imprisonment as smaller businesses may be bankrupted. Collecting societies should rather provide education.
 - Policy decision
- CAPASSO: Although criminalisation is welcomed, civil action may be more appropriate (FIAPF also called for a civil remedy).
 - Policy decision (a civil remedy may have to be advertised)
- SAMPRA: The effectiveness of criminal sanction is dependent on an effective investigation. Recommends a presumption that failure to register is presumed to be intentional.
 - There is a constitutional presumption of innocence and intention lies at the heart of that.
- 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.
 - Section 9A speaks to the obligation on the user. Section 22C empowers a Collecting Society to receive the report. They are just two sides of the same coin and not a duplication.
- FIAPF, IFLA, SAMRO, PASA, DALRO: Propose that all penalties be referred for a legal opinion (penalties are harsh)
 - 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). This is a policy decision.
 - 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)
 - (“If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”) SAMRO, PASA, DALRO, SANCB, LIASA: Welcomes criminalisation, but is concerned about the sentence.
- SANCB: It is recommended that “turnover” be replaced with “revenue” to avoid confusion
 - “Turnover” is the word used in the Acts that were compared when redrafting the Bill. To ensure clarity, the relevant paragraph used in Clause 9 – S8A; Clause 11 – S9A; and Clause 27 – Section 27, could be repeated here so that a guide is given on how to calculate turnover.
- 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

Clause 25, section 22F: Skills of an administrator

- MPASA, SAMPRA, SAMRO, PASA, DALRO: We welcome this provision. Does Chapter 6 of the Companies Act however allow CIPC to step in iro business rescue? Accreditation should not be suspended pending business rescue.
 - The administrator will be appointed in terms of the Copyright Act, not the Companies Act.
 - CIPC to advise as well.
- CAPASSO: Concerned about the dual role of the CIPC
 - The Tribunal has specifically been brought in to address this. An administrator will be appointed to avoid CIPC having a conflict.
- SANCB: These insertions are acceptable.



Clause 28: Clarifying section 28

- MPASA, FIAPF, PASA, DALRO: These amendments still allow parallel importation, which MPASA objects to. Section 12B(6) sufficiently provides for this.
 - Policy decision
- SANCB: These insertions are acceptable.



Concerns re method of consultation

- “Bill should have been advertised in its entirety”
 - The Bill was advertised in its entirety at the outset.
 - Concerns about technical inconsistencies resulted in a redraft of the Bill: Draft 1 (October 2017)
 - The inputs from the public on substance was deliberated on by the Committee between October 2017 and June 2018: Draft 2 (June 2018)
 - Some of the inputs of the public and deliberations resulted in new clauses being included in the redrafted Bill, which clauses had to be advertised (2nd advertisement). Some of these clauses required permission to be sought from the House.
 - Only NEW issues were advertised. Amendments to matters that were already in the Bill as advertised, need not be advertised again: A committee will never stop consulting if it has to go back to the public every time it accepts input from the public.
 - Inputs from the second advertisement was considered by the Committee.
 - This resulted in changes to the Bill – proposed changes dealt with the clauses that were advertised: Draft 3 (August / September 2018)
 - Concerns raised by PC: No provision is made for it to be an offence if a person operates as a collecting society without having been accredited first.
 - The offence was advertised (3rd advertisement) and the inputs related to the offence resulted in the definition of “collecting society” being added.
 - The Bill was sent to the technical panel for inputs.
 - The inputs from the technical panel resulted in further amendments being proposed: Draft 4 (October 2018) with new issues added that had to be advertised
- The Committee sufficiently consulted on all issues contained in the Bill

General comments

- TM Maphumulo:
 - “...the changes I saw were amazing...”
 - “I as an artist have been looking forward to these changing and welcome them with open arms.”
 - “We are playing a big part in the South African economic and should get what is due to us. Thank you so much for what you do. By doing this for artist you change the lives of our families as well.”
- South African Teachers’ Union, National Professional Teachers’ Organisation of SA:
 - “We would like to express our sincere thanks to Ms. Fubbs and the Portfolio Committee for including fair use provisions and exceptions for education, research, libraries and archives and for people with disabilities in the Copyright Amendment Bill. We look forward to this progressive Bill passed urgently.”



END