

Department of Trade, Industry and Competition

Presentation of the amendments from the National Council of Provinces

Portfolio Committee on Trade and Industry

6 February 2024



the dtic

Department:
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

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Purpose

To brief the Portfolio Committee on the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB), following the changes in the National Council of Provinces (NCOP).

Outline of Clauses

the dtic will brief the committee on these amendments:

- Issues of equitable remuneration being added to royalty options: Long title, clauses: 5, 7, 9, 24, 26, 27, 33, 35, and 37;
 - Clause 5, 7, 9-royalty clauses in literary or musical works, visual artistic works and audiovisual works
 - Clause 24, section 21-commissioned works
 - Clause 26, section 22A-Licenses in respect of orphan works
 - Clause 27, section 22B-Chapter on Collecting societies
 - Clause 33-section 29, functions of Tribunal
 - Clause 35, section 39-Regulations
 - Clause 37, section 22(3)-Schedule 2-Translation licences
- Deletion of definition of “broadcast”;
- Clause 15, section 12B(6)-(general exceptions from copyright protection) – the issue of deleting “of ownership” after “assignment”; and
- Clause 35, section 39 (Regulations)
 - Rates and tariffs only in respect of resale royalty rights.

Background

- The National Assembly passed the Bills on 1 September 2022.
- The Bills were referred from the National Assembly to the National Council of Provinces and initial briefing took place on 25 October 2022 in the Select Committee.
- 6 Provincial Legislature briefings took place from 1 to 4 November 2022. The 3 other briefings took place in 2023, in Limpopo, Free State and North West.
- The Bills were advertised for public comment between December 2022 and January 2023.
- The Select Committee held public hearings in February and March 2023.
- Provincial public hearings were held in provinces between February and May 2023. More than 40 public hearings sessions were held in provinces.
- The public submissions responses briefing took place in the Select Committee on 18 April 2023.
- Negotiating mandates were submitted by provinces in May 2023.
- Responses to the mandates as well as voting on the clauses took place by end of May and in June 2023.
- The E-list indicated amendments where changes were made in the Bills.
- Provinces submitted final mandates in September 2023. The meeting of 5 September 2023, adopted the report. 7 provinces voted in favour of the Bills.
- The NCOP adopted the Bills on 26 September 2023 and they were referred to the National Assembly.

Background: Final mandates

- Final mandates were received from 9 provinces. The 7 provinces voted in support, 1 province abstained and 1 province voted not in favour of the Bills.

Province	Negotiating Mandate
Eastern Cape	In favour
Free State	In favour
Gauteng	In favour
Limpopo	In favour
Kwazulu Natal	Abstained
Mpumalanga	In favour
Northern Cape	In favour
North West	In favour
Western Cape	Not in favour

The Amendments to the Copyright Amendment Bill

Clause 1, section 1: Definitions-Broadcast

- The amendment made to the Bill was the removal of the definition of Broadcast based on concerns raised by the provinces and the public.
- This was the definition: “ ‘broadcast’ means—
- (a) transmission, partially or wholly, by wire or wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;
- (b) transmission, partially or wholly, by satellite; or
- (c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;”.
- **Rationale:** Concerns were raised with the proposed definition that it excludes other forms of broadcast transmissions (reduces scope of protection), the implication of wire transmission and alignment to international treaty, some terminologies used (public reception) and other processes locally and globally underway that may affect policy in future, (The Department of Communication and Digital Technologies is currently busy with a white paper on broadcasting as an example).
- Gauteng province proposed to retain current definition of "broadcast" in Copyright Act, 1978 and delete clause 1(d).
- The Department recommended that the definition in the current Act be retained. Considering all the discussions and implications and the confusion around the definition.
- Gauteng, North West

Long title: Equitable remuneration or share in royalties

- To include wording ‘equitable remuneration’ next to the sharing of royalties, in share of royalties for literary or musical works, visual artistic works and audio visual works in order to accommodate other forms of remuneration.
- Overall in the Bill. Equitable remuneration is added wherever “royalties” is included in the other clauses.
- **Rationale:** Addressing one size fits all remuneration model across all sectors concern. Equitable remuneration or sharing of royalties was recommended to address this concern.
- It was not the intention of the Bill to treat all the copyright based industries the same. Therefore a one size fits all was not the intention.
- The CAB introduces and in some respects strengthens the royalty provisions. The Department recognizes that industries prefer to address issues of remuneration differently.
- This amendment will bring more clarity and accommodate the stakeholders who needed further assurance that all modes of remuneration were addressed in the CAB.

Clause 5, section 6A: Equitable remuneration or share in royalties regarding literary or musical works

- To include wording 'equitable remuneration' next to the share of the royalty, for literary or musical works. To accommodate other forms of remuneration. Equitable remuneration is added wherever "royalty" is indicated.
- **Rationale:** Addressing one size fits all remuneration model across all sectors concern, equitable remuneration or royalties, addressing one size fits all concern.
- Free State, Gauteng

Clause 7, section 7A: Equitable remuneration or share in royalties regarding visual artistic works

- To include wording 'equitable remuneration' next to share of the royalty for visual artistic works. To accommodate other forms of remuneration.
- **Rationale:** Addressing one size fits all remuneration model across all sectors concern, equitable remuneration or royalties.
- To include wording 'equitable remuneration' next to share of the royalty, in visual artistic works.
- Free State, Gauteng

Clause 9, section 8A: Equitable remuneration or share in royalties regarding audiovisual works

- To include wording ‘equitable remuneration’ next to share of the royalty, for audiovisual works. Equitable remuneration is added wherever “share of royalties” is indicated.
- **Rationale:** Addressing one size fits all remuneration model across all sectors concern.
- Free State, Gauteng

Clause 15, section 12B(6): Specific exceptions from copyright protection applicable to all works

- Deletion of the word “of ownership” in section 12B(6), in clause 15.
- General exceptions-section 12B(6) dealing with parallel imports or first sale doctrine. Once the goods have been put on the market by or with the consent of the right holder, further circulation cannot be controlled. Parallel imports refer to the original products sold by the right holder or with his consent in another market and then imported through a channel “parallel” to that authorized by the right holder. Parallel imports are not counterfeit or pirated goods and they do not infringe Intellectual Property Rights in the country of Origin.
- Parallel importation would allow distributors and booksellers to choose from a range of world markets as opposed to the South African market, which could lead to a more equitable pricing structure. Parallel importation would open access to cheaper copyright works abroad. A relative lack of competition in the marketplace is an important factor.
- **Rationale for the change in the Bill:** To amend wording in the subsection by removing the word ‘ownership’. The comment from the North West provincial submission is with regard to the use of the term assignment of ownership in section 12B(6) instead of transfer of ownership as used in Article 6(2) of the WCT which appears to be a huge error according to the province. The term assignment is naturally applied to the right of transfer of copyright not in respect of tangible goods.
- Accordingly, in the phrase “assignment [**of ownership**], the phrase “of ownership” is deleted.
- **After removal of the words ‘of ownership’:** (6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other assignment of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.
- North West

Clause 24, section 21 : Ownership of copyright-Commissioned works

- To insert “equitable remuneration or” in clause 24, section 21.
- This is one of the consequential amendments where there are royalties. These are not from provinces but are regarding legal drafting and technical in nature.
- This clause provides for commissioned works.
- Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of an audiovisual work or the making of a sound recording and may approach the Tribunal for an order—
 - (i) where the work is not used by the person who commissioned the work for the purpose commissioned, licensing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the person who commissioned the work; or
 - (ii) where the work is used for a purpose other than that for which it was commissioned, ordering the person who commissioned the work to make payment of royalties to the author for such other use.
- **Change in the Bill:** (c) The author of a work contemplated in subsection (1)(c) may approach the Tribunal for an order—
 - (i) where the work is not used by the person who commissioned the work for the purpose commissioned, licensing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the person who commissioned the work; or
 - (ii) where the work is used for a purpose other than that for which it was commissioned, ordering the person who commissioned the work to make payment of equitable remuneration or royalties to the author for such other use.

Clause 26, section 22A: Licences in respect of orphan works

- Clause 26, section 22A. provides for licences in respect of orphan works.
- orphan works' means a work in which copyright subsists and the owner of a right in that work (a) cannot be identified; or (b) is identified, but cannot be located.
- **Rationale:** This is one of the consequential amendments where there are royalties.
- Around 6 amendments are affected on orphan works to include or equitable remuneration.

Clause 27, section 22B : collecting societies

- This is an amendment to include equitable remuneration in clause 27, section 22B.
- Clause 27 deals with a chapter on collecting societies. Provisions relates to the membership, accreditation, governance, commencement, administration of rights, cancellation or suspension of the collecting societies, etc.
- Collecting Societies are non-profit agencies formed and established by members (right holders). Members (right holders) mandate the collecting societies to administer and manage their rights.
- Collecting Societies exist to: license users, collect royalties from licensed users, distribute the royalty to members (right holders) in accordance with the actual usage of the members repertoire, conclude reciprocal agreements with other collecting societies (only if desirable and expedient) , deduct admin costs and account to members regularly.
- There are 21 instances where this consequential change is made in this clause.

Clause 33, section 29: Functions of Tribunal

- This is an amendment to include equitable remuneration in clause 33, section 29.
- Clause 33 provides for the functions of the Tribunal.
- **Rationale:** The amendment to equitable remuneration is one of the consequential amendments where there are royalties.
- Change in the Bill: Section 29A(2)(e) settles disputes relating to licensing schemes, payment of equitable remuneration or royalties or terms of agreements entered into as required by this Act or agreements entered into in order to regulate any other matter in relation to copyright.

Clause 35, section 39: Regulations

- The amendments relate to amendments in regulations.
- Specific changes in the Bill:
- The amendment to equitable remuneration is one of the consequential amendments where there are royalties.
- (cG) prescribing the standard elements for agreements to be entered into in terms of this Act, to ensure that rights or protection afforded by this Act are duly provided for. (CRC recommendation-10.12.5. The dti should develop a standardised template for contracts between performers and recording companies that will deal with all the above-mentioned loopholes and should encourage performers and recording companies to use this contract.)
- (cl) prescribing royalty rates or tariffs for resale royalty rights.
 - It was recommended that the powers of Minister to prescribe royalty rates be removed in the Bill, to allow for market forces between parties.
 - The recommendation was made to prescribe royalty rates or tariffs for resale royalty rights. It is a new type of royalty and governments can determine the royalty rates as per the Berne Convention.
- (cJ) prescribing the period within which distribution of equitable remuneration, or the percentage and period within which distribution of royalties must be made by collecting societies.
- (cK) prescribing the terms and manner relating to the management of unclaimed equitable remuneration or royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of equitable remuneration or royalties by a collecting society.
- Gauteng

Clause 37, section 22 (3), schedule 2-Licences

- The amendment relates to insertion of equitable remuneration in clause 37.
- Clause 37 provides for schedule 2 of licences (translation, reproduction, broadcasting, etc).
- The amendment to equitable remuneration is one of the consequential amendments where there are royalties.
- Changes in the Bill: Scope and condition of licence (translations licences): (3) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of equitable remuneration and of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the Republic and copyright owners in the country of the copyright owner.
- Scope and condition of licence (reproduction licence): (3) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of equitable remuneration and of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the Republic.

Amendments in the Performers' protection amendment Bill (PPAB)

Objectives of the Bill

- The Bill seeks to amend the Performers' Protection Act, 1967 (Act No. 11 of 1967) so as to:
- provide for performers' economic rights;
- extend moral rights to performers in audiovisual fixations;
- provide for the transfer of rights where a performer consents to fixation of a performance; to provide for the protection of rights of producers of sound recordings;
- broaden the restrictions on the use of performances;
- extend the application of restrictions on the use of performances to audiovisual fixations;
- provide for royalties or equitable remuneration to be payable when a performance is sold or rented out;
- provide for recordal and reporting of certain acts and to provide for an offence in relation thereto; to extend exceptions from prohibitions to audiovisual fixation and sound recordings and include exceptions provided for in the Copyright Act, 1978 (Act No. 98 of 1978);
- provide for the Minister to prescribe compulsory and standard contractual terms as well as guidelines for a performer to grant consent under this Act;
- provide for prohibited conduct and exceptions in respect of technological protection measures and copyright management information respectively; and
- provide for further offences and penalties.

Definition of broadcast

- To omit paragraph (b) in clause 1 which is the definition of broadcast.
- The definition of broadcast is removed and the explanation is same as in the Copyright Amendment Bill.
- Gauteng, North West

Clause 1: Definition of performer

- The amendment proposes to insert wording that excludes extras from the definition of performer. It reads as “, but does not include extras, ancillary participants or incidental participants”.
- **Rationale:** A concern was raised that the definition of performer must be clarified by excluding extras because extras are not like other performers and this causes confusion on matters related to royalties.
- The Treaties are clear that extras are not included in the definition of performer, as well as in other laws globally. Although, this proposed amendment is not impacting the definition, it was addressed to answer the concern and to provide further clarity and certainty.
- Gauteng

Thank You