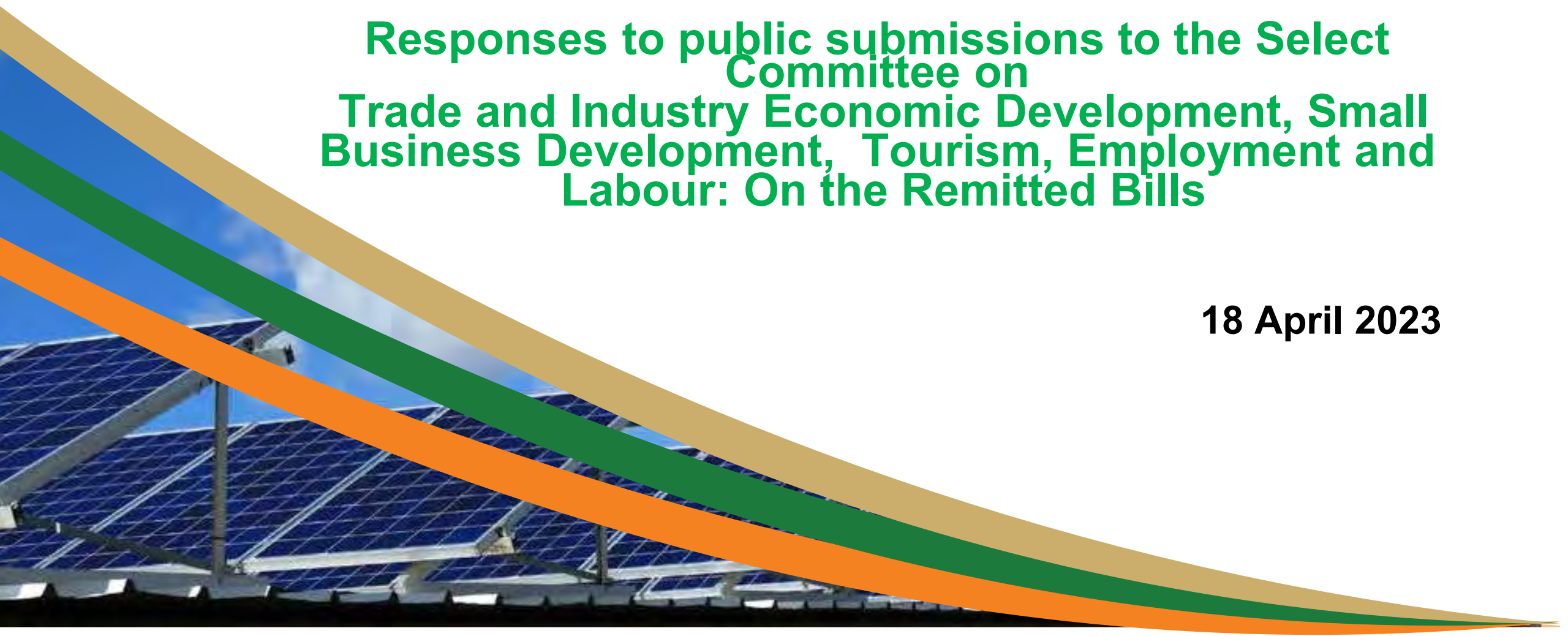


Department of Trade, Industry and Competition

Responses to public submissions to the Select Committee on Trade and Industry Economic Development, Small Business Development, Tourism, Employment and Labour: On the Remitted Bills

18 April 2023



the dtic Team

Dr Evelyn Masotja

DDG: Consumer and Corporate Regulation Branch, the dtic

Mr Klaas Mokaba

Acting Chief Director: Legislative Drafting, the dtic

Mr Desmond Ramabulana

Acting Chief Director: Regulatory Policy and Legislation, the dtic

Ms Meshendri Padayachy

Deputy Director: Intellectual Policy and Law

Mr Kadi Petje

Manager: Copyright CIPC

Ms Marissa van Niekerk

Director Legal Services, the dtic

Advocate Ntokozo Khamba

Chief Director: Legal Services, the dtic

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Purpose

To brief the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour on the responses by the Department of Trade, Industry and Competition to the public submissions on the Copyright Amendment Bill and the Performers' Protection Amendment Bill (also known as remitted Bills).

Background

- The **dtic** will be responding to the public submissions for both Bills during the presentation.
- The Department extends its gratitude to the public for submitting comments in the legislative process to ensure the law is sound and responds to the creation of an enabling and conducive environment for the copyright based industries.
- All the sectors affected that include persons living with disabilities, the education sector, libraries, archives and museums, the technology sector, the art sector (painters, sculptures), advertising, music industry, film and television industry, photographers, collecting societies, publishing industry, broadcasting industry, authors, performers, we recognize you.
- These Bills are complex and address several policy objectives addressing the diverse groups of copyright based industries.
- A brief recap of the process of the Bills is as follows:
- On 5 December 2018 the National Assembly adopted the Bills. On 28 March 2019, the NCOP adopted the Bills and they were referred to the President.
- On 16 June 2020, a letter was received from the President of the Republic to the Speaker of Parliament to refer the Copyright Amendment Bill, and the Performers' Protection Amendment Bill, 2016 to the National Assembly for consideration of the President's reservations on the basis of their constitutionality.
- The President raised the following constitutional reservations: Incorrect tagging, retrospective and arbitrary deprivations of property, impermissible delegation of legislative power to the Minister, fair use (insufficient consultation), the copyright exceptions, international Treaty Implications. Some of these reservations were procedural and others substantive in nature. They have been deliberated extensively in Parliament and will not be addressed in this presentation.
- Section 79(1) of the Constitution of the Republic of South Africa requires that the President must either assent to and sign a Bill, or if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- The initial briefing by **the dtic** to the Portfolio Committee on Trade and Industry was in August 2020, it included a presentation on the Treaties implications. Part of it was delivered by the Minister of Trade and Industry.

Background: Parliamentary Process

- The Bills were adopted by the National Assembly on 1 September 2022. They were referred to the National Council of Provinces for concurrence.
- The briefing to the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour took place on 25 October 2022.
- The provincial briefings to Provincial Legislatures took place in 8 provinces.
- The Department is currently participating in the public hearings in provinces. Provinces where the hearings took place or still underway include Gauteng, Mpumalanga, Eastern Cape, Kwazulu Natal, Western Cape, Limpopo and Northern Cape.
- I would like to thank **the dtic** officials from the Consumer and Corporate Regulation Branch and CIPC, parliamentary and provincial officials and leadership, who are participating and providing support during the public hearings.
- The Bills were recently advertised for public comment in the National Council of Provinces.
- The public hearings were held in the Select Committee on 21 February, 7 and 14 March 2023, where oral presentations were made by the public.
- The submissions received from the public were 62, with additional documents included.
- The public is commended for their active participation in the legislative process of the Bills.

Objectives of the Copyright Amendment Bill (CAB)

- To develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa.
- To introduce provisions, which deal with matters pertaining to collective management. Collecting societies will only be allowed to collect for their registered members, and all collecting societies have to be accredited with the Companies and Intellectual Property Commission (“CIPC”).
- To deal with the protection of works and rights of authors in the digital environment.
- The Bill provides for standard contractual terms to empower authors when negotiating contracts. This will close the loophole that has resulted in unfair contractual terms that has led to creators signing away their rights.

Objectives of the CAB

- To introduce a Resale Royalty Right. This Resale Royalty Right means that an artist could be entitled to a royalty when their original work is resold commercially.
- To introduce a hybrid system for the reproduction of copyright material for limited uses or purposes without obtaining permission and without paying a fee or a royalty. Furthermore, this provision stipulates the factors that need to be considered in determining whether the copyright work is used fairly.
- To provide for exceptions and limitations in education, libraries, archives and museums, computer programmes; To provide for the availability of accessible format copies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind and includes other disabilities such as learning disabilities, dyslexia etc.
- To provide for the sharing of royalties in respect of literary, musical, artistic and audiovisual works.
- It provides for the recordal and reporting of certain acts.
- To strengthen the Copyright Tribunal so that it can deal with all Copyright and related rights matters.
- To address the rights of authors in commissioned works that includes to facilitate commercial exploitation by any person so licensed.
- To introduce Technological Protection Measures (TPMs) to reduce incidents of copyright infringement.

Treaties Informing the Bills

- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds). South Africa is not a member.
- **The Beijing Treaty on Audio Visual Performances (BTAP)** deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member.
- **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 VIP Treaty to Facilitate** (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.
- **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.

Definitions

Public comment

- The proposed amendment to the definition of “broadcast” in the Bills is vague and could create uncertainty for the creative sector, (NAB).
- Until the Draft White Paper process has been finalised, and the necessary legislative amendments have been effected, the current definition of “broadcast” in the Copyright Act, 1978 should be retained.-NAB
- There is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signals (Anton Mostert), Prof Owen Dean, Anton Mostert
- The new definition reduces the scope of 'broadcast' and the protection afforded under copyright law. (Multi Choice)
- The current definition of “broadcast” in the Bills is not fit for purpose in several respects.- (eMedia)
- The definition of "broadcast" in the Copyright Bill and PPA Bill has also introduced features of the Beijing Treaty definition such as "partially or wholly" that are unclear.

the dtic response

- The definition of broadcast was deliberated and consideration was made to the white paper process underway for the Electronic Communications Act of 2005 and the international treaty processes where discussions on broadcasting are still on-going. There were concerns noted with unintended consequences of the proposed changes.
- There was a discussion on the alignment to the international treaties and implications on wire and wireless means of broadcasting.
- The current definition in the Bill was retained and it was recommended that when future policy direction changes, the definition can be considered.
- The definition as it stands intended to incorporate the programme carrying signal particularly the transmission by satellite. If that is unclear, it can be reviewed.
- It is recommended to retain the definition in the Act.

Definitions

Public comment

- The definition of “accessible format copy” in the Bill is inconsistent with the definition in the Marrakesh Treaty.
- Definition of beneficiary person not aligned to the Marrakesh Treaty (Copyright Coalition, SAMRO)
- The definition of ‘accessible format copy’ as in the Constitutional Court crafted remedy be adopted as it is in line with the Marrakesh VIP Treaty.
- No change required to the definition of ‘persons with disabilities’ as the breadth of the definition fulfils South Africa’s Bill of Rights and international disability rights obligations. –BlindSA, Joint Academic Opinion
- The definition of ‘permitted entities’ as in the Constitutional Court crafted remedy be adopted in the definition of ‘authorised entities.- BlindSA
- The Portfolio Committee implored to ensure that the definition of “accessible format copy” is aligned to that provided for in the Marrakesh Treaty in line with the intention of that treaty and that a definition of “beneficiary” that aligns with that used in the Treaty be inserted in line with the principle of national treatment, if South Africa introduces exceptions that go beyond what is required in international treaties, only South African rights-holders will suffer from this. – Copyright Coalition South Africa, SAMRO (alignment to international obligations)

the dtic response

- The definition of accessible format copy was aligned to the language in the treaty. It is widened on the form of disability to include other forms of disabilities.
- The definition of beneficiary person has been widened to address all forms of disabilities in line with the Constitution. This is to ensure no discrimination.
- It is recommended that the definitions be retained as they are in the Bill.
- The uniformity of international rights is noted. The Bill provides more rights in line with the Constitution. In our reading, the Marrakesh treaty is not that explicit on national treatment. It gives the national governments the guidance on ensuring support through legal systems and practice, economic situation, social and cultural needs, to persons with disability and ensuring availability of accessible format copies as well as other rights.

Definitions

Public comment

- A further opportunity which was overlooked is that CAB was the opportunity to provide clarity on who is viewed as a “producer” by adding a definition for this term.-Writers Guild of South Africa
- The definition of “producer” should add “or the entity which” after the phrase “the person who”, to align fully with the definition used in the WPPT and seeing that generally producers are corporate entities (record companies) rather than natural persons.-Copyright Coalition SA
- Although the Copyright Act does in fact define “dramatic work”, and CAB does seek to introduce a definition for “audiovisual work,” there lacks an appropriate and clear distinction between these works. It may be misconstrued that dramatic work would fall under audiovisual work, at least to some extent, and as such it is imperative to note that although all audiovisual work may be dramatic work, not all dramatic work is necessarily audiovisual work. Furthermore, the flawed inclusion of “dramatic work” under the definition of “literary work” as it currently stands in the Copyright Act is also an outdated approach which does not accurately depict the complexity of such works.- Writers Guild of South Africa

the dtic response

- The definition of producer was raised and deliberated before. It is provided in the Performers’ Protection Amendment Bill.
- On the entity related to the definition of producer, in legal terms person can include natural or juristic person.
- It is recommended the definition of dramatic work can be reviewed. The proposed definition is as follows: “**dramatic work**” means any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise and any compilation of dramatic works.
- The definition in the current Act is as follows: “**dramatic work**” includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film.

Definitions

Public comment

- The definition of “authorized entity” refers to “the government”. If the intention is to refer to all three spheres of government then it is submitted that the wording can be improved by referring to “...any sphere of government”. If the intention is to only refer to national government then a definition needs to be inserted.-MEC Wengner, WC
- The definition of “authorized entity” refers to “non-profit organization”. It is submitted that a definition needs to be inserted referring to the legislation in terms of which non-profit organizations are registered.-MEC Wengner, WC
- This definition of ‘audiovisual work’ is identical in effect to the current definition of ‘cinematograph film’. The term is simply nothing more than a synonym for ‘cinematograph film’ as defined in the Act. The current definition of 'cinematograph film' has a very broad meaning and has been interpreted by the court.-Professor Owen Dean
- The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new genus of work of which “cinematograph film” is a species. The term “cinematograph film” as currently used in the Act can now have two possible meanings. It is probably better to stay with the existing terminology and delete this definition or possibly have it indicate that it means “cinematograph film”, in which case no further changes are necessary.-Professor Owen Dean
- The effect of this definition and the use of the term in the Bill is to create a new category of work eligible for copyright, with no corresponding change to section 2 of the Copyright Act, which lists the eligible works. The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new genus of work of which “cinematograph film” is a species. The term “cinematograph film” as currently used in the Act can now have two possible meanings. The term indicating the equivalent of the new genus must be changed to “audiovisual work” while the one denoting the species must remain unchanged.-Anton Mostert Chair of IP
- The use of audiovisual works as opposed to cinematograph as a work eligible for copyright does not have a rationale because it is derived from the performers treaty and not copyright.-SAIPL

the dtic response

- The definition of authorized entity is aligned to the Marrakesh treaty. It does not categorise spheres of government.
- The definition does not distinguish forms of NGOs, aligned to the treaty.
- The definition of audiovisual works has been drafted in a manner that includes the cinematograph film. The audiovisual works was considered in order to take into account the treaty language. The view is that the term commonly utilized now is audiovisual works. An example of use is in the US copyright Act.

Definitions

Public comment

- The definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ are incorporated by reference from the Copyright Act, and PASA suggests a loose-standing set of definitions in the PPAB.-PASA, SAIPL
- The definitions of “technological protection measure” and “technological protection measure circumvention device and service” are not compatible with the WPPT’s requirement to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”.-PASA
- The definition of visual artistic works and resale royalty rights to be recast in a new chapter.-SAIPL
- Definition of Commission be provided for.-Professor Owen Dean, Multichoice
- Clause 1(k)-This provision provides for the insertion of a definition for “technological protection measure circumvention device or service”. The last line in this proposed definition – “protection measure;” – needs to be underlined in its entirety to indicate the insertion.-MEC Wengner, WC

the dtic response

- The definitions are in both Bills.
- The definitions were deliberated in the PC and the definitions provide adequate legal protection and effective legal remedies. The implications of adding stronger TPMs was found to have serious negative implications on areas such as competition and consumer protection.
- The definition of artistic visual works and resale royalty rights comment is noted. The reference to section 37 of the Berne Convention in the RRR can be reviewed to amend the section.
- The Commission is defined in the Intellectual Property Laws Amendment Act. The transitional provision provides clarity on the definition of the Commission.
- The drafting suggestion is noted.

Definitions

Public comment

- Since this Bill intends to bring the copyright law into the 21st century, it is important to define common words in the digital space, such as 'data', 'digital', 'digital rights', digitisation', 'digital curation' and 'digital or e-licences' and '(digital) preservation'. –Creative Commons
- Wire and wireless are not defined in the CAB in sections 6A, 7A, 8A. It is noted in the Memorandum on the Objects of the Copyright Amendment Bill, that the proposed amendment to section 9 of the CAB provides for the distribution of a sound recording to the public “by wire or wireless means, including internet access”.-
- The definition of open licences, but are concerned that this is not sufficiently specific about what the acts that may be undertaken are-International Federation of Library Associations and Institutions
- The definition of orphan works be extended to include works in which related rights subsist also, in order to avoid a situation where copyrights can be cleared, but that related rights are still an issue.-International Federation of Library Associations and Institutions

the dtic response

- The comments are noted. The wording is commonly used and aspects of it can be found in the dictionary. They do not have to be defined in the legislation.
- Some of the terms are not in the Bill such as digital curation, e-licences, digitization and will not be advisable to define them without specific reference in the Bill.
- Wire and wireless is treaty language. They are not defined in the Treaty, but used to distinguish such platforms as the internet or online access.
- The definitions of open license and orphan works clarifies what they mean.

Local organization

Public comment

- Local organisation provision in section 22 be withdrawn. Giving arbitrary powers to Minister.-SAIPL
- This proposed amendment should be rejected by the NCOP as it is open to potential abuse and does not appear to serve any other purpose. -Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA)

the dtic response

- The copyright vested in local organization will operate similarly to the state and international organization that were already in the Copyright Act.
- There is copyright that can be generated by a local organization and not infringe copyright of an author.

Sections 6A, 7A, 8A

Public comment

- The way in which the new statutory royalty entitlements under Sections 6A – 8A were conceptualized and hastily drafted by the National Assembly' Portfolio Committee introduces so much legal uncertainty on how royalty rates could be determined, payable and shared, that it would likely not provide substantial practical benefits for the intended beneficiaries.-Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA)
- Section 6A – 8A of the Copyright Amendment Bill. If the provisions are to be proceeded with, the advertising industry should be excluded from its operation.-Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA)
- The proposed Sections 6A, 7A and 8A of the Copyright Act be rejected by the NCOP Select Committee, or at least that the restrictive sections of CAB be amended to cater for contractual freedom through the introduction of the proposed phrase where relevant.-Writers Guild of SA
- The fundamental difficulty with sections 6A and 8A of the Copyright Act and section 3A of the Performers' Bill are that they contemplate a single remuneration model across all forms of copyright works, namely the payment of a percentage of royalties.-Multichoice, Baker and McKenzie, Spotify,

the dtic response

- The royalty regime is in the copyright Act although limited in scope (sound recordings, performers), the royalty sharing, the language, assignments, contracts are in those provisions, this was not arbitrary but included to create more certainty and strengthen provisions for the copyright based industries .
- The provisions in section 6A, 7A and 8A provide a royalty regime. These provisions will provide more protection for authors and copyright owners as they aim to create an enabling environment.
- The legislation provides a framework but contracting parties have the freedom to arrange how they make arrangements. The recommendation to exclude a sector is noted.
- The contractual provisions in the royalties are meant to assist authors and other rightholders with guidelines on how to approach their rights in the contracting.
- **The remuneration model is noted. It is recommended that the amendment be effected by including equitable remuneration or royalties in section 8A to take into account other modes of remuneration.**

Sections 6A, 7A, 8A

- **Public comment**

- The Copyright Bill accordingly eliminates the parties' ability to contract on mutually beneficial terms by narrowly referring to a "share of the royalty". The proposed new s6A and 8A are accordingly so narrow and inflexible that they are unworkable. Concerned that it will be extremely difficult to implement and extremely disruptive to contracting workflows and schedules.-Multichoice
- Suggests that Section 8A be struck from the CAB. The point remains: section 8A of the CAB should be removed, and performers' rights left to be regulated by the Performers' Act.-eMedia
- In this context, it is incongruent and confusing to refer to a "royalty received for the execution of any of the acts contemplated in section 6". They propose that the reference in s6A to the "execution" of the work be deleted, and that the section refer to the royalty received for the authorisation of any of the acts contemplated in s6 and s8 if it is not deleted.-Multichoice

- **the dtic response**

- The current Copyright Act has the 'share of royalties' and agreement.
- The royalty provisions should be viewed as measures to create clarity on the royalty regime and not an imposition on contractual freedom. They will create an enabling environment and level the playing field.
- The decision to include the performers in the copyright was to create a link between the two bills and to ensure a stronger protection for performers.
- The Copyright Act is linked to the performers and the royalty provisions were in the Act as far back as 2002. The definition of performance was incorporated in 1992.
- Related rights" refer to the category of rights granted to performers, phonogram producers and broadcasters. In some countries, such as the United States of America and the United Kingdom, these rights are simply incorporated under copyright.
- Other countries, such as Germany and France, protect these rights under the separate category called "neighbouring rights."
- In South Africa, related rights are incorporated under copyright and protected under the Copyright Act 98 of 1978 and the Performers Protection Act 11 of 1976.
- On the word execution in section 6A, authorization is already in the provision. The execution or carrying out of certain actions refers to actions to be taken. The words are sufficient as they are.
- **It is recommended that section 8A be retained in the Copyright Amendment Bill.**

Sections 6A, 7A, 8A

- **Public comment**

- For this reason, firmly support the work of creation by artists even as they have moved on with their lives from it, they should be compensated where needed retrospectively to recognise their dignity, ensure equity and enable justice.-Gender Equity Unit

- the dtic response

- The royalties that are retrospective in nature were in the Bill. They were raised as part of the reservations by the President on the basis of their Constitutionality.
- The retrospective sections in 6A, 7A, 8A were removed from the Bill.

Rights of distribution and rental

- **Public comment**

- Comments made in regard to the revised Section 6 of the Act above on the question of the distribution on the original version of the work. Those comments apply equally to the rental of the original version. This version is covered by the normal principles of the law relating to ownership of physical property and is not a copyright issue.-Prof Owen Dean
- Comment includes section 7, 8
- it should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic. Is the issue not that it is the unauthorised disclosure of the “original” that is sought to be prohibited? Third, in relation to paragraph (d), it is not clear how, factually, an “original” published edition could be distributed (as there should presumably only be one such item). “Distribution” suggests that there are multiple copies of something.-Anton Mostert

the dtic response

- The comments are noted.
- The provisions related to digital rights are derived from the international treaties. The text was used to ensure alignment with the treaties. An example below is from the WCT.

Wipo Copyright Treaty (WCT)

- Agreed statement concerning Articles 6 and 7: As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.
- Article 6 -Right of Distribution
- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

Reporting requirements (s8A and s 9A)

- **Public comment**

- The requirement of registration and reporting of all commercial uses of every work would be, if enacted, administratively burdensome and unworkable, and imposes unnecessarily excessive penalties for non-compliance. –Amazon
- To compound the potential negative impacts of Section 8A, it also seeks to criminalize the non reporting of all commercial uses that may be made of audiovisual works, including television commercials. Section 8A(5) purports to introduce a mandatory reporting obligation that would require of all users of audiovisual works, including copyright owners and their licensees, to register each act of commercialization and to submit a ‘complete, true and accurate report’ to each performer that may appear in an audiovisual work, even to every ‘extra’ or background performer appearing.-Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA)
- Further, the registration and reporting requirements in the CAB or PPAB are too prescriptive, and presume an ongoing administrative relationship that may not be appropriate for the specific use or creative work.-Spotify

the dtic response

- The non- reporting is a serious issue that has impacted on many performers whose works is played on radio or television or any medium for commercial purposes without any compensation. There are series played repeatedly on television and actors have indicated that they are not paid for those works.
- **The CRC found: music usage information (music log sheets)- It was noted that music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records. -page 77**
- The reporting requirements are necessary to provide certainty on payments of royalties for commercial usage.
- The reporting provisions have a rationale and they address the challenges with royalties. This impacts the music and audiovisual sector.
- The reporting and recordal of commercial uses was introduced to address the policy gap of lack of royalty payments and no mechanism to ensure the use of works of performances for commercial purposes are addressed.

Section 12A-Fair use

Issued raised

- The incorporation of a Fair Use exception alongside that of Fair Dealing raises fundamental problems as the two are jurisprudentially incompatible. –Capasso, IFFRO
- We thus suggest that the proposed section 12A(d) is not appropriate and should thus be removed from the Act.-SAMRO
- Are concerned about the blanket exception for public administration in section 12A. Although some uses of copyright works in public administration may be permissible under exceptions because of their strong public policy objectives, there are many uses of copyright works in public administration which are licensed uses in many countries.-the International Federation of Reproduction Rights Organisations
- Section 12A(a)(iv)-While a fair-use exception for scholarship and illustrative purposes in teaching may be appropriate, the exception for “education” could have disastrous consequences for educational authors and publishers, depending on how wide this exception will be. –Anton Mostert
- Clause 13 – section 12A(d) – extension of fair use principles to other exceptions Paragraph (d) of section 12A in clause 13 of the Bill introduces this provision: “The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b).” Thus suggest that the proposed section 12A(d) is not appropriate and should thus be removed from the Act.-SAMRO
- Submit that Section 12A of the Copyright Amendment Bill, which introduces an open ended US-style fair use provision, is deleted or rejected.-RISA, PASA, e Media, Anton Mostert
- Require a far more digitally-friendly ‘fair use’ regime in Section 12A. It is suggested that ‘text and data mining’ or ‘computational analysis’ for research be included as an example under fair use.-Durban University of Technology, Denise Nicholson, Joint Academic Opinion

the dtic response

- On fair dealing and fair use. It has been found that countries with fair dealing are moving towards or have open exceptions that are similar to fair use. This is not unique to South Africa. According to new developments, more countries have flexible exceptions under fair dealing. Having exception in fair use and a list of exceptions is practiced globally.
- The public administration purpose was deliberated under fair use purposes. It was found to not be problematic, hence it was retained. It would be subjected to the four factor test.
- The section 12A(a)((iv) of scholarship, teaching and education was deliberated in the previous public submission process. The public opined that the purpose should be retained.
- The section 12A(d) was removed from the Bill, in the previous advertised Bill of the National Assembly, it was incorporated and advertised following public submissions. The public found it problematic and it was removed, not in the current version of the Bill.
- The computational Analysis is noted. We opine, with ‘such as’ in the provision, it is not necessary to add to the list. Several stakeholders raised concern with the longer list of examples in fair use exception citing that they are more than the US examples. The existing purposes can be retained as are.

Fair use-Section 12A

- **Public comment**

- Clause 15 (Relating to Section 12A)- Suggest that, in the bullet points listing potential purposes covered, that the following be included as a point a(viii) and a(ix): • repair and the sharing of repair information • provision of access to orphan works.-International Federation of Library Associations and Institutions
- Recommend that: (i) the over-broad fair use doctrine is revised, (ii) that the words “such as” are struck, (iii) that the provision be narrowed down to the words not in the US law.-Dalro
- An aggravating factor regarding the fair use provision introduced under section 12A in the CAB is the fact the words “such as” in the phrase “for purposes such as the following” were inserted by the previous Portfolio Committee at-the-last-minute, at the instigation of the proponents of the fair use exception, without affording stakeholders the opportunity to debate the matter.-Copyright Coalition of South Africa
- The expression “such as” must be removed, as it extends the application of this already open-ended exception to an undeterminable remit of uses, instead of being restricted to certain special cases only.-International Publishers Association (IPA), Dalro
- The 4th factor is incompatible with the three-step test, as it conditions the concept of normal exploitation of the work to an artificial substitution effect. –IPA
- Provide guidance/criteria to courts in introducing new future uses. Maintain the United States’ fair use criteria as requested by some of the entities that object to the modified factors in the CAB. Effectively, abandon in particular s12A(b)(iii)(bb) and s12A(b)(iv). – Prof Forere

the dtic response

- Because of ‘such as’ repair and the sharing of repair information does not have to be added to the list. Several stakeholders raised concern with the longer list of examples in fair use exception citing that they are more than the US examples. It is recommended the existing purposes can be retained as are.
- The expression ‘such as’ was subject to public consultation. It contributes to the fair use to be future proof. It is not necessary to make a lengthy list of examples, as ‘such as’ covers many activities.
- South African judges have already been applying the four factor U.S. fair use test in their fair dealing jurisprudence.
- The fair use has factors that guides in terms of what constitutes fair usage. This point is made regarding the fair use criteria.

Subsection (b) in section 12A

- (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;
- (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.
- It is recommended that section 12A(b) (iv) be removed or reference to ‘substitution’ be deleted. In the US is factor 4, ‘(4) the effect of the use upon the potential market for or value of the copyrighted work.’
- Section 12A was reopened for further deliberations. The four factors and purposes of fair use were discussed in the parliamentary consultative processes

Socio economic impact assessment

Public comment

- A material procedural oversight during the development of the Copyright Amendment Bill is the absence of a meaningful economic impact assessment that should have informed the drafting of the Bill.- MEC Wengner
- Widespread public consultation process and a proper economic impact assessment be conducted to assess for the first time the impact of the amendments on the various copyright sectors.-Dalro
- Lack of a proper Socio-Economic Impact Assessment System (SEIAS)-Copyright Coalition, MEC Wengner, PASA
- Stakeholders have raised a concern that the fair use was not assessed, analysed or impact assessment conducted on it.

the dtic response

- The Department conducted a regulatory impact assessment study finalised in 2014. The study was not published to the public. The requirement for legislation is not a regulatory impact assessment study. The study mentions fair use and other issues considered in the Bill.
- The Socio Economic Impact Assessment System was developed by the Department of Performance and Monitoring and Evaluation in the Presidency. This one is the legislative requirement.
- In February 2015, Cabinet approved the SEIAS in line with the Medium Term Strategic Framework (MTSF) to improve policy development and create a more efficient and robust legislation and regulations. Cabinet adopted a resolution on the establishment of the SEIAS Unit in the Presidency to facilitate and provide guidance to national departments on the application of SEIAS to the design of policies, legislation and regulations.
- According to Cabinet Resolution, all policies, bills and regulations were to be subjected to SEIAS, to assess their impacts and contribution to the National Development Plan priorities before their approval. The CAB was subjected to a SEIAS.
- The department conducted various studies that informed the Bill, the Copyright Review Commission report is one of such studies.
- The Bill evolved and was informed by various stages of public participation and some provisions were amended, this means the study would have to be conducted each time there are new recommendations.
- **It is recommended that the Select Committee can, where possible, initiate a process of an independent regulatory impact study to address the concerns of the public, including on fair use and exceptions. The challenge is that with the history of the Bills, diverse views and industries, that study may not be widely accepted as there is a likelihood, industries will critique it, each other and experts in those industries to invalidate it. This is likely because of the various, diverse copyright based industries and different objectives of industries.**

25 years reversion right

Public comment

- This provision to be added to the current provisions relating to the formalities of assignments, simply states that every assignment of copyright in a literary or musical work shall only be valid for 25 years, and not potentially the current 50 years after the death of the author. – PASA
- An unwaivable 25-year limitation on assignment terms of literary and musical works would mean that a producer can only guarantee the risk-free commercialization of a film for that period, which is half the time currently allowed in terms of the Act (50 years) and about a third of the time afforded under US and UK law (75 and 70 years respectively). - Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA)
- The Copyright Amendment Bill proposes an unwaivable 25-year limitation on all assignments of rights in literary and musical works that would pose great challenges to a producer's ability to secure rights clearances and consolidate all rights in an audiovisual work. Consolidation of rights in the producer is a fundamental requirement in the film and television industries. –Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA)
- The prevention of certain authors and performers from licensing or assigning their rights for longer than 25 years, which would reduce incentives for producers to invest in content in the territory, likely reduce the worth of content if there are conflicting interests of multiple parties, and require the needless renewal of many transfers, even when all parties are satisfied with the original deal struck. -Amazon
- The proposed 25 year reversion clause will allow actors an opportunity to address exploitative contracts they may have entered in the past, so the abuse does not continue into the FUTURE. -SAGA

the dtic response

- The reversion period is 25 years informed by the Copyright Review Commission (CRC) report. The period of reversion is informed by a study. In the US it is 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa (i.e 70 years).
- The 25 years reversionary right is informed by the Copyright Review Commission report recommendations. This right is not unique to SA. Some countries have the reversionary rights.
- The reversion clause can be expanded more in the Regulations.
- The parties can renegotiate their agreements.
- “The CRC believes that the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights. Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. Page 5 of the CRC Report”.

Compulsory and standard contractual terms

Public comment

- Reject all provisions of contract regulations-SAIPL
- The proposed Sections 6A, 7A and 8A of the Copyright Act be rejected by the NCOP Select Committee, or at least that the restrictive sections of CAB be amended to cater for contractual freedom-Writers Guild of SA
- The Minister of Trade and Industry is empowered to set compulsory and standard contractual terms to be included in private agreements between parties, including between “the method and period within which any royalty or equitable remuneration must be paid by the relevant producer, broadcaster or user, to the performer” –Spotify
- Unfair contract terms and unenforceable contract terms (currently dealt with in the proposed s39(cG) and 39B of the Act respectively) should rather be dealt with by the Tribunal.-Multichoice
- Overall comments were made about freedom to contract and powers of the Minister to interfere in private contracts. i.e
- Minister's powers to prescribe compulsory and standard contractual terms (clause 35(b) of the Copyright Bill).
- Unenforceable contract provision to be removed.-SAIPL
- We submit that, rather than giving the Minister wide, vague and unfettered powers to regulate contractual terms - which would be both impractical and susceptible to legal challenge - the Tribunal should be empowered to set aside contractual terms that are manifestly unjust and unreasonable (rendering them null and void).-Multichoice

the dtic response

- **“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.” CRC Recommendation.**
- **This recommendation was focusing on the music industry, however, through developments in the industry, practices, consultations and studies, it was found that unfair contracts cuts across in the creative sector hence the standard contract provisions were developed.**
- The powers of the Minister are meant to create an enabling environment. The Minister will not interfere in private contracts but will create a framework to guide contracting parties when they carry out contracts.
- The provisions on unenforceable contracts are aimed at ensuring adherence to the Act. Where the rights provided in the Act are violated, the contract becomes unenforceable. This is additional protection provided.
- The policy objective applies to sections 6A, 7A, 8A and the regulations on the contractual terms.
- The Tribunal will play an important role in terms of disputes that arise from the agreements.
- There is example of government globally that set the framework in copyright contracts to address challenges in contractual issues.

Contractual terms

Public comment

- Prescribing royalty rates or tariffs for various forms of use, particularly Resale Royalty Rights. SAIPL
- Section 39(CI) be reworded to specify Minister will set royalty rates for resale royalty rights.-SAIPL

the dtic response

- The royalty rates are not legislated. There has been challenges with the setting of the rates and these have resulted in court intervention before.
- The Resale Royalty Rights is a specific type of royalty involving virtual artistic works. Governments are allowed to determine matters of collections and amounts how they regulate this form of right in terms of the Berne Convention (Article 14'ter.
- It is recommended the provision in section 39 (CI) can be focused on the resale royalty rights and the royalty for other uses be left amongst contractual parties to determine. It is recommended that section 39(CI) be amended.

Commissioned works-Section 21

Public comment

- The proposed changes will likely result in legal uncertainty on key issues relating to the commissioning of works that do not currently exist in the Copyright Act, and we submit that these proposed changes should be rejected by the NCOP.-Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA)
- The proposed amendments to section 21 should be removed in their entirety.-e Media
- The inclusion of a requirement to enter into an agreement for commissioned works and the potential limitation thereof could create confusion for parties in respect of such agreements and such limitations. The NAB therefore opposes the proposed amendment of section 21(1)(c) and recommends keeping section 21 as it is currently in the Copyright Act.-NAB
- The value chain in the film industry is complex and the investment that goes in the production is massive yet certain sections such as ownership on commissioned works in the film industry are unusual and can be a deterrent.-Prof Forere

the dtic response

- The challenges arise where work is commissioned. One of the challenges is where the copyright owner who commissioned the work, utilizes the work for purposes other than that which was commissioned for or where he fails to utilize the work at all and the work lies dormant. Section 21 of the Act must be amended to give the author of the copyright the right to apply before the Tribunal for a licence to use the work where the person who commissioned the work has not exploited the work within a reasonable time and where he is using the work for purposes other than what is commissioned for.
- The commissioned works provisions were informed by challenges with the practices on these works.
- The Commissioned works was deliberated extensively in the PC at the time. Measures were added for more protection and certainty in different scenarios wherein the author did not have recourse before.

Section 12B-D

Public comment

- Concerns were raised regarding section 12B(6), regarding its alignment to the Wipo Copyright Treaty, the alignment with the current provision in the Act in section 23(2), conditions of distribution versus importation. It was recommended that the expression “or outside the Republic” be deleted from the provision.-International Publishers Association (IPA), PASA, Amandla Omnotho, SAIPL
- Section 12C -This section should be reviewed to (i) apply only to temporary copies and not adaptations, given that adaptation is a copyright law concept that goes beyond the formatting of a text for example. –IPA, SAIPL
- The format shifting in section 12C(b) is suitable for personal use as recommended by the CRC.-SAIPL
- Section 12B, sub-section 3, is unclear and seemingly empties the right of adaptation, by giving a blank permission to produce adaptations, without any requirements or conditions of use. It should be deleted. –International Publishers Association (IPA)
- Section 12B(1)(c) should be amended to remove the obligation to delete any broadcast that includes ephemeral works after six months. The current drafting only allows a broadcaster to retain a broadcast after six months if the broadcast is of “an exceptional documentary nature”. Whether a broadcast meets this standard at the point at which the broadcast is meant to be deleted is a vague question. –e Media
- It is therefore submitted that proposed section 12B needs to be reassessed.-MEC Wengner
- Personal Use - The scope of the personal use provisions in section 12B(h) is too wide and there is a missed opportunity to introduce private copying remuneration for authors. -the International Federation of Reproduction Rights Organisations.
- Section 12B(1)(a) sets out an exception for quotation, which is unduly broad. In respect of sound recordings, there is no need for a quotation exception. -RISA
- Reject section 12B on translations as it violates three step test and Berne Convention-SAIPL
- We submit that the NCOP should reject sections 12B – 12D-Copyright Coalition
- Sections 12C and 12D are not labelled as exceptions and may be better termed limitations.-Joint academic opinion
- It is not clear what constitutes a reasonable price or reasonable terms and conditions. These provisions can be interpreted very broadly and abused.-MEC Wengner

the dtic response

- TRIPS article 6 allows exhaustion of rights and for the country to choose which system of exhaustion which then determines how the parallel import will work. The term exhaustion refers to the principle in IP law to the principle that a right holder cannot prevent the further distribution or resale of the goods after consenting to the first sale also known as the first sale doctrine. Once the good has 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. The lack of competition is evident from price of the books. National copyright legislation should therefore follow the rule of international exhaustion rather than the rule of national exhaustion.
- It is recommended that section 12B(6) be reviewed and possibly removed to ensure better clarity. Section 23(2) to be reviewed to ensure policy objective is addressed.
- The personal use provisions were reviewed. The private copy levy is a system that was raised. In other countries implementing it, there are challenges with its application. More work and research is needed to look into it.
- It is recommended that the adaptation in section 12C can be reviewed, in line with the EU Directive and the UK copyright law. Adaptation in section 12C can be recommended for removal.
- Sections 12C and 12D are general exceptions and are labelled as such.
- The ephemeral right was deliberated and it was found that the timelines in South Africa are in accordance with best practice. It was resolved to retain the draft Bill in its current form on the subsection.
- The quotation exception was considered in the parliamentary process. It includes all works. Control measures were incorporated in the quotation exception to tighten it.

Freedom of Panorama-Section 15

Public comment

- The adoption of Freedom of Panorama, as outlined in section 14 (ii) which amends section 15 of the original act, will allow South Africans to freely celebrate our recent history. It will allow the people to share photographs of public monuments and works of art over the internet to celebrate our struggle against apartheid.-Wikipedia, Poly Haven
- Delete section 15(1) as it allows unlimited use of re-uses of artistic works in public places. The one in the Act is not repealed-SAIPL

the dtic response

- The section 15(1) substitutes the section in the current Act. The section 15 (1) does not have to be repealed.
- General exceptions from protection of artistic works:

The Act

- (1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.

CAB

16. Section 15 of the principal Act is hereby amended **by the substitution** for subsection (1) of the following subsection:

“(1) (a) The copyright in an artistic work shall not be infringed by its [inclusion] use in [a cinematograph film or a television broadcast or transmission in a diffusion service] another work, if—

(i) such [inclusion] use is merely by way of background, or incidental, to the principal matters represented in [the film, broadcast or transmission] that other work; or

(ii) the artistic work so used, is situated in a public place.

(b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the copyright.”.

Section 19C

Public comment

- Some words are not mentioned at all, such as 'digitisation' or 'digital curation', which are missing from Section 19C.-Creative Commons
- In s19D in the Copyright Bill there has been an attempt to put in place a government managed regime to authorize persons to make copies for persons with disabilities without first obtaining the permission of the owner of the works. A similar provision should be considered for s19C. –Multichoice
- Recommend that this exception be expanded to cater for the temporary downloads of work and recordings for use in the educational and academic sectors.-Google
- Proposed section 19C(3) provides for a library, archive, museum and gallery to provide "temporary access" to a copyright work to a user or another library. It is not clear from this what is meant by "access".-MEC Wengster

the dtic response

- The comment is noted. Introducing the downloads of works and recordings in an environment of concerns of free use and exploitation of rights may open the Bill to challenges.
- The words recommended are not in the Bill. Section 19C is comprehensive and provides for the exceptions for libraries, museums and archives and how they can be applied. Issues of technology are embedded in some of the provisions.
- The words digital, format shifting are used in section 19C addressing issues of the digital content.
- The government managed regime in section 19C is not applicable in terms of the library provisions.

Section 19D

Public comment

- Section 19D as a whole -We propose, to avoid further litigation on the grounds of unfair disability discrimination, that the scope of s 19D remains extended to persons with disabilities across the spectrum. –Joint academic opinion, BlindSA
- The first sentence of s 19D(1) was interpreted by the Court to require regulations for its operationalisation. Delete the phrase “as may be prescribed and” from s 19D(1). -Joint Academic Opinion
- Section 19D(2)(a) restricts the scope of its application to those activities that are a result of the operation of s 19D(1). This means that persons with disabilities are permitted to only use accessible format copies made under s 19D(1). Delete the phrase “as a result of an activity under subsection (1)”.
- We propose that s 28P(2) be deleted as it replicates the requirement of authorisation by the copyright owner that renders accessible format shifting near impossible. –Joint Academic Opinion, Recreate
- Minor amendments to be effected to s 19D(2)(a) and 19D(3) to ensure that these provisions do not unintentionally prevent the making and sharing of accessible format copies between Blind SA and the people whom we serve-BlindSA

the dtic response

- The recommendations supported for further consideration.
- It is recommended that the policy on all works, all forms of disabilities be retained.
- The prescribed in the Bill is different to the court judgment, the copyright Act had to be effective immediately to activate the rights and subjecting it to regulations was going to delay the rights. In the Bill, it is important recommended that the prescribed in the Bill is retained.
- The recommendation to delete section 28P(2) is supported.
- Reference to sub section 1 in section section 19D(3) is recommended to be removed as it restrict the rights provided in the provision and not in the spirit of the court judgement. Also, other minor amendments to ease the provision can be considered.

Orphan works

Public comment

- The obligations imposed by this section on the licensees of orphan works are unjustifiably onerous for producers and content distributors who wish to licence the copyright in a work whose author cannot be identified or is identified, but cannot be located.-Baker and McKenzie Incorporated
- The use of most orphan works would be covered under Section 12A, except in some circumstances, where Section 22A may apply. Section 22A is a lengthy and expensive process so would probably not be applied as much as fair use.-Library and Information Association of South Africa (LIASA)
- Section 22A is impractical and fails to provide a practical way of dealing with orphan works, especially anonymous works. -Durban University of Technology
- A further weakness is the proposal to oblige the payment of licences with no guarantee that the money will be paid out. As has been shown through research into potentially orphan works in the United Kingdom, in the vast majority of cases the immediate reaction of creators of works previously considered as being orphan was in fact happiness at having their expression shared, and not a desire to claim money. A far preferable approach would be to avoid the moral hazard that such a fund can create, and rather give a confirmed rightholder, once identified, the right to stop any use of orphan works (outside of those permitted under exceptions), and then negotiate.-International Federation of Library Associations and Institutions
- The statutory licence for orphan works does not apply to resale royalty rights.-SAIIPL

the dtic response

- This is an important procedure that will enable works to be located. It is used in countries such as the UK. The provisions are comprehensive in sections 116A-116D.
- The resale royalty rights comment to be reviewed.

Penalties and Sanctions

- **Public comment**

- The penalties for failing to register or omitting to submit a report, set out in section 8A(5) of the CAB, are excessive (up to a minimum of 10% of annual turnover). It is unclear why such onerous penalties are needed for failing to fulfil what are essentially administrative requirements.-NAB,
- The requirement of registration and reporting of all commercial uses of every work would be, if enacted, administratively burdensome and unworkable, and imposes unnecessarily excessive penalties for non-compliance. –Amazon
- Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures. This requires that ss 27(5B) and 28O be deleted from the Bill and replaced by a provision deeming circumvention and trafficking in anti-circumvention devices to be an infringement of copyright.-Joint Academic opinion
- In sub-section (5C)(b) of Section 27 of the CAB, the offence for exploiting works where management information attached to those works has been modified or removed, must, like sub-section (5A), only constitute an offence where the infringing party knows that it is infringing copyright. In this regard, broadcasters often receive content from third parties and may not have direct knowledge about whether they are infringing copyright or not.-Etv eMedia
- The provisions in the exception clause, Section 28P(2), are problematic, in that it legitimises uses of measures by means of circumvention devices simply by notice to the copyright owner.-PASA

the dtic response

- It is recommended that section 28P(2) be deleted.
- The PC was concerned that the issue of reporting has impacted the payment of royalties and this had serious consequences for the performers. It was for this reason, strong penalties were imposed. These provisions were deliberated at length given their significance.
- In international discussions on copyright related matters, the intellectual property legislative regime of South Africa has been questioned in terms of the strong legal measures to deal with infringements related to the digital environment.
- The view is that the matters are serious such that the penalties should be more stronger. The criminal penalties will send a message that deters these infringements. This aspect can be reviewed.

Intellectual Property Laws Amendment Act

Public comment

- This section (and point 3.36 of the Memorandum to the Bill) refers to the impractical 'Intellectual Property Laws Amendment Act 28 of 2013' (IPLA Act) (not yet operational after 10 years!). There is a more practical and appropriate piece of legislation which is outside copyright law. It is the "sui generis" 'Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019', that addresses IK and TK but conflicts with the IPLA Act.-Denise Nicholson
- This comment applies to references to IPLAA throughout the Bill and assumptions made in certain places that it is in operation, and includes in particular to the numbering of some of the new sections sought to be introduced into the Copyright Act by the Bill. This will lead to considerable confusion and is editorially irrational and unsound. – Professor Owen Dean.
- The repeal of IPLAA will have implications for the copyright and performers' protection amendment bills transitional provisions.-SAIPL

the dtic response

- The comments are noted.
- IPLAA is an Act of Parliament in the statute books. It has to be referenced in the law.

Other amendments

Public comment

- Should the Committee be steadfast in the need to introduce the Fair Use doctrine into South African law, there would be even more of a need for the introduction of the Statutory Damages-Capasso
- Insert a sub-section that states: 2A (3) (a) Copyright extends only to the products of a natural person's skill, effort and creativity.-Research ICT Africa (RIA)
- Propose that a minimum consultation period of 60 days for any regulations prescribed under the Act is necessary. We further propose that any regulations prescribed should be informed by a thorough consultation on the underlying policy and practical considerations and a comprehensive socio-economic impact assessment.-Multichoice
- Oppose the Commission's proposed enforcement function contemplated in the new s28Q of the Act or the proposal that the Commission should deal with "any other matter referred to the Commission by any person, Tribunal or any other regulatory authority".
- Section 22C(3)(c) provides that a collecting society may "only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic."-Dalro
- It is submitted that this section introduces reciprocity requirements that are at odds with the national treatment and minimum rights principles embodied in the TRIPs Agreement and the Berne Convention.-Dalro

the dtic response

- Minimum consultation term is 30 days, if extended to 45 days. The regulations involve public participation.
- The AI recommendation is noted and shed light on the role of technology in copyright however this is a new amendment that have not been consulted upon. It will be considered for further discussions and future amendments.
- The comment about statutory damages is noted. It is an area that can be reviewed further before placing in a legislation.
- On the reciprocity, the collecting societies as a point of departure must make a finding and a determination that the rights under it administration are enjoying protection usually through a treaty such as WPPT. Once that has been determined, a collecting society must then find out if the rights of its members (under the administration) are indeed consumed in the jurisdiction in question (e.g US). If such rights are indeed consumed then it therefore expedient and/or desirable for a collecting society to enter into a reciprocal agreements to ensure that the citizens (right holders from the two jurisdictions are equalled in terms of receiving royalty) receive royalty from the usages. Secondly, the treaty itself creates obligations for all contracting members and when that is taken down to the level of operations in the collecting societies, it basically translates to reciprocal arrangements.
- Collecting societies are not forced to conclude reciprocal agreements, they only do so when it is expedient and/or desirable to do so with a treaty supporting the protection of the rights under administration.

Other amendments

Public comment

- We propose that the law of succession should apply to the performers rights, where the next of kin is/are not prejudiced from getting royalties/ remuneration/merits upon the death of the creator.-Mr Vusumzi Moyakhe, NW film Commission
- s29H(c) empowers the Tribunal to impose a fine under s175 of the Companies Act. The Tribunal is not the appropriate forum to impose such fines. More generally, it is unclear what the rationale is for empowering the Tribunal to make an order for an administrative fine. If reparation in the form of a monetary award is required, it must take the form of a damages award made in favour of the successful party before the Tribunal (the copyright owner, author, licensee etc.). The State has no interest in the disputes that will be heard by the Tribunal, and there is no justification for it benefitting from them.-Multichoice
- The NCOP to determine whether the Tribunal provisions of 29A to 29H comply with section 3 of the Superior Courts Act of 2013.-SAIIPP
- We submit that a turnover-based fine is not appropriate in the context of intellectual property rights penalties. This should also be borne in mind in the context of fines under s27(6) of the Act, as proposed to be amended by clause 29(b) of the Bill.
- M-Net and MultiChoice propose that the Copyright Act should be amended to include provisions for a streamlined and fast-track process for removal, takedown and site blocking by ISPs upon notification by verified rights holders without the need to approach the court, as the process to obtain an interdict can be costly and time consuming and may well end up being too little too late in the majority of cases.
- Absence of effective legal remedies to combat online infringement remains a material oversight in the Bill, i.e website-blocking remedy.-SAIPL

• the dtic response

- Tribunals can impose fines. The Tribunal can make orders that benefit the parties not only government. There are Tribunals currently that carry similar functions.
- Turnover based fines can be imposed on juristic persons. This will not be unique to the Act and intellectual property.
- There is a Copyright Tribunal currently with limited jurisdiction. In terms of adjusting and strengthening the powers of the Tribunal, the necessary legislation will be applied.

Other amendments

Public comment

- These actions would not fall under the current prohibition of circumvention of TPMs. M-Net and MultiChoice therefore propose that this conduct be dealt with by way of a provision in the Copyright Bill that serves to criminalise the making and selling of equipment and software used for purposes of signal piracy.
- M-Net and MultiChoice therefore propose an amendment to the Copyright Bill that will effectively criminalise the making available (on a website or an app) of copyright content for downloading or streaming by members of the public. The following provision be inserted in Bill as a new s27(4B).
- In addition, we recommend the introduction of a new criminal provision dealing with digital sharing. -Multichoice
- Unpublished works' copyright term – this is not an important issue at this stage, so we are not too concerned that it hasn't been included. However, we believe that research should be done to investigate applying the copyright term to unpublished works sometime in the future-LIASA
- Resale royalty right is not a copyright, recommend a separate chapter in Bill.-SAIPL
- The words by 'art market professional' be added after 7B(1)(a)-SAIPL
- Clause 10(b)-This provision provides for It is submitted that proposed paragraph (f) should end in a semi colon, not a full stop. The insertion of three proposed paragraphs – (f), (g) and (h) in section 9 of the Act. –MEC Wengner

the dtic response

- The proposed amendments have not been part of the Bill and will require a separate process and further review. They are noted.
- Comment on unpublished works and future work is noted.
- The drafting suggestion is noted for consideration.

Conclusion

- The Select Committee to note the presentation of **the dtic** in response to the public submissions.

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.

Definitions

Public comments

- The definition of “broadcast” in respect of the CAB. and reiterate that the Draft White Paper process has been finalised, the current definition of “broadcast” in the Performers’ Protection Act, 1967 should be retained in the PPAB.-NAB, Multichoice
- In respect of the definitions of “performer” and “producer”, the NAB submits that these definitions are vague, and should be reframed to ensure that there is clarity for the creative industry.
- Amend the definition of "producer" to read as follows: "producer means the person who takes responsibility for the first fixation of a sound recording or an audiovisual fixation"-Multichoice
- Amend the definition of "performer" to read as follows: "'performer' means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise viewed in context, performs literary, musical or artistic works as contemplated in the Copyright Act, but does not include extras, ancillary participants or incidental participants"-Multichoice
- The definition of performer is broad. The NAB respectfully submits that a distinction must be made between a performer for purposes of the statutory rights and obligations, and incidental participants (such as extras) who would not, in context of literary, musical or artistic works, be considered a performer or “member of the cast”. This distinction is especially crucial as only performers have a statutory right to receive a royalty or equitable remuneration.-NAB

The dtic response

- The definition was deliberated in parliament. The various policy considerations around it were noted. It is recommended the current definition in the Act be retained.
- The language in the definition of performer and producer is in line with the language of the treaty.
- The definition proposal to address the extras, is not necessary because extras are not entitled to royalties. The treaty definition does not include the extras. However, the recommendation to clarify in the law can be considered as proposed.

Reversionary clause

- **Public comments**

- The bill needs to be explicit as to what happens to rights of performers have transferred to the owner of the recording after 25 years. do those rights revert back to the performer or what really becomes of those rights after the expiry period?-Mr Vusumzi Moyakhe, North West Film Commission
- Propose that the law of succession should apply to the performers rights, where the next of kin is/are not prejudiced from getting royalties/ remuneration/merits upon the death of the creator-Mr Vusumzi Moyakhe, North West Film Commission

- **The dtic comments**

- The objective is for the rights to revert back to the performer after 25 years.
- The law of succession comment is noted.

Clause 2, 3, 4 and 5

- **The public comments**
 - Throughout the PPAB there is a lumping of what would be exclusive rights (i.e. rights requiring the prior authorization of the rights-holder) and remuneration rights (i.e. rights only requiring that payment must be made for usage but which do not prohibit the usage itself). Currently in respect of performances, the “needle-time rights” system contemplated in section 5(1)(b) of the PPA is an example of a remuneration rights system. The provisions in clauses 2, 3, and 4 (in particular the proposed section 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4) all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights. –Copyright Coalition SA.
 - The legislation cannot create a “royalties or equitable remuneration” regime, as it will create uncertainty. In respect of performances embodied in sound recordings, it is clear from the provisions of the Rome Convention and the WPPT that the system has to be that of equitable remuneration. In respect of performances embodied in audio-visual works, it can either be a royalties system or an equitable remuneration system.-Copyright Coalition SA
- **The dtic response**
 - The structure of the Bill is aligned to the Performers’ Protection Act.
 - The remuneration structure in the PPAB was amended and aligned to the treaties during the parliamentary process.

Clause 2, 3, 4 and 5

- **The public comments**

- Reject the definition of communication to the public in 1(d)
 - New section in 3(4) in clause 2
 - New section 5(1)(a)(i), 1(b)(iv) to (vii), 1A, 2, 4 and 5 in clause 4
 - New section 8(2)(f) in clause 5(a)
 - Amendment of section 8(3) (a) by clause 5(b), because they are in some places incorrect or in conflict with the WPPT and the Beijing treaty.
- Section 8F and 8H not compliant with the treaties and not provide adequate legal protection-SAIPL

the dtic response

- The comments are noted.
- Section 3(4) provides exclusive rights for performers. The other clauses provide for other rights and exceptions. It is unclear why they are recommended to be rejected.

Conclusion

- For the Select Committee to note the presentation on the Performers' Protection Amendment Bill and the submissions from the public.

Thank You