



the dti

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

**PRESENTATION TO THE PORTFOLIO COMMITTEE ON COPYRIGHT: TRADE AND  
INDUSTRY**

**Response to public submissions  
14 AUGUST 2018**



the dti

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

**Presenters**

**Dr Evelyn Masotja**

Deputy Director General, CCRD

**Ms Meshendri Padayachy**

Deputy Director: IP Law and Policy

**Dr Ria Nonyana Mokabane**

Chief Director: Legislative Drafting, CCRD

**Ms Pregoria Mubaso Muvhango**

Director: Legislative Drafting

**Mr Nkosinathi Mkhonza**

Administrative Clerk: IP Law and Policy

**Mr Kadi Petje**

Companies and Intellectual Property Commission (CIPC)

### Purpose of the Presentation

To respond to the public submissions submitted by stakeholders to the Portfolio Committee on Trade and Industry.

3

### BACKGROUND

- The Portfolio Committee advertised clauses to the public between June and July 2018.
- More than 50 submissions were received.
- Clauses were advertised on minimum content of contract related to royalty percentages-clause 5,7, 9; the issue of retrospective application-clauses 5,7, 9; reciprocal application of the resale royalty right, log sheets, etc.
- The key comments from the public are included in the presentation as well as the response from **the dti**. The matrix document is more detailed with stakeholders and their detailed submissions.

4



## The definition of visual artistic work

### Comments

- Clause 1 definition of visual artistic Work-Concerned over the broadness of the definition as it might extend to jewellery etc. which could qualify as a design. Recommendation that the definition be reviewed and corrected.
- Definition be reviewed, corrected and improved as to which works subjected to artistic resale royalty rights.
- With reference to Clause 1, par(i), (b), that audiovisual works should also be expressly excluded as the definitions of "visual artistic work" and "audiovisual work" seem to overlap.
- Definition introduced in Clause 1 was seen as too broad by some stakeholders and limiting by others, Spoor and Fischer noted that there is no problem with the definition of visual artistic works but recommended that it may be simpler merely to refer to the works identified in sub-section (a) of the definition of "artistic work".

### the dti response

- Definition to be retained. Could remove the word commercialised. Can amend title to be applicable to RRR- e.g, works covered in artistic resale rights.
- Aligns with the principal Act.



## Clause 5: Section 6A(4) The minimum content of the agreement related to royalty percentages

### Comments

- Assignment is not applicable to literary works (rare).
- It should be noted that assignment of copyright does not take place in the book publishing. It was proposed that 'literary' works be excluded from section 6.
- Authors of literary works, unlike authors of musical works, don't have collecting societies.
- There were comments that questioned why be entitled to royalty when author have assigned rights.
- Flexibility to negotiate other arrangements-other remuneration was a concern.
- Comment that Section 6A should not be proceeded with until the Portfolio Committee has a clear understanding of the existing arrangements that exist between scholarly journal publishers and their authors so that the Bill does not impact on these arrangements or result in unintended consequences.
- The clause might cause some commercial challenges; it might have the effect of discouraging broadcasters, publishers and producers from acquiring assignment of such copyrights in future, and rather pursuing lower value licensing contracts, where copyright is licensed or transferred temporarily or partially.

### the dti response

- Assignments in the literary works are common between author and publisher and not between author and collecting society.
- This clause is not about assignment.
- Reversion is separate from royalties.
- The Bill provides for collecting societies for all the works. The Regulations will provide a framework.
- The clause is reconsidered. the dti to propose a new clause on royalties percentages in literary works.
- Royalty payment is important for the context of SA.

**Clause 5 and Clause 9: Section 6A(4) and Section 8A(4):  
The minimum content of the agreement related to royalty percentages**

**Comments**

- The clauses are not applicable to these works and must be industry relevant.
- However, this Section would fail to change the plight of audio-visual authors (producers) in the country due to the fact that it unfortunately does not apply in the case of commissions.
- It was proposed permitting the parties to agree on an appropriate remuneration model, which could be an upfront remuneration payment or a percentage of the royalty received by the copyright owner for the authorisation of any of the acts contemplated in s6/s8.
- Proposed factors to guide the Tribunal when determining the remuneration or royalty percentage.
- Clause 9 (the proposed section 8A) should be re-drafted to reflect the right of performers of audio-visual works to receive equitable remuneration. The clause should reflect similar rights afforded to the performers of audio-visual works than that afforded to the performers of sound recordings (embodied in clauses 10-11 of the Copyright Bill). These rights were internationally established through the WPPT and the Beijing Treaty.

**the dti response**

- These clauses are not about assignment.
- Section 6 and 8 to be reconsidered. Proposed clauses to be provided.
- Factors to guide the Tribunal can be considered.
- On clause 8A, the fall back may not be 50/50 but a performer has to be catered for.
- Drafting has to be reviewed to cater for performer. Suggested clause to be provided.
- Failure to agree, then the Tribunal may be approached.

**The minimum content of the agreement related to royalty percentages-broad concerns on clauses 5, 7, 9**

**Comments**

- By prescribing compulsory standard contractual terms, the Minister would completely eliminate the parties' autonomy to regulate their commercial arrangements on terms they see fit.
- The terms of contract prescribed by the new provisions in the Bill will be challenging to implement.
- The new powers proposed to be given to the Minister are far-reaching. They involve the Minister in writing contracts for parties. However, no guidance is provided to the Minister about how these powers should be exercised or what purpose is sought to be achieved by their regulation.
- Submissions raised the overall concerns of freedom to contract brought about by the setting of contract standards.
- It is undesirable and impractical to stipulate contractual terms in legislation, due to the dynamic and complex industries in which copyright is created and used, the inability of the law to keep up with technological development, and the inevitable delays in amending legislation/regulations.
- Rather than giving the Minister wide, vague and unfettered powers to regulate contractual terms - the Tribunal should be empowered to set aside contractual terms that are manifestly unjust and unreasonable (rendering them null and void).
- Any remaining concerns about unequal bargaining power can be addressed through collective negotiation. The interests of individuals in the creative industry are best protected by collective negotiation structures, such as industry associations and collecting societies.

**The dti response**

- The intention is to have minimum requirements and not limit freedom to contract.
- The Tribunal can be used as a safe guard as there is a history of abuse. The Tribunal will adjudicate on all disputes.
- Bargaining mechanisms are important but legislation will provide more protection.



### The minimum content of the agreement related to royalty percentages on clauses 5, 7, 9

#### Comments

- The requirement for a 'cooling off' period as an integral part of the agreement needs to be qualified. It is not clear whether the "cooling off" period envisioned here is akin to that which is found in pieces of legislation such as the South African Consumer Protection Act, No 68 of 2008 (CPA); National Credit Act, No. 34 of 2005 (NCA) and/ or the Alienation of Land Act, No. 68 of 1981 (ALA) or the drafter envisioned something different.
- The time period for the cooling off period be stipulated, possibly 5 (five) to 7 (seven) days.
- Suggested to remove 6A(4) (d). "A cooling off period" will not work within industry due to the amount invested in the exploitation of a work.
- Cooling off period may not work in literary works. E.g-A "cooling off period" – effectively an author's right to 'walk away' from a contract after signing it could bring an entire production to a halt.

#### the dti response

- A cooling-off period generally refers to a period of time within which a person (usually a consumer) may decide to cancel a contract.
- Recommendations were made to introduce a period of when the cooling period will be applicable 5 or 7 days for example.
- Literary works are excluded from a cooling off period in terms of the Electronic and Communications Transaction Act.
- Cooling off period is a safeguard for artists before entering into a contract.



### The issue of retrospective application

#### Comments

- All retrospective applications of royalty rights must be removed from the Bill. These would introduce material and virtually unmanageable financial risks to all academic institutions as well as to any existing business dependent on these types of copyright works.
- A legal opinion on retrospectivity should have been sought first.
- Retrospectivity will potentially affect existing successful business arrangements and would wreak havoc on existing relationships, business models, forecasts and cost structures (academic institution or technology business).
- It would also expose the legislation to constitutional challenge in accordance with the recognition that statutory retrospectivity generally undermines the rule of law.
- Retrospectivity to works that have already been assigned is unfair and unrealistic and may be contrary to the Constitution.
- Thus, the matter of the retrospectivity of Section 6A(5), as well as the other provisions of retrospective application in the Bill, must undoubtedly be seen as "weak" and should be deleted.
- Inclusion of the retrospective provisions in respect of commissioned works not supported as retrospectivity poses Constitutional challenges.
- Clause 7- objects to any royalties or remuneration being imposed retrospectively.

#### the dti response

- Many submissions against it.
- Retrospectivity is not necessarily unconstitutional.
- Proposal: A rationality test can be applied (royalties). Refer to Prof Tana Pistorius comments.
- Legislation does not apply retrospectively unless certain conditions are present- Pen Afrikaans.
- However, it is noted that it may be impractical to apply.



**Clause 7: Section 7B (3)(a)(i) read with Section 7B:  
Reciprocal application of resale royalty right**

**Comments**

- Proposal for a separate legislation on RRR.
- Prescribed royalty rate to be increased but can also decrease. So it is recommended that increased be replaced by amended.
- To study the international impact in other countries where resale royalties was introduced.
- Term of RRR must be limited.
- Due consultation be arranged before the current RRR are enacted.
- Not clear which entity will be responsible for the operation enforcement of the system whether collecting societies will administer.
- Application of RRR to be limited to visual artistic works.

**the dti responses**

- Separate legislation is not viable.
- Counter argument - can add it as a category in the artistic works provision.
- Collective Management of RRR is possible.
- The application of RRR will be detailed in the Regulations.
- Propose for resale royalty to apply after the commencement of the Act.

**Clause 7: Section 7B (3)(a)(i) read with Section 7B:  
Reciprocal application of resale royalty right**

**Comments**

- A more balanced model be considered based on some principles outlined
- Alignment to Treaties/ international obligations boundaries-
- Which countries are designated countries and how it will be determined.
- The retrospective application may not be enforceable and may be unlawful in terms of practical applications as far as other legislation are concerned. Clause 7-provision should be expanded so that the resale royalty will only be applicable to transactions effected after the commencement of the Act or work that was made before the commencement of the Act but the application limited to resale transaction concluded after the commencement of the Act.
- Draft IP policy did not include this as well as the Copyright Review Commission
- The criminalization of these provisions a concern as they are not clear.
- Concern over when these RRR became a priority as it was not included during public consultations.
- The introduction of the RRR in the Bill, and proposes that RRR should appear in a separate chapter.
- There are no provisions to enable artists to claim their royalties in terms of RRR and there are no artists or collecting societies.
- The person liable to pay the RRR to the artist not specified.
- Retrospective application of RRR to be deleted

**the dti response**

- Designation can be explained as SA is part of Berne Convention.
- It is our view that the seller should be liable. (UK as an example is the seller).
- The reciprocity of the clause will be done through arrangement between countries who have adopted this right which is internationally under discussion at WIPO as many jurisdictions have adopted this right.
- Exploitation of the work can be used as rationale for retaining it in the CAB.
- Section 7A is for artistic works and 7B creates a RRR.
- The rationale – RRR is being discussed at WIPO. The RRR is not a new right, the public called for it to be part of Copyright.
- It is our view that the seller should be liable.
- There are more than 100 countries that are WIPO members that have the RRR.
- This is to boost artistic sector as they did not have other revenue streams except direct sales of artistic works.



dti

Department  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

### Clause 11: Section 9A(1)(Aa): Log Sheets

#### Comments

- The language in Section 9A(4) read with Section 9A (1) (aA) should also be found in Sections 6, 7 & 8 or within Chapter 1A.
- While the invitation for public comment seems to be in respect of Clause 9A only, this must be an oversight, since one must presume that the Legislator wishes to implement the criminalization of failure to report uses of any of the rights forming the bundle of copyright, not just the public performance of sound recordings.
- The word 'intentional' recommended to be removed.
- One hopes that the words 'prescribed manner or form' will result in Regulations that clearly prescribe the accuracy levels required in user reporting.
- Making the violation of the clause an offense puts the onus of enforcement on Government. Enforcement should rather continue to be the duty of collective management organizations through civil law.
- Further, the reporting requirements constantly evolve with the changing times, as such, the Tribunal would not be in a position to continuously make determinations what should constitute a usable format.

#### the dti response

- Consideration to extend this to all works as well as to both Natural and Juristic Persons.
- This will be prescribed in the Regulations.
- Suggested re-wording to be considered.



the dti

Department  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

### Clause 11: Section 9A(4) Failure to record acts or to report constituting an offense and the penalty for that offense

#### Comment

- Very strong legal action needs to be taken against all major music users, including broadcasters, who are infringing the rights of composers and performers by failing to report properly and/or pay correct licensing fees.
- Imprisonment sentence is draconian.
- Recommend that this sanction be reconsidered and greater scope be given to a presiding officer to exercise their discretion to impose a punishment they deem appropriate so that the severity of the punishment better suits the crime.
- Propose that a task team be set up, under the auspices of the Commission, to address this problem. The task team should be dedicated to the specific task of assisting the Collecting Societies in intensifying their licensing and collecting activities, and in upgrading the quality of usage information they receive.
- Spot-checks, venue inspections, reviews of reports, access to records and even confiscation and the furnishing of spot-fines should fall within the purview of this task team.

#### the dti response

The comments noted.  
Clause can remain.  
Serves as a deterrent.



the dti

Department  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

#### Clause 12: Section 11-Nature of Copyright in programme-carrying signals

##### Comment

- The wording of this amendment does allay some of the old confusions between broadcast, diffusion, communication and making available, the latter two now having at least been defined and provided for.
- Broadcasters proposed exclusive rights to make available.
- Protection of the broadcaster's signal must not be allowed to extend to a post fixation right to the work.
- Apply to exclusive rights to the signals only.

##### The dti response

- Broadcasters do not own the content in the signal.



the dti

Department  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

#### Clause 15: Section 15: Panorama rights and incidental use

##### Comment

- Agreement that it should remain in the Bill. But be restricted only to incidental use.
- The right of panorama is unduly limited. It should be expanded to include photographs and other images (such as paintings).
- This proposed section should be re-drafted, especially in light of the fact that section 15(3) of the Copyright Act is not amended.
- Many copyright scholars and practitioners are of the view that that situation is already adequately catered for in the Act.
- The amendments to Section 15 go way beyond these requests. Since this provision will be a direct disincentive to visual artists creating works for public spaces, we suggest that this amendment be withdrawn.

##### The dti response

- The clause has more support. It can be retained as is.





## Clause 22: Section 21(3): new process for commissioned work

### Comments

- There is some confusion in that s 21(1)(c) seems to provide that commissioning does not apply to literary or musical works – only to all other works. This must be a mistake, since great confusion will result if this is the case, and abuse of the term “commission” will be the undoubted consequence, for composers of musical and literary works.
- Commissioned Works, where ongoing royalties are most needed, have been exempted. This clause will be fatal to commissioned writers – one of the very categories of creators it is supposed to protect.
- No research seems to have been done on the potential economic impact of the works in this clause.
- The term “tariff” in this Section needs to be changed to read “fee”. The term tariff, denotes general application. Meaning, that the Tribunal would only need to set the tariff once and it would apply to all similar matters.

### the dti response

- Some stakeholders say we should remove it. Some say royalties should be applied in this clause.
- The principal Act prescribes the works that applies to commissioned works.
- The term tariff can be changed to fee.



## Clause 22: Section 21(3): new process for commissioned work

### Comment

- Would have no objection to Section 21(1)(c) being repealed entirely.
- If it is nevertheless desired to retain Section 21(1)(c), then it is suggested that minimum standards for a commissioning agreement be prescribed, instead of providing for the process in new section 21(3).
- The process proposed in new section 21(3) is extremely burdensome and will create more, not less, confusion in its practical application. Legislation should provide clarity that, absent an agreement to the contrary, the default copyright owner is the commissioning party. There is concern that unless this is clear, litigation may arise.
- The commissioning party should be given a reasonable time to exploit the work so as to realise a return on investment. A seven year period in sub-section 3(c) was proposed, after which the author may approach the Tribunal.
- The default for works not created by employees should be that the creator owns copyright absent contract.
- The Bill does not address the common situation in which a creator seeks to use a work, or the source material to create the work, for purposes other than that for which it is commissioned.

### the dti response

- The minimum standard of contract can be prescribed.
- There is a need to provide for the rights of authors. The clauses proposed are fair.
- Pursuant to the commissioning (if not, then it reverts back to the author). After 7 years the work reverts back to the author. Author can approach the Tribunal.
- The author approaches Tribunal when the commissioned work is no longer used.
- The position provided for in the Bill allows the author remedies in the instance on non-use.
- The author can approach the Tribunal for the use of the work non other than its original use. The Bill provides for this.

**Clause 25: Section 22B(7): Transitional provisions to provide for existing Collecting Societies**

**Comments**

- It is important to distinguish between a "natural person" and a "legal person" in the wording of this section. This observation has bearing on 22B (1) in addition to 22B (7).
- In addition, it should also be made clear that such legal person must be not-for-profit and controlled by the copyright owners or the performers, as the case may be. Otherwise any producer or agent could incorporate itself as a collecting society.
- The period of 18 months to be reduced to 12 months. Option to extend once for another 6 months.

**the dti response**

- CS are organisations that are member based. The wording of the section sufficient. They are for non-profit.

**Clause 25: Section 22C(3)(c): Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries**

**Comment**

- The Societies, under the Regulations to be drafted, should be given a wide berth in pursuing such reciprocal agreements. Some foreign societies have been known to take advantage of limiting provisions in our current law, in order to avoid entering into agreements, or to avoid paying for the use of South African content.
- CMO will always be required to pay other countries amounts collected on their behalf-section to be deleted.
- A CMO will always be obliged to pay foreigners any amounts collected on their behalf, whether there is a reciprocal agreement or not.
- The reciprocal agreements are between CS and not countries.
- It is wise to compel collecting societies to only pay royalties overseas where a reciprocal agreement is in place. That could hamper collecting societies' competitiveness on the global market and their ability to enter in agreements freely.

**the dti response**

- The legislation does create clarity about foreign royalties. There is a need for legislation in this regard.
- The intention is to have the agreement between collective society to another collecting society in another country but not a country to another country.



dti

Department  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

**Clause 25: Section 22D(2)(b) and 22D(3): How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer**

**Comment**

- Collecting societies to report regularly and mandatory, royalties received and retained.
- Broadcasters to have access to such records.
- The period be for 5 years and if after cannot find owner, the undistributed amounts be allocated to other activities.
- CMOs should lack any ability to profit from their activities. Thus, the law should require that they be formed as either non-profit corporations or cooperatives under South African law.
- It would be prudent to grant authors more time to claim their unmatched royalties by increasing the claim period from 3 to 5 years.
- Unclaimed royalties to be placed in a fund that will be used for development. The funds should be allocated, after the three years have elapsed, to a social responsibility fund to be used for the education and upliftment of impoverished musicians.

**the dti response**

- CMOs are non profit organisations and not meant to profit from royalties.
- The period to retain unclaimed royalties can be increased to 5 years.
- The reporting requirement noted and necessary.
- The proposals for the fund to develop the industry is welcome.



the dti

Department  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

**Clause 27(6): Increased penalties for infringement. Provision for fines when the convicted person is not a natural person**

**Comments**

- Strong copyright protection is welcomed. The fines imposed on juristic persons are draconian and are minimum penalties.
- Corporate entities should either have to pay 10% of annual turnover for each offense, or 25% of Profit After Tax, whichever is the greater.
- The provision of criminal sanction for copyright infringement should be extended to include criminal sanction against failure to report use of copyrighted works, even if the use is licensed under a blanket license. Broadcasters, venues, retailers, clubs, bars and incidental users do not properly report their usage, even when licensed, and therefore create problems for the Collecting Societies in achieving correct and accurate distribution of funds.
- Recommend a penalty of R10,000 or one year in prison for each failure to report music usage. The complainant in such criminal proceedings should be the Collecting Societies, therefore the empowering legislation should permit such collecting societies to lay criminal charges and pursue civil claims without having to seek mandate from their members to do so (since such mandates may otherwise take up to a year to acquire, at subsequent member AGM's).

**the dti response**

- The Bill provides for the reporting and sanctions. There will be fines imposed on failure to report.



## Clause 27: Section 27(6): Increased penalties for infringement.

### Provision for fines when the convicted person is not a natural person

#### Comments

- Although the criminalisation of such an offence is provided for in the current version of the Bill, it does not provide for civil remedies and therefore does not fully benefit the right-holders.
- Criminal prosecutions for copyright infringement of audiovisual works are relatively rare and need to be supported by private bodies. Not clear whether this proposed change will bring about any real benefit in combating infringement.
- Several comments were raised on measures to address piracy.
- Concerns were raised about the turnover based fines (e.g the 10%). Turnover-based fines are not appropriate in the context of copyright infringement.
- The new offence, fine and/or possibly a maximum of 5 years imprisonment seen as unduly harsh.
- A discord also exists between the punishments proposed for natural persons on the one hand and juristic persons on the other. The punishment of the latter, although still heavy, is incomparable to that of the former.
- The overlap between criminal law and company law (in the case where the infringer is a juristic person) will certainly bring about more legal uncertainty where the implementation of this Bill is concerned, and arguably blurs the lines between the copyright law, company law and criminal law respectively.
- Has reservations about unlimited fines on individuals and fines determined as a measure of turnover. Instead, recommends an increased fixed maximum fine.

#### the dti response (continued)

- The civil remedies are already there in the principal Act in the form of interdicts/claim for damages and rightholders should initiate it themselves. The intention of the Bill is not to exclude civil remedies. It should be noted that the Copyright Tribunal as amended in the Bill is a civil Tribunal.
- The Counterfeit Goods Act can be applied (Seizures/Take down Notices) for online piracy.
- It is noted that online infringement legislation is mandate of Department of Communications.
- Turnover based fine is appropriate for businesses. They were benchmarked against other jurisdictions. They will serve as deterrent to copyright infringement.
- Fines should be applicable to all persons.
- As for the harshness of the penalties, this will be an effective deterrent.



## Clauses 29 and 30: Copyright Tribunal

#### Comments

- s29(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.
- 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.
- More definitions and descriptions are required around the Copyright Tribunal.
- However, proposed Section 29(1) does not make any provision for the resignation of the Deputy Chairperson.
- Must clarify when a Deputy Chairperson can resign (periods etc).

#### the dti response

- The Tribunal should have powers to impose fines.
- The Tribunal will be empowered to hear disputes faced by artists.



## Clauses 29 and 30: Copyright Tribunal

### Comment

- Whether the introduction of a "Tribunal" that can hear any matter referred to it by the Commission (as opposed to a Tribunal dealing exclusively with copyright-related matters) is advisable.
- Judges, acting judges and retired judges do not exhaust the available pool of experts that might be suitable candidates to serve on this Tribunal. Industry practitioners and academics may well be as suited, if not more so, due to their knowledge of particular industries. It is not reasonable to expect a Judge of the High Court to have an intimate knowledge, for example, of the vagaries of music law and the various rights and income streams in the music industry, since these are traditionally not taught by university law schools, and there is almost no High Court precedent in this field-qualifications, experience or research in Copyright Law, Entertainment Law and Music Law (a sui generis field deserving of specific description.).
- Section 36 (the appeals section is deleted). This section needs to be re-inserted this applies equally to the right to review a decision of the Tribunal. It needs to be included in the Bill.
- That the individual does not have a criminal record be an additional requirement for eligibility for the judges to serve in the Tribunal.

### the dti response

- The Tribunal will hear on matters in copyright. Artists can approach the Tribunal directly.
- Judges are best placed to hear matters. They will be empowered/capacitated on copyright matters.
- The Appeals section as well as the right to review decisions proposed to be re-instated.
- The criminal record can be an additional requirement.



## Clause 37: Transitional provision

### Comment

- Few comments recommended that the Intellectual Property Laws Amendment Act of 2013 should be repealed in its entirety. This Act is unworkable, and will derogate hugely from the commercial usage of traditional South African works, throughout the world. The Act should be repealed before any Regulations are promulgated under it and all reference to 'Indigenous Communities' issuing licenses or collecting royalties, should be deleted.
- Whether there is a reason a traditional community cannot be considered and act as a CMO.

### the dti response

- IPLAA to be implemented and not repealed.
- The proposed re-wording made in the submission to be considered.
- The Bill to consider to include a similar definition for indigenous cultural expressions as in IPLAA.





#### Other comments

- Removal of exception for computer programmes- There was a call for reintroduction of the exception as appeared in the 2017 Bill.
- The introduction of a private copy levy on all devices that can copy content, where such devices are manufactured in, or imported into, the Republic of South Africa.
- One collecting society per set or rights. Some submissions raised concerns with leaving this principle. The recent dispute between SAMPRA and IMPRA regarding a large SABC license payment is a stark reminder of the need for this principle in our law. The principle of One Society Per Right exists for a reason, and is internationally successful. South Africa needs it more than any other jurisdiction, due to historical conflict and the resulting fragmented nature of our industry. Practically, the Multiplicity Problem has resulted in the establishment of a number of collection societies – often each representing different copyright holders/performers who each claim a royalty in respect of the same performance. The irrational consequences of the Multiplicity Problem are unconstitutional.
- Concern that the Committee has not adequately deliberated on sections of TPMs as result, the final Act will not achieve its objectives in relation to TPM. In particular, that this Bill requires that the provisions of this section on TPM must be read together with sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 ("the ECT Act"), seemingly unaware that the Cybercrime and Cybersecurity Bill currently before another Parliamentary Portfolio Committee is proposing the repeal of these same sections of the ECT Act.
  - The revision of the definition of TPM proposed.
  - Suggestions to ensure that the effectiveness of the new s28P(1)(b) and s28P(2) is not reduced.



#### Other comments

- Perpetual licensing of collecting society-The limitation of the license granted to any collecting society may affect the collection of royalties from users towards the end of the term. Licensees may refuse to enter into new long-term agreements with the collecting society. If the renewal comes towards the end of the term. The uncertainty of whether or not the license shall be renewed may make licensing and collecting of fees difficult thus throwing the collecting society into a perpetual panic towards the expiration of the term which will ultimately prejudice the societies members.
  - To remedy the potential abuse by licensees, the suggestion is that the license granted to the collecting society be perpetual in nature, with the Commission being granted statutory power to terminate the license on notice, on good cause shown. This will allow the collecting society to operate without any impediment for as long as all the necessary requirements set by the Commission are being met.



#### Other comments

- A concern was raised that on Clause 25, that there is no provision for the Companies Commission in the Bill or Act. It should be properly introduced and the term should be defined.
  - While we recognise a role for the Commission, some of the powers proposed to be given to the Commission are excessive and intrusive in a copyright regime. The new s28Q, read with s187 of the Companies Act, contemplates a level of monitoring, oversight, regulation and investigation which will be counter-productive and will not benefit any of the persons intended to be protected by the Bill. We therefore propose that s28Q be deleted.
- In order to address broadcast piracy, the restricted act of communicating a work to the public (which right the Bill proposes adding to s6, 7, 8 and 9 of the Act) should be added to s10 of the Act to confer the same exclusive right in relation to broadcasts.
- The introduction of the 'making available' right is, however, immediately undone by the provisions of the new Section 12B(6) (Clause 14), the deletion of Section 23(2)(b) (Clause 26) and the amendments to Section 28 (Clause 28). The net effect of these provisions is to allow unlimited parallel importation of all copyright works, which has not been subject to research or impact assessment.
- Consequential amendments arising from the introduction of the 'communication to the public' and the 'making available' rights, such as in Section 27, have not been made in the revised Bill.



THANK YOU