

**DAC PERSPECTIVE ON THE DRAFT COPYRIGHT AMENDMENT BILL AND THE DRAFT PERFORMERS’ PROTECTION AMENDMENT BILL**

**Introduction:-**

* Strong and effective copyright law can promote and encourage investment and economic growth in the creative industries
* The DAC is one of interested parties and a strategic partner in the development of the intellectual property policy for the South African cultural and creative industries.

**Sector Challenges**

* The South African creative industries are nominally included and considered in South Africa’s industrial plans and strategies, however the sector’s potential to contribute to growth and development is not fully recognised
* The legislative and policy environment are outdated and not in line with International standards
* There is often exploitation due to lack of well enforced legislation and capacity on the part of particularly creators to protect and maximise the value of their rights
* There are high levels of unauthorised commercial use of copyright work and limited or lack of enforcement of the laws
* The cost of enforcement is high and the onus is generally on the individual whose rights have been infringed
* There is insufficient knowledge of copyright and related rights,
* Lack of infrastructure, government support and capital
* Issues with the administration, collection and distribution of royalties by Collecting Management Organisations (CMOs)

**DAC and the Legislative Review Process**

* For its part, the DAC has since 1998 developed strategies to support and grow the creative industries, starting with the Cultural Industries Growth Strategy (CIGS) in 1998, the Music Industry Task Team (MITT) process, the Mzansi Golden Economy (MGE) which is aimed at positioning South African cultural production across the value chain and it is squarely pointing in the direction of local content development.
* The DAC participated in the Copyright Review Commission (CRC) process, and became part of the Interdepartmental Committee for Implementation of the CRC Recommendations. This process culminated into crafting of the current Bills under consideration by the DTI, and the ICASA Local Content Regulations of 2016.
* The DAC recognises the importance of reviewing the current copyright legislation, and broader Intellectual Property Policy, as a tool to promote innovation, foster development and increased productivity in the South African creative industries.

**Relevance of the Bills**

* Copyright protection aims to promote creativity by rewarding the creative authors while ensuring that the users have access to the works.
* The system is the most efficient and effective way of ensuring that creative works are able to exploit the rights attributed to those works.
* DAC believes that the ethos of the current policy revision is crafted in line with the National Development Plan (NDP) objectives of growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.
* The Bills address some of the key challenges stated by the DAC Music Industry Task Team (MITT) report of 2001.
* The policy revision is also based on the need to align the copyright and related rights legislation to international standards by responding to challenges of digital age, a requisite towards participation in global trade.
* The draft Bills is an attempt to call for consistency and coherence in aligning the approach of various government departments to Intellectual Property (IP) matters.

**Key Issues Addressed**

* Access to copyright work: The DAC supports amendment of the legislation to ensure access to information for research, education, libraries and archives and persons with disabilities. Access to information is fundamental human rights, and the inclusion of the exception will assist to promote the dissemination of information, and to alleviate the symptoms of market failure.
* Extension of protection of performers’ moral and economic rights: The DAC support the provision for protection for performers and producers of phonogram including audio-visual performers – a provision that is absent in the current legislation.
* Written Contractual Agreement: Accordingly, the DAC support the requirement for written contractual agreement which shall give to performer the right to receive royalties for any use of the performance.
* Establishment of IP Tribunal: The DAC support the establishment of the Tribunal to assist in the management and enforcement of legislation and to create a more accessible means of dealing with disputes especially for the creators of works
* Technological Protection Measures: The DAC support law against circumvention of technological measures in order to restrict unauthorized downloading of content. This kind of law is no means designed to restrict access to information but will be used as a means to promote fair use and fair trade.
* Collecting Management Organisations (CMOs): the DAC support the provision for accreditation and registration of all collecting societies and the legal requirements for management of the CMOs. The legislation will strengthen good governance in CMOs, a pillar to preserve the existence of a vibrant business environment among all stakeholders.
* Promotion of Local Content: The DAC support a legislation that will compel broadcasting industry to develop the culture and support the growth of local content in specified areas, provided it is done in a proper way.
* Protection of copyright in visual arts work: The DAC support the introduction of resale rights, however recognises that the administration of this system is going to be complex

**Issues to be noted: Local Content**

* The CRC recommended that local content quota be moved to 80% on both public and community radio stations and to 60% on private radio stations. The DAC has always supported the recommendations presented by the CRC on local content quota. The CRC recommendation has been included in the Copyright Amendment Bill.
* The ICASA local content quota on music as published in March 2016 allows for the following;
  + 60% and increase to 70% after eighteen months - Public broadcasters,
  + 60% increase by 10% annually to reach 80% - Community broadcasters,
  + 35% after eighteen (18) months Commercial broadcasters, a minimum of 20% to increase to 30% in the following year - Subscription broadcasters

The approved ICASA local content quotas thus differ with those proposed in Copyright Amendment Bill, thus causing policy tension. This matter that requires further attention by the concerned parties thus DAC, DOC and the DTI.

**Issues to be noted: Public vs Private Use**

* Technological development has diversified the paths for creation, production, exploitation of content, making it difficult to deal with unauthorized exploitation and consumption resulting into escalating theft of content. The inclusion of “personal and private use” in the draft Bill as general exception from protection of copyright work, allows escalation of consumption of copyright work without fair compensation.
* The public interest argument in favour of permitting the total exclusion of protection of copyright holders in this regard is not fairly substantiated.
* DAC proposes that the law on copyright and related rights should be adapted in such a manner that it will respond adequately to the economic realities and this could be done by, for example, introducing private copying surcharge as part of the limitations and exceptions.
* A private copying surcharge is a system whereby the copyright legislation introduces special statutory extra charge on any multimedia device capable of copying and storing multimedia content and the money accrued is used to benefit the concerned sector.
* Models of this nature have been used extensively across the globe to ameliorate the impact of private copying, however the feasibility of such mechanisms will need to be assessed

**Issues to be noted: Protection Amendment Bill division of rights**

* The legislation which provided for the statutory license in respect of Performers Protection Amendment Act which allows for a 50/50 split did not adequately protect the rights of session performers but has provided a greater advantage to producers of recorded material and to some extent main or featured artists. On the 50% allocated for performers, 65% of the royalty would go to the featured performer with 35% shared equally amongst the non-featured performers.
* In advancing the performers protections legislation, the DAC believes that royalty share between producers of phonograph and performers should be informed by equity and fairness and therefore proposes a split that favors performers.

**Issues to be noted: IP Ownership**

* It should be noted however that the challenge faced by many local creators and producers is lack of financial resources to participate meaningfully in the value chain especially in quality music production and the distribution of the content production.
* An inevitable result of this is that larger players prioritise the protection of their investments through various means including the buying of local catalogues or intellectual property.
* SA’s failure to link rights ownership to rights exploitation inevitably result into to financial leakages and defeats the notion of local content, hence the IP would be practically owned by foreign investors.

**Opportunities: Digital Migration**

* 2013 has seen continuous growth of the creative industries in Africa especially in the area of audio and audio-visual production because of migration to digital broadcasting.
* While digital migration opened up opportunities, at the practical level it means more television channels and radio stations and this translates into significant demand for content.
* In a way, DTI sets a new economic trajectory for the African audio-visual sector which required major investments in both technology and creation of quality content as well as coupled with a policy that support content ownership by local producers.

**Broader Policy & Programme Considerations**

* Accelerate Human Capital Development: broad education and training which must incorporate IP education and awareness at all levels;
* Create institutions and programmes to assist with the development, production and protection of content and this should include legal aid, provision of incentives across all copyrights industries, industrialisation programmes to support content production and distribution.
* Develop platforms to foster local ownership of the intellectual property to achieve significant economic benefits.
* Ensure linkages between creative copyright industries and other sectors such as ICT and Tourism
* Developing and strengthening cultural diplomacy agenda which will enable SA to effective participate in global industry.
* Even though the types of protection in the Copyright Amendment Bill do not directly or expressly protect Indigenous Knowledge Systems (IKS) and Traditional Cultural Expressions (TCEs) this type of protection is required because the recognised types of intellectual property or the common law provide a basis for which to further enhance the draft bill on the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, (DST, 2016).

**LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES AND PERSONS WITH DISABILITIES IN COPYIGHT AMENDMENT BILL**

**LIBRARIES AND ARCHIVES**

The role and global impact of libraries and archives have changed tremendously. They are leaders in print and digital information collection, management and dissemination, as well as in preservation, data management, knowledge production, literacy development, and other key professional activities. The internet may give users thousands of hits, but libraries and archives give relevant and on-the-spot information. As the country grows a large middle-class society, the pressure on libraries and archives to produce relevant information and knowledge is ever-increasing. Copyright law has severely hampered the services that libraries and archives provide, or want to provide to their users. It has prevented libraries and archives from sharing information to poor and rural communities who do not have proper services. The services provided by these institutions in enhancing access to resources through making copies of material for broader distribution is hampered by the Copyright laws.

The crucial role of libraries and archives, more so than ever before, is recognised at an international level, including WIPO. International copyright conventions and Treaties also provide for limitations and exceptions to the exclusive rights of authors.

Libraries and archives also recognise the principles of our Constitution and the African Cultural Renaissance, which highlight the importance of access to information and education, creativity and promotion of cultural goods in our country and further afield. They also support the principles of the Cape Town Declaration, signed by South Africa and 12 other African countries on 14 August 2015, which include the commitment to encourage the implementation of fair and balanced copyright laws to facilitate access to information for all.

The Draft Copyright Bill does not address the matter of unpublished material, in other words, “records”. “Records” are defined by the National Archives and Records Service of South Africa Act (Act No. 43 of 1996, as amended) as recorded information regardless of form or medium and “public records” as records created or received by a governmental body in pursuance of its activities. These public records need protection under the proposed Copyright Act as the current situation can lead to misuse and / or unlawful appropriation of such records. Examples of this would be:

1. when an employee of a governmental body leaves such a body and takes the records that s/he has created with, as the author of those records;
2. researchers would copy whole collections of records at the National Archives to create their own archival repositories (sometimes for profit);
3. researchers would copy records at the National Archives and sell it for profit elsewhere;
4. researchers would not credit the National Archives in their publications as the owners or custodians of the records they use in such publications

The Copyright law should provide for exceptions for copying for preservation. There are instances where material must copied to preserve it from obsolescence, or fragility or any other issues that may render the original support or content vulnerable.

Films, videos, CDs, DVDs, broadcasts, etc. should be allowed to be shown to students in a classroom or assembly situation. Currently this is restricted by licensing and the copyright law.

Copies of copyright works should be allowed to be included in posters or brochures for schools, libraries, universities, public information boards, for non-commercial educational purposes.

*This affects both libraries and archives*

**Persons with Disabilities**

The current Copyright law has no provisions for persons with disabilities, which has meant that copyright permission has had to be sought for every time a blind person needs information to be converted into Braille or other accessible format, or when something has to be converted into a more visual format for deaf people. This is costly and takes a long time to get the material, thus prejudicing students and researchers who need the information at the same time as sighted persons get it.

*Unless South Africa ratifies the Marrakesh Treaty for the Blind and Visually Impaired adopted by WIPO members in 2013, material in accessible formats will not be able to be shared across borders to assist persons with disabilities in other countries and to bring accessible works into South Africa. The South African Library for the Blind will continue to struggle to provide the services to its clients.*

**Fair Use**

‘Fair Use’ provisions are noted in our Copyright Bill but they need to be open-ended using the words ‘such as’ when mentioning examples, rather than itemising specific uses of material.

**Orphan Works**

The provisions for orphan works in the Copyright Amendment Bill are problematic and impractical. It would be best to deal with orphan works under Fair Use provisions, than to have orphan works controlled under the State indefinitely. Copyright terms will eventually expire and those works should go into the public domain, but under these provisions, copyright will basically be perpetual on those works. Also, State ‘ownership’ of orphan works is problematic because these works may be owned by the actual rights-owners or their heirs but not known. Fair Use provisions would make use of these works much easier rather than the cumbersome process of advertising in newspapers, the Government Gazette and then getting permission from the State. When such material is required for research, education or other non-commercial purposes, users cannot wait weeks or months before getting the permission to use the works. They need the works almost immediately or in a short period of time, so fair use would provide for this.

**Digitisation, Preservation and Digital Curation in Libraries and Archives**

The Copyright Bill needs to support provisions for digitisation, preservation and digital curation for libraries and archives, and in particular, for Legal Deposit. A lot of library projects have been held back and hampered by restrictive copyright laws and the lack of provisions to format shift and convert to new technologies as others become obsolescent. Without adequate provisions to do this and other activities to preserve and curate knowledge, collections could become inaccessible to future generations.

*The National Archives has started digitisation projects for preservation and enhanced access. The national Film, Video and Sound Archives is challenged by the lack of provisions to format shifting as the audio-visual formats are changing with technological developments. The Department of Arts and Culture is mandated to deal with Legal Deposit issues and negatively affected by restrictive provisions of Copyright laws.*

**Conclusion**

* The DAC regards IP policy as a cross-cutting issue that impacts largely on arts and culture. The DAC proposes that this policy should not just understand IP in the narrow confines of copyright regulation but should also understand that culture has a dual character of being an economic commodity as well as public good and social asset that defines the cultural expression of being South African.
* The DAC believes that the copyright legislation should be part of investment measures to support the growth of South African cultural industries.
* The DAC believes that the use of copyrights to achieve developmental goals should be at the center of the legislation. This therefore raises the importance of balancing the needs of content creators and of content using the applicable limitations and exceptions as informed by international framework.
* Intellectual Property should be an asset that is safeguarded to largely benefit local people who are empowered to fully exploit these assets for economic, social and cultural benefit, and whose rights are effectively protected.