



science
& technology

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TO: MS J FUBBS

**CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON TRADE AND
INDUSTRY**

ATTENTION: MR A HERMANS (ahermans@parliament.gov.za)

**DEPARTMENT OF SCIENCE AND TECHNOLOGY
COMMENTS ON THE DRAFT COPYRIGHT AMENDMENT BILL**

The Department of Science and Technology hereby provides written comments in response to the Copyright Amendment Bill published on date 16 May 2017.

Submission for comments has been extended to 7 July 2017.

We trust that our comments, as set out below, will be favourably received and incorporated.

G.N.M. Pandor
MRS GNM PANDOR, MP

MINISTER OF SCIENCE AND TECHNOLOGY

DATE: *21-7-2017*



DEPARTMENT OF SCIENCE AND TECHNOLOGY COMMENTS ON THE DRAFT COPYRIGHT AMENDMENT BILL

The Draft Amendments addresses key provisions of the Copyright Act, No 98 of 1978 and the Performers Protection Act, No 11 of 1967, which we view as outdated in light of developments at the international level in particular with regard to the digital environment. Although we appreciate the attempts by the Department of Trade and Industry (**the dti**) to revolutionise the Copyright Act, especially in the context of the digital environment, we have concerns about the drafting, formulation and presentation of this Bill.

In this context we also raise concerns as the proposed Copyright Amendment Bill will have adverse effects on the work of indigenous knowledge activities in particular with regards to the proposed Bill on the protection, promotion development, and management of indigenous knowledge Systems (IK Bill) and copyright ownership specifically with regards to the Intellectual Property Rights from Publicly Financed Research and Development Act (No. 51 of 2008; IPR Act).

These concerns are elaborated below:

1. Definitions

“copyright management information” is defined as *“information, including meta-data, attached to or embodied in a copy of a work”*.

We are concerned with this definition as it creates an impression that all meta-data is copyright management information, given that the national recordal system in documenting indigenous knowledge uses meta-data. We are of the view that not all meta-data is copyright management information.

Amendment requested: Revert to the definition in the 2015 version of the Copyright Amendment Bill.

2. Section 2: Scope of Protection

Section 2A (4) (4) states that *“Notwithstanding the provisions of section 2, no protection shall, extend to an expression”*.

It is trite law that no right exists before the expression is reduced to a material form. We are concerned that this sub-section will be misinterpreted with the IK Bill, which grants protection to cultural expression of folklore recorded or documented in the National Recordal System.

Amendment requested: Clarity in the terminology *“extend to an expression”*, given that copyright does not exist prior to the creation of an expression”.

3. Section 5: State and Copyright

The Berne Convention for the Protection of Literary and Artistic Works, ratified by South Africa in 1989, removes registration requirements for copyright protection. This means that copyright exists in literary or artistic works, including governmental works, from the moment of their inception, unless statutory or common law provides to the contrary.

It is noted that the term "funded by" has been introduced within section 5 of the Copyright Amendment Bill¹ such that section 5 now reads:

"(2) (a) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or [such] an international [organizations as may be prescribed] or local organisations.

(b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question."

As there is no definition for what constitutes "state funding", it is assumed that for every organisation that receives funding from the state directly or indirectly, they are by default state funded and thus every work, which is eligible for copyright, shall belong to the state.

This has serious implications for all our higher education institutions, science councils and any other publicly financed research institution as they are all regarded as being publicly financed either through a parliamentary grant or through an allocation from national, provincial or municipal government. The consequence of this is that as research is conducted and recorded in a laboratory notebook, the notebook is a work, which is eligible for copyright. As copyright subsists automatically, the copyright in the laboratory notebook will vest in the state.

Furthermore, as proposed section 22 provides "*that copyright owned by, vesting on, or under the custody of the state may not be assigned*", the researcher will not be in a position to produce a publication from his/her laboratory notebook and further will not be able to assign that copyright to a local or international publishing house as the rights to the copyright never vested in the researcher or his/her employer. This has serious implications for all researchers whose curriculum vitae and standing in the academic community is largely recognised by the publications that they produce. In addition, this is one means for science to be advanced and information sharing to take place, which will now be impeded.

Furthermore, this proposed amendment has serious implications for the Intellectual Property Rights from Publicly Financed Research and Development Act (No. 51 of 2008; IPR Act). The objects of the IPR Act are that intellectual property emanating from publicly financed research and development should be identified, protected, utilised and commercialised for the benefit of the people of the Republic.

The IPR Act states that ownership of intellectual property emanating from publicly financed research and development will be owned by the recipient of public funds (typically the higher education institution and science council but also any individual juristic or not that receives public funds for research and development), however, the recipient now has the obligation to

¹ Amendment of section 5 of Act 98 of 1978, as amended by section 5 of Act 52 of 1984 and section 5 of Act 125 of 1992

ensure that the intellectual property results in products, processes and services that impact on the lives of all South Africans.

As with publications, the proposed amendment to the Copyright Amendment Bill would prevent researchers from seeking for statutory protection of their invention, new design, plant variety or other as the original copyright in their laboratory notebooks resides with the state. Innovation from the public sector would thus be hampered and the increasing role all recipients of public funds who perform research and development are playing in addressing societal challenges would be effectively stopped.

Effectively by the addition of two words “funded by”, the publication and intellectual property rights outputs of all publicly financed researchers will be prevented!

Furthermore, according to the Bill, the ownership of all-copyright held by individuals will automatically transfer to the state on their death if no estate exists. Our concern is that currently the Department of Science and Technology is currently recording and documenting indigenous knowledge through Indigenous Knowledge Documentation Centres (IKDCs) from communities, with the express undertaking that the copyright/intellectual property resides with the community. Communicating to communities that upon the death of the practitioner or holder, ownership will be transferred to the State given that it is theirs in perpetuity will have serious implications. Firstly, State ownership of indigenous knowledge contradicts the IK Bill, and secondly it defeats the notion that indigenous knowledge transcends from generation to generation, as State ownership will terminate custodianship of communities.

Amendment requested: The words “funded by” should be deleted from section 5 of the Copyright Amendment Bill”.

4. Section 6: Nature of Copyright in literary and musical works

We are concerned by the addition of the following proviso:

“Provided that, notwithstanding the transfer of copyright in a literary or musical work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have the right to claim an equal portion of the royalty payable for the use of such copyright work”.

The above proviso suggests that indigenous communities (authors) will have a right to claim an “equal portion” of royalty, which means that the community has to share their royalty with someone else. This is not the case in royalty transactions.

The above concern prevails in Sections 7 and 8.

Amendment requested: Removal of the word “equal”, given that technically it is only communities/ authors who receive royalties from publishers by way of assignment of the copyright.

5. Section 9A: Royalties

Section 9A (1)

The whole of this section is onerous and will be difficult to implement. In terms of indigenous communities, a broadcaster will have to obtain the permission of the communities for the use of their sound or recording- notwithstanding the scheme (Trust) or collection society in place.

Resale of Royalty rights [Section 9B (1-3)] (note the correct heading should be Artist resale right)

The artist resale right is well supported in principle because it extends to the artists an inalienable right to gain extended benefits in their work, which already exists for other artists. While legal evolution has occurred to recognise an expanded framework of artists' rights as extremely important, it is also important that those individual indigenous artists who have hitherto not been sufficiently recognised or rewarded for their work should be provided for under this provision.

South Africa will join some 81 countries that already have in their national law some provision on resale royalty right. In spite of the potential for recognising indigenous artists' contribution to South African culture, the resale royalty is a right for individuals only and does not recognise collective authorship. Indigenous art often contains indigenous knowledge that has been passed down through the generations, and belongs to an indigenous community that has collective origin. It is recommended that where an artwork is embodied with collective heritage and knowledge, the authorship should be able to be asserted by a representative/trustee of the indigenous community so that the community as a whole can benefit from the resale royalty. We have noticed that while auction houses and galleries make their business by taking commissions, it would be paradoxical that indigenous artists do not benefit from the profit generated by their cultural works on the art market. This argument is consistent with the IK Bill.

For indigenous communities, it allows for improved welfare and an ongoing income and encourages the expression and preservation of culture. The operation of the resale royalty scheme, in particular through the system of registration (IK Bill), may compel people to buy art more ethically and will in turn enhance the protection of communities' moral rights. The National Recordal System (NRS) will be able to track the flow of works through the market; will be able to see who is buying what and what they are paying for it. This may solve every problem that exists but the fact that there is more information in the market is going to help.

Section 9B (3) states that any of the "user, performer, owner, producer or author" will be entitled to receive the royalty. This subsection is nonsensical given the type of artistic work, which this type of provision is meant to deal with. From an indigenous community perspective, communities will have to share royalties with the user of the artistic work. It appears that the drafters do not understand the relationship in the context of the resale.

Section 9C (3) is both a concern to indigenous communities and difficult to achieve in practice, given that it is already almost four years since the Intellectual Property Laws Amendment Act 28 of 2013 ("IPLAA") was passed and yet has not yet been implemented, due to absence of Regulations. This section of the Bill has direct reference to "traditional works", in IPLAA, which

connotes a different context. Meaning that for indigenous communities to benefit they must upload their artwork in *the dti* database.

Section 9A (a) and (c) reflects a lack of understanding of the nature of indigenous knowledge. Individuals in their own right cannot be holders of indigenous knowledge they merely act as custodians or representative of the community. Hence, to give effect to this section of the Bill an entire community has died.

Section 9F has to be redrafted taking into account individual indigenous artists who die interstate. We are opposed to “testamentary disposition” as this is a western concept and in conflict with customary law and practices. We recommend the law of succession route.

The establishment of a scheme through a collecting society for resale royalty rights for artists is particularly important in the context of the rapidly booming international market for Indigenous artworks as compared to the desperate economic conditions within which many Indigenous artists live and work.

Amendment requested: Section 9B (1) inclusion of the word “original”, which now read, as “The author of an original artists’ work shall enjoy an inalienable right to receive royaltiesof that work”.

Section 9B (3) clarity of the term “user”, as in certain instance, under the same clause, it is used as a stand-alone term 9B (1), whilst in 9B (3) it is lumped with performers, producers and authors.

Section 9C (3) reference must be made to IPLAA given that collecting societies will be granting licences for traditional “works”. Reference to IPLAA will remove the confusion that the “work” is a product of the National Recordal System.

Section 9A (a) and (c) and where ever “indigenous communities” are mentioned the word “representative” should be included. Our view is that the Bill contravenes IPLAA, as the author is an indigenous community, which does not exist. Indigenous communities often find themselves in the position of not being the legal ‘owners’ or ‘authors’ of works that draw on their knowledge and knowledge systems

Section 9F inclusion of a sub-clause to provide for situations when an individual indigenous artist die intestate or when, for some reason, their will is invalidated.

6. Section 12A: Fair Use

We are of the view that one of the most controversial features of the Bill is the inclusion of a new “fair use” right in Article 12A, modelled on the laws of the United States. Our concern is that when an institution decides to provide public access to an indigenous work through a specific library exception, fair use, or when the material is in the public domain, they must engage in these further processes to obtain cultural clearance to use the work. The IK Bill requires that prior informed consent from the community must be obtained. Such considerations may even arise when an individual artist as the copyright holder in a work gives permission for use of the work, either by an institution, or commercially, but the wider community claims custodianship of the cultural material contained in the work. International case law has recognised that an artist owes a fiduciary obligation to his or her community to

ensure that work was used consistently with customary obligations. The proposed IK Bill considers this circumstance.

Our concern is that the introduction of “*personal use*”, exception is now legal. This would have a profound impact on the misappropriation of indigenous cultural expression in the name of personal use. It would now be legal to download music for personal use.

Section (12) (1) (a) (1): We are of the view that responsible handling of research results should be taken. Where confidential indigenous knowledge is accessible, it must be done under mutually agreed terms. The IK Bill makes it mandatory for users to obtain prior informed consent from communities.

Section 12A. (1)(a): The provision for quotation is far stricter than the Copyright Act No. 98 of 1978, and the 2015 Copyright Amendment Bill. It now creates an unfair and serious restriction on innovation and creativity. It will have serious implications for anyone who needs to quote from other works, e.g. researchers, students, educators etc.

Amendment requested: Removal of “personal use”, for making copies of sound recording.

In section (12) (1) (a) (1), inclusion of the condition “prior informed consent” when accessing IK for research purposes.

In section 12A (1) removal of “quotation” from the sub clause.

7. Section 22: Orphan Works

The issue of “*orphan works*” (in sections 22 to 27) has been identified as an area needing legal reform for some years, and has been discussed at numerous creative and cultural industry fora conducted both by the Department of Science and Technology and the Department of Arts and Culture. Our view is that there is no legal presumption that because an indigenous community/owner cannot be found that they have abandoned any further interest in controlling use of the cultural material. Accordingly, there is no defence under our copyright law for unauthorised use of copyright material *just because* it is an orphan work. Unless another defence is available, such as fair use for criticism or review, a person who uses copyright material without permission is vulnerable to a claim of infringement if the community/owner later emerges. If the Bill is enacted in its current form and comes into force after the IPLAA, it will raise the question of whether it repeals the IPLAA by implication.

The Department of Science and Technology endeavours to protect works in the NRS from becoming orphans by collecting as much information as possible at the point of acquisition and ensuring that information is entered and maintained in the collection management system (NIKMAS). However, this is just the tip of the iceberg – rights holders move, businesses close-up, and a work may have a great deal of cultural significance but only part of it may be extant, or it may come into the collection with no provenance. We note that while copyright protection in the NRS is automatic, the ability to contact a holder or practitioner may not be possible.

Another concern is that the Bill also provides that the state will own all ‘orphan works’, including works where the author is deceased. The implication is that on the death of an author, copyright ownership will not pass to the heirs, executors or deceased estate, but rather to the

state. This has implication for the NRS as most practitioners and holders documenting their indigenous knowledge are near death age.

In sum, the orphan works problem disproportionately affects access to the cultural traditions of indigenous communities and disadvantaged groups because the rights holders for these works tend to be especially difficult to locate. The omission of works by communities in museum exhibitions results in the suppression of these groups' cultural heritage and in doing so perpetuates an incomplete version of our cultural history. Therefore, we welcome the role of the State in acting as a trustee (not owner) on behalf of the indigenous community, which in any event will be consistent with the IK Bill. What the Amendment Bill does is to vest copyright in the state, and to provide that copyright in orphan works shall be perpetual.

Section 22 also provides for a State fund to which owners of orphan works can submit claims. The problem, however, is that in most instances those rights-owners no longer exploit those works and/or have abandoned them. It will be very difficult to locate indigenous artist previously residing in rural communities, hence, large amounts of money will remain indefinitely in the State fund.

We finally recommend that drafters look at the text currently at the SCCR, on "ORPHAN WORKS, RETRACTED AND WITHDRAWN WORKS, AND WORKS OUT OF COMMERCE".

Amendment requested: All references to "author" should be remove and replaced with "ownership" and "custodianship" when the state is in custody of the work.

8. Section 21: Commissioned works

Section 21 makes certain types of creative work where the commissioner owns the copyright of that work. Section 21 includes portrait photographs, a recording and the making of cinematographic work, which includes a documentary. We cannot ignore that work will be exploited on multiple levels, so we have the default model of a broadcaster commissioning and then owns the content. The broadcaster owns it and does not want to licence it to competitors. One wants to have work reach maximum audience. We need to address Section 21 to bring it into alignment with South Africa's position at the SCCR on broadcasting issues.

Amendment requested: Distinction should be made between the author and the commissioner

9. Other cogent remarks are as follows:

9.1 The Bill makes provision for the regulation of copyright collecting societies. These bodies collect royalties on behalf of artists or owners of copyright. "The principle is that there will only be one society per right – whether that is mechanical rights, performance rights or broadcast rights. Our question remains whether the collecting society for works in indigenous knowledge under IPLAA will apply in this instance.

Clarity requested on whether IPLAA would create a similar structure for traditional works.

9.2 No reason has been given for replacing the Copyright Tribunal referred to Section 29 (1) – which is currently a single judge – whilst an Intellectual Property Tribunal consisting of at least 10 members! To date there has been no suggestion that the Copyright Tribunal is overworked. Our query is whether the Intellectual Property Tribunal repeals the Commission contemplated in Section 43 (1) in IPLAA. The IKS Bill creates an arbitration

committee, which to our mind will be more favourable to indigenous communities, given that alternate dispute mechanisms would be applied.

Clarity requested.

9.3 The concern is also raised regarding extensive provisions on performer's protection rights. There is however already a separate Performers Protection Act, matters pertaining to that area should be dealt with in an amendment to that Act, not in the Copyright Bill. However, more importantly we raised our concern why the IPLAA was not extended to performer's protection. In our IPLAA submission, we raised the concern that the definition of "performer" in the Performers' Protection Act (Act No.11 of 1967) excludes performances that are not performances of literary or artistic works. As a result, various other types of "unscripted" performances, which make use of cultural folklore, oral indigenous tradition and other forms of indigenous culture, are excluded. We like to bring to the attention of the drafters of the Amendment that the draft IK Bill makes such provisions to include indigenous culture. Furthermore, the WIPO Performance and Phonograms Treaty (WPPT), (South Africa is not a member state) potentially gives traditional/indigenous performers control over the songs, chants, and recitations that are customary means of transmitting and preserving their cultural heritage and indigenous knowledge. We can now expect *the dti* to amend IPLAA to include traditional/indigenous performer's control over performance, and accede to the WPPT.

Amendment requested: Removal of performers rights from the Bill as the Performance Act should cater for these rights

Overall, we recommend that references to performance be deleted from the Copyright Act altogether.

9.4 We are pleased that the Bill puts an end to copyright provisions restricting the sale of parallel imports or 'gray goods'. Much of indigenous products have been manufactured outside South Africa, depriving communities of business and development opportunities. It would be interesting to see how the drafters will reconcile South Africa's position at the SCCR, given that it supports libraries and archives to acquire and import legally published works to be incorporated into their collections. This is in cases where a Member State/Contracting Party does not provide for international exhaustion of distribution right after the first sale or other transfer of ownership of a work.

9.5 We also recommend amendments to section 23(2) and redefining of "*infringing copy*" to as to accommodate the misappropriation of indigenous cultural expressions.

Amendment requested: Inclusion of "misappropriation of indigenous cultural expressions", in the sub-clause.

9.6 The Bill also breaks new ground on disability access. Article 19D implements exceptions to copyright to permit "*an accessible format of a work for the benefit of a person with a disability.*" Given that indigenous communities are the most vulnerable this article is most welcomed.

9.7 The term 'author' vs 'rights-owner' in many sections of the Bill, including those relevant to people with disabilities, the word "author" is used instead of rights-owner. In most

instances, authors assign their rights to third parties, e.g. editors, publishers, etc. Given that indigenous communities are not authors but right holders.

Amendment requested: Clear distinction in the definitions section between “author” and “right-owners”.

9.8 The Memorandum on the Objects of the Copyright Amendment Bill (the “Memorandum”) accompanying the 2017 Bill introduces a new right “indigenous work”, (7.9), we query if this term conflicts with “traditional works”, under IPLAA.

Clarity requested whether “ indigenous works” are now a new set of rights.

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