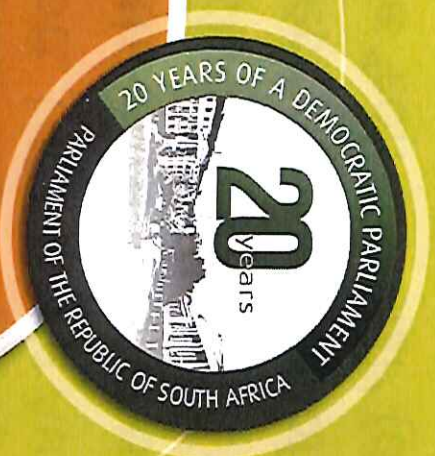




PARLIAMENT  
OF THE REPUBLIC OF SOUTH AFRICA

# Copyright Amendment Bill



5<sup>th</sup> DEMOCRATIC  
**PARLIAMENT**

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# Clause 1 – “visual artistic work”

- Submissions: “Too broad” <—> “Too narrow”
- Proposals for alternative wording were made
  - Include more examples of inclusions and exclusions (Dalro, Walker Scott, UNISA, the Author, Strauss & Co);
  - Rather use “aesthetic” / “functional” for the distinction (Karjiker);
  - Exclude audiovisual works (PMA; SAGA);
  - Specify what type of copy qualifies and limits applicable (ReCreate);
  - Use “commercial” (defined in the Bill) (SAIIPPL);
  - Use UK wording (VANSA).
- Department to consider inputs and confirm final wording that gives effect to the policy on Artistic Resale Right

# Clauses 5 (S6A(4)), 7 (S7A(4)), 9 (S8A(4)): Minimum content royalty % agreement (1)

- Concerns:

## Constitutional:

- Undermines contractual arrangements and fundamental principle of contractual freedom (Dalro, NAB, PASA, SAIIPL) and may be unconstitutional (deprivation – DALRO; right to freedom of trade – SAIIPL, P Hollis)
  - The setting of minimum terms in itself, cannot constitute deprivation – see discussion at retrospective application (Slide 5).
  - Section 22, Constitution: “The practice of a trade, occupation or profession may be regulated by law.” – This allows for guidance to be set in legislation, which would include minimum content of an agreement.

## Need more clarity:

- No guidance to the Tribunal on how to determine a % (MNet, Multichoice, PEN)
- Not clear if the share should be in profit, or iro licensed use of the work (SAIPL)
- How would accessible formatted work fit in with this? Should it not be excluded (TAB, SANCB)
- Is the terminology correct? It is not always the author who assigns copyright (Speer & Fisher)

# Clauses 5 (S6A(4)), 7 (S7A(4)), 9 (S8A(4)): Minimum content royalty % agreement (2)

## Practicalities

- Does not take into account collective bargained agreements (FIAPF)
- Does no take into account multiple forms of remuneration possible (Mnet, Multichoice, NAB)
- Performers' right to equitable remuneration for the commercial exploitation of their performances fixated in audio-visual works is not yet in existence. A right that is not in existence presently cannot be created retrospectively. Neither can obligations to effect equitable remuneration be created retrospectively (Unisa)

## Unintended consequences:

- Could discourage investments in new film and audiovisual works (FIAPF, Kagiso); Could prevent the sale of especially second hand educational works (USAf)
- May lower deals offered to authors and require them to share the commercial risk – only commercially successful authors would benefit ; Could cause companies to not source external graphic designers, and rights holders could simply state that all acquisitions are commissioned works (SAIPPL)
- In stead of agreements with agencies, the assignee will now have to enter into multiple contracts – often works have multiple authors (Sasol)
- The cooling off period will not work in industries where large amounts are invested to exploit a work (The Author); Cooling off periods are excluded iro literary work under the Electronic Communications and transactions Act, Who has the cooling off right? (UNISA)
- The clause does not seem to accord with the current practice – not all instances require assignment of copyright; Musical and literary works work differently – Authors could loose a lot of income if forced to accept a royalty rather than a lump sum: Exclude Literary works – the amendment is based on Farlam, which was for musical works (PEN, ANFASA)
- This makes works perpetually encumbered, and with the 25 years reversion right, makes it more difficult to sell works. In addition, it may force authors to only receive a royalty when the work is sold on, rather than when it is used : Most uses today are of incidental value to the copyright owner, who does not derive a profit from such use (CAPASSO)

# Clauses 5 (S6A(4)), 7 (S7A(4)), 9 (S8A(4)): Minimum content royalty % agreement (3)

- Proposals
  - Limit to specific acts e.g. the right of reproduction, public performance, communicating /making available to the public), the reprographic right, right of affixation or synchronization to any audio-visual work (Matzukis).
  - Alternate wording proposed (MNet, Multichoice)
  - Include another form of payment: “remuneration / consideration OR a % of royalty”) (MNet, Multichoice, NAB, Spoor & Fisher)
  - Provide a time limit for the cooling of period (e.g. five or seven days) (Spoor & Fisher)
  - Add “ownership” – “a person who obtained ownership of copyright...” (Spoor & Fisher)
- Appears to be many unintended consequences – different works are assigned and used differently, meaning that a “single solution” may not work.
  - May need to consider rejecting these clauses so that the Department is given time to reformulate them in respect of the practical application of each type of work;
  - If retained, guidance should be given to the Tribunal regarding determining a percentage; iro what the royalty is paid on; applicability to formatted work; author v copyright owner.
    - Department to advise on correct wording
- Most concerns and proposals raise policy questions: The Department to advise

# Clauses 5 (S6A(5)), 7 (S7A(5)), 9 (S8A(5)): Retrospective application

- Deprivation of property (Dalro, FIAPF, PASA, Matzukis, MNet and Multichoice, SAILPL, The Author, UNISA, IPO);
  - Minimal deprivation – only future cost implications
  - Law of general application? ✓
  - Fair administrative procedure? ✓
  - Sufficient reason? ✓
- Must clearly indicate that the re-negotiation is for future use only (PEN)
  - **Agree**
- There may not be any budget left for new negotiations (PASA, FIAPF) and the negotiated price at the time of assignment of ownership of copyright would not have taken into account perpetual future royalties (ReCreate, USAf);
- Practical implications: persons are expected to trace each other down and renegotiate terms that were agreed to possible years ago under very different circumstances (Kagiso; Karjiker; SAILPL, SASOL; USAf)
- Potentially affect existing successful business arrangements and would wreak havoc on existing relationships, business models, forecasts and cost structures (Matzukis, NAB, USAf, ReCreate)
- How would this affect non profit organisations? (TAB, SANCB)
- Currently reprographic royalties are shared 50:50 – this would affect that right (UNISA)
- Appears to be many unintended consequences and practical implementation challenges: **May affect the Constitutionality of the provision as the rule of law requires certainty in laws**
  - Department to advise on unintended consequences and implementation challenges

# Clause 7 (S7B(3)(a)(i) + S7B(5): Reciprocal application of the resale royalty right

- Dalro: Rather amend section 37 by adding “*in relation to the resale royalty right or equivalent right in respect of works of visual art made or created by citizens of that country as it applies to the resale royalty right for visual artistic works made or created by citizens of or persons domiciled or resident in the Republic*” (consequential amendments also suggested)
- Submitters generally support reciprocal application, however concerns were raised about the clause being vague (who must pay the author?; potential scope of application; successor in title)
  - It should be clearly defined in the legislation who is the person responsible to pay: the author needs to claim the royalty either at the art market professional, the seller or the buyer. Usually the seller is liable for the payment and the art market professional may enter and take over the debt (Euro Visual Artist)
- Recommend that the uncertainties be cleared up.
  - The clarity that is sought relates to policy decisions: The Department must advise the Committee

## Clause 7 (S7B(6)): Retrospective application of an artist's resale right

- Should be clear that the application is only iro future sales (Dalro; ReCreate, Spoor & Fisher, Strauss & Co)
  - “*The resale royalty will be payable only in relation to transactions of sale of visual artistic works concluded after the commencement date of the Copyright Amendment Act, 2019.*”
  - This is the intention and how the Bill will be interpreted by courts – the additional wording could be added for additional clarity
- The reference to section 9 in section 7B(3)(d) is incorrect (Dalro)
  - Agree: must be corrected: Department to confirm correct cross reference

# Clause 11 (S9A(1)(aA)): Log Sheets

- Concerns:
  - Still unclear when the registration and submission must be done: If before use, it will curtail usage (Kagiso)
  - Cumbersome and costly (NCRF; PMA)
  - The need for usage reports is not unique to collecting societies for performers and producers –It is common to all collecting societies and the Bill should seek to remedy that for authors just as much as it seeks to do so for performers: 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. (CAPASSO)
- Proposals
  - This should apply to all copyright work, not just needletime it should be in the new Ch1A (Dalro)
  - Change “perform” to “undertake” in (aA) to avoid confusion with Performer; Add ‘whose performance is featured on the sound recording’ after “performer in (aA)(ii) (Karjiker) - Remove all reference to “performer” and add it to the Performers Protection Act (Spor and Fisher)
  - Add: “*submit a complete, true and accurate report, citing the correct accompanying data regarding the copyright owner/s, performer/s and composer/s, within ten (10) days of such use.* (Matzukis)
  - Committee to develop minimum standards for reporting and submitting and extend to all Collecting Societies (SAIPL)
  - Alternative wording proposed (SAMPPRA)
- Department to confirm final wording that would remove vagueness.
- The Department to advise the Committee iro extending this obligation to all works

## Clause 11 (S9A(4)): Failure to record / report constituting an offence + penalty

- Mostly supported
- Some viewed it as too strong, others as not strong enough
  - Administrative fines would be more appropriate with enforcement on Collecting Societies (NCRF, PEN, ReCreate, USAf)
  - Need to be in line with all collecting societies (SAIPL)
  - 10% minimum of turnover and 5 year imprisonment is harsh (NCRF, SAIPL, Spoor & Fisher, USAf)
- Propose that exceptions are provided for private persons? (Karjiker)
  - Department to advise
- These are policy decisions – Department to advise

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

- Concerns:
  - S(1)(a) refers to simultaneous or deferred (re)transmission.  
How can a right on deferred transmission of the work be in the interests of signal protection? (PMA, SAGA)
  - Department to advise on correct wording
  - S(1)(b) encroaches on the content carried by the signal.  
This should refer to the signal and not the work. (PMA, ReCreate, SAGA, USAf)
  - Department to advise on correct wording



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

- Concerns
  - Will be a direct disincentive to visual artists creating works for public spaces (DALRO, SAILPL, VANSA)
- Many supported this clause and its broad application
- Proposals:
  - The proposed s(1)(a)(ii) be deleted or be limited to “*the artistic work so used, is permanently situated in a street, square or similar public place*”, as then the public place is more limited in its scope (Kagiso).
  - Expressly limit the types of work to which this applies (SAILPL)
  - Clarify (*b*) to refer to the other work (“anything” → “another work”) SAILPL proposed wording
- The Department to advise on the correct wording



# Clause 22 (S21(3)): New process for commissioned work

- Concerns:
  - Burdensome process to enforce rights (FIAPF, PASA, USAf, IPO)
  - Some commissions do not yet know what acts the work would be required for (Kagiso, PEN)
  - Will cause uncertainty (NAB, PASA)
- Proposal:
  - As the copyright owner is now in some instances the author, the word “copyright owner” should rather be replaced with “commissioner” ((3)(c)(ii))(Karjiker)
    - Agree
  - The term “tariff” in this Section needs to be changed to read “fee” (CAPASSO)
    - The Department to advise
  - The clause should provide for more rights (wording proposed)(Matzukis)
  - The author should only be able to approach the Tribunal if the work was not used for seven years (MNet, Multichoice, NAB); 3 years: (USAf; Wits)
  - Proposed alternate wording more in line with the current Act (Mnet, Multichoice) / where the author is owner (ReCreate, USAf, IBFC, IPO)
    - These are policy decisions – Department to advise



# Clause 25 (S22B(7): Transitional provisions to provide for existing Collecting Societies

- Proposals

- CS' should not have to re-apply (SAILPL)
- Must make it clear that accreditation of existing CS cannot unreasonably withheld or refused – provided possible factors for refusal (DALRO); Must provide that the CS can continue to operate until its existing accreditation falls away (SAMPPRA)
- 22B(7)(b): The grounds for intervention by the Commission prior to accreditation of an existing collecting society need to be spelt out (DALRO), Conditions must only be iro efficient and just operation and not open ended (Spoor & Fisher)
- Must be a legal person – not for profit (wording proposed by ReCreate)(PMA, SAGA)
- Must provide for joint CS (SAMPPRA)
- Shorten the 18 months period in (7)(a) to 12 months, with a possible extension that can be applied for (USAf)
- Licences should be perpetual as there is a risk iro collection and collection agreements towards the end of a licence period (CSs may be reluctant to collect; Users may be reluctant to enter into long term agreements with CSs past their licence period) – this would ensure CSs can be held accountable by their members. A licence can rather be suspended or removed when a CS is not performing. (CAPASSO)

- Mostly policy decisions – Department to advise

# Clause 25 (S22C(3)(c)): Reciprocity: pay- outs to foreign countries

- May be a breach of obligations under Berne / TRIPS – delete (DALRO, IFFRO, Kagiso, NAB, PASA, PMA, SAGA, SAILPL, VANSA, Spoor and Fisher) <-> This is in compliance with Berne and Trips (USAf);
  - The Department must confirm which is the correct statement
- CS' may enter into bilateral agreements with collecting societies in other countries, and remittances into and out of South Africa are already controlled under the Exchange Control regulations (DALRO);
- Reciprocal agreements are between CS and not between countries (RISA)
  - Similar provisions have been interpreted by foreign societies in a way that they can avoid entering into such an agreement (Matzukis)
- This strict enforcement is an example of needletime matters being enforced on all of copyright – reciprocal rights are not necessary for musical works (CAPASSO)
- It appears that either this clause is not necessary and may complicate matters, or it simply confirms an international treaty: The Department must advise whether it should be retained, amended or deleted

## Clause 25 (Ss22D(2)(b) and 22D(3)): Collecting Societies - paying royalties

- Proposals
  - CSS should also be required to report on moneys (a list is provided)(NAB)
  - Distribution should be annual. The 3 years should only apply where the performer / copyright owner cannot be found (PMA, SAGA, Spoor and Fisher, USAf)
  - Need a way of distribution where a recipient cannot be found (SAIPL, SAMPPRA)
  - Need a limit iro collections for multiple rights in one work (BVPGK – wording suggested)
  - Authors need between 3 and 5 years' time to claim uncollected royalties as it is difficult to trace usage (CAPASSO)
- Matters of policy – the Department must advise

# Clause 27 (S27(6)) : Penalties

- Concerns:
  - The penalties are too high (Karjiker, ReCreate, SAIPL, SAMRO, TAB, SANCB, USAf)
  - Need higher fines (Spoor and Fisher)
  - Other protection measures (especially iro internet usage) must accompany penalties (CAPASSO)
- Proposals:
  - Need civil remedies – fines go to the State and do not benefit authors, or copyright owners (DALRO, IIPA, FIAPF, PASA, The Author, P Hollis)
  - Need civil remedies in addition to fines (Matzukis)
    - *Recommend that consideration be given to adequacy of existing civil remedies;*
  - Turnover may not be appropriate as some offenders do not infringe for payment (Mnet, Multichoice)
  - Alternative wording proposed (ReCreate)
  - Calculation should be the year before the infringement, not the year before calculation (SAIPL)
    - *Recommend that calculation to be in the year of infringement or the year before.*
  - Need exemptions (e.g. S13(4) in the Current Copyright Regulations of 1978) for the digital environment: for libraries, archives, museums, galleries, cultural organisations, educational and research institutions and entities serving disabled communities, as well as carriage service providers (USAf).
    - *Recommend that the need for exemptions be considered;*
- Save for the recommendations above, the decisions here are policy related and the Department should advise the Committee

# Clauses 30 and 31: Copyright Tribunal

- Welcomed in general
- Proposal:
  - Judges must be experts in copyright law, not other forms of IP (DALRO, Matzukis)
  - The establishment of the Tribunal and its jurisdiction has been removed and should be reinserted (SAILPL)
    - *If so, recommend that it must be corrected.*
  - Must clarify when a Deputy Chairperson can resign (periods etc.) (Spoor & Fisher)
  - The right to appeal and review for interim relief should be returned (DALRO)
    - *If not provided for, recommend that it must be corrected.*
  - The procedure in the Tribunal should be adversarial (SAILPL)
  - There should not be fees applicable when filing a complaint (Spoor and Fisher)
- Where clarity can be added, it should
- The Department to advise on policy matters

## Clause 37: Transitional provision

- Calls were made for IPLAA to be repealed.

Until IPLAA is repealed, provision must be made for it on the statute book

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# Thank you