

ANNEX

The European Commission thanks the Select Committee on Trade and International Relations for the invitation to interested individuals and stakeholders to submit written comments on the Copyright Amendment Bill [B 13B-2017] and on the Performers' Protection Amendment Bill [B 24B-2016]. We welcome the commitment of the South African Government to modernise its copyright regime in order to comply with international Conventions and Treaties, notably the Internet Treaties ("WPPT" and "WCT"), the Rome Convention, the Marrakesh Treaty and the Beijing Treaty). Updating the substantive copyright laws, in order to bring them into line with these Treaties, is a very important step but should not be seen as a substitute for the ratification of these Treaties. In particular, the European Commission suggests that South Africa ratifies and implements the two Internet WIPO Treaties as soon as possible.

The European Commission wishes to draw attention to its concerns related to some of the proposed changes and in particular:

I. Comments from the European Commission on the Copyright Amendment Bill [B 13B-2017]

Point 1: [SECTION 7 B (4) - Resale royalty]

The European Commission welcomes the future insertion of a resale right in the South African copyright regime. In doing so, South African authors of original works sold in the EU will get, according to the Berne Convention, royalties in conformity with the EU Member State regimes of resale right. The EU authors will enjoy the equivalent right according to the reciprocity principle of the Berne Convention as regards the resale right.

The current drafting of this section lacks clarity. Section 7B(4)(a) sets out that only citizens or residents of South Africa (or another state designated by the Ministry) are entitled to claim the resale right. This provision raises doubts as to its compliance with South's Africa's obligation pursuant to Article 5 and 14ter of the Berne Convention related to national treatment. As far as the protection term is concerned, since the resale right is a copyright, it would be best to simply provide that the duration of the resale right must be identical to the term of the copyright in respect of artistic works, including joint, anonymous, pseudonymous or orphan works.

Point 2: [SECTION 9A – Royalties regarding sound recordings]

Section 9A lays down a very complicated system for the licensing of rights and for the payment of royalties for the broadcasting of phonograms. It is difficult to understand what this section intends to do, since it seems to establish an exclusive right to authorise the broadcasting of phonograms, in a way that would oblige broadcasters to license the rights of every single phonogram they intend to broadcast. This protective measure may be counterproductive for the dissemination of phonograms, particularly of foreign right holders.

Point 3: [SECTION 12A – Fair use]

Section 12A introduces a kind of fair use provision in South Africa while keeping established exceptions. The European Commission thinks that the introduction of this new principle, which constitutes a paradigm shift in South Africa, would be negative for the copyright regime in South Africa and would not improve it despite this being the main objective of the reform. Fair use is based on "established" jurisprudence. The lack of tradition and jurisprudence in South Africa in this regard raises significant concerns. The introduction of fair use into South African law in parallel with exceptions would result in significant legal uncertainty and would increase the number of litigations.

Furthermore, the provisions are often difficult to understand, since they sometimes include references to the need to obtain authorisation from the right holder or from the Commission (a South African public body to license works). There is also a list of factors to be considered in order to determine if certain use is fair or not (Section 12A(b)), but it is not clear whether commercial uses are covered or not, for instance (Section 12A(b)(iii)(bb) raises doubts about this as well). The compliance of these provisions with South Africa's obligation related to the three-step test should be challenged.

Point 4: [SECTIONS 12B-D, 19B-D and 39B (Clause 34) – Specific exceptions]

Clause 34 (unenforceable contractual term) would apply to all exceptions – including those under the general principle of fair use. While Section 12 B and Section 19 B (2) provides for mandatory exceptions (e.g. for quotation, illustration for teaching...), Section 12 D, Section 19 B (1) and Section 19 C deal with optional exceptions. This is where a general application of Clause 34 is problematic. The prohibition of contractual override makes its all sense in the case of mandatory exceptions; it achieves the scheme by specifying that a contract cannot hinder the application of the exceptions. But in the case of optional exceptions, it seems that the prohibition of contractual override may be less welcome since it deprives right holders from any flexibility concerning the exceptions, which runs contrary to the will of the legislator. This duality of regime should be addressed properly in the law. Besides, as it is currently drafted, the system creates a very large scope which could be considered going beyond the three-step test. Moreover, applying the Clause 34 to the general exceptions that can be granted under fair use, may be considered very carefully since, as already pointed out, the lack of tradition and jurisprudence in South Africa in this regard raises significant concerns.

Point 5:[SECTION 19D – Exception for persons with disability]

Under Marrakesh Treaty only “authorised entities” defined in the Treaty are permitted to make a copy under the exception. This restriction is not clear in Section 19D(1) as it refers to “any person as may be prescribed and that serves persons with disabilities”. A clear restricting definition should be added. Moreover, in the conditions of the exception there is no reference to the requirement that “such accessible format copies are supplied exclusively to be used by beneficiary persons”.

Point 6: [SECTION 22A – Orphan works]

As regards the definition, which is quite general, we suggest that a reference be added to a “diligent search” obligation prior to the use, which is included further in the text. Concerning the system itself – It is advisable to add a clear reference to a publicly accessible online portal. On such a portal the potential rightholders should find information on orphan works status or

on ongoing diligent search. It is particularly important for EU rightholders who normally do not have an easy access to national newspapers etc. There is a reference to this kind of a portal in Section 22A(6)(a) but it should be much clearer and detailed. When it comes to the claims of royalties, the wording of Section 22A(9) is still “may recover royalties” while it should be clear that the rightholders are entitled to royalties in this case.

Point 7: [CHAPTER 1A (Sections 22B-22F) – Collecting societies]

The European Commission welcomes any initiative related to ensuring clear rules on the governance, transparency and equal treatment in the context of collecting societies.

In Section 22C there is a reference to “indigenous communities”. Contrary to collective societies, indigenous communities are not subject to accreditation. If indigenous communities play a role in collective management of rights, it is not clear whether these communities are subject to any regulations in this regard.

Moreover, in the light of the European Union experience concerning definition of collecting societies, it is suggested to add to the definition a condition that collecting societies act “for collective benefit of the members”.

Point 8: [SECTION 28P(1) – Exceptions in respect of technological protection measures]

Section 28P(1) is very problematic. It allows users to circumvent TPMs in order to benefit from an exception or fair use. This right to circumvent granted to beneficiaries would add legal uncertainty and would promote the business of devices, products or components for the purpose of enabling or facilitating the circumvention. Instead, voluntary agreements or solutions involving the cooperation of right holders should be envisaged (as it is the case in paragraph 2, which applies only when the user is unable to circumvent the TPM and needs the assistance of the right holders).

Point 9: [SCHEDULE 2 (SECTION 22(3)) – Translation licences & Reproduction licences]

The "Schedule" establishes two kind of compulsory licences (to be granted by the Intellectual Property Tribunal) for the translation and the reproduction of works. This should be clarified by the South African authorities, since these are exclusive rights which should be, as a matter of principle, be authorised by the right holder.

II. Comments from the European Commission on the Performers’ Protection Amendment Bill [B 24B-2016]

Point 10: [SECTION 3(4) – Economic rights]

It is not clear whether Section 3(4)(g) provides for an exclusive right of broadcasting and communication to the public of fixed performances or a right to equitable remuneration. Section 3(4)(h) provides for exclusive distribution right (not introduced in WPPT). It is not clear how it relates to the right provided for in Section 3(4)(d).

Point 11: [SECTION 3A(3)(c) – Transfer of rights]

Section 3A(3)(c) introduces an automatic revocation of rights after 25 years. The European Commission wonders whether there were any issues with regards to contractual freedom.

Point 12: [SECTIONS 8F – Exceptions in respect of technological protection measures]

This section provides for an exception in respect of technological protection measures. Please see our Point 8 above on Section 28P(1).

Point 13 : [Exceptions]

The Bill provides that exceptions to copyright also apply so we refer to our comments above to the exceptions (Point 4).