

ANNEX

Comments from the European Commission on the Copyright Amendment Bill of the Department of Trade & Industry of South Africa

Point 1: (definitions)

- "digital rights system": the purpose of this definition is unknown, since it is not used later in the text. Its meaning or its possible relations with TPMs are not obvious. Further clarification from the South African authorities would be needed.
- "orphan work": apart from possible inconsistencies, the definition seems rather too broad, and it does not reflect the conditions for a work to be declared orphan if the right holder is not located (for instance, a diligent search – something similar to the diligent search is mentioned later in the text, but further clarification in the definition itself would be advisable).
- "reproduction". The modification of the definition of reproduction raises major concerns. It is too restrictive, since it replaces the existing definition (which is broader) and only refers to "a copy made of a fixation or audio-visual fixation of a performance".
- "TPMs". The definition of TPM is linked to "measures [...] designed to prevent or restrict infringement of copyright work". Apart from pure infringements, right holders may apply TPMs to avoid unauthorised access (for instance, from another territory), which is not strictly an infringement if carried out by an individual user. These TPMs should also be granted protection.

Point 2: (Orphan works)

Section 3 (see also comments on Point 24) establishes the perpetual protection of copyright when it is vested in the State, and relating to orphan works. Once the term of protection of an orphan work expires, it should become part of the public domain. The perpetual exploitation of an orphan work by the State is unjustified, in our opinion (for instance, it may affect works whose rights belonged to EU right holders – once in the public domain, why would the Republic of South Africa still exploit it as the copyright holder?). The European Commission suggests that orphan works should fall into the public domain like all other copyright works. No country in the world has granted perpetual protection to economic copyrights. Only the moral right is perpetual in certain countries.

Point 6 (7A Resale right):

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. Therefore, the meaning of article 7A (3) (a) (i) and (b) need some clarification. In effect, a foreign author

enjoys a resale right only if the legislation in the country to which the author belongs so permits. He does not have to be resident in the country where he claims royalties.

Furthermore, it would be appropriate to explain precisely what "commercial sale" means. In general, the resale right must apply to all acts, except the first transfer of the work by the author, of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

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 7 & 8: (the making available rights)

The European Commission welcomes the proposed amendment to Sections 8 and 9, which would introduce the making available rights for cinematograph films and sound recordings.

Point 9: (licensing & collective management organisations)

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 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. We understand that the references to the "owner of the copyright" in this Section refers to the phonogram producer, but further clarification would be needed.

Section 9 is related to collective management organisations (preferable to collecting societies). We welcome any initiative designed to ensure clear rules on the governance, transparency and equal treatment in the context of collective management organisations. In Section 9B (1), we believe clarification is needed about the reasons why there should be one collective management organisation per copyright and per set of rights with regard to all music rights. This may make the system inefficient and prejudice particularly foreign right-holders. This could raise problems related to the management of databases and business efficiency.

Furthermore, the new rules (notably that collective management organisations should also have to comply with BBEE measures) could impact heavily the position of the foreign right-holders and the current reciprocal agreements with foreign collective management organisations.

Point 11: (quotas)

In order to preserve cultural diversity, the Commission is not against the principle of quotas in the audio-visual sector. However, in Section 10A (1) we find exaggerated provisions related to the minimum percentage of local content that should be broadcast in the South African public and private radios and televisions (more than 60% or 80% of the content needs to be local). This could be counterproductive and very prejudicial to cultural diversity, even though it is not strictly related to copyright law.

Point 14: (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.

There is also a list of factors to be considered in order to determine if certain use is fair or not (Section 12A.5), but it is not clear whether commercial uses are covered or not, for instance (Section 12A.6 raises doubts about this). The compliance of these draft provisions with South Africa's obligation related to the three-step test must be evaluated. Compensation is not mentioned in the draft. This would need clarification, notably as far as private copying is concerned.

Section 12A.3 on the use of digitised copyright material in the educational context must be developed in order to bring more legal certainty.

Section 12A.4 mixes in one and the same article parody, private copy and format-shifting. This would deserve further clarification.

The purpose of Section 12A.8 is unclear. Is it related to the possibility to circumvent TPMs?

The scope of the exception allowed for by section 12 (15) seems too broad and could undermine copyright protection in South Africa and foster piracy, without addressing the need for access to educational material.

Point 22: (the exceptions for archives, libraries, museums, etc.)

Section 19C is not abundantly clear and would need to be improved. For instance, it is not clear whether online uses are permitted (i.e. does Section 19C.1 (a) apply to online uses or digital materials when it mentions distribution?) and the distribution right is not defined in the law. Furthermore, no compensation is set out in the law. This latter point deserves more discussion.

Point 24: (obligations of broadcasters)

Section 20C.5 deals with obligations of broadcasters but the meaning and purpose of this provision are unclear as it is apparently a "must" provision.

Point 24: (orphan works)

Section 21 sets out that the State will be the owner of the copyright of orphan works. This may be a political choice, but further justification and clarification are needed as regards the successors in title or the exclusive licensees, who are the lawful right-holders of the works as regards the distribution of royalties. It seems advisable to share them with right holders (which may finally benefit foreign right-holders). Moreover, a register for orphan works, accessible outside South Africa, should be put in place in order to ensure that relevant right-holders may become aware of the exploitation of their orphan works and reappear. In this sense, if a right-holder reappears and claims his or her rights, they should be given back to him or her immediately (Section 22A.13 establishes that they "may", instead of "shall" have their copyright returned).

Point 31: (exceptions in respect of TPM)

Section 28P.1 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 measures or solutions including agreements between right-holders and involving the cooperation of right holders should be envisaged (as 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).

Schedule

The "Schedule" establishes two kinds of compulsory licences (to be granted by the Intellectual Property Tribunal) for the translation and 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, authorised by the right holder.