



SERVING AUTHORS WORLDWIDE
AU SERVICE DES AUTEURS DANS LE MONDE
AL SERVICIO DE LOS AUTORES EN EL MUNDO

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CISAC comments on 2017 South Africa Copyright Amendment Bill

1. Executive summary

The International Confederation of Societies of Authors and Composers (CISAC) thanks the Portfolio Committee on Trade and Industry of the Parliament of the South African Republic for the opportunity to provide written comments on the 2017 Copyright Amendment Bill (the “Bill”).

CISAC welcomes any initiative intending to implement a more effective, efficient and adaptable copyright system if it is respectful of creators’ rights. We are writing to you to express our concerns with some of the copyright recommendations in the Bill that are out of step with international law and practice, which will have a deeply detrimental impact on creators by jeopardising their ability to continue making a living from their creative works.

First of all, we would like to remind the Committee that cultural and creative industries fuel the economy as a whole. A recent study commissioned by CISAC and carried out by Ernst & Young¹ shows that the cultural and creative industries generate US\$2.250 billion in revenue and 29.5 million jobs worldwide. They are a main driver of the online economy. According to a 2014 CISAC Report², the breakdown of the creative economy’s contribution to national GDP of South Africa is 4.11%. These studies establish that copyright sits at the heart of an innovative and modern economy. It provides sufficient flexibility in response to change, particularly with the challenges brought by the transition to a digital economy.

After reviewing the Bill, the following points contain the most important issues that, if unchanged, would be detrimental for author’s rights and are without any proper justification within the international regulatory framework:

1. Provisions that fix the term of validity of the copyright assignment should not apply in respect of assignments between rights holders and accredited collective societies that permit the reversion of copyright to rights holders at the termination of membership (Section 21(b)).
2. In the provisions contained in Sections 6, 7, 8 and 9, the role of various parties in the copyright value chain should be conveniently rectified in order to exclude some categories (“users, producers, community trusts”) from being entitled to sharing on a royalty.
3. The right of communication to the public should be reformulated based on the definition laid out in international treaties (Section 7(dA)).
4. The definition of orphan works should include the requirement of a diligent search before a work can be considered to be as such (Section 1(f)).
5. Usage information in respect of copyright works is fundamental to ensure that royalties are fairly distributed among rights holders. Legislation should be amended to compel users to submit music usage reports (Section 22(D)(2)).
6. Provisions that attribute to the “State, international or local organisations” the ownership of works made by or under the direction or control of such entities should be limited to a closed list of specific category of works. Furthermore, the inclusion of any “local organisation” would have a very dire effect on the livelihoods of rights holders and should be deleted (Section 5(2)).
7. CISAC encourages the introduction of a private copying levy to ensure that copyright holders are duly compensated for acts of copying that are done by individual persons and for private use.

Finally, in light of the reporting requirement for collecting societies provided for in Sections 22D and 22E of the Bill, we would like to provide the Committee and the Parliament with some insights related to the code of conduct for collective management societies. Good governance and best practices in collective management are among the core activities of CISAC. Since 2008, CISAC has implemented a sophisticated system of Professional Rules and Binding Resolutions (“the Rules”) that set the highest standards of professionalism in collective rights management activities.

¹ “The first global map of cultural and creative industries”, EY, December 2015, <http://www.worldcreative.org>

² “The creative industries and the BRICS”, CISAC, 2014, <http://www.cisac.org/Cisac-University/Library/Studies-Guides>

These Rules, adopted voluntarily by our members, treat various issues including, without limitation, membership, corporate governance, documentation, licensing, collection, distribution, complaints and dispute resolution. The Rules also include a compliance review process, which reflects CISAC's ability and willingness to hold its members accountable to the highest standards of professional conduct and reinforce the legitimacy of collective management of rights. We would like to underline that the South African collective management societies who are members of CISAC already respect, to a large extent, the thresholds set by these Rules.

2. CISAC's comments

CISAC, the International Confederation of Societies of Authors and Composers, is a non-profit non-governmental organization, composed of 239 authors' collective management societies from 121 countries across the world. SAMRO (Southern Africa Music Right Organisation), DALRO (Dramatic, Literary and Artistic Right Organisation) and CAPASSO (Composers, Authors and Publishers Organisation) are CISAC member organisations that administer rights on behalf of creators in South Africa.

Through its membership, CISAC represents over 4 million authors, scriptwriters, authors, painters, composers, photographers and publishers. These creators are drawn from a wide range of artistic fields, including music, literature, drama, graphic, photographic and audio-visual.

CISAC's goal is to promote the interests of its members by strengthening the development of the international network of collective management organisations. As the umbrella organisation for authors' societies, CISAC fosters a global network of collective management and promotes good governance, transparency and best practices among its members. As representatives of authors and their collective management organisations, our priority is to ensure that an appropriate legal framework is in place to allow them to protect their copyrighted works, collect royalties from users and make a livelihood from their creations. As such, on-going reform projects within the regions where our members operate are of great interest to us.

Our main concerns with the amendments proposed in the 2017 Copyright Amendment Bill are set forth below.

2.1. Reversionary provisions should not apply to assignments between rights holders and accredited authors' societies

The Bill provides in Section 21(b) that "assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment".

CISAC points out that assignments between rights holders and accredited authors' societies usually permit the reversion of copyright to rights holders at the termination of the membership. Thus, it would be burdensome for both rights holders and authors' societies to process the "renewals" of thousands of assignments when rights holders can, at any stage, terminate their membership and have their rights revert to them. For this reason, CISAC proposes to introduce an exception in this regard and that such assignments should not be subject to any term of validity.

2.2. Role of various parties in copyright value chain should be conveniently rectified

The proposed amendments contained in Sections 6, 7, 8 and 9B display a lack of understanding of the parties that are involved in the copyright chain, where for instance, performers and users are included as being entitled to sharing a royalty in these sections, which deal with authors' rights. Similarly, the proposed section 22C(3)(c) of the Bill provides that royalties collected by collective societies shall be distributed to "users, performers, owners, producers, authors, community trusts or collecting societies". CISAC urges deleting the reference to "users, producers, community trusts and collecting societies" in those sections and to maintain the reference to "authors" and "copyright owners".

2.3. Right of communication to the public should be reformulated according to definitions laid out in international treaties

CISAC welcomes the recognition of the right of communication to the public in the Bill and its extension to the "making available right" in Section 7(dA). This right is fundamental for creators in today's digital world as it allows them to control interactive dissemination of their works over the Internet. It forms the basis for the licensing of online services and for the development of the legitimate online market for the delivery of copyright content.

Nevertheless, the inclusion of the phrases "by means of internet access" and "whether interactively and non-interactively" in the Bill does not add anything of significance to the Bill's definition, nor does the omission of the phrases detract from its efficacy. In order to ensure that the right recognised to authors in the Bill is in line with other countries' laws, based on the international copyright treaties, we suggest that the Bill use the terminology of the 1996 WIPO Copyright Treaty, and that the right is defined as follows in article 8(1) of the Bill:

(...)

(dA)) communicating the work to the public, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them".

2.4. Definition of orphan works should include the requirement of a diligent search

The revised definition of "orphan works" has removed the requirement of diligent search before a work can be considered as orphan work. This means that when none of the rights holders in a work is identified, or even if one or more of them is identified but cannot be located, then such a work would be considered as an "orphan work" and consequently would be administered by the Intellectual Property Commission.

Such approach would be detrimental to rights holders taking into account that, as a general rule, a large amount of information concerning unidentified works is likely be traced after a diligent search conducted by consulting the appropriate sources.

We make reference to the solution adopted by the European Union in the Directive 2012/28/EU on certain permitted uses of orphan works. Article 3 of the Directive lays down the general principle that before a work can be considered as orphan work, "a diligent search shall be carried out in good faith in respect of each work or other protected subject-matter". Furthermore, the Directive requires that any information related to such diligent search shall be recorded in a single publicly accessible online database established and managed by the EU Office for Harmonization in the Internal Market.

In light of these considerations, CISAC urges the Committee and the Parliament to include the requirement of a diligent search in good faith in the definition of orphan works. Such search should be carried out by consulting the appropriate sources for the category of works in question.

2.5. Users should be compelled to provide usage reports

Proposed Section 22(D)(2) of the previous Bill provided that royalties distributed to the authors of rights must be distributed in proportion to the actual usage of their works, and this provision has been unchanged under the current Bill. CISAC supports this provision and urges that the legislation be amended to compel all users to submit usage reports and to subscribe to monitoring services that would provide complete accurate usage data to authors' societies.

At this respect, we point out that in the European Union, the Directive 2014/26/EU on Collective Rights Management³ introduces specific duties for information for users regarding works usage from repertoires of collective management societies. Article 13 of the Directive establishes that "users shall provide CMOs, within an agreed upon, or pre-established time, and in an agreed upon or pre-established format (using as far as possible, voluntary industry standards) with relevant information at their disposal on the use of the rights represented by the collective management organisation as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders". The information should be provided as best as possible in accordance with voluntary industry standards. Furthermore, according to Article 17, the deadline to provide information must be reconcilable with the distribution deadline of CMOs.

2.6. Provisions that attribute ownership of works funded by such entities to "State, international or local organisations" should be rectified

The proposed amendment to Section 5(2) of the Act provide that the copyright in any work funded by or made by or under the direction or control of the State or an international organisation or local organisations shall belong to the state or the organisation in question. Currently, Section 21(1)(c) limits the scope of this provision to certain categories of works (e.g. photograph, painting, cinematographic film and sound recording) made under commission.

The effect of the proposed amendment is to extend the automatic transfer of copyright from authors to the State, international organisations or local organisations, regardless of the type of the work, every time such work is funded or made under the direction of such organisations. It would thus no longer be a requirement that, regarding e.g. to literary and musical works, copyright can only be transferred through a proper, written assignment.

Furthermore, CISAC is concerned that under the proposed amendment this automatic transfer of copyright would include the works funded by (or made under the control of) "local organisations". The scope of the expression "local organisations" was not clarified and can be interpreted to include many entities. Such entities would be assigned ownership of copyright not only where the works are specifically assigned to them, or if they were created during the course of employment by a person employed by such organisation as referred to in the Copyright Act, but simply if the making of the work is funded by them.

Both provisions would have a very dire effect on creators, who are reliant on the royalty income derived from the use of their works. CISAC reminds that, without prejudice to the specificities of the rules on ownership of commissioned works, one of the basic principles relating to copyright ownership is that the author as the creator of the work is the owner of copyright. In light of these considerations, CISAC urges the Committee and the Parliament to remove the proposed amendments to Section 5(2) of the Act.

2.7. A private copy levy mechanism should be implemented

³ Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market

CISAC would like to emphasise the importance of introducing a private copying levy to ensure that copyright holders are duly compensated for acts of copying that are done by individual persons and for private use. A private copying levy system is currently the only efficient mechanism that allows rights holders to be compensated for the limitation of their exclusive right of authorising the reproduction of their works.

CISAC encourages the Committee and the Parliament to adopt a private copying levy system where importers and manufacturers are required to pay a levy on recording equipment and/or media used by individuals for their private use to a collective management organisation in charge of the collection and distribution of this remuneration. In this system, the levy is generally included in the selling price of the products. The funds collected could generally be redistributed to creators and thus contribute to the creative process.

These provisions would harmonise South Africa's legislation with accepted international standards. In absence of provisions as previously described, CISAC is gravely concerned that article 12A(j) would open the way for infringing commercial use of copyrighted works.

3. Importance of ratifying World Copyright Treaty

As a general comment, CISAC strongly encourages the ratification of the WIPO Copyright Treaty (WCT) by the South African Government. CISAC would also like to highlight article 46 5(f) of the Trade, Development and Cooperation agreement between the EU and South Africa, which acknowledges the importance of the WCT. Ratification of the WCT would strengthen many provisions required for the efficient functioning of the South African copyright system in a rapidly changing global creative economy. There is an urgent need to address licensing in the digital environment and the right of communication to the public, particularly to ensure adequate licensing for digital music delivery and efficient collection and distribution of royalties to rights holders.

4. Conclusion

CISAC thanks the Portfolio Committee on Trade and Industry of the Parliament of the South African Republic for taking its comments into consideration. Through CISAC's representation of creators and rights owners, we believe in the value of strong copyright systems that incentivise creativity. We remain at your disposal should you need any further information or clarification on the aforementioned considerations.