

**From:** Art. 4(1)(b) (TRADE)  
**Sent:** jeudi 10 septembre 2015 17:04  
**To:** Art. 4(1)(b) (CNECT)  
**Cc:** CNECT ; Art. 4(1)(b) (CNECT); Art. 4(1)(b) (CNECT); Art. 4(1)(b) (CNECT); Art. 4(1)(b) (CNECT); Art. 4(1)(b) (TRADE)  
**Subject:** RE: New South African draft Copyright Amendment Bill published for public comment - ddl 7 September 2015

Dear Art. 4(1)(b), thanks for your valuable contribution.

I will add our comments to yours.

One minor point however, in matter of resale right, article 14 ter provides for reciprocity as an exception to the national treatment (similar to art 4 (2) of the WPPT). In effect, a foreign author enjoys resale right in South Africa only if legislation in the country to which the author belongs so permits. Of course, in this case, the EU authors would be eligible.

Therefore, as you said, the meaning of article 7A (3) (a) (i) and (b) need some clarifications and must be amended in compliance with Berne Convention.

Thanks again.

Amitiés

Art. 4(1)(b)

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**From:** Art. 4(1)(b) (CNECT)  
**Sent:** Thursday, September 10, 2015 4:14 PM  
**To:** Art. 4(1)(b) (TRADE); Art. 4(1)(b) (TRADE)  
**Cc:** CNECT ; Art. 4(1)(b) (CNECT); Art. 4(1)(b) (CNECT); Art. 4(1)(b) (CNECT)  
**Subject:** RE: New South African draft Copyright Amendment Bill published for public comment - ddl 7 September 2015

Dear Art. 4(1)(b),

Further to your request, we have revised the South African draft Copyright Amendment Bill and we have the following general comments on its content.

- Most of the drafting of the amendments to the South African Copyright Act lack clarity or consistency. This raises major concerns in terms of interpretation of the scope and purposes of the proposed amendments and their relation to existing provisions in the Copyright Act. More importantly, the legal certainty for both copyright holders and users would be undermined if unclear provisions are adopted. This is particularly applicable to the provisions related to fair use, but could be extended to all provisions. We understand that this might be a sensitive issue, so we would suggest referring to concerns raised by South African scholars (Commentary on the Copyright Amendment

Bill published by the Stellenbosch University is an excellent source – I must say that I agree with most of the comments therein).

- As South Africa is not a Contracting Party to the WPPT or the Rome Convention, their obligations in terms of neighbouring rights are limited to those stemming from the TRIPS Agreement. We will focus our comments in those articles more related to South Africa's obligations in the context of the Berne Convention, the TRIPS Agreement and the WCT.
- In the chapter related to definitions, the main inconsistencies are related to the following:
  - "digital rights system": the purpose of this definition is unknown, since it is not used later in the text. Its meaning or its possible relation with TPMs are also obscure. Further clarification from the South African authorities would be needed.
  - "orphan work": apart from possible inconsistencies (reference to the creator of the work), the definition seems rather 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.
- Section 3 establishes the perpetual protection of copyright when is vested in the state, concerning 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 their copyright holder?).
- Section 7A establishes the resale right in South Africa, which we should welcome. However, there is a major concern in this regard. Subsection 3 sets out that only South African citizens or residents are entitled to claim this right. This would not comply with South Africa's obligation pursuant to Articles 5 and 14 ter of the Berne Convention (national treatment). We understand this is a very sensitive issue, since the South African authorities may reconsider their decision to grant this right if foreigners from the EU may be the main beneficiaries of this right.
- 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. We understand that the references to the "owner of the copyright" in this Section refer to the phonogram producer, but further clarification would be needed.

- Section 9 is related to collecting societies. We welcome any initiative related to ensuring clear rules on the governance, transparency and equal treatment in the context of collecting societies. In Section 9B(1), we believe clarification is needed about the reasons why there should be one collecting society 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.
- In Section 10A(1) we find aggressive 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 is very prejudicial for the interests of the EU, even though it is not strictly related to copyright law.
- Section 12 introduces fair use provisions in South Africa. A general negative reaction on this should be transmitted to the South African authorities in this regard. The lack of tradition and jurisprudence of South Africa in this regard raises significant concerns. 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.5), but it is not clear whether commercial uses are covered or not, for instance (Section 12A.6 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. Other comments:
  - Section 12A.3 is not clear enough.
  - Section 12A.4 seems to mix parody and private use and format-shifting. Further clarification would be needed.
  - Compensation is never mentioned. We would need clarification on this.
  - The purpose of Section 12A.8 is unclear. Is it related to the possibility to circumvent TPMs? The South African authorities should clarify this.
- As a general comment, the exceptions on education and libraries are sometimes unclear. For instance, it is not clear whether online uses are permitted (Does Section 19C.1.a apply to online uses or digital materials when it mentions distribution? – distribution is not defined in the law.
- Section 20c.5 deals with obligations of broadcasters (it is a "must" provision). The meaning and purpose of this provision is unclear.
- Section 21 lays down the provisions related to orphan works. Firstly, paragraph 3 sets out that "ownership of any copyright whose owner [...] is deceased shall vest in the state. This is completely unwarranted and should be modified, since the successors in title or the exclusive licensees are the necessary right holders of those works.

- Section 21 sets out that the state will be the owner of copyright of orphan works. This may be a political choice, but further clarification is needed to find out the plans of the South African authorities in terms of, for instance, the distribution of royalties for the use of those rights, since it seems advisable to share them with right holders (which may finally benefit EU right holders, even in a limited manner). 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).
- Section 28P.1 is very problematic. It allows users to circumvent TPMs in order to benefit from an exception or fair use. 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).
- 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.

I remain at your disposal for further clarification or to discuss any of these particular items.

Kind regards,

Art. 4(1)(b)

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**From:** Art. 4(1)(b) (TRADE)  
**Sent:** Friday, August 14, 2015 10:41 AM  
**To:** Art. 4(1)(b) (CNECT)  
**Cc:** Art. 4(1)(b) (CNECT); Art. 4(1)(b) (CNECT); Art. 4(1)(b) (TRADE)  
**Subject:** New South African draft Copyright Amendment Bill published for public comment - response due 27 August 2015  
**Importance:** High

Dear Art. 4(1)(b)

We have been informed very late of the public consultation in South Africa about the draft Copyright Amendment Bill. I must confess that I haven't had time yet to analyse the text in details... Please find attached the Copyright Act in force currently in SA and the Draft Bill.

<< File: Copyright Act.pdf >> << File: Draft Bill copyright 25 7 2015.pdf >>

I have just noted that besides several positive aspects (e.g. introduction of a resale right) we could have concerns about the introduction of a kind of US-style "fair use" (not the tradition in SA), compulsory licenses for certain exceptions, State controlled "compulsory licence" type of mechanism for the reproduction of whole analogue print works and audio visual fixations not available in South Africa, licensed uses for "systematic instructional activities" (right-holders are entitled to "just compensation"), exceptions / State controlled "compulsory licence" for translations, etc.

We are going to inform the South African authorities that the European Commission will be in position to comment properly the draft Copyright Amendment Bill published for public comment at a later stage after the summer break.

Therefore, it would be good to get your comments on the 7<sup>th</sup> of September eob.

I am back on the 1<sup>st</sup> of September and I will be available to discuss with the colleague in charge of South Africa in your Unit at his convenience.

Amitiés

Art. 4(1)(b)