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REPUBLIC OF SOUTH AFRICA

PRESENTATION TO THE SUBCOMMITTEE ON COPYRIGHT: TRADE AND INDUSTRY

THE COPYRIGHT REVIEW COMMISSION (CRC) REPORT

13 MARCH 2018



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PRESENTERS

Art.4(1)(b)

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PURPOSE OF PRESENTATION

- ☐ The purpose of the presentation is to offer the Sub-committee insight into:
 - ☐ the Copyright Review Commission Report (CRC);
 - ☐ key proposals in the report; and
 - ☐ key policy issues under consideration and the recommendations of the CRC.



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INTRODUCTION

- ❑ Copyright law grants a range of exclusive rights to the creators of works such as –
 - the literary, musical, artistic works, novels, poems and plays cinematograph films, drawings, paintings, photographs, sculptures, architectural designs and published editions to have a control of the work.
 - other rights related to copyright include, artist's performance, producers of phonograms in recordings, broadcasters in radio and television programs.



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BACKGROUND

Establishing the Copyright Review Commission

- ❑ The creative industry met with the President in 2009.
- ❑ In 2010, the Minister of Trade and Industry, Dr Rob Davies established the Copyright Review Commission (CRC) with a view to assess the concerns raised about the model of collecting societies in place for the distribution of royalties to musicians and composers of music.
- ❑ The CRC, was chaired by a retired judge Ian Farlam, accountable to the Minister of Trade and Industry and instructed to advise and make recommendations. Consisted of 5 other members, e.g Prof Tana Pistorius, Prof Musa Xulu.
- ❑ The recommendations of the CRC were presented to the Portfolio Committee (PC) in 2012.
- ❑ In 2013, **the dti** published a Draft Intellectual Property Policy, as recommended by the CRC. The publication saw consultations, through which 118 written submissions were received from stakeholders and the general public.



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BACKGROUND cont

- ☐ The CRC conducted a detailed examination of the workings of the collecting societies that were established in South Africa to license musical, literary works, sound recordings and published editions for prospective users.
- ☐ It analysed their functioning and the degree to which they complied with the accepted principles of corporate governance.
- ☐ Aimed to ascertain how after nine years after the enactment of needletime legislation in 2002, not a cent had been paid in royalties to musicians and record companies.
- ☐ It was concluded that the legislation which provided for a statutory license in respect needletime, did not adequately protect the rights owners, whose rights were made subject to the licence.



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BACKGROUND cont

Terms of reference of the CRC

- ☐ Assess the effectiveness of the structure of collecting societies in South Africa.
- ☐ Assess the relationship of collecting societies in South Africa.
- ☐ Assess the nature of private and public agreements that radio and tv stations have with local and international collecting societies.
- ☐ Assess the nature and extent of the use of music by mobile telephony companies and whether these companies are paying copyright royalties to the rightful owners.
- ☐ Assess the distribution of royalties and determine the percentages distributed nationally vis a vis outside South Africa.
- ☐ Assess tariffs associated with these licensing agreements.



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BACKGROUND: TOR cont

- ☐ Assess licensing agreements that universities, other institutions of higher learning and training institutions have with collecting societies regarding royalties for copyright or literary work. And how these royalties are distributed to collecting societies and from there on to artists, composers, authors and or publishers.
- ☐ Determine whether all money collected is distributed and for what purposes any remaining money is being used, (admin, social pension).
- ☐ Assess a sample of contractual relationships between collecting societies in the music industry and other users such as hoteliers and places of employment. Determine how these contracts are structured and how royalties are fixed.
- ☐ Determine whether collecting societies, both nationally and internationally, collect for members only and or for non-members. Assess how the royalties of non-members are treated and distributed, including the effort taken by collecting societies to trace non-members whose royalties are in their custody.
- ☐ Assess reciprocal agreements between collecting societies and their counterparts, and determine who owns the rights in such a relationship. Are rights assigned to third parties without the consent of the owner of those rights?



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BACKGROUND: TOR cont

- ☐ Assess how reciprocal agreements operate among states. Can South Africa, for example, direct how reciprocal agreements should be structured in terms of Section 4 of the performers protection Act, 1967?
- ☐ Assess contractual relationships among artists and big recording companies, such as Sony, EMI, Gallo and Universal and publishing houses pre-and post-Copyright Amendment Act, 2002, and the Performers Protection Amendment Act, 2002.
- ☐ Determine whether accredited collecting societies are complying with the Copyright Regulations regarding the administration and distribution of needletime royalties.
- ☐ Assess how foreign broadcasters treat the playing of music of South African artists and composers who do not belong to collecting societies and where no reciprocal agreements agree. Determine if any royalty is payable, to whom it is payable and how such royalty is treated by the laws of various countries where it is collected.



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BACKGROUND: TOR cont

- ☐ Assess all licenses issued by ICASA to public and private radio and TV stations in relation to music genres. Is there compliance with the terms of the license? How can enforcement be improved?
- ☐ Determine whether collecting societies are complying with the general rules of corporate governance in terms of relevant legislation and the Copyright Regulations, 2006, which regulate the administration of the needletime royalty.
- ☐ Assess the efficiency of legislation in South Africa to deal with the concerns raised above.



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Stakeholders in the CRC process

Collecting organisations

- The Southern African Music Rights Organisation Ltd (SAMRO);
- Performers Organisation of South Africa (POSA);
- South African Music Performer's Rights Association (SAMPRA);
- National Organisation for Reproduction Rights in Music in Southern Africa Ltd (NORM);
- The Recording Industry of South Africa (RISA);
- Dramatic, Artistic and Literary Rights Organisation (DALRO); and
- South African Recording Rights Association Ltd (SARRAL), was under liquidation.

Role players in the music industry

- SABC, Primedia Broadcasting, the SABIDO group (etv), National Association of Broadcasters, Multichoice, M-NET, Telkom, Vodacom, the Internet service providers Association (ISPA), the wireless Application Service Providers Association (WASPA), Sony Music Entertainment Pty Ltd, EMI Music South Africa, Universal Music (Pty) Ltd and the Gallo Record Company Ltd.

Government Departments

- Department of Arts and Culture
- ICASA
- National Director of National Prosecutions (NDPP)



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ART OF THE PROBLEM

Introducing challenges in the creative industry

- ❑ When a matter is protected by copyright law, any reproduction or distribution or communication of the work to the public may not take place without the consent of the creator of the work or the person to whom the creator's rights have been assigned to.
 - However, in other situations some acts may be performed without the consent of the owner of the copyright, subject to terms and conditions such as, payment of royalties to the rightful owner, as agreed to by the owner or representative or determined in terms of a statute (such as the Copyright Act) a court.



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ART OF THE PROBLEM cont

Challenges in the creative industry

- ☐ there is no payment of royalties in the form of repeat fees and commercial exploitation for actors.
 - ☐ royalties have not been paid to artists;
 - ☐ failure of the national broadcaster to pay for the use of mechanical rights and music videos.
 - ☐ artists die as paupers without receiving royalties;
- ☐ the sector is currently not organised for negotiation purposes;
- ☐ low levels of local content and lack of monitoring;
- ☐ there is lack of formalisation of the creative industry which exposes it to abuse;
- ☐ enforcement agencies are not coordinated to deal with issues of piracy/ counterfeiting.
- ☐ Inadequate funding for music development;
- ☐ there is unfairness in contractual agreements which result in the signing away of party's economic rights and the lack of updated industry contracts for freelance performers;
- ☐ the operations of mobile service providers who distribute content without licenses.
- ☐ Collecting societies non compliance with sound corporate governance principles.



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ART OF THE PROBLEM cont

Challenges in the creative industry

- ☐ there is lack of recognition of the moral and economic rights of performers;
- ☐ treaties that make provision for the recognition of the moral and economic rights are not ratified;
- ☐ there is no payment of needletime royalty;
- ☐ there is inadequacy regarding reciprocity in the payment of royalties from other jurisdictions;
- ☐ disputes are not resolved speedily;
- ☐ the digital environment is not catered for in the current Copyright Act, due to in part, failure to ratify the digital Treaties.



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ART OF THE PROBLEM cont

Challenges in the creative industry

- ☐ lack of access to education, training and information about the economics of the industry and lack of transparency and accountability of key players;
- ☐ The tracing of unclaimed royalties beneficiaries;
- ☐ musicians lack the legal protection and benefits because of the inadequate definition of musicians status as workers;
- ☐ musicians living outside Gauteng isolation; and
- ☐ allegations of racism and sexism in the industry.



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CRC RECOMMENDATIONS

Key Proposals in the CRC Report

- ☐ The amendment of the Copyright Act by adopting *inter alia* the right to communicate literary and musical works to the public and the right to make available copies of sound recordings.
- ☐ The copyright law should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant collecting society (SAMPRA, NORM or SAMRO).
- ☐ Legislation be amended to allow for one Collecting Society per set of rights with regard to all rights governed by the Copyright Act of 1978. (performance, needle time and mechanical rights).
- ☐ The law should be amended to allow for all music-rights collecting societies (SAMRO, NORM and SAMPRA) to fall within the ambit of the Regulations issued under the Act.
- ☐ The legislation to be amended as follows: retention of music usage information to be compulsory for essential music users.
- ☐ Provide that the royalties payable for the use of sound recordings be divided equally between the copyright owners and the performers-50% split.



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RECOMMENDATIONS cont

Key Proposals in the CRC Report

- ☐ The Copyright Act must be amended to allow rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied.
- ☐ The Acts should be amended to provide that needle time be divided equally between the owner(s) of the copyright in the sound recordings and the owner(s) of the neighbouring right to needle time.
- ☐ The Copyright Act must be amended to include a section modelled with reference to the US Copyright Act that provides for the reversion of assigned rights, 25 years after the copyright came into existence.
- ☐ The definitions of local music contained in the principal Act should be enlarged.
- ☐ The Copyright Act should be amended to adopt “the right to communicate the work to the public” and “the making available right” as two new exclusive rights of copyright owners.



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RECOMMENDATIONS

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Key Proposals in the CRC Report

- ☐ The Copyright Act and associated legislation must be reviewed so as to bring it within the modern trends in the copyright regime.
- ☐ The Minister of Trade and Industry should liaise with the Minister of Communications with a view of encouraging the SABC and royalty collection agencies to effect payments of royalties to musicians retrospectively from 2006 when the Copyright Act and the Performers Protection Act, came into legal force through Regulations.
- ☐ Presidential Task Team of Deputy Ministers for the Creative Industries was established.
- ☐ An interdepartmental committee at the level of Directors- General or Deputy-Directors General should be appointed with a view of implementing the recommendations of Commission.
 - ☐ Task team was established. The Task team report was provided to the Portfolio Committee in 2015.
- ☐ **the dti** urged to draw up standard contracts between performers and record companies that are fair to both sides and both parties are encouraged to use.



RECOMMENDATIONS cont

Key Proposals in the CRC Report

- ☐ Collecting societies that currently fall outside the ambit of the Regulations should be given a time period after the date of amendments to reduce their administration costs in order to be in line with the requirements of the Regulations.
- ☐ Independent Communications Authority of South Africa (ICASA) should include as a condition in the broadcasters' licences that compliance with needle time and copyright obligations is compulsory and that a repeated failure by broadcasters to comply should lead to cancellation of their licences.
- ☐ Local content for public, private and community radio stations should be 80%, 50% and 80% respectively.
- ☐ Adherence to good principles of corporate governance must be compulsory for collecting societies.
- ☐ Provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights.
- ☐ The strategic plans of the Companies and Intellectual Property Commission (CIPC) should include targets for tangible deliverables arising from the supervisory function of collecting societies and
- ☐ **the dti** strategic plans should incorporate high levels plans and targets for the implementation of the CRC's recommendations.



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Treaties Informing the Bills

International prescripts that influence the review of legislation in the creative industry amongst others, the following:

- ☐ The CRC recommended an impact study should be conducted and finalised to determine the appropriateness to ratify and implement the WIPO Internet treaties.
 - ☐ **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), South Africa is not a member;
 - ☐ **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member;



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Way forward

- ☐ **the dti** in the process of reviewing mechanisms to implement some of the CRC recommendations even before the Copyright Amendment Act is enacted.
 - ☐ Quick wins sought for the creative industry role players.



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