Subject: FW: South Africa - Copyright Amendment Bill

From: Dean (TRADE) <ec.europa.eu>
Sent: Thursday, February 21, 2019 7:59 PM
To: Art.4(1)(b) TRADE <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>
Cc: Art.4(1)(b) TRADE <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>; Art.4(1)(b) CNECT <ec.europa.eu>

Subject: RE: South Africa - Copyright Amendment Bill

Thank you for consulting us.

As a general remark, it seems that some amendments proposed in 2015 were not taken on board and they are included again in this proposal, sometimes slightly adjusted. For this reason some of our comments from 2015 are still relevant. I included them in our analysis below. I refer as well to the points made by you. (I refer to the numbering of the sections of the original act.)

Comments to Copyright Amendment Bill:

- **[SECTIONS 10, 11A and 11B - Computer programmes]** Further to your comment - It is up to countries to grant the making available right for computer programs. For instance the EU did not follow this option – only the right of reproduction, translation and distribution are mentioned in the Directive 2009/24/EC. But this does not prevent MS from inserting the making available right in their national laws, in compliance with the international obligations, should they wish to do so. So, if SA does not want to extend the making available right to computer programs, this does not seem to be contrary to the international conventions.

- **[SECTION 6A, 7A and 8A – Share in royalties]** We agree with your assessment.

- **[SECTION 7 B (4) – Resale royalty]** The current drafting of this section lacks of 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. Concerning a copyright nature of resale right you refer to, we would not be so categorical. The resale right is included in the Berne Convention so there is no issue if it is a part of the copyright legislation.

- **[SECTION 9A – Royalties regarding sound recordings]** Section 9A was adopted as in a 2015 draft law. In commented draft law there are only few changes proposed, for instance the inclusion of indigenous community (see comment on Chapter 1A). Thus, we can repeat our comment from 2015, i.e. “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.”

- **[SECTION 12A – Fair use]** Section 12A is a second attempt to introduce fair use provisions in South Africa. Some parts of the drafting are somehow improved in comparison to the 2015 draft, so we would not go into details. However, we can repeat with full confidence a part of our comment from 2015, i.e.: “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(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.”

- **[SECTIONS 12B-D, 19B-D and 39B (Clause 34) – Specific exceptions]** We understand that 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 (“shall”; e.g. for quotation, illustration for teaching...), Section 12 D, Section 19 B (1) and Section 19 C deal with optional exceptions (“may”). This is where a general application of Clause 34 seems to be 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 seems to create a very large scope which goes 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.

- **[SECTION 12C – Temporary reproduction and adaptation]** Section 12 C related to temporary reproduction and adaptation is only a "may" provision whereas what is at stake is the effective functioning of transmission systems – e.g. acts of browsing and caching. Indeed this provision relates to the functioning of internet and should, as such, be considered as being mandatory.

- **[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”.

- **[SECTION 22A – Orphan works]** We may repeat some of our comments from 2015 as the text changed only slightly. Concerning the definition – it is still quite general. It is would be good to add a reference to a “diligent search” obligation prior to the use, which is included further in the text. Concerning the system itself – it would be still 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.

- **[CHAPTER 1A (Sections 22B-22F) – 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 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, are they subject of any regulations in this regard? It is not clear for us. Moreover, concerning definition of collecting societies, it might be useful to add to the definition a condition that collecting societies act “for collective benefit of the members”. However, it is only a suggestion coming from EU experience and not international obligations.

- **[SECTION 28P(1) – Exceptions in respect of technological protection measures]** We can repeat our comment from 2015, i.e. “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).”

- **[SCHEDULE 2 (SECTION 22(3)) – Translation licences & Reproduction licences]** We can repeat our comment from 2015, i.e. “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.”
Comments to Performers' Protection Amendment Bill (thanks for [Art.4(1)(b) help):

- **[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).
- **[SECTION 3A(3)(c) – Transfer of rights]** Section 3A(3)(c) introduces an automatic revocation of rights after 25 years. It would be interesting to know the rationale of this restriction.
- **[SECTIONS 8F – Exceptions in respect of technological protection measures]** This section provides for an exception in respect of technological protection measures. Please see our comment above to Section 28P(1).
- **Exceptions** – the bill provides that exceptions to copyright also apply so we should keep in mind the comments above to the exceptions.

We do not have strong view on your comments concerning Clause 23(b) and Section 27.

I hope it is clear and it helps. Please do not hesitate to call me if you have any further questions.

Kind regards,

[Art.4(1)(b)]

---

From: [Art.4(1)(b) TRADE]
Sent: Wednesday, February 20, 2019 8:35 PM
To: [Art.4(1)(b) CNECT]
Cc: [Art.4(1)(b) TRADE ; Art.4(1)(b) CNECT]
Subject: RE: South Africa - Copyright Amendment Bill

Importance: High

[Art.4(1)(b)]

Dear [Art.4(1)(b)], please find below my first assessment of the draft © Bill. I raise all concerns or questions (to be discussed with you) I have found so far in the order of appearance in the text - not according to the importance.

Could you comment on them and add other topics/issues I have not seen yet? Could you also check whether our first comments we made in 2017 could be still valid?

In doing so, I think we could have enough element to intervene as a foreign Public Authority.

Thanks again for your kind cooperation.

[Art.4(1)(b)]

1. Clauses 4, 6, 8 and 10 are the key provisions in the Bill as they introduce the making available right (in view of the future accession to WCT & WPPT). However, these ‘digital rights’ (not sure that this wording is appropriate and/or legally dangerous) have not been extended to broadcasts, published editions and computer programmes (Sections 10, 11A and 11B). Computer programmes are deemed to be literary works under the Berne Convention and the WCT. However, subject to rights for computer programmes covered by WCT, internationally, not all countries grant these rights, correct? It’s not a point that seems to me to have high priority for anyone.

2. No criminal sanction (Section 27) for copyright infringement in relation to the new rights of ‘communication to the public’ and ‘making available’ where the person knows that the act is infringing and the act is undertaken for his financial gain to the prejudice of the copyright owner. This undermines the ability of
right-holders to combat online infringement. However, this is questionable whether the EU can make this point.

3. Clause 7 (Sections 7B to 7F) on resale right is confusing. The right to resale royalty is not a right of copyright, but a right attaching to the physical works that are subject to this right and subject to those works also qualifying for copyright protection. The provisions must appear elsewhere in a separate legislation and be delinked from the copyright provisions.

4. The consequence of the application of National Treatment to Sections 6A and 7A is that foreign authors who have authorised rights of use or assigned copyright to South African persons under South African law, will have an unwaivable claim against the South African right-holders and against South African collecting societies. The same consequence of National Treatment applies to Section 8A in respect of foreign performers in audio-visual works owned by South African copyright owners and/or where South African law applies to the contracting of their performances. There is no policy statement foreseeing this outcome. No change, this remains the same.

5. Clause 23(b) is about assignments of copyright for literary and musical works. The amendment provides for a 25-year limit on these assignments. Is it in line with the international practice?

6. Clause 24 relates to orphan works and the potential liability for users. Do you think it is acceptable as such and/or in line with our Directive? As already commented in our first contribution “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).” Furthermore, I think that we can reiterate our concerns we raised in our last contribution (see again attached).

7. As Regards “fair use” and other exceptions, I would suggest to recall our first comments which reads :” 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.”

I wonder whether the following provisions are in breach of South Africa’s treaty obligations under the Berne Convention and TRIPS and/or will create difficulties to SA’s accession to the WCT, the WPPT, the Beijing Treaty or the Marrakesh Treaty.

8. Clauses 13 (amending Section 12), 19 and 20 (inserting Sections 19B and 19C) on exceptions coupled with the contract override provision in Clause 34 seem to create a very large scope which go beyond the 3-step test. Is this enough for rising it as a general statement while in our previous contribution we highlighted “fair use” and Section 19C?

9. Clause 20 about Section 19D on disabled people. Does it include any of the content required by Article 4 of the Marrakesh Treaty? If not, it would therefore fail to meet the conditions for a copyright exception or limitation permitted by the Treaty and, in the circumstances, will not meet compliance with the Berne Convention either.

From: Art.4(1)(b) (TRADE)
Sent: Friday, February 15, 2019 11:32 AM
To: Art.4(1)(b) (CNECT); Art.4(1)(b) (CNECT); Art.4(1)(b) (CNECT); Art.4(1)(b) (CNECT)
Cc: Art.4(1)(b) (TRADE)
Subject: South Africa - Copyright Amendment Bill

Dear friends, dear colleagues
As you may remember, we informed you in our organisation of work on international files with you about the need for a legal analysis of the copyright reform in South Africa.
A notice of the National Council of Provinces (NCOP) Select Committee’s call for comments has just been posted: https://www.parliament.gov.za/committee-notice-details/115.
As feared and as expected, the deadline date is 22 February 2019, 7 days from now.

Please find attached the two draft bills to be assessed and the current © Act:

You will remember that we had already intervened in 2016 at an earlier stage, see attached.

<< File: 150916 COMMENTS FROM THE EC ON THE COPYRIGHT AMENDMENT BILL OF THE DTi.docx.pdf >>
Furthermore, an element of context is also extremely important, unrelated to this process is that there is now a broader circle of SA Government departments that will have a direct interest in these draft Bills following the Cabinet decision to accede to the international treaties, WCT, WPPT and Beijing. The record of the Cabinet decision on

We work also on our side but we have to identify the most relevant concerns and we need your expertise, e.g. ‘Fair use’, new copyright exceptions, coupled with contract override and compliance with Berne, TRIPs, WCT, WPPT and the Beijing Treaty; exception for persons with a disability and compliance with the Marrakesh Treaty; unwaivable right of authors and performers to a royalty, coupled with contract override; distributions by collecting societies to foreign rightsholders and meeting compliance with Berne, TRIPs, WCT, WPPT and the Beijing Treaty; do the new copyright exceptions amount to expropriation of property?; retrospective effect of certain provisions relating to the unwaivable rights by authors to a royalty and the 25-year limit on assignments of copyright already made; exhaustion of rights, permitting parallel importation and reducing the scope of secondary infringement by certain forms of distribution... 

.........and maybe other important issues that I’m missing now....

As regards both draft bills we have received the attached brief from IFPI

<< File: IFPI.pdf >>

Thanks a lot for your cooperation. Tell me who will be in charge of this file in your Unit
I’m of course available for more info.

Amitiés