



national film and video foundation
SOUTH AFRICA

an agency of the
Department of Arts and Culture

National Film and Video Foundation (NFVF)

Submission to the Parliament Portfolio Committee on Department of Trade and Industry on the Copyright Amendment Bill [B12-2017]

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1. INTRODUCTION

The National Film and Video Foundation (**NFVF**) is an agency of the Department of Arts and Culture (**DAC**), responsible for the development and promotion of the South African audio-visual industry. Our main role is to fund the development, production and to a limited extent the marketing and distribution of audio-visual content, including shorts, documentaries, features and animation formats.

We acknowledge the important role of the Department of the Trade and Industry (**DTI**) who have been funding partners in local content development through its Film and TV Production Incentive programmes.

We believe that the amendment of the Copyright Act, 1978 presents an opportunity for the DTI as well as the creative/cultural industries to ensure that this process brings the Copyright Act in line with international best practice, technological developments as well as taking stock of other legislation and policies, particularly the Berne Convention for the Protection of Literary and Artistic Works, 1886.

2. BACKGROUND

The NFVF welcomes the revision of the Copyright Act, 1978 by the Department of Trade and Industry (DTI). The revision is long overdue and the task of overhauling the economic rights of South African content producers must be geared towards fair and balanced protection.

There have been significant technological developments in the audio-visual industry since the inception of the principal Copyright Act, 1978, that have changed how content is created, distributed and consumed by audiences. As such, the current legislative amendment process must take such developments into account. In the same breath, a balanced protection of performances has become even more important in the digital age where privacy rights are increasingly encroached and personality rights have found increased focus and protection

As a primary piece of legislation affecting and impacting the work of filmmakers and producers of audio-visual content, this submission serves to discuss and raise some issues relating to the suggested amendments, as well as put forward the NFVF's recommendations.

3. COMMENTS AND RECOMMENDATIONS

Section 1 of the principal Act

"accessible format copy" and "person with a disability"

The NFVF welcomes the efforts of the DTI towards a fair balance between access and protection. The inclusion of this definition as well as the related definition of **"person with a disability"** and the inclusion of the proposed sections 12A(2)(c) and section 19D which allows the adaptation of copies into accessible formats will increase the accessibility of audio-visual content.

"Audio-visual fixation"

The NFVF welcomes the addition of a new definition to encompass audio-visual products and the effort to ensure alignment of the definition used in the Copyright legislation with that used in the Performers Protection Act. It is however noted with concern that this definition is not a definition outright but rather one which is incorporated by reference to the Performers Protection Amendment Bill, which to date has yet to be enacted.

To the extent that there is any delay or contention around the definition of audio-visual fixation in the Performers Protection Act, then a *lacuna* continues to exist in the Copyright Act. The NFVF suggests that a definition be included outright in the Copyright Act as it is a form of work which has been inadequately captured by the definition of *cinematographic film*. Further the interests of those who would find protection through the inclusion of the definition in the Copyright Act, being the entire audio-visual industry, goes further than those parties whose interests are protected by the Performers Protection Act.

Alternative suggested wording:

The embodiment of a series or sequence of related images intended to be viewed as moving images whether or not accompanied by sounds or the representations thereof, reproduced and intended to be communicated through a machine or device for exploitation in theatres, on television, video or any other form of distribution or medium.

For sake of completion, we include the NFVF's comments on the definition of audio-visual fixation as proposed in the Performers Protection Amendment Bill.

"audio-visual fixation"

The NFVF welcomes the addition of a new definition as contemplated in the Performers Protection Act, 1967. The proposed definition is in line with international legislative instruments, it is suitably broad and in line with modern international practice. The NFVF welcomes the inclusion of an 'audio visual' definition of works which goes beyond the restrictions embodied in the now outdated term 'cinematographic film'. We believe this is an all-inclusive definition which moves beyond film.

*However, it is curious that this definition does not go further to replace the now outdated definition of **cinematographic film** completely, as it would be contemplated in the definition of **audio-visual fixation**.*

"commercial" commercial resale", "commercial exploitation",

The NFVF notes the amendment of the definition of "commercial" to ensure that it is understood in applicable to works. However the clarity on the definitions of "*commercial resale*" and "*commercial exploitation*" have been omitted from the Copyright Bill.

The NFVF recommends that clarity on the definitions of the terms *commercial resale*, and *commercial exploitation* be given as they will have a marked impact on the protection and limitation of protection imposed on copyrightable works.

“Performer”

The NFVF welcomes the addition of a new definition for “performer” and the effort to ensure alignment of the definition used in the Copyright legislation with that used in the Performers Protection Act. The reference to a definition in Performers Protection Amendment Bill, which to date has yet to be enacted is problematic for the same reasons discussed under “audio-visual”. Definitions should appear in both Bills to ensure that if one comes into effect before the other, definition provisions should stand on their own.

Further, the NFVF also notes the broadening of the definition of performer to include the performer of musical works. It is noted that the resulting definition is quite a broad, global encompassing definition, based on function. It brings amateurs into the realm of performer with no distinction based on professionalism. Particularly with regard to non-fiction (documentary) content, this could create a particularly onerous rights clearance regime. For example, it is possible that a documentary maker could require a release for every voice sung or heard in a scene making it difficult if not impossible to secure all rights and/or releases.

As such, the NFVF welcomes the amendment of section 12 of the Principal Act which includes a fair use clause that would prevent unreasonable application of copyright protection and presents a defence for non-compliance where application of the protection can be shown to be unfair or unbalanced and could not have been contemplated by the drafters or serve the purpose of the provision.

Section 8 of the principal Act

The NFVF welcomes the DTI’s efforts to afford all audio-visual fixations the protections, which were previously reserved for cinematographic films.

However the NFVF notes with concern the extension of the royalty right inserted at the end of section 8:

: Provided that, notwithstanding the transfer of copyright in a cinematograph

film or an audiovisual fixation by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such film or fixation shall have the right to claim an equal portion of the royalty payable for use of the copyright film or fixation.”.

The royalty right has been extended beyond the author to all users, performers, owners, producers and authors of the audio-visual work. This is quite a significant change to the current format and would have significant effect on the ability of the owner of the audio-visual work to exploit the copyright conferred on the work.

Section 12 and Section 12A of the principal Act

“Fair use”

The NFVF welcomes the definition the inclusion of fair use provisions. Fair use is the legal principal of limiting the rights of the copyright owner. The NFVF however notes the potential conflict posed by the inclusion of fair use provisions while the principal Act continues to contain fair dealing provisions, which is also a limitation of the rights of the copyright owner. Further the NFVF is concerned that the fair use provision in its current form potentially allows for whole sale copying of works for exempted purposes.

Section 20 (1) and Section 20(2) of the principal Act

The NFVF welcomes the protection of the author is respect of audio-visual fixations and cinematographic films included in the amended Section 20.

This amendment will ensure that the author of work shall remain acknowledged regardless of how the rights in the work are exploited and the author will have the authority to object to any distortions or versions which would be prejudicial to the honour or reputation of the author. This will serve to protect scriptwriters in the South African audio-visual industry in a manner in which they have never enjoyed protection before.

Section 21(1)(c) (and Section5(2)) of the principal Act

Section 21 of the Copyright Act of 1978 deals specifically with the ownership of copyrights. The NFVF welcomes the amendment of this section in respect of cinematographic works and audio-visual fixations to ensure that in the absence of contract, ownership shall vest in the commissioning party, however, author of the work *shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable **exclusively by the author.***

Alternatively, commissioning parties should by default receive limited exclusive licenses and repeats of the work for a limited period. Thereafter the copyright in the work should revert to the creator or author. Rights that the commissioning party does not intend to exploit should also revert to the author after a stipulated number of years have lapsed; which number of years should be kept to a minimum.

This reasoning is applicable to Section 5 of the Principal Act as well to the in respect of works funded by the State.

Section 22A of the principal Act

“Assignment and licenses in respect of orphan works”

The NFVF welcomes the addition of a mechanism of the assignment and licensing of orphan work. However the mechanism continues to be quite onerous and it is requested that an easier mechanism be considered to increase access to orphan works. This is made more troublesome by the fact that the copyright shall vest in the state perpetually.

The NFVF recommends an amendment which would see easier usage of orphan works, and free usage after a reasonable period, for example 50 years after the classification of a work as an orphan work.

Schedule 2 Part B (5)

“License for audio-visual fixations”

The NFVF welcomes the provision of mechanisms for a translation licences and a reproduction licence in respect of systemic instructional activities, but suggests that in respect of systemic instructional activities, it should be amended that to the extent that these systemic instructional activities were produced for commercial gain, then ordinary conditions of contract should apply, particularly as there is no definition is “*systemic instructional activities*”.

4. NOTABLE OMISSIONS IN THE COPYRIGHT AMENDMENT BILL

“Works”

The NFVF notes that the definition *audio-visual fixation* has not been included in the definition of *works eligible for copyright* as set out in section 2 and the definition of cinematographic work, which is encompassed by the definition of audio-visual fixation, remains. .

Alternative suggested wording:

S2 (1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright -

(j) audio-visual fixations

Section 3 of the principal Act

“Copyright by virtue of nationality, domicile or residence, and duration of copyright”

The NFVF notes that the definition *audio-visual fixation* has not been contemplated in this section.

Alternative suggested wording:

S3 (2) (b) The term of copyright conferred by this section shall be, in the case of...

(b) *audio-visual fixations, cinematograph film...*

Section 4 of the principal Act

“Copyright by reference to country of origin”

The NFVF notes that the definition *audio-visual fixation* has not been contemplated in this section.

Alternative suggested wording:

S4(1)(d) Copyright shall be conferred by this section on every work which is eligible for copyright and which

(c) being an *audio-visual fixation* or cinematograph film, is first published in the Republic...

The establishment of a Copyright Registration Bank

The NFVF acknowledges that there is no copyright in ideas. We have been approached by filmmakers seeking to protect their works – whether in the form of scripts or treatments. The nature of the local film industry is largely developmental. Filmmakers work within an environment in which contractual agreements and protections are unavailable in their interactions whether due to a lack of resources or a lack of knowledge.

A Copyright Registration Bank would place on record a verifiable account of the date and content of the work in question, so that in the event of a legal claim, or case of infringement or plagiarism, the copyright owner can produce a copy of the work from an official government source.

In accordance with the Berne Convention, 1989, the NFVF is of the view that copyright registration should not be a condition for protection, but rather an additional measure available to the creative industry to ensure that collaboration and consultation can occur within an environment in which additional legal assurance is available.

Definition commercial resale and commercial exploitation

The NFVF recommends that clarity on the definitions of the terms commercial resale and commercial exploitation be given as they would have a marked impact on the protection and limitation of protection imposed on copyrightable works.

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Authorised by: Zama Mkosi

Chief Executive Officer

National Film and Video Foundation