

II: EXECUTIVE SUMMARY OF MAIN ISSUES OF CONCERN REGARDING THE BILL

1. Virtually all the parties that have commented on this Bill have lauded the DTI for introducing legislation that is aimed at providing protection for traditional knowledge. All these parties are however concerned with the manner in which the department sets out to introduce this legislation, namely, its attempt to provide protection of traditional knowledge through the existing intellectual property rights systems (namely trademarks, artistic designs, copyright and performers' rights).

2. Creative Business (SAMRO, PASA, DALRO, SAFACT) have submitted to the NEDLAC Forum detailed comments on the Bill so far as it relates to the Copyright Act, 1979, and the Performers' Protection Act, 1967. The Bill has been the subject of much criticism from the legal profession, amongst another by Mr. Justice Louis Harms, Judge of Appeal of the Supreme Court of Appeal of South Africa (A few negative trends in the field of intellectual property rights in 2009 THRHR, vol. 72, page 175.) The crux of this criticism is that existing intellectual legislation is not capable of accommodating a set of mechanically prepared amendments to protect indigenous knowledge of the same basis as other matter protected by the legislation. Specific issues are:

2.1 The definition of "indigenous community" and its application to the creation and holding of rights under the legislation.

2.2 The definitions of "traditional works" and "traditional intellectual property." A serious problem with the Bill is that definitions are used inconsistently. This will create uncertainty in the application of the law. There could be overlaps between traditional works and other form of copyright works, which will create a conflict in interpretation and application.

2.3 Copyright is only conferred to a traditional work if it is created after the commencement of the Act or 50 years before. As traditional works are normally understood to have existed for a substantial period of time, this means that the award of the copyright will have minimal benefit to the performers of traditional works and the communities they come from.

2.4 The proposed amendment to section 9A of the Copyright Act, 1978. Section 9A was written to regulate specifically collecting societies in the field of sound recordings, and it cannot be adapted otherwise. We proposed an alternative solution at NEDLAC, which was only accepted by Government in part.¹

¹ These Amendments purport to extend the provisions meant for the administration of "Needletime" rights – i.e. the performance rights in sound recordings – to also include other copyright works (e.g. literary works, artistic works, cinematograph films, computer programmes, published editions etc). The rights introduced in respect of the Needletime rights regime are "remuneration rights" rather than "exclusive rights". While remuneration rights do not present any problems with respect to the administration of Needletime rights, their introduction in respect of the other copyright works would however, present serious problems. This is because this would amount to the erosion of exclusive rights, and result in the contravention of international treaties that South Africa belongs to. During the NEDLAC process when this Bill was being discussed this issue

2.5 Royalties for the use of TK are to be paid to a nationally controlled fund, not to the community. Also, a member of an indigenous community who makes a commercial benefit from the traditional work is liable to pay a royalty on that commercial benefit to the fund. Traditional performers will thereby be deprived of a part of their income through these measures, in return for no apparent benefit.

2.6 The database for traditional works, will probably be redundant and very costly to create and maintain. It will probably become a “first come, first served” solution that will affect ownership claims. As there is not examination procedure or validation for entries in the database until there is a dispute, it would be easy for all kinds of items to be recorded as traditional works.

2.7 An ill-founded definition of traditional knowledge, coupled with a database which is bound to be unreliable, with no funding for the database, and with many or unclear competences, will make indigenous traditional knowledge protection unworkable under this Bill.

3. The regulation of collecting societies

3.1 Even though not part of the original plan of introducing TK protection, the government embarked on introducing changes to copyright law with an intention to regulate collecting societies. Creative Business holds the following views on this aspect of the Bill

3.2 The regulation of collecting societies (in addition to the Needletime rights societies that are regulated at present) has been referred to in para 2.4 above. Business is not opposed to the regulation of collecting societies for literary and musical works, but has proposed that this be done in consultation with the affected parties to allow for their comments on how this should be done. Furthermore such regulation must facilitate the efficient functioning of these organisations rather than impede it through the introduction of impractical rules and compliance requirements. Any regulation of collecting societies should not seek to fix what is not broken.

4. The proposal regarding the introduction of the “communication to the public” right

4.1 The new Bill (as well as the Needletime Rights amendment) presents an anomalous situation in that the Bill provides for the concept of “communication to the public” in respect of traditional works (the proposed Section 2(B)). This right had equally been introduced as part of the 2002 amendment to the Copyright Act (which introduced Needletime Rights), but such a right is not provided for in respect of other conventional copyright works (such as literary works, musical works, artistic works and cinematograph works). This creates an imbalance that should be rectified.

4.2 The “communication to the public” right is used in current international copyright law to ensure that the usage of copyright works through new technology media usages (such as the exploitation of musical works as ringtones and through the internet), is only done by prior permission of the rightsholders. Without this right in the digital age new media users have flatly refused to pay royalties in respect of the usage of copyright works through these media. This is the

was raised by representatives of Business and recommendations were made on how best to deal with the situation in order to ensure that there is no erosion of exclusive rights.

situation in South Africa, where authors, composers and other owners of copyright works have lost, and continue to lose, millions of Rands in unpaid royalties. The introduction of the “communication to the public” right in respect of sound recordings, and now as proposed, in respect of traditional works, while not providing the same protection for the musical and literary works embodied in sound recordings creates a situation where the usage of the one work would encourage the infringement of the other. It is a situation akin to saying that the person who created the orange juice (the musical works) is not entitled to any compensation, and only the person who created the orange juice bottle (the sound recording) is entitled to do so.

4.3 The destruction of the right of private ownership of intellectual property rights

There is also the danger that the new Bill will encroach into the ability of individuals to have private ownership of a work that they have created, if such work is based on traditional knowledge, e.g. a work based on a traditional musical style. An example was given in the policy document to the traditional work “Mbube”, which through legal genius was restored to Mr. Solomon Linda as being its rightful owner. The policy suggests that the issues concerning this work needed to have been dealt with in terms of the regime proposed in the Bill (i.e. as a traditional work owned by a community). This is worrying in that it would suggest that those persons who create original musical works could, suddenly, find themselves no longer owning the copyright in the works they have created, merely on the ground that these works are based on traditional knowledge or traditional musical styles. Conversely the Bill introduces the possibility of having one work protected as a normal copyright work, owned by an individual, and at the same time as a traditional copyright work owned by a community, a situation that is certain to present many problems.

4.4 Miscellaneous Provisions

There are other aspects of the Bill which we believe are likely to create difficulties. These relate to:

- The inadequate definition of terms and concepts;
- The provision that traditional knowledge copyright works shall exist for a period of 50 (“fifty”) years, (which creates a conflict with the concept of traditional knowledge as existing for perpetuity);
- The lack of protection for moral rights;
- The retrospective application of the Bill;
- The undefined nature of the traditional works database, and
- Issues relating to the community’s ability to own rights.
