



national film and video foundation
SOUTH AFRICA

an agency of the
Department of Arts and Culture

**NATIONAL FILM AND VIDEO FOUNDATION SUBMISSION ON THE CYBER
CRIMES AND CYBER SECURITY BILL, 2015 AND THE CYBER CRIMES AND
CYBER SECURITY DISCUSSION DOCUMENT, 2015
PUBLISHED 28 AUGUST 2015**

INTRODUCTION

1. The National Film and Video Foundation (NFVF) is an agency of the Department of Arts and Culture responsible for the development and promotion of the South African film and video industry. Our main role is to fund the development, production and to a limited extent the marketing and distribution of content for shorts, documentaries, features and animation formats.
2. The NFVF acknowledges the important role of the Department of Justice and Constitutional Development (**DJCD**) in its efforts to combat cyber crime.
3. We believe that the introduction of the Cyber Crimes and Cyber Security Bill (**Bill**) as read with the Discussion Document, is an opportunity for the DJCD as well other stakeholders which includes the creative/cultural industries, to combat the crippling effects of piracy, counterfeiting and copyright infringement and to bring South Africa's regulatory

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framework, as it relates to cyber crime and cyber security in line with international best practice, technological developments as well as taking stock of other legislation and policies that impact on the effectiveness of the current process.

BACKGROUND

4. The NFVF welcomes the introduction of the Cyber Crimes and Cyber Security Bill, 2015. The creation of a legislative instrument, specifically targeting copyright infringement through electronic means is long overdue and the task of developing such legislation must endeavour to strike a fair balance between access and protection.
5. There has been a lot of technological developments in the film and audio-visual industry that have changed how content is created, distributed and consumed by audiences. As such, the current legislative process must take such developments into account. In the same breath, copyright protection has become even more important in the digital age where piracy is so rife and devaluing the commercial value of copyrighted works. Therefore, the NFVF hopes that the proposed legislation will be effective in countering the crippling effects of piracy and copyright infringement.

The Bill is meant to provide the public, government entities and private companies with an opportunity to play an active role in protection and controlled access to local content.

6. Copyright is an automatic right that protects cultural and creative expressions including audio-visual products. The Copyright Act, 1978 currently provides protection, the right to access while also balancing the rights of the owner. The Copyright Act has to date been considered as the primary piece of legislation combatting copyright infringement affecting and impacting the work of filmmakers and producers of audio-visual content.
7. The NFVF wishes to encourage the alignment and harmonization between the copyright infringement and protection measures contained in the Copyright Act, 1978 (read together with the proposed Copyright Amendment Bill, 2015) and those contained in the Cyber Crimes and Cyber Security Bill, 2015. This submission serves to discuss and raise some issues relating to the proposed provisions and present some recommendations.

The NFVF submission will be focused on issues related to copyright infringement. Our submission takes the form of comments where we directly respond to the copyright infringement related provisions contained in the Bill and where applicable suggested wording has been recommended.

COPYRIGHT INFRINGEMENT

8. Copyright protection is necessary for the local audio-visual sector's survival. The Cyber Crimes and Cyber Security Bill criminalises copyright infringement in a section 20 of the Bill. The NFVF is of the view that the criminalization of copyright infringement through electronic means is a necessary step in the advancement and sustainability of the audio-visual sector. Once content has been sold, downloaded, distributed or otherwise made available to the public through illicit means, it is rendered worthless or less likely to have value for other channels, platforms or distribution streams. This is particularly critical when the infringement is done through electronic means as the infringement, once enacted, then becomes almost impossible to counter or mitigate.
9. The NFVF commends the thorough understanding of the complexities and devastating effect of copyright infringement, as displayed in the 3.2.17 of the Discussion Document. Electronic means provides for viral distribution of works and thus require innovative measures of legislative intervention. The NFVF also notes and commends the attempt to align the legislative tools provided in the Bill with those already provided in the copyright laws of South Africa.
10. Section 13 of the Bill criminalises computer related appropriation of property rights and property. Section 13(3)(a) of the Bill defines 'property' to exclude works subject to the Copyright Act, 1978. However works subject to the Copyright Act, 1978 are included in the definition of Right in Property at section 13(3)(b). The infringer needs to have acted unlawfully and intentionally to deprive property rights or to prejudice the owner of such property rights to be liable for conviction.

11. Section 20 of the Bill criminalises a broad scope of activities in relation to copyright infringement and attached an appropriate punishment of three years imprisonment or a fine for those convicted of the infringement by means of a computer network or electronic communication. The infringer needs to have acted unlawfully and intentionally, while copyright subsists in the work and without the authority of the owner of the copyright, to be liable for conviction.

NFVF RECOMMENDATIONS AND COMMENTS

12. The NFVF notes that the definition of 'property' in section 13 of the Bill excludes works in which copyright subsists in accordance with the Copyright Act, 1978, but curiously includes such works in the definition of 'property rights'. While the NFVF acknowledges that equal protection is provided to property rights as well as property, it is not clear why this distinction has been made and why works in which copyright subsists are excluded from the definition of property and thus excluded from protection as property.

13. The NFVF notes the use of the term 'prejudice' as an element of the offence at section 13(1)(b). The use of 'prejudice' is the vague and the NFVF submits that the elements which would indicate prejudice be amplified in the provision to make reference to benefits lost to the copyright owner.

14. The NFVF notes that the sentence imposed for computer related appropriation as contained in section 13(2)(b) includes as aggravating factors: the extent of the prejudice and loss suffered and the extent of financial gain by the infringer.

15. The NFVF notes that the importing of works in which copyright subsists as well as the tampering with of digital protection measures or associated digital identifiers or meta data is not included as an offence in the Bill. This is contrary to the protections provided in the proposed Copyright Amendment Bill, 2015.

16. The NFVF notes that section 20 of the Bill does not appear to extend protection to exclusive licensees or sub-licensees and the protection of such parties is limited to section

13 of the Bill. The NFVF recommends that the rights accorded to copyright owners should be extended to exclusive licensees and sub-licensees.

17. The NFVF notes that the lack of authority of the owner is an element for infringement in section 20. This would criminalise the use of the unauthorised use of the work, even in instances of remixes and parodies. In line with best practice, the Bill needs to maintain a careful balance between protection and access. The Bill should accordingly include public interest, fair use or fair dealing exemptions.

18. The NFVF notes that the element of 'prejudice' is included as a necessary element of the offence at Section 20(1). The use of 'prejudice' in the section is vague and the NFVF submits that the elements which would indicate prejudice be amplified in the provision to make reference to benefits lost to the copyright owner.

19. The NFVF submits that the nature of the maximum fine contained in section 20(2) of the Bill need to be more certainly articulated. However, the NFVF cautions against the fine being expressed in relation to the commercial value or market value of the infringed products as certain audio-visual products may have negligible commercial value but are no less deserving of protection against copyright infringement. It is suggested that the fine correlates with the scale of infringement, devaluing of the integrity of the work and consequential damages attached.

20. The NFVF notes that the category of 'cinematograph film' have been included in the definition of work contained at Section 20(3). In line with modern international best practice, it is suggested that this definition either be replaced by or included 'audio-visual fixations' to ensure platform neutrality and to protect beyond the restrictions embodied in the term 'cinematograph film'.