



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 Department of Trade and Industry**  
**on the Copyright Amendment Bill of 27 July 2015**

**16 September 2015**

2<sup>nd</sup> Floor, 87 Central Street, Houghton, 2198, South Africa  
Private Bag X04, Northlands, 2116, South Africa  
Tel: +27 11 483 0880 Fax: +27 11 483 0881 Email: [info@nfvf.co.za](mailto:info@nfvf.co.za) Website: [www.nfvf.co.za](http://www.nfvf.co.za)

Councillors

Ms Mmabatho Ramagoshi (Chairperson); Mr George Leolo (Deputy Chair); Advocate Roshal Dehal; Ms Lorraine Ramathesele; Mr Phillip Molefe;  
Mr Mfundu Vundla; Ms Desiree Markgraaf; Mr Thabiso Masudubele; Ms Pamela Mashiane; Mr Lesile Mkhabela; Mr Sandile Swana; Mr Brendyn Meyer CA(SA);  
Mr Aboobaker Moosa

Chief Executive Officer: Zamantungwa Mkosi

## **1. INTRODUCTION**

The National Film and Video Foundation 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.

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 of 1978 is opportune 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 that impact on the effectiveness of the current process.

## **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 South Africa's archaic copyright regime must be towards a fair balance between access and protection.

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 amendment 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 revisions will unlock the indisputable potential of the industry as contained in the preamble of the Copyright Amendment Bill (Bill) which was published for comment on 27th July 2015.

Copyright is an automatic right that protects cultural and creative expressions including audio-visual products. The Copyright Act does not only provide protection, but also includes the right to access while also balancing the rights of the owner. 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, and also raise points that can be brought forth for recommendations.

Our submission takes the form of comments where we directly respond to the proposed revisions in the Bill and where applicable suggested wording has been recommended.

### **3. COMMENTS AND RECOMMENDATIONS**

#### **Section 1 of the principal Act**

##### **“audio-visual fixation”**

The NFVF welcomes the addition of a new definition as contemplated in the Copyright Act, 1978. 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*. It is also curious that *audio-visual fixation*, as a type of work is not then followed through and included in relation to the rest of the Act, including the definitions of *author*, *copy*, *infringing copy*, *publication* and *works* (as read with section 2 – *works eligible for copyright*). It has however notably been included in the new definition of *reproduction*.

##### **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.*

##### **“Commission”**

**Comment:** The NFVF welcomes the establishment of Intellectual Property Commission, or rather the addition of copyright determinations to the scope of the Commission for Intellectual Property (CIPC).

##### **“copyright management information”**

The NFVF welcomes the addition of a new definition which seeks to identify the copyright owner/ creator or author of a work. However in the digital framework within

which modern works are created. It is suggested that the definition be extended to include meta data and/ or other digital identifiers. It is further suggested that the term 'digital object identifier' also be included in the definition.

**Alternative suggested wording:**

**"copyright management information"** means information, *including meta data and or digital object identifiers*, embodied in a copy of a work that

- (a) Identifies the work and its author or copyright owner; or
- (b) Identifies or indicates some or all of the terms and conditions for using the work or indicates that the use of the work is subject to terms and conditions;

**"Tribunal"**

The NFVF welcomes the definition of a Tribunal, for sake of clarity, being the Copyright Tribunal as previously established in the principal Act.

**Section 3 of the principal Act**

**"in the case of copyright that vests in the state due to the fact that the owner cannot be located, is unknown or is dead, the term of such copyright shall be perpetual"**

The NFVF notes with concern that the section 3 of the principal Act has been amended to the effect that perpetual copyright will vest in the State in respect of orphan works. It is concerning that there will not be a time in which copyright does not attach to orphan works and the works become freely available for use. This also contradicts the provision in relation to anonymous and pseudonym works as contained in section 3(3) (a) of the principal Act. The NFVF suggests that the wording of section 3(3) (a) should be carried through in the amended section.

**Suggested wording:**

In the case of copyright that vests in the state due to the fact that the owner cannot be located, is unknown or is dead, the term of copyright shall *subsist for fifty years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died.*

**Section 7A of the principal Act**

**"Resale Royalty Right"**

The NFVF notes this provision introduces two undefined terms – creator and works of arts. This is problematic and it is suggested that the current reference to author be retained (or a suitable definition of creator be included). Further reference should be made to works, and not works of art. The only current reference to ‘works of art’ is in the definition of writing in relation to an ‘exhibition of a work of art’.

Reference to commercial resale is also a potential point of contention as the Act does not define what would fall within the definition of commercial resale.

The effect of the introduction of a resale royalty shall be that while the copyright persists in the work (except only for 50 years after the death of the author, in the case of orphan works which will now enjoy perpetual protection), any commercial resale of the work shall earn the author a 5 percent royalty.

**Alternative suggested wording:**

*An author of a work in which copyright subsists shall, in respect to the original work enjoy the inalienable resale royalty right on the commercial resale or resale of the right for purposes of commercial exploitation, of his or her created works subsequent to the first transfer by the author of such works.*

**Section 7B of the principal Act**

**“Proof of the author or creator”**

The NFVF suggests the establishment of a Copyright Bank, through which all works to which the resale royalty shall attach, are registered for certainty of all parties involved in the resale. This will minimise potential disputes about the identity of the author, the duration of the resale right and any other potential disputes which would defeat the purpose of this clause.

**Alternative suggested wording:**

*S7B (3) If the work appears in the Copyright Registry as administered by the Copyright Tribunal.*

**Section 10A (1) (b) (i) and Section 10A (1) (b) (ii)**

**Local content quotas in broadcasting**

The Independent Communications Authority of South Africa (ICASA) is responsible for the regulation of local content through a number of pieces of legislation which include the Broadcasting Act, the Electronic Communications Act, 2005. There is a current process underway where ICASA recently called for public comments on its position paper for the Review of Regulation on South African Local Content: Television and Radio dated 18 June 2015 in relation to the discussion document was published in the Government Gazette on 04 July The position paper proposes an increase on music

and television quotas of 2002 as well as the percentage of independently produced local content that relevant broadcasters must source from the independent production sector.

We have noted the marked difference in the proposed increases in ICASA's position paper and those that have been proposed in the above sections. We therefore anticipate that there will be uniformity between what the DTI copyright amendment process is suggesting as well as what ICASA is currently proposing once these processing are completed.

**Alternative suggested wording: 10A(1)(b) (i)**

*Broadcasting 80% of local television content in public channels, **40% of which shall be procured from independent local content producers**, consistently with applicable local content quotas **as developed by the communications regulator** ; and*

**Alternative suggested wording: Alternative suggested wording: 10A(1)(b) (ii)**

*"Broadcasting 60% of local television content in private channels, **40% of which shall be procured from independent local content producers**, consistently with applicable local content quotas **as developed by the communications regulator**";*

The NFVF is of the view that it is important that there is explicit mention of the communications regulator as ICASA is responsible for this function in terms of various enabling legislation.

**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.

However, we are concerned that the fair use provision in its current form allows for whole sale copying of works for exempted purposes.

**Section 20(3) and section 20(4) of the principal Act**

**"Moral rights"**

The amendments propose a regime in which the creator or author of the works shall be attributed as such, have protection from the derogatory distortion of the works and shall benefit from royalties attributable from “repeats of the film, television, radio, photography or art work”. The NFVF welcomes the addition of these moral rights in protection of the original creators. However the NFVF cautions as to the enforceability of these rights and whether these rights are best placed within this piece of legislation

### **Section 20A of the principal Act**

#### **“Protection of performers’ moral and economic rights”**

The amendments propose a regime in which the creator or author of the works shall be attributed as such, have protection from the derogatory distortion of the works and shall benefit from royalties attributable from distribution through audio-visual fixations ( It is assumed that YouTube and streaming platforms are some of the fixations contemplated by this provision).

The NFVF welcomes the addition of these moral rights in protection of the original creators. However the NFVF cautions as to the enforceability of these rights and whether these rights are best placed within this piece of legislation. The NFVF also cautions against platform specific protection as is posed in section 20. The protection should be platform neutral.

### **Section 22 of the Copyright Act, 1987**

The NFVF welcomes the inclusion of a ‘reversion’ right in section 22. Section 22 that after 25 years if the author or creator would like to revisit the negative position that the author or creator she initially entered into the contract, the author or creator has the option to review the initial terms of the said contract. This section does not however apply to commissioned cinematography works, and consequently does not give the filmmaker an opportunity to acquire the rights after the 25 year period.

The NFVF would also urge a revisiting of the 25 year period. It is suggested that a 10 year period would be more appropriate.

### **Section 22A of the principal Act**

#### **“Copyright vesting in the state cannot be assigned”**

The NFVF notes that this section s prevents the state, in whom all works deemed orphan works shall vest, from easily issuing licences to use orphan works, and always at a fee. This is made more troublesome by the fact that the copyright shall vest in the state perpetually.

We recommend 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.

#### **4. NOTABLE OMISSIONS IN THE COPYRIGHT AMENDMENT BILL SECTION 2 OF THE PRINCIPAL ACT**

##### **“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.

##### **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 of creator and author**

The Copyright Amendment Bill introduces the use of the word 'creator' seemingly interchangeably with the defined term 'author' defining the term 'creator' and how these two terms are distinguishable as well as linked.

### **Alternative suggested wording:**

*"Author means a creator who contributes towards works in which copyright subsists."*

*"Author means a creator who contributes towards works that are eligible for copyright protection in accordance with the copyrights laws of the Republic of South Africa. "*

### **"Creator(s)"**

*"A person who participates in programs, who conceives, creates, invents, makes, or first reduces to practice, in whole or in part, works. In the case of a copyrightable works, the author is a Creator whose original ideas become fixed in a tangible medium. An Inventor or Creator is one who founds, creates or originates works. Merely performing work in a manner that does not contribute to the constitution, creation, origination nor the founding of the Invention does not meet the definition of a Creator or Inventor. A Creator is independent of the legal determinations of authorship under Copyright law."*

## **Definition commercial resale, commercial exploitation, normal exploitation**

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

## **Section 21 of the Copyright Act, 1987**

Section 21 of the Copyright Act of 1978 deals specifically with the ownership of copyrights. The NFVF strongly recommends the review of this section in respect of cinematographic works and audio-visual content.

Section 21 currently remains unchanged in the proposed Bill and reads as follows "where a person commissions the taking of a photograph, the painting of a portrait, the making of a gravure, the making of a cinematography films or the making of a sound recording and pays or agrees to pay for it in money or in money's worth, and the work is made in pursuance of that commission, such person shall be regarded as the owner of any copyright that subsists therein".

According to this section the author (filmmaker) acquires no copyright in respect of the work and therefore has no right to use work. This places the filmmaker in a very unfavourable position especially where the person who commissions the work does not intend to exploit the various rights in the commissioned.

The NFVF recommends an inclusion of a default provision in this section that states that the author should be the owner of the work in the absence of any contractual agreement between the parties that suggests otherwise.

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 creator after a stipulated number of years have lapsed; which number of years should be kept to a minimum.