# Copyright Amendment Bill: consideration

#### [Trade and Industry](https://pmg.org.za/committee/98/)

##### 05 June 2018Chairperson: Ms J Fubbs (ANC)

### Meeting Summary

The Portfolio Committee met to attend to outstanding matters in the Copyright Amendment Bill. A Senior Parliamentary Legal Advisor presented a matrix of clauses flagged for further attention. This provided an overview and refreshed Members’ understanding of matters that remained unresolved.

The Chairperson led the deliberations on all the flagged items. All clauses that could not be resolved immediately would be finalised in the following two meetings. Clause 3 amending Section 5 in the Act and related to artists’ works funded by or under the control of the state, elicited much discussion. One Member declared that the state had to be protected from people who exploited the state while another Member said that in the absence of a contract, it was not possible to say that the state owned the work. One could not say that if the state had made a grant, the state owned the work. That was contrary to every moral right. Members could not reach agreement on that even though the clause was currently in the principal Act. It was suggested that ‘clear rights management’ be incorporated in the Bill.

Clause 11 dealt with the manner in which radio stations and others kept a record of sound recordings played in order to pay royalties due to the artist. The Committee had already decided to introduce a system of log sheets to record needle time but the question was one of enforcement, and whether failure to comply should become an offence and how such offences would be monitored. There was also the question of whether the system of a pre-arranged contract with the artists should be retained, especially as it was an extremely cumbersome process. The issue was flagged for finalisation during the week.

An area of major contention was whether the Copyright Act should be based on the ‘fair use’ or the ‘fair dealing’ principle. The Committee strongly favoured ‘the fair use’ principle but with exceptions to manage the openness of the system. The Department of Trade and Industry agreed that a hybrid model that would open up copyright was essential but attempted to persuade the Committee that it was better to base the Act on ‘fair dealing’ which was the older, more closed and restrictive system and to add exceptions to open up copyright matters. The Department had based its stance on the approach used in Singapore. One Member noted that countries that used ‘fair dealing’ had regressed; only those that used ‘fair use’ had advanced in technology. Another Member noted that one could not transpose something directly from one country to another. South Africa had to establish what it needed first and then ensure that those needs were achieved. After a lengthy discussion, it was determined that the Department had to undertake further research and make a presentation the following day.

Clause 14 amending section 12B had been flagged because of a concern that a person who had a legitimate copy of a work could make as many copies of that work as that person wished to make. The clause referred to the bona fide copying of a textbook that one had purchased. Several Members indicated that it was often better to work from photocopies than from the original work but other Members believed that the exception could allow for abusive practices. Clause 19 amending Section 19B was extended, following requests from the public, to include as exemptions to copyright, computer programs used for teaching and educational purposes as well as the use of software to make repairs, such as motor vehicle software.

The question of the ownership of copyright when there was no contract, as contained in Clause 22 amending Section 21, recognised the difference between commercial and non-commercial purposes of ownership of copyright. However, the essence of the clause was the proposal to give the author rights to a work that someone had commissioned. The intention in the Bill was to protect and empower the authors of all works, especially those who were vulnerable. However, one Member pointed out that Roman-Dutch law accepted both a written and a verbal contract as valid. While the purchaser of the commissioned work retained copyright, the artist retained the right to full use of the material. That led to a legal conundrum in the country as there could not be two owners with legitimate rights and the one who had purchased the work had to be the owner. The Committee suggested that the Canadian model be incorporated into the Bill. Some Members felt that the Canadian model was too extreme as, even if someone commissioned and paid for a work of art, the artists retained full rights to that work while the person who had paid for the commission received a licence to use the work. It was agreed that the Department would attempt to offer a solution the following day.

The matter of collecting societies as contained in Clause 25 amending Sections 22A to F led to difficult deliberations. Some Members wanted to impose BBBEE requirements on the societies or to find some other way to transform the sector. It was agreed not to restrict the societies to a single society per right in order to open up the space for black societies. There was an agreement that the societies should be registered with the Companies and Intellectual Property Commission, which would also accredit the societies.

Another question that had to be resolved was whether to adopt the Department proposal to remove the establishment of the Intellectual Tribunal but to strengthen the Copyright Tribunal. The desire to minimise such bodies and the extensive legal requirements, such as an amendment to the Patent Act, swung the vote in favour of a strengthened Copyright Tribunal. Many of the latter flagged clauses in the Bill required attention on a technical level, which was something that the Department was requested to address and present to the Committee.

The Chairperson indicated that it was hoped to advertise and call for comment the changes and additions by mid June 2018.

### Meeting report

**Opening remarks**
The Chairperson thanked the committee whip, Mr Radebe, for chairing in her absence. The Committee would be meeting on the Bill from 5 June to 7 June 2018. The Chairperson spoke about details of the Committee meeting during the parliamentary recess.

Mr B Radebe (ANC) noted that at the 31 May meeting, it had been agreed that the Committee would deal with the voluminous matrix before Members on 5 June and the Legal Advisor would indicate clauses that the Committee had agreed upon and where there were outstanding matters. The Company and Intellectual Property Commission (CIPC) had not attended the meeting and there were a number of issues where it was required to give input. The Department of Trade and Industry (DTI) would help with definitions. Once the Committee had gone through the matrix to ensure everything was in perspective, the Committee could go through the Bill, clause by clause, on 6 and 7 June.

The Chairperson noted apologies, especially that of CIPC. It appeared that the CIPC members were ‘undergoing examinations’. She welcomed Mr Zwelakhe Mbiba, Acting Deputy Director-General from the Department of Arts and Culture and from DTI, Dr Evelyn Masotja, Deputy Director-General of Consumer and Corporate, Ms Pregoria Mabaso-Muvhango, Director: Legislative Drafting, Ms Meshendri Padayachy, Deputy Director: Intellectual Property and Policy, and Mr Nkosinathi Mkhonza, Intellectual Property Officer.

**Copyright Amendment Bill: decisions and outstanding matters**
The Senior Parliamentary Legal Advisor, Adv Charmaine van der Merwe, presented the matrix document:

Long title
Adv van der Merwe suggested that the Committee should only look at the long title when the changes to the Bill were complete.

Clause 1(in the Bill) - Section 1 (in the Act) - Definitions
Adv van der Merwe stated that definitions should also be finalised at the end. She reminded the Committee that depending on final decisions, the definitions for “orphan work’ and ‘tribunal’ might have to be amended, and that the Bill would need a definition for ‘visual artistic work’ which was used in clause 7. She would look at a proposed definition that had a broader definition, after the meeting. Clause 7 referred to resale rights for artistic works and the idea was to limit that clause to visual artistic works. The Department of Arts and Culture had requested a definition for ‘user’ which DTI had promised to supply.

Clause 2 - Section 2A: Scope of Copyright Protection
No amendments.

Clause 3 – Section 5: Copyright in relation to the state
The clause dealt with what the state owned. It was agreed to remove the words ‘funded by the state’. The concern was that any work that received an incentive in any form from the state, would also belong to the state. That was problematic and would be in conflict with research legislation. The clause also provided for local organisations whereas the Act provided for international organisations. There had been a Sub-Committee decision to remove the whole clause with its restrictions and to keep only the reference to the state and prescribed international organisations. The point had not been discussed in the Portfolio Committee.

The Department of Arts & Culture was concerned that works owned by the state were being commercially exploited and made available online and shared online. That was a new issue. That asked for ‘clear rights’ management. It had not been discussed and if the Committee wanted to stop the exploitation, it would have to advertise a proposed clause before it could be included in the Bill.

Clause 4 – Section 6: The nature of copyright in a literary or musical work
No amendments.

Clause 5 - inserts Section 6A: Royalties regarding literary or musical works
The Committee agreed that the clause should provide for contractual freedom and a portion of the royalties had to go to the author, regardless of whether the author had sold the copyright, but a template was needed. The concerns were that the author could sell the work and the buyer could make copies of the work and sell them and the author would not receive anything. A concern was raised about the 50/50 split on royalties and contractual freedom. The Committee agreed that the actual template of a contract between author and buyer would be prescribed by the Minister at a later stage.

The Legal Advisor raised the question of existing contracts. It was not straightforward, and a number of scenarios had to be considered. How far back would one go in looking at agreements in the past? What if the rights had been sold to a corporation 200 years ago? What if people could not agree on a new contract? They would flood the tribunal. Within what period should agreements be re-negotiated? Members had to think about it. It was something new and would have to be advertised.
It was agreed to ask DTI proposal to redraft section 6A (1).

Clause 6 – Section 7: Nature of copyrights and artistic works
No amendment was required.

Section 7A: Royalties regarding Artistic Works
DTI had suggested the deletion of Section 7A as the Resale of Royalty Rights applied to visual arts only and was only for the resale of a work and not for reproduction etc. The choice was to retain or delete or amend. Provision would have to be made for reciprocity.

Section 7B: Royalties regarding Visual Works
The section was only applicable to visual arts. The Committee was looking at an amendment to replace “artistic work with “visual artistic work” in Sections 7A to 7E. The question was whether it should apply to all sales, e.g. private sales. Who would know that private sales happen? Should it be limited to a commercial purveyor of art?

The Bill had to be applicable to all works, even those completed prior to the Act so that everything before Act did not fall through the cracks. It did not refer to something sold in the past, but to the re-sale in future of works sold in the past. There would be a need to advertise the clause. Provision would have to be made for reciprocity.

The Chairperson pointed out drafting mistake which the Legal Advisor agreed to correct.

Section 7C: Proof of Author
There was a need to consider a method for artists to register their work so that it could not be copied or adapted by a company to whom the work had been shown but which had been rejected at the time. The question was whether it was in respect of literary works or whether it fitted into ownership of copyright. Should all work be protected from copying? It would have to be advertised.

There was also a reference to indigenous cultural expressions and indigenous communities. Those terms were dependent on the Bill being prepared by the Department of Science and Technology which had not yet been passed by Parliament and might not be passed before the Copyright Amendment Bill. It was not possible to legislate on something not enacted. DTI could include a transitional provision. If the Bill was in existence, DTI could refer to it in drafting the transitional clause.

Clause 8 – Nature of Copyright in Cinematograph films
No amendments required.

Clause 9 – Section 8A: Royalties regarding audio-visual works
The section would be amended as per clause 5 (Section 6A).

Clause 10 – 9: Nature of copyright in sound recordings
No amendments required.

Clause 11 - Section 9A: Royalties regarding sound recordings
A provision was made for users of sound recordings to keep log sheets to record the use of recordings in order pay royalties on the use. It was a needle time concern. The question was whether the log sheet as a requirement was sufficient or whether the process had to be included. It was acknowledged as a cumbersome process but the companies that played records did not keep records and therefore did not pay royalties. Was it necessary for both log sheets and the process for approval or were log sheets sufficient? The log sheets had been included in the Bill. A second question was whether failure to keep a log sheet should be an offence. Thirdly, was there a need to define ‘user’ as requested by the Department of Arts and Culture (DAC)?

Clause 12 – Section 11: Nature of copyright in programme – carrying signals
No amendments required.

Clause 13 – Section 12: General exceptions from protection of literary and musical works
No amendments required.

Clause 14 – Section 12A: General exceptions from copyright protection
It had been agreed that the Bill should use a hybrid approach to the fair use/fair dealing debate. The suggestion was that the Bill itself would refer to, or be anchored in, fair use. DTI would provide the wording for how the hybrid system would be presented, as well as a list of exceptions. The Singapore model was a good one on which to base the clause. DTI would also refer to the WIPO website.

It was recommended that Section 12A(1)(a)(vii) be removed as the words: “expanding access for underserved populations” were vague and meaningless.

Clause14 – Section 12B: Specific exceptions
The clause fitted in with the hybrid model of fair use / fair dealing as it provided a list of exceptions.
In section 12B(1)(j)(iii), the words “public information” should be removed as it simply did not make sense and the sentence already referred to communicating with the public.
Section12B(1)(j)(i) should be removed or amended as it was open to abuse because it suggested that an individual could make as many copies as he or she wished to make.

Clause14 - Section 12C
The clause fitted in with hybrid model as it contained a list of exceptions.

Clause14 -Section 12D
The clause fitted in with hybrid model as it contained a list of exceptions.

The Chairperson noted that the Committee had received numerous emails regarding educational and academic activities. It was a social media issue. It had to do with education and academic work. A child used social media/Google and then put the information together so that it became a child’s homework for school. DTI needed to provide recommendations as it was policy and a practical application.

Mr D Macpherson (DA) asked Adv van der Merwe who determined a comparable price in South Africa. And what if a comparable work did not exist? How would that be determined?

The Chairperson indicated that the point would be addressed when the Committee reached that stage.
She asked Dr Masotja to address her point.

Dr Masotja stated that it was about addressing access and the use of information from different sources.

Ms Meshendri Padayachy said it was important to remember that the world was in the digital economy. Learners had to acknowledge the work. The source had to be named as plagiarism was not acceptable. They could not take substantial work, e.g. if using the Chairperson’s poetry, the learner would have to acknowledge the source and use only a couple of sentences. The Bill allowed for the quoting of work if it was not a substantial piece of work.

Mr Macpherson noted that point 4(c) related to making of copies for educational purposes i.e. an entire textbook that was not obtainable in SA or obtained at a reasonable price. Who determined the reasonable price and how did one do it if no comparable work existed?

Mr Radebe noted that certain books in certain disciplines, e.g. Natural Sciences were imported, and one had to use the international monetary exchange as a benchmark. In Russia, the book would be sold in Roubles. One had to look at the exchange rates and check the average exchange rate over six months because exchange rates fluctuated. The market determined the cost, but DTI would have to say who determined the fair price.

Mr J Esterhuizen (IFP) asked if a textbook could not be obtained in the country, what one would consider a reasonable price. It remained a mystery.

The Chairperson noted books could be very expensive, but they were issued in hard and soft cover. Hard covers were expensive, but publishers were often happy for a book to be printed with a soft cover. Those issues would probably have to be taken into account.

Dr Masotja said that DTI needed to reflect on the matter and would get back to the Committee on it.

Adv van der Merwe continued with Sections 15, 16, 17 and 18 which dealt with repealing of specific works in different genre. There were no amendments required as all had been taken into 12A to D.

Clause 19 – Section 19B: General exceptions to computer programmes
The clause dealt with general exceptions to computer programmes. The public had suggested that the clause be broadened. Anton Mostert, Intellectual Property Law at Stellenbosch University, had said that computer programs should also be made available for teaching purposes, educational purposes and providing access for disabled people. The University of Cape Town had suggested that the clause should be expanded to include legitimate purposes, including reverse engineering to create inter-operable hardware and to repair products that were covered, including software. Currently only software was covered.

It was similar to DTI’s proposal to include educational and academic activity. She proposed breaking up section 19B to include a range of activities such as observing, testing, etc. while performing normal activities or for educational and academic purposes. The Committee needed to look at the proposal.

The Chairperson noted that three years previously Microsoft had had a huge legal challenge in the USA about putting a copyright on processing as that would have stifled innovation. Was that a programme? DTI was requested to take a look at the case.

Clause 20 – Section 19C: Libraries
The issue had been flagged because the Department of Arts and Culture had been concerned about galleries which DAC believed should be taken out. The question was whether there should be an exception for a gallery. DTI agreed that it was possible that galleries were different from libraries but should there be any exceptions for galleries.

Clause 20 – Section 19D: Persons with disabilities exceptions
No amendment was required.

Clause 21 – Section 20: Moral rights
No amendment required.

Clause 22 – Section 21: Ownership of copyright
There was a concern about the ownership of copyright, especially around commissioned work. If there was no contract, the person who had commissioned the work was the owner. However, the author retained the right to use the work. The Canadian model gave ownership to the author and the one who commissioned the work got a licence to use it. The problem was that two people had the right to exploit the work and that was a conflict of interest. For example, TV companies commission work but that work might be archived for years without being used. DTI proposed that the author might request permission to do certain things with the work. The suggestion was that the Tribunal would look at the nature of the work and the reason for it not being used, as well as public interest in the work. The clause needed to be reworked.

Point 2 in the same clause stated that the ownership of a commissioned work had to be governed by a contract but indicated what would occur in the absence of a contract. That was a contradiction that needed reworking and should apply to a written contract as a verbal contract was difficult to prove. The licence allowed the licensee to do very specific things. For example, a picture could become an advertisement, which was a much broader use than the initial purpose. The suggestion was to create a list of things that contract had to contain, or the matter would have to be referred to the Tribunal.

Mr Macpherson noted that it was very tricky as people who commissioned a work might have a private reason for not wanting it made available to others, e.g. a picture of family. Copyright of commissioned work was a business transaction, even if the service was artistic in nature. Ownership could not remain in the hands of an author. He was also worried about the involvement of the Tribunal. Those things often had unintended consequences. DTI needed to look at the service rendered and not create ownership was shared or equal.
The Chairperson said that the Committee would come back to the issue.

Clause 23 – Section 22: Assignment and licences in respect of copyright
The Committee had agreed that the 25-year mandatory period should be ‘up to 25 years’ but the question arose of what would happen if the person to whom the writer had assigned the work to, for example a film company, had a contract that would extend beyond the 25 years. The other concern was that other countries had a 50-year copyright period. However, if the right reverted to the author, royalties went to the author. It was suggested that the author should be compelled to honour any agreement. The issue was flagged.

Ms P Mantashe (ANC) asked whether the Committee had agreed on 25 years.

Mr Radebe said that the issue had been flagged. The issue was if other countries protected authors for 50 years, why was the Bill under-protecting South African artists?

Adv van der Merwe explained that the Committee had agreed on a period up to 25 years, i.e. not a single period.

Clause 24 – Section 22A: Orphan works
If the clause were provided for in the fair use/fair dealing approach, then it could be deleted. One issue was that the owner had only five years to claim copyright but there did not seem to be a reason for the five-year limitation and Adv van der Merwe was recommending the removal of the five-year limit. Furthermore, the wording was not aligned with existing principles as one did not have to go to court to prove ownership. It was suggested that “orphaned” work had to be registered, not claimed. It was still a proposal.

Clause 25: Chapter 1A Sections 22A – 22F
The whole chapter dealing with collecting societies had been flagged. It was about the registration of collecting societies. Some collecting societies were already registered with the Companies and Intellectual Properties Commission (CIPC) but none were accredited. The Bill stated that there would be one collecting society per right. The question was about how one achieved transformation. The existing companies would not give scope for transformation. Collecting societies were often organic, developing according to need. It was a competitive business and smaller societies had previously gone under. The clause had also been flagged because disputes were referred to the Tribunal. It was the bigger issues that had been flagged.

Ms Mantashe asked how the Bill ensured that the collecting societies would have fair representation and not be a free-for-all. There were black collecting societies, and she was not saying that white people could have collecting societies, but how did one ensure that collecting societies complied with BBBEE? The Committee wanted to create a safety net for the artists.

Dr Masotja suggested that with accreditation, DTI would have to consider the issue of BBBEE as a requirement. Inclusiveness and empowerment would be very important. DTI could ensure inclusiveness and support current black societies.

The Chairperson reminded Members that in terms of the BBBEE legislation, a company with a turnover under a certain threshold was exempt from complying with BBBEE. She did not know what the turn-over was for a collecting society.

Dr Masotja informed the Committee that the collection societies were NPOs. A society was collecting for its members and was not supposed to be a business making money out of it.

Ms Mantashe said that was not the issue. There could be no ring-fenced profession that was for one race only. She was raising the issue because the Committee had established Black Industrialists but they were not being supported, not even by the state-owned enterprises (SOEs). They were not being serviced well by the SOEs which did not give them contracts and which imported items that the Black Industrialists could manufacture. The Committee had to be vigilant because officials in departments and SOEs undermined legislation.

The Chairperson said the societies were not-for-profit. Government was not-for-profit but the departments did not always adhere to the principles of BBBEE.

Mr G Cachalia (DA) said he did not see the point of Ms Mantashe’s statement as it was about copyright and to ensure the industry was carefully regulated. It was not about business, etc. They were not-for-profit organisations. They were not governed along racial lines but along industry lines. It was about supporting artists and that was what the Committee was trying to ensure. It had nothing to do with race or SOEs or anything else. It was about copyright.

The Chairperson pointed out that in the public hearings, artists themselves had raised concerns about the fact that the societies were not being properly managed, and they were not distributing monies fairly. Members had copies of the public hearing submissions and could go back and see what artists themselves were saying. She asked Adv van der Merwe to continue.

Clause 26 - Section 23 infringement
No amendments required.

Clause 27 – Section 27: Penalties and proceedings in respect of dealings which infringe copyright
The clause was flagged because DTI had to give careful consideration to wording in respect of technological measures and to ensure that the measures did not clash with the exceptions and limitations. Adv van der Merwe had checked the wording and it was in order as it currently stood.

Clause 28 - Section 28 Provision for restricting importation of copies
No amendments required.

Clause 29 – Section 28O, 28P, 28Q, 28R and 28S Technological issues
The new sections dealt with all the aspects of technology in a similar way to other material. No amendments were required but dependence on the way in which technological protection measures were handled there might need a relook, especially in some sections.

Clause 30: Heading of Chapter 3
The proposal from DTI was that the Tribunal should not be an Intellectual Property Rights Tribunal, but that the Copyright Tribunal should be strengthened. If that was accepted, the clause fell away. If the structure of the Tribunal was changed, that would need to be advertised. DTI had suggested the widening of powers of the Tribunal to empower the Commissioner. DTI would look at the Patent Act and consider whether it had to be amended. If that were required, the matter would have to go to the National Assembly because it would be broader than the scope of the Bill.

The Chairperson requested Adv van der Merwe to explain the impact on the Patents Act.

Adv van der Merwe explained that the impact on the Patents Act would be limited to the section on the Tribunal. If there were no clashes between the Tribunal established in the Copyright Act and the Intellectual Property Rights Tribunal there would be no problem. If there were conflicting statements, amendments would have to take place in the Patents Act.

Ms Mantashe referred to section 29 and suggested that the Committee should go with the proposal of DTI and widen the powers of the Commissioner because the Committee did not want to establish too many bodies of that nature.

The Chairperson noted that the section had been flagged and that when the advocate had completed her presentation, the Committee would go back and address each of the flagged issues.

Clause 32 – Sections 29A to 29S
Sections 29A to 29S all dealt with the Tribunal. Section 29P related to costs. DAC had asked about Legal Aid being able to represent artists in the Tribunal. However, the advocate was not sure whether the Legal Aid operated in the Tribunals but suggested that the Committee either work with the Department of Justice and Constitutional Development or with the Legal Aid Board to determine whether Legal Aid could assist.

Clause 33 – Repeals Sections 30, 31, 32, 33 and 36
Those sections would have to be discussed once a decision had been taken whether to retain the Copyright Tribunal or to establish a new Tribunal.

Adv van der Merwe pointed out that they were very big discussion points but that the impact on Bill would be very small. There had been very little in the way of submissions about the Tribunal. The sections themselves were not contentious.

Clause 34 – Section 39: Regulations
No amendment

Clause 35 – Section 39B: Unenforceable contractual term
The issue was that the vulnerable person would contract because he or she would want his or her work published. However, the contracts could take away all of the rights that the Act would allow. The clause stated that if a vulnerable person contracted himself out of his rights, it was an unenforceable contract. There were, however, two exceptions: settlement agreement, and a service licence. If the vulnerable person was told that the contract was unenforceable but that he or she could reach a settlement agreement, that person was still vulnerable and could be exploited in the settlement agreement. That needed to be considered.
The terms of the service licence were unclear to the advocate. She did not understand how the licence could take away rights from the Act. DTI had not understood her concerns so she was explaining her concerns to the Committee.

Clause36 - Schedule 2 Part A: Translation licences
The issues were technical issues. There were questions about the correct phrase to use. For example, in 2(3)(a) should the language be a ‘specified’ language, which was not defined, or should it be an ‘official’ language? Which was the correct phrase? Terms like ‘such use” were vague.

Clause 36 – Schedule 2 Part B: Reproduction licences
The wording was vague and elicited questions.

The Chairperson asked when DTI would come back to the Committee with responses. She noted that works were often published outside of one’s own country. For example, textbooks were published in London and printed in China or Japan or elsewhere. Was that what Adv van der Merwe was referring to?

Adv van der Merwe suggested that the matter be discussed fully when the flagged issues were raised. She moved on.

Clause 37 - Amendments of Certain Expressions in Act 98 of 1978
The clause referred to “cinematographic film” and “film” changed to “audio-visual work” and “work”. No amendments were required but it was flagged because the technical panel needed to confirm that the consequential amendments in respect of cinematograph film were correctly reflected, particularly, the definitions listed, and other changes made.

Clause 38 – Transitional provision
The clause had been flagged because the Committee was looking at “indigenous cultural expressions”, “indigenous community” and “National Trust” and any reference to those phrases would only become effective when the Intellectual Property Laws Amendment Act 2013 became operational.

Adv van der Merwe concluded her overview of items that had been flagged and put into the matrix.

The Chairperson stated that the presentation had refreshed Members and updated them but had not tackled the flagged items. The Committee needed to take the issues of principle. For example, was there a need for the new tribunal? There was a need for DTI to come in quite extensively and to give some kind of timeline when responses could be expected. She pointed out that where the Committee could not reach consensus, she would move on and come back to the flagged item later.

**Deliberations on Flagged Clauses in the Matrix document**
Clause 3 – Section 5
Mr Macpherson noted that the clause stated, ‘funded by or under the control of the state”. He asked if SABC would fall into that clause if ‘state-funded’ was removed. The state was a stakeholder of the SABC. His concern arose from the fact that there were many issues with the SABC, such as archived works and funded projects. He asked for clarity as to how SABC would fit into that clause.

Mr Esterhuizen said that the state had to protect authors and creators but the Committee had to be objective in seeking to reward creators for creativity. It could not just a case of gaining maximum profit because creators were lauded for their creativity. In respect of the very next one, what happened to lecturers who worked for the state and produced artistic works?

Mr Radebe declared that the work owned by the state had to be protected from people who exploited the state. The state archives could not be used to produce a movie that made millions, but the state got nothing out of it. Other organisations, such as Eskom and the SABC, were companies where the state was a stakeholder. They fell under the Companies’ Act, so they had to protect their work.

Mr Radebe asked why CIPC was not in attendance at the meeting. CIPC needed to attend the meetings so that it could explain such issues to the Committee. When he had been acting Chairperson the previous week, he had appealed to CIPC to attend the meetings this week.

The Chairperson had explained that CIPC had sent apologies explaining that they were writing examinations but she was not sure how long the examinations would last.

Mr Radebe needed to know when the CIPC was coming back.

Dr Masotja indicated that CIPC had sent apologies to DTI.

The Chairperson declared that it was not acceptable that an entire entity could not be available. CIPC needed to indicate when it would be returning from the leave of absence.

Ms Theko agreed that the Committee needed answers.

The Chairperson responded that legislation was the equivalent of attending a court case. The Committee was in limbo as a result of the absence of CIPC. However, she requested Dr Masotja to clarify the details of the apology before the Committee was able to have a discussion on the absence of the entity.

Mr Radebe stated that he would not have accepted the apology of CIPC if he had not received full details. The entire entity could not be writing examinations.

The Chairperson agreed and pointed out that, when an apology was made, there had to be an indication of when that person would be available. It was a piece of legislation and the timeframes were very challenging.
The matter had been registered.

Ms Theko said that they could ask the DTI to ask them to send answers in writing.

The Chairperson thanked Ms Theko and stated that the matter had been noted and would be left there. She moved on to Mr Cachalia.

Mr Cachalia spoke of the matter of the state and the funding issue. The state was often a catalyst and assisted the arts and that was the way it should be as that was the state’s role and it was very noble. The state “invested” on the basis of grants, donations etc. but to claim ownership was entirely problematic. If there was a problem, that had to be addressed in the first instance by a contract. In the absence of a contract, it was not possible to say that the state owned it. One could not say that if the state had made a grant, the state owned the work. That was contrary to every moral right.

The Chairperson noted that the decision had been taken to remove “funded by”. Was Mr Cachalia of the same opinion?

Mr Cachalia stated that the removal of “funded by” did not help his concern. What did it mean if it was “directed” by the state?

Mr Esterhuizen referred to Section 12B about specific exceptions from copyright protection applicable to all works and asked why the advocate was recommending that they take out “public information”. He knew that the Minister of Arts and Culture and the previous Minister had signed a declaration with 12 other countries to ensure fair and balanced copyright Acts to ensure information for all. Libraries were for public information.

The Chairperson informed Mr Esterhuizen that the Committee was not yet at that clause and so he should hold his point in abeyance.

Ms Mantashe noted that DAC had raised a concern about the cause and she wanted to know what the concern was.

Mr Radebe noted that if the state commissioned work with another entity, the state had to be able to protect its work. In private work, the contract was relevant. State-owned works would operate at different levels.

Mr Macpherson agreed with Mr Cachalia but asked what under the “control and direction of the state” meant. Did it mean managerial control or artistic direction? Was it ownership or being a stakeholder? Because the clause was talking about artistic work, he would assume that it referred to artistic direction of a work.

The Chairperson noted that it was a thorny issue and, before she commented, she wanted the advocate and DTI to give their input.

Adv van der Merwe noted that Members had not addressed one of the flagged issues in their comments. The current Act said that “Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organisations as may be prescribed.” That was section 5 in current Act. That was the current existing law and was interpreted as “where the state instructs a company to develop a work, the copyright of the guideline was invested in the state”. SABC might also have copyright ownership. There was no concern about the state owning copyright on work made by the state or under the state direction or control. The concern was that it had become too broad when “funded by” had been added to the clause. It had been agreed to remove those words.

What had not been looked at was, whether copyright could be conferred on any international organisation and any local organisation. Currently, the Act prescribed the internal organisations, but the Bill opened it up and simply said “an international organisation”. What DAC had proposed, was the inclusion of clear rights management and DTI was looking at wording.

Adv van der Merwe reminded the Committee that by removing “funded by”, the clause reverted to current law.

Mr Cachalia had a question of clarity. In the section in the original Act that she had quoted, his question was to whom was the copyright being conferred? Was it being conferred to the funder, the director or controller or to the author or to whom?

The Chairperson requested Adv van der Merwe to respond to Mr Cachalia.

Adv van der Merwe stated that the state owned the copyright, so where it came to enforcing the rights of the state, it would be done as any other enforcement by the state. For example, for example, if DTI instructed for a guideline to be developed, and it was adapted and used by someone else, it would be the Minister of Trade and Industry who would institute an action.

Ms Meshendri Padayachy stated that she agreed entirely with Adv van der Merwe who had explained it exactly as she would have. The principle Act was working well but DTI had added “local organisation” to stop “fronting”, especially with international directors.

The Chairperson stated that the matter had been thoroughly discussed. The Committee accepted the principle Act. It was in line with DAC. It was the Committee that had wanted to add “funded by”. That clause was finalised.

Mr Radebe asked Adv van der Merwe if she had said that the clause would need to be advertised.

Adv van der Merwe stated if the Committee added ‘clear right management’ that would have to be advertised.

Dr Masotja asked if DTI could come back to it later.

Clause 5 Section 6(A)
The Chairperson noted that DAC had proposed the inclusion of ‘clear rights management’. She would therefore flag it so that the Committee could come back to it. The next issue was clause 5, section 6(a) dealing with retrospective application. She asked Mr Radebe was it was flagged.

Mr Radebe said that it was to protect those people already exploited. Adv van der Merwe had provided a solution but there was a need to advertise it. The Committee could not engage with it at that point

Ms C Theko (ANC) had consulted with the whip and was in agreement that it would be advertised.

Mr Cachalia pointed out that the Committee was in agreement, notwithstanding what he had understood as a difference between contractual freedom and minimum requirements. Contractual freedom should not be subject to certain conditions. What he had understood was that there needed to be a flagging of particular areas of the contract that had to be addressed to avoid potential conflict. The contractual freedom would mean the contract could take a position in respect of the points made. If that were not the case, he saw a potential for conflict.

Chairperson said that the Committee would flag the issues of contracts. She was putting a second flagging on clause 5, section 6A.

Clause 7 Section 7A
Dr Masotja stated that DTI had had original art works in mind but now proposed the retention of section 7A for other art works and adopted the proposal by Adv van der Merwe on the wording of the clause.

Clause 7 Section 7C
The Chairperson turned to section 7C. That would have to be advertised as the Committee was advertising everything that was new. The second aspect of the section related to ‘indigenous community’. DTI proposed deleting the phrases. The concern was that the Committee could not legislate on a Bill that had not yet been passed. She recalled, however, that Dr Masotja had said that the Committee could wait and see if the Department of Science and Technology (DST) Bill was passed before the Committee had completed the Copyright Amendment Bill (CAB).

Dr Masotja stated that DTI had decided to align with the terminology used by DST and once the Bill had been passed, the Copyright Amendment Bill would align with the relevant framework. DTI did note the concern of the advocate that there would be a problem if the DST legislation was not passed. DTI, therefore, proposed that “National Trust” be removed but that “indigenous communities” remained.

The Chairperson said that was directly related to the Intellectual Property Laws Amendment Act (IPLA) which the Committee had accepted. The next flagged clause was section 7E which referred to “indigenous community”.

Clause 7 Section 7E
Dr Masotja proposed that wherever there was a reference to “indigenous communities”, the Committee could take the contingency approach if the DST Bill was not passed before the Copyright Amendment Bill.

The Chairperson asked if the Committee agreed with the proposal to take the contingency approach if the DST Bill was not passed before the Copyright Amendment Bill.

Clause 11 Section 9A
The Chairperson noted that a decision had been taken in respect of the concern about “indigenous community”. The question was whether failure to report fully in the log sheets should be an offence. What was the value of a log sheet?

Dr Masotja stated that the log sheets enabled the artists to be paid. If a record was not kept of the use of recordings, it was not possible to pay royalties according to the use of an artist’s work. Log sheets were essential to the economic benefits of the artists.

The Chairperson was satisfied with the explanation as it indicated precisely why log sheets were important.

Mr Radebe agreed that it was very important as it was the only way royalties could be accrued but the previous requirement, of contacting the artist to alert him or her that the work would be used, should not be dumped. The long process had to remain, as well as the log sheets.

Mr S Mbuyane (ANC) noted, in terms of the log sheets, that if it was needle time, it would be easy but when using technology to record, that was difficult for a DJ. How could a DJ play a song and record electronically?

Mr Cachalia stated that the long process was cumbersome, but the main question was about how it was to be enforced. Without enforcement, one could do anything one liked. People needed to be flagged that their song would be played, but what constituted proper communication and how would it be enforced? Those details were not there.

Ms Theko asked how log sheets should be dealt with, what permission was necessary and whether the clause needed advertising, etc. so that the Committee dealt with all the issues and did not forget something or have to come back to the clause again.

The Chairperson agreed that enforcement was important. If it was going to be an offence, that was part of the enforcement but how were the log sheets going to be checked? Would there be an inspectorate? How would they be checked?

Ms Theko asked Adv van der Merwe to explain. Once the Members understood, they could make appropriate comments.

Adv van der Merwe explained that the log sheet was a different way of achieving the same result. Recordings were played on different radio stations, etc but there was no record of who was playing an artist’s work. The Bill suggested process whereby if a person intended to broadcast the sound recording, play the recording or communicate the sound recording to the public, the person must, before that, in a prescribed way, submit a notice to the performer, the copyright owner, the collecting societies or indigenous community and state the intention to broadcast, provide the date etc and get the person to sign notice. If the person, performer/copyright holder rejected the agreement, the parties had to attend the Tribunal. It was too cumbersome a process, especially for those in radio. To make it easier, the suggestion was made that the person using the sound recording should keep a log sheet with details of each playing of an artist’s sound recording. In terms of enforcement, it might be difficult but if someone heard the music play, that person could inform the artist, etc. It was a risk not to record on log sheet because so many people listened to the radio.

Mr Radebe declared that the issue of cumbersome was an issue of not wanting to pay. It was the responsibility of the radio station to ask for permission upfront. Inspectorates worked very well. Inspectors could not check every domestic worker, but they did random checks, and that was simple. If it was the law, the inspectors could pick at random and check.

The Chairperson could see that the Committee wanted to make the keeping of log sheets an offence. She assumed that the matter had been addressed.

The Committee agreed.

Clause 14 Section 12a
The Chairperson turned to section12A which contained the first use of the word ‘hybrid’.

Ms Mantashe said that Dr Masotja had not agreed to anchor the Copyright Amendment Bill to ‘fair use’. ANC had agreed that ‘fair use’ would be the anchor. She wanted to know if Dr Masotja was still of the same opinion and, if so, could she explain her position. She had made them feel uncomfortable.

The Chairperson asked whether it was the ANC or the Committee that had decided on ‘fair use’. It must have been a robust discussion. She asked Dr Masotja to respond.

Dr Masotja agreed that it had been a robust discussion. The officials had gone back as a collective and had had a discussion about anchoring on ‘fair use’. She would present the Singapore perspective and not DTI’s perspective. Singapore had anchored their copyright documents on ‘fair dealing’ because that was where they had come from and had added exceptions. DTI had looked at starting with ‘fair use’ and had added to the exceptions. She had prepared something and would bring it on the following day. DTI had added issues around scholarship and education as well as archives and libraries to most of the clauses in section 12. There were other sections that were specific. DTI had looked at computer programmes and had to include them in the light of such issues as educational activities and programmes. She concluded that all the models that DTI had consulted, started with ‘fair dealing’.

Ms Theko said that the Committee’s position was not understood if DTI did not understand about ‘fair use’ as DTI kept coming back with ‘fair dealing’ issues. The Committee and DTI had had the same discussion many times and Dr Masotja kept coming back with her ‘fair dealing’. She was not giving the Committee what it wanted. The Members had given her a directive.

Ms Mantashe said that the Committee should listen to Dr Masotja so that the Committee could get a scholarly view. She did not want something that was challengeable. They had put their hearts on ‘fair use’, but they wanted to understand whether ‘fair use’ would lead to challenges to the Bill. If there was a reason that it was going to work, Members could re-consider.

Mr Cachalia added that the Sub-Committee had been thorough in its discussion. He agreed that ‘fair use’ was better as it was open-ended and was not closed to future developments. If the Committee agreed, it would have to be a convincing argument.

Mr Radebe said that when he had summarised the issue, Mr Alberts had said that all possibilities had to be considered. Mr Macpherson had suggested taking the middle ground. He had asked Dr Masotja to present the two side by side as that would be a scholarly exercise. He was concerned that exploitation happened under fair dealing.

The Chairperson agreed that there had been robust discussion and it had been thoroughly thrashed out, but she recalled the Berne Convention in the 19th century and since then society had moved forward. Technology was moving forward at such an incredible rate that the Bill would be outdated in terms of technology, and there could be a new form, by the time it was passed.

Government wanted an open approach which was the ‘fair use’ approach as it opened up development. The raison d’être for the Bill was that African people had not had any rights and had not benefitted under copyright at all. It was incumbent upon the Committee as legislators to look at legislation and see what prevailed. The Agricultural Act of 1978 had said that black sugar farmers were illegal and that was grounded in apartheid law. They would not have been challenged in terms of ownership. The shortest Bill in Parliament had stated that black sugar farmers were no longer illegal. She had learnt her lesson then that she could not forget the environment and the goal. DTI was intent on achieving the goal too, but the Committee was seeing it in parallel, so she would ensure that the Committee’s position prevailed. The Bill was to be anchored to ‘fair use’ as decided by the Committee, unless someone could say that it was unconstitutional. She wanted it to be anchored on ‘fair use’ and then it could have exceptions. The Committee would be happy to address any weakness.

Ms Meshendri Padayachy wanted to create clarity. The Bill was a hybrid based on the Singapore model. She wished to avoid semantics. It was an exception to the law. It was about how far one was prepared to open up the exception. So, one had the ‘fair dealing’ name, because that was the approach that all Commonwealth countries had had. The question was how far a country was prepared to open up by transplanting the US ‘fair use’ model as an exception. Commonwealth countries had a fair deal list, but some countries had opened up the model by incorporating fair dealing. They had started with ‘fair dealing’ and opened up to the ‘fair use’ doctrine. Singapore had used ‘such as’ to open up to include education, technology, artificial intelligence etc.

Ms Padayachee understood that Members wanted a more open model and that was what the Bill gave them. ‘Fair dealing’ was closed but it had been opened up, and it was based on the Singapore model. It was a mixture of ‘fair deal’ and ‘fair use’ then to safeguard against abuse and misuse, the four-factor test had been included. The model before the Committee was a Singapore model anchored in ‘fair use”.

The Chairperson said she thought that Singapore was anchored in ‘fair dealing’ as in the original Act.

Ms Padayachee said that all Commonwealth countries had ‘fair dealing’ as their base but had opened up using the exceptions based on the United States ‘fair use’ provision.

The Chairperson noted that the Committee had made Ms Padayachee a little nervous and she had misspoken.

Ms Padayachee continued explaining that Singapore was a ‘fair deal’ model using ‘fair use’ in practice as fair use. So, it was a fair use model in practice.

The Chairperson thanked her for a good explanation but thought that with clearer spectacles, it was, in practice, ‘fair use’ so the Committee should call a spade a spade and call it by what it was, ‘fair use’.

Mr Radebe stated that countries that used ‘fair dealing’ had regressed. Only those that used ‘fair use’ had advanced in technology. Mr Alberts had said that one could not transpose something directly from one country to another. South Africa had to establish what it needed first and then ensure that was achieved.

The Chairperson noted that the workshop on copyright had been extremely valuable. The Committee wanted a balanced approach. The Chairperson looked at the Berne convention that had first decided to develop copyright, and, of course, it was the old world. Now the ‘new world’, the Americas, Africa, and Asia wanted to be open. She noted that China had anchored its first copyright legislation on Confucius and that was an open system.

What was important was to ask what the goal was and what the purpose was. The hybrid model said that neither one was the best. Why not say that ‘fair dealing’ was going to compromise the Constitution, and so use ‘fair use’? It was a hybrid. It was a broader framework. She asked everyone to leave out the old talk of anchoring.

Dr Masotja asked what the Chairperson wanted DTI to prepare for the committee in respect of the ‘fair use’ and ‘fair dealing’ matter.

The Chairperson asked for Members’ comments before she commented.

Mr Cachalia had heard DTI when it had talked about Singapore and how it had incorporated ‘fair use’ to expand ‘fair deal’ in order to balance users’ rights. That spoke to the hybrid model that the Committee wanted. He asked that DTI unpack the Singapore model in respect of how it applied to the South African legal system, etc., the Committee could evaluate its choice to go with ‘fair use’. If it did not, the Committee would tell DTI what it wanted.

Ms Pregoria Mabaso- Muvhango asked if the Committee wanted DTI to matrix the Bill as it stood, being anchored on fair use. They had worked on a hybrid from Singapore. What did the Committee want in the second matrix?

The Chairperson pointed out that the Singapore model was based on ‘fair dealing’, not ‘fair use’.

Ms Theko asked the Chairperson for a few minutes for a caucus.

The Chairperson declared that Members could caucus at the tea break. She had said that if a flagged item took too long, she would move on but she had not changed the Committee’s position or the model in the Bill. She had tried to persuade the DTI and would work on it before instructing DTI or asking the Minister to instruct. She reminded the Committee that all references to terminology emanating from the DST Bill [Protection, Promotion, Development and Management of Indigenous Knowledge Systems](https://pmg.org.za/bill/635/) would be addressed in the way previously discussed.

Clause 14 Section 12B
The Chairperson requested Adv van der Merwe to speak to clause 14 section 12B(1)(j)(i).

Adv van der Merwe explained that the clause had been flagged because of a concern that a person who had a legitimate copy of the work could make as many copies as that person wished to make.

Mr Radebe noted that one could make copies for personal use. If one had bought a copy of the book, it would be stolen at a university library, for example, if one did not make and use photocopies in public places. An owner of a work had to be allowed to make copies.

The Chairperson commented that one only needed one licence for watching TV regardless of how many TV sets one had. Would the same not apply to making personal copies of a work? The Committee accepted that copies could be made for bona fide purposes. The clause did refer to the bona fide copying of a textbook that one had purchased, and it was often better to work from photocopy. Was the Committee agreeing to leave that clause in the bill? She saw heads nodding.

Clauses 13, 14, 15 ,16, 17, 18
No discussion required.

Clause19 Section 19B
The Chairperson noted that the next flagged clause was about the general exceptions regarding protection of computer programmes. The clause had been flagged, because software was covered but not hardware.

Adv van der Merwe indicated that there had been two proposals that the clause be broadened. The Chairperson of the panel of experts, Anton Mostert, had asked that it also be made available for teaching and educational purposes and the University of Cape Town asked that it include hardware as well as software, especially for repair work, and also reverse engineering. For example, in repairing a car, if one was not a licenced dealer, one had to hack the software to repair one’s car. DTI said agreed to broaden the clause for teaching and educational purposes.

The Chairperson asked DTI if it agreed with the educational purposes, but not the car example. She paraphrased the explanation. If one wanted to repair one’s car, one would have to hack into the software which, technically, was illegal.

Mr Cachalia said that tinkering with the car would nullify the warranty.

Dr Masotja stated that DTI wanted the most access possible and would include the car example.

Clause 20 Section 19C
The Chairperson noted that galleries was the point flagged in clause 20 section 19C. Everyone had agreed to everything, so why not art galleries? Should the exceptions be applicable to galleries? The National Art Gallery in Johannesburg was going to pieces.

Dr Masotja indicated that DTI had taken another look at galleries and had agreed to include galleries in the exceptions in the Bill to create balance and to keep the group of institutions together.

Ms Padayachy agreed entirely with Dr Masotja. DTI would look at a way of simplifying the processes applicable to art galleries. Of course, it applied only to non-commercial galleries.

The Chairperson noted that clause 20 amending section 19C had been resolved.

Clause 22 Section 21
The Chairperson next dealt with the question of the ownership of copyright when there was no contract. She had also noted the difference between commercial and non-commercial purposes of ownership of copyright. She asked Adv van der Merwe to clarify the clause, after Mr Mbuyane had spoken.

Mr Mbuyane thought that the advocate should add the Canadian model.

Adv van der Merwe clarified the clause on commissioned work. DTI would speak on the Canadian model. If there was no contract, then the person who had commissioned the work was the copyright owner, and the author had licence to do whatever he or she wished. In practice, there was the owner who had copyright and a person who was licensed to do whatever he wished with the work. That meant that one person was impacting on another person’s rights. DTI had suggested that instead of the author being given a licence, the author should be allowed to approach the Tribunal and ask for permission to use the work. The nature of the work was important and would be considered by the Tribunal. For example, it was a family portrait, permission might not be granted but if a documentary was being shelved, the Tribunal might favourably consider that request for use. Another consideration would be whether it was in the public interest. The Tribunal could also consider requiring the author to pay a tariff to the person who had commissioned and owned the rights to compensate the person who had paid the commission. DTI had presented two options: changes to the current clause or re-drafting the clause entirely.

The Chairperson asked for a comment from DTI.

Dr Masotja stated that after the extensive discussions around commissioned work, DTI thought that the section should be retained because it affected a lot of interactions between the copyright holders and the other role players in copyright work. The Committee would have to look at different views and make a determination.

DAC had raised the Canadian model. At present, the Bill said that whoever commissioned a work owned the work. The Canadian model said that the author had more rights than the one who had commissioned it. It put more emphasis on the rights of the author than on the rights of the person who had commissioned the work because that balanced out the dynamic of power. The contractual arrangements were key to the Canadian model. It was about the role of the author and the role of the one who commissioned a work.

Ms Padayachy added that the public was curtailed from a lot of works that were locked up because they had been commissioned. the Canadian model gave the author a negotiating power that he or she had not had previously. Two parties would be exercising same rights, but the author was the dominant player. DTI felt that the model was too open. The DDG had made it clear that the model had to include all works.

The Chairperson did not believe that the explanations had taken the Members closer to a decision.

Mr Cachalia agreed it was not easy. If he commissioned something, he could do what he liked with it. He could, for example, burn a painting. The author would say he had rights and that the one who commissioned could not burn the painting to which he had rights. At the same time, the commissioner had rights that had to be protected. The author could ask for some rights of access, but in the absence of the contractual arrangement, the rights had to remain with the one who had commissioned the work. It came down to a verbal or written contract. The author could request some rights of access in the contract.

Mr Mbuyane was looking at the principal Act. He was not sure what was not right in the Act.

Mr Radebe suggested that it worked at two levels. The first level was personal. There were things where he would not grant anyone rights to, e.g. a family portrait. That was in the Constitution of the country and he could never agree to that. Secondly, there were works that could be used to make money. He used the example of a logo where the person commissioning had an original idea but that original idea could not be copyrighted, but if someone used a similar logo, she had rights. Another example was about someone who commissioned a logo but did not give the idea, which resulted in the author having more rights. Then there was a third point and that was about the power relationships. It was about ensuring protection of the weaker creator against the powerful person commissioning the work and who would exploit the author commercially.

Mr Cachalia said that he would also use an example. Assume Mr Zuma started a new party…

Mr Cachalia attempted to put his point across several times but each time, there was an outcry from ANC Members of the Committee who did not want Mr Cachalia to use that example.

Mr Macpherson called on the Chairperson to address the rowdy Committee Members who were harassing another Member. Mr Cachalia had the right to say what he wanted to say and was not contravening any parliamentary rules.

Mr Radebe said that the meeting was recorded, and the Committee did not want to listen to it.

The Chairperson asked Mr Cachalia not to use a person’s name.

Mr Macpherson asked the Chairperson to rule whether Mr Cachalia could not cite Mr Zuma as an example. He insisted that the Chairperson rule on that.

The Chairperson stated that she tried to avoid ruling on issues. She said that the reference might not be against the rules of Parliament, but it disrupted the meeting because everyone felt entitled to be disruptive and then the substance of the matter was lost. The Committee needed to remain focussed on the substance of the issue. There was no need to mention an example. Right now, in South Africa, a number of political leaders were in the limelight, but it could derail the substance of their work.

Mr Macpherson asked the Chairperson to protect Mr Cachalia.

The Chairperson called for attention and asked Mr Cachalia to proceed but with the proviso that she did not want to hear a political leader’s name.

Mr Cachalia suggested that if a former political leader left a party and took the logo in three colours, one of which was green and another black and wanted to create a new logo for his new party and, in some way, used the same colour yellow and a spear, what rights were vested with the creator? Did he have any rights to use that logo anywhere? Mr Cachalia had wanted to use a particular name as it would have helped to create the scenario that he was attempting to depict.

The Chairperson noted that there had been several disputes over logos and names and it had been the subject of court cases. In terms of elections, the IEC had not ruled the parties out at the time. If it passed muster, the question was why could one not use it?

Mr Cachalia asked what rights one had to use a logo if the party objected.

Ms Padayachy explained that a logo was protected under trademark law and not copyright law and copyright law was related to the specific issues listed in the clause. Trademark law was about intellectual property rights and was registered as such.

As a separate issue, she added that DTI had picked up a need to limit works such as a portrait, etc. and so she suggested that personal artistic works would fall out of that category of commissioned works. Photographs, sound recordings would remain in the clause.

Ms Theko suggested that DTI make a presentation on it the following day when they would be presenting a number of issues.

The Chairperson agreed.

Clause 23 Section 22
The Chairperson moved onto the next flagged clause which had been flagged because there had been a question around the 25 years before the expiration of copyright. The 25 years meant that the owner could assign copyright for a period of 25 years.

Ms Theko stated that the Sub-Committee had been concerned that other countries protected authors’ rights for 50 years, but South Africans were only protected for 25 years. That gap had to be closed.

The Chairperson asked who it was protecting and who the Committee wanted to protect.

Mr Radebe suggested that it was a case of ‘what I do unto you, you do unto me’. When the work went to the USA, if copyright was for 50 years, that protection should apply to South African works too.

Adv van der Merwe explained that the 25-year period meant that if an author had assigned a right to someone else, the rights came back to the creator after 25 years. It was different from the USA’s 50 years. After 25 years, the author should get his or her rights back and then he or she could re-assign the rights.

Mr Esterhuizen asked what the situation would be if the rights were assigned to more than one person.

The Chairperson responded that if there were joint authors, both got their rights back after 25 years.

Adv van der Merwe stated that an author could not sign his rights to more than one person. The only exception was in a case where, perhaps the author signed rights to two people on same day, but, after 25 years, the rights from both persons would revert to the author. If the person who had rights for 25 years had signed rights for five people to sing a particular song, the rights would go back to the author who might then sign contracts with the five persons. The working of the law would sort that out.

Ms Mabaso- Muvhango said that she wanted DTI to take another look at the clause as the rights could not be given to someone beyond the 25-year period. She had missed that and was not happy with it.

The Chairperson agreed to receiving a report on the matter the following day.

Clause 25 Sections 22A to F
The following clause was about collecting societies. The Chairperson asked whether there had been a response from CIPC regarding its absence.

Dr Masotja said that CIPC would attend the following day.

The Chairperson noted that there was a huge issue about collecting society. It had been flagged several times but there was no agreement on the clauses. The Committee had, therefore, to go through them clause by clause. It was an entirely new chapter in the Bill. The Committee would begin with registrations and accreditations in section 22A to F. As she recalled the debate, it was about the limitation of one society per right.

Mr Mbuyane was adamant that it was not acceptable to have one collecting society per right as that limited the participation of the masses. The Committee had allowed the masses to contribute and not limit the space to the large conglomerates. The Sub-Committee had checked whether collecting societies had registered with CIPC and were in compliance. It seemed that people were fronting for the societies for their own purposes. In terms of licensing and transformation, would the country be able to transform the situation and the question of membership? It had not happened in the past 24 years. Furthermore, societies had one membership but collected for different rights for their members.

Mr Cachalia reminded the Committee that, as DTI had pointed out earlier, the societies were NPOs and there should be no restriction on the number of societies provided that they were correctly registered and followed proper procedures. The societies had to provide a service. The ultimate choice had to lie with the consumer and then there would a need to regulate the organisations. He did not see that there was a need to impose BBBEE or to worry about how the NPOs fitted into the BBBEE legislation at all. People who signed up should get their money. That was it.

The Chairperson had a note about the Tribunal and whether everything to do with it should go to the CIPC. Perhaps there would be too much pressure on the CIPC but the Committee wanted the societies to go to CIPC.

Mr Radebe stated that the Committee had agreed on accreditation. When coming to the NPOs, he noted that they were collecting money, but they were also making money. FIFA was a non-profit organisation (NPO) but it was making money, a lot of it. The issue of NPOs should not make the Committee close its eyes.

The Chairperson suggested that the matter should be raised with CIPC.

Dr Masotja offered to give the context around collecting societies, although CIPC could offer their own explanation the following day. CIPC was already responsible for registering NPOs and so CIPC had suggested focussing on accreditation. Separating registration from accreditation would ensure that the collecting societies met requirements. CIPC had proposed that the Bill should not allow more than two societies per right because the societies had to fight each other for members and when they spent time in court, it meant that royalty payments were not made.

Mr Mbuyane asked about the two societies where beneficiaries were not getting royalties. What was the challenge there? In terms of registration, all companies had to be registered with CIPC, including NPOs.

The Chairperson referred to information received previously by the Committee on which collecting societies had been accredited. It seemed that there were five societies addressing different rights: SAMPRA, SAMRO, CAPASSO, POSAT, SARA. The Committee seemed to be saying that saying that there was no need for half a dozen societies per right.

Mr Cachalia said that that was not what he was saying. They were service providers who would be registered and accredited. If people put their faith in a society and the authorities ensured that the money was paid out and accreditation was correct, then the market would sort it out based on service and that was how it should be.

The Chairperson said that she used to go along with that thinking until the taxi wars. A technical marketing person explained how marketing worked in the taxi environment. Wars occurred because the market was not big enough for so many taxis. The market was over-saturated. That was one of the reasons for taxi violence. She was cautious about restricting or opening the market if it were a small or medium market. More than one would ensure a better price but some of the societies were not paying out and others were collapsing. Members should think about it and the Committee would tackle the question the following day. She noted agreement amongst Committee Members.

Clause 27 Section 27, Clause 28 Section 28, Clause 29 Sections O to S
The Chairperson noted that clause 27 amending section 27 dealt with penalties and proceedings in respect of dealings which infringed copyright. There seemed to be a clashing of expectations.

Adv van der Merwe said that it related to technological protection measures. In the presentation of DTI previously, the DDG had said it had to be carefully considered and checked for clashes. It was about technical issues. Clause 28 was similar, as was clause 29.

The Chairperson suggested that the Committee think about all those clauses and the deliberations would return to them the following day.

Ms Mantashe suggested that because it was technical matter, it should be given it to the technocrats to resolve. They were only politicians and would mess up.

Clause 30 Chapter 3, Clause 31 Section 29
The Chairperson agreed that it was work for DTI. Clause 30 was the Heading of Chapter 3 and was subject to the decision taken in clause 31 section 29. Clause 31 was about the establishment of a Tribunal and DTI had proposed removing the establishment of the Intellectual Property Tribunal and strengthening the Copyright Tribunal.

Ms Mantashe suggested that strengthening the Tribunal was the right way to go instead of creating a new Board.

The Chairperson noted that if the Committee had agreed to strengthen the Tribunal, they should have indicated that so that the clause was not flagged.

Clause 32A
Clause 32A was about the functions of the Tribunal, if the agreement was to strengthen the Tribunal. The Chairperson asked DTI for comment.

Dr Masotja proposed that DTI came back to the Committee on the strengthening of the Tribunal because it would mean changing all clauses relating to the Tribunal. DTI had also checked the patent legislation and, rather than incur additional legislative processes, it was better to use the section currently in the principal Act because it did establish a Tribunal and a Commissioner, as well as a mechanism that could be used to strengthen the Tribunal. It was preferable to do it in the Copyright Right Bill rather than amending the Patents Act. It was better to put what they wanted in the Copyright Act if it was possible to get what was wanted.

The Chairperson referred to the terms of office of members of Tribunal. DTI had to try and rationalise the terms of office and how people were to be appointed and align it with other tribunals and boards and so on. The Committee wanted one approach and not half a dozen.

32 Section 29f
The Chairperson was moving past all clauses relating to the Tribunal until she reached the conflict of interest section, clause 32 Section 29F. It had come to the attention of Parliament that members of tribunals did not understand their responsibilities in terms of conflict and disclosure of interests. She was pleased to see it in the Bill and hoped that the Bill was very clear about conflict of interest. Parliament had been asked to check very carefully that the conflict of interest was very clear to entities. Legislation should not encourage conflict of interest. It was also important that members of a tribunal did not divulge any information. She asked why that particular clause had been flagged.

Adv van der Merwe stated that all of those sections related to whether the Committee kept the Copyright Tribunal instead of proposing an Intellectual Property Rights Tribunal. If the Copyrights Tribunal was retained, all of the sections could be addressed in terms of the current wording in the Act.

Ms Theko asked if the Committee had to request permission from the House to establish an Intellectual Property Rights Tribunal.

Adv van der Merwe explained that if the Committee kept the Copyright Act, it would not need permission as it was in the current Act and the Bill would simply strengthen the same Tribunal.

Ms Theko stated that the Committee needed to decide on the issue.

Mr Radebe noted that the Committee had made an in-principle decision to strengthen the Tribunal

Clause 30 Section 29P
The Chairperson asked about the clause 30 section 29P that dealt with Legal Aid. Was that applicable to a tribunal which was a form of court? She wanted the Legal Aid Act checked and also an engagement with the Department of Justice and Constitutional Development or the Legal Aid Board as the Act might say something, but that was not necessarily how it was interpreted in practice.

Ms Theko said that other tribunals were like magistrates’ court from where one could appeal to the High Court and that should be in the Bill.

Clause 35 Section 39B
The Chairperson asked for a reminder about the clause.

Adv van der Merwe explained that clause 32A protected the vulnerable. That clause protected the vulnerable party who had contracted himself or herself out of the rights afforded by the Act. However, after a dispute about a contract, the person involved in the settlement of that contract would still be vulnerable. The policy also allowed for a service licence to exclude the protection afforded by the Act. What was the service licence and why was it there? Was it intended to exclude rights?

The Chairperson agreed that it had to be addressed.

Clause 36 Schedule 2, Part A And B
 The Chairperson stated that clause 36 Schedule 2, Part A and B did not make sense. It was about languages other than a language used in the Republic and so on.

Adv van der Merwe stated that those were technical questions about language, not policy issues. Other terms were too vague. Those were the issues in clause 36. She would work with DTI and the Department could present on it the following day. That would also give them an opportunity to check for policy issues.

The Chairperson cautioned the Committee that it had to be careful that technical issues were not policy issues, so DTI had to see whether the clauses were technical or not. She was asking Ms Padayachy to be very careful as Committees sometimes adopted things as technical but found when the Bill was presented in the House that the change was, in fact, a huge policy issue.

**Concluding remarks**
Ms Theko noted, as part of the conclusion of the day, that the Committee had given DTI an enormous amount of work and the Committee wanted to know exactly which clauses contained policy issues and if there were any constitutional issues. Could DTI do all the work and bring it the following day? The technical part of it was perhaps too much.

The Chairperson stated that DTI would be required to respond to the issues dealt with that day as well as the previous issues that had been raised and the Committee needed them to be alert. She was therefore delaying the start of the meeting by 30 minutes the following day. She requested Members to be ready to work late the following day.

Mr Radebe suggested that DTI could say how long its presentation would take the following day.

Dr Masotja agreed that there was a lot of work to get through the following day and she did not want to compromise on the quality of the work so she suggested that some of the technical areas could be held over until the Thursday. She suggested that the Tribunal and technical issues be addressed on Friday.

The Chairperson agreed and noted that the Committee had addressed as much as it could that day. She asked DTI to ensure that CIPC was in attendance. She expressed her gratitude to the members of DTI and the Adv van der Merwe for all their hard work.

Meeting was adjourned.

#### Audio

* [Copyright Amendment Bill: consideration 3](https://pmg.org.za/files/180605pctrade_3.mp3)
* [Copyright Amendment Bill: consideration 1](https://pmg.org.za/files/180605pctrade_2.mp3)
* [Copyright Amendment Bill: consideration 1](https://pmg.org.za/files/180605pctrade_1.mp3)

#### Documents

* [Copyright Amendment Bill working draft version 2](https://pmg.org.za/files/180605Copyright_Amendment_Bill_B_Bill_Draft_2.docx)
* [Matrix - Deliberations on Copyright Amendment Bill](https://pmg.org.za/files/180605Deliberation.docx)

#### Bills

* [B13-2017 - Copyright Amendment Bill](https://pmg.org.za/bill/705/)