



Let's Talk About Copyright (and the Copyright Amendment Bill)

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TABLE OF CONTENTS

Background.....	1
Copyright Project.....	3
Next Steps	5

[Copyright](#) is sacrosanct. The most important and valuable right for any performance writer. [Copyright law](#) serves to protect us against unauthorised use of our copyrighted material, regulates how that material should be used and balances owners' rights and users' responsibilities. Any changes to that law, i.e., the [Copyright Amendment Bill](#), must be our priority.

On 16 June 2020, the President returned the Copyright Amendment Bill to Parliament. A huge setback for those pinning for the signing of Bill, but a once in a lifetime opportunity for the Writers Guild of South Africa to right the wrongs of the past. This article will focus on three things, the Bill's background, the Guild's Copyright Project, and the next steps in the law-making process.

Background



Figure 1: Summary of the Copyright Amendment Bill process

In 2009, the President [met with the creative industries](#) to discuss why South African artists were “economically impoverished whereas the creative arts were a significant economic driver in other countries”. That same year, performance writers met to discuss

the rights of writers in the film and television industry and established the Writers Guild of South Africa.

In 2010, the Minister of Trade and Industry tasked a Copyright Review Commission (CRC) to investigate the “issues relating to the collective societies in the music industry”. Meanwhile, the Guild looked at the copyright law concerning performance writers and focused on commissioned works and residuals.

In 2011, a CRC [report](#) made recommendations which later informed the [2013 Policy on Intellectual Property](#). The CRC reported that “contracts between musicians and users of their art were unfair and economically exploitative on the musicians due to their lack of organisation and bargaining power” (the same could be said for performance writers and other creative industries practitioners). By then the Guild had a solid standpoint on the copyright law: the right for performance writers to earn *royalties* (repeat fees/residuals) for all works on all platforms for all users.

In 2015, Trade and Industry, in an attempt to align our laws with international treaties and to make the legislature “future proof”, released the [first version](#) of the Bill (together with the Performance Protection Bill, but the focus of this article is on the former) and opened it for commentary. The Guild supported the review of the copyright and raised concerns about the Bill’s direction and drafting errors, and focused on one thing, our right to earn *royalties*.

In 2017, Trade and Industry published the [revised](#) Bill and opened it for public commentary:

- [Copyright Amendment Bill: public hearings day 1](#)
- [Copyright Amendment Bill: public hearings day 2](#)
- [Copyright Amendment Bill: public hearings day 3](#)
- [Copyright Amendment Bill: engagement with key stakeholders](#)

The Parliamentary Portfolio Committee surmised that, “delegates were divided on whether a [fair use clause](#), which grants [an] exception to a copyright, should be considered and if so, how broad the provision should be”.

What is fair use?

Fair use allows for any person to use copyrighted work, without the copyright owner’s permission and or licence, based on a list of [limitations and exceptions to copyright](#) or a general clause commonly known as *fair use* or *fair dealing*. It all depends on a specific country’s legal system.

South African law currently follows the *fair dealing* doctrine. The primary difference between *fair use* and *fair dealing* is that the former is a “defence under US law” and the latter, “copyright exceptions in the UK”.

Fair use and *fair dealing* doctrines are more than just US and UK terms, “they encompass two similar [yet fundamentally different concepts](#)”. The Bill proposes a “hybrid” *fair use* clause that combines elements of both doctrines.

In 2018, Trade and Industry released the [second version](#) of the Bill which was passed by both Houses of Parliament: the National Assembly (NA) that same year and the National Council of Provinces (NCOP) in 2019.

As the last step of a Bill becoming law in South Africa, the Bill was sent to the President for assent (or review). Trade and Industry noted comments from the creative industry as part of their [Stakeholder Submissions and Responses Document](#), pp 42.

By this time, both local and international organisations put pressure on the President to “make the right decision” for the betterment of the country and its citizens. Two local organisations (representing multiple organisations) were at the forefront of the call for copyright reform:

- [Recreate South Africa](#) – advocated for the signing of the Bill(s) into law.
- Copyright Coalition of South Africa – against the [signing of the Bill\(s\) as is](#).

In 2020, after much deliberation, the President [referred the Bill back to Parliament](#). The Guild established the [Intellectual Property](#) (IP) and Copyright Committee.

Copyright Project

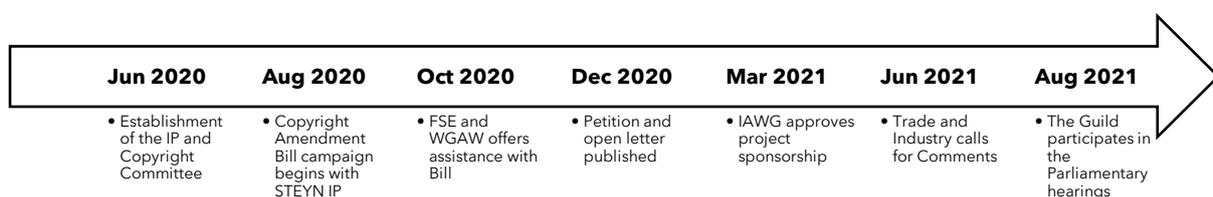


Figure 2: Summary of the Guild’s copyright project so far

The IP and Copyright Committee’s purpose is to ensure that performance writers’ voices on copyright are heard since:

- The current law sees performance writers as authors of *literary work* and producers as authors of *audio-visual work*, following the UK’s copyright law where copyright is seen as a property right.
- The onus is then on us to seek out legal advice when negotiating fair remuneration and a fair share in *royalties* whenever *literary work* (e.g., a screenplay) is transferred to *audio-visual work* (e.g., a film).
- The Bill, through the “hybrid” *fair use* clause, expects us to go to court for any unauthorised use of copyrighted *literary work*.

Since public hearings for the Bill were held in 2017, it was unlikely that Parliament would allow for the second round of public hearings. To this end, the IP and Copyright Committee started the copyright project (sponsored by the [IAWG](#)) in partnership with [STEYN IP](#). The project had two phases: 1) the call for the President and the Speaker of the NA to allow public participation on the Bill and once approved 2) for the Guild to address Parliament with our concerns on the Bill.

The Copyright project campaign began during the Guild's contracts and copyright online sessions (sponsored by the NFVF) in 2020. A [petition](#) was created, members were asked to sign and write [open letters](#) calling for public participation.

In 2021, a year after the President returned the Bill to Parliament, the NA opened the [call for the second round of public participation](#) but restricted the comments to the "hybrid" *fair use* clause. The Guild addressed this, in detail, in our official submission (available to members upon request). During public hearings, the Guild, represented by the project team, focused on:

- how the "hybrid" *fair use* clause gives the courts authority to determine whether any instance of unauthorised use of copyrighted work is fair, and that
- this need for litigation would be to our detriment, as there is little to no access to financial resources to pursue formal litigation in every instance of unauthorised use.
- The Guild highlighted the payment of *royalties* as international best practice (after both Multichoice and Netflix evaded the question about the payment of royalties and implied they were following other ways of paying for the reuse of copyrighted work other than best practice).

Videos for both sessions can be found here:

- [Portfolio Committee on Trade and Industry, 11 August 2021](#) (the Guild's presentation is at approx. 07:55:00 hours and the Multichoice and Netflix presentations are a few minutes before).
- [Portfolio Committee on Trade and Industry, 12 August 2021](#) (The last presentation by COSATU/TUMSA which calls for a "balanced" copyright law summarizes the main purpose of this process).

Next Steps

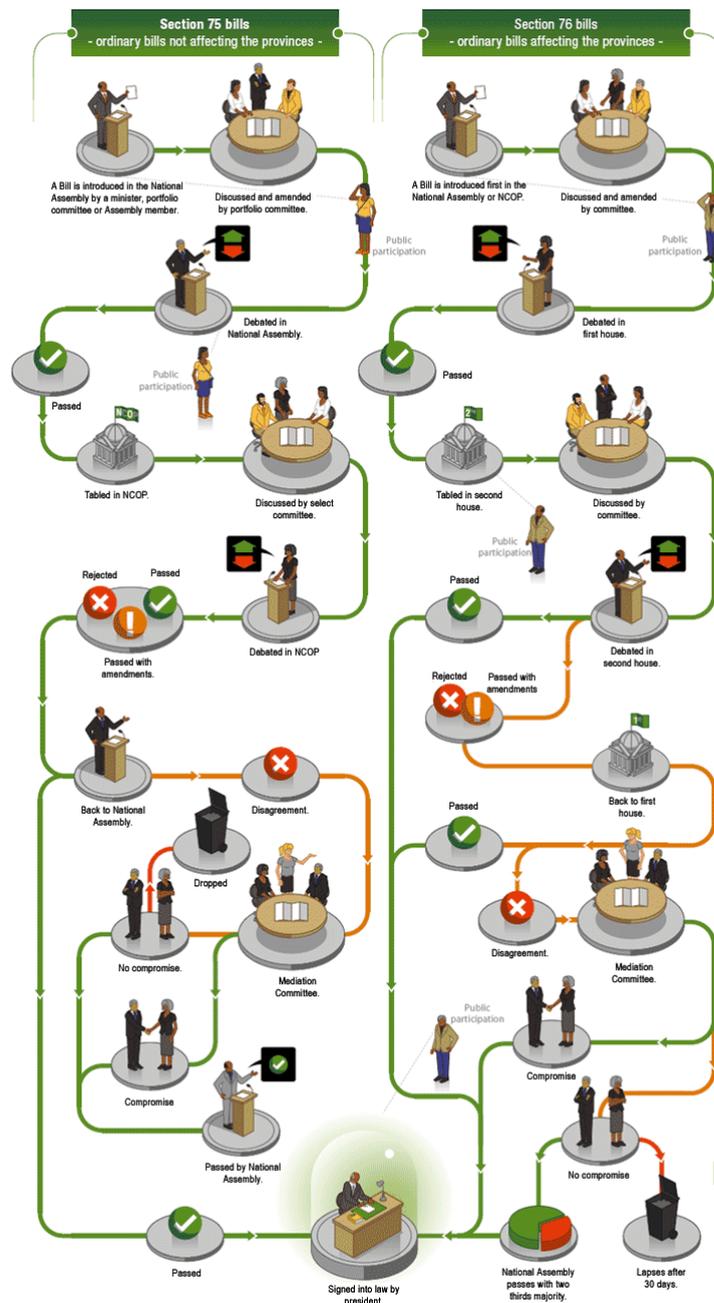


Figure 3: How a law is made. Source: Parliament RSA

The Bill is currently under consideration by the National Assembly (NA). Once it's passed by the NA, it will be tabled in the National Council of Provinces (NCOP) where there might be another call for commentary.

STEYN IP had this to say, "We are likely to gain more clarity on the next steps after we have received formal feedback from the Parliamentary Committee on all written and verbal submissions. This will also be a key driver in the way forward and would provide insight into whether further submissions (if allowed) are submitted to the NCOP."

Furthermore, the NCOP's call for comments (if forthcoming) would be standalone and would likely have unique parameters in which we would be allowed to comment. We can, at that stage, consider the most appropriate approach for the Guild and either comment or merely openly support (or co-author) submissions from another party whose views are aligned with that of the Guild".

At the time of writing this, the parliamentary portfolio committee were set to meet throughout November. The project team will continue to monitor the situation and report on any developments when such are forthcoming.

Theoline Maphutha is a full member of the guild and the project manager of the Copyright Project (sponsored by the IAWG) in partnership with STEYN IP (represented by Christiaan Steyn).