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RE: COMMENTS ON THE COPYRIGHT AMENDMENT BILL, 2017

1. Introduction

The Composers Authors and Publishers Association (CAPASSO) is pleased to make comments on the Copyright Amendment Bill for purposes of deliberations by the Portfolio Committee on Trade and Industry. CAPASSO is a member of the Copyright Alliance which is an organised collective of stakeholders in the creative sector with a keen and vested interest in the developments in the South African copyright industries and legislative framework. As a member of the Copyright Alliance, CAPASSO fully supports the comments and submissions made by the Copyright Alliance and would like to implore the Portfolio Committee to take heed of the contents thereof. The above notwithstanding, CAPASSO would like to highlight a specific matter for the Portfolio Committee's attention which we feel needs to better reiterated.

It would be useful to make a brief introduction of CAPASSO and why the proposed amendments to the Copyright Act are of importance to us. CAPASSO was incorporated in 2014 as a non-profit South African company representing the *mechanical rights* of music composers, authors and publishers. "Mechanical rights" are essentially the reproduction rights in musical works as contemplated in Section 6(a) of the Copyright Act 98 of 1978, the Act which is the subject of the current amendments. Our comments are thus limited to the Copyright Amendment Bill, and further only with regard to those aspects of the Bill that have a bearing on musical works and literary works.¹ In this regard we are also not concerned with sound recordings, namely the rights provided for in Section 9 and Section 9A of the Act, although these are also concerned with music (i.e. *recorded music*, which is essentially a recording of musical works). We hope that others will make comments with regard to this and other aspects and areas of the Copyright Act. It needs however to be noted that the Copyright Act is not only concerned with the protection of works that relate to the music industry but with the protection of other works such as cinematograph films (or simply "films"), artistic works, computer programs, broadcasts etc. Another type of work protected by copyright in which we are interested is what are termed "published editions" (see Section 11A of the Copyright Act), since musical works are often published as sheet music or music scores, the collection of which is many times published in bound music books, songbooks and folios which thus qualify as "published editions".

CAPASSO was formed when the Southern African Music Rights Organisation (SAMRO) and the National Organisation for Reproduction Rights in Music (NORM) (which both administered mechanical rights) embraced a vision of working together in the administration of mechanical rights in order to create a progressive mechanical rights licensing hub, which would represent all rights-holders and would play an integral role in the copyright licensing landscape on the African continent. The formation of CAPASSO was motivated by the Report of the Copyright Review Commission of 2011 ("the Copyright Review Commission Report"), which was released by the Department of Trade and Industry (DTI) in 2012.² The Copyright Review Commission Report recommended the formation of one collecting society

¹ Although CAPASSO is primarily concerned with musical works, it is trite fact that musical works generally incorporate literary works in the form of music lyrics.

² For the report see <http://www.gov.za/documents/copyright-review-commission-report-2011> (Accessed 11 August 2015).

per right. Based on this, both SAMRO and NORM transferred their mechanical rights licensing operations to CAPASSO. Since the formation of CAPASSO NORM's operations have ceased and NORM was replaced by the Music Publishers Association of South Africa (MPASA). Both SAMRO and the MPASA support CAPASSO's strategic goals of service excellence to both members and users, as well as its comprehensive licensing strategy for the digital environment. CAPASSO seeks to be a truly African organisation that provides solutions that are geared to deal with the unique challenges faced by African rights-holders.

CAPASSO generally welcomes the spirit behind the amendments to the Copyright Act as such amendments were long overdue, especially in view of technological developments that have overtaken the traditional music industry. CAPASSO notes that many of the proposed amendments reflect a distinctly positive endeavour by the department to improve our copyright and neighbouring rights legislation. CAPASSO is particularly encouraged by the department's efforts to introduce provisions relating to the protection of rights-holders in the digital environment. Such provisions shall ensure that the interests of rights-holders are safeguarded in an increasingly digitised environment.

Having indicated this, CAPASSO also wishes to bring to light provisions in the proposed amendment which, if not attended to and rectified, will, rather than safeguarding the interests of rights-holders, have the opposite effect of jeopardising them.

2. Section 3 of the Bill

Clause 3 of the Bill amends Section 5(2) of the current Act by adding the element of funding to the categories of works whose copyright will be owned by the state or an international organisation. Under the current Act, the state is only eligible to own copyright in respect of works "made by or under the direction or control of the state or such international organizations" (Section 5(2), read with Section 21(2) of the current Act). Thus under the current dispensation ownership of copyright by the state and international organisations clearly occurs in limited and narrowly-defined cases. The proposed amendments add funding as a cause for vesting the first ownership of copyright under this Section, not even stating the quantity of funding needed to trigger this vesting. Furthermore, this benefit is extended to not only the State and international organisations which were up to now required to be defined by regulation, but all "international organisations" and also "local organisations"

The concern we have with regard to the extension of cases in which the state may own copyright to include *works funded by the state* is that this will inevitably result in authors and owners of copyright in works funded by, for example, the South African Broadcasting Corporation (SABC), as an organ of State,³ being denied copyright ownership in these works. This would have dire consequences for authors of musical works, who are heavily dependent on the public broadcaster in respect of so-called "commissioned works".⁴ Under the current Act, the SABC would only own copyright in respect of musical works created by its own production studios and not those created by outside production companies, though such works may have been commissioned by the SABC.⁵ Consequently, *the authors and owners*

³ As an institution exercising public power the SABC is clearly an "organ of state" as contemplated in Section 239 of the Constitution of the Republic of South Africa, 1996. See further in this regard *Democratic Alliance v SABC and Others Case No:12497/2014 (on appeal)* at para 26.

⁴ The expression "commissioned works" in respect of musical and literary works is, in light of the provisions of the Copyright Act, a misnomer in that these works are excluded from the application of the commissioning provisions of Section 21(1)(c) of the Act. The proposed amendment to Section 5(2) will however, render this exclusion of no effect as it will, in essence, stealthily include musical and literary works within the commissioning regime.

⁵ See in this regard *Biotech Laboratories (Pty) Ltd v Beecham Group Ltd and Another* 2002 (4) SA 249 (SCA). While not necessarily dealing with the meaning of the phrase "by the state" the court held in this case (see paras 18 – 20) that the

Directors: N. Matzukis; N. Migogo; R. Hill; Y. Kenan, L. Bulley; A. Sibiya

of copyright in such “commissioned” musical and literary works are entitled to receive mechanical and performing rights royalties from the SABC in addition to the commission fee.

Broadcast mechanical and performing rights royalties in many cases constitute a large portion of the royalties earned by authors and publishers of musical works. A loss of this income as a result of ownership of commissioned works by the SABC would adversely affect the livelihoods of authors and the economic wellbeing of copyright owners, and will in fact, make great mockery of government’s stated objectives for the current Bill, which include “[addressing] the plight of musicians and performers by ensuring that royalties are paid on time by recording companies and broadcasters as most of them are dying as paupers”.⁶ In view of this we recommend that the addition of the funding requirement be completely removed.

3. Section 4 of the Bill

The Copyright Alliance has made extensive submissions on the proposed amendments of sections 6 to 9. CAPASSO would like to, for the most part, defer to those submissions and the suggestions made therein save for the proviso.

In the provisos to sections 6, 7 and 8 the DTI clearly displays a lack of understanding of the parties that are involved in the copyright chain. Performers and users are included as being entitled to sharing in a royalty in these sections, which in fact deal with author’s rights. Similarly, the proposed section 22C(3)(c) of the Bill provides that collected fees shall be distributed to “users, performers, owners, producers, authors, community trusts or collecting societies”.

The proviso quite clearly seeks to transfer what should be a neighbouring rights provision into the musical works realm without having regard to how these rights differ and are treated. General practice is such that the earnings from the exploitation of musical works (at least as far as reproduction royalties are concerned) are usually in favour of the authors. The current language will force authors to share earnings from the exploitation of their work equally with whomever the work is assigned to. The language also affects the ability to assign rights unencumbered which will effectively devalue musical works.

4. Section 11 of the Bill

The proposed new Section 12A(1)(c)

This section sadly retains the controversial ephemeral use provisions of the Copyright Act, contained in the Section 12(5) of the current Act. This provision has had a negative impact on the ability of rights-holders to earn what is termed “broadcast mechanical royalties”, namely, royalties payable in respect of the reproduction of musical works for purposes of broadcasts. In this regard we wish to point out that though Article 11bis(3) of the Berne Convention permits the enacting of such ephemeral provisions, it in fact leaves it to member states to determine the period within which such provisions would be applicable. It appears that the South African legislature adopted position adopted in the Tunis Model Law, which recommends a period of six months or more. There is however no reason why our legislature, taking into

phrase “under the direction” of the state requires the state to initiate the making of the work and to “prescribe the manner and means to be employed” in doing so; while the phrase “under the control of” requires that the work is *made* under the control of the state, and not merely that the state had the power to approve or disapprove of the work, since copyright vests in the author of the work as soon as the work is completed and can thereafter only be transmitted under Section 22 of the Act.

⁶ Per Minister Jeff Radebe, as reported in <http://qa.sanews.gov.za/south-africa/cabinet-approves-bills> (Accessed on 23 August 2016).

account the local conditions of South African copyright owners, should follow the Tunis Model Law in this regard. "Ephemeral" in any case means "temporary", "momentary" or "short-lived".

The provisions of the current Section 12(5) (as repeated here in the new Section 12A(c)), have had a very negative effect on the ability of rights-holders to earn broadcast mechanical royalties, as broadcasters argue that they are exempted from paying royalties on the basis of this section. This particularly affects the work of CAPASSO as a society representing rights-holders in respect of their mechanical rights. With the possible demise of the income available to rights-holders in respect of commissioned works as highlighted above (see the comments under paragraph 3.2 above*), the further erosion of their income through the ephemeral provisions will bring in a double-barrel injustice to rights holders. Such provisions have led to such erroneous practices such as broadcasters failing to pay for mechanical royalties on radio broadcasts. This clearly prejudices the rights of composers, authors and publishers.

In view of the foregoing we recommend that the proposed amendment be removed and replaced with provisions similar to those applicable under Section 30(8) of the Canadian Copyright Act which provides, *inter alia*, that (a) the ephemeral provisions apply only in respect of a live recording of a copyright work by a broadcaster ["programming undertaking"] authorized to make such a recording; (b) the broadcaster must use its own facilities to make such a recording; (c) the broadcaster must make the recording for its own broadcasts; (d) the broadcaster must destroy the recording within thirty days of making it (unless otherwise authorized by the rights-holder or unless it keeps the recording in an archive), failing which royalties must be paid to rights-holders and (e) the provisions of the section does not apply where the broadcaster has secured a licence from a Collecting Society to make such a recording.

It does not make sense that a jurisdiction such as Canada, which is a developed country, should have such generous provisions in respect of copyright owners, whereas South Africa, a developing country with a still-developing music industry and where rights-holders are said to die as paupers, should not at least have similar provisions.

The proposed new Section 12A(1)(f)

The introduction of considerations of commercial v non-commercial use as a basis for permitting copyright uses is problematic. The idea that a whole work can be translated into another language without the copyright owners' consent because the use is for non-commercial purposes is problematic and would encroach into the normal exploitation of the work and be prejudicial to the interests of the rights holder. CAPASSO's concern here is with regard to music lyrics. If this were to be permitted at all (something not advisable), it should be clearly spelt out that **no copies of the translated work can be made or sold, except by the copyright owner.**

The proposed new Section 12A(3)

What is proposed here is overreaching. The right to make an adaptation of a work is an exclusive right of the copyright owner and the essence of this provision (which makes reference to the "making or use of an adaptation") would be to take away from the rights holder his exclusive right. This does not for example, only suggests that where a song was recorded, a purchaser of the recording would be entitled to make a personal copy of the work in any format, but further infers that such purchaser would also be able to make an adaptation of the song or to translate it into another language. This is completely in conflict with the three-step test whole section needs to be removed.

3.4.2.9 The proposed new Section 12B

This section purports to introduce the so-called "first sale doctrine" which is a part of American law and has never been a part of our law. This Americanisation of South African copyright law is radical and problematic. The fact that the provision applies "notwithstanding any provisions of this Act, the

Trademark Act, 1993 (Act 194 of 1993) and the Counterfeit Goods Act 1997 (Act 37 of 1997)" means that the drafters want to remove any doubt as to their intention: both parallel importation (regardless of the source of the article being imported) and distribution is permissible, without the consent of the copyright owner, if the article concerned was subject to a "first sale or other transfer of ownership", whether in the Republic or outside the Republic. What is more, the essence of this new section is that even if the first sale or transfer of ownership was unlawful, that would still qualify to enable an importer or distributor to import or distribute the article without the need to obtain permission from the copyright owner, or the need to pay any royalties in this regard. In one stroke, the relevance of the anti-parallel importation and anti-distribution provisions of three Acts has been taken away, and with it established case law.⁷ This would for example, mean that a person can import a video-film (from whatever source, whether making of the film constituted infringement of copyright or not) or buy it here in South Africa, and open a video-hire shop, without the need to obtain a licence from the copyright owner (or such copyright owner's lawful representative in South Africa), thus for example, overruling the position adopted by our courts in *Mr. Video (Pty) Ltd & Others v Nu Metro & Others*⁸, where such action was confirmed to be unlawful.

Not only the usage of the film but also that of the underlying works (including musical works) would be deemed to be lawful, since there would have been a first distribution of such works (through the usage in the film). The changes proposed here are sweeping in that, under the current law, distribution (or publication, as defined in the Copyright Act) of a work in South Africa would, without the permission of the copyright owner, be prohibited even if the copies thereof were lawfully imported, or even if the article concerned was lawfully purchased in South Africa, it being understood that such importation or purchase would be for personal use and that without the authorization of the copyright owner the importer or purchaser cannot use the article for commercial purposes. This new section however permits not only the importation and distribution of the article if it was lawfully obtained (an act currently prohibited), but also regardless of whether the article is a pirated copy (in view of excluding the application of any contrary provision of the Counterfeits Goods Act, the Copyright Act and the Trademark Act). The proposed provision is thus in fact promoting what is currently a criminal act and a civil wrong. In view of this, the proposed section must be dropped like a hot potato.

Section 9 of the Bill

We note here that the proposed Section 13A of the Bill introduces a temporary reproduction exception that mirrors Article 5 of the EU Copyright Directive. Article 5 of the EU Copyright Directive read with Recital 33 thereof permits transient reproductions where these form part of and / or complete a technological process that produces copies of a limited duration that are thereafter automatically deleted (as in the case of browsing and caching). Article 5 was the subject of the controversial *Meltwater* decision,⁹ where both the UK Supreme Court and the Court of Justice of the European Union (CJEU) held that on-screen copies and cached copies created for the purpose of viewing websites comply with the provisions of Article 5 of the Copyright Directive (and Section 28A of the UK Copyright, Designs and Patents Act of 1988). This means that the streaming of copyright content (whether authorized or not) is permissible in Europe under Article 5 of the Copyright Directive, as long as no downloading takes place. It is submitted that the proposed Section 13A in the Bill, understood within developments in European copyright law on which it is based, is not one that is suitable for the South African market where rights-holders have, for a long time, been deprived of income from the digital exploitation of their works and should therefore not be incorporated. With the demise of income from the exploitation of physical products of music, and the switch of users' interests from music downloads to live streaming, a provision that permits live streaming without the need for compensation will virtually impoverish rights-holders and

⁷ For example, the case of *Paramount Pictures Corporation v Video Parktown North (Pty) Limited* 1983 (2) SA 251 (T).

⁸ (472/08) [2009] ZASCA 127 (29 September 2009)..

destroy the music industry.¹⁰ It has been said that streaming is the new revolution in the entertainment industry. Several new streaming services have made their debut in South Africa. This is a huge potential source of income for rights holders, but with the proposed section, rights holders will not be able to earn any income in this regard. In view of this, and as a way of building the South African music industry, it is proposed that musical works and lyrics should be exempted from the application of the proposed Section 13A of the Bill. What is even more concerning with the proposed Section 13A is that it does not incorporate provisions similar to Article 5(5) of the EU Copyright Directive, which in essence subjects the provisions of Article 5(1) to the three-step test.¹¹ **If the proposed provisions are to remain there must at least be a three-step provision in line with Article 5(5) of the EU Copyright Directive to counter the harsh effects of the provisions.**

Further to what has been highlighted above, we also wish to highlight that confusion may be created by the provisions of the proposed Section 13A that broadcasters are included within the ambit of this provision. If that were to be the case this would adversely affect the ability of rights-holders to earn mechanical rights royalties for the reproduction of their works. For this reason it is proposed that the reference to “network” in the proposed section should be amended to state “computer network” and that broadcasters be explicitly excluded from the provisions of the proposed section.

Section 18 of the Bill

The proposed Section 19C of the Bill

It should be made clear that the provisions of the proposed Section 19C are only applicable in respect of lawfully-obtained copies of a work. A provision relating to the three-step test should also be incorporated in this section, i.e. it should be stated that the cases dealt with in this section will only be applicable if such usages do not conflict with the copyright's owner's normal exploitation of the work and do not prejudice the legitimate interests of the copyright owner. The phrase “copyright works incorporated” in subsection (2) of this section should be amended to read “copyright works lawfully obtained and incorporated ...”.

The proposed Section 19(D) of the Bill

The provisions of this section are clearly meant to implement the provisions of the Marrakesh Treaty. The provisions in this section are however, broader than those of the Marrakesh treaty in that they give the impression that any person or organization may carry out the activities contemplated here. It is suggested that the approach of the Marrakesh treaty, in which only “designated” or “authorized” entities are permitted to carry out these activities, should be adopted here. Furthermore, the section must clearly spell out the responsibility of the designated or authorized entities to ensure that the persons benefiting from the provisions of this section are in fact “persons with disability” (as per the proposed amended definition), or what the Marrakesh Treaty terms “beneficiary persons” (Article 3 of the Marrakesh Treaty).

Section 21 of the Bill

There is concern in relation the proposed amendment to section 22(3) of the Copyright Act by providing that “assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment. The proposed amendment is problematic because it amounts to an invasion of the freedom to contract. Forcing authors to assign their works for a minimum period of 25 years is not only contrary to

current practice but leaves the authors of such works tied to long term contracts that may be unfavorable. Clarity on the operation of this clause is thus sought.

Section 22 of the Bill

In CAPASSO's submission to the Department in respect of the first version of the Bill we expressed the view that the orphan works regime should not apply in respect of musical works, as Collecting Societies have established systems with regard to the search of works whose authors are not known, and also because this "problem" is not a major one in the music industry as it may be in other areas of copyright such as the literary industries. If it is however, felt that these provisions must nevertheless be incorporated, it is suggested that one of the conditions for granting a licence to an applicant in respect of orphan works under subsection (6) must be that "the applicant must demonstrate that he or she has approached existing Collecting Societies to obtain information about the author of the work and the relevant Collecting Societies must have shown that they do not have such information, provided that if within six months of the application having been made to the Commission any Collecting Society approaches the Commission with information about the author of the work concerned, the licensing of the work shall henceforth be dealt with in line with the normal processes of the Collecting Society concerned, and the licence granted by the Commission shall be revoked."

We also wish to indicate that the proposed subsection (7) is in fact a repetition of subsection (2) and should thus be removed. Furthermore, the word "may" at the end of the first line of subsection (10) needs to be changed to "**must**". Failure to do this will result in lack of accountability with regard to moneys paid in respect of orphan works.

CAPASSO would like to humbly request that the Portfolio Committee considers the above comments as well as those made by the Copyright Alliance. Further, CAPASSO would like to request an opportunity to make oral submissions to the Committee when such opportunity is made available.