16 July 2021

The Honourable Mr. Duma Nkosi

Chairperson: Portfolio Committee on Trade and Industry

Attention Mr. A Hermans

Parliament of the Republic of South Africa

CAPE TOWN

Dear Mr. Nkosi,

SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY ON SPECIFIC PROVISIONS OF THE COPYRIGHT AMENDMENT BILL [B13-2017]

A.   INTRODUCTION

1.   The Southern African Music Rights Organization ("SAMRO" functions as a Collecting society established in terms of section 1(a) of the Copyright Amendment Act 9 of 2002.

2.   SAMRO's primary mandate is limited to the administration of the rights afforded to authors and copyright owners in terms of section 2(1)(b) read with section 6 of the Copyright Act 98 of 1978 (Act) which relate specifically to musical works**.**

3.   SAMRO has previously made submissions pertaining to the Copyright Amendment Bill and we are making this submission in response to the recent call for public submissions made by the Portfolio Committee. We would like to state that although we will confine this submission to the points made in the committee's request, there are many other defects in the bill that would render it unconstitutional. We also welcome the decision by the Joint tagging mechanism to retag the bill as a Section 76 bill and recommend that all the problematic provisions of the bill be dealt with holistically during that public consultation process in the provinces.

4.   SAMRO agrees with the reservations about the bill which he raised in a letter to the speaker of the National Assembly when he referred the bill back to Parliament for consideration.

5.   SAMRO is a member of the Copyright Coalition of South Africa and we are aware that the CCSA will be making a separate submission to the portfolio committee. The CCSA represents a number of industry organisations and trade associations and its submission, which we support, will deal with the issues pertaining to the bill in a more substantive manner.

B.   FAIR USE EXEMPTION

6.   **"Fair use"** is broad and open ended in that it is not confined to certain kinds of works, it applies to all copyright protected works and to all four of the restricted acts. It outlines mere examples of what types of use would constitute fair use and then sets out the factors that must be considered when determining whether the use of the work constitutes fair use.

7. This is done on a case-by-case basis. The end result is that when there is doubt as to whether a specific use of a work constitutes fair use, the dispute will have to be referred to the courts to resolve the matter. The courts will then apply the principles and determine the permitted use.

8. The problem with the fair use approach is that a broad variety of uses of works are allowed without the user being required to seek and obtain the copyright owner's permission and without paying a royalty. It therefore does not serve the purpose that the copyright protection was intended for in the sense that it places the author and copyright owners in a position where they would have to seek the assistance of the judicial system in terms of enforcing their rights, which is costly and time consuming.

9. The danger with this approach is that the decision as to what constitutes fair use will ultimately lie in the hands of the court and users will attempt to rely on the fair use exemption as an excuse not to take out a licence. Should a collecting society wish to challenge this, they will have to take the user to court which will be a lengthy and costly exercise. The only parties that are set to benefit from this provision are the lawyers who will be litigating on the matters. This does not serve the purpose that the Bill was set to achieve.

10. The principle of fair use is an American approach which is wholly offensive to and inappropriate for South Africa. Firstly, the US is a litigious society, and in contrast South Africa is far from a litigious society and in fact great barriers in respect of access to justice and economic freedom exist in South Africa. Litigation is extremely expensive and citizens cannot be expected to litigate in order to protect their bread and butter.

11. We submit that the weighting of prejudice, required for the balancing of rights in this regard, favours the author and rights-holder. Secondly, the absolutist approach used in the US regarding the freedom of expression is not appropriate in South Africa given that our Constitution specifically provides that freedom of expression can be limited and must be weighed up against other constitutional rights such as the right not to be deprived of one's property, and the limitations provided for in section 36 of the Constitution.

12. We therefore, submit that the imposition of such an approach would be wholly unconstitutional and a grave intrusion of authors and rights-holders rights, which this bill sets out to protect.

13. The Copyright Act currently adopts the doctrine of fair dealing. Under this doctrine, "fair dealing" in respect of a work of copyright does not constitute a copyright infringement, however such fair dealing is limited to certain purposes, under certain circumstances. Fair dealing is adopted in the Copyright Act.

14. SAMRO respectfully submits that the current fair dealing provisions are sufficient to achieve the purpose of facilitating private education and study. Should there be any dispute as to whether a use of a work constitutes fair dealing as set out above, the dispute can be referred to the Copyright Tribunal for cost effective, efficient and speedy resolution.

C.   LIMITATIONS ON COPYRIGHT

15. In his letter, the President refers to other new exceptions in the bill that are problematic, namely those in sections 12B – 12D, 19B and 19C. The President asserts that these exceptions may constitute an arbitrary deprivation of property; may violate the right of freedom of trade, occupation and profession; may be in conflict with the WIPO Internet treaties (the WCT and the WPPT) and may be in breach of the three-step test.

16. **Section 12B** introduces other additional exceptions that would amount to an arbitrary deprivation of property.

17. **Section 12C** introduces a temporary reproduction exception that is based on article 5 of the European Union Copyright Directive of 2001.[1] We submit that the proposed section 12C in the Bill is not fit for purpose in the South Africa context where rights-holders have been unable to make an income from the digital exploitation of their works.

18. **Section 12D**, the "education exception", introduces provisions that would have a number of negative effects including the possibility of a work like a book being copied in its entirety without any payment being made to the author.

19. **Section 19C(4)** poses a real threat to the rights of the relevant rights-holders. This is particularly problematic when read with section **19C(5)** which allows a library, archive, museum or gallery to

---

[1] Information Society Directive 2001/29/EC.

make a copy of a publicly accessible website (which thus includes the various copyright works in such website) without compensating the relevant rights-holders.

D. INTERNATIONAL TREATIES

20. SAMRO has previously submitted that the bill does not comply with international treaties. This was also concern raised by the President. To this end we have included a link to a submission previously made by Andre Myburgh to the Portfolio Committee in 2017 and subsequently edited in 2018 which dealt with the defects of the bill and also dealt with matters pertaining to international treaty compliance: https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf

21. SAMRO reiterates that it is encouraged by Parliament's commitment to the objectives set out in the bill and thanks the Parliament for considering the submissions contained herein.

22. We remain available to Parliament for any further discussions or queries in respect of our submissions and any subsequent legislative amendments that may follow.

_____