

10 March 2023

The Hon. Chair of the Standing Committee on Finance, Economic Opportunities & Tourism
Hon. C. Murray
Western Cape Provincial Parliament
Cape Town
Attention: Zaheedah Adams, Procedural Officer
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Dear Honourable Chair,

The Southern African Music Rights Organisation (SAMRO) submission to your committee on the Copyright Amendment Bill (B13D-2017) and the Performers Protection Amendment Bill (B24D-2016)

Introduction

The Southern African Music Rights Organisation (SAMRO) thanks your committee for affording stakeholders this opportunity to make submissions in relation to the Copyright Amendment Bill (B13D-2017) (CAB/Bill) and the Performers Protection Amendment Bill (B24D-2016) (PPAB) (both herein sometimes referred to as the Bills).

SAMRO functions as a licensing body and protects the rights of composers and authors (music creators) both locally and internationally. The primary role of SAMRO is to administer Performing Rights afforded to authors and copyright owners in terms of section 2 read with section 6 of the Copyright Act 98 of 1978 (the Act) which relate specifically to musical works and performs this role by collecting license fees from music users – television broadcasters,

radio stations, in-store radio stations, pubs, clubs, retailers, restaurants, and all other businesses that broadcast, use, or play music.

SAMRO has been following the protracted and often controversial process that commenced in 2015 to amend the outdated Act. This process promised, amongst others, the long-overdue modernisation of South Africa's copyright legislation in order to make it relevant for the digital age. SAMRO recognises and agrees with this need for reform and as such, we on behalf of our members have actively participated and responded to the calls for public comments on the Bills. We have also consistently expressed our reservations regarding several of the proposed amendments in the Bills and highlighted major flaws specifically in the CAB that would need to be corrected if the Bills are to achieve the objective of making South African copyright legislation more effective in the digital age. In particular we have expressed our vehement opposition for what appears to be kowtowing to the demands of big tech companies who wish to drastically transmute copyright legislation from being an "authors' rights" law into a "users' rights" law.

We hope that our concerns highlighted in this submission will be considered by the NCOP and Provincial Legislatures. Specifically, we wish that the Bills in their current flawed form will be rejected and allowed to lapse in terms of section 76(1)(a) and (d) of the Constitution.

Beyond this written submission, we wish to participate and appear before your committee's scheduled public hearings to present our oral submissions. We can be contacted telephonically on 0609773053 or by email on legalthelpdesk@samro.org.za.

We remain available for consultation to provide the delegates with any additional information they may require.

Yours faithfully,

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SUBMISSION

While we support the need for updating the old Act, we vehemently oppose the draft Copyright Amendment Bill (CAB) as it falls short of providing adequate legal certainty and protection for copyright works and fails fundamentally to address His Excellency President Cyril Ramaphosa's concerns around its constitutionality; and reasons for his referral-back in June 2020. Upon comparison of the 2019 B-Bill referred by the President and the current 2022 D-Bill before the NCOP and Provincial Legislatures, we submit that the changes which were made by the Department of Trade Industry and Competition (DTIC) are in our view a tick box exercise and do not take into consideration fundamental issues raised by rights holders. The Bills remain defective and not fit for the purpose they were intended.

Regrettably, this flawed proposed legislation is being presented to the NCOP and Provincial Legislatures despite numerous submissions (written and oral), not only from SAMRO but by many others who are negatively affected by these Bills. We make the submission mindful that the NCOP is bound by Section 76 of the Constitution to consider the impact of the Bills on trade and cultural sectors and remain hopeful for the sake of the ailing industry in the different provinces that the NCOP and Provincial Legislatures will reject such defected Bills in order to present the creative industries an opportunity to contribute to the redrafting of legally sound legislation fit for purpose and fit for the digital era.

Music cuts across many industries including audio-visual and Interactive media, performance and celebration, and cultural heritage. Authors of music are the quintessential innovators providing a bedrock for the performing, recording and distribution of authored works. SAMRO exists to ensure that such authors receive fair compensation for their authorship. A weak copyright regime, despite the noble objective to prevent artists 'from dying as paupers'¹, will have the opposite effect, eroding not only authors of music but the entire entertainment value chain which is already ailing due to 'pirating' of music and the effect of the COVID-19 pandemic.

¹ [Cabinet approves Bills | SAnews.](#)

There are numerous illustrative examples of what could be a major success resulting from adequate copyright protection. By way of example, the internationally appealing music genre from the South African townships, 'ekasi' for example follows the legacy of the post-1994 township music 'Kwaito' provides positive competition in the music industry of the contemporary indigenous genres between Durban KwaZulu-Natal's 'Gqom' music, and Pretoria's (Gauteng) 'Amapiano' music that favors creatives from largely disadvantaged backgrounds. These musical works, if adequately protected against unfair uses, are able to have great multiplying effects, creating legacies for the authors and economic gains for many in the value chain. The Broadway musical the Lion King recently celebrated 25 years on Broadway, the South African composer Lebo M through his musical compositions remains legendary by having successfully woven the African sound into this Broadway musical which is celebrated globally. The Bills as it stands threaten this emerging opportunity for up-and-coming authors of musical works, a situation provincial economies cannot afford to risk.

Against this introduction, SAMRO continues to respond to the call for public submissions to amplify our views and concerns with regards to the proposed Bills. Below we summarise key but non-exhaustive areas that render the CAB defective, as these areas have a bearing on the operations of SAMRO as a collecting society, music industries, and consequently a threat to provincial economies. (These specific areas of concern were submitted in our previous public calls by the Portfolio Committee on Trade and Industry, copies are readily available upon request).

RESPONSE TO SPECIFIC PROPOSED AMENDMENTS

1. Clause 12A - Introduction of the 'fair use' exception;

South Africa has in the current Act the 'fair dealing' provision which has its origins in the copyright legislation of the United Kingdom. Fair dealing has a defined list of exceptions for use of copyright works. The CAB, in an unprecedented venture, introduces the 'fair use' doctrine into South African law. 'Fair use' has its origins in the USA and the doctrine relies on the USA courts with many years of developed jurisprudence and socio-economic circumstance, that determine the permissibility of its use.

An impression has been created by the legislators that the ratios between countries using the fair dealing defence and those using the fair use defence, is in par or reasonably comparable. However, the reality is that the ratio is disproportionately dissimilar: While only less than a dozen countries use a fair use system – with several of those using a brand of ‘fair use’ that is very dissimilar to that applicable in the USA – the majority of countries use a fair dealing defence.²

It is important for Provincial Legislatures and the NCOP to insist that the drafters of the CAB provide a rationale for this drastic change from the current policy to the proposed USA doctrine. SAMRO submits that such a policy change requires strong motivation and adequate stakeholder consultation. There should be cogent reasons to motivate why South Africa should leave its tradition of using a fair dealing defence, to join the less-than-a-dozen countries that use a non-uniform fair use system. This is even more so considering the fact that our courts will need to develop fair use jurisprudence “from scratch”, and in so doing will be forced to rely on jurisdictions such as the USA which are not compatible with our system of law – while disregarding a rich jurisprudence from English law and other common-law jurisdictions still using a fair dealing defence.

In the *Moneyweb* judgment³ Berger J, recognising the importance of history in our precedence system where certainty is critical, provided the following reasons why he needed to rely on English for an understanding of the meaning of “fair dealing”:

*... I... accept that I must be cautious in considering foreign law because its jurisdiction has its own particular history and, in many cases, is bound or influenced by domestic statutory precepts. I therefore intend, for historical reasons, to focus on English authority.*⁴

² For more information on countries using both systems see this link: [The Fair Use/Fair Dealing Handbook \(infojustice.org\)](http://infojustice.org) (accessed 25/01/2022).

³ *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

⁴ *Id* at para 103. Emphasis added.

SAMRO and other rights-holders observe the Bill being increasingly transformed into a *de facto* users' rights law, rather than it being an authors' rights law, as copyright law generally is.

SAMRO submits there lies a need for certainty when dealing with copyright infringement matters. It should be immediately clear what acts constitute infringement and not be left to the courts to determine such on a case-by-case basis, where the courts will need to develop new rules with no precedent in our law (and thus having to rely on American law – a legal system diametrically different from ours in many ways).

Furthermore, in the South African context, where access to justice is already a serious issue, rights-holders do not have the means to institute litigation in order to confirm their rights and they will have to accept defeat and allow users to exploit their works with no recourse. Rights-holders will be up against large, deep-pocketed tech conglomerates that have a deep interest in an expansive exceptions regime. The South African context matters deeply when making this policy consideration and the solution cannot be resolved through a one-size-fits-all approach.

2. Lack of a proper Socio-Economic Impact Assessment System (SEIAS)

Most right holders unanimously contend that the foundation upon which these Bills were built is procedurally flawed and goes against Cabinet's February 2007 decision on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation, and regulations through a proper Socio-Economic Impact Assessment System (SEIAS).

The National Assembly in this regard wrongly proceeded to deliberate and accept the Bills with new policy initiatives without satisfying themselves on the socio-economic impact of the new policy in the different sectors.

The fact that Parliament was not provided with a proper SEIAS of the totality of the effect of the Bill on the creative sector or professional legal analysis of the Bill's provisions measured against the Constitution and international treaties when the Bill was introduced, is reason enough to go back to the drawing board and make considerations to insist on a redraft of the Bills and a SEIAS report.

3. Clause 1 - Definition of “accessible format copy”

Musical works in all forms of usages will be included in new exceptions. As those advocating for the safeguarding of the rights of authors and copyright owners have argued throughout the consultation process relating to this Bill, it can never be assumed, without conducting an actual economic and social impact assessment, that the introduction of a new limitation and exception complies with the three-step test. It is for this reason that authors' rights organisations and practitioners have been consistently calling for this, to no avail.

SAMRO submits that the proposed amendment in respect of “accessible format copy” definition, does not align to the definition in the Marrakesh Treaty.

As advised in the advisory opinion of one of the technical experts appointed by the Committee in 2018,⁵ the definition of “accessible format copy” in the Bill is diametrically opposed to the definition in the Marrakesh Treaty. This has not changed by the insertion of the phrase “including to” in the definition and the definition has not thereby been made to be more conformed to the definition in the Marrakesh Treaty. As indicated in Dr Baloyi's advisory opinion, the definition of “accessible format copy” in the Bill is inconsistent with the definition in the Marrakesh Treaty in the following manner:

- (i) It extends the application of the proposed exception to all works (thus including musical works), rather than certain literary works only, as contemplated in the Marrakesh Treaty, which seeks to address the “book famine” phenomenon; and

⁵ The advisory opinion of Adv. J. Joel Baloyi, available here: [Baloyi.pdf \(legalbrief.co.za\)](#).

- (ii) It not only limits the application of the exception to certain “beneficiary persons”, as contemplated in the Treaty, but extends this to all “persons with a disability”, as further defined in the Bill.

We are aware of the submission made by the legislature during deliberations in which it was argued that South Africa is not bound to strictly adhere to the regime contemplated in the Marrakesh Treaty and that it may, in fact, introduce additional exceptions other than those contemplated in the Treaty. While we are not in disagreement with this, this is not the issue for consideration. The issue for consideration is the determination of whether, in introducing additional limitations and exceptions, this was done in conformity with other international treaty requirements, as contemplated in the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty, including the requirement in respect of applying the “three-step test”. As Baloyi has observed, “[i]ndeed article 12 of the Marrakesh Agreement makes it possible ... to introduce other limitations and exceptions ... for the benefit of the beneficiary persons ... However the treaty provides that such additional limitations and exceptions must be ‘in conformity with ... international rights and obligations’. This entails strictly applying the three-step test when introducing any new limitations and exceptions.

SAMRO joins hands with those advocating for the safeguarding of the rights of authors and copyright owners and will continue to argue throughout this consultation process relating to this Bill, that it can never be assumed, without conducting an actual economic and social impact assessment, that the introduction of a new limitation and exception complies with the three-step test. It is for this reason that authors’ rights organisations and practitioners have been consistently calling for this, to no avail.

4. Clause 20 - amendment to section 19(D) of the Bill

It is submitted that the insertion of the expression “authorized entity” in this section does not cure the defect of the section, in that, by keeping the phrase, “any person that serves persons with disability, including an authorized entity” (s 19D(1)), the facilitation of access to accessible format copies is not limited to authorized entities, as contemplated in the Marrakesh

Agreement, but also includes other persons serving persons with disability. This defeats the purpose of having authorized entities to facilitate access to copies by beneficiaries and in fact removes the incentive to seek authorisation and / or recognition by government as an authorized entity – if any other person, even though not an authorized entity, may also provide those services.

In the Marrakesh Agreement it is entities recognised as “authorized entities” that may facilitate access to works by beneficiary persons, i.e. it is authorized entities that serve beneficiary persons (art. 2(c) of the Marrakesh Treaty). By including persons or entities other than “authorized entities” among entities that may facilitate the access to works by beneficiary persons, the Bill is not aligning with the Marrakesh Agreement and is following its worrying trend of incorporating adverse provisions for authors and rights-holders by introducing expansive limitations and exceptions.

We therefore recommend that the NCOP rejects this section so it can be amended appropriately by limiting the provisions of section 19D(1) to authorized entities.

5. Clause 13, section 12B(1)(b) – Ephemeral use exception

This amendment seeks to amend the ephemeral use exceptions in the Copyright Act by introducing a regime similar to that applicable in Canadian copyright law. This is welcome, as rights-holder groups have called for a review of the ephemeral use provisions. In particular the amendment seeks to limit the period within which a broadcaster may reproduce performances, sound recordings and other works for purposes of making a broadcast / doing communication to the public, without requiring authorisation from the rights-holder, to a period not exceeding thirty days – as contrasted with the current arrangement where such use is permitted for a period of up to six months. However, the following highlights instances where the amendment should be distinguished from the position applicable in the Canadian regime, or where it has not fully captured that position:

- (i) In subparagraph (i) of section 12B(1)(b) the condition for permitting ephemeral uses is that the broadcaster must be authorized “to communicate the performer’s

performance, work or sound recording to the public by telecommunication”. However this is because the Canadian Copyright Act does not have a right of broadcasting a work or performance and instead has a right of communicating the work or performance by telecommunication. However, since this exception is applicable to broadcasters and the South African Copyright Act has both a right of broadcasting a work or performance, and a right of communicating the work to the public (as introduced in the Bill), the ambit of section 12B(1)(b)(i) should be extended to include broadcasts. Thus subparagraph (i) should read as follows:

“is authorized to broadcast or communicate the performer’s performance, work or sound recording to the public” (with the phrase “by telecommunication” being removed as it is not used in our law).

- (ii) In subparagraph (vi) the expression “which authorization *may* be subject to the payment of applicable royalties” (emphasis added) is used at the end of the paragraph. However, in the equivalent provision in the Canadian Copyright (s 30(8)(5)) the word “must” is instead used. It is recommended that the word “may” must be replaced with the word “must”, in order to give assurance that rights-holders will in fact receive payment of royalties and that this will not be left to negotiations, where the broadcaster, being the party with stronger bargaining power, may also insist that the need to pay royalties has to be removed, by contractual arrangement.
- (iii) For the avoidance of doubt, a provision similar to that in section 30.8(5) of the Canadian Copyright Act, must be included. This section provides the following: “Where the copyright owner authorizes the fixation or reproduction to be retained after the thirty days, the [broadcaster] must pay any applicable royalty.”

6. Clause 27 – new subsection (5A) of section 27

The proposed subsection (5A) under section 27 of the Act seeks to add the newly-introduced restricted acts of communicating a work to the public and making the work available to the

public among the acts that are considered to be infringing acts under section 27 of the Copyright Act and for which criminal sanctions are imposed. While this is laudable, it is greatly concerning that subsection (5A) would only consider such acts as constituting copyright infringement if they are carried out “without the authority of the owner of the copyright *and for commercial purposes*” (emphasis added).

This is extremely problematic as infringement of copyright should not be dependent on whether or not a use is for commercial purposes. Whether a use is for commercial purposes or not, the copyright owner has the exclusive right to authorise the usage of the work. As Slomowitz AJ observed in the *Video Parktown North* case, the essence of copyright as a right of ownership is that the copyright owner has an exclusive right “to do what he pleases” with the subject-matter of the copyright.⁶

Whether for commercial or non-commercial purposes, nobody has a right to exploit another’s copyright work without their authorisation.

We therefore submit that this provision be rejected and that the phrase “and for commercial purposes” must be removed.

7. Clause 13 – section 12A(d) – extension of fair use principles to other exceptions

Paragraph (d) of section 12A in clause 13 of the Bill introduces this provision:

“The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b).”

⁶ *Video Parktown North (Pty) td v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T), at 7.

While not derogating from our consistent objection to introducing a fair use defence in South African copyright law (considering that we, together with the majority of countries in the world, have a fair dealing provision that can be adapted to changing circumstances), we are of the view that making the fair use provisions apply to other exceptions, as proposed here, is plainly wrong. Each exception must stand on its own legs. The only condition in international copyright law in this regard is that the exception must satisfy the requirements of the three-step test.

In the United States of America, where the fair use defence originates, fair use is dealt with under section 107 of the US Copyright Act, 1976. However, apart from fair use, other exceptions, which are not connected to fair use, exist. Thus section 108 is concerned with exceptions relating to libraries and archives and section 109 is concerned with the “first-sale” doctrine. Other exceptions, distinct from the fair use exception, are dealt with in sections 110 to 112. Even under the current South African Copyright Act, fair dealing is provided for only in section 12(1) of the Copyright Act. The rest of the subsections in section 12, up to subsection 13; and the other exceptions provided for in sections 13 until 19B, deal with other exceptions separate from the fair dealing exception. Each exception has to stand on its own legs and be justified on its own, based on the three-step test. We thus suggest that the proposed section 12A(d) is not appropriate and should thus be removed from the Act.

8. Clause 13 – new section 12C(2) – subjecting the temporary reproduction and adaptation exception to the three-step test

After rights-holders had raised this issue for a protracted period, the Committee has now sought to introduce a three-step provision in relation to the temporary reproduction and adaptation exception. As indicated previously, this exception mimics article 5 of the EU 2001 Copyright Directive,⁷ (although the EU Directive is only concerned with temporary reproductions, not adaptations). However, the section did not subject the exception to the three-step test, as done under the EU Directive (art. (5) of the Directive). The Committee has now attempted to do so under the new section 12(C)(2) and this is commendable. However,

⁷ Information Society Directive 2001/29/EC.

the phrasing of the wording in relation to the three-step test is not strictly in line with the formulation of the three-step test in the EU Directive and in the Berne Convention, particular by limiting the application of the three-step cases to the exceptions proposed, rather than *applying* the stipulated exceptions to “certain special cases”, as contemplated in the EU Directive (the Berne Convention refers to *permitting* the exceptions in certain special cases,⁸ and the TRIPS Agreement refers to *confining* the exceptions to certain special cases⁹).

In view of this, we recommend, to ensure alignment with what was contemplated when introducing this exception in the EU Directive, the following revision of paragraph (2):

(2) The making of transient or incidental copies or adaptations of a work contemplated in subsection (1), may—

(a) only be done in certain special cases;

(b) that do not conflict with the normal exploitation of the copyright work; and

(c) do not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.”

CONCLUSION AND RECOMMENDATIONS

The Copyright Amendment Bill and the Performers Protection Amendment Bill have been in the making for a lengthy period however the Bills are still far from immunity from a Constitutional challenge, due to lingering issues that have not been resolved through the piece-meal approach followed so far.

⁸ Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, 1886 (1971 Paris Text) (Berne Convention).

⁹ Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property, 1995 (TRIPs Agreement).

It is unfortunate that it seems that yet another “half-baked” legislation is going to be forced upon stakeholders. This only means that, if passed to law in its current form, the Bill will be intensely contested through court processes.

We appeal to your committee to sincerely reflect on our submission and reject the Bills in their current form particularly given their potential impact on Provincial Cultural and Creative Industries and employment.

As indicated earlier, we remain keen and available to offer our services and expertise, together with our partners within the Copyright Coalition of South Africa, to assist your committee in tackling this mammoth task.