



# SOUTH AFRICAN MUSIC INDUSTRY COUNCIL (SAMIC)

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27th February 2023

To:

Chairperson

By email to the Committee Secretariat:

**Submission by South African Music Industry Council (SAMIC)**

**Re: Proposed amendments to the Copyright Act in the Copyright Amendment Bill (CAB) and the Performers' Protection Act in the Performers' Protection Amendment Bill (PPAB)**

Dear Chairperson,

SAMIC is an umbrella body that represents the collective interests of key organisations in the music industry, which includes performers, creatives, musicians, composers, publishers, collecting societies, and record company associations. SAMIC's foundational vision and mission is to mobilise, unify, support, transform, formalise, and coordinate relations between stakeholder organisations through the implementation of industry-wide programmes to the benefit of all role players and stakeholders in the music industry.

Fostering the growth of the music industry is of utmost importance to the vision and purpose of SAMIC. This is achieved through the self-regulation of the music industry, ensuring industry-wide compliance, monitoring the functions of its 23 key player industry members, and developing mechanisms to counter challenges that cripple the industry's growth.

SAMIC has a vested interest in the South African music industry through its comprehensive representation of various stakeholder organisations within the music industry. In this sense, SAMIC is unique as a representative of the wider industry and distinguishes itself from other stakeholders in the music industry who represent specific sectors. Such stakeholders' businesses are often delineated according to the types of works that they create or deal in. In SAMIC's instance, our members have an interest in a variety of works which include musical works, literary works, sound recordings, and cinematograph films. The full list of SAMIC's members is set out in Annexure A hereto.

SAMIC has, since its inception in 2016, been entrusted by its member organisations to, among other responsibilities, act as a policy lobbyist for the music industry. The unified and mutual mandate bestowed upon SAMIC is primarily rooted in safeguarding the socio-political and economic interests of the players in the South African music industry. As such, SAMIC has a direct and substantial interest in the CAB and the PPAB and their impact on the music industry.

SAMIC supports the progressive steps towards modernised legislation that will be cognisant of rapid technological developments and advancements in the global intellectual property discourse. These advancements should undoubtedly influence policy and legislation. However, SAMIC believes that new

legislation and policy should not have the effect of substantially diminishing the rights of authors, performers, and rightsholders in the music industry. It is paramount that legislation is drafted that modernises the South African approach to copyright whilst ensuring that the interests and livelihoods of the members of our music industry are not only protected but also promoted.

SAMIC believes that in its attempt to modernise the approach to copyright, the Bills may significantly curtail the rights of authors, performers, publishers, and producers and their ability to earn off their works. These views are supported by the submissions set out below.

In addition to our written submissions, we would greatly appreciate it if we were granted an opportunity to make oral when the Bills are considered. Our comments on the Bills are set out below.

## **1. THE 25-YEAR REVERSION PROVISION**

In terms of Section 3A (3) (c) of the PPAB, the exclusive rights of reproduction, making available to the public, communication to the public, broadcasting, rental, and distribution will all revert to the performer after a maximum period of 25 years.

The reversion to the performer of exclusive rights after 25 years will mean that the rights in a recording would be fragmented between the copyright owner and the performers, or their respective successors, meaning no one party would be able to authorise a third party to use the recording.

If the record companies and all of the performers (i.e. featured, session, and backing vocalists) are not able to reach an agreement regarding the continuing exploitation of the recording, none of them will be able to authorise the use of the recordings, meaning the recordings would cease to generate revenues for everyone in the music value chain including authors, publishers, performers, and producers.

**Recommendation : This section should be amended as follows:**

**3A(3)(c) "shall, subject to a written agreement to the contrary, be valid for a period of up to 25 years from the date of commencement of that agreement in the case of a sound recording, where after the exclusive rights contemplated in subsection (1) reverts to the to the performer."**

## **2. THE REQUIREMENT THAT ALL PERFORMERS IN AUDIO-VISUAL RECORDINGS MUST BE PAID ROYALTIES.**

Section 8A (1) of the CAB provides that "a performer shall have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8".

Established industry practice is for dancers and other secondary performers in an audio-visual recording that is made of a single song - commonly referred to as a music video - to be paid a single session fee for their contributions to the audio-visual recording. However, the featured artist is paid on a royalty basis.

This practice should be allowed to continue to operate, as such supporting performers will, in almost all cases, prefer to be paid a one-off fee for their contributions rather than having to wait indefinitely to receive a share in future royalties of unknown value if any.

Furthermore, the obligation to pay a royalty to each performer or participant in a music video would place an unreasonable administrative burden on the record companies that commission the videos. The

unintended consequence of such an obligation would be to restrict the number of dancers and backing performers used in music videos, thereby reducing job opportunities for performers. As section 8A of the CAB currently stands, however, a producer/ copyright owner and performer are not permitted to agree that the background performer is paid a session fee or similar lump sum for his/ her contribution.

**Recommendation : Section 8A(1) should be amended to include an option of remuneration through a single payment or made subject to a written agreement to the contrary.**

### **3. THE MINISTER'S POWERS TO PRESCRIBE COMPULSORY AND STANDARD TERMS OF CONTRACTS.**

Section 8D of the PPAB, read with Section 3A(3)(a) of the PPAB and with Section 39(b)(cG) and (cl) of the CAB empowers (and in the case of the PPAB, requires) the Minister to impose compulsory and standard contractual terms relating to contracts involving the rights covered by the CAB and PPAB, which would include agreements entered into by performers, producers, broadcasters and other commercial users.

The potential disadvantage under which all rightsholders, including authors and performers, will be placed by the exercise by the Minister of these powers is exacerbated by the provision in section 39B(1) of the CAB that restricts the parties' freedom of contract.

The exercise of these powers by the Minister will undermine competition in the music industry to the detriment of the artists and will potentially create an environment in which performers and copyright owners can be compelled to allow their intellectual property to be used by third parties on financial terms that are not market-related, thereby depriving artists and rights owners of their of constitutionally protected intellectual property.

No evidence of any form of market failure in the South African music industry warrants the intervention of the drastic nature provided for in the Bills.

**Recommendation : Sections 8D and 3A(3)(a) of the PPAB should be removed from the Bill or the Minister's powers should be limited to providing guidelines.**

### **4. THE PROHIBITION OF CONTRACTUAL VARIATIONS**

Section 39B in the CAB stipulates that any contract term that purports to restrict a right or protection afforded by the Act shall be unenforceable. This is a drastic interference in the constitutionally protected rights of authors, publishers, performers, and producers to exercise their rights to trade by entering into contracts that reflect the outcome of arm's length bargaining and the free exchange of rights and obligations.

Copyright owners, authors, performers, and collecting societies will also be compelled to accept the terms and conditions of licensing contracts that they would not accept in a normal competitive marketplace.

**Recommendation: Section 39B should be deleted.**

## 5. Introducing "fair use" would undermine the protection of creators

Whilst fair use may allow for a flexible approach to the changing public mores around copyright and accessibility, it similarly throws the exclusive rights granted to authors, performers, publishers, and producers into uncertainty. The only way out of this quagmire of uncertainty is through developing jurisprudence on fair use.

Unfortunately, the development of this jurisprudence will rely solely on authors, artists, publishers, and producers protecting their rights through litigation. Litigation requires authors, artists, publishers, and producers to expend immense amounts of money to bring matters to the Courts.

The parties that stand to benefit from the ambiguity created by the new fair use exception are large, multi-national businesses with almost bottomless pockets. The parties that stand to lose are authors, artists, publishers, producers, and creatives.

Unlike the United States, which has a history of copyright litigation, South Africa has a dearth of copyright litigation. The Bills are, therefore, asking musicians and creatives to build fair use jurisprudence through litigation. This is manifestly prejudicial to South Africa's creative industry, especially when we consider the impact of artificial intelligence, the absence of an economic impact study, and the prejudice this will cause to artists. Therefore, only poor South African creatives will feel the unfairness of introducing fair use in the South African context.

The question the Committee must ask themselves is why fewer than ten countries in the world adopted fair use and why others are concerned about the impact of artificial intelligence in the copyright industries.

**Recommendation: Delete section 12A and ask DTIC to conduct an economic assessment of the impact of introducing fair use in South Africa.**

## 6. UNCONSTITUTIONAL VAGUENESS CAUSED BY SECTION 3A(3)(c) OF THE PPAB

Section 3A(3)(c) of the PPAB conflicts with section 9 of the Copyright Act, and stands to be set aside for vagueness.

In terms of section 3A(l) of the PPAB, where a performer has consented to fixation of his or her performance, the exclusive rights of authorisation granted to the performer by sections 3(4)(c), (d), (e), (f) and (g) are transferred to the producer. This consent must be embodied in a written agreement. In terms of section 3A(3)(c), that written agreement shall, in the case of a sound recording, be valid for a period of up to 25 years from the date of commencement of the agreement. After 25 years, the exclusive rights revert to the performer.

The effect of section 9 of the Copyright Act is that the producer of a sound recording has the exclusive right to perform the acts listed in section 9 in respect of that sound recording, or to authorise others to do so. A number of the rights that section 3(4) of the PPAB confers on performers, in respect of their performances, are substantially similar to those section 9 of the Copyright Act confers on producers, in respect of their sound recordings. The effect of these provisions is this: the producer, as the copyright owner in the sound recording, continues to have the exclusive rights conferred by section 9 of the Copyright Act. Yet, somehow, the performer now has substantially similar exclusive rights to those that the Copyright Act vests - exclusively- in the producer.

The rule of law requires that laws be reasonably certain so that those bound by them may regulate their conduct accordingly. Section 3A(3), read with section 9 of the Copyright Act, does not meet this test.

**Recommendation: Section 3A(3)(c) should be deleted from the PPAB to prevent constitutional vagueness. Alternatively, it should be made subject to a written agreement to the contrary.**

## **7. SECTION 8D(3) OF THE PPAB IMPERMISSIBLY DELEGATES LEGISLATIVE POWER TO THE MINISTER**

Section 8D(3) of the PPAB impermissibly delegates plenary legislative power to the Minister, which stands to be set aside on this basis.

In Executive Council, Western Cape Legislature, the Constitutional Court held that detailed provisions are often required for the purposes of implementing laws, and Parliament is permitted to delegate subordinate regulatory authority to other bodies for this purpose. However, the Court held that there is a difference between delegating authority to make subordinate legislation within the framework of a statute and assigning plenary legislative power to another body. The assignment of plenary legislative power to another body is not permissible.

Section 8D(3) does not simply permit the Minister to make regulations "within the framework of" the PPAB, which would be permissible. In fact, the bill provides no framework at all to guide the Minister's exercise of his powers under section 8D(3). There is no guidance in the bill as to what the rights and obligations should entail, or even the purposes they must serve. Rather, section 8D purports to permit the Minister to determine the rights and obligations of persons who enter into agreements under the Act from scratch - as though the Minister is the legislative authority.

**Recommendation: section 8D(3) constitutes an impermissible delegation of legislative authority to the Minister. As such, it would be invalid if enacted and should be deleted from the PPAB.**

We thank you for this opportunity and look forward to assisting in shaping legislation that will ensure the development and growth of our music industry.

Yours in Music

**Vusi Leeuw**

**President of SAMIC**

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**NATIONAL OFFICE BEARERS (NOB):**

Vusi Leeuw: **President**, Nhlanhla Sibisi: **First Deputy President**, Linah Ngcobo: **Second Deputy President**, Romeo Qetsimani: **Secretary General**, Thobela Dlamini: **Deputy Secretary** Oupa Salemane: **Treasurer General**