



MUSIC PUBLISHERS' ASSOCIATION OF SOUTH AFRICA

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The Hon. Mr D Nkosi
Chair of the Parliamentary Committee on Trade and Industry
National Assembly, Parliament of the Republic of South Africa
CAPE TOWN

15 July 2021

ATTENTION: Mr A Hermans
Secretariat

By email to the Committee Secretariat: ahermans@parliament.gov.za

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Dear Mr Nkosi

Please find herewith a submission from the Music Publishers' Association of South Africa (MPASA), by invitation, in relation to the Copyright Amendment Bill [B13B-2017] and Performers' Protection Amendment Bill [B24B-2016].

This submission follows a narrative in relation to aspects of the President's concerns, demonstrating how we, like the President, are gravely concerned in particular by aspects of the bills that will stifle small businesses in the sub-sector. We have sought to illustrate this through the fictional but likely journey of a typical musician who decides to establish and grow a small business in the music publishing sub-sector, and we ask respectfully that you indulge any informality in this approach. It is most likely unfair to expect that the parliamentary committee has already delved into the intricacies of the music publishing business, and there is no research into the impact the new laws will likely have on this often neglected but critical sub-sector that is built around composers of music. There is no way the previous committee, its advisors and indeed the drafters could have been expected to properly consider the Bill's impact without such critical information. We trust our approach will this time assist, now in deliberations around President Ramaphosa's request in his letter of referral of 16 June 2020 to consider these Bills afresh.

This submission was conceived and drafted by a composer and entrepreneur, a lawyer employed at a successful independent South African music company and an executive employed by a multi-national music publisher. The viewpoint is diverse but the warnings, squarely aligned to the President's concerns, are grave and should not be ignored. With the best of intentions, the current committee stands to betray the charge entrusted to them by South African creators and the support structures that sustain them. The result will be the destruction of value in music copyright and a declining industry – where our global peers experience the opposite.

Lethabo Music (Pty) Ltd.

The birth of a music publishing company in South Africa



In one of South Africa's 17.2 million households lives Lethabo. Lethabo lives with her parents and works as an administrator at a financial services company. She sings at her local church and at community events.



She meets a Producer at a work function who sends her a track. She writes and sings a topline to the track. The Producer sends the track to an aggregator that uploads the track on to streaming platforms. The track does very well



Encouraged by her friends and colleagues, especially her boss who also sets up a meeting with the marketing department of her company to explore some small business development opportunities in the music industry with Lethabo's music publishing company as a test company. She approaches the producer with some capital to record more songs and also signs the producer as the first composer to her publishing company, Lethabo Music. Gradually, royalties start coming in.

OPPORTUNITY - Small Business Development



Lethabo now has another songwriter and producer signed to her small company. She writes TV jingles and calls Lethabo to say that a well-known tech company has used her work, but hasn't concluded any contracts – she asks for help.



Good news! A big South African brand wants to use Lethabo's first track in a TV and online campaign! They must get permission and license from the copyright owners and creators.

THREATS – Small Business Development

One of Lethabo's composers calls her to say that a well-known South African Edutech platform is using her song as a background to online classes. It wasn't a commercial hit, but the brand asked the writer to send a track, which she did. Now the brand has started using it for audio branding in all of its teaching videos. Lethabo calls the Edu-tech platform, but her request to discuss the copyright licence is turned down and she is informed that no licence is required and her composer is not due royalties due to Fair Use. Her only option is to take them to court, however she doesn't have the funds for this. The Edutech platform got free music for their brand at the expense of the composer.

One of Lethabo's composers starts to get popular. People are posting cover versions (their own renditions) of the composer's song on online video-on demand platforms. Lethabo is pleased by this development and she tries to monetize the said cover versions for the benefit of her composer using content ID technology. She is unable to do so as she is informed that the cover versions constitute Fair Use on the basis of "homage" and "tribute". Once again Lethabo is unable to pay for litigation costs. The result is a loss of income for the composer and Lethabo.

Lethabo's composer wrote a song with three additional composers. One of them couldn't be located when they notified the song to the Collecting Society. Songs are mostly jointly authored, and it often takes time to sort out the claims, even after release. But according to the new laws, the whole work became an orphan work. The composer has since been located and just in time - now, a big South African brand wants to use the song and has offered R800 000 to license the song in a television advert!

Since the state has appropriated the entire work as an orphan work, Lethabo must help the co-composer to pay a lawyer to have it released, but there's no way this will be done in time for the advert. Advertising agencies usually work on very stringent turnaround times. The agency looks at what they have to do to get this song cleared. There is absolutely no way they will undergo such a difficult and lengthy process, or pay Lethabo's money to the state for Lethabo to have to claim back in a difficult legal process. Due to these impediments, the ad agency decides to choose a different song from a new American artist, where the copyright is not similarly encumbered.

In another example, the state may also have decided to licence a song at R400 000 to Sneaker Brand X, without Lethabo's knowledge. A competing brand, Sneaker Brand Y which sponsored Lethabo's composer, would cancel this lucrative sponsorship because they are concerned that people may associate Lethabo's composer with their competitor..

PROBLEMATIC SECTIONS OF THE COPYRIGHT AMENDMENT BILL AND COMMENTARY

12A. – GENERAL EXCEPTIONS FOR COPYRIGHT PROTECTION

- The inclusion of the phrase "for purposes such as" allows for an open-ended list of instances which constitute "Fair Use".
- The open-ended nature of the provision give too much latitude to courts to establish whether certain usages fall within the scope of "Fair Use".
- As confirmed in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Freedom of Expression Institute (CC) (case CCT 42/04)* Intellectual Property Rights are property rights protected in section 25 (1) of the Constitution. Section 12A amounts to a deprivation of property as it does not meet the limitations test in section 36 of the Constitution.
- Furthermore, Section 12A is in conflict with South Africa's Treaty obligations in that it does not align with the 3 Step Test established in the Berne Convention and expanded in the TRIPS Agreement to which South Africa is a member of both.

orphan work' means a work in which copyright subsists and the owner of a right in that work—

- (a) cannot be identified; or
(b) is identified, but cannot be located;";*

22A - Licences in respect of orphan works

*(1) A person who wishes to obtain a licence to do an act which is subject to copyright in respect of an orphan work must make an application to the Commission in the prescribed manner.
(2) Before making an application in terms of subsection (1), the applicant must publish his or her intention to make such application by notice in the Gazette in English and one other official language, as well as in two daily newspapers having general circulation throughout the Republic in any official language.*

- Most works are co-authored. Section 22A places the authors of these works in a very vulnerable position as the whole work will fall within the control of the state in the event that one author cannot be identified or located. Under normal circumstances, authors are able to set out their own contractual mechanisms for administration and licencing of their works. The process set out in 22A is too cumbersome for Licensees given the often stringent turnaround times involved in music licencing.
- The licencing of music by brands is a very lucrative revenue source which often benefits artists who at times may not necessarily enjoy regular income in the form of live shows. It cannot be stressed enough how Section 22A directly threatens this revenue source. Needless to say, the entire work falling within the control of the state in the manner described above constitutes an arbitrary deprivation of property.

OPPORTUNITY - Small Business Development



Lethabo is now worse off financially than when she started, but there is hope. Her second single is charting on radio stations in the UK

THREATS – Small Business Development

One of Lethabo’s composers has a hit on TV and radio stations in the United Kingdom. Lethabo signed the composer’s performance right to the South African collecting society. This right is represented by the collecting society in the U.K., who has a reciprocal agreement with the South African society. The U.K. exploitations of the song fall under their standard blanket licence. The U.K. collecting society deducts its costs, including salaries, social and cultural funds and the like, and pays the remaining royalties over to the South African collecting society, who deducts its costs, including salaries and the like. Now it comes time to pay Lethabo, but because collecting societies do not pay out royalties based on gross profit, there is no way of readily calculating how to legally pay Lethabo. In fact, all royalties have been suspended by the South African collecting society and the collecting societies are trying to resolve the matter, but sadly the law is explicit. Lethabo needs to find another way of making money to help scale her new business.

One of Lethabo’s composers has used a portion of a Australian composer’s work in her new song. Lethabo and the Australian composer enter into a licence agreement. The Australian composer prefers a high upfront fee in lieu of royalties down the line. Lethabo prefers this model as well and she pays R100 000 to the Australian composer. The Australian composer subsequently learns that as a result of the new copyright laws in South Africa, the Australian writer has an unwaivable claim of royalties against not only Lethabo but the collecting society in South Africa. The Australian composer decides to take advantage of these laws and claims royalties from Lethabo and any other subsequent rightsholder notwithstanding his agreement with Lethabo. Lethabo is unable to recoup the R100 000.

Lethabo and her composers, having failed to receive royalties from the collecting society which administers public performance royalties (see above), learn that the collecting society that administers mechanical royalties in South Africa can at least still pay for digital royalties generated by the hit song in the United Kingdom. Lethabo calls the collecting society, who inform her that this used to be the case, but since the new laws, big tech companies argued that all their streaming copies are transient, and the collecting society, unable to access the same global legal resources as Big Tech, lost their negotiating advantage and now composers can no longer receive those royalties.

PROBLEMATIC SECTIONS OF THE COPYRIGHT AMENDMENT BILL AND COMMENTARY

6A. (1) For the purposes of this section, ‘royalty’ means the gross profit made on the exploitation of a literary work or musical work by a copyright owner or a person who has been authorized by the author to do any of the acts contemplated in section 6.

- This definition of ‘royalty’ does not take into consideration the operations of Collecting Societies, who like any other business, have to deduct operating costs.
- Furthermore 6A (1) does not seem to have taken due regard of the obligations of National Treatment of foreign authors obligations under the Berne Convention and TRIPS (South Africa is a member of both). Applying 6A (1) to National Treatment has the result that foreign authors have licensed or assigned their works to South African authors will have an unwaivable claim against South African rightsholders and Collection Societies.
- Furthermore, there seems to be no discernible indication that this limitation on the transferability of copyright was applied against section 36 of Constitution. Section 6A is therefore unconstitutional in that it is an encroachment to freedom of trade.

Temporary reproduction and adaptation

12C. Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—

- (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or**
- (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent, economic significance to these acts.**

- A mechanical royalty is paid to the writer each time a composition is reproduced. 12C has the potential of seriously eroding the mechanical royalty.

OPPORTUNITY - Small Business Development



So Lethabo tries to get an investor or a bigger publisher to invest in a percentage of her catalogue / company to at least recoup costs, to help collect royalties in other countries and to scale the company for the benefit of the writers.



Lethabo, in a final attempt to make things work, hears about other opportunities for development for her composers and her business.

THREATS – Small Business Development

Lethabo has learned that publishing catalogues (rosters of composers with published works) are currently trading around 10 to 18 times their annual value and she would like to take advantage of this gold rush in the market by sourcing an investor who can acquire 30% of the catalogue.

The investor becomes aware that the composers will have an unwaivable royalty claim against the investor. This will apply to all subsequent transactions the investor may enter into. The writer will have to enter into prescribed agreements with all successive rightsholders. The complications introduced by these laws seriously devalues Lethabo's catalogue.

This, in conjunction with the 25 year limitation on assignments resulted in the investor being uncertain whether it can recoup its investment. Subsequently, the deal falls through as the investor prefers to deal with a publisher who is in a country with less restrictive laws.

Lethabo is forced to solely rely on unreliable royalties in the pipeline, as opposed to benefitting from the greater value of an upfront payment which could have helped her to scale her business.

At this point, Lethabo is seriously struggling to grow her business because of all the new unforeseen hurdles and her composers are complaining at her doorstep, accusing her of not paying them proper royalties. She messages a publisher friend who resides in Holland, who informs her that most societies are expected to deduct an amount from collections to contribute to social and cultural activities, including funeral benefits for composers, business skills development and mobility. All members from composers to big multi-national publishers have their royalties deducted for this. She immediately calls the South African collection societies, who inform her that South Africans specifically no longer enjoy those those benefits, as the new laws unintentionally put an end to them. Her composers must now invest their own private funds to enjoy these same benefits – and of course these funds are scarce. This is the final straw for Lethabo. Feeling betrayed, she has no choice but to return to her previous job, and pays lawyers to help her exit her music publishing contracts.

PROBLEMATIC SECTIONS OF THE COPYRIGHT AMENDMENT BILL AND COMMENTARY

6A – SHARE IN ROYALTIES REGARDING LITERARY AND MUSICAL WORKS

- This section has the unintended effect of devaluing copyright assets.
- There are instances where an upfront lump sum is more beneficial than the uncertainty of royalties down the line. Depriving composers and publishers of the right to choose the most suitable model is a gross limitation on Freedom of Trade
- The prescribed agreements are an invasion of Freedom of Contract.

23 (3) - 25 YEAR LIMITATION ON COPYRIGHT ASSIGNMENTS

*22D. (1) A collecting society is subject to the control of the authors, performers or copyright owners whose rights that collecting society administers, and the collecting society shall, in such manner as may be prescribed—
(b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the authors, performers or copyright owners; and*

- South African artists have benefitted from funeral, educational and subsidies granted by collecting societies. Section 22 D (1) (b) prevents collecting societies from deducting amounts from royalties for these purposes.

In closing

The examples provided in Lethabo's story originate from honest concerns drawn directly from normal, everyday business activities in music publishing. They are not speculations based on extraordinary activities.

Ultimately, Lethabo's business should have encountered minimal obstacles. The legislative environment should have been an enabling force in order for the business to:

- grow,
- establish a sustainable position in the market,
- create viable competition to currently entrenched enterprises,
- employ people within the sector,
- attract much needed cross-sectoral skills to the music industry,
- support and develop the business activities of local composers,
- transfer business skills to future generations of music creators,
- access justice,
- compete on a regional and global scale.

Instead, the legislative environment did the opposite. It stifled growth, created unnecessary costs and legal fees, created barriers to justice, caused disinvestment and unemployment, a skills outflow, loss of value in the creative sector, and ultimately it disempowered an entrepreneur that should have been empowered.

We are at your disposal for further information,
The Music Publishers' Association (MPA SA)