16 July 2021

COPYRIGHT AMENDMENT BILL [B13-2017]

SUBMISSION
by

SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION

COMMENTS FOCUSING ONLY ON PROVISIONS HAVING A NEGATIVE IMPACT ON THE FUNCTION OF SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION AS A COLLECTING SOCIETY AND A REPRESENTATIVE ASSOCIATION

SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION'S SUBMISSION OF COMMENTS TO THE PORTFOLIO COMMITTEE – TRADE AND INDUSTRY REGARDING THE COPYRIGHT AMENDMENT BILL

INTRODUCTION

South African Music Performance Rights Association ("SAMPRA") is a non-profit company accredited to administer the **rights of copyright owners and performers, jointly,** under Section 9(c), (d), and (e) of the Copyright Act No 98 of 1978, (as amended) (CA) and Section 5(1)(b) of the Performers' Protection Act No 11 of 1967, (as amended) (PPA). SAMPRA was accredited from June 2007 to November 2014 to administer rights under the CA on behalf of Recording Industry South Africa ("RISA") as an organisation representing 50 or more copyright owners entitled to receive payment of royalties for the use of recordings in terms of the Section 9 and 9A of the Copyright Act. In November 2014, SAMPRA was **accredited to administer rights of copyrights owners and performers, jointly**, under the CA and the PPA. SAMPRA's administration of rights is limited to audio recordings (sound recordings). SAMPRA has continued to administer copyright owners' and performers' rights in sound recordings as a **joint collecting society** and its current accreditation was issued on 15 June 2019.

In view of SAMPRA's status as a joint collecting society of copyright owners and performers, SAMPRA is obliged, in presenting submissions to the Committee to consider the rights and interests of both performers and copyright owners. However, SAMPRA's submissions herein are limited to areas that affect SAMPRA in its function of administering performance rights and as a representative association. Separate separations, both supported by SAMPRA, will be made by the copyright owners, represented by RISA and by the performers, through the Performers' Chamber of SAMPRA.

SAMPRA welcomes the invitation extended to make written submissions "with reference only to clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) in relation to the Copyright Amendment Bill [B13B-2017].

SAMPRA notes that the invitation:

- is for further submission in response to the Presidents' reservations in that various sections of the Bill, including section 12A, which deal with the fair use of a work or the performance of a work, were not put out for public comment before the final version of the Bill was published and that some of copyright exceptions may be unconstitutional; and
- is for written submissions with reference to the alignment of the Copyright Amendment Bill [B13B-2017] and the Performers Protection Amendment Bill [B24B-2016] with the obligations set out in international treaties, including the World International Property Organization (WIPO) Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

This written submission is made in recognition of the above.

INTERNATIONAL TREATIES

SAMPRA welcomes the intention to align the Copyright Amendment Bill (CAB) and the Performer Protection Amendment Bill (PPAB) to the country's international obligations in international treaties. The specific ones cited are the WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT) and the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled. Of special note is that there is no mention of the **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention)**. The WTTP and the Rome

Convention respectively are of significant relevance to the treatment of sound recordings fixated in South Africa when such sound recordings are used by music users outside of the borders of the Republic of South Africa in territories regarded as Rome Convention countries. South Africa has not acceded to either treaty and the result is loss of income by many of South African performers on works first fixed in South Africa and performed in Rome Convention countries even where reciprocal arrangements are in place.

Attention is specifically drawn to the provisions of Article 5 [Protected Phonograms: 1. Points of Attachment for Producers of Phonograms; 2. Simultaneous Publication;
3. Power to exclude certain Criteria] of the Rome Convention that provides:

> "1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:
>
> (a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);
>
> (b) the first fixation of the sound was made in another Contracting State (criterion of fixation);
>
> (c) the phonogram was first published in another Contracting State (criterion of publication)."

By only aligning the legal regime to international treaties (which South Africa has not acceded to), is of little help to performers whose music is performed internationally. They will continue to loss income for works whose first fixation is South Africa when performed in Rome Convention countries. The real benefit of the amendments to "reward and incentivise authors (also other creatives) of knowledge and art" cannot be realised by the creatives in the space of neighbouring rights if South Africa delays the accession of WPPT and the Rome Convention.

RECOMMENDATION

SAMPRA strongly motivates for South Africa to accede to the WPPT and Rome Convention as a matter of urgency to ensure proper revenue flow to South African performers.

DEFINITIONS

Section 1 of the CAB is noted. There are definitions reflected in one not the other of the CAB and the PPAB and this could cause confusion and interpretation and application challenges.

Broadcast – The PPAB has a substituted definition which is line with the concept of technology neutrality while a similar amendment is absent in the CAB. It is not apparent why the CAB has no similar amendment.

RECOMMENDATION

The CAB to have the same amended definition as in the PPAB.

Collecting society – The (a) and (b) of the definition are not in congruent with the publish Regulations on the Establishment of Collecting Societies (Collecting Societies Regulations) in the Music Industry that is deliberate in defining 3 forms of collecting societies for sound recordings (1) wholly consisting of copyright owners (2) wholly consisting of performers and (3) a joint society. The "or" in both sub-sections without and "and" is indicative that a collective society can only consist of copyright owners and performers separately and not jointly.

The South African Music Performance Rights Association (SAMPRA) is currently accredited by CIPC as a collecting society in respect of both performers' rights and copyright owners' performance rights in sound recordings, without there being any indication that this situation is problematic or undesirable.

Forcing a split will massively increase costs, to the detriment of performers and copyright owners, as the administrative burden of managing a repertoire will have to be duplicated and will no longer be shared. Moreover, in all instances, the various rights will be embodied in a single physical article or electronic copy used for rendering the performance of all the protected elements at the same time. In practical terms, the copyright owners' will deduct their licensing and collection costs and share the residual royalties with the performers. The performers will the apply their administrative and distribution costs before distributing the royalties. The performers will therefore, on a net basis, receive a lower royalty share than the copyright owners on the same works. The unintended consequence of a drafting mishap will thus further disadvantage a group that is already economically disadvantaged.

SAMPRA was informed after the publication of the Bill in 2015 that the absence of a provision for the accreditation of a joint collecting society was just a drafting error that would be corrected later.

RECOMMENDATION

It is proposed that the distinction in the Collecting Societies Regulations for 3 types of collective management organisations be maintained.

Communication to the public – The term is defined in the PPAB and although used extensively in the Copyright Act and the CAB, it is not amended in the copyright legislation.

RECOMMENDATION

The CAB to have the same amended definition as in the PPAB.

Commercial – The term is defined in the CAB but not in the PPAB even though the term is used in the PPAB.

RECOMMENDATION

The PPAB to have the same amended definition as in the CAB.

Producer – The PPAB defines producer and seems to differentiate producer as being also capable of not owning the copyright. This is derived from the use of the words in PPAB section 3B (1) viz. “a producer of a sound recording, who is also the owner of the copyright…”. In contrast, the Copyright Act and the CAB use the term “copyright owner” and not producer.

The definition is the PAB seems to suggest a two-step process (1) initiative (2) responsibility for first fixation. It is not clear why the two must co-exist and how initiative can be proved and why responsibility is a qualifying process. The Rome Convention defines a *producer (of phonograms) as the person who, or the legal entity which, first fixes the sounds of a performance or other sounds*”.

It is therefore not clear whether the terminology that is intended to be used is “producer” or have the two terms used interchangeably or are to point at different relationships. Consistent terminology should be used to avoid unnecessary confusion. It is notable that the Copyright Act does not define “owner of copyright in sound recording”. This should not be left to a process of deduction that can easily be resolved by a definition.

RECOMMENDATION

1. The definition of “producer” in the PPAB be changed to align with the Rome Convention definition.
2. The CAB to have a similar definition and cross reference the producer as the “owner of the copyright” in sound recording or audiovisual.

ROYALTIES

OBLIGATION OF THE USER TO PAY BEFORE USAGE

Section 9A is proposed to be amended as follows:

"(1) (a) In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment of a royalty to the owner of the relevant copyright—

(i) broadcast a sound recording as contemplated in section 9(c);

(ii) cause the transmission of a sound recording as contemplated in section 9(d); or

(iii) communicate a sound recording to the public as contemplated in [section 9(e)"

The amendment introduces licencing before usage by a user who wishes to do any of the acts that are exclusive to the copyright owner under section 9(c),(d) and (e). The process proposed requires the user before performing any of these acts to:

"register the act/s in *a prescribed notice in the prescribed manner and form to the copyright owner, performer, collecting society or indigenous community, as the case may be."*

SAMPRA welcomes the amendment but wish to highlight that the acts contemplated in the sub-section often, if not always, are continuous in nature and cover millions of sound recordings. At a practical level, it is not feasible that each individual act goes through the process as contemplated. To circumvent this impracticality, SAMPRA, and the rest of the music industry, has introduced blanket licence that allows user to engage in multiple performances on payment of a single licence fee.

RECOMMENDATION

The sub-section be re-drafted to include the practical solution of blanket licensing and clarify the registration requirement in relation to the requirement of an agreement prior to use.

REGISTRATION

SAMPRA further notes that that the acts of performing the acts in sub-section 9(c), (d), (e) and (f), must be registered in a prescribed manner and form. It is not apparent with whom the registration must happen and whether the prescribed "manner and form" will be a done through regulations. Additionally, it is not apparent why a registration process is necessary when the Act requires agreement prior to use. It is also not clear if the registration is going to be done otherwise than to the person with whom a user has an agreement, whether the register will be public.

RECOMMENDATION

The Act should specify with whom the registration will be done. It would make sense that the registration is done with the persons/bodies identified in 9(A) (1) (aA) (ii).

SUBMISSION OF REPORTS

The proposed section 9(A) (1) (aA) (ii) imposes an obligation on a user to submit "complete, true and accurate report … in the prescribed manner, for purposes that include the calculation of royalties due and payable by the person."

Licensing and distribution processes require reporting at least at two levels; (1) at licensing regarding use of sound recordings and determination of the licence fee and (2) at distribution where information on what sound recordings were used is needed. The processes happen each at least once a year and with broadcasters, monthly. It is

therefore imperative that these practical differences are considered when the "prescribed manner" is formulated.

SHARING OF ROYALTIES

SAMPRA notes the already embedded prescription on the equal sharing of royalties between the copyright owner and the performer.

COPYRIGHT EXCEPTIONS

SAMPRA notes that section 12 has been amended to:

1. apply "fair use" in replacement of "fair dealing"; and
2. the exceptions are extended from literary works and musical works to "a work or performance" which would include sound recordings.

From a jurisprudence perspective, it is not clear why the drafting replaces "fair dealing" with "fair use". "Fair dealing" is a "common law" concept that defines circumstances that a work does not require permission or a licence from the copyright owner, therefore are limited in scope. On the other hand, "fair use" is a defence under US law.

The Berne Convention provides a three-step test for exceptions and Article 9 (reproduction) states that:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

In contrast, The Rome Convention, while recognising that a contracting parting may in their domestic legislation apply the same exception regime to performers and copyright owners of sound recordings as they do to literary and artistic works, states that:

> *"Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:*
>
> *(a) private use;*
>
> *(b) use of short excerpts in connection with the reporting of current events;*
>
> *(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcast;*
>
> *(d) use solely for the purposes of teaching or scientific research."*

Article 16 of the WPPT states that:

> *(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.*
>
> *(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."*

While section 12A seems provide for specific general exceptions, the inclusion of "such as" is indicative of a non-exhaustive list of circumstances. This makes the list to be indicative and open-ended. This open-endedness may contradict the obligation of a contracting party under the WPPT to ensure that the limitations or exceptions "*do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."*

RECOMMENDATION

It is recommended that the words "such as" be deleted. The jurisprudential questions and confusion of "fair use" could be resolved by defining fair use so that it is understood in the South African context not as an imported US legal term but as a term that should be understood only in the context of the South African legislation and jurisprudence.

ACCREDITATION OF COLLECTING SOCIETIES

The proposed Section 22B (1) (b) negates the three forms of collecting societies recognised in Regulation 3(1) of the Collecting Society Regulations (published under Government Notice 517 in Government Gazette 28894 of 1 June 2006). Regulation 3(1)(c) provides for a "joint" collecting society comprising of copyright owners and performers; the proposed section 22B does not cater for "joint" collecting societies. Regulation 3 (1) provides for accreditation as follows:

(a) *for administering on behalf of 50 or more copyright owners, or on behalf of an organisation representing 50 or more copyright owners, the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978;*

(b) *for administering on behalf of 50 or more performers, or on behalf of an organisation representing 50 or more performers, the right to receive payment of a royalty in terms of section 5(1)(b) of the Performers' Protection Act, 1967; and*

(c) *administering on behalf of 50 or more copyright owners and performers jointly, or on behalf of an organisation representing 50 or more copyright owners and performers jointly.*

The splitting of administration that will result from the proposed section 22B is increased administrative costs (duplicated administration), and reversal of gains made in running a joint collecting society. SAMPRA currently ensures that a minimum of 80% of all licence fees collected in any financial year is distributed and split equally between copyright

owners and performers. Failure to cater for joint collecting societies would mean having separate collecting societies for copyright owners and performers. The administrative cost of separate societies for copyright owners and performers, would exceed 20% and lead to copyright owners and performers receiving less than 80% in distributions.

SAMPRA has invested in members, licensing and distribution systems that cater for joint administration. Changes to the current administration regime must be motivated by benefit to members and administration in the light of the costly unwinding that would be the result of doing away with joint administration.

SAMPRA as a collecting society accredited in respect of both performers' rights and copyright owners' performance rights in sound recordings since 2014 does not find any justification for the splitting of administration. The splitting of administration from the proposed section 22B will result in increased administrative costs (duplicated administration), and reversal of gains made in running a joint collecting society. As the performance and the sound recording are inextricably merged and cannot be separated, it makes sense therefore that the administration of the royalties thereto should be done by a single collecting society.

It is worth further highlighting that, as the performance and the sound recording are inextricably merged and cannot be separated, it makes sense therefore that the administration of the royalties thereto should be done by a single collecting society.

RECOMMENDATION

We propose the inclusion of joint collecting societies as currently provided for in the Collecting Societies Regulations (Regulation 3 (1) (c)). The proposed wording is:

(b) performers and/or copyright owners, or on behalf of an organisation representing performers and/ or copyright owners …"

We invite the Committee to also consider the following comments that SAMPRA submitted on Section 22 previously:

The proposed section 22B (7) on transitional provisions to provide for existing collecting societies caters for an uninterrupted administration of right by existing collecting societies. However, joint collecting societies like SAMPRA will face legitimacy and administration challenges during the transitional phase if the section is not amended to provide for joint society.

Collecting Societies that are accredited under the Collecting Societies Regulations are accredited on assessment of the Registrar of Copyright who approves the accreditation on any condition determined. It is not clear why the Commission would give further conditions and what the Commission would have considered in instructing any such conditions. The proposed Section 22B (7) (b) (Iii) seems to suggest that while an application for accreditation under the Copyright Act is underway, the Commission may make findings on the application and those findings would then be applied to the collecting society before the accreditation is granted. Findings by the Commission should be part of the administrative process on new applications and made applicable on the granting of the accreditation.

,

RECOMMENDATION

We propose the following:

- the inclusion of joint collecting societies as currently provided for in the Collecting Societies Regulations (Regulation 3 (1) (c)).
- The proposed section 22B (b) be redrafted as follows:

"Any person who at the commencement of the Copyright Amendment Act, 2019, is acting as a representative collecting society must apply to the Commission in the prescribed manner and form for accreditation.

(b) The person contemplated in paragraph (a)

(i) who is accredited as a collect society under the Collecting Society Regulations will continue to operate as an accredited collective society as if accredited under this Chapter until the expiry of its current accreditation;

(ii) and any other representative collecting society must, within 18 months of the commencement of the Copyright Amendment Act, 2019 apply for accreditation with the Commission, and may continue to act as a representative society pending such accreditation subject to any conditions that the Commission may instruct it in writing to comply with.

.