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## **CAPASSO COPYRIGHT AMENDMENT BILL [B13-2017]**

### **Introduction**

The Composers Authors and Publishers Association (CAPASSO) is pleased yet again to get an opportunity to make suggestions and comments on some of the specific clauses within the proposed Copyright Amendment Bill (the Bill). Further, CAPASSO would like to request an opportunity to make oral representations during the upcoming public hearings.

### **(1) General Exceptions From Copyright Protection (12A)**

The Bill seeks to introduce a revolutionary concept of Fair Use into our law. Serious problems would arise from the incorporation of a fair use exception alongside that of fair dealing as the two are not jurisprudentially compatible. Fair Use is a wide and general exception whereas Fair Dealing is more specific. As such, the two forms of exceptions are fundamentally different. In

order for the fair use exception to be less uncertain, jurisprudence needs to be developed via the courts. Litigation is thus crucial to the proper functioning of the fair use exception. The problem with implementing such an exception in South Africa is since the very Bill under consideration, was partly introduced to remedy the plight of the impoverished South African creative. The Bill now requires that same impoverished creative to somehow fund the litigation required to sustain this new law. The burden of making fair use work cannot be borne by the very creator who is appealing to the legislator for just enough protection to even be able to fund the mere creation of copyright protected works.

Digitisation has exposed creators to the dictates of super users of creative content without much recourse. Technology companies gain massive benefit from exploiting creative works without compensating the creators of said work. For example, YouTube which has over 2 billion monthly users unilaterally dictates when any one creator can earn from their works being exploited on the platform<sup>1</sup>. In order to earn from the content, they create one live in a country where the program is available, have 4000 watch hours as well as a minimum of 1000 subscribers<sup>2</sup>. This effectively means, the majority of content creators who drive usage on the platform simply do not get remunerated for their content and they are without any recourse as the platform dictates the rules of engagement. Such examples showcase the unfair power dynamics that exist in today's digital environment which require legislators to afford creators more protection in order to level the playing field rather than grant wider general exception which will ultimately exacerbate the creators already weakened position.

## **(2) Specific Exceptions “Ephemeral Provisions” (12B)**

The focus of our comments under clause 12B will be limited to the ephemeral provisions detailed in clause 12B 1(c). This clause effectively reiterates the provisions on the section 12(5) of the current Copyright Act. This provision finds its genesis in Article 11bis(3) of the Berne Convention which allows for member states to elect whether to or not to include such provisions in their domestic legislation. It is our averment that, as this is not a peremptory provision, it should be left

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<sup>1</sup> <https://support.google.com/youtube/answer/72851?hl=en> (accessed 15 July 2021)

<sup>2</sup> Ibid

out of South African legislation altogether. It appears that the South African legislature adopted position adopted in the Tunis Model Law, which recommends a period of six months or more. There is however no reason why our legislature, taking into account the local conditions of South African copyright owners, should follow the Tunis Model Law in this regard.

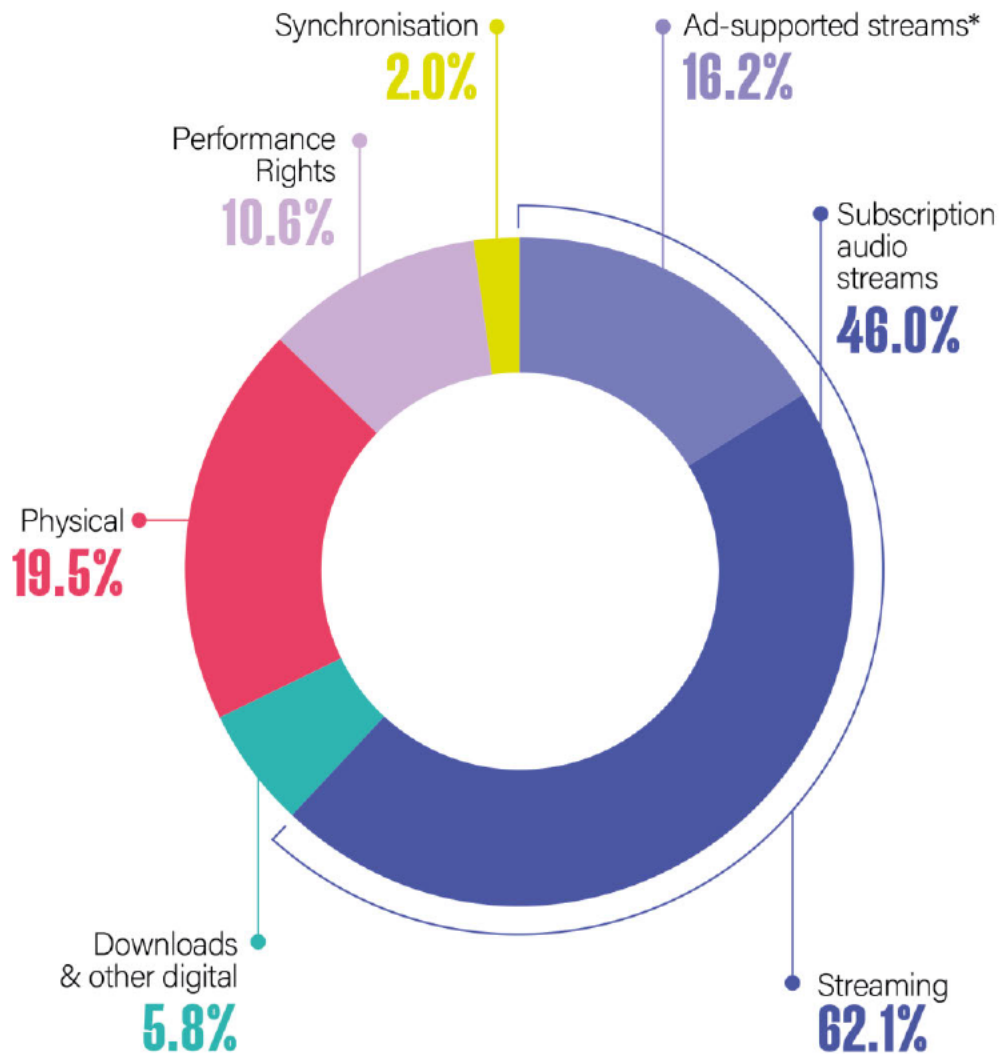
Traditionally, this provision was only relevant in territories which had different time zones such that broadcasts needed to be temporarily recorded in order to be aired at the same time across multiple different time zones. Thus, it serves no real purpose besides to afford broadcasters a loophole to unnecessarily avoid paying legitimate royalties. The current section 12(5) has been the fundamental reason why songwriters in South Africa have to date earned zero royalties from radio broadcasters. Despite the fact that there is an increase reliance on catalogue recordings (songs older than 18 months), radio broadcasters do not pay a single reproduction royalty to South African songwriters. The provision fails to consider the interests on songwriters and is unnecessarily onerous, especially in a country where the songwriting industry is still developing.

### **(3) Temporary Reproduction and Adaptation (12C)**

This clause mirrors Article 5 of the EU Copyright Directive read with Recital 33. However unlike the EU Directive from which it is taken, the current articulation of the clause is flawed as it fails to expressly include the fact that it should be evaluated in accordance with the three step test. The three step test is a crucial aspect which is found in the Directive. In as far as the transient copies fail to account for this test, it shall fall short of achieving the necessary balance. Without the above caveat, there is a risk of this clause being manipulated by digital streaming services to escape what is a very crucial income stream for authors and composers (songwriters). Over the last few years, as physical CD sales have basically disappeared, income from digital streaming services has become the bedrock of music industry. The illustration below showcases the income derived from such services from a global perspective. Over 62% percent of all global recorded revenues stem comes from digital streaming services.<sup>3</sup>

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<sup>3</sup> <https://www.ifpi.org/our-industry/industry-data/> (Accessed on 16 July 2021)



\*INCLUDES AD-SUPPORTED STREAMS AND VIDEO STREAM REVENUES.

CAPASSO has worked tirelessly over the last few years to ensure that composers and authors from across the continent are adequately remunerated by such services when their songs are exploited by such services. Of particular importance in this drive, is CAPASSO's ability to license the reproduction (mechanical) right which is exercised by these services. Should this exception

not be clarified, it will place all the income that CAPASSO has licensed for songwriters in jeopardy. Thus, it should be clearly articulated, that royalties currently payable will not be affected by this exception. It shall, as intended really afford the ability of internet browsing and generation of necessary cookies. This is a very crucial aspect of all songwriters income now and in the future as streaming become more of a revenue driver. This revenue stream currently makes up close to eighty percent **(78.4%) of ALL CAPASSO collections.**

#### **(4) Reproduction for educational and academic activities (12D)**

In light of the teaching and educational exceptions being introduced, a clear definition of what amounts to teaching/ education is pivotal. The Berne Convention makes allowances for the educational exceptions provided that the quotation or illustrations are:

1. based on works that have already been made available lawfully
2. that their compatible with a fair practice
3. their extent does not exceed that justified by the purpose

A clear definition of what amounts to education or educational purposes allows for the evaluation of any act in light of the condition set out in the Convention. Further, the application of any exception will still be required to meet the three step test as set out by the Convention. A clear definition will aid in the evaluation of the act in light of that test. This is absolutely pivotal in relation to how literary works are used within the South African context.

#### **(5) General Exceptions: Libraries, Archives, Museums and Galleries (19C)**

Exceptions for libraries and archives are born out of the Bangui Agreement under Annexure 8. The Agreement places a number of conditions in the implementation of this exception namely;

1. The reproduction should not be for commercial purposes either direct or indirectly
2. Should be to meet the request of a natural person

### 3. For preservation, replacement or archiving

The current articulation seeks to extend this exception to include lending or granting access in digital means and to include other libraries or archives as beneficiaries. Due to the exceptions that are in Bangui Agreement, the agreement also expressly states that:

“The authors of literary and artistic works, performers in respect of their performances fixed on phonograms and phonogram producers shall be entitled to remuneration for the reproduction of such works, performances and phonograms intended for strictly personal and private use and made in accordance with the provisions”

As a result, countries that include the library exception include some form of **private copying levy** remuneration. This allows the agreement to fall within the scope of the 3 step test. Without such a mechanism the implementation of such an exception would fall foul of the 3 step test. The levy would afford rightsholders a much needed balance into the encroachment of their exclusive rights. This becomes even more of a requirement if the exception is extended to digital use.

Additionally, the extension into the digital space further requires that the libraries that benefit from the exception put in place protect measures to ensure that the work is not subsequently used for other purposes especially infringement.

It is also pertinent to note that the initial Bill that was introduced for public comment in 2015 included a Private Copying Levy provision alongside these general exceptions. This was most probably informed by the knowledge of the need to balance them with the interests of rightsholders. It is opined that this should be reintroduced in order to ensure that these exceptions are balanced.

## (6) Treaties

It is worthy to note that CAPASSO supports the accession to the WIPO Internet Treaties (WPPT & WCT), The Marrakesh Treaty, The Beijing Treaty and also encourages the Committee to support the implementation and global adoption of the Resale Royalty Right.

As a general note on the Bill's relation to international treaties, it is crucial to note that a fundamental tool employed by all international treaties in striking the necessary balance and protecting all necessary rights, is the 3 step test. The Bill perennially fails to highlight the need for all exceptions to be considered within the auspices of the 3 step test. Any and all exceptions, need to be considered in light of the test in order to ensure that rightsholders are protected whilst the achieving the necessary access the Bill seeks to afford. The evaluation of the all encroachments into the exclusive rights of rightsholders against the 3 step test is a pivotal in any copyright legislation. The 3 step test states the following in respect of any exception:

1. shall only be applied in certain special cases
2. does not conflict with a normal exploitation of the work;
3. does not unreasonably prejudice the legitimate interests of the rightholder.”

Any exception which is not evaluated in accordance with this test, runs the risk of being unbalanced and will definitely fall foul of compliance with all international treaties. As such, it is averred that the Bill must clearly state the application of the test to each and every encroachment or exception to the exclusive rights afforded to rightsholders.