SOUTH AFRICAN MUSIC INDUSTRY COUNCIL (SAMIC)

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Portfolio Committee on Trade and Industry

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Dear Sir/Madam

COPYRIGHT AMENDMENT BILL AND PERFORMERS' PROTECTION AMENDMENT BILL

1. On or about 4 June 2021, the Chairperson of the Portfolio Committee on Trade and Industry ("the Portfolio Committee") called for public submissions and comments with reference being made to specific sections in the Copyright Amendment Bill ("the Bill"), those being sections 12A – 12D, 19B and 19C, and also in relation to the issue concerning the alignment of the Bill and the Performers' Protection Amendment Bill ("the PPAB") with the obligations set out in international treaties.

2. In response to the above call, the South African Music Industry Council ("SAMIC") is pleased to make the submissions as set out herein. SAMIC thanks the Portfolio Committee for the opportunity to comment on the Bill and requests the opportunity to make oral representations at the public hearings. SAMIC records that the submissions herein are limited to the provisions on which comment has been called for by the Portfolio Committee. These submissions do not deal with other matters raised in the President's reservations, nor with other matters that SAMIC would want to comment on in the Bill and the PPAB. To the extent that there is an opportunity to make further submissions on the Bill and the PPAB in any forum, we expressly reserve our rights to do so.

SAMIC

3. 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.

4. Fostering the growth of the music industry is of utmost importance to the vision and purpose of SAMIC. This is achieved through the 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 growth of the industry.

5. SAMIC has a vested interest in the South African music industry through its wide representation of various stakeholder organisations within the industry. In this sense SAMIC is unique as a representative of the wider industry and distinguishes itself from other stakeholders who represent specific sectors in the industry. 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.

6. SAMIC has, since its inception in 2016, been entrusted by its member organisations to 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 Bill and the PPAB, and their impact on the music industry.

7. SAMIC supports the Portfolio Committee's 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 and rightsholders in the music industry. It is paramount that legislation be drafted which 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.

8. SAMIC is of the view that in its attempt to modernise the approach to copyright, the Bill significantly curtails the rights of authors and their ability to earn off their works. In addition, SAMIC is of the view that both the Bill and the PPAB are not aligned with South Africa's international treaty obligations. These views are supported by the submissions set out below.

OVERVIEW OF COPYRIGHT LEGISLATION

9. Copyright legislation the world over seeks to establish an exclusive property regime for authors[1] (or rights holders in due course) over categories of works. These works are all things we consume on a daily basis in the form of music, television shows, artworks, books, and movies. Often, our consumption of these works is commercialised – we pay something to someone in order to access and enjoy these works. The public policy rationale for this is obvious – those who expend effort, skill and time to create works should be compensated for this effort. Of course, whether or not an artist actually earns enough to eat depends on the market for their works. But the meal-ticket is created solely through the creation of the work which is protected in terms of the Copyright Act No 98 of 1978 (hereinafter referred to as "the Act"), and the exclusive rights granted to the author to deal in and exploit the work on terms that they find to be acceptable. It is through this regime of property that any author can even hope to make a living off their works.

10. The music industry as a whole has an interest in numerous types of works. Songwriters create musical works and music publishers administer them. Collective management organisations cater for the interests of authors and publishers by ensuring that revenue is collected and distributed for the performance and broadcast of musical works[2] and for the reproduction of musical works.[3] Performing and recording artists and record labels create and sell sound recordings. Other collective management organisations collect revenue from those who broadcast sound recordings, cause sound recordings to be communicated in diffusion services and communicate sound recordings to the public.[4] There are other works that go along with these works, including music videos in the form of audio-visual works[5], and artworks associated with music releases in the form of artistic works. Our entire industry relies on the exclusive rights granted by the Act to create livelihoods for musicians, artists, and creatives.

[1] Reference to author in these submissions will also include a reference to a rights holder in due course.
[2] This is undertaken by one of our members, the Southern African Music Rights Organisation.
[3] This is undertaken by another of our members, Composers Authors and Publishers Association.
[4] Such as our member organisation, South African Music Performance Rights Association.
[5] Which are licensed by RiSA Audio Visual, a division of our member organisation, The Recording Industry of South Africa.

11. In this context, the introduction of extensive exceptions to authors' exclusive rights presents a very real and existential threat to the music industry as a whole. SAMIC, acting as a representative of the music industry, will make the following submissions on Sections 12A, 12B, 12C, 12D, and 19C of the Bill under the headings that follow:

11.1 Exceptions to copyright;

11.2 Fair use and the proposed exceptions;

11.3 The mechanical right and the effect of 12C;

11.4 'Non-commercial use' in the context of education, museums, galleries, archives and libraries;

11.5 The new exceptions amount to arbitrary deprivation of property; and

11.6 International obligations.

EXCEPTIONS TO COPYRIGHT

12. Much in the same way copyright legislation the world over creates exclusive property regimes for authors, so does such legislation create exceptions to these exclusive rights. At its core, exceptions to exclusive rights are meant to balance the public good in being able to access and use copyrighted works, against the exclusive rights and monopoly of the author. There are many historically recognised grounds for when exceptions may apply – these include private, non-commercial educational purposes and other non-commercial public goods like public libraries and museums.

13. As the methods by which we engage with copyrighted works change, so too do the exclusive rights and exceptions of copyright. To illustrate the point, consider that historically, the so-called 'mechanical right' attaching to the reproduction of musical works arose from the invention of the piano

roll; an antiquated music storage medium which reproduces a piano performance. Prior to the invention of the piano roll, musical works could only be exploited through public performance, which required a musician, and producing sheet music. However, the invention of the piano roll allowed for the 'mechanical' reproduction of a musical work without the need for a person to perform it – the piano would play itself through a mechanical system, the details of which need not be expounded. The effect of this invention was to ostensibly exclude performers and songwriters from being able to derive value from the performance of musical works, whether in the form of a performance fee or a fee for the public performance of their work.

14. Following litigation and lobbying by songwriters in the United States, the 'mechanical right' was introduced into copyright legislation, which granted authors the exclusive right to authorise the mechanical reproduction of their musical works. From this, collective management organisations dedicated to granting and collecting license income for the grant of mechanical rights were born, and the issue of authors not receiving income for the mechanical reproductions of their works was notionally solved. In addition to the creation of the mechanical right, jurisdictions the world over recognised the need for exceptions to this right – most notably, to allow for reproductions without consent subject to payment of a royalty and meeting other criteria. Our own legislation recognises this exception.[6]

15. The above illustration of the development of the mechanical right underpins a broad purpose for these submissions. Copyright legislation needs to develop in order to protect authors, as the methods through which works are accessed and exploited change and evolve. Further, the exceptions to exclusive rights so too need to develop. However, in doing so, a careful balance needs to be struck between the economic certainty provided by exclusive rights, and the public good afforded by exceptions to these rights.

[6] Section 15 of the Copyright Act 98 of 1978.

16. In this context, the new exceptions proposed by the Bill present an existential threat to the South African music industry as a whole. For reasons that will be set out below, the new exceptions go far beyond the balance of securing a public good in the face of new technological developments. Rather, the new exceptions make nearly all exclusive rights granted by the Act ambiguous. This lacuna will merely create space for large corporations to exploit works without payment of a royalty to the detriment of the creators and controllers of such works. With the survival of the music industry premised almost entirely on the ability to earn royalties, the exceptions in their current form sound a death knell for the music industry in South Africa.

FAIR USE AND THE GENERAL EXCEPTIONS

17. Section 12A introduces fair use as a general exception.[7] Fair use is an Anglo-American legal concept that stands in stark contrast to the list of exceptions currently included in the Act. Whereas the exceptions in the Act stand as a limited and closed list of uses that will not amount to an infringement of an author's exclusive rights, fair use inverts the closed list by introducing criteria that are to be used in assessing whether any particular use of a work without the consent of the author would amount to fair use.

Fair use and the development of jurisprudence through litigation

18. Whilst fair use allows for a reflexive legislative approach to the issue of changing mores around copyright and accessibility, it similarly throws the exclusive rights granted to authors into uncertainty. The only leg-up out of this quagmire of uncertainty is through developing jurisprudence on fair use.

[7] 12A(b) of the Bill.

19. Of course, developing jurisprudence relies solely on litigation. Litigation requires parties to expend immense amounts of money to bring a matter to conclusion. When the parties that stand to benefit from the ambiguity created by the new fair use exception are large, multinational businesses with near bottomless pockets, and the parties that stand to lose are artists, musicians and creatives, the unfairness of fair use in the South African context is thrown into sharp relief.

20. Unlike the United States, which has a history of copyright litigation, South Africa has a dearth of copyright litigation. What the Bill is asking of musicians and creatives is to do the job of legislating what amounts to fair use through litigation. Not only is this contrary to South Africa's international law obligations (as set out below), but this is manifestly prejudicial to South Africa's creatives.

Interplay between fair use and the specific exceptions

21. In addition to the unfair outcomes of fair use, its introduction as a stand-alone exception into our copyright regime makes very little sense insofar as the existing exceptions in the Act are retained in the Bill, including their own 'fair dealing' limitations. In this regard, the phrase 'the use shall not exceed the extent justified by the purpose' (the purpose limitation) appears in the listed exceptions at clause 12B of the Bill. When considering the general fair use exception that has been incorporated in the Bill, the inclusion of the purpose limitation in the listed exceptions of the Bill appears to be an anachronism of the Act that has no place in the shift from listed exceptions to fair use proposed by the Bill.

22. The Act currently uses the purpose limitation throughout section 12. The purpose limitation, as used in the Act, borrowed a part of the fair use tradition and inserted it in the context of fair dealing in the Act. As submitted by Dr Dean[8], fair dealing and fair use are actually synonymous terms. What the

[8] *Handbook of South African Copyright Law*, Juta, Dr Owen Dean, 2006, para 9.2.3, 1-52.

Act does not do, is introduce a broad criterion based fair use, but rather uses the purpose limitation as an internal regulator of the listed exceptions.

23. The inclusion of the purpose limitation creates interpretational confusion with the standard applied to assessing fair use in the Bill. It seems to be nonsensical to include the purpose limitation in the listed exceptions together with a shift to fair use. Whilst the standard of the purpose limitation appears to some extent to be encapsulated in the general fair use exception, the two standards (the purpose limitation and fair use) are, in fact, mutually exclusive. This drafting flaw is fatal to the internal logic of the Bill and the exceptions. The confusing interplay between the general and specific exceptions is discussed further in paragraph 33 below.

24. Due to the overwhelming prejudice caused by the introduction of fair use into our jurisdiction, and the logical inconsistency of including both fair use and the purpose limitation in the Bill, SAMIC submits that the general fair use provision should not be included in the Bill in any form.

THE SPECIFIC EXCEPTIONS

25. The Bill maintains some of the current exceptions in the Act but presents them in a new section 12B. In doing so, the Bill:

25.1 Applies existing exceptions to works that previously did not apply, with dire consequences.

25.2 Creates tautologous categories of exceptions.

Applying existing exceptions to <u>all</u> works

26. The existing Act creates a list of exceptions that apply to musical and literary works. These are contained in section 12. Subsequent sections of the existing Act set out which of these listed exceptions apply to each other work in the Act (i.e., works other than musical and literary works which are regulated in terms of section 12).

27. The new sections 12A and B of the Bill, insofar as they replicate section 12 of the Act, simply apply all the listed exceptions to *all* works, unlike section 12 of the Act which, as mentioned above, applies to musical and literary works. As an example, section 12(1)(a) of the Act allows for the unauthorised use of a musical work for personal or private use. In terms of section 17 of the Act, the general exceptions regarding the protection of sound recordings, this exception expressly does not apply to sound recordings (or what we consume as recorded music). Simply put, the existing Act does not permit unauthorised use of a sound recording for personal or private use. The Bill, however, does.

28. The rationale for not allowing unauthorised private use of sound recordings is clear. If an exemption permits unauthorised private use of sound recordings, then this ostensibly allows anyone to access recorded music on an unauthorised basis so long as it is 'private'. The problem with this is that private use is the *pillar* of income for the recorded music industry. This nuance and essential exclusion of sound recordings in terms of section 17 of the Act is flipped on its head in the Bill with outrageous and grim consequences.

29. The new section 12A(i) of the Bill would allow for persons to use sound recordings for private use without the need to attain lawful access to the sound recording via a traditional medium, whether it be a CD, vinyl or streaming subscription. It is submitted that private use of recorded music accounts for the majority of revenue for recorded music. In a millennium where revenue derived from sales of

recorded music decreased to nearly a quarter of its previous high[9], allowing private use on an unauthorised basis would have a catastrophic effect on an already limping music industry. To legalise unauthorised private use of sound recordings would be legalising piracy of the kind already well known via peer-to-peer torrents accessible via websites including PirateBay and KickAss Torrents.

30. Sound recordings are not the only works deprived of their intrinsic commercial value by the new exceptions. Similarly, cinematographic films and audiovisual works will be allowed to be used without prior authorisation subject to the use being 'private'. Like sound recordings, one of the primary streams of income for films are derived from private use.

31. The current Act makes distinctions between which exceptions apply to which works for reasons which remain economically and politically relevant today. As set out briefly above, the operation of the new exceptions, which do not take the nuanced approach to exceptions that the current Act does, will only serve to deny the music industry of a significant portion of its gross revenue. The devastating effect of this cannot be overstated.

32. On this basis, the application of all exceptions to all types of works in the Bill should be removed and reconsidered, with reference to the underlying rationale for excluding certain exceptions from certain works as is currently represented in the Act.

Tautologous exceptions

33. The Bill creates various exceptions for what appear to be similar authorised uses. For example, if a person wishes to use a work for "educational purposes" (a broad categorisation for purposes of this example), they could ostensibly rely on:

[9] https://www.visualcapitalist.com/music-industry-sales/

33.1 12A(a)(iv) of the Bill, which states that use for scholarship, teaching, and education will amount to fair use in respect of that work.

33.2 12B(1)(b) of the Bill, which states that copyright in a work will not be infringed by any illustration in a publication, broadcast, sound or visual record for the purpose of teaching.

33.3 12D(1) and the subsections to 12D, which state that a person may make copies of works or recordings of works, including broadcasts, for the purposes of education and academic activities.

34. What makes these tautologous exceptions even more confusing is that different standards of what amounts to fair use apply as follows:

34.1 12A(a)(iv) has no internal standard for assessing fair use – all the user has to do is quote the source and name of the author.

34.2 12B(1)(b) is subject to the use not exceeding the extent justified by the purpose, and quoting the source and name of the author.

34.3 12D (1) is subject to the use not exceeding the extent justified by the purpose, and quoting the source and name of the author.

35. In assessing whether an educational use may fall into either or all of the three exceptions in the Bill, the role of 12A(b) (the general fair use criteria introduced by the Bill) is unclear. Is 12A(b) intended to be:

35.1 a general interpretational tool for all exceptions;

35.2 a standalone exception; or

35.3 an interpretational tool solely for the exceptions listed in 12A(a).

36. As set out in paragraph 21, the inclusion of the purpose limitation is antithetical to a fair use regime. In addition to this, a person would appear to have four avenues to exploit works without consent insofar as it may fall into the exceptions listed in paragraph 33 above or may be justified in terms of the new fair use provision at section 12A(b). With different standards applying to each exception, the new exception and fair use regime is not only confusing but extremely prejudicial to the exclusive rights granted to an author of a work.

37. Confusion in the context of exceptions allowing unauthorised use of works will only erode the exclusive rights necessary to support the continued survival of the music industry and allow corporates to use works on an unauthorised basis with little challenge.

38. SAMIC submits that the Bill should be redrafted to update the existing fair dealing regime to the extent necessary, rather than a regime that allows for a person to rely on up to four possible exceptions (with different standards) for a single type of use.

Section 12C and the extension of the mechanical right exception

39. Section 12C(b) of the Bill appears to allow mechanical reproductions of musical works in circumstances where the reproduction itself carries no 'independent, economic significance'. The mechanical right attaching to a musical work is exercised when the musical work is reproduced into a different form, as in the piano roll example set out above. The full wording states that a person may

make transient or incidental copies 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 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.

40. As set out in our introductory submissions, the mechanical right attaching to musical works was introduced to protect the livelihoods of composers, when their ability to earn off performing their works was threatened by the new inventions which allowed mechanical reproductions of their compositions. Thus, the mechanical right was born, along with collective management organisations dedicated to collecting licensing income for the use of the mechanical right by users. In South Africa, one of our members, the Composers, Authors and Publishers' Association (CAPASSO), is the collective management organisation mandated to license and collect revenue for the use of the mechanical right.

41. As technology has progressed, so have the manners in which musical works are reproduced. No longer are there mechanical pianos playing tunes in bars; rather, there are reproductions occurring every second when the format of a musical work is changed to allow delivery of the work via our phones, computers, TVs, radios, and any other device we use to access music.

42. CAPASSO, on behalf of its members who are primarily composers and the publishers that represent them, collects income due by parties who reproduce musical works. In the current technological context, that would include broadcasters, radio stations, and digital service providers like Apple Music, Spotify, and Deezer. On a technical level, the reproduction is necessary to adapt the work to allow use on different technological devices. This falls squarely within the wording of the new exception at 12C.

43. The next question is whether the reproduction has any 'independent, economic significance'. Radio stations, broadcasters and digital service providers are not in the business of reproducing musical works as a core economic activity. To the extent that they do reproduce musical works, this reproduction is often ancillary to and dependent on other economic activity of their business. Whilst there is economic significance in the reproduction (insofar as it is necessary to make their product available to users), this reproduction does not carry *independent* economic significance.

44. As much, the inclusion of this new exception appears to deny composers a right to earn income off the mechanical reproductions of their musical works by the parties who reproduce them most – i.e., the broadcasters, radio stations, and digital service providers.

45. On this basis, it is submitted that this exception should be removed or alternatively amended to the extent necessary to protect composer's existing rights.

'Non-commercial use' in the context of education, museums, galleries, archives and libraries

46. Unauthorised use of works is allowed where, subject to certain provisos:

    46.1 The work is reproduced for educational and academic purposes.[10]

    46.2 The work is used by galleries, museums, archives and libraries.[11]

47. In both of the above scenarios, unauthorised use is not allowed where the work is used for 'commercial purposes'.[12]

[10] Section 12D(1) of the Bill.
[11] Section 19C(1) of the Bill.

48. What amounts to a commercial purpose becomes blurred in the context of the uses for which sections 12D and 19C grant unauthorised use. A gut reaction to the words 'education, museums, galleries, libraries and archives' would suggest to the average reader that these are public goods, and these uses should in fact be exceptions to copyright. The words carry a sense of prevailing public good – of education, enlightenment, and public experience of the works created by society's creatives.

49. What the exceptions set out above fail to consider is that many libraries, museums, galleries and archives function as commercial activities. Further, education often takes place in the context of a profit motive. Whilst the exceptions attempt to cure this by limiting the exception to excluding 'commercial uses', it is submitted that what amounts to commercial use is not explicitly clear in a number of scenarios.

50. As an example, many videos made available on YouTube are educational in nature. These vary from instructional DIY home videos made by ordinary people to educational videos created by full scale production teams that garner millions of views. Whilst the quality of the educational content varies across this spectrum, one thing remains constant: all of this content is freely available to consume by any user of the internet. In this context, it would appear that educational content placed on YouTube would not always be for a patent commercial use, where such access is not directly monetized. Any unauthorised use of a work by a creator posting such content would fall into the education exception granted by the Bill.

51. However, commerciality in this context would not begin and end at the creator not earning income off views of their content. The Bill does not satisfactorily distinguish the line between educational and academic activities on the one hand, and commercial uses on the other. So, where a so-called

[12] Sections 12D(5) and 19C(1) of the Bill.

'YouTuber' creates a channel (which is not monetized) for the purpose of discussing the history of AmaPiano music, that person would, in terms of the Bill, be entitled to reproduce AmaPiano sound recordings and musical works for the purpose of educating viewers. Such usage would ordinarily be required to be licensed from the author for a fee. In this scenario, what is not taken into account is:

51.1 The impact of the YouTuber's channel may result in them receiving sponsorships, endorsements and other income earning opportunities as a result of the popularity of the channel. To the extent that the channel may notionally ride off the goodwill of the sound recordings, that enhance the YouTuber's reputation and channel used on an unauthorised basis, the authors of these sound recordings would remain uncompensated.

51.2 Whilst YouTube channels are free to view, YouTube earns income off selling advertising space and subscriptions to third parties. In this scenario, the use of sound recordings on an unauthorised basis, which enhance YouTube content, would see an increase in the numbers of viewers of the channel. In the above example, the YouTuber's reputation and channel would be enhanced, to its benefit, and YouTube would continue receiving advertising income. The author would remain unpaid.

52. What the above sets out is how commerciality can actually fall on the penumbra of what we would understand as 'non-commercial' uses. In as much as the above example exists in the context of education, it could easily be extrapolated to museums, galleries, libraries and archives.

53. It is the uses that will fall on the penumbra of 'non-commercial' that will deny authors the ability to earn royalties off their works. This deprivation is caused solely by the drafting of the exceptions, which fails to take the complexities of reproductions in the current context into account, and ought to be reconsidered on this basis.

ARBITRARY DEPRIVATION OF PROPERTY

54. Section 25(1) of the Constitution makes clear that no law may permit arbitrary deprivation of property. Intellectual property of the kind created and protected by the Act is property. The new exceptions amount to a deprivation of existing property, insofar as they limit or renounce rights currently enjoyed by authors to their existing property. Arbitrariness arises when a depriving law does not provide sufficient reason for that particular deprivation. SAMIC submits that the new exceptions amount to arbitrary deprivation of property:

54.1 As set out in in paragraph 24 above, the new Bill will deprive authors of sound recordings the right to earn royalties for the private use of their property. This deprivation is significant, as selling recorded music for private use is one of the primary forms of income for the recorded music industry, which includes musicians, recording artists, and record labels.

54.2 As set out in paragraph 35 above, the new Bill will deprive authors of musical works the right to earn royalties from the mechanical reproductions of their works. This deprivation is significant for those composers whose musical works are reproduced as a part of broadcasts and streaming platforms like Spotify.

55. The purpose of the exceptions is to promote access to copyrighted material as a public good. The minimal good achieved by permitting private use of sound recordings and royalty free reproductions of musical works, is manifestly disproportionate to the harm that will be caused to musicians, recording artists, record labels, composers and collecting societies if these exceptions are passed into law.

56. Our submissions above highlight certain examples of how the new exceptions will deprive authors of their existing rights to benefit from the exploitation of their property. Whilst the economic impact of the new exceptions is plainly obvious from our submissions above, the operation of the exceptions goes

beyond being politically and economically disastrous and further amounts to an unconstitutional, arbitrary deprivation of property for the reasons set out above.

INTERNATIONAL OBLIGATIONS

57. SAMIC submits that the Bill and the PPAB fail to align with South Africa's international obligations insofar as:

57.1 The new exceptions in the Bill are contrary to the Three-Step Test.

57.2 Section 3 and 5 of the PPAB are contrary to international digital treaties.

Exceptions in the Bill are contrary to the Three-Step Test

58. South Africa is a signatory to the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Our firm reservations on the fair use provisions and new exceptions in the Bill have been set out in our comments above. In addition, we submit that new Bill violates the *Three-Step Test* under the Berne Convention.

59. The *Three-Step Test* 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".

60. According to the learned IP scholars of the Max Planck Institute[13] the *Three-Step Test* should be interpreted in a manner that respects third parties' legitimate interests deriving from human rights and fundamental freedoms.[14] For reasons set out in more detail in our submissions above, the new copyright exceptions undeniably repress the fundamental rights and freedoms of copyright right holders, specifically the rights to dignity, property, socio-economic rights and the right to access courts.

61. Myburgh correctly points out that U.S. copyright law maintains its compliance with the *Three-Step Test* solely through well-established case law and a significant body of jurisprudence.[15] What is evident from this analysis, is that the contours of fair use, as specified by the four-factor test in section 12A(b) of the Bill, would have to be developed and/or defined in our courts. There is no alternative path to compliance. This outcome cannot be interpreted in isolation of the unreasonable prejudice facing South African musicians, artists and creatives who will not have the financial means to challenge any unlawful exploitation of their copyrighted works. The current gaping vacuum in South Africa's copyright jurisprudence is already illustrative of the socio-economic exclusion of copyright right holders, especially music industry players, from access to courts. When faced with a Bill that will extinguish numerous avenues of income for authors, their ability to litigate and protect their rights will only lessen.

62. In legislating exceptions, Parliament is obliged by treaty to ensure "that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". For reasons set out in detail in our submissions above, the new exceptions will undoubtedly conflict with the normal exploitation of the work, and will prejudice the legitimate interests of the author. In this regard, we refer you to the submissions made on sound recordings at paragraph 27 above, and the mechanical right at paragraph 39 above. SAMIC urges the Portfolio

[13]https://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three Step-Test.pdf.
[14] Band, Jonathon, "Analysis of Woods and Myburgh Comments on CAB" (2020). Joint PIJIP/TLS Research Paper Series. 55. https://digitalcommons.wcl.american.edu/research /55.
[15] Supra 14.

Committee to commit to its international obligations by refraining from enacting future legislation that will unreasonably prejudice the most vulnerable members of the music industry. On this basis and in addition to the submissions above, SAMIC submits that the copyright exceptions in the Bill are in conflict with South Africa's international treaty obligations and should not be passed into law.

Section 3 and 5 of the PPAB are contrary to international digital treaties

63. The PPAB proposes new provisions that mirror (in certain respects) provisions in the so-called "digital treaties" which include the Beijing Treaty on Audiovisual Performances ("Beijing Treaty")[16] and the World Intellectual Property Organization (WIPO)'s two Internet Treaties, namely the WIPO Copyright Treaty ("WCT") and WIPO Performances and Phonograms Treaty ("WPPT") (collectively, "the digital treaties"). South Africa has not acceded to the digital treaties as yet, but clearly intends to do so.[17]

64. The digital treaties are international instruments that respond to the growing need to protect copyright right holders and performers' rights in the ever-evolving global digital environment. Of utmost importance is that the treaties promote and codify performers' exclusive rights in the digital environment, such as reproduction rights and the rights of communication to the public, including the rights of making available to the public. Protection is extended to performers and producers of phonograms, in addition to the exclusive rights to equitable remuneration rights in respect of direct or indirect commercial broadcasting or communication to the public of phonograms.

65. To the extent that South Africa intends acceding to the digital treaties, the PPAB will not be aligned with the digital treaties in that:

[16] The Beijing Treaty has not been ratified or acceded to by at least 30 member states and as a result, is not in force yet.

[17] During a presentation on 26 March 2019, the Department of Trade and Industry sought to obtain the approval of the Select Committee on Trade and International Relations ("the Committee") to accede to the Beijing Treaty on Audiovisual Performances and the World Intellectual Property Organization (WIPO)'s two Internet Treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Committee had no objections to the accession.

65.1 Section 5(1)(b) of the PPAB downgrades the performers' exclusive rights of distribution and rental to mere remuneration rights. This is incompatible with the digital treaties, which do not permit these rights to be protected at the level of mere remuneration rights.

66. In addition, the PPAB will not be aligned with the Berne Convention, TRIPS and the digital treaties in that:

66.1 Section 5(1A) of the PPAB implies that **all** performers' rights under sections 3 and 5(a) are downgraded from exclusive rights to mere remuneration rights, in addition to those set out in section 5(1)(b). Although draft section 5(1A) appears intended to ensure that the exclusive rights in sections 3 and 5 are not exploited by authorised third parties without full usage reporting being provided to the relevant right holders listed therein, draft section 5(1A) is unclear, and could be misinterpreted as conveying a right of use upon users, provided they comply with the notification requirements set out in 5(1A). Such an approach would be incompatible with the nature of the exclusive rights set out in sections 3 and 5 and would consequently be incompatible with the WIPO Copyright Treaty, the TRIPS Agreement and the Berne Convention.

67. SAMIC submits that the Bill and PPAB should be redrafted to the extent necessary to align with South Africa's existing and intended international treaty obligations.

CONCLUSION

68. The Bill in its current form will decimate significant parts of the music industry. The Bill is set to take away the right of authors to earn income off the private use of the works, and denying composers a right to earn off mechanical reproductions of their works. Who stands to benefit from artists being deprived of the ability to earn off the exploitation of their compositions and recordings? Users of

music. Sometimes those users of music will be large corporations. This opens up fertile ground for exploitation of artists at a level not yet seen. Whereas in the past artists could at least rely on their exclusive rights in the Act, these too will be thrown into disarray by the Bill for reasons more fully set out above. In this context, why would artists even bother creating music? For the exceptions to apply, there has to be work to access. The new exceptions may completely disincentivise artists to create.

69. As an example of the effects of the Bill, the ripple effect of the new exceptions would make its way to record labels, who invest large sums of money in nurturing artists, recording their music and distributing it for sale across the world. This is a vital part of a country's cultural economy. If labels are deprived of the opportunity to see a return on investment, this may impact on their appetite for investing in works.

70. These obvious outcomes, in addition to the other submissions made above regarding, amongst other things, the Bills tautologous drafting, unjustifiable shift to fair use and non-compliance with international law, should prompt the Portfolio Committee to restructure and redraft the Bill.

71. In summary, SAMIC believes that the Bill and the PPAB cannot be passed in their current form as:

    71.1 The new 'fair use' model will unfairly favour corporate interests over the interests of musicians, composers, and recording artists.

    71.2 The new exceptions extend permitted use beyond that granted in the Act, and do so to an extent that will deprive industries of large amounts of income they are entitled to.

    71.3 The new exception at 12C grants parties a right to mechanically reproduce musical works without payment of a royalty in circumstances where those parties would and should pay a royalty for such use.

71.4 The exceptions relating to educational use, and uses by museums, galleries, archives and libraries, fail to adequately deal with uses that may be non-commercial, but for which an author should be compensated.

71.5 The new exceptions amount to an arbitrary deprivation of property.

71.6 The Bill and the PPAB are not aligned with South Africa's international law obligations.

ANNEXURE A

SAMIC MEMBERS

1. The members of SAMIC include:

1.1 Artist and Performer Organisations:

1.1.1 Association for the Entertainers of South Africa (AESA); and

1.1.2 National Traditional Music Association (NATMA).

1.2 Record Company Organisations:

1.2.1 Association of Independent Record Companies (AIRCO); and

1.2.2 The Recording Industry of South Africa (RiSA).

1.3 Music Production Organisation:

1.3.1 Black Technical Production Association (BTPA).

1.4 Composer and Publisher Organisations:

1.4.1 Composers and Publishers' Association of South Africa (CAPASSO); and

1.4.2 Music Publishers Association of South Africa (MPASA).

1.5 Non-profit Organisations:

1.5.1 Cstahood Foundation;

1.5.2 Nokwe Creation Development Foundation;

1.5.3 Rods Foundation;

1.5.4 Solly Molepo Foundation;

1.5.5 Jazz Foundation (JF); and

1.5.6 Arthur Mafokate Foundation.

1.6 Cultural and Creative Arts Development Organisations:

1.6.1 Cultural and Creative Industries Chamber of Commerce;

1.6.2 Indigenous Cultural Forum;

1.6.3 Youth Education Initiative (YEI);

1.6.4 Omama Be Mvelo Creative Arts Association (OMCA); and

1.6.5 South African Arts and Development Association (SAADA).

1.7 Collecting Societies and Administrator Organisations:

1.7.1 Music Industry Professionals and Administrators South Africa (MIPASA);

1.7.2 South African Music Promoters Association (SAMPA);

1.7.3 South African Performance Rights Association (SAMPRA); and

1.7.4 South African Music Rights Organization (SAMRO).

1.8 Music Service Provider Organisation:

1.8.1 South African Music Industry Service Providers Association (SAMIPA).