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CAPASSO
THE MECHANICAL RIGHTS HUB

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CAPASSO COPYRIGHT AMENDMENT BILL [B13-2017]

Introduction

The Composers Authors and Publishers Association (CAPASSO) is pleased to yet again be afforded an opportunity to make comments on the Copyright Amendment Bill for purposes of deliberations by the Select Committee on Trade and Industry. CAPASSO is a member of the South African Copyright Alliance (SACA) which is an organised collective of stakeholders in the creative sector with a keen and vested interest in the developments in the South African copyright industries and legislative framework. As a member of the SACA, CAPASSO fully supports the submissions made by the SACA and yet again appeals to the Committee to afford SACA an opportunity to workshop the Committee on the different ways in which copyright industry bodies handle the management of copyright on a daily basis. This, we opine, is the

quickest way to ensure that the Committee is brought up to speed with the legislative requirements of a modern and ever changing Creative and Cultural Industry (CCI) thus ensuring they are drafting a balanced piece of legislation which will, not only be fit for purpose, but also afford the CCI an opportunity to maximise its development into the future.

Clause 13: Amendments Related To Ephemeral Rights & Personal Copies

Although we are still of the averment that this exception could be left out in its entirety due to the fact that it finds its genesis in Article 11bis(3) of the Berne Convention which affords member states the option to **elect to not to include such provisions in their domestic legislation**, the addition of contemporary limitations to the application of this exception are welcomed. In particular the inclusion of **12B(1)(b)(v) and (vi)** read in conjunction with the inclusion of **12B(2).** We commend the Committee for these amendments as they seek to safeguard the interests of songwriters, and indeed other stakeholders as well, whilst giving much needed balance.

Regarding personal copies and format shifting, we would once again caution the Committee to take cognisance of developments in other jurisdictions regarding the implementation of such provisions. Particularly, it would be important to refer to a recent UK case[1] where the court squashed the private copying and formatting shifting in the then UK Copyright Act on the grounds that it was incompatible with European law, which requires that if an exemption to allow copying for private use causes any harm then that harm must either be zero or minimal, **or be compensated for by a fair and adequate compensation scheme for rights-holders** ((Article 5(2) (b) Directive 2001/29/EC (the "Copyright Directive")). Further, without the introduction of a private copying levy system to compensate rights holders for the impact of the private use provisions, it would be possible for rights holders in South Africa to mount a similar court action in this regard. In fact, without such a system, rightsholders would have no alternative but to challenge the validity of these provisions.

[1] *British Academy of Songwriters, Composers and Authors Musicians' Union & Others v Secretary of State for Business, Innovation and Skills & Another* [2015] EWHC 2041 (Admin) (17 July 2015).

With recent developments in the digital space, it has become even more prudent that rightsholders are afforded more protection against their works being reproduced in different formats. With the rise of Web 3.0 initiatives such as Non Fungible Tokens (NFTs), rightsholders have seen their works being abused and misused and misappropriated in newer formats thus either diluting the rightsholder market or preventing rightsholders from entering the space to begin with. The most famous of these issues relates to NFTs of Netflix's most popular show, Squid Games, which were made without the involvement of Netflix as a rightsholder[2]. If the rights of well-resourced multinational conglomerates like Netflix can easily be abused in new formats, it is unthinkable what would befall the local rightsholder who is neither aware of these new formats nor in a position to use their influence to deter others from misappropriating their works and reformatting them.

Clause 13 - Section 12C

We would like to commend the Committee for adding the three step test to these exceptions. This is pivotal to ensuring the proper application of this provision. Aligning the clause with its counterpart in Article 5 of the EU Copyright Directive read with Recital 33 safeguards the rights of South African rightsholders whilst ensuring the necessary balance. As per our previous submissions, the addition of the three step test ensures that close to 89% of CAPASSO's collections for members are kept intact.

Clause 27: Amendments Providing For Offences For TPMs And Digital Rights

The inclusion of these offences are welcome in principle. Piracy is said to be "the biggest threat to Africa's media sector"[3]. As such, it is crucial that legislative intervention is made to discourage this activity.

[2] https://www.coindesk.com/layer2/2022/01/19/the-balance-between-art-and-ip-theft-in-nft-culture/ (Accessed 21 January 2022)
[3] https://broadcastmediaafrica.com/piracy-is-the-biggest-threat-to-africas-media-sector-warns-tech-company (Accessed on 21 January 2022).

However, it is our belief that the wording of this clause 27(5A) should read as follows:

> "Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright —
> (a) communicates the work to the public by wire or wireless means; and
> (b) makes the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time
> by that person, which they know to be infringing copyright in the work, shall be guilty of an offence.

The current inclusion of the term "for commercial purposes" is not only inconsistent with the deletion of the term made in other parts of the Bill but also weakens the effectiveness of this provision. In reality, the majority of infringement is done not ostensibly for commercial purpose, but affects the rightsholders interests and investments all the same. The rampant rise of User Generated Content (UGC) platforms such as TikTok and YouTube is irrefutable evidence of this. This is the exact driver of the so called "Value Gap" within the music industry. Thus the term should be deleted from the clause.

Additionally, any digital protection measures made in the Copyright legislation need to be aligned with those found in the Electronic Communications and Transactions (ECTA)[4]. The internet has changed the authors ability to earn a livelihood in that it made mass scale consumption of authors works possible for free. Leaving the author famous but effectively penniless. Without proper protection being granted to authors, the internet will result in more artists dying paupers than ever before. This is the reason why our current safe harbour provisions as found in (ECTA) would need to be amended to protect against abuse by multinational corporations who unduly benefit from offering copyright protected content on their platforms without compensating the authors of such content justly. Services such as YouTube, Facebook etc, offer platforms for the use and sharing of copyright protected works to billions of people (Facebook has over 2 billion users whilst YouTube has about 1.9 billion) but fail to pay rightsholders a fair share of the revenue derived from such usage, thus creating what is known as the value gap. These services are able to do this due to abusing provisions in European and American law similar to that which is found in Chapter 11 of ECTA which were made for legitimate ISPs. There is a need to explicitly exclude such services from claiming protection under Chapter 11 in order to ensure that they are forced to obtain a license from rightsholders

[4] Act No. 25 of 2002

on an equal footing to ensure just and fair compensation. It is almost impossible for songs not to be on these platforms, whether the owner of such songs has authorized it or not, the song is most likely to be found on such these platforms. Due to this fact, it is crucial that rightsholders be compensated justly for the availing of their works on such platforms as "promotion" does not pay bills.

A large portion of infringement of copyright on the internet occurs via file sharing and due to the volumes, it becomes almost impossible for rightsholders to hold users to account. If rightsholders are to protect their rights against peer to peer file sharing platforms, there is a need to enlist the aid of internet service providers (ISP). As such, it is high time the South African legislation made provisions for what is known as graduated responses. ISPs are the only entities capable of enforcing measures to curb copyright infringement on the internet. This is especially true in that they derive a financial benefit from people interacting with copyright content on the internet. More and more, ISPs are marketing data plans and internet speed options on the back of the how much music and movies one can download or stream. As such, it stands to reason that they play a role in ensuring that the music content consumed as a result of their offerings does not infringe copyright. As it currently stands, ISPs have no general obligation to monitor the activities that occur on their platform (s78 of ECTA), this is a burden currently being carried by copyright owners themselves.

Lastly; although the criminal sanctions and offence introduced in the Bill can aid as a deterrence, the sort of copyright protection and jurisprudence required to achieve the affects of the proposed amendments can only ever be realized through civil litigation. As such, it is imperative that all these new amendments coupled with a very robust and clear statutory damages framework. In terms of the current legislation, rightsholders are afforded three remedies namely; interdict, delivery-up and damages[5]. Digital exploitation of music has

[5] R Kelbrick, "The Historical Development of Civil Copyright Remedies Commonwealth Jurisdictions" 1997; *CILSA*, 152

spotlighted the shortcomings of each of these remedies thus necessitating additional remedies to be prospected. Section 24 of the Act grants the rightsholder one of two options in as far as damages are concerned; to either prove actual damages or rely on a reasonable royalty[6]. The actual damages contemplated in section 24 generally take the form of compensation for the loss of profit arising from the infringing action. Digitisation has made that computation a very difficult task for musicians as a whole.

The difficulty of proving actual damages has been succinctly articulated as follows:

> "It is almost unchallenged that provable actual damages frequently fail properly to compensate for the violation of a copyright, because of the intangible nature of the interest so protected and the difficulty involved in presenting to the court an accounting which reflects the real injury inflicted on the aggrieved owner"[7]

Given the above, there is a clear need to grant rightsholders additional protection in the form of statutory damages. Statutory damages are imperative in the digital era in that they do not require that loss be demonstrated by the rightsholder. They thus serve a dual purpose to firstly, incentive the mass users of copyright content to obtain the necessary licenses whilst also incentivising the rightsholder to sue in the event that the licenses are not obtained.

The introduction of statutory damages will also fall in line with the introduction of all the exceptions that the Bill seeks to introduce. It will also ensure that rightsholders are given the opportunity to be in charge of their own affairs. The criminal justice system will be overwhelmed if most infringements and offences are dealt with via criminal proceedings. Affording rightsholders the ability to properly quantify the possible value of infringements will not only deter rampant infringement but will also incentivise jurisprudential development in cases where it is necessary. As such, in addition to the criminal offences, it is our plea that the Committee further introduces statutory damages within clause 27.

[6] H Dean Handbook of South African Copyright Law (1987) Juta & Co: Cape Town 1-127.
[7] Carroll J. Donohue, Statutory Damages for Copyright Infringement, 24 Wash. U. L. Q. 401 (1939).