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CISAC comments on additional definitions and clauses in relation to the South African Copyright Amendment Bill [B13B-2017]

1. Executive Summary

1.1. About CISAC

The International Confederation of Societies of Authors and Composer (CISAC) would like to thank the Portfolio Committee on Trade and Industry of the Parliament of the South African Republic (the "Committee") for the opportunity to provide written comments on additional definitions and clauses in relation to the Copyright Amendment Bill (the "Bill").

As the leading worldwide network of authors' societies (also referred to as Collective Management Organisations, or CMOs), CISAC unites 228 societies from 120 countries. Through our members, CISAC represents the interests of over 4 million creators from all artistic fields including music, drama, literature, audio-visual, graphic and visual arts. CISAC's membership in South Africa includes SAMRO, CAPASSO (both managing the musical repertoire) and DALRO (managing the literary, dramatic and visual arts repertoire).

1.2. Overview

CISAC continues to follow closely the process for the development of the Copyright Amendment Bill (hereinafter, the "Bill"), as well as the Performers Protection Amendment Bill. We note that the Committee is committed to ensure that the reservations expressed by the President Cyril Ramaphosa are duly reflected in the legislation. However, we are of the view that the proposed amendments and definitions tabled by the Parliamentary Legal Adviser and other changes raised by the Minister for Trade Industry and Competition and the DTIC, will not go to the heart of the problems with the Bill.

The purpose of this contribution is to express our concerns with some of the provisions of the Bill that are still out of step with international law and practice. If unchanged, these provisions would have a deeply detrimental impact on creators by jeopardizing their ability to continue making a living from their creative works and would also reduce the incentives to invest in South African creative industries to the detriment of all rightsholders and the wider South African economy.

Our main concerns with the amendments proposed in the Bill are set forth below.

1. The open fair use exception (Section 12A) should be withdrawn or amended, subject to a proper and independent impact assessment.
2. The exception for personal use under Section 12B(i) should be subject to a remuneration or levy system.
3. Copyright exceptions in new Sections 12B, 12C, 12D, 19B, 19C and 19D should be properly redrafted to ensure compliance with the so-called "three-step test" of the Berne Convention and the TRIPS Agreement.
4. The scope of the exception for persons with disabilities under Section 19D) should be redrafted to ensure compliance with the Marrakesh Treaty and the "three-step test" of the Berne Convention and the TRIPS Agreement.
5. The limitation in the term of validity of copyright assignments should exclude assignments between rights holders and accredited collective management societies.

Further, as a general comment, CISAC strongly encourages the ratification of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) by the South African

Government as this would significantly increase the effectiveness of the Bill, in a rapidly changing global creative economy.

2. CISAC's comments

2.1. Open fair use exception in Section 12A should be withdrawn or amended

The proposed amendment in Section 12 A a) introducing an over-broad fair use exception inspired by, yet going far beyond, the US model, that will complement all the existing and newly proposed fair dealing exceptions, is unacceptable in its current formulation and should be removed or redrafted as a matter of priority.

The current South African Copyright Act of 1978 has already introduced a large range of fair dealing exceptions, which allow the use of copyright material for specified purposes (e.g teaching, quotation, etc.). Adding to such existing exceptions an open-ended exception for "fair use" will significantly harm rights owners by creating an enormous imbalance between creators and users by weakening the value of exclusive rights. This is all the more true to the extent that Section 12A, by incorporating the words "*for purposes such as*" in the introductory sentence, provides for an open, illustrative list of purposes for which a work can be used and be considered 'fair use'.

Furthermore, the imprecise "fair use" exception leaves both copyright owners and users in a vague situation of having to resort to judicial courts to determine what permitted uses fall under the "fair use" exemption, creating legal uncertainty in the market.

This situation will put authors at a disadvantage, both because of the costs of legal proceedings to those authors that can afford it, and because of the time frame it will take for a decision to be issued. This applies all the more as the Bill provides for a so-called "contract override" prohibition. Whereas fair use in the US is subject to contractual agreement and licensing, allowing the definition by the parties of the contours of permitted uses, the South African Act prohibits all agreements relating to uses that might fall within the scope of exceptions (new Section 39B):

> "To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright …, such term shall be unenforceable".

Although it can be argued that the "fair use" exception is similar to that of the US doctrine, in reality the proposed South African's fair use exception is significantly broader in scope to that of the US fair use doctrine, for various reasons.

First of all, the US fair use doctrine has been carefully modulated by numerous Court decisions which in some 150 years of jurisprudence have helped interprete the four factors laid down in Section 107 of the US Copyright Law to define what constitutes "fair use". This is not the case in South Africa.

Secondly, the list of admitted uses is significantly broader, including, for example, personal use (including format shifting) illustration, parody, satire, caricature, cartoons and pastiche (12Bii), preservation and access to collections of libraries, archives and museums (a2b vi), or proper performances of public administration (vii) which are not contemplated in the US Copyright Act.

Furthermore, the Bill has adopted the wording "substitution effect of the act on the potential market for the work" instead of the US formulation "the effect of the use upon the potential market

for or value of the copyrighted work" when listing with the relevant factors to be considered for the application of "fair use". As already explained by the South African Institute of Intellectual Property Law (SAIIPL) in previous submissions, a negative substitution effect would likely have detrimental impact on rightsholders, insofar as it would conflict with the second of the three-step test, namely the normal exploitation of the copyright work concerned, as explained below.

Since the introduction of a such a broad fair use provision will considerably restrict the already-limited scope of exclusive rights granted to authors, its impact needs to be properly assessed. Under international treaties, any exception to the reproduction right shall comply with the "three step test" of art. 9.2 of the Berne Convention , extended to all exclusive rights by Article 13 of the TRIPS Agreement, of which South Africa is a party and by (art. 9(2)), WIPO Copyright Treaty (art. 10), WIPO Performances and Phonogram Treaty (art. 16). Under the three-step test, an exception must be (1) confined to certain special cases which (2) do not conflict with normal exploitation of the work and (3) do not unreasonably prejudice the right holder. The three-step yest offers both flexibility and determines the limits beyond which national laws are not allowed to go in establishing exceptions and limitations. An open-ended fair use exception such as the one proposed under Section 12(A) of the Bill fails to meet the prongs of the three-step test and, as result, if enacted, would situate South Africa in breach of its international obligations.

Finally, the introduction of such a fair use exception would be very detrimental to rightsholders as several uses currently licensed under a fit-for-purpose licensing and remunerated system will now be free for users. If South African creators cannot continue making a living from their creations, it must be expected that their incentive to create will be reduced and thus that the production of South African works will be seriously affected. This is a key issue in the protection of South African cultural diversity.

In light of these considerations, we strongly urge the Committee to avoid adding an open-ended fair use exception by deleting Section 12(A) of the Bill. If a decision is made to retain a fair use provision inspired by the US model, we strongly recommend to, at least, adhere literally to the US fair use doctrine and refrain from introducing a variant that is even broader in scope than the original model.

We further encourage the Committee to support the South African Copyright Coalition in defending the economic and moral interests of South African and foreign authors and refrain from placing copyright owners in a significantly worse position in South Africa than in other countries.

2.2. The exception for personal use under Section 12B(i) should be subject to a remuneration or levy system

Section 12B(i) contains an exception for "a personal copy of such work by a natural person for their personal use, including the use of a lawful copy of the work at a different time or with a different device owned by that natural person, and made for ends which are not commercial: provided that the work was lawfully acquired and that such personal use shall be compatible with fair practice".

CISAC welcomes the improvement of the provision as it now clarifies that the copy of the work needs to have been "lawfully acquired".

However, CISAC would like to emphasize the need to make the exception for personal use subject to a remuneration or levy system to ensure that copyright holders are duly compensated for private copying acts done by individual persons and for personal use.

A private copying levy system is currently the only efficient mechanism that allows rights holders to be compensated for the limitation of their exclusive right of authorizing the reproduction of their works. Private copying levy schemes are recognized in nearly 80 countries around the world. Most countries of continental Europe have recognized these rights for decades, even prior to the regulations of Directive 2001/29 EC on the harmonization of certain aspects of copyright and related rights in the information society, which, under article 5.2 (b), allows member States to introduce limitations to the exclusive right of reproduction, under the condition that the copyright owners receive a proportional compensation. The Directive further recognizes that digital private copying can be spread at an uncontrolled pace, which can cause a greater economic impact than mechanical copying would. Moreover, numerous resolutions issued by the Court of Justice of the European Union have repeatedly recognized that the compensatory remuneration for private copying is legitimate, both as a compensation and in the way it is enforced. In European countries and in other regions, the experience has been successful to such extent that the compensatory remuneration has become an essential source of income for creators.

Globally, in 2020, private copying generated 516 million euros in collections, representing a substantive source of income for creators under the pandemic. In Africa, private copy collections amounted in 2020 to 11 million euros, representing 16.6% of the region's income. In some African countries, private copying levies constitute more than half of the local society's income. However, the potential of private copying is still uncaptured in the region, since only nine countries have introduced an effective remuneration system with a distribution mechanism.

Considering the above, CISAC encourages the Committee to adopt a private copying levy system where importers and manufacturers are required to pay a levy on recording equipment and/or media used by individuals for their private use to a collective management organization in charge of the collection and distribution of this remuneration. In such system, the levy does not increase the price of the products since the levy is generally included in the selling price of the products. The funds collected should be distributed to creators and thus contribute to the creative process.

Introducing a private copy remuneration scheme would harmonize South Africa's legislation with accepted international standards and would set an important precedent for proper implementation of private copying levies in Africa.

Further, in the absence of a remuneration or levy system, CISAC is gravely concerned that article 12B(i) in its current formulation would not be compliant with the three-step test of the Berne Convention and TRIPS Agreement.

CISAC would like to further draw the Committee's attention to the Private Copying Global Study conducted by CISAC in 2020, which can be accessed through the following link: https://www.cisac.org/services/reports-and-research/private-copying-global-study. This Study offers relevant pointers on how to develop the true potential of this important source of income for creators, as would be expected from an effective compensatory system for private copying.

Finally, we kindly submit to your consideration an important initiative to expand and harmonize the implementation of private copying remuneration in Africa put forward by the regional community WAEMU (West African Economic and Monetary Union). WAEMU is developing a regional private

copying Directive aimed at implementing private copying remuneration in its eight member states[1]. The final text of the directive is expected to be adopted by the Council of Ministers of WAEMU in the first semester of 2022 and then transposed into the national legislations of the member states.

2.3. Copyright exceptions in new Sections 12B, 12C, 12D, 19B, 19C and 19D should be amended to be compliant with the "three-step test" of the Berne Convention and the TRIPS Agreement.

CISAC is seriously concerned about the scope of the extensive set of new copyright exceptions introduced in Sections 12B, 12C, 12D, 19B, 19C and 19D, which have been included without a proper legal assessment in terms of compliance with international treaties.

These new exceptions have a broad scope and are formulated in a way that is not compliant with the three-step test. CISAC is particularly concerned with the following exceptions:

- the exception for translations (Section 12B(f)), whose extremely broad scope breaches Article 8 of the Berne Convention, according to which copyright expressly includes the exclusive right of making and of authorizing translation. We further note that this exception might result in discrimination against indigenous languages;

- the general exception for libraries, archives, museums and galleries (Section 19C), which provides for an extremely broad exception for access to works in the collection of these categories of users. In particular, Section 19C (4) permits libraries, archives, museums or galleries to make available for educational and research purposes, on an institutional secure network, audio-visual works, musical compositions and sound recordings. This exception to the exclusive right of communication to the public goes far beyond the uses admitted under a "special case" of the three-step test, particularly to the extent that licensing solutions for the use concerned are easily available from collective management organisations.

- the exception for open access to scientific and academic contributions (Section12D(7)(A)), which has the effect of legitimising potential plagiarisms of protected material in education institutions, thus conflicting with a normal exploitation of copyright works.

Several other exceptions in Sections 12B, 12C, 12D, 19B, 19C and 19D are drafted in a way that may conflict with one or more prongs of the three-steps and therefore would put South Africa in breach of its international obligations.

This panoply of over broad exceptions would severely impact not only rightsholders in South Africa, but also the creative community in general, further aggravating the economically precarious situation that most creators are facing due to the COVID-19 pandemic.

Considering the above, we recommend the Committee to undertake a legal assessment of the copyright exceptions in new Sections 12A, 12B, 12C, 12D, 19B, 19C to ensure compliance with international treaties and particularly with the three-step test of the Berne Convention.

[1] Members of the West African Economic and Monetary Union (also known by its French acronym, UEMOA) are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

2.4. The scope of the exception for persons with disabilities (Section 19D) should be redrafted to ensure compliance with the Marrakech Treaty and the "three-step test"

CISAC acknowledges the universal support in earlier public consultations for an exception to benefit the visually impaired and South Africa's accession to the Marrakesh Treaty. In this framework, the current formulation of Section 19D intends to bring the legislation closer to meeting the requirements of the Marrakesh Treaty.

However, the exception introduced by the Marrakesh Treaty is narrower in scope compared to that of the Bill, since it only affects a closed list of beneficiaries (persons who are blind, visually impaired, print disabled or persons with a physical disability that prevents them from holding and manipulating a book) and is limited to the subject matter of literary works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media. No other works, such as musical compositions or audio-visual works are within the scope of the Marrakesh Treaty.

Insofar as Section 19D of the Bill extends the exception envisaged in the Marrakech Treaty to a broader scope of beneficiaries (other persons with disabilities) and to a broader object (any kind of work, which can made be accessible by any means, including by digital communication by wire or wireless means), this provision falls out of the scope of the Marrakech Treaty and therefore must meet the general requirements of the three-step Test of the Berne Convention and the TRIPS agreement, which currently is not the case.

In this regard, we respectfully point out that Ms. Michele Woods, Director of the WIPO Copyright Division, who was a member of the Panel of Experts for the previous Committee, recommended in her advice of October 2018 that this exception be entirely redrafted to be compliant with international treaties.

In view of the above, CISAC recommends the Committee to draft a cogent exception for persons with disabilities. As suggested by Ms. Woods, this would require redrafting this section to include a general national exception for persons with disabilities, together with a separate section covering the activities encompassed by the Marrakesh Treaty. In the latter case, a number of additional definitions would be needed, including those to describe the works covered, the beneficiaries, and the activities of authorized entities or "organizations serving persons with disabilities."

2.5. Assignments between rights holders and accredited authors' societies shall not be limited in time

The Bill provides in Section 22(3) that "*assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment*".

Assignments between rightsholders and accredited authors' societies usually permit the reversion of copyright to rightsholders at the termination of the membership. Thus, it would be burdensome for both rightsholders and authors' societies to process the "renewals" of thousands of assignments when rightsholders can, at any stage, terminate their membership and have their rights revert to them. For this reason, CISAC proposes to introduce a carve-out in this regard and that such assignments should not be subject to any term of validity.

In view of the above, CISAC urges the Committee to redraft the provision in Section 22(3) in a way that allows assignment to authors' societies to be valid for an indefinite period of time.

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CISAC would like to thank the Portfolio Committee on Trade and Industry of the Parliament of the South African Republic for taking our comments into consideration. Through CISAC's representation of creators and rights owners, we believe in the value of strong copyright systems that incentivize creativity. We remain at your disposal should you need any further information or clarification on the aforementioned considerations.