

27 January 2022

Chairperson: Portfolio Committee on Trade and Industry
Attention Mr. A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: [REDACTED]
[REDACTED]

Dear Sir,

Joint RiSA and IFPI submission on additional definitions and clauses in relation to the South African Copyright Amendment Bill [B13B-2017]

I. INTRODUCTION

The Recording Industry of South Africa (RiSA) is the trade association representing the collective interests of producers of music sound recordings and major and independent record labels in South Africa. RiSA has approximately 20,000 members, the majority of whom are small independent, artist-led record labels, as well as the three major record labels, Sony, Universal and Warner.

IFPI is the voice of the recording industry worldwide, representing over 8,000 record company members across the globe. We work to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music around the world.

We welcome the initiative of the South African Government to modernise South Africa's copyright law to make it a standard for the region and to bring it into line with international treaties and best practice, in pursuance of our shared appreciation for, commitment to, and support of the creative as well as the commercial success of South African art and artists.

We are pleased to note that some of the concerns raised in our previous submission "*Joint RiSA and IFPI Submission on the South African Copyright Amendment Bill and Performers' Protection Amendment Bill, July 2021*" (attached in **Annex II**) on the Portfolio Committee's call for submissions in response to the President's reservations with respect to the Copyright Amendment Bill (CAB) and Performers' Protection Amendment Bill (PPAB) were addressed in

the proposed amendments. We thank the Committee for the opportunity to make written submissions on additional definitions and clauses in relation to the CAB.

In doing so, we urge the Portfolio Committee to consider our recommendations set out in this submission to ensure that the national copyright legislation is in full compliance with the WIPO Performances and Phonograms Treaty (WPPT), the WIPO Copyright Treaty (WCT) and other relevant international copyright standards.

II. EXECUTIVE SUMMARY

Advertised provisions in the CAB

We support the following proposed amendments in the CAB, which are in keeping with international treaties and best practice:

- The new definitions of “broadcast” and “lawfully acquired”.
- Clause 1(i) – the proposed amendments to the definition of “technological protection measure” and “technological protection measure circumvention device”.
- Clause 13 – the proposed amendments to the ephemeral exception in section 12B(1)(c) and new section 12B(2); and proposed amendments to the temporary reproduction and adaptation exception in section 12C and reproduction for education and academic activities exception in section 12D.
- Clause 27 – the proposed amendments to section 27(5A), (5B) and (5C) on penalties and proceedings in respect of dealings which infringe copyright.

However, we recommend the following further changes:

- Deletion of the open-ended US-style fair use provision in section 12A.
- Amendment of the definition of “technological protection measure circumvention device” to include “*performed*”.
- Amendment of the private copying exception in section 12B(3), which extends to digital storage and fails to ensure fair remuneration for right holders whose works are being copied (contrary to international practices).
- Amendment of section 27(5B)(a)(i) to make it clear that the offering and other dealing with circumvention devices are already infringing acts, without the need to show that the illegal device is subsequently used to infringe copyright.

Our detailed comments on these are set out in Part III of the submission.

Further concerns in the CAB and PPAB

While we understand that the present consultation process is limited to certain provisions, we also wish to take this opportunity to bring to the Committee’s attention a number of our other concerns in the CAB and PPAB which we strongly recommend should be addressed so as to ensure the continued growth of the South African music industry. These concerns are

outlined in **Annex I**. For further information, we refer to our previous submissions attached in **Annex II**.

III. DETAILED COMMENTS ON THE ADVERTISED PROVISIONS IN THE CAB

1. New definitions: “broadcast” and “lawfully acquired”

(i) Definition of “broadcast”

We welcome the proposed new definition of “broadcast” which removes reference to “wire” transmissions. This new definition is compatible with international law and international treaties, including the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and Article 2(f) of the WPPT, where “broadcast” is defined as a technical term referring specifically to *wireless, over the air, one-to-many transmissions*.

(ii) Definition of “lawfully acquired”

We welcome the proposed new definition of “lawfully acquired” in the context of the private copying exception in section 12B(1)(i). However, please see Section 3 below for our recommendations on further amendments to the private copying exception in the CAB to ensure that it is adequately scoped and complies with the three-step test.

2. Clause 1(l): Amended definitions of “technological protection measure” and “technological protection measure circumvention device or service”

(i) Definition of “technological protection measure” to include “product” and “is designed”; and the deletion of paragraph (b)

We welcome the proposed amendments of the definition of “technological protection measure”. These amendments are in line with the WIPO Treaties and international good practice, such as Article 6 of the EU Copyright Directive (Directive 2001/29/EC)¹.

(ii) Definition of “technological protection measure circumvention device or service”

‘technological protection measure circumvention device or service’ means a device or service—

(a) primarily designed, produced, ~~or~~ adapted, or performed for purposes of enabling or facilitating the circumvention of a technological protection measure;

(b) promoted, advertised or marketed for the purpose of circumvention of a technological protection measure; or

(c) with a limited commercially significant purpose or use other than to circumvent a technological protection measure;” and”.

¹ A copy of the EU Copyright Directive is accessible at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=celex%3A32001L0029>.

We also welcome the amended definition of “technological protection measure circumvention device or service”, which aligns with the WPPT and international practice. However, for clarity we propose to add “performed” to the list of activities to reflect the addition of services in the definition.

However, we have serious concerns regarding section 28P of the CAB addressing exceptions in respect of TPMs. Section 28P risks totally undermining the effectiveness of the protections afforded by section 28O, because it creates a market for illegal hacking devices under the pretext that they can be used to benefit from exceptions and there is simply no way to verify the purpose for which they are used.

Moreover, section 28P(2)(a) already provides for a redress mechanism for persons who are unable to circumvent a TPM for a permitted use, that is, for the user to seek assistance from the right holder in gaining access to the work in question. We recommend that section 28P be amended as follows:

Recommended amendments

Deletion of section 28P(1), section 28P(2)(b) and section 28P(3) as follows:

Exceptions in respect of technological protection measure

~~28P. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), **Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following:**~~

~~(a) An act permitted in terms of any exception provided for in, **or prescribed under, this Act; or**~~

~~(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).~~

~~(2) A person who wishes to circumvent a technological protection measure so as to perform a~~

~~permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—~~

~~(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or.~~

~~(b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.~~

~~(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—
(a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and
(b) purpose for which the services of such other person has been engaged.~~

3. Clause 13: Exceptions and limitations

(i) Section 12A(d): new paragraph (d) making the four factors in paragraph (b) applicable to exceptions in sections 12B, 12C, 12D, 19B and 19C

We respectfully recommend **deletion** of the fair use provision in section 12A in its entirety for the following reasons:

- (i) The Copyright Act currently provides for specific exceptions and limitations for the purpose of fair dealing and consequently provide a high degree of certainty as to the acts that are permitted in respect of protected works or subject matter.
- (ii) Fair use, unlike fair dealing, is open-ended and, as such, requires a great deal of litigation and judicial interpretation to establish its scope and application (unlike in the US where the scope and application of fair use have been developed in 150 years of jurisprudence, South African law does not have this case law history, making the interpretation of the proposed fair use provisions, and the outcome of any litigation unpredictable).
- (iii) The introduction of fair use into South African law would plunge the growing South African online market for creative works into significant legal uncertainty and would increase the risk of litigation and entry barriers for new services and creators wishing to commercialise their works to the detriment of South African creators and creative industries.

For further information on our recommendation to delete the open-ended US-style fair use provision in section 12A fair use from the bill in its entirety, we refer to our previous submissions attached in **Annex I**.

(ii) Section 12B(1)(c) and new 12B(2): providing for new provisions related to ephemeral rights

We welcome the proposed amendments to the ephemeral exception in section 12B(1)(c) and the new section 12B(2), which are adequately scoped and comply with the three-step test. In particular, we welcome the amendment which limits broadcasters from keeping copies of sound recordings from 6 months to 30 days, which is truly “ephemeral”. We would also recommend that the exception be amended to include in subsection c that copies must not be used for transmission more than 3 times.

(iii) Section 12B(3)(b): providing for the factors related to the exception for personal

copies to not apply to any other exception that permits a copy to be made

We welcome the new proposed definition of “lawfully acquired” and the proposed amendment to the private copying exception in section 12B(1)(i).

However, section 12B(3)(a)(iii)) extends the private copying exception to digital storage, risking undermining existing licensing practices and without providing for fair remuneration for right holders whose works are being copied (contrary to international practices).

To ensure that the private copying exception is adequately scoped to ensure it complies with the three-step test, we recommend amending the exception in section 12B(3)(a) to include that permitted personal uses are limited to the making of a back-up copy or for time or format shifting only. Further, the introduction of a levy on devices and storage media as a quid pro quo for the loss of the copying exclusive right has been found in many jurisdictions to be necessary to compensate copyright owners and performers. We recommend that due consideration be given to international practice in this area before proceeding with the proposed exception, and we stand ready to assist with providing any assistance required in that respect.

Notably, section 12B(3) includes a new subsection (b) which states: “*The factors associated with making a personal copy, set out in subsection (1)(i), do not apply to a copy made in terms of another exception provided for in this Act*”. It is unclear which other exception(s) in the Act permits the making of a personal copy and therefore, we recommend deletion of this subsection.

Recommended amendments

Section 12B

Specific exceptions from copyright protection applicable to all works

12B. (1) Copyright in a work shall not be infringed by any of the following acts:

[...]

(3) (a) For the purposes of subsection (1)(i), permitted personal uses include are—

(i) the making of a back-up copy; and

(ii) time or format-shifting; or

~~(iii) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.~~

~~(b) The factors associated with making a personal copy, set out in subsection (1)(i), do not apply to a copy made in terms of another exception provided for in this Act.~~

[...]

(iv) Sections 12C(2) and 12D(1)(b), (c) and (d): adding the wording of the three-step test as additional factors against which the exceptions must be tested

We welcome the proposed amendments to the exceptions in section 12C *Temporary*

reproduction and adaption and section 12D *Reproduction for education and academic activities* to ensure compliance with the three-step test.

4. Clause 27: Offences in respect of digital rights, technological protection measures, and copyright management information

Clause 27 - Section 27 (Penalties and proceedings in respect of dealings which infringe copyright.)

“27. Section 27 of the principal Act is hereby amended—

(a) by the insertion of the following subsections:

“(5A) Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright and for commercial purposes—
(eA) communicates the work to the public by wire or wireless means; and

(eB) 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 chosen by that person,
which they know to be infringing copyright in the work, shall be guilty of an offence.

(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if—

(i) such person knows or should reasonably have known, that that device or service will or is likely to be used to circumvent infringe copyright in a work protected by an effective technological protection measure;

(ii) such person provides a service to another person to enable or assistsuch other person to circumvent an effective technological protectionmeasure; or

(iii) such person knows or should reasonably have known, that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by an effective technological protection measure;

(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protectionmeasure in the Republic; or

(c) circumvents such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.

(5C) Subject to section 28S, any person who—

(a) in respect of any copy of a work, remove or modify any copyright management information; or

(b) make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire or communicate to the public a work or a copy of a work, if the copyright management information in respect of that work or copy of that work, has been removed or modified without the authority of the copyright owner, shall be guilty of an offence.

We welcome the proposed amendments to section 27(5A), (5B) and (5C) providing for offences in respect of digital rights, TPMs and copyright management information. This is in keeping with Article 18 and Article 19 of the WPPT which require adequate legal protection and effective legal remedies against the circumvention of effective technological measures and infringement of electronic rights management information. However, the new section 27(5B)(a)(i) should be amended to make clear that the offering and other dealing with circumvention devices are already infringing acts, without the need to show that the illegal device is subsequently used to infringe copyright. The current wording sets the bar for infringement so high such that it makes the whole provision ineffective.

IV. CONCLUSIONS

Thank you for the opportunity to make this submission. We also stand ready to provide any further information on any of the above points.

For further information, please contact:

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