



SOUTHERN AFRICAN MUSIC RIGHTS ORGANISATION

**SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY ON SPECIFIC CLAUSES
OF THE COPYRIGHT AMENDMENT BILL [B13-2017]**

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A. INTRODUCTION

1. The Southern African Music Rights Organization (“SAMRO”) would like to express its gratitude to the Portfolio Committee on Trade and Industry (“the Committee”) for the opportunity to make submissions in respect of specific clauses of the Copyright Amendment Bill (“the Bill”) and the Memorandum of Objects of the Bill.
2. We would like to highlight that this is our second written submission in respect of the Amendment Bill and as such, this document must be viewed either as a supplement or in addition to our first submission made in 2017.
3. There are a number of issues which were raised in our 2017 submissions, but do not appear to have been considered by the legislature in drafting the 2017 Amendment Bill.
4. Accordingly, it should be noted that our views in respect of these submissions have not changed and will be restated herein below.

B. LEGISLATIVE FRAMEWORK

5. SAMRO functions as a collecting society established in terms of section 1(a) of Act 9 of 2002.
6. SAMRO’s primary mandate is limited to the administration of the rights afforded to authors and copyright owners in terms of section 2(1)(b) read with section 6 of the Copyright Act 98 of 1978 (Act) which relate to the public performance and broadcast rights in musical works.
7. For your ease of reference, section 2(1)(b) read as follows:

“2. Works Eligible for Copyright.
(1) Subject to the provisions of this Act, the following works...shall be eligible for copyright –
(a)
(b) musical works

8. Section 6 of the Act provides the extent to which Copyright applies and provides as follows:

“6. Nature of copyright in literary or musical works.
(1) Copyright in a...musical work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) *reproducing the work in any manner or form;*
- (b) *publishing the work if it was hitherto unpublished;*
- (c) ***performing the work in public;***
- (d) ***broadcasting the work;***
- (e) ***causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;***
- (f) *making an adaptation of the work;*
- (g) *doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.” [Own emphasis added]*

9. SAMRO's primary role is the administration of the public performance and broadcast rights in musical works. This means the actual musical composition and the associated lyrics. We therefore represent the composer of the music in a song, the lyricist of the words associated with a song and the publisher in respect of that song.
10. SAMRO is thus only obliged to represent the publisher where an agreement has been concluded between the publisher and the composer and/or lyricist.
11. SAMRO acquires these rights from each of its members by means of a written deed of assignment as contemplated in section 22 of the Act.
12. SAMRO's members are obliged to notify SAMRO of each and every work the member creates as well as whether there are any co-authors/owners and what the share splits in respect of the royalties should be.
13. It should be noted that SAMRO plays no role in determining the ownership of works or the share splits involved.
14. The duration of each assignment of rights is limited to the duration of membership with SAMRO.
15. The deed of assignment covers all musical works that the member has created prior to becoming a member and all musical works that the member will create in the future. This is important as SAMRO implements a “blanket licensing regime” in respect of its repertoire.
16. Briefly explained, SAMRO's blanket licensing regime entails the following:
 - 16.1. it grants a user the right to use any of the musical works held and administered by the collecting society, at any time during the term of the licence and creates the reciprocal duty on the user to fully account for all the music used during the term of the licence; and

- 16.2. it alleviates the administrative burden of having to identify which works will be used in advance and having to adhere to a playlist after pre-clearing with the collecting society.

C. SUBMISSIONS ON THE RESPECTIVE CLAUSES

17. As indicated above, we intend to deal with issues raised in our 2017 submissions which appear to have not been considered by the legislature in drafting the 2017 Amendment Bill.
18. Under this heading we shall deal with the following sections and/or clauses in chronological sequence:
- 16.3. The definition of “Broadcasting” in relation to the exclusion of digital platforms;
 - 16.4. Commissioning of works in terms of clause 3 of the Amendment Bill;
 - 16.5. Fair use exemptions contemplated in clause 10 as opposed to fair dealing;
 - 16.6. Assignment and licenses in respect of orphan works in terms clause 22A of the Amendment Bill;
 - 16.7. Accreditation of Collecting Societies in terms of clause 22B(3) of the Amendment Bill;
 - 16.8. Reporting by Collecting Societies in terms of clause 22E of the Amendment Bill; and
 - 16.9. The criminalisation of copyright infringement as proposed in clause 25 of the Amendment Bill.

D. THE DEFINITION OF BROADCASTING IN RELATION TO THE EXCLUSION OF DIGITAL PLATFORMS

19. In terms of section 6 of the Act, copyright in a musical work vests the exclusive right to do or to authorize the doing of a number of acts in respect of a musical work in the Republic including the broadcasting of the work.
20. In terms of the Copyright Act “**broadcast**” means:

...a telecommunication service of transmissions consisting of sounds, images, signs or signals which-

- (a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and*
- (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as A verb, shall be construed accordingly...”*

'broadcaster' means “a person who undertakes a broadcast.

21. Programming has traditionally been broadcast by a limited number of licensed entities via radio frequency spectrum.
22. Advancements in broadcast technology and the internet have changed the way in which musical works are “broadcast” or accessed by the public.
23. Members of the public are now able to receive content on their computers, mobile phones, tablets, smart TV’s and other connected devices and are in addition, able to create and distribute their own content via the internet.
24. The definition of “broadcasting” provided for in the Act has not been amended to keep up with these technological advancements and to afford proper copyright protection for authors and rightsholders.
25. Moreover, this has allowed mobile and online providers to exploit authors and rightsholders of musical works without compensation. For instance;

Members of the public with access to the internet are able to convert music videos from platforms such as YouTube and Soundcloud and download them for free in Mp3 format without having to compensate the artist, author or publisher for the musical work.

26. These technological developments were however provided for in the Electronic Communications Act 36 of 2005 (ECA), by the inclusion of a technology neutral definition of broadcasting.
27. “Broadcasting in terms of the ECA is currently defined as:

*“any form of unidirectional electronic communications intended for reception by—
(a) the public;
(b) sections of the public; or
(c) subscribers to any broadcasting service, whether conveyed by means of radio frequency spectrum, or any electronic communications network, or any combination thereof and
“broadcast” is construed accordingly*

28. We agree with the drafters of the Bill that the act of broadcasting is one distinct from communication to the public, both of which should be protected as separate restricted acts in respect of a musical work.
29. SAMRO notes that South Africa is a party to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).
30. Article 11 of the Berne Convention specifically provides that.

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:

- i. the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
- ii. any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one...*

31. For purposes of the Berne Convention the term “literary work” includes musical works, with or without lyrics.
32. With the development of the digital age, the internet and satellite broadcasting, broadcasters are now able to re-transmit a broadcast of another broadcaster, either in the same format or an amended format, via their own broadcast platform, and in so doing rebroadcast musical works to the audience of their own broadcast platform and generate revenue on the back of authors and rightsholders rights copyright.
33. An example of the re-broadcaster as envisaged in the Berne Convention would be where:

Broadcaster X who broadcasts in a certain area and whose footprint is limited by their broadcast licence, but is now able to sell their broadcast to Broadcaster Y, who in turn includes it in their offering to their customers and with a larger footprint. Authors and rightsholders rights are exploited without compensation.

34. SAMRO submits that the definition of “broadcasting” in the Copyright Act should be amended to a technology inclusive definition similar to that contained in the ECA.
35. We propose the following in respect of the wording of the definition:

...any form of unidirectional electronic communications, conveyed by whatever means, and intended for reception by—

- (a) the public;*
- (b) sections of the public; or*
- (c) subscribers to any broadcasting service and shall include the rebroadcast of the broadcast of a Work when the broadcast is made by an organization either than the original broadcaster*

E. WORKS CREATED USING GOVERNMENT FUNDING

36. Clause 3 of the Bill proposes to amend section 5 of the Act to read as follows:

(2) (a) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or [such] an international [organizations as may be prescribed] or local organisations. (b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question.'

37. Clause 21 of the Bill provides as follows:

(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: Provided that copyright owned by, vested in or under the custody of the state may not be assigned.'

38. This provision essentially allows for the vesting of copyright in government, local and international organisations if the creation thereof is funded by any such entity. It undermines the fundamental principle to protect authors of works against exploitation that the Copyright Act seeks to achieve.

39. This will severely impact the income of the authors that this Bill seeks to protect, who produce works with state funding, for purposes which include commercial use by the public broadcaster and are reliant on the royalty income derived from these works. The state funding is and has always been provided to compensate the author or composer for the labour undertaken during the creation process, and not for the copyright itself. The provisions of the current Copyright Act recognise this principle. SAMRO is of the firm view that copyright in terms of this section should be owned by the respective author or composer and that transference of copyright remains subject to written assignment at the authors' or composers' instance only.

40.

41. The inclusion of this provision will have the dire consequence of limiting creativity rather than the intended objective of fostering creativity, economic transformation and freedom.

F. FAIR USE EXCEPTION AS CONTEMPLATED IN CLAUSE 12 AS OPPOSED TO FAIR DEALING:

42. Clause 12 (A) of the Bill provides as follows:

41. Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device;*
- (ii) criticism or review of that work or of another work;*
- (iii) reporting current events;*
- (iv) scholarship, teaching and education;*
- (v) comment, illustration, parody, satire, caricature or pastiche;*
- (vi) preservation of and access to the collections of libraries, archives and museums;*
- (vii) expanding access for underserved populations; and*
- (viii) ensuring proper performance of public administration.*

(b) In determining whether an act done in relation to a work constitutes fair dealing or fair use, all

relevant factors shall be taken into account, including but not limited to—

- (i) the nature of the work in question;*
- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;*
- (iii) the purpose and character of the use, including whether—*
 - (aa) such use serves a purpose different from that of the work affected; and*
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes;**And*
- (iv) the substitution effect of the act upon the potential market for the work in question.*

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.”

- 43. Clause 10 of the Bill amends section 12 of the principal Act by the substitution in subsection 1 which appears to introduce the “fair use defence” which exempts a user of a work from copyright infringement. It does this while still maintaining the “fair dealing exemption” in its current form. We therefore, respectfully submit that the “fair use defence” should be removed from the Bill and that the “fair dealing” provisions should be retained.
- 44. “Fair use” is broad and open ended in that it is not confined to certain kinds of works, it applies to all copyright protected works and to all four of the restricted acts. It outlines mere examples of what types of use would constitute fair use and then sets out the factors that must be considered when determining whether the use of the work constitutes fair use. In addition, section 12A(1)(a) of the latest Amendment Bill provides, “..., for purposes such as the following,” which makes the provisions for fair use to be even more open ended.
- 45. This is done on a case-by-case basis. The end result is that when there is doubt as to whether a specific use of a work constitutes fair use, the dispute will have to be referred to the courts to resolve the matter. The courts will then apply the principles and determine the permitted use.
- 46. The problem with the fair use approach is that a broad variety of uses of works are allowed without the user being required to seek and obtain the copyright owner’s permission and without paying a royalty. It therefore does not serve the purpose that the copyright protection was intended for in the sense that it places the author and copyright owners in a position where they would have to seek the assistance of the judicial system in terms of enforcing their rights, which is costly and time consuming.
- 47. The danger with this approach is that the decision as to what constitutes fair use will ultimately lie in the hands of the court and users will attempt to rely on the fair use exemption as an excuse not to take out a

licence. Should a collecting society wish to challenge this, they will have to take the user to court which will be a lengthy and costly exercise. The only parties that are set to benefit from this provision are the lawyers who will be litigating on the matters. This does not serve the purpose that the Bill was set to achieve.

48. The principle of fair use is an American approach which is wholly offensive to and inappropriate for South Africa. Firstly, the US is a litigious society, and in contrast South Africa is far from a litigious society and in fact great barriers in respect of access to justice and economic freedom exist in South Africa. Litigation is extremely expensive and citizens cannot be expected to litigate in order to protect their bread and butter.
49. We submit that the weighting of prejudice, required for the balancing of rights in this regard, favours the author and rightsholder. Secondly, the absolutist approach used in the US regarding the freedom of expression is not appropriate in South Africa given that our Constitution specifically provides that freedom of expression can be limited and must be weighed up against other constitutional rights such as the right not to be deprived of one's property, and the limitations provided for in section 36 of the Constitution.
50. We therefore, submit that the imposition of such an approach would be wholly unconstitutional and a grave intrusion of authors and rights holders rights, which this Bill sets out to protect.
51. The Copyright Act currently adopts the doctrine of fair dealing. Under this doctrine, "fair dealing" in respect of a work of copyright does not constitute a copyright infringement, however such fair dealing is limited to certain purposes, under certain circumstances. Fair dealing is adopted in clauses 12 to 19B of the Copyright Act.
52. In summary copyright is not infringed by any fair dealing with literary works, musical works, artistic works, broadcasts and published editions, where the use of the work is:
 - 50.1 for the purpose of research or **private study** by, or the personal or private use of, the person using the work;
 - 50.2 for the purpose of criticism or review of that work or of another work, provided that the source and the name of the author (if it appears on the work) shall be mentioned; or
 - 50.3 for the purpose of reporting current events:
 - 50.3.1 in a newspaper, magazine or similar periodical, provided that the source and the name of the author (if it appears on the work) shall be mentioned; or
 - 50.3.2 by means of broadcasting or cinematograph film.

50.3.3 In respect of cinematograph films, sound recordings and computer recordings, copyright is not infringed by any fair dealing.

53. SAMRO respectfully submits that the current fair dealing provisions are sufficient to achieve the purpose of facilitating private education and study. Should there be any dispute as to whether a use of a work constitutes fair dealing as set out above, the dispute can be referred to the Copyright Tribunal for cost effective, efficient and speedy resolution.

G. COMPELLING MUSIC USERS TO PROVIDE MUSIC USAGE DETAILS

54. The CRC recommended that the Copyright Act should be amended by the legislators to force music users to submit log sheets.

55. SAMRO is reliant on receiving music usage log sheets from music users in order to distribute all the licence fees that we receive to our members accurately. Although music users are clearly obliged to provide these reports in terms of the licence agreements that they enter into with SAMRO, they do not comply fully with their obligations. Licensees also refuse to subject themselves to such conditions by agreement. Certain users do not record the details of the music that they perform in public or broadcast, whilst others provide inaccurate or incomplete information.

56. SAMRO is, as a result of this situation, forced to distribute the licence fees collected based on the information that it does receive. Music usage reports are largely submitted by public and commercial television and radio stations. Thus their data contributes largely to the data used for the distribution of royalties. However, the music played by these broadcasters is also predominantly international content. Reporting by community broadcasters is poor to non-existent and non-broadcast users seldom bother to provide any usage data.

57. The CRC also highlighted the fact that general music users like retailers, pubs and clubs, who currently don't submit their music usage data as they are supposed to tend to play more local music content than broadcasters. This, the CRC asserted, put local composers at a disadvantage.

58. The industry urgently requires the assistance of the legislature in this regard. All music users must be compelled to provide collecting societies with their music usage reports as prescribed by collecting societies, authors or rightsholders.

59. In addition, SAMRO recommends that broadcast users be required to subscribe to a monitoring service such as Soundmouse or BMAT which would provide complete and accurate usage monitoring and data. Alternatively, the costs of doing so should be included in the tariff payable for the music rights.

60. Parliaments' assistance in this regard will significantly improve the identification of musical works and the relevant rights holders' in a cost effective way. More importantly this will mean increased royalty revenue for authors and rights holders' and contribute tremendously towards economic freedom and development.

H. ASSIGNMENT AND LICENCES IN RESPECT OF ORPHAN WORKS IN TERMS OF CLAUSE 22A OF THE AMENDMENT BILL

61. The problem facing the music industry is the enforcement of copyright for owners of musical works who cannot be identified, commonly referred to as "orphan works". SAMRO is encouraged by the Department's commitment to resolving the problem that exists with orphan works, however, we do not believe that the current drafting will alleviate the situation.

62. The nature of an orphan works and in turn, the problem, is confined to those works where copyright owners or holders cannot be identified. The proposed definition of orphan works goes further than is required, and should be restricted to only those copyright owners who cannot be identified.

63. The licences that SAMRO issues are in respect of its members' works that have been duly assigned to SAMRO. When authors and rights holders sign up as members, they voluntarily contact with SAMRO in respect of their intellectual property, by assigning their broadcast and performance rights to SAMRO so that SAMRO can administer the rights by issuing licences to music users and collecting license fees for distribution to the members in accordance with the SAMRO rules. This we add is their constitutional right. SAMRO is a membership based organisation and thus accountable to each member, through the AGM. It is the member's prerogative to determine and agree to the rules that are applicable to their works, even in instances where the member can no longer be located, or in instances where the works may not be properly documented.

64. SAMRO rules provide that all possible efforts must be made to obtain the correct information to distribute the funds. If after a period of 5 years SAMRO is not able to obtain the correct information required to distribute the funds, they are placed back in the distribution pool for redistribution to SAMRO members.

65. As mentioned herein above, SAMRO members are obliged to notify SAMRO of each and every work that he or she creates as well as whether there were any co-authors/owners and what the share splits in respect of the royalties should be. It is often the case then that members do not notify SAMRO of their works or that the notification information is inadequate or that the SAMRO members cannot be immediately located.

66. Section 22 of the Bill appears to undermine the members' constitutional right to contract freely in respect of his or her rights, by providing for the unlawful expropriation of the rights by the State in so far as it extends further than those authors or rights holders that cannot be identified.
67. Moreover, the undocumented royalties are largely a factor of poor reporting by users as insufficient information is provided to SAMRO to enable the money to be distributed to the correct rights holders. If the remedies referred to above with regard to a legal obligation on users to employ the services of a monitoring service provider and submit complete and accurate usage returns, including cue sheets, were implemented the problem would largely be alleviated.
68. We suggest that the definition set out in section 1(f) of the Bill be amended to read as follows:

“orphan works” mean works in which copyright still subsists but the right holder, both the creator of the work or the successor in title are not identifiable”.

I. ACCREDITATION OF COLLECTING SOCIETIES IN TERMS OF CLAUSE 22B (3) OF THE AMENDMENT BILL

69. Clause 24 of the Bill proposes the insertion of a new Chapter 1A into the Act. This chapter provides for the accreditation of collecting societies.
70. SAMRO has no objection to collecting societies being required to be registered and accredited with the Commission, in so far as the purpose of this accreditation is the promotion of transparency, good governance and accountability to its membership. SAMRO is confident that the proposed amendments seek to achieve this purpose.
71. We do however, for technical reasons, suggest that the provisions be amended to read as follows:

22B (3) Any person or an institution that intends to act as a Collecting Society by administering on behalf of any copyright owners or on behalf of an organisation representing copyright owners, the right to receive payment of a royalty in terms of this Act, must be registered and accredited by the Commission in terms of this Act.

72. That is not to say that collecting societies administering performers rights should not be regulated, registered or accredited by the Commission, but rather that this provision should appear in the Performers Protection Act, 1967 (Act 11 of 1967) (PPA), which was specifically enacted to provide for the protection of performers rights, and adapted to meet the needs of performers rights. The CRC report does envisage the amendment of both the Copyright Act and the PPA respectively.
73. The rights of performers are not rights of copyright. They are accepted internationally as “neighbouring rights”. As such these rights require separate legislation, the PPA, which speaks to the specific nuances of the performers industry. That is also not to say that one collecting society cannot act on behalf of performers

and copyright holders, but that they should be required to obtain accreditation in terms of both Acts and comply with the specific “right specific” regulatory requirements required in terms of the respective Acts.

J. ADMINISTRATION OF “MUSIC USERS RIGHTS”

74. Section 24 recommends the insertion of clause 22C (1) which provides that collecting societies may accept exclusive authorisation to administer any right from a music “user”.
75. SAMRO understands that music users, who exploit authors and rights holders’ rights, also have rights of copyright that require protection. An example of this a broadcaster, who exploits musical works in their broadcast programming, but also has a right to protect their own actual broadcast, including the re-broadcast thereof as per section 10 of the Copyright Act. SAMRO assumes that this is what the legislature intended to accommodate when including the term “user” in this proposed amendment.
76. SAMRO submits that due to the competing interests at play, it would be a conflict of interest for any one society to administer music users’ rights on the one hand and authors and rights holders’ rights on the other. Authors are reliant on collecting societies to protect their rights and collect licence fees. Handing power over collecting societies to the very people that exploit these rights and have no interest in protecting any rights but their own would be a grave intrusion of the rights of authors and rights holders. Music users are intent on cutting costs, driving down the royalties payable to authors and understating the value that a musical work has in enabling them to generate revenue. It is unthinkable that this is the legislature’s intention.
77. SAMRO is of the view that the Bill should be reviewed to remove all such references in-so-far as they conflict with the rights of authors and right-holders.

K. THE CONTROL OF COLLECTING SOCIETIES

78. SAMRO notes that the proposed section 22D provides that a collecting society is subject to the control of the users, performers, owners, producers or authors whose rights the collecting society administers.
79. In view of our comments in the preceding paragraphs, we agree that collecting societies should be subject to the control of those whose rights they administer, but for the reasons highlighted above, a collecting society cannot be placed in the untenable position of having to administer the rights of music users on the one hand and the rights of authors and rights holders’, on the other.

L. APPROVAL FROM MEMBERS

80. SAMRO welcomes the inclusion of section 22D in so far as it requires the following from collecting societies:
81. to obtain the approval of its members for its procedures of collection and distribution. We submit that SAMRO is obliged in terms of its rules to obtain such approval from its members.
82. to obtain the approval of its members for the utilisation of any amounts collected as royalties for any purpose other than the distribution of the royalties to the members. We submit that SAMRO is obliged in terms of its rules to obtain such approval.
83. to provide its members with regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of rights. We submit that SAMRO is obliged to provide this information to its members.
84. to distribute royalties, in so far as is possible, in proportion to the actual use of the associated works. SAMRO submits that, where music usage reports are received, it uses all best endeavours to ensure that distributions are executed accordingly. This task is made difficult due to the failure of music users to provide accurate, if at all, details of their music usage, and to do so on time. With reference to our comments hereinabove, a provision in the Bill forcing music users to submit their music usage reports, as prescribed by the collecting society would assist us tremendously in reaching this objective. Moreover, the costs of a collecting society doing this on the music users' behalf and for purposes of ensuring that this information is accurate should be built into the collecting societies tariffs.
85. SAMRO welcomes the inclusion of the proposed section 22C (1) (b) allowing authors and rights holders' to withdraw their rights from collecting societies.
86. We submit that this is in keeping with SAMRO's Membership Rules and authors and rights holders' in this regard.
87. Section 22C (2) (d) provides that collecting societies may negotiate royalty rates.
88. SAMRO is not involved in the negotiation of royalty rates. SAMRO does however negotiate licence fees with music users.
89. We suggest that this section be amended to read as follows:

“(d) negotiate license fees with music users”.

90. The Bill proposes that section 22E be inserted which provides as follows:

22E. (1) A collecting society or Community Trust shall submit to the Commission at the prescribed time such returns and reports as may be prescribed.

(2) The Commission may call for a report and specific records from a collecting society for the purposes of satisfying the Commission that—

(a) the affairs of the collecting society are conducted in a manner consistent with the registration conditions of that collecting society; or

(b) the royalties collected by the collecting society in respect of rights administered by that collecting society are being utilised or distributed in accordance with the provisions of this Act.

91. SAMRO welcomes this provision and suggests that, in addition, the section should be amended to provide for specific reporting requirements, details of reports and timelines so that Collecting Societies can prepare and ensure that it can meet its obligations to both the Commission as well as its members' year-on-year.

92. Subsection (2) above states inter alia that the Commission may call for any report or record for purpose of satisfying itself that the royalties are collected by the Collecting Society in respect of rights administered by such Collecting Society are being distributed in accordance with the provisions of the Act. SAMRO respectfully submits that the royalties are not distributed in accordance with the Act, but in accordance with the Collecting Society's distribution rules. SAMRO has no objection to the requirement of obtaining approval for its distribution plan.

93. We thus suggest that this provision be amended to read as follows:

(1) The Commission may call for any report and also call for any records of any Collecting Society for purposes of satisfying the Commission that the affairs of such Collecting Society are conducted in a manner consistent with registration conditions or that royalties collected by the Collecting Society in respect of rights administered by such Collecting Society are being utilised or distributed in accordance with the Act and Collecting Society's approved distribution plan."

M. THE CRIMINALISATION OF COPYRIGHT INFRINGEMENT AS PROPOSED IN CLAUSE 27 OF THE AMENDMENT BILL

94. Collecting societies are reliant on music users to provide them with the necessary information and details, including technical details and financial information, in relation to how they use the musical works and the parameters used to calculate their licence fees according to the collecting societies tariffs.

95. Moreover, an essential element of determining a reasonable and appropriate tariff for a particular licence is the value that the musical work brings to the music user. It is international best practice that the licence fees payable for the use of music as an essential part of the music users business is determined based on the revenue generated, whether directly or indirectly, by the business of the music user.

96. As such the information referred to above is essential for the proper licensing and protection of authors and rightsholders' copyright. Collecting societies need to have sufficient information at their disposal in order to issue the user with the appropriate licence and charge the appropriate fees. This information is often not forthcoming or misrepresented by the user.
97. SAMRO submits that the Copyright Act should provide that users must provide collecting societies, authors and rights holders' with all the necessary information relating to the calculation of licence fees, the use of the work and the music that was used, as prescribed by the collecting society, author or rightsholder.
98. We suggest the inclusion of the following clause in this regard:

Any person who performs a restricted act in respect of any work protected by copyright under this Act, or causes another to do so, without providing the copyright owner or collecting society responsible for administering the said copyright, with all information regarding the use of the work, information necessary for calculating the applicable licence fee and the required usage information shall be guilty of an offence punishable by a fine or imprisonment not exceeding five years, or both.

99. We are also of the view that although the criminalisation of such an offence is provided for in the current version of the bill, it does not provide for civil remedies and therefore does not fully benefit the right-holders.

N. FAILURE TO PROVIDE FOR CIVIL REMEDIES

100. Our concerns in this regard are in relation to clause 27 of the Amendment Bill which seeks to amend section 27 of the Act by the insertion of subsection 5A:
101. Clause 27 provides the following:

“(5A) 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 advertise for sale or hire, a technological protection measure circumvention device if—

(i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure;

(ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or

(iii) such person knows or has reason to believe 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 a technological protection measure;

- (b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological protection measure in the Republic; or*
- (c) circumvents such technological protection measure when he or she is not authorised to do so, shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.*

102. Clause 27 further proposes the substitution section 6 of the Act and makes provision for infringement by juristic persons.

103. Clause 27 provides:

“(6) A person convicted of an offence under this section shall be liable—

- (a) in the case of a first conviction, to a fine [not exceeding five thousand rand] or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or*
- (b) in any [other] case other than those contemplated in paragraph (a), to a fine [not exceeding ten thousand rand] or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”*

104. Given SAMRO's role in protecting the interests of copyright owners, it is a concern that the proposed amendments section 27 of the Act fail to account for the interest of these copyright owners. This is evidenced by the failure to provide for civil remedies to copyright owners where an infringement has occurred in respect of works that a protected by a technological protection measure applied by the owner of the copyright.

105. In fact, SAMRO believes the penalty imposed in clause 27 is incongruent with the object of the Act, which is the protection of copyright owners.

106. We note that clause 27 relates to “technological protection measures” applied by the owner of the copyright. It follows that the owner of the copyright in a work protected by technological measures should be compensated for an infringement or a breach of such technological protection measure.

107. Technological protection measure is defined in the Amendment Bill as follows:

‘technological protection measure’—

- (a) *means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts the infringement of copyright in a work; and*
- (b) *does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;*

108. Practically speaking, technological protection measures include, but may not be limited to password protection software locks.
109. Such measures are not only to ensure the protection of the work, but also come at cost to the copyright owner.
110. Section 24 of the Act provides civil remedies for the owner of a copyright in instances where there is an infringement of a copyright.
111. It would appear that the provisions of section 24 do not extend to works protected by technological protection measures.
112. Section 24 of the Act states:

- (1) *Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.*
- (1A) *In lieu of damages the plaintiff may, at his or her option, be awarded an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee in respect of the work or type of work concerned.*
- (1B) *For the purposes of determining the amount of damages or a reasonable royalty to be awarded under this section or section 25 (2), the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiry as the court considers necessary.*
- (1C) *Before the owner of copyright institutes proceedings under this section, he or she shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.*

113. SAMRO agrees with the remedies contained section 24 of the Act and believes that these remedies should be applicable to infringements of works protected by technological protection measures.

114. The imprisonment of a person convicted in terms of clause 27 does not redress the loss suffered by the copyright owner.
115. Accordingly, SAMRO proposes that clause 27 be amended to read as follows:

“Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the owner of the copyright;
(a)...
(b)...
(c)....
... shall, in addition to the remedies available to copyright owners in terms of section 24, be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.”

O. ADDITIONAL RECOMMENDATIONS (REVIEW OF LICENSING TARIFFS)

116. It was concluded by the CRC that local tariffs are generally lower than the average tariffs for the countries selected in the benchmarking. Moreover, the existing tariffs do not reflect the true value of music to music users. It was recommended that the collecting societies should review and benchmark the tariffs every five years to ensure that they are competitive.
117. While we appreciate the CRC’s endorsement that collecting societies may review their tariffs and are obliged to ensure that they remain competitive, our challenge is not in reviewing the tariffs but rather in implementing existing tariffs as well as revised tariffs. Music users such as large retail chains and broadcasters refuse to pay certain existing tariffs or revised tariffs. Attempts to negotiate with these users have seen long drawn-out negotiations where delay tactics are employed to avoid paying revised tariffs. Moreover they refuse or fail to refer their dispute to the Copyright Tribunal.
118. This situation severely hinders the efforts of collecting societies to collect what is due to authors and publishers for the use of their musical works. SAMRO suggests the following in the circumstances: In view of the fact that section 9A applies to **sound recordings only** and not to musical or literary works, SAMRO submits that a new section 6A be inserted after section 6 of the Act which provides as follows:

6A. Royalties in Respect of Musical and Literary Works.

- (1)(a) No person may do or cause the restricted acts contemplated in section 6 without the prior permission and payment of a royalty to the owner of the relevant copyright or collecting society.*
- (b) A person who intends to do or cause restricted acts contemplated in section 6 must at any time before performing such acts give the collecting society a notice in the manner prescribed by the collecting society, of his or her intention to perform such acts, indicating the date and duration of the proposed performance of the acts and the details, including technical details, of how the musical and literary works will be used by the user.*
- (c) The collecting society must as soon as is reasonably practicable upon receipt of such notice*

respond to such notice by providing the prospective licensee with the appropriate licence terms and conditions and applicable tariff.

- (d) If the user rejects the terms and conditions and applicable tariff, the user may within 30 days of receipt of the licence terms and conditions and tariff refer the matter to the Tribunal. If the, contrary to (a) above, the user has already proceeded to use the works or the user proceeds to use the works without referring the matter to the Tribunal as envisaged herein above within 30 days, the user will be bound by the terms and conditions and tariffs of the collecting society.*
- (e) The Tribunal must adjudicate such matter as soon as reasonably practicable and where possible, before the performance of the act which is the subject of the application, make any order it deems fit.*
- (f) Notwithstanding the fact that a licence agreement has been entered into with a music user, the author, rightsholder or collecting society shall be obliged to review the terms and conditions and tariffs applicable to any licence agreement regularly, so as to ensure that the authors and copyright owners rights are protected at all times and that the author and copyright owners receive a reasonable royalty for the exploitation of their works by the user. The procedures set out in this section shall apply in this regard.*

119. SAMRO is of the view that the inclusion of this section for musical and literary works under section 6A is necessary as authors and rightsholders and their Collecting Societies also need an effective mechanism for the processing and finalisation of licensing and tariff disputes with users. This provision would go a long way in assisting the industry in having tariff disputes heard and dealt with effectively and efficiently.

P. LIMITATIONS ON COPYRIGHT

Berne Convention:

120. South Africa is a party to the Berne Convention for the Protection of Literary and Artistic Works. The expression "literary and artistic works" for purposes of the Bern Convention includes musical compositions (with or without words).

121. Article 9 provides that authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. It is further provided that the contracting country may to permit, by way of legislation, the reproduction of 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.

122. The Bern Convention sets out a three-step-test concerning the imposition of such restrictions. Restrictions that do not pass the test are unlawful. The three requirements of the three-step test are:

123. exceptions should be confined to certain special cases;

124. exceptions must not conflict with a normal exploitation of a work; and
125. exceptions must not unreasonably prejudice the legitimate interests of the author.
126. Section 10 of the Bill proposes a number of restrictions on copyright, a number which we believe unreasonably prejudice the rights of authors and rightsholders and conflict with the normal exploitation of the work.

Q. MINIMUM AGREEMENT CONTENTS

127. In relation to the minimum content of the agreements relating to royalty percentage payments, we note that the language used therein appears to be prescriptive and leaves no apparent room for variation by the contracting parties.
128. In this regard we note the contents of clauses 6A(4), 7A(4) and 8A(4), which all read as follows:

The agreement contemplated in subsection (2)(a) must include the following:

- (a) The rights and obligations of the author and the assignee;*
- (b) the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;*
- (c) the method and period within which the amount must be paid by the assignee to the author;*
- (d) a cooling off period; and*
- (e) a dispute resolution mechanism.*

129. By the use of the word “*must*” in the above clauses, it is evident that the legislature intended to impose on contracting parties, the minimum content of the agreement.
130. We are open to the possibility that the intention of the legislature could have been to create of *essential elements* for agreements relating to royalty percentages.
131. Accordingly, whilst it is clear that the legislature intended to make the minimum content non negotiable, the parties to the agreement should be allowed to add any other terms they may want to add.
132. SAMRO accordingly recommends that the above clauses be amended to read as follows:

*The agreement contemplated in subsection (2)(a) must include, **without limitation**, the following:*

“the general rule is that, in the absence of express provision to the contrary statutes should be considered as affecting future matters only, and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation...”

133. Furthermore, section 39 (2) of the Constitution, provides that:

“when interpreting any legislation and when developing the common law or customary law, the court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

134. SAMRO believes that the retrospective application of the abovementioned clause does not promote the objects of the Bill of Rights on the basis that the retrospective application prejudices copyright owners by placing on them, an obligation to conclude agreements within 48 months in terms of which the copyright owners must negotiate a further payment of a percentage of royalties to authors of works.

135. This has never been a requirement and as such, not only infringes the rights of current copyright owners but also places a burden on administrators such as SAMRO and other collecting societies to ensure compliance within 48 months.

136. SAMRO is of the view that these provisions should apply only to the copyright owners who obtain a copyright post the enactment of the Amendment Bill, 2019.

137. Clause 5: section 6A (5) (a) of the Amendment Bill provides as follows:

“a person who obtained the copyright in a literary or musical work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after the said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted literary or musical work in question”

138. SAMRO therefore proposes that this provision be amended to read as follows:

... upon the enactment of the Amendment Bill, 2019, Copyright owners who obtain copyright in literary or musical works, must prior to obtaining such right negotiate a percentage of royalty as contemplated in subsection (1) with the author of the literary or musical works in question.

139. SAMRO therefore proposes that the abovementioned suggestions be taken into account, as the main objective of the legislation is to protect the rights of authors and those who subsequently obtain copyright of particular works.

R. RETROSPECTIVE APPLICATION OF CLAUSE 5: SECTION 6A (5)(a)

140. As a starting point we wish to highlight the importance of Section 2 of the Constitution which provides that the Constitution is the supreme law of the Republic, and that conduct or law which is inconsistent with it shall be deemed invalid.
141. It is in light of the Constitution and the Bill of Rights that we submit our comments on the retrospective application of the above clause.
142. We understand retrospective application of law to simply mean, that a law is enacted in the present to affect the past.
143. The issue with retrospective application is that it often seeks to impose rules and/or regulations to affect a state of affairs that existed before its enactment. This is not only in conflict with the principal of legality but also poses a huge administrative burden on those tasked with ensuring compliance with the newly enacted legislation
144. The court in ***Curtis v Johannesburg Municipality*** laid down the general rule regarding the retrospective application of legislation and stated that:

“the general rule is that, in the absence of express provision to the contrary statutes should be considered as affecting future matters only, and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation...”

145. Furthermore, section 39 (2) of the Constitution, provides that:

“when interpreting any legislation and when developing the common law or customary law, the court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

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151. SAMRO therefore proposes that the above mentioned suggestions be taken into account, as the main objective of the legislation is protect the rights of authors and those who subsequently obtain copyright of particular works.

S. ROYALTY PAYMENTS

152. The latest Amendment Bill provides for the actions the collecting society should take in respect to unpaid royalties.

Section 22D(3)(b) of the latest Amendment Bill provides:

“Where the collecting society, for whatever reason, is unable to distribute the royalties within three years from the date on which the royalties were allocated, that collecting society shall-

- (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution...”

The amendment in section 39(cK) of the latest Amendment Bill then provides for regulations that the Minister may make, which include:

“...prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and

any other matter relating to the reporting, operations, activities and better collection processes of royalties by collecting society...”

SAMRO submits that the two aforesaid provisions should be drafted in such a way that it is made clear how collecting societies are required to deal with royalties that are not paid or unclaimed by the copyright owner, and in respect to the exclusive right to the public performance and broadcast of musical works. In determining the requirements in respect of unpaid or unclaimed royalties we submit that consideration also be made to SAMRO’s aforesaid provision in respect of the collecting societies own members’ right in determining and agreeing to the rules that are applicable to their works.

T. CONCLUSION:

153. SAMRO reiterates that it is encouraged by Parliament's commitment to the objectives set out in the Bill and thanks the Parliament for considering the submissions contained herein.

154. We remain available to Parliament for any further discussions or queries in respect of our submissions and any subsequent legislative amendments that may follow.
