representing the recording industry worldwide

IFPI Comments on the Department of Trade and Industry Copyright Amendment Bill and initial Comments on the Performers' Protection Amendment Bill 2017

July 2017

INTRODUCTION

IFPI – representing the recording industry worldwide thanks the Government of the Republic of South Africa for the opportunity to submit comments on the Copyright Amendment Bill and Performers' Protection Amendment Bill 2017. IFPI represents some 1,300 record companies in 63 countries and affiliated industry associations in another 57 countries, including in South Africa (Recording Industry South Africa (RISA) and South African Music Performance Rights Association (SAMPRA)). IFPI has over eighty years of experience in assisting governments worldwide in ensuring that their copyright laws and accompanying enforcement laws and procedures are fit for purpose in supporting investment in artists and music production and the development of thriving creative economies, which are now largely online.

We welcome the South African Government's commitment to modernising the South African copyright law to make it a standard for the region and to bring it into line with the provisions of the Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"). However, we would like to highlight the importance not only of updating the law to bring it into line with these Treaties, but taking the further step of ratifying them. Only then will South African creators reap the full rewards of their works being enjoyed globally.

However, we wish to draw attention to the negative impact that some of the proposed changes would have upon the growth of the South African record industry. We recognise that in undertaking a review of copyright law, the DTI is motivated by an intention to foster growth in the interests of those involved in making music in South Africa, and IFPI welcomes that intention. Unfortunately, an unintended consequence of some of the proposals, which are contrary to the WCT, WPPT, and other international treaties, will be to reduce substantially the incentives for investment in the South African music industry by record companies to the detriment of all those involved. This threat is of fundamental importance when considering the vital role of record companies in the value chain that develops new artists and brings new music to the public, in South Africa and beyond.

The current review of the Act by the Department of Trade and Industry gives an opportunity to set a legislative gold standard for copyright in Africa and to put South Africa in the position of a standard-bearer for other African countries to follow. Copyright industries already

account for 4.11 % of the South African economy, and 4.08 % of employment[1]. These figures are significant, but there is potential to grow the creative sectors even further. In the UK, for instance, creative Industries are growing faster than any other sector of the economy and now account for 5.8% of all UK jobs[2]. IFPI's global market report, Recording Industry in Numbers, the authoritative publication on the recorded music market, shows that in 2016 the South African record industry was the 30th largest in the world. With a population on a par with some of the most successful music markets, there is great potential for growth in the South African market (and in scores of African regional markets), particularly in its digital music market.

Our proposals are designed to ensure that the DTI's intention to promote the interests of South African music creators and consumers listeners becomes reality. In this submission we explain the important role of record companies as the engines of growth in music markets, in particular through their investment in artists. We further identify provisions in the Copyright Bill and Performers Protection Bill, which could undermine the commercial basis for making that investment, with conflict with the WCT, WPPT, and TRIPS, and which are at odds with the industry best practices that have underpinned growth elsewhere.

The music industry is increasingly a digital business, with 50% of revenues globally coming from digital uses of music. In South Africa, that percentage was 33% in 2016, showing the enormous potential for growth. However, to provide a healthy internet environment for legal digital services to launch and grow, it is crucial to ensure not only that the law reflects the provisions of the WPPT accurately, but also to ensure that the law meets the commercial and technological developments which have occurred since the adoption of the WPPT.

We submit that our proposals are consistent with the DTI's intention first and foremost to promote the interests of South African music creators and listeners. Our suggestions would help to create a copyright system that would enable the South African music industry to grow and develop to its full potential. They should also attract investment in the South African music industry, benefitting South Africa's creators, online services and the South African economy.

We are aware of the pivotal role that South Africa can play in the development of the recorded music industry across the African continent. The African continent is the obvious first market for South African recorded music exports. Moreover, If South Africa can set a standard of copyright legislation that encourages and incentivises investment in new recordings, while protecting and enhancing the economic success of all those involved in creating recorded music, we hope that those standards will be adopted in other African countries. This would benefit the South African music industry and the region, intensifying trade in music rights across the continent.

[1] http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf

[2]For example, the creative industries in the UK are growing faster than any other sector of the economy and now account for 5.6% of all UK jobs https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546262/DCMS_Sectors_Economic_Estimates_-_Employment.pdf, page 5, table 4.1

IFPI also co-ordinates the collective management of recording industry public performance and so-called "needletime" rights globally, establishing best practice for collective management and assisting some 75 collective management organisations (CMOs) around the world to ensure maximum transparency, accountability and good governance in their operations. IFPI works closely with SAMPRA, which has implemented IFPI Music Licensing Companies Code of Conduct and Distribution Guidelines, and which stands as an example of best practice for the African continent. We were grateful for the opportunity to discuss best practice at the Workshop on Collective Management in Pretoria in March this year, and this submission also addresses some areas where the Copyright Bill could be further developed to reflect international best practice, ensuring efficiencies and accountability in the interests of all right holders.

We remain at the disposal of the South African Government to provide any further assistance required.

SECTION I: THE ROLE OF RECORD COMPANIES IN DEVELOPING AND SUSTAINING THRIVING MUSIC MARKETS

"Making music is about passion, inspiration, emotion and creative talent. However, it is not just a gift of human nature: it also requires the extraordinary amount of hard work, time, effort and sustained investment.

An enormous supporting cast of skilled, dedicated and passionate people are devoted to helping make the artist and their music a success. The behind-the-scenes community works in hundreds of different ways. In countless different roles, to support the artist and to take their work to a large audience of fans, often spanning the globe. It is no less important in today's music landscape than in the past – in fact it is more important. In a world of digital diversity and complexity, this help is needed more than ever before.

"Investing in Music" tells the story of the immense effort and skill of the team surrounding today's recording artists. It also shows how much financial investment is needed to help an artist pursue the career to which they aspire.

This is a truly impressive story, giving insight into the work of today's global music sector. As an artist who has witnessed their vital role over my long career, I salute the investors in music."

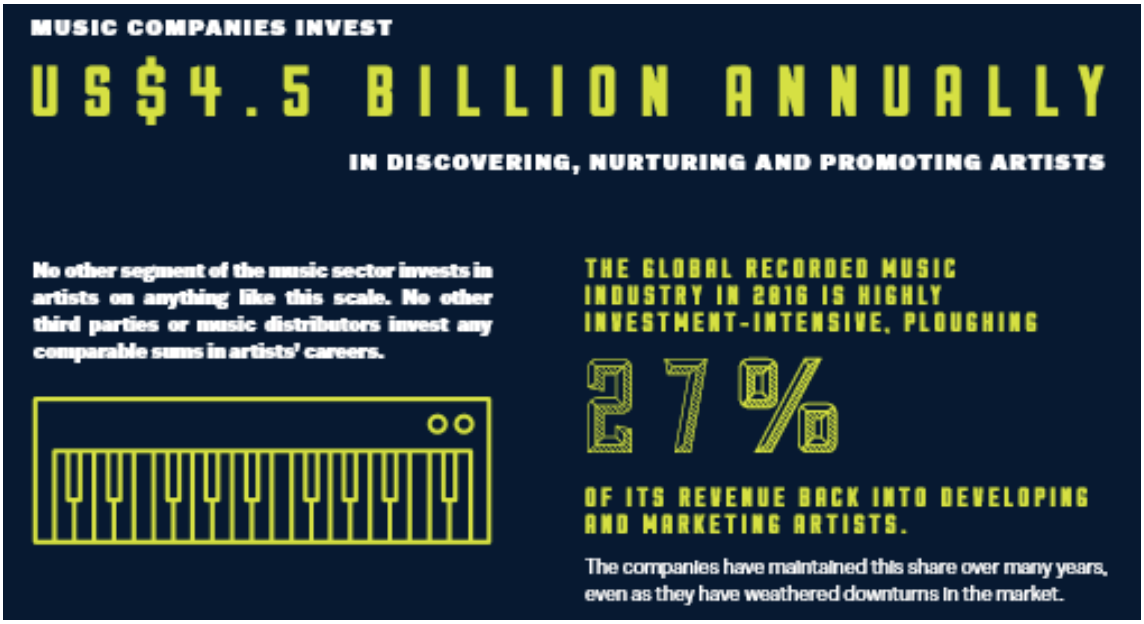
4(1)(b) , 2017
IFPI

Record companies are the largest upfront investors in artists' careers. Common features of contracts signed with emerging artists include the payment of advances, recording costs, tour support, video production and marketing and promotion costs. These investments are not

supported by any guarantees of returns other than the common interest of artists and producers in making the recordings popular and commercially successful.

Global experience has shown us that unsigned artists seek record deals to fund their creative activities, to connect them with producers and other musicians, to market them and their work, and to strike the best deals for the use of recordings.

Despite declining record industry revenues, artists continue to benefit from their relationships with record companies. For example, while the total recorded music industry revenues have declined, the artists' share of those revenues has decreased by much less than the record companies' share. IFPI conducted research in 2016 to obtain an accurate picture of how royalty payments have changed as the market has shifted from physical sales to digital channels. Industry data compiled by IFPI from the three major global record companies, covering local sales for locally signed artists in 18 major markets in the six year period to 2015 shows that artists' share of record labels' sales revenue increased by 20% from 2011 to 2015. This positive trend is likely to continue as digital revenues make up a greater proportion of the growing market.



SECTION 2: RATIFICATION OF WPPT

As we stated above, we commend the South African Government for seeking to further the interests of those involved in making recorded music in South Africa, including by seeking to bring the law into line with the provisions of WPPT. However, we submit that the interests of South African creators would be best served by ratification and full implementation of the Treaty.

The effect of this would be to enable South African creators to benefit from the use of their works in foreign markets (in which 92 countries have to date ratified or acceded to the WPPT).

In particular, as the African music market develops, new digital services emerge, and other African countries ratify WPPT, revenues from South African music exports (South Africa being the largest recorded music market in Africa) will flow into South Africa. By ratifying WPPT now, South Africa will be securing future revenues for South African artists.

Ratification would also benefit South African artists immediately as the foreign use of their works can be monetized through reciprocal licensing agreements with partner collecting societies.

SECTION 3: COMMENTS ON THE PROVISIONS OF THE COPYRIGHT AMENDMENT BILL

This submission addresses the principal areas of concern in draft Bill. We do not cover every issue, but stand ready to provide further input and assistance if required. We also support the more detailed submission of IFPI National Group, RISA, and the submission made by SAMPRA. The issues covered by this submission are as follows:

1. Scope of the communication to the public right

2. Downgrading of the communication to the public right and equal sharing of royalties

3. Downgrading of the making available to the public right

4. The sweeping statutory licensing system in proposed section 9A

5. Equal sharing of revenues from the making available right would render the South African digital music market unviable

6. Limitation of the term of assignments to 25 years

7. Regulatory interventions into private contractual relations

8. Exceptions and limitations, including the proposal to implement fair use

9. Best practice for the collective management of rights

10. Other issues

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1. Scope of the communication to the public right

IFPI welcomes the proposed amendment to Section 9(e) of the Copyright Act, confirming that sound recording producers in South Africa have the exclusive making available right set out in Article 14 WPPT, which underpins the digital music industry. However, the wording of draft

section 9(e) omits an express reference to "public performance", as provided for in the WPPT definition of "communication to the public", which states that communication to the public "*includes making the sounds or representations of sounds fixed in a phonogram audible to the public".* To avoid any misunderstanding that the amended act is removing public performance from the existing section 9(e) of the Act, we submit that the new section 9(e) should expressly refer to public performance.

The provisions of the proposed new section 9A of the Copyright Bill are extremely concerning, and are inconsistent with WPPT and international practices. The effect of section 9A would be **to downgrade the existing full exclusive rights in existing section 9(c) and (d) and the amended communication to the public and making available right in proposed section 9(e) to mere remuneration rights, render contractual negotiations unworkable, undermine the economics of the digital music economy, and introduce a sweeping statutory licensing regime**. These provisions are addressed in more detail below.

2. Downgrading of the communication to the public right and equal sharing of royalties

The existing section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public. The communication to the public right enables record companies to derive revenue from the public performance (see point 1 above regarding the importance of section 9(e) expressly referring to public performance), broadcasting and other communications of sound recordings (as distinct from the making available of their works – described in more detail in point 3 below).

Sections 9A(1)(aA)-(aE) have the effect of downgrading the right of communication to the public from an exclusive right to a mere right of remuneration by removing the ability of right holders to choose whether or not to license, merely allowing them to negotiate the royalty for a licence, failing which the Tribunal may adjudicate (we comment in more detail on best practice for the collective management of right at point 9 below). Although the existing section 9A puts in place a system for adjudication in the event that a rightholder and a user are unable to agree a royalty for the use of works, the proposed section 9A(aB) goes much further, seemingly permitting users to use works without first entering into a licence.

The analysis section of the Bill does not explain the policy justification or evidence relied upon for this downgrading of the right, yet the effects of the proposal would be significant. Downgrading the right would weaken the industry's ability to license those rights effectively and therefore would have a negative effect on the South African record industry's revenues. This in turn would reduce the ability of record companies to invest revenues back into the development of new artists in South Africa.

These rights used to be known as "secondary" rights, since the primary form of generating revenue was through the sale of physical goods. However, the primary market globally is now the sale of electronic copies of recordings and the licensing of access to recordings for a wide range of consumer and commercial demands, and the South African is also following this trend. The digital share of market has increased from 26% in 2015 to 33% in 2016, and the physical market share has reduced from 53% in 2015 to 39% in 2016 (meanwhile public performance revenues have increased, further illustrating the importance of the exclusive

right of communication to the public in South Africa). Ensuring that all such digital sales and all such licensing takes place on market principles is of central importance to the ability of the recording industry to continue to invest in and bring to market a continuous stream of new, fresh and innovative recordings by new artists as well as established artists. Downgrading the right runs contrary to that aim.

Furthermore, the **minimum** standard of protection required under Art.15 WPPT is that of a remuneration right. Indeed, the Agreed Statement to Article 15 WPPT provides expressly that this minimum level provided for by the Treaty does not provide a comprehensive solution in the digital environment. :

> *"Agreed statement concerning Article 15: It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution."*

There is simply no justification for downgrading the existing best practice provision of an exclusive right by enabling users to use works without first obtaining a licence. We note that the existing South African law, at section 9(e) of the Copyright Act, represents a global best practice in transposition of the WPPT standards as it provides that the communication to the public right is an exclusive right, which is consistent with WPPT. Limiting this right would contradict the modernising aims of the Bill, and there is no evidential basis for doing so. Exclusive rights enable record companies or their collective management organisations to negotiate fair commercial terms for the public performance and broadcast of sound recordings. <u>These licensing activities benefit record companies and artists alike, since these revenues are shared equally by record companies and artists.</u>

As to which, draft section 9A(2)(a) provides that royalties from communications to the public "*shall be divided equally between the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust on the one hand and the performer on the other hand or between the recording company, user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust.*"

We do not understand this provision. Why, for example, would the user (in other words the licensee) share in the royalties it pays for its use of sound recordings? We are also unclear as to the role of the other parties cited in the licensing of sound recordings.

In any event, it is <u>already establshed industry practice globally and in South Africa that the revenues from the public performance and broadcasting of sounds recordings are shared **equally** between the sound recording owner (record companies) and performers</u>. In view of that, we propose that the draft section be amended to reflect that arrangement.

However, insofar as the section applies to revenues from the right of making available to the public, we oppose any such provision for the reasons explained at point 5 below.

3. Downgrading of the making available to the public right

The making available to the public right (derived from Article 14 WPPT) and expressly set out in the proposed amendments to section 9(e) of the Act underpins the licensing of digital services that offer any "interactive" uses of music. In other words, any making available of music other than purely "linear" communications to the public where the user has no control over the music that is communicated by the service (these linear transmissions are covered by the communication to the public right described above). Article 14 WPPT provides that the making available right is exclusive, and does not provide any option for contracting parties to provide lesser protection, such as by making the right a remuneration right as proposed by section 9A(1)(a)(iii).

In practice, the exclusive right enables right holders to enter into bespoke licensing agreements with a wide range of services of terms negotiated between the right holder and the service. This right has enabled the recording industry to licence some 200 digital services globally, and thirteen in South Africa alone.

Downgrading the right of making available to a mere remuneration right would be seriously detrimental to the music market in South Africa, likely reducing revenues for artists and producers alike and possibly rendering the economics of a digital music market in South Africa wholly unworkable. The problem is compounded by subsequent provisions of draft section 9A, as explained in points 4 and 5 below. We respectfully submit that it should be made clear that the provisions of section 9A do not apply to the making available right. This would be consistent with the international treaties and international practice.

4. The sweeping statutory licensing system in proposed section 9A

As part of downgrading the rights of communication to the public and making available to the public, sections 9A(1)(aA)-(aE) propose to introduce a sweeping statutory licensing scheme. The effect of this would be to entirely remove right holders' control over how to license the rights of communication to the public and making available. Most concerning, it would enable digital services to make available recordings even without a licence, with licensing terms to be negotiated subsequently or adjudicated by the Tribunal. This would likely be a race to the bottom, substantially reducing the revenues that can be derived from digital uses of works, thereby reducing revenues paid to performers by record companies, and therefore reducing investments back into new and established artists and repertoire. It would also remove the ability of sound recording producers to authorise the reproduction of their recordings, rendering the provisions incompatible with Article 14(2) of the WTO TRIPS Agreement.

The proposed power for the Tribunal to set the terms of licence agreements between an individual right holder and a user amounts to an intervention into private contract law and constitutes a serious limitation on individual record companies' and other right holders' ability to authorise or prohibit the use of their sound recordings. Such an expansive limitation on the rights would constitute a breach of the obligations under international copyright

treaties (the Berne Convention, WTO TRIPs Agreement), and would be contrary to the WCT and WPPT treaties, which the Bill is otherwise seeking alignment with (as stated above, we encourage the South African Government to ratify the WPPT).

It is submitted that oversight of collective licensing arrangements by a copyright tribunal can be appropriate in relation to collective (but not individual) licensing schemes, such as those currently in operated in South Africa by SAMPRA in respect of public performance and "needletime" rights. However, the best international practice is to put in place a tribunal as a highly specialised neutral dispute resolution mechanism, and not a body regulating individual private contracts. For example, section 149 of the UK Copyright Designs and Patents Act 1988, gives the UK Copyright Tribunal jurisdiction over "*licensing schemes which are operated by licensing bodies and cover works of more than one author*" in circumstances further elaborated in that legislation. Similarly, the Arbitration Panel operating under the German Patent Office has the authority to propose rates for certain of the German collecting societies' tariffs schemes[3].

It is possible that the inclusion of the right of making available in section 9A is simply an oversight resulting from the proposed expanded definition of communication to the public in section 9(e). However, even if that is the case, the provisions allowing users to communicate sound recordings to the public even before entering into a licence is clearly open to wide abuse, and should be removed. Section 9 of this submission sets out more detailed provisions about best practice in the collective management of rights and the valuation of those rights in disputes.

5. Equal sharing of revenues from the making available right would render the South African digital music market unviable

The provision in section 9A(2)(a) (as confusing as it is, referring for example to users sharing in the revenues they pay) would seem to require that revenues derived from the licensing of the making available right be shared equally between producers and performers. Regrettably, it does not appear that the provision has been drafted with due consideration for the practical realities of the licensing structure of the recorded music industry or of its economics.

To require that revenues from interactive and certain other exploitations of work be shared equally between record producers and the performers would be economically unfeasible, considering that record companies cover all the costs and carry the risk of bringing new artists to market. Compulsory equal sharing of all revenues from making available to the public would remove all profit from record companies, making it economically unviable to continue to produce new recordings, and breaking the cycle of investment referred in the introductory sections to this submission.

Revenues from digital services comprise an increasingly large proportion of record industry revenues internationally and are vital to the survival of the record industry. At the same time, research conducted by IFPI shows that across 18 territories local performers' share of industry revenues from digital services increased by 20% between 2009 and 2015 relative to record

[3] See Article 14 and 14(a) Urheberrwahrnehmungsgesetz (the Law on the Management of Copyright and Related Rights (Copyright Administration Law)).

producers share, despite overall industry revenues decreasing until recently. This shows that the economics of the digital music market work for performers. Although the policy motivation behind this proposed section of the Bill is not articulated in the Analysis section of the Bill, to the extent that it is to increase performers' share of revenues from digital services, it is likely to have the opposite effect. The actual effect of this provision would be to remove the incentive for record companies from investing (as described in section 2 above), would make licensing of certain digital services uneconomical. While certain revenue streams may be appropriate for such sharing arrangements (i.e. traditional broadcasting and public performance rights when collectively administered, as we describe above), it would be a market killer if applied to on-demand communications.

We are not aware of any other country in the world where the making available right is subject to statutory licensing or compulsory revenue sharing in this way, and we strongly urge the South African Government to exclude the making available right from the ambit of section 9A.

As explained at point 2 above, it is already standard practice in South Africa and internationally that revenues from broadcasting and public performance (but not making available) are shared equally between the sound recording owner (the record company) and performers. In view of that, we would propose that the section be amended to reflect that arrangement, while excluding the right of making available to the public from the ambit of section 9A altogether.

6. Limitation of the term of assignments to 25 years.

a. Section 22(b)(3) of the Bill that limits the term of an assignment to 25 years would undermine the record companies' ability to invest in artists and recordings

The proposed section 22(b)(3) would undermine record companies' ability to invest in new talent and disrupt the well-established practices of the recording industry in South Africa and internationally. It would risk serious harm to the South African record industry as a major incentive to invest would be removed. An artist catalogue, or historic repertoire, is an important part of the revenues a record company can expect from an artist agreement. This aspect has been accentuated by the shift away from physical consumption (CDs etc) to downloads (iTunes etc), and now to streaming (Spotify etc). While CD sales are decreasing, music can generate revenues from digital services over a longer period of time. The proposed section 22(b)(3)) would disrupt this to the detriment of the entire music industry value chain. As explained above, introducing new artists to the market and promoting their careers requires large upfront investment with no certainty in relation to when, if ever, the investment will be recouped. Limiting the term of assignment would increase the economic risk even further and would likely reduce the number of investments in new talent undertaken by record companies. The proposed provision should be removed.

b. The proposed limitation would complicate the licensing of sound recordings

At present, record companies are able to license third parties to distribute or use sound recordings. Music publishers (who own the copyright in the underlying compositions and

lyrics) do the same. The proposed section 22(b)(3) could result in those wishing to use music having to constantly renegotiate their licences as the assignments would terminate and rights ownership change hands. This would significantly convolute the established licensing practices, increase the costs of licensing and consequently reduce the revenues generated by all those involved in the creation of recorded music.

It could also lead to a position in which neither the record company nor the performer is able to license the use of a recording since the user needs both the record producer and the performer's authorisation. This is possible when the performer's rights have been assigned to the record producer, but may not be if the performer's rights then revert back to the performer. Consequently, the limitation may also have the effect of reducing the period during which the performers can derive revenues from the recordings since they would not be able to licence the use of recordings without the record companies also licensing their rights.

Such a provision would be highly unusual, if not entirely unique. Indeed, we are not aware of any such provision in the copyright laws of any other country. It simply does not make sense commercially, and will harm artists and record companies alike.

7. Ministerial interventions into private contractual relations

The proposed extension of the Ministerial powers set out in section 39 of the Copyright Act constitute serious regulatory interventions into private contractual arrangements. By way of example only, proposed section 39(cG) empowers the Minister to prescribe compulsory and standard contractual terms for the exercise of the rights set out in the Act, and proposed section 39(cI) empowers the minister to prescribe royalty rates. The Minister could therefore prescribe the terms on which a record company licenses a digital music service, including royalties payable under the licence. These provisions are not justified and do not respond to any market failure. The record industry seeks to make its recordings as widely available as possible and on terms that make access to music affordable to consumers. In doing so, the industry has already licensed 13 digital services for the South African market. These provisions should be deleted.

8. Exceptions and limitations, including the proposal to implement fair use

a. Fair use

IFPI submits that no case nor policy rationale has been made out for the introduction of a broad "fair use" exception into South African law. We are not aware of any evidence establishing the need for, or the desirability of a fundamental shift in South Africa's approach to copyright law whereby enumerated rights are accompanied by enumerated exceptions. Nor are we aware of any evidence that the introduction of fair use would benefit the South African creative industries, users of copyright works, or the South African economy.

We are somewhat reassured that the list of fair use purposes in proposed section 12(1)(a) is a closed list, as opposed to the uncertain US "open-ended" model. Nevertheless, we are concerned about the very broad scope of the purposes cited:

- Fair use for "personal use" (proposed section 12(1)(a)(i) could potentially cover any use of a work by an individual. Although the fair use factors in proposed section 12(1)(b) should act as a safety-valve against the over-broad application of fair use, the experience of the US indicates that those factors at times offer little safeguard against highly commercialised uses of protected works. The "personal" use provision should be removed, not least since proposed section 12A(1)(j) provides a standalone exception for certain private uses (as to which point 8.b below).

- Fair use for "expanding access to underserved populations" (proposed section 12(1)(vii)) is also an ambiguous concept. While we recognize the positive intention of the section, regrettably it may be abused by users (by which we refer for example to digital platforms) wishing to gain access to works for free. We would urge a reconsideration of this provision that precludes its application where a rightholder is willing to grant licences for the access of their works by underserved populations. This would have the positive effect of encouraging the further development of content markets in South Africa.

b. Private copying

Draft section 12A(1)(j) would introduce a potentially far-reaching **private copying exception** into South African law, without providing for fair remuneration for right holders whose works are being copied. Although IFPI does not consider private copying exceptions to be necessary, we would not oppose the introduction of a private copying exception that (a) is adequately scoped to ensure it complies with the three-step-test and (b) provides that right holders should be fairly remunerated when their works are copied[4]. 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 compensate fairly copyright owners and performers.

However, a further concern arises in relation to proposed section 12A(2)(c) insofar as it relates to the electronic storage of works. All of the "cloud" services of which we are aware do not offer mere storage of content to their users. They also have additional functionality such as making available stored content across users' devices, or enabling users to stream music from the cloud. These services are themselves copying sound recordings and making available sound recordings, and (except in the case of infringing services) they should therefore be licensed by right holders to carry out these restricted acts.

This increasingly important market could be undermined if new private copying exceptions were created, expanded or interpreted to permit cloud service providers to set up music distribution services on the back of private copying exceptions. Proposed section 12A(2)(c) poses that risk. Although it refers to the storage are being "*accessible only by the individual and the person responsible for the storage area*", in practice this does not safeguard against such a service becoming a hub for copyright infringement, and profiting from that activity. So-

[4] For example, the High Court of England & Wales recently quashed a newly introduced private copying exception following a legal challenge that the exception was not compliant with EU legislation because it did not provide for right holders to receive fair remuneration. See https://www.gov.uk/government/news/quashing-of-private-copying-exception

called “cyber-lockers” provide users with links to their stored files. In theory, the service is providing storage that is “*accessible only by the individual and the person responsible for the storage area*”. In practice, users (often with the encouragement or inducement of the service) make these links widely available, creating public access to unlicensed copies of sound recordings. Services wishing to offer content services in this way should be licensed, and should not be able to rely on their users’ private copying exceptions.

Private copying exceptions do not apply to commercial acts or to acts of making available. In theory, a private copying exception could permit individuals themselves to make copies of their lawfully acquired content in the cloud, but this possibility is purely theoretical, since, as mentioned above, we are not aware of the existence of any such basic services. Therefore, proposed section 12A(2)(c) does not reflect a use that is practically available to users, and should therefore be removed from the draft. At the very least, it should be made clear in the text that the exception in section 12A(2)(c) applies to the user alone, and may not be relied upon by the service provider. Absent that clarification, infringing services may argue that their activities are covered by the exception, and the market for digital music licensing will be undermined.

9. Best practice for the collective management of rights

IFPI has been overseeing the effective, transparent, accountable and well-governed collective management of producers’ rights for years. We and our members’ CMOs work closely and very often in collaboration with performers’ organisations, often through joint CMOs for performers and producers. We have developed the IFPI Music Licensing Companies Code of Conduct and Distribution Guideline, and IFPI works closely with WIPO to encourage best practice globally. To that end we were delighted to attend the Workshop on Collective Management of Copyright and Related Rights in Music.

Although several provisions in the Bill go some way to introducing best practice in South African legislation (SAMPRA already implementing the IFPI Code of Conduct and Guidelines) we are concerned by the draft provision requiring one CMO for each right. It appears this could prohibit the existing collaboration between performers and producers in SAMPRA. If that interpretation of the drafting is correct, this proposal goes against the interests of those right holders, the users (licensees) and the public at large. We are not aware of any similar provisions or proposals outside South Africa. Joint sound recording producer and performer organisations operate in some 40 territories. By working together on the licensing of rights, performer and producers make substantial cost savings, thereby increasing the proportion of revenues returned to them. There are also obvious benefits to users of being able to take a licence from one CMO that covers both performers’ and producers’ rights.

We are also concerned by draft section 22D(1) which proposes that users (as well as right holders) should have control over collecting societies. There can be no possible justification for allowing users to control an entity from which they seek licences and users should be removed from this section.

As a general point, it is also vital that any rates set by the Tribunal for the public performance or "needletime" should reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice, which seeks to ensure that right holders are remunerated adequately for the high value of recorded music. As much has been recognised at European level – see Article 16 of the European Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Directive 2014/26/EU), which states:

> *"Rightholders shall receive appropriate remuneration for the use of their rights.* ***Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade****, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs"* (emphasis added).

For example, for a pub or a bar the value of music is in the benefit to the business of playing music. Economic studies have shown this benefit to be an increase in patronage and sales. The same is true of retailers and public services like hairdressers and gyms. We can provide further information on this if required.

The fundamental point is that the remuneration for the public performance of sound recordings is a payment for the use of a commercial product. For the remuneration to be equitable it should amount to the market price for these rights.

We enclose the IFPI Music Licensing Companies Code of Conduct and Distribution Guidelines.

10. Other issues

a. Term

The Bill does not address the term of protection for sound recordings. IFPI submits that the term of protection of sound recordings should be extended from 50 years to at least 70 years. This longer term of protection would provide greater incentives for the production of sound recordings, not least since recording artists would have the security of knowing that their recordings have the potential to generate income during their entire lifetime. The longer potential economic life of a sound recording would also enable producers to continue to offer recordings to local consumers in updated and restored formats as they are developed. As a result, the longer term would support the development of the industry and the creation of new jobs.

Furthermore, a term for sound recordings of 70 years or longer has become the international standard, and extending the term of protection would be consistent with the modernising aims of the Bill. Currently 62 countries now protect sound recordings for 70 years or longer, including 9 out of the top 10 music markets (by total revenue in 2014) and 28 out of the 32 OECD member countries.

b. Prohibition on contractual override

Draft section 39B (Unenforceable contractual term) would prevent record companies from agreeing to contractual terms which would deviate from the provisions of the Bill. This element of section 39B should be deleted to reflect the commercial reality of how rights are licensed by right holders, including licences and assignments from performers and licences to digital services and onwards to users.

c. Enforcement

Furthermore, no consideration of substantive copyright provisions would be complete without considering the importance of appropriate enforcement mechanisms to enable effective exercise of those rights in practice, including fast and effective judicial procedures. We invite the South African Government to consider the importance of these issues alongside the modernisation of copyright law and would welcome the opportunity to make additional submissions in this area, or otherwise assist the government.

SECTION 4: COMMENTS ON THE PROVISIONS OF THE PERFORMERS' PROTECTION AMENDMENT BILL

We support the South African Government's initiative to implement provisions of the Beijing Treaty. However, we submit again that South Africa should not only seek to bring its law into line with international treaties, but should ratify them too.

There are, however, areas of the Performers' Protection Amendment Bill which cause substantial concern for the reasons set out in our submissions on the Copyright Amendment Bill. These are:

Section 3A, which seeks to limit the term of assignments to 25 years. We repeat our submissions under point 6 above.

Section 5, which introduces a sweeping statutory licensing scheme equivalent to that proposed in section 9A of the Copyright Amendment Bill. We repeat our submissions under points 2 to 5 above.

In addition, we note that the proposed new **section 3B** of the PPA introduces producers' rights into the PPA in a way that is not consistent with the existing or proposed section 9 of the Copyright Act. We would therefore propose that the PPA should address performers' rights alone, leaving the provisions for copyright in sound recordings in the Copyright Act.

We also support SAMPRA's more detailed submission on the Performers Protection Amendment Bill, and we would welcome the opportunity to make more detailed submissions on the Performers' Protection Bill in due course.

CONCLUSION

In this submission, we have addressed the priority issues affecting the recording industry and welcomed the stated aim of modernising South African copyright law in line with international standards and the demands of the modern, increasingly online market for creative works.

We thank the South African Government again for the opportunity to make this submission, and we stand ready to assist the Government with further information on any of the above points.

For further information, please contact:

Art. 4(1)(b)
Art. 4(1)(b)
Tel: Art. 4(1)(b)
Art. 4(1)(b) @ifpi.org

Art. 4(1)(b)
Art. 4(1)(b)
Tel: Art. 4(1)(b)
Art. 4(1)(b) @ifpi.org