



representing the
recording industry
worldwide

31 October 2018

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Dear Sirs,

COMMENTS ON THE PERFORMERS' PROTECTION BILL 2016

We are grateful for the opportunity to provide this submission on the latest draft of the Performers' Protection Bill. IFPI, representing the recording industry worldwide, fully supports performers' rights being protected in line with the WIPO Performances and Phonograms Treaty (WPPT) and Beijing Treaty on Audiovisual Performances, and welcomes the Government's intention for the Performers' Protection Bill (the "PPB") to be premised on those Treaties as well as the WIPO Copyright Treaty (WCT).

We are concerned, however, that elements of the PPB are not compatible with those Treaties, and that other provisions of the PPB would cause confusion between the Copyright Act and the Performers' Protection Act ("the PPA").

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1. Definitions – section 1 PPB

1.1 Section 1(b) “broadcasting”

The proposed amendment to the definition of “broadcast” is incompatible with international law because of the inclusion of transmissions by wire within the meaning of “broadcast”. “Broadcast” is defined in international treaties, including the Rome Convention and the WPPT. “Broadcast” is a legal technical term which refers specifically to *wireless, over the air, one-to-many* transmission.

Recommendation

We recommend that the reference to by “wire” be removed from the definition.

2.2 Section 1(c) “communication to the public of a phonogram”

The proposed amendment in part mirrors the WPPT definition of communication to the public, and we welcome the use of internationally recognised and agreed definitions of rights. However, the wording of draft section 1(c) is incomplete, omitting 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*”.

Recommendation

To avoid any misunderstanding that the amended act is removing public performance from the existing protection of performers’ rights, we submit that the definition of “communication to the public of a phonogram” should fully reflect the WPPT definition by including an express reference to public performance.

2.3 Section 1(e) - “fixation”.

Fixation is a term used frequently in the Bill, and therefore needs to be defined.

Recommendation

The Beijing Treaty and WPPT definitions of “fixation” should be included as follows:

“‘fixation’ means in the context of audio-visual the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device, and

in the context of sound recordings means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.”

2.4 Section 1(h) “producer”

The definition of “producer” should be clarified to ensure that it covers both natural and legal persons, in line with the WPPT definition of “producer”.

Recommendation

The definition of “producer” should be amended as follows:

“‘producer’ means the person or legal entity who or which takes the initiative and has the responsibility for the first fixation of a sound recording or an audiovisual fixation;”

2.5 Section 1(f) “reproduction”

The proposed definition should be clarified to confirm that it means the copying of the whole or a part of an audiovisual fixation or sound recording.

Recommendation

“‘reproduction’ means a copy made as contemplated by the Copyright Act and includes a copy of the whole or a part of an audiovisual fixation or a sound recording of a performance;”

2.6 Section 1(j) “sound recording”

The definition of sound recording should be clarified so as to be consistent with the definition in WPPT and to ensure, in accordance with the Agreed Statement to WPPT, that the incorporation of a sound recording into an audiovisual work does not affect the copyright in the sound recording. The Agreed Statement to Article 2(b) WPPT (the definition of “phonogram”) states:

“It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work”

Recommendation

“‘sound recording’ means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”.

3. Scope of protection – section 2 PPB

Section 2 of the PPB would substitute section 3 of the PPA with a new section 3, the effect of which would be to remove protection for phonograms first fixed in a country which is member of the World Trade Organisation. At present section 3(c) of the Act provides that performances fixed in a WTO country will be protected in South Africa to the extent that performances fixed in South Africa are protected in the other country. By limiting protection to performances first fixed in the Republic (draft section 3(1)(c)), South African performers would be denied protection in respect of their performances when they are exploited in other WTO countries, thereby precluding performers from revenues for the foreign uses of their performances.

Furthermore, we understand that it is the Government’s intention to ratify WPPT and the Beijing Treaty. Article 4 WPPT and Beijing requires that *“each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals...”* (the principle of “national treatment”). Neither section 3 of the PPA nor section 3 of the PPB would be compatible with WPPT and Beijing since they would preclude national treatment.

Recommendation

We therefore recommend that section of the PPB be amended to provide national treatment in respect of nationals of WPPT and Beijing contracting parties, as well as protecting the performances of nationals of other countries where the performances of South African performers are protected.

4. Transfer of rights – section 3 PPB – and regulations on contractual terms – section 8D

We welcome the improvements made to draft section 3A to clarify that where a performer has consented to the fixation of their performance, their exclusive rights under section 3 are transferred to the producer.

However, the proposals in draft section 3(3) are highly problematic, as follows.

4.1 Interference in private contractual arrangements

Draft section 3A envisages the imposition of *“compulsory and standard contractual terms as may be prescribed”*, and this requirement is further described in section 8D. Prescribing the terms on which a performer may transfer their exclusive rights to the copyright owner is not justified and there is no evidence of a market failure that might support such a provision.

Rather, these provisions would restrict the flexibility in transfer agreements, which is needed to address the varying relationships between performers and copyright owners. In the context of music videos, for example, the relationship and contractual agreement between the featured artist and the copyright owner will differ substantially from that between a performer appearing as a one-off background dancer and the copyright owner. Neither performers nor copyright owners would benefit from prescribed contracts which would fail to meet the differing needs of performers depending on their role in an audiovisual production. Furthermore, the recording industry exists on the basis of its partnerships with artists; the artist is central to everything a record company does. The market is highly competitive and for record companies to compete they must ensure that artists receive competitive and fair returns for their work, and this is already provided for in agreements between record companies and performers. There is simply no evidence of a market failure that would justify this extensive interference into contractual relations. Furthermore, the proposals would impose unwarranted contractual formalities on all contractual partners.

Recommendation

We recommend that draft sections 3A(3)(a) and 8D be removed.

4.2 Unclear requirement for contracts to set out the “royalties or equitable remuneration, whichever is applicable, due and payable to the performer for any use of the fixation of the performance”

The use of the term “equitable remuneration” risks creating confusion because it is a term that is understood to have a particular meaning in respect of the remuneration payable for the exploitation of mere remuneration rights.

Recommendation

We recommend that draft section 3A(3)(b) be clarified as follows:

(b) shall set out the performer’s right to receive royalties or an agreed reasonable one-time payment, whichever applicable, due and payable to the performer for any use of the fixation of the performance; and

4.3 Unjustified limitations on the transfer of rights

The proposed section 3A proposes to limit the term of contracts between performers and copyright owners of audiovisual works and sound recordings to a maximum term of 25 years. This provision would substantially disrupt the well-established practices of the recording industry in South Africa and internationally when it comes to the creation and use of sound recordings and music videos. It would risk serious harm to the South African record industry as a major incentive to invest would be removed.

Historic repertoire, including music videos, is an important part of music industry revenues – for performers, record companies and authors. Revenues from historic repertoire are increasingly important now that the music industry is predominantly a digital industry. The shift away from physical consumption (CDs etc) to downloads (iTunes etc), and now to streaming (Spotify, YouTube etc) means recorded music (and music videos) can generate revenues from digital services over a longer period of time. The proposed section 3A would disrupt this to the detriment of the entire music industry value chain because it would likely result in many music videos becoming unusable after 25 years, as explained below.

Sound recordings and music videos will typically include performances from a large number of performers. While the copyright owner of the sound recording or music video (the record company) will often have a long-term relationship with the featured artist, it is far less likely to have such a relationship with, for example, a performer who has entered into a one-off agreement to dance in the background of a music video, or provide backing vocals or other musical performances in a sound recording. Despite the less central contribution of such a performer to the overall music video or sound recording, each such performer would have rights according to the PPB, which under draft section 3A would be transferred to the copyright owner to enable the copyright owner to license the use of the music video by third parties, including broadcasters and digital services.

However, draft section 3A appears to provide that the record company would cease to have those rights after 25 years. That would mean that the record company would have to seek out many thousands of performers (with whom the company has no long-term relationship) to seek their mutual consent to an extension of the 25-year term. The inability to locate just one background performer involved in a music video or sound recordings would mean the music video could no longer be used, ending the revenues that come to record companies, performers and authors from the exploitation of that video or recording. That cannot be the intention of this legislation.

Furthermore, the provision would have a broader negative effect on performers. Introducing new artists to the market and promoting their careers requires large upfront investment from record companies, with no certainty in relation to when, if ever, the investment will be recouped. Limiting the term of agreements between record companies and audiovisual performers would increase the economic risk even further and would likely reduce the number of investments in new talent that can be

undertaken by record companies. On average, record companies invest 27 percent of their revenues into artists and repertoire, and the marketing of those artists. The cost alone of producing a music video for a major new artist is between USD 25,000 and USD 300,000. These investments would not be sustainable if the period that revenues can be earned from music videos is effectively halved (from the existing copyright term of protection of 50 years).

Recommendation

Section 3A(3)(c) should be deleted.

5. Restrictions of use of performances – section 4 PPB (amending section 5 of the PPA)

Unjustified downgrading of performers' exclusive rights

Section 5 of the PPB sets out the rights granted to performers. In the PPB, performers' rights are also enumerated under section 3. The amendments to section 5 are therefore in part duplicative of section 3.

More importantly, though, despite improvements on the previous draft of the PPB, draft section 5(1)(b) downgrades the performers' exclusive rights of distribution and rental to mere remuneration rights, a proposal that would be incompatible with WPPT and the Beijing Treaty, which do not permit these rights to be protracted at the level of mere remuneration rights. Furthermore, providing mere remuneration rights in respect of distribution and rental, subject to rate-setting by the Tribunal (section 5(3)(b)), would prejudicially devalue these performers' rights; experience in South Africa and internationally shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed.

Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audio-visual works as a result of one set of rights being subject to private negotiation (the producers' rights), and the performers' rights being subject ultimately to Tribunal rate-setting. The consequence would be a transfer of value from those who create and invest in recorded performances to the licensees of those performances, the latter likely ending up paying less, resulting in reduced revenues for producers to invest in South African performers.

Meanwhile, draft section 5(1A) implies that **all** performers' rights under drafts sections 3 and 5(a) are downgraded from exclusive rights to mere remuneration rights, in addition to those set out in section 5(1)(b). Although draft section 5(1A) appears to be intended to ensure that the exclusive rights in sections 3 and 5 are not exploited by third parties without full usage reporting being provided to the relevant rightholders listed therein, draft section 5(1A) is unclear, and could be misinterpreted

as conveying a right of use upon users, provided they comply with the notification requirements set out in 5(1A). This potential confusion is caused particularly because this section envisages a user registering their uses and providing a “complete, true and accurate report” of their uses. If this section could be understood as applying to unlicensed users of sound recordings or audio-visual works, it would imply that a user does not have to obtain an authorisation from the relevant rightsholders prior to use, so long as it registers and reports upon its uses after the event “for the purpose of calculating royalties or equitable remuneration due and payable by that person”. Such an approach would be incompatible with the nature of the exclusive rights set out in sections 3 and 5, and would consequently be incompatible with the WIPO Copyright Treaty, the TRIPS Agreement and the Berne Convention.

Recommendations in relation to proposed clause 4 (amending section 5(1)(b) and inserting 5(1A))

1. The amendments to section 5(1)(b) should be deleted, leaving section 5(1)(b) of the PPA in its present form.
2. Section 5(1A) should expressly apply only to licensed uses of sound recordings and audiovisual works.
3. To avoid confusion as to how to comply with section 5A(1), specifically where the performers’ rights in question have been transferred to the producer or other third part, the obligations should apply only vis-à-vis the licensor(s) of the use in question.
4. To avoid an undue interference with private contractual agreements, section 5(1A) should be made subject to the terms of contracts agreed between the licensor and licensee.
5. Consequently, draft sections 5(4)(a) and 5(5) should also be amended to remove references to “sale, commercially renting out, distribution” (noting also that sale and distribution have overlapping meanings).

6. Exceptions (draft section 8)

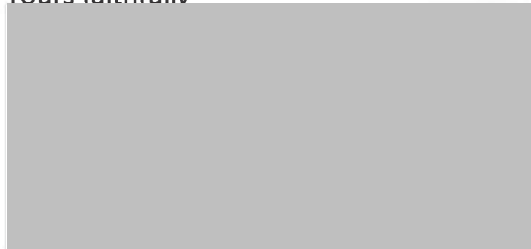
We refer to section 5 of our submission dated 25 October 2018 on the Copyright (Amendment) Bill concerning proposed amendments to the provisions in that Bill on technological protection mechanisms (a copy of which is at Annex 1 to this submission). We urge the adoption of our recommendations, and that the PPB be amended to reflect those recommendations.

7. Technological protection mechanisms (draft sections 8E and 8F)

We refer to section 6 of our submission dated 25 October 2018 on the Copyright (Amendment) Bill concerning proposed amendments to the provisions in that Bill on technological protection mechanisms. We urge the adoption of our recommendations, and that the PPB be amended to reflect those recommendations to ensure adequate protection and consistency between the Copyright Act and the Performers' Protection Act.

Once again, we thank you for the opportunity to make this submission. IFPI stands ready to provide whatever further assistance may be required.

Yours faithfully



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Enc.

ANNEX 1

IFPI 25 October 2018 submission on the Copyright Amendment Bill



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25 October 2018

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Dear Sirs

IFPI, representing the recording industry worldwide, represents some 1,300 record companies and affiliated industry associations in some 60 countries. We are grateful for the opportunity to comment on the latest draft of the Copyright Amendment Bill [B13-2017].

In this submission, we express our concerns in relation to the published clauses, and also set out our principal concerns regarding the latest version of the Bill (Draft 4), since a number of proposals therein have not been published for public comment, yet concern issues of critical importance to the recorded music industry, and are also incompatible with the WIPO Performances and Phonograms Treaty (WPPT) with which we understand the South African Government is seeking to align its law. The issues we address in this submission are as follows:

1. Published clause 10 of Draft 4 (Section 9 – sound recordings) and unpublished amendments to section 9 (deletion of the exclusive right of making available to the public).
2. Section 9A of Draft 3 (royalties regarding sound recordings)

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3. Published clause 9 of Draft 4 (Section 8A – requiring recording of acts in respect of audiovisual works and providing for an offence in this regard)
4. Section 8A of Draft 4 (to the extent not published)
5. Section 12 of Draft 4 (Fair use)
6. Sections 1(h) and 28P of Draft 4 (definition of “technological protection measure” and exceptions to the prohibited conduct in respect of technological protection measures.
7. Section 23(1)(c) of Draft 4 (unclear provision concerning abuse of copyright)
8. Section 29A(1)(e) of Draft 4 (inappropriate powers granted to the Tribunal)
9. Section 39 (Ministerial powers to intervene in private contractual relations)

1. CLAUSE 10 (SECTION 9 – SOUND RECORDINGS) AND UNPUBLISHED AMENDMENTS TO SECTION 9 (DELETION OF THE EXCLUSIVE RIGHT OF MAKING AVAILABLE TO THE PUBLIC)

We welcome the published amendment to section 9 (the exclusive rights in sound recordings), which proposes expressly to enumerate the sound recording producers’ exclusive right of distribution in section 9(f), in accordance with Article 12 WPPT.

However, we are concerned that the published clauses do not clarify that the latest draft of the Bill deletes from section 9 the previously included exclusive right of making available to the public (derived from Article 14 WPPT). The removal of this exclusive right from the Bill would render the Bill incompatible with the WPPT.

The exclusive right of making available to the public is of paramount importance to the recorded music industry. This right applies to the licensing of digital uses of sound recordings, whether by way of a digital service enabling downloads of sound recordings or providing access to sound recordings by way of streaming. As the South African industry continues to transition to a predominantly digital industry, such licensed uses of sound recordings comprised in 2017 49 percent of South African recorded music industry revenues (and far higher is performance rights are not included), up from 33 percent in 2016, and we anticipate further growth of the South African digital music industry.

To provide a healthy digital environment for legal digital music services to launch and grow, to the benefit of producers, artists and users alike, it is crucial to ensure that the law reflects the provisions of the WPPT accurately. Revenues from licensing the rights in WPPT, and most specifically in light of digital growth, the making available to the public right, enable record companies to be the largest investors in artists, investing some 27 percent of revenues back into artists and repertoire and marketing.

A failure to include the exclusive right of making available to the public in section 10 of the Bill (and therefore section 9 of the Act) would render South African copyright law incompatible with WPPT, Article 14 of which requires that contracting parties implement making available to the public as an exclusive right. Such an omission

would therefore be incompatible with one of the stated aims of the Bill, which is to align South African law with the WPPT with a view, we understand and welcome, of South Africa acceding to WPPT in the near future.

We would therefore welcome an urgent clarification that the exclusive right of making available to the public will remain in section 9, whether at section 9(g) or otherwise.

2. CLAUSE 11 OF DRAFT 3 (SECTION 9A – ROYALTIES REGARDING SOUND RECORDINGS)

In our July 2017 submission, we raised serious concerns about the inclusion of the exclusive making available right in the statutory licence regime set out at proposed section 9A. We note that that this right is, correctly, no longer included in section 9A (however as noted above, the right has been removed from section 9 as well). It is vital that if the making available right is restated in section 9, it is not also restated in section 9A.

The proposed inclusion of sound recording producers' making available right in section 9A of Draft 3 of the Bill risked destroying the South African digital music market, and thereby substantially reducing investments in South African artists, as we explain below.

2.1 Harmful and unjustified downgrading of the making available to the public right

Draft 3 of the Bill included a proposed Section 9A(1)(a)(iv), which would subject the exclusive right of making available to the public in section 9(f) of Draft 3 to the section 9A statutory licence.

The effect of this section would have been to downgrade the right of making available to a mere remuneration right. Such a treatment of the making available right would have rendered the economics of a digital music market in South Africa wholly unfeasible.

The correct treatment of the exclusive right of making available to the public (Article 14 WPPT) is, as explained in section 1 above, to expressly enumerate it as an exclusive right under section 9, but not then to downgrade it to a remuneration right subject to statutory licence under section 9A.

Consequently, it is essential that the reinstatement of the making available to the public right in section 9 is not accompanied by also subjecting the right to section 9A. We explain below the harmful effects of including the making available right in section 9A and the incompatibility of such an approach with WPPT.

2.1.1 WPPT does not permit downgrading of the exclusive right of making available to the public to a mere remuneration right

The making available to the public right is derived from Article 14 WPPT and underpins the licensing of digital music distribution services such as Apple Music, Deezer etc that offer any “interactive” uses of music. Under Article 14 WPPT, the making available right is exclusive, and does not provide any option for contracting parties to provide lesser protection, including by downgrading the right to a mere remuneration right as previously proposed by Section 9A(1)(a)(iv) in Draft 3. By contrast, both the broadcast and communication to the public rights are provided a minimum level of protection as remuneration rights under Article 15 of WPPT. This option is not available to contracting parties in respect of Articles 14 of WPPT.

As explained in our previous submission on the Copyright Amendment Bill in July 2017, and as 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 the planned ratification of the WPPT. However, the insertion of Section 9A(1)(a)(iv) under Section 11 of the Bill would have rendered South African copyright law incompatible with Article 14 of the WPPT, and therefore this treatment of the making of the making available should not be repeated.

2.1.2 The sweeping statutory licence scheme in section 9A would wholly undermine the South African digital music industry and would violate the requirements of WPPT, if extended to the exclusive right of making available to the public

The effect of section 9A as drafted in Draft 3 would have been to entirely remove right holders’ control over how to license the right of making available to the public (as well as the other rights covered by the section). Most concerning, it would have enabled interactive digital services to make available recordings even without a licence, with licensing terms to be negotiated subsequently or adjudicated by the Tribunal. This would have resulted in a race to the bottom, not only substantially reducing the revenues of performers and producers from digital uses of their works, but also thereby reducing the available revenues to re-invest in South African artists.

2.1.3 In any event, the sweeping statutory licence scheme in section 9A should be limited to collective licensing of the rights included in the present draft of section 9A, but should not interfere with individual licensing arrangements

The proposed power in Drafts 3 and 4 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.

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 operation in South Africa by SAMPRO 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, with authority to adjudicate over disputes concerning collective licensing, but certainly not a body regulating individual private contracts, and certainly not a body setting rates for uses of the making available right (as proposed in Draft 3).

Recommendations in relation to sections 9 and 9A

1. The exclusive right of making available to the public should be expressly enumerated in section 9 of the Act, in accordance with Article 14 WPPT.
2. The exclusive right of making available should not be reinstated in section 9A, where its inclusion would render South African law incompatible with WPPT.
3. The statutory licensing scheme in section 9A should not apply only to collective licensing arrangements but not to individual licensing arrangements.

3. PUBLISHED CLAUSE 9 (SECTION 8A – REQUIRING RECORDING OF ACTS IN RESPECT OF AUDIOVISUAL WORKS AND PROVIDING FOR AN OFFENCE IN THIS REGARD)

Section 8 of the Act (nature of copyright in audiovisual works) sets out the exclusive rights in audiovisual works, which include music videos.

Published clause 8A(6) appears to be intended to ensure that the exclusive rights in section 8 are not exploited by third parties without prior authorisation by the relevant copyright owners. However, clause 8A is unclear, and could be misinterpreted as conveying a right of use upon users, provided they comply with the notification requirements set out in proposed section 8A(6). This potential confusion is caused particularly because sections 8(6)(a) and (b) envisage a user registering their uses and providing a “complete, true and accurate report” of their uses. If this section could be understood as applying to unlicensed users of audio-visual works, it would imply that a user does not have to obtain an authorisation from the relevant rightsholders prior to use, so long as it registers and reports upon its uses after the event. Such an approach would be incompatible with the nature of the exclusive rights set out in section 8, and would consequently be incompatible with the WIPO Copyright Treaty, the TRIPS Agreement and the Berne Convention.

Recommendations in relation to proposed clause 9 (section 8A(6))

1. Section 8A(6) should apply only to licensed uses of audiovisual works.

2. To avoid confusion as to how to comply with section 8A(6), the obligations should apply only vis-à-vis the licensee.
3. To avoid an undue interference with private contractual agreements, section 8A(6) be made subject to the terms of contracts agreed between the licensor and licensee.

4. SECTION 8A - MECHANISM FOR THE PAYMENT OF ROYALTIES TO PERFORMERS WHOSE PERFORMANCES ARE FEATURED IN AN AUDIOVISUAL WORK.

Section 8A of Draft 3 introduced a new proposal in the Bill to regulate the remuneration terms of private contractual agreements between performers and copyright owners. This section is also included in Draft 4. Despite proposing a significant interference into private contractual arrangements, to the particular detriment of certain performers, section 8A has not been published for consultation (except for section 8A(6)).

Regrettably, the absence of consultation has resulted in a proposal that would substantially undermine the economics and commercial practices concerning the production of audio-visual works (specifically, from the perspective of IFPI's members, music videos). While we recognise and support the intention of section 8A to ensure that performers are remunerated appropriately, in practice the proposal would in fact cause substantial harm to a large category of the performers who perform background roles in music videos, as we explain below.

The cost of producing music videos comprises a substantial part of the investments made by record companies in artists (as referenced above, record companies are by far the biggest investors in artists, investing 27 percent of revenues in artists & repertoire and marketing). These upfront costs are very often not recouped because only a minority of artists "break through", meaning that the investments made by record companies in artists are very often never recovered. To understand the significance of that as concerns performers, it is necessary to understand how different performers are remunerated, a consideration that unfortunately has not been taken account in the drafting of proposed section 8A.

Music videos comprise performances from featured performers (the artist or artists with whom the record company has partnered) and non-featured or backing performers (the performers who typically are contributing to a music video on a one-off basis, such as dancers performing in the background of the video). Featured artists are remunerated in accordance with the terms they have negotiated with the record company, and these terms almost invariably are on a royalty basis (in addition to lump-sum advances). Non-featured performers, on the other hand, are remunerated by way of lump-sum payments, typically by way of one-off contracts rather than by way of a longer-term partnership with a record company. Section 8A would appear to propose

removing the possibility of lump-sum payments and replacing them with royalty payments.

The effect of section 8A, rather than benefitting performers, would in fact result in many performers having no guarantee of receiving any remuneration from exploitations of the music video in which they have performed. This is because, as stated above, many featured artists do not “break through”, which means their recordings and music videos are loss-making for the producer and do not generate any royalties. As a consequence of proposed section 8A, non-featured performers performing in music videos would no longer enjoy being paid a lump sum immediately in return for their one-off performances and would instead have to wait to be remunerated on a royalty basis, which would only happen if the video in question actually succeeds in generating revenues beyond breaking even. The result, because the majority of the featured artists in whose videos these backing performers perform do not “break through”, will be that there are simply no revenues to distribute on a royalty basis as draft section 8A proposes, and many non-featured performers would therefore lose much of their income. The current commercial practices avoid that outcome by paying non-featured performers on a lump sum basis, reflecting their ancillary role to the overall production and their need to be remunerated as and when they work, irrespective of whether the music videos in which they perform succeed or do not. This cannot have been the intention of draft section 8A.

Section 8A therefore should be amended to avoid the unintended consequences that the present draft would have, and we propose the following amendments to achieve the desired outcome of ensuring performers are remunerated appropriately without harming the position of the substantial number of non-featured performers engaged by record companies. We also propose removing the references to collecting societies, since it is not the role of a collecting societies to negotiate contracts between producers and performers. Instead, we include an amendment to allow for the possibility of performers appointing representatives to negotiate on their behalf.

Recommendations for amendments to section 8A

Share in royalties regarding audiovisual works

8A. (1) A performer shall, subject to the Performers Protection Act, 1967 (Act No. 11 1967) have the right to be appropriately remunerated ~~share in the royalty received by the copyright owner~~ for any of the acts contemplated in section 8.

(2) (a) The performer’s remuneration ~~share of the royalty~~ contemplated in subsection (1) shall be determined by a written agreement ~~in the prescribed manner and form, between the copyright owner and the performer or their appointed representatives~~ copyright owner or between their representative collecting societies.

~~(b) Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4), as the case may be.~~

~~(3) Where the performer and copyright owner contemplated in subsection~~

~~(2)(a) cannot agree on the performer's share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer's share of the royalty.~~

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

(a) The rights and obligations of the performer and the copyright owner;

~~(b) the performer's remuneration share of the royalty 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 copyright owner to the performer; and

(d) a dispute resolution mechanism.

(4) (a) This section applies to an audiovisual work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that audiovisual work—

(i) falls within the application of this Act; and

(ii) is still exploited for profit.

~~(b) The Minister must prescribe the process to give effect to the application of this section to a work contemplated in paragraph (a).~~

~~(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date of the Copyright Amendment Act, 2019."~~

5. SECTION 12 (FAIR USE) AND OTHER EXCEPTIONS

5.1 Fair use – section 12

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.

On the contrary, IFPI submits that the introduction of fair use into South African law would result in plunging the growing South African online market for creative works into significant legal uncertainty and would increase the risk of litigation and entry barriers for new services and creators wishing to commercialise their works.

Fair use constitutes a fundamentally different legal approach to exceptions and limitations to rights compared to fair dealing exceptions in that *there is no limit to the acts to which fair use may be applied*. The common law tradition of providing for clearly and closely worded "fair dealing" exceptions reflects the tradition of providing an enumerated set of exceptions to the rights provided in legislation (or specific uses of protected works, to put it another way). The overarching principle is that a use will only fall within the exception if it is listed in the enumerated exceptions and is done for the purpose of fair dealing. The US copyright law tradition of providing for "fair use" differs fundamentally from the "fair dealing" tradition in other countries in that it does not require a list of enumerated exceptions. Rather, it is typified by a non-exhaustive list of illustrative uses that may fall within "fair use", and the criteria to determine whether any use (not limited to the illustrative uses) is fair. Put simply, fair use is open-ended and, as such, requires a great deal of litigation and judicial interpretation to establish its scope and application.

Its introduction into the Act would mark a paradigm shift in South Africa's copyright law, introducing uncertainty that will require extensive litigation to resolve, hampering the development of the South African digital music market.

Where exceptions to copyright are appropriate, we submit that clearly defined exceptions better achieve legal and commercial certainty, promoting innovation, and are also consistent with the three-step-test¹.

Legal certainty drives innovation and growth

Record companies have licensed around 43 million tracks and more than 400 digital music services in some 200 countries worldwide. Some of the most successful of these services were developed and launched in countries that do not have fair use, for example Spotify (Sweden), Tidal / WiMP (Norway) and Deezer (France). Indeed, the vast majority of the 200 or so countries where licensed digital music services are available are not fair use jurisdictions, including the South Africa where some 14 digital services are licensed. Fair use is not necessary to drive or sustain innovation, as evidenced by the huge increase in innovative licensed digital music services globally.

¹ The first limb of the three-step test, provided by the Berne Convention, WCT, WPPT, TRIPs, and by EU legislation, requires that limitations and exceptions to exclusive rights should only apply in "certain special cases".

The Act currently provides for specific exceptions and limitations for the purpose of fair dealing. In common with many other countries, the fair dealing exceptions in the Act comprise a comprehensive list, and consequently provide a high degree of certainty as to the acts that are permitted in respect of protected works or subject matter. This legal certainty is essential to making the South African online market predictable for new entrants.

Fair use is dependent upon established jurisprudence

A particular problem that would arise if a "fair use" doctrine were introduced concerns the scope and application of fair use by the courts. An open-ended 'fair use' provision, such as the one available under the US Copyright Act and that put forward in the Bill, cannot function properly without the backdrop of substantial case law on the interpretation of fair use.

The scope and the application of fair use in the US have been developed in 150 years of fair use jurisprudence. South African law does not have this case law history, making the interpretation of the proposed fair use provisions, and the outcome of any litigation unpredictable. It is expected that the introduction of fair use in South Africa would ultimately increase the number of cases that reach courts on this issue, as both right holders and users will be unable to determine the scope of the exception and judicial intervention will be required. As US academic and fair use proponent Lawrence Lessig put it:

"Fair use means the right to hire a lawyer"².

In turn, uncertainty discourages investment and undermines licensing models which drive growth in innovation and digital markets.

Importantly in the context of the policy aims underlying the Copyright Amendment Bill, fair use would disadvantage South Africa creators who do not have the resources to bring cases against those claiming the benefit of fair use, no matter how unfairly. Consequently, fair use would result in a transfer of value from South African performers, producers and other creators to large - mainly foreign - technology corporations.

In addition, the drafting of the fair use provisions is itself problematic, and it is not clear how the proposed "fair use" exception would co-exist with the enumerated fair dealing exceptions already in the Act.

Where new exceptions to copyright are justified on the grounds of a sound evidential basis or a genuine overriding public interest, we submit that clearly defined exceptions for the purpose of fair dealing, drafted so as to comply with the three-step-test, would better achieve legal and commercial certainty.

² http://lessig.org/blog/2004/03/talkback_manes.html

Recommendation in relation to Fair Use

We urge reconsideration of the substantial change in copyright policy that would see US-style fair use implemented into South African law, resulting in legal and commercial uncertainty to the detriment of South African creators and creative industries. Where updated or new exceptions are supported by a clear evidential basis, targeted exceptions for specific purposes should be proposed and put to public consultation.

5.2 Quotation exception – section 12B(1)(a)

Section 12B(1)(a) sets out an exception for quotation, which is unduly broad. In respect of sound recordings, there is no need for a quotation exception. Such an exception would undermine the existing market in South African for licensing sampling (an important aspect of the music licensing market) and, therefore, would not comply with the three-step-test.

Recommendation

To ensure compatibility with the three-step test, we recommend that the exception be clarified by expressly stating that quotations are only permitted where they do not reproduce a substantial part of the work, red limited to review and criticism, and crucially that the use of the quotation must not prejudice the legitimate interests of the right holder, including by conflicting with the commercial exploitation of the work.

5.3 Private copying exception – section 12B

We also note that draft section 12B(1)(i) and 12B(2) proposes to 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 in light of existing licensing arrangements, 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 copied³.

³ For example, the High Court of England & Wales 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>

Recommendation

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. We recommend that due consideration be given to international practice in this area before proceeding with the proposed exception, and IFPI stands ready to assist with providing any assistance required in that respect.

6. TECHNOLOGICAL PROTECTION MEASURES (TPMS) AND RELATED PROVISIONS NEED TO BE REVISED TO ENSURE MEANINGFUL PROTECTION

In this section we address the inadequate implementation of, and the specific issues with, the technological protection measures (TPMs) introduced in the Copyright Amendment Bill. Article 18 of WPPT requires that contracting parties provide *“adequate legal protection and effective legal remedies against the circumvention of effective technological measures”*. At present, the proposed provisions in the Bill are not compatible with that requirement, as we explain below.

This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the music industry. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on technical protection measures is therefore essential to protect against piracy and thereby enable the development of new business models. We welcome the inclusion of the provisions on TPMs in the Bill, but make the following recommendations to ensure that the provisions will be able to serve their intended purpose.

First, the definition of “technological protection measure” in Section 1(h) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to being designed to have that effect. The plain reading of this definition would be that a TPM that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. This would defeat the purpose of the provisions prohibiting the circumvention of TPMs. We therefore recommend that, in line with Article 6 of the EU Copyright Directive (Directive 2001/29/EC), the following amendment be made to the definition in **section 1(h)** of the Bill:

‘technological protection measure’

(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is designed to prevent or restricts infringement of copyright in a work; and

We also propose the deletion of paragraph (b) in the definition. That a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. Rather, the provision of section 28P(2)(a) would apply to enable the user to seek assistance from the right holder in gaining access to the work in question. As it stands, paragraph (b) of the definition is open to abuse and would provide a charter for hacking TPMs. In this respect, please see also our comments below in respect of section 28P(1)(a).

Second, we also recommend that the definition of ‘**technological protection measure circumvention device**’ be amended also to include devices that (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition is adequately scoped to encompass all TPM circumvention devices, which would also be consistent with Article 6(2) of the EU Copyright Directive, for example.

Finally, the exceptions in **section 28P** in relation to prohibited conduct in respect of TPMs (in **section 28O**) are inadequately defined, therefore rendering them incompatible with the three-step-test and substantially reducing the effectiveness of the protections afforded by section 28O, because:

- under section **28P(1)(a)** it would be extremely burdensome, if not impossible, for right holders to establish that the use of a TPM circumvention device by a user was to benefit from an exception; and
- a provider of an unlawful circumvention technology could rely on section **28P(1)(b)** to claim they are acting lawfully merely by showing that the technology can be used to access a work perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of section **28(2)(b)**.

We therefore recommend that provisions such as those set out in section 296ZE of the UK Copyright Designs and Patents Act 1988 (“CDPA”) be included instead of the sections highlighted above. Section 296ZA CDPA, for example, makes available a complaints mechanism for users who are prevented from accessing a work for the purposes of carrying out a permitted act, thereby ensuring the correct balance is struck between the protection of TPMs and the importance of enabling access to works for the purpose of carrying out permitted uses.

7. UNCLEAR PROVISION CONCERNING ABUSE OF COPYRIGHT

Finally, the meaning of proposed section 23(1)(c) is wholly unclear and may be open to abuse by defendants to claims for infringement. This provision should be clarified.

8. SECTION 29A(1)(e) – POWERS OF THE TRIBUNAL

Proposed section 29A(1)(e) in Draft 4 proposes that the Tribunal be given the power to “settle disputes relating to licensing schemes, payment of royalties or terms of agreements entered into as required by this Act or agreements entered into in order to regulate any other matter in relation to Copyright”. While the Tribunal is the correct forum to deal with certain disputes in relation to licensing schemes, it is not the correct forum for other contractual disputes not subject to collective licensing. Such disputes should fall within the jurisdiction of the courts and we recommend that this section be amended accordingly.

9. SECTION 29 (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(cl) 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.

Conclusion

Once again, we thank you for the opportunity to make this submission. Given the very substantial harm posed by many of the provisions in Draft 4 of the Bill, we strongly and respectfully urge greater consideration of the Bill, including full engagement of all stakeholders’ whose businesses and livelihoods will be affected by it.

Yours faithfully

