

**From:** Art. 4(1)(b) @ifpi.org>  
**Sent:** lundi 16 juillet 2018 20:03  
**To:** Art. 4(1)(b) (TRADE)  
**Subject:** South Africa copyright bill

Dear Art. 4(1)(b),

As promised, please find attached our comments on the South African copyright bill, as circulated for public consultation. As you will see, we are not limiting ourselves to the specific questions posed for consultation as there are several important concerns and omissions which just have to be mentioned in this context.

I am happy to discuss further tomorrow. Our national group will be filing a submission too, but the document is not yet finalised.

Best wishes,  
Art. 4(1)(b)

**I. Problems with exceptions and limitations:**

- 1) **Fair use: Section 12A** would introduce full US-style, open-ended fair use exception into South African law, thereby weakening copyright protection in SA and creating substantial legal and commercial uncertainty for all the parties involved in the use of copyrighted material.

There is no evidential basis justifying the substantial policy shift to change the exceptions regime from a fair dealing regime to a fair use regime. This is particularly true given the substantial amendments that the Bill already proposes in relation to exceptions in sections 12B, C and D.

The uncertainty that would be created by the introduction of fair use would undermine the protection afforded to right holders, not least because there will have to be substantial amounts of litigation in order to begin to establish the parameters of the fair use exception in South Africa. Regrettably, this would advantage those who have the resources to litigate, which tend to be large-scale commercial users of copyright works. We strongly urge the removal of the fair use from this Bill, which is intended to be a Bill to further the protection of South African creators.

- 2) **Quotation exception (Section 12B(1)(a))** : The proposed quotation exception in section 12B(1)(a) is overly broad and circular in nature in that it would apply to any quotation; such broad application would undermine established markets for licensing the use of extracts of works and sound recordings.

The drafting states that a quotation is not an infringement provided that “*the extent thereof shall not exceed the extent reasonably justified by the purpose*”. If the “quotation” were to be a commercial sampling of a sound recordings for use in a new

sound recording, that use would seemingly fall within the exception, thereby wholly undermining the well-established market for the licensing of sampling in South Africa. The exception would thus not meet the three-step test as it would conflict with the normal exploitation of the works and would unreasonably prejudice the interests of right holders in licensing such uses.

- 3) *Personal copies*:** The international practice with respect to exceptions for the purpose of private copying is that such exceptions are typically accompanied by a remuneration (or “levy”) system by which right holders are recompensed for the losses they inevitably sustain as a result of private copies being made. The Bill does not provide for any such system.

Of particular concern is **section 12B(2)(c)** which permits the making of electronic copies *“in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility”*. A substantial volume of infringing activity takes place on so-called “cyber lockers”, which purport to be personal storage services, but in fact are open hubs for infringing content designed to facilitate sharing of links to stored copies of protected sound recordings on a massive scale. The wording of **section 12B(2)(c)** is inadequate to prevent the proposed exception being used by such cyberlocker services as a shield against liability. Our first recommendation would be for section 12B(2)(c) to be deleted altogether.

At the very least it should be amended to clarify that it would apply only where the stored copy (1) is made from a copy acquired lawfully and owned by the individual, (2) the stored copy may be accessed exclusively by that user, and (3) the sole beneficiary of the exception is the user and not the provider of the storage service. At present, section 12B(2)(c) does not contain any of these three essential qualifications and as such it is dangerously overbroad.

## **II. Technological protection measures (TPM) (Section 1(h) and related provisions**

The definition of “technological protection measure” is problematic because it refers to technologies that achieve the result of preventing or restricting infringement, as opposed to being designed to have that effect. While the WIPO Internet treaties require countries to provide remedies against the circumvention of effective TPMs that obligation does not mean that there is no infringement where a TPM has been circumvented. Logically, if the mere fact that a TPM has been successfully circumvented were to mean that the TPM was not ‘effective’ and thus there was no actionable circumvention, there would be no reason for having the provision in the first place. This was clearly not the intention in the WIPO treaties and equally, it is not believed that the bill aims to introduce a provision which would defeat the purpose of introducing a prohibition on 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 restrict infringement of copyright in a work; ~~and~~*

We also propose the deletion of paragraph (b) in the definition. TPMs are often deployed by a distributor service (e.g. an online streaming platform) to prevent access to works ; the question of whether users would be seeking access to these works for non-infringing or infringing purposes does not arise at this stage and it should not have the effect on the status of the measures as TPMs. Rather, the provision of section 28P(2)(a) would apply to enable the user to seek assistance from the rightholder in gaining access to the work in question.

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, and would also be consistent with Article 6(2) of the EU Copyright Directive.

The exceptions in **section 28P** in relation to prohibited conduct in respect 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 rightholders to establish that the use of TPM circumvention device by a user was to benefit from an exception.
- 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 in order to 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 be included instead of the sections highlighted above. Section 296ZE makes available a complaints mechanism for users who are denied access to a work for the purposes of carrying out a permitted act. This

ensures 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.

### **III. Accreditation of collecting societies**

**Section 22B(2)(b)** implies through the words *“A collecting society that has been accredited by the Commission to administer rights on behalf of performers **or** owners”* (emphasis added) that it may not be possible for a performers’ and producers’ society to be accredited jointly. International practice has shown that performers and producers operating joint societies results in substantial efficiencies in licensing, to the benefit of rightholders and users alike. This has been the experience of SAMPRA in South Africa. We would welcome confirmation in the Bill that joint societies of producers and performers may continue to operate and be accredited to do so.

### **IV. Reciprocity between “countries”**

There appears to be a drafting error in **section 22C(3)(c)** in that it foresees reciprocal agreements between South Africa and other countries. In practice, the reciprocal agreements are between collecting societies in different countries and not between the states.

### **V. Performers’ remuneration**

Proposed sections **9A(2)(a)** and **9A(2)(b) and (c)** appear contradictory in that the former (s. **9A(2)(a)**) prescribes that revenues (from the uses of sound recordings covered by the provisions – namely, broadcast, public performance and linear non-interactive communication to the public) be shared equally between the producer on the one hand and performers on the other, and the latter (s. **9A(2)(b) and (c)**) states that the performer’s share must be “fair and equitable”. For certainty, we recommend that the provisions be clarified to state that revenues from the affected uses (broadcast, public performance and linear non-interactive communication to the public) are shared 50% to the sound recording producer and 50% to the performers, in the absence of an agreement to the contrary, in line with existing South African and international practice.

### **VI. Missing provisions on term extension and WIPO Internet Treaties (WPPT/WCT) accession**

We note that the bill is a good opportunity for South Africa to accede to the WIPO WPPT/WCT treaties, following in the steps of Nigeria and India to name but two recent examples. In addition, while the government is seemingly minded to improve the legal protection of some categories of rightholders (e.g. performers, hence the separate Performers Protection Bill) it has not yet proposed the most basic form of protection, namely, matching the duration of protection for sound recordings in which both performers and producers have rights to the duration of protection offered in most important music producing countries around the world – i.e. 70 years from publication. Countries in which this term of protection (or longer) is the applicable legal standard account for 91% of the total revenues returned to the music industry

and recording artists. This fact underscores the importance of this aspect of protection to the health of the music production ecosystem.

Art. 4(1)(b)

IFPI – representing the recording industry worldwide

7 Air Street | London | W1B 5AD | UK | T: Art. 4(1)(b) | Art. 4(1)(b) [@ifpi.org](mailto:info@ifpi.org)



[www.ifpi.org](http://www.ifpi.org) – representing the recording industry worldwide

[www.pro-music.org](http://www.pro-music.org) – for all you need to know about getting music on the internet

@IFPI\_org