



IFPI Comments on the Department of Trade and Industry Copyright Amendment Bill 2015 (the “Bill”), Amending the Copyright Act No. 98 of 1978 (the “Act”)

INTRODUCTION

IFPI – representing the recording industry worldwide thanks the Government of the Republic of South Africa for the opportunity to submit comments on the Bill. 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 commitment the South African Government has demonstrated in the Bill 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. We also wish to draw attention to the negative impact that some of the proposed changes could 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 will be to reduce 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 employment¹. 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 5.6% of all UK jobs². IFPI’s

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

²For 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/394668/Creative_Industries_Economic_Estimates_-_January_2015.pdf

global market report, Recording Industry in Numbers, the authoritative publication on the recorded music market, shows that in 2014 the South African record industry was the 24th 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 help South Africa implement the DTI's intention to promote the interests of South African music creators and listeners. 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, which could undermine the commercial basis for making that investment, and which are at odds with the industry best practices that have underpinned growth elsewhere.

In order 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.

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

By way of introduction to the importance of record companies in developing new artists, we set out below some extracts from Plácido Domingo's introduction to the recent IFPI *Investing in Music* report:

(The full Investing in Music Report is available at http://www.ifpi.org/content/library/Investing_In_Music.pdf):

In my long career, I have worked with all the major record labels, and even some of the smaller ones. From my experience in the recording industry, I know very well what a big difference a record label can make to the success of an artist's career. To achieve success, of course, means investment by the labels, both in time and money, in promoting the artist and his or her recordings.

It is very important, from time to time, to be reminded of the industry that is working tirelessly behind the artist. Today, it is easy to take for granted the constant supply of new music from a huge range of artists, emerging on a weekly basis. In the digital world, it is so easy to access music, people can forget the time and effort that goes into creating a professional recording, as well as the work needed to bring it to the attention of the public.

The investors in music are vital to the work of artists. They are the risk-takers who win if an artist is successful (and far fewer succeed than fail), but lose if they are not; they provide the financial support in advance of recording that others are not prepared to give; they offer skills and understanding of how to reach the consumer in all the ways the digital age allows; and they provide many other skills too. This is all part of the work of record companies who, according to this report, invest US\$4.3 billion dollars worldwide in the work of recording artists.

Investment in music cannot be taken for granted. Like the creativity of the artist, it is something that needs to be supported and protected by a secure legal environment. That is why a safe, adequate copyright framework for artists and labels is so crucial.

4(1)(b)

Indeed, 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 statistics show that on average between 7 and 8 out of every 10 newly signed artists do not break even, meaning that the money invested in them is lost in whole or in part.

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. In September 2014, IFPI partnered with *The Unsigned Guide*, an almanac of information from unsigned artists, to survey performers currently without a record deal. Seventy per cent of the unsigned artists surveyed said they wanted a record deal. The Annex to this submission sets out some case studies on the relationship between artists and record companies.

Worldwide, the record industry invested US\$4.3bn in Artists & Repertoire (A&R) and marketing in 2013. Between 2009 and 2013 the amount invested in A&R and marketing was in excess of US\$20bn.

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 2014 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 outside Japan and the US in the five year period to 2014 shows that while record companies' sales revenue fell 17 per cent, record companies' payments to artists – in the form of royalties and unrecouped advances – declined much less in real terms (down 6 per cent) and therefore the artists' share of total sales revenues increased significantly as a share of sales revenue, by 13 per cent. Over

the five year period, total payments by record companies to local artists totalled more than US\$1.5 billion across the 18 markets.

More information about the role of record companies as the primary investors in the careers of musicians is available in the Investing in Music Report (see link above).

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 BILL

1. Copyright in Sound Recordings

IFPI welcomes the proposed amendment to Section 9(e) of the Act, which would transpose the text of Article 14 WPPT into the Act, but at the same time it is noted that some of the proposed changes are not consistent with the WPPT and/or international best practice, or are very unclear.

We submit that the Bill should be revised to clarify that:

- (a) Sound recordings continue to be protected as copyright works. The relationship between the rights proposed in section 20C and the copyright in sound recordings is unclear, at best. The provisions in section 9 and section 20C are overlapping and contradictory.
- (b) The Copyright Tribunal's jurisdiction covers only collective licensing schemes, it should have no jurisdiction over the commercial terms in direct agreements between individual right holders and users.
- (c) Artists and record companies can continue to freely negotiate the commercial terms, including the level of royalties, of artist agreements.

Each of these points is addressed in greater detail below by reference to the same paragraph lettering.

a) Sections 20 A through to 20 F are unnecessary, and overlap with and contradict Section 9 and the existing Performers' Protection Act

The South African Copyright Act follows the copyright tradition. Accordingly sound recordings are protected as works, and record producers enjoy protection as authors.

The proposed section 20 is an alien implant based on the civil law concept of “related rights”. It sits poorly in the South African copyright tradition, as demonstrated by the problematic overlaps and contradictions between sections 9 and 20 of the Bill.

We respectfully submit that the proposed section 20 should be deleted. Producers’ rights are set out in section 9. Performers’ rights are set out in the existing Performers’ Protection Act, and it is assumed that any changes relating to performers’ rights will continue to be addressed in that statute.

Notwithstanding our position that section 20 should be deleted from the Bill, we note that **section 20C(3) appears to downgrade the existing full exclusive rights of communication to the public (it is not immediately apparent which exclusive rights are being referred to) set out sections 9(c) and 9(e) of the Act to mere remuneration rights** (the minimum standard of protection afforded by WPPT). This would represent a weakening of protection and run counter to market trends by which record producers are increasingly reliant on income derived from the licensing of these rights as income from physical sales continues to decline (although income from licensing these rights has not offset the very substantial global losses in sales revenues).

The communication to the public right enables record companies to derive revenue from the public performance, broadcasting and other communications of sound recordings (as distinct from the making available of their works described above). The proposal to downgrade the communication to the public rights would weaken the industry’s ability to license those rights effectively and would have a negative effect on the South African record industry’s revenues and, consequently, its ability 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 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. 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 .

The **minimum** standard of protection required under Art.15 WPPT is that of a remuneration right. It must be emphasized that this represents only the **minimum** of harmonisation required. Indeed, the Agreed Statement to Article 15 WPPT provides expressly that the Article does not cap or limit the **maximum** extent of protection:

“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.”

We note that the existing South African law, at section 9 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. Exclusive rights enable record companies or their collective management organisations to negotiate fair commercial terms for the public performance and broadcast of sound recordings. These licensing activities benefit record companies and artists alike, since these revenues are shared equally by record companies and artists.

b) Section 9A would introduce a sweeping statutory licensing regime, contrary to international copyright treaties

The draft provisions of s.9A restate the Copyright Tribunal's power to set the terms of licence agreements between an individual right holder and a user.

This power 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). This power should be revoked.

It is submitted that oversight of collective licensing arrangements by a copyright tribunal can be appropriate in relation to collective licensing schemes. 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 schemes³.

We also have concerns regarding other provisions regarding collecting societies and rate-setting. For instance, the provision prohibiting the setting-up of joint collecting societies by right holders (in particular by performers and record companies) would go 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.

As a general point, it is also vital that any rates set by the Tribunal for the public performance or broadcasting of sound recordings 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.

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

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.

c) Section 9A(b) is counterproductive

As noted above, statutory licensing and Tribunal oversight of individual licensing of exclusive rights is contrary to international obligations (Berne and TRIPS) and would hinder rather than foster the market for music rights. Moreover, the provisions of draft section 9A(b) are problematic also because they disregard long-established industry practices, which have led to increased efficiencies in licensing practices, thereby increasing the revenues derived from licensing by artists and producers alike. The following is a brief description of relevant licensing practices which are currently applied in South Africa; draft section 9A(b) would make it impossible to continue with those efficiency-oriented practices.

1. It is industry practice for artists to assign rights to record companies. Record companies are then in a position to grant licences of bundled rights, which is fundamental to the possibility of large-scale licensing of sound recordings and the associated economic benefits for record companies and artists. Agreements between record producers and users depend upon record companies being able to grant licences to enable users to use substantial parts of record companies' catalogues, if not their entire catalogues. It would be entirely impractical to expect an agreement to be reached between the user, the record companies and thousands of performers. There are approximately 7,500 performers on Major record companies' rosters alone, and none of these performers will have mandated collecting societies to negotiate licences for their exclusive rights on their behalf. Requiring that performers who have already assigned their rights should subsequently negotiate rates for the making available of their recordings, goes against the industry practice and, crucially, would be completely unworkable. The proposed section 9A(b) could make licensing of catalogues of sound recordings impossible in practice, thereby stymieing developments in digital markets and reducing public access to music in South Africa. That cannot have been the DTI's intention.

We note the recommendation of the South African Copyright Review Commission in its 2012 report that *"it should not be necessary, (as Section 9A(1)(b) of the Copyright Act presently requires), for the determination of the royalty payable under Section 9A(1)(a) that the performer, or a collecting society acting on his or her behalf, should agree thereto. In this regard, the CRC accepts the contention of SAMPRO that the current provision is likely to lead to substantial problems in practice because of the difficulty of procuring the participation of a significant number of performers in a multiplicity of tripartite negotiations with potential users and copyright owners"* (CRC Report paragraph 3.3.7 at page 26).

2. To require that revenues from interactive and certain other exploitations of work be shared equally between the right holders (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. We have also noted the statement as long ago as 1993 by the Standing Advisory Committee on Intellectual Property that performance rights were necessary in order to replace sales of physical products lost due to technology and unlawful copying. (Standing Advisory Committee Report dated November 5th 1993 at paragraph 8). Compulsory equal sharing of all revenues would remove all profit from record companies, making it economically unviable to continue to produce new recordings, and breaking the

cycle of investment referred to above. While certain revenue streams may be appropriate for such sharing arrangements (i.e. non-interactive broadcasting and public performance rights when collectively administered), it would be a market killer if applied to on-demand communications.

3. 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 (see <http://www.ifpi.org/digital-music-report.php>) shows that across 18 territories local performers' share of industry revenues from digital services increased between 2009 and 2013 relative to record producers share, despite overall industry revenues decreasing. Although the policy motivation behind this proposed section is unclear, 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, and would therefore result in reduced revenues for all those involved in creating sound recordings.

The South African Government should revise this proposal and remove (a) the provisions extending the Copyright Tribunal jurisdiction, (b) statutory licensing to cover individual licensing of rights, and (c) the division of revenues between performers and record companies, except in respect of royalties paid by users in respect of the broadcast or public performance of protected works.

2. Limitation of Term of Assignment

a) Section 26(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 26(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 (26(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. The limitation would also have the effect of limiting 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 licensing their rights.

Draft section 39A (Unenforceable contractual term) would prevent record companies and performers from agreeing to contractual terms which would deviate from the provisions of the Bill. This element of section 39A 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. Similarly, proposed section 9B(2) which purports to give Ministerial oversight of contracts between *inter alia* record companies and artists constitutes a fetter on the freedom to contract and will hold up rather than encourage investment in artists.

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. 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.

3. 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.

4. 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.

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-test⁴.

Legal certainty drives innovation and growth

Record companies have licensed around 43 million tracks and more than 450 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. Fair use is not necessary to drive or sustain innovation, as evidenced by the huge increase in innovative licensed digital music services globally.

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 [REDACTED] put it:

“fair use means the right to hire a lawyer”⁵.

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

⁴ The 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”.

⁵ http://lessig.org/blog/2004/03/talkback_manes.html

In addition, the drafting of the fair use provisions is itself problematic, and it is not clear how the proposed “fair use” exception could 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-test⁶, would better achieve legal and commercial certainty.

We also note that draft section 12A(1) appears 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, 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 copied⁷. 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.

5. Other Points

Aside from the major concerns raised above, we also have concerns in relation to other provisions of the Bill such as:

- The **broadcasting quotas** (proposed section 10A(c)).
- Certain of the **criminal offences** (proposed 23(a)).
- Draft section 12A(7) concerning **parallel imports of trademarked goods** creates confusion by its proposed inclusion in the Copyright Act. While we assume this is not the intention, to permit parallel imports of sound recordings would constitute an unjustifiable limitation of the right in section 9(b) of the Act (and equivalent provisions for other copyright works). It would exacerbate the already serious piracy problems in South Africa.

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.

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.

⁶ The 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”.

⁷ 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>

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:

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Tel:

[@ifpi.org](mailto:ifpi.org)

4(1)(b)

Tel:

[@ifpi.org](mailto:ifpi.org)

ANNEX 1

ARTIST CASE STUDIES

5 SECONDS OF SUMMER

5 Seconds of Summer (5SOS) are a band from Australia who have taken the world by storm, becoming the biggest debut act of 2014 in the US, with a number one album that sold more than a quarter of a million copies in its first week of release.

The story began in 2011 when four school friends came together to play a gig locally after [REDACTED] had initially posted material on YouTube and was later joined by [REDACTED]. Post the release of their debut EP in Australia charted at no.1 in I Tunes album chart there with no label or promotion - the [REDACTED], felt they should secure a recording deal overseas to ensure they were pushed globally as soon as possible. He introduced them to [REDACTED] at Modest Management in the UK who in turn played them to [REDACTED] and [REDACTED] of Modest who collectively understood the band had a similar fan base to One Direction, who they also managed, despite their more punk influenced sound.

In February 2013, they approached [REDACTED], now [REDACTED] Capitol Records UK, and [REDACTED] and, played them the band's demos. [REDACTED] was impressed and went with his [REDACTED] to see them play live in Dublin. "We knew that they were stars. The material needed a little tweaking, but they had talent, likeability and star quality by the bucket load."

Capitol signed the band in May 2013 and introduced them to American producers and songwriters from a guitar background, such as [REDACTED]. [REDACTED] says: "We built up a body of work, about 50 to 60 songs and then worked on those that we felt could make the album."

At the same time, the label's digital team worked with its counterpart from the management company and helped grow the band's Twitter base from 250,000 to four million. The marketing team put in place the building blocks for a global promotional campaign.

[REDACTED] says: "Both label and management had a vision for the band that involved them being broken to a global audience. We had the backing of all the senior executives at Universal Music and I worked closely with [REDACTED] of Capitol Records US, who led the American campaign. We had a global taskforce at Universal Music dedicated to pushing the band across all the territories we operate in. Our teams talked on a daily basis as we prepared the campaign."

The team across the label and management were able to draw on many years of shared experience, with [REDACTED] and [REDACTED] knowing each other for almost 40 years, since they were the [REDACTED] of AC/DC. [REDACTED] says: "Part of the success of the campaign is down to the fact that there were almost 40 years of relationships between all of us involved."

5SOS's eponymous debut album went to number one on the iTunes chart in more than 70 countries worldwide and has since sold 2 million albums so far and counting. Plus the album entered the US Billboard Top 200 at no.1 selling 258,000 in its first week – the biggest debut by an Australian Band in the Soundscan era.

[REDACTED] says: "The digital age means you can now break an act simultaneously around the world, indeed you can't hold anything back as music spreads virally around the internet. The public

worldwide took to the band's authenticity and talent. We were able to make use of global machine to highlight their music and personalities to the world."

MKTO: USING A GLOBAL NETWORK TO BREAK AN ACT

MKTO are pop duo [REDACTED] and [REDACTED]. The story of their success is an example of how some record companies can leverage their global presence to help break new artists.

The pair met when their paths crossed in the TV world and were discovered, nurtured & developed by renowned writer/producers [REDACTED] and [REDACTED] who subsequently introduced them to Columbia Records in the US. But their first taste of commercial success was to come from thousands of miles away in Australia.

[REDACTED], [REDACTED] at Sony Music Entertainment, says: "As a global company we meet on a regular basis to take stock of new signings, new music and identify new opportunities on an international level. In one such meeting in London, [REDACTED] who runs our Australian and Asian region heard MKTO's track Thank You. He immediately felt he had a chance with this song and artist in his market. He returned to his team and launched into an engagement campaign. Within weeks, the social media pull noticeably shifted to Australia and soon we began to build on the Australian radio chart."

The campaign paid off with Thank You going triple platinum and topping the Australian airplay chart. The success enabled the US record company to further invest with the band's second single, Classic and ultimately release their full album in Australia before the rest of the world. The band returned on subsequent promotional trips and eventually partnered again with Sony Australia on a highly successful paid tour.

[REDACTED] says: "Every good record company must take risks –and must invest. Here, Sony Music Australia - lead by years of experience, passion and great ears - took a gamble on an unproven American signing. Columbia in turn took a risk developing a marketing and promotional campaign for a foreign market prior to their own. And thanks in no small part to plenty of hard work from the group and excellent guidance by their manager, these risks paid off."

The Australian campaign resulted in more than just local success and paved the way not only in their home market but globally.

[REDACTED] says: "With our Australian company taking early ownership of the MKTO project, it enabled the artist to undergo a rigorous bootcamp of experience before they encountered the intense & competitive US market. Six months of shooting videos, live shows, TV performances, media interviews and interfacing with the label and the industry gave them the insight & confidence to hit the ground running on home turf."

The record company went on to promote MKTO in the US where Classic is now platinum. And now sights have turned to the launch of the group's career in Europe – where they have already scored a Gold single in the UK and a platinum one in Sweden.

NEGRAMARO: INVESTING FOR THE LONG TERM

Sugar Music, Italy's leading independent record labels, signed rock band Negramaro ten years ago. The group has become the biggest Italian rock band of modern times, but their success did not come overnight.

_____ says: "Investing in a rock band in Italy can be difficult. There are usually a lot of people in a band so it can be expensive and rock is not really the dominant genre in Italy. But Negramaro had Mediterranean influenced melodic song writing that we found really interesting."

The band's eponymous first album was instinctive, but essentially self-produced and regarded as too alternative to attract a significant fan base among Italian consumers. Sugar Music brought in producer _____, who had worked with superstars such as _____, to work on some new songs that were repackaged with the first album, but the result was still not a commercial breakthrough.

_____ says: "We lost money on the project for the first two and half years, but we had a real belief in the band and invested in the production of a second album."

_____ worked with the band on their second album *Mentre Tutto Scorre* which was a rock-pop fusion which has greater traction with the Italian public. The band entered their song *Mentre Tutto Scorre* at the Sanremo Festival competition, often seen as breakthrough opportunity, but were eliminated in the first round.

Sugar Music played the album to the film director _____ who was enthused by the band. "He loved Negramaro's music and the fact that they had not broken as a band, and he put six of their songs into his film *Le Febbre*. It introduced them to a whole new audience and we leveraged this success to help them become a stadium filling rock band." The album sold more than 350,000 copies. In 2007, Negramaro relocated to the US to work on their new album *La Finestra*. The album was produced and arranged by _____, in collaboration with Negramaro themselves: it included fourteen tracks ranging from rock to harmonies inspired by the heritage of great Italian singers-songwriters; from electronic elements to "visual" lyrics evoking pictures and metaphors to explore a sense of social and personal discontent.

Among the most notable moments in the band's history are a string of memorable live shows; after hundreds of live shows, the band's extensive touring culminated in May 2008, with a memorable concert held at Milan's San Siro stadium, the first time ever for an Italian band to play the so-called "La Scala of football". The concert's images, music and atmosphere were captured in Negramaro's first live album *San Siro Live*. The DVD launch was an unprecedented cinematic and musical event, featuring screenings in more than thirty HD digital movie theatres all over Italy.

In 2010 Negramaro were back in movie theatres, this time penning the soundtrack for _____ criminal drama *Vallanzasca - Gli angeli del male*. The movie was presented out of competition at the 67th Venice Film Festival.

Negramaro went on to have a string of commercially successful albums, overall sales of more than 1.5 million, and Sugar Music has recently released a compilation of their biggest hits over the last decade. They also produced the anthem for the Italian football team's 2014 World Cup campaign.

The label is now trying to break the band outside of Italy, sending its songwriter [REDACTED] to writers' camps overseas and looking at promotional activities in Latin America and the US.

[REDACTED] says: "We took a chance on investing in Negramaro and maintained our belief in them even though success did not come overnight. We helped them develop their talent act and generated different opportunities to take their music to a wide audience. Believing in artists and supporting them is what we do and we are so proud now that Negramaro are the most popular band in Italy."