

From: [Art. 4(1)(b)]@ifpi.org>
Sent: vendredi 19 octobre 2018 15:08
To: [Art. 4(1)(b)] (TRADE); [Art. 4(1)(b)] (TRADE)
Subject: RE: South Africa updates
Attachments: 12102018_Further clauses for advertisement.doc

Dear [Art. 4(1)(b)],

I have a few more updates on SA for you, so allow me to summarise:

- 1) Following the misstatement of the experts' opinion regarding the treatment of the making available right under the WPPT, the DIT have redrafted the text to delete the making available right from BOTH Art.9A (statutory licence), which is fine, but also from Art.9 (list of exclusive rights), which is bad;
- 2) Please keep in mind that a new version of the Copyright Amendment Bill is about to be published; (there is a "Draft 4 of 10.11.2018", but please keep this confidential as the 11 Oct draft has not yet been officially circulated; the parliament has only released a few provisions (on CMOs etc; attached and dates 12 Oct) for comment (by Oct 25th), but these are not the problematic provisions..
- 3) Our initial idea of stocking with the existing status and claiming the making available right falls under the communication to the public right (listed in Art.9 amongst the exclusive rights) will NOT work because the FULL right of CTP is now subject to the statutory licence (Art.9A). Under the existing legislation, the statutory licence is more limited, so the proposed amendments are going backwards compared to the existing level of protection.
- 4) To solve the problem, we need to see the exclusive making available right reinstated into Art.9(f), but ensure that there is no reference to that right/Art.9(f) in Art.9A which lists the rights subject to the statutory licence.
- 5) Fair use and other ugliness mentioned in our comments below are still there in the October 11th version.

As for official contacts, all correspondence should be addressed to [Art. 4(1)(b)] (and her secretaries: [Art. 4(1)(b)] [Art. 4(1)(b)]@parliament.gov.za> and [Art. 4(1)(b)]@parliament.gov.za). [Art. 4(1)(b)] is assisted by the DTI staff. I do not have the names for the working level officials there, but for official comments on the bill we were directed to the [Art. 4(1)(b)] at the Department of Trade and Industry, Pretoria: [Art. 4(1)(b)]@thedti.gov.za

Best regards,
[Art. 4(1)(b)]

[Art. 4(1)(b)]

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From: Art. 4(1)(b)

Sent: 05 October 2018 10:55

To: 'Art. 4(1)(b) @ec.europa.eu'; Art. 4(1)(b) @ec.europa.eu'

Subject: South Africa updates

Dear Art. 4(1)(b) and Art. 4(1)(b)

I trust you are getting updates from the Delegation on the South African copyright amendments saga – both re the Copyright Act and the Performers Protection Bill. Please find below some input from our corner too:

- Please find attached the latest version of the **Copyright Act amendment bill – draft 3, dated 29 Aug 2018 (attached)** although we received it just recently. The main issue (amongst many horrors) is the attempt to reduce the exclusive making available right to a remuneration right and putting it under a statutory license (again! Sigh...). This crazy idea was out of the previous version of the draft (version 2), but has reappeared in version 3.
- Below, you will find IFPI's comments on this version – we will be sending these comments formally to the relevant parliamentary committee, but I don't yet know if we will do so as IFPI or via our national group, RISA
- On the **Performers Protection Bill 2016**, there were public hearings in parliament in September. RISA made a presentation (together with an artist) – please find attached the slides from the hearing. Our impression post-hearing is that some of these points were not understood and the idea of massively limiting the freedom of contract (even where both parties are independently legally advised, which is standard practice these days) is still in the air. If those "protection" proposals go through, then South Africa will be full of very well "protected" but unsignable acts as these proposals cut right across investment cycles and risk calculations for music labels as the only upfront investors in the production enterprise. This legislative proposal also includes a US-

style fair use doctrine, so the package is completely counter-productive for the creative industries / right holders.

- Apart from the slides, please find attached our draft comments on the performers' bill as agreed by IFPI with RISA. These are the arguments that our industry is putting out locally in the discussions.

Please feel free to share the above with the Delegation, but please note that only the ppt slides have been presented in public.

Best wishes,

Art. 4(1)(b)

THE SOUTH AFRICAN DIGITAL MUSIC INDUSTRY NEEDS A FAIR LEGAL FRAMEWORK

The music industry is increasingly a digital business, with 50 percent of revenues globally coming from digital uses of music. In South Africa, that percentage was 49 percent in 2017 (and far higher if performance rights are not included), up from 33 percent in 2016, showing the enormous potential for growth. However, to provide a healthy internet environment for legal digital music services to launch and grow, to the benefit of producers, artist 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, 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.

The proposed treatment of sound recording producers' making available right in the Bill risks destroying the South African digital music market, and thereby substantially reducing investments in South African artists, as we explain below.

1. Harmful And Unjustified Downgrading Of The Making Available To The Public Right

The Bill introduces a new Section 9A(1)(a)(iv), which would subject the exclusive right of making available to the public in section 9(f) to the section 9A statutory licence.

The effect of this section would be to downgrade the right of making available to a mere remuneration right. This risks rendering the economics of a digital music market in South Africa wholly unfeasible. The problem is compounded by the proposed equal sharing of revenues from the making available right between producers and performers. We explain below the harmful effects of:

1. Downgrading the right of making available to the public to a mere remuneration right.
2. Subjecting the making available right to the sweeping statutory licence regime in section 9A.
3. Mandating the equal sharing of revenues from making available to the public between performers and producers.

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 proposed by Section 9A(1)(a)(iv). 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, 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 render South African copyright law incompatible with Article 14 of the WPPT.

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

The effect of section 9A would be to entirely remove right holders’ control over how to license the right of making available (as well as the other rights covered by the section). Most concerning, it would enable 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 result in a race to the bottom, not only substantially reducing the revenues for performers and producers that can be derived from digital uses of works, but also thereby reducing the available revenues to reinvest in South African artists.

The proposed power for the Tribunal to set the terms of licence agreements between an individual right holder and a user amounts to an intervention into private contract law and constitutes a serious limitation on individual record companies’ and other right holders’ ability to authorise or prohibit the use of their sound recordings. Such an expansive limitation on the rights would be contrary to the WCT and WPPT treaties, which the Bill is otherwise seeking alignment with.

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.

2. Equal Sharing Of Revenues From The Making Available Right Would Render The South African Digital Music Market Unviable

The provision in section 9A(2)(a) requires that revenues derived from the licensing of the making available right be shared equally between producers and performers. Regrettably, the provision has

not been drafted with due consideration for the practical realities of the licensing structure of the recorded music industry or of its economics.

To be clear, revenues from public performance and “needletime” rights are already shared equally between producers and performers, and we do not object to a confirmation of that arrangement in the Bill.

However, requiring that revenues from exploitations of the making available right be shared equally between record producers and the performers would be economically unfeasible, considering factors including that record companies cover all the costs and carry the risk of bringing new artists to market. Compulsory equal sharing of all revenues from making available to the public would remove all profit from record companies, making it unviable to continue to produce new recordings, and thereby breaking the cycle of re-investment of revenues.

Revenues from digital services, which are licensed under the making available right, comprise an increasingly large proportion of record industry revenues internationally and are vital to the sustainable future of the record industry and the performers with whom they partner. In other words, these revenues are replacing the revenues generated by sales of physical products, principally CDs. At the same time, research conducted by IFPI shows that across 18 territories local performers’ share of industry revenues from digital services increased by 20 percent between 2009 and 2015 relative to record producers share, despite overall industry revenues decreasing. This shows that the economics of the digital music market work for performers. Although the policy motivation behind this proposed section of the Bill is not articulated in the Analysis section of the Bill, to the extent that it is to increase performers’ share of revenues from digital services (which our research shows is already happening), it is likely to have the opposite effect. The actual effect of this provision would be to drastically reduce producers’ and performers’ revenues, thereby removing the ability and incentive for record companies to invest by making the licensing of certain digital services entirely uneconomical. While certain revenue streams may be appropriate for such sharing arrangements (as stated, this is already the case in respect of traditional broadcasting and public performance rights when collectively administered), it would be a market killer if equal sharing was applied to interactive uses of recordings, which are covered by the making available right.

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

3. Technological Protection Measures (TPMs) And Related Provisions Need To Be Revised To Ensure Meaningful Protection

Further, we would like to highlight 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 restrict 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, 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.

Finally, the exceptions in **section 28P** in relation to prohibited conduct in respect of

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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.

Art. 4(1)(b)

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