



IFPI Submission on The South African Copyright Amendment Bill and Performers' Protection Amendment Bill

22 February 2019

IFPI, representing the recording industry worldwide, has some 1,300 record company members in some 60 countries and affiliated industry associations in some 57 countries. IFPI's objective is to develop fair and balanced market conditions for our members to operate in, to enable the recording industry to continue to invest in artists, create jobs, and contribute to economic growth. We are grateful for the opportunity to submit comments on the draft Copyright Amendment Bill and Performers' Protection Bill, and would welcome the opportunity to appear before the NCOP should hearings on these bills be held.

The National Council of the Provinces has a vital role to play in ensuring that this legislation creates a legal framework that sets a gold standard for the African continent, underpinning the growth of the South African digital industry for the benefit of South African creators, consumers and South African culture. The bills before the NCOP regrettably would not achieve this. Instead, they risk setting South African creative sectors back, reducing investments in South African cultural industries, and harming all participants in the creative economy, including the very creators that these draft laws seek to support. We therefore respectfully and strongly urge the NCOP to pause to consider the impact that these Bills would have in their present forms, and make changes to the Bills which are essential to avoid these dire consequences, as we explain in this submission.

The context – creating and releasing recorded music is a high-risk activity that depends upon high levels of investment and deep partnerships between record companies and artists

Music does not just happen. Taking a song from a concept to a recording and then distributing it takes a huge amount of work, time and effort, and an array of people. There are the writers and recording artists, the creators and performers. There are those who discover and nurture artists, those who produce the recordings and the videos, and those who market and promote them. And there is the distribution, in physical and digital formats, to thousands of retail partners and digital services.

All this demands substantial up-front investment, well before a single stream plays or an album goes on sale.

Success often also requires a long-term vision. The vast majority of albums do not break even financially, and those that do take time to do so. Nor is the true value of every artist or album immediately recognised and appreciated.

Record companies remain the largest investor in music, investing 27 percent of their revenues into A&R and marketing. They have sustained this investment through recent years, even as the industry weathered two decades of revenue decline.

The partnership between artists and labels goes far beyond the financial. Record companies nurture artists, allowing them to develop their sound, their craft and their careers. Labels' marketing expertise and resources enable them to create and deliver cutting-edge campaigns that engage fans around the world. They help manage thousands of partners spanning the globe, requiring local expertise in each market with networks of relationships and marketing. The bills before the NCOP risk seriously harming the carefully balanced ecosystem that enables record companies to invest in and partner with artists, working together to drive the success of the South African music industry.

1. EXECUTIVE SUMMARY

We welcome the commitment of the South African Government to modernising South African copyright law to make it a standard for the region and to bring it into line with the WIPO Internet and Beijing treaties and best practice, in pursuance of our shared appreciation for, commitment to, and support of the creative as well as the commercial success of South African art and artists. We also support the aim of the Copyright Act Amendment Bill and the Performers' Protection Amendment Bill of ensuring that South African creators are remunerated fairly for their artistic endeavours, the fair remuneration of artists already being of central importance to our sector. In their present forms, the Bills will not achieve these aims.

We understand also that that there are serious concerns regarding the constitutionality of both bills. These concerns are elaborated in more detail in the submission by RiSA, the IFPI national group in South Africa. We further understand that as a result the bills may be found to be invalid.

Regardless of the above concerns regarding constitutionality of the Bills, we proceed to comment them and in this submission we respectfully propose essential changes to these Bills to avoid the most harmful unintended consequences.

The principle areas of concern are:

Copyright Amendment Bill ("CAB")

1. **Section 8A:** Drastic interferences into the commercial arrangements around the exploitation of music videos, which risk reducing the income of a large number of performers, reducing the number of performers who will be engaged to perform in music videos, and reducing the revenues available to record companies to invest in South

African artists and repertoire. In addition, the potential retroactive effect of these provisions would appear to be unconstitutional.

2. **Section 39:** Broad Ministerial powers to prescribe contractual terms, thereby unduly regulating the framework in which the creative industries may operate.
3. **Section 12:** The introduction of a sweeping open-ended US-style “fair use” exception, combined with numerous new enumerated exceptions.
4. **Section 1(h) (and related sections):** Inadequate implementation of provisions concerning technological protection mechanisms, which risks turning South Africa into a safe haven for piracy.
5. **Section 9A (1)(aA) – (aB) and 8A(6)(a)-(b):** Reporting obligations, which could be misinterpreted as downgrading exclusive rights to mere remuneration rights, which would be incompatible with the WIPO Performances and Phonograms Treaty which South Africa intends to ratify.

Performers Protection Amendment Bill (“PPAB”)

1. **Section 3A:** Unwarranted and harmful restrictions on the transfer of rights by performers, including an automatic reversion of assigned rights after a maximum of 25 years, and Ministerial obligations to regulate the terms of contractual agreements between performer and producers. These provisions would wholly undermine the South African music industry, reducing revenues for performers and producers alike, and creating major disincentives for investment in South African record companies and artists.
2. **Downgrading of performers’ rights from exclusive to mere remuneration rights:** The bill proposes levels of protection for certain performers’ rights, which less than the requirements of the WIPO Performances and Phonograms Treaty which South Africa intends to ratify.
3. We also note that the problematic fair use provision and provisions on technical protection measures are duplicated by reference to the CAB.

We address each of these issues in detail below.

2. NCOP HEARINGS ON THE BILLS

We understand that the NCOP may hold hearings to hear the view of stakeholders on these bills. Given the importance of the bills to the future of the music industry in South Africa, and the serious threats they pose in their present form to that that future, we respectfully request that we and other stakeholders be given the opportunity to appear before the NCOP to present our concerns.

Detailed Comments on the Copyright Amendment Bill (“CAB”)

1. SECTION 82 – MANDATING A ROYALTY ENTITLEMENT FOR ALL AUDIOVISUAL PERFORMERS WILL RESULT IN REDUCED INCOMES FOR PERFORMERS, REDUCED ENGAGEMENT OF SOUTH AFRICAN PERFORMERS IN AUDIOVISUAL PRODUCTIONS AND REDUCED INVESTMENTS IN SOUTH AFRICA

Section 8A of the draft bill presented to and passed by the National Assembly includes a new proposal, introduced without prior consultation, to regulate the remuneration terms of private contractual agreements between audiovisual performers and audiovisual copyright owners, which includes performers in and copyright owners of music videos.

Section 8A(1) proposes that performers shall “*have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8*”, i.e. all licensed uses of audiovisual works, or sales thereof. Section 8A (2)(a) proposes that the written agreement between the performer and the copyright owner may be agreed between the parties’ collecting societies, despite collecting societies having no role in such agreements. Finally, section 8A(3) provides that in the absence of an agreement on the amount of the royalty, the amount may be determined by the Tribunal, whose jurisdiction should be limited to determining disputes concerning collectively managed rights.

Regrettably, the absence of consultation on this proposal has resulted in a provision that risks fewer South African performers being engaged to perform in music videos, a reduction in income for those who are engaged, and a reduction in investments in the South African music industry, for the following reasons

1.1 How performers are paid for their performances in music videos now

Music videos comprise varying contributions from different types of performers, who require varying contractual and remuneration agreements:

- Performances from **featured performers** (the artist or artists with whom the record company has partnered). Featured artists, who have ongoing partnerships with record companies, are remunerated in accordance with the terms they have negotiated (and re-negotiated from time to time) with their record company, and these terms almost invariably are on a royalty basis (in addition to often substantial lump-sum advances); and
- **Performances from non-featured 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). Non-featured performers are typically remunerated by way of one-off lump-sum payments. A music video can contain performances from dozens of background performers.

These different modes of remuneration for these two categories of performer reflect the relatively ancillary role played by non-featured performers when compared to the featured

artist. This also reflects the fine economic balance underpinning the music industry, which would be dismantled with harmful consequences by the one-size-fits-all approach proposed in this provision. Finally, it reflects the fact that non-featured performers work on numerous different productions and want to be paid upfront for their work. This approach also means that non-featured performers do not share in the risk of the production. If the production does not succeed commercially, as they majority do not, these performers are not affected. They have been paid and their payment is not contingent on the success of the production.

1.2 Draft section 8A would fundamentally change the economics of the industry to the direct detriment of performers

Section 8A would end the long-established international and South African practice of upfront payments to non-featured performers. Instead, section 8A would mandate that these performers must be paid on a royalty basis, meaning that instead of receiving an upfront payment for their contributions to music videos, these performers would have to wait to receive a share of royalties derived from licensed uses of the music video.

In practice, because only the minority of music releases are commercially successful, this means that very few background performers will ever receive royalties equivalent to the one-off payments they enjoy now, and further it will take significantly longer for them to receive any revenues from their performances at all.

Draft section 8A will therefore remove the certainty of income for these performers, and instead require them to share in the risk of the production, with no guarantee of any payment. Record companies take these risks with every music video and sound recording they produce, not least with new artists, but non-featured artists do not. Draft section 8A will change that to the clear detriment of those performers.

1.3 Draft section 8a will reduce the investments that record companies can make in South African artists and repertoire.

Draft section 8A would entitle all performers to share in revenues from licensed uses of a music video, irrespective of the nature of their performances. Where a production is not commercially successful, there will be little by way of revenue to share as explained above. For the minority of productions that do succeed commercially, those revenues would have to be shared with a much larger group: the featured artist (who is already contractually entitled to royalties), every non-featured performer who has performed in the music video irrespective of the nature of their contribution, and the record company. Put simply, the featured artist's and record company's share of revenues will be reduced. This will have the direct result of reducing featured artists' revenues and the revenues for record companies to reinvest in artists and repertoire, meaning fewer South African artists' careers will be given the opportunity to succeed. In the worst case even the most successful productions will become unprofitable, meaning the incentive to invest in such productions at all will be significantly reduced, if not removed. Indeed, this worst case may be the most probable because section 8A seemingly does not even entitle the copyright owner to recoup its costs before such shares in royalties become payable (unlike section 6A, for example, where "royalty" means gross profit).

1.4 Fewer South African artists will be engaged to perform in music videos

The consequences outlined above are not economically sustainable. The most likely outcome, therefore, would be that fewer South African performers will be engaged to work in music videos. Music videos would either be produced overseas or those produced in South Africa will include fewer non-featured performers because the risks of large productions would simply be too high.

It is inconceivable that the above outcomes represent the intended consequences of these proposals. We respectfully submit that 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, and without reducing investments in those South African artists. We also strongly urge removal of the references to collecting societies, since it is not the role of a collecting societies to negotiate individual contracts between producers and performers. Finally, it would be wholly inappropriate for the Tribunal to set remuneration rates in private contractual agreements. The power of the Tribunal to do so would simply delay agreements being reached and discourage investment in South African performers and productions.

1.5 Retroactive effects of these provisions

Finally, but very significantly, section 8A(5) purports to apply the above provisions to contracts entered into force before the date that the law comes into force. This would have the effect of undoing contracts previously agreed between performers and producers, based on the legitimate expectations of the parties at the time of entering into such contracts. Such a provision would set a very dangerous precedent for South Africa, eroding privity of contract and sending a message that the State can at any time undo contracts that were entered into by the parties lawfully. There would also be a significant economic impact, again reducing investments. Finally, we have concerns about the constitutionality of such a provision.

Proposed amendments

1. Musical performances in audiovisual works should be excluded from the scope of section 8A(1).

OR

2. The provision insofar as it applies to music videos should apply express state that it applies only to featured artists (the principal artist named on the production).

AND

3. In any event, the provision should be made subject to contractual agreement providing for alternative modes of remuneration

AND

4. In any event clarify that “royalties” has the same meaning as in draft section 6A.

AND

5. In any event remove the reference to the Tribunal being empowered to set the royalty.

AND

6. Delete section 8A(3) and the references to the Tribunal elsewhere in section 8A.

AND

7. Remove references to collecting societies.

AND

8. Remove section 8A(5).

2. DRAFT SECTION 39: 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. 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, for example, prescribe the terms on which a record company licenses a digital music service, including royalties payable under the licence.

Setting the terms of agreements between record companies and performers would also be inappropriate since different performers seek different terms from record companies. Neither party would benefit from rigid standard terms, that would effectively substantially reduce or even remove competition from the market.

Even when it comes to the remuneration terms for uses covered by producers’ mere remuneration rights (broadcast and certain communication to the public), the Minister should not be empowered to set such terms. Rather, as already provided by South African law, such terms should be determined by the Tribunal in the absence of an agreement between the parties and following the filing of evidence and the opportunity to make representations.

A thriving South African cultural sector would be best supported by robust copyright protection, not by undue regulation private contractual agreements. Such provisions risk disincentivising investments in South Africa, since the ability to determine the terms on which copyright is licensed or assigned is a key part of establishing thriving content markets. This is particularly true of digital markets where the flexibility of freedom of contract enables right holders to respond rapidly and innovatively to market developments. The recording industry is highly competitive and record companies need to be able to respond to the varying needs of artists in order to compete to work with them. These provisions would therefore impose contractual formalities that benefit no party.

Furthermore, section 39B(1) further restricts contractual freedom, and fails to take into account the numerous legitimate reasons why parties may wish to contract out of protections afforded by the law.

Recommendation

We recommend that drafts sections 39(cG), (cI), (cJ) and 39B(1) be removed.

3. DRAFT SECTION 12: FAIR USE AND OTHER EXCEPTIONS

IFPI respectfully 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, nor 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, we submit 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. The most likely result of introducing fair use will be a transfer of value from South African creators to large multi-national technology corporations who, unlike most creators, can afford to litigate the issue of fair use.

The difference between fair use and 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.

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”¹.

Fair use therefore hands a significant advantage to users of copyright works who can afford lengthy and complex litigation.

Consequently, and contrary to the aims of this legislation, introducing fair use would result in a transfer of value from South African performers, producers and other creators to large - mainly foreign - technology corporations.

The introduction of fair use would be even more severe because it forms part of what has been referred to as a “hybrid” approach, which essentially means fair use is in addition to all the existing enumerated exceptions and the new enumerated exceptions proposed in the CAB. The relationship between this amalgamation of different legal traditions is unclear and will serve only to exacerbate the uncertainty that fair use would create. In practice if a user cannot rely on one of the myriad enumerated exceptions, they will fall back on fair use, and extensive litigation will be required to establish what South African fair use means.

This uncertainty will hamper the development of the South African digital music market, and harm South Africa creators. We strongly urge the NCOP to uphold the fundamental principle of legal certainty and to reject fair use.

Recommendation in relation to fair use

We urge the removal of fair use from the bill. The bill already sets out new enumerated copyright exceptions in addition to those already available in the existing Copyright Act. There is simply neither need nor justification for this significant change in the law.

Other new enumerated exceptions are problematic, including the over-broad quotation exception, which could undermine the existing market for sampling of sound recordings, and a broad private copying exception which is not accompanied by a remuneration system (contrary to international practice) and extends to digital storage, risking undermining existing licensing practices. We recommend that at the very least, these exceptions are made subject to the three-step-test, and we refer to our more detailed comments on these provisions in our letter to the Deputy Director General dated 1 October 2018.

¹ http://lessig.org/blog/2004/03/talkback_manes.html

4. 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 the Performances and Phonograms Treaty (WPPT), which South Africa intends to ratify, 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.

4.1 Definition of “technological protection measure”

First, the definition of “technological protection measure” in section 1(i)(a) 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), for example, the following amendment be made to the definition in **section 1(i)** of the Bill. 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).

We also recommend that the definition of ‘**technological protection measure circumvention device**’ be amended also to include services and 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 services, which would also be consistent with Article 6(2) of the EU Copyright Directive, for example, and would therefore be compatible with WPPT (and the WIPO Copyright Treaty).

Recommended amendment

Section 1(i) '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~~

Deletion of paragraph 1(h)(b).

Section 1(i) 'technological protection measure circumvention device or service'

Replace proposed definition with:

Means devices, products or components or the provision of services which:

(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, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or
facilitating the circumvention of,

any effective technological measures.

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).

Section 28P(2)(a) already provides for a redress mechanism for persons who are unable to circumvent a technological protection measure for a permitted use.

Furthermore, section 33(ch) of the Bill, amending section 39 of the Act, already provides for Ministerial powers to prescribe permitted acts for the circumvention of technological protection measures. The Bill is therefore sets out a mechanism for addressing any concerns

relating to technological protection measures restricting permitted uses. This recommended approach would be adequate and appropriate.

Recommendation

Sections 28P(1), (2)(b) and (3) should be removed.

5. UNCLEAR REPORTING OBLIGATIONS, WHICH COULD BE MISINTERPRETED AS DOWNGRADING EXCLUSIVE RIGHTS TO MERE REMUNERATION RIGHTS

Section 9A (1) (aA) – (aB) of the CAB requires users to notify the copyright owner, performer, indigenous society or collecting society of any uses of sound recordings and to submit reports on such usage for purposes including calculating royalties that are due. Section 8A(6)(a)-(b) of the CAB requires users of audiovisual recordings to do the same.

We understand that these provisions are intended solely to ensure that licensed users of rights report their uses accordingly. However, the provisions are unclear, and could be misinterpreted as conveying a right of use upon users, provided they comply with the notification requirements set out in these draft provisions. This potential confusion is caused particularly because these sections envisages a user registering their uses and providing a “complete, true and accurate report” of their uses “for purpose that include the calculation of royalties due and payable by that person”. If these sections 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. Such an approach would be incompatible with the nature of the exclusive rights set out in the present Act and in the CAB, and would consequently be incompatible with the WIPO Copyright Treaty, the WPPT the TRIPS Agreement and the Berne Convention.

Recommendations in relation to proposed sections 8A and 9A

1. Sections Section 9A (1) (aA) – (aB) and 8A(6)(a)-(b) should expressly apply only to licensed uses of sound recordings and audiovisual works.
2. To avoid an undue interference with private contractual agreements, these sections should be made subject to the terms of contracts agreed between the licensor and licensee.

Detailed Comments on Performers' Protection Amendment Bill

1. SECTIONS 3A AND 8D: HARMFUL RESTRICTIONS ON TRANSFER AND UNJUSTIFIED REGULATION OF PRIVATE CONTRACTUAL AGREEMENTS

While we support proposed section 3A(1), which provides that where a performer has consented to the fixation of their performance, their exclusive rights under section 3(c),(d),(e),(f),(g) and (h) are transferred to the copyright owner of the audiovisual work or sound recording in question, proposed section 3A(3) will harm producers and performers alike, for the reasons we explain below.

1.1 Section 3A(3)(A) – unjustified interference in private contractual arrangements

Draft section 3A(3)(a) would require that written agreements between producers and performers “*must at least contain the compulsory and standard contractual terms as may be prescribed*”. Draft section 8D provides that the Minister must make regulations prescribing compulsory and standard terms covering seemingly every aspect of the contractual relationship between a producer and a performer (the rights and obligations of both parties, the remuneration terms, the method and timings of payments, the term of the agreement, and dispute resolution mechanisms).

These provisions not only represent severe (and unsupported by an evidence-based need) intrusions into private contractual relations, but are also premised on the assumption that producers and performers should be subjected to rigid, one-size-fits-all contractual regulation. This ignores the reality, which is that partnerships between producers and performers vary greatly, and that both parties benefit from the flexibility that contractual freedom permits.

In the context of sound recordings and music videos, 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 musician or dancer and the copyright owner. The relationships between record companies and performers within in those two categories will also vary greatly, and are wholly unsuited to standard contractual terms.

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 must also compete to provide the varying levels of service required by different artists. The agreements between featured artists and record companies reflect negotiated agreements in which the artist is professionally represented, and these agreements can vary significantly from one artist to another. For example, one artist may want a “full service” agreement with a record company where the partnership covers almost all aspects of the artist’s professional career, whereas another artist may want the record company to play a more limited role. Contractual terms set by a Minister will never be able to take the nuances of these highly personal relationships into account, and will instead

reduce competition in the market to the detriment of artists who require increasingly bespoke agreements from their record company partners.

There is simply no evidence justifying this extensive interference into contractual relations.

Recommendation

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

1.2. 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” in section 3A(3)(b) risks creating confusion because it is a technical term that is understood internationally as having a particular meaning in respect of the remuneration payable for the exploitation of mere remuneration rights.

Recommendation

We recommend that draft section 3A(3) be deleted and section 3A(2) be amended as follows:

(a) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer and must set out the remuneration terms agreed.

1.3. The proposed reversion of assigned rights after 25 years will harm the very performers the provision purports to protect

Draft section 3A(c) proposes to limit the term of contracts between performers and copyright owners of sound recordings to a maximum term of 25 years. This provision would have seriously harmful consequences for South African performers, producers, songwriters and publishers alike, reducing revenues from recorded music and reducing investments in South African artists and repertoire.

Not only would this provision harmfully disrupt the well-established practices of the recording industry in South Africa and internationally, it will have the unintended consequence of the majority of South African recordings ceasing to be available to the public, and therefore ceasing to generate any revenues for performers, producers, authors or publishers after 25 years:

1.3.1 *Reversion of rights will make sound recordings unusable after 25 years, thereby harming the very performer that the proposal purports to protect*

Sound recordings almost invariably include performances from a large number of performers, comprising:

- the **featured artist** (the principal performer or performers (in the case of a band or group). Featured artists enter into partnerships with record companies whereby the two parties work together to produce, typically, a number of albums (the partnerships are much broader than that, but this element is relevant for present purposes). Featured artists receive “advance” payments from record companies (lump sums, often very substantial, which provide income for the artist to work on their music), and royalties from the revenues generated by the recordings; and
- “session musicians” who perform the “backing track”, such as a drummer or backing vocalist. Session musicians, typically contract with record companies on a one-off basis to perform in the background of one or more tracks. They are paid upfront, and tend to work on numerous projects across different record companies.

In each case the performer typically assigns their performers’ rights to the record company. This enables the record company to license third parties, such as digital services, to make the recordings available to the public, thereby generating revenues from the recordings, which are shared with the featured artists, and reinvested at high rate back into the development and marketing of new artists and repertoire. On average 27 percent of record company revenues are invested back into artists and repertoire and the marketing of them.

Reversion of these assigned rights to performers after a maximum of 25 years would fragment the rights in a recording and render it unusable by anyone. Because a recording is made up of a number of performances, no-one would gain anything from the reversion of the rights in their performance. A performer cannot do anything with their reverted rights in their percussion performance on a track that comprises, for example, other performances by backing singers, keyboard players, drummers etc etc. These rights on their own cannot be licensed without all of the rights of the other performers and of the record company.

The sole effect of the reversion would be that the rights in the recording are fragmented between the record company which owns the copyright in the sound recording and the performers who each own their rights in their own contribution to the overall track, with no party able to license and derive revenues from their individual rights.

Therefore, unless following the reversion of rights the record company can secure new assignments or exclusive licences from each of the performers of a track, the track cannot be used by anyone. The inability of the record company to regain the reverted rights from just one performer (eg the drummer) would mean the track cannot be licensed to, for example, a digital music service, because the use would infringe the drummer’s reverted rights even if all of the other rights had been re-assigned back to the record company.

This is not a hypothetical risk. When considering the thousands of tracks produced by a record company in partnership with many thousands more performers, the impossibility of securing renewed assignments of rights after the reversion is clear. While the record company may have an ongoing relationship with the featured artist on a track or album, locating every session musician who has performed on a track or album would be impossible in many cases.

The effect of the proposed 25 year reversion will therefore be that a vast catalogue of recorded music will fall out of circulation because it simply cannot be used without infringing one or more parties' rights. In effect the period that a sound recording can generate revenues for producers and performers will be halved from the current 50 year term of protection to a maximum of 25 years.

A provision intended to protect performers would therefore in fact harm them, as well as harming the producers whose investments are vital to the careers of recording artists, while depriving South African culture of a vast array of recorded music.

The harm will be felt even more acutely because historic repertoire is an increasingly important part of record company and performers' revenues 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 can generate revenues from digital services over a longer period of time. The proposed provision would result in the majority of sound recordings produced after the law comes into force being removed from such services after 25 years because the rights could not be cleared.

1.3.2 Reversion of rights would have a direct negative effect on investments in South African artists

As set out previously, the recording industry is a high-risk investment industry. Record companies invest substantially in new artists, paying them advances and investing large sums in the production of their recordings, music videos, tour support, marketing and other costs. It is these investments that enable artists to focus solely on their art rather than having to work for a living while trying to create.

The majority of new artists do not "break through", meaning the record companies' investments are written-off (we note that nonetheless unsuccessful artists are not required to re-pay the advances paid by record companies to them – the record company incurs these losses). This means that the revenues from successful sound recordings (which are shared with featured artists) are vital to the ability of record companies to be able to invest in new artists and repertoire. If record companies cannot do this, many artists' careers will simply never get started.

For the reasons set out in the section above, the proposed reversion provision risks rendering the majority of recordings unusable after 25 years. That means such recordings would cease to generate revenues for record companies and artists, reducing the revenues available to reinvest into new artists and repertoire. The virtuous circle of re-investment would be seriously disrupted, to the direct detriment of emerging South African artists and South

African culture as a whole. Again, these are real, not hypothetical consequences of the proposal, and are surely consequences that are not intended. We therefore respectfully urge the NCOP to propose amendments that will avoid these seriously harmful consequences.

Recommendation

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

In the alternative, section 3A(3)(c) should be amended to make the reversion provision subject to contract as follows (insertion of underlined words):

3A(3)(c) “shall, subject to a written agreement to the contrary, be valid for a period of up to 25 years from the date of commencement of that agreement in the case of a sound recording, where after the exclusive rights contemplated in subsection (1) reverts to the performer.”

2. DOWNGRADING OF PERFORMERS’ EXCLUSIVE RIGHTS TO MERE REMUNERATION RIGHTS WOULD BE INCOMPATIBLE WITH THE INTERNATIONAL TREATIES (WPPT AND BEIJING IN THIS CASE) WHICH SOUTH AFRICA INTENDS TO RATIFY

Unjustified downgrading of performers’ exclusive rights

Sections 3 and 5 of the PPB sets out the rights granted to performers and are in part duplicative.

More importantly, though, 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.

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 authorised third parties without full usage reporting being provided to the relevant right holders 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). 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 present Act 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).

3. EXCEPTIONS (DRAFT SECTION 8)

We refer to section 3 of this submission in respect of the Copyright (Amendment) Bill concerning proposed amendments to the provisions in that Bill on introducing fair use and numerous other exceptions. 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.

4. TECHNOLOGICAL PROTECTION MECHANISMS (DRAFT SECTIONS 8E AND 8F)

We refer to sections 4 of this submission in respect of 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 input may be required.

CONCLUSION

IFPI once again thanks the NCOP for the opportunity to make this submission, and stands ready to provide any further information that may be required by the NCOP. We once again reiterate our respectful request to be given the opportunity to present our concerns regarding these bills to the NCOP.

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