



**SAMRO**  
Southern African Music Rights Organisation

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The Department of Trade and Industry (DTI)  
77 Meintjies Street, Sunnyside  
PRETORIA, 0002  
Block B, 1<sup>st</sup> Floor (CCRD)  
Private Bag x14  
PRETORIA, 0001  
Fax: (012) 394 2510  
Email: [publiccomments@thedti.gov.za](mailto:publiccomments@thedti.gov.za)

Attention: MacDonald Netshitenzhe

17 June 2008

Dear Sirs/Madams

**RE: POLICY FRAMEWORK FOR THE PROTECTION OF INDIGENOUS TRADITIONAL KNOWLEDGE THROUGH THE INTELLECTUAL PROPERTY SYSTEM AND THE INTELLECTUAL PROPERTY LAWS AMENDMENT BILL, 2008 (Notice 552 of 2008, GG 31026 of 5 May 2008) - COMMENTS BY THE SOUTHERN AFRICAN MUSIC RIGHTS ORGANISATION (SAMRO)**

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We refer to the above-mentioned notice in the Government Gazette and the concomitant call for public comments. The following serves as SAMRO's comments and contribution in this regard.

#### 1. INTRODUCTION AND EXECUTIVE SUMMARY

From the outset SAMRO deems it necessary to laud the Department of Trade and Industry (DTI) for these important steps taken in addressing a subject of great importance for developing countries, namely providing legal protection to works of a traditional origin and character. SAMRO agrees with the DTI that we cannot wait for the failed negotiations within the WIPO/UNESCO/WTO frameworks before we can begin to offer protection to our traditional works and performances.

In view of the laudable efforts of the department in this regard we would like to submit our contribution and comments on the Intellectual Property Laws Amendment Bill ('the Bill') in its present version, in order to plead with the department to effect certain changes to the Bill which SAMRO believes are essential if the objectives of the policy framework are to be achieved.

SAMRO is the largest organization in Africa involved with the collective management of copyright in musical works. As a significant player in the copyright administration field, SAMRO always has an immense interest in new developments in this area of law. SAMRO administers both performing rights and mechanical rights in musical works, and has recently been accredited as a collecting society with regard to the administration of public play (or so-called 'needletime') rights.

SAMRO's membership is comprised of authors, composers and publishers of musical works, as well

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as performers. SAMRO has in excess of 7000 active members, as well as over 10 000 other members whose works are not actively earning royalties. In addition, SAMRO controls the copyright of over a million other rightsholders from all over the world, and in total administers a repertoire of over four million musical works. This is made possible through reciprocal agreements entered into with over 200 similar societies from all over the world, who all belong to the International Confederation of Societies of Authors and Composers, and the International Bureau of Mechanical Rights Societies (whose French acronyms are CISAC and BIEM, respectively).

SAMRO's comments on the bill are divided into four areas, namely (i) *comments relating to drafting problems*, (ii) *comments relating to substantive issues*, (iii) *comments relating to the unsuitability of the copyright and related right system*, and (iv) *concluding remarks*. SAMRO seeks to point out certain important areas in the Bill that could create problems with regard to the efficient administration of copyright, and in conclusion propose that the use of a *sui generis* form of intellectual property rights system **may be the best mechanism** for the administration of traditional knowledge systems. SAMRO's comments on the Bill are limited to the amendments with regard to the Performers' Protection Act and the Copyright Act.

We now set out to deal specifically with the afore-mentioned issues.

## 2. COMMENTS RELATING TO DRAFTING PROBLEMS

We believe that the manner in which the Bill is structured reflects certain drafting problems which may present difficulties in the application and interpretation of the legislation, necessitating costly court actions. As a general remark we should mention the fact that the phrase 'Intellectual Property Laws Amendment Act, 2007' is used throughout the Bill. We should think that this would be a reference to the 'Intellectual Property Laws Amendment Act, 2008' (that is, if the Bill is passed into law in 2008). We highlight the specific areas of concern below.

### 2.1 Amendments relating to the Performers' Protection Act

Section 1(d) of the Bill proposes to amend the definition of 'literary and artistic works' in the Performers' Protection Act 11 of 1967 ('the Performers' Protection Act') by adding 'musical ... and traditional works', and providing that these terms shall have the meaning assigned to them in the Copyright Act 98 of 1978 ('the Copyright Act') 'in so far as such works are capable of being performed, and included dramatico-musical works and expressions of folklore'. We note in this regard that:

2.1.1 The reference to 'dramatic' works has been omitted from the new definition, while not specifically deleted.

2.1.2 The phrase 'and include ... expressions of folklore' is retained in the proposed amendment, despite the insertion and introduction of 'traditional works'. We believe that this presents problems in that 'expressions of folklore' are of necessity, a species of 'traditional works'. The retention of the phrase "and include ... expressions of folklore" may thus defeat the purpose of the Bill and create interpretational problems *where musical works which are an expression of folklore may be seen as being distinct from musical works which are viewed as a 'traditional work'*. This is because in the proposed amendments to the Copyright Act a 'traditional work' is defined as *including* a 'musical work'.

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The foregoing raises very significant problems with regard to the administration of intellectual property relating to musical works and performances. The ideal situation would be to delete the reference to ‘expressions of folklore’ in the proposed amended definition, but this does not deal adequately with all the problems that may arise, and these are dealt with comprehensively below under section 3.

## 2.2 Amendments relating to the Copyright Act

Section 8 of the Bill proposes to amend Section 9A of the Copyright Act by inserting provisions that purport to extend the provisions relating to the payment of royalties in respect of ‘needletime’ or ‘public play rights’,<sup>1</sup> to all the other categories of copyright works provided for in the Copyright Act, including the newly-introduced category of ‘traditional work’. The proposed amendments further purport to regulate the payment of royalties in respect of usages relating to these copyright works, through ‘collecting societies’.

While provisions relating to the payment of royalties and the regulation of collecting societies with regard to other forms of copyright in themselves appear to be an anomaly in a Bill that proposes to deal with a matter which in itself is of major interest (namely the protection of traditional intellectual property through existing intellectual property systems), the proposed or purported amendments particularly raise very serious *drafting* and *interpretational* problems, which will have very grave and unintended consequences with regard to the administration of copyright works. In particular we note the following:

2.2.1 Section 9A of the Copyright Act was specifically inserted by section 3 of Act 8 of 2002, which aimed to deal ‘with the consequences of the introduction of the so-called ‘needletime’’.<sup>2</sup> The section therefore specifically deals with the payment of royalties with respect to the *broadcast, transmission in a diffusion service and communication to the public of sound recordings*, to the owners of the copyright in the sound recording and the performers whose performances were recorded in the said sound recordings.

2.2.2 If the proposed amendments to section 9A are carried out, it will be impossible to read the new amended section without getting confusion because:

2.2.2.1 Section 9A1(a), *which the amended section 9A1(b) makes reference to, only* deals with the payment of a royalty in relation to copyright in public play rights (i.e. needletime), and specifically makes reference to section 9 (c) – (e) of the Copyright Act. The new section 9A1(b) however still provides as follows: ‘[t]he amount of any royalty *contemplated in paragraph (a)* shall be determined by an agreement between ...’,<sup>3</sup> and proceeds to make reference to users and authors/owners in respect of all categories of copyright, including the proposed copyright in traditional works.

2.2.2.2 Adding to the complications highlighted under 2.2.2.1 above, it should be noted that a reading of the amended section 9A will also include subsections 9A1(c), 9A2(a) – (d) and

<sup>1</sup> Which arose from the 2002 amendment of the Copyright Act (through Act 9 of 2002) by inserting subsections (c) to (e) under section 9.

<sup>2</sup> See Dean OH, “Handbook of South African Copyright Law”, Juta & Co. 2002, Cape Town.

<sup>3</sup> Emphasis added.

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9A(3), **which all refer to needletime rights!** One can only imagine the interpretational ‘disasters’ that would arise from such a situation.

2.2.2.3 An assumption that section 9A applies not only to copyright in sound recordings but to all forms of copyright would imply that the regulations passed by the Minister on 1 June 2006 with regard to the application of section 9A of the Copyright Act and section 5(3) of the Performers’ Protection Act (‘the Regulations’)<sup>4</sup>, would also apply to all other forms of copyright. This will however, create further confusion in that the regulations clearly deal with needletime rights, and make reference to ‘producers’ and ‘performers’, which all relate to copyright in sound recordings. Furthermore, copyright management organizations presently administering copyrights other than copyright in sound recordings would feel that they were not given an opportunity to comment on the Regulations with regard to their own operations, since it was clear when the Regulations were passed that they only related to the collective management of needletime rights. This may result in court actions to challenge the applicability of these Regulations; hence the need to deal adequately with this matter at this stage.

2.2.2.4 There may also be problems with regard to the usage of the term ‘collecting society’ as defined in the Copyright Act, since this contemplated a collecting society administering needletime rights. It would therefore be necessary, where the intention is the regulation of all collective management societies, to re-define this term in order to make this clearer.

2.2.2.5 Deviating from the language used in respect of the original section 9A1(b) (the proposed 9A1(b)(i)), the provisions relating to certain other forms of copyright works (namely those mentioned in the proposed section 9A1(b)(ii) – (vii) use the phrase ‘author of copyright’ rather than ‘owner of copyright’. Seeing that the author of copyright may not necessarily also be the owner of copyright (in terms of sections 21 and 22 of the Copyright Act) this, if not corrected, can create problems with grave consequences. It is also noteworthy that all other forms of copyright are included, except ‘musical works’. If this is the intention of the legislator perhaps it would be useful to clearly indicate this. If it is however, ‘clerical errors’, this would need to be rectified.

2.2.3 Having indicated the foregoing, SAMRO is well aware of the statement made by the Minister in the preamble to the Regulations with regard to the application of section 9A of the Copyright Act and section 5(3) of the Performers’ Protection Act promulgated on 1 June 2006, to the effect that there was common understanding during stakeholder consultations that all rights in the copyright regime should in future be managed through collecting societies. SAMRO further notes that the Minister has again emphasized this point in the preamble to the present notice, by stating that the Bill provides ‘that other rights in the copyright regime should preferably also be subjected to “collective management of copyright regime”’.

SAMRO is not opposed to the idea of the regulation of all forms of copyright management through the use of regulated collecting societies, as also highlighted in our submissions to the DTI during the commenting phase for the needletime regulations. We do not however, believe that the manner in which the introduction of such a regulated copyright collective management regime is being proposed, is adequate. The use of the word ‘preferably’ in the minister’ statement in the preamble to

<sup>4</sup> Regulations on the Establishment of Collecting Societies in the Music Industry (Notice No. 517, GG 28894, 1 June 2006).

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the present notice may also suggest that there is an awareness that this matter is not dealt with adequately or *definitely* in the Bill.

In view of the foregoing, and it is in fact the legislator's intention to introduce the regulation of all societies dealing with copyright works, SAMRO **proposes** as follows:

2.2.3.1 that the reference to other categories/forms of copyright as provided for in the proposed amendment to section 9A of the Copyright Act, be removed in order to avoid confusion, and that these proposed changes be dealt with adequately under the various sections presently dealing with these categories of copyright, in the same way in which the amendments relating to royalties in respect of public play of sound recordings were dealt with through section 9A;

2.2.3.2 that regulations specifically dealing with the collective management of copyrights other than copyright in sound recordings, be promulgated, and that persons and organizations affected by such regulations be afforded an opportunity to comment on such regulations, in the same way that comments were given with respect to the regulations relating to needletime collecting societies; and

2.2.3.5 that the 'clerical errors' referred to under 2.2.2.5 above be rectified.

2.2.4 Another drafting problem relates to the fact that the terms 'trust' and 'fund' seem to be used interchangeably in the Bill (see section 11 of the Bill - amending section 21 of the Copyright Act -, which identifies the fund as being the owner of the copyright in the traditional work, and the proposed sections 19C and 23(4), which identify the trust as being the owner of the copyright). Without clarification in this regard many problems may arise as to who in fact, owns the copyright, and this may make it difficult to administer copyright in traditional works.

2.2.5 In overall, SAMRO believes not enough consideration was made of the impact that the proposed amendments to the Copyright Act will have on the application and interpretation of the Copyright Act as a whole, especially in view of the fact that the protection of traditional works through copyright laws involves many deviations from existing copyright law. In this regard we make reference to the proposed section 3(1)(A) introduced by section 7 of the Bill, which provides that traditional works that existed prior to the advent of the Bill will be protected for fifty years from the date of commencement of the Bill. We wish to indicate in this regard that this will be in conflict with section 43(a)(ii) of the Copyright Act, and without a specific repeal or amendment of this section will result in an Act which contradicts itself, result in grave interpretational problems. We believe that this highlights the incompatibility of the copyright law system for the protection of traditional knowledge systems, as fully discussed under 4 below.

### 3. COMMENTS RELATING TO SUBSTANTIVE ISSUES

#### 3.1 The definition of terms

Certain terms are introduced in the Bill which would need to be clarified in order to avoid confusion and uncertainties. We have in this regard noted the following:

##### 3.1.1 The definition of a 'traditional performance' and a 'traditional work'

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The Bill introduces protection for ‘traditional performances’ and ‘traditional works’, which we believe are not adequately defined and would thus give rise to serious interpretational problems. A ‘traditional performance’ is defined as ‘a performance which is recognized by an indigenous community as a performance having an indigenous origin and a traditional character’, while a ‘traditional work’ is similarly defined as ‘a literary work, an artistic work or a musical work which is recognized by an indigenous community as a work having an indigenous origin and a traditional character.’

There are several questions/concerns that present themselves with regard to the above definitions, such as the following:

(i) *Who* in the indigenous community must recognize a traditional performance and work as having an indigenous origin and a traditional character – is it the whole indigenous community concerned, a substantial number of the members of such a community, or any one member of such a community? Ideally a traditional performance and/or work should be recognized as such by a substantial number of members of an indigenous community<sup>5</sup>, to avoid the arbitrary designation of performances and works as being ‘traditional’ by any one person, thus often resulting in disputes. This might presuppose the formation of committees of these indigenous communities comprised of persons with special knowledge of the traditions and cultural expressions of such communities.

(ii) Related to what is mentioned under (i) is the question as to what the meanings of the terms ‘indigenous origin’ and ‘indigenous character’ are. Bearing in mind that the definitions for ‘traditional performance’ and ‘traditional work’ refer to a subjective test of an ‘indigenous community’, the interpretation of these vague terms is likely to give rise to serious disputes.

### 3.1.2 The definition of ‘indigenous community’.

The broad definition of the term ‘indigenous community’ is also likely to give rise to problems. The term is defined as ‘any community of people currently living within the borders of the Republic, or which historically lived in the geographic area currently located within the borders of the Republic.’ Practically some of the questions that arise in this regard are:

(i) By ‘indigenous community’ are we referring to what has been called ‘tribal groups’ or ‘language groups’, or are we referring to sections of such groups etc? Does this for example, refer to the Xhosa people in South Africa, the Xhosa people in the Eastern Cape, or the Xhosa people from certain parts of the Eastern Cape?<sup>6</sup>

With reference to the definition of traditional performance and traditional work discussed under 3.1.1.

(i) above, would any Xhosa person, or any Xhosa person from the Eastern Cape or a part of the Eastern Cape, whatever the case may be, be able to identify a traditional work as being of their ‘indigenous origin’ or having an ‘indigenous character’?

(ii) Since SAMRO presently administers copyright in musical works and the literary works (‘lyrics’)

<sup>5</sup> Which could for example, be construed as 75% of the members of a committee representing such indigenous community.

<sup>6</sup> We intentionally make reference to the Xhosa people because reference is made in the Policy Framework document, (paragraph 4.6, page 18), to the Mbube song and how it should have been dealt with.

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relating to these musical works, it is of utmost importance for us to fully understand the implications of the introduction of the concept of ‘traditional work’, seeing that a traditional work is defined as including literary and musical works. SAMRO’s concern in this regard relates both with regard to the need for certainty in relation to future administration of musical works, as well as the need for clarity regarding SAMRO’s historical administration of works that would have been deemed as being in the public domain because of their traditional nature.

In terms of the existing copyright regime, any person who makes an arrangement of a public domain or traditional musical work, and displays a substantial amount of originality because of the skill, judgment and labour expended in the making of such an arrangement, would own the copyright in such an arranged work. SAMRO therefore has hundreds of members who have notified works of a traditional nature in which they have exerted their own original input and arrangement. Because of the international framework within which SAMRO operates<sup>7</sup>, musical works notified to SAMRO by its members are registered in an international database of musical works – the Works Information Database (WID), a part of the CISAC Information System - , and thus recognized and administered internationally as belonging to the members who notified these works.

(iii) In view of the situation mentioned under (ii) above, and the fact that the protection of traditional works applies retrospectively to include traditional works created ‘within fifty years preceding’ the date of the commencement of the Intellectual Property Laws Amendment Bill<sup>8</sup>, it becomes important for SAMRO to understand, in view of these notifications of works and the recognition of such notifications worldwide, what the implications are for SAMRO (and its affiliate societies)’s administration of these works.

Put differently, the question to ask is: ***who owns certain musical styles, such as isicathamiya music, maskandi music, mbube music etc?*** By saying that indigenous communities own traditional works and performances, are we saying that they own certain traditional songs which are *known* – or communicated to the public, using the language of the Bill – or are we saying that they own the isicathamiya, maskandi and mbube musical styles, so that any person *who composes* music in these traditional styles would need authorization to do so, or rather need to pay royalties for doing so? The fact of the matter is that artists emanating from indigenous communities will create literary, musical and artistic works of an indigenous origin and of a traditional character. These works will be characterized as traditional works due to their intrinsic and extrinsic values.

(iv) If what the Bill envisages is what is highlighted in the second paragraph of (iii) above, then the effect is that the music of Ladysmith Black Mambazo, Solomon Linda’s “Mbube” and the many pieces of music composed by maskandi singers and singers of many other traditional musical forms, and which have been notified to SAMRO by these composers and/or their publishing companies and are therefore recorded as being owned by them all over the world, in fact belongs to indigenous communities and not the composers and publishers of these works. SAMRO holds the view that this would be the effect of the Bill in its present form, and finds this situation **very concerning** as it will

<sup>7</sup> That is, being a member of the International Confederation of Societies of Authors and Composers (CISAC), and having through this international affiliation, entered into reciprocal agreements with other CISAC-member societies in terms of which each of the societies represents the musical works of another in their own territories.

<sup>8</sup> Section 7 of the Bill, proposing a new section 3(1A) to the Copyright Act. It is not clear if such retrospective application applies with regard to the Performers’ Protection Act, that is, whether section \_\_\_ of the Bill, which deals with the term of protection for performances (including performances of traditional works), also applies retrospectively.

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seriously affect the collective administration system as well as the livelihood of the composers who composed such traditional music, *their only offence being that they created certain music using existing traditional musical styles.*

(v) Another unintended consequence which may arise from the above is the creation of a climate that encourages the infringement of traditional works that are presently notified as owned by certain persons because of the original input that they gave with regard to the arrangements of these works. This would be made possible by the provisions of section 13 of the Bill, which insert a new section 23(4)(a), which allows 'the indigenous community 'from which a traditional work originated, or ... any one of its members' to use such traditional work without authorization, as long as no commercial benefit is obtained from such usage. The new section 23(4)(b) provides that a person who had acquired rights in respect of a traditional work prior to the commencement of the Bill and continues to do acts in relation to the work shall not infringe the copyright in these works, provided that where such person obtains commercial benefit from the usage of the work the person will need to pay a royalty in respect of such usage.

*Without the clarification and limitation of the definition of a 'traditional work' the proposed subsection would, for example, result in an indigenous community or any member of such a community, which has claimed ownership of the isicathamiya musical form/style, using any of Ladysmith Black Mambazo's music without paying Ladysmith Black Mambazo or their publisher any royalties, or where they derive commercial benefit from the usage of these works, paying the royalties to the trust, with the result that Ladysmith Black Mambazo will no longer earn any royalties with regard to the exploitation of their compositions, as any royalties payable will be used for the benefit of the indigenous community concerned. Furthermore, because they use the isicathamiya style, Ladysmith Black Mambazo will, in respect of their compositions, be deemed to have received a licence from the indigenous community owning the isicathamiya musical style, and Ladysmith Black Mambazo will therefore be expected to pay a royalty to the trust every time they perform their compositions!*

In view of the foregoing **it is recommended** that the definition of 'traditional works' should be clarified to make it clear that this does not relate to traditional music *styles or rhythmical arrangements* but rather relates to *existing* traditional songs and *melodies*, e.g. as used in folklore, fables, fairy tales and cultural and other traditional ceremonies (such as initiation ceremonies, the 'coronation' of chiefs and other traditional leaders, as well as other traditional rituals).

### 3.2 Problems arising from the retention of the concept of 'expressions of folklore'

Another situation hinted to above<sup>9</sup>, which highlights the interpretational problems that arise from the drafting of the Bill, relates to what appears to be a duplication of protection with regard to the traditional performances. This has to do with the inclusion of "expressions of folklore" in the definition of 'literary, musical, artistic *and* traditional works' as proposed in the amendment to the definition of 'literary and artistic works' in the Performers' Protection Act. A situation of dual protection may, as indicated above, arise in that the performance of musical works which include 'expressions of folklore' may be seen as distinct from the making of traditional performances as envisaged in the Bill.

### 3.3 The prohibition of assignment of copyright in traditional works

<sup>9</sup> Under 2.1.2.

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SAMRO has noted the position of the DTI with respect to assignment of copyright in traditional works through 'the deed of sale that is currently under the Copyright Act', as highlighted in the policy framework document. SAMRO furthermore appreciates the rationale of the DTI's thinking in this regard, namely the fact that '[l]icensing would result in the continuous payment of royalties as opposed to a once-off payment that would result from the sale of the intellectual property'.<sup>10</sup> In line with this thinking, the DTI proposes in section 12 of the Bill to insert a new section 22(2A), which provides as follows: 'The copyright in a traditional work shall not be transmissible by assignment, testamentary disposition or operation of law, but the doing of an act which is the subject of the copyright may be licensed.'

While SAMRO understands the DTI's concerns in this regard, SAMRO would like to clarify the situation with regard to the assignment of rights by members to SAMRO as a collective management society. It is important to note that the assignment of rights by a member to SAMRO *is only an assignment that allows SAMRO to represent these rights in its own name* (i.e. to license the usage of the rights and to collect them in its own name, as well as to enforce them in any legal forum in its own name). SAMRO has also managed to use the assignment of rights to prevent unscrupulous persons from negotiating a full buy-out of rights from members of SAMRO (i.e. the deed of sale referred to in the policy framework), as well as a claim of ownership of the copyright of SAMRO members as a result of employment relationships.

In spite of the above, an assignment of rights to SAMRO *does not entitle or enable SAMRO to further alienate these rights* by way of transferring ownership to another party. Quite to the contrary, a member may, at any time terminate his/her/its membership of SAMRO, and at that point the entire member's copyright **reverts** to the member. The assignment of copyright to SAMRO is therefore merely for purposes of enabling SAMRO to effectively administer the copyright for the benefit of the member, without any hassles or the need to contact the member each time problems arise with regards to the administration of these rights. In this regard clause 2bis of SAMRO's Memorandum of Association, after dealing with the provisions relating *inter alia*, to the assignment of rights to SAMRO, provides as follows:

**'Notwithstanding anything to the contrary herein contained, the Company shall be deemed to be acting on behalf of the Members, and receiving income from the exercise and enforcement of various rights on behalf of and for the benefit of the Members.'**

SAMRO therefore submits that the assignment of rights by members to SAMRO is not something to frown upon, but a mechanism that ensures the better administration of these rights. In this regard it is important to note that none of SAMRO's members, including its publisher members, have expressed problems with the use of assignment as the basis for their relationship with SAMRO. It is also important to note that SAMRO has, since its establishment in 1961, used assignment as the basis for its relationships with its members (who now total over seven thousand), as well as its international affiliated societies. Assignment of rights has also been the traditional basis of the relationships between performing rights societies and their members all over the world because unlike an assignment of rights to a publishing company, which transfers ownership of the rights to the publishing company without any reversionary interest for the member, the assignment of rights to a society *is not an absolute one*.

If the situation regarding the assignment of rights were to change, this would greatly impact on

<sup>10</sup> Page 18, Policy Framework document.

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SAMRO's legal relationships, especially the reciprocal agreements with its international affiliates which is largely based on an assignment of rights, some of which span many years. Such a situation would also necessitate massive changes in SAMRO's administrative systems. Another problem relates to rights in relation to traditional works, as explained under 3.1 above, which have *already* been assigned to SAMRO by its members. In view of this, SAMRO proposes that the proposed section 22(2A) of the Copyright Act **be amended** as follows:

'2A(a) The copyright in a traditional work shall not be transmissible by assignment, testamentary disposition or operation of law, but the doing of an act which is the subject of the copyright may be licensed.

*(b) Notwithstanding the provisions of paragraph (a) the assignment of copyright in a traditional work to a collecting society, including such existing assignments, shall be permissible, provided that such assignment shall be used for the benefit of the assignor and the collecting society shall not be able to further transmit such copyright to another person, and further that the copyright shall, upon termination of membership for any reason, revert to the assignor.'*

We believe that such an insertion will adequately deal with the concerns of the DTI and shall completely remove the possibility of a collecting society using the assigned copyright in a manner harmful to the assignor.

#### 3.4 Problems in relation to membership matters

It is important for the proper functioning of a collecting society that it has members whom it represents, and further that these members are easily identifiable. It is difficult however, in terms of the Bill, to determine who the member of SAMRO in respect of the administration of copyright in traditional works will be. Section 5(a) of the Bill introduces a new sub-section (j) to the definition of 'author' in section 1 of the Copyright Act, which provides that the author of 'a traditional work' shall be 'the indigenous community from which the work originated and acquired its traditional character.' However, section 11 of the Bill (through the proposed amendment of section 21 of the Copyright Act) provides that the ownership of any copyright in a traditional work shall vest in 'the fund' to be established by means of the proposed new section 40D.

The nature of the 'fund' referred to above (which seems to be used interchangeably with the 'trust' also envisaged in the Bill), is not explained or determined. The question then arises as to *who would be the member of SAMRO in this situation?* In terms of SAMRO's present operations, both the author/composer of the musical work, and the owner (where the author/composer has transferred ownership of the copyright to a publisher by way of assignment of rights) would become members of SAMRO. Unlike in the proposed amendments, where royalties are paid to the fund/trust however, SAMRO does not pay the composer's share of royalties to the publisher, but pays them to the composer directly, and only pays the publisher's share of the royalties to the publisher. Seeing that the fund certainly has no legal personality, who will then become a member of SAMRO?

Even if it were to be argued that the author of the copyright in the traditional work, namely the indigenous community, were to become the member of SAMRO, seeing that the term 'indigenous community' is vague as indicated above, there would be practical and legal difficulties for SAMRO with regard to entering into agreements with the 'indigenous communities' regarding the administration of rights. SAMRO cannot negotiate or contract with communities at large and

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although the new proposed section 13B in terms of section 4 of the Bill envisages a situation where a person may act on behalf of an indigenous community, *it may prove difficult or impossible to establish **who** the authorized representative or representatives of an indigenous community is/are*, also bearing in mind that the identity of such authorized representatives would need to change during the period that the relevant work enjoys protection. However, even if the authorized representative or representatives are identified, 'indigenous communities' cannot constitute juristic persons. The question therefore remains as to who will become a member of SAMRO.

### 3.5 Problems in relation to licensing matters

Akin to the problems highlighted under 3.4 above are problems in relation to the ability of collecting societies to adequately license the usage of traditional intellectual property works. This situation is demonstrated by the provisions of section 2 of the Bill, which seeks to amend section 6 of the Performers' Protection Act by introducing a new section 3(b), which provides that the amount of a royalty payable in respect of a traditional performance recorded in the database shall be determined:

(i) by agreement between the performer or performers or the person or persons receiving the commercial benefit and the fund; [or]

(ii) by one or more collecting societies representing either or both of these parties.

Our concern in this regards relates to the fact that, particularly where there is a dispute as to who the authorized representative of any particular 'indigenous community' is (seeing that the 'trust' or 'fund' is not a juristic person), agreements concerning the payment of royalties may be entered into without the involvement of the collecting society, in spite of the fact that such collecting society would have been appointed to administer the 'traditional performance' in question. The same situation would apply with regard to the exploitation of traditional works in terms of the proposed section 19C(4) of the Copyright Act as introduced by section 10 of the Bill.

In view of the foregoing, it is proposed that the following provision be inserted after both the proposed section 6(3)(b) (in respect of 'traditional performances'), and the proposed section 19C(4) (in respect of 'traditional works'):

**'provided that the provisions of subsection [3(b)(i) in the case of the proposed amendments of section 6 of the Performers' Protection Act, and 4(a) in respect of the proposed insertion of section 19C in the Copyright Act] shall not apply where a collecting society has already been appointed to administer the said [*traditional performance*, or *traditional work*, respectively].'**

Further to what is indicated above, a complication would be created by the insertion of section 19C in the Copyright Act, in terms of section 10 of the Bill. Sub-section (2) of this new section provides that 'the indigenous community from which the work originated, or any of its members, shall be entitled to do any of the acts referred to in section 11C'. What this implies is that where SAMRO has been appointed as the collecting society in respect of the relevant traditional work, SAMRO would not be able to collect any royalty from the involved indigenous community or any of its members. How is SAMRO going to determine whether a particular individual is a member of the relevant indigenous community?

Shall there be a database in which the members of indigenous communities will be listed, to enable

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collecting societies to administer the rights without hindrances? It is proposed that such a database would be useful to enable efficient administration of the rights by collecting societies, or at least the database of traditional works provided for in the Bill should also serve as a database of rightsholder, with information about all the members of an indigenous community whose traditional works are recorded in the database. Failing that, this provision will create a situation where persons will use the provision as an excuse for not requiring a licence from SAMRO for the usage of traditional works and therefore arguing that the collecting society is not entitled to collect a royalty.

### 3.6 Problems in relation to the payment (distribution) of royalties

Reference is made to section 2 of the Bill, in particular the proposed new section 6(3)(a) of the Performers' Protection Act, which provides that a royalty shall be paid in relation to a traditional performance *recorded in the database* contemplated in section 13A (which in fact, should be a reference to section 13B). Although the recordal of a traditional performance in the national database is not a requirement for the subsistence of copyright in the relevant traditional performance, royalties will only become payable if the performance has been recorded. This therefore means that collecting societies will first need to determine that the relevant performance has indeed been recorded on the national database before collecting and paying royalties to the fund.

Also the proposed section 23(4)(b)(ii) of the Bill makes reference to a 'commercial benefit', which could mean something other than financial gain. The requirement to pay a royalty is also vague. Also the date from which the royalty must be paid is not clear – for example, is it from the date of demand, the date of the commencement of the Act or the date of exploitation? How will the duty to pay royalties be determined – and by whom? Is there a **right of appeal or some objection mechanism**, should the nature of the work be in dispute?

## 4. COMMENTS RELATING TO THE UNSUITABILITY OF THE COPYRIGHT AND RELATED RIGHTS SYSTEM AS A MECHANISM FOR THE PROTECTION OF TRADITIONAL WORKS

While SAMRO would appreciate it if our comments in the preceding sections would be considered and the Bill amended accordingly, ideally it would be more preferable and appropriate if indigenous traditional knowledge would be protected through a *sui generis* system rather than the copyright and related rights regimes. Such a *sui generis* system need not be much distanced from the copyright system of protection and may well be a *sui generis* copyright system unique for the protection of indigenous intellectual property relating to works that would normally be protected through the copyright system, if they were not traditional works.

One would argue that the proposed provisions relating to traditional do constitute such a *sui generis* system; the problem however, is that they are provided for in the Copyright Act. **Having a separate legislation, (instead of amending the existing Copyright Act), which would be a sui generis copyright law for the protection of traditional works and performances, or traditional knowledge systems, would be more workable that attempting to force the protection of traditional works and performances within the copyright and related rights system.**

Intellectual property legal regimes are generally considered to be incompatible with traditional knowledge systems because traditional knowledge is typically based on collective knowledge and

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prior use. While this would be true with regard to many forms of intellectual property regimes, it is submitted, as is also borne out by legal literature in this regard, that this is even more so with regard to the copyright system. We consider below several elements of copyright and with regard to each, highlight how these are incompatible with the protection of traditional intellectual property envisaged in the Bill:

#### 4.1 Requirements for the subsistence of copyright

The two inherent requirements for the subsistence of copyright are *originality* and *material embodiment*, while the two formal requirements are that the work concerned should have been created by a qualified person, or first published or made in the Republic (sections 3 and 4 of the Copyright Act).

4.1.1 Interestingly, the inherent requirements for copyright protection are, to an extent, maintained for traditional works in the Bill. Clause 6(a) retains the requirement for originality and amends section 2 of the Copyright Act by simply stating that traditional works, *if they are original*, are eligible for protection.

4.1.2 Section 6(b) of the Bill further proposes to amend section 2 of the Copyright Act in order to address the issue of material embodiment with regard to traditional works. In this regard the section 6(b) provides that a traditional work need not be in material form to be eligible for copyright protection. Traditional works are in this regard, accorded the same position as applies to broadcasts and programme-carrying signals (which do not require material embodiment to be eligible for copyright protection).

4.1.3 Quite in **contradiction** to the provisions of section 6(b) however, section 6(c) of the Bill proposes a new section 2B in the Copyright Act, which provides that a traditional work shall not be eligible for copyright *'unless it has been written down, recorded, represented in digital data or signals, or otherwise reduced to material form or communicated to the public'*. [Emphasis added]. This is a direct contradiction to section 6(b), which dispenses with the requirement for material embodiment with respect to traditional works, as this section in fact provides that there are such requirements, with strange addition of the concept of 'communication to the public' as constituting another form of material embodiment for traditional works.

#### Comments:

4.1.4 The mere assumption that a traditional work, as defined, should comply with the originality requirement for eligibility for copyright protection is fraught with doctrinal difficulties. In terms of South African copyright law, to meet the originality requirement the author must have expended sufficient skill or labour to impart to his work some quality or character which substantially *distinguishes his work from the material he uses*. It is a contradiction in terms to require a traditional work to have a *traditional character* in terms of the definition, but also to *substantially distinguish itself* from other traditional works, for eligibility purposes. This goes against the fact that 'in the case of [indigenous] art, the work's value lies not in its originality or individuality but in its conformity to tradition.'<sup>11</sup>

<sup>11</sup> Puri, Kamal, 'Protection of Traditional Culture and Folklore' <http://www.folklife.si.edu/resources/Unesco/puri.htm> [Accessed on 14/06/2008].

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4.1.5 Often a traditional work will be recognized as such precisely because it is part of a traditional culture. The similarities or 'style' of these traditional works are their distinguishing traits, not the substantial differences. Thus our concern above<sup>12</sup> with regard to the problems that would arise if the protection of traditional works relates to musical styles, rather than already-existing songs or melodies. *Furthermore, cultural identity presupposes that certain works are created in a substantially similar way in order for it to retain its indigenous origin.*

4.1.6 Further to the above, section 6(b) represents a serious departure from the common-law concept of material form, seeing that ideas are not protected by copyright and the material embodiment requirement means that the work should have a certain measure of permanence. Furthermore, in copyright law, the time a work is reduced to material form is also the time the work is made. Without the requirement for material embodiment disputes can arise between competing indigenous communities as well as between indigenous artists and indigenous communities, since it will be difficult to prove the date on which the work was created. The provisions of section 6(b) may also result in the dilution of the distinction between copyright protection for traditional copyright works and the protection of unfixed performances in terms of the Performer's Protection Act.

4.1.7 The insertion of section 6(c)2B also presents problems as highlighted under 4.1.3 above, as it is not clear whether the legislator intends to protect traditional works which exist both in material form and in non-material form. If this was the legislator's intention it should have been stated clearly. Such a dual protection would be in line with the WIPO/UNESCO Model Provisions and the Tunis Model Law, which protect both fixed and unfixed expressions of folklore. For the example, the Tunis Model Law provides: 'with the exception of folklore, a literary, artistic or scientific work shall not be protected unless the work has been fixed in some material form'.

4.1.8 The dual protection referred to under 4.1.7 would be preferred, and the recording of the traditional work in the database contemplated in section 40C could be considered as an alternative to meeting the material embodiment requirement, provided sufficient detail is entered to identify the specific traditional work (seeing that in any case, no royalty is, in terms of section 2, payable for 'a collective traditional performance' unless such performance is recorded in the database). This situation would be preferable to the conundrum currently created by clauses 6(b) – 6(c).

## 4.2 Subject Matter of Copyright

The Bill introduces 'traditional works' as a new category of work provided for in the Copyright Act. We have above<sup>13</sup> elaborated on the complexities that arise from the manner in which traditional works and performances are defined. Another definition that warrants consideration is the definition of traditional intellectual property<sup>14</sup>, which is defined to mean an intellectual property that has an indigenous origin and is owned or could be owned by an indigenous community as determined by the registrar. This further raises problems with regard to the definition of an 'indigenous community', which were also highlighted above.

### **Comments:**

<sup>12</sup> At 3.1.2.

<sup>13</sup> At 3.1.1.

<sup>14</sup> Inserted by the section 5 of the Bill.

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4.2.1 Reference was made above<sup>15</sup> to the problems that arise from the fact that the phrases 'indigenous origin' and 'traditional character', which are central to the definition of a traditional work, have not been defined. In terms of the Convention on Bio-Diversity (the CBD) traditional knowledge is held as encompassing a **cultural aspect**, (i.e. the culture and values of a community), a **temporal aspect** (i.e. it is passed through the generations, and slowly adapts to respond to changing realities) and a **spatial aspect** (i.e. it relates to the relationship which a community has with the lands and waters that it has traditionally occupied). It is submitted that the definition of traditional work in the Bill only include the cultural and spatial aspects of traditional knowledge.

4.2.2 By attempting to protect traditional knowledge through the intellectual property system we are in danger of leaving out certain very important aspects of traditional knowledge, thus leaving those without protection. Dufield<sup>16</sup> notes that we should avoid a fixed and dogmatic idea of what traditional knowledge holders and their communities look like, because although traditional knowledge holders tend to inhabit rural areas including very remote ones, members of such peoples and communities may live in urban areas, yet continue to hold traditional knowledge. There is also the issue of traditional knowledge which would be considered as trade secrets (for example songs and dances forming part of the rain-making ritual of the Modjadji people). If we 'force' the protection of traditional knowledge through the intellectual property system, we may create a situation where these 'trade-secret based' traditional works may be vulnerable to infringement as indigenous communities may not be happy to have such traditional knowledge 'communicated to the public', which is the requirement for subsistence of copyright in such works.

### 4.3 Duration of Copyright

4.3.1 Section 7(b) of the Bill introduces a new section 3(2)(g) to the Copyright Act, which provides that the term of protection for traditional works will be fifty years from the end of the year: i) in which the Bill comes into operation; or ii) the work was first communicated to the public with the consent of the authors, whichever term expires last.

4.3.2 It is important to note with regard to what is indicated above that there is no provision for the duration of works created after the commencement of the Bill and never communicated to the public with the consent of the indigenous communities concerned. On the present wording of the Bill these works will only be protected for a period of up to fifty years from the date of commencement of the Bill, irrespective of their date of creation. The term of copyright protection for works not communicated to the public will thus diminish progressively. This is in stark contrast to the WIPO/UNESCO Model of Provisions and the Tunis Model Law, which provide for an indefinite period of protection for folklore.

It is submitted that instead of doing good for indigenous knowledge, this situation of forcing indigenous knowledge to conform to the copyright system will only result in the loss, over a short time, of this knowledge, *which is supposed to be eternal*. After the fifty years of protection the traditional works will fall into the public domain in terms of the copyright system, whereas if the works were protected through a *sui generis* system, they could continue to be protected indefinitely.

<sup>15</sup> At 3.1.1.

<sup>16</sup> Dufield, Graham, 'Protecting Traditional Knowledge and Folklore: A review of progress in a Developing Country: Options For Sub Saharan African Countries'. A paper presented at the Copyright Workshop at the Zimbabwe International Book Fair on 30 July 2003.

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#### 4.4 The Authorship and Ownership of Copyright

4.4.1 In terms of the Bill the author of a traditional work is the indigenous community from which the work originated and acquired its traditional character (section 5(a)). The owner of traditional copyright is however, the fund, in terms of the proposed section 21(f) inserted through section 11 of the Bill.

4.4.2 It should be noted that there is a tremendous diversity of traditional proprietary systems, many of which are highly complex. An assumption that there is a generic form of collective community rights or 'traditional intellectual property' would be misleading. Dutfield notes that although customary rules governing access to and use of knowledge often differ from western intellectual property formulations, they also differ widely from each other.<sup>17</sup> Dutfield further indicates that some indigenous groups consider it presumptuous to attribute authorship to a community or to a group of people,<sup>18</sup> while Blakeney<sup>19</sup> provides that authorship is often replaced by a concept of interpretation through initiation.

4.4.3 The new section 23(4)(b)(ii) would be very onerous on copyright owners, in that works previously in the public domain will revert to the private domain. Although works created by the use of public domain material would not be infringing of rights in traditional works, the continued exploitation of these works after the commencement of the Bill will render such exploitation subject to payment of a royalty.

4.4.4 The payment of a royalty for use of a traditional work by an indigenous community to the fund (which is supposed to disperse the royalty to the indigenous community again) should be reviewed. In this case the author will be paying the copyright owner for the exploitation of the author's own traditional work. This is very objectionable from a sustainable development point of view. Also the general exception to protection in section 19(C)(2) should also be applicable to a former member of the community.

#### 4.5 The exclusion of moral rights provisions in respect of traditional works

4.5.1 While positive protection entails the active assertion of IP rights in protected subject matter, with a view to excluding others from making specific forms of use of the protected material, defensive protection refers to provisions adopted in the law or by the regulatory authorities to prevent intellectual property claims to knowledge, cultural expressions or a product being granted to unauthorized persons or organizations.

4.5.2 The biggest concern of traditional communities regarding the use of a folkloric expression by others may have as much to do with distortion and a failure to acknowledge the source as it has to do with commercial exploitation. The portrayal of indigenous culture in entire or partial form must include members of the group concerned in the performance. **Thus the protection of moral rights is very important**, and even more so with regard to traditional works. It is therefore regrettable that moral rights have not been extended to traditional works in the Bill. This serious oversight should be addressed.

<sup>17</sup> Dutfield, Graham (quoted at footnote 16 above), at 14.

<sup>18</sup> Supra, at 15.

<sup>19</sup> Blakeney, M. (2000). 'The protection of traditional knowledge under the intellectual property law'. European Intellectual Property Review 22, 251.

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## 5. CONCLUDING REMARKS

5.1 In conclusion we wish to indicate that while government's efforts to create a framework for the protection of traditional intellectual property are laudable, *there are a number of drafting and substantive problems that need to be addressed* to ensure that the Bill achieves the policy objectives. If these are not dealt with adequately the application of the Bill, once passed into law, could have unintended consequences.

5.2 On the other hand we note that it would even be best if traditional knowledge was protected by a *sui generis* form of protection, which may be a form of traditional intellectual property system. This is more particularly pertinent with regard to the protection of traditional knowledge through the copyright system, as the copyright system is not compatible with traditional knowledge systems. In this regard Puri writes: 'Non-exclusive rights are a peculiar feature of Aboriginal customary law that is not readily compatible with the Western notion of exclusive rights under the copyright system ...'<sup>20</sup>

5.3 We believe that it is very crucial that the concerns raised above receive attention, since not taking the concerns into cognizance would have a very negative impact on the administration of rights by collective management organizations like ourselves. In summary we note the following implications that the Bill will have on the collective administration of rights by collecting societies, in its present form:

5.3.1 Traditional works already protected through the copyright system would need to be registered in the database contemplated in the Bill – in this regard any person may enter such information on the database, thus affecting the ownership of works (Section 40(C)(6)(c)).

5.3.2 Traditional performances would need to be entered in the database to enable performers to earn royalties.

5.3.3 Societies would need to review all copyright works and rights administered on behalf of their members to determine if such works and rights involve traditional literary or musical works.

5.3.4 Societies would need to review all works and rights administered on behalf of their members to determine if such works and rights involve traditional performances.

5.3.4 Where societies are administering rights that involve traditional works or traditional performances, the indigenous community from whom the works emanate would need to be identified.

5.3.5 Societies would need to ascertain whether any acts resulted or will result in commercial benefits in order to ascertain the financial implications of the exploitation of such works.

5.3.6 Societies will need to establish mechanisms to identify the royalty payable to the fund and the procedures for payment of such royalties to the fund.

5.3.7 Societies will need to review the repertoire of rights and works currently administered to identify

<sup>20</sup> Puri, Kamal, 'Protection of Traditional Culture and Folklore'  
<http://www.folklife.si.edu/resources/Unesco/puri.htm> [Accessed on 14/06/2008]

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the traditional works and traditional performances *assigned* to them, seeing that such assignment of rights, will, in terms of the Bill, not be enforceable and the administration thereof would need to be transferred to the fund.

5.3.8 Societies will have to contend with the uncertainty of the provisions of the revised section 9A(b) in the Copyright Act, which appears to extend the regulation of collective rights management to all categories of copyright works, while doing so in a very haphazard manner which, without further clarification and ensuring that relevant amendments of the Copyright Act are made, would result in many difficulties.

5.3.9 The Bill does not address the problem of the extra-territorial effect of the protection of traditional works. No matter how effective our laws may be at the domestic level, it would have no extra-territorial effect. Thus indigenous communities will not be able to secure similar protection of their works abroad, and the exploitative behaviour of foreigners with respect to these works will continue unabated.

We wish to thank the department for affording us the opportunity to comment on this Bill. Please do not hesitate to contact us should you wish to discuss any aspect of the submission, or if you require clarification on any of the issues raised.

Kind regards,

Adv. J. Joel Baloyi

For and on behalf of SAMRO

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Directors: A E Emdon; J S M Khumalo; J Edmond; R I Kallenbach; S C P Mabuse; Y Mhinga; M N Motsatse; G G Trefusis-Paynter (British); C G de Villiers; T S Kekana; J Zaidel-Rudolph; G J Zoghby;  
Company Secretary: Adv J J Baloyi