SOUTHERN AFRICAN MUSIC RIGHTS ORGANISATION'S

SUBMISSION IN RESPECT OF THE COPYRIGHT AMENDMENT BILL OF 2017

(GENERAL NOTICE B13-2017)

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INTRODUCTION

1. The Southern African Music Rights Organisation (SAMRO) thanks the Portfolio Committee on Trade and Industry (DTI) for the opportunity to make these submissions on the Copyright Amendment Bill of 2015 published for comment in General Notice 646 on 5 July 2016 (Bill).

2. SAMRO is encouraged by the DTI and Parliament's commitment to enhancing the copyright legislative regime and the objectives set out in Bill in so far as they relate to musical works. In addition we are pleased that the proposed amendments set out in the Bill appear to implement the recommendations made by the Copyright Review Commission (CRC) where appropriate or possible.

3. In this document we:

3.1. highlight the important role that copyright plays in building cultural heritage and advancing economic freedom, transformation and development.

3.2. highlight the particular amendments that we believe will go a long way in advancing the copyright legislative regime;

3.3. recommend certain amendments that are not provided for in the Bill but are essential for the effective protection of copyright, the objectives that the Bill sets out to achieve, including economic freedom and transformation;

3.4. identify and discuss those provisions we believe will have the unintended consequence of muddying the legislative landscape and infringing upon the rights of music authors and rightsholders; and

3.5. make suggestions as to how the problematic provisions can be resolved.

BACKGROUND

Music has and will continue to play a pivotal role in fulfilling our nation's Constitutional imperative of healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights while also improving the quality of life of all citizens and freeing the potential of each person. As SAMRO we exist to ensure that the principle objectives of the spirit underpinning the Copyright Act are fulfilled – that creators can monetise their ingenuity and thereby earn sustainable livelihoods for themselves, their families and communities so as to continue to contribute towards building a new and inclusive society.

SAMRO's Foundations in the Copyright Act:

4. SAMRO functions as a Collecting society through the mandates of its members. SAMRO's primary mandate is limited to the administration of the rights afforded to authors and copyright owners in terms of section 2 read with section 6 of the Copyright Act 98 of 1978 (Act) which relate specifically to **musical works.** For your ease of reference, these provisions read as follows:

"2. Works Eligible for Copyright.
(1) Subject to the provisions of this Act, the following works...shall be eligible for copyright –
(a) literary works;
(b) musical works;
(c) artistic works;
(d) cinematograph films;
(e) sound recordings;
(f) broadcasts;
(g) programme-carrying signals;
(h) published editions;
(i) computer programs." [Own emphasis added]

"6. Nature of copyright in literary or musical works.
(1) Copyright in a...musical work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:
(a) reproducing the work in any manner or form;
(b) publishing the work if it was hitherto unpublished;
(c) performing the work in public;
(d) broadcasting the work;
(e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
(f) making an adaptation of the work;
(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive." [Own emphasis added]

Musical Works relation to sound recordings/needletime:

Musical works serve as the raw material for the rest of the creative industry – out of the compositions and lyrics that our members author; performers can perform, recordings can be recorded, CDs can be sold and tracks downloaded. Not all who sing are necessarily composers just as not all who compose are necessarily singers; in fact, some of the greatest composers have been to known to be among the worst singers. The hearts and minds of authors are the sacred spaces in which insights are woven into notes and lyrics; it is a space safe from the intrusion and exploitation of monopoly capital. SAMRO exists to ensure that when the musical works leave that sacred space and enter our world, they are protected and the rights of these composers enforced in order to, ensure that the value of their contribution is rewarded so that they may have the means and ability to continue authoring more musical works.

5. SAMRO draws its authority from section 6 of the Copyright Act which deals exclusively with **musical and literary works.** Section 9 on the other hand deals with a different type of work of intellectual property namely, a **sound recording**, more commonly known in the industry as "needletime rights".

6. A sound recording is the embodiment or fixation of sounds, data or signals representing sounds. However, musical works are the actual music compositions and associated lyrics contained used sounds recordings. Musical works and sound recordings are two separate works of intellectual property.

7. SAMRO notes that in a number of instances the Bill fails to consider or provide the necessary protection for musical works, while doing so for sound recordings.

SAMRO's authority to act as a collecting society on behalf of its members:

Authors of music are the quintessential innovators, those who draw inspiration from dreams, research, observations of life and the randomness of humanity and out of it author the soundtracks that animate our lives – Before that music can ever be sung, performed, recorded or distributed, it has to be authored in the hearts and minds of authors. SAMRO exists to ensure that such authors receive fair compensation for their authorship; without the works that they author the rest of the value chain of music cannot exist – there would be nothing for the singer to perform, nothing for the producers to record and ultimately none of our favourite songs to sing and listen to when we are in need of consolation, falling in love, marching into battle or celebrating our triumphs over adversity. SAMRO, in its administration of musical and literary works, therefore plays a critical role in enabling the sustainability of the music and arts, culture and heritage sectors more broadly – SAMRO enables resources to flow into the creative and innovative process of authorship that catalyses social transformation, through music, based on social practices, values, traditions and histories of cultural communities.

8. SAMRO's primary role is the administration of the **public performance** and **broadcast rights** in **musical works**. This means the actual musical composition and the associated lyrics. We therefore represent the composer of the music in a song, the lyricist of the words associated with a song and the publisher in respect of that song, if the composer and/or lyricist has entered into an agreement with a publisher in respect of the publication of that song.

9. SAMRO acquires these rights from each of its members by means of a written deed of assignment. The duration of each assignment of rights is limited to the duration of membership with SAMRO.

10. The deed of assignment covers all musical works that the member has created prior to becoming a member and all musical works that the member will create in the future. This is important as SAMRO implements a "blanket licensing regime" in respect of its repertoire. This regime is more fully explained herein below.

11. SAMRO members are then obliged to notify SAMRO of each and every work that he or she creates as well as whether there are any co-authors/owners and what the share splits in respect of the royalties should be. SAMRO plays no role in determining the ownership of works or the share splits involved.

The Blanket Licensing Regime:

The SAMRO licence enables us to collect royalties on behalf of our members and, in turn, to be able to not only distribute such royalties back to the pockets of our members but to also contribute towards achieving the following on behalf of our members and society at large : (a) extending arts, culture and heritage infrastructure, facilities and resources beyond the colonial urban centres into peri -urban and rural communities, (b) providing education, training and skills through formal and informal programmes, (c) expanding existing local markets regionally, continentally and globally – allowing our members' works to reach all corners of the world so they can earn royalties beyond our national borders, (d) developing beneficial public, private and international partnerships, (e) liaising with local, provincial and national authorities for the advancement of the music sector and (f) initiating and participating in activities relating to and beneficial to the art, culture and heritage practices.

12. The term “blanket licence” as opposed to a “transactional licence”, refers to a licence which grants a user the right to use any of the musical works held and administered by the collecting society, at any time during the term of the licence and creates the reciprocal duty on the user to fully account for all the music used during the term of the licence. This is convenient for the user and alleviates the user of the administrative burden of having to identify which works will be used in advance and adhere to the playlist after pre-clearing the use thereof with the collecting society.

13. In the case of a “transactional licence” on the other hand, a user cannot use any musical work until he or she has obtained the express permission of the collecting society and paid a licence fee to the collecting society that holds and administers the rights, otherwise such use would constitute a copyright infringement in terms of the Act. This type of licensing is very onerous for a user to implement on a large scale, for example a broadcaster. Moreover, it significantly increases the costs of administering musical works which ultimately affects either the amount of royalties payable to our members or the licence fees payable by the user. This also increases the music users’ administrative costs significantly.

14. It is on this basis that the blanket licensing regime has been accepted internationally as one of the most effective systems of copyright licensing from both a rightsholder and user perspective. SAMRO is also committed to driving down the costs of administering musical works in order to maximise the royalties payable to our members.

SAMRO’s Repertoire:

The SAMRO repertoire is the creative mine that attracts local and international investors to draw from it, make something of it and generate value from the distribution and consumption thereof. The SAMRO repertoire is one of the few, remaining re-usable resources that ensures that the compositions of the past can continue to live on in the content of the present and the future; thus creating the potential for exponential value creation. The SAMRO licence ensures that the wealth that sits in that mine is not exploited unfairly, that the rightful owners of the resources in that mine are compensated by those who draw from vast creative resources that sit in the mine.

15. SAMRO represents the past and future rights of its local members in respect of their musical works. However, SAMRO does not only represent its members’ musical works, it also represents the musical works of international authors and their publishers in almost every country around the world. Thus SAMRO’s repertoire is forever growing and changing as and when works are authored and notified to SAMRO and our affiliated societies around the world. This is known as the system of collective management. Blanket licensing forms an integral part of this system.

16. SAMRO participates in this international system in order to ensure that our local members’ rights are represented and treated on the same basis as the members of our affiliated societies in their respective territories.

DEFINITION OF BROADCASTING

To continue with the mining metaphor: the fact that those who mine our natural resources periodically change the tools that they use to mine, beneficiate and distribute those resources does not change the fact that irrespective of what tools were used to mine the resources, the value that derives from those resources needs to be shared with the communities in which such mining takes place and with the broader nation as a whole through royalties. We live in an age of rapid technological advancement where the means through which information is distributed change often; the fact that music is today consumed over the internet as opposed to a radio broadcast does not alter the fundamental value of that musical work and thus should not prejudice the authors of such works from sharing in the value derived from making use of those works – doing so would go against the spirit of inclusive growth and be tantamount to only requiring royalties to be paid for instances where platinum is used for jewellery purposes, while not requiring royalties for instances where platinum is used by the automotive industry to manufacture catalytic converters.

Technological Neutrality:

17. In terms of S6 of the Copyright Act, copyright in a musical work vests the exclusive right to do or to authorize the doing of a number of acts in respect of the a musical work in the Republic including the broadcast of the work.

18. In terms of the Copyright Act **"broadcast"** means:

    ...a telecommunication service of transmissions consisting of sounds, images, signs or signals which-
    (a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and
    (b) is intended for reception by the public or sections of the public,

    and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly…"

    'broadcaster' means "a person who undertakes a broadcast.

19. Programming has traditionally been broadcast by a limited number of licensed entities via radio frequency spectrum. Advancements in broadcast technology and the internet have changed the way in which musical works are "broadcast" or accessed by the public. Audiences are now able to recieve content on their computers, mobile phones, tablets, smart TV's and other connected devices. Moreover audiences are able create and distribute their own content via the internet.

20. The definition of "broadcasting" provided for in the Copyright Act has not been amended to keep up with these technological advancements and to afford proper copyright protection for authors and rightsholders. Moreover, this has allowed mobile and online providers to exploit authors and rightsholders musical works without compensation.

21. These technological developments were however provided for in the Electronic Communications Act of 2015 (ECA), by the inclusion of a technology neutral definition of broadcasting. "Broadcasting in terms of the ECA is currently defined as

    "any form of unidirectional electronic communications intended for reception by—
    (a) the public;
    (b) sections of the public; or
    (c) subscribers to any broadcasting service,

whether conveyed by means of radio frequency spectrum, or any electronic communications network or any combination thereof, and "broadcast" is construed accordingly.."

22. We agree with the drafters of the Bill that the act of broadcasting is one distinct from communication to the public, both of which should be protected as separate restricted acts in respect of a musical work.

23. SAMRO notes that South Africa is a party to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). Article 11 of the Berne Convention specifically provides that.

> *(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:*
> *(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
> *(ii) any communication to the public by wire or by* ***rebroadcasting of the broadcast of the work****, when this communication is made by an organisation other than the original one…*

24. For purposes of the Berne Convention the term "literary work" includes musical works, with or without lyrics.

25. With the development of the digital age, the internet and satellite broadcasting, broadcasters are now able to re-transmit a broadcast of another broadcaster, either in the same format or an amended format, via their own broadcast platform, and in so doing rebroadcast musical works to the audience of their own broadcast platform and generate revenue on the back of authors and rightsholders rights copyright.

26. An example is Broadcaster X who broadcasts in a certain area and whose footprint is limited by their broadcast licence, but is now able to sell their broadcast to Broadcaster Y, who in turn includes it in their offering to their customers and with a larger footprint. Authors and rightsholders rights are exploited without compensation.

27. SAMRO submits that the definition of "broadcasting" in the Copyright Act should be amended to a technology neutral definition similar to that contained in the ECA. We propose the following in respect of the wording of the definition:

> *...any form of unidirectional electronic communications, conveyed by whatever means, and intended for reception by—*
> *(a) the public;*
> *(b) sections of the public; or*
> *(c) subscribers to any broadcasting service*
> *and shall include the re-broadcast of the broadcast of a work when the broadcast is made by an organisation other than the original one.*

COMMUNICATION TO THE PUBLIC RIGHT

28. The communication to the public right is distinct from the right to broadcast in that, in respect of a broadcast, control of the timing of the transmission rests with the broadcaster (so-called "push services"). However in respect of the right of communication of the public, the user (audience) chooses when and where to access the works at his or her demand.[1]

29. An example of a communication to the public is the re-transmission via the internet of works included in terrestrial or satellite TV broadcasts or a streaming service[2]

30. SAMRO welcomes the inclusion of the communication to the public as a restricted act in respect of musical works. SAMRO is pleased to note that this provision echoes the rights provided for in Article 11 of the Berne Convention and the Article 8 of the WCT.

31. This amendment will go a long way in assisting collecting societies in the collection of licence fees for the digital exploitation of musical works and ensuring that the rights of authors and rightsholders are adequately remunerated digital users. SAMRO agrees with the inclusion of the words *"whether interactively or non-interactively*" as provided for in the proposed definition.

OBLIGATIONS OF USERS OF MUSICAL WORKS

The music industry, along with the cultural and creative industries more broadly, is characterised by members who have the distinct profile of "producers"; most of whom are micro and small enterprises. In contrast to that, the most significant "users" and exploiters of the musical works tend to be large corporates and media networks. The power imbalance that exists between producers and users necessitates that a regulatory framework be put in place to protect producers – this includes compelling users to supply the correct information to authors and their representatives so that appropriate licences and fees can be issued and charged.

Compelling music users to provide details of how works are used:

32. Collecting societies are reliant on music users to provide them with the necessary information and details, including technical details and financial information, in relation to how they use the musical works and the parameters used to calculate their licence fees according to the collecting societies tariffs.

33. Moreover, an essential element of determining a reasonable and appropriate tariff for a particular licence is the value that the musical work brings to the music user. It is international best practice that the licence fees payable for the use of music as an essential part of the music users business is determined based on the revenue generated, whether directly or indirectly, by the business of the music user.

[1] De Wolf & Partners *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society ("InfoSoc Directive"*), European Union 2013 at page 27.
[2] Art 3 InfoSoc Directive.

34. As such the information referred to above is essential for the proper licensing and protection of authors and rightsholders' copyright. Collecting societies need to have sufficient information at their disposal in order to issue the user with the appropriate licence and charge the appropriate fees. This information is often not forthcoming or misrepresented by the user.

35. SAMRO submits that the Copyright Act should provide that users must provide collecting societies, authors and rightsholders' with all the necessary information relating to the calculation of licence fees, the use of the work and the music that was used, as prescribed by the collecting society, author or rightsholder.

36. We suggest the inclusion of the following clause in this regard:

> *Any person who performs a restricted act in respect of any work protected by copyright under this Act, or causes another to do so, without providing the copyright owner or collecting society responsible for administering the said copyright, with all information regarding the use of the work, information necessary for calculating the applicable licence fee and the required usage information shall be guilty of an offence punishable by a fine or imprisonment not exceeding five years, or both.*

Compelling music users to provide music usage details:

37. The CRC recommended that the Copyright Act should be amended by the legislators to force music users to submit log sheets.

38. SAMRO is reliant on receiving music usage log sheets from music users in order to distribute all the licence fees that we receive to our members accurately. Although music users are clearly obliged to provide these reports in terms of the licence agreements that they enter into with SAMRO, they do not comply fully with their obligations. Licensees also refuse to subject themselves to such conditions by agreement. Certain users do not record the details of the music that they perform in public or broadcast, whilst others provide inaccurate or incomplete information.

39. SAMRO is, as a result of this situation, forced to distribute the licence fees collected based on the information that it does receive. Music usage reports are largely submitted by public and commercial television and radio stations. Thus their data contributes largely to the data used for the distribution of royalties. However, the music played by these broadcasters is also predominantly international content. Reporting by community broadcasters is poor to non-existent and non-broadcast users seldom bother to provide any usage data.

40. The CRC also highlighted the fact that general music users like retailers, pubs and clubs, who currently don't submit their music usage data as they are supposed to tend to play more local music content than broadcasters. This, the CRC asserted, put local composers at a disadvantage.

41. The industry urgently requires the assistance of the legislature in this regard. All music users must be compelled to provide collecting societies with their music usage reports as prescribed by collecting societies, authors or rightsholders.

42. In addition, SAMRO recommends that broadcast users be required to subscribe to a monitoring service such as Soundmouse or BMAT which would provide complete and accurate usage monitoring

and data. Alternatively, the costs of doing so should be included in the tariff payable for the music rights.

43. Parliaments' assistance in this regard will significantly improve the identification of musical works and the relevant rightsholders' in a cost effective way. More importantly this will mean increased royalty revenue for authors and rightsholders' and contribute tremendously towards economic freedom and development.

REGULATION OF COLLECTING SOCIETIES

Accreditation of Collecting Societies:

44. Clause 24 of the Bill proposes the insertion of a new Chapter 1A into the Act. This chapter provides for the accreditation of collecting societies.

45. SAMRO has no objection to collecting societies being required to be registered and accredited with the Commission, in so far as the purpose of this accreditation is the promotion of transparency, good governance and accountability to its membership. SAMRO is confident that the proposed amendments seek to achieve this purpose.

46. We do however, for technical reasons, suggest that the provisions be amended to read as follows:

> *22B (3) Any person or an institution that intends to act as a Collecting Society by administering on behalf of any copyright owners or on behalf of an organisation representing copyright owners, the right to receive payment of a royalty in terms of this Act, must be registered and accredited by the Commission in terms of this Act.*

47. That is not to say that collecting societies administering performers rights should not be regulated, registered or accredited by the Commission, but rather that this provision should appear in the Performers Protection Act, 1967 (Act 11 of 1967) (PPA), which was specifically enacted to provide for the protection of performers rights, and adapted to meet the needs of performers rights. The CRC report does envisage the amendment of both the Copyright Act and the PPA respectively.

48. The rights of performers are not rights of copyright. They are accepted internationally as "neighbouring rights". As such these rights require separate legislation, the PPA, which speaks to the specific nuances of the performers industry. That is also not to say that one collecting society cannot act on behalf of performers and copyright holders, but that they should be required to obtain accreditation in terms of both Acts and comply with the specific "right specific" regulatory requirements required in terms of the respective Acts.

One Collecting Society per Right:

49. The Bill introduces in Chapter 1A section 22B(6) which provides as follows:

> *"(6) The Commission shall only register one collecting society for each right or related right granted under copyright.*
> (7) *Where there is no collecting society for a right or related right granted under copyright, the user, performer, owner, producer or author may enter into such contractual arrangements as may be prescribed."*

50. Concerns have been raised that this provision may attract competition law issues. However, we trust that this was fully canvassed by the CRC and the drafters of the Bill. SAMRO submits that where there is no collecting society in place for a particular right, the author or rightsholder should be free to contract as he or she deems fit. This we submit is an authors' and rightsholders' constitutional right.

51. It is sometimes not possible or cost effective to administer restricted acts in respect of a particular copyright, on their own, it also creates confusion on the part of users as to which collecting society is responsible for which restricted act, in relation to a specific copyright. It is for instance more effective from an administrative and cost perspective to licence broadcast and reproduction rights in respect of musical works jointly. Collecting societies must be given the freedom to organise themselves appropriately to issue joint licences.

52. SAMRO suggests that the proposed section be redrafted so as not to exclude any rights or restricted acts in respect of those rights:

> *There shall be one collecting Society per copyright and set of restricted acts, to be registered and regulated by the Commission. Where there is no collecting society in place for a particular right, the author or rightsholder is free to contact as he or she deems fit.*

Administration of "Music Users Rights":

53. Section 24 recommends the insertion of clause 22C(1) which provides that collecting societies may accept exclusive authorisation to administer any right from a music **"user".**

54. SAMRO understands that music users, who exploit authors and rightsholders' rights, also have rights of copyright that require protection. An example of this a broadcaster, who exploits musical works in their broadcast programming, but also has a right to protect their own actual broadcast, including the re-broadcast thereof as per section 10 of the Copyright Act. SAMRO assumes that this is what the legislature intended to accommodate when including the term "user" in this proposed amendment.

55. SAMRO submits that due to the competing interests at play, it would be a conflict of interest for any one society to administer music users' rights on the one hand and authors and rightsholders' rights on the other. Authors are reliant on collecting societies to protect their rights and collect licence fees. Handing power over collecting societies to the very people that exploit these rights and have no interest in protecting any rights but their own would be a grave intrusion of the rights of authors and rightsholders. Music users are intent on cutting costs, driving down the royalties payable to authors

and understating the value that a musical work has in enabling them to generate revenue. It is unthinkable that this is the legislature's intention.

56. SAMRO is of the view that the Bill should be reviewed to remove all such references in-so-far as they conflict with the rights of authors and rightholders.

Control of Collecting Societies:

57. SAMRO notes that the proposed section 22D provides that a collecting society is subject to the control of the users, performers, owners, producers or authors whose rights the collecting society administers.

58. In view of our comments in the preceding paragraphs, we agree that collecting societies should be subject to the control of those whose rights they administer, but for the reasons highlighted above, a collecting society cannot be placed in the untenable position of having to administer the rights of music users on the one hand and the rights of authors and rightsholders', on the other.

Approval from Members:

59. SAMRO welcomes the inclusion of section 22D in so far as it requires the following from collecting societies:

59.1. to obtain the approval of its members for its procedures of collection and distribution. We submit that SAMRO is obliged in terms of its rules to obtain such approval from its members.

59.2. to obtain the approval of its members for the utilisation of any amounts collected as royalties for any purpose other than the distribution of the royalties to the members. We submit that SAMRO is obliged in terms of its rules to obtain such approval.

59.3. to provide its members with regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of rights. We submit that SAMRO is obliged to provide this information to its members.

59.4. to distribute royalties, in so far as is possible, in proportion to the actual use of the associated works. SAMRO submits that, although it uses all best endeavours , this is a very difficult task. This this is due to the failure of music users to provide accurate, if at all, details of their music usage, and to do so on time. With reference to our comments hereinabove, a provision in the Bill forcing music users to submit their music usage reports, as prescribed by the collecting society would assist us tremendously in reaching this objective. Moreover, the costs of a collecting society doing this on the music users' behalf and for purposes of ensuring that this information is accurate should be built into the collecting societies tariffs.

Withdrawal of rights from Collecting Societies:

60. SAMRO welcomes the inclusion of the proposed section 22C(1) allowing authors and rightholders' to withdraw their rights from collecting societies.

61. We submit that this is in keeping with SAMRO's Membership Rules and authors and rightsholders' in this regard.

Negotiation of royalties with Publishers:

62. Section 22CE provides that collecting societies may negotiate royalty rates with **publishers**.

63. SAMRO submits that it is not a collecting society's' role to negotiate royalty rates with publishers. Royalty rates are paid and negotiated with music **users**.

64. We suggest that this section be amended to read as follows:

> *"(d) negotiate royalty rates with **users**".*

Reporting by Collecting Societies:

65. The Bill proposes that section 22E be inserted which provides as follows:

> *22E. (1) A collecting society or Community Trust shall submit to the Commission at the prescribed time such returns and reports as may be prescribed.*
>
> *(2) The Commission may call for a report and specific records from a collecting society for the purposes of satisfying the Commission that—*
> *(a) the affairs of the collecting society are conducted in a manner consistent with the registration conditions of that collecting society; or*
> *(b) the royalties collected by the collecting society in respect of rights administered by that collecting society are being utilised or distributed in accordance with the provisions of this Act.*

66. SAMRO welcomes this provision and suggests that, in addition, the section should be amended to provide for specific reporting requirements, details of reports and timelines so that Collecting Societies can prepare and ensure that it can meet its obligations to both the Commission as well as its members' year-on-year.

67. Subsection (2) above states *inter alia* that the Commission may call for any report or record for purpose of satisfying itself that the royalties are collected by the Collecting Society in respect of rights administered by such Collecting Society are being distributed in accordance with the provisions of the Act. SAMRO respectfully submits that the royalties are not distributed in accordance with the Act, but in accordance with the Collecting Society's distribution rules. SAMRO has no objection to the requirement of obtaining approval for its distribution plan.

68. We thus suggest that this provision be amended to read as follows:

> (2) *The Commission may call for any report and also call for any records of any Collecting Society for purposes of satisfying the Commission that the affairs of such Collecting Society are conducted in a manner consistent with registration conditions or that royalties collected by the Collecting Society in respect of rights administered by such Collecting Society are being utilised or distributed in accordance with the Act and* ***Collecting Society's approved distribution plan."***

LICENSING TARIFFS

Review of Licensing Tariffs:

69. It was concluded by the CRC that local tariffs are generally lower than the average tariffs for the countries selected in the benchmarking. Moreover, the existing tariffs do not reflect the true value of music to music users. It was recommended that the collecting societies should review and benchmark the tariffs every five years to ensure that they are competitive.

70. While we appreciate the CRC's endorsement that collecting societies may review their tariffs and are obliged to ensure that they remain competitive, our challenge is not in reviewing the tariffs but rather in implementing existing tariffs as well as revised tariffs. Music users such as large retail chains and broadcasters refuse to pay certain existing tariffs or revised tariffs. Attempts to negotiate with these users have seen long drawn-out negotiations where delay tactics are employed to avoid paying revised tariffs. Moreover they refuse or fail to refer their dispute to the Copyright Tribunal.

71. This situation severely hinders the efforts of collecting societies to collect what is due to authors and publishers for the use of their musical works. SAMRO suggests the following in the circumstances: In view of the fact that section 9A applies to **sound recordings only** and not to musical or literary works, SAMRO submits that a new section 6A be inserted after section 6 of the Act which provides as follows:

> *6A. Royalties in Respect of Musical and Literary Works.*
>
> *(1) (a) No person may do or cause the restricted acts contemplated in section 6 without the prior permission and payment of a royalty to the owner of the relevant copyright or collecting society.*
>
> *(b) A person who intends to do or cause restricted acts contemplated in section 6 must at any time before performing such acts give the collecting society a notice in the manner prescribed by the collecting society, of his or her intention to perform such acts, indicating the date and duration of the proposed performance of the acts and the details, including technical details, of how the musical and literary works will be used by the user.*
>
> *(c) The collecting society must as soon as is reasonably practicable upon receipt of such notice respond to such notice by providing the prospective licensee with the appropriate licence terms and conditions and applicable tariff.*

(d) If the user rejects the terms and conditions and applicable tariff, the user may within 30 days of receipt of the licence terms and conditions and tariff refer the matter to the Tribunal. If the, contrary to (a) above, the user has already proceeded to use the works or the user proceeds to use the works without referring the matter to the Tribunal as envisaged herein above within 30 days, the user will be bound by the terms and conditions and tariffs of the collecting society.

(e) The Tribunal must adjudicate such matter as soon as reasonably practicable and where possible, before the performance of the act which is the subject of the application, make any order it deems fit.

(f) Notwithstanding the fact that a licence agreement has been entered into with a music user, the author, rightsholder or collecting society shall be obliged to review the terms and conditions and tariffs applicable to any licence agreement regularly, so as to ensure that the authors and copyright owners rights are protected at all times and that the author and copyright owners receive a reasonable royalty for the exploitation of their works by the user. The procedures set out in this section shall apply in this regard.

72. SAMRO is of the view that the inclusion of this section for musical and literary works under section 6A is necessary as authors and rightsholders and their Collecting Societies also need an effective mechanism for the processing and finalisation of licensing and tariff disputes with users. This provision would go a long way in assisting the industry in having tariff disputes heard and dealt with effectively and efficiently.

DURATION OF ASSIGNMENT

73. Clause 21 of the Bill proposes that section 22 is amended as follows:

"(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the [licenser] licensor or, in the case of an exclusive [principal act] sub-licence, the exclusive [sub-licenser, as the case may be] sub-licensor, as stipulated in Schedule 2: Provided that assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment."

74. This amendment appears to stem from paragraph 10.10 of the CRC report which dealt with and recommended the limitation of the duration of the assignments of rights between recording entities and "artists" or performers, in respect of the sound recording rights provided for in section 9A of the Act ("Needletime"). The purpose of such a provision is said to be the protection of "artists" in their dealings with record companies and preventing "artists" from unknowingly signing their rights away in perpetuity without the option to revoke the assignment if they are unhappy with the service that they receive from the recording company or in instances where agreements are breached.

75. Contrary to the CRC's recommendations, this provision limits the duration of all assignments and not only those between recording entities and "artists" or performers, in respect of Needletime. Moreover, the wording of the proposed provision forces all authors or rightsholders' to assign rights for **no less than 25 years**. We submit that this was not the intention of the CRC.

76. SAMRO suggests that this section be amended to provide that assignments will be valid for a period of up to 25 years from the date of the assignment, except for assignments between an author or

rightsholder and an accredited collecting society which may be valid for an indefinite period of time, but shall terminate and revert to the author or publisher upon the termination of their membership of the collecting society, or the lapse of the collecting societies accreditation.

77. To expect an accredited society to monitor the dates and duration of thousands of deeds of assignment is administratively onerous and will detract from the collecting societies time, resources and primary function of collecting royalties for its members. This can be avoided by the inclusion of such an exemption.

OWNERSHIP OF ORPHAN WORKS

78. The problem facing the music industry is the enforcement of copyright for owners of musical works who cannot be identified, commonly referred to as "orphan works". SAMRO is encouraged by the Department's commitment to resolving the problem that exists with orphan works, however, we do not believe that the current drafting will alleviate the situation.

79. The nature of an orphan work and in turn, the problem, is confined to those works where copyright owners or holders cannot be **identified.** The proposed definition of orphan works goes further than is required, and should be restricted to only those copyright owners who cannot be identified.

80. The licences that SAMRO issues are in respect of its **members' works** that have been duly assigned to SAMRO. When authors and rightsholders sign up as members, they voluntarily contact with SAMRO in respect of their intellectual property, by assigning their broadcast and performance rights to SAMRO so that SAMRO can administer the rights by issuing licences to music users and collecting license fees for distribution to the members in accordance with the SAMRO rules. This we add is their constitutional right. SAMRO is a membership based organisation and thus accountable to each member, through the the AGM. It is the member's prerogative to determine and agree to the rules that are applicable to their works, even in instances where the member can no longer be located, or in instances where the works may not be properly documented.

81. SAMRO rules provide that all possible efforts must be made to obtain the correct information to distribute the funds. If after a period of 5 years SAMRO is not able to obtain the correct information required to distribute the funds, they are placed back in the distribution pool for redistribution to SAMRO members.

82. As mentioned herein above, SAMRO members are obliged to notify SAMRO of each and every work that he or she creates as well as whether there were any co-authors/owners and what the share splits in respect of the royalties should be. It is often the case then that members do not notify SAMRO of their works or that the notification information is inadequate or that the SAMRO member cannot be immediately located.

83. Section 22 of the Bill appears to undermine the members' constitutional right to contract freely in respect of his or her rights, by providing for the unlawful expropriation of the rights by the State in so far as it extends further than those authors or rightsholders that cannot be identified.

84. Moreover, the undocumented royalties are largely a factor of poor reporting by users as insufficient information is provided to SAMRO to enable the money to be distributed to the correct rightsholders. If the remedies referred to above with regard to a legal obligation on users to employ the services of a monitoring service provider and submit complete and accurate usage returns, including cue sheets, were implemented the problem would largely be alleviated.

85. We suggest that the definition set out in section 1(f) of the Bill be amended to read as follows:

> *"orphan works" mean works in which copyright still subsists but the right holder, both the creator of the work or the successor in title* ***are not identifiable".***

WORKS CREATED USING GOVERNMENT FUNDING

86. Clause 3 of the Bill proposes to amend section 5 of the Act to read as follows:

> *(2) (a) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or [such] an international [organizations as may be prescribed] or local organisations. (b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question.'*

87. Clause 21 of the Bill also proposes that to amend section 22 of the Act by providing as follows:

> *(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: Provided that copyright owned by, vested in or under the custody of the state may not be assigned.'*

88. This provision essentially allows for the vesting of copyright in government, local and international organisations if the creation thereof is funded by any such entity. It undermines the fundamental principle that the authors of commissioned work retains copyright in the actual musical work, regardless of fact that it is commissioned.

89. This will severely impact the income of the very authors that this Bill seeks to protect, who produce works with state funding, for purposes including commercial use by the public broadcaster and are reliant on the royalty income derived from these works. The state funding is and has always been provided to compensate the author or composer for the labour undertaken during the creation process, and not for the copyright itself. The provisions of the current Copyright Act recognise this principle. SAMRO is of the firm view that transference of copyright remains subject to written assignment at the authors instance only.

90. The inclusion of this provision will have the dire consequence of limiting creativity rather than the intended objective of fostering creativity, economic transformation and freedom.

LIMITATIONS ON COPYRIGHT

Berne Convention:

91. South Africa is a party to the Berne Convention for the Protection of Literary and Artistic Works. The expression “literary and artistic works” for purposes of the Bern Convention includes musical compositions (with or without words).

92. Article 9 provides that authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. It is further provided that the contracting country may to permit, by way of legislation, the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

93. The Bern Convention sets out a three-step-test concerning the imposition of such restrictions. Restrictions that do not pass the test are unlawful. The three requirements of the three-step test are:

93.1. exceptions should be confined to certain special cases;

93.2. exceptions must not conflict with a normal exploitation of a work; and

93.3. exceptions must not unreasonably prejudice the legitimate interests of the author.

94. Section 10 of the Bill proposes a number of restrictions on copyright, a number which we believe unreasonably prejudice the rights of authors and rightsholders and conflict with the normal exploitation of the work.

Educational Use Exemption:

95. Section 10 of the Bill appears to propose expanded exemptions for reproductions of all works for educational and academic activities.

96. SAMRO is of the view that the inclusion of such provisions is tantamount to using a sledgehammer to crack a nut. Moreover, the provision will have a dire impact on the livelihoods of authors, rights holders and the public at large as there will be no incentive for the creation of works for consumption by the public. This in turn will have a severe impact on the quality of works and education in the future. SAMRO is of the view that if not corrected, these provisions would be open to a successful constitutional challenge.

97. While we understand that the intention of the drafters is an attempt to further the education agenda, which is an important objective, by providing students with free access to study material, we do not believe that this provision will achieve this purpose, nor will it serve the interests of providing a sustainable livelihood for the authors and rights holders of these works e.g. a person doing a degree costing R40,000 per annum - if say, 3,000 copies are made from a book/s, at a photocopy cost of 10 cents per page will convert to R300. The cost of a licence for universities to copy material for students

for all their subjects for a full year of study is on average significantly less than the cost of having to purchase a single textbook. These costs represent such a small percentage when compared to the cost of tuition. Moreover, the impact of removing the incentive for authors to create works will far outweigh the impact, that having to pay a nominal fee for the use of such works will have on education.

98. Moreover, we believe that introducing the aforementioned exemption will upset the balance that the current fair dealing provisions strike between the interests of copyright owners on the one hand and the public interest and the interests of the users on the other. One of the important purposes of copyright is that it incentivises the creation of the very material that the Bill proposes to make available for free.

99. In view of the aforementioned we submit that there is no reason why the proposed exemption should be a separate exception and not part of the current fair dealing provisions.

100. We do not believe that the expropriation of rights provided for in this regard meet the requirements of the three-step-test referred to above, and that the imposition of such a provisions constitute a violation of authors' and rightsholders constitutional rights.

101. In view of the aforementioned we submit that the proposed exemption should be removed from the Bill and that the current fair dealing provisions be relied upon. In instances where a dispute arises as to whether the use constitutes fair dealing, the copyright tribunal or a court of law may preside over and decide on the dispute.

Fair Use Exemption:

102. Clause 10 of the Bill amends section 12 of the principal Act by the substitution in subsection 1 which appears to introduce the "fair use defence" which exempts a user of a work from copyright infringement. This it does while still maintaining the "fair dealing exemption" in its current form. We respectfully submit that the "fair use defence" should be removed from the Bill and that the "fair dealing" provisions should be retained.

103. "Fair use" is broad and open ended in that it is not confined to certain kinds of works, it applies to all copyright protected works and to all four of the restricted acts. It outlines mere examples of what types of use would constitute fair use and then sets out the factors that must be considered when determining whether the use of the work constitutes fair use. This is done on a case-by-case basis. The end result is that when there is doubt as to whether a specific use of a work constitutes fair use, the dispute will have to be referred to the courts to resolve the matter. The courts will then apply the principles and determine the permitted use.

104. The problem with the fair use approach is that a broad variety of uses of works are allowed without the user being required to seek and obtain the copyright owner's permission and without paying a royalty. It opens copyright protection and the exemptions up to abuse and places authors and copyright owners in a position where they have to go to court in order to enforce their copyright, which is costly and time consuming.

105. The danger with this approach is that the decision as to what constitutes fair use will ultimately lie in the hands of the court and users will attempt to rely on the fair use exemption as an excuse not to take out a licence. Should a collecting society wish to challenge this, they will have to take the user to court which will be a lengthy and costly exercise. The only parties that are set to benefit from this provision are the lawyers who will be taking these cases to court. This does not serve the purpose that the Bill was set to achieve.

106. The principle of fair use is an American approach which is wholly offensive to and inappropriate for South Africa. Firstly, the US is a litigious society. South Africa is far from a litigious society and in fact great barriers in respect of access to justice and economic freedom exist in South Africa. Litigation is extremely expensive and citizens cannot be expected to litigate in order to protect their bread and butter. We submit that the weighting of prejudice, required for the balancing of rights in this regard, favours the author and rightsholder. Secondly, the US absolutist approach to freedom of expression is not appropriate in South Africa given that our Constitution specifically provides that freedom of expression can be limited and must be weighed up against other constitutional rights such as the right not to be deprived of one's property, and the limitations provided for in section 36 of the Constitution. We submit that the imposition of such an approach would be wholly unconstitutional and a grave intrusion of authors and rightsholders rights, which this Bill sets out to protect.

107. The Copyright Act currently adopts the doctrine of fair dealing. Under this doctrine, "fair dealing" in respect of a work of copyright does not constitute a copyright infringement, however such fair dealing is limited to certain purposes, under certain circumstances. Fair dealing is adopted in clauses 12 to 19B of the Copyright Act.

108. In summary copyright is not infringed by any fair dealing with literary works, musical works, artistic works, broadcasts and published editions, where the use of the work is:

108.1. for the purpose of research or **private study** by, or the personal or private use of, the person using the work;

108.2. for the purpose of criticism or review of that work or of another work, provided that the source and the name of the author (if it appears on the work) shall be mentioned; or

108.3. for the purpose of reporting current events:

108.3.1. in a newspaper, magazine or similar periodical, provided that the source and the name of the author (if it appears on the work) shall be mentioned; or

108.3.2. by means of broadcasting or cinematograph film.

108.3.3. In respect of cinematograph films, sound recordings and computer recordings, copyright is not infringed by any fair dealing.

109. SAMRO respectfully submits that the current fair dealing provisions are sufficient to achieve the purpose of facilitating private education and study. Should there be any dispute as to whether a use of a work constitutes fair dealing as set out above, the dispute can be referred to the Copyright Tribunal for cost effective, efficient and speedy resolution.

PRIVATE COPYING LEVY

110. Many countries limit the reproduction right for private use, because it is practically impossible to grant permission to and monitor millions of people and how they reproduce works. A private copy is a copy made by an individual for non-commercial purposes.

111. In view of the expropriation of the rights of authors and rightsholders occasioned by the imposition of the aforementioned limitations on copyright and South Africa's obligations set out in the Berne Convention, we submit that providing for a private copy levy, payable by manufacturers of devices used to access copyright protected material, would go a long way in ensuring that the rights of authors and rightsholders are not limited more than is necessary and the appropriate constitutional balance is struck. This approach is adopted in many jurisdictions, where such limitations to copyright are legislated.

112. SAMRO remains available to the Portfolio Committee to provide more information in respect this suggestion and the various models that have been adopted throughout the world.

CONCLUSION:

113. SAMRO reiterates that it is encouraged by Parliament's commitment to the objectives set out in the Bill and thanks the Parliament for considering the submissions contained herein. We remain available to Parliament for any further discussions or queries in respect of our submissions and any subsequent legislative amendments that may follow.

114. We look forward to presenting our submissions verbally in August 2017.