



SOUTHERN AFRICAN MUSIC RIGHTS ORGANISATION'S

SUBMISSION IN RESPECT OF

PERFORMERS' PROTECTION AMENDMENT BILL OF 2016

(GENERAL NOTICE [B24-2016])

Published in Government Gazette on 6 to 7 January 2017

1. INTRODUCTION:

- 1.1. The Southern African Music Rights Organisation (SAMRO) thanks the Department of Trade and Industry (DTI) for the opportunity to make these submissions on the Performers' Protection Amendment Bill of 2016 published for comment in General Notice [B24-2016] 6 to 7 January 2017 (Bill).
- 1.2. SAMRO is encouraged by the DTI's commitment to the enhancement of the performers' legislative regime and the objectives set out in the Bill in so far as they relate to audio-visual fixations.
- 1.3. In this document we highlight the particular amendments that we believe will go a long way in advancing the performers' legislative regime, as well as those we believe will have the unintended consequence of muddying the legislative landscape and infringing upon performers. We also make suggestions as to how the problematic provisions can be resolved.

2. BACKGROUND:

2.1. ***SAMRO's Foundations in the Copyright Act:***

2.1.1. 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 relates specifically to **musical works**.

2.1.2. 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

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- (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- (b) *publishing the work if it was hitherto unpublished;*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]*

2.1.3. In addition to SAMRO’s functions stated in paragraph 2.1.1 above, SAMRO previously also had a mandate to administer rights afforded to Performers in terms of the Performers’ Protection Act 11 of 1967. SAMRO drew its authority from section 9 of the Copyright Act, which deals with a type of work of intellectual property that is a sound recording, more commonly known in the industry as “Needtime Rights”.

2.1.4. Needletime Rights are rights that ensure that owners of sound recordings (record companies) and performers (recording artists) are remunerated for the usage of record companies’ sound recordings and the public performance of performers’ commercially released recorded performances. The remuneration of record companies and performers happens each time the recorded performance is played on radio stations, restaurants and bars, et cetera. A needletime right is not a Copyright. It is a neighbouring right that is provided for in the Performers’ Protection Act.

2.1.5. A Trust, known as the Performers' Organisation of South Africa Trust (POSA), was established in 2009 to administer needletime rights on behalf of recording artists or musicians who had assigned their needletime rights to SAMRO.

2.1.6. The Copyright Amendment Bill 2015 introduced section 9B which provides that:

“There shall be one collecting Society per copyright and per set of rights, with regard to all music rights such as performance, needletime and mechanical, to be registered and regulated by the Commission.”

2.1.7. The resolution of the legal battles POSA Trust had with the old South African Music Performance Rights Association (SAMPRA) on the sharing of needletime royalties between record companies and performers, led to POSA Trust and SAMPRA reaching an agreement in 2014 that the two organisations should merge to form one organisation.

2.1.8. The merger of the two organisations was completed in November 2016. The new organisation has two chambers: the performers' chamber and the record companies' chamber. The two chambers have equal powers and are equally represented on the board of directors. The Memorandum of Incorporation, also states that royalties will be shared equally between the record company that produced the sound recording and the performers featured in the tracks.

2.1.9. Due to the fact that SAMPRA had been the needletime right organisation licensing music users and collecting licence fees, it was agreed that the new merged organisation would be known as SAMPRA.

2.1.10. Section 9A of the Copyright Act specifically refers to sound recordings only and thus the current accreditation of collecting societies is not applicable to SAMRO in respect of administration of musical works.

2.1.11. A majority of the members that SAMRO represents are also performers, and their needletime rights are administered by SAMPRA. This has resulted in SAMRO sharing a strong interest with SAMPRA in respect of performers represented by SAMPRA. SAMRO makes it its priority to ensure that the interests of performers represented by SAMPRA are treated as paramount and as though they were SAMRO members.

2.2. **SAMPRA's Authority to Act as a Collecting Society on behalf of its Members:**

- 2.2.1. SAMPRA acquires the rights to administer performers' rights from each of its members by means of a written mandate. The duration of each mandate of rights is limited to the duration of the members' membership with SAMPRA. The mandate covers all performances that the member has created prior to becoming a member and all sound recordings that the member will create in the future. This is important as SAMPRA implements a "blanket licensing regime" in respect of its repertoire. This regime is more fully explained herein below.
- 2.2.2. A Featured Performer who has mandated SAMPRA to administer his/her needletime rights is obliged to notify SAMPRA of each and every recorded work that he or she has performed in. The Featured Performer also has the obligation of registering the names Non-featured Performers and/or Other featured Performers who contributed in the recording of the recorded performances.
- 2.2.3. A Featured Performer is an individual performing artist in whose name the album/track was recorded, or a member of a band and who made a performing contribution to the recorded performance.
- 2.2.4. A Non-featured performer is an individual performing artist who has been engaged for a fixed period of time, customarily known as a session, specifically to make one or more recorded backing performances which subsequently are included in the sound recording.
- 2.2.5. An Other featured Performer is a guest recording artist whose contribution would ordinarily fall within the Non-featured Performer status, but merits Featured Performer status.
- 2.2.6. SAMPRA's distribution rules for performers state that the performer revenue for each track is split on a 65%/35% basis, with 65% allocated to the Featured Performer. The remaining 35% is shared amongst the Non-featured Performers in the track. But an individual Non-featured performer can never receive more than one seventh of the allocation of 35. If there is only one Non-featured performer in the track, the total Non-featured performer is only entitled to one seventh of 35%, with the remaining six sevenths of 35% reverting to the Featured Performer.

2.2.7. The Other featured Performer shares equally with the Featured Performer(s).

2.2.8. Where there are no Non-featured Performer or Other featured performers, the allocation to Featured Performer(s) is 100%.

2.3. **The Blanket Licensing Regime:**

2.3.1. 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 performers’ performances 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 performers’ performances used during the term of the licence. This is convenient for the user and alleviates the administrative burden by not having to identify which performers’ performances will be used in advance and adhere to the playlist after pre-clearing the use thereof with the collecting society.

2.3.2. In the case of a “transactional licence” on the other hand, a user cannot use any of SAMPRA’s performers’ performances 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 an infringement in terms of the Performers’ Protection 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 performers’ performances which ultimately affects either the amount of royalties payable to SAMPRA’s performers or the cost of the licence to the user. This will also affect the administrative costs of the performance users significantly.

2.3.3. SAMPRA is committed to driving down the costs of administering performers’ performances in order to maximise the royalties payable to their members.

2.3.4. It is on this basis that the blanket licensing regime has been accepted as one of the most effective systems of licensing from both a rightsholder and user perspective.

2.4. **SAMPRA Repertoire:**

2.4.1 SAMPRA represents the past and future rights of its local performer members, as well as performer members of sister societies with whom SAMPRA has concluded reciprocal agreements, in respect of their performances. SAMPRA's repertoire is forever growing and changing as and when performances are authored and notified to SAMPRA. This is known as the system of collective management. Blanket licensing forms an integral part of this system.

2.5. **Musical Works relation to Sound Recordings Needletime:**

2.5.1. SAMRO draws its authority from section 6 of the Copyright Act, cited herein above, 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". A sound recording is the embodiment or fixation of sounds, data or signals representing sounds. Musical works are contained in sounds recordings but are separate works of intellectual property.

2.5.2. Section 9A of the Act also specifically refers to sound recordings only and thus the current accreditation of collecting societies is not applicable to SAMRO in respect of its administration of musical works.

3. ***Insertions of new definitions and substitutions to existing definitions***

3.1. Section 1 of the Bill proposes the insertions of the following definitions to section 1 of the Act:

3.1.1. "audiovisual fixations" means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived, reproduced or communicated through a device'

3.1.2. "broadcasting" means—

(a) transmission, partially or wholly, by wire or wireless means for public reception of sounds or of images or of images and sounds or

of the representations thereof;

(b) transmission, partially or wholly, by satellite; or

(c) transmission, partially or wholly, of encrypted signals if the means

for decrypting are provided to the public by the broadcasting organisation or with its consent”

- 3.1.3. “communication to the public of a performance’ means the transmission to the public by any medium, other than by broadcasting of an unfixed performance or of a performance fixed in an audio-visual fixation including making a performance fixed in an audio-visual fixation audible or visible, or audible and visible to the public”
- 3.1.4. “communication to the public of a phonogram’ means the transmission to the public by any medium, other than by broadcasting of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram”
- 3.1.5. “Tribunal’ means the Intellectual Property Tribunal established in terms of section 29 of the Copyright Act, 1978 (Act No. 98 of 1978).”

3.2. Section 1 of the Bill also proposes the substitution of already existing definitions in section 1 of the principal Act, namely:

- 3.2.1. ‘performer’ means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary, musical or artistic works;”
- 3.2.2. “‘phonogram’ means [any exclusively aural fixation of sounds of a performance or of other sounds;] the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;”
- 3.2.3. “‘reproduction’ means a copy made [of a] as contemplated by the Copyright Act, 1978 (Act No. 98 of 1978), and shall include an audio-visual fixation of a performance”
- 3.2.4. SAMRO welcomes the new definitions as the Bill aims to introduce digital protection in respect of performances and aims to safeguard protection in respect of audio-visual fixations.
- 3.2.5. The expansion in the definition for broadcasting is a good thing which SAMRO welcomes. The principal Act limits broadcasting to telecommunication service of transmission, whereas the Bill now provides that it also includes transmission by wireless and satellite. However SAMRO is

concerned that any definition of types of use (such as broadcasting) that are based on the utilisation of specific technologies would be problematic, for example because:

- Technologies change over time, and legislation can quickly become out-dated and inapplicable.
- Technological descriptions may be insufficiently precise to unambiguously define (as is required) any specific type of use. For example, “transmission by satellite” may correctly describe a broadcast, but may also correctly describe a file download or a media stream.

SAMRO therefore proposes the implementation of definitions that describe what is being done rather than the technology that is used to do it. For example, broadcasting could be defined as “any transmission that may be received by any (appropriately identified, authorised and/or enabled) person.” SAMRO is also willing to assist in the drafting herein in order.

3.2.6. SAMRO is certain that the insertion of ‘communication to the public of a performance’ and ‘communication to the public of a phonogram’ will create clarity that protection of communication to the public is not limited only to an unfixed broadcast or performance fixed in an audio-visual fixation, but that it also includes communication to the public by any medium. In respect of communication to the public of a phonogram, the Bill provides a detailed definition that it will include transmissions to the public by any medium and that it is not limited to transmission by broadcasting. These definitions were not provided in the principal Act and are welcomed by SAMRO.

3.2.7. The principal Act only mentions the dispute forums for disagreements between parties, which includes a Tribunal, but omits to define what it means by a ‘Tribunal’. The fact that the Bill inserts a definition to the word ‘Tribunal’ creates awareness and clarity to the public and enables accessibility to the different dispute resolution forums.

3.2.8. The Bill expands the definition of ‘reproduction’ to include protection in respect of audio-visual fixations.

3.2.9. The definition of ‘performer’ now includes those performers who perform ‘musical works’ as a description to identify the type of work a performer performs, whereas in the principal Act it limited performers to those who performed ‘literary or artistic works’ only.

3.2.10. SAMRO welcomes these developments as they do not only aim to provide protection in respect of advancing technology, but they also aim to place the Bill in line with the Copyright Act and the recognition of musical works in respect of performers.

4. ***Protection of Performers' morals***

4.1. Section 2 of the Bill substitutes section 3 of the principal Act as follows:

4.1.1. “(2) A performer shall, independently of a performer’s economic rights, after the transfer of those rights, as regards his or her live performances or performances fixed in audiovisual fixations, have the right— (a) to claim to be identified as the performer of his or her performances, except where the omission is dictated by the manner of the use of the performance; and (b) to object to any distortion, mutilation or other modification of his or her performances that would be prejudicial to his or her honour or reputation, taking due account of the nature of audiovisual fixations. (3) The rights granted to a performer in accordance with subsection (2) shall, after a performer’s death, be maintained at least until the expiry of other rights granted in terms of this section or other provisions of the Copyright Act.”

4.1.2. The Bill proposes that where a performer has transferred his/her rights in respect of their live performances or performances fixed in audio-visual fixations, the performer shall still have a right to claim to be identified as the performer of their performances. The performers will also have a right to object to the way in which their performances are used, for instance in the case of a distortion, mutilation or other modifications of their performances.

4.1.3. SAMRO welcomes this amendment as it does not only promote the moral rights of a performer, but it also allows the performer to protect his or her reputation if the use of their performance is prejudicial to their honour or reputation.

4.1.4. The Bill however leaves the extent to which this right can be maintained after the death of a performer unclear. SAMRO finds this provision to be problematic because the right is dependent on the expiry of other unspecified rights and can imply that the moral rights granted to Performers are uncertain and that protection of the honour of their performances is not guaranteed after their death.

5. *Rights provided by the Bill*

5.1. Section 2 of the Bill substitutes section 3 of the principal Act as follows:

5.1.1. “(4) A performer shall enjoy the exclusive right of authorising, as regards his or her performances— (a) the broadcasting and communication to the public of his or her unfixed performances except where the performance is already a broadcast performance; (b) the fixation of his or her unfixed performances; (c) the direct or indirect reproduction of his or her performances fixed in audiovisual fixations, in any manner or form; (d) the making available to the public of the original and copies of his or her performances fixed in audiovisual fixations through sale or other transfer of ownership; (e) the commercial rental to the public of the original and copies of his or her performances fixed in audio-visual fixations, even after distribution of such copies by, or pursuant to, authorisation by the performer; (f) the making available to the public of his or her performances fixed in audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them; and (g) the broadcasting and communication to the public of their performances, fixed in audiovisual fixations.”

5.1.2. In the principal Act, section 5 only prohibits the use of performances where consent is not obtained, whereas section 3(4) of the Bill proposes clarity on the certain exclusive rights that a performer has. The Bill also provides for an exclusive right to give authority in respect of wireless communications to the public and in respect of performances fixed in an audio-visual fixation, which is in line with the new digital recognition introduced by the Bill. SAMRO welcomes this amendment. SAMRO is also concerned herein that, as pointed out in paragraph 3.2.5, the technological definition may be problematic. People might rather transmit via the internet to circumvent the intent of the legislation.

5.2. Section 3 of the Bill amends the principal Act by inserting after section 3 sections 3A and 3B as follows:

5.2.1. “3A. Where a performer has consented to fixation of his or her performance in an audio-visual fixation, the exclusive rights of authorisation granted to a performer in terms of section 3(4)(c), (d), (e), (f) and (g) shall be owned or exercised by, or transferred to the copyright owner of such

audiovisual fixation, or his or her licensee, subject to a prescribed written contractual agreement with the performer which shall give the performer the right to receive royalties or a fair equitable remuneration, whichever applicable, for any use of the performance: Provided that such agreement between the parties shall be valid for a period of 25 years from the date of commencement of the agreement and may be novated by mutual consent.”

5.2.2. ‘3B. (1) A producer of a phonogram shall enjoy the exclusive right of authorising— (a) the direct or indirect reproduction of his or her phonogram in any manner or form; (b) the making available to the public of the original and copies of his or her phonogram through sale or other transfer of ownership; (c) the commercial rental to the public of the original and copies of his or her phonogram even after distribution of them by or pursuant to the authorisation by the producer; and (d) the making available to the public of his or her phonogram by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them. (2) A performer and copyright owner of a phonogram shall enjoy the right to earn an equitable remuneration to be approved by the Minister for the direct or indirect use of the phonogram published for commercial purposes for broadcasting or for any communication to the public.’”

5.2.3. Where the performer has consented to the fixation of their performances in an audio-visual fixation, the transfer of this right is specifically ‘subject’ to a prescribed contractual agreement which will provide a performer the right to receive ‘royalties or a fair equitable remuneration’ for any use of the performance. In contrast, the principal Act provides that the transfer of this right will imply that the person who arranges the fixation has the exclusive right to receive the royalties, whereas the Bill compels the parties to enter into a prescribed written agreement. SAMRO welcomes this amendment although there is a concern that the agreement procedure prescribed may not be easy to conclude and may cause delays.

5.2.4. In 2011, SAMRO and POSA Trust petitioned the Minister of Trade and Industry requesting that the principal Act be amended to make it clear that Needletime royalties would be split 50/50 between the record company that produced the sound recording and the performer(s) featured in the recording. The legal battle between POSA Trust and the old SAMPRA centred on the splitting of Needletime royalties between record companies and performers. It is, therefore,

possible that if the equal splitting of royalties is not stipulated in the legislation, disputes could arise again in future.

- 5.2.5. SAMRO recommends that the legislation should clearly stipulate that Needletime royalties will be shared equally between the record company that produced the sound recording and performers featured in the tracks. Although SAMPRO's MOI states that Needletime royalties administered by SAMPRO will be shared equally between the record company that produced the sound recording and performer featured in the tracks, it would be better to have the split legislated. This would help prevent any potential future disputes between record companies and performers.
- 5.2.6. The equal sharing of royalties has also been recommended by the Copyright Review Commission ("the CRC"), where it states that the law should be amended to provide that the royalties payable for the use of sound recordings should be divided equally between (a) the copyright owner or owners, and (b) the performer or performers.
- 5.2.7. Stipulating that Needletime royalties will be shared equally between the record company that produced the sound recording and performers featured in the track would also do away with the proposal that the 'equitable remuneration should be approved by the Minister.'
- 5.2.8. The Minister does not have to determine what is equitable remuneration for the direct or indirect use of the phonogram since the Copyright Tribunal is already in place to adjudicate matters where parties do not agree in respect of remuneration payable to them.
- 5.2.9. SAMRO is concerned that it will be problematic to determine what an equitable remuneration is, that a performer is entitled to if this is applicable. There is neither a benchmark nor a clear direction of what an equitable remuneration is. SAMRO is concerned that there is a likelihood that a performer may be remunerated unfairly in this regard. SAMRO recommends that, the proposal provided in the Copyright Amendment Bill, stating that the parties should share in the royalties equally, should also be provided in this Bill. As already stated, the equal sharing of royalties has been recommended by the CRC.

- 5.2.10. The proposed Bill is poorly drafted where it states that the agreement referred to in section 3A shall be valid for a period of 25 years. On the face of the wording, it would appear that the performer will have no rights, whatsoever, to terminate this agreement before 25 years have lapsed. SAMRO objects to the drafting of this provision as it encumbers the performers' rights to terminate the contract prematurely. Performers would need to consider whether this is reasonable or not, but they are lay persons to the law who do not understand the consequences of entering into binding agreements. This also means that such agreements would need to be entered into between the parties prior to the fixation taking place, which also undermines the bargaining position of the performer.
- 5.2.11. In this instance SAMRO proposes that international treaties be looked into for reference in terms hereof.
- 5.2.12. The Bill grants exclusive rights to a producer of a phonogram, and a right of a performer and the producer of the phonogram to earn an equitable remuneration, determined by the Minister, for the direct or indirect use of the phonogram. SAMRO finds this provision to be problematic. The Copyright Tribunal is already in place to adjudicate matters where parties do not agree in respect of remuneration payable to them. SAMRO objects that the remuneration payable to the performer and copyright owner of a phonogram be determined by the Minister, and proposes that the insertions proposed in section 4 of the Bill to insert sections 1A, 1B, 1C and 1D also be applicable in this instance.
- 5.3. Section 4 of the Bill amends section 5 of the principal Act by the substitution in subsection (1) for paragraph (a) of the following paragraph:
- 5.3.1. “(a) without the consent of the performer— (i) broadcast or communicate to the public an unfixed performance or performance fixed in an audiovisual fixation of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; [or] (ii) make a fixation of the unfixed performance or performance fixed in an audiovisual fixation of such performer; [or] (iii) make a reproduction of a fixation of a performance or performance fixed in an audiovisual fixation of such performer— (aa) if the original fixation or the audiovisual fixation, other than a fixation excluded by section 8 from the necessity for

obtaining the consent of the performer, was itself made without his or her consent; [or] (bb) if the reproduction is made for purposes other than those in respect of which such performer gave his or her consent to the making of the original fixation or audiovisual fixation of a reproduction thereof; or (cc) if the original fixation or audiovisual fixation was made in accordance with the provisions of section 8 and the reproduction is made for purposes not covered by those provisions; [or] (iv) make available to the public the original performance and (iv) make available to the public the original performance and copies of that performance fixed in an audiovisual fixation through sale or otherwise of such a performer; (v) commercially rent out to the public the original performance and copies of that performance fixed in audiovisual fixation of such a performer; or (vi) make available to the public the performance fixed in audiovisual fixation, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”

5.3.2. 'by the substitution in subsection (1) for paragraph (b) of the following paragraph: “(b) by means of a fixation or audiovisual fixation of a performance published for commercial purposes, without payment of a royalty to the performer concerned— (i) broadcast the performance; (ii) cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act, 1978 (Act No. 98 of 1978), unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; [or] (iii) cause any communication of the performance to the public; (iv) sell the performance; or (v) commercially rent out such performance.”

5.3.3. The bill inserts technology terms such as 'audiovisual fixation' and 'wireless' for required consent in respect of the usage of performers' performances. It also separates the different usages by inserting 'or' between each of them, which can mean that the prohibition of the acts can happen in differing instances. SAMRO welcomes these amendments and they are in line with the advancing of technology.

5.3.4. The Bill recognises the making available to the public the original and copies of performances and provides that consent ought to be obtained to sell the performance or to commercially rent out such performances. SAMRO welcomes these amendments.

5.3.5. In paragraph (d) of the Bill, “by the substitution for subsection (2) of the following subsection: “(2) In the absence of an agreement to the contrary, a performer’s consent to the broadcasting of his or her performance shall be deemed to not include his or her consent to the rebroadcasting of his or her performance, the fixation or audiovisual fixation of his or her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation or audiovisual fixation.”

5.3.6. The principal Act states that the performer’s consent to the broadcasting of the performer’s performance will **include** the consent to the rebroadcasting, fixation or audio visual fixation of his or her consent, whereas the Bill inserts that the performer’s consent herein shall “**not include**” the aforesaid consent. SAMRO welcomes this amendment.

5.4. Section 4 of the Bill amends the principal Act by inserting in subsection (1) after paragraph (b) of the following subsections:

5.4.1. “(1A) A person who intends to— (a) broadcast or communicate to the public an unfixed performance or performance fixed in audiovisual fixation of a performer; (b) make a fixation of the unfixed performance or performance fixed in audiovisual fixation of a performer; (c) make a reproduction of a fixation of a performance or performance fixed in audiovisual fixation of a performer; (d) make available to the public the original performance and copies of that performance fixed in an audiovisual fixation through sale or otherwise of a performer; (e) commercially rent out to the public the original performance and copies of that performance fixed in an audiovisual fixation of such a performer; (f) make available to the public the performance fixed in an audio-visual fixation of a performer, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them; or (g) perform any act contemplated in subsection (1)(b), must give the copyright owner, performer or collecting society, a notice in the prescribed manner of his or her intention to perform such acts, indicating where practical, the date of the proposed performance, the proposed terms and conditions for the payment of royalty or fair equitable remuneration, whichever applicable, and request the copyright owner or collecting society to sign the proposal attached thereto.

5.4.2. “(1B) The copyright owner, performer or collecting society must as soon as is reasonably possible upon receipt of such notice respond to such a proposal.

5.4.3. “(1C) If the copyright owner, performer or collecting society rejects such proposal or proposes different terms and conditions and the parties are unable to agree on either of the proposals, either party may in the prescribed manner refer the matter to the Tribunal.

5.4.4. “(1D) The Tribunal must adjudicate such matter as soon as is reasonably practicable and where possible, before the performance which is the subject of the application takes place and may make any order it deems fit, including but not limited to an order that a provisional payment of royalty be made into a trust account of an attorney nominated by the copyright owner, performer or collecting society pending the finalisation of the terms and royalty payable: Provided that such amount shall be paid over to the copyright owner, performer or collecting society as represents the difference, if any, between the amount determined as the appropriate royalty and the amount already paid and any balance, if any, must be repaid.”

5.5. The Bill provides for a licensing procedure, in terms whereof it requires that, any person who intends to broadcast or communicate to the public a performer’s performance which is fixed in an audio-visual fixation, is required to notify the copyright owner, the performer or the collecting society of this intention. The Bill provides that matters may be referral to the Tribunal where parties disagree.

5.6. This amendment is welcomed by SAMRO. It is in line with the Copyright Act and safeguards for negotiations between the performer and other parties in respect of remuneration to be paid and also provides for a dispute resolution procedure should the parties not agree on proposals made.

5.7. Section 5 (4) of the principal Act is amended by the substitution of the following subsection:

5.7.1 “(4) (a) A performer who has authorised the fixation or audiovisual fixation of his or her performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the **[person who arranges]** copyright owner for such fixation or audiovisual fixation to be made the exclusive right to receive the royalties or fair equitable remuneration, whichever applicable, contemplated in subsection (1)(b) in respect of any broadcast, transmission, sale, commercially renting out or communication of such fixed performance: Provided that the performer is entitled to share in any payment received the **[person who arranges]** copyright owner for the fixation, in the

manner agreed upon between the performer and the [person who arranges] copyright owner for such fixation, or between their respective representative collecting societies.”

- 5.7.2 When SAMRO and POSA Trust petitioned the Minister in 2011, one of the things they highlighted as problematic was the deeming provision in Section 5(4)(a) of the principal Act. It is worth noting that the recording agreement itself has not, traditionally, made provision for a record company to receive royalties for Needletime rights on behalf of the performer. The new type of recording agreement, namely the “360 degree” record deal, which enables the record company to earn income from non-traditional sources in respect of its recording agreement with a performer, may make provision for the record company to also share in the performer’s Needletime remuneration. There is, however, no certainty whether all 360 degree recording agreements in South Africa do in fact provide for the record company’ share in the performer’s Needletime remuneration.
- 5.7.3 The fact that the payment due to the performer has, in terms of Section 5(4)(a), to be determined in the manner agreed upon between the performer and the record company does not assist the performer in that it is trite knowledge that artists have less bargaining powers regarding the conclusion of recording agreements. In the majority of cases artists (especially those just commencing their careers) feel compelled to accept the terms of a recording agreement because they believe that is the only way in which they can “get a record deal”. They are therefore likely to accept unfavourable terms with regard to the share of royalty given to them in respect of Needletime rights remuneration, especially if the record company has adopted the position that it is not obliged to pay performers 50% of the royalties.
- 5.7.4 SAMRO recommends that the deeming provision should be removed, and that the legislation should specifically provide that the royalty payable in respect of Needletime rights shall be divided equally between copyright owners and performers.
- 5.7.5 Leaving the determination of the royalty due to performers in the hands of record companies could result in an inequitable and uncontrolled system of royalty distribution to performers in respect of Needletime Rights, in each case at the instance of record companies, with some performers probably sharing 50/50 with their record companies and probably the majority not benefitting from

the system. A more appropriate system would be for the legislation itself to determine the share split between record companies and performers.

5.7.6 Further to the above, it would be important to note the provision of Section 5(6) of the principal Act, which stipulates that “In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.” Thus the performer’s remuneration right may be assigned to another, by, amongst other modes, contractual arrangement. But because of the deeming provision of Section 5(4)(a), this would mean that where performers have assigned their right or have mandated to receive Needletime royalties to another (as in the case of SAMPRA’s performer members at the moment), the party to whom the right has been assigned **will need to receive the performer’s share of the royalties from the record companies**, under the same conditions highlighted above. This is a very untenable situation and would be a very costly exercise, resulting in performers getting even less after their royalty share has been determined (in some cases arbitrarily) by record companies, and after the deduction of advances.

5.7.7 In view of this it would make sense, where societies are involved, to deal with the distribution of royalties at the level of societies. This would minimise administration costs and in addition the activity would be subject to the regulatory supervision of the Registrar of Copyright, thus preventing abuses. As indicated above, record companies are not accredited collecting societies and are therefore not under the supervision of the Registrar of Copyright.

7. Broad exemptions

7.1. Section 5 of the Bill amends section 8 of the principal Act by the substitution for subsection (2) of the following subsection:

7.1.1. “(2) A performance, a fixation or audiovisual fixation of a performance or a reproduction of such a fixation or audiovisual fixation may be used without the consent required by section 5— (a) if it is for the purposes of private study or personal and private use; [or] (b) if it is for the purposes of criticism or review or for the purpose of reporting on current events, provided that not more than short excerpts from the performance are used and, whenever possible, the performer’s name or the names of the leading performers are acknowledged; [or] (c) if it is for the purposes of teaching or for scientific research; or (d) if it is for the purpose of legal proceedings; [or] (e) if it is for the demonstration of recording, amplifying or similar apparatus, provided that the demonstration is made by a licensed dealer on his or her premises to a specific client[.]; or (f) if it is for purposes which are acceptable and exempted in terms of any other provision of the Copyright Act, 1978 (Act No. 98 of 1978).”

7.1.2. This section appears to exempt the communication of performances by an educational establishment to its students when the “communication” is solely for private, educational and research purposes.

7.1.3. 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 believe that this should not be at the expense of providing a sustainable livelihood for the performers of a fixation or audio-visual fixation.

7.1.4. Moreover, we believe that a balance of the current fair dealing provisions which are provided by the Copyright Act should be struck between the interests of performers on the one hand and the public interest and the interests of the users on the other. One of the important purposes of performers’ protection is that it incentivises the creation of the very material that the Bill proposes to make available for free.

7.1.5. The exemptions are too broad and open ended in that they do not confine to certain kinds of performances. It outlines mere examples of what types of use would be applicable. The end result is that when there is doubt as to whether a specific use of a performance falls under the exemptions, the dispute will have to be referred to the courts to resolve the matter. The courts would then apply the principles and determine the permitted use.

7.1.6. The problem is that this opens protection and the exemptions up to abuse and places performers and copyright owners in a position where they have to go to court in order to enforce their right, which is costly and time consuming.

- 7.1.7. The danger with this approach is that the decision as to what constitutes an exemption will ultimately lie in the hands of the court and users will attempt to rely on the exemptions 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.
- 7.1.8. 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 by any user wishing to be exempted from acquiring a licence for the communication of a performance. In instances where a dispute arises as to whether the use constitutes fair dealing, the copyright tribunal may preside over and decide on the dispute.

8. Prohibited Conduct

8.1. Section 6 of the Bill amends the principal Act by inserting after sections 8 of the following:

- 8.1.1. “8A.(1) The prohibited conduct in respect of the technological protection measure, the use of a technological protection measure circumvention device and the exceptions related to technological protection measures contemplated in sections 280 and 28P of the Copyright Act, 1978 (Act No. 98 of 1978), shall apply, with the necessary changes, in respect of performances which are fixed or fixed in audio-visual fixations. (2) The contravention of the technological protection measure provisions contemplated in subsection (1) shall be an offence and a person convicted thereof shall be liable in terms of the provisions of this Act.”
- 8.1.2. “8B. (1)The prohibited conduct in respect of the removal or modification of copyright management information attached too rembodyed in a copy of work and the exceptions relating to such removal or modification contemplated in sections 28Q and 28R of the Copyright Act, 1978 (Act No. 98 of 1978), shall apply, with the necessary changes, in respect of performances which are fixed or fixed in audiovisual fixations.”
- 8.1.3. SAMRO welcomes this amendment as it provides for protection measures in respect of technology.
- 8.1.4. “(2) The contravention of the copyright management information provisions contemplated in subsection (1), shall be an offence and a person convicted thereof shall be liable in terms of the provisions of this Act.”
- 8.1.5. SAMRO welcomes this amendment as it criminalises the failure to adhere to the copyright management provisions.

9. CONCLUSION:

9.1. SAMRO reiterates that it is encouraged by the DTI's commitment to the objectives set out in the Bill and thanks to the DTI for considering the submissions contained herein and remains available to the DTI for further discussions in respect of the Bill and any subsequent legislative amendments that may follow.