

Attention: Chairperson Fubbs

Portfolio Committee on Trade and Industry

Submitted by: Graeme Gilfillan (MA Copyright Law UK, EC & US (Kings College)

Business Affairs – Nisa Global Entertainment (PTY) Ltd

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Subject: Response to Copyright Alliance Response to the Copyright
Amendment Bill1 (“the Bill”)

This response has been written to clarify other views existing amongst the members of the organizations allegedly part of the Copyright Alliance. The view put forward by the Copyright Alliance was never cleared with all members of each organization cited, but it is alleged, only with certain vested interests. Most members would be hard pressed to know of any such initiative called the Copyright Alliance.

A review of the Copyright Alliance Response to the Bill yields a number of omissions which cannot be left without comment.

To disambiguate the points raised by the “Copyright Alliance”, please note the following:-

1. Proposal to engage with the Portfolio Committee in a workshop

If there is to be a “workshop” then it is suggested that such not be held for the “Copyright Alliance” alone for such would be a distortion of fact and law, never mind views of members and that Copyright Alliance will be hard pressed to evidence any member communication or to put qualified copyright law skills forward, especially such that actually practice, to rebut and respond to the position put forward below.

2. Extension users’ “rights” at the expense of creator’s rights (*Users as copyrightholders*)

The language used as a bullet point heading has no meaning in the Copyright Act 98 of 1978 and thus is vague and embarrassing, to the extent of meaning different things to different people. As this was a submission in respect of the Copyright Amendment Bill from organizations in the copyright business it is fair and reasonable that language that resonates with the Copyright Act 98 of 1978 be used.

In this instance:

“user” - The word “user” appears 3 times in the current Copyright Act 98 of 1978 – Ch 1 Sec 9A.1 (1) (b) and (c), and 9A. (2) (d) and quite clearly only in respect to sound recordings, no other works eligible for copyright. In the amendment the concept of “user” is expanded in Sec 9 primarily and has application further but is NOT defined – which is a problem not noted.

“creator” – the word does not exist as a noun in the old Copyright Act 98 of 1978, only as a verb where it is used 2 times, in Definitions 1. (1) (iv) (a) as regards the definition of an author being one who creates musical, literary and artistic works and Definitions 1 (4) in relation to a computer program. “Creator” is used once in the Bill in 2.1. in the Overview. “Create” as a verb is used in the Bill and is without definition, a valid issue which might have been raised.

“copyright holder” the word has no meaning in the Copyright Act 98 of 1978 however “holder” appears 1 time in Ch 3 Sec 35 (1) in relation to the “holder of a license”

The use of language, as its appearance confirms, is deliberate and has the intent to obfuscate from the real issue (footnoted as a reference) only being the new “provision” in Sec 4,5,6 and 8 of Ch 1 of Copyright Act 98 of 1978, which provision states as follows:-

“Provided that, notwithstanding the transfer of copyright in a literary or musical/artistic/cinematographic film or audiovisual fixation work by the user, performer, owner, producer or author, the user, performer, owner, producer or

author of such work shall have the right to claim an equal portion of the royalty payable for the use of such copyright work.”

Currently, there are only two parties that take “transfer” (read assignment) of copyright in musical and literary works:

1. SAMRO takes assignment of the performing right (includes broadcast, public performance, transmission through a diffusion service and communication to the public). Consequently no author, composer, arranger or publisher own this right
SAMRO is ALWAYS the owner of the performing right
2. Music Publishers take assignment of all other rights (reproduction, publishing, and adaptation) with NO investment but on the basis of a share collected (except for performing rights)

In South Africa between SAMRO and the music publishers, ALL the rights in musical and literary works are owned, with music publishers also holding 50% of the seats on the board of SAMRO and CAPASSO. There are 3 giant music publishers who have no local shareholders and no black equity of any kind who sit on all the Boards..

SAMRO is a member of and beholden to CISAC – the confederation of music and other societies that controls the ISWCs.

SAMRO also has a monopoly right to issue the ISWC (ISO standard identifier for musical and literary works) – the International Standard Work Code

SAMRO is not, and has never been, accredited for music works and literary works.

CAPASSO takes license not assignment of certain reproduction rights mostly on behalf of publishers

Currently there are two parties that take “transfer” of copyright in a sound recording, cinematographic film or audiovisual fixations:

1. Record Cos They pay for the recordings and films (music videos)
2. SAMPRA Accredited under the Collection Society Regulations 2006, SAMPRA is the only CMO accredited to offer public performance licenses for sound recordings.

SAMPRA is controlled by RISA, the sole IFPI member in South Africa. RISA also has a monopoly right to issue the ISRC (ISO standard identifier for sound recordings) - – the International Standard Recording Code

RISA is a member of and beholden to IFPI – the confederation of record labels that also controls the ISRCs (ISO standard identifier for sound recordings) – RISA has a monopoly issuing the ISRC in South Africa.

In South Africa between SAMPRA and the record labels (and the missing in action RAV – RISA Audio Visual), ALL the rights in sound recordings and music videos are owned or licensed, with 3 record labels also holding 50% of

the seats on the board of RISA.....the same 3 giant record labels who have no local shareholders and no black equity of any kind.

A review of what the State has proposed in each of 4,5,6 and 8 is to provide regulation to the “shares” between the parties by saying:

“.....shall have the right to claim an equal portion of the royalty payable for the use of such copyright work”

The incumbents, read the vested interests controlling the Copyright Alliance’s position do not want this clarity, this fairness.....they prefer it is alleged such to be unregulated, hence the vague and embarrassing claims about “users” and “creators”

In short the current CISAC/Publisher and IFPI/Record label incumbents, who are linked and whose behaviour on granular inspection does not serve the nation’s interests presently are opposed to new entrants to their ranks, most especially opposed to upsetting the “delicate balance” of their current controls.

Currently, and the bulk of the Copyright Alliance knows full well of the existence of “Lalela Music (PTY) Ltd (Reg# 2008/016684/07)” a company set-up and owned by E TV (and possibly other insiders) for the specific purpose of publishing (owning) as much music used on E TV. There is thus nothing new about “users” like e TV taking a position to publish not just what it invests in but in any music that is flighted on E TV.

Lalela Music is a SAMRO, CAPASSO and RISA/SAMPRA member.

So when the Copyright Alliance alleges that

“this would not only seriously erode the basis of copyright as a principle, but would also effectively dilute the royalties payable to the creators of the content” and “This far-reaching concept of the user as a primary rights-holder”

.....they are not being forthcoming.

The Bill, by providing for the equal share of royalty provides certainty where there is none and there is rank abuse in the absence of certainty – further so-called “users” have long been rights holders and a claim to the contrary which is not and cannot be supported, is utter nonsense.

The reference to “user” in the amended Section 9B(1) “subsequent to the first transfer by the *user* of that work.”

A read of the whole Section 9B(1) sentence puts the State’s intentions into clear light with nothing incorrect as the sentence refers to “commercial resale” i.e. post the first sale by the author.....not the sale by the author.

“The author of an artistic work shall enjoy an inalienable right to receive royalties on the commercial resale of his or her work subsequent to the first transfer by the user of that work (in this Chapter referred to as the “resale royalty right”)”

Where things do fall apart in the Copyright Amendment Bill, omitted by the Copyright Alliance, is that “User” is not defined and that is incorrect and does require amendment.

The claim that

“the far-reaching general education use exemption in section 9 of the Bill (introducing a new section 13B) is not justified and shall serve to disincentivise the publication of works”

.....is neither supported by evidence nor justified by fact by the Copyright Alliance.

In light of the recent final decisions by the Delhi High Court in the DU photocopy case where academic publishing houses, OUP and CUP were defeated in their litigation against Delhi University (DU) and Rameshwari Photocopy Service, the State’s position as regards introducing a new section 13B is justified and proper.

What must be noted is the slip in the semantics between

“.....delicate balance between **author** and user that copyright law strives to achieve” on the one hand”

And

“.....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”

Copyright owners are typically only “authors” by definition and not by business jargon. An author may be a “creator” just as an author may be a “copyright owner”.

This entire point is made on behalf of copyright owners who are not creators and any attempt to make such the point cannot be evidenced or justified.

3. Automatic usurpation of copyright where composers and authors are commissioned or funded to create musical or literary works

The state has proposed here:

1. To amend Sec 5 (2) into two parts
2. That the first part amends the existing Sec 5 (2) by adding “funded by” and “international or local organizations” as well as deleting “such.....organizations as may be prescribed”
3. That the second part “(b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question.”.”

The addition of the word “funding” in the amendment once again provides legal certainty and clarity to what has been opaque and unattended up until now in the form of not just Sec 5 (2) but also in respect of Sec 21 (1) (c) (old Act). Every film and TV company and broadcaster that commissions films and recordings owns such under the wording of the Act.

There has never been a requirement when “made” was used for a “quantity of “made”. The music industry has always taken “made” and “made the arrangements for the making of” as meaning having paid i.e. funded

In specifics the State proposes with Sec 21 (1) (c) (old Act) the replacement of the language

“.....such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4”

with

“.....the ownership of any copyright subsisting in the work shall be governed by contract: Provided that in the absence of valid contract, ownership shall vest in the person commissioning the work and the author of the work shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable exclusively by such author.”

Nowhere in the commissioning clause is a “musical work” added and with all authorial works the “author” is defined as “literary, musical or artistic work, means the person who first makes or creates the work;” which remains unchanged by the amendments proposed.

How and where one asks reading the *plain language* is there anything changed that addresses a musical work or an argument between the

difference between “made” and “funded by” to the extent that there is the need for alarmist language like “Automatic usurpation...”.

What the amendments do speak to is the need for the State and tax funded entities to take note of the copyrights, the movable property rights that they commission, make or fund and act like any other owner of copyright. This is of critical import when it comes to the national anthem for instance that is currently subjected to anarchy and the benefit of large numbers of private parties EXCEPT the State.

The problem that the Copyright Alliance has with the amendments is the State being a publisher subject to the amendments to Sections 4,5,6 and 8 “.....shall have the right to claim an equal portion of the royalty payable for the use of such copyright work”.

The reality, unadmitted by the Copyright Alliance is that ALL the music publishers involved have never paid for their rights, have taken assignment using the English language and wish to protect a bastion of white economic control in South African music.

Further the assignments music publishers take from authors (except for the performing right) gives the music publisher the ownership of the rights.....not the author (composer)

There is another unstated fear of the Copyright Alliance lurking from the industry which is the “performing right” in musical works which currently SAMRO has a monopoly in South Africa on. This is one “delicate balance” that will be upset by the State becoming a “publisher”.....with the other “delicate balance” being the hegemony music publishers currently have on copyright ownership.

There are several other points not stated by the Copyright Alliance.....omitted is a better point.....that relate to the usurpation by members of the Copyright Alliance currently all of which “have a very dire effect on the livelihoods of rights-holders” in general in the favour of a few which the Copyright Act amendments will interrupt and end, as follows:

1. The (ab)use of the shares of works in the public domain through the allocation of shares to a composer called “DP”.(IPN¹: 00039657154)
2. The (ab)use of the shares of works whose authors are not society members through the allocation of shares to a composer called “NS” (IPN: 00224 31 55 03)
3. The (ab)use of the shares of works in any work through the allocation of shares to a composer called “SAMRO Shares”. (IPN: 00039748640)

¹ Interested Party Number – a number allocated by each CMO to a composer or publisher

4. The (ab)use of private databases to hide copyright work authorship and ownership information from the State;
5. The (ab)use of CMO membership allowing for “splitting” of membership, undisclosed to the State, so that global collections (for SA copyrights) are never reported to South Africa or the State.
6. The transfer of South African copyrights, movable property rights, outside of South Africa, including their respective income collection rights, without notice or notification to the State.
7. The (ab)use of market share to unjustifiably and illegally pay parties monies that belong to others.

The following statements by the Copyright Alliance, unsupported hearsay one must point out, are false and untrue:

1. “This will have a very dire effect on the livelihoods of rights-holders (the very authors that this Bill seeks to protect), who produce works for commercial use by the commissioning party and are reliant on the royalty income derived from these works”

Comment: the dire effect is on incumbent publishers and collection societies who are not compliant with the law presently

2. “Further to the above, while the proposed amendments to section 21(1)(c) appear, on face value, to favour authors, the proposed amendment to section 5(2) will do away with any semblance of benefit accruing to authors as a result of the amendments to section 21(1)(c). This is because, as highlighted above, many authors, composers and film producers depend on state funding (e.g. through the SABC, the IDC, the NFVF) to create their works. In this regard section 5(2)(1) will not only nullify the exemption of musical and literary works from the application of section 21(1)(c). It will also affect the ability of all owners of copyright works from earning income from the exploitation of these works, where the works are created through State funding”

Comment: Nonsense – authors and composers are unaffected and the real fear is the State having to be reported to as a copyright owner....disrupting the so-called delicate balance of “market share”

3. “As a practical example, it will, in the case of musical works, preclude authors and composers from the *automatic right* to receive royalties for the broadcast of their music by the SABC and other broadcasters (in respect of *performing rights* royalties payable by SAMRO and *mechanical rights* royalties payable by CAPASSO). In the case of films whose making was funded by the IDC or NFVF (such as the famous *Tsotsi* and *Yesterday* films), the producers shall not have any copyright ownership in such films and will thus find it difficult to obtain further investment funding from private

parties, and would have difficulties promoting the film and getting distribution deals”

Comment: SAMRO is the owner of all “performing rights” of its members. To be a member at SAMRO, an author, composer or arranger has to assign their performing right to SAMRO. SAMRO is the sole monopoly collector and licensor of performing rights in SA, whether one is a member or not. As most composers know full well, there has never been an automatic right to receive *per se* – there has though been an automatic right for broadcasters to pay SAMRO and SAMRO has concern for itself here – no members.

CAPASSO is a new mechanical rights organization, not accredited by the State. It does not own or control all reproduction rights presently and the concern is its “hoped for” automatic right to for broadcasters to pay CAPASSO whether an author, composer or arranger or publisher is a member or not.

Authors and composers and arrangers are unaffected, only the current intermediary incumbents – they will receive an equal share of the royalties as per the provisions in Sections 4,5,6 and 8

Very interesting to read of Copyright Alliance is incorrect view as relates to Section 5 (2) stating the following:-

“Further to the foregoing, and very importantly – it needs to be observed that the proposed amendment to section 5(2) **directly** contradicts the provisions of the *Intellectual Property Rights From Publicly-Financed Research and Development Act* (Act No. 51 of 2008) (the “*PFRD Act*”), which has extensive provisions about intellectual property ownership in such situations. More specifically, the *PFRD Act* provides that the state-funded institution owns the intellectual property developed from such funding, unless it does not wish to do so.

Related to this, the *PFRD Act* also deal with research that is party funded by the State and a private party. The chilling effect of the proposed amendments to section 5(2) is that, with one stroke, the amendment will undo the well-functioning public-private partnership that exists in terms of the *PFRD Act*. Conversely, it would not be good policy to have two regimes dealing with the same matter, with the one regime permitting private ownership of the intellectual property developed through State funding, and the other prohibiting it. It is accordingly proposed that the proposed amendments to section 5(2) should be removed in their entirety.

The Copyright Alliance urges that the proposed amendments be set aside and for ownership of and access to the literary or musical work so funded to be dealt with by contract”

Comment: This position of the Copyright Alliance is rebutted as vague and embarrassing. No specifics are offered as to which Section of the *Intellectual Property Rights From Publicly-Financed Research and Development Act* (Act No. 51 of 2008) actually is odds with the addition of “funded by” and “local organizations” in the amended Section 5 (2) – most likely because there is none when one wants to compare defined “*Publicly-Financed Research and Development*” and the copyright “made by” the State.....and local organizations”

The contrarian position is that the proposed amendments are proper and should remain.

4. Introduction of the US doctrine of Fair Use without holistic consideration of the case law imperatives of that doctrine

The Copyright Alliance uses two articles from 2001 and 2006 which are frankly out of step with current case law.

A review of current case law brings up to cases where creators
(composer/authors) have benefited from fair use

1. 2016 - Estate of James Oscar Smith v Cash Money Records Inc – Case
1:14-cv-02703-WHP

And

2. 2016 - VMG Salsoul LLC v Madonna Louise Ciccone et al – Case 2:12-
cv-05967-BRO-CW

There is certainly a case for fair use transformative use to co-exist with fair dealing limitations exceptions. There is also a case to be made that fair dealing limitations and exceptions, as in the Copyright Act, are not fit for purpose in a digital world.

A contrarian view is submitted to the Copyright Alliance's position, one that does speak for those who create as well as own, rather than just speaking for those who own (and never create – i.e. music publishers and CMO's)

The "fair use" provision has a four factor test, not a five factor test and addresses another side of the exceptions coin so to speak, that limitations and exceptions in the fair dealing don't.

It should not be forgotten that South African copyright law, a common law copyright regime is just as much a product of UK copyright law as is US copyright law, with both having been borne from what started off as the Statute of Anne in 1710.

5. Widening the Value Gap

The so-called “value gap” has nothing to do with copyright law in truth and to suggest otherwise is fallacious.

Here the Copyright Alliance makes the point

“The effect of some of the language in the Bill as it currently stands tragically does not alleviate this for local creators but rather exacerbates matters by affording multinational corporations “user rights” to content that should be exclusively belong to the creators of those rights”

What “language in the Bill” the Copyright Alliance refers to is omitted as is the presence of six multi-nationals that dominate the membership at the Copyright Alliance:-

1. Sony Music
2. Universal Music
3. Warner Music
4. Sony/ATV (publisher)
5. EMI Music Publishing
6. Universal Music Publishing

Also omitted is the truth of the “value gap” which arises from two points

- a. The destruction by digitization of the “reproduction right” (the marginal cost of making a digital copy is Nil) as a value metric

- b. The rise of a “share of advertising and subscription revenue” as the new value metric.

So-called “User rights” have already been afforded to multi-nationals by the safe-harbour provisions in the Electronic Communications and Transactions Act 25 of 2002 and bringing such into the Copyright Act Amendment Bill is simply aligning with the fact that such exist in all developed copyright acts.

The position of the Copyright Alliance is rebutted as being vague and embarrassing and should be ignored

6. Local Content

The Copyright Alliance shows its true colours here in that the organizations do not speak for authors, composers, performers and other local creators.

The contrarian view is the Minister should have the requisite power and imperative to make calls on content quotas after consultation. This is critical in order to provide balance to the decidedly unhealthy copyright import/export ratios which currently are decidedly not in the nation’s interest.

A contrarian position is taken and the position of the Copyright Alliance is rebutted.

The Copyright Alliance ends with the following

“We humbly request that the Committee affords the authors and composers, and the industries that work with them, an opportunity to partake in the shaping of their

industry meaningfully, by strongly considering the content of the comments that will be submitted”

It now becomes important to disambiguate the parties who make up the so called “Copyright Alliance” because it should be known that

- A. Not one (excluding SAIPL and PASA) of the
composer/performer/label/publisher members of the Copyright Alliance
(except those few on the boards) consulted members respectively on the
positions taken variously in the submission

- B. The “Copyright Cabal” would be more appropriate it is alleged, so narrow are
the interests represented.

- C. As no members of either of SAMRO, SAMPRA, RISA or CAPASSO² were
consulted as to the position taken by these bodies and if put to prove what
communications were sent to members, there would be nothing to offer. The
position put forward by the “Copyright Cabal” can be said to represent a few
certain interests of:
 - a. Two Collective Management Organizations³

 - b. 10 or so private companies (record labels and publishers) – 3
addressed above

² SAMRO and RISA hold monopoly identifier/qualifier rights with respect to ISWCs and ISRCs respectively

³ CMOs – SAMRO and SAMPRA. No Section 6 right CMO is accredited for musical and literary works, including SAMRO and CAPASSO. SAMRO’s claimed accreditation is for POSA in respect of performers and Section 9 rights.

D. Omitted by the “Copyright Cabal” were the following factual truths:

- a. SAMRO owns DALRO and provides office space for MASA and MPASA at no cost to either – omitted from the list is POSA⁴ which SAMRO also owns
- b. RISA ‘owns’ and runs and houses SAMPRA – omitted from the list is RAV (RISA Audio-Visual) which is also controlled/owned by RISA
- c. MASA (a rehash of the failed MUSA⁵ by the same folk responsible for the failure) does not have the membership to speak for any industry and should be asked for such.
- d. “MPASA” is the former NORM essentially on the facts a cabal of 90% white publishers
- e. Advocate Baloyi was for many years head of legal at SAMRO and has full knowledge of the “interests” that “rule” SAMRO
- f. Excluding SAIPL, not one of the organizations have a single post-graduate qualification in copyright law, and for the CMOs, never have invested in such. It should be noted that taking the 35 hour elective on

⁴ Performers of South Africa

⁵ Musicians Union of South Africa

ALL IP⁶ during a BA LLB does not make a qualified copyright lawyer in the same vein that working as a GP for 30 years does not make a cardio vascular surgeon.

- g. SAIPL, primarily populated by trademark and patent attorneys, has little to no involvement in the creative industry *per se* and would be hard pressed to offer any evidence of such.

- h. In the ranks of members there exist contrarian positions to that put forward by the “Copyright Cabal” which contrarian positions have been shuttered from the Portfolio Committee by deliberate collusion and obfuscation. Thus the Chairperson should not be fooled and misled by omissions.

⁶ Intellectual property – meaning trademarks, patents, designs, copyrights, geographical indicators and trade secrets