07 July 2017

COPYRIGHT AMENDMENT BILL [B13-2017]

SUBMISSION
by

SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION

COMMENTS FOCUSING ONLY ON PROVISIONS HAVING A NEGATIVE IMPACT ON THE FUNCTION OF SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION AS A COLLECTING SOCIETY

SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION'S SUBMISSION OF COMMENTS TO THE PORTFOLIO COMMITTEE – TRADE AND INDUSTRY REGARDING THE COPYRIGHT AMENDMENT BILL

INTRODUCTION

South African Music Performance Rights Association ("SAMPRA") is a non-profit company accredited to administer the rights of copyright owners and performers, jointly, under Section 9(c), (d), and (e) of the Copyright Act No 98 of 1978, (as amended) (CA) and Section 5(1)(b) of the Performers' Protection Act No 11 of 1967, (as amended) (PPA). SAMPRA was accredited from June 2007 to November 2014 to administer rights under the Copyright Act on behalf of Recording Industry South Africa ("RiSA") as an organisation representing 50 or more copyright owners entitled to receive payment of royalties for the use of recordings in terms of the Section 9 and 9A of the Copyright Act. In November 2014, SAMPRA was accredited to administer rights of copyrights owners and performers, jointly, under the CA and the PPA. SAMPRA's administration of rights is limited to audio recordings.

In view of SAMPRA's status as a joint society of copyright owners and performers, SAMPRA is obliged, in presenting submissions to the Committee to take into account the rights and interests of both performers and copyright owners. However, SAMPRA's submissions herein are limited to areas that affect SAMPRA in its function of administering performance rights.

SAMPRA welcomes the invitation extended to give comments on the Copyright Amendment Bill (**B13-2017).**

COMMUNICATION TO PUBLIC RIGHT

In 2002, the CA was amended to re-introduce "performance /needletime right" for sound recordings. The performance rights provided for are for broadcasting, diffusion and communicating to the public.

Section 6 has been amended to include "communication to the public" in addition to the current wording of "performing the work in public". The effect of the amendment may be that the performance right and the communicating to the public right are seen as separate rights. SAMPRA does not believe that it is the intention of the Bill to dilute the "communicating the sound recording to the public" right that has existed since 2002. It might be contended that performers and record companies would no longer be able to be paid royalties for the use of

their recordings by commercial users of their recordings, when such recordings are used at restaurants, retail outlets, shopping malls and other users currently covered in terms of SAMPRA's more than 30 tariffs.

RECOMMENDATION

It is proposed that the amendment to Section 9(e) be amended by inserting a provision for "*performing the work in public*".

ROYALTIES

OBLIGATION OF THE USER TO PAY BEFORE USAGE

Section 9A is proposed to be amended as follows:

"(1) (a) In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment of a royalty to the owner of the relevant copyright—
(i) broadcast a sound recording as contemplated in section 9(c);
(ii) cause the transmission of a sound recording as contemplated in section 9(d); or
(iii) communicate a sound recording to the public as contemplated in [section 9(c)"

The amendment introduces licencing before usage by a user who wishes to do any of the acts exclusively reserved to the copyright owner under section 9(c),(d) and (e) of the CA. The process proposed requires the user before performing any of these acts to submit -

"*a prescribed notice in the prescribed manner to the copyright user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust, as the case may be, of his or her intention to perform that act, and must, in that notice— (i) indicate, where practicable, the date of the proposed performance and the proposed terms and conditions of the payment of a royalty; and (ii) request the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust to sign the proposal attached to the notice in question*."

If the copyright owner agrees to the request, he must sign the notice. If no agreement is reached, the matter must be referred to the newly created IP Tribunal for resolution.

While it may appear that the process must be complied with before a performance takes place, paragraph (aB) seems to suggest that the user may still engage in the

performance without licence. Furthermore, paragraph (aE) states that the Tribunal must adjudicate the matter "as soon as reasonably practicable and where possible, before the performance which is the subject of such application" This suggests that the performance can actually take place before the matter is finalised, presumably provided notice is given prior to the contemplated performance. This ambiguity should be resolved.

At a practical level, it is not feasible that each individual performance goes through the process as contemplated. To circumvent this impracticality, SAMPRA, and the rest of the music industry, has introduced blanket licence that allows a user to engage in multiple performances on payment of a single licence fee. In the instance of broadcasters, payment of royalties happens after usage as the usage determines the royalty payable.

RECOMMENDATION

The amendment to make provision for a blanket licence and it should require that all the information relevant for the granting of consent for the proposed use should be provided by the user.

TERMS AND CONDITIONS FOR USAGE

The proposed amendment requires the user to propose "terms and conditions for the payment of royalty". This undermines the exclusive nature of the rights vested in the copyright owner under Section 9(c), (d) and (e) of the CA. Furthermore, the licence in respect of the use of an exclusive right entails more than "terms and conditions for the payment of a royalty".

RECOMMENDATION

It is recommended that the licence must be subject to the normal terms of usage prescribed by the copyright owner for that category of usage.

SHARING OF ROYALTIES

The proposed section 9 (2) (a) introduces a number of persons in the sharing of royalties. The amendment states that :

"*The user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967): Provided that the royalty payable for the use of a sound recording shall be divided equally between the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust on the one hand and the performer on the other hand or between the recording company, user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust"*

The amendment introduces various parties in the sharing of royalties payable for "needletime". By the nature of the rights emanating from sound recording, the only two parties that share in the royalties are copyright owners (the record companies) and performers.

It is further not clear why a user of copyright work, who must pay royalties for the use of the work, should share in the royalties.

RECOMMENDATION

It is proposed that "all the other parties mentioned in the amendment, other than copyright owner and performer, being user, producer (who in the context of "needletime is the same as copyright owner), author, collecting society (the collecting society acts on behalf of the owner and performer and is not itself a beneficiary of "needletime"), indigenous community, community trust or National Trust be deleted.

ACCREDITATION OF COLLECTING SOCIETIES

The proposed Section 22B appears to be a copy of Regulation 3(1) of the Collecting Society Regulations (published under Government Notice 517 in Government Gazette 28894 of 1 June 2006). However, whereas the Regulation 3(1)(c) provides for a "joint" collecting society comprising of copyright owners and performers, the propose section 22B does not cater for "joint" collecting societies.

SAMPRA is accredited as a collecting society in respect of both performers' rights and copyright owners' performance rights in sound recordings. The splitting of

administration from the proposed section 22B will result in increased administrative costs (duplicated administration), and reversal of gains made in running a joint collecting society.

As the performance and the sound recording are inextricably merged and cannot be separated, it makes sense therefore that the administration of the royalties thereto should be done by a single collecting society.

RECOMMENDATION

We propose the inclusion of joint collecting societies as currently provided for in the Collecting Societies Regulations (Regulation 3 (1) (c)).