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CAPASSO AMENDMENT BILL SUBMISSION 2018: CHAPTER1A

Introduction

The Composers Authors and Publishers Association (CAPASSO) is pleased yet again to get an opportunity to makes suggestions and comments on some of the specific clauses within the proposed Copyright Amendment Bill (the Bill). Although the current comments are limited to the proposed clause 22B (8), these must be read within the context of the submissions made to the Committee prior.

Definition

Prior to delving into the merits of the proposed clauses, it is crucial to note the defective nature of how the term "Collecting Society" is defined in the principal Act. As it currently stands, the definition, or lack thereof, will result in more confusion than clarity. The Act defines a Collecting Society as:

> "a collecting society established under this Act"[1]

This would need to be remedied, especially if the Bill seeks to criminalise the unaccredited operation of a such an entity. The nature of the entity the Bill seeks to regulate needs to be clearly defined so as to not unjustifiably affect businesses that fall outside the scope and mandate of the proposed. A more concise definition similar to that found in the European Directive on Collective Management which reads as follows:

> "**collective management organisation'** means any organisation which is authorised by law **or** by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightsholders, for the collective benefit of those rightsholders', as **its sole or main purpose**, and which fulfils one or both of the following criteria: (i) **it is owned or controlled by its members**; (ii) it is organised on a **not-for-profit basis**;"[2]

The definition above allows for contextualisation of what it and what is not a Collecting Society/ Collective Management organisation (CMO). Without a clear definition, it will difficult to ascertain which entities

[1] The Copyright Act 98 of 1978
[2] European Union Directive 2014/26/EU

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require accreditation and which ones do not which will hamper the effective monetisation of copyright protected works.

Criminalisation Clause 22B (8)

Regarding the proposed clause 22B(8), it is imperative that the criminalisation be viewed within the overall context and purpose of Chapter1A. The regulation of CMOs is dual-purposed. In the first instance, it aims to regulate the unfettered monopoly that CMOs enjoy, by design, to ensure that competition and anti-trust laws are not flouted. The second purpose is to increase the entities transparency to its members. Thus, any proposed clauses need to be interpreted in light of this dual purpose.

We shall deal with the latter purpose first. The main premise of this element is that the regulation of CMOs should supplement and strengthen the rights that members would ordinarily have due to the fact that CMOs are owned and/or controlled by such members. Regulation should thus not usurp or decrease the rights that members have save for in stances where competition considerations demand. The criminalisation of unaccredited licensing does not aid in increasing transparency to members and consequently should not necessarily be part of the eventual legislation. This is particularly important in that the rights granted by members, some of which are collectives in their own right, are increasingly being exercised by such members directly. The unintended consequence of criminalisation would be a member exercising their exclusive right being arrested for breaking the law. The likelihood of this occurring increases given the fact that there is no clear definition of what a CMO is in the legislation. Two or more rightsholders can and should be able to exercise their exclusive right directly without fear of being arrested.

Another consideration to be made is the more jurisprudential question of whether or not a CMO acting its capacity as a beneficial rightsholder, assignee or exclusive licensee should be required obtain accreditation. If other rightsholders, assignees and/ or exclusive licensees can exercise such rights sans accreditation, there is a legal question as to why such is required for CMOs particularly to the point of criminalisation.

The other purpose of regulating CMOs has, in recent times become less important. The concept of regulating a CMOs monopoly has become less of a consideration as territoriality factors less in the exploitation of copyright protected works. If a CMO only operates within a defined geographical area, it becomes necessary to limit its monopoly. Digitisation has solved the competition problem by removing the limit of territoriality. Members of CMOs can now license works directly without the need for CMOs. This pushes CMOs to be more efficient in order to retain the members rights. Criminalisation of members ability to license outside the CMOs without the need to obtain accreditation will negatively affect this favourable condition that digitisation has granted members. It has now become a common occurrence for creators to join resources to enable them to take advantage of the current digital climate and license works directly without going via CMOs. Criminalising this advantage is not of any benefit to creators. It will only serve to be an additional and unwarranted burden.

In addition, the proposed clauses do not take into account the fact that CMOs within South Africa now compete with CMOs from other territories. The digital environment has afforded European, American etc CMOs the ability to license usage within South Africa directly from their home territories. These CMOs will not be subjected to any possible criminal sanction for not having been accredited within the territory, however they will be able to operate unfettered due to the nature of digital licensing. The current wording is thus unfit to deal with the current status quo in as far as digital licensing is concerned. The threat of criminal sanction will unfairly tilt the scales in favour of international CMOs who will prove more efficient due to the fact that they are not subject to regulation. Multi-national companies that offer music, film or books in South Africa can all be licensed by international rightsholders for usage that occurs in South Africa, without either setting foot in the country. Thus, it becomes crucial to afford local CMOs the ability

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to compete on an equal footing without additional administrative burdens or threats of criminal sanction. Failing to do so will result in local creators being forced to join the international CMOs to collect royalties from usage of their works in South Africa.

Conclusion

Regulation of CMOs is necessary, especially in light of the country's recent history. However, such regulation must be first and foremost for the benefit of the members. Any regulation that fails to centre the interest of members is bound to be ineffective. It should be of paramount importance to ensure that any regulatory regime does not usurp the members power but rather supplements it. The addition of criminal sanctions tips the scale more towards the former.