



South African Copyright Bill

MPA comments

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The Music Publishers Association (“MPA”) is the trade association for music publishers in the UK, with over 260 members, representing nearly 4,000 catalogues covering every genre of music.

UK music publishers have close and long established links with the South African music industry. More recently, our members have been working with South African music publishers in developing licensing systems for digital music services. Given the cross border reach of digital music services (both downloading and streaming) such licensing ideally has to be done on a multi territorial basis. In Europe we have been addressing similar issues in recent years successfully providing multi territorial licensing across the whole of Europe. South Africa seems the natural place for providing such multi territorial licenses throughout Africa. The strength of the national copyright system is the fundamental element for such (multi-territorial) licensing activities.

Music publishers invest significantly in the promotion of South African music both locally and internationally; South African music of all genres has become a successful export in the international music scene. Copyright is key to the investment in, and promotion of, music. Destabilising copyright will impact on economy and culture in South Africa reducing its attraction for music publishers. We are particularly concerned about the proposed introduction of a general fair use exception into South African copyright law. This will lead to legal uncertainty directly impacting on current licensing procedures; these procedures work for the benefit of right holders such as music publishers and commercial users such as digital service providers. We are equally concerned about the impact of the proposed restriction of the duration of an assignment to 25 years. In a free market, the term of a contract should not be determined by state legislation.

Communication to the public

We welcome the express reference to communication to the public in amended draft Sections 6 to 9 of the South African Copyright Act; the wording reflects the Berne Convention (Art 11 bis) and the European Information Society Directive (Article 3). Communication to the public underpins not only the use of music in radio and TV broadcasting but also the increasing use of music in digital services.

Fair use

We are concerned about the introduction of a fair use exception into South African law (draft Section 12A South African Copyright Act). More generally, the Act convolutes the concept of fair use with the more specific and established fair dealing exceptions (c.f. current Section 12 South African Copyright Act). This will lead to uncertainties in an area where both right holders and users need certainty in order to operate successfully (for the ultimate benefit of the consumer).

The question of fair use and whether it should be introduced in the UK has been comprehensively assessed in 2011 during the [Review](#) on Intellectual Property carried out by Professor Ian Hargreaves. In conclusion, Professor Hargreaves advised against the wholesale implementation of the Fair Use approach into UK law given the legal uncertainties it would create.

Even in the US there are still uncertainties despite over 170 years of case law interpreting Fair Use.

Specific exceptions

At a general level, we are concerned about the evidence base justifying the introduction of new exceptions. In our experience some exceptions aim to address problems which do not exist in practice. The importance of evidence for policy making has been confirmed recently in the UK: A new exception for personal copies for private use was introduced in October 2014 without fair compensation for right holders. Following a judicial complaint by composers and performers the law has been quashed by a court in July 2015 because of the inadequate evidence used to justify the exception without compensation. [This](#) might be relevant for draft Section 12 (A) 4 (b) and (c) South African Copyright Act.

Cartoons, parody or pastiche (New Section 12A (4))

In the area of parody music publishers provide licenses for such uses. We are not aware of any problem in practice such an exception for cartoons, parody or pastiche will solve. Moreover, it will create legal uncertainty as to the interpretation of what qualifies as a cartoon, parody or pastiche. Such uncertainty will hold back the use of music to the detriment of right holders as well as users without a counterbalancing wider public benefit.

Legally, any exception has to be considered in the context of the internationally mandatory Three Step Test provided by the Berne Convention, i.e. it should (1) only be applied in certain special cases which (2) do not conflict with a normal exploitation of the work or other subject-matter and (3) do not unreasonably prejudice the legitimate interests of the rightholder. A broad and undefined exception such as the one proposed, covering an area which is currently licensed by music publishers potentially infringes all of the three steps.

Educational activities

Concerning the exception for reproduction for educational activities we are particularly concerned about new Section 13 B (5) which states that the exception covers *“the reproduction of a whole textbooks where the textbook ... cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.”* Such a broad exceptions interferes with existing licensing activities and conflicts with the normal exploitation of the work, thus infringing the internationally binding Berne Three Step Test.

We note that the UK system based on licensing educational institutions caters for the needs of right holders and educational establishments alike and operates efficiently in everybody's interest. In the area of reproduction of sheet music in educational establishments the MPA operates [Printed Music Licensing Limited](#) which licenses reproduction of sheet music in educational establishments via the UK [Copyright Licensing Agency](#).

Orphan works

The UK Government introduced an exception for orphan works for non-commercial use as well as a licensing system for commercial use in October 2014. It might be helpful to share experiences in particular concerning the extent of orphan works and the parameters for diligent search to establish whether a work is an orphan.

Restriction of Assignment to 25 years

Clause 26 stipulates that an assignment of copyright shall only be valid for a period of 25 years from the date of agreement of such assignment (Changes to Section 22 (3) South African Copyright Act). Such restriction to contractual freedoms contravenes first principles of how parties are able to transfer their property. Restrictions on contracts might be justified for certain consumer protection contracts but they are not appropriate for individually negotiated contracts between parties

Collective management

New Section 9B deals with collective management, amongst other prescribing 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.

Collecting societies serve the interest of their members, i.e. right holders such as composers and music publishers; it is inappropriate for the state to interfere with the setup of such collecting society, and even more unacceptable if a "Commission" decides to take on the running of a collecting society as provided in new draft Section 9F. Right holders who have the required expertise should decide what set of rights for what uses should be administered by collecting societies.

We welcome the recognition that collecting societies are controlled by right holders in Section 9D South African Copyright Act and the right to withdraw their repertoire in Section 9C (1b) South African Copyright Act. It is ultimately for the right holders such as composers or music publisher to decide how to exercise their respective rights, collectively or individually.

Technological protection measures/ copyright management information

We welcome the insertion on prohibited conduct in respect of technological protection measures and of copyright management information respectively (new Sections 28 O and 28R South African Copyright Act).

We are at the disposal of the South African Government to discuss any of the issues in more detail should this be considered useful.

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About the MPA:

The Music Publishers Association (“MPA”) is the trade association for music publishers in the UK, with over 260 members, representing nearly 4,000 catalogues covering every genre of music. Our members include all three of the UK’s “major” music publishers, independent pop publishers, classical publishers, production music publishers and also printed music publishers. We estimate that our members represent around 95% of publishing activity in the UK.

The vast majority of our member companies are small or medium sized enterprises. Many of our member companies are multi-disciplinary music companies, operating not just as music publishers but as record labels, managers, promoters, producers, manufacturers, distributors and retailers.

The MPA is the owner of the Mechanical Copyright Protection Society (MCPS) and of Printed Music Licensing Limited (PMLL), which licenses the copying of sheet music in schools.

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