From: Copyright
Sent: 14 October 2013 07:17 AM
To: 'david@risa.org.za'
Cc: Sunny ; 'keith@risa.org.za'; 'bronwen.harty@samro.org.za'; 'sipho.dlamini@samro.org.za'; 'thomas.windisch@samro.org.za'; 'pfanani.lishivha@samro.org.za'; 'johan.visagie@samro.org.za'; 'brigitte.magg@samro.org.za'; 'jodi.goldstein@samro.org.za'
Subject: RE: RESPONSE TO POSA TRUST DOCUMENT
Importance: High

Morning David

Greetings from the Business Affairs of a large number of SAMPRA members, 98% of whom are black and the balance black empowered "**record companies**", whose artists dominate local record sales and the local performance industry.

Such "**record companies**" include Soulistic Music (Black Coffee & Co), Kalawa Jazzmee (Oskido, Mafikizolo, Dr Malinga, DJ Zindle & Co), Afrotainment (Big Nuz, DJ Tira & Co), MentalWave (Liquideep, Karabo & Co) Shota Music (Shota, Phumeza & Co), Soul Candi Music (Mi Casa, RJ Benjamin, Lulu Café & Co), 88 Productions (DJ Kent & Co), Will of Steel Productions (DJ Cleo, Teddy Bears & Co), Demor Music (Demor & Co), Jaziel Music Productions (Jaziel Brothers, Tsokae & Co), Herbal 3 Records (DJ Aero & Co), Siyandisa Music (Miriam Makeba) and many others.

It is with sadness and regret that all are required to be exposed to the drivel that SAMRO has put out in respect of its alleged interests in performers, at the same time patronizing all Black recording company owners to the extent that such are incapable of reporting to and managing their relationships with their artists, producers and session musicians.

How do the artists, producers and others currently and historically collect their royalties? From their respective "**record companies**".

Is SAMRO involved? NO

Does any single of the "**record companies**" want SAMRO involved, and many are performer owned labels)? NO

Has SAMRO ever consulted any one of them in respect of their current systems and *modus operandi*? NO

Is SAMRO trusted when it comes to monies? NO

Does SAMRO have any copyright law qualifications in its staff? NO

SAMRO's position on "record companies" is that of the ill-informed and misguided, especially when SAMRO's utterances fall upon local Black Record companies.

The position that SAMRO takes that they "are fighting for justice and redress" is laughable were it not such a sick joke as is the idea that SAMRO says that "We view this as a human rights issue". SAMRO has in the eyes of many no concept of the meaning of "justice and redress" and certainly does not practice such when it, without authorization of membership, uses composer, author, arranger and publisher royalty income for years to fund the POSA Trust, which has nothing to do with composers, authors, arrangers and publishers. What "justice and redress" is that? And when will the monies be repaid to the composers, authors, arrangers and publishers?

There are 7 solid reasons why SAMRO and its puppet "POSA Trust" should have nothing to do with performers, record companies or needletime revenue, as follows and you are welcome please to share such with all RISA and SAMPRA members:

1. SAMRO has no knowledge, expertise, qualification, understanding or skill concerning the recording industry or concerning sound recordings, performer's rights or the agreements that for fifty years have governed such rights. Worse SAMRO has no qualified personnel with expertise in Copyright Law.

2. SAMRO has since 2002 (See Annexure B 2 attached) coveted the income that needletime stands to generate, and has approached performer's interests with the intention of handling the monies, not the interests of performers. SAMRO has consequently sunk tens of millions of monies belonging to composers, authors, arrangers and publishers into the POSA Trust. SAMRO in simple terms pursues needletime income for the wrong reasons and is insincere in its attack on "record companies" particularly Black owned and empowered record companies who form the bulk membership of the South African recording industry

3. SAMRO's current royalty supply chain management procedures do not fairly or properly distribute royalties collected to its composer, author, arranger and publisher members. The degree of manipulation is such with the royalties due to composers, authors, arrangers and publishers that no performer, producer or session musician who had knowledge of SAMRO'S actual behaviour would in their right mind wish to entrust SAMRO with the monies. There are inter alia at least two issues that have implications to any attempt by SAMRO to handle any further monies than they currently handle as follows:

   a. The treatment by SAMRO of monies where there is insufficient documentation – See "Black Box II" and its Annexures A to D.

   b. The current and past royalty distribution inequality that actually exists at SAMRO – See Black Box II– Annexure D.

   The recording industry would serve its constituents well were it avoid like the plague anything to do with the practices detailed above and attached, and the outcomes as practiced by SAMRO.

4. SAMRO is a monopoly currently in respect of Section 6 rights concerning composers, authors, arrangers and publishers, and its attempts to extend its monopoly to the Section 9

rights involving performers, producers and session musicians is neither welcome, nor healthy for the community, nor good for competition. In fact it is roundly condemned as the actions of a greedy mind set.

5. There is no transparency of any kind at SAMRO. Members are prohibited from accessing SAMRO'S databases concerning their works or shares of works. SAMRO uses without right the issue of "confidentiality" as a reason to not share information when it knows full well that there are NO confidentiality clauses in its deed or "membership agreements" with any SAMRO members.

6. SAMRO does not respect the issues of its current membership's wishes, as has been detailed and evidenced by SAMRO'S refusal to accept a non-profit status as decreed by the New Companies Act, instead trying to unsuccessfully force on its membership first "for profit' status and then secondly "co-op" status. This behaviour by SAMRO's Board and management fly's in the face of SAMRO's letterhead statement for the past 40 years which has said "Not profit making"

7. The "record companies" reject with contempt SAMRO's patronizing idea that somehow they are incapable of distributing needletime income to their Artists and producers. These "record companies" currently distribute royalties to their Artists and producers with no involvement of SAMRO, and have no intention of EVER asking SAMRO to have ANY involvement in such royalty distributions

It has been alleged that SAMRO is utterly desperate to cover the substantial unjustified 'hole' in its composer, author, arranger, publisher royalties caused by SAMRO's foray with the POSA Trust which SAMRO knows has nothing to do with the incomes of its composer, author, arranger, publisher members to the extent that in their desperation SAMRO would go on record that "We shall take this matter to the Constitutional Court if need be". Such an action would just incur more unjustifiable expenses where there is no income. How SAMRO aims to repay the composer, author, arranger,

publisher royalties that SAMRO has used on the POSA trust is another matter which remains to be seen.

It is high time that SAMRO was called to order – and requested to cease wasting composer, author, arranger and publisher member monies on the POSA Trust and on legal fees.

Please advise any questions

Sincerely

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From: david@risa.org.za [mailto:david@risa.org.za]
Sent: 11 October 2013 05:01 PM
To: Sunny
Subject: RESPONSE TO POSA TRUST DOCUMENT
Importance: High

Dear Member,

INTRODUCTION

SAMPRA really does not wish to conduct a war of words with POSA Trust or SAMRO. SAMPRA and SAMRO are both accredited collecting societies and we should be able to resolve differences through sensible discussions.

It is, however, necessary for SAMPRA to set the record straight over a string of untrue claims made by the Board of POSA Trust in its circular letter dated October 8th 2013.
These claims affect the rights and interests of artists and SAMPRA would be failing them if we did not respond to POSA Trust's untrue allegations.

SAMPRA is required to comply with the provisions of the Copyright Act, the Performers' Protection Act and the Collecting Society Regulations.
SAMPRA's activities are regulated by the Registrar of Copyright.
SAMPRA is fully compliant with the provisions of both Acts and the Regulations.

If SAMPRA does not comply with what the law requires, our accreditation as a collecting society would be cancelled by the Registrar of Copyright.

A core problem, however, is that what the law clearly provides for is not acceptable to SAMRO and POSA Trust. Instead of lobbying for changes in the law - as RISA and SAMPRA have done - they have argued that the law must be interpreted to suit them. Having lost that argument, they have now chosen to attack SAMPRA and the integrity of the nearly three thousand South African record companies on behalf of which SAMPRA administers needletime rights.

The Registrar of Copyright has approved SAMPRA's Distribution Plan.
She has authorised SAMPRA to effect distributions of royalties collected by SAMPRA between 2009 and 2011.
SAMPRA is also in a position to apply for approval to distribute royalties collected in 2012 before the end of the year.
Initial distributions run to approximately R105 million.
The 2012 distribution will be for a further amount of more than R40 million.
Once the Copyright Tribunal referrals and court cases involving broadcasters' and retailers' tariffs and payments have been concluded, significant further amounts will be available for distribution.

The key issue that divides SAMPRA on the one hand and POSA Trust/SAMRO on the other hand concerns and affects the financial positions of artists.
The Copyright Act and the Performers' Protection Act both compel the user to pay the royalty to the copyright owner.
SAMPRA is merely the administrator of record companies' rights - and is required to pay the full royalty that it collects from users to the record company.
The Acts then require the record company to share the royalty with the performer.
Unfortunately, these Acts do not state that the royalty must be shared equally.
They say that the ratio of sharing must be by agreement between the record company and the performer.
If they have not reached agreement, or can not do so, then the ratio of sharing must be decided by arbitration or by the Copyright Tribunal.

Record companies lobbied as far back as 1993 for the law to require the royalty to be shared equally.
At the time the law was introduced in 2002, DTI contended that it was not able to make the equal sharing of needeletime royalties compulsory because of constitutional and competition law requirements.
DTI was advised by Government law advisers to leave it to the record company and the performer to agree on the ratio of sharing in every instance.

SAMPRA has continued since its creation in 2007 to lobby DTI to change the law, without success, to require a compulsory equal sharing of the royalty.
By coincidence, SAMPRA submitted that request again to the DTI as recently as last Friday – October 4th.

The Registrar of Copyright has given SAMPRA permission to distribute royalties. She did so after approving a set of practical proposals put forward by SAMPRA that are designed to protect the rights of artists and to help artists to get payment from their record companies of royalties that are due to them.
POSA Trust and SAMRO, however, have disputed the entitlement of the Registrar to have given permission to SAMPRA to distribute royalties.

SAMRO have continued to oppose SAMPRA in a High Court case that SAMPRA had to bring against the Registrar before the decision to approve the distribution plan was made. SAMRO continued their opposition to SAMPRA's application after the Registrar of Copyright had agreed to settle the case with SAMPRA and to approve our distribution plans. SAMRO have announced their intention to bring a High Court case against the Registrar of Copyright to have her decision to approve distributions by SAMPRA set aside, and have filed an interdict application in the High Court to prevent SAMPRA from making any distributions at all until that review has taken place.

What is it that SAMRO actually wants?

Essentially, SAMRO wants the performers' share of the royalty to be paid directly to SAMRO and not to the record company. While this started out as a demand that it should only apply to performers who are members of SAMRO or POSA Trust, it appears to have now been extended to prevent payment of any royalties to any performers or any record companies until SAMRO's demands as to how distributions are to take place have been met.

Neither RISA nor SAMPRA has never contested the right of any artist to be represented by a performers' collecting society if that is what an artist wishes to do. But SAMPRA believes it is important that all artists should know the facts before they make a decision as to whether to get their royalties directly from the record company with which they have a contract - or whether they prefer to do so through SAMRO or POSA Trust.

The bottom line for artists is that SAMRO/POSA Trust have informed SAMPRA that they will charge artists an administration commission of 16% on the royalties that are due to them (on the assumption that the artist will received 50% of the royalty received from the user). If, by contrast, an artist's share of the royalty is paid by SAMPRA to the record company and, then, by the record company to the artist, no such deduction will be made from the artist's share of the royalty.

So, to express it very simply, an artist can get his or her full royalty from the record company with which he or she has a recording contract without payment of a commission – or, if he or she believes it is in her or his interests to be represented by POSA Trust/SAMRO, he or she can get the royalty from POSA Trust/SAMRO, but less a service fee/commission of 16%.

Artists need to know these facts before they make decisions as to which system they would like to use.

SAMPRA's responses to specific allegations made by POSA Trust in its circular letter are set out below.

POSA STATEMENT:

It has come to the attention of the POSA Board of Trustees that the South African Music Performance Rights Association (SAMPRA), has been contacting POSA members asking them to provide SAMPRA with their banking details.

SAMPRA RESPONSE:

It is misleading to claim that SAMPRA "has been contacting POSA members".
This implies that SAMPRA has been targeting artists who are members of POSA.
In truth, SAMPRA has not contacted ANY artists.
However, if an artist is the owner of a record company - and many artists are owners of record companies - and has chosen to join RISA, then that record company has indeed been asked to provide SAMPRA with its banking details so that SAMPRA can effect payment to the record company of needletime royalties.
This request was made to all RISA members in a circular notice dated July 3rd.
POSA Trust is well aware of the notice as it has been attached to SAMRO's court application seeking an interdict against the distribution of royalties by SAMPRA.

POSA STATEMENT:

SAMPRA is also asking artists to authorise it to distribute Needletime Rights royalties directly to artists.

SAMPRA RESPONSE:

This is simply not true.

SAMPRA has not asked any artists to authorize it to distribute needletime royalties directly to artists.

As with our response to POSA's previous statement, if any artist is also the owner of a record company, which many are, then that "artist" will have been asked in that capacity as the owner of a record company by SAMPRA to submit details of the company's bank account so that needletime royalties can be paid to it – i.e. to the record company.

POSA must surely understand that each record company's banking details are needed by SAMPRA if SAMPRA is to do its work of distributing needletime royalties.

This complaint by POSA illustrates the absurdity of POSA's own position.

What POSA is demanding is that if an artist is the owner of a record company, the needletime royalties that are due to that artist must not be paid to his own record company. Instead, the amount due to the artists must be paid to SAMRO – which will then charge the artist a commission of 16% before paying the balance to the artist.

POSA STATEMENT:

The POSA Board of Trustees views this action, by SAMPRA, in a very serious light. As you may all know, the dispute on the sharing of the Needletime Rights royalties between record companies and artists is before the North Gauteng High Court, Pretoria.

POSA is fighting for the equal sharing of Needletime Rights royalties between record companies and artists.

SAMPRA RESPONSE:

The case that came before the High Court on October 8th was not about the sharing of royalties.

The case by that stage was about the procedures under which royalties are to be distributed.

The sharing of royalties is governed by the Copyright Act and the Performers' Protection Act, both of which state very clearly that the ratio of sharing must be by agreement between the record company and the performer.

In 2009, despite the clear wording of both Acts the Registrar of Copyright at the time ordered SAMPRA to pay half of all royalties collected to SAMRO or any other collecting societies, without regard to any contractual agreements to the contrary.
SAMPRA could not do that without breaking the law.
SAMPRA had to apply to the High Court to overturn the Registrar's order.
SAMRO supported the Registrar and opposed SAMPRA's case.
In 2013 the new Registrar of Copyright agreed that SAMPRA's interpretation of the Acts was correct and that SAMPRA must comply with what the law required it to do.
In SAMRO's written argument submitted to the High Court for the hearing on October 8th, their Senior Counsel conceded that royalties must be divided by agreement between the record company and the artist, or if they have not agreed or can not agree, by arbitration or by the Copyright Tribunal.
POSA Trust seem to be persisting in arguing that even though that is what both Acts state, that that is what the Registrar has accepted and that that is what even SAMRO's Counsel has conceded, the provisions of both Acts should not be followed.

In its letter, POSA Trust is trying to project itself as the champion of artists' rights by claiming to still be fighting for the equal sharing of royalties.
If POSA was indeed "fighting for the equal sharing of needletime royalties between record companies and artists" it would have done more to have lobbied government to amend the Copyright Act and the Performers' Protection Act to require that royalties should be shared equally, as SAMPRA has done continually over many years and as RISA did before SAMPRA was created.
By coincidence, the last attempt by SAMPRA to persuade DTI to change the law to require a compulsory equal sharing of the royalty was as recently as Friday October 4th in SAMPRA's submission to DTI in response to DTI's Policy Paper on Intellectual Property.
In truth, what POSA is fighting for is simply to get as much money as possible paid to POSA Trust so that POSA Trust and SAMRO can optimize the revenues retained by them from a 16% commission they will charge to artists on whatever amounts are paid to POSA Trust.

POSA STATEMENT:

while SAMPRA holds the view that record companies should have the final say on how royalties are split.

SAMPRA RESPONSE:

This is not true.

It is, very unfortunately, a deliberate untruth that is intended to create a hostile relationship between record companies and artists.

The Copyright Act and the Performers' Protection Act both state that the royalty must be shared by agreement - and that if the record company and the performer can not agree, then the ratio of sharing must be determined by arbitration or by the Copyright Tribunal.

None of these three alternative ways of deciding how the royalty is to be shared give the record company "the final say on how royalties should be split".

SAMPRA would have expected that at least one of POSA Trust's Board members would have read the relevant Acts to establish what the Acts provide for before putting their names to unfounded attacks on SAMPRA and record companies - or that they would have asked their lawyers to do so for them.

POSA STATEMENT:

and that record companies have the right to deduct whatever advances they may have given artists from the artists' share of the royalties.

SAMPRA RESPONSE:

POSA Trust's Board members should state clearly whether or not they support the practice of record companies giving advances to artists?

If they do, then they must explain whether they believe that record companies will give advances to artists against future needletime royalties if those advances are not recoupable against future needletime earnings that are due to the artist?

POSA should also state whether it would give advances to its members against needletime royalties if those members choose to have their royalties paid to POSA Trust?

It is obvious that if record companies are entitled to deduct advances against needletime royalties, less money will be paid by record companies to POSA for those artists who choose

to have their royalties paid to POSA, since the record company will be entitled to deduct amounts from what is paid across to POSA Trust.

POSA proposes to charge artists a commission of 16% on what they receive on the artist's behalf.

This would mean that POSA would earn less revenue from the 16% commission they will charge artists on money received.

SAMPRA does not charge any commission at all, and nor do record companies when they pay royalties to their artists.

POSA STATEMENT:

Needletime Rights royalties should provide a separate stream of income, separate from the regular recording royalty paid to artists by record companies.

SAMPRA RESPONSE:

That is exactly what RISA fought for from 1988 until the law was passed in 2002.

POSA ignores the fact that SAMRO opposed the introduction of needletime.

The practice of record companies giving advances to artists against future royalties is an important part of the industry – and is clearly to the advantage of artists.

Why does POSA Trust want to make it more difficult for artists to get advances from their record companies?

POSA's financial sponsor, SAMRO, pays advances to its composer members against their future royalties.

Why should record companies not also do so?

Access to funding for career and personal purposes is a very important issue for artists.

POSA STATEMENT:

Needletime Right is intended to spread earnings to ALL artists who performed when the track(s) was/were recorded.

SAMPRA RESPONSE:

This is not an accurate statement.

The entitlement of “all artists who performed when the track(s) were recorded” to earn needletime is a matter of agreement between the record company, the featured artists and backing / sessions musicians in every instance.

Under the Performers’ Protection Act, a backing musician may also have a claim to share in the royalties if her or his performance constitutes a “substantial part of the performance” that has been recorded even if he or she does not have a contractual right to claim a share of the royalty.

SAMPRA has no interest in whether the featured artist gets the full share or whether it is divided between the featured performer and session musicians.

SAMPRA has always said that contractual arrangements between record companies, featured artists and session musicians must be respected and that artists must be allowed to develop their own rules about the issue through a consultative process.

However, whatever rules are made must be made by performers with full knowledge of their options.

POSA STATEMENT:

By signing the SAMPRA form, and authorising SAMPRA to handle your Needletime Rights royalties, you will be giving SAMPRA the right to distribute royalties according to record companies' wishes (and wants), not your own.

SAMPRA RESPONSE:

This is an irresponsible and clearly false claim.

SAMPRA is justified in contending that the claim has, very regrettably, been made by the Board of POSA Trust with the deliberate intention of creating a hostile environment between record companies and artists.

It is designed to serve the financial interests of SAMRO by instilling in artists a fear that their needletime rights will be ignored by their record companies and that they must join POSA Trust if they want their needletime rights to be protected.

What it does not tell artists is that once they join POSA Trust, they will pay a 16% commission to SAMRO on their royalties, whereas they would pay no commission if they received their share of royalties from their record companies in the normal course, just as they do for other royalties that are due to them.

POSA STATEMENT:

You will be arming record companies and giving them the right to lay their hands on your share of the royalties.

SAMPRA RESPONSE:

This is simply a repetition of the same false statement that is designed to serve the financial interests of SAMRO.

It is clearly intended to lead artists to believe that record companies can simply steal their royalties.

POSA STATEMENT:

We urge you not to sign any form that has been sent to you by SAMPRA.

SAMPRA RESPONSE:

SAMPRA has not asked anyone to sign any form.

POSA STATEMENT:

We are fighting for justice and redress.

SAMPRA RESPONSE:

In SAMPRA's assessment, POSA are not fighting for "justice and redress" - they are fighting for POSA and SAMRO to earn commissions from artists.

The best interests of artists are served by a royalty collection and distribution structure that restricts the costs of administration as much as possible.

POSA STATEMENT:

We view this as a human rights issue.

SAMPRA RESPONSE :

We also view performance rights in sound recordings as a human rights issue - as is clear from our formal submissions to the Copyright Tribunal and the Supreme Court of Appeal.
The difference between record companies and SAMRO is that record companies have been viewing it as a human rights issue since 1988.
Record companies fought for this right over many years against powerful opposition, and have never deviated from their position that royalties should be shared equally.
Among the powerful opponents of the restoration of needletime was SAMRO.
It is the record companies and SAMPRA that have done all the work to create the capacity to turn needletime rights into actual revenue.

POSA STATEMENT:

We shall take this matter to the Constitutional Court if need be.

SAMPRA RESPONSE:

What "matter" will POSA Trust take to the Constitutional Court?
The right to take a 16% commission for doing what SAMPRA and record companies will do for free?
The right to ignore the clear provisions of Acts of Parliament?
And at the cost of the very performers whose interests POSA Trust claims to represent?

Please let me know if you have any questions in this regard.

Regards

David du Plessis
SAMPRA – CEO / RiSA - Operations Director