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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**The Performers Protection Amendment
Bill**

**Presentation to the Portfolio Committee on Trade and Industry
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CAPE TOWN**

Presenters

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Purpose

The purpose of this presentation is to brief the Portfolio Committee (PC) on the Performers' Protection Amendment Bill.



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Background

Background:

- Intellectual Property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. IP is divided into two categories, namely:
 - ✓ **Industrial Property:** includes inventions (patents), trademarks, industrial designs, and geographic indications of source, AND
 - ✓ **Copyright and Related Rights:** includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.
- In 2013 a Draft IP Policy was published and 118 written submissions were received.
- Copyright Amendment Bill (Copyright and Performers Protection Amendment Bill) were consulted upon and 122 written submissions were received.
- Presidential Task Team (led by DM Manamela at the Presidency) and the Presidency (Budget Speech 2016/2017) want these Bills to be concluded.

Background

Background:

- Copyright Review Commission (CRC) established and made recommendations of effective collective management system:
- ✓ The copyright law should be amended **to allow the Registrar to take over the administration** of any relevant collecting society;
- ✓ Legislation should be amended **to allow for one collecting society per set of rights with regard to all rights governed by the Copyright Act of 1978** (performance, needle time and mechanical rights).
- ✓ Independent Communications Authority of South Africa (ICASA) should include as a condition in the broadcasters' licences that compliance with needle time and copyright obligations is compulsory and that a repeated failure by broadcasters to comply should lead to cancellation of their licences.
- ✓ Collecting societies that currently fall outside the ambit of the Regulations should be given a time period after the date of amendments to reduce their administration costs in order to be in line with the requirements of the Regulations.

Background

Background:

- Through the public participation process the **dti** began to unpack the issues facing the audio visual performers in South Africa:
 - ✓ Repeat Fees;
 - ✓ Commercial Exploitation;
 - ✓ Contracts and
 - ✓ The accession to the Beijing Treaty on Audio Visual Performances.
- Cabinet Approved Bills for introduction into Parliament on the 8th of June 2016.

Background

Performance Protection – PPA

- Three categories of related rights namely: performers(actors, musicians and dancers), producers of phonograms and broadcasting organisations.
- Live performances are a principal means of generating income for musicians and these performances are regulated through the PPA
- A singer , musician, dancer is one who claims or performs literary or artistic works.
- This Bill does not in anyway restrict or affect the rights provided for by any other law relating to Copyright in literary and artistic works.
- The protection of performance is provided for in S5 of the PPA and it extends to other countries that are members of the World Trade Organisation (WTO)
- Performance must be taking place.
- Broadcast without fixation.
- Royalties are paid for performances depending on contractual terms agreed upon, these royalties are paid to the owner of any copyright subsisting in the fixation in terms of S 9A of the Copyright Act.

Problem Statement

- The sector is currently not organised for bargaining purposes.
- Lack of formalisation of the creative industry which exposes it to abuse.
- Piracy / Counterfeiting is rife and enforcement agencies not coordinated.
- Unfair Contracts resulting in the perpetual signing away of their economic rights and the lack of updated industry contracts for freelance performers.
- Non - Payment of Royalties in the form of Repeat Fees and Commercial Exploitation for Actors.
- Non – Recognition of the Moral and Economic Rights of performers.
- Non – Ratification of Treaties that make provision for the recognition of the Moral and Economic Rights.
- Non – payment of Needletime royalty.
- Reciprocity regarding payment of royalties from other jurisdictions.
- Disputes not resolved speedily.
- The digital environment is not catered for in the Act.

Objectives of the Bill

- The Bill seeks to address the challenges facing the creative industry from non-payment of royalties; lack of formalisation of the creative industry which exposes it to abuse; piracy; and rights of performers by making provision for the above mentioned to be addressed.

Treaties Informing the Bill

- **Trade Related Aspects of Intellectual Property (TRIPS Agreement)** administered by the World Trade Organisation, South Africa is a member;
- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), South Africa is not a member;
- **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations** administered by WIPO, International Labour Organisation (ILO) and United Nations Educational Scientific and Cultural Organisation (UNESCO), South Africa is not a member; and
- **The Beijing Treaty for Audio Visual Performances (BTAP)** administered by WIPO, South Africa is not a member.

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill	What the Bill provides
<p>Definitions <i>Amendment of section 1 of Act 11 of 1967</i> <i>Page 1</i></p>	<p>Clause 1 proposes amendments to certain definitions and the insertion of definitions of “audiovisual fixation”, “broadcasting”, “communication to the public of a performance”, “communication to the public of a phonogram”, and “Tribunal” and by the substitution for the definitions of “performer” “phonogram” and “reproduction”. <i>Page 2-3 of the Bill</i></p>
<p>Transfer of Rights <i>Substitution of Section 3 of Act 11 of 1967</i> <i>Page 2 of the Act</i></p>	<p>Clause 3 proposes the insertion of sections 3A and 3B to provide for the transfer of rights where the performer has consented to fixation of his or her performance in an audiovisual fixation, subject to written contractual agreement which shall give the performer the right to receive royalties for any use of the performance. <i>Page 4 of the Bill</i></p>

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Equitable Remuneration

*Insertion of Section 3A and 3B into Act 11 of 1967
 Page 2 of the Act*

What the Bill provides

Clause 3 grants exclusive rights to the producer of a phonogram and the right to earn an equitable remuneration for the direct or indirect use of phonogram to the performer, composer and producer of phonogram.

It also proposes the deletion of a phrase in subsection (1) by virtue of the insertion of the definition of “communication to the public of a phonogram” in section 1 of the principal Act.

Page 4 of the Bill

**Proposed
 Amendments**

<p>Issues to be introduced by the Performers' Protection Amendment Bill</p>	<p>What the Bill provides</p>
<p>Consent for Use of Performers Work <i>Amends Section 5 of Act 11 of 1967 as amended by Act 8 of 2002</i> <i>Page 3 of the Act</i></p>	<p>Clause 4 provides for the consent of the performer for performance fixed in audiovisual fixation. It provides for availability of the original and copies of performance fixed in audiovisual fixation to the public; provide for persons who intend to broadcast or communicate to the public a performance fixed in audiovisual fixation of a performer, to give the performer, trust or community trust or representative or collecting society notice of his or her intention to do so; and provide for a matter to be referred to the Tribunal where the copyright owner, performer, trust, community trust or representative or collecting society rejects the proposal by any person.</p> <p><i>Page 4-6 of the Bill</i></p>

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill	What the Bill provides
<p>Exceptions to Use <i>Amendment of section 8 of Act 11 of 1967, as amended by Act 38 of 1997 and Act 8 of 2002</i> <i>Page 5 of the Act</i></p>	<p>Clause 5 provides for situations where audiovisual fixation can be used without consent for purposes of private study or criticism etc. <i>Page 7 of the Bill</i></p>
<p>Technological Protection Measures [TPM] <i>Insertion of sections 8A and 8B in Act 11 of 1967</i> <i>Page of 6 the Act</i></p>	<p>Clause 6 provides for the prohibited conduct in relation to a TPM as contemplated in sections 28O and 28P of the Copyright Act, 1978, to apply in respect of performance fixed or fixed in audiovisual fixations; and provide for the prohibited conduct in relation to the removal or modification of copyright management information; and the exceptions relating to such removal or modification contemplated in sections 28Q and 28R of the Copyright Act, 1978, to be applicable in respect of performances that are fixed or fixed in audiovisual fixation. The Bill makes it an offence to contravene these prohibitions. <i>Page 7 of the Bill</i></p>

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill	What the Bill provides
<p>Collecting Society for AudioVisual Performances</p> <p><i>Intended amendment to appear in the Copyright Amendment Bill which deals with Collective Management</i></p>	<p>The Bill seeks to introduce a Collecting Society for Audio Visual Performers whereby the four economic rights, namely (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available will be administered.</p> <p>The setup of this Collecting Society will allow for audio visual performers to be remunerated for their work in the same manner as in the music industry.</p>

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Rome Convention for the Protection
of Performers, Producers of
Phonograms and Broadcasting
Organisations

*Insertion of sections 3A and 3B in Act 11 of 1967
Page 2 of the Act*

What the Bill provides

This Convention allows for the insertion of provisions into the Bill that relate to, amongst other things, the protection of performances for performers and producers of phonograms as far as it relates to phonograms. Clause 3 of the Bill incorporates the provisions of this Convention through the insertion of Section 3B with regard to producers of phonograms and Section 3A with regard to performers.

Page 4 of the Bill

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Beijing Treaty on Audio Visual Performances (BTAP):

*Substitution of Section 3 of Act 11 of 1967
Page 2 of the Act*

What the Bill provides

The adoption and insertion of the Beijing Treaty on Audiovisual Performances provisions strengthens the prejudicial position of performers in the audiovisual industry by providing a clearer legal basis for the international use of audiovisual productions, both in traditional media and in digital networks. Such an instrument will also contribute to safeguarding the rights of performers provided by the treaty against the unauthorized use of their performances in audiovisual media, such as television, film and video.

Page 3 of the Bill

Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Beijing Treaty on Audio Visual Performances

*Substitution of Section 3 of Act 11 of 1967
Page 2 of the Act*

What the Bill provides

The main difference between the BTAP and the 1961 Rome Convention is that, whilst the latter only awarded performers the right to oppose certain uses of their performances, the former grants them a comprehensive list of exclusive rights, including the right of making available on demand, which has become essential in light of the latest technological developments and the digital distribution of creative works. The BTAP also awards audiovisual performers moral rights, which were not included in the Rome Convention. By far the most striking difference however is the fact that, the BTAP specifically protects audiovisual fixations, whilst the Rome Convention did not. *Page 3 of the Bill*

**Proposed
 Amendments**

<p>Issues to be introduced by the Performers’ Protection Amendment Bill</p>	<p>What the Bill provides</p>
<p>WIPO Performances and Phonograms Treaty(WPPT) <i>Substitution of section 3 of Act 11 of 1967</i> <i>Page 2 of the Act</i></p>	<p>Both the performer and producer of a phonogram shall enjoy the right to a single equitable remuneration in terms of the Bill. Provides economic and moral rights for performers of phonograms/sound recordings. <i>Page 4 of the Bill</i></p>

RECOMMENDATIONS

- Portfolio Committee (PC) should take note of the subtle delays that certain stakeholders have embarked upon on IP matter (Attached Article: Public Affairs Engagement - <http://mg.co.za/article/2014-01-16-motsoaledi-big-pharmas-satanic-plot-is-genocide>).
- PC should take note that this Bill does not intend to repeal any law relating to copyright and related rights.
- PC should adopt the Bill as it confers rights to the vulnerable.
- PC should consider ratification of all treaties/conventions related to this Bill.
- PC should legislate in the area of Copyright; that collecting societies must be statutorily regulated.
- PC should confer with PC of Communications regarding the issue of (music) local content: 80% (public) / 60% (private).
- PC should impose time lines for e.g.: regulations/databases to be finalised.
- PC should foster coordination of enforcement agencies to deal with piracy and counterfeiting.
- PC must take note of the Socio Economic Impact Assessment (SEIAS Report)



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Thank You