

Performers Protection Amendment Bill



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

–Public Comments



2018.11.08

Definitions (1)

- No inputs received iro
 - Deletion of the definition of “cinematograph film” (Clause 1(c))
 - Substitution of the definition of “performance” (Clause 1(f)).
- Deletion of the definition of broadcast (Clause 1(b))
 - IFPI: Remove “by wire” from the definition.
 - Dti to advise.
- Deletion of the definition of “fixation” (Clause 1(e)).
 - IFPI proposed a different definition for “fixation”.
 - We are removing the definition as we are now dealing with either “audiovisual fixation” or “sound recording”.
 - RISA: as “fixation” is used elsewhere in the Act, a definition should be retained.
 - This is amended in clause 9 where the expression “fixation” is replaced throughout the Act.

Definitions (2)

- New definition of “producer” (Clause 1(h)).
 - IFPI, RISA: Add “or legal entity”.
 - “Person” already includes both natural and legal persons.
 - RISA: replace “who takes initiative” and “who has the responsibility” as they are unclear – rather say “who produces and creates”.
 - The problem with using “produce” in the definition of “producer” is that you define in a circle.
 - Dti to advise
- New definition of “sound recording” (Clause 1(j)).
 - IFPI: The rights in a sound recording should not be affected by the incorporation of a sound recording into an audiovisual work. Remove the exclusion of sound-tracks associated with audiovisual fixations.
 - Dti to advise.

Royalties / equitable remuneration (Clause 2 – Section 3(4)(a) and (g))

- IPO & FIAPF: The term “equitable remuneration” could cause confusion - Insert words: “fair equitable **pre-purchase fee or residual** remuneration”.
 - Dti to advise.
- PMA: Add “whichever is applicable” wherever royalties and equitable remuneration is mentioned as performers would be entitled to negotiate for both.
 - “or” in legislation includes “and”, so both would be possible in negotiations.
- PMA: Distinguish between these for Audio-visual performers and for Musicians as there are big differences between the two groups.
 - Neither the Act, nor the Bill defines either term – the term will thus be interpreted in relation to the relevant industry.



Distribution right

(Clause 2 – Section 3(4)(h); and
Clause 4 – section 5(a)(vii))

- No inputs received

- Standard T&Cs + Minimum content (Clause 3 – Section 3A(3)(a) and (b)) (1)

- PMA: Strongly recommend that all the terms and conditions for film and television contracts be standardised., especially iro working hours, safety, insurance and conditions on set.
 - When the Minister prescribes standard terms, the industry will be consulted and these may be included at that stage.
- SAGA: These terms should be designed to provide the basic minimum protections and this should be clear from the Bill.
 - That is the intention. The terminology is well known enough that the Bill need not explain further.



- Standard T&Cs + Minimum content (Clause 3 – Section 3A(3)(a) and (b)) (2)

- IPO, FIAPF, RISA, SAIPL: Forcing a formal agreement could paralyze an economic fragile sector. Acknowledge that fair and reasonable practices of contracting must be adopted. Propose trade associations or organisations of producers and performers should recommend standard terms.
 - Standard terms are the essentials of a contract. There will be flexibility.
 - These organisations will be consulted by the Minister before the Minister prescribes the standard terms.
- IFPI, RISA, SAIPL: Welcome the clarifications made however the imposition of compulsory standard terms is not justified. There is no market failure that requires this. This would restrict the flexibility of the transfer agreements.
 - Standard terms are the essentials of a contract. Sufficient flexibility.
- IFPI: The term “equitable remuneration” could cause confusion as it is normally used iro “remuneration payable for the exploitation of mere remuneration rights”.
 - Dti to advise.
- RISA: Existing contracts already have suitable provisions for remuneration.
 - Paragraph (b) is simply another standard provision of the contract - These existing provisions can continue to be used.



Making equal remuneration subject to a contract (Clause 3 – Section 3B(2)).

- No specific inputs received: see comments on previous slides re minimum content of clauses



- Recording and reporting + Offence (Clause 4(c) – Section 5(1A))

- IFPI, RISA: Subsection (1A) should only apply to licenced use of sound recordings and audiovisual works. Propose the subsection reads “(1A) A licensed user who, for commercial purposes...”
 - The Bill includes “for commercial purposes” – i.e. it relates only to licenced use.
 - It can however be clarified more: [Dti to advise](#)
- IFPI, SAIPL: the reporting responsibility should only be to the licensor to avoid confusion where rights were transferred and should be subject to an agreement between the licensor and licensee.
 - [Dti to advise](#)
- RISA: Subsection (1A) implies that all performers’ rights under sections 3 and 5 are downgraded from exclusive rights to remunerative rights.
 - [Dti to advise](#)
- RISA, SAIPL: It implies that as long as a person records and reports for the purpose of calculation of royalties, there is no need for authorisation to use.
 - The recordal and reporting is only iro commercial usage, which implies authorisation. Furthermore, the Act as amended must be read as a whole. Section 5(1A) cannot override section 3.
- SAGA: There should also be consequences for someone who negligently fails to register an Act – this could be through an administrative penalty.
 - Intent is the best standard as it is wide enough to include intent where the person should have foreseen what would happen and failed to take action (*dolus eventualis*). A company who this fails because they have no systems, will thus be acting with intent.
 - It is difficult to attach criminal liability to negligence, as by its nature it is unintentional.
- Multichoice: These provisions are burdensome, the scope is not clear and in any event all performers will in any event had agreements with the owners of copyright.
 - The regulations will provide clarity. The process may appear burdensome, bet it addresses a more serious challenge, that of authors, performers and copyright holders not having any rights to determine the use of their work. According to the dti the agreement is in fact not sufficient and authors and performers are not receiving their due, thus requiring a more formal recordal of usage.

- Recording and reporting + Offence (Clause 4(c) – Section 5(1B))

- RISA, SAIPL: Welcome the criminalisation of non reporting as it is a key problem in the music industry.
- Multichoice: It is not clear why the failure to submit a report should be a criminal offence. The minimum fines are furthermore draconian in nature.
 - Propose that a similar provision be inserted here as was done in the Copyright AB, i.e. a clause that gives the court a discretion to impose a lesser sentence if circumstances justify that.
 - The amount / percentage involved is however a policy decision.

Regulations

clause 6, section 8D(3) and (4)

- RISA, Multichoice, SAIPL: These subsections provide for broad unilateral powers of the Minister to regulate contractual dealings and includes that the Minister may decide what is a reasonable royalty rate, what remuneration would be appropriate and what the terms of industry agreement should be – this is overregulation and should only be iro market failures.
 - The introductory sentence to subsection (3) is critical. It only allows the Minister to prescribe compulsory and standard contractual terms. No further determination is allowed. The list contained in subsection (3) are some of the compulsory and standard terms that must be in an agreement. There is however no power given to the Minister to prescribe what the content iro each item listed should be.
- Multichoice: Parliament may not delegate unfettered powers.
 - These delegations are not broad at all. They are very strictly delineated and guidance is provided.

technological protection measures and copyright management information (Clause 7 – Section 8E to 8H)

- RISA: These are not meaningful digital enforcement mechanisms. They allow too broad an exception.
 - Dti to advise
- No definition is provided for technological protection measure or copyright management information’
 - Agree with the concern – the clauses are now repeated here and the Bill should include definitions for the relevant terms.
 - No need to advertise definitions as they were suggested by the public and will in any event refer to the Copyright Act, where the public had an opportunity to comment.



Offenses (Clause 8 – Section 9).

Amendment to certain expressions in Act
11 of 1967 (Clause 9)

Transitional provisions (Clause 10)

- No inputs received on these clauses

General comments

- Amanda Lane: The amended legislation is reasonable and brings our industry in line with International standards and will help protect performing artists from abuse.



END