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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

Performers Protection Amendment Bill: Responses to public submissions

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the dti Delegation

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Purpose

The purpose of the presentation is to respond to the public submissions and public hearings made to the Portfolio Committee on Trade and Industry on the Performer's Protection Amendment Bill.

Background

- Submissions were received from stakeholders.
- The public hearings were held on 13 and 14 September 2018.

Definitions

- The definition of broadcast should be aligned in both the CAB and the PPAB (**M-Net and Multichoice, SAIPL**).
 - The PPAB introduces new definitions which are aligned to the BTAP, however, the PABB does not seem to have taken into account existing definitions in the Copyright Act or definitions of the same concepts in the Copyright Act (**NAB**).
 - No definition is provided for “fair and equitable remuneration”. It is not clear as to what would constitute a fair equitable remuneration in lieu of a royalty. The drafters are urged to provide clarity on this phrase (**Spoor & Fisher**).
 - It is unclear from the principal Act which party is deemed to be a “producer” of a phonogram. This term is not defined.
- The definition of broadcast is not in either Bills.
 - The definitions in the IPLAA and CAB will be aligned through transitional provisions.
 - Fair and equitable remuneration is provided in the WPPT and BTAP. It will depend on the contractual arrangements between the performer and other right holders.
 - The WPPT defines producer of phonogram. The same can be included.

Definitions

- With regard to clause 4 of the PPAB, since ‘performance’ is not defined, it is not clear how the audiovisual fixation could be sold or rented out. Wording suggested subsection 5(b)(iv) and 5(b)(v)(**Spoor & Fisher**).
- The performer definition not clear and too broad. Whether it includes the crew members. Not clear who receives the economic rights (**IPO**).
- There are two subcategories of fixation, namely, a phonogram and audiovisual fixation. Wording for the definition of ‘Fixation’ has been suggested (**Prof Karjiker, NFVF, SAIPL**).
- Performance is defined in IPLAA. It will be added in the PPAB through transitional provisions. The BTAP makes provision for the Right of Rental which has been incorporated into the PPAB.
- The definition does not include crew members or extras.
- Fixation as defined by IPLAA covers both phonograms and Audiovisual Works (No subcategories in this regard).

Rights of performers

- Actors should be viewed as independent (**Hans Strydom**).
- South Africa is not a contracting party to the Beijing Treaty and has not signed or ratified it. This seems premature (**NAB**).
- Actors treated as contractors and not as employees (**Hans Strydom**).
- The PPAB does not encourage collective bargaining (**MPA**).
- The contracts by the broadcasters raised as a serious concern by performers (**Florence Masebe & Nambitha Mpumlwana**).
- The view on how actors should be treated varies. There are those of the view that actors should be employees and the other view is to be an independent contractor. This may not be the appropriate legislation to pronounce on the status of an actor.
- SA can adopt the principles of the BTAP. Ratification requires the depositing of a legal instrument.
- The Labour issues impacting actors are important. To be engaged further. They require the Department of Labour (DOL).
- Minimum contract requirements to be prescribed by the Minister.

Rights of performers

- Concerns around the term independent contractor and the implications thereof as opposed to being an employee which attracts protection in terms of other legislation. No legislation governs what the performer is which leads to exploitation (**Thato Molamu**).
- Recommend standardized pay rates, a rate card, for the industry as there is no union. The current SABC freelance contract stipulates that the broadcaster will pay royalties to the artist, but they have thus far not honoured that agreement (**Sikelewa Sishuba**).
- The SABC should be required to sign these contracts so that the artist may be able to enforce this clause (**Zikhona Sodlaka**).
- This issue should be a non-issue, when a show I have shot is being rebroadcast for commercial gain, the artist should get paid, at a negotiated rate. This should be COMPULSORY; no broadcaster should get away with noncompliance in this regard (**Zikhona Sodlaka**).
- Generally, actors would be considered to be employees — the company that hires them exercises a great deal of control over what they do: the company (or director) tells them when to start, when to stop, what to say and what to do. Independent contractors typically are independent — they set their own schedule, choose where to work and control what they do.
- OR represented by a guild/union, certain rights must be made clear in the contract even as independent contractors.
- The labour issues to be addressed with DOL.
- Labour issues to be addressed
- Minimum contract to be prescribed
- The remuneration of the performers to be addressed.

Moral Rights: Clause 2

- Concern over the duration of the moral rights given to performers (**M-Net and Multichoice**).
- With regard to the introduction of moral rights, there are two substantial departures from the wording of the BTAP in new subsections 3(2) and (3) (clause 2). The Memorandum is silent on the reason for this departure (**MPA**).
- The moral rights duration applies for 50 years. The departure not clear as the wording taken as is from the Treaty.
- The PPAB is introducing moral rights in line with the BTAP.

Moral Rights: Clause 2

- In terms of the moral rights section in the PPAB, it is not clear why a performer would, in terms of subsection 3(2), only enjoy the right to be identified as the performer, and the right to object to distortions and mutilations etc of his performance (ie the usual moral rights) only ‘after the transfer of those rights’ as stated in subsection (2). It is recommended that the wording in the proposed subsection 3(2) be corrected by replacing the word ‘after’ with the word ‘notwithstanding’ (**SAIPL**).
- The amendment to be considered. The wording taken from the Treaty.
- The rationale is that after the rights are transferred the performer has no control of what happens to his images.
- “After” to be replaced with “notwithstanding”.

Transfer of rights: Clause 3: 3A and 3B

- If assignment of rights, why be forced to pay royalties? Why necessity to pay continued royalties? (**SABC**)
- Why be forced to pay royalties for 25 years? (**SABC**)
- Section 3A, 3B which may impact negatively-it is not practical. If law not changed, SABC will be required to pay for everything. No rationale for 25 years, May undermine record companies ability to invest (**SABC**).
- If record companies told no right after 25 years, why would they spend money on something they would not have anything on (**SAMPRA**).
- The policy position taken is that even though rights are transferred the performer should be remunerated. This is in line with international best practice in regions as the EU.
- The payment of royalties for 25 years is because the performance continues to attract royalties. The performer must be remunerated.
- There has been past injustices and loopholes. Broadcasters were not required to pay. This closes the developmental gap and addresses the rights of actors.

Transfer of rights: Clause 3: 3A and 3B

- What happens after 25 years? What about featured artists? (**Prof Karjiker**)
- Protection of sound recording and of producers—unless duplication may create confusion. May be misplaced—3B should be removed (**SAMPRA**)
- Protection is to performers.
- Remuneration of actors is key. Minimum contract requirements will be prescribed.
- Reversionary clauses are not unique to SA. 25 years can apply to music industry.
- After 25 years the contract can be renegotiated.
- The protection of producers is also important. The performer's protection is important.

Transfer of rights: Clause 3: 3A and 3B

- We welcome the idea behind Section 3A, and to avoid any doubt and to better reflect the way the industry works, we suggest that the words “copyright owner” are replaced with “producer” (**MPA**).
- Introduction of economic rights in section 3 for performers is welcomed. However the manner in which this section has been drafted creates non-waivable, non-transactable, inalienable rights (**NFVF**).
- we suggest that, the treatment of the different kinds of rights in new Section 3(4) and in Section 5 of the be reviewed. The kind of text set out in new Section 3(4) be used; Careful attention be given to correct cross-referencing and to avoid errors (**PASA**).
- The word copyright owner can be replaced with producer.
- The rights in section 3 are transactable, waivable and alienable.
- Section 3(4) and section 5 will be reviewed to ensure certainty and minimize contradiction.

Transfer of rights: Clause 3: 3A and 3B

- contract terms and remuneration prescribed by the Government in new Section 3A (**PASA**).
- Prescribed remuneration in new Section 3B(2) – which, incidentally, does not meet the requirements of Article 15 of WPPT, which requires a “single equitable remuneration”, and
- An onerous prescribed procedure for obtaining rights set out in new Sections 5(1A)- (1D) (**PASA**).
- Furthermore, in section 3B(2) the copyright owners exclusive commercialisation right is being undermined by the proposed sharing in proceeds of such commercialisation by the performer/s and producer (copyright owner and producer are not always the same person) (**Spoor & Fisher**).
- Minimum contract requirements will be prescribed not the contract.
- The South African developmental agenda and historical deprivation informs the on-going equitable remuneration.
- The wording to be approved by the Minister to be reviewed. The sharing of remuneration by the performer and copyright owner.
- Concern about the producer not always being the copyright owner is noted.

Clause 4

- Not sure if prescribed written agreement is the way to go-for well known artist and unknown performer.
- Notify before nothing is done-transactional licensing nightmare. Administratively it might be a nightmare. Blanket licenses versus transactional licenses (**SAMPRA/SAMRO**).
- Equal sharing of royalties-MOI shared split, 50:50, if do not have it in the legislation, it cannot be guaranteed. It is in the MOI. Make it explicitly clear that sharing of needletime be 50:50 (**SAMPRA**).
- It is necessary to prescribe minimum contract requirements to protect, close the past imbalances and empower performers.
- The proposal to split needletime 50:50 can be proposed to the Committee. However contractual arrangement can determine the split in the royalties.

Clause 4 continued....

- We support, in principle, measures to protect performers from abuse. However, the Bill's approach, in the proposed s 5(1A) to 5(1D) of the Act in particular, excessively interferes with the parties' freedom to contract (**M-Net and Multichoice**).
- Sections 5(2) and (4), as to be amended by clause 4 of the PPAB, create “hold-back” provisions that will result in interfering in contractual agreements and therefore undermine investments in the works embodying performances (**MPA**).
- Clause 4 - sets out a long and complex procedure for persons wishing to obtain permission to exercise the exclusive rights given to performers in relation to their unfixed performances and audio-visual performances. its implementation will lead to a lot of uncertainty and delay (**MPA**).
- The minimum contract requirements are critical to protect performers.
- The long process can be reviewed.

Clause 4 continued...

- With regard to the proposed insertions of section 5(1A) to (1D) in the PPAB, the proposals in their current form do not consider the realities of the broadcast environment and will negatively impact production and scheduling (**NAB**).
- The process can be reviewed.

Clause 5

- The proposed section 8(2)(f) is inappropriate, and should be deleted (**Prof Karjiker**).
- With regard to clause 6 of the PPAB which introduces section 8A and 8B, the drafters should take the IPLAA into consideration in respect of the numbering of the principal Act (**Spoor & Fisher**).
- The proposed section 8A makes reference to sections 28O and 28P of the Copyright Act. These Sections have not yet been incorporated in the Copyright Act, and as such, it is uncertain as to whether the numbering is correct or whether these Sections will be introduced in the Copyright Act (**Spoor & Fisher**).
- Proposal supported.
- Reference is applicable to Copyright Act than IPLAA.
- It is a technicality, the IPLAA will be addressed through transitional provisions.
- The process of the CAB is ongoing and the two Bills will be aligned in this regard.

TPM's: Clause 6

- In South Africa we do not have punitive measures.
- Not opposed to the referencing of “copyright sections” in sections 8A and 8B but have grave concerns with contents of section 28P. proposed section 28P in the CAB reduces protection against piracy and render access control technologies vulnerable to hacking. Proposed that section 28P of the CAB be reformulated and definition of TPM circumvention device be made clearer (**Mnet & Multichoice**).
- There are civil remedies to address contraventions. There are punitive measures.
- The clauses can be reviewed.
- Penalties and offenses can be strengthened.

TPM's: Clause 6

- The Performers Protection Act should have its own exceptions and its own provisions relating to TPM's and rights management information, and not be dependent on the terms of the Copyright Act (**PASA**).
- However, the clause introduces a criminal offence for the production and dealing in TPM circumvention devices. Such conduct is already criminalised in terms of section 86(3) and (4) of the Electronic Communications and Transactions Act (**Spoor & Fisher**).
- Furthermore, the definition of TPM circumvention device is not yet introduced into the Copyright Act and is also not clearly defined in the PPAB (**Spoor & Fisher**).
- The Bill has its own exceptions in clause 5. The flexibilities and limitations are in line with the Treaties.
- The TPM can be considered in the Bill.
- There is a need for penalties according to the PPAB.
- The definition issue on TPM is technical. There is alignment between the CAB and the PPAB.
- The process of the CAB is ongoing and the two Bills will be aligned in this regard.

Conclusions

- There are legal technical issues in the Bill to be addressed:
 - IP Tribunal to be the Copyright Tribunal, the communications to the public of a phonogram to be removed, etc.
- The recording of information critical for performers (log sheets) needs to be incorporated.
- Some proposed changes in the submissions to be addressed.
 - Alignment of definitions.



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