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Department:  
Trade and Industry  
**REPUBLIC OF SOUTH AFRICA**

# **Performers' Protection Amendment Bill: Responses to public submissions**

**8 November 2018**

## the dti Delegation

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## Purpose

The purpose of the presentation is to respond to the advertised clauses to the Portfolio Committee on Trade and Industry on the Performers' Protection Amendment Bill.

## Background

- The Performers' Protection Amendment Bill (PPAB) was published for comments on specific clauses/sections during October 2018.
- The following stakeholders made additional written submissions on the PPAB during October 2018:
  - IFPI (representing the recording industry worldwide)
  - International Federation of Film Producers Association (FIAPF) / Independent Producers Organisation (IPO)
  - Recording Industry of South Africa (RISA)
  - MultiChoice and M-NET
  - Personal Managers Association (PMA)
  - South African Institute for Intellectual Property (SAIIPL)
  - South African Guild of Actors (SAGA)
  - Amanda Lane

## Stakeholder Comments

- Propose the deletion of the definition of “fixation” or clearly defined using WPPT definition as it is used in number of sections (RISA).
- That the term “fixation” needs to be defined using WPPT and BTAP definitions. Wording suggested (IFPI/RISA).
- Proposed definition of “producer” should be amended to establish more clarity. Person to include both natural and legal entity (IFPI/RISA).
- It should be clarified that a producer is the party who produces the first fixation (RISA).
- Definition of producer: Replace “who takes initiative” and “who has the responsibility” as they are unclear – rather say “who produces and creates” (RISA).
- **Definition of broadcast is incompatible with international law due to inclusion of transmission by wire. Recommends removal of the word “wire” from definition (IFPI).**
- The wording of “communication to the public” is incomplete. Recommends that the definition should fully reflect definition as in WPPT by including reference to public performance (IFPI).

## Definitions

### dti Responses

- Fixation is defined in IPLAA. Reference will be made as provided in IPLAA. Department fixed it in line with the previous submissions. Audio visual and sound recording distinguished.
- ‘Person’ defined as natural and legal person.
- The definition already clarifies and captures that producer is of the first fixation.
- The intent behind the suggestion is noted but it defines producer in circle. i.e. ‘producer means the person who produces and creates’. Retain the current definition. In line with WPPT Treaty.
- **International practice noted. Broadcast can include wire to allow for flexibility and options. No clear harm demonstrated to justify to remove it. Propose to be retained.**
- Wording aligned to the Wipo Performances and Phonograms Treaty (WPPT).

## Definitions

- Definition of “Reproduction” should be clarified to confirm that it means the copying of the whole or part of an audio visual fixation or sound recording. Wording suggested (IFPI).
- Definition of sound recording should be clarified so that it is consistent with WPPT and its statement regarding incorporation of sound recording into an audio visual work (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 soundtracks associated with audiovisual fixations (IFPI).**
- Reproduction is a right provided for in the Act. Application will depend on circumstances.
- Terminology was amended. Consistent but updated according to trends and developments. Aligned to Copyright and Performers’ Protection and aligned to the WPPT.
- **The rights are provided for separately and they differ. The sound recording is about the fixation of sound. The principal Act excludes soundtracks which are audiovisual works. They could be addressed in the agreement between parties when such an arrangement is made.**

- Recommends that section 3A(3)(a) be deleted as it interferes with private contractual arrangements (IFPI).
- That section 3A(3)(b) is an unclear requirement for contracts regarding the set out of royalties and needs to be clarified. Wording suggested (IFPI).
- With regard to section 3A(3)(b), there is no existence of a fault in the market which would demand over-regularisation of contractual arrangements (RISA).
- **The Bill to allow Pre purchase of rights.**
- **The term “equitable remuneration” could cause confusion as it is normally used i.r.o “remuneration payable for the exploitation of mere remuneration rights” : “fair equitable pre-purchase fee or residual remuneration” (IPO & FIAPF, IFPI).**

### Clause 3: Section 3A(3)(a)-(b)

- Abuses of contracts and injustices to performers. Not prescribing a contract. Minimum contractual standards. Challenges with existing contracts. E.g not signed by both parties.
- It is clear. Section 3A (3)(b) provides that the agreement must set out royalties or equitable remuneration due and payable to the performer.
- There is existence of fault in the market. Outcry with performers both in film and music. Performers dying as paupers. Media highlighted and continue to highlight the plight of musicians and actors.
- **The Bill advocates for the provision and protection of rights of performers. Performers must receive fair remuneration and receive royalties for their performances. If parties agree to the pre purchase of rights and the performer is aware of his/her rights, it will be subject to an agreement. Equitable remuneration is the term used in the Treaties-WPPT. The agreement between the parties can stipulate other remuneration.**

- It is not desirable for compulsory and standard contractual terms to be prescribed by government, unless perhaps in very specific circumstances, where a clear market failure has been identified and only after a commissioned enquiry was established and it was determined with certainty that the proposed, prescribed contractual terms would address that market failure (SAIPL).
  - A mandatory contractual provision does not imply a 'standard or fixed contract'. The contractual provisions envisaged as being mandatory should be designed to ensure basic minimum protections. Examples of this is the non-waiver of specific rights that performers possess (SAGA).
  - Clause 3 at Sections 3A (3)(a) and (b): The legislation should go further to explain what the standard and compulsory contractual terms should be reconsidered and removed from the Bill (SAGA).
- Clause 3: Section 3A(3)(a)-(b)**
- Only minimum standard contract requirements will be provided, not the contract itself and content.
  - **The wording of compulsory and standard contractual terms to be amended throughout the Bill (long title, 3A, 8D) to address minimum contract requirements.**
  - There are serious market failures in the music and audio visual industries.
  - Performers will never be paid if this is considered. They are not paid now.

## Clause 2: Section 3

- Who would control moral rights after a performer's death.
- There is no need to have moral rights extend beyond the death of performers given their personal nature and their character as inseparable from the personality of the performer.
- 25 years: the provision inimical to the sound commercialization of audio visual content, where as a rule a producer has a multitude of contracts with a great number of performers and other talent.
- The Bill should specify that parties to the contract that led to the transfer of the rights (performer and producer) shall be free to extend its terms by mutual consent, (FIAPF).
- In section 3(3)-delete or other relevant provisions of the Copyright Act (FIAPF).
- The performer's heirs. Dealt with in law of succession.
- The rights should extend beyond death: e.g. performance.
- Reversion is for music only (sound recordings) not audiovisual works.
- No need to put in legislation, it is given. Parties to agree.
- This is to ensure the moral rights of the performer are sufficiently protected.

### Clause 3: Section 3A(3)(a)- (b)

- The 25 year reversion clause would impact upon viability of this established business model and the result would likely be less investment into local and new artists.
  - Reconsider the 25 years from a collective bargaining perspective.
  - Duplicative and conflicting language between section 3 and 5-right to prohibit (RISA).
  - **Subsection (1A) implies that all performers' rights under sections 3 and 5 are downgraded from exclusive rights to remunerative rights (RISA).**
- Reversion right is not unknown and it is aligned to the Copyright Act. The 25 years is sufficient for recouping investment.
  - Collecting bargaining does not fit the context of the Bill. It's a labour issue.
  - No duplication. Section 3 deals with the protection of performers' rights in respect of performances whereas Section 5 deals with Restrictions on the use of performances without the consent of the performer.
  - **No downgrading of performer's rights. Performer earns on exclusive rights.**

## Section 3B(2)

- Careful consideration is required to ensure that exclusive rights are not enacted for the benefit of performers and producers in terms of the Performers' Protection Act, which would conflict with existing statutory rights of copyright owners of sound recordings and audiovisual works (SAIPL).
- The rights were already in the principal legislation, amendments just added few changes.
- There is alignment between the Copyright and Performers' Protection Amendment Bills. The other is primary and the other is secondary in the context of IP. It is cross referencing.

## Clause 4: Section 5(1)(1A)

- **Section 5(1)(1A) and (1B))- The criminalization of the non-reporting of commercial usages of 'protected performances' (in terms of the Performers' Protection Act. Provision should only apply to 'licensed parties' or 'licensed users' or 'licensed persons' – not 'A person...' as presently stated in the Bill (RISA).**
  - On the present construction of Section 5(1)(1A), any person may make unauthorized commercial use of a copyright protected sound recording or audiovisual work, as long as they follow a certain procedure of reporting. This opens the door for abuse of process and many users would be tempted to not obtain licenses prior to making use of protected works and performances. (SAIPL, IFPI)
  - A 'statutory licensing scheme' may invite users to infringe copyright and the rights of performers in their 'protected performances' and this potential abuse of process should be avoided by clarifying that the Section is only applicable to users who have already obtained a license to make commercial usage of the relevant copyright protected work and 'protected performances' (SAIPL).
- **It is for commercial use but limiting it to licensed users only will open the section to abuse. Retain wording.**
  - Reporting will address the plight of performers when it comes to accurate information to determine remuneration. Just because there is possibility of non-compliance, it does not mean this gap should not be closed.
  - The licensing is required. Compliance is required. Requirement to report does not encourage abuse.

## Clause 4: Section 5(1)(1A)

- The new powers given to the Minister eviscerate the parties' freedom to contract. Will not survive a constitutional attack (MultiChoice and M-NET).
- Section 5(1A)-registration of every reproduction and the offence related is draconian (MultiChoice) and M-NET.
- Provisions are unduly burdensome and onerous for broadcasters of audiovisual fixations and firms that exploit audiovisual fixations (MultiChoice and M-NET).
- Only on material terms of the contract. The market space has been abused. Department not interfering with contracts. Spelling out only minimum contract requirements not the content of the contract.
- Lack of data capturing affects royalties. In light of actors dying paupers, rebroadcasts, repeats, this is necessary. Systems should be put in place. Broadcasters do not know how much is currently played.
- This is a governance issue- recording is important. There should be measurement.

## Clause 4: Section 5

- There is a duplication under Section 9A of the Copyright Act and 5(1)(b) which allows a performer to also claim a royalty in terms of PPA (MultiChoice and M-NET).
- The objective of 5(5) is to prevent the performer claiming multiple royalties under different statutory instruments for the same act. The performer should be able to claim the same royalty from the broadcaster as well-proposed wording given (MultiChoice and M-NET).
- Owner of copyright in an audiovisual fixation is not clear (MultiChoice and M-NET).
- Reference is made to audiovisual fixations in the proposed 5(5) there are no royalties payable to a performer whose performance is fixed in an audiovisual work in terms of S9A (MultiChoice and M-NET).
- Rights granted in Section 5 of the PPA should be deleted. There is no justification and nor is there any need for maintaining a duplicative system of protection that will only confuse all stakeholders.
- There is no duplication.
- Agree with the comment. There is no intention for performer to claim multiple royalties.
- Owner can be broadcaster or producer.
- Section 5(5) addresses both audiovisual and sound recordings. Each has its own royalties. Reference to section 8A to be added.
- The rights in section 5 restricts the use of the performance of the performers. It gives the performers rights to authorise the use of performance. It is for their protection.

- Section 8D-Constitutional court-where the legislature grants broad discretionary powers, it is required to delineate how those powers are to be exercised (MultiChoice).
- 8D(3) and (4) seeks to introduce the Minister to unilaterally regulate commercial dealings within copyright and entertainment industries.
- **TPMs: These are not meaningful digital enforcement mechanisms. They allow too broad an exception (RISA).**

## Clause 6 & 7: Section 8D, 8E, 8F

- Regulations will ensure the law is effective. They will indicate how the powers are to be exercised. The Minister must be empowered to prescribe regulations.
- Minister will prescribe regulations in consultation with other stakeholders. The law does not allow Minister to make regulations unilaterally. Consultation is a requirement. **Propose to amend compulsory standard contractual** to minimum contract requirements.
- **TPMs are aligned to the copyright legislation. The intention is not to have the TPMs too strong as they affect access. They will be implemented and reviewed later on.**



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