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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**The Performers' Protection Amendment
Bill**

**Presentation to the Select Committee on
Trade and International Relations
13 February 2019
CAPE TOWN**

Purpose

The purpose of this presentation is to brief the Select Committee on Trade and International Relations on the Performers' Protection Amendment Bill (PPAB).



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Background

- Performers' Protection is a related right of Copyright that caters specifically for the protection of the rights of performers.
- In 2010 **the dti** commissioned a study through the World Intellectual Property Organisation (WIPO) to research the benefits coming from the copyright-based industries in South Africa.
- In 2015 the CAB (The PPAB was still combined with the CAB) was published for public consultation purposes and 122 written submissions were received. The CAB and PPAB were separated into two (2) different Bills based on comments received.
- Cabinet approved the PPAB for introduction into Parliament on 08 June 2016.
- In 2016 Socio Economic Impact Assessments (SEIAS) was completed on the PPAB.
- The Bill was introduced to Parliament and referred to the Committee on 2 December 2016.

Background

- The Committee held a workshop with the Department of Trade and Industry (**the dti**) on intellectual property and the key concepts related to the Performers' Protection Amendment Bill on 7 February 2017. It also received a briefing on the Performers' Protection Amendment Bill on 21 February 2017.
- The Committee advertised and called for written submissions in national, provincial and regional newspapers in all official languages from 19 January until 6 February 2017. The Committee received 22 submissions.
- Due to the cross-references with the Copyright Amendment Bill, which had not yet been tabled, the Committee resolved to await the tabling of the Copyright Amendment Bill to ensure alignment between the two Bills. The Copyright Amendment Bill was subsequently introduced on 16 May 2017.
- On 13 and 14 September 2018 public hearings on the PPAB were held with **the dti** responding to submissions from the hearings on 09 October 2018.
- Further public consultations on the PPAB were held by the Trade and Industry PC between October and November 2018 wherein additional comments on specific provisions of the PPAB were requested from the public.
- The Trade and Industry PC adopted the PPAB on 15 November 2018. The National Assembly passed the PPAB on 5 December 2018.

Challenges Currently faced by Industry

- Non-payment of repeat fees.
- Non-payment for commercial exploitation.
- Unfair contracts resulting in the perpetual signing away of their economic rights.
- The lack of updated industry contracts for freelance performers.
- 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.
- Disputes not resolved speedily.
- The digital environment is not catered for in the Acts wherein audiovisual content is consumed (Non-ratification of digital Treaties).

Objectives of the PPAB

- 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 protection of performers' moral and economic rights;
 - royalties or equitable remuneration to be payable when performance is sold or rented out;
 - recordal and reporting of certain acts and offences thereof;
 - written agreement where rights of performers are involved;
 - the protection of rights of producers of sound recordings; and
 - prohibition of conduct in respect of technological protection measures ("TPMS") and copyright management information.

Treaties Informing the PPAB

- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds) South Africa is not a member.
- **The Beijing Treaty for Audio Visual Performances (BTAP)** deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member.
- **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member.
- **Rome Convention** secures protection in performances for performers in phonograms (sound recording) for producers of phonograms and in broadcasts for broadcasting organisations. It is administered by WIPO.



Proposed Amendments

Issues to be introduced by the PPAB	What the Bill provides
Definitions	Clause 1 proposes the insertion of definitions of “audiovisual fixation”, “communication to the public”, “copyright management information”, “producer”, “sound recording”, “technologically protected work”, “technological protection measure”, “technological protection measure circumvention device” and “Tribunal”, the deletion of the definition of “cinematograph film”, “fixation”, “phonogram” and by the substitution for the definitions of “broadcast”, “performance”, “performer” and “reproduction”. <i>Pages 2-4 of the Bill.</i>
Protection of Performers’ moral and economic rights	Clause 2 of the Bill proposes the substitution of section 3 of the principal Act. The primary objective of this clause is to clearly circumscribe the statutory rights conferred upon a performer, in particular certain exclusive rights in respect of his or her performances. <i>Pages 4-5 of the Bill.</i>

Proposed Amendments

Issues to be introduced by the PPAB	What the Bill provides
Transfer of Rights	<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 or sound recordings, subject to written agreement which shall give the performer the right to receive royalties or equitable remuneration for any use of the performance. It is proposed that the exercise of this right in respect of sound recordings shall be valid for a period of 25 years from the date of commencement of the agreement and where after the rights reverts to the performer;</p> <p><i>Page 5 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the PPAB	What the Bill provides
Protection of rights of producers of sound recordings	<p>Clause 3 also grants exclusive rights to the producer of a sound recording that include the rights to reproduce and making available to the public. The clause also provides the right to earn an equal remuneration, subject to the contract in the contrary, for the direct or indirect use of sound recording to the performer, composer and producer of sound recording published for commercial purposes for broadcasting or communication to the public.</p> <p><i>Page 5 of the Bill.</i></p>
Restrictions on use of performance	<p>Clause 4 of the Bill proposes amendments to section 5 of the principal Act to provide for the consent of the performer for an unfixed performance or a performance fixed in an audiovisual fixation or sound recording. It provides for availability of the original and copies of performance fixed in audiovisual fixation to the public.</p> <p><i>Pages 5-8 of the Bill.</i></p>

Proposed Amendments

Issues to be introduced by the PPAB	What the Bill provides
Restrictions on use of performance	<p>Clause 4 also provides for persons who intend to broadcast or communicate to the public a performance fixed in audiovisual fixation or sound recording of a performer, to record certain acts and submit reports thereon. Failure to do so constitutes an offence. The clause further provides the penalties that include fine, imprisonment not exceeding five years, for a juristic person ten percent of annual turnover. The courts are granted discretionary powers to give a lesser sentence.</p> <p>The clause also provides for the performer to receive royalties or equitable remuneration for authorizing the fixation of audiovisual fixation or sound recording for performing certain acts provided the agreement with the producer of the fixation. <i>Pages 5-8 of the Bill.</i></p>
Nature of copyright in audiovisual works	<p>Clause 5 of the Bill proposes amendments to section 8 of the principal Act and provides for situations where an audiovisual fixation or a sound recording can be used without consent for instances that include private study or personal and private use, criticism or review, or reporting on current events, teaching or for scientific research. The clause provides for the acts the broadcaster can perform without consent required in section 5, but where the performer has consented.</p> <p><i>Pages 8-9 of the Bill.</i></p>
Regulations	<p>Clause 6 of the Bill empowers the Minister to make regulations regarding compulsory and standard contractual terms as well as to provide guidelines to performers when granting consent.</p> <p><i>Page 9 of the Bill.</i></p>

**Proposed
 Amendments**

<p>Issues to be introduced by the PPAB</p>	<p>What the Bill provides</p>
<p>Technological Protection Measures (TPM) and Copyright Management Information (CMI)</p>	<p>Clauses 7 and 8 of the Bill proposes the insertion of sections 8E, 8F, 8G and 8H to provide for the prohibited conduct in relation to a Technological Protection Measures, which is aligned with sections 28O and 28P of the Copyright Act, 1978, to apply in respect of performances 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, which is aligned with 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 in clause 8 makes it an offence to contravene these prohibitions and provides for a sanction.</p> <p><i>Pages 9-11 of the Bill.</i></p>



Proposed Amendments

Issues to be introduced by the PPAB	What the Bill provides
'Phonogram' and 'Fixation' Expressions	Clause 9 substitutes the expressions "phonogram" to sound recording and "fixation" to a sound recording wherever they appear in the Act. <i>Page 11 of the Bill.</i>
Transitional Provisions	Clause 10 provides for transitional provisions. <i>Pages 11-12 of the Bill.</i>
Short title and Commencement	Clause 11 provides for the short title of the Bill and commencement. <i>Page 12 of the Bill.</i>



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Thank You