

# **MEMORANDUM ON THE OBJECTS OF THE PERFORMERS' PROTECTION AMENDMENT BILL 2016**

## **1. BACKGROUND**

- 1.1 The draft Performers' Protection Amendment Bill (Bill) seeks to amend the Performers' Protection Act, No. 11 of 1967 ("the principal Act"). It addresses issues relating to the payment of royalties to performers; safeguarding the rights of contracting parties; promotes performers' moral and economic rights for performances in audiovisual fixations. Thus, the proposed provisions in the Bill are strategically aligned with the priorities outlined in the National Development Plan (NDP), with the aim of ensuring effective governance, social protection, employment creation, recreation and leisure.
- 1.2 The draft Bill outlines the policy proposals that intend to review the structure of the Tribunal in order to broaden access to justice by aggrieved parties which is hampered by the delays in allocating the dates for hearing and making findings. The Bill's proposals are premised partly on the World Intellectual Property Organisation (WIPO) treaties such as The Beijing Treaty for the protection of Audio Visual Performances, the Performers and Phonograms Treaty and the WIPO Copyright Treaty.

## **2. OBJECTIVES OF THE BILL**

- 2.1 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 -
  - 2.1.1 the protection of performers' moral and economic rights;
  - 2.1.2 written agreement where rights of performers are involved;
  - 2.1.3 the protection of rights of producers of phonograms; and

2.1.4 prohibition of conduct in respect of technological protection measures (TPMS) and copyright management information.

### **3. OVERVIEW OF THE BILL**

3.1 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”.

3.2 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 of authority in respect of his or her performances.

3.3 Clause 3 of the Bill -

3.3.1 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. It is proposed that the exercise of this right shall be valid for a period of 25 years from the date of commencement of the agreement; and

3.3.2 provides for the communication to the public of a phonogram. The Bill 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.

3.4 Clause 4 of the Bill proposes amendments to section 5 of the principal Act to –

3.4.1 provide 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;

3.4.2 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

3.4.3 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.

3.5 Clause 5 of the Bill proposes amendments to section 8 of the principal Act and provides for situations where audiovisual fixation can be used without consent.

3.6 Clause 6 of the Bill proposes the insertion of sections 8A and 8B to –

3.6.1 provide for the prohibited conduct in relation to a Technological Protection Measure as contemplated in section 28O and 28P of the Copyright Act, 1978, to apply in respect of performance fixed or fixed in audiovisual fixations; and

3.6.2 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 section 28Q and 28R of the Copyright Act, No. 98 of 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.

#### **4. DEPARTMENTS/BODIES/PERSONS CONSULTED**

The Department of Trade and Industry (**the dti**) consulted various stakeholders in different sectors within the South African Copyright regime such as, local performers, composers, academics, Non-Government Organisations (NGOs), copyright consultants and the general public, through meetings and a conference.

## **5. IMPLICATIONS FOR PROVINCES**

The Provinces will be consulted.

## **6. FINANCIAL IMPLICATIONS FOR STATE**

To be accommodated within the existing budget.

## **7. PARLIAMENTARY PROCEDURE**

7.1 The Department of Trade and Industry is of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or section 76 of the Constitution applies.

7.2 Although Intellectual Property (IP) is a national legislative competence, copyright and performers protection affect the people and Indigenous Knowledge (IK) at provincial level. Therefore there is a need to consult with the provinces and the House of Traditional Leaders in terms of section 18 (1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).