



Performers' Protection Amendment Bill

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DStv
Media Sales



Team



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Contents



1. Introduction

2. Performers on TV

3. Our proposals

4. Conclusion



Introduction

Introduction

- MultiChoice and M-Net are significant investors in local television content
- We rely on performers and producers to deliver great local content
- Bill seeks to address challenges faced by performers
- Performers are a crucial part of any film and TV production
- We support interventions to protect performers



Beijing Treaty

- Proposals in the Bill emanate from the Beijing Treaty for the Protection of Audiovisual Performances
- But we understand South Africa is not yet a contracting party and Treaty is not in effect
- Ideally a cost-benefit analysis on the Treaty should have been conducted before legislative amendments were considered
- However we understand the motivation to address performer issues timeously

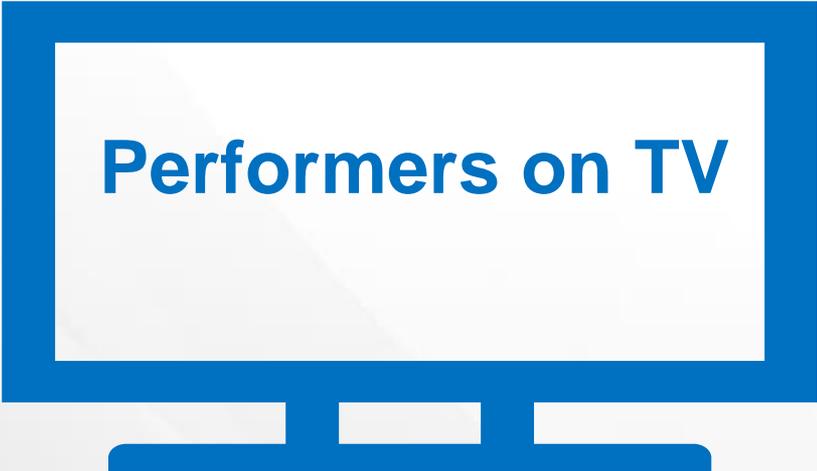


2016

Objectives of the Bill

- Bill is concerned with protecting performers in audiovisual fixations (TV, film etc)
 - Defines the rights of a performer
 - Provides for transfer of rights
 - Deals with how royalties or fair equitable remuneration must be negotiated
- We support the objectives of the Bill
- We suggest certain amendments so that objectives can be met and the Bill can be easily implemented





Performers on TV



Our role in TV content

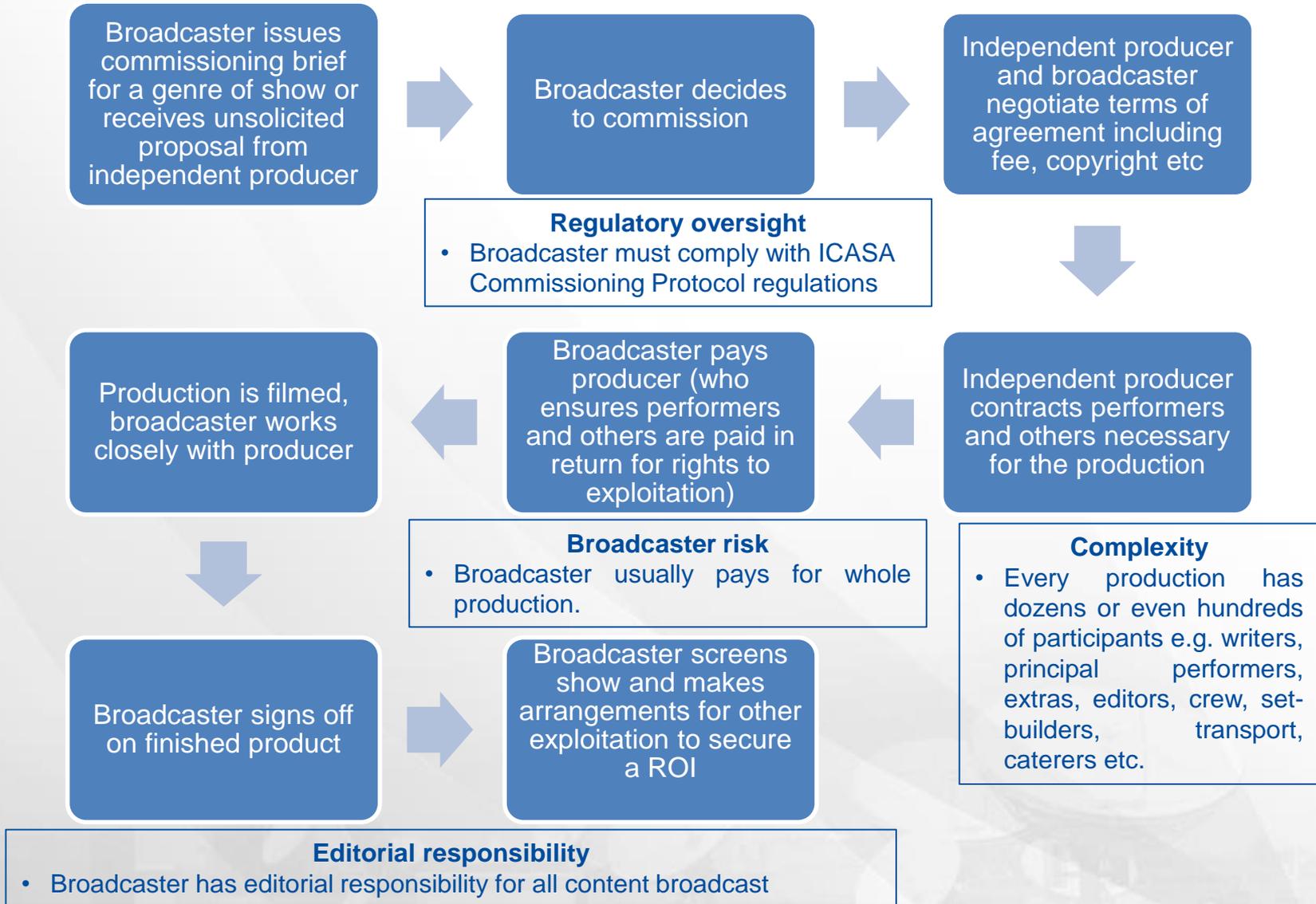
- We are a homegrown pay TV business
- We broadcast channels to subscribers
- We acquire and commission content to package into channels e.g. Mzansi Magic, M-Net, Kyknet and others
- We are major funders and supporters of local talent
- Committed to investing in local production industry in way that benefits all stakeholders, including performers

Production Complexity and Collaboration

- TV production highly collaborative – many performers making different contributions
- Some drama casts comprise more than 20 principal performers (some taking lead roles others only speaking 1 or 2 lines) and dozens of extras
- Other productions e.g. Idols – there are thousands of contributors
- Every production is different and complex in own way. Not possible to legislate specifics
- Can't have one size fits all approach to all performers



TV Commissioning Value Chain



How performers are contracted

- Majority of local content is commissioned
- Agreements with local performers are therefore usually via the producer of the programme:
 - Broadcasters don't usually contract directly with the performer
 - Broadcasters require the producer to make provision for payment of the performer in return for the exploitation of rights for the performance
 - Performer remuneration negotiated, will differ according to who performer is, budget for production, nature of performer's role

Risk

- In commissioned content broadcasters usually put up all funding and therefore take all risk
- Producers and performers are paid upfront, regardless of how the show performs
- As the broadcaster, we endeavour to create 'win/win' situation where producer / performer / broadcaster all benefit from the production

Other investment in performers

- We support performers in other ways
 - Funding to enable performers to start their own production companies
 - Investment in skills development and training
 - Support, mentoring and financial assistance e.g. contribution to marketing for Awards campaigns
- These initiatives have enabled some performers to become job creators and to build their own businesses



What TV sector needs from the Bill

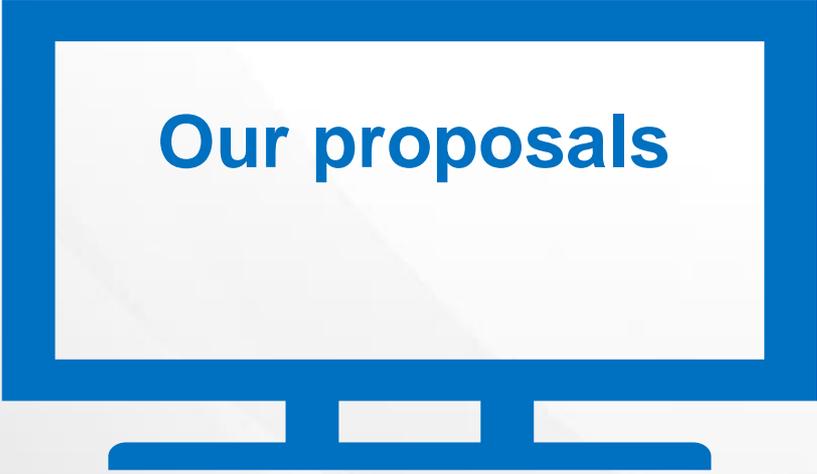
- That it provides sufficient protection to performers
- That it promotes enabling environment for investment in performers and local content
- That it is not overly rigid so that contracting performers and exploiting rights becomes too difficult for producers and broadcasters



International benchmarking

- Have looked at statutory treatment of performer royalties in 8 countries (China, India, Malaysia, Mexico, Nigeria, Russia, Brazil and Vietnam)
 - Most are Rome Convention countries - general approach is that performers have a right to prevent broadcast of their performance but there are no specific statutory obligations on broadcasters to pay royalties to performers
 - As a result, whether and how a performer is paid depends of the terms of his agreement with the producer and/or broadcaster.
- In US and UK there is also no statutory right to royalties for performers.
 - But in practice, performers have won these rights in agreements through strong actor guilds
 - e.g. Screen Actors Guild (US) and Equity (UK)
 - These guilds negotiate collective bargaining contracts including royalties with producers and broadcasters

Supporting collective bargaining and strong representation of performers seems to be best way of improving the position of performers



Our proposals

Definition of a performer

- Definition is wide - does not differentiate between a principal performer and extras
- Large productions can have over 150 “performers” (including principal performers and extras)
- Would be unworkable for the provisions of the Bill to extend to all performers

Our proposal: This issue should be clarified in the Bill, the Bill should state that it is only concerned with principal performers



Regulation of agreements and performer remuneration

- Bill makes proposals on the contractual relationship between performers, copyright owners and users
- For example:
 - Written agreements to be prescribed (new s3A)
 - Equitable remuneration “to be approved by the Minister”(new s3B).
- We appreciate Bill seeks to prevent exploitation of performers
- But the Bill’s proposals may restrict the parties’ freedom to contract as they see fit and may make contracting difficult (one approach for every agreement). Not clear how it will work in practice
- Have raised similar concerns with the Copyright Bill

Our proposal: Rather than providing for written agreements to be prescribed or remuneration to be approved by Minister, Bill should consider other solutions to provide protection for performers in agreements e.g. Copyright Tribunal could be empowered to set aside unfair contractual terms

Agreements and Dispute Resolution

- Performers must receive equitable remuneration for their performances
- But we're concerned that the prescriptive provisions on the process to be followed by the parties prior to using a performance are impractical:
 - Cumbersome and unworkable considering the volume of performers involved
 - Will create a bottleneck situation
 - Will cause delays to the finalisation of broadcast budgets and schedules

Our proposal: Amend to include principled provisions to ensure that performers receive equitable remuneration. Reframe this as a right to remuneration rather than a right of authorisation

Transfer of Rights

- Proposed s3A seeks to adopt the provisions of Article 12 of the Beijing Treaty
- Article 12 gives Contracting States option of conferring economic rights in performances that have already been fixed in an audiovisual fixation to the producer by one of three legal mechanisms, i.e. (i) by law; (ii) by compulsory licence OR (iii) by contract
- Indicates that in SA it will be by contract, which we support
- However, the proposed new s3A is not consistent
- We have suggested text to rectify this and allow the economic rights to be transferred in more streamlined process

Our proposal: s3A should be reworded “Where a performer has consented to fixation of his or her performance in an audio-visual fixation, the exclusive rights granted to a performer in terms of section 3(4)(c), (d), (e), (f) and (g) shall be transferred to the producer of the audio-visual fixation on terms which are to be agreed between the performer and the producer.”

Rights deemed to be included

- Existing Act provides that in the absence of an agreement to the contrary, the performer's consent to broadcasting includes the ancillary rights of rebroadcasting, fixation for broadcasting and reproduction of the fixation for broadcasting
- This provision is logical and appropriate
 - Rebroadcasting, fixation and reproduction are all for the same purpose of broadcasting a performance
- The Bill proposes reversing this position
 - requires separate consent for each activity
 - This doesn't necessarily assist the performer and introduces red tape

Our proposal: The current provision in s5(2) of the Act should be retained as is

Technological Protection Measures

- Pay TV broadcasters use access control systems to protect against piracy
- Piracy is one of the main factors impacting on the financial well-being of artists and performers. Broadcasters are less able to invest in productions if they are pirated, with direct implications for artists and performers
- Access control systems are a type of Technological Protection Measure
- We are concerned that s28P of the Copyright Act (which this Bill proposes to incorporate) is too widely formulated in how it allows TPMs to be circumvented
- Enables any person who wishes to circumvent a Technological Protection Measure to take the law into their own hands

Our proposal: As per our submissions on the Copyright Bill, the proposed s28P in the Copyright Bill should be reformulated to assist with anti-piracy

Transitional Provisions

- Broadcasters need a transitional period to prepare for the implementation of the Bill
 - Need to undertake the necessary negotiations without a disruption of operations
 - Need to budgets for any additional costs
 - Need to prepare production schedules

Our proposal: The Bill should provide for a transition period so that we can prepare for implementation



Conclusion



Conclusion

- M-Net and MultiChoice grateful for opportunity to comment on the Bill. Hope our comments will assist the Committee
- Look forward to finalized legislation which protects performers and provides enabling environment for investment in film and television content
- It is in all our interests that performers thrive and we are committed to playing our role in making that happen



Thank you