

Recording Industry of SA

National Assembly Portfolio Committee on Trade and Industry
Public Hearings on Performers' Protection Amendment Bill [B24-2016]

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Presenters

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Outline

1. Overarching position and concerns on the Amendment Bill
2. RiSA Overview
3. State of Recording Industry: Investment, Value-Chain, Statistics
4. Artists share of Revenue
5. International Treaty Ratification
6. Economic Impact on local artists and record labels
7. Recommendations
8. Conclusions

RiSA support dedicated legislation to protect the financial and economic interests of performers.

Therefore RiSA welcomes this amendment of the Principal Act to protect local performers from the negative (economically and financially) effects of the 4th Industrial Revolution.

The Bill largely achieves this objective.

9 Key Concerns

1. **Definitions:** Section 1
2. **Section 2:** Scope of Protection
3. **Section 3A:** Transfer of Rights
4. **Section 3A:** Undue interference in contractual relations
5. **Section 3B:** Duplication and inconsistency with Copyright Act
6. **Section 5A:** Undermining the protection of performers and producers
7. **Section 6:** Technological Protection Measures (TMPs) Provisions
8. **Section 8:** Recommendation in relation to Exceptions
9. **Section 8:** US style fair use would harm performers

RiSA Overview (1)

▶ BACKGROUND

- ▶ Trade Association of the Recording Industry in South Africa
- ▶ Formed in mid 1970s as Association of South African Music Industries (ASAMI)
- ▶ Changed its name to Recording Industry of South Africa (RiSA) in 2000 to identify specifically with the Recording Industry
- ▶ Member of the International Federation of Phonographic Industries (IFPI)

▶ OBJECTIVES

- ▶ To represent the rights of its members through collective licensing and lobbying
- ▶ To combat the piracy of recorded music
- ▶ To set benchmarks for and issue sales certifications
- ▶ To organise the Annual South African Music Awards

RiSA Overview (2)

▶ MEMBERSHIP

- ▶ Represents approximately 5000 independent record companies - many of which are owned and managed by self-releasing artists, as well as 3 multinational companies.
- ▶ Our members range from Kalawa Jazmee, 999 Music, Ghetto Ruff, Gallo, Afrotainment to Sony Music Entertainment, Warner Music and Universal Music

▶ ACHIEVEMENTS

- ▶ Was instrumental in the re-introduction of the so-called “needletime” rights in 2002, and the Collecting Society Regulations in 2006
- ▶ Successfully staged over two decades of South Africa’s leading music awards event
- ▶ Built and maintains the most accurate repository of recorded music industry data

State of the Recording Industry

An amazing time to be a South African music fan...

* More choice than ever

* 45m+ licensed tracks on 14 digital services in SA



Music doesn't just happen...



Record companies are the primary investors in music - discovering, nurturing and promoting artists and their music.

- **\$4.5bn** global annual investment in A&R and Marketing
- **27%** share of revenue invested in A&R and Marketing
- **A&R investment** larger than any other industry R&D



Investment by SA Recording Industry

Investing in taking new artists to the market and promoting their careers requires large upfront investment from record companies, with no certainty in relation to when, if ever, the investment will be recouped.

ON AVERAGE PER RELEASE

ADVANCES	UP TO R1M
RECORDING COSTS	R50k TO R3M
VIDEO PRODUCTION	R50k TO R1M
TOUR SUPPORT	Up to R250k
MARKETING AND PROMOTION	Up to R1M

Our Music Value Chain

CONTENT CREATION				MONETISATION		
CREATION	PRODUCTION	PRODUCT MANAGEMENT	SALES / MARKETING	DISTRIBUTION	PLATFORMS	CONSUMPTION
Songwriting	Sound Recording	Artist Identity Strategy	Media Promo	Physical retailers	Music Retailers	Unit purchase
Composing	Sound Editing	Music clip creation	Radio Promo	E-Retailers	Social Media	
Acquisition of music rights	Mixing	Marketing strategy	TV Promo		Streaming Services Deezer, Spotify...	Pay per play (music streaming)
	Mastering		Online Promo		Online Stores iTunes, Amazon	Pay per Download
			Above The Line Advertising			Music Publishing Registering copyrights for musical compositions
						Live Performances Public buy tickets for live performances
						Public Performance
						Synchronisation

RiSA estimated illustrative breakdown of R55.99 monthly streaming subscription fee in SA.



VAT
R7.82



Platform*
R17.23



Author*
R6.25



Artist*
R8.34



Label
R4.87
(Net
income
pre-tax)



Costs to Label
R23.51

- Marketing, promo and creative investment
- Sales and distribution
- General overheads

Label*
R28.68

*Figures are industry level, and not based on any individual contract. They are gross, including unrecouped artist advances, before costs. Due to rounding, figures may not precisely add up to total precisely.

Artists' share of revenues is increasing

- ▶ Artists have more choice than ever.
- ▶ Increased competition and new models for artist partnerships benefit artists.
- ▶ IFPI research shows that digital, and streaming in particular, resulted in a 20% increase in artists' share of revenues between 2011 and 2015.

Artists' share of royalties is growing...

+20% increase in artists' share of royalties 2011-2015

"Artists may secure a slightly better rate on downloads than CD, and a slightly better rate again on streams over downloads..."

– MMF, *Dissecting the Digital Dollar*, p.57

“

"Artists have a greater range of label partners and deal types to choose from today than in the past."

– *Music Managers Forum, Dissecting the Digital Dollar*

South African artists are at the centre of the industry

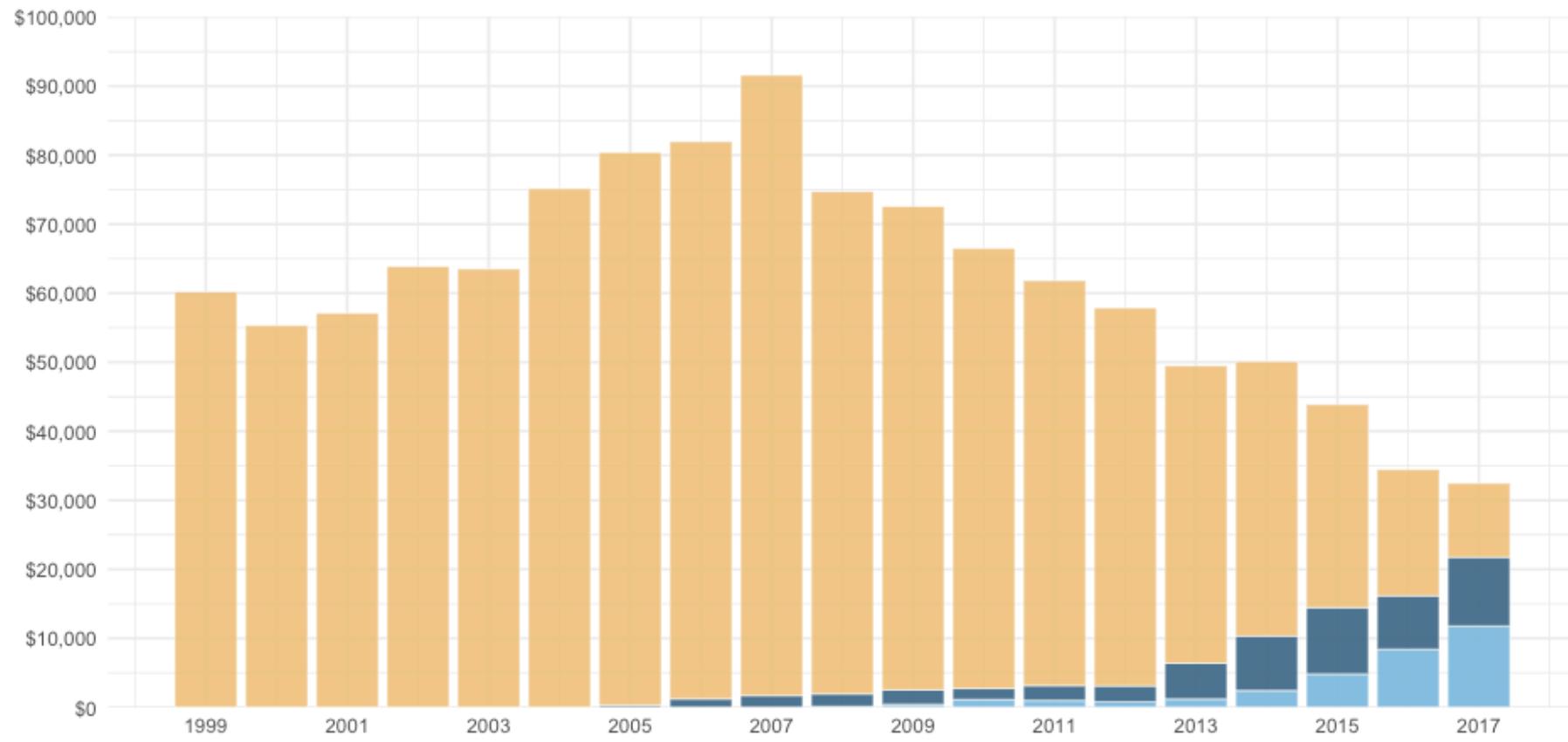
Record companies compete to partner with artists. Signing an artist and producing recordings and music videos is only one part of the process.

Record companies support artists through roles such as marketing, A&R, distribution (in South Africa and globally), and data & analytics.



Current State of the Industry: A digital industry that needs fair digital markets to recover

South African recorded music industry revenues 1999-2017
(US \$ Thousands)



-  **DIGITAL EXCL. STREAMING**
Permanent downloads, mobile revenues - EXCLUDES streaming
-  **PHYSICAL**
Sales of all physical formats, including CD and vinyl
-  **STREAMING**
Audio and video streaming revenues, paid and ad-supported

South African Music Market 2017 In Numbers

40%

Growth in
streaming
revenue

67%

Digital Share
of SA
Revenue

-5,7%

SA Revenue
Growth

-41,4%

Physical
Revenue

-15,75%

Download
revenue

Treaty Ratification

- ▶ We welcome the Government's aims:
 - ▶ to bring the Copyright Act and Performers' Protection Act in line with the WIPO Copyright Treaty (WCT), Performances and Phonograms Treaty (WPPT) and The Beijing Treaty; and
 - ▶ to ensure performers and artists are fairly remunerated.
- ▶ But the PPB is not compatible with the treaties and some provisions would cause serious harm to performers and producers.
- ▶ We also encourage the Government to take the further step of ratifying these treaties. Only then will South African creators reap the full rewards of their works being enjoyed globally.

Economic Impact on Local Musicians and Record Labels

Rather than supporting performers, a number of the proposals would harm performers and producers alike, including:

- ▶ Downgrading of exclusive rights to mere remuneration rights and subjecting them to a statutory licence regime.
- ▶ The 25-year Limitation on the term of assignment of rights.
- ▶ Introduction of a sweeping United States style fair use exception.
- ▶ Incomplete provisions on technical protection measures, which risk creating a legal haven for pirate services in South Africa.

Definitions: Section 1

Section 1(c) “communication to the public of a phonogram”

- ▶ To avoid any misunderstanding that the amendment is removing public performance from the existing protection of performers’ rights.
- ▶ We submit that the definition of “communication to the public of a phonogram” should fully reflect the WPPT definition by including an express reference to public performance.

Section 1(f) “reproduction”

- ▶ The right of fixation is distinct from the right of reproduction, and should be treated as such.
- ▶ The reference to fixation should therefore be removed from the definition of reproduction.

Section 2: Scope of Protection

- ▶ Section 2 of the PPB would substitute section 3 of the PPA with a new section 3, the effect of which would be to remove protection for phonograms first fixed in a country which is member of the World Trade Organisation.
- ▶ The amendment would deny performers protection in respect of their performances when they are exploited in other WTO countries, and is incompatible with TRIPS.
- ▶ Neither section 3 of the PPA nor section 3 of the PPB would be compatible with WPPT and Beijing since they would preclude national treatment.

Section 2: Scope of Protection

Recommendation

- ▶ Section 2 of the PPB be amended to provide national treatment in respect of nationals of WTO, WPPT and Beijing contracting parties, as well as protecting the performances of nationals of other countries where the performances of South African performers are protected.

Section 3A: Transfer of Rights

Three elements of Section 3A are legally problematic and would harm performers and producers alike:

1. **Limiting the term of assignment to 25 years will disrupt licensing, reduce producers' and performers' revenues, and reduce investments in South African artists, and reduce the number of services and works available to South Africans.**
 - i. The high levels of investments in artists (27% of revenues on average) by record companies depends upon the ability to be able to earn a share of the revenues from the minority of recordings which “break through”, and for the term of copyright in those recordings.
 - ii. The proposed limitation would effectively prevent substantial catalogues of music videos from being licensable after 25 years - half the term of protection.
 - iii. The effect would be reduced revenues for South African performers, producers and, consequently, reduced investments in artists.
 - iv. SA licensees such as digital services would not be able to obtain licences to many catalogue works, giving an advantage to global services licensed outside of SA.

Section 3A: Undue interference in contractual relations

2. **Prescribing the terms of agreements between performers and producers is an undue interference into contractual relations, restricts flexibility and serves neither party.**
 - ▶ Agreements between different performers and producers vary greatly, with good reason. An established artist will require different terms to a newly signed or backing artist, for example.
 - ▶ The market is highly competitive and for record companies to compete they must ensure that artists receive competitive and fair returns for their work. This is already provided for in agreements between record companies and performers.
 - ▶ There is simply no evidence of a market failure that would justify this extensive interference into contractual relations.
 - ▶ The proposal would also impose unwarranted contractual formalities on all contractual partners, benefiting no-one.
3. **The transfer of rights provision is confusing and needs to be clarified.**

Section 3A: Recommendations

Section 3A: Transfer of Rights

- ▶ The 25 year limitation on the assignment of rights should be removed.

Section 3A: Undue interference in Contractual Relations

- ▶ The imposition of prescribed contracts should be removed.
- ▶ For legal and commercial certainty, we recommend that draft section 3A be clarified so that where an AV performer has consented to the recording of their performance, the exclusive rights of the performer are automatically transferred to the copyright owner of the audiovisual fixation, subject to any written contractual agreement to the contrary (as provided in Article 12(1) of the Beijing Treaty).

Section 3B: Duplication and inconsistency with Copyright Act

- ▶ Section 3B of the PPB, concerning the “*protection of rights of producers of phonograms*” is misplaced.
- ▶ The protection of sound recordings is already set out in section 9 of the Copyright Act. The PPA should not include provisions on copyright.
- ▶ Furthermore, Section 3B of the PPB is inconsistent with the protection afforded to the producers of sound recordings under both the Copyright Act and the current draft of the Copyright Amendment Bill.

Section 3B: Duplication and inconsistency with Copyright Act

Recommendation

- ▶ Section 3B should be removed.

Section 5A: Undermining the protection of performers and producers

- ▶ The Bill proposes that audiovisual performers' be granted **mere remuneration rights** in respect of fixation, reproduction, distribution, rental and making available to the public, and subjects those rights to a **statutory licence regime**
- ▶ The proposal is *incompatible with the Beijing Treaty*
- ▶ The proposal to extend the existing statutory licence in respect of certain rights of phonogram performers to cover also their rights of *rental and sale* is incompatible with WPPT.
- ▶ These proposals would significantly disrupt licensing, reducing revenues for performers and producers, reducing investments in performers and resulting in less choice for South African consumers.

Section 5A: Effects

- ▶ Section 5A creates a statutory licence, removing the ability of performers or their assignees to negotiate licences for the use of their rights on fair market terms.
- ▶ Lengthy and costly Tribunal tariff-setting processes would complicate and delay licensing, and result in below-market rates.
- ▶ The effect would be a reduction in revenues for performers and producers and fewer licensed services.
- ▶ This will reduce the revenues available to invest in performers, harming the development of South African artists.
- ▶ Complicating licensing in this way will also give an advantage to digital services operating outside of SA on the basis of global licences, thereby hampering growth of the South African digital industry, and reducing consumer choice in SA.

Section 5A: Recommendation

- ▶ Draft Article 5A is not compatible with The Beijing Treaty nor the WPPT - the treaties provide that the majority of rights must be exclusive rights and does not permit the imposition of statutory licences.
- ▶ AV performers' rights should be granted exclusive rights without statutory licence.
- ▶ The statutory licence in respect of phonogram performers rights should not be extended to sale and rental.
- ▶ Equivalently problematic provisions appear in the present draft of the Copyright Amendment Bill, and should be removed.

Section 6: Technological Protection Measures (TMPs) Provisions

- ▶ The South African recorded music industry is a digital industry with great potential for growth.
- ▶ Piracy in South Africa remains a substantial obstacle to growth.
- ▶ The introduction of adequate provisions on technological protection measures is essential to enable the development of new business models.
- ▶ The proposed measures in s.6 are inadequate, inconsistent with international standards, and would create a haven for pirate services operating in South Africa.

Section 6: Technological Protection Measures (TPMs) Provisions

Recommendations

- ▶ The proposed definition of “technological protection measure” should refer to technologies *designed to have the effect of circumventing TPMs*.
- ▶ Paragraph (b) of the definition would provide a charter for hacking TPMs, and users already have the safeguard of draft section 28P(2)(a). It should be deleted.
- ▶ The definition of “circumvention device” is too narrow and should include devices that (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs.
- ▶ The exceptions inadequately scoped and are open to abuse.

Section 8: US style fair use would harm performers

- ▶ The current draft of the Copyright Amendment Bill includes an full open-ended US style fair use exception, which would also apply under the PPB.
- ▶ The open-ended nature of fair use results in a disproportionately high level of litigation to establish what is fair use. Even after 150 years of case law in the US, the scope of fair use is uncertain.
- ▶ Fair use favours those who wish to use protected works (and performances) on a commercial scale for free, and who can afford to litigate. It disadvantages creators who do not have the resources to bring cases against those claiming the benefit of fair use, no matter how unfairly.
- ▶ Fair use would result in a transfer of value from South African performers, producers and other creators to large - mainly foreign - technology corporations.

Section 8: Recommendation in relation to Exceptions

- ▶ Copyright drives innovation, as shown by developments in the recorded music industry. A fair and balanced copyright system is essential for functioning digital markets.
- ▶ RiSA supports a review of exceptions to ensure they are fit for purpose for the digital age.
- ▶ Where there is an evidence basis for new or amended exceptions, clear targeted exceptions that are compatible with the three-step-test may be considered.
- ▶ However, there is no evidence basis supporting the introduction of fair use.
- ▶ Fair use would harm South African performers and it should not be adopted.

Conclusion

1. RiSA fully supports the fair treatment of performers - partnerships between record companies and artists are at the heart of the industry.
2. RiSA fully supports the grant of rights to performers in accordance with the WPPT and Beijing Treaty.
3. But, the PPB is not compatible with these treaties.
4. The PPB would result in lower revenues for performers and producers alike, thereby reducing the investments in performers which are essential in the discovery and nurturing of new talent.
5. We encourage a reconsideration of the PPB in light of the international treaties and the serious harm that the present draft would cause.
6. RiSA stands ready to assist.