



Summary of Submissions for the Performers' Protection Amendment Bill [B24-2016]

1. Introduction

The Performers' Protection Amendment Bill (PPAB) intends to address and resolve the following but not limited to:

- The non-payment of royalties for audio-visual performers;
- The lack of formalisation of the creative industry and the related abuse;
- To address digitisation;
- The incidence of piracy; and
- The moral and economic rights of performers related to audio-visual fixations.

The Performers' Protection Amendment Bill focuses on the:

- Definition of certain words and expressions;
- The protection of performers' moral and economic rights;
- Written agreements where rights of performers are involved;
- The protection of rights of producers of phonograms (sound recordings); and
- Prohibition of conduct in respect of technological protection measures and copyright management information.

The Performers' Protection Amendment Bill incorporates the following International Treaties, which will be ratified:

- The WIPO Performances and Phonograms Treaty (WPPT)- 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); and
- The Beijing Treaty on Audio-visual Performances (BTAP) deals with the intellectual property rights of performers in audio-visual performances.

The Beijing Treaty on Audio-visual Performances:

The Beijing Treaty modernizes and provides updates for the digital era for the protection for singers, musicians, dancers and actors in audiovisual performances contained in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).

The Beijing Treaty encompasses the performances of actors in different media, such as film and television, and also includes musicians when their musical performances are recorded in a DVD or any other audiovisual platform. The Beijing Treaty grants performers economic rights in fixed and unfixed performances, as well as certain moral rights.

Moral Right:

The right to claim to be identified as the performer; and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation, taking into account the nature of the audiovisual fixations.

Four Economic Rights:

Right of reproduction is the right to authorize direct or indirect reproduction of the performance fixed in an audiovisual fixation in any manner or form.

Right of distribution is the right to authorize the making available to the public of the original and copies of the performance fixed in an audiovisual fixation through sale or other transfer of ownership.

Right of rental is the right to authorize the commercial rental to the public of the original and copies of the performance fixed in an audiovisual fixation.

Right of making available is the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in an audiovisual fixation, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet.

Socio Economic Impact Assessment Report (SEIAS) 2017 and the Regulatory Impact Assessment (RIA) 2014:

An independent assessment was undertaken in 2014 after the Draft IP Policy was published for public comments in September 2013. The assessment was focused on a selection of policy proposals in the Draft IP Policy, identifying the critical policy themes as representative of the core policy objectives and significant change in the IP regulatory landscape. One of the critical policy themes the RIA assessed was the amendment of various legislation to implement the contents of international treaties; in the domains of Copyright, Designs and Trade Marks.

The CAB SEIAS Report was certified on 29 May 2017 by the Department of Monitoring and Evaluation (DPME). This was after it was published by the PC for public comments on the 7 May 2017. Hence, the PC has made it available on request. The SEIAS does meet the guidelines of the DPME.

Information on the SEIAS to be provided by the appropriate unit as many of the submissions deals with a SEIAS not being done on the PPAB and the BTAP.

Consultation with Stakeholders:

SAMIC – South African Music Council

CCIFSA - Cultural and Creative Industries Federation of South Africa

MASA – Musicians Association of South Africa

SAGA – South African Guild of Actors

NACSA- National Actors Council of South Africa

FIA-International Federation of Actors

2009 – Creative Industry Meeting with the President at Sandton Convention Centre

2011 – Copyright Review Commission (CRC) Task Team – to Refer Appendix 1A and 1B of CRC

2014 – Industry Roundtable

06 August 2015 – Non Governmental Organisations Consultation on CAB/PPAB

07 August 2015 – Publishers Consultation on CAB/PPAB

10 August 2015 – Anti Counterfeit Consultation on CAB/PPAB

10 August 2015 – Visual Arts Consultation on CAB/PPAB

10 August 2015 – Innovation Hub Consultation on CAB/PPAB coordinated by Joint Academics

12 August 2015 – Attorneys Consultations on CAB/PPAB

12 August 2015 – Photographers Consultation on CAB/PPAB

14 August 2015 – Authors and Writers Consultation on CAB/PPAB

14 August 2015 – Broadcasters Consultation on CAB/PPAB

14 August 2015 – Telecoms Consultation on CAB/PPAB

17 August 2015 – Collecting Societies Consultation on CAB/PPAB

19 August 2015 – Government and Agencies Consultation on CAB/PPAB

27 August 2015 – Birchwood Hotel CAB Conference (500 attendees)

23 September 2015 – Arts and Culture Workshop (CAB/PPAB 2015 presented) in Thohoyandou

September 2015 – Galleries and Photographers Consultation in Cape Town on CAB/PPAB

29 September 2015 – Musicians Workshop in Thohoyandou (CAB/PPAB presented)

16 March 2016 – Witwatersrand Consultation on CAB/PPAB

06 April 2016 – Industry Bodies Consultation (CCIFSA/SAMIC/ARTINET/SAGA/MASA) on CAB/PPAB

06 April 2016 – UK Delegation meeting (Artist Resale Right and Collecting Societies) coordinated by CIPC

22 April 2016 – SASOL Consultation on CAB/PPAB

29 April 2016 – Musicians Workshop at Thohoyandou on CAB/PPAB

03 May 2016 – Department of Small Business and Development Consultation on CAB/PPAB

12 May 2016 – Department of Small Business and Development Consultation on CAB/PPAB

12 May 2016 – Department of Social Development meeting on CAB/PPAB

11 July 2016 – Modiri Mochoari Musicians Consultant Consultation on CAB

7-10 September 2016 – Moshito (Musicians and Composers) presentation on the CAB/PPAB

25 August 2016 – SAMIC meeting on CAB/PPAB

26 August 2016 – PASA Legal representative on CAB

30 August 2016 – PASA AGM Presentation on the CAB

15 October 2016 – Actors Industry Meeting Consultation on CAB/PPAB

22 October 2016 – Actors Industry Meeting Consultation on CAB/PPAB

27-28 October 2016- Saga/ International Federation of Actors (Fia) Conference for Audio Visual Performers on PPAB

23 November 2016 – Independent Producers Organisation (IPO) presentation on CAB/PPAB

12 December 2016 – American University College of law meeting on CAB/PPAB

24 January 2017 – Musicians Association of South Africa (MASA) consultation on the CAB/PPAB

14 & 15 March 2017 – WIPO Workshop on Collective Management of Copyright and Related Rights in Music

11 August 2017 – Musicians Indaba presentation of CAB/PPAB

24 July 2018-Actors PPAB

2. Summary of core issues (List not exhaustive)

- “Communication to the public of a performance” should not be limited to audiovisual fixation only but should apply to phonograms as well.
- “Performance” - a definition of performance should be included in the PPAB.
- Reversion – the PPAB is not clear on what happens to performers rights after the lapse of the 25-year period.
- IPLAA - Drafting of the Bill denotes that IPLAA amendments will no longer be implemented.
- BTAP – the incorporation of the provisions of the BTAP is premature as no cost-benefit analysis has been done and the BTAP is not in force yet.
- Treaties - a definitive statement from the South African Government on its intention to accede to treaties is necessary.
- Collective Bargaining – The Bill does not make provision for collective bargaining, only individually negotiated contracts.
- “Broadcast” the definition of broadcast should be aligned in both the CAB and the PPAB.

- The PPAB reads in such a way that it seems that performers only entitled to a moral right after the transfer of rights as contemplated in section 3A and 3B of the PPAB.
- The prescription of terms and conditions of contractual agreements directly affects contractual freedom.
- The Ministry of Arts and Culture, Trade and Industry and Heritage Council should develop an unwavering interest in making sure that the discrimination against actors of certain ethnic groups ends. A call for the promotion of social cohesion and inter-culturalism has been made.
- The SEAIS does not reflect that proper research on policies and procedures underlying the PPAB was done.
- The assumption that performers must participate in all commercial negotiations between copyright owners and users is directly contrary to the way in which the recording industry works in practice.
- The agreement procedure prescribed in sections 3A and 3B may not be easy to conclude and will result in delays.
- Exemptions contemplated in the PPAB are too broad and should be confined to certain kinds of performances. A general exceptions clause should be inserted into PPAB to ensure a balanced performers' pro-regime.
- Clarity sought on what constitute a "fair equitable remuneration" with regard to a royalty. This will result in delays in payments as exploitation of performances is dependent on agreement between parties.
- The Minister does not have to determine what is equitable remuneration for the direct or indirect use of the phonogram since the Copyright Tribunal is already in place to adjudicate matters.
- Distribution of royalties should be dealt with at the level of Collecting Societies. This would minimise administration costs and in addition the activity will be subject to the regulatory supervision of the Registrar of Copyright to ensure prevention of abuses.
- There should be payment for repeat fees (rebroadcasts) and commercial exploitation as this is currently not happening except for a few isolated cases.
- Notice procedure proposed in section 5 is cumbersome and difficult.
- Transitional period should be provided for in the PPAB.
- Contracts by broadcasters are collusive and unfair and should be done away with.

3. List of stakeholders

The following stakeholders made written submissions on the PPAB:

- Prof Sadulla Karjiker
- Dramatic, Artistic and Literary Rights Organisation (DALRO)
- Hans Strydom
- The International Federation of Film Producers Associations (FIAPF)
- M-Net and Multichoice
- Motion Picture Association (MPA)
- Nambitha Mpumlwana
- National Association of Broadcasters (NAB)

- National Film and Video Association (NFVF)
- Patrick Molefe Shai
- Personal Managers Association (PMA)
- Publishers Association of South Africa (PASA)
- SA Institute of Intellectual Property Law (SAIPL)
- South African Guild of Actors (SAGA)
- Recording Chamber of South African Music Performance Rights Association (SAMPRA)
- Submission by Sampra's Performers' Chamber
- Southern African Music Rights Organisation's (SAMRO)
- Sikelewa Sishuba
- Spoor and Fischer
- Thato Molamu
- Zikhona Sodlaka
- Zolisa Xaluva
- Recording Industry of South Africa (RiSA)
- Florence Masebe
- Prof. Tana Pistorius
- South African Broadcasting Corporation (SABC)
- Independent Producers Organisation (IPO)
- UNISA

During the public hearings

4. Specific comments/Questions Raised by Stakeholders

| No | Name of the Stakeholder | Comment/Question | Response by the dti |
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| 1 | Prof Sadulla Karjiker- Anton Mostert Chair of Intellectual Property Stellenbosch | <ul style="list-style-type: none"> • Is the intention that the IPLAA amendments will no longer be implemented? • There are two subcategories of fixation, namely, a phonogram and audiovisual fixation. Wording for the definition of 'Fixation' has been suggested. | <p>the dti will be implementing IPLAA, 2013.</p> <p>Fixation as defined by IPLAA, 2013 covers both phonograms and Audiovisual works (no subcategories in this regard).</p> |

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| | <ul style="list-style-type: none"> • It is not clear if a distinction between aural recordings and audiovisual recordings is at all necessary. • Careful consideration should be given to whether certain provisions are intended to apply to fixations or specifically to phonograms or audiovisual fixation. • “Communication to the public of a performance” should not be limited to audiovisual fixation only but should apply to phonograms as well. • A definition of performance should be included in the Bill. • The proposed new section 3(3) unclear. • What happens to performers rights after 25yrs? • The term producer is undefined- is this the same as the author? • The proposed section 8(2)(f) is inappropriate, and should be deleted • Agrees and Supports the submission | <p>The Copyright regime has always differentiated between audio recordings and audiovisual recordings (the other one including sounds only while the other including both sounds and images). Use of fixation will depend on the right applicable to the provision.</p> <p>Comment is misplaced simply because communication to the public is provided for performances in both sound recordings and audiovisual works. Applies to both. Fixation is a fixation.</p> <p>Performance is defined in the IPLAA, 2013 and it will be applicable.</p> <p>3(3) will be clarified.</p> <p>After 25 years the performer's rights will be renegotiated.</p> <p>The term producer needs to be considered in the context of sound recordings and audio visual works to which they play different roles. It may be possible to define the term producer for clarification.</p> <p>Noted.</p> <p>Noted.</p> |
| 2 | Dramatic, Artistic and Literary Rights Organisation | |

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| | (DALRO) | of PASA. | |
| 3 | Hans Strydom | <ul style="list-style-type: none"> • Of the view that the Act which was drafted before television existed was aimed at musicians only and not actors. Would prefer a separate Act for Musicians and a separate Act for Actors. • The SABC and Etv have made provision in their standard contracts with actors and writers, for a “repeat fee” to be paid in the case of a programme being repeat broadcasted and a “commercial exploitation fee” if the programme is commercially exploited. We refer to these contractual rights as “economical rights” in contrast with “royalty rights”. • Mnet and Kyknet contracts do not make provision for such economical rights. • The distinction between copyright and non-copyright holders, it is important to retain the phrase “royalty or other equitable remuneration” in clauses of the Bill | <p>Performer Protection deals with related rights linked to copyright. The intention has always been to protect all artists. In the past international treaties such as WPPT and Rome Convention covered performances in sound recordings only. The BTAP has now created the opportunity for audio visual performers to receive adequate protection. It must be noted that stage always existed. Now with digital means different forms of fixation need to be protected.</p> <p>the dti has investigated this situation and majority of performers are not receiving any payments and contracts are being used to exploit the situation of the actor in the absence of legislative reform allowing for economic rights.</p> <p>Noted</p> <p>Distinction is not necessary.</p> |

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| | | <p>when referring to compensation payable to performers for the usage of their images. This is to also make provision for non-copyright.</p> <ul style="list-style-type: none"> The Bill also provides for the establishment of so-called “collecting societies”. It is suggested that membership of these societies be on a voluntary basis as not all actors are keen to join such organisations, especially in the light of what happened in the music industry. Actors should be viewed as independent contractors and not as employees. It is nevertheless absolutely necessary for legislation to ensure that actors are compensated for the continued usage of their images, even after their deaths. | <p>Yes, joining Collecting Societies is voluntary, but Collecting Societies must be regulated. Collective management is a mechanism which allows for management of rights.</p> <p>It depends on the relationship. Full-time employment possible and independent contracting is possible. The Bill does not regulate this relationship.</p> <p>Agreed. Lifespan should be 50 years after death of an actor.</p> |
| 4 | The International Federation of Film Producers Associations (FIAPF) | <ul style="list-style-type: none"> Submits that law crossing the boundary between a legislative framework and agreements between producers / AV performers related to performer remuneration should be avoided. This includes dictating how revenue from commercial exploitation should be shared. Rights transfer details should be left to collective bargaining agreements due to the financial and distribution complexities involved in audio visual | <p>The law wants to balance power relations of parties who own rights that can be commercially exploited. Minimum contractual terms need to be prescribed. Self-regulation should not be left to chance in the rampant economic exploitation.</p> <p>Like in the labour environment, although collective bargaining is allowed, the Labour Relations Act (LRA) makes a deliberate intrusion in order to curb</p> |

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| | <p>works and the huge amounts involved in the cost of making audio visual works compared to other forms of productions such as books.</p> <ul style="list-style-type: none"> • Concern with section 3A is that agreements will not be left to industry collective bargaining, but will be the result of direct intervention from a governmental entity. • Recommends allowing stakeholders to construct agreements bilaterally as being more effective. • The disposition in section 3A seems overly prescriptive in the context of film or TV production in terms of being royalty based. As a solution, suggests the use of the UK system based on residuals as being more realistic. • Royalty based approach in PPAB will be a disincentive for investment into SA productions. • Suggests the use of the reference “producer” instead of “copyright owner” in the context of the transfer of rights in section 3A. • Contradictory language used in proposed section 3A and section 5 will result in challenges when it comes to deploying a contractual | rampant exploitation of the workers. |
| | | Same analogy as in the LRA. The intention is for minimum standard of protection to be introduced to ensure fairness in the contracts. |
| | | Status quo of rampant exploitation can no longer be left undisturbed. Industry has called for intervention and the legislation is being aligned to international law as well. |
| | | PC should look at different models, and make an appropriate decision. |

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| | <p>system for an affected audiovisual work based on clear legal concepts.</p> <ul style="list-style-type: none"> Proposed sections 5(1A) to 5(1D) are problematic as it interferes directly with the exclusive rights of the copyright owner under the Copyright Act. Submits that the entire section be reconsidered. The PABB should contain clearly laid out provisions regarding exceptions and limitations to the rights therein. The current catch-all references in section 8(2)(f) and 5(a) to the exceptions and limitations in the Copyright Act are insufficient. The PPAB should contain its own bespoke provisions on the legal protection of TPM's and rights information. Concerned with unwaivable right to remuneration in proposed section 3A. Does not support remuneration mechanism being determined by Government. Proposed section 5 contradicts BTAP rights in proposed section 3(4) by reducing them to a prohibition. Proposed the use of Collective | <p>Noted.</p> <p>Agreed.</p> <p>Suggestions are welcome.</p> <p>Agreed, but it should be borne in mind that Copyright provisions form the basis for the protection of inter-related rights contained in the PPAB.</p> <p>There is a reason for not allowing certain rights to be waived. Rampant exploitation must be stopped.</p> <p>Noted.</p> <p>Will consider.</p> <p>Not everything should be left for</p> |
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| | | <p>Bargaining for legal certainty.</p> <ul style="list-style-type: none"> • Proposed the use of the UK model for remuneration. • Proposed that we look at UK TV contracts for actors. | <p>Collective Bargaining as not all performers choose this.</p> <p>Benchmarks should go beyond one country and the best is recommended.</p> |
| 5 | M-Net and Multichoice | <ul style="list-style-type: none"> • The Broadcasting industry is one of the major funders of performers. • South African broadcasters must address all contributors in the process whilst increasing volume etc. • M-Net and MultiChoice support, develop and invest in performers in ways not contemplated or addressed in the Bill. • South Africa is not a contracting party to the Beijing Treaty and has not signed or ratified it. This seems premature. • No cost-benefit analysis has been done on BTAP. • We also propose that the Bill be amended to provide that it will come into force 24 months (or longer) after it is signed by the President, to allow stakeholders sufficient time to prepare for its implementation. | <p>Noted.</p> <p>Agreed.</p> <p>M-Net and MultiChoice should align themselves with the policy of Government.</p> <p>The PPAB should have provisions aligned to BTAP and ratification should follow later. Provisions of international treaties are required to be included in domestic legislation aligned with the policy objectives. The Beijing Treaty with several other WIPO treaties have all be considered and analysed.</p> <p>Cost-Benefit analysis was done in WCT, WPPT and BTAP is just an extension for performers - moral rights of performers to be commercially recognised.</p> <p>Noted.</p> |

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| | <ul style="list-style-type: none"> • We commend the drafters' decision to remove the performers' protection provisions from the draft Copyright Amendment Bill, 2015 and address them in PPAB. • The definition of broadcast should be aligned in both the CAB and the PPAB. • The Bill contains a number of provisions which seek to interfere with the freedom which broadcasters, producers and performers currently enjoy to contract with each other. • Concerns with the following definitions-audiovisual fixation, broadcasting, communication to the public of a performance, performer, phonogram and reproduction. • Concern over the duration of the moral rights given to performers. • Resolution of disputes- These provisions are impractical and lend themselves to protracted negotiations and delays. • We support, in principle, measures to | <p>It was the proposal of the stakeholders to separate the Bills as the principal Acts (Copyright Act/Performers Protection Act) are separate, unlike the IPLAA 38 of 1997 that amended IP laws in one Act.</p> <p>Agreed.</p> <p>This is a deliberate intervention in order to provide a balanced approach. Exploitation has to be addressed and laws strengthened and updated in line with best practice.</p> <p>Will be reconsidered to be in line with BTAP, WCT and WPPT.</p> <p>This is in line with BTAP and it is deliberate.</p> <p>At least the copyright regime is providing for ADR and the Tribunal will be the court of first instance to the High Courts, Supreme Court of Appeal and the Constitutional Court.</p> <p>Not agreed.</p> |
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| | <p>protect performers from abuse. However, the Bill's approach, in the proposed s 5(1A) to 5(1D) of the Act in particular, excessively interferes with the parties' freedom to contract.</p> <ul style="list-style-type: none"> • We also propose that performer's rights in respect of the broadcasting and communication to the public of performances fixed in audiovisual fixations be reframed as a right to equitable remuneration, rather than a right of authorisation. • We recognise that the exceptions in respect of technological protection measures contained in s28P of the Copyright Act originate in the European Copyright Directive-concern on the drafting. • Not opposed to the referencing of "copyright sections" in sections 8A and 8B but have grave concerns with contents of section 28P. Proposed section 28P in the CAB reduces protection against piracy and render access control technologies vulnerable to hacking. Proposed that section 28P of the CAB be reformulated and definition of TPM circumvention device be made clearer. • An effective and actively enforced copyright regime is important against | <p>Noted.</p> <p>Noted.</p> <p>Noted, will be considered.</p> <p>Agreed.</p> |
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| | <p>piracy.</p> <ul style="list-style-type: none"> • Since section 28Q no longer applicable to prohibited conduct regarding copyright management information, the reference in section 8B of PPAB should therefore be amended to make reference to section 28R and 28S. • Definition of performer is too wide and does not differentiate between principal performers and extras. • PPAB restricts freedom to contract and makes contracting difficult. • Prescriptive provisions on the process to be followed to use performances are cumbersome, create a bottleneck situation and will cause delays in finalising broadcasts. • Section 3A should be reframed as a right to remuneration rather than authorisation. Suggested wording for section 3A provided. <ul style="list-style-type: none"> • Current provision in section 5(2) of the principal Act should be retained as is. • With regard to TPM's, concern is that section 28P of the CAB is too widely | <p>Noted and can be considered.</p> <p>Noted, to be considered.</p> <p>Disagree.</p> <p>The aim is to allow the performer to be consulted in his/her work. Suggestion to improve the performer's consultation will be appreciated.</p> <p>"Authorisation" indicates a strong legal connection such as "Ownership" instead of a weaker legal connection such as "Remuneration" that can take place with or without consultation.</p> <p>Noted.</p> <p>Noted however the provision is drafted</p> |
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| | | formulated and should be reformulated to assist with piracy. | with the appropriate balance needs be struck with developing provisions on TPMS and exceptions and limitations. |
| 6 | Motion Picture Association (MPA) | <ul style="list-style-type: none"> • The Motion Picture Association (MPA) is a trade association representing the interests of six major international producers and distributors of films, home entertainment and television programmes. • South Africa is a premier destination for investment in audio-visual works and shooting of scenes for TV advertisements. The film industry has taken root and is going from strength to strength. Films shot in South Africa by our member companies in the recent years for instance are “The Avengers”, “Age of Ultron”, “Blended”, “Safe House”, “Chappie”, “District 9” and “Mandela: Long Walk to Freedom”. Going forward, our member companies expect and hope that this does not change. • Welcomes the policy underlying the Bill to strengthen the rights of performers. Proposed remuneration and contract terms may well act as a disincentive to engaging performers in SA. • The PPAB seems to proscribe Contract above a bare minimum are | <p>Noted.</p> <p>Noted.</p> <p>Disagree.</p> <p>Contract above a bare minimum are</p> |

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| | <p>individually-negotiated agreements, and agreements resulting from collective bargaining receive no recognition in the PPAB.</p> <ul style="list-style-type: none"> • SA has not ratified BTAP and WPPT and would like Government to definitively indicate its intention to ratify these treaties. • The PPAB should be redrafted in order to be consistent with BTAP, WPPT. • The duplication of performers' rights in relation to audio-visual fixations in new section 3(4) (clause 2 of the Bill) and in the amendments to section 5 (clause 4) are not compliant with the BTAP. Attention must be given how these rights are cast in a reworking of the PPAB. • With regard to the introduction of moral rights, there are two substantial departures from the wording of the BTAP in new subsections 3(2) and (3) (clause 2). The Memorandum is silent on the reason for this departure. • Accession to the BTAP and WPPT would give SA performers the benefit of national treatment of their rights in the other respective convention countries. | <p>allowed. Below threshold, contract should not be enforceable.</p> <p>When the Bill is adopted with BTAP and WPPT provisions, instrument of ratification will be deposited with WIPO.</p> <p>Noted.</p> <p>Noted.</p> <p>The intention is to comply with provisions of BTAP wholly.</p> <p>Noted and Agreed.</p> |
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| | <ul style="list-style-type: none"> • With regard to the transfer of rights, Section 5 together with the rest of the Act remains framed as a “prohibition without consent”-type of performer’s protection legislation. This will create considerable confusion, resulting in legal uncertainty. • We welcome the idea behind Section 3A, and to avoid any doubt and to better reflect the way the industry works, we suggest that the words “copyright owner” are replaced with “producer”. • Further, the drafting of the provision is not abundantly clear and appears to subject the vesting of rights to unnecessary and potentially burdensome formalities. • Clarity needed about the relationship between performers’ rights and copyright in copyright works containing performances. • Sections 5(2) and (4), as to be amended by clause 4 of the PPAB, create “hold-back” provisions that will result in interfering in contractual agreements and therefore undermine investments in the works embodying performances. • Clause 4 - sets out a long and | Noted. Noted. Noted. Noted. Noted. |
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| | <p>complex procedure for persons wishing to obtain permission to exercise the exclusive rights given to performers in relation to their unfixed performances and audio-visual performances. Its implementation will lead to a lot of uncertainty and delay.</p> <ul style="list-style-type: none"> • We counsel against prescriptive agreements and prescribed remuneration which interfere with the freedom to contract. • Opposed to approach regarding the new sections 3A and amended Section 5(1)(b)) as it is considered to be unnecessary and inappropriate as it affects freedom to contract. • The PPAB, by virtue of Sections 3A, 3B and 5(1A)-(1D), does not allow for contractual freedom. • The PPAB does not encourage collective bargaining. <p>With regard to TPM's, incorporating TPM's by reference in new section 8(2)(f) (n clause 5(a) of the PPAB) of all exceptions will create unnecessary uncertainty.</p> <ul style="list-style-type: none"> • We also propose that the Act have | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Contractual freedom allowed above the threshold.</p> <p>The Bill does not address collective bargaining but the mechanism can be beneficial to performers. It is not within the scope of mandate of the dti. Collective Bargaining addresses labour related matters and unions.</p> <p>Noted.</p> |
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| | | <p>its own provisions relating to the protection of TPM's and rights management information.</p> <ul style="list-style-type: none"> With regard to offences and penalties, the current list of offences only relates to Section 5 of the Act. | <p>The proposal to include TPMs in the Bill to be considered.</p> <p>Offenses and penalties in the Bill to be strengthened.</p> |
| 7 | Nambitha Mpumlwana | <ul style="list-style-type: none"> The issue of growth in remuneration remains major, we are still being offered call fees that fall way below our rates. Regulating the industry has become a matter of serious urgency, and of course we expect an annual increase that is in line with inflation. Proposed that tax be reduced to 10 percent and agents take only 5 percent. remember that we have no benefits, life insurance, medical aid etc. are all paid for by us. Contractual issues pertaining to transportation, turnaround times, additional calls and cancellation fees. An actor's job is to perform and move on to another projects, the responsibility of promoting the show should fall in the hands of the broadcaster and the producer, should the actor be required after his principal work is complete, a publicity and promotions contract should be drawn. In the dispensation we find ourselves under of artists dying poor, | <p>Noted, some of the issues like the rates can be prescribed by the Minister.</p> <p>Noted.</p> <p>Noted and this should be read with copyright Regulations dealing with the retention of 20% fee from the collected royalties.</p> <p>Noted.</p> <p>Noted.</p> |

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| | <p>we need this additional income.</p> <ul style="list-style-type: none"> • ROYALTIES: The current SABC freelance contract stipulates that the broadcaster will pay royalties to the artist, but they have thus far not honoured that agreement. • The SABC should be required to sign these contracts so that the artist may be able to enforce this clause! • This issue should be a non-issue, when a show that has been shot is being rebroadcast for commercial gain, the artist should get paid, at a negotiated rate. This should be COMPULSORY; no broadcaster should get away with noncompliance in this regard. • If the artist's image is associated with a commercial brand, the artist should by law benefit financially. (Product placement). • Labour laws do not protect actors/performers. <p>• Do not receive royalties for repeats and commercial exploitation of their</p> | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>PPAB protects the performer's moral right.</p> <p>The current situation for the actor is whether the actor is an independent contractor or employee. The PPAB cannot legislate on this, the dti will consult with the Department of Labour.</p> <p>Noted.</p> |
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| | <p>image in other jurisdictions.</p> <ul style="list-style-type: none"> • Current employment situation of performers/actors renders them unbankable resulting in them not being able to access funds from financial institutions. • Supports retrospectivity and that it should go back 10-20 years. • Residual payments should come in the form of structured compensation and that the PPAB should include language used in contracts. • Performers/actors are not regarded as employees but expected to pay 25% in taxes. • Actors at SABC are “permanent freelancers”. Actors are in collusive, corrupt and abusive contractual arrangements with production companies who are service providers to the SABC. The lives of actors are dictated and exploited through this contract. | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted</p> |
| 8 | National Association of Broadcasters (NAB) | <ul style="list-style-type: none"> • Acknowledges separation of the Bills but asserts that meaningful inputs cannot be made on the PPAB without making reference to the Copyright Amendment Bill (CAB) as the PPAB makes reference to the CAB and there is a need to harmonise the two Bills. Therefore, |

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| | <p>the Bills should have been processed together.</p> <ul style="list-style-type: none"> • South Africa has not ratified the BTAP and amendments incorporating provisions of the BTAP are premature and do not accord to international law principles as well as the provisions of section 231 of the Constitution of SA. • The department has to conduct a cost-benefit analysis and a Socio-Economic Impact Assessment (SEIAS) as provided for by the cabinet framework for the BTAP. • The PPAB introduces new definitions which are aligned to the BTAP, however, the PABB does not seem to have taken into account existing definitions in the Copyright Act or definitions of the same concepts in the Copyright Act. • There is a misalignment between the proposed definition and existing definitions of 'Broadcast' and 'Broadcaster' as contained in the Copyright Act. The PPAB should adopt the definition of 'Broadcast' as in the Copyright Act to cure this misalignment. • With regard to the proposed insertions of section 5(1A) to (1D) in | <p>When ratification is done through depositing the instrument of ratification. Cabinet and Parliamentary process will be followed as per section 231 of the Constitution. This process has commenced already.</p> <p>This was done, a regulatory impact assessment in 2014 and SEIAS in 2016/17. Both in support of accession to the BTAP.</p> <p>Noted will align to Copyright legislation and IPLAA.</p> <p>Noted.</p> <p>Noted.</p> |
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| | | <p>the PPAB, the proposals in their current form do not consider the realities of the broadcast environment and will negatively impact production and scheduling.</p> <ul style="list-style-type: none"> • The notice and response procedure will be difficult to implement for live broadcasts and will unduly delay production schedules. • The proposed referral to the Tribunal to resolve disputes will be too costly and time consuming. The proposals in the PPAB will allow parties to effectively delay broadcasts pending the outcome of the Tribunal proceedings, which could take years. • To ensure that broadcasts are not unfairly and unnecessarily delayed, the NAB proposes that the PPAB should provide for a right to equitable remuneration rather than a right of authorisation. • Transitional period on implementation of the PPAB should be written into the PPAB to facilitate a smooth transition by performers and broadcasters. | <p>The issue is to protect the owner of the right (Performer/Musicians), otherwise exploitation of somebody's right happens without permission.</p> <p>The Tribunal is going to be easily accessible. Procedures will be simplified.</p> <p>“Authorisation” is stronger than “Remuneration”. Remuneration may or may not be paid, leading to exploitation. “Permission/Authorisation” should be done on time.</p> <p>A transitional provision can be provided but it should be very short, for less than 6 months as the transitional period will be adding to exploitation of musicians.</p> |
| 9 | National Film and Video Association (NFVF) | <ul style="list-style-type: none"> • Proposed definition of ‘Audio-Visual Fixation’ is in line with international legislative instruments; it is suitably broad and in line with modern international practice. | Agree. |

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| | <ul style="list-style-type: none"> • The inclusion of an ‘audio visual’ definition of works is welcomed as it goes beyond the restrictions embodied in the now outdated term ‘cinematographic film’. The definition is all-inclusive which moves beyond film. • Wording suggested for ‘Audio Visual Fixation’ definition. • Acknowledges the broadening of the definition of performer to include the performer of musical works. • It is suggested that a general exceptions or limitations clause be inserted into the PPAB to ensure a fair and balanced performers protection regime. This can take the form of a ‘fair use’ or ‘fair dealing’ clause. • Introduction of economic rights in section 3 for performers is welcomed. However the manner in which this section has been drafted creates non-waivable, non-transactable, inalienable rights. • It is suggested that a general exceptions or limitations clause be inserted into the PPAB to ensure a fair and balanced performers protection regime. This can take the | <p>Agree.</p> <p>As long as it is in line with the international instrument.</p> <p>Noted.</p> <p>Agree.</p> <p>Noted.</p> <p>Noted.</p> |
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| | | <p>form of a 'fair use' or 'fair dealing' clause.</p> <ul style="list-style-type: none"> With regard to section 20 of the Copyright Act, 1978, it is noted that section 20(5) of the Copyright Act creates a form of exception. However this excludes reference to the economic rights as created by the Amendment Bill. It is suggested that section 20 should be amended to ensure that all the rights created by the Amendment Bill are balanced, fair and reasonable in the circumstances. Suggested wording for section 20 of the Copyright Act, 1978. | <p>Noted.</p> <p>Noted.</p> |
| 10 | Patrick Molefe Shai | <ul style="list-style-type: none"> Began acting in 1976 and to date the industry has not been transformed. There is an absolute disregard of the plight of the Black Artists by the Ministry of Arts Culture, Trade and Industry, and Heritage Council. Mandate of NFVF questionable in terms of transformation. The question is why do we have on SABC stories that always paint Black Life in the negative. It is typical of the then Apartheid segregationist SABC. <u>Recommendations:</u> That SABC collusive contract with | <p>The proposed amendment and reform is to create an enabling and conducive environment for the creative sector in South Africa.</p> <p>No comment.</p> <p>No comment.</p> <p>Contracts play an important role in the</p> |

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| | <p>production is done away with.</p> <ul style="list-style-type: none"> • That white owned production should not have automatic entitlement to being commissioned. Productions like Penguin Films, Boom Factory to name a few have continued to enjoy commissioning albeit them not painting a true and balance narrative of a new South Africa. Promote Social Cohesion and inter-cultural ism. • The Ministry of Arts and Culture, Trade and Industry and Heritage Council develop an unwavering interest in making sure that the Black Artist is not discriminated against. That, they lead and assist with the formation of a non-sectarian Union for the industry, the protection artist and the promotion of truly South African film and television content. • That performing arts is governed by labour laws like all industries. • Those artists are recognised as workers and not mere entertainers. • Payment of decent salaries. • Establishment of the Artists Ombudsman. | <p>regulatory framework, the dti is proposing minimum protection standards to address exploitation, the introduction of economic and moral rights into the legal framework is a step in addressing the situation of the exploitation. The contract is important and cannot be removed.</p> <p>Noted.</p> <p>Noted, however the PPAB is not the legislation that can address this situation, engagement with the Department of Labour Relations will take place.</p> <p>Economic rights are being factored into the legislation.</p> <p>Noted.</p> |
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| | | <ul style="list-style-type: none"> • Artist to benefit from the proceeds of storyline integration and product placement. • Development of SA Box Office Names. | <p>There is a difference between product placement and what the legislation strives or which is moral rights. Product placements are often endorsements and commercial deals whereas the moral right is the right to claim you are the performer and that your image should be distorted.</p> <p>Agreed.</p> |
| 11 | Personal Managers Association (PMA) and South African Guild of Actors (SAGA) | <ul style="list-style-type: none"> • <u>Challenges:</u> • SABC only pays repeat fees but no payment of commercial exploitation fees. • With the launch of Etv, payments of repeat fees and commercial exploitation remain difficult to police and artists are seldomly paid what is due to them. • With DSTV, South African films, International films and tv series, artists are forced to sign away all their rights and the only fees they see for their work is the money for the actual shooting of the production. • The difference between South African actors and International actors is that South African actors are paid a once off fee for their part whereas international actors get paid residual fees as the film is sold all over the world. • In South Africa actors cannot | <p>The amendment to the PPAB in line with the BTAP will address this.</p> <p>Noted.</p> <p>Noted, the Bills will address this in terms of the strengthened legal framework which includes a strengthened Tribunal process as well.</p> <p>The purpose of the Bill is bring South African Actors on par with international counterparts.</p> |

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| | <p>even afford medical aid and live hand to mouth.</p> <ul style="list-style-type: none"> • There is no need for a distinction between ‘phonograms’ and ‘audio-visual fixations’, however, it is acknowledged that the distinction is a historical one that may have reference to other pieces of legislation. • The definition of “performer” should include one who engages in “expressions of folklore” and that provision should be made for works that are incarnated at the time of performance (not yet existing in any form). • Film contracts take away moral rights of performers and subject them to only a performance fee. • Performers forced to either take it or leave with no legal recourse. • PPAB only makes provision for contracts and not Collective Bargaining. • Performers have a weaker voice when it comes to negotiations. • Performers only get paid service fee and do not benefit from further exploitation of works. | <p>For legal certainty there needs to be a distinction.</p> <p>Noted this was addressed in the definition of performer in IPLAA.</p> <p>Noted moral rights should not be waived.</p> <p>Noted, the Bill aims to balance the environment.</p> <p>Noted, Collective Bargaining is the mandate of the Department of Labour. Issues of labour can be considered with the DOL.</p> <p>Collective management of rights will assist in this regard.</p> <p>Noted.</p> |
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| | <ul style="list-style-type: none"> • Transfer of rights does not imply a waiver of rights. • That BTAP economic rights should be unwaivable. • A 50/50 split used in sound recordings should be added in PPAB for audio visual performers. • Need to ensure that the BTAP provisions are not diluted in national legislation. • Suggested wording for definition of “performer”. • The “Protection of performers' rights in respect of performances in the Republic” section should be split into at least 4 different sections, namely ‘beneficiaries’; ‘moral rights’; ‘exclusive rights’; and ‘transfer of exclusive rights’. These would be, respectively, sections 3, 3A, 3B and 3C. • Suggested wording for section 3. • Suggested wording for section 3A. • Suggested wording for section 3A. | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <ul style="list-style-type: none"> • Suggested wording for section 3C. • With regard to “<i>Extension of protection of performers' rights to performances in certain countries</i>” it is submitted that there is no need to keep current section 4 as set out in the PPAB, as the points of attachment concerning foreign performers are already provided (or should be provided) under section 3 above. • Endorses inclusion of articles 11-15 of the WPPT. • With regard to Article 15 of the WPPT SAGA believes that the remuneration should be “single”; it should also be subject to collective management, and shared equally between performers and producers (in the absence of agreement). It can be managed by a joint society of performers and producers of phonograms, or jointly by two different societies (one for performers and one for producers). SAGA believes that this right improves upon and replaces the existing ‘Needletime’. | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <ul style="list-style-type: none"> • Suggested wording for Protection of rights of producers of phonograms section. • Suggested wording for Restrictions on use of performances. • With regard to collective performances there is no provision in the PPAB for adjustments to section 6 of Act 11 of 1967. In addition, reference to Copyright Act, 1965 (Act 63 of 1965) is not necessary, and should be removed. | Noted. |
| | <ul style="list-style-type: none"> • Suggested changes for the wording of Collective musical performances. | Noted. |
| | <ul style="list-style-type: none"> • Suggested wording for the term of protection. | Noted. |
| | <ul style="list-style-type: none"> • With regard to exceptions from prohibition against use of performance without the consent of the performer, it is proposed that the heading of this section be amended in the interests of coherence with the proposed wording of sections 3 and 5, as reflected below. In addition, references to the AV fixations in the Bill are deleted, as “a fixation of a performance” already includes phonograms and audio-visual | Noted. |

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| | <p>fixations.</p> <ul style="list-style-type: none"> • Proposed wording for adjustment to offences and penalties. • <u>How SAGA/PMA proposal benefits actors:</u> <p>Sustainability:</p> <ul style="list-style-type: none"> • The protection of performers and the economic rights that are supported by SAGA would mean that a residual income stream is forthcoming, accruing through the use and further exploitation of the body of work a performer has created; years later there would still be money coming to a performer for work they did in their heyday. This legislation will ensure that performers have ownership and control over their legacy and no longer die as paupers. This would give dignity to those that have entertained audiences for years that they are not only given the accolades in name; they would receive the accolades in their bank accounts too. <p>Exposure:</p> <ul style="list-style-type: none"> • The penalty that actors currently experience, by being such talented performers that they are in numerous series in their career, would no longer undermine the earning capacity and income of a performer | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>as they would be compensated for being on our screens in various forms. The over exposure argument will not hurt their pocket any longer. SAGA's support of the new legislation and lobbying for Collective Management for these audio-visual performers is so that the actors can get the money due to them.</p> <p>Standards:</p> <ul style="list-style-type: none"> • Performers will be protected by statute which therefore can be included in the standard contracts that the industry will subscribe to in support of the performers protection. By clearly stipulating, in standard industry contracts, the various rights due to performers as prescribed, (such as the right to broadcast, reproduce, make available) we will be helping to protect performers from being undermined and ensuring that standards are maintained. There is also the advantage that the South African performance industry will be able to truly compete in the international arena, as these protections are part of the international best practice recognised in many countries around the world. The exploitation of talent will no longer be allowed without the performers rights being compensated accordingly. | Noted. |
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| | | <ul style="list-style-type: none"> • Recommends the use of Collective Bargaining for performers. • That there should be a regulatory body for foreign productions. • That there should be a collecting society for audio visual performances. • That the department of labour should define 'performer' properly. | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Agreed.</p> |
| 12 | Publishers Association of South Africa (PASA) | <ul style="list-style-type: none"> • There is need for South Africa to become a party to international treaties on copyright and, by extension, performers' rights. PASA and its members would therefore welcome a definitive statement from the Government whether it is the intention that South Africa accede to these Treaties or any of them. • Ratification and implementation of the Treaties would also bring legal recognition to technological protection measures (TPMs) and rights management information and the ability for South African rightsholders, including performers, to have the same rights recognised subject to the principles of national treatment in other Treaty countries. • Different rights for the same fixations are duplicated. Section 3 of the Act is | <p>The Bill consists of provisions from the WPPT/BTAP and ratification of these treaties will take place.</p> <p>Agreed.</p> <p>Noted.</p> |

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| | <p>no more than an introduction to the rights, which are then detailed in Section 5. Attention must be given how these rights are cast in a reworking of the Bill.</p> <ul style="list-style-type: none"> • In order to meet the standards set by the Beijing Treaty, we suggest that, the treatment of the different kinds of rights in new Section 3(4) and in Section 5 of the be reviewed. The kind of text set out in new Section 3(4) be used; Careful attention be given to correct cross-referencing and to avoid errors. • With regard to “Equitable remuneration” the PPAB does not follow international standards in order to achieve this goal in its reliance on: • contract terms and remuneration prescribed by the Government in new Section 3A, • prescribed remuneration in new Section 3B(2) – which, incidentally, does not meet the requirements of Article 15 of WPPT, which requires a “single equitable remuneration”, and • an onerous prescribed procedure for obtaining rights set out in new Sections 5(1A)- (1D). | <p>Noted, will be attended too.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <ul style="list-style-type: none"> • Two fundamental objections to the policy of Government prescription underlying these procedures. First, they undermine freedom of contract, to the detriment of both performers and producers. • Second, we are concerned about a one-size-fits-all approach to regulating, in such a prescriptive way, contracts between creative talent and producers. • The introduction of moral rights for performers is welcomed, but we suggest that these would be better placed in a new section immediately after section 5 of the Act, with an appropriate cross-reference in section 3. • With regard to “Offences and Penalties” the current list of offences in Section 9 only relates to Section 5 of the Act. • The Performers Protection Act should have its own exceptions and its own provisions relating to TPM’s and rights management information, and not be dependent on the terms of the Copyright Act. • It would be better to identify exceptions and permissible acts by reference to the need for such acts | <p>Noted.</p> <p>Noted this is not the approach being pursued.</p> <p>Noted.</p> <p>Noted.</p> <p>Agreed.</p> <p>Noted.</p> |
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| | <p>to qualify for being the subject of exceptions and to add them to Section 8(2). However, Both the Memorandum and the SEIAS assessment are silent on identifying such needs.</p> <ul style="list-style-type: none"> • With regard to the “Relation between performer’s rights and published works” The Act is already not entirely clear about the relationship between performers’ rights and copyright in copyright works. • The Bill proposes to amend Section 5(1)(b) by including audiovisual fixations and by adding rights relating to the “sale” and “commercially rent[ing] out” of performances. We submit that these amendments are based on a misconstruction of Section 5(1)(b). • The SEIAS assessment is disappointing, with no attempt seeming to have been made to research any of the policies and procedures underlying the PPAB. • The Bill does not explicitly deal with fair use or fair dealing • We are deeply concerned that the undertaking given by the dti at the meeting of stakeholders at the | <p>Propose on what clarity is sought.</p> <p>Noted, however the BTAP allows for the rental right.</p> <p>Noted.</p> <p>This been dealt with in the Copyright Amendment Bill, PPAB has never had a fair dealing or fair use clause.</p> <p>In 2014 an impact assessment was done with Genesis which investigated the</p> |
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| | <p>Birchwood Hotel in August 2015, at the end of the consultation period of the draft CAB, 2015, to commission an independent economic impact study was not followed through. The SEAIS assessment is, regrettably, no substitute for the promised study.</p> <ul style="list-style-type: none"> • PPAB weakens Technological Protection Measure (TPM) provisions which have an impact on the Electronic Communications and Transactions Act 25 of 2002. • Section 28 of the CAB was not consulted on properly. • Exceptions in the PPAB too broad and that the PPAB should have its own exceptions which are independent of those in the CAB. • Socio-economic Impact Assessment (SEIAS) is disappointing and that a proper impact assessment is needed for the PPAB. • That ‘fair and equitable remuneration’ undermines the right of performers. • Suggested wording for TPM’s. • A one-size-fit all approach with regard to contracts undermines the freedom of contract. | <p>impact of the policy positions and accession to international treaties.</p> <p>Do not agree. TPM requires a fine balance and should be used as a mechanism to lock up work for exuberant license fees.</p> <p>Process on CAB had many consultations including with PASA, at various stages including NEDLAC.</p> <p>Comment noted exceptions need to be flexible to address South Africa's developmental goals.</p> <p>Noted.</p> <p>Noted, is terminology used in the BTAP and therefore does not undermine the performer.</p> <p>Noted.</p> <p>Noted this is not the approach being pursued.</p> |
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| 13 | SA Institute of Intellectual Property (SAI IPL) | <ul style="list-style-type: none"> • Period granted for submissions was too short even though the PPAB is a smaller amendment, but it contains some novel provisions. • It is pointed out that the Performers' Protection Act, 1976 (the PPA) has already been amended by the IPLAA, although not in force. It is not clear that the amendments to the PPA effected by the IPLAA were taken into account when the PPAB was drafted. • There are potential conflicts between IPLAA and PPAB. It is recommended that the Amendment Bill be revised to take into account the amendments already effected in the Performers' Protection Act by the IPLAA. • There are potential inconsistencies between the CAB and PPAB in terms of Tribunal; TPM's. It is recommended that, to prevent inconsistencies between the Performers' Protection Act and the Copyright Act, the inconsistencies must be corrected, or the implementation of the Amendment Bills of the two Acts must be coordinated. • The new definition of 'audiovisual fixation', which is clearly taken from the BTAP, refers to the 'embodiment' | <p>Noted, process is a parliamentary one.</p> <p>Noted.</p> <p>Noted and will be attended too.</p> <p>Noted and will be attended too.</p> <p>Noted.</p> |
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| | <p>of images without referring to the medium or carrier of the ‘embodiment’.</p> <ul style="list-style-type: none"> • Further, an ‘audiovisual fixation’ already falls within the scope of the existing definition of ‘fixation’, but the PPAB treats them differently. • With regard to the definition of “Broadcast” the PPAB should rather align the definitions of ‘broadcast’, ‘broadcaster’ and ‘broadcasting’ to the existing definitions of ‘broadcast’ and ‘broadcaster’ in the current Copyright Act. • It is further submitted that a definition of the concept ‘performance’ would be important; such a definition has already been introduced into the PPA by the IPLAA. • The current definition of ‘phonogram’ in the PPA is to be replaced by a new definition. The definition bears many similarities to the definition of ‘sound recording’ in the Copyright Act. In fact, it would seem that a ‘phonogram’ and a ‘sound recording’ could be the same thing. This similarity and potential duplication is of particular importance. • The definition of a ‘reproduction’ is proposed to be amended; it is not | <p>Noted.</p> <p>Noted.</p> <p>Noted and agreed.</p> <p>Noted and will be attended too.</p> <p>Noted.</p> |
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| | <p>clear whether the implications of the proposed wording have been considered. It is recommended that the wording and the potential effect of the proposed changes to the definitions be reconsidered.</p> <ul style="list-style-type: none"> • It is recommended that the potential of conflicting rights being granted under the PPA and the Copyright Act be considered and investigated, and that appropriate mutually accommodating provisions be introduced into both Acts. • It is worth noting that the BTAP is not yet in force and that South Africa is not party to either the BTAP or/and the WPPT. The adoption of clauses from a treaty that South Africa has not signed or acceded to seems premature, particularly given that a full costs-benefit analysis does not appear to have been conducted to check whether it would be in SA's best interests to become an effective party to the BTAP. • Ideally, the issue of economic rights should be dealt with in one clause, followed by a clause dealing with the matter of the recognition of a performer's moral rights, instead of one and the same clause. • The economic rights which the | <p>Noted, alignment will occur.</p> <p>Noted however this is not the case. South Africa intends acceding to all the treaties in terms of copyright and related rights. The BTAP is an extension of the WPPT to include rights for audio visual performers.</p> <p>Noted and will attend to.</p> <p>There is a need to balance to all</p> |
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| | <p>Amendment Bill seeks to grant to performers would cause a direct conflict with certain existing rights.</p> <ul style="list-style-type: none"> • In terms of definitions relating to sound recordings and phonograms, the same applies to definitions of 'cinematograph films' and 'audio visual fixations'. To recognise that the copyright owner of a cinematograph film has the exclusive right to reproduce or to authorise the reproduction of the film/fixation on which a protected performance is recorded, in terms of the Copyright Law, and on the other hand seek to grant an exclusive right of reproduction (in any manner or form) to each performer whose performance is featured on that copyright protected work, would in law result in conflicting rights arising. • With regard to transfer of rights, the proposed insertion of section 3A in terms of section 3 of the PPAB, is rather nonsensical, as the copyright owner of the audiovisual fixation or cinematograph film already has the exclusive 'economic rights'. • Further points in this section which need reconsideration are the mention of a 'prescribed written agreement', and just what would be deemed to constitute 'fair equitable | <p>interests of right holders.</p> <p>Noted. Again this pertains to the balancing of rights and benefits cannot be given to one right holder only.</p> <p>Noted.</p> <p>Noted and will be attended to.</p> |
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| | <p>remuneration'. These terms need to be definable and determinable, otherwise the section does not establish legal clarity on these important issues.</p> <ul style="list-style-type: none"> • It is also unclear why the term of 25 years is deemed to be the preferred duration of an agreement in terms of which the performer would look to profit from his/her art, considering the fact that the term of protection is 50 years from certain point in time. • With regard to the commercialisation of a performer's rights, there also appears to be some confusion between the nature of a performer's right to share in the commercialisation of a recorded performance, and the rights of copyright which the owner of a sound recording and/or cinematograph film has. • With regard to the assignment of commercialisation rights, in most cinematograph films, there could be hundreds of performers involved on a recording project, including all of the actors, singers, dancers, background actors, etc. An attempt to assign exclusive commercialisation rights to each and every performer featured on a sound recording or cinematograph film can | <p>To empower the performer and to improve/renegotiate terms of contracts for better benefits.</p> <p>There is no confusion; the performer is being empowered by new treaties as performers were not being recognised prior.</p> <p>Noted, as in the spirit of the BTAP and other models the focus is the lead performer and performers need to be appreciated in accordance with their contribution.</p> |
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| | <p>lead to situations where hundreds of different performers have ‘exclusive’ commercialisation rights relating to the recorded work.</p> <ul style="list-style-type: none"> • It is not established with clarity in the PPAB just what would be perceived as free and equitable remuneration in section 3A of the PPAB. This could lead to situations where performers may seek to renegotiate terms and perhaps even delay the further commercialisation of the film until such time as their remuneration has been renegotiated. • It is clear that the ultimate objective of the PPAB is to establish protection for the economic rights of performers, and to establish their right to receive free and fair remuneration for the continued commercialisation of their recorded art. This objective could be achieved through an appropriate amendment of section 5(1)(b) to clearly state that performers whose performances are featured on a phonogram or audiovisual fixation shall have the right to receive royalties for reproduction, communication to the public, retail of sound recording, rental. • The amount of royalty concerned should ideally be determined by | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>industry and so confirmed in the Amendment Bill, to avoid the same uncertainty and protracted disputes that occurred in the music industry.</p> <ul style="list-style-type: none"> • The issue of the protection of the so-called economic rights of producers of phonograms is quite problematic, since the 'producer' of a phonogram is not defined in the Performers Protection Act. • The introduction of exclusive commercialisation or economic rights to the benefit of the producer of a phonogram as envisaged in section 3B of the Amendment Bill is also problematic, since those exclusive rights are already exercised by the copyright owners of sound recordings. It is <u>recommended</u> that the entire issue of the moral and economic rights to be afforded to performers be reconsidered with a view to the introduction of a legal model that would be fair and equitable but also feasible and properly aligned with the existing legal dispensation. • In terms of the moral rights section in the PPAB, it is not clear why a performer would, in terms of subsection 3(2), only enjoy the right to be identified as the performer, and the right to object to distortions and | <p>Noted definition can be considered.</p> <p>The BTAP is a good treaty that empowers performers and such recognition must be accepted within industry.</p> <p>Noted.</p> |
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| | <p>mutilations etc of his performance (ie the usual moral rights) only ‘after the transfer of those rights’ as stated in subsection (2). It is recommended that the wording in the proposed subsection 3(2) be corrected by replacing the word ‘after’ with the word ‘notwithstanding’.</p> <ul style="list-style-type: none"> • It is not clear what the new subsection 3(3) intends to provide in respect of the duration of the moral rights granted in respect of the performance after the performer’s death. • Although the current section 3 and the proposed subsection 3(1) both refer to section 5, it seems that this link to section 5 only relates to the protection mentioned in the proposed subsection 3(1). • It is submitted that there is a lack of clarity in the provision of the proposed subsection 3(3) in regard to the duration of the performer’s moral rights. It is recommended that the intended duration to be provided by, and the formulation of, the proposed new subsection 3(3) be reconsidered and corrected. • It is recommended that the issue of the duration of the economic rights to | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted as long as the rights of performers as per the BTAP are not disadvantaged.</p> |
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| | <p>be granted to performers be considered, and that appropriate provisions be drafted for inclusion in the PPAB.</p> <ul style="list-style-type: none"> With regard to the new subsection 3(4), it is recommended that the substantive provisions to be introduced into the PPA by the PPAB be analysed and compared to potentially conflicting provisions contained in the Copyright Act, and that a workable alignment of the two legal dispensations be considered and brought about. With regard to the section 3A, it is submitted that the section should be rephrased so that its legal aspect is clarified. It is recommended that the new section 3A be reconsidered and redrafted to remove the many unclear or potential conflicting provisions. With regard to the proposed new section 3B, there is a serious degree of overlapping, and the potential conflict, between the provisions of section 3B and the provisions of section 9 of the Copyright Act. It is submitting that this matter should be reconsidered. | Noted. Noted. Noted. Noted. Noted. |
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| | | <ul style="list-style-type: none"> It is recommended that the enactment of the proposed new section 3B as part of the PPA be reconsidered in the light of the potential conflict with section 9 of the Copyright Act, and that a new legal model be devised if there is a need for a legislative provision in the PPA in respect of phonograms. | |
| 15 | Recording Chamber of South African Music Performance Rights Association (SAMPRA) | <ul style="list-style-type: none"> The term “blanket licence” as opposed to a “transactional licence” is convenient for the user and alleviates the administrative burden by not having to identify which performers’ performances will be used in advance and adhere to the playlist after pre-clearing the use thereof with the collecting society. Committed to driving down the costs of administering performers’ performances in order to maximise the royalties payable to their members. It is on this basis that the blanket licensing regime has been accepted as one of the most effective systems of licensing from both a rightsholder and user perspective. With regard to section 3A, The proposal to limit assignments to 25 years would undermine record companies’ ability to invest in new talent and disrupt the well-established practices of the | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |

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| | <p>recording industry in South Africa and internationally.</p> <ul style="list-style-type: none"> • Section 3A contemplates that the transfer to the copyright owner of the exclusive rights of authorisation granted to a performer shall be valid for a period of 25 years from the date of the commencement of the agreement". The question arises as to who the performers are to whom the exclusive rights are to revert? • With regard to a novation agreement, the requirement of "a prescribed agreement" is an undue incursion into the parties' freedom of contract. We therefore propose that such requirement be excluded from the PPB. • With regard to transfer of rights, it is submitted that the BTAP leaves it to each signatory country to decide for itself in its domestic legislation whether the rights in question "should be owned or exercised by, or transferred to the copyright owner". Our legislation should incorporate a clear rebuttable presumption on the transfer of rights of audio-visual performers to the producers of audio-visual products. It is submitted that the words "owned or exercised by, or" should be deleted so that it is clear that the rights in question "shall be transferred to the copyright | <p>The rights will revert to performers who contributed to the work and with whom contracts were negotiated/concluded with.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>owner".</p> <ul style="list-style-type: none"> • With regard to royalties and equitable remuneration, the requirement for the payment of royalties or equitable remuneration for "any use" is too broad. • The requirement that the performer and the copyright owner should become party to "a prescribed written contractual agreement" is an undue incursion into the parties' freedom of contract. • With regard to section 3B, the PPAB is not the appropriate legislation to set out producers' rights and section 3B should be deleted. • We note that section 5(1) (b) of the PPA already provides that performers shall be entitled to a payment of a royalty when their fixed performances are communicated to the public, so the proposed new section 3B is superfluous vis-à-vis performers as well. • With regard to section 5(1)(b), The proposed new Section 5(1A)(g) should be deleted from the Bill because section 5(1A) is at odds with sections 8(c), (d), and (g) and 9 (b) – (e) of the CA. The proposal would be contrary to articles 6, 7 and | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>8 of WCT and South Africa's obligations under Article 9 of the WTO TRIPS Agreement, which oblige contracting parties to guarantee exclusive rights to owners of right in audio visual works.</p> <ul style="list-style-type: none"> • The proposal would weaken the industry's ability to license those rights effectively and would have a negative effect on the South African record industry's revenues and, consequently, its ability to invest revenues back into the development of new artists in South Africa. • Second, the proposed section 5(1A) appears to also subject the interactive making available of sound recordings to compulsory licensing. Imposing a compulsory license to the exclusive making available rights would be fatal blow to the music industry in South Africa, it also contrary to the clear obligations of WPPT Articles 10 and 14. • While the minimum standard of protection with respect to broadcasting and non-interactive forms of communication to the public of sound recordings, required under Art.15 WPPT, is that of a remuneration right, this represents only the bare treaty minimum. | Noted. |
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| | <ul style="list-style-type: none"> • The proposed procedures that are required to be followed by a person who wishes to use an audio recording in any manner contemplated in section 5(1)(b) are also functionally unworkable in practice. • The PPAB raises issues of competition law in terms of fixing royalties or equitable remuneration; the Minister being both an administrator and a regulator; the prescription of terms and conditions of a contract. • The proposed introduction of Section 3(B) of the PPAB raises issues of Constitutional law as it prejudices copyright owners and performers by amending the remuneration arrangements; not providing what constitutes “fair and equitable remuneration” but subjecting it to review process. • If Parliament is requested to approve the provisions of Section 3(B) of the Performers Protection Act, it is submitted that the section should be further amended so as to prescribe to the Minister the circumstances that he is required to take into account in making such a determination. | Noted. |
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| | <ul style="list-style-type: none"> • With regard to definitions, there is not sufficient clarity on what a “performer” is. • Is the test of what constitutes “the substantial part of the performance” a qualitative test or a quantitative test? There is no answer to this question. But certainty is required. It is recommended that the definition be amended either to read “to a substantial qualitative part of the performance” or to read “regardless of the qualitative performance done by the performer”. • With regard to the requirement of giving notice by the user before usage, we note that the language is limited to “or”. This implies that there is room for an argument that notice to any one of the three is sufficient. • Furthermore, we note the inclusion of the performer in this clause, which surely means the exclusion of the performer from the previous subsection, is simply a drafting error. • The proposed 5(1)(1C) in practice, will require blanket licence agreements to be entered into by collecting societies and user groups. In practice, however, it will result in excessive contestation, cost and | Noted. Noted. Noted. To be considered. Noted. Noted. |
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| | <p>litigation.</p> <ul style="list-style-type: none"> • A new series of disputes will result in years-long delays with the result that there will be no payments of money to copyright owners or performers while multiple issues are contested and are eventually only resolved through the courts. • With regard to powers of the Tribunal under the proposed section 5(1)(1D), it is not possible to find a sensible interpretation to this clause. It would make sense if the user was required to pay to the copyright owner an amount prior to initiating the stipulated notice procedure – but that is not what is provided for anywhere else in the draft. • With regard to the participation of the performer in commercial negotiations, the assumption that performers must participate in all commercial negotiations between copyright owners and users, is directly contrary to the way in which the recording industry works in practice. • This issue was addressed by the Copyright Review Commission under Judge Farlam in 2011 and was specifically dealt with in the Commission's report published in | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| 16 | Submission by Sampra's Performers' Chamber | <ul style="list-style-type: none"> • SAMPRA welcomes the new definitions as the Bill aims to introduce digital protection in respect of performances and aims to safeguard protection in respect of audiovisual fixations. • The expansion in the definition for 'broadcasting' is a good thing which is welcomed. • The insertion of 'communication to the public of a performance' and 'communication to the public of a phonogram' will create clarity that protection of communication to the public is not limited only to an unfixed broadcast or performance fixed in an audiovisual fixation, but that it also includes communication to the public by any medium. • The fact that the Bill inserts a definition to the word 'Tribunal' creates awareness and clarity to the public and enables accessibility to the different dispute resolution forums. • The Bill expands the definition of 'reproduction' to include protection in respect of audiovisual fixations. • With regard to Moral rights, amendment is welcomed. The PPAB | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>The moral rights duration applies for 50 years.</p> |

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| | <p>however leaves the extent to which this right can be maintained after the death of a performer unclear.</p> <ul style="list-style-type: none"> • Section 3(4) of the Bill proposes clarity on the certain exclusive rights that a performer has and this is welcomed. • With regard to Section 3 of the PPAB inserting after section 3 sections 3A and 3B, the amendment is welcomed although there is a concern that the agreement procedure prescribed may not be easy to conclude and may cause delays. • Calls for the equal split to be legislated on. • The equal sharing of royalties has also been recommended by the CRC. • The Minister does not have to determine what is equitable remuneration for the direct or indirect use of the phonogram since the Copyright Tribunal is already in place to adjudicate matters. • With the agreement in section 3A being valid for 25 years, the wording suggests the performer will have no rights to terminate the agreement before the lapse of 25 years. This | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted and will be reconsidered.</p> |
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| | <p>provision encumbers the performers' rights to terminate the contract prematurely.</p> <ul style="list-style-type: none"> • With regard to section 4 of the PPAB, the insertion of digital terms is welcomed as they are in line with the advancing of technology. • The Bill recognises the making available to the public the original and copies of performances and provides that consent ought to be obtained to sell the performance and this amendment is welcomed. • The substituted subsection (2)(d) in section 3A is welcomed. • The Bill provides for a licensing procedure for anyone who intends to broadcast or communicate to the public of a work and this is welcomed. It is in line with the Copyright Act and safeguards for negotiations between the performer/representative collecting in respect of remuneration to be paid and also provides for a dispute resolution procedure should the parties not agree on proposals made. • Recommends that the deeming provision (section 5(4)(a)) should be removed, and that the legislation | Noted. Noted. Noted. Noted. Noted. Noted. |
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| | <p>should specifically provide that the royalty payable in respect of Needletime rights shall be divided equally between copyright owners and performers.</p> <ul style="list-style-type: none"> Leaving the determination of the royalty due to performers in the hands of record companies could result in an inequitable and uncontrolled system of royalty distribution to performers in respect of Needletime Rights. Distribution of royalties should be dealt with at the level of CS. This would minimise administration costs and in addition the activity would be subject to the regulatory supervision of the Registrar of Copyright, thus preventing abuses. With regard to section 5 of the PPAB relating to exemptions related to education, we do not believe that this provision will achieve this purpose. The proposed exemption should be removed from the PPAB and that the current fair dealing provisions be relied upon by any user. PPAB leaves the extent to which moral right can be maintained after the death of a performer unclear. Proposed section 3A would risk | <p>50:50 split for needletime royalties can be considered. The contract should be the first avenue to determine equitable remuneration.</p> <p>Noted.</p> <p>Noted however the provision is drafted with the appropriate balance that needs to be struck with developing provisions on exceptions and limitations.</p> <p>The moral rights duration applies for 50 years.</p> |
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| | | <p>serious harm to the SA record industry.</p> <ul style="list-style-type: none"> • Proposed section 5 proposes transactional licensing - a very onerous form of licensing that significantly increases the costs to administer Needletime Right. • A “prescribed” contract would be incapable of addressing the multitude of variations between contracts between different copyright owners and different performers. • With regard to exemption, users will attempt to rely on the exemptions as an excuse not to take out a licence. | <p>Noted.</p> <p>Noted.</p> <p>Minimum contract requirements will be prescribed, not the contract as a whole.</p> <p>Noted.</p> |
| 17 | Southern African Music Rights Organisation's (SAMRO) | <ul style="list-style-type: none"> • The term “blanket licence” as opposed to a “transactional licence”, is convenient for the user and alleviates the administrative burden by not having to identify which performers’ performances will be used in advance and adhere to the playlist after pre-clearing the use thereof with the collecting society. • With regard to definitions, the new definitions are welcomed as the Bill aims to introduce digital protection in respect of performances and aims to safeguard protection in respect of audio-visual fixations. | <p>Noted.</p> <p>Noted.</p> |

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| | <ul style="list-style-type: none"> • The expansion in the definition for broadcasting is a good thing and is welcomed. • The insertion of ‘communication to the public of a performance’ and ‘communication to the public of a phonogram’ will create clarity that protection of communication to the public is not limited only to an unfixed broadcast or performance fixed in an audio-visual fixation, but that it also includes communication to the public by any medium. • The fact that the Bill inserts a definition to the word ‘Tribunal’ creates awareness and clarity to the public and enables accessibility to the different dispute resolution forums. • The definition of ‘performer’ is welcomed. • With regard to Moral rights, the amendment is welcomed. The Bill however leaves the extent to which this right can be maintained after the death of a performer unclear. • With regard to section 2 of the PPAB, it provides for an exclusive right to give authority in respect of wireless communications to the | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>The moral rights duration applies for 50 years.</p> <p>Noted.</p> |
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| | <p>public and in respect of performances fixed in an audio-visual fixation, which is in line with the new digital recognition introduced by the Bill. This is welcomed.</p> <ul style="list-style-type: none"> • Concerned herein that the technological definition may be problematic. People might rather transmit via the internet to circumvent the intent of the legislation. • With regard to section 3 of the PPAB inserting sections 3A and 3B, this amendment is welcomed although there is a concern that the agreement procedure prescribed may not be easy to conclude and may cause delays. • Recommends that the legislation should clearly stipulate that Needletime royalties will be shared equally between the record company that produced the sound recording and performers featured in the tracks. • The equal sharing of royalties has also been recommended by the Copyright Review Commission (“the CRC”). • The Minister does not have to determine what is equitable | Noted. |
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| | <p>remuneration for the direct or indirect use of the phonogram since the Copyright Tribunal is already in place to adjudicate matters.</p> <ul style="list-style-type: none"> • The proposed Bill is poorly drafted where it states that the agreement referred to in section 3A shall be valid for a period of 25 years. • The Bill grants exclusive rights to a producer of a phonogram, and a right of a performer and the producer of the phonogram to earn an equitable remuneration, determined by the Minister, for the direct or indirect use of the phonogram is problematic. • With regard to section 4 of the PPAB, the PPAB inserts technology terms such as ‘audiovisual fixation’ and ‘wireless’ for required consent in respect of the usage of performers’ performances and this is welcomed. • The PPAB provides for a licensing procedure and provides that matters may be referred to the Tribunal where parties disagree. This amendment is welcomed. • With regard to the amendment of section 5 (4) of the principal Act, it is recommended that the deeming provision should be removed, and that the legislation should specifically | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>provide that the royalty payable in respect of Needletime rights shall be divided equally between copyright owners and performers.</p> <ul style="list-style-type: none"> • Where societies are involved, they should deal with the distribution of royalties at the level of societies. This would minimise administration costs and in addition the activity would be subject to the regulatory supervision of the Registrar of Copyright, thus preventing abuses. • With regard to section 5 of the PPAB relating to exemptions, we believe that this should not be at the expense of providing a sustainable livelihood for the performers of a fixation or audio-visual fixation. • The exemptions are too broad and open ended in that they do not confine to certain kinds of performances. • Not enough local content played in SA. • Clarity needed on what is meant by 'equitable remuneration'. • 'Communication to the public' and 'making available' are used interchangeably as making available | <p>Noted.</p> <p>Noted.</p> <p>Noted, however the provision is drafted with the appropriate balance that needs to be struck with developing provisions on exceptions and limitations.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | | <p>is a component of communication to the public.</p> <ul style="list-style-type: none"> • Exemptions in PPAB are too broad and not defined/limited to certain kinds of performances | <p>Noted, however the provision is drafted with the appropriate balance that needs to be struck with developing provisions on exceptions and limitations.</p> |
| 18 | Sikelewa Sishuba | <ul style="list-style-type: none"> • Agrees with the new proposed amendments. • Our sector has been living without rules for a very long time and by virtue of that it has created a Gap for Broadcasters and Producers to exploit the rights of the performer without any sustainable outcome financially. • Rights of a performer belong to the performer and the performer shall receive Royalties of 10 percent from any rebroadcast nationally and internationally in any broadcasting form, wireless, satellite or any platform that allows viewing in these platforms, Internet, Mobile (phone, tablet, billboard, streaming sites) ,unless images are used for purposes of marketing the production for airing purposes. (For example Multi-choice Broadcaster has a BUY OUT CLAUSE in their contract which states that they buy out the rights of a performer perpetually and have the right to exploit the performers image for a lifetime without ever having to | <p>Noted.</p> <p>Noted.</p> <p>The PPAB proposes equitable remuneration in this regard.</p> <p>the dti has investigated this situation and majority of performers are not receiving any payments and contracts are being used to exploit the situation of the actor in the absence of legislative reform allowing for economic rights.</p> |

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| | <p>pay any royalty to the performer, unless if legislation says so then they will abide. This by virtue of the structure breaks even international rules that build a sustainable market that contributes to the economy of the Performer) This can't be right that the big players grow at the expense of the Performer who are Role models and representatives of this beautiful country internationally.</p> <ul style="list-style-type: none"> • A collecting society is crucial for the securing of Performers financial freedom and we support a Tribunal to resolve matters of performers and not use the method Arbitration as it's a costly exercise for the performer. (This Bill proposition will secure that the performer not to die a pauper and for the performer to be bankable for a longer period of their existence because their work generates financial gains even when they aren't working through repeats). • Independent Contractor is the term used to describe our services in our contracts which is a vague explanation, which by virtue of the term Independent has given way to exploitation of the performer's right to do any other work outside the scope of the agreement with their employer. This description has been misused because broadcasters usually want | <p>Noted.</p> <p>The current situation for the actor is whether the actor is an independent contractor or employee. The PPAB cannot legislate on this; the dti will consult with the Department of Labour.</p> |
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| | <p>sole rights to your time without any compensation which is wrong.</p> <ul style="list-style-type: none"> The performer doesn't set their own times and working conditions. The working hours and conditions apply for an employee but with productions it works the other way. You belong to that show for the period and usually for about 3 months with no fee sable returns on a monthly basis to sustain the livelihood of the performer. To own the time of an individual must by virtue of agreement allow for a better rate financially. A lot of performers have been fired without any recourse if they question anything or fight for matters that are principle matters of morals because there is no law that guides or protects the performer. We also need Standardized Pay Rates based on experience as per the other sectors which acknowledge experience because that is value add to any production. We also propose a Rate Card for starting out performers from University to have a starting rate going towards 1- 5 year, 10 year to more than 20 year experience. This will help guide and direct the broadcasters on how to pay performers based on their experience that they bring to | <p>Noted. the dti will consult with the Department of Labour.</p> <p>Noted.</p> <p>Noted, as in the spirit of the BTAP and other models performers need to be compensated in accordance with their contribution.</p> |
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| | <p>productions.</p> <ul style="list-style-type: none"> • The industry does not have a Union that is firm on this matter, which has given the Broadcasters the powers to discard the principle of Experience by still paying Rates from 15 years ago, in the ever changing economy. We can't be still Call Fees of R2500 to R5000 a day when these rates were being paid when we started TV. This has created an industry where broadcasters have been receiving growth yearly with ever growing productions that are appealing to an international market and international interest which pays in bigger currency but the performer is not seeing a cent of that. • There are many flaws in our sector that need the remedies of legislation and the Protection Amendment Bill speaks to the morals of the performer which is why we see it fit to be put into practice. Change must come now and a new legacy that protects the performer is a responsibility of the powers that be. May the current leadership leave a legacy by giving performers their dignity and protect fathers and mothers that love this industry. | <p>Noted, economic rights are being factored into the legislation.</p> <p>Noted. The PPAB intends to create a concussive environment wherein performers are properly protected. The PC is committed to effecting a positive change.</p> |
| 19 | <p>Spoor and Fischer</p> <ul style="list-style-type: none"> • It is unusual that the Bill proposes to adopt principles from the Beijing Treaty which South Africa is not a | Ratification of the BTAP will take place. |

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| | <p>party to and which is not yet enforceable on the Contracting States. Furthermore, these Contracting States have not yet adopted the provisions of the Beijing Treaty in their local legislation. As such, we query why South Africa, who is not a party to the BTAP, will be one of the first countries who adopt the provisions of the BTAP.</p> <ul style="list-style-type: none"> • The IP Laws Amendment Act has not yet be signed by the President, and as such, is not yet in force. However, once the IP Act is signed by the President, it will effectively amend the PPA, which will introduce clause that will be in conflict with the Bill. • Wording suggested for the preamble. • Performance should be defined. <p>• The definition of “audiovisual fixation” is unclear. The definition should include the embodiment of moving images which are accompanied by sounds. Wording suggested for audiovisual fixation. Furthermore, the inclusion of “audiovisual fixation” as a separate species of Copyright Work is questioned.</p> <ul style="list-style-type: none"> • The PPAB and the IPLAA provide | <p>Noted. However, The IPLAA, 2013 has been signed but it is not yet in force.</p> <p>Noted.</p> <p>Performance is defined in IPLAA. It will be added in the PPAB through transitional provisions.</p> <p>Noted.</p> <p>Noted. The definitions will be aligned</p> |
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| | <p>two different definitions of “performer”. We recommend that the drafters should clarify which definition will be incorporated in the PPA once the Bill and IP Act are enacted.</p> <ul style="list-style-type: none"> With regard to section 3(2) and (3) of the PPAB, the enforceability of the BTAP is reemphasised. We are of the view that the order of Section 3 is incorrect. We suggest that the proposed subsections (2) and (3) should follow subsection (4) since subsections (1) and (4) both relates to the performers’ “economic rights” whereas subsections (2) and (3) both relates to the performers’ “moral rights”. With regards to subsection (3), it is not understood why the drafters extracted this provision from Article 5 of the BTAP, but did not use the same wording. It is also not understood to what other provisions of the Copyright Act this subsection is referring to. Wording is suggested for the aforesaid subsection. With regard to clause 2 of the PPAB amending section 3(4) of the principal Act, which was extracted from the BTAP, the enforceability of the BTAP is reemphasised. | <p>through transitional provisions.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>Furthermore, with regard to the rights that the clause seeks to introduce, we are of the view that these exclusive “commercialisation” or “economic” rights that the Bill seeks to grant to a performer could potentially conflict with the exclusive rights of the copyright owner of a cinematograph film.</p> <ul style="list-style-type: none"> • With regard to clause 3 of the PPAB which amends section 3A of the principal Act relating to the transfer of rights, since the definition of a cinematograph film, as per the Copyright Act and the IPLAA, can be understood to include “audiovisual fixations”, and since the Copyright Act provides for the same exclusive rights which vest in the copyright owner, it seems that the scenario can arise where two sets of competing exclusive rights, which could theoretically lead to a situation where a performer (who has not transferred his rights) can prevent the copyright owner of a cinematograph film from exercising his exclusive rights in terms of the Copyright Act. • Furthermore, the clause also suggests that the copyright owner does not have any of the exclusive rights until such time as Section 3A of the PPA is respected. This | <p>Noted.</p> <p>Noted.</p> |
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| | <p>completely ignores the copyright ownership in the “cinematograph film”.</p> <ul style="list-style-type: none"> • It is unclear what is meant by the “prescribed written contractual agreement”. Will the Minister publish a prescribed agreement which the performer and owner must use for the purpose of transferring the rights in the performance? • No definition is provided for “fair and equitable remuneration”. It is not clear as to what would constitute a fair equitable remuneration in lieu of a royalty. The drafters are urged to provide clarity on this phrase. • With regard to clause 3 of the PPAB, the definition of a “sound recording” in the Copyright Act and that of a “phonogram” in the PPAB could be understood to be one and the same thing. It is unclear from the principal Act which party is deemed to be a “producer” of a phonogram. This term is not defined. • Furthermore, in section 3B(2) the copyright owners exclusive commercialisation right is being undermined by the proposed sharing in proceeds of such commercialisation by the performer/s and producer (copyright owner and | <p>Minimum contract requirements will be prescribed, not the contract as a whole.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>producer are not always the same person).</p> <ul style="list-style-type: none"> • With regard to clause 4 of the PPAB, since ‘performance’ is not defined, it is not clear how the audiovisual fixation could be sold or rented out. Wording suggested subsection 5(b)(iv) and 5(b)(v). • With regard to clause 4 of the PPAB which amends section 5(2) of the principal Act, the word “not” should be removed from this Section as it has the opposite effect to the goal which this Section wishes to achieve. • With regard to clause 6 of the PPAB which introduces section 8A and 8B, the drafters should take the IPLAA into consideration in respect of the numbering of the principal Act. • We commend the drafters of the PPAB for introducing anti-circumvention provisions for TPM’s, in compliance with the WIPO Treaty. • However, the clause introduces a criminal offence for the production and dealing in TPM circumvention devices. Such conduct is already criminalised in terms of section 86(3) and (4) of the Electronic Communications and Transactions Act. Furthermore, the definition of | <p>Performance is defined in IPLAA.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>TPM Circumvention device has been introduced in the CAB. The definition issue on TPM is technical. There is alignment between the CAB and the PPAB.</p> |
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| | | <p>TPM circumvention device is not yet introduced into the Copyright Act and is also not clearly defined in the PPAB.</p> <ul style="list-style-type: none"> • The proposed section 8A makes reference to sections 28O and 28P of the Copyright Act. These Sections have not yet been incorporated in the Copyright Act, and as such, it is uncertain as to whether the numbering is correct or whether these Sections will be introduced in the Copyright Act. • It is unclear as to what is meant with “copyright management information”. This phrase is not defined in the PPAB, and as such, no clear meaning can be given to this phrase. | <p>Noted.</p> <p>Noted. It is defined in the CAB. Alignment to be addressed.</p> |
| 20 | Thato Molamu | <ul style="list-style-type: none"> • I agree to the new proposed amendments. Our sector has been living without rules for a very long time and by virtue of that it has created a Gap for • Broadcasters and Producers to exploit the rights of the performer without any sustainable outcome financially. • Rights of a performer belong to the performer and the performer shall receive Royalties of 10 percent from any rebroadcast nationally and internationally in any broadcasting form, wireless, satellite or any | <p>Noted.</p> <p>The PPAB seeks to remedy the situation.</p> <p>The PPAB proposes equitable remuneration in this regard.</p> |

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| | <p>platform that allows viewing in these platforms, Internet, Mobile (phone, tablet, billboard, streaming sites), unless images are used for purposes of marketing the production for airing purposes.</p> <ul style="list-style-type: none"> • Multi-choice Broadcaster has a BUY OUT CLAUSE in their contract which states that they buy out the rights of a performer perpetually and have the right to exploit the performers image for a lifetime without ever having to pay any royalty to the performer, unless if legislation says so then they will abide. • A collecting society is crucial for the securing of Performers financial freedom. • Support a Tribunal to resolve matters of performers and not use the method Arbitration as it's a costly exercise for the performer. • Concerns around the term independent contractor and the implications thereof as opposed to being an employee which attracts protection in terms of other legislation. No legislation governs what the performer is which leads to exploitation. • Recommend standardized pay rates, a rate card, for the industry as there is no union. • Sector requires legislative intervention. | <p>the dti has investigated this situation and majority of performers are not receiving any payments and contracts are being used to exploit the situation of the actor in the absence of legislative reform allowing for economic rights.</p> <p>The PPAB to introduce a collecting society for audiovisual performers.</p> <p>Noted.</p> <p>The current situation for the actor is whether the actor is an independent contractor or employee. The PPAB cannot legislate on this, the dti will consult with the Department of Labour Relations.</p> <p>Noted, as in the spirit of the BTAP and other models performers need to be appreciated in accordance with their contribution.</p> <p>Noted.</p> |
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| 21 | Zikhona Sodlaka | <ul style="list-style-type: none"> • Remuneration: The issue of growth in remuneration remains major, we are still being offered call fees that fall way below our rates. • I would like to propose that tax be reduced to 10 percent and agents take only 5 percent. Remember that we have no benefits, life insurance, medical aid etc. are all paid for by us. • Contractual issues pertaining to transportation, turnaround times, additional calls and cancellation fees. • An actors job is to perform and move on to another projects, the responsibility of promoting the show should fall in the hands of the broadcaster and the producer, should the actor be required after his principal work is complete, a publicity and promotions contract should be drawn. In the dispensation we find ourselves under of artists dying poor, we need this additional income. • ROYALTIES: The current SABC freelance contract stipulates that the broadcaster will pay royalties to the artist, but they have thus far not | <p>Noted, some of the issues like the rates can be prescribed by the Minister.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |

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| | | <p>honoured that agreement.</p> <ul style="list-style-type: none"> • The SABC should be required to sign these contracts so that the artist may be able to enforce this clause! • This issue should be a non-issue, when a show I have shot is being rebroadcast for commercial gain, the artist should get paid, at a negotiated rate. This should be COMPULSORY; no broadcaster should get away with noncompliance in this regard. • If the artist's image is associated with a commercial brand, the artist should by law benefit financially. (product placement) | <p>Noted.</p> <p>Noted.</p> <p>PPAB provides for the protection of a performer's moral right.</p> |
| 22 | Zolisa Xaluva | <ul style="list-style-type: none"> • Remuneration: The issue of growth in remuneration remains major, we are still being offered call fees that fall way below our rates. • I would like to propose that tax be reduced to 10 percent and agents take only 5 percent. remember that we have no benefits, life insurance, medical aid etc. are all paid for by us. • Contractual issues pertaining to transportation, turnaround times, additional calls and cancellation fees. • An actors job is to perform and move on to another projects, the responsibility of promoting the show should fall in the hands of the broadcaster and the producer, | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |

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| | <p>should the actor be required after his principal work is complete, a publicity and promotions contract should be drawn. In the dispensation we find ourselves under of artists dying poor, we need this additional income.</p> <ul style="list-style-type: none"> • ROYALTIES: The current SABC freelance contract stipulates that the broadcaster will pay royalties to the artist, but they have thus far not honoured that agreement. • The SABC should be required to sign these contracts so that the artist may be able to enforce this clause! • This issue should be a non-issue, when a show I have shot is being rebroadcast for commercial gain, the artist should get paid, at a negotiated rate. This should be COMPULSORY; no broadcaster should get away with noncompliance in this regard. • If the artist's image is associated with a commercial brand, the artist should by law benefit financially. (product placement) | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>PPAB provides for the protection of a performer's moral right.</p> |
| Prof Tana Pistorius (UNISA) | <ul style="list-style-type: none"> • Wording suggested for the definition of "Technologically Protected Work". • Wording suggested for the definition of "Technological Protection Measure Circumvention Device". • With regard section 28O it is | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |

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| | <p>submitted that reference should also be made to relevant sections of the Cybercrimes and Cybersecurity Bill, 2017 as clause 6 and 7 of the Cybercrimes Bill has a reference to the PPAB in that the aforesaid clause provide for digital protection of works as well as the creation of offences for circumvention of certain protections put in place.</p> <ul style="list-style-type: none"> • With regard to section 28P it is submitted the permissible use of a TPM circumvention device is very wide. This is especially true for audio-visual works and sound recordings. • The legitimate interests of the copyright owners in applying TPM to protect their works from digital piracy must be weighed against the rights of users to access works. • Section 28P should be amended so as to limit permitted use of TPM devices or means to specific uses, especially use for research purposes and circumvention by authorised persons only. Section of the New Zealand Copyright Act referred to for illustrative purposes. • It is submitted that in the Hong Kong Copyright Act circumvention is only limited to certain works by librarians | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <p>or similar professionals.</p> <ul style="list-style-type: none"> • It is submitted that the section 28P should be amended to address technological protection measures that enforce geographical market segmentation since the Bill adopts an international exhaustion of rights. • With regard to section 28Q it is submitted that reference should be made to the Cybercrimes and Cybersecurity Bill, 2017. | <p>Noted.</p> <p>Noted.</p> |
| South African Broadcasting Corporation (SABC) | <ul style="list-style-type: none"> • With regard to transfer of rights (section 3A), the section does not make it explicitly clear that other options are available to a performer in relation to the payment of royalties or an inequitable remuneration (e.g. buy-outs) which is in line with section 21(1)(c) of the Copyright Act. • Wording suggested for section 3A. • With regard to section 3B, legislating rates for the use of phonograms published for commercial purposes for broadcasters might be anti-competitive. Furthermore, certain factors, amongst others, such as the quality of the phonogram should be considered. • With regard to restrictions on the use of performances, this section should be amended in a way that sensitises | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |

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| | <p>a performer to the issue of a buy-out of royalties, especially when commissioning of performances has been done.</p> <ul style="list-style-type: none"> • The requirement to give the performer a notice of intention to perform might be cumbersome in practice and would hamper the broadcasts of certain performances while disputes are being settled. • Agrees that assignment should be in writing but not to a royalty after assignment. Does not agree to limitation of 25 years. • Agrees with the fair and equitable remuneration of performers for their performances. • Recommends that PPAB provide for Buy-Outs of a performer's exclusive rights of authorisation and Buy-Out of the 25 year period. • The payment of continued royalties should not be an option as it is not practical for commissioned works. If royalties are an option – a cap on the years of payment royalties should be an option for the use of the performance. • Legislating rates for the use of phonograms published for | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Competition law considered.</p> |
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| | <p>commercial purposes for broadcasters might be anti-competitive. Competition law principles should be considered.</p> <ul style="list-style-type: none"> • Notice of Intention to perform might be cumbersome in practice and would hamper the broadcasts of certain performances. Recommends deletion of proposed section 5 (1A). • The proposed definitions of “broadcast” and “communication to the public” do not clarify whether they include social media platforms and streaming on the internet. • S3B Competition law provision. Might be uncompetitive for phonograms. • S5-not practical to notify the performer, collecting society before we communicate to the public. Audio visual work are tied to timed transmission. <p>The agreement not SABC agreement.</p> <ul style="list-style-type: none"> • | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
| Recording Industry of South Africa (RiSA) | <ul style="list-style-type: none"> • PPAB is not compatible with the treaties informing it and some provisions would cause serious harm to performers and producers. • Proposed section 3 of PPAB would | <p>Noted.</p> <p>Noted.</p> |

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| | <p>deny performers protection in respect of their performances when they are exploited in other WTO countries, and is incompatible with TRIPS. Recommends it to be amended to provide for national treatment.</p> <ul style="list-style-type: none"> • Limiting the term of assignment to 25 years will disrupt licensing, reduce producers' and performers' revenues, and reduce investments in South African artists. Recommends it to be removed. • Section 3B is misplaced because the protection of sound recordings is already set out in section 9 of the Copyright Act, 1978. Secondly, section 3B is not aligned with the Copyright Act, 1978 and the Copyright Amendment Bill (CAB). • The definition of "communication to the public of a phonogram" partly mirrors that of WPPT but it is incomplete as it omits reference to "public performance". • Recommendation is that it should fully reflect WPPT definition. • The definition of "reproduction" confuses the concepts of fixation and it is recommended that reference to fixation be removed from definition. | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <ul style="list-style-type: none"> • The proposed section 3(1)(c) limits protection to performances first fixed in SA and will result in SA performers being denied protection with regard to their performances when exploited in other WTO countries. • This proposed section 3(1)(c), together with same section in the principal Act, are not in line with WPPT and BTAP with regard to National Treatment and recommendation is to amend it to provide for national treatment. • The proposed section 3A lacks clarity, interferes with private contractual arrangements and puts unjustified limitations on transfer of rights. Recommendation is for section to be clarified for legal and commercial certainty and reference to “a prescribed written agreement which shall give performer the right to receive royalties or fair equitable remuneration” as well as the limitation on transfer of rights be removed. • The proposed section 5 is partly confusing as it may introduce a statutory license on all performers rights in this section and this will be incompatible with the Memorandum of Objects; BTAP and WPPT in terms of levels of protection and CAB | Noted. Noted. Noted. Noted. |
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| | <p>in terms of exclusive rights pertaining of audio visual performers being reduced to remuneration rights which would not be in line with BTAP. Recommendation is to have proposed section 5 (1A)-(1D) be removed.</p> <ul style="list-style-type: none"> • Proposed section 5(4)(a) related to presumption of transfer of rights should be removed. • With regard to exceptions clause (section 8), the CAB together with PPAB introduces problematic and impractical amendments such as fair use and recommended that fair use be removed from CAB. • Section 8A related to TPM's – the proposed definition of TPM in CAB is inadequate. Suggested drafting for definition of TPM in the CAB for it to be in line with article 6 of the EU Copyright Directive. Proposed paragraph (b) of TPM definition in CAB should be deleted because of the unintended effect it might have. • Recommended that the definition of TPM Circumvention device be amended and suggested wording for amendment. • Prescribing the terms of agreements between performers and producers | <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>The law wants to balance power relations of parties who own rights that</p> |
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| | | <p>is an undue interference into contractual relations, restricts flexibility and serves neither party.</p> | can be commercially exploited. Minimum contractual terms need to be prescribed. Self-regulation should not be left to chance in the rampant economic exploitation. |
| | Florence Masebe | <ul style="list-style-type: none"> • The absence of a legislative framework has led to actors being impoverished while their works benefit those who commissioned them. • PPAB is not about producers and broadcasters, but about performers. • Broadcasters and producers enjoy the dti rebates and incentives and then give crumbs to performers. • SA actors are owed incalculable monies by the public broadcaster for all the works that were sold to MultiChoice in the form of commercial exploitation remuneration and no clarity from broadcaster on whether or not they, or their families in the case of those who have passed on, will get these monies. • Plea to Parliament is to save actors and their future generations from blatant exploitation by broadcasters who have taken advantage of actors' lack of education and information. | <p>Noted hence the proposed amendments.</p> <p>The PPAB is to strike the appropriate balance and provide rights to performers.</p> <p>Noted.</p> <p>Noted.</p> |

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| | <ul style="list-style-type: none"> • The standard Freelance Performers Agreement that most industry contracts are currently based on, negotiated between the then Performance Art Workers Equity (PAWE) and the SABC when there were only 4 channels on TV, is more than 30 years old. • The old freelance agreement is as good as dead as actors now operate in an environment with many players and no legal regulatory framework. • Has not earned any money from commercial exploitation of a number of works that she worked on. • MultiChoice is the biggest commissioner of works apart from SABC and has a bigger reach into other countries than SABC. Actors feel cheated when they see their works being repeated on the Encore channel owned by MultiChoice as they do not get compensated for repeat fees. • The right to repeat fees that the outdated agreement with SABC assures actors gets removed by producers without consequence. <p>Fully supports PPAB with the hope that it will ensure:</p> | <p>Noted.</p> <p>Noted, the Bills will address this in terms of the strengthened legal framework which includes a strengthened Tribunal process.</p> <p>The Bill seeks to remedy this occurrence.</p> <p>Noted.</p> <p>Noted.</p> |
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| | <ul style="list-style-type: none"> • Full recognition of the audio-visual performer's right to royalties across all broadcasting channels. • That it sets minimum standards for all performance agreements in the audio-visual sector. • That it recognises and endorses Performer's economic and moral rights as set out in the Beijing Treaty. • That it ensures an environment in which there are harsh consequences to those that contravene the law in this regard. • In spite of the R90 Billion contribution by creative industries, artists continue to be welfare cases even as such figures continue to appear in government speeches and brag sheets. • Knows that the PPAB may not magically solve all the ills of the industry, but remains confident that it is a crucial building block towards creating an industry in which performers are treated fairly and with dignity. • In memory of all the departed artists who could not benefit from the full value of their work, pass PPAB into law. | <p>Noted.</p> <p>Minimum contract requirements will be prescribed.</p> <p>The PPAB seeks to introduce economic rights as well as moral rights into legislation through provisions of the BTAP.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> |
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| Independent Producers Organisation (IPO) | <ul style="list-style-type: none"> • Supports fair and equitable remuneration of performers. • Prescription of contractual terms according to section 3A not feasible in filming business. • Proposed Tribunal will hinder producers' ability to function and contract freely. • Definition of performer too broad such that it includes 'extras'. • Process of notifying performers prior to a broadcast and then getting permission is not feasible. | <p>Noted. Only minimum contractual requirements to be prescribed, not the whole contract.</p> <p>Noted. The definition does not include crew members or extras.</p> <p>Noted.</p> |
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CONCLUSION:

The Department has reviewed the submissions. The comments received will enhance the development of the Bill.