

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:

- Clauses that should be advertised for further public comment:
- Deletion of the definition of broadcast (Clause 1(b)).
- The deletion of the definition of "cinematograph film" (Clause 1(c)).
- The deletion of the definition of "fixation" (Clause 1(e)).
- The substitution of the definition of "performance" (Clause 1(f)).
- The new definition of "producer" (Clause 1(h)).
- The new definition of "sound recording" (Clause 1(j)).
- The provision for royalties or equitable remuneration (Clause 2 – Section 3(4)(a) and (g)).
- The distribution right (Clause 2 – Section 3(4)(h)).
- The requirement for the agreement to be subject to standard terms and conditions in (a), and minimum content in (b) (Clause 3 – Section 3A(3)(a) and (b)).
- Making the equal remuneration subject to a contract (Clause 3 – Section 3B(2)).
- Distribution right (Clause 4 – section 5(a)(vii)).

- New process regarding recording and reporting and providing for an offence in this regard (Clause 4(c) – Section 5(1)(1A) and (1B)).
- Regulations – clause 6, section 8D(3) and (4).
- Prohibited conduct in respect of technological protection measures and copyright management information (Clause 7 – Section 8E to 8H).
- Offences (Clause 8 – Section 9).
- Amendment to certain expressions in Act 11 of 1967 (Clause 9).
- Transitional provisions (Clause 10).

- **Summary of core issues (List not exhaustive)**

- Definitions e.g. fixation' should be aligned to WPPT definition.
- Reporting usage etc. is burdensome and onerous.
- Exclusive right of distribution reduced to a mere remuneration right is incompatible with WPPT and BTAP.
- Introduction of Criminal penalties for non-submission of a report and fines are draconian.
- Interference in the freedom to contract.
- Powers granted to Minister in section 8D too wide and intrusive.

2. List of stakeholders

The following stakeholders made additional written submissions only on the PPAB during October 2018:

- IFPI
- Recording Industry of South Africa (RISA)
- MultiChoice and MNET
- Personal Managers Association (PMA)
- South African Institute for Intellectual Property (SAIIPL)
- South African Guild of Actors (SAGA)
- Amanda Lane
- FIAPF AND IPO

3. Specific comments/Questions Raised by Stakeholders

No	Name of the Stakeholder	Comment/Question	Response by the dti
1	IFPI	<ul style="list-style-type: none"> • That definition of broadcast is incompatible with international law due to inclusion of transmission by wire. Recommends removal of the word “wire” from definition. • The wording of “communication to the public” is incomplete. Recommends that the definition should fully reflect definition as in WPPT by including reference to public performance. • That the term” fixation” needs to be defined using WPPT and BTAP definitions. Wording suggested. • Definition of “producer” needs to be clearly defined to include both natural and legal persons to be in line with WPPT definition. Wording suggested. • Definition of “Reproduction” should be clarified to confirm that it means the copying of the whole or part of an audio visual fixation or sound recording. Wording suggested. • Definition of sound recording should be clarified so that it is consistent with WPPT and its statement regarding incorporation of sound recording into 	<ul style="list-style-type: none"> • Broadcast can include wire. • Definition aligned to the WPPT. • As defined in IPLAA. Fixed it in line with the previous submissions. Audio visual and sound recording distinguished. • Person already defined as natural and legal entity. • Reproduction is a right provided for. Application will depend on circumstances. • Terminology was amended. Consistent but updated as per trends and developments. Aligned to Copyright and Performers

		<p>an audio visual work. Wording suggested.</p> <ul style="list-style-type: none"> • Recommends that section 3A(3)(a) be deleted as it interferes with private contractual arrangements. • That section 3A(3)(b) is an unclear requirement for contracts regarding the set out of royalties and needs to be clarified. Wording suggested. • Section 5(1)(b) reduces the exclusive right of distribution to a mere remuneration right which is incompatible with WPPT and BTAP. • Section 5(1A) should expressly apply to licensed uses of sound recording and audio visual works and it should be made subject to contract terms to avoid interference with contractual arrangements. • Regarding section 8 – comments made to CAB advertised clauses in October 2018 have reference. • The rights in a sound recording should not be affected by the incorporation of a sound recording into an audiovisual work. Remove the exclusion of soundtracks associated with audiovisual fixations (IFPI). 	<p>Protection legislation and aligned to the WPPT.</p> <ul style="list-style-type: none"> • Abuses in contractual arrangements. Department not prescribing the contract but minimum contractual standards. Challenges with existing contracts. E.g not signed by all the contracting parties. • Exclusive rights are not reduced to remuneration rights. They are interrelated. • Section 5(1A) applies to commercial use and reference to only licensed will cause abuse to this requirement. There will not be interference with contractual arrangements. • The rights are provided for separately and they differ. The sound recording is about the fixation of sound. The principal Act excludes soundtracks, which are audiovisual works. They could be addressed in the agreement between parties when such an arrangement is made.
--	--	--	--

2	Recording Industry of South Africa (RISA)	<ul style="list-style-type: none"> • Propose the deletion of the definition of “fixation” or clearly defined using WPPT definition as it is used in number of sections. • Proposed definition of “producer” should be amended to establish more clarity. • Section 3A(3)(a) interferes with private contractual arrangements and this introduces undue restrictions on performer’s rights and rights holders. • With regard to section 3A(3)(b), there is no existence of a fault in the market which would demand over-regularisation of contractual arrangements. • Section 5(1)(b) reduces the exclusive right of distribution to a mere remuneration right which is incompatible with WPPT and BTAP. • Section 5(1A) implies that all performer’s rights under draft section 3 and 5(a) are downgraded from exclusive to mere remuneration rights and could be misinterpreted to convey a right of use to users provided they comply with section 5(1A). This is incompatible with WCT, TRIPS Agreement and Berne Convention. • Welcomes criminalisation of non-reporting by user but current drafting of 	<ul style="list-style-type: none"> • The comments and inputs have been noted. As defined in IPLAA. Fixed it in line with the previous submissions. Audio visual and sound recording distinguished. • Person defined as natural and legal entity. • No interference with contractual arrangements, only minimum contract requirements will be provided. • There is fault in the market. Outcry with performers both in film and music industries. Performers dying as paupers. Media highlighted and continue to highlight the plight of musicians and actors. • Exclusive rights are not reduced to remuneration rights. They are interrelated. • Noted
---	---	--	---

		<p>section 5(1)(1A) and (1B) presents risk of introducing a statutory licensing scheme which would promote unauthorised usage. Clause needs to be clarified. Wording suggested.</p> <ul style="list-style-type: none"> • Section 8D provisions concerning as they open door for over regulation and Governmental overreach into private contractual arrangements. • Ministerial powers contemplated in section 8D are intrusive. This section should be applicable in instances where clear market failures have been identified. • TPMs: These are not meaningful digital enforcement mechanisms. They allow too broad an exception (RISA). 	<ul style="list-style-type: none"> • Regulations are necessary to give effect to the legislation. The Minister will not prescribe them arbitrarily and without proper consultation. • Only on material terms of the contract. The market space has been abused. We are not interfering with contracts. The Department is spelling out only minimum contract requirements not the content of the Bill. • TPMs are aligned to the copyright legislation. The intention is not to have the TPMs too strong as they affect access. They will be implemented and reviewed later on.
3	MultiChoice and MNET	<ul style="list-style-type: none"> • Did not comment on all clauses advertised. • Concerns over the registration and reporting obligations contained in the proposed Section 5(1)(A), 5(5) which deals with broadcaster's obligations to make payments to a performer where payment has already been made to the producer and 8(D) confers powers on the Minister to regulate contractual relationships. • Copyright Bill also confers protection rights on performers and objects to this 	<ul style="list-style-type: none"> • The comments and inputs have been noted. • Only on material terms of the contract. The market space has been abused. The Department is not interfering with contracts. Spelling out only minimum contract requirements not the content of the contract. Regulations will be consulted upon on the Bill.

		<p>overlap. Recommend deletion in the CAB.</p> <ul style="list-style-type: none"> • Section 5(5)-serves to avoid the double payment of royalties to performers whose performances form part of a sound recording. • There is a duplication under Section 9A of the Copyright Act and 5(1)(b) which allows a performer to also claim a royalty in terms of PPA. • The objective of 5(5) is to prevent the performer claiming multiple royalties under different statutory instruments for the same act. The performer should be able to claim the same royalty from the broadcaster as well-proposed wording given. • Owner of Copyright in an audiovisual fixation is not clear. • Reference is made to audiovisual fixations in the proposed 5(5) there are no royalties payable to a performer whose performance is fixed in an audiovisual work in terms of S9A. • . • Section 8D-Con court-where the legislature grants broad discretionary powers, it is required to delineate how those powers are to be exercised. • The new powers given to the Minister eviscerate the parties' freedom to contract. Will not survive a constitutional attack. 	<ul style="list-style-type: none"> • This is aligned to the principal legislation. There is alignment. • Noted and agreed. • There is no duplication. • Noted and agreed. • Copyright owner can be producer or broadcaster. • Reference to be made to section 8A. • Regulations are necessary to give effect to the legislation. The Minister will not prescribe them arbitrarily and without proper consultation. • The wording on contracts to be adjusted. Minister will prescribe minimum requirements of contract. He will not prescribe the contract content just a guide on
--	--	---	--

		<ul style="list-style-type: none"> • Section 5(1A)-registration of every reproduction and the offence related is draconian. • Provisions are unduly burdensome and onerous for broadcasters of audiovisual fixations and firms that exploit audiovisual fixations. • Each month multichoice broadcasts approximately 122400 hours of audiovisual fixation contains fixations by numerous performers. • In addition to broadcasts Multichoice makes available audiovisual fixations of performances on its on demand platforms –Showmax and DSTV Now-on average 30 million video play events. • Multichoice often does not know the content on the channels that it broadcasts. (content of the SABC channels it broadcasts is determined by the SABC). • Channel producer will also have to register fixated performances. • MultiChoice will not be able to register every broadcast etc. • Clause envisages registration to occur in advance which is a problem. • Unclear what is meant by report. • Unclear why failing to submit a report must be a criminal offence. 	<p>what the contract could and should include broadly for more protection to performers.</p> <ul style="list-style-type: none"> • Lack of data capturing affects royalties. In light of actors dying paupers, rebroadcasts, repeats, this is necessary. Systems should be put in place to record usage. Broadcasters do not know how much is being played. This is a governance issue-recording is important. There should be measurement of usage. • Regulations can clarify further on the report.
--	--	--	--

		<ul style="list-style-type: none"> • Minimum fines are draconian. • Clause will not pass constitutional muster. 	<ul style="list-style-type: none"> • The report is critical for the payment of performers. It affects their economic survival and many have died poor. That is why failing to submit the report should be made a criminal offense in the South African context given the significant impact it has on performers. There is a need to balance profit maximisation and fair business practice when it comes to remuneration of performers. The report is very important.
4	Personal Managers Association (PMA)	<ul style="list-style-type: none"> • Did not comment on the advertised clauses. • It might be more beneficial for performers if the PPAB distinguish between Royalties for Musicians, Royalties for Audio-visual performers, Equitable Remuneration for Musicians and Equitable Remuneration for Audio-visual performers. There are big differences between the Music Industry rights and the Audio- Visual Performers rights and with both industries submitting, it would be detrimental to both industries if these clarifications are not made clear in the PPAB. 	<ul style="list-style-type: none"> • The comments and inputs have been noted.
5	SA Institute of Intellectual Property (SAIPL)	<ul style="list-style-type: none"> • Clause 3 – Section 3A(3)(a) and (b)- it is not desirable for compulsory and standard contractual terms to be prescribed by government, unless perhaps in very specific circumstances, where a clear market failure has been 	<ul style="list-style-type: none"> • Only minimum standard contracts are prescribed. Not the entire contract and its content. There is market failure. Outcry with musicians both in film and music. Performers dying as paupers.

		<p>identified and only after a commissioned enquiry was established and it was determined with certainty that the proposed, prescribed contractual terms would address that market failure.</p> <ul style="list-style-type: none"> • It appears that the intention behind the proposed Section 3A(3)(a) and (b) is focused on increasing the bargaining power of performers, who are generally perceived to have been ‘on the wrong end’ of one-sided and exploitative agreements in the past. • It is important to allow for flexibility and to respect the Constitutional rights of freedom to trade (and contract). • Section 3A(1) seeks to transfer certain rights which are confirmed as exclusive rights of a performer (granted in terms of Section 3(4)(c)-(h), and referenced in the WIPO Performances and Phonograms Treaty [WPPT]), whose performances are recorded on an audiovisual work or sound recording, to the producer of those recordings, who may not be the copyright owner of the recordings. The exclusive rights referred to are the rights of reproduction, making available, commercial rental, broadcasting, communication to the public and distribution. • Careful consideration is required to ensure that exclusive rights are not enacted for the benefit of performers and producers in terms of the 	<p>Media highlighted and continue to highlight the plight of musicians and actors.</p> <ul style="list-style-type: none"> • The rights were already in the principal legislation, amendments just adds. • Noted. • There is alignment between the Copyright and Performer’s Protection. The other is primary and the other is secondary in the
--	--	---	---

		<p>Performers' Protection Act, which would conflict with existing statutory rights of copyright owners of sound recordings and audiovisual works.</p> <ul style="list-style-type: none"> • Although many countries have acceded to and ratified WPPT around the world, it is uncertain, without the benefit of further and thorough research, how the provisions of WPPT have been domesticated into national laws of those member countries (it is likely that many member countries are yet to do so). • The construction of Section 3B(1) in the Bill therefor suggests that it was recognized that a conflict of rights would arise if producers were awarded the same exclusive commercialization rights in audiovisual fixations that are already conferred on copyright owners of sound recordings. • Concerns over reversion clause for sound recordings. • Section 5(1)(1A) and (1B))- The criminalization of the non-reporting of commercial usages of 'protected performances' (in terms of the Performers Protection Act), and the copyright protected sound recordings and audiovisual works on which those performances have been fixated, is to be welcomed. • provision should only apply to 'licensed parties' or 'licensed users' or 'licensed persons' – not 'A person...' as presently stated in the Bill. 	<p>context of IP. It is not the creation of another revenue stream. It is cross-referencing. Section 5: performers. Copyright: owners.</p> <ul style="list-style-type: none"> • The Treaties have protections and rights for performers that will benefit them economically. the dti has done some analysis of the Treaties in 2014 and has consulted on the Treaties with WIPO and others. Performers stand to benefit from the ratification of the Treaties. Given the historical deprivation for performers, this is long overdue. • Reversion clause not unique to SA. • Noted. • To apply for commercial usage. Limiting it to licensed will subject it to abuse.
--	--	---	---

		<ul style="list-style-type: none"> • In the absence of an existing license or authorization to make commercial use of a copyright protected work (which may contain a fixed performance of a performer that is protected in terms of the Performers Protection Act), such as a sound recording or audiovisual work, such use would amount to copyright infringement. • On the present construction of Section 5(1)(1A), any person may make unauthorized commercial use of a copyright protected sound recording or audiovisual work, as long as they follow a certain procedure of reporting. • This opens the door for abuse of process and many users would be tempted to not obtain licenses prior to making use of protected works and performances. • A 'statutory licensing scheme' may invite users to infringe copyright and the rights of performers in their 'protected performances' and this potential abuse of process should be avoided by clarifying that the Section is only applicable to users who have already obtained a license to make commercial usage of the relevant copyright protected work and 'protected performances'. • Drafting recommended. 	<ul style="list-style-type: none"> • The licensing is required. Compliance is required. It does not encourage abuse. • There is a possibility on non-compliance but the law must provide for this. • Licensing is important and should be adhered to. It will not open the section to abuse. Non-compliance does not mean it should not be provided for. • The licensing is required. Compliance is required. It does not encourage abuse.
--	--	--	--

		<ul style="list-style-type: none"> • Section 8D(3) and (4)- any undue governmental interference with private business dealings and contractual arrangements, especially industry arrangements which are considered to be standardised globally within a particular industry, such as film or music, should be avoided at all costs. 	<ul style="list-style-type: none"> • There will not be undue government interference. Minimum contract requirements will be provided for. Regulations will be consulted upon. • Minister will prescribe regulations in consultation with other stakeholders. Propose to remove compulsory standard contractual to minimum contract requirements. Since there is non-compliance does not mean it should not be done.
6	South African Guild of Actors (SAGA)	<ul style="list-style-type: none"> • Did not comment on all the advertised clauses. • Supports collective management. • A mandatory contractual provision does not imply a 'standard or fixed contract'. The contractual provisions envisaged as being mandatory should be designed to ensure basic minimum protections. Examples of this is the non-waiver of specific rights that performers possess. • Clause 3 at Sections 3A (3)(a) and (b): The legislation should go further to explain what the standard and compulsory contractual terms should be. • agrees that reporting must not be an onerous process there must still be consequences for those that negligently fail to register an act in terms of section 5(1). As much as 	<ul style="list-style-type: none"> • The comments and inputs have been noted. • The standard and compulsory contract wording to be amended to minimum contract requirements.

		<p>knowingly failing to register an act is an offence there must be some corresponding consequence for negligence in this regard.</p> <ul style="list-style-type: none"> • It is also necessary for the PPAB to introduce penalties for parties who negligently fail to report acts contemplated in section 8 for commercial purposes. 	
7	Amanda Lane	<ul style="list-style-type: none"> • Did not comment on the advertised clauses. • Supports the changes on the Bill. 	<ul style="list-style-type: none"> • The comments and inputs have been noted.
	FIAPF AND IPO	<ul style="list-style-type: none"> • The transfer disposition should not limit the force and effect of any agreements to 25 years. Urge the Committee to reconsider this matter in favor of facilitating and encouraging industry solutions through collective bargaining. Wording suggested. • The term “equitable remuneration” could cause confusion as it is normally used iro “remuneration payable for the exploitation of mere remuneration rights” : “fair equitable pre-purchase fee or residual remuneration” The Bill should allow the pre-purchase of rights as pre-purchase can be an attractively flexible option for performers (IPO & FIAPF, IFPI). 	<ul style="list-style-type: none"> • Reversion right is not unknown, not unique to South Africa and it is aligned to the Copyright Act. The 25 years is sufficient for recouping investment. Collecting bargaining does not fit the context of the Bill. It’s a labour issue. • The Bill advocates for the provision and protection of rights of performers. Performers must receive fair remuneration and receive royalties for their performances. If parties agree to the pre purchase of rights and the performer is aware of his/her rights, it will be subject to an agreement. Equitable remuneration is the term used in the Treaties-WPPT. The agreement between the parties can stipulate other remuneration.

		<ul style="list-style-type: none"> • The 25 year provision is inimical to the sound commercialization of audio visual content, where as a rule a producer has a multitude of contracts with a great number of performers and other talent. • Should remove the very problematic duplicative and conflicting language between Sections 3 (exclusive rights) and 5 (right to prohibit). Wording suggested. • Remove or clarify who would control moral rights after a performer's death. • The Bill should specify that parties to the contract that led to the transfer of the rights (performer and producer) shall be free to extend its terms by mutual consent, (FIAPF). 	<ul style="list-style-type: none"> • Reversion is for music only (sound recordings) not audiovisual works. • No duplication. Section 3 deals with the protection of performers' rights in respect of performances whereas Section 5 deals with restrictions on the use of performances without the consent of the performer. • The performer's heirs. Dealt with in law of succession. • No need to put in legislation, it is given. Parties to agree.
--	--	---	--