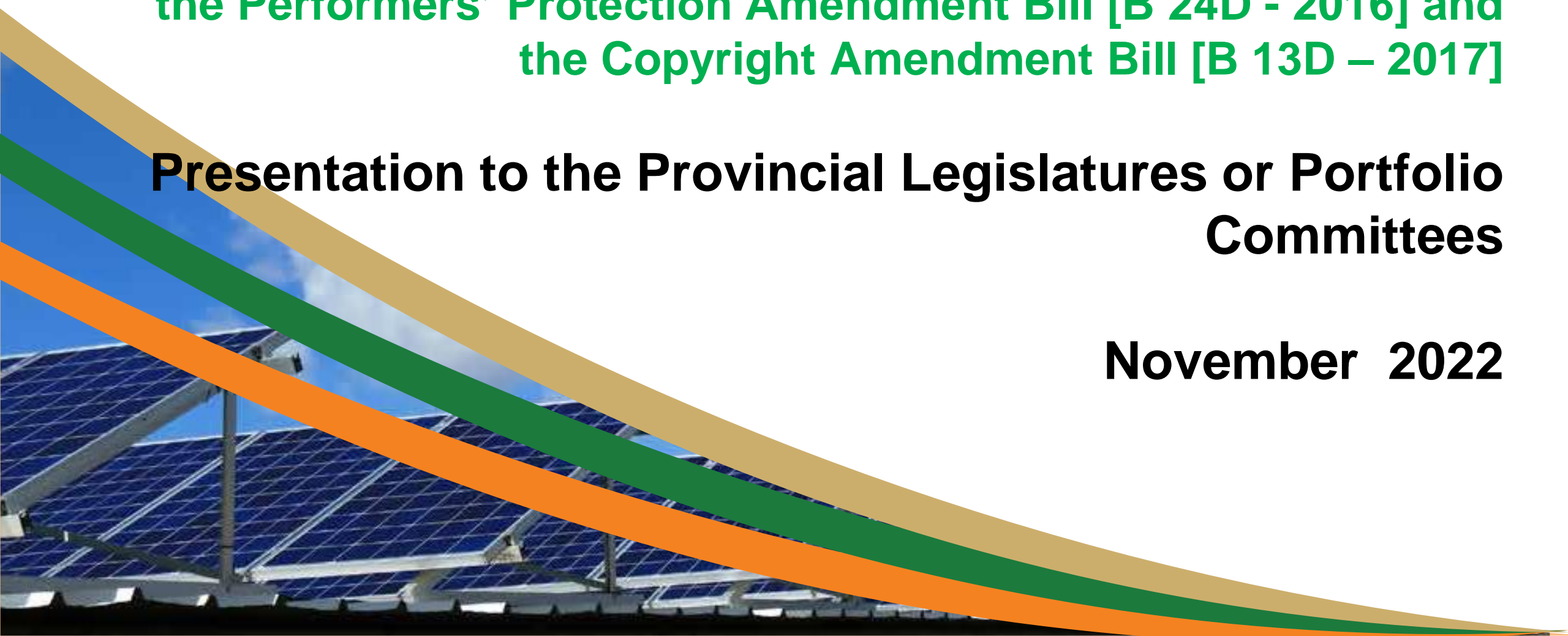


Briefing by Department of Trade, Industry and Competition on the Performers' Protection Amendment Bill [B 24D - 2016] and the Copyright Amendment Bill [B 13D – 2017]

Presentation to the Provincial Legislatures or Portfolio Committees

November 2022



the dti

Department:
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

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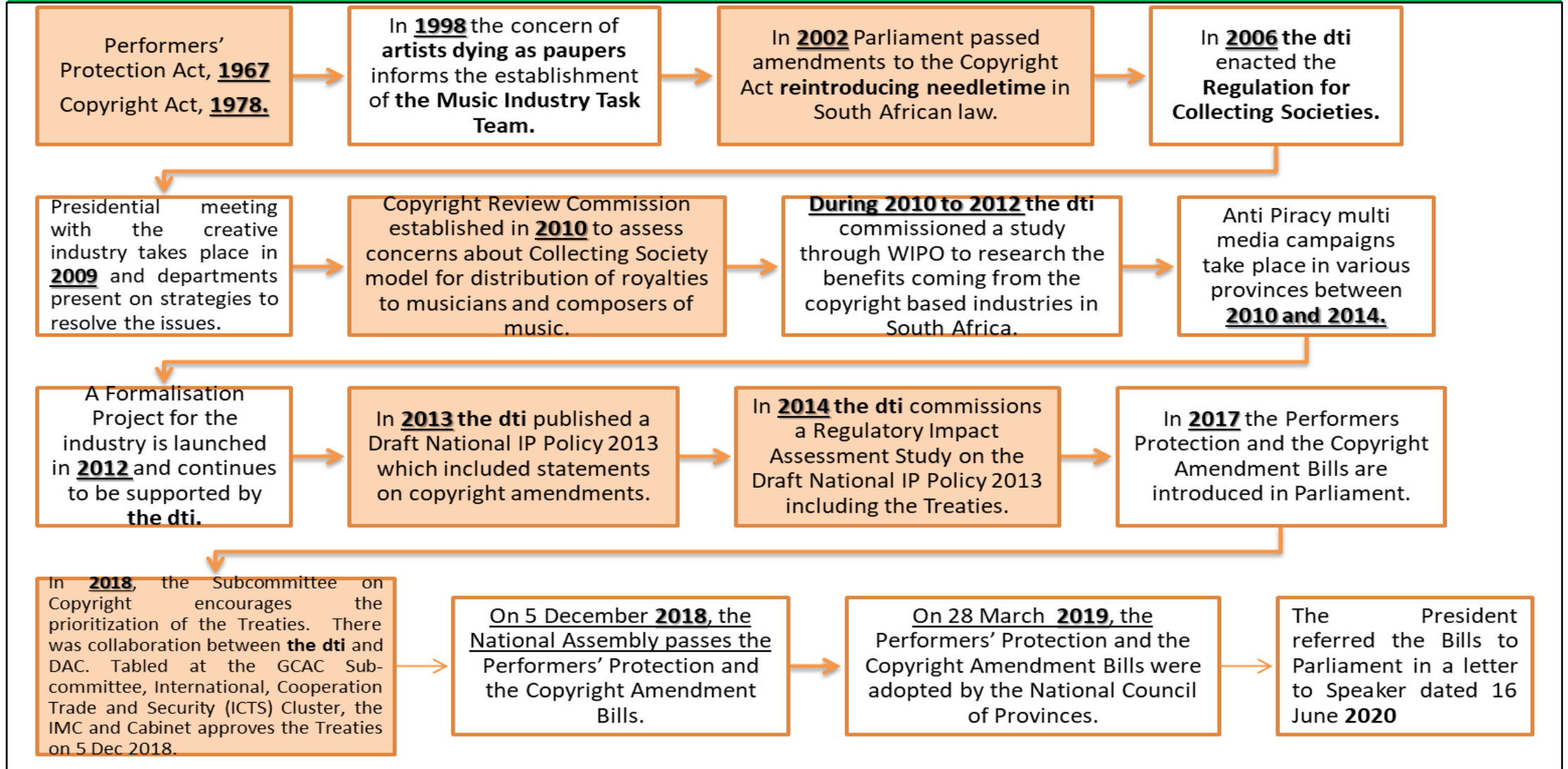
Presentation Outline

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Purpose

To brief the Provincial Legislature on the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB). The presentation will address all the clauses of the Bills beyond the President's reservations, as section 76 Bills.

Background



Background: What informed the Bills (Historical Background)

- Some of the amendments were informed by the Copyright Review Commission (CRC) recommendations, the CRC was chaired by the retired Judge Ian Farlam.
- The amendments made in the Bill in terms of collective management, royalties, the Tribunal etc. are a direct result of the following Copyright Review Commission recommendations:
- South Africa should amend its Copyright Act by adopting inter alia the right to communicate literary and musical works to the public and the right to make available copies of sound recordings.
- The copyright law should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant Collecting Society.
- Legislation be amended to allow for one Collecting Society per set of rights with regard to all rights governed by the Copyright Act of 1978 (performance, needle time and mechanical rights).
- The law should be amended to allow for all music-rights Collecting Societies to fall within the ambit of the regulations issued under the Act.

Background: What informed the Bills

CRC Recommendations continued...

- The legislation to be amended as follows: retention of music usage information to be compulsory for essential music users.
- The Copyright Act must be amended to allow rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied.
- The Acts should be amended to provide that needle time be divided equally between the owner(s) of the copyright in the sound recordings and the owner(s) of the neighbouring right to needle time.
- The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence.
- The definitions of local music contained in the Electronic Communications Act should be enlarged.
- The Copyright Act should be amended to adopt the right 'to communicate the work to the public' and the 'making available' right as two new exclusive rights of copyright owners.

Background: What informed the Bills

- Several studies were conducted prior to the Bills being introduced into Parliament as early as 2009.
- In 2014, **the dtic** commissioned a Regulatory Impact Assessment Study on the Draft National Intellectual Property (IP) Policy 2013, it included the Treaties, fair use, Treaties, exceptions, etc.
- The WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty informed some provisions in the Bills.
 - In some respects **the dtic** considered the Treaties, in line with the Constitution, developmental consideration in the best interest of the creators and other rights holders.
- The Socio Economic Impact Assessment report was conducted for the Bill by DPME.

Background

- On 5 December 2018 the National Assembly adopted the Bills. On 28 March 2019, the NCOP adopted the Bills and they were referred to the President.
- On 16 June 2020, a letter was received from the President of the Republic to the Speaker of Parliament to refer the Copyright Amendment Bill, and the Performers' Protection Amendment Bill, 2016 to the National Assembly for consideration of the President's reservations on the basis of their constitutionality.
- Section 79(1) of the Constitution of the Republic of South Africa requires that the President must either assent to and sign a Bill, or if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- The initial briefing by **the dtic** was in August 2020, it included a presentation on the Treaties implications. Part of it was delivered by the Minister of Trade, Industry and Competition.

Background

- On 1 June 2021, the National Assembly adopted the Committee's report in which the Committee outlined how it intended to correct any procedural defect (*Minutes of Proceedings, National Assembly, 1 June 2021*).
- On 4 June 2021, the Committee placed adverts in national and regional newspapers inviting stakeholders and interested parties to submit written submissions with reference to the alignment of the Performers' Protection Amendment Bill [B24B-2016] with the obligations set out in international treaties. The Committee received 91 submissions in this regard.
- Furthermore, in preparation for the public hearings, the Committee held a workshop on 3 and 4 August 2021 to provide the new members of the Portfolio Committee on Trade and Industry with a conceptual framework of copyright and related rights.
- On 11 and 12 August 2021, the Committee held public hearings to consider the submissions received in relation to the Committee's call in respect of the President's reservations.
- On 11 and 12 November 2021, the Committee received a response with regard to the oral and written submissions received in relation to the President's reservations from the Department and Parliament's Constitutional and Legal Services Office respectively.
- On 19 November 2021, the Committee adopted its report seeking permission from the National Assembly in terms of Assembly Rule 286(4)(c) for it to amend other provisions of the Copyright Act. As certain clauses of the Performers' Protection Amendment Bill [B24B-2016], are subject to the promulgation of the Copyright Amendment Bill [B13-2017], the Committee agreed that it would consider both Bills simultaneously.
- On 1 December 2021, the National Assembly granted the Committee permission to inquire into amending other provisions of the Copyright Act (*Minutes of Proceedings, National Assembly, 1 December 2021*).
- On 4 December 2021, the Committee placed adverts in national and regional newspapers inviting stakeholders and interested parties to submit written submissions on the additional proposed provisions to the Copyright Act. The Committee received 53 submissions in this regard.
- On 6 May 2022, the Committee received a response with regard to these written submissions received from the Department and Parliament's Constitutional and Legal Services Office respectively.
- The Committee continued with its deliberations on 11, 17, 18 and 25 May 2022 considering the inputs and responses from the Department and Parliament's Constitutional and Legal Services Office to the additional clauses advertised.
- On 8 June 2022, the Committee formally considered the amendments to the Performers' Protection Amendment Bill and the Copyright Amendment Bill on 10 June 2022. The reports were adopted.

Background

- The President raised reservation that the Copyright Amendment Bill may encounter constitutional challenges and he cited specific sections of the Bill: Sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C(3), 19C(4), 19C(5)(b) and 19C(9) may constitute deprivation of property; Sections 12A and 12D may further violate the right to freedom of trade, occupation and profession.
- There were 2 calls for public comments. The recent provisions on the Remitted Bills were advertised for public comment from 3 December 2021 to 21 January 2022 and the deadline was extended to 28 January 2022 (2nd call for comments). This was a follow up process from the process undertaken in 4 June to 9 July 2021 (1st call for comments) wherein parliament advertised the clauses (i.e sections 12A, 12B, 12C, 12D, 19B, 19C and compliance with international treaty obligations) and held public hearings in August 2021 (11 and 12 August), to address the concerns of the President.
- In terms of section 79(1), the Committee was required to limit the consideration of the inputs to clauses affected by the reservations only.
- The public comments led to further proposed amendments, recommended by the public, in an effort to address the President's reservation. The amendments were informed by the previous public submissions process of June-August 2021.

Background

- Some of the stakeholders who made submissions did not support the amendments. Some argued that the amendments went beyond the President's reservations. In such instances, it was not the case but because of the international treaty obligations.
- The amendments advertised respond to the reservations of the President. The recent advertised clauses were informed by the previous public submissions.
- The issues raised by the public were substantive and that necessitated they be advertised and put forward for comment.
- The majority of the feedback or responses from the public pointed to the unintended consequences to some of the proposed changes.
- The National Assembly adopted the Bills on 1 September 2022 and referred them to the NCOP for concurrence.
- Going forward, the Bills are going to be addressed in entirety in the National Council of Provinces (NCOP) because the Bills are retagged as section 76 Bills. All clauses will be presented, not only those related to the President's reservations.

Objectives of the Copyright Amendment Bill (CAB)

- To develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa.
- To introduce provisions, which deal with matters pertaining to collective management. Collecting societies will only be allowed to collect for their registered members, and all collecting societies have to be accredited with the Companies and Intellectual Property Commission (“CIPC”).
- To deal with the protection of works and rights of authors in the digital environment.
- The Bill provides for standard contractual terms to empower authors when negotiating contracts. This will close the loophole that has resulted in unfair contractual terms that has led to creators signing away their rights.

Objectives of the CAB

- To introduce a Resale Royalty Right. This Resale Royalty Right means that an artist could be entitled to a royalty when their original work is resold commercially.
- To introduce a fair use system for the reproduction of copyright material for limited uses or purposes without obtaining permission and without paying a fee or a royalty. Furthermore, this provision stipulates the factors that need to be considered in determining whether the copyright work is used fairly.
- To provide for exceptions and limitations in education, libraries, archives and museums, computer programs; To provide for the availability of accessible format copies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind and includes other disabilities such as learning disabilities, dyslexia etc.
- To provide for the sharing of royalties in respect of literary, musical, artistic and audiovisual works.
- It provides for the recordal and reporting of certain acts.
- To strengthen the Copyright Tribunal so that it can deal with all Copyright and related rights matters.
- To address the rights of authors in commissioned works that includes to facilitate commercial exploitation by any person so licensed.
- To introduce Technological Protection Measures (TPMs) to reduce incidents of copyright infringement.

Treaties Informing the Bills

- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), 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). South Africa is not a member.
- **The Beijing Treaty on Audio Visual Performances (BTAP)** deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO. South Africa is not a member.
- **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs. South Africa is not a member.
- **Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled:** to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled. South Africa is not a member.
- **Berne Convention** deals with the protection of literary and artistic works. South Africa is a member.

Reservations of the President

- The President raised the following reservations:
 - **Incorrect Tagging**
 - The Bills were classified as section 75 Bills (including the Performers' Protection Amendment Bill). The President was of the view that the Bills concerned are incorrectly tagged and are in fact Section 76 Bills, given that they affect cultural matters and trade—namely trade in copyright- in which provinces exercise competence.
 - The Portfolio Committee urged the Joint Tagging Mechanism to err on the side of caution and classify both Bills as section 76.
 - The view of the Department was that both Bills are regulating rights and at most are regulating a profession. They are regulatory or administrative in nature.
 - **Retrospective and Arbitrary Deprivations of Property**
 - The President also had reservations that several sections of the Copyright Amendment Bill may constitute retrospective and arbitrary deprivations of property in that copyright owners will be entitled to a lesser share of the fruits of their property than was previously the case.
 - He raised reservations with Section 6A(7), 7A(7) and 8A(5) of the Copyright Amendment Bill as constituting retrospective and arbitrary deprivations of property. The provisions are seen to reach far beyond the authors it seeks to protect. They deprive copyright owners of property without sufficient reason and will result in substantial arbitrary deprivation of property. They relate to the retrospective application of royalties. The clauses were removed from the Bill.
 - **Impermissible Delegation of Legislative Power to the Minister**
 - The President in his letter stated that sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) confer substantial discretionary powers on the Minister and this may well constitute an impermissible delegation of legislative authority and as such would be constitutionally invalid if the Bill is assented to in its current form.
 - These provisions empower the Minister to conduct an impact assessment and develop regulations that will be tabled in the National Assembly. These clauses were included to ensure that the royalties are dispensed responsibly after further study and not arbitrarily. The clauses were removed from the Bill.

Reservations of the President

- **Fair use**

- Following public hearings in August 2017, substantial amendments were effected to various sections of the Bill including section 12A.
- The relevant provisions as amended were not put out for public comment before the final Bill was published.
- The changes to the section were material to the scheme as a whole and failure to consult could render the provisions unconstitutional.

- **The Copyright Exceptions**

- The President raised a reservation that the Copyright Amendment Bill introduces Copyright exceptions in the new sections 12A to 12D, 19B and 19C. These sections may encounter constitutional challenges and he cited specific sections of the Bill: Sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C, 19C(4), 19C(5)(b) and 19C(9) may constitute deprivation of property; Sections 12A and 12D may further violate the right to freedom of trade, occupation and profession. Other reasons cited by the President include other copyright exceptions listed in his reservation provided for in the Copyright Amendment Bill may constitute arbitrary deprivation of property and may violate the right to freedom of trade, occupation and profession, and may be in conflict with the World Intellectual Property Organisation (WIPO) Treaty and the WIPO Performance and Phonograms Treaty.

- **International Treaty Implications**

- The President indicated he has reservations about whether the Bills comply with the international Treaties.
- The President in his letter was not specific with the challenges he had reservations with regarding the Treaties. He referred the Bills back to Parliament in order that Parliament may consider the Bills against South Africa's international law obligations.

Proposed Amendments

	What the Bill provides
Definitions	<p>Clause 1 proposes amendments to certain definitions and the insertion of definitions of ‘accessible format copy’, ‘art market professional’, ‘authorized entity’, ‘broadcast’, ‘Collecting Society’, ‘commercial’, ‘Companies Act’, ‘copyright management information’, ‘open licence’, ‘orphan work’, ‘performer’, ‘person with a disability’, ‘technologically protected work’, ‘technological protection measure’, ‘technological protection measure circumvention device or service’, ‘Tribunal’, ‘visual artistic work’.</p> <ul style="list-style-type: none">• The accessible format copy definition was amended adding the words ‘including to’, it was not part of the advertised clauses.• Includes the definition of authorized entity.• The definition of broadcast in the copyright to be aligned to performers’ protection amendment Bill and to include ‘wire’. This definition was only in the performers’ protection amendment Bill previously. It is emphasized because of the discussion to exclude ‘wire’ because of the treaty implication.• The technological protection measures definition to include ‘product’,• The technological protection measure circumvention device definition to include ‘ or service’.
Scope of Copyright Protection	<p>Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.</p> <p>The clause provides that copyright protection subsists in expressions and not in ideas, procedures, methods of operation or mathematical concepts.</p> <p>In the case of computer programs, in interface specifications.</p> <p>The clause provides no protection to an expression of official texts of legislation or speeches of a political nature.</p>

Proposed Amendments

	What the Bill provides
State or Organization (international or local) Intellectual Property (made by or under the direction or control)	Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for ownership of copyright made under the direction or control by the State, local or international organisation.
Communication to the public of a literary or musical work, making available and distribution of an original or a copy of a work	Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

Proposed Amendments

	What the Bill provides
Share in royalties regarding literary or musical works	<p>Clause 5 of the Bill proposes an insertion of a new section 6A specifically providing for royalty sharing after assignment of copyright in a literary or musical work or where the author of a literary or musical work authorised another to do any of the acts contemplated in section 6. The share of royalties to be determined by a written agreement in a prescribed manner.</p> <p>The royalty provisions are similar in the Bill (6A, 7A and 8A). They address a historical policy gap of royalty payments, where authors or creators or performers have historically had not had a legislative framework to ensure protection, fair and equitable payment for their works. Lack of royalty payments and abusive contracts have impacted the creative industry negatively.</p>
Distribution of an artistic work, Communication to the public and making available to the public	<p>Clause 6 of the Bill proposes an amendment to section 7 by providing for the distribution of an artistic work to the public, communication to the public of an artistic work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such a work from a place and at a time individually chosen by them, whether interactively or non-interactively.</p>

Proposed Amendments

	What the Bill provides
Sharing of royalties regarding a visual artistic work	Clause 7 of the Bill inserts a new section 7A specifically providing for royalty sharing after assignment of copyright in an artistic work or where the author of an artistic work authorised another to do any of the acts contemplated in section 7. The share of royalties to be determined by a written agreement in a prescribed manner.
Resale Royalty Right: section 7B Section 7C-7E	<p>Clause 7 also inserts section 7B that provides that the author of visual artistic work in which copyright subsists or their heir must be paid royalties on the commercial resale within the art market of that work.</p> <p>Royalties in respect of visual artistic works shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts and culture.</p> <p>The seller and the art market professional are jointly and severally liable to pay the royalties to the author. It also provides in section 7C to 7E for authors of visual artistic works to enjoy the inalienable resale royalty right on the commercial resale of their original work of art, subsequent to the first assignment by the author of such work of art. This includes the resale, duration, assignment or waiver of the resale royalty right.</p> <p>The resale royalty rights will only apply after the commencement date of the Copyright Amendment Act.</p>

Proposed Amendments

	What the Bill provides
<p>Distribution, commercial renting, communication to the public and making available of an audiovisual work</p>	<p>Clause 8 of the Bill proposes an amendment to section 8 of the Act by providing for the distribution of an audiovisual work to the public, authorising commercial rental of the work to the public, communication to the public of an audiovisual work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.</p>

Proposed Amendments

	What the Bill provides
Sharing of royalties between performers and copyright owners of audiovisual works	Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing between performers and the copyright owner of audiovisual works for any of the acts contemplated in section 8. The share of royalties to be determined by a written agreement in a prescribed manner. It requires the recording and reporting of any act contemplated in section 8 and makes the failure to do so, an offence.

Proposed Amendments

	What the Bill provides
Distribution, commercial rental, communication to the public and making available of a Sound Recording	Clause 10 of the Bill proposes an amendment to section 9 of the Act providing for the distribution of a sound recording to the public, authorising commercial rental of the work to the public, communication to the public of such sound recording by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

Proposed Amendments

	What the Bill provides
Royalties regarding sound recordings	Clause 11 substitutes section 9A that provides for the royalty that is equally shared between the owner of the copyright, collecting society or indigenous community subject to the agreement to the contrary between the owner and the performer.

Proposed Amendments

Clause	What the Bill provides
Retrospective application of royalties	The subsections addressing the retrospective royalties and the powers of the Minister to issue the regulations have been removed from the Bill.
Clause 5, clause 7 and clause 9-Share in royalties regarding literary and musical works, visual artistic works and audiovisual works.	Deletion of the retrospective clauses of royalties (section 6A (7) (a), section 7A (7)(a), 8A(5)(a) and delegations to Minister clauses related to royalties (section 6A(7)(b), 7A(7)(b), and 8A(5)(b). Subsections were deleted from the Bill as agreed by the Portfolio Committee.

Proposed Amendments

	What the Bill provides
Recording and Reporting for royalty determination	<p>Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d), (e) or (f) and makes the failure to do so, an offence. It also makes certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.</p> <p>The offence provides that a person convicted of an offence shall be liable for a fine or imprisonment for a period not exceeding five years or both such fine and imprisonment.</p> <p>The annual turnover of a convicted person that is not a natural person at the time assessed, is the total income of that person during the financial year during which the offence or the majority of offenses, to which this Act applies.</p>

Proposed Amendments

What the Bill provides

Clauses on
Gender neutral drafting

Various sections were amended to address the gender neutral concern. The provisions ranged beyond the President's reservations and included the entire Act. Wherein there was 'his or her', it was changed to 'them, their, ' throughout the CAB. These amendments were recommended in the Committee, they did not come from the public.

Some of the clauses include: Clause 11 (royalties regarding sound recordings), clause 21 (computer programs), clause 23 (assignment), clause 24 (commissioned works), clause 25 (assignment), clause 31 (exceptions in respect of technological protection measures).

Clause 12: Amending sections 11A (published editions) and Clause 13: amendment to 11B by insertion of (computer programs)-both-making communicating the work to the public by wire or wireless means and making the work available to the public by wire or wireless means.

Section 11A provides for the making the work available by wire or wireless means and communicating the work to the public by wire or wireless means to the public for the published editions. This include the distribution of such work.

Section 11B provides for the making available the work to the public and communicating the work by wire or wireless means for computer programs. This clause include the distribution of the work.

Proposed Amendments

What the Bill provides

- Clause 15:
General exceptions from copyright protection
Section 12A
Section 12A(c)
- Clause 15 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection for all works, providing for fair use, which is a model of use of work or the performance and includes factors to consider to ensure the usage of the works is fair (the nature of the work, the amount and substantiality of the part of the work, the purpose and character of the use, etc). The clause includes examples or purposes of uses (research, scholarship, reporting current events, criticism or review, etc) .
 - Fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission. The fair use is an exception to the exclusive rights of a copyright owner. Fair use exceptions include but are not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder.
 - Introduction of a hybrid fair use provisions is a policy position of **the dtic** and it is addressing socio economic challenges of a developmental state of SA. The Portfolio Committee on Trade and Industry agreed that the Bill should use a hybrid approach to the fair use/ fair dealing, which must be anchored in fair use. A hybrid model is the mixing of fair dealing and fair use. Mixing fair use with pre-existing fair dealing provisions creates a hybrid model.
 - Fair use is not foreign to SA, other jurisdictions have introduced it. The provisions of fair use have safeguards. Countries that apply fair use tend to be more innovative and with a growing creative industry.
 - There are several countries in the world with open broad exceptions and have not been found to be in contravention of international law. Other countries have adapted fair use such as the US, Israel, Sri Lanka.
 - The current system in the Copyright Act of 1978 is fair dealing, comprising of a closed list of exceptions. The Act does not define it.
 - For subsection 12A(c), in respect of the name of the author for 12A (a) and (b); The Bill provides that the name of the author is to be mentioned if it appears on the work.
 - “and” was changed to “as well as” and “if it appears on the work” was added on the subsection.

Proposed Amendments

	What the Bill provides
<p>Clause 15</p> <p>Section 12B -Specific exceptions from copyright protection applicable to all works</p> <p>Section 12 B(1)(a)(i) provides for the quotations</p> <p>Section 12B(1)(b)</p>	<ul style="list-style-type: none">• The CAB seeks a balance that ensures reasonable access to users to copyright protected works to ensure access to information, research, education and resources for persons with disabilities and other exceptions and to ensure that creators (authors, copyright owners) obtain a fair compensation for their creative endeavours. The CAB aims for a developmental approach for the author, copyright owner and user. It addresses issues of public interest, access to information and knowledge and protection in line with international developments.• The exceptions were found by the dtic to be aligned to international treaties and in line with the three step test.• The current Act has a list of exceptions that are limited in scope.• The current Parliamentary process tightened and strengthened the exceptions further.• S12B(1)(a): The following amendments were made on the Quotations: Name of the author to be mentioned if it appears on the work; deleted “practicable” in respect of (ii) and includes “to the extent justified by the purpose” and “fair practice”.• It was recommended to use both fair practice and extent justified by the purpose as the Act already has this exception and does not provide the limit in respect of “as far as is practicable”, it was recommended that it not be included in the Bill.
<p>12B (1) (d) in respect of the name of the author-to add if it appears on the work</p>	<p>This is to recognize the author and to ensure that when the name appears on the work it is acknowledged.</p>

Proposed Amendments

	What the Bill provides
Section 12B(1)(d)	Initially focused on reporting current events exception. As far as practicable was recommended to be excluded and removed from the Bill. The name of the author to be included if it appears on the work is included in the subsection. Section 12B(1)(e)(i) was deleted as sufficiently covered in section 12A. Extent justified by the purpose is the only one used. The intro section was corrected ‘ for purposes of providing current information’ in 12B(1)(d)(ii). In section 12B(1)(d)(ii), only extent justified by such purpose is retained.
Section 12B(1)(e)	The provision provides for translations. Changed the wording to read ‘ non commercial purposes’ instead of ‘not for commercial purposes’. Added language and culture as reason for translation or further uses of translations. Fair practice is retained for translations There were technical amendments, ‘and’ instead of ‘or’ to read the provision as all inclusive.
Section 12B(1)(h) for personal copies	For personal copies, fair practice is included in the Bill. Consideration was given not to include extent justified by the purpose. The word ‘individual’ is substituted with ‘natural person’. The wording ‘different time or with a different device’ is retained in 12A(1)

Proposed Amendments

	What the Bill provides
Section 12C	<p>12C provides for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process.</p> <p>Wording was corrected in respect of the lay out error.</p> <p>The provision was retained with a slight amendment of removing the word 'independent, economic, significance'. To read as 'commercial significance'.</p>
Section 12D	<ul style="list-style-type: none">• Section 12D provides for exceptions related to educational and academic activities.• The existing fair dealing exception in the 1978 Copyright Act fails to provide an exception for education purpose and other uses necessary for teaching.• The Bill makes clear that schools and universities may make copies of extracts for educational purposes without licensing. The law is limited to excerpts. It specifically provides that course packs or other forms of copying may not “incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work” under normal circumstances. (12D(2)). The Bill permits copies of whole works only where there is an abuse of the market. It authorizes copying of full works only if “a licence to do so is not available from the copyright owner, collecting society, an indigenous community or the National Trust on reasonable terms and conditions”; “where the textbook is out of print”; “where the owner of the right cannot be found”; or where the right holder is engaged in anticompetitive conduct in the form of excessive pricing.• The amendments in section 12D were not substantive. Section 12D(8)(a), includes as far as practicable. As section 12D(8)(a) is not an exception that is contained in the Act, but a new exception, ‘as far as is practicable’ is included.• Added the name can be mentioned where it appears and where it is possible.• For 12D, both fair practice and extent justified by the purpose are included, in terms of subsection 12D(8)(b).• Section 12D(9)-both fair practice and extent justified by the purpose are included. Deleted if the name appears ‘in’ the work only retained ‘on’ the work. (it read as ‘if it appears on or in the work’).
General exceptions: Freedom of Panorama	<p>Clause 16 of the Bill proposes an amendment to section 15 of the Act to provide for general exceptions from protection of artistic works and incidental use exceptions. Freedom of Panorama allows the user to use photographs of public spaces, art and buildings without restriction (e.g Nelson Mandela stature in Parliament). Whilst ensuring the artist or architect still benefits from copyright rights. South Africa does not have Freedom of Panorama. Sharing such photos on social media isn't permitted.</p>

Proposed Amendments

	What the Bill provides
Exceptions regarding Computer Programs	<p>Clause 21 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computer program shall be entitled, without the authorisation of the copyright owner, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.</p>

Proposed Amendments

What the Bill provides

Clause 22 Section 19C	<ul style="list-style-type: none">Section 19C provides general exceptions regarding protection of copyright work for libraries, archives, museums and galleries. Section 19C(4) was raised as a reservation by the President. There were concerns raised with the use of for commercial purposes when reading section 19C(1) with 19C(4). The subsection outlines activities that can be permitted for access, educational or research purposes. The section was retained as is with 'commercial purposes'.Subsection 19C(4) provides that a library, archive, museum or gallery may for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes.
Clause 22 Section 19D	<ul style="list-style-type: none">Section 19D provides general exceptions regarding protection of copyright work for persons with disability.The Bill provides for all forms of disabilities not only the blind and visually impaired to ensure the right to equality as enshrined in the Constitution and access to information caters for other forms of disabilities (hearing impaired, dyslexia). This is a policy position.The Department has also noted the developments on the BlindSA matter regarding the Constitutionality of the Copyright Act as well as the Constitutional judgment. In the court application, the Act was found unconstitutional to the extent that it (a) limits and/or prevents persons with visual and print disabilities from accessing works under copyright that persons without such disabilities are able to access and; (b) does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the manner contemplated by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty). The Department has undertaken to abide by the court's decision. The plight of persons with disabilities is of importance to the Department. Parliament Legal Services will be looking into the implications of the judgement on the Bill, particularly section 19D.Several amendments were made to align the provisions to the Marrakesh Treaty. Provides for the authorized entities, cross border requirements, etc. Section 19D(1)(b) is aligned to the treaty language, regarding the integrity of the work.In section 19D authorized entity was added in appropriate subsections (19D(2)(a), 19D(3)(a).Section 19D(3)(b) reads as in the Treaty. Included 'reason to know' as per the Treaty wording.Section 19D(4)(a) added if the name appears on the work. As far as practicable was removed.In provisions where the word 'that' was used in relation to a person, was replaced with 'who', section 19D(1), 19D(2)(a).

Proposed Amendments

	What the Bill provides
Moral Right	<p>Clause 23 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.</p> <p>The clause further provides that the author shall be deemed to have the right to take legal action related to the infringement of the provisions of this section on moral rights.</p>

Proposed Amendments

What the Bill provides

Ownership of copyright in Commissioned Works

- Clause 24 of the Bill proposes an amendment to section 21 of the Act to provide for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission to be governed by written agreement. It further provides for the protection of the author by allowing an application to the Tribunal where the work is not used by the person who commissioned it for the purpose it was commissioned; where the work is used for the use other than that for which it was commissioned; when the commissioned work is of a personal nature, the Tribunal may not license the author to use that work. when considering the license when the work is not used by the person who commissioned, the Tribunal must take all relevant factors into account.
- The Copyright Act does not define commission work. Commission work in simple terms is when you request or commission another person or organisation to create or produce copyright work for you and paying for it. It applies to a photograph, painting or drawing, the making of a gravure, the making of an audiovisual work or sound recording.

Assignment of literary or musical work

- Clause 25 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned. It also provides a reversion right for where copyright in a literary or musical work was assigned by an author shall only be valid for a period of up to 25 years from the date of such assignment. Such a license can be verbal or in writing.
- Reversion clauses are not new to legal frameworks whether in the USA or the UK for different type of works. The Bill limits the assignment to these works as a result of the Copyright Review Commission (CRC). The importance of this is that 25 years has been benchmarked as a sufficient period to recoup the investment made in the work and to make a profit, it also allows the negotiation or brokering of a new agreement after 25 years. Historically in contractual terms, authors signed the commercial rights to publishers or producers and forfeited the right to economically exploit the work. This clause aims to correct the policy gap by allowing the author to have access to the commercial rights after 25 years. The contract can be re-negotiated.

Proposed Amendments

	What the Bill provides
Licenses in respect of Orphan Works	<p>Clause 26 of the Bill proposes the insertion into the Act of a new section 22A, making provision for licences in respect of orphan works. The clause provides a procedure of how to address orphan works with the process administered by the Commission. The clause provides for orphan works for resale royalty rights.</p> <p>Orphan works means a work in which copyright subsists and the owner of a right in that work cannot be identified or is identified but cannot be located.</p>
Accreditation, Administration and Regulation of Collecting Societies (Cs)	<p>Clause 27 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation that include the transformation requirements in the collecting society, administration and regulation of collecting societies. It also provides that where a person intentionally gives him or herself out as a collecting society, that person commits an offence. The Bill provides the transitional arrangement period of 18 months for the accreditation of cs. The collecting society can make royalty payments where there are reciprocal agreements with other collecting societies outside the Republic.</p> <p>The clause provides for the control of collecting society by authors, performers or copyright owners and the functions it will perform such as to collect and distribute royalties. It further provides for the suspension, cancellation of accreditation of collecting societies and the role of the Commission in that regard as well as the skills requirement of the person appointed by the Tribunal for the administration and discharging of the functions of the collecting society.</p>

Proposed Amendments

	What the Bill provides
Copyright Management Information (CMI)	Clause 28 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright or abuses copyright and technological protection measures.
Technological Protection Measure (TPM)	Clause 29 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection, which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author or copyright owner. It also provides for penalties where the convicted person is not a natural person.

Proposed Amendments

	What the Bill provides
<p>Clause 29</p> <p>Section 27 (5A) – Offences in respect of to communicate the work and make the work available to the public by wire or wireless means</p>	<p>Section 27 provides for offences in respect of communicating and making available the work to the public by wire or wireless means.</p> <p>Removed the reference to owner – the owner could have authorised another person to give authority. Necessary authority is all that is required.</p> <p>Due to the serious nature of some breaches that are not for commercial purposes, it was recommended that the offence be made applicable to infringement that are for commercial, as well as to those that are for non-commercial purposes.</p> <p>A person should have knowledge. Only intent constitutes an offence and offences in general (negligence rarely constitutes an offence. It was recommended that negligence should not be included as an offence.</p> <p>The words ‘or has reason to believe’ were removed from the section.</p> <p>Paragraphs were numbered (a) and (b) and not (eA) and (eB) (in the advertised Bill).</p>
<p>Clause 29</p> <p>Subsection (5B)-offences of infringing copyright with device or service and a new (5C)-offence in respect of copyright management information</p>	<p>Only intent constitutes an offence and offences in general (negligence rarely constitutes an offence).</p> <p>The verbs were corrected (on the advertised clause).</p> <p>A person should have knowledge, the word ‘knows’ are included.</p>

Proposed Amendments

	What the Bill provides
Clause 31 Section 28O	<p>The section provides for the prohibited conduct in respect of technological protection measures.</p> <p>In section 28O, added service, to read as technological protection measure device or service.</p> <p>Removed reference to Electronic Communications and Transactions Act (ECTA) already agreed to by Portfolio Committee.</p>
Clause 31 Section 28P	<p>Section 28P provides for the exceptions in respect of technological protection measures.</p> <p>Removal of reference to ECTA.</p> <p>Reference to regulations made under the Act included in the section, section 28P(1)(a).</p>

Proposed Amendments

	What the Bill provides
Clause 31 Section 29C	Corrected the subsection numbering. It had two subsections 2.

Proposed Amendments

	What the Bill provides
Copyright Tribunal	Clauses 32 and 33 of the Bill amends section 29 and propose the insertion of sections 29A to 29H into the Act, which provide for, amongst others, the strengthening of the Copyright Tribunal; its functions; appointment of its members; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal.

Proposed Amendments

	What the Bill provides
Clause 35 Regulations	Clause 35 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies, as well as prescribing minimum standards for contracts.
	Section 39(1)-Corrected (cH) to read “28P”. It was 28B and the section did not exist.
	Section 39(3) regarding regulations in respect of recognizing entities in respect of persons with disability. Consequential amendment to include the regulations in subsection (2) in respect of persons with disability.

Proposed Amendments

	What the Bill provides
Unenforceable Contracts	Clause 36 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purports to renounce a right or protection afforded by the Act will be unenforceable.
Schedule 2	Clause 37 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.
‘Cinematograph Films’ and ‘Film’	Clause 38 provides for the amendment of the expressions “cinematograph film” and “film” with “audiovisual work” and “work”.

Proposed Amendments

	What the Bill provides
Transitional Provisions	Clause 39 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013).
Short Title and Commencement	Clause 40 of the Bill provides for the short title and commencement.

Conclusion

- All the President's reservations were considered.
- Many provisions were considered however due to their substantive nature and potential unintended consequences, the changes could not be made. (e.g TPMs definitions, definition of broadcast, ephemeral exceptions, personal use-lawfully acquired).
- More alignments were made on the standards of controls to use the exceptions (e.g fair practice, extent justified by the purpose, as far as practicable, the name of the author).
- The Bill has been opened due to the section 76 retagging. All the provisions will be considered in totality in accordance with the principles set out in section 76.
- The provincial briefings and public hearings are going to take place in all 9 provinces.

Performers' Protection Amendment Bill (PPAB)

Objectives of the Bill

The Bill seeks to amend the Performers' Protection Act, 1967 (Act No. 11 of 1967) so as to:

- provide for performers' economic rights;
- extend moral rights to performers in audiovisual fixations;
- provide for the transfer of rights where a performer consents to fixation of a performance; to provide for the protection of rights of producers of sound recordings;
- broaden the restrictions on the use of performances;
- extend the application of restrictions on the use of performances to audiovisual fixations;
- provide for royalties or equitable remuneration to be payable when a performance is sold or rented out;
- provide for recordal and reporting of certain acts and to provide for an offence in relation thereto; to extend exceptions from prohibitions to audiovisual fixation and sound recordings and include exceptions provided for in the Copyright Act, 1978 (Act No. 98 of 1978);
- provide for the Minister to prescribe compulsory and standard contractual terms as well as guidelines for a performer to grant consent under this Act;
- provide for prohibited conduct and exceptions in respect of technological protection measures and copyright management information respectively; and
- provide for further offences and penalties.

Proposed Amendments

	What the Bill provides
Definitions	<p>Clause 1 proposes the insertion of definitions of “audiovisual fixation”, “broadcast”, “communication to the public”, “copyright management information”, “performance”, “performer”, “producer”, “reproduction”, “sound recording”, “technologically protected work”, “technological protection measure”, “technological protection measure circumvention device” and “Tribunal”.</p> <ul style="list-style-type: none">• Performer’s protection is a neighbouring/ related right to copyright. Both Bills are interlinked. Changes in definitions in the Copyright Amendment Bill also applies to the performers’ protection amendment Bill. The application of some provisions are in the CAB (e.g Tribunal).
Protection of Performers’ moral and economic rights	<ul style="list-style-type: none">• Clause 2 of the Bill proposes the substitution of section 3 of the principal Act. The primary objective of this clause is to clearly circumscribe the statutory rights conferred upon a performer, in particular certain exclusive rights in respect of their performances.• The clause provides for the protection granted to the performer in respect of their performances, the moral rights of the manner they and their performances are identified, and the exclusive rights (e.g broadcasting and communication to the public of their unfixed performances, fixation of their unfixed performances in an audiovisual fixation or a sound recording).• Gender neutral drafting was effected.

Proposed Amendments

	What the Bill provides
Transfer of Rights	<p>Clause 3 proposes the insertion of sections 3A to provide for the transfer of rights where the performer has consented to fixation of their performance in an audiovisual fixation or sound recordings, subject to written agreement which shall give the performer the right to receive royalties or equitable remuneration for any use of the performance. It is proposed that the exercise of this right in respect of sound recordings shall be valid for a period of 25 years from the date of commencement of the agreement and where after the rights reverts to the performer.</p> <p>The clause distinguishes remuneration of performers in relation to audiovisual works and sound recordings in respect of royalties and equitable remuneration (royalties or equitable remuneration-audiovisual works and equitable remuneration in respect of sound recordings), the clause also provides the gender neutral drafting.</p>

Proposed Amendments

	What the Bill provides
Protection of rights of producers of sound recordings	<ul style="list-style-type: none">• Clause 3 also grants exclusive rights to the producer of a sound recording that include the rights to reproduce and making available to the public. The clause also provides the right to earn an equal remuneration, subject to the contract in the contrary, for the direct or indirect use of sound recording to the performer, composer and producer of sound recording published for commercial purposes for broadcasting or communication to the public.
Restrictions on use of performance	<ul style="list-style-type: none">• Clause 4 of the Bill proposes amendments to section 5 of the principal Act to provide for the consent of the performer for an unfixed performance or a performance fixed in an audiovisual fixation or sound recording. It provides for availability of the original and copies of performance fixed in audiovisual fixation to the public.• Gender neutral drafting was effected.

Proposed Amendments

	What the Bill provides
Restrictions on use of performance	<p>Clause 4 also provides for persons who intend to broadcast or communicate to the public a performance fixed in audiovisual fixation or sound recording of a performer, to record certain acts and submit reports thereon. Failure to do so constitutes an offence. The clause further provides the penalties that include fine, imprisonment not exceeding five years, for a juristic person ten percent of annual turnover. The courts are granted discretionary powers to give-a lesser sentence.</p> <p>The clause also provides for the performer to receive royalties or equitable remuneration for authorizing the fixation of audiovisual fixation or sound recording for performing certain acts provided the agreement with the producer of the fixation.</p>
Nature of copyright in audiovisual works	<ul style="list-style-type: none"> • Clause 5 of the Bill proposes amendments to section 8 of the principal Act and provides for situations where an audiovisual fixation or a sound recording can be used without consent for instances that include private study or personal and private use, criticism or review, or reporting on current events, teaching or for scientific research. The clause provides for the acts the broadcaster can perform without consent required in section 5, but where the performer has consented. • Gender neutral drafting was effected.
Regulations	<p>Clause 6 of the Bill empowers the Minister to make regulations regarding compulsory and standard contractual terms as well as to provide guidelines to performers when granting consent.</p> <p>Correcting a typographical error, added a missing word 'into'.</p>

Proposed Amendments

	What the Bill provides
Technological Protection Measures (TPM) and Copyright Management Information (CMI)	<p>Clauses 7 and 8 of the Bill proposes the insertion of sections 8E, 8F, 8G and 8H to provide for the prohibited conduct in relation to a Technological Protection Measures, which is aligned with sections 28O and 28P of the Copyright Act, 1978, to apply in respect of performances fixed or fixed in audiovisual fixations; and provide for the prohibited conduct in relation to the removal or modification of copyright management information; and the exceptions relating to such removal or modification, which is aligned with sections 28Q and 28R of the Copyright Act, 1978, to be applicable in respect of performances that are fixed or fixed in audiovisual fixation. The Bill in clause 8 makes it an offence to contravene these prohibitions and provides for a sanction.</p> <p>Clause 7 – removal of reference to the Electronic Communications and Transactions Act in section 8E and Section 8F.</p> <p>Gender neutral drafting in section 8(F)(3)(a)</p>

Proposed Amendments

	What the Bill provides
'Phonogram' and 'Fixation' Expressions	Clause 9 substitutes the expressions “phonogram” to sound recording and “fixation” to a sound recording wherever they appear in the Act.
Transitional Provisions	Clause 10 provides for transitional provisions.
Short title and Commencement	Clause 11 provides for the short title of the Bill and commencement.

Thank You