



NEGOTIATING MANDATE

TO: The Chairperson of the Select Committee on trade and industry, Economic Development, Small Business Development, Tourism, Employment and Labour

Hon. Ml Rayi

NAME OF BILL: Performer's Protection Amendment Bill

NUMBER OF BILL: [B24D-2016]

DATE OF DELIBERATION: 11 May 2023

VOTE OF THE LEGISLATURE: The Gauteng Provincial Legislature is supporting the Performer's Protection Amendment Bill subject to the amendments below being considered:

- Section 1

Proposed Amendment: Performer- "an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise viewed in context, performs literary, musical or artistic works, but does not include extras, ancillary participants or incidental participants.

The definition of *broadcast* is not in line with international treaties (e.g. the WPPT) because it refers to "transmission ... by wire or wireless means". However, in international treaty law broadcasts always entail "wireless" transmission. This should thus be fixed *The current definition of "broadcast" in the Performers' Protection Act, 1967 should be retained.*

The definitions of "performer" and "producer", these definitions are vague, and should be reframed to ensure that there is clarity for the creative industry. In order to ensure this legal certainty, recommend *the following definition of performer: "an actor, singer, musician, dancer or other person who acts, sings,*

delivers, declaims, plays in, or otherwise, viewed in context, performs literary works, musical works, artistic works, dramatic works or traditional works as contemplated in the Copyright Act, but does not include extras, ancillary participants or incidental participants.

- Propose a revision of the definition of “*communication to the public*” in the following manner: “Communication to the public” — i. in respect of the performance of an audiovisual work, means the transmission to the public by any medium, other than by broadcasting of an unfixed performance or of a performance fixed in an audiovisual fixation including making a performance fixed in an audiovisual fixation audible or visible, or audible and visible to the public; and ii. in respect of the performance of a sound recording, means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance.
- The definition of “producer” should add “or the entity which” after the phrase “the person who”, to align fully with the definition used in the WPPT and seeing that generally producers are corporate entities (record companies) rather than natural persons.
- Clause 1 (b)

Replace proposed definition of "broadcast" with current definition of "broadcast" in the Copyright Act, 1978. Namely, "broadcast," when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs, or signals which - (a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;"

- Clause 1(e)

Propose that clause 1(e) and (l) be amended to repeat the corresponding definitions in the Copyright Act instead of the respective clauses cross referring to the definitions in the Copyright Act. i.e. Each term should be defined in the PPA Bill itself.

- Clause 1(h)

Amend the definition of "performer" to read as follows: "performer' means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise viewed in context, performs literary, musical or artistic works as contemplated in the Copyright Act, but does not include extras, ancillary participants or incidental participants".

- *Clause 1(j)*

Amend the definition of "producer" to read as follows: "producer means the person who takes responsibility for the first fixation of a sound recording or an audiovisual fixation".

- Royalty Definition has the potential to be interpreted to authorise publishers to deduct their costs from the royalty provision, prior to distributing to composers and authors. Thus, royalty should be defined as a percentage of the total turnover/ revenue generated by the musical work.
- The definitions of “*technological protection measure*” and “*technological protection measure circumvention device*” are not compatible with Article 18 of the WPPT, and the exceptions in sections 8E and 8F relating to prohibited conduct in respect of technological protection measures and exceptions in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test.
- The provisions in clauses 2, 3, and 4 (in particular the proposed section 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4) all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights.
- The use of the phrase in those sections “against payment of royalties or equitable remuneration” is problematic in that it will not create certainty as to the system contemplated and will spawn disputes. It will not be clear at which state royalties, requiring prior authorization for usages based on exclusive rights, will be payable, and at which a system of equitable remuneration is contemplated. Both the Rome Convention (article 12), the WPPT (article 15), and the Beijing Treaty (Article 11(2)) make provision for a system of equitable remuneration in respect of fixed performances. Technology Protection Measures are still not Treaty compliant.
- Submit that, despite the amended and improved wording proposed in the definition of “*Technological Protection Measures*” and “*Technological Protection Measures Circumvention Device or Service*”, these are still not enough to render the Bill Treaty compliant, viewed within the prism of the WIPO Copyright Treaty

(WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty

- Section 3(1): *The scope of protection for performers' rights is not in line with the WPPT which states that protection should be granted to recorded performances based on nationality, place of first fixation, or simultaneous publication criteria.*
- Section 3A(3)(a) and (b): *Ministerial obligations to regulate contractual agreements between performers and producers and an unclear requirement for contracts to set out the "royalties or equitable remuneration in respect of audiovisual works; and equitable remuneration in respect of sound recordings, due and payable to the performer for any use of the fixation of the performance".*
- Section 3A(3)(c) should be deleted from the PPAB to prevent constitutional vagueness. Alternatively, it should be made subject to a written agreement to the contrary
- Section 3B: *Given that the protection of sound recordings is already set out in section 9 of the existing Copyright Act (subject to proposed amendments thereto in the Copyright Amendment Bill), section 3B concerning the "protection of rights of producers of sound recordings" is misplaced and creates legal and commercial uncertainty.*
- Section 4(c)

Imposing registration and comprehensive reporting would create material administrative burdens and costs on distributors, diverting investment from content, and be practically impossible to comply with. The possibility of a punitive sanction for non-compliance could chill the market. There are more reasonable approaches to encouraging transparency which recognize the substantial amount of information already publicly available and can be calibrated to avoid unreasonable burdens on producers and distributors.

- Section 5(1A)(a) and (c)

Amend s5(1A) (a) and (c) to read as follows: "A person who for commercial purposes intends to - (a) broadcast or communicate to the public an unfixed performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording; ... (c) make a reproduction of a fixation of a performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording;... must prepare and submit a complete

true and accurate annual report of such usage and must make the relevant parts of such report available to the performer, producer, copyright owner, the indigenous community or collecting society as the case may be, within a reasonable time after having received a request for such.

- Section 5(1A) of the PPAB regarding registration and reporting requirements
This requirement may have a stifling effect on creators in the value chain, which could lead to a decrease in the amount of broadcast content that falls within the ambit of the PPAB. This may result in a significant decline in investment in the sector.

“A person who for commercial purposes intends to: Broadcast must prepare a complete true and accurate annual report of such usage and must make the relevant parts of such report available to the performer, producer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner, within a reasonable time after having received a request for such, for the purpose of, amongst others, calculating the royalties or equitable remuneration due and payable by that person.”

- Section 5(1B) of the PPAB regarding failure to register or report
Penalties are excessive, the registration and reporting duties are burdensome and this section could have a stifling effect on the creative industries. The quantum of fines must be assessed and determined with reference to failure to comply with a specific section of the Amendment Act, once promulgated. It is undesirable for the Bill to adopt a blanket approach without considering the nuances on a case-by-case basis. The amount of the fine should be proportionate to the severity of the act which is penalised.
- Clause 4(g) Section 5(5)
Amend s5(5) to read as follows: "(5) Any payment made to a producer in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out, distributes or causes communication of the performance to pay a royalty or equitable remuneration, whichever is applicable, to- (i) the performer in terms of section 5(1)(b) above or in terms of section 8A of the Copyright Act, 1978 (Act No. 98 of 1978) in respect of the same act; and (ii) the owner of copyright subsisting in the sound recording, in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."
- Section 6 Clause 5 Section A

Reject Section 6A as introduced by Clause 5 and properly investigate workable solution to benefit authors.

- Section 8D(3) and (4)

The broad ministerial power.

- This provision should be deleted, as it will have a chilling effect on investment. It is an extreme form of regulation and creates great uncertainty for existing and prospective productions
- Recommend the conduct of a full economic impact assessment, as well as an objective expert study of alternative legislative approaches with reference to other jurisdictions.

Suggest replacing the constrictive “royalty” obligation with a standard that preserves contractual freedom of the parties to determine what is feasible and favourable.

Suggest:

Without specifying the content of agreements, the Minister may make regulations prescribing a list of contractual terms which must be included in agreements to be entered into in terms of this Act. Such list may include: (a) the rights and obligations of the parties (b) the royalties or equitable remuneration payable to the performer agreed on as the case may be; (d) the period of the agreement; and (e) the dispute resolution mechanism.

- Section 8A(1) should be amended to include an option of remuneration through a single payment or made subject to a written agreement to the contrary.
- Clause 12 A
Remove Section 12A and first put in place: 1. A proper socio-economic impact and legal assessment to be conducted 2. A sound policy foundation.
- Clause 12 A- D
12B–12D need to be redrafted using the Three-step test as a criteria and the current exceptions in 12(4) as template.
- Section 22A: orphan works regime should not apply in respect of musical works.
- Reject Clause 25(b) amending Section 22(3) and retain the current assignment formality in the Copyright Act.

- Section 28 P

Reject the current provisions regarding TPMs and exceptions in Section 28P as they do not comply with international treaties. Replace with treaties-compliant text.

- Section 39B

These sections should be deleted in their entirety and APACT (see above) be acknowledged for the value it adds to the creative industry ecosystem.

- Institute a proper Socio-Economic Impact Assessment Study as a basis, including on AI and along with an appropriate Intellectual Property Policy and legal foundation, for a redrafting of the Bill
- Work with university bodies to engage the implications of the Copyright Amendment Bill with regard to their own resource allocation and Intellectual Property policies, and also to undertake urgent planning to address the likely effects of the legislation on the national research economy.



Date: 17 May 2023

HON. WILLIAM MATSHEKE

CHAIRPERSON: ECONOMIC DEVELOPMENT PORTFOLIO COMMITTEE

GAUTENG PROVINCIAL LEGISLATURE