



Northern Cape
Provincial Legislature

Portfolio Committee on Finance, Economic Development & Tourism

Private Bag X5066
Kimberley 8300
Nobengula Extension
Galeshewe
Kimberley 8300

Fax: Admin (053) 839 8094
Tel: (053) 839 8149

Hon MI Rayi

Chairperson: Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour

NEGOTIATING MANDATE

Name of the Bill: **Performers' Protection Amendment Bill**

Number of the Bill: **B24D – 2016**

Date of deliberation: **Thursday, 04 May 2023**

Vote of the Legislature: **The legislature votes in favour**

(Subject to consideration of the proposed amendments)

A handwritten signature in black ink, appearing to be 'N Maneng', written over a horizontal line.

Hon N Maneng

Chairperson: PC on Finance, Economic Development & Tourism

Date: 04 May 2023



PORTFOLIO COMMITTEE ON FINANCE, ECONOMIC DEVELOPMENT & TOURISM

NEGOTIATING MANDATE ON THE PERFORMERS' PROTECTION AMENDMENT BILL [B24D – 2016]

1. INTRODUCTION

The Chairperson of the Portfolio Committee on Finance, Economic Development & Tourism, Hon G N Maneng, tables the Committee's Report on the **Performers' Protection Amendment Bill [B24D – 2016]**, as adopted by the Portfolio Committee on Thursday, 04 May 2023.

2. PROCESS FOLLOWED

2.1 The Speaker of the Northern Cape Provincial Legislature has on receipt of the Bill referred the **Performers' Protection Amendment Bill [B24D – 2016]** to the Portfolio Committee on Finance, Economic Development & Tourism.

2.2 On Friday, 04 November 2022, the Portfolio Committee received a briefing on the Bill from Hon K Mmoiemang, NCOP Permanent Delegate, Mr K Petje (Director), from the National Department of Trade, Industry and Competition, under the leadership of Dr E Masotja.

2.3 Public Participation processes that were facilitated:

2.3.1 Hybrid public hearings has been scheduled with stakeholders from all five (5) regions of the Province namely, Frances Baard District; Namakwa District; ZF Mgcawu District; Pixley Ka Seme District; and John Taolo Gaetsewe District, including national stakeholders (on virtual platform) on Thursday, 30 March 2023. Due to network challenges, the virtual hearing was postponed to Wednesday, 19 April 2023. The physical hearing did continue.

2.3.2 A request was also forwarded to all stakeholders in all regions of the Province and Nationally on Monday, 23 January 2023 and, on Monday, 13 March 2023 with the Public Hearing invitation, for written submissions on the Bill.

2.3.3 Posters on official social media pages of the Legislature.

2.3.4 Adverts were placed in "Die Plattelander" and the "Gemsbok".

3. WRITTEN AND ORAL SUBMISSIONS ON THE BILL

Written and oral submissions were received from:

- 3.1 Cultural & Creative Industries Federation of South Africa (CCIFSA) – 1 attachment:**
- i) CCIFSA Submission on Copyright Amendment Bill 2017
- 3.2 BlindSA SECTION27 – 2 attachments:**
- i) BlindSA SECTION27 Submission to NCPL
 - ii) SECTION27 BlindSA Constitutional Court judgement guide
- 3.3 South African Institute of Intellectual Property Law (SAIPL) – 2 attachments:**
- i) SAIPL covering letter submission Copyright Amendment Bill January 2023
 - ii) SAIPL submission Copyright and Performers Protection Amendment Bill January 2023
- 3.4 Higher and Further Education Disability Services Association (HEDSA) – 1 attachment:**
- i) 2023 CAB Submission HEDSA MR74
- 3.5 Joint Academic Opinion on the Copyright Amendment Bill – 1 attachment:**
- i) 20230214 Joint Academic Opinion NCPL
- 3.6 International Federation of Film Producers Association (FIAPF) – 1 attachment:**
- i) NCOP Consultation on CAB PPAB – FIAPF Submission 27.01.23
- 3.7 Joint submission from Representing the Recording Industry in South Africa (RiSA) and Representing the Recording Industry Worldwide (IFPI) – 3 attachments:**
- i) 27012023 Joint RiSA and IFPI Submission on the South African Copyright Amendment Bills
 - ii) Provincial Joint RiSA and IFPI submission on the South African Copyright Amendment Bills
 - iii) Additional Submission on AI impact _ April 2023
- 3.8 Scholarly Horizons by Denise Nicholson – 2 attachments:**
- i) Denise – Bio – January 2023
 - ii) 2023 – CAB – Denise Nicholson Submission (final) to Northern Cape Provincial Leg – sent 27.2.2023

- 3.9 Netflix – 3 attachments:**
- i) 2023 NETFLIX SUBMISSION TO THE NCPL ON THE COPYRIGHT AMENDMENT BILL AND PERFORMERS PROTECTION AMENDMENT BILL
 - ii) Netflix submission _ Afrikaans abridged
 - iii) Netflix submission _ Setswana abridged
- 3.10 Scholarly Publishers Committee in the Publishers’ Association of South Africa (PASA) submits the main document, namely: Scholarly Publishers’ Committee PASA submission to the NCOP Select Committee and the supporting document, namely: PASA Submission to NCOP – 2 attachments:**
- i) Schol Com submission CAB 28 Feb 2023
 - ii) PASA Submission to Northern Cape Legislature Select Committee Draft1 Clean copy
- 3.11 Wikimedia – 1 attachment:**
- i) WMZA 2023 letter to Parliament (1)
- 3.12 Recreate ZA – 1 attachment:**
- i) 2023 – RECREATE FINAL SUBMISSION ON CAB – NORTHERN CAPE LEGISLATURE – 14.2.2023
- 3.13 Artists Unite – 1 attachment:**
- Artists Unite – Northern Cape CAB NCOP Submission
- 3.14 Dramatic, Artistic and Literary Rights Organisation (Pty) Limited (DALRO) – 1 attachment:**
- i) CAB280223DALRO _ Submission _ Northern _ Cape _ CAB _ 20230228[49]
- 3.15 Composers, Authors and Publishers Association (CAPASSO) – 1 attachment:**
- i) CAPASSO Copyright Amendment Bill Submission (Northern Cape)- 28 February 2023 (1)
- 3.16 PEN Afrikaans – 1 attachment:**
- i) 28.02.2023. PEN Afrikaans. Submission on Copyright Amendment Bill. Northern Cape Legislature
- 3.17 MNet and Multichoice – 2 attachments:**
- i) Copyright Performer provincial submission 27 Feb 2023
 - ii) Draft Annexure A to Copyright Performer submission (27 January 2023) _ Final version

- 3.18 Publishers' Association of South Africa (PASA) – 1 attachment:**
i) PASA Submission to Northern Cape Legislature Select Committee
28Feb2023
- 3.19 South African Democratic Teachers' Union (SADTU) – 1 attachment:**
i) 28022023 SADTU SUBMISSION TO NC LEGISLATURE ON COPYRIGHT
AMENDMENT BILL [B13D-2017]
- 3.20 Copyright Coalition of South Africa (CCSA) and South African Music Rights
Organisation (SAMRO) submissions – 2 attachments:**
i) CCSA Submission on the Copyright Amendment Bill and the Performers
Protection Amendment Bill 28 February 2023
ii) SAMRO submission on the Copyright Amendment Bill and the Performers
Protection Amendment Bill
- 3.21 Motion Pictures Association (MPA) – 1 attachment:**
i) MPA Submission South Africa Copyright – Northern Cape – 28_02_2023
- 3.22 Writers Guild of South Africa by Christiaan Steyn IP Attorney – 1 attachment:**
i) Submission made by the Writers Guild of South Africa on the Copyright
Amendment Bill B13D-2017 (NCPL)
- 3.23 South African Music Industry Council (SAMIC) – 1 attachment:**
i) Provincial letter SAMIC Submission on the 2 Bills (CAB & PRB)
- 3.24 Joint Submission by the Commercial Producers Association (CPA) and the
Association for Communication and Advertising (ACA) – 2 attachments:**
i) Submission on the CAB and PPAB by the CPA and ACA_26 January 2023
ii) Submission on CAB and PPAB by CPA and ACA – Annexure A
- 3.25 Independent Producers Organisation (IPO) – 1 attachment:**
i) CAB-PPAB AV Sector N Cape Provincial Submission 2023
- 3.26 Music Publishers Association of South Africa (MPA SA) – 1 attachment:**
i) MPA-SA CAB Final Submission 2023
- 3.27 Northern Cape Theatre Practitioners Forum – 1 attachment:**
i) Submission for the Copyright Amendment Bill NCTPF

Please note that all written submissions are attached in full to this mandate.

4. STAKEHOLDER RECOMMENDATIONS ON THE BILL

- 4.1 Original creators are defrauded from the work they wish to publish, especially when applying for funding as well and do not receive the royalties due to them. It is thus recommended that strict judiciary measures should be included in the Bill to ensure that publishers are protected from fraudulent persons/groups/institutions and also, for such royalties to be restored to the original publisher.
- 4.2 The Bill should be explicit on protection of all works on social media.
- 4.3 Fair use is of great concern where productions are being used without the original individual or group's permission resulting in artists dying as paupers. It is recommended that the Bill considers a simple system to ensure that the actual recipients get their due.
- 4.4 Stricter measures should be included in the Bill that will enforce Government Departments to ensure contractual obligations of artists are adhered to.
- 4.5 Adequate provision must be made in the Bill for the recognition of academic work.
- 4.6 Artists are being disadvantaged by government bureaucracies in respect of collecting societies and it is requested that the Minister cannot dictate engagements among the contractual participants. Furthermore, artists require collecting societies to account to them as well.
- 4.7 The use of an artist's work following their departure should be 75 years not 50.
- 4.8 Bigger city artists have easier access to South African Music Rights Organisation (SAMRO) but not in rural areas like the Northern Cape. The Bill must provide for protection of these rural areas if SAMRO's reach cannot not assist in such areas.
- 4.9 A Performers' Tribunal is requested to enable performers to claim their royalties.
- 4.10 The timeframe to earn royalties should be shortened.

5. STAKEHOLDER POSITION ON THE BILL

The majority of the stakeholders voted in support of the Bill on condition that their inputs are considered.

6. COMMITTEE RECOMMENDATIONS ON THE BILL

The Committee recommends the following:

- 6.1 It is crucial that recommendations in the submissions by all stakeholders must be considered in the Bill, especially the ones from the Northern Cape as well. All stakeholders raise valid and crucial concerns and a balance must be attained in addressing these concerns in the Bill. The select committee to give a report on how these inputs have been addressed in the Bill.
- 6.2 Fair use vis-à-vis fair dealings severely disadvantages the normal artist/publisher and the like and the Bill must protect these individuals or groups adequately to ensure receipt of the royalties due to them. The fair use doctrine needs to be revised and should be subjected to the 3-step test overall yardstick to provide legal certainty.
- 6.3 Provisions should be made in the Bill to always consider differently abled persons' requirements in the field, especially considering the court case in respect of Blind SA.
- 6.4 Indigenous and cultural content productions and/or creations, especially Nama, is not considered in the Bill and it is recommended that the Bill provides for a similar system like SAMRO to assist indigenous and cultural content productions or creations and further Nama restoration especially. The Bill should further ensure that such indigenous properties are protected.
- 6.5 There cannot be a one-size fit all approach when determining royalties and it should not be dictated by the Minister. The different sectors should be taken into account when determining royalties.
- 6.6 Streaming platforms/social media is becoming very prevalent affecting collecting societies and creatives represented very negatively. The Bill must be aligned to ensure that the intended participants receive the royalties.
- 6.7 A full socio-economic impact assessment should be considered in respect of investment drivers for the development and production of audio-visual works.
- 6.8 It is not clear if the Bill will create investments in Provinces and should be indicated.
- 6.9 Consequences for Internet piracy should be addressed in the Bill as well.
- 6.10 The Committee further also recommends that the years following which an artist's works can be used following their departure should be increased to 70 years.
- 6.11 In respect of orphan works, the licensing process will not be applicable for the music industry and must be addressed per sector in the Bill.

6.12 It must further be impressed in the Bill that the intended authors receive the royalties in respect of the provision of private levies.

6.13 The following legal technical inputs:

6.13.1 Insertion of section 6A in Act 98 of 1978:

(2) (b)subject to any agreement - It must be specific because of the nature of this act. Therefore it should read: "*intellectual property agreement*" throughout the Bill. Words to be written into the Bill: "intellectual property agreement".

6.13.2 In terms of Royalties the percentage (%) must be stipulated to protect the artist for example: 60% (artist) - 40% (Producer/Company) shares in terms of royalties. Many of the people in the industry might not have the financial means to have intellectual property agreements drawn up (which is very costly). Therefore, it would be better if the person (irrespective of the field of artistic expression) knows what they are entitled to, be it on a sliding scale and upon valid consensus being reached between all concerned parties.

6.13.3 Fines also need to be stipulated for example: a minimum fine of R5 000 or maximum fine of 1% of Companies/Producers' annual turnover, in the case of non-compliance issues.

6.13.4 Clause 31 Section 28P:

The removal of reference to Electronic Communications and Transactions Act (ECTA) cannot be endorsed for the following reasons:

- i) Artists predominantly use on-line platforms such as Tik Tock/Facebook, Twitter etc;
- ii) Sections 54 and 55 of the ECTA regulates the registration of critical databases that is part of the Minister's responsibility;
- iii) Critical data is defined in the ECTA as "data that is declared by the Minister in terms of section 53 to be of importance to the protection of the national security of the Republic or the economic and well-being of its citizens;
- iv) Critical database means "a collection of critical database in electronic form from where it may be accessed, reproduced or extracted"; and
- v) All content whether it be music or literature and so forth will not be protected should the ECTA be removed from this Bill. It will also open up the industry to cybercrime activity for perpetrators.

Therefore, all references to the Electronic Communications and Transactions Act, 2002 (hereinafter "ECTA") should be retained within this

Bill as the removal thereof will be prejudicial to the industry in terms of all on-line platforms utilised in the industry.

The ECTA will protect the use of all content and copyright and cannot be viewed as an exception in respect of technological protection measures.

During the COVID-19 pandemic, the value of on-line platforms (example: Teams, Zoom etc) was discovered and were utilised in our country and throughout the world. The judiciary also engaged in such platforms in the pursuit of justice.

These on-line platforms are also subject to the ECTA.

Our world has evolved into an "electronic age" which we need to embrace by means of electronic commerce (regulated by ECTA). The fourth industrial revolution is proof thereof.

6.13.5 The Bill should be subject to the limitations as stipulated within the Constitution of South Africa (1996).

Decentralized mixed jurisdiction with common-law and civil-law influences. (Detailed general limitation clause; some rights subject to additional qualifications)

Section 36 Limitation of rights:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (i) the nature of the right;
 - (ii) the importance of the purpose of the limitation;
 - (iii) the nature and extent of the limitation;
 - (iv) the relation between the limitation and its purpose; and
 - (v) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

7. DISSENTING VIEW/S IN TERMS OF RULE 100(3) OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE

The Democratic Alliance opposes the Bill in its current form based on the following:

1. Unless the Bill is redrafted and reworked substantially, it will not be consistent with the Beijing Treaty and the World Intellectual Property Organisation Performances and Phonograms Treaty (WPPT). South Africa accedes to these international treaties and our legislation must be consistent with the content thereof.
2. For example, the WPPT and Beijing Treaty prescribe equitable remuneration for performances. The Bill does not follow international standards in order to achieve this laudable goal in its reliance on contract terms and remuneration prescribed in the new section 3A of the Bill, prescribed remuneration in the new section 3B(2) of the Bill, and an onerous prescribed procedure for obtaining rights as set out in sections 5(1A) – (1D). In fact, the prescribed remuneration in the new section 3B(2) does not meet the requirements of Article 15 of WPPT, which requires a “single equitable remuneration”.
3. In its current forms, these clauses mentioned above undermine freedom of contract to the detriment of both performers and producers, making it extremely difficult for producers to make investment decisions.
4. The method for achieving the goal of equitable remuneration for performers should be reconsidered entirely.
5. There is no indication that the impact of this prescriptive regulatory approach has been researched or that any comparison has been made to successful, Treaty-compliant approaches in other countries.
6. The Bill is indicative of sloppy drafting. It needs to be read with the Copyright Amendment Bill and unintended consequences with regards to implications on contract and international compliance must be addressed. We cannot simply pass legislation just for the sake of ticking off a checklist; legislation needs to be properly considered and only passed if it is in the national interest.

8. COMMITTEE ADOPTION ON THE BILL

After due deliberation, the Portfolio Committee on Finance, Economic Development & Tourism supports the bill.

The Committee adopted this negotiating mandate duly signed by the Chairperson of the Committee, Hon N Maneng.

The Committee recommends to the House to mandate the Permanent Delegates to participate in deliberations at the negotiating stage and to support the Bill.



HON N MANENG
COMMITTEE CHAIRPERSON

Date: 04 May 2023