



Wes-Kaapse Provinsiale Parlement
Western Cape Provincial Parliament
IPalamente yePhondo leNtshona Koloni

*RAADSTEUN
PLENARY SUPPORT*

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Date
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Verwysing
Reference
Isalathiso WCPP 11/1/3

NEGOTIATING MANDATE

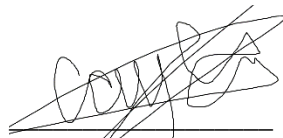
To: Hon. Mr MI Rayi
Chairperson SC Trade

Name of Bill: Performers' Protection Amendment Bill

Number of Bill: [B 24D - 2016] (NCOP)(S76)

Date of deliberation: 11 May 2023

Vote of Legislature: The Standing Committee on Finance, Economic Opportunities and Tourism, having considered the subject of the Performers' Protection Amendment Bill [B 24D - 2016] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill in its current form and calls for the Bill to be redrafted in its entirety and undergo the full legislative process which includes public participation and a comprehensive socio-economic impact assessment for the following reasons:


Signature

Date: 18 May 2023

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Finance, Economic Opportunities and Tourism on the Performers' Protection Amendment Bill [B 24D - 2016] (NCOP)(S76), dated 11 May 2023, as follows:

The Standing Committee on Finance, Economic Opportunities and Tourism, having considered the subject of the Performers' Protection Amendment Bill [B 24D - 2016] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill in its current form and calls for the Bill to be redrafted in its entirety and undergo the full legislative process which includes public participation and a comprehensive socio-economic impact assessment for the following reasons:

1. Procedural Issues:

1.1 Poor Drafting:

The Bill was criticised for having been poorly drafted, and its contents were often conflated with what was included in the Copyright Amendment Bill. Clauses 1 to 32 of the Performers' Protection Amendment Bill (the Bill) contain provisions that overlap with and/or duplicate existing provisions in the Copyright Act. This lack of clarity and overlap between the two Bills makes the Performers' Protection Bill confusing and problematic.

The Bill is unclear in various sections, leading to potential misinterpretations and inconsistencies. For example, Clause 5 regarding "equitable remuneration" lacks specific guidelines.

Clause 5 reads: "...(b) by the substitution in subsection (1) for paragraph (b) of the following paragraph: "(b) by means of [a fixation] an audio-visual fixation or sound recording of a performance published for commercial purposes, without payment of a royalty or equitable remuneration to the performer concerned— (i) broadcast the performance ... (h) perform any act contemplated in subsection (1)(b), must register that act in the prescribed manner and form and submit a complete, true and accurate report to the performer, producer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner, for the purpose of, amongst others, calculating the royalties or equitable remuneration due and payable by that person. (f) by the substitution for subsection (4) of the following subsection: "(4) (a) A performer who has authorised the audio-visual fixation or sound recording of [his or her] their performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the [person who arranges] producer [for] of such audio-visual fixation or sound recording to be made, the exclusive right to receive the royalties or equitable remuneration, whichever is applicable, contemplated in subsection (1)(b) in respect of any broadcast, transmission, sale, commercially renting out, distribution or communication of such [fixed performance] audio-visual fixation or sound recording: Provided that the performer is entitled to share in any [payment] royalties or equitable remuneration received..."

1.2 Lack of Availability of a Socio-Economic Impact Assessment:

As with the Copyright Amendment Bill, this Bill lacks an impact assessment on affected industries, leading to potential unforeseen consequences.

The Bill was introduced without a proper socio-economic impact assessment, which is necessary to determine how various stakeholders within the industry, including film, theatre, design, and music, could be adversely affected.

The Socio-economic Impact Assessment System (SEIAS), which was only provided to the committee upon request and not shared with the public, further omits crucial elements needed to reassure the industry. The SEIAS analyses the effects of the proposed Bill on a range of socioeconomic factors. However, these assessments did not consider the impact of the Bill on specific industries.

This is a significant limitation, as the impact of a Bill on a particular industry may be vastly different from its impact on the broader economy – resulting in unintended consequences. Therefore, it is important for socio-economic impact assessments to take a detailed, industry-specific approach, to provide a more accurate and comprehensive understanding of the Bill's impact.

2. Substantive Issues:

2.1 Negative Implications on International Treaties:

The Bill could contravene international copyright laws, potentially causing diplomatic complications and harming our creative industries.

The Bill violates international treaties because the existing Act is not aligned with the Rome Convention, and the proposed amendment may exclude performances protected under international treaties.

The definition of “performer” in section 1(h) should exclude “extras”, in line with the Beijing Audio-visual Performances Treaty and international standard practice.

Section 1 (h): “performer’ means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary works, musical works, artistic works, dramatic works, [or works of joint authorship] or traditional works as contemplated in the Copyright Act...”

2.2 Undermining Freedom to Contract:

The Bill potentially limits the freedom of contract between performers and producers. A prescriptive approach to contract regulation may not be suitable for all creative talent and producers across different copyright industries. Limiting freedom of contract could discourage investment in creative industries and reduce opportunities for performers. The Bill, in its current state, undermines the freedom to contract, creating potential for abuses and unfair treatment, as illustrated in Clause 8.

Clause 8 reads: “Section 8D of the principal Act is hereby amended by the addition of the following subsections: “(3) The Minister must make regulations prescribing compulsory and standard contractual terms to be included in agreements to be entered into in terms of this Act, which contractual terms must include— (a) The rights and obligations of the performer and the relevant producer, broadcaster or user; (b) the royalties or equitable remuneration payable to the performer agreed on as the case may be; (c) the method and period within which any royalty or equitable remuneration must be paid by the relevant producer, broadcaster or user, to the performer; (d) the period of the agreement; (e) a dispute resolution mechanism; and (f) provision for both parties to sign the written agreement as proof of consensus. (4) The Minister may prescribe guidelines for a performer to grant consent under this Act.”.

2.3 Confusion Between Performers' Rights and Copyright:

The Bill blurs the line between performers' rights and copyright, as seen in Clause 3, leading to uncertainty about ownership and compensation or exclusive rights and remunerative rights.

Clause 3A reads: The principal Act is hereby amended by the insertion after section 3 of the following sections: “Transfer of rights. 3A. (1) Where a performer has consented to fixation of their performance in an audiovisual fixation or sound recording, the exclusive rights of authorisation granted to a performer in terms of section 3(4)(c), (d), (e), (f), (g) and (h) shall be transferred to the producer of such audiovisual fixation or sound recording, or their licensee. (2) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer. (3) The written agreement contemplated in subsection (2)— (a) must at least contain the compulsory and standard contractual terms as may be prescribed; (b) must set out the— (i) royalties or equitable remuneration in respect of audiovisual works; and (ii) equitable remuneration in respect of sound recordings, due and payable to the performer for any use of the fixation of the performance; and (c) shall be valid for a period of up to 25 years from the date of commencement of that agreement in the case of a sound recording, where after the exclusive rights contemplated in subsection (1) reverts to the performer.”

Clause 3(B) reads: “Protection of rights of producers of sound recordings 3B. (1) A producer of a sound recording, who is also the owner of copyright in that sound recording, enjoys the exclusive right of authorising— (a) the direct or indirect reproduction of their sound recording in any manner or form; (b) the making available to the public of the original and copies of their sound recording through sale or other transfer of ownership; (c) the commercial rental to the public of the original and copies of their sound recording even after distribution of them by or pursuant to the authorisation by the producer; and (d) the making available to the public of their sound recording by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them. (2) A performer and the producer of a sound recording, who is also the owner of copyright in that sound

recording, enjoy the right to share equal remuneration, subject to an agreement to the contrary, for the direct or indirect use of the sound recording published for commercial purposes, for broadcasting or for communication to the public.”.

The proposed changes may blur the distinction between performers' rights and copyright, leading to uncertainty about ownership and compensation. This confusion could lead to disputes and legal challenges, making it difficult for performers and producers to enforce their rights.


Section 8A should be deleted from the Copyright Amendment Bill and exclusively dealt with in this Bill to avoid overlap and confusion.

The DTIC has not adequately addressed these issues, necessitating a comprehensive redrafting of the entire Bill.

Minority View

In terms of Standing Rule 90, the African National Congress expressed its minority view to support the Bill, requesting that consideration be given to technical amendments/comments proposed by the stakeholders during the public participation process, that would improve certain clauses, and that the DTIC effect the concerns raised by the stakeholders during the public participation, which included the disappointment raised in respect of the delays in the legislative process, with “new committees, and demonstration of lack of familiarity with complexities of the Bill nor its urgency” (quoted from SADTU’s submission). Furthermore, consideration should be given to other submissions made at the public hearings, such as Denise Nicholson from Scholarly Horizons, who raised the concern of ample scientific evidence made that includes studies on the evolution of “fair use”. Ms Nicholson advised on appreciating the real benefits of fair use and claimed that it is a “permit to increase access to knowledge” for all South Africans. Further we must be weary of elongated practices of collection management organizations, CMOs that are not regulated resulting to furtherance of exploitation of local users, and artists.

In terms of Standing Rule 90, Al Jama-ah expressed its minority view to support the Bill.



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MS CAT MURRAY, MPP

**CHAIRPERSON: STANDING COMMITTEE ON FINANCE, ECONOMIC OPPORTUNITIES
AND TOURISM**