**Performers Protection Negotiating mandates**

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| **Provincial Legislature** | **Recommendations** | **DTIC and CLSO comment** | **Decision** |
| **Clause 1 - definitions** | | | |
| **General comment** | | | |
| **NORTH WEST** | The definition of "broadcast", "communication to the public", "fixation", "producers", "reproduction" are not keeping with the corresponding definitions in the International Treaties | **No amendment recommended – the definitions do comply with the treaties**  **DTIC**  The Bill took the treaties into consideration and ensured alignment. The Rome convention was noted given its similarity to WPPT. The Beijing treaty was also considered. In some respects, more rights were considered to ensure more rights for the performers.  **CLSO**  It is not clear in what manner these definitions do not comply with the treaties. The wording of a treaty need not be copied verbatim. It should be adjusted to fit into the local laws. This has been done iro all definitions. |  |
| **“broadcast”** | | | |
| **FREE STATE** | Amendment of Section 1 as ff:  (On the definition of  (b) “**broadcast**” – deletion of the words **[wire or].** | **It is recommended that the amendment to the definition of “broadcast” be deleted and that the current definition as in the Act be retained. I.e., delete clause 1(b).**  **DTIC**  The recommendation to retain the current Act can be supported. There were extensive debates in the Portfolio Committee on wire implications and the implication for industries and the policy considerations underway - white paper. There are policy challenges that were identified.  The broadcast definition was intended to cater for various transmissions and meet treaty obligations. The concern raised that it may exclude other forms of transmissions is noted for further consideration.  There is white paper being finalised. The deliberations in parliament looked at the implication of wire transmission. Concerns were raised about the implication of removing wire. There were concerns raised about the terms used in the definition in the Bill such as wholly or partially. With the amendments, concern was that now it omitted satellite transmission and programme carrying signal.  The wire transmission is still taking place in South Africa. Removing wire may have unintended consequences for a vast number of industries still using the mode of transmission.  **CLSO**  By deleting “wire”, the definition excludes licensed broadcasters who currently broadcast content by wire in South Africa. Wire is still used in the rest of the Act (Assman, Scholarly horizons (D Nicholson), E-Media)  CLSO consulted in the PC on this exact issue: we received feedback from E Media, Multichoice, NABSA and SABC:  Inclusion of “wire” in the definition of “broadcast”  In South Africa, the two main broadcast platforms are satellite and terrestrial (wireless). There is nothing in law preventing cable broadcasting being introduced into South Africa at this point, but the existing extent of terrestrial/satellite broadcasting services and capital outlay associated with cable roll-out mean it’s unlikely that any party in South Africa would seek such a broadcasting licence at this late stage.  The proposal is that this word be included. Broadcasting can happen by way of wire, although what could be regarded as broadcasting by wire in South Africa at the moment is not currently subject to licencing requirements. This licensing requirement may however change in the near future.  The word “wire” may refer to a number of types of broadcasting:  • Cable, which is used in the USA and Europe (because of cost perhaps not likely in South Africa);  • Internet Protocol Television: This is offered over optical fiber private networks – i.e., internet broadband services bundled with television services that are offered using internet protocol over private networks in gated estates, hotels or apartment buildings There are such services in SA at the moment. However, no broadcasting licence is yet required for this type of broadcast as it is provided by “third parties who bundle internet broadband services together with simultaneous retransmissions of the channels of existing broadcasting licensees via servers based in the estate, hotel or apartment blocks.”  Technically, these services would require a broadcasting licence if they offered television services that were not those of the existing broadcasting licensees. As far as the NAB is aware, no such licence application has been made to ICASA as these IPTV services offer, in the main, mere simultaneous retransmissions of the channels of existing TV broadcasting licensees via servers and private networks based on gated estates or in apartment buildings. Therefore, a licence is only required for the internet provision (an Electronic Communication Service licence). ICASA has in fact already looked into this and is of the view that depending on how this service is structured, it may require a broadcasting licence.  Fiber optical network – i.e., the internet in South Africa. “(A)ll the broadcasters are currently providing channels over the top (OTT) using the internet in one form or another”. Streaming services are also provided via the internet in this manner.  This type of broadcasting by wire is not yet considered as being broadcasting for the purposes of having to obtain a licence.  The Department of Communication and Digital Technologies is currently busy with a white paper that will bring this type of broadcasting under the licencing framework set by the Electronic Communications Act – it seems it will be classified as “audiovisual content services”, of which broadcasting will be a sub-category. |  |
| **GAUTENG** | 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.  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;" |  |
| **“communication to the public”** | | | |
| **GAUTENG** | 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 proposed amendment is not recommended – the definition took the treaty into consideration**  **DTIC**  It is unclear what the issue is with the definition. The definition took the treaty into consideration. |  |
| **“copyright Management Information”; “sound recording”; “technological protection measure” and “technological protection measure circumvention device” referring to the Copyright Act** | | | |
| **GAUTENG** | Clause 1(e) – Copyright Management Information  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. | **The proposed amendment is not recommended. The Acts are interlinked**  **CLSO**  This can be done, but it is not recommended. The two Acts work together. Should the Copyright Act be amended and, in an oversight, the PPA is not, the definition in the PPA will be outdated. |  |
| **GAUTENG** | Clause 1(l) – ‘sound recording’, ‘technologically protected work’, ‘technological protection measure’ and ‘technological protection measure circumvention device’  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. |  |
| **NORTH WEST** | the Performers Protection Bill and Copyright Amendment Bill are interdependent, cannot be split to independent Bills, and to avoid confusion clear definitions should be included for "artists" and "performers" in both Bills |  |
| **“performer”** | | | |
| **GAUTENG** | 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 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.  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". | **Recommend that the definition be amended as proposed – see wording in blue**  ‘‘ **‘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, but does not include extras, ancillary participants or incidental participants.;’’;  **DTIC**  The concern of the performers and other participants are noted. The Beijing Treaty does not exclude extras. Performer is defined. It is known that extras do not receive royalties and they are at the background. The recommendation on the extras is not necessary, however given the concerns raised, it can be recommended.  **CLSO**  The Bill’s definition does conform with that of Beijing. The Bill identifies a performer as an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs (various) works  Definition in Beijing treaty - actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise performs (various) works  “Extras” do not have speaking roles, and are in the background – they do not act, sing, deliver, declaim or play in works.  Interpretation of laws – Courts will not allow an absurd interpretation |  |
| **WESTERN CAPE** | • 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…’’ |  |
| **NORTH WEST** | 1. Section 1: the definition of the word "Performer" - is quite narrow and may exclude certain types of performers who deserves protection under law. It is therefore proposed that the definition be broaden to ensure that all classification is covered. | **The proposed definition is not recommended - the definition is aligned to international treaties and law.**  **DTIC**  The definition has to align to the treaty. The definition is informed by the international treaties and the nature of the law. It is not clear the other performers that can be considered. The current definition should be retained as it sufficiently covers performers. Broadening it may make it to be outside the correct legal context.  The definition of performer addresses various role players in the creative industry. The definition of performer is in line with international best practice. |  |
| **“producer”** | | | |
| **FREE STATE** | (j) ”**producer**” – insertion of any before the word “person” to ensure that both natural and legal persons are included. | **The proposed amendment is not recommended – the Interpretation Act provides for “person” to include juristic and natural persons.**  **CLSO**  Not recommended: It is not necessary to add anything as “person” means in itself any person – drafting conventions require us to draft in the singular unless absolutely not possible. All singular words may thus mean plural – i.e., “any person” / “persons”. Treaties need not be incorporated verbatim into our law.  Person in SA law – Interpretation Act:  “person” **includes**—  (a) any divisional council, municipal council, village management board, or like authority;  (b) any company incorporated or registered as such under any law;  (c) any body of persons corporate or unincorporate;  It is thus not necessary to differentiate between natural or legal when using “person” as it includes both. |  |
| **GAUTENG** | 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(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". |  |
| **“reproduction”** | | | |
| **FREE STATE** | (k) “reproduction” – insertion of the words **the whole or a part of** in between the words “copy of” and “an audiovisual” | **The proposed amendment is not recommended – it may have unintended consequences and needs more research. It will also require additional public participation.**  **DTIC**  The definition proposal is noted. However, it may have unintended consequences and requires further consultation. It is not recommended in this process. |  |
| **FREE STATE** | (l) “**Sound recording**” – substitute the words [**but does not include a sound track associated with and audiovisual fixation]** with other **than in the form of a first fixation in cinematographic or other audiovisual work; rights in a sound recording are in no way affected by the subsequent incorporation of a sound recording in any other media, including in an audiovisual work;** | **The proposed amendments are not recommended – it may have unintended consequences and needs more research. It will also require additional public participation.**  **DTIC**  This proposal will make the definition not to be aligned to the treaty. Parties can address the rights in the contractual arrangements. The safeguarding of the preexisting sound recordings should not be addressed in the definition. |  |
| **NORTH WEST** | The definition of "sound recording" should be amended to clarify that rights in pre-existing sound recordings are not affected by their inclusion into audio-visual work |  |
| **“technological protection measure” and “technological protection measure circumvention device”** | | | |
| **GAUTENG** | 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.  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 | **No amendment to the wording of the Bill’s definitions recommended: These definitions are fully compatible with the treaties and the three-step test. As they are currently worded, they provide a very careful balance between rights of copyright owners and users.**  **DTIC**  The definitions of TPMs were debated extensively. Given that the Bills will be new, a balance must be found between, protection and access. The stronger TPMs were advertised and experts advised of the challenges in countries that went that route such as the US. There was advise that the stronger TPMs will impact negatively on consumer protection and competition law. Within the developmental context they are sufficient. The balance between access to users and protection to authors is important. TPMs should not be too strong to an extent they harm other parts of the market including for consumers and competition.  **CLSO**  The proposed wording was in fact considered by the Portfolio Committee and advertised. The public’s responses showed that the current wording in the D Bill is a balanced approach and compliant with treaties. The proposed wording resulted in unintended consequences, including iro consumer law, competition law and other security related breaches. In South Africa, the imaginative reconfiguration of diverse components to adapt or repair a system to suit local needs and conditions will be prohibited: Foreign giants will decide what is and is not permissible in respect of the digital technologies that South Africans depend upon.  Unless a nexus with infringement is clear these 3 freedoms are compromised:   * “the freedom to arrange our conduct to our own benefit rather than that of the shareholders of the companies whose products we purchase (to use the product as the consumer wants to); * the freedom of third parties to offer accessories, consumables, services and repair for the products we own; and * the freedom of auditors to uncover and publicise defects in the products we rely on (they are threatened that any disclosure could jeopardise the TPM).” (Doctorow) |  |
| **NORTH WEST** | 3. Definition of "technological protection measure" and "technological protection measure circumvention device" are not compatible with Article 18 of the WPPT and the exceptions in section 8E and 8F relating to prohibited conduct in respect to technological protection measures and exceptions in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test. |  |
| **“royalty”** | | | |
| **GAUTENG** | 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 proposed amendment to a definition is not recommended – the word is not defined in the Act or Bill.**  **CLSO**  Royalty is not defined in the PPA or in the amendment to the PPA |  |
| **Clause 2: Section 3** | | |  |
| **GAUTENG** | 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. | **The proposed amendment is not recommended – the treaty wording need not be incorporated word for word. The wording may be in the Rome treaty, which does not apply to performers.**  **Additional rights envisaged will require research, consultations and an impact assessment. It will also require public participation.**  **DTIC**  The reference and content could not be found in the WPPT. It might be in the Rome Convention, Article 5. Those rights are for producers of phonograms not for performers. To incorporate them will require a new process. The performers protection provides exclusive rights and moral rights.  **CLSO**  It is not necessary that the Bill is limited to the wording or required rights of a treaty. The wording of a treaty need not be copied verbatim. It should be adjusted to fit into the local laws. Provided there is general compliance with the principles of the treaty, the actual wording is not required to be included in legislation.  Iro the wording quoted, this Bill chose place of fixation as the basis for protection. The treaty does not require all 3 elements to be present. |  |
| **NORTH WEST** | Section 3 (1) of the Bill: 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 fixation or simultaneous publication criteria. |  |
| **GAUTENG** | 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 proposed amendment is not recommended - The remuneration structure in the PPAB was amended and aligned to the treaties**  **DTIC**  The structure of the Bill is aligned to the Performers’ Protection Act. The remuneration structure in the PPAB was amended and aligned to the treaties during the parliamentary process. The Bills harmonize with the international treaties. This has been assessed and deliberated in parliament.  The view of the legal and technical experts of the Committee at the time the Bill was finalised, is that the Bills are aligned with the contents of the relevant Treaties. Following the recent processes in the National Assembly, the view is that the Bills are aligned to international Treaties and international obligations.  In clause 4, section 5, the current Act uses “without consent” of the performer which the Bill just perpetuated but included all the WPPT and Beijing provisions. The right to consent is an important policy in that that the performer will always exercise and decide how to agree on the remuneration that follows once his or her performance is broadcast, communicated to the public, made available to the public, reproduced etc.  This right is therefore not downgraded but education and awareness are critical to the performing industry on what this right entails. Consent giving and agreement of royalty payment is done simultaneously in practice and that’s where is kind of confusing and very often the contract only mentions agreement of royalty payment and not the right to consent to be recorded. |  |
| **GAUTENG** | The use of the phrase in in clauses 2, 3, and 4 “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. | **The proposed amendment is not recommended - Equitable remuneration is widely used in the context of remuneration in copyright and related rights**  **DTIC**  Equitable remuneration is widely used in the context of remuneration in copyright and related rights. It also makes allowance for various arrangements of remuneration between parties. Stakeholder submissions and industry view is that it is acceptable to use the wording ‘equitable remuneration’. |  |
| **NORTH WEST** | Section 3: Granting audio-visual performers additional rights even after the grant of exclusive rights is not a requirement under the Beijing Treaty which South Africa intends to ratify. | **No amendments recommended – countries may grant more rights than envisaged in treaties**  **DTIC**  It is unclear the additional rights referred to in this comment, however in terms of treaties, they do not have to be worded verbatim. In addition, countries can give more rights in line with their legal contexts, in South Africa’s case, the Constitution.  **CLSO**  It is not necessary that the Bill is limited to the wording or required rights of a treaty. The Bill can go broader. |  |
| **Clause 3 – Section 3A (Transfer of rights) and 3B (Protection of rights of producers of sound recordings)** | | |  |
| **Section 3A** | | |  |
| **FREE STATE** | The Minister should not be given sole responsibility in determining the prescribed standards of contracts. | * **The proposals to remove the power of the Minister to prescribe in relation to terms of a contract are not recommended. The purpose is to ensure protection for vulnerable parties who do not have a strong negotiating base when entering into agreements.** * **However, the following amendments are proposed to ensure that the Bill is clear on the nature of what the Minister may include in regulations (an option is provided iro wording) – see font in blue:**   **CLAUSE 3 – SECTION 3A**  “(3) The written agreement contemplated in subsection (2)—   1. must at least contain the **[compulsory and]** standard contractual terms reflecting rights as set out in this Act and the Copyright Act, as may be prescribed;”   or  “(3) The written agreement contemplated in subsection (2)—  *(a)* must at least contain the **[compulsory and]** standard **[contractual terms]** elements, as may be prescribed, to ensure that rights or protection afforded by this Act and the Copyright Act are duly provided for;”  **DTIC**  The standards aim to provide minimum standards of protection and not dictating commercial terms.  The powers of the Minister to set minimum contract standards are meant to ensure there is an enabling environment for contacting amongst parties. There are abuses to contracts and it is important that this is addressed.  **CLSO**  It is not clear who is recommended to share this responsibility.  Many contracts have prescribed formalities and terms:   * Surety agreement; * Sale of immovable property; * Even in common law: a valid agreement to buy and sell must contain – identification of the parties, an offer, an acceptance, a product, a price, agreement of minds, competency to contract.   These are all required terms of a contract in terms of law  Farlam Commission – CRC report: “the dti is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5”  Proposed amendment:  “(3) The written agreement contemplated in subsection (2)—  (a) must at least contain the **[compulsory and]** standard contractual terms reflecting rights as set out in this Act and the Copyright Act, as may be prescribed;” |  |
| **FREE STATE** | Insertion of the words ”**and must set out the agreed remuneration terms”** at the end of **Section 3A(2);** and  Delete **Section 3A(3)** as it is contrary to the law of contract. | **Proposed amendment not recommended – 3A(3) is not contrary to the law of contract.**  **DTIC**  The standards aim to provide minimum standards of protection and not dictating commercial terms.  The powers of the Minister to set minimum contract standards are meant to ensure there is an enabling environment for contacting amongst parties. There are abuses to contracts and it is important that this is addressed.  **CLSO**  The proposal re 3A(2) depends on the deletion of 3A(3) and is thus addressed by speaking to the law of contract iro (3). It is not clear why 3A(3) is viewed to be contrary to the law of contract:   * (3) deals with the required written agreement between parties. * (a) requires that the agreement must “at least contain the compulsory and standard contractual terms as may be prescribed.” As indicated before, many types of contracts have minimum or compulsory terms. Both compulsory and standard terms would have to reflect, or at least be closely aligned to, the content of the Act, or they would be *ultra vires* (the Minister cannot go broader than the Act in what they prescribe). * These requirements are in accordance with the law of contract * (b) requires that the royalties or equitable remuneration agreed upon must be included in the written agreement. * This requirement is in accordance with the law of contract * (c) contains a reversion right. * This is not retrospective and is thus not affecting rights already accrued. Any person entering into a contract knows of this reversion and thus contracts within its confines. Such a prescript is not against the laws of contracts. * Should the argument be about constitutionality the same argument applies – no existing rights are affected and section 22 of the Constitution allows for a trade to be regulated.   It is submitted that the sections are clear.  See discussion above re standard terms and why they are proposed in these Bills (to protect the authors / performers)  It differentiates between the way payment occurs iro 2 different works:   * audiovisual works are paid either by way of royalties or equitable remuneration; and * Sound recordings are only paid by way of royalties |  |
| **GAUTENG** | 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”. |  |
| **NORTH WEST** | Section 3A(3)(a) and (b): Ministerial obligation to regulate contractual agreements between performers and producers and an unclear requirement for contract to set out "royalties or equitable remuneration in respect of audio-visual works; and equitable remuneration in respect of sound recordings, due and payable to the performer for any use of the fixation of the performance". This section is therefore recommended to be revised. |  |
| **GAUTENG** | 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 | **The proposed amendments are not recommended – The reversion right is an important policy directive to protect the vulnerable**  **DTIC**  • The reversion right is not unique to SA. It is similar to the one in the CAB.  • The Copyright Review Commission made recommendation on this right and it found 25 years to be sufficient to recoup the investment. Parties can renegotiate the contracts.  • Given the policy context of the abuses in contracts and assignments previously, it makes this amendment crucial.  **CLSO**  In case this concern also has a legal element: This is not retrospective and is thus not affecting rights already accrued. Any person entering into a contract knows of this reversion and thus contracts within its confines. Such a prescript is thus lawful. |  |
| **LIMPOPO** | **Clause 3 Insertion of section 3A in Act 11 of 1967**  Section **3A(3)(c)** should be deleted as it limits the commercial availability of the work to a period of 25 years from the date of commencement of the agreement. It will mean that applications for the rights to use the work post 25 years would have to start afresh, which may be too difficult. |  |
| **MPUMALANGA** | In protecting the performers exclusive rights to revert to him or her after twenty-five (25) years in terms of Section 3A(3)(c), the bodies recommended “shall, subject to a written agreement to the contrary, [shall] be valid for a period of up to twenty-five (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”. The committee noted, however, that this provision requiring a written agreement, has already been covered in Clause 3A(3)(c). |  |
| **NORTH WEST** | Proposal that section 3A (3)(c) which provides for automatic reversion assigned after 25 years, be deleted. Section 3A (3)(c) limits the term of contract between performers and copyright owners of sound recordings including producers, songwriters, authors and publishers to a maximum term of 25 years, after which rights will automatically revert to the respective parties. Reversion of assigned rights would also have the direct and severe negative impact on investments in South African artists and repertoire as sound recordings would ease to generate revenues for record companies and artists, reducing the revenues available to reinvest in new South African Artists. |  |
| **Section 3B** | | |  |
| **GAUTENG** | 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. | **The proposed amendments to delete section 8A in the Copyright Amendment bill is not recommended – the Acts are interlinked and both sections are necessary.**  **DTIC**  • The two Bills are interlinked. Both laws can be addressed in the same Bill. The response is similar to the explanation provided for section 8A in the CAB.  • The inclusion of sound recordings provisions in both Bills is not arbitrary. The link will ensure that other remedies in the Copyright Amendment Bill that includes access to collecting societies, the Copyright Tribunal, the Commission amongst others are catered for.  **CLSO**  Clause 9 in the Copyright AB deals with the nature of copyright in sound recordings. The new section 3B deals with rights of producers specifically iro sound recordings. The PPAB is a specific Act and Copyright Act general. In any conflict of laws, the terms of the PPAB will trump. There is this no legal uncertainty.  “Equitable remuneration” seemed to be clear to the industry judging from public submissions – it is not necessary to define a term that has its normal meaning. |  |
| **NORTH WEST** | 9. Section 3B: It is assumed that the protection of sound recordings is already displayed in section 9 of the Copyright Act, section 3B concerning the "protection of rights of producers of sound recordings" is misplaced and creates legal and commercial uncertainty. |  |
| **WESTERN CAPE** | Lack of clarity and overlap between the two Bills makes the Performers' Protection Bill confusing and problematic  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.  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 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 4 – Section 5** | | |  |
| **FREE STATE** | The bill as it relates to the rate in reporting on performance to Department of Trade, Industry and Competition (DTIC) by the production companies should be reduced as it becomes a duplication because this function is already being performed either monthly or quarterly. | **The proposed amendments are not recommended – This relates to the Copyright Amendment Bill and was addressed there – due to abuse in the industry it is crucial for reporting and registration to be regulated.**  **DTIC**  The PPAB has no reporting requirements from the Department of Trade, Industry and Competition by the production companies. The comment is not related to the Bill.  The PPAB Bill distinguishes remuneration for sound  recordings and audiovisual works.  The reporting requirements and penalties for compliance is a policy decision. The amendment was discussed extensively in parliament. Given its impact on performers, they were seen as critical. |  |
| **GAUTENG** | Clause 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. |  |
| **GAUTENG** | 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 for the purpose of, amongst others, calculating the royalties or equitable remuneration due and payable by that person.  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. |  |
| **FREE STATE** | There is a concern that the bill is using a one size fits all approach on the payment of royalties. | **A proposal is made for an amendment to the Copyright Amendment Bill to also provide for equitable remuneration, in certain clauses where “royalties” are referred to.**  **No amendments are required the Performers Protection Amendment Bill**  **DTIC**  The PPAB Bill distinguishes remuneration for sound recordings and audiovisual works. |  |
| **FREE STATE** | Section 5(1) (b) as is in the Principal Act be retained.  Section 5(1A) – must expressly apply only to approved licensed uses of sound recordings and audiovisual works.  Obligations in terms of Section 5(1A) must apply only between the licensor(s) of the use in question.  Section 5(1A) must be aligned with the law of contract to avoid undue interference in private.  Align the “sale, commercially renting out and distribution” in Section (4)(a) | **The proposed amendments are not recommended – the purpose of the amendments is not clear.**  **CLSO**  It is not clear why section 5(1)(b) is objected to. The amendments are:   * Changing “fixation” to be both an audiovisual fixation or sound recording so as to provide for both instances – very important as the definition of “fixation” is now deleted by this Bill. * Adding equitable remuneration as a form of payment, so that not only royalties are provided for: This has been something the public inputs seemed to agree on – royalties cannot be the only form of payment * Using the correct wording to refer to the Copyright Act as it is already defined in the Performers Protection Act. * Adding selling or renting out of the original or a copy of the audiovisual fixation or sound recording of the performance as rights of the performer for which the performer must be compensated.   Re (1A):   * It is not clear how (1A) could apply to any person who is not authorized to do these Acts, and thus can apply between the licensor(s) of the use in question. * It is not clear where (1A) is not aligned with the law of contract. It simply sets out that any person who makes use of the performance as per the acts in (a) to (h) must register that this will be done and must report on what was done in order to calculate payment due to the performer.   Re (4)(a) – This may be something that went off when the Bill was emailed. The Creda version that I have is correctly formatted. However, when final Bills are printed, this is something that will be looked at carefully. |  |
| **GAUTENG** | 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. | **The proposed amendments are not recommended – the penalties are required as deterrent due to the impact the act has on performers**  **DTIC**  The reporting requirements and penalties for compliance is a policy decision. The amendment was discussed extensively in parliament. Given its impact on performers, they were seen as critical. |  |
| **GAUTENG** | 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)."' | **The proposed amendment is not recommended – the meaning and intention is unclear**  **DTIC**  The amendment is noted however it is a proposed amendment and it is unclear what its meaning and intention is. Changes have to be sufficiently supported by context to assist the process. The amendment is not recommended.  **CLSO**  Section 5 PPA and section 8A do not apply in addition to each other. They apply at once and must be read as one. There is thus no need to offer a choice between the two Acts.  As Copyright Act is defined in the PPA, we need not use its full citation. |  |
| **NORTH WEST** | Section 5: Downgrading of performer's rights from exclusive to mere remuneration rights which are less than the requirements of the WPPT and the Beijing Treaty which South Africa intends to ratify. | **No amendments are recommended – performers rights are not downgraded**  **DTIC**  The PPAB provides rights to performers. It is unclear how section 5 downgrades performers’ rights from exclusive to mere remuneration rights. The Bill outlines exclusive rights in section 3 and provides other protections in the Bill such as of moral rights. Section 5 provides 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 a performance fixed in audiovisual fixation to the public and provide for persons who intend to broadcast or communicate to the public a performance fixed in an audiovisual fixation or sound recording of a performer, to record certain acts and submit reports thereon. Failure to do so constitutes an offence.  In clause 4, section 5, the current Act uses “without consent” of the performer which the Bill just perpetuated but included all the WPPT and Beijing provisions. The right to consent is an important policy in that that the performer will always exercise and decide how to agree on the remuneration that follows once his or her performance is broadcast, communicated to the public, made available to the public, reproduced etc.  This right is therefore not downgraded but education and awareness are critical to the performing industry on what this right entails. Consent giving and agreement of royalty payment is done simultaneously in practice and that’s where is kind of confusing and very often the contract only mentions agreement of royalty payment and not the right to consent to be recorded.  **CLSO**  I am not 100% sure I follow the argument. Clause 4, amending section 5 only adds to the existing Act – It does not take away rights. |  |
| **Clause 6 – Section 8D (Regulations)** | | |  |
| **GAUTENG** | 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. must 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. | * **The proposals to remove the power of the Minister to prescribe in relation to terms of a contract are not recommended. The purpose is to ensure protection for vulnerable parties who do not have a strong negotiating base when entering into agreements.** * **However, the following amendments are proposed to ensure that the Bill is clear on the nature of what the Minister may include in regulations (an option is provided iro wording) – see font in blue:**   **CLAUSE 6 : SECTION 8D**  “(3) The Minister must make regulations prescribing **[compulsory and]** standard contractual terms reflecting rights as set out in this Act and the Copyright Act, **[to]** that must be included in agreements to be entered in terms of this Act, which contractual terms must include—"  Or  “(3) The Minister must make regulations prescribing **[compulsory and]** standard **[contractual terms]** elements **[to]** that must be included in agreements to be entered into in terms of this Act, to ensure that rights or protection afforded by this Act and the Copyright Act are duly provided for, which contractual terms must include—;”  **DTIC**  The standards aim to provide minimum standards of protection and not dictating commercial terms.  The powers of the Minister to set minimum contract standards are meant to ensure there is an enabling environment for contacting amongst parties. There are abuses to contracts and it is important that this is addressed.  The minimum requirements on contracts serve a purpose. The minimum contact terms are meant to ensure the protection of performers.  **CLSO**  There is no chapter 2 right to “freedom to contract”.  Section 22 provides: “Freedom of trade, occupation and profession.—Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”  Even if argued that these contracts underpin the practicing of a trade (etc.), the constitution still allows that to be regulated by law.  Many contracts have prescribed formalities and terms:   * Surety agreement; * Sale of immovable property; * Even in common law: a valid agreement to buy and sell must contain – identification of the parties, an offer, an acceptance, a product, a price, agreement of minds, competency to contract.   These are all required terms of a contract in terms of law  Farlam Commission – CRC report: “the dti is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5”  A similar exercise is done in clauses 5 (s6A(5)), 7 (S7A(5)) of CAB and 3 (section 3A(3)) in PPAB by setting out the terms that MUST be included in an agreement such as terms of payment and choosing a dispute resolution mechanism.  This does not constitute a delegation of plenary powers – it deals with operational matters that may need to change fast and are thus ideal to be situated in regulations.  The Bill very clearly provides the minimum standard clauses that must be included in a contract in paragraphs (a) to (f) of section 8D(3) – these thus serve as a guide to the minister iro the type of clauses to prescribe. Prescribing compulsory contractual terms is not plenary power. It is exactly the type of power that can be delegated as it relates to operational issues that could change and thus need a quick legislative update. The Minister is simply given additional power to add to these as the legislature cannot foresee every abuse that may arise in future in respect of every type of contract. |  |
| **WESTERN CAPE** | 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. |  |
| **NORTH WEST** | Section 8D (3) impermissibly delegates plenary legislative power of the Minister, which stands to be set aside on this basis. The same section does not simply permit the Minister to make "Regulations" within the framework to all to guide the Minister's exercise of his powers under section 8D (3). There is no guidance in the bill as to what the rights and obligations should entail, or even the purposes they must serve. Instead section 8D purports to permit the Minister to determine the rights and obligations of persons who enter into agreements under the Act from scratch, as if the Minister is the legislative authority.  It is therefore recommended that section 8D (3) constitutes an impermissible delegation of legislative authority to the Minister, as such it would be invalid if enacted and should be deleted from the Bill. |  |
| **Matters dealt with in the Copyright AB** | | |  |
| **FREE STATE** | All collecting societies must first be accredited before they can perform their functions of collecting royalties on behalf of artists. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  The Bill provides for this – Section 22B. Giving yourself out as such without being accredited is an offence. (22B(8))  However, existing Collecting Societies cannot simply be disbanded – section 22B(7) requires those to apply for accreditation within 18 months of the commencement of the Amendment Act |  |
| **FREE STATE** | The bill must make sure that artists are in line with 4th Industrial Revolution and be able to benefit the economy through digital programmes. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  The Copyright Amendment Bill seeks to align copyright with the digital era and developments at a multilateral level – it gives effect to the WIPO Copyright Treaty (‘‘WCT’’), the WIPO Performance and Phonograms Treaty (‘‘WPPT’’); and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.  Also see sections 12C, 19B, 19C, 19D, 23, 27, 28O to 28S. |  |
| **GAUTENG** | Section 6 Clause 5 Section A  Reject Section 6A as introduced by Clause 5 and properly investigate workable solution to benefit authors | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Bill - 6A is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | 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. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - 8A is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | 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. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - 12A is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | 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. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - This is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | Section 22A: orphan works regime should not apply in respect of musical works. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - This is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | Reject Clause 25(b) amending Section 22(3) and retain the current assignment formality in the Copyright Act | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - This is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | 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. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - This is introduced in the Copyright Amendment Bill – see comments there |  |
| **GAUTENG** | 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. | **No amendments to the Performer’s Protection Amendment Bill required – matter dealt with in Copyright Amendment Bill**  **CLSO**  This is the wrong Amendment Bill - This is introduced in the Copyright Amendment Bill – see comments there |  |
| **New matters (not currently in the Bill)** | | |  |
| **Period of protection** | | |  |
| **FREE STATE** | Members of the community proposes that the Bill should look into extending the royalties shares from 50 to 70 years after the death of an artist. | **This proposed amendment is not recommended – it will require policy development: research, consultations and an impact assessment. It will also require a public participation process.**  **DTIC**  The term of performers to receive royalties is related to the lifespan of the work. This is a significant proposed amendment that requires a new process. It is recommended that it can be considered in the next legislative process. |  |
| **Recorded performances published in SA** | | |  |
| **FREE STATE** | A further amendment of Section 3(1) is recommended to ensure protection for the recorded performance SA nationals where the performances of SA performers are protected, and for recorded performances published in SA within a period of 30 days of their first publications. | **This proposed amendment is not recommended – it will require policy development: research, consultations and an impact assessment. It will also require a public participation process.**  **DTIC**  The proposed amendment seems to be in the Rome Convention, Article 5. A proposal of this nature will require a new process as a new amendment for further consultation. Its inclusion is not recommended. |  |