



27 January 2023

Hon Chairperson

By email

Dear Chair,

JOINT RiSA AND IFPI SUBMISSION ON THE SOUTH AFRICAN COPYRIGHT AMENDMENT BILL (B 13D – 2017) AND PERFORMERS’ PROTECTION AMENDMENT BILL (B 24D – 2016)

RiSA is the industry body representing the South African recorded music industry, while IFPI represents the recording industry worldwide.

RiSA and IFPI thank the Select Committee for the opportunity to comment on the Copyright Amendment Bill and Performers’ Protection Amendment Bill (Bills) and provide input on our serious concerns regarding the Bills which if implemented in their present form, will have several unintended and harmful consequences which would hamper the growth and investment in the South African recorded music industry, harm artists, and weaken South Africa’s internal and export markets for creative content.

Our detailed submission is attached hereto. In addition, we advise that we appreciate and welcome the opportunity to participate in the public hearings process that the Select Committee has indicated it intends to hold.

Our main recommendations are as follows:

- Subsections to Section 39 of the Copyright Amendment Bill giving the Government power to dictate terms in copyright contracts, seriously and without justification interferes with the freedom of contract, and should be deleted.
- The proposal to introduce automatic reversion of assigned rights after 25 years in the Performers’ Protection Amendment Bill, which would have a negative impact on labels’ ability to invest in artists and would end up hurting the South African artists, should be rejected.

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- The importation of the US-style “fair use” exception in the Copyright Amendment Bill must be resisted. It would undermine the protection of the South African creative community, create significant legal uncertainty, and benefit mainly large foreign companies seeking to use South African works for free.

These provisions would interfere with freedom of contract, undermine the protection of creative works, lead to legal and commercial uncertainty, and create a disincentive to invest in South African cultural industries. A thriving South African cultural sector, one that is able to create jobs and generate tax revenues, needs robust copyright protection and fair and predictable rules.

We thank you in advance for your attention to this important matter. Please do not hesitate to contact us for any information that you may require.

Yours faithfully,



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Submission on the Copyright Amendment Bill and Performers' Protection Amendment Bill

I. INTRODUCTION

The Recording Industry of South Africa (RiSA) is the trade association representing the collective interests of producers of music sound recordings and major and independent record labels in South Africa. RiSA has approximately 20,000 members, the majority of whom are small independent, artist-led record labels including, among others, Ambitious Entertainment, Open Mic, Kalawa Jazmee, Muthaland, Gallo Records, Afrotainment, as well as the three major record labels, Sony, Universal and Warner.

RiSA is part of IFPI, which is the global body and the voice of the recording industry worldwide, representing over 8,000 record company members across the globe. Together we work to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music around the world.

We thank the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour (Select Committee) for the opportunity to make our written submission on the Copyright Amendment Bill (B 13D - 2017) and Performers' Protection Amendment Bill (B 24D - 2016), and make the following recommendations to bring the national copyright legislation in line with international treaties, including the WIPO Performances and Phonograms Treaty (WPPT), the WIPO Copyright Treaty (WCT), and international best practice.

II. BACKGROUND

South Africa's music sector contributes significantly to South Africa's rich and diverse culture. It also provides jobs and attracts investments in South Africa. In 2019, South Africa's recorded music industry grew by 18.8 percent, with revenues of R 866,145,000 (or USD 59.9 million) after years of decline caused by piracy. This return to growth is driven by record companies' substantial investments in South African artists and music, and by the industry embracing innovative methods of providing South African consumers with access to recorded music online.

Recent growth represents only a fraction of the industry's potential, but for the South African music sector to achieve its full potential, it needs a legal framework that supports national growth and attracts foreign investment.

III. MAIN RECOMMENDATIONS

We strongly support the initiative of the South African Government to modernise South Africa's copyright law to make it a gold standard for the region and to bring it into line with international treaties, including the WIPO Performances and Phonograms Treaty (WPPT), the WIPO Copyright Treaty (WCT), and international best practice, ensuring that they protect all participants in the music value chain.

To achieve this objective, we recommend that the following provisions be amended as follows:

1. Freedom to contract

We submit that Sections 39(cG), (cI), (cJ) and 39B(1) of the Copyright Amendment Bill, which sidestep the democratic process and extend Ministerial powers to mandate standard and compulsory contractual terms in private contractual arrangements, be deleted.

Section 39 includes several provisions which deprive artists and producers of their freedom to contract and extend Ministerial powers to regulate private contractual arrangements including:

- (i) Section 39(cG) which empowers the Minister to prescribe compulsory and standard contractual terms for the exercise of the rights set out in the Copyright Act;
- (ii) Section 39(cI) which empowers the Minister to prescribe royalty rates;
- (iii) Section 39(cJ) which empowers the Minister to prescribe the percentage and period within which distribution of royalties must be made by collecting societies; and
- (iv) Section 39B(1) which restricts contracting out of protections afforded by the law, and fails to take into account the numerous legitimate reasons why parties may wish to contract out of protections afforded by the law.

Rationale:

Pursuant to section 39, the Minister could prescribe the terms of agreements between producers and performers including royalties payable under a licence. These provisions would interfere with the freedom of contract and impose contractual formalities that are not beneficial to artists and producers. They risk disincentivising investments in South Africa, since the ability to determine the terms on which copyright is licensed or assigned is a key part of the growth of a content market. A thriving South African cultural sector would be best supported by robust copyright protection, not by undue regulation of private contractual agreements or by restricting the freedom to contract.

The power to intervene in the parties' freedom of contract in such a drastic manner cannot be left to the executive alone, therefore, the above subsections in section 39 should be removed.

2. Automatic reversion of assigned rights

We submit that Section 3A(3)(c) of the Performers' Protection Amendment Bill, which provides for an automatic reversion of assigned rights after 25 years, be deleted.

Section 3A(3)(c) limits the term of contracts 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.

Rationale:

Currently, parties negotiate the length of the assignment of performers' rights to the record company. This enables the artist and the record company to agree on mutually beneficial terms for their collaboration, including the size of advances paid and the extent of label's investment in marketing, promotion, tour support, etc. This process provides the optimal combination of flexibility and commercial certainty throughout the music value chain, from the artists all the way to the digital services, enabling labels to generate revenues from the recordings, which are shared with the featured artists, and reinvested at a high rate back into the development and marketing of new artists and repertoire.

The effect of the reversion would be overwhelmingly negative. Firstly, record companies could not take the same level of risk when investing in new artists, reducing the level of upfront investment in advances and marketing and promotion of the artists. Secondly, rights in the recording risk becoming fragmented between the record company, which owns the copyright in the sound recording, and the performers, who each own their rights in their own contribution to the overall track, with no party able to license and derive revenues from the use the sound recordings, thereby making sound recordings "*locked away*" after 25 years. That outcome would harm the very performer that the provision purports to protect.

Reversion of assigned rights would also have a direct and severe negative impact on investments in South African artists and repertoire as sound recordings would cease to generate revenues for record companies and artists, reducing the revenues available to reinvest in new South African artists.

3. Fair use

We submit that Section 12A of the Copyright Amendment Bill, which introduces an open-ended US-style fair use provision, is deleted.

Section 12A introduces an open-ended US-style fair use provision.

Rationale:

We respectfully submit that no evidence-based case nor policy rationale has been made for the importation of a broad and open-ended "fair use" exception into South African law. Rather than clearly listing uses and conditions for exceptions to copyright as the law currently

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does, the *fair use* approach developed in the US provides a defence for unauthorised users of copyright works if their use is deemed fair. Ultimately, that determination is done by courts.

We are not aware of any evidence establishing the need for, nor the desirability of such a fundamental shift in South Africa's approach to copyright law. Nor are we aware of any evidence that the introduction of *fair use* would benefit the South African consumers, creative industries or the South Africa economy at large.

On the contrary, the introduction of *fair use* in South African copyright law would create significant legal uncertainty and increase the risk of litigation. Ultimately, the likely result stemming from the introducing *fair use* will be a transfer of value from South African creators to large technology corporations – from Google and Facebook to new short form media platforms such as TikTok – who, unlike most creators, can afford to litigate the issue of fair use.

The Copyright Act currently provides for specific exceptions and limitations for the purpose of “fair dealing” and consequently provide a high degree of certainty as to the acts that are permitted in respect of protected works or subject matter. Legal certainty drives innovation as evidenced by the vast majority of some 200 countries worldwide, which are not fair use jurisdictions. It is evident that, *fair use* is not necessary to drive or sustain innovation.

While a number of moderate improvements to the Bills were made by the Department of Trade, Industry and Competition (DTIC) and the Parliamentary Law Advisor during the deliberations, these were backtracked, resulting in numerous changes and amendments. The defective legislative process of the Bills is further evidenced by the lack of an updated, sufficiently comprehensive socio-economic assessment study (SEIAS) on the impact of the Bills on the South African recorded music industry and South African artists. Further, the Bills do not adequately address President Ramaphosa's reservations regarding constitutionality and compatibility with international treaty obligations.

In addition to these provisions, the Bills contain a number of other concerning provisions which are discussed in detail in Part IV of this submission below. **Annex I** highlights our recommended amendments to ensure that the national copyright legislation is in full compliance with international treaty obligations.

IV. EXECUTIVE SUMMARY OF OTHER CONCERNS IN THE COPYRIGHT AMENDMENT BILL AND PERFORMERS' PROTECTION AMENDMENT BILL

In addition to the above-mentioned problematic provisions, we have various other concerns with the Bills which could have serious, unintended and harmful consequences, which, if implemented, would hamper the South African recorded music industry, harm artists and weaken South Africa's internal and export markets for creative content. These concerns are listed below and include:

Copyright Amendment Bill

1. **Section 8A:** Mandatory royalty entitlement for all audiovisual performers which will result in reduced incomes for performers, reduced engagement of South African performers in audiovisual productions and reduced investments in South Africa.
2. **Section 12B(1)(a), Section 12B(1)(h) and Section 12B(2), and Section 12B(1)(b):** Broad exceptions and limitations that are not adequately scoped in keeping with the three-step test including the quotation exception, private copying exception, and reproductions of sound recordings by a broadcaster exception. Under this test, exceptions and limitations to exclusive rights must apply in certain special cases, must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of right holders.
3. **Section 1 and Section 28P:** The definitions of “technological protection measure” and “technological protection measure circumvention device and service” are not compatible with the WPPT’s requirement to provide “*adequate legal protection and effective legal remedies against the circumvention of effective technological measures*”. Further, the exceptions in relation to prohibited conduct in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test.

Performers’ Protection Amendment Bill

4. **Section 1:** The definitions of “broadcast”, “communication to the public”, “fixation”, “producer”, and “reproduction” are not in keeping with the corresponding definitions in the international treaties, and the definition of “sound recording” should be amended to clarify that rights in pre-existing sound recordings are not affected by their inclusion into an audiovisual work.
5. **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.
6. **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*”.
7. **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.

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8. **Section 1() and Sections 8E and 8F:** 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.
9. **Section 3:** Granting audiovisual performers additional rights even after the grant of exclusive rights is not a requirement under the Beijing Treaty which South Africa intends to ratify.
10. **Section 5:** Downgrading of performers’ 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.

These provisions are discussed in detail in Part IV and Part V of this submission below. Further, **Annex I** highlights these provisions and our recommended amendments to ensure that the national copyright legislation is in full compliance with international treaty obligations including the WIPO Performances and Phonograms Treaty, the WIPO Copyright Treaty and other relevant international copyright standards.

V. DETAILED COMMENTS ON OTHER CONCERNS IN THE COPYRIGHT AMENDMENT BILL AND PERFORMERS’ PROTECTION AMENDMENT BILL

COPYRIGHT AMENDMENT BILL (CAB)

1. **Section 8A: Mandatory royalty entitlement for all audiovisual performers which will result in reduced incomes for performers, reduced engagement of South African performers in audiovisual productions and reduced investments in South Africa**

Section 8A proposes to regulate the remuneration terms of private contractual agreements between performers and copyright owners in audiovisual works including music videos, by including the following provisions:

- Section 8A(1) which proposes that performers shall “*have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8*”, i.e. all licensed uses of audiovisual works, or sales thereof;
- Section 8A(2)(a) which proposes that the written agreements between the performer and the copyright owner may be agreed between the parties’ collecting societies, despite collecting societies having no role in such agreements;
- Section 8A(3) which provides that in the absence of an agreement on the amount of the royalty, the amount may be determined by the Tribunal, the Tribunal’s jurisdiction should be limited to determining disputes concerning collectively managed rights; and

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- Section 8A(5) and (6) which propose mandatory requirements to register contractual agreements in effect amounting to “conditions” of the enjoyment and/or exercise of rights, which are prohibited under the Berne Convention and the WPPT; and impose criminal sanctions (fines/imprisonment or both) for failure to register said agreements which are draconian and wholly disproportionate to the nature of the obligations set out in subsection 5.

While the intention of section 8A is to ensure that performers are remunerated appropriately, the provision has several unintended consequences which would harmfully impact performers in South Africa who perform background roles in music videos including by:

- (i) Fundamentally changing the long-established international and South African practice of upfront payments to non-featured performers (performers who typically are contributing to a music video on a one-off basis, such as dancers performing in the background of the video) by requiring that all performers be paid on a royalty basis;
- (ii) Reducing the investments that record companies can make in South African artists and repertoire as all performers (including non-featured performers and featured performers (artists with whom the record company has partnered and are remunerated in accordance with negotiated terms)) would be entitled to share in revenues from licensed uses of a music video; and
- (iii) Resulting in fewer South African performers being engaged to perform in music videos as they would be either produced outside South Africa or those produced in South Africa would include fewer performers because the risks of large productions would simply be too high.

We recommend amending section 8A to:

- (i) Provide contractual freedom between performers and copyright owners which allow for different market practices (remuneration agreed upon may take the form of a lump sum payment (one-time payment) or receiving royalties or both, taking into account the specificities of the sector, contribution of the performer to the work as whole and to its commercial success);
- (ii) Clarify that the remuneration agreed on shall be determined between the performer and the copyright owner or their representatives when they are voluntarily and expressly mandated by the relevant copyright owner and / or performer;
- (iii) Remove reference to “collecting societies” in subsection 2;
- (iv) Delete subsection 3 which empowers the Tribunal to set the royalty rate; and

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- (v) Delete subsections 5 and 6 which propose mandatory requirements to register agreements and imposes criminal sanctions (fines / imprisonment or both) for failure to register said agreements.

We recommend amending section 8A as follows:

Recommended Amendments

Share in royalties regarding audiovisual works

8A. (1) A performer shall, ~~subject to the Performers Protection Act, 1967 (Act No. 11 1967), have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8.~~ be entitled to appropriate remuneration for the transfer of his or her rights granted by the Performers Protection Act, 1967 (Act No. 11 1967).

(2) ~~(a) The performer's share of the royalty contemplated~~ The remuneration agreed on in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the performer and the copyright owner or between their representative collecting societies, or their representatives when expressly and voluntarily mandated to represent them in respect of the relevant uses of the rights concerned.

(b) Unless otherwise agreed by the parties, Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in ~~paragraph (a)~~ subsection (2), or the order contemplated in subsection ~~(4)(3),~~ as the case may be.

(3) ~~Where the performer and copyright owner contemplated in subsection (2)(a) cannot agree on the performer's share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer's share of the royalty.~~

~~(4)(3)~~ The agreement contemplated in subsection (2)(a) must include the following:

- (a) ~~the rights and obligations of the performer and the copyright owner;~~
- (b) ~~the performer's share of the royalty~~ remuneration agreed on, or ordered by the Tribunal, as the case may be; and
- (c) ~~the method and period within which the amount must be paid by the copyright owner to the performer; and;~~
- (d) ~~a dispute resolution mechanism.~~

~~(5) Any person who executes an act contemplated in section 8 for commercial purposes must—~~

- ~~(a) register that act in the prescribed manner and form; and~~
- ~~(b) submit a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of royalties due and payable by that person.~~

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~~(6) (a) Any person who intentionally fails to register an act as contemplated in subsection (5)(a), or who intentionally fails to submit a report as contemplated in subsection (5)(b), shall be guilty of an offence.~~

~~(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.~~

~~(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.~~

~~(d) If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.~~

~~(5) Any person who executes an act contemplated in section 8 for commercial purposes must—~~

~~(a) register that act in the prescribed manner and form; and~~

~~(b) submit a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of royalties due and payable by that person.~~

~~(6) (a) Any person who intentionally fails to register an act as contemplated in subsection (5)(a), or who intentionally fails to submit a report as contemplated in subsection (5)(b), shall be guilty of an offence.~~

~~(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.~~

~~(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.~~

~~(d) If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.~~

2. Section 12B(1)(a), Section 12B(1)(h) and Section 12B(2), and Section 12B(1)(b): Broad exceptions and limitations that are not adequately scoped in keeping with the three-step test including the quotation exception, private copying exception, and reproductions of sound recordings by a broadcaster exception

Section 12 introduces broad exceptions and limitations that are not adequately scoped in keeping with the three-step test including:

2.1 Section 12B(1)(a) – quotation exception

Section 12B(1)(a) sets out an exception for quotation, which is unduly broad. In respect of sound recordings, there is no need for a quotation exception. The application of the quotation exception to sound recordings would undermine the existing market in South Africa for licensing sampling (an important aspect of the music licensing market) and, therefore, would not comply with the three-step test. Sampling refers to using parts of an existing sound recording in the process of creating a new recording. This would undermine the existing market and harm right holders whose recordings are used commercially and for whom the licensing of sampling constitutes a “normal exploitation” of sound recordings, and who therefore have a “legitimate interest” in being able to control uses of samples of sound recordings.

We recommend amending section 12B(1)(a) as follows:

Recommended Amendments

Specific exceptions from copyright protection applicable to all works

12B. (1) Copyright in a work shall not be infringed by any of the following acts:

- (a) ~~Any~~ **Quotation for the purpose of criticism or review**: Provided that—
- (i) the extent thereof shall not exceed the extent ~~reasonably~~ justified by the purpose, and it shall be compatible with fair practice; and
 - (ii) the source and the name of the author, if it appears on the work, shall be mentioned in the quotation.

2.2 Section 12B(1)(h) and section 12B(2) – private copying exception

Section 12B(1)(h) and section 12B(2) introduce a broad private copying exception into South African law which extends to digital storage and without providing fair remuneration for right holders whose works are being copied (contrary to international practices).

To ensure that the private copying exception is adequately scoped to ensure it complies with the three-step test, we recommend amending the exception in section 12B(1)(h) and section 12B(2) to introduce reasonable limits to the private copying exception to include the following:

- (i) The exception applies only to a work that is acquired lawfully by a natural person for that person’s personal use (which by definition excludes uses with commercial purpose);
- (ii) A copy that has been acquired lawfully includes a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift; and does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy; and

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- (iii) Permitted personal uses are limited to the making of a back-up copy or for time or format shifting only and should not extend to digital storage which would risk undermining existing licensing practices.

Further, the introduction of a levy on devices and storage media as a quid pro quo for the loss of the copying exclusive right has been found in many jurisdictions necessary to compensate copyright owners and performers. We recommend that due consideration be given to international practice in this area before proceeding with the proposed exception, and we stand ready to assist with providing any assistance required in that respect.

We recommend amending section 12B(1)(h) and section 12B(2) as follows:

Recommended Amendments

Specific exceptions from copyright protection applicable to all works

12B. (1) Copyright in a work shall not be infringed by any of the following acts:

[...]

(h) the making of a personal copy of ~~such a~~ work acquired lawfully by a natural person for their personal use, ~~and made for ends which are not commercial~~. Provided that such use shall be compatible with fair practice.

(2) For the purposes of subsection (1)(h), permitted personal uses ~~include~~ are—

(a) the making of a back-up copy; ~~and~~

(b) time or format-shifting; ~~or~~

(c) ~~the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.~~

(c) For the purposes of section 12B(1)(h), a “copy” that is acquired lawfully-

(a) includes a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift (other than a download of a kind mentioned in paragraph (b)); and

(b) does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy.

2.3 Section 12B(1)(b) – reproduction of sound recordings by a broadcaster

Section 12B(1)(b) sets out an exception for the reproduction of sound recordings by a broadcaster. To ensure that this “ephemeral exception” is adequately scoped to ensure it complies with the three-step test, we recommend amending section 12B(1)(b) to introduce reasonable limits to the exception to include the following:

- (i) The time limit must be such that it limits the copies made to truly “ephemeral”¹

¹ The report from the Brussels Conference which took place in 1948 and was one of the Revision Conferences of the Berne Convention states that “ephemeral” means “to be kept only for a short time”.

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copies for example, copies may not be kept for longer than 30 days²;

- (ii) Copies must not be used for transmission more than three (3) times; and
- (iii) The exception should not allow broadcasters to use it to create permanent databases of copyright works which they use in their broadcast activities.

We recommend amending section 12B(1)(b) as follows:

Recommended Amendments

Specific exceptions from copyright protection applicable to all works

12B. (1) Copyright in a work shall not be infringed by any of the following acts:

[...]

*(b) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of ~~six months~~ **30 days** immediately following the date of the making of the reproduction, ~~or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work~~ **and the copy shall not be used for transmission more than three times**: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;*

- 3. Section 1(k) and Section 28P: The definitions of “technological protection measure” and “technological protection measure circumvention device and service” are not compatible with Article 18 of the WPPT, and the exceptions in section 28P relating to prohibited conduct in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test**

Article 18 of the WPPT, which South Africa intends to ratify, requires that contracting parties provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”.

At present, the proposed provisions in the CAB are not compatible with the WPPT’s requirement, as we explain below. This issue is of paramount importance when considering the central role of digital distribution to the current and future economics of the music industry. While the recorded music industry in South Africa is now predominantly a digital industry, piracy remains a serious obstacle to continued growth in this area. The introduction of adequate provisions on technological protection measures (TPMs) is therefore essential to protect against piracy and thereby enable the development of new business models. We

² Section 68 of the UK Copyright, Designs and Patents Act provides that a copy of the work must be destroyed within 28 days after being broadcasted; Article 55 of the German Act on Copyright and Related Rights provides that a copy of the work must be destroyed no later than 1 month after the first broadcast of the work.

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welcome the inclusion of the provisions on TPMs in the Bill but make the following recommendations to ensure that the provisions will be able to serve their intended purpose.

3.1 Definition of “technological protection measure”

First, the definition of “technological protection measure” in section 1(k) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to being designed to have that effect. The plain reading of this definition would be that a technological protection measure that is circumvented is therefore not one that prevents or restricts infringement (because it has not achieved that aim), and therefore the circumvention of it is not an infringement. This would defeat the purpose of the provisions prohibiting the circumvention of TPMs.

We therefore recommend that, in line with Article 6 of the EU Copyright Directive (Directive 2001/29/EC)³, for example, amendments be made to the definition of “technological protection measure”. We also propose the deletion of paragraph (b) in the definition. That a TPM may prevent access to a work for non-infringing purposes should not have the effect of removing its status as a TPM. Rather, the provision of section 28P(2)(a) of the Bill would apply to enable the user to seek assistance from the right holder in gaining access to the work in question. As it stands, paragraph (b) of the definition is open to abuse and would provide a charter for hacking TPMs. In this respect, please see also our comments below in respect of section 28P.

3.2 Definition of “technological protection measure circumvention device or service”

We recommend that the definition of “technological protection measure circumvention device or service” in section 1(k) be amended to include services and devices that: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition is adequately scoped to encompass all TPM circumvention devices and services, which would also be consistent with Article 6(2) of the EU Copyright Directive, for example, and would therefore be compatible with WPPT (and the WCT).

We recommend amending section 1(k) as follows:

Recommended Amendments

Section 1

[...]

(k) by the insertion after the definition of “sound recording” of the following definitions:

‘technologically protected work’ means a work that is protected by a technological protected measure;

‘technological protection measure’—

³ A copy of the EU Copyright Directive is accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029>

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(a) means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation is designed to prevents or restricts infringement of copyright in a work; ~~and~~

~~(b) does not include a process, treatment, mechanism, technology, device, product, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;~~

~~'technological protection measure circumvention device or service' means a device or service primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure; devices, products or components or the provision of services which:~~

~~(a) are promoted, advertised or marketed for the purpose of circumvention of, or~~

~~(b) have only a limited commercially significant purpose or use other than to circumvent, or~~

~~(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,~~

~~any effective technological measures.~~

3.3 Exceptions in respect of technological protection measures

The exceptions in section 28P in relation to prohibited conduct in respect of TPMs (in section 28O) are inadequately defined, therefore rendering them incompatible with the three-step test and substantially reducing the effectiveness of the protections afforded by section 28O, because:

- (i) Under section 28P(1)(a) it would be extremely burdensome, if not impossible, for right holders to establish that the use of a TPM circumvention device by a user was to benefit from an exception; and
- (ii) A provider of an unlawful circumvention technology could rely on section 28P(1)(b) to claim they are acting lawfully merely by showing that the technology can be used to access a work to perform a permitted act. There is a substantial risk that this provision would be abused by those providing circumvention technologies for unlawful purposes. The same is true of section 28P(2)(b).

Additionally, section 28P(2)(a) already provides for a redress mechanism for persons who are unable to circumvent a technological protection measure for a permitted use, that is, for the user to seek assistance from the right holder in gaining access to the work in question. Further, section 33(cH) of the CAB, amending section 39 of the Copyright Act, already provides for Ministerial powers to prescribe permitted acts for the circumvention of technological protection measures. The Bill therefore sets out a mechanism for addressing any concerns relating to technological protection measures restricting permitted uses. This recommended approach would be adequate and appropriate.

We recommend deleting section 28P(1), section 28P(2)(b) and section 28P(3) as follows:

Recommended Amendments

Exceptions in respect of technological protection measure

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~~28P. (1) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following:~~

~~(a) An act permitted in terms of any exception provided for in, or prescribed under, this Act; or
(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).~~

~~(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—~~

~~(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or~~

~~(b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.~~

~~(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—~~

~~(a) other person, including his or her name, address and all other relevant information necessary to identify them; and~~

~~(b) purpose for which the services of such other person has been engaged.~~

3.4 Offences in respect of digital rights, technological protection measures, and copyright management information

We welcome section 27 which provides for offences in respect of digital rights, TPMs and copyright management information which are in keeping with Article 18 and Article 19 of the WPPT. However, section 27(5B)(a)(i) should be amended to make clear that the offering and other dealing with circumvention devices are already infringing acts, without the need to show that the illegal device is subsequently used to infringe copyright. The current wording sets the bar for infringement so high such that it makes the whole provision ineffective.

We recommend amending section 27(5B)(a)(i) as follows:

Recommended Amendments

(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—

*(i) knows that the device or service will, or is likely to be used to, **circumvent infringe** copyright in a work protected by an effective technological protection measure;*

(ii) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure; or

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(iii) knows that the service contemplated in subparagraph (ii) will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;

(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or

(c) circumvents such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.

PERFORMERS' PROTECTION AMENDMENT BILL (PPAB)

1. Section 1: The definitions of “broadcast”, “communication to the public”, “fixation”, “producer”, and “reproduction” are not in keeping with the corresponding definitions in the international treaties, and the definition of “sound recording” should be amended to clarify that rights in pre-existing sound recordings are not affected by their inclusion into an audiovisual work

1.1. Section 1(b): Definition of “broadcast”

The definition of “broadcast” in section 1(b) is incompatible with international law because of the inclusion of transmissions by wire within the meaning of “broadcast”. “Broadcast” is defined in international treaties, including the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the WPPT, as a technical term referring specifically to *wireless, over the air, one-to-many transmissions*.

The current definition of “broadcast” in the Bill is therefore incompatible with the international standard as it extends the definition of broadcast beyond wireless transmissions by including transmissions “by wire.” This could potentially be understood as including certain online transmissions (i.e., transmissions by wire).

We recommend amending the section as follows:

Recommended Amendments

‘broadcast’ means—

(a) transmission, partially or wholly, by ~~wire or~~ wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;

(b) transmission, partially or wholly, by satellite; or

(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;

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1.2. Section 1(d): Definition of “communication to the public”

The definition of “communication to the public” in section 1(d) mirrors the WPPT definition of “communication to the public” in Article 2(g). However, the definition omits an express reference to “public performance” as provided for in the WPPT definition of “communication to the public”, which states that communication to the public “*includes making the sounds or representations of sounds fixed in a phonogram audible to the public*”.

We recommend amending the section as follows:

Recommended Amendments

‘communication to the public’ –

[...]

*(b) of a sound recording means the transmission to the public by any medium, other than by broadcasting of sounds of a performance or the sounds or the representations of sounds fixed in a sound recording **and includes making the sounds or representations of sounds fixed in a sound recording audible to the public;***

1.3. Definition of “fixation”

The term “fixation” is used frequently in the Bill, and therefore, needs to be defined in keeping with the WPPT and Beijing Treaty and definitions of “fixation”.

Recommended Amendments

“fixation” means in the context of audiovisual works the embodiment of moving images, whether or not accompanied by sounds or by representations thereof, from which they can be perceived, reproduced or communicated through a device, and in the context of sound recordings means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device”.

1.4. Section 1(j): definition of “producer”

The definition of “producer” should be clarified to ensure that it covers both natural and legal persons, in line with the WPPT definition of “producer” in Article 2(d).

We recommend amending the section as follows:

Recommended Amendments

*‘producer’ means the person or **legal entity** who **or which** takes the initiative and has the responsibility for the first fixation of a sound recording or an audiovisual fixation;*

1.5. Section 1(k): definition of “reproduction”

The definition of “reproduction” in section 1(k) should be clarified to confirm that it means the copying of the whole or a part of an audiovisual fixation or sound recording in keeping with Article 11 of the WPPT.

We recommend amending the section as follows:

Recommended Amendments

*‘reproduction’ means a copy made [of a] as contemplated by the Copyright Act, and includes a copy of **the whole or a part of** an audiovisual fixation or a sound recording of a performance;*

1.6. Section 1(l): definition of “sound recording”

The definition of “sound recording” in section 1(l) risks creating confusion about the rights in a pre-existing sound recording once incorporated into an audiovisual work. It is important therefore to distinguish between the sounds recorded as part of the audiovisual fixation, and pre-existing sound recordings synchronised with the audiovisual fixation.

To resolve this ambiguity, the definition of “sound recording” should be clarified to ensure that the rights in pre-existing sound recordings are not affected by their inclusion in an audiovisual work. This can be done by making the following amendment:

We recommend amending the section as follows:

Recommended Amendments

*‘sound recording’ means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, ~~but does not include a sound track associated with an audiovisual fixation;~~ **other than in the form of a first fixation in a 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;***

2. 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 3(1) lists only the “country of fixation” (point c) as the point of attachment to determine whether performers’ recorded performances are protected. This 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 Bill should include all three of the three criteria. Further, Article 4 of the WPPT and the Beijing Treaty address the principle of “national treatment”. Neither section 3 of the Performers’ Protection Act nor section 3 of the PPAB would be compatible with the WPPT and Beijing Treaty since they would preclude national treatment.

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We recommend amending section 3(1) as follows:

Recommended Amendments

Section 3(1) should be amended to ensure protection also for recorded performances of nationals of South Africa as well as other countries where the performances of South African performers are protected, and for recorded performances published in South Africa within 30 days of their first publication.

3. 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)(a) requires that written agreements between performers and producers “*must at least contain the compulsory and standard contractual terms as may be prescribed*”. This represents an unwarranted and harmful restriction on the transfer of rights by performers. Prescribing the terms on which a performer may transfer their exclusive rights to the copyright owner ignores the reality, which is that partnerships between producers and performers vary greatly, and that both parties benefit from the flexibility that contractual freedom permits.

Further, section 3A(3)(b) contains an unclear requirement for contracts to 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*”. The use of the term “equitable remuneration” risks creating confusion because it is a technical term that is understood internationally as referring to the mere right to remuneration (instead of exclusive rights), the modalities of which are often separately regulated.

We recommend amending section 3A(2), 3A(3)(a) and (b) as follows:

Recommended Amendments

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 his or her licensee.*

(2) *Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer **and must set out the remuneration terms agreed.***

~~(3) *The written agreement contemplated in subsection (2) —*~~

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~~(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~~
~~[...]~~

4. Section 3B: The protection of rights of producers of sound recordings is already set out in the existing Copyright Act

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 CAB), section 3B concerning the “*protection of rights of producers of sound recordings*” is misplaced and creates legal and commercial uncertainty.

We therefore recommend deleting section 3B as follows:

Recommended Amendments

~~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.~~

5. Section 1(l) and Sections 8E and 8F: 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

Section 1(l) and sections 8E and 8F provide for an incomplete and inadequate implementation of provisions concerning technological protection measures which are not compatible with the WPPT.

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The definition of “technological protection measure” and “technological protection measure circumvention device” in section 1(l) *“has the meaning assigned to it in the Copyright Act”* and would mirror the provisions in section 1(k) of the CAB. We refer to section 3 of this submission in respect to the CAB and the proposed amendments to the respective provisions in the Bill. We urge the adoption of our recommendations, and that the PPAB be amended to reflect those recommendations to ensure adequate protection and consistency between the Copyright Act and the Performers’ Protection Act.

Further, section 8E and 8F which address prohibited conduct in respect of technological protection measures and exceptions in respect of technological protection measures, mirror the provisions in section 28O and section 28P of the CAB. We refer to section 3 of this submission in respect to the CAB concerning the proposed amendments to the respective provisions in that Bill. We urge the adoption of our recommendations, and that the PPAB be amended to reflect those recommendations to ensure adequate protection and consistency between the Copyright Act and the Performers’ Protection Act.

6. Section 3: Granting audiovisual performers additional rights even after the grant of exclusive rights is not a requirement under the Beijing Treaty which South Africa intends to ratify

The Bill grants audiovisual performers exclusive rights including the right of reproduction, distribution, rental, making available to the public, broadcasting, communication to the public and fixation. We note that this approach is in line with the Beijing Treaty. However, the Bill grants audiovisual performers additional rights even after the grant of exclusive rights which is not a requirement under the Beijing Treaty. Further, we do not believe that this will benefit South African performers; it would make it less likely that producers engage South African performers due to the additional administrative burden and cost.

7. Section 5: Downgrading of performers’ 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

Section 5(1)(b) downgrades the performers’ exclusive rights of distribution and rental to mere remuneration rights. This downgrading is incompatible with WPPT and the Beijing Treaty, which do not permit these rights to be protracted at the level of mere remuneration rights. Furthermore, providing mere remuneration rights in respect of distribution and rental, subject to rate-setting by the Tribunal (section 5(3)(b)), would prejudicially devalue these performers’ rights; experience in South Africa and internationally shows that Tribunal-set remuneration falls well below the commercial value of the rights licensed. Section 5(1)(b) would also substantially and detrimentally disrupt the sale and rental of sound recordings and audiovisual works as a result of one set of rights being subject to private negotiation (the producers’ rights), and the performers’ rights being subject ultimately to Tribunal rate-setting.

Meanwhile, section 5(1A) implies that all performers’ rights under sections 3 and 5(a) are downgraded from exclusive rights to mere remuneration rights, in addition to those set out in section 5(1)(b). Although section 5(1A) appears to be intended to ensure that the exclusive

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rights in sections 3 and 5 are not exploited by authorised third parties without full usage reporting being provided to the relevant right holders listed therein, section 5(1A) is unclear, and could be misinterpreted as conveying a right of use upon users, provided they comply with the notification requirements set out in section 5(1A). Such an approach would be incompatible with the nature of the exclusive rights set out in sections 3 and 5 and would consequently be incompatible with the WCT, the TRIPS Agreement and the Berne Convention.

We recommend amending section 5 as follows:

Recommended Amendments

1. Section 5(1)(b) should be deleted, leaving section 5(1)(b) of the present Act in its present form.
2. Section 5(1A) should expressly apply only to licensed uses of sound recordings and audiovisual works.
3. To avoid confusion as to how to comply with section 5(1A), specifically where the performers' rights in question have been transferred to the producer or other third party, the obligations should apply only vis-à-vis the licensor(s) of the use in question.
4. To avoid an undue interference with private contractual agreements, section 5(1A) should be made subject to the terms of contracts agreed between the licensor and licensee.
5. Consequently, sections 5(4)(a) and 5(5) should also be amended to remove references to "*sale, commercially renting out, distribution*" (noting also that sale and distribution have overlapping meanings).

VI. CONCLUSIONS

We thank you for the opportunity to make this submission. We also stand ready to provide any further information on any of the above points.

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Annex I

Recommended Amendments to the Copyright Amendment Bill and Performers’ Protection Amendment Bill

I. MINISTERIAL INTERVENTIONS INTO PRIVATE CONTRACTUAL ARRANGEMENTS, AUTOMATIC REVERSION OF ASSIGNED RIGHTS AND FAIR USE

Section	Existing Provision	Recommended Amendments
<p>Section 39 of the Copyright Amendment Bill: Ministerial powers to mandate standard and compulsory contractual terms in private contractual arrangements which constitute serious regulatory interventions</p>	<p><i>Section 39(cG)</i></p> <p><i>The Minister may make regulations- (cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;</i></p> <p><i>Section 39(cI)</i></p> <p><i>The Minister may make regulations- (cI) prescribing royalty rates or tariffs for various forms of use;</i></p> <p><i>Section 39(cJ)</i></p> <p><i>The Minister may make regulations- (cI) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;</i></p> <p><i>Section 39(B)(1)</i></p> <p><i>Unenforceable contractual term</i></p>	<p><i>Section 39(cG)</i></p> <p><i>The Minister may make regulations- (cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;</i></p> <p><i>Section 39(cI)</i></p> <p><i>The Minister may make regulations- (cI) prescribing royalty rates or tariffs for various forms of use;</i></p> <p><i>Section 39(cJ)</i></p> <p><i>The Minister may make regulations- (cI) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;</i></p> <p><i>Section 39(B)(1)</i></p> <p><i>Unenforceable contractual term</i></p>

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Section	Existing Provision	Recommended Amendments
	<p><i>39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</i></p>	<p><i>39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</i></p>
<p>Section 3A(3)(c) of the Performers’ Protection Amendment Bill: Automatic reversion of assigned rights</p>	<p><i>Transfer of rights</i></p> <p><i>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 his or her licensee.</i></p> <p><i>(2) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer.</i></p> <p><i>(3) The written agreement contemplated in subsection (2)—</i></p> <p><i>(a) must at least contain the compulsory and standard contractual terms as may be prescribed;</i></p> <p><i>(b) must set out the-</i></p> <p><i>(i) royalties or equitable remuneration in respect of audiovisual works; and</i></p> <p><i>(ii) equitable remuneration in respect of sound recordings,</i></p> <p><i>due and payable to the performer for any use of the fixation of the performance; and</i></p>	<p><i>Transfer of rights</i></p> <p><i>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 his or her licensee.</i></p> <p><i>(2) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer <u>and must set out the remuneration terms agreed.</u></i></p> <p><i>(3) The written agreement contemplated in subsection (2)—</i></p> <p><i>(a) must at least contain the compulsory and standard contractual terms as may be prescribed;</i></p> <p><i>(b) must set out the-</i></p> <p><i>(i) royalties or equitable remuneration in respect of audiovisual works; and</i></p> <p><i>(ii) equitable remuneration in respect of sound recordings,</i></p>

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Section	Existing Provision	Recommended Amendments
	<p><i>(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.</i></p>	<p><i>due and payable to the performer for any use of the fixation of the performance; and</i> <i>(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.</i></p>
<p>Section 12A of the Copyright Amendment Bill: Fair use</p>	<p><i>General exceptions from copyright protection</i> 12A. (1)(a) <i>In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:</i></p> <ul style="list-style-type: none"> <i>(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;</i> <i>(ii) criticism or review of that work or of another work;</i> <i>(iii) reporting current events;</i> <i>(iv) scholarship, teaching and education;</i> <i>(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;</i> <i>(vi) preservation of and access to the collections of libraries, archives and museums; and</i> <i>(vii) ensuring proper performance of public administration.</i> <p><i>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors should be taken into account, including but not limited to—</i></p>	<p><i>General exceptions from copyright protection</i> 12A. (1)(a) <i>In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:</i></p> <ul style="list-style-type: none"> <i>(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;</i> <i>(ii) criticism or review of that work or of another work;</i> <i>(iii) reporting current events;</i> <i>(iv) scholarship, teaching and education;</i> <i>(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;</i> <i>(vi) preservation of and access to the collections of libraries, archives and museums; and</i> <i>(vii) ensuring proper performance of public administration.</i> <p><i>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors should be taken into account, including but not limited to—</i></p>

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Section	Existing Provision	Recommended Amendments
	<p><i>(i) the nature of the work in question;</i> <i>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</i> <i>(iii) the purpose and character of the use, including whether—</i> <i>(aa) such use serves a purpose different from that of the work affected; and</i> <i>(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and</i> <i>(iv) the substitution effect of the act upon the potential market for the work in question.</i> <i>(c) For the purposes of paragraphs (a) and (b) the source, as well as the name of the author shall be mentioned, if it appears on the work.</i></p>	<p><i>(i) the nature of the work in question;</i> <i>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</i> <i>(iii) the purpose and character of the use, including whether—</i> <i>(aa) such use serves a purpose different from that of the work affected; and</i> <i>(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and</i> <i>(iv) the substitution effect of the act upon the potential market for the work in question.</i> <i>(c) For the purposes of paragraphs (a) and (b) the source, as well as the name of the author shall be mentioned, if it appears on the work.</i></p>

II. COPYRIGHT AMENDMENT BILL

Section	Existing Provision	Recommended Amendments
<p>Section 8A: Mandatory royalty entitlement for all audiovisual performers</p>	<p><i>Share in royalties regarding audiovisual works</i></p> <p><i>8A. (1) A performer shall, subject to the Performers Protection Act, 1967 (Act No. 11 1967), have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8.</i></p> <p><i>(2) (a) The performer’s share of the royalty contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the</i></p>	<p><i>Share in royalties regarding audiovisual works</i></p> <p><i>8A. (1) A performer shall, subject to the Performers Protection Act, 1967 (Act No. 11 1967), have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8.</i> <u><i>be entitled to appropriate remuneration for the transfer of his or her rights granted by the Performers Protection Act, 1967 (Act No. 11 1967).</i></u></p>

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Section	Existing Provision	Recommended Amendments
	<p><i>performer and the copyright owner or between their respective collecting societies.</i></p> <p><i>(b) Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (3), as the case may be.</i></p> <p><i>(3) Where the performer and copyright owner contemplated in subsection (2)(a) cannot agree on the performer’s share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer’s share of the royalty.</i></p> <p><i>(4) The agreement contemplated in subsection (2)(a) must include the following:</i></p> <p><i>(a) The rights and obligations of the performer and the copyright owner;</i></p> <p><i>(b) the performer’s share of the royalty agreed on, or ordered by the Tribunal, as the case may be;</i></p> <p><i>(c) the method and period within which the amount must be paid by the copyright owner to the performer; and</i></p> <p><i>(d) a dispute resolution mechanism.</i></p> <p><i>(5) Any person who executes an act contemplated in section 8 for commercial purposes must—</i></p> <p><i>(a) register that act in the prescribed manner and form; and</i></p> <p><i>(b) submit a complete, true and accurate report to the performer, copyright owner, the</i></p>	<p><i>(2) (a) The performer’s share of the royalty contemplated <u>The remuneration agreed on in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the performer and the copyright owner or between their representative collecting societies, or their representatives when expressly and voluntarily mandated to represent them in respect of the relevant uses of the rights concerned.</u></i></p> <p><i>(b) <u>Unless otherwise agreed by the parties,</u> Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in paragraph (a) <u>subsection (2), or the order contemplated in subsection (4)(3),</u> as the case may be.</i></p> <p><i>(3) Where the performer and copyright owner contemplated in subsection (2)(a) cannot agree on the performer’s share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer’s share of the royalty.</i></p> <p><i>(4)(3) <u>The agreement contemplated in subsection (2)(a) must include the following:</u></i></p> <p><i>(a) The rights and obligations of the performer and the copyright owner;</i></p>

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	<p><i>indigenous community or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of royalties due and payable by that person.</i></p> <p><i>(6) (a) Any person who intentionally fails to register an act as contemplated in subsection (5)(a), or who intentionally fails to submit a report as contemplated in subsection (5)(b), shall be guilty of an offence.</i></p> <p><i>(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.</i></p> <p><i>(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.</i></p> <p><i>(d) If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the</i></p>	<p><i>(b) the performer's share of the royalty remuneration agreed on, or ordered by the Tribunal, as the case may be; <u>and</u></i></p> <p><i>(c) the method and period within which the amount must be paid by the copyright owner to the performer; and;</i></p> <p><i>(d) a dispute resolution mechanism.</i></p> <p><i>(5) Any person who executes an act contemplated in section 8 for commercial purposes must—</i></p> <p><i>(a) register that act in the prescribed manner and form; and</i></p> <p><i>(b) submit a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of royalties due and payable by that person.</i></p> <p><i>(6) (a) Any person who intentionally fails to register an act as contemplated in subsection (5)(a), or who intentionally fails to submit a report as contemplated in subsection (5)(b), shall be guilty of an offence.</i></p> <p><i>(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.</i></p>

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	<p><i>proceedings and must thereupon impose such lesser sentence.</i></p>	<p>(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.</p> <p>(d) If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.</p>
<p>Section 12B(1)(a): Quotation exception</p>	<p><i>Specific exceptions from copyright protection applicable to all works</i></p> <p><i>12B. (1) Copyright in a work shall not be infringed by any of the following acts:</i></p> <p><i>(a) Any quotation: Provided that—</i></p> <p><i>(i) the extent thereof shall not exceed the extent reasonably justified by the purpose, and it shall be compatible with fair practice; and</i></p> <p><i>(ii) the source and the name of the author, if it appears on the work, shall be mentioned in the quotation;</i></p>	<p><i>Specific exceptions from copyright protection applicable to all works</i></p> <p><i>12B. (1) Copyright in a work shall not be infringed by any of the following acts:</i></p> <p><i>(a) Any quotation for the purpose of criticism or review: Provided that—</i></p> <p><i>(i) the extent thereof shall not exceed the extent reasonably justified by the purpose, and it shall be compatible with fair practice; and</i></p> <p><i>(ii) the source and the name of the author, if it appears on the work, shall be mentioned in the quotation.</i></p>

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<p>Section 12B(1)(h) and section 12B(2): Private copying exception</p>	<p><i>Specific exceptions from copyright protection applicable to all works</i></p> <p>12B. (1) Copyright in a work shall not be infringed by any of the following acts: [...] (h) the making of a personal copy of such work by a natural person for their personal use and made for ends which are not commercial: Provided that such use shall be compatible with fair practice.</p> <p>(2) For the purposes of subsection (1)(h), permitted personal uses include— (a) the making of a back-up copy; (b) time or format-shifting; or (c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.</p>	<p><i>Specific exceptions from copyright protection applicable to all works</i></p> <p>12B. (1) Copyright in a work shall not be infringed by any of the following acts: [...] (h) the making of a personal copy of such a work <u>acquired lawfully</u> by a natural person for their personal use, and made for ends which are not commercial.—Provided that such use shall be compatible with fair practice.</p> <p>(2) For the purposes of subsection (1)(h), permitted personal uses include are— (a) the making of a back-up copy; and (b) time or format-shifting; or (c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility. <u>(c) For the purposes of section 12B(1)(h), a “copy” that is acquired lawfully-</u> <u>(a) includes a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift (other than a download of a kind mentioned in paragraph (b)); and</u> <u>(b) does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been</u></p>

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		<p><u>obtained by means of a download enabling no more than temporary access to the copy.</u></p>
<p>Section 12B(1)(b): Reproduction of sound recordings by a broadcaster</p>	<p><i>Specific exceptions from copyright protection applicable to all works</i></p> <p><i>12B. (1) Copyright in a work shall not be infringed by any of the following acts:</i> <i>[...]</i> <i>(b) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;</i></p>	<p><i>Specific exceptions from copyright protection applicable to all works</i></p> <p><i>12B. (1) Copyright in a work shall not be infringed by any of the following acts:</i> <i>[...]</i> <i>(b) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months 30 days immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work and the copy shall not be used for transmission more than three times: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;</i></p>

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Section	Existing Provision	Recommended Amendments
<p>Section 1(k): Definition of “technological protection measure” and “technological protection measure circumvention device”</p>	<p><i>Section 1</i> [...]</p> <p><i>(k) by the insertion after the definition of “sound recording” of the following definitions: “ ‘technologically protected work’ means a work that is protected by a technological protection measure; ‘technological protection measure’—</i> <i>(a) means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; and</i> <i>(b) does not include a process, treatment, mechanism, technology, device, product, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;</i> <i>‘technological protection measure circumvention device or service’ means a device or service primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;</i></p>	<p><i>Section 1</i> [...]</p> <p><i>(k) by the insertion after the definition of “sound recording” of the following definitions: ‘technologically protected work’ means a work that is protected by a technological protected measure;</i> <i>‘technological protection measure’—</i> <i>(a) means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation <u>is designed to</u> prevents or restricts infringement of copyright in a work; and</i> <i>(b) does not include a process, treatment, mechanism, technology, device, product, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;</i> <i>‘technological protection measure circumvention device or service’ means a device or service primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure; <u>devices, products or components or the provision of services which:</u></i> <i><u>(a) are promoted, advertised or marketed for the purpose of circumvention of, or</u></i> <i><u>(b) have only a limited commercially significant purpose or use other than to circumvent, or</u></i></p>

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		<p><u>(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.</u></p>
<p>Section 28P: Exceptions in respect of technological protection measures</p>	<p><i>Exceptions in respect of technological protection measure</i></p> <p><i>Exceptions in respect of technological protection measures 28P. (1) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following: (a) An act permitted in terms of any exception provided for in, or prescribed under, this Act; or (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</i></p> <p><i>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may— (a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act;</i></p>	<p><i>Exceptions in respect of technological protection measure</i></p> <p>28P. (1) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following:</p> <p>(a) An act permitted in terms of any exception provided for in, or prescribed under, this Act; or (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</p> <p>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—</p> <p>(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or</p>

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	<p><i>or (b) if the copyright owner has refused such person's request or has failed to respond to it within a reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</i></p> <p><i>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the— (a) other person, including their name, address and all other relevant information necessary to identify them; and (b) purpose for which the services of such other person has been engaged.</i></p>	<p><i>(b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</i></p> <p><i>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the— (a) other person, including his or her name, address and all other relevant information necessary to identify them; and (b) purpose for which the services of such other person has been engaged.</i></p>
<p>Section 27(5B)(a)(i): Offences in respect of digital rights, technological protection measures, and copyright management information</p>	<p><i>(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—</i></p> <p><i>(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—</i></p> <p><i>(i) knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure;</i></p> <p><i>(ii) provides a service to another person to enable or assist such other person to</i></p>	<p><i>(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—</i></p> <p><i>(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—</i></p> <p><i>(i) knows that the device or service will, or is likely to be used to, circumvent infringe copyright in a work protected by an effective technological protection measure;</i></p>

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	<p><i>circumvent an effective technological protection measure; or</i></p> <p><i>(iii) knows that the service contemplated in subparagraph (ii) will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;</i></p> <p><i>(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or</i></p> <p><i>(c) circumvents such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence</i></p>	<p><i>(ii) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure; or</i></p> <p><i>(iii) knows that the service contemplated in subparagraph (ii) will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;</i></p> <p><i>(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or</i></p> <p><i>(c) circumvents such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.</i></p>

III. PERFORMERS’ PROTECTION AMENDMENT BILL

Section	Existing Provision	Recommended Amendments
<p>Section 1(b): Definition of “broadcast”</p>	<p><i>Section 1</i> [...]</p> <p><i>(b) by the substitution for the definition of “broadcast” of the following definition:</i></p> <p><i>‘broadcast’ means—</i></p>	<p><i>Section 1</i> [...]</p> <p><i>(b) by the substitution for the definition of “broadcast” of the following definition:</i></p> <p><i>‘broadcast’ means—</i></p>

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Section	Existing Provision	Recommended Amendments
	<p><i>(a) transmission, partially or wholly, by wire or wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;</i></p> <p><i>(b) transmission, partially or wholly, by satellite;</i></p> <p><i>or</i></p> <p><i>(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;</i></p>	<p><i>(a) transmission, partially or wholly, by wire or wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;</i></p> <p><i>(b) transmission, partially or wholly, by satellite;</i></p> <p><i>or</i></p> <p><i>(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;</i></p>
<p>Section 1(d): Definition of “communication to the public”</p>	<p><i>Section 1</i> <i>[...]</i> <i>(d) by the insertion after the definition of “Commission” of the following definition:</i></p> <p><i>‘communication to the public’ –</i> <i>[...]</i> <i>(b) of a sound recording means the transmission to the public by any medium, other than by broadcasting of sounds of a performance or the sounds or the representations of sounds fixed in a sound recording;</i></p>	<p><i>Section 1</i> <i>[...]</i> <i>(d) by the insertion after the definition of “Commission” of the following definition:</i></p> <p><i>‘communication to the public’ –</i> <i>(b) of a sound recording means the transmission to the public by any medium, other than by broadcasting of sounds of a performance or the sounds or the representations of sounds fixed in a sound recording <u>and includes making the sounds or representations of sounds fixed in a sound recording audible to the public;</u></i></p>
<p>Definition of “fixation”</p>	<p>There is no definition for “fixation” in the PPAB.</p>	<p>We recommend including a definition of “fixation” as follows:</p> <p><u>“fixation” means in the context of audiovisual works the embodiment of moving images, whether or not accompanied by sounds or by representations thereof, from which they can be</u></p>

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Section	Existing Provision	Recommended Amendments
		<p><u>perceived, reproduced or communicated through a device, and in the context of sound recordings means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device”.</u></p>
<p>Section 1(j): Definition of “producer”</p>	<p>Section 1 [...] (j) by the insertion after the definition of “prescribe” of the following definition: ‘producer’ means the person who takes the initiative and has the responsibility for the first fixation of a sound recording or an audiovisual fixation;</p>	<p>Section 1 [...] (j) by the insertion after the definition of “prescribe” of the following definition: ‘producer’ means the person or legal entity who or which takes the initiative and has the responsibility for the first fixation of a sound recording or an audiovisual fixation;</p>
<p>Section 1(k): Definition of “reproduction”</p>	<p>Section 1 [...] (k) by the substitution for the definition or “reproduction” of the following definition: ‘reproduction’ means a copy made [of a] as contemplated by the Copyright Act, and includes a copy of an audiovisual fixation or a sound recording of a performance;</p>	<p>Section 1 [...] (k) by the substitution for the definition or “reproduction” of the following definition: ‘reproduction’ means a copy made [of a] as contemplated by the Copyright Act, and includes a copy of the whole or a part of an audiovisual fixation or a sound recording of a performance;</p>
<p>Section 1(l): Definition of “sound recording”</p>	<p>Section 1 [...] (l) by the insertion after the definition of “reproduction” of the following definitions:</p>	<p>Section 1 [...] (l) by the insertion after the definition of “reproduction” of the following definitions:</p>

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Section	Existing Provision	Recommended Amendments
	<p><i>‘sound recording’ means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with an audiovisual fixation;</i></p>	<p><i>‘sound recording’ means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with an audiovisual fixation; <u>other than in the form of a first fixation in a 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;</u></i></p>
<p>Section 3(1): Scope of protection for performers’ rights</p>	<p><i>Protection of performers’ moral and economic rights [in respect of performers in the Republic]</i> <i>3. (1) Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances—</i> <i>(a) taking place;</i> <i>(b) broadcast without a fixation; or</i> <i>(c) first fixed, in the Republic.</i></p>	<p>We recommend amending section 3(1) to ensure protection for recorded performances of nationals of South Africa as well as other countries where the performances of South African performers are protected, and for recorded performances published in South Africa within 30 days of their first publication.</p>
<p>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”.</p>	<p><i>Transfer of rights</i> <i>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 his or her licensee.</i></p>	<p><i>Transfer of rights</i> <i>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 his or her licensee.</i></p>

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Section	Existing Provision	Recommended Amendments
	<p>(2) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer.</p> <p>(3) The written agreement contemplated in subsection (2)—</p> <p>(a) must at least contain the compulsory and standard contractual terms as may be prescribed;</p> <p>(b) must set out the-</p> <p>(i) royalties or equitable remuneration in respect of audiovisual works; and</p> <p>(ii) equitable remuneration in respect of sound recordings, due and payable to the performer for any use of the fixation of the performance; and</p> <p>[...]</p>	<p>(2) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer <u>and must set out the remuneration terms agreed.</u></p> <p>(3) The written agreement contemplated in subsection (2)—</p> <p>(a) must at least contain the compulsory and standard contractual terms as may be prescribed;</p> <p>(b) must set out the-</p> <p>(i) royalties or equitable remuneration in respect of audiovisual works; and</p> <p>(ii) equitable remuneration in respect of sound recordings, due and payable to the performer for any use of the fixation of the performance; and</p> <p>[...]</p>
<p>Section 3B: The protection of rights of producers of sound recordings</p>	<p>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—</p> <p>(a) the direct or indirect reproduction of their sound recording in any manner or form;</p> <p>(b) the making available to the public of the original and copies of their sound recording through sale or other transfer of ownership;</p> <p>(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</p>	<p>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—</p> <p>(a) the direct or indirect reproduction of their sound recording in any manner or form;</p> <p>(b) the making available to the public of the original and copies of their sound recording through sale or other transfer of ownership;</p> <p>(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</p>

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Section	Existing Provision	Recommended Amendments
	<p><i>(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.</i></p> <p><i>(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.</i></p>	<p><i>(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.</i></p> <p><i>(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.</i></p>
<p>Section 1(l): Definition of “technological protection measure” and “technological protection measure circumvention device”</p>	<p><i>‘technological protection measure’ has the meaning assigned to it in the Copyright Act;</i></p> <p><i>‘technological protection measure circumvention device’ has the meaning assigned to it in the Copyright Act;’</i></p>	<p>We recommend that the definition of “technological protection measure” and “technological protection measure circumvention device” mirror the provisions in section 1(k) of the Copyright Amendment Bill.</p>
<p>Section 8E and 8F: Prohibited conduct in respect of technological protection measures and Exceptions in respect of technological protection measures</p>	<p><i>Prohibited conduct in respect of technological protection measures</i></p> <p><i>8E. (1) No person may make, import, sell, distribute, rent out, offer or expose for sale, rental or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe the right of a performer in respect of a performance that is</i></p>	<p>We recommend that section 8E and 8F mirror the provisions in section 28O and section 28P of the Copyright Amendment Bill.</p>

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Section	Existing Provision	Recommended Amendments
	<p><i>fixed in a technologically protected audiovisual fixation or sound recording.</i></p> <p><i>(2) No person may provide a service to any other person if—</i></p> <p><i>(a) such other person intends to use the service to circumvent an effective technological protection measure in an audiovisual fixation or sound recording; or</i></p> <p><i>(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright or the right of a performer in a technologically protected audiovisual fixation or sound recording.</i></p> <p><i>(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.</i></p> <p><i>(4) No person may, during the subsistence of the right of a performer in respect of a performance that is fixed in a technologically protected audiovisual fixation or sound recording and without a licence of that performer and the owner of copyright in the relevant work, circumvent an effective technological protection measure applied to such work.</i></p> <p><i>(5) A technological protection measure shall be deemed to be effective if the use of the audiovisual fixation or sound recording is controlled by the exclusive licensee, producer or copyright owner in such work through the</i></p>	

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	<p><i>application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.</i></p> <p><i>Exceptions in respect of technological protection measure</i></p> <p><i>8F. (1) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device applied to an audiovisual fixation or sound recording to perform any of the following:</i></p> <p><i>(a) An act permitted in terms of any exception provided for in this Act or the Copyright Act; or</i></p> <p><i>(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</i></p> <p><i>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—</i></p> <p><i>(a) apply to the performer and the copyright owner for assistance to enable such person to circumvent such technological protection</i></p>	

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	<p><i>measure in order to perform such permitted act;</i> <i>or</i> <i>(b) if either the copyright owner, or the performer has refused such person’s request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</i> <i>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—</i> <i>(a) other person, including their name, address and all other relevant information necessary to identify them; and</i> <i>(b) purpose for which the services of such other person has been engaged.</i></p>	
<p>Section 3: Protection of performers’ moral and economic rights</p>	<p><i>Protection of performers’ moral and economic rights [in respect of performers in the Republic]</i></p> <p><i>3. (1) Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances—</i> <i>(a) taking place;</i> <i>(b) broadcast without a fixation; or</i> <i>(c) first fixed, in the Republic.</i></p> <p><i>(2) A performer shall, independently of a performer’s economic rights, during the circumstances contemplated in subsection (1)</i></p>	<p>The Bill grants audiovisual performers additional rights even after the grant of exclusive rights which is not a requirement under the Beijing Treaty. Further, we do not believe that this will benefit South African performers; it would make it less likely that producers engage South African performers due to the additional administrative burden and cost.</p>

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	<p><i>and after the transfer of their economic rights, as regards their live performances or performances fixed in audiovisual fixations or sound recordings, have the right—</i></p> <p><i>(a) to claim to be identified as the performer of their performances, except where the omission is dictated by the manner of the use of the performance; and</i></p> <p><i>(b) to object to any distortion, mutilation or other modification of their performances that would be prejudicial to their honour or reputation, taking due account of the nature of audiovisual fixations or sound recordings.</i></p> <p><i>(3) The rights granted to a performer in accordance with subsection (2) shall, after a performer’s death, be maintained until the expiry of the economic rights granted in terms of this Act or other relevant provisions of the Copyright Act.</i></p> <p><i>(4) A performer enjoys the following exclusive rights of authorising, as regards their performances:</i></p> <p><i>(a) The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance against payment of royalties or equitable remuneration;</i></p> <p><i>(b) the fixation of their unfixed performances in an audiovisual fixation or a sound recording;</i></p> <p><i>(c) the direct or indirect reproduction of their performances that are fixed in audiovisual fixations or sound recordings, in any manner or form;</i></p>	

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Section	Existing Provision	Recommended Amendments
	<p><i>(d) the making available to the public of the original and copies of their performances fixed in audiovisual fixations or sound recordings through sale or other transfer of ownership;</i></p> <p><i>(e) the commercial rental to the public of copies of their performances fixed in audiovisual fixations or sound recordings, even after distribution of such copies by, or pursuant to, authorisation by the performer;</i></p> <p><i>(f) the making available to the public of their performances fixed in audiovisual fixations or sound recordings, 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;</i></p> <p><i>(g) the broadcasting and communication to the public of their performances, fixed in audiovisual fixations or sound recordings against payment of royalties or equitable remuneration; and</i></p> <p><i>(h) distributing the original or a copy of an audiovisual fixation or sound recording to the public.</i></p>	
<p>Section 5: Performers’ exclusive rights</p>	<p><i>Section 5 of the principal Act is hereby amended—</i></p> <p><i>(a) without the consent of the performer—</i></p> <p><i>(i) broadcast or communicate to the public an unfixed performance of such performer or where that performance is fixed, the applicable audiovisual fixation or sound recording, unless the performance used in the broadcast or the</i></p>	<p>We recommend the following amendments:</p> <ol style="list-style-type: none"> 1. The amendments to draft section 5(1)(b) should be deleted, leaving section 5(1)(b) of the present Act in its present form. 2. Draft section 5(1A) should expressly apply only to licensed uses of sound recordings and audiovisual works.

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	<p><i>public communication is itself already a broadcast performance; [or]</i></p> <p><i>(ii) make a fixation of the unfixed performance of such performer; [or]</i></p> <p><i>(iii) make a reproduction of [a fixation of] an audiovisual fixation or sound recording that contains a performance of such performer—</i></p> <p><i>(aa) if the original audiovisual fixation or sound recording[, other than a fixation excluded by section 8 from the necessity for obtaining the consent of the performer,] was itself made without [his or her] their consent and is not excluded by section 8 from the necessity for consent of the performer; [or]</i></p> <p><i>(bb) if the reproduction is made for purposes other than those in respect of which such performer gave [his or her] their consent to the making of the original audiovisual fixation or sound recording [of a reproduction thereof]; or</i></p> <p><i>(cc) if the original audiovisual fixation or sound recording was made in accordance with the provisions of section 8 and the reproduction is made for purposes not covered by those provisions; [or]</i></p> <p><i>(iv) make available to the public by wire or wireless means, the original performance of the performer or copies of that performance fixed in an audiovisual fixation or sound recording through sale or otherwise; (v) commercially rent out to the public the original or a copy of the performance of the performer that is fixed in an audiovisual fixation or sound recording;</i></p>	<p>3. To avoid confusion as to how to comply with draft section 5(1A), specifically where the performers’ rights in question have been transferred to the producer or other third party, the obligations should apply only vis-à-vis the licensor(s) of the use in question.</p> <p>4. To avoid an undue interference with private contractual agreements, draft section 5(1A) should be made subject to the terms of contracts agreed between the licensor and licensee.</p> <p>5. Consequently, draft sections 5(4)(a) and 5(5) should also be amended to remove references to “sale, commercially renting out, distribution” (noting also that sale and distribution have overlapping meanings).</p>

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	<p><i>(vi) communicate to the public the performance fixed in an audiovisual fixation or 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; or</i></p> <p><i>(vii) distribute the original or a copy of an audiovisual fixation or sound recording that contains the performance of such a performer, to the public.”;</i></p> <p><i>(b) by the substitution in subsection (1) for paragraph (b) of the following paragraph: “(b) by means of [a fixation] an audiovisual fixation or sound recording of a performance published for commercial purposes, without payment of a royalty or equitable remuneration to the performer concerned—</i></p> <p><i>(i) broadcast the performance;</i></p> <p><i>(ii) cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act[, 1978 (Act No. 98 of 1978)], unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; [or]</i></p> <p><i>(iii) cause [any] communication of the performance to the public;</i></p> <p><i>(iv) sell the original or a copy of the audiovisual fixation or sound recording of the performance;</i></p> <p><i>or</i></p>	

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	<p><i>(v) commercially rent out the original or a copy of the audiovisual fixation or sound recording of the performance.”</i></p> <p><i>(c) by the insertion in subsection (1) after paragraph (b) the following subsections:</i> <i>“(1A) A person who for commercial purposes intends to—</i></p> <p><i>(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;</i></p> <p><i>(b) make a fixation of the unfixed performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording;</i></p> <p><i>(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;</i></p> <p><i>(d) make available to the public by wire or wireless means the original performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording through sale or otherwise;</i></p> <p><i>(e) commercially rent out to the public copies of the performance of a performer that is fixed in an audiovisual fixation or sound recording;</i></p> <p><i>(f) communicate to the public the performance of a performer that is fixed in an audiovisual fixation or sound recording, by wire or wireless means, in such a way that members of the public may</i></p>	

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	<p><i>access them from a place and at a time individually chosen by them;</i></p> <p><i>(g) distribute the original or a copy of an audiovisual fixation or sound recording that contains the performance of such a performer to the public; or</i></p> <p><i>(h) perform any act contemplated in subsection (1)(b),</i></p> <p><i>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.”</i></p> <p><i>(1B) (a) Any person who intentionally fails to register an act or who intentionally fails to submit a report as contemplated in subsection (1A), shall be guilty of an offence.</i></p> <p><i>(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.</i></p> <p><i>(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the</i></p>	

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	<p><i>majority of offences, were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.</i></p> <p><i>(d) If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.</i></p> <p><i>(d) by the substitution for subsection (2) of the following subsection: “(2) In the absence of an agreement to the contrary, a performer’s consent to the broadcasting of [his or her] their performance shall be deemed to not include [his or her] their consent to the rebroadcasting of [his or her] their performance, the audiovisual fixation or sound recording of [his or her] their performance for broadcasting purposes, [and] nor the reproduction for broadcasting purposes of such audiovisual fixation or sound recording.”;</i></p> <p><i>(e) by the substitution in subsection (3) for paragraph (b) of the following paragraph: “(b) In the absence of an agreement contemplated in paragraph (a), any party may refer the matter to the [Copyright] Tribunal [established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the</i></p>	

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	<p><i>matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965)].’</i></p> <p><i>(f) by the substitution for subsection (4) of the following subsection:</i></p> <p><i>“(4) (a) A performer who has authorised the audiovisual 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 audiovisual 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] audiovisual fixation or sound recording: Provided that the performer is entitled to share in any [payment] royalties or equitable remuneration received by the [person who arranges for] producer of the fixation, in the manner agreed upon between the performer and the [person who arranges] producer for such audiovisual fixation or sound recording, or between their [representative] respective collecting societies.</i></p> <p><i>(b) In the absence of an agreement contemplated in the proviso to paragraph (a), any party contemplated in that proviso may refer the matter to the [Copyright] Tribunal [established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the</i></p>	

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	<p><i>parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965)].”</i></p> <p><i>(g) by the substitution for subsection (5) of the following subsection: “(5) Any payment made 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 the performer or owner of [any] copyright subsisting in that audiovisual fixation or sound recording, in terms of [section] sections 8A and 9A of the Copyright Act[,1978 (Act No. 98 of 1978)].”</i></p>	