

THE SELECT COMMITTEE ON TRADE AND INDUSTRY, ECONOMIC DEVELOPMENT, SMALL BUSINESS DEVELOPMENT, TOURISM, EMPLOYMENT AND LABOUR



Workshop on Performers' Protection
Amendment Bill [B 24D – 2016]

Performances – enjoying protection in law

25 October 2022



PURPOSE OF THE PRESENTATION:

The purpose of this presentation is to take the members of the Select Committee through the **Performers' Protection Act, 1967** so that it can assist them to deliberate on the two Bills before it

The two Bills are:

Copyright Amendment Bill (CAB)

Performers Protection Amendment Bill (PPAB)

POINTS FOR DISCUSSION :

- **Copyright Act and Performers Protection Act**
- **Performance and Copyright**
- **Restrictions on the use of Performance**
- **Performance is a right**
- **Performance in a Film (audio visual work)**
- **Performance in a Sound Recording (audio)**
- **The law of contract (Contractual arrangement on performance)**
- **International Treaties on Performers' rights (WIPO Treaties)**
- **Duration of protection for Performance**
- **Exceptions on the use of Performances**
- **Offences and liabilities**

COPYRIGHT ACT AND PERFORMERS' PROTECTION ACT :

- The South African Copyright Act, 1978 is a **primary legislation** in the copyright system and it is the **national law** that complies with the Berne Convention Treaty, 1886 as SA is a signatory to Berne Convention
- This is a national copyright law that listed all **categories of copyright works** which enjoy protection and also the requirements to attain copyright protection in such works
- In contrast, Performers Protection Act. 1967 is a **secondary legislation** and it is the national law that complies with WIPO Rome Convention, 1961 and to certain extent with WIPO Performances and Phonograms Treaty, 1996 especially on collective management of rights in sound recordings
- Performers Protection Act is a piece of legislation specifically for performers to ensure that their **performances enjoys protection** in the same manner as copyright works (books, film etc)
- The Performers Protection Act places **certain restrictions on the use of performances** of the performers and that constitutes the monopoly the law grants to them through this secondary legislation
- Performances are a **product of creativity** in the same manner as copyright works and display **talent**

COPYRIGHT AND PERFORMANCE DISTINGUISHED:

- While **copyright** is defined as a type of intellectual property that grants the owner (author is the first owner unless otherwise) the exclusive right to copy, distribute, adapt, display and perform the copyright work for a limited period (exclusive right – monopoly)
- **Performance** simply means delivering, enacting or giving rendition of a work (music or script)
- Copyright works enjoying protection in law:
 - Literary works (Performance on film script)
 - Musical works (Performance on musical composition)
 - Artistic works
 - Published Editions
 - Programme carrying signals
 - Broadcast
 - Computer program
 - Cinematograph Films – performance fixated in the film
 - Sound Recordings – performance fixated in the sound recordings

COPYRIGHT AND PERFORMANCE DISTINGUISHED:



COPYRIGHT AND PERFORMANCE DISTINGUISHED:



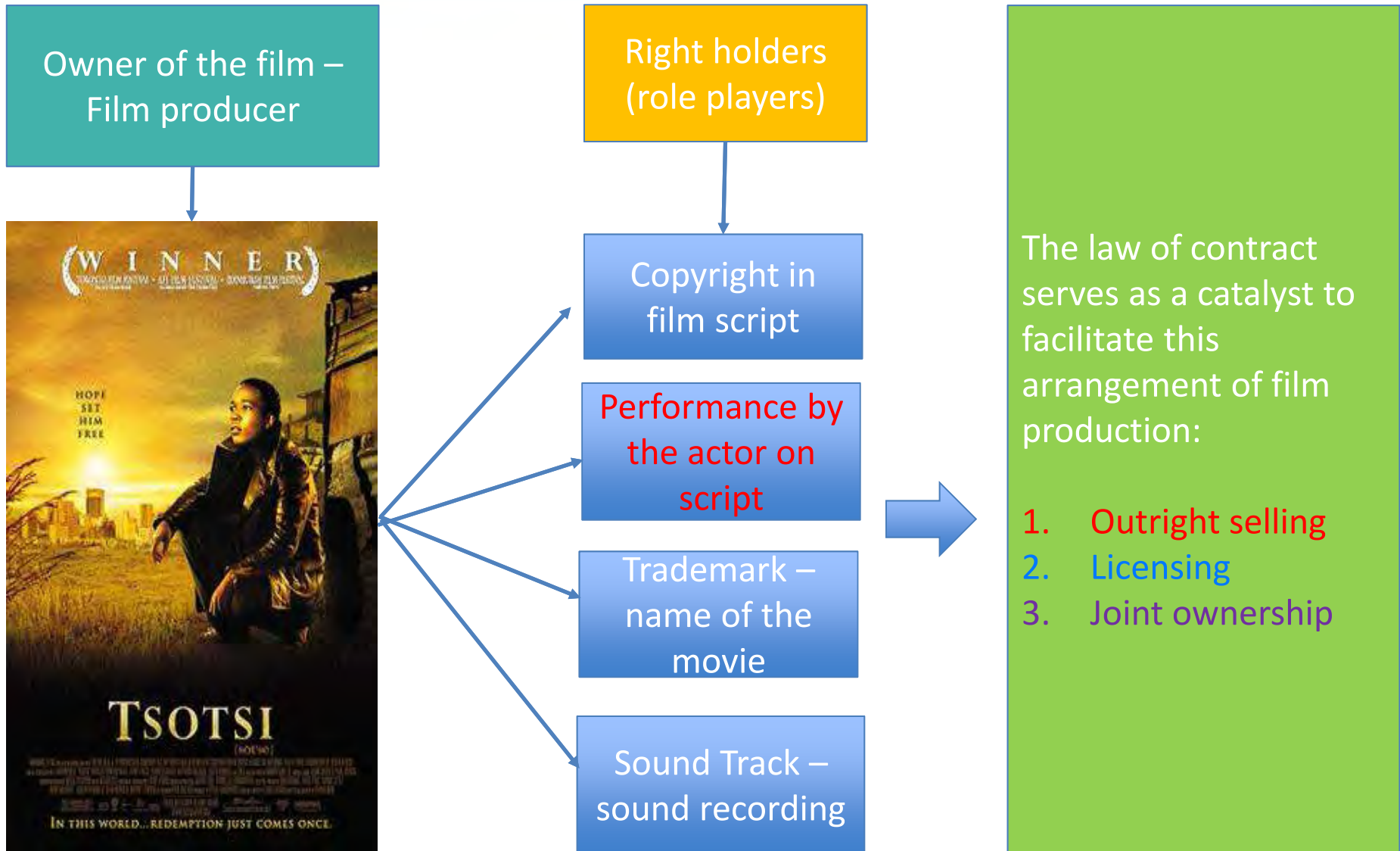
RESTRICTIONS ON USE OF PERFORMANCES:

- Section 5 of the Performers Protection Act provides that no person shall:
 - Without the consent of the performer-
 - Broadcast or communicate to the public an unfixed performance of such performer unless the broadcast is itself a broadcast performance
 - Make a fixation of the unfixed performance of such performance
 - Make a reproduction of the fixed performance of such performer
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- Performances are by nature rights to one's performance not to do certain acts (restricted acts)
- Performances are also subject to exceptions in the same manner as copyright works in terms of the Copyright Act, 1978

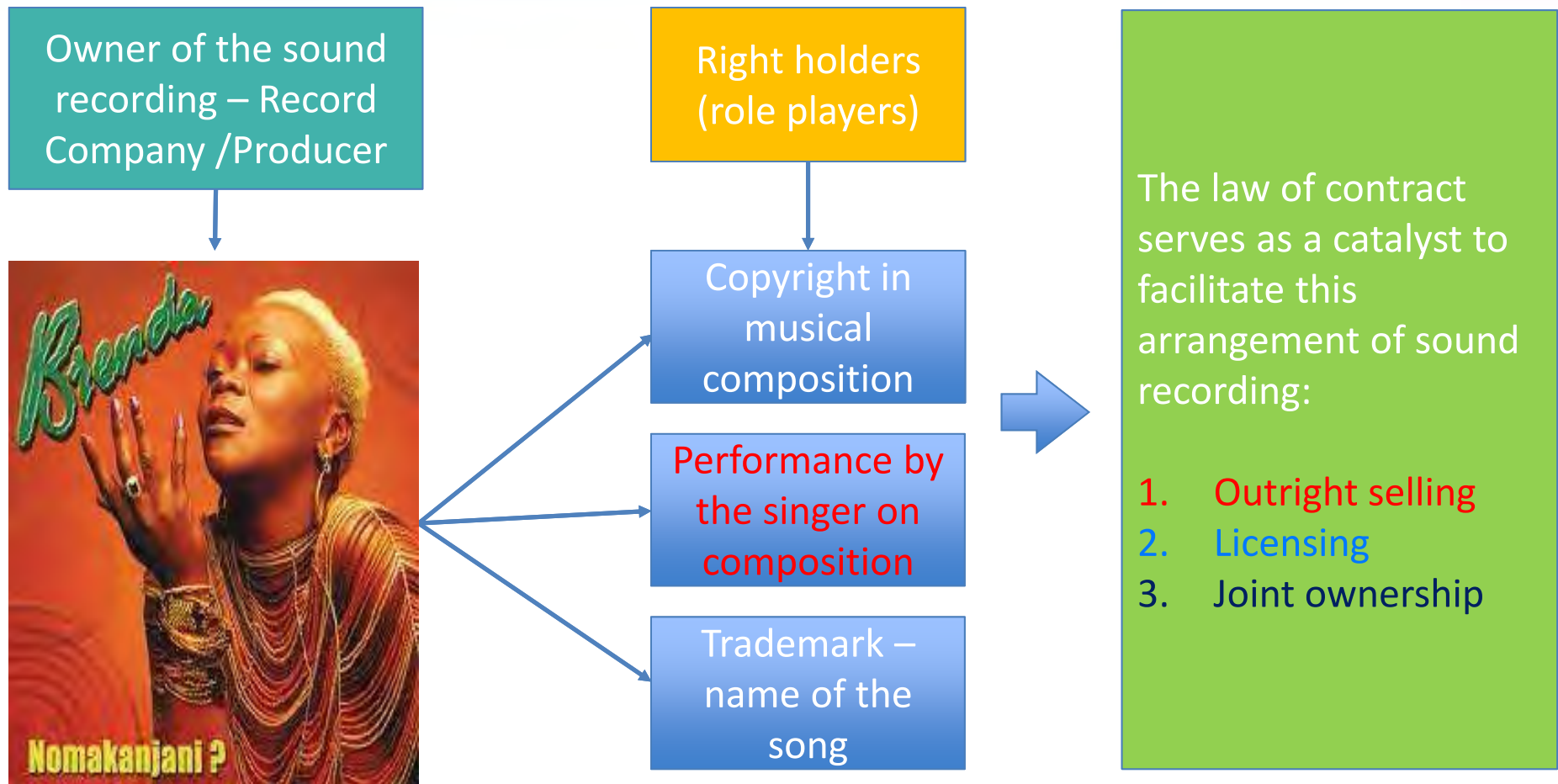
PERFORMANCES ARE RIGHTS:

- Performers are simply actors in the film (audio-visual work) and singers in the music sound recordings
- **Singing** in the sound recording and **acting** in the film constitute performances
- Performances are sometimes called **related rights or neighbouring rights** but should not be understood to suggest that such rights are **inferior** to rights in copyright works (they are all rights under the law)
- It is only the economic systematic challenges and imbalances in the commercial market which subject the performers to inferior status when negotiating commercial deals
- In other jurisdictions, performers have very functional unions representing the performers and influencing commercial deals on their behalf. SA has no such model

FIXATED PERFORMANCE IN FILM



FIXATED PERFORMANCE IN SOUND RECORDING



LAW OF CONTRACT

- The performers are in law entitled to conclude recording / filming deals on how royalties will be paid to them when sales are made to **films (audio visuals)** and **sound recordings (audio)** where their performances featured
- In the area of sound recordings, consent by the performer to be recorded or performance fixated is deemed to be consenting to the record producer entitled to solely commercialize the sound recordings
- Different types of contracts are entered into between performers and producers of sound recordings including **advance payments** to performers by record companies
- The law of contract plays an important role to ensure that performances and copyright works attract commercial gains
- The law of contract also enables these rights to be transferred from one person to another for a commercial gain

INTERNATIONAL TREATIES FOR PERFORMERS

- The rights of performers are as important as Copyright works and therefore enjoys international recognition through various international treaties
- **The Rome Convention, 1961** (This treaty was recognized the rights of performers and there were no digital markets at that time)
 - Rights of performers
 - Rights of producers of phonograms
 - Rights of broadcasting organizations
- **The WIPO Performances and Phonograms Treaty, 1996** (Responded to technological evolution on these rights)
 - Rights of producers of phonograms
 - Rights of performers – **audio performances**
- **The Beijing Treaty on protection of Audio-Visual Performances, 2012** (Recognized the rights and further responded to technological evolution)
 - Rights of performers – **audio visual performances**
- These treaties, constantly keep on improving the rights of performers in accordance with the emerging issues in the industry. This is necessary to ensure that talent / creativity exhibited by performances (performers) continues to be relevant and rewarded ,

INTERNATIONAL TREATIES FOR PERFORMERS

- The SA Performers' Protection Act, 1967 lacks provisions addressing the performances when consumed by the market on digital platform simply because it is an old piece of legislation (no longer relevant to modern way of doing business)
- The new rights for Performers in the International Treaties:
- **WIPO Performances and Phonograms Treaty –**
 - Right of reproduction
 - Right of distribution
 - Right of rental
 - Right of making available
- **The WIPO Beijing Treaty on Audio Visual Performances -**
 - Right of reproduction
 - Right of distribution
 - Right of rental
 - Right of making available
 - Right of broadcasting, communication and fixation if the performance is unfixed

DURATION OF PROTECTION FOR PERFORMANCE

- The performance is protected from the day it took place if unfixed and if fixed in a sound recording from the time it was first fixed for a period of **50 years**
- Other jurisdictions provide a longer duration of performance

EXCEPTIONS ON THE USE OF PERFORMANCES

- In the same manner as copyright works can be used without the permission or authorization by the owner, performance can be used without the performer's permission under the provisions on **Exceptions** as provided for in the Copyright Act
- Such exceptions are:
 - Use for criticism, review or reporting of current events
 - Teaching or scientific research
 - Legal proceedings

OFFENCES AND LIABILITIES

- Performances are rights in terms of section 5(1) of the Performers Protection Act, 1967, therefore any persons contravening such rights shall be guilty for a criminal offence
- Any person infringing Performers rights may be sued in a court of law for **damages or be interdicted**
- These offences and liabilities demonstrate that rights relating to performances are enjoying same legal recognition as rights in respect of copyright works
- In the matter between **SAMRO vs SAMPRA**, a collecting agency for performers successfully interdicted a collecting society for owners of sound recordings over distribution of royalty for not being part of the process to formulate a distribution plan. Although these are related rights they are rights in law and can be enforced like any other rights

THANK YOU

Kadi Petje: Senior Manager Copyright CIPC
Email: Kpetje@cipc.co.za
Mobile: +27 64 900 9717