



# Copyright Amendment Bill and the Performers' Protection Amendment Bill - Background document for Portfolio Committee on Trade and Industry

18 August 2020



**the dtic**

Department  
Trade, Industry and Competition  
REPUBLIC OF SOUTH AFRICA

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# Purpose of this document

To brief the Portfolio Committee on Trade and Industry on the Bills remitted by the President and to give an overview of the Copyright Amendment Bill and the Performers' Protection Amendment Bill.



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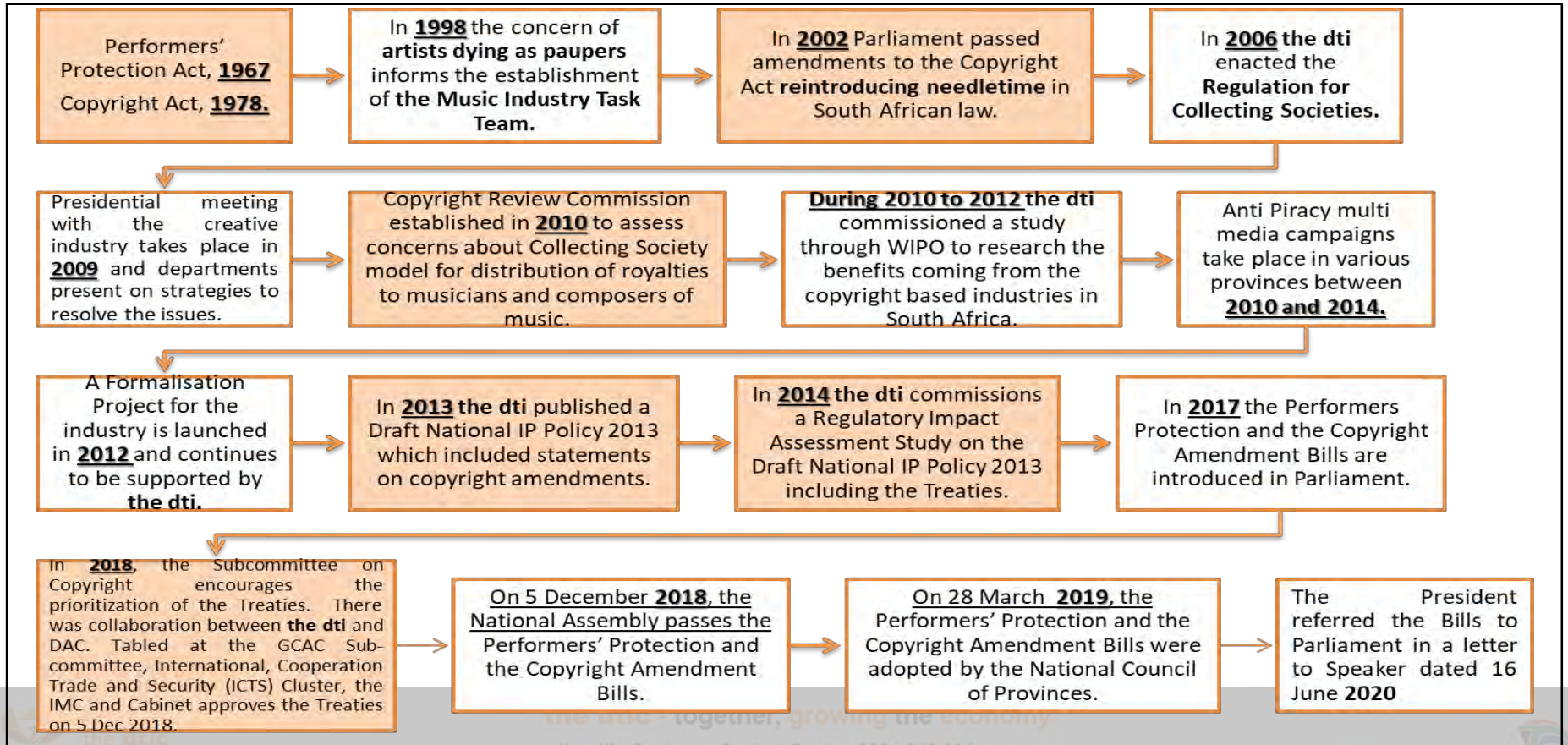
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# Background to the Bills - processes



# Objectives of the Copyright Amendment Bill (CAB)

- To develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa.
- To introduce provisions which deal with matters pertaining to collective management. Collecting societies will only be allowed to collect for their registered members and all collecting societies have to be accredited with the Companies and Intellectual Property Commission (“CIPC”).
- To deal with the protection of works and rights of authors in the digital environment.
- The Bill provides for standard contractual terms to empower authors when negotiating contracts. This will close the gap that has resulted in unfair contractual terms that has led to creators signing away their rights.

# Objectives of the CAB

- To introduce a Resale Royalty Right. This Resale Royalty Right means that an artist could be entitled to a royalty when their original work is resold commercially.
- To introduce a hybrid system for the reproduction of copyright material for limited uses or purposes without obtaining permission and without paying a fee or a royalty. Furthermore, this provision stipulates the factors that need to be considered in determining whether the copyright work is used fairly.
- To provide for exceptions and limitations in education, libraries, archives and museums, computer programmes; To provide for the availability of accessible format copies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind and includes other disabilities such as learning disabilities, dyslexia etc.
- To provide for the sharing of royalties in respect of literary, musical, artistic and audiovisual works.
- To provide for the recordal and reporting of certain acts.
- To strengthen the Copyright Tribunal so that it can deal with all Copyright and related rights matters.
- To address the rights of authors in commissioned works
- To introduce Technological Protection Measures (TPMs) to reduce incidents of copyright infringement.



# What informed the Bills: CRC recommendations (1)

**the dtic** draft Bill took into account the recommendations from the Copyright Review Commission (CRC). The amendments set out in the Bill in terms of collective management, royalties, the Tribunal are a direct result of the following CRC recommendations:

- South Africa should amend its Copyright Act by adopting inter alia the right to communicate literary and musical works to the public and the right to make available copies of sound recordings.
- The copyright law should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant Collecting Society.
- Legislation be amended to allow for one Collecting Society per set of rights with regard to all rights governed by the Copyright Act of 1978 (performance, needle time and mechanical rights).
- The law should be amended to allow for all music-rights. Collecting Societies ought to fall within the ambit of the regulations issued under the Act.

# What informed the Bills: CRC recommendations (2)

- The legislation to be amended as follows: retention of music usage information to be compulsory for large music users.
- The Copyright Act must be amended to allow rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied.
- The Acts should be amended to provide that needle time be divided equally between the owner(s) of the copyright in the sound recordings and the owner(s) of the neighbouring right to needle time.
- The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence.
- The definitions of local music contained in the Electronic Communications Act should be enlarged.
- The Copyright Act should be amended to adopt the right 'to communicate the work to the public' and the 'making available' right as two new exclusive rights of copyright owners.



# What informed the Bills

- Several studies were conducted prior to the Bills being introduced into Parliament as early as 2009.
- In 2014, **the dtic** commissioned a Regulatory Impact Assessment Study on the Draft National Intellectual Property (IP) Policy 2013, it included the Treaties, fair use, Treaties, exceptions, etc.
- The WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty informed some provisions in the Bills.
  - In some respects **the dtic** considered the Treaties, in line with the Constitution, developmental consideration in the best interest of the creators and other rights holders.
- The Socio Economic Impact Assessment report was conducted for the Bill by DPME.

# Treaties Informing the Bills

- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds). South Africa is not a member.
- **The Beijing Treaty on Audio Visual Performances (BTAP)** deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member.
- **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member.
- **Marrakesh VIP Treaty to Facilitate** (South Africa not a member): to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, South Africa is not a member.
- **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.

# Provisions in the Bill with no Reservations

- Recordal and reporting for royalty determination
- Regulation of collecting societies
- Royalties regarding sound recordings equally shared between the owner of the copyright, collecting society or indigenous community subject to the agreement to the contrary between the owner and the performer.
- Commissioned works, with more protection for authors
- Strengthening of the Copyright Tribunal
- Improved penalties for infringements of copyright
- Freedom of panorama and incidental use exceptions

# Constitutional Reservations Raised by the President

- On 16 June 2020, a letter was received from the President of the Republic to the Speaker of Parliament to refer the Copyright Amendment Bill, 2017 [B13-2017] and the Performers' Protection Amendment Bill, 2016 [B24-2016] to the National Assembly for consideration of the President's reservations on their constitutionality.
- Section 79(1) of the Constitution of the Republic of South Africa requires that the President must either assent to and sign a Bill, or if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

# Constitutional Reservations Raised by the President

- The President raised the following reservations:
  - Incorrect Tagging
  - Retrospective and Arbitrary Deprivations of Property
  - Impermissible Delegation of Legislative Power to the Minister
  - The Copyright Exceptions
  - International Treaty Implications

# Constitutional Reservations Raised by the President

The President noted as follows:

“In considering the numerous and varied submissions made and the process followed in Parliament to pass the Bills, I have a number of reservations as to the constitutionality of the Bills, These reservations lead me to conclude that, in its present form, the Bill may not pass constitutional muster and may therefore be vulnerable to constitutional challenge. I set out below those constitutional matters that require reconsideration so that these important statutes achieve their intended purpose without the risk of being set aside by the courts.”



# Incorrect Tagging

- The Bills were tagged as section 75 Bills. The President is of the view that the Bills concerned are incorrectly tagged and are in fact section 76 Bills, given that they affect cultural matters and trade—namely trade in copyright- in which provinces exercise competence.
- The President notes the Copyright Amendment Bill may affect trade because sections 6A, 7A, 8A, 39(Cg), (cl), 22(3), 7B-F and 22A of the Bill provide how copyright may be traded. The Bill further affects cultural matters since indigenous works will become eligible for payment of royalties under the Bill.
- Sections 6A, 7A and 8A are on the sharing of royalties for literary or musical works, visual artistic works and audiovisual works. Section 39(Cg) focuses on prescribing compulsory and standard contractual terms to be included in agreements to be entered into in terms of this Act; section 22(3) deals with the reversion of assigned rights in 25 years from copyright owner to author; section 7B-F deals with the Resale Royalty Rights and section 22A deals with licences in respect of orphan works.

# Incorrect Tagging

- The Office of the Chief State Law Advisors (OCSLA), Parliamentary Legal Advisor and Parliament's Joint Tagging Mechanism assessed the clauses of the Bills and found them to be section 75 Bills and correctly tagged.
- OCSLA concluded that neither the specific clauses that they considered, nor any of the other clauses of the Bills, in substantial measure affect a functional area in Schedule 4 and thus recommended that the PPAB and the Copyright AB be classified as section 75 Bills.
- The Intellectual Property (IP) mandate is a national competence and not a provincial mandate. The trade aspect was considered to be a remote focus of the Bills as opposed to a direct relation.
- Section 76 of the Constitution, read with Schedule 4, sets out a list of the subject matters where a Bill would affect provinces. In the matter of Tongoane and Others v National Minister for Agriculture and Land Affairs & Others, it was indicated that the Bill must affect one of the listed items in schedule 4 in a substantial manner, before it will be rendered a section 76 Bill.
- The President concluded that both Bills had been incorrectly tagged by virtue of the fact that certain of the provisions embodied therein substantially affect the areas of cultural matters and trade as listed in Schedule 4 to the Constitution.

# Retrospective and Arbitrary Deprivation of Property

- The President also has reservations that several sections of the Copyright Amendment Bill may constitute retrospective and arbitrary deprivation of property in that copyright owners will be entitled to a lesser share of the fruits of their property than was previously the case.
- The President raised reservations with section 6A(7), 7A(7) and 8A(5) of the Copyright Amendment Bill as constituting retrospective and arbitrary deprivation of property. The provisions are seen to reach far beyond the authors it seeks to protect. They deprive copyright owners of property without justifiable reason thus resulting in substantial arbitrary deprivation of property.

# Retrospective and Arbitrary Deprivation of Property

- It is important in law to ensure that if deprivation of property occurs, it is not arbitrarily done. Where the harm done by the law (deprivation) would not be balanced by the benefits that it is designed to achieve (providing relief to authors who live in poverty as a result of not being fairly compensated) such deprivation would not be reasonable and justifiable in an open and democratic society.
- Historically authors assigned their rights, did not receive royalties and were exploited. The Portfolio Committee considered this exploitation and sought to address it. The rationale for inserting these clauses was an attempt to correct exploitation, which justified the deprivation.

# Retrospective and Arbitrary Deprivation of Property

- The retrospective application of these provisions were debated extensively in the Portfolio Committee on Trade and Industry.
- The Portfolio Committee requested a legal opinion, on the constitutionality of these clauses. The Office of the Chief State Law Adviser, the Legal Adviser to the Department and the Parliamentary Legal Adviser consulted and agreed on the opinion that was provided to the Committee.
- The opinion raised a constitutional concern regarding the retrospectivity of sections 6A(7), 7A(7) and 8A(5).
- The Committee was however concerned with the historical untransformed creative industry landscape and the unfair bargaining powers that deprived authors and performers of their royalties and opted for the retrospectivity clauses.
- These clauses were inserted on the basis of ensuring that the proposed legislation also deals with restorative justice.
- In paragraph 11 on page 5 of the Presidential letter of referral, the conclusion is reached that sections 6A(7), 7A(7) and 8A(5) constitute retrospective and substantial arbitrary deprivation of property. It is thus imperative that these provisions be reconsidered in Committee proceedings.

# Impermissible Delegation of a Legislative Power to the Minister

- The President in paragraph 13 on page 6 of his letter states that sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) confer substantial discretionary powers on the Minister and this “may well” constitute an impermissible delegation of legislative authority and as such would be constitutionally invalid if the Bill is assented to in its current form.
- In paragraph 14 on page 6 the President states that section 6A(7)(b) permits the Minister to make key decisions regarding the deprivation of property (copyright) to whom it was assigned in the past. Furthermore, this also has the effect that there is no participation process to which litigation is generally subjected. The Bill fails to provide for the oversight role of the NCOP. The decision making process is within the domain of the National Assembly.



## Comment: Impermissible Delegation of Legislative Power to the Minister

The clauses in all sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) all contain the following provision:

“(b) The Minister must—

- (i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);
- (ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and
- (iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.”

## Comment: Impermissible Delegation of Minister's Powers

- These provisions empower the Minister to conduct an impact assessment and develop regulations that will be tabled in the National Assembly.
- These clauses were added to ensure that the royalties are dispensed responsibly after further study and not arbitrarily.
- These provisions were only to come into effect after certainty has been established. Once enacted, the Act could have been put into operation with the exception of these sections, thus remaining inoperative until the National Assembly has approved the regulations.
- The Portfolio Committee found the clauses workable to operationalise the Bill.
- Given the direct nexus with the retrospectivity clauses, the Ministerial power to make these regulations ought to be revisited.

# The Copyright Exceptions

- The President raises a reservation that the Copyright Amendment Bill introduces Copyright exceptions in the new sections 12A to 12D, 19B and 19C. These sections may encounter constitutional challenges for the following reasons: sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C(3), 19C(4), 19C(5)(b) and 19C(9) may constitute deprivation of property; sections 12A and 12D may further violate the right to freedom of trade, occupation and profession.
- The President is also concerned that copyright exceptions provided for in the Copyright Amendment Bill may constitute arbitrary deprivation of property; may violate the right to freedom of trade, occupation and profession; and may be in conflict with the World Intellectual Property Organisation (WIPO) Treaty and the WIPO Performance and Phonograms Treaty, both of which South Africa subscribes to.
- The letter from the President points to the fact that substantial amendments were effected to section 12A of the Bill without greater allowance for widespread public consultation. The implication being that it might be advisable to conduct further consultations.

# The Copyright Exceptions

## The clauses unpacked

- Clause 12A deals with “General exceptions from copyright protection”. The concern on this section is two-fold: deprivation and the freedom to trade occupation and profession.
- Clause 12B deals with “Specific exceptions from copyright protection applicable to all works”.
- Sub-paragraph 12B(1)(a)(i) allows quotations of works and stipulates that the extent of the quotation may not exceed the extent reasonably justified by the purpose of the quotation.
- Paragraph 12B(1)(c) allows the reproduction of a work by a broadcaster for its own lawful broadcasts. It is required that these reproductions must be destroyed within six months, or as agreed with the relevant copyright owner. Where the work is of an “exceptional documentary nature”, the broadcaster is allowed to preserve the work in the archives of the broadcaster. The broadcaster may however not broadcast that reproduction or use it for any other purpose without the consent of the relevant copyright owner.
- Sub-paragraph 12B(1)(e)(i) allows the reproduction by the press, or reproduction in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics. It also deals with broadcast works of the same character where there is no express reservation on reproduction, broadcasting or other communication thereof. The sub-paragraph requires that the source and name of the author must however, where it is practicable, be indicated. This exception also applies to transmission by a diffusion service [sub-clause (5)].
- Sub-paragraph 12B(1)(f) allows the translation of a work by a teacher or student. It also stipulates that such translation may not be done for commercial purposes. Where it is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes, such use may not exceed the extent justified by the purpose. It also allows translation of the work for communication to the public for non-commercial purposes.

# The Copyright Exceptions

## The clauses unpacked

- Clause 12C deals with “Temporary reproduction and adaptation” of a work where that copy or adaptation is an essential part of a technical process. The President does not mention this section in the detailed discussion.
- Clause 12D deals with “Reproduction for educational and academic activities”. The concern regarding this section is two-fold: deprivation and the freedom to trade, occupation and profession.
- Clause 19B deals with “General exceptions regarding protection of computer programs”. The President does not mention this section in the detailed discussion.
- Clause 19C deals with “General exceptions regarding protection of copyright work for libraries, archives, museums and galleries”.
- Clause 19C(3) allows the above institutions to provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another similar institution.
- Clause 19C(4) allows the above institutions to permit a user to view or listen to the whole of certain digital or other forms of audiovisual- or musical works, or sound recordings. This is limited to educational or research purposes and may only be allowed on its own premises or in a institutional classroom or lecture theatre. They may not permit that user to make a copy or recording of the work for commercial purposes.
- Clause 19C(5)(b) allows the above institutions to make a copy of publicly accessible website for the purposes of preservation.
- Clause 19C(9) allows the above institutions to make a copy of a copyright work for its own collection when the permission of the owner of that copyright, collecting society or relevant indigenous community cannot, after reasonable endeavour, be obtained or where the work is not available by general trade or from the publisher.

# the dtic rationale in Parliament: Fair use

- The Copyright Act of 1978 contains a fair dealing provision as the Act is based on the United Kingdom legislation.
- The Copyright Amendment Bill is premised on a hybrid model of fair use that includes a list of exceptions and limitations that incorporates a list that include libraries, archives, museums and galleries, persons with disabilities, computer programmes, education and academic activities.
- Fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission. The fair use is an exception to the exclusive rights of a copyright owner.
- Fair use exceptions include but are not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder.



# Fair use

- Fair use can have considerable economic benefits – particularly so in a more digitised world. The application of fair use has been found to lead to high innovation, economic growth and improved creativity, which bode well for the economy. Access to knowledge, education and information will improve the social conditions of South Africans.
- There are several countries in the world with open broad exceptions and have not been found to be in contravention of international law such as the US, Singapore, Malaysia, Israel, South Korea, Sri Lanka and Canada etc.
- Many countries apply fair dealing with wider exceptions.

# Fair use

- The Bill introduces safeguards in addition to the three-step test contained in the Berne Convention.
- Fair use does not permit full-text copying or multiple copies of a book for students. This is not fair as it will be a substitution of the original work. Digitisation without authorisation is not fair use. Numerous courts have found that digitisation of a work and incorporation into a database for purpose of search is essentially transformative use. The Bill makes it clear that schools and universities may make copies of extracts for educational purposes without licensing.
- The law is limited to excerpts. It specifically provides that course packs or other forms of copying may not “incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work” under normal circumstances. (12D(2)).
- The PC was provided with a legal opinion by the OCSLA, Parliamentary Legal Advisor and Department's legal advisor that found section 12A to 12D reasonable and justifiable in an open and democratic society.

# Fair use

- Globally, South Africa is a signatory to many multilateral agreements. As a member of the World Trade Organisation (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and as party to the Berne Convention binds South Africa.
- The fair use provision is aligned to the Berne convention 3 step test and have safeguards. The three-step test sets restrictions to copyright exceptions and limitations, thus creating an international standard against which national copyright exceptions and limitations are to be judged.
- The test puts forward three cumulative conditions for national copyright exceptions and limitations and prescribes that such exceptions and limitations must:
  - be confined to certain special cases;
  - not conflict with the normal exploitation of the copyright work; and
  - not unreasonably prejudice the legitimate interests of the rights holder /author.
- The opinion by Professor Tobias Schonwetter on the exceptions and its alignment to the Berne convention sought by the Portfolio Committee also attested to the alignment of the fair use provision as well as exceptions and limitations to the Berne 3 step test.

# The Copyright Exceptions – process concerns

- The Copyright Amendment Bill was developed through a consultative parliamentary process, stretching over two years, where a diverse set of stakeholders and constituencies were active participants. A number of public hearings were held over an 18 month period in the National Assembly where both written and oral comment was sought on the objectives and the efficacy of the Bills and written submissions were received in the National Council of Provinces. More than 250 written submissions were received by the relevant parliamentary committees.
- The heart of the President's concerns relate not to the content per se, or to consultation in general, but to the adequacy of public consultation on the **changes made** by the Committee during the process of reviewing the Bill. It has been argued the changes were far-reaching and ought to have been accompanied by further opportunities to the public to comment.
- The Committee was of the view that the changes it introduced were consistent with the policy framework that informed the original Bill and thus did not require further consultation. Some affected parties contend the changes were material and could prejudice them.

# The Copyright Exceptions

- There is no codified way to determine the adequacy of consultation.
- Two key Constitutional Court judgements may assist the Portfolio Committee to consider whether the processes of public consultation on the changes, were adequate.
- In the SA Veterinary Association case, the court established the Committee provide for further public comment, where it makes a material amendment to a Bill
- In the Doctors for Life case, the court stated that in evaluating the adequacy of consultation, it will consider inter alia, the nature and importance of the legislation and the intensity of its impact on the public.
- The original provision read: In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, **for the following purposes**, does not infringe copyright in that work.
- The revised provision read: In addition to uses specifically authorised, 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.
- The Portfolio Committee may wish to make a call on the sufficiency of the process, based on an assessment of the materiality of the change; the relationship taken as a whole to the original provisions that were subject to public comment; and finally the benefit of insulating the Bill against future constitutional attack, by providing for public consultation on the relevant referred provisions.

# International Treaty Implications

- There were concerns raised by the stakeholders on the alignment of the Bills to the international Treaties. The Treaties include the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Marrakesh Treaty.
- The concern with the WIPO Performance and Phonograms Treaty was its economic implication of the Bills as they relate to the economic rights of performers.
- The President indicated he has reservations about whether the Bills comply with the Treaties.
- In paragraph 21 on page 10 of his letter, the President raises concern that the Bills contain provisions that are inconsistent with South Africa's International Law obligations embodied in the Treaties concerned.



# International Treaty Implications

- Treaty provisions, especially those on economic rights were introduced into the Bill.
- Exceptions and limitations in term of the Treaties are left to each country.
- Drafting of the Bills were done within the scope of the Treaties to allow for accession.
- The Department and the Portfolio Committee were of the view that there is alignment with international Treaties and other international obligations.
- **the dtic** and the Portfolio Committee as well as the Parliamentary Legal Office did indeed consider the three-step test in terms of the Berne Convention, an opinion was presented on this matter and all the exceptions and limitations were found to be consistent with the three step test and other legal instruments.

# PERFORMERS' PROTECTION AMENDMENT BILL



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- **Challenges Currently Faced by Industry**
- **Objectives of the PPAB**
- **Proposed Amendments**

# Background

- Performers' Protection is a right related to that of Copyright that caters specifically for the protection of the rights of performers.
- In 2010 **the dtic** commissioned a study through the World Intellectual Property Organisation (WIPO) to research the benefits coming from the copyright-based industries in South Africa.
- In 2015 the CAB (The PPAB was still combined with the CAB) was published for public consultation purposes and 122 written submissions were received. The CAB and PPAB were separated into two (2) different Bills based on comments received.
- Cabinet approved the PPAB for introduction into Parliament on 08 June 2016.
- In 2016 Socio Economic Impact Assessments (SEIAS) was completed on the PPAB.
- The Bill was introduced to Parliament and referred to the Committee on 2 December 2016.

# Background

- The Committee held a workshop with the Department of Trade, Industry and Competition (**the dtic**) on intellectual property and the key concepts related to the Performers' Protection Amendment Bill on 7 February 2017. It also received a briefing on the Performers' Protection Amendment Bill on 21 February 2017.
- The Committee advertised and called for written submissions in national, provincial and regional newspapers in all official languages from 19 January until 6 February 2017. The Committee received 22 submissions.
- Due to the cross-references with the Copyright Amendment Bill, which had not yet been tabled, the Committee resolved to await the tabling of the Copyright Amendment Bill to ensure alignment between the two Bills. The Copyright Amendment Bill was subsequently introduced on 16 May 2017.
- On 13 and 14 September 2018 public hearings on the PPAB were held with **the dtic** responding to submissions from the hearings on 09 October 2018.
- Further public consultations on the PPAB were held by the Trade and Industry PC between October and November 2018 wherein additional comments on specific provisions of the PPAB were requested from the public.
- The Trade and Industry PC adopted the PPAB on 15 November 2018. The National Assembly passed the PPAB on 5 December 2018.

# Challenges Currently Faced by Industry

- Non-payment of repeat fees.
- Non-payment for commercial exploitation.
- Unfair Contracts resulting in the perpetual signing away of artists' and performers' economic rights.
- The lack of updated industry contracts for freelance performers.
- Non-recognition of the moral and economic rights of performers.
- Disputes not resolved speedily.
- The digital environment is not catered for in the Acts wherein audiovisual content is consumed (Non-ratification of digital Treaties).

# Objectives of the PPAB

- To address the challenges facing the creative industry from non-payment of royalties; lack of formalisation of the creative industry which exposes it to abuse; piracy; and rights of performers by making provision for:
  - extending the protection of performers' moral and economic rights;
  - royalties or equitable remuneration to be payable when performance is sold or rented out;
  - recordal and reporting of certain acts and offences thereof;
  - the Minister to prescribe compulsory and standard contractual terms as well as guidelines for a performer to grant consent under this Act;
  - the protection of rights of producers of sound recordings; and
  - prohibition of conduct in respect of technological protection measures ("TPMS") and copyright management information.

# ANNEX 1: COPYRIGHT AMENDMENT BILL PROVISIONS



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# Proposed Amendments

Provisions	What the Bill provides
Definitions	<p>Clause 1 proposes amendments to certain definitions and the insertion of definitions of ‘accessible format copy’, ‘art market professional’, ‘audiovisual fixation’, ‘Collecting Society’, ‘commercial’, ‘Companies Act’, ‘copyright management information’, ‘orphan work’, ‘performer’, ‘person with a disability’, ‘technologically protected work’, ‘technological protection measure’, ‘technological protection measure circumvention device’, ‘Tribunal’. <i>Pages 2-4 of the Bill.</i></p>
Scope of Copyright Protection	<p>Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.</p> <p>The clause provides that copyright protection subsists in expressions and not in ideas, procedures, methods of operation or mathematical concepts.</p> <p>In the case of computer programs, in interface specifications, a table or compilation which by reason of the selection or arrangement of its content, constitutes an original work</p> <p>The clause provides no protection to an expression of official texts of legislation or speeches of a political nature.</p> <p><i>Page 4 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
State or Organisation Funded Intellectual Property	Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for ownership of copyright funded by the State, local or international organisation. <i>Page 4 of the Bill.</i>
Communication to the public of a literary or musical work, making available and distribution of an original or a copy of a work	Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

## Proposed Amendments

	What the Bill provides
Share in royalties regarding literary and musical works	Clause 5 of the Bill proposes an insertion of a new section 6A specifically providing for royalty sharing after assignment of copyright in a literary or musical work or where the author of a literary or musical work authorised another to do any of the acts contemplated in section 6. The share of royalties to be determined by a written agreement in a prescribed manner. <i>Pages 5-6 of the Bill.</i>
Distribution of an artistic work, Communication to the public and making available to the public <i>Amendment of section 7 of Act 98 of 1978</i> <i>Pages 13-14 of the Act</i>	Clause 6 of the Bill proposes an amendment to section 7 by providing for the distribution of an artistic work to the public, communication to the public of an artistic work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such a work from a place and at a time individually chosen by them, whether interactively or non-interactively. <i>Page 6 of the Bill.</i>

# Proposed Amendments

	What the Bill provides
Sharing of royalties regarding a visual artistic work	<p>Clause 7 of the Bill inserts a new section 7A specifically providing for royalty sharing after assignment of copyright in an artistic work or where the author of an artistic work authorised another to do any of the acts contemplated in section 7. The share of royalties to be determined by a written agreement in a prescribed manner.</p> <p><i>Pages 6-7 of the Bill.</i></p>
Resale Royalty Right: section 7B	<p>Clause 7 also inserts section 7B that provides that the author of visual artistic work in which copyright subsists or his or her heir must be paid royalties on the commercial resale within the art market of that work.</p> <p>Royalties in respect of visual artistic works shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts and culture.</p> <p>The seller and the art market professional are jointly and severally liable to pay the royalties to the author. it also provides in section 7C to 7E for authors of visual artistic works to enjoy the inalienable resale royalty right on the commercial resale of his or her original work of art, subsequent to the first assignment by the author of such work of art. This includes the resale, duration, assignment or waiver of the resale royalty right.</p> <p>The resale royalty rights will only apply after the commencement date of the Copyright Amendment Act.</p> <p><i>Pages 6-8 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
Distribution, commercial renting, communication to the public and making available of an audiovisual work	<p>Clause 8 of the Bill proposes an amendment to section 8 of the Act by providing for the distribution of an audiovisual work to the public, authorising commercial rental of the work to the public, communication to the public of an audiovisual work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.</p> <p><i>Pages 8-9 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
Sharing of royalties between performers and copyright owners of audiovisual works	<p>Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing between performers and the copyright owner of audiovisual works for any of the acts contemplated in section 8. The share of royalties to be determined by a written agreement in a prescribed manner. It requires the recording and reporting of any act contemplated in section 8 and makes the failure to do so, an offence.</p> <p><i>Pages 9-10 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Royalties regarding sound recordings	<p>Clause 11 substitutes 9A that provides for the royalty that is equally shared between the owner of the copyright, collecting society or indigenous community subject to the agreement to the contrary between the owner and the performer.</p> <p><i>Pages 11 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Distribution, commercial rental, communication to the public and making available of a Sound Recording	<p>Clause 10 of the Bill proposes an amendment to section 9 of the Act providing for the distribution of a sound recording to the public, authorising commercial rental of the work to the public, communication to the public of such sound recording by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.</p> <p><i>Page 10 of the Bill.</i></p>



# Proposed Amendments

## What the Bill provides

The Agreement: section 6A, 7A, 8A (Share of royalties)

The royalty will be provided in the written agreement in the prescribed manner and form. The agreement must include:

- The rights and obligations of the contracting parties.
- The share of royalties.
- The method and period of payment.
- Dispute resolution mechanism.

In the instance where there is no agreement, parties may approach the Copyright Tribunal.

**Pages 5, 6 and 9 of the Bill.**

## Proposed Amendments

Clause	What the Bill provides
Retrospective application of royalties	<p>Clause 5 on share of royalties in literary and musical works, clause 7 on share of royalties in artistic works and clause 9 of share of royalties in audiovisual works will apply retrospectively.</p> <p>It applies to works in the copyright Act still exploited for profit.</p> <p>The Minister must develop draft regulations setting out the process to give effect to the share of royalties.</p> <p>Conduct an impact assessment of the process proposed in the regulations contemplated.</p> <p>Table the draft regulations and impact assessment in the National Assembly for approval.</p> <p>This will apply after the commencement date contemplated in section 38(2) of the Copyright Amendment Act of 2017.</p> <p><i>Pages 5-9 of the Bill.</i></p>

## Proposed Amendments

Clause	What the Bill provides
Recording and Reporting for royalty determination	<p>Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d), (e) or (f) and makes the failure to do so, an offence. It also makes certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.</p> <p>The offence provides that a person convicted of an offense shall be liable for a fine or imprisonment for a period not exceeding five years or both such fine and imprisonment.</p> <p>The annual turnover of a convicted person that is not a natural person at the time assessed, is the total income of that person during the financial year during which the offence or the majority of offenses, to which this Act applies.</p> <p><i>Pages 10-11 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
General Exceptions and specific exceptions regarding protection of copyright work; permission to make copies; Exceptions related to educational and academic activities	<p>Clause 13 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection for all works, which is a hybrid model of use of work or the performance and includes factors to consider to ensure the usage of the works is fair; section 12B provides for specific exceptions from copyright protection for all works and section 12C is providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process. It also proposes the insertion of section 12D providing for exceptions related to educational and academic activities. All these sections have safeguards on the use of copyright works.</p> <p><i>Pages 12-15 of the Bill.</i></p>
Freedom of Panorama	<p>Clause 14 of the Bill proposes an amendment to section 15 of the Act to provide for panorama and incidental use exceptions.</p> <p><i>Page 15 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Exceptions regarding Computer Programmes	<p>Clause 19 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computer program shall be entitled, without the authorisation of the copyright owner, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.</p> <p><i>Pages 15-16 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
General exceptions regarding protection of copyright works for libraries, archives, museums and galleries as well as for persons with disability	<p>Clause 20 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for libraries, archives, museums and galleries, as well as exceptions regarding protection of copyright work for persons with disability.</p> <p><i>Pages 16-18 of the Bill.</i></p>
Moral Right	<p>Clause 21 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.</p> <p>The clause further provides that the author shall be deemed to have the right to take legal action related to the infringement of the provisions of this section on moral rights.</p> <p><i>Pages 18 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Ownership of copyright in Commissioned Works	<p>Clause 22 of the Bill proposes an amendment to section 21 of the Act to provide for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission to be governed by written agreement. It further provides for the protection of the author by allowing an application to the Tribunal where the work is not used by the person who commissioned it for the purpose it was commissioned; where the work is used for the use other than that for which it was commissioned; when the commissioned work is of a personal nature, the Tribunal may not license the author to use that work. when considering the license when the work is not used by the person who commissioned, the Tribunal must take all relevant factors into account.</p> <p><i>Pages 18-19 of the Bill.</i></p>
Assignment of literary or musical work	<p>Clause 23 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned. It also provides a reversion right for where copyright in a literary or musical work was assigned by an author shall only be valid for a period of up to 25 years from the date of such assignment. Such a license can be verbal or in writing.</p> <p><i>Pages 19-20 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Licenses in respect of Orphan Works	<p>Clause 24 of the Bill proposes the insertion into the Act of a new section 22A, making provision for licences in respect of orphan works. The clause provides for orphan works for resale royalty rights.</p> <p><i>Pages 20-21 of the Bill.</i></p>
Accreditation, Administration and Regulation of Collecting Societies	<p>Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation that include the transformation requirements in the collecting society, administration and regulation of collecting societies. It also provides that where a person intentionally gives him or herself out as a collecting society, that person commits an offence. The Bill provides the transitional arrangement period of 18 months for the accreditation of cs. The collecting society can make royalty payments where there are reciprocal agreements with other collecting societies outside the Republic.</p> <p>The clause provides for the control of collecting society by authors, performers or copyright owners and the functions it will perform such as to collect and distribute royalties. It further provides for the suspension, cancellation of accreditation of collecting societies and the role of the Commission in that regard as well as the skills requirement of the person appointed by the Tribunal for the administration and discharging of the functions of the collecting society.</p> <p><i>Pages 21-24 of the Bill.</i></p>



# Proposed Amendments

	What the Bill provides
Copyright Management Information (CMI)	<p>Clause 26 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright or abuses copyright and technological protection measures.</p> <p><i>Page 24 of the Bill.</i></p>
Technological Protection Measure (TPM)	<p>Clause 27 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection, which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author or copyright owner. It also provides for penalties where the convicted person is not a natural person.</p> <p><i>Pages 24-25 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Circumvention of TPM	<p>Clause 28 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.</p> <p><i>Pages 25-26 of the Bill.</i></p>
Prohibited conducted in terms of CMI and TPM	<p>Clause 29 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, and 28S in the Act providing for prohibited conduct in respect of technological protection measures and of copyright management information; exceptions in respect of technological protection measures and copyright management information; and enforcement by the Commission.</p> <p><i>Pages 26-27 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
Copyright Tribunal	<p>Clauses 30 and 31 of the Bill amends section 29 and propose the insertion of sections 29A to 29H into the Act, which provide for, amongst others, the strengthening of the Copyright Tribunal; its functions; appointment of its members; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal.</p> <p><i>Pages 27-28 of the Bill.</i></p>
Regulations	<p>Clause 33 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies, as well as prescribing minimum standards for contracts.</p> <p><i>Pages 30 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
Unenforceable Contracts	<p>Clause 34 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purports to renounce a right or protection afforded by the Act will be unenforceable.</p> <p><i>Page 31 of the Bill.</i></p>
Schedule 2	<p>Clause 35 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.</p> <p><i>Pages 31-35 of the Bill.</i></p>
‘Cinematograph Films’ and ‘Film’	<p>Clause 36 provides for the amendment of the expressions “cinematograph film” and “film” with “audiovisual work” and “work”.</p> <p><i>Page 35 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Transitional Provisions	Clause 37 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013). <i>Page 35 of the Bill.</i>
Short Title and Commencement	Clause 38 of the Bill provides for the short title and commencement. <i>Page 36 of the Bill.</i>

## Proposed Amendments

	What the Bill provides
Transitional Provisions	<p>Clause 37 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013).</p> <p><i>Page 35 of the Bill.</i></p>
Short Title and Commencement	<p>Clause 38 of the Bill provides for the short title and commencement.</p> <p><i>Page 36 of the Bill.</i></p>

# ANNEX 2: PERFORMERS' PROTECTION AMENDMENT BILL PROVISIONS



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# Proposed Amendments

Provisions	What the Bill provides
Definitions	<p>Clause 1 proposes the insertion of definitions of “audiovisual fixation”, “communication to the public”, “copyright management information”, “producer”, “sound recording”, “technologically protected work”, “technological protection measure”, “technological protection measure circumvention device” and “Tribunal”, the deletion of the definition of “cinematograph film”, “fixation”, “phonogram” and by the substitution for the definitions of “broadcast”, “performance”, “performer” and “reproduction”. <i>Pages 2-4 of the Bill.</i></p>
Protection of Performers’ moral and economic rights	<p>Clause 2 of the Bill proposes the substitution of section 3 of the principal Act. The primary objective of this clause is to clearly circumscribe the statutory rights conferred upon a performer, in particular certain exclusive rights in respect of his or her performances.</p> <p><i>Pages 4-5 of the Bill.</i></p>



# Proposed Amendments

	What the Bill provides
Transfer of Rights	<p>Clause 3 proposes the insertion of sections 3A and 3B to provide for the transfer of rights where the performer has consented to fixation of his or her performance in an audiovisual fixation or sound recordings, subject to written agreement which shall give the performer the right to receive royalties or equitable remuneration for any use of the performance. It is proposed that the exercise of this right in respect of sound recordings shall be valid for a period of 25 years from the date of commencement of the agreement and where after the rights reverts to the performer.</p> <p><i>Page 5 of the Bill.</i></p>

# Proposed Amendments

	What the Bill provides
Protection of rights of producers of sound recordings	<p>Clause 3 also grants exclusive rights to the producer of a sound recording that include the rights to reproduce and making available to the public. The clause also provides the right to earn an equal remuneration, subject to the contract in the contrary, for the direct or indirect use of sound recording to the performer, composer and producer of sound recording published for commercial purposes for broadcasting or communication to the public.</p> <p><i>Pages 5 of the Bill.</i></p>
Restrictions on use of performance	<p>Clause 4 of the Bill proposes amendments to section 5 of the principal Act to provide for the consent of the performer for an unfixed performance or a performance fixed in an audiovisual fixation or sound recording. It provides for availability of the original and copies of performance fixed in audiovisual fixation to the public.</p> <p><i>Pages 5-8 of the Bill.</i></p>

# Proposed Amendments

Issues introduced by the PPAB	What the Bill provides
Restrictions on use of performance	<p>Clause 4 also provides for persons who intend to broadcast or communicate to the public a performance fixed in audiovisual fixation or sound recording of a performer, to record certain acts and submit reports thereon. Failure to do so constitutes an offence. The clause further provides the penalties that include fine, imprisonment not exceeding five years, for a juristic person ten percent of annual turnover. The courts are granted discretionary powers to give a lesser sentence.</p> <p>The clause also provides for the performer to receive royalties or equitable remuneration for authorising the fixation of audiovisual fixation or sound recording for performing certain acts provided the agreement with the producer of the fixation. <i>Pages 5-8 of the Bill.</i></p>
Nature of copyright in audiovisual works	<p>Clause 5 of the Bill proposes amendments to section 8 of the principal Act and provides for situations where an audiovisual fixation or a sound recording can be used without consent for instances that include private study or personal and private use, criticism or review, or reporting on current events, teaching or for scientific research. The clause provides for the acts the broadcaster can perform without consent required in section 5, but where the performer has consented.</p> <p><i>Pages 8-9 of the Bill.</i></p>
Regulations	<p>Clause 6 of the Bill empowers the Minister to make regulations regarding compulsory and standard contractual terms as well as to provide guidelines to performers when granting consent.</p> <p><i>Page 9 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
Technological Protection Measures (TPM) and Copyright Management Information (CMI)	<p>Clauses 7 and 8 of the Bill proposes the insertion of sections 8E, 8F, 8G and 8H to provide for the prohibited conduct in relation to a Technological Protection Measures, which is aligned with sections 28O and 28P of the Copyright Act, 1978, to apply in respect of performances fixed or fixed in audiovisual fixations; and provide for the prohibited conduct in relation to the removal or modification of copyright management information; and the exceptions relating to such removal or modification, which is aligned with sections 28Q and 28R of the Copyright Act, 1978, to be applicable in respect of performances that are fixed or fixed in audiovisual fixation. The Bill in clause 8 makes it an offence to contravene these prohibitions and provides for a sanction.</p> <p><i>Pages 9-11 of the Bill.</i></p>

## Proposed Amendments

	What the Bill provides
'Phonogram' and 'Fixation' Expressions	Clause 9 substitutes the expressions "phonogram" to sound recording and "fixation" to a sound recording wherever they appear in the Act. <i>Page 11 of the Bill.</i>
Transitional Provisions	Clause 10 provides for transitional provisions. <i>Pages 11-12 of the Bill.</i>
Short title and Commencement	Clause 11 provides for the short title of the Bill and commencement. <i>Page 12 of the Bill.</i>

# Thank you



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