Department of Trade, Industry and Competition

Responses to provincial negotiating mandates

Select Committee on Trade and Industry Economic Development, Small Business Development, Tourism, Employment and Labour: On the Remitted Bills

30 May 2023

Purpose

To respond to the provincial mandates in the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour on the Copyright Amendment Bill and the Performers' Protection Amendment Bill.

Background

- Negotiating mandates from 9 provinces.

Province	Negotiating Mandate
Eastern Cape	In favour
Free State	In favour
Gauteng	In favour
Limpopo	In favour
Kwazulu Natal	In favour
Mpumalanga	In favour
Northern Cape	In favour
North West	In favour
Western Cape	Not in favour

Observations

- The provinces raised issues that are in the Bill and requested they be provided for.
- Some provinces raised implementation related issues that cannot be addressed by the Bills.
- Other provinces commented on mandates of other national departments and other organisations, not related to the Bills.
- Some themes are recurring such as fair use, fair dealing; 25 years reversion rights; powers of the Minister to issue minimum contract standards; orphan works; the remuneration/royalties, collecting societies, definitions, regulatory impact assessment, persons with disabilities.
- Some provinces repeated issues from individual submissions in public hearings and the documents had much repetition. The presentation will not be able to address individual submissions, it will be very long.
- New amendments not in the Bill were proposed by provinces.
- Mandates are responded to in a Matrix in more detail.

Cultural Legislation

- **Comments from the provinces**:
- The fact that this Bill refers to the Intellectual Property Laws Amendment Act (Act 28 of 2013), which has still not been signed by the President, is problematic for the implementation of this Bill, should it be adopted.-Western Cape
- Indigenous and cultural content productions and/or creations, especially Nama, is not considered in the Bill and it is recommended that the Bill provides for a similar system like SAMRO to assist indigenous and cultural content productions or creations and further Nama restoration especially. The Bill should further ensure that such indigenous properties are protected.-Northern Cape
- There is a rise of traditional and cultural appropriation of local designs sold in foreign owned stores without attribution or acknowledgement of original garment designers.-Eastern Cape

- **The dtic response**
- Intellectual Property Laws Amendment Act was passed into law in 2013, it is an Act of law in the Statutes.
- It has not been operational to date.
- The Bill recognizes indigenous knowledge. Indigenous knowledge is critical in the economic development and development of the cultural industry of South Africa.
- IPLAA aims to recognise and protect certain manifestations of indigenous knowledge. South Africa has a rich heritage that has an impact on the communities and society.
- It amends certain Intellectual Property (IP) Statutes to protect various forms of Indigenous Knowledge (IK) and granting of intellectual property of the IK.
- The Intellectual Property Laws Amendment Act amends South Africa's four existing IP statutes to incorporate indigenous intellectual knowledge as a form of IP.
    - The SA Copyright Act 1978, the Performers' Protection Act 1967, the Trade Mark Act 1993 and the Design Act 1993 are amended to include certain forms of TK protection.
- The other Indigenous Knowledge legislation exists in the Department of Science and Innovation (DSI), Protection, Development and Management of Indigenous Knowledge Act,2019, which deals with promotion and preservation of indigenous knowledge. The aspects in the IPLAA include requirements of prior informed consent, disclosure of source of origin and benefit sharing agreement.

Other Government Work

- **Comments from the provinces**

- Arts and culture should be introduced as subjects at school levels.-Free State
- The National department of Arts and Culture must assist in the establishment of five arts and culture district centres for artists to have access to equipment and resources.-Free State
- The arts and culture industry leaves artists and performers vulnerable during catastrophes such as Covid therefore the bill must make a provision of disaster relief for such pandemic.-Eastern Cape
- The recognition and protection of artists must be seen in a broader light as local and provincial artists did not receive Covid-19 funding relief funds whereas national artists had access to the funds and had the know-how of accessing the various relief programmes on offer.-Eastern Cape

- **The dtic response**
- The Bill does not address these issues.
- Regulating issues of local content is a competency of the Minister of Communication and Digital Communications. The Copyright Review Commission recommended that the radio local content should be raised together with the local content of TV. In the Task Team of the four departments it was agreed that there should be radio and TV quotas. The political heads have to agree on the rate of the local content, and this is why the Ministers are to consult with each other.

Socio Economic Impact Assessment

- **Comments from the provinces:**
- Authors strongly disagree with clause 12A and 12D and desperately beg the reconsideration of the entire clause 12A and 12D until proper socio-economic impact assessment has been done.-Eastern Cape
- Lack of Availability of a Socio-economic Impact Assessment-Western Cape
- Negative Impact of Fair Use, Resale Royalties, and Copyright Exceptions-Western Cape
- A full socio economic impact assessment should be considered in respect of investment drivers for the growth and development of the audio visual sector.-Northern Cape
- Some stakeholders strongly raised a concern about a lack of a socio-economic impact assessment in respect of the Bill-Mpumalanga
- Institute a proper Socio-Economic Impact Assessment Study as a basis, including on AI and along with an appropriate Intellectual Property Policy and legal foundation, for a redrafting of the Bill.-Gauteng
- Clause 15 Insertion of section 12A in Act 98 of 1978-Section 12A: The proposed doctrine of "fair use" is too wide and may subject artists to exorbitant litigation in an attempt to challenge the use of their work under the doctrine of fair use. Section 12A should be deleted and the Department should conduct an economic assessment of the impact of introducing fair use doctrine in South Africa.-Limpopo
- A material procedural oversight during the development of the Copyright Amendment Bill is the absence of a meaningful economic impact assessment that should have informed the drafting of the Bill.-Kwazulu Natal
- Institute a proper Socio-Economic Impact Assessment Study as a basis, including on AI and along with an appropriate Intellectual Property Policy and legal foundation, for a redrafting of the Bill.-Free State
- Conduct a proper Socio-Economic Impact Assessment Study as a basis, along with an appropriate Intellectual Property Policy and legal foundation, for a redrafting of the Bill.-Eastern Cape
- Impact assessment study on the exclusive rights is recommended before the implementation of this clause as it has the potential of providing for additional burden and costs on the artists and performers.-Free State

- **The dtic response**
- The Draft Copyright Amendment Bill was released for public comment on 27 July 2015, which was before the SEIAS Guideline from DPME came into effect.
- The Guide came into effect on 01 October 2015. The Guide states "To implement the Cabinet decision, from 1 October 2015 Cabinet Memoranda seeking approval for draft policies, Bills or regulations must include an impact assessment that has been signed off by the SEIAS Unit…." There was no requirement for a SEIAS Report published with the Bill prior to 01 October 2015.
- On 08 June 2016 the two Bills were presented to Cabinet. The certificates were issued on 19 May 2016 for both the Copyright and Performers Protection Amendment Bills. Since the intention was not for it to be published for public comments but rather to introduce it to Parliament, the SEIAS Reports were never published.
- According to the SEIAS Guideline by DPME on page 9, "Departments are responsible for attaching the final impact assessment to legislation, regulations or policy when submitted for approval by the relevant authorities, whether Cabinet, the Minister or Parliament…"
- The Performers Protection Amendment Bill was introduced in Parliament and referred to the Portfolio Committee on 02 December 2016, without the Copyright Amendment Bill (CAB).
- the CAB was introduced to Parliament on 17 May 2017.
- There were a few SEAIS reports conducted.

Socio Economic Impact Assessment

- **The dtic response**
- Other studies were conducted on both Bills as well as policy positions underpinning the amendment to the legislation as early as 2009.
- During 2010 to 2012, the dti commissioned a study through the World Intellectual Property Organisation (WIPO) to research the benefits coming from the copyright based industries in South Africa. The study state this: **"The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.", page 53.**
- The Copyright Review Commission (CRC) was established in 2010 to assess concerns about collecting society model for distribution of royalties to musicians and composers of music and was a fundamental report that informed some proposed amendments in the copyright amendment Bill.
- In 2014, the dti commissioned a Regulatory Impact Assessment Study on the Draft National IP Policy 2013. The impact study addressed many issues including mentioning fair use, copyright based industries stakeholders and the WIPO Treaties.
- There has been extensive public participation on the Bills, spanning as far back as 2009. The Bills evolved as amendments were made. It was not possible or feasible to have an impact assessment on every issue that was consulted upon. Moreso after the Bills were introduced in Parliament.
- **The dtic** is of the opinion much and extensive public participation and studies were conducted on the Bills. There were SEIAS conducted and other key studies including a Commission.

International Treaty Alignment

- **The comments from the province**
- **Lack of Adherence with International Treaties:**
- The Bill has been criticised for failing to adhere to international treaties, which could have implications for South Africa's international trade relationships. The Bill may also result in a loss of foreign investment in South Africa's creative industries.
- Section 12A introduces the principle of 'Fair Use', which is contrary to South African law. Fair use is also not a widely used approach globally and it does not comply with the 'Three Step Test' set out in the Berne Convention and the TRIPS Agreement. Section 12 would breach these conventions and would be unconstitutional.-Western Cape

- **The dtic response**
- The proposed provisions in the Bill are aligned to South Africa's international obligations under the TRIPS Agreement and the Berne Convention. Alignment was also sought with other relevant World Intellectual Property Organization (WIPO) digital treaties including the Copyright Treaty (WCT), the Performance and Phonograms Treaty (WPPT), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The TRIPS Agreement has provided effective enforcement of the rights and obligations undertaken by all WTO Member States, including on copyright protection. Any alleged breach of those obligations would be subjected to the WTO's Dispute Settlement Understanding processes and procedures. If a panel or the Appellate Body found that a Member has breached its obligations, that Members would be required to bring its measure into conformity and, failing that would entitle the complainant to impose retaliatory measures equivalent to the costs incurred by the breach.
- There is alignment to the Treaties. It should be noted that South Africa has not acceded to any of the Treaties referred by the President and not subject to their requirements. None of these treaties are currently enforceable in South African law – they have not yet been ratified, nor domesticated, as required by section 231 of the Constitution.
- The view of the legal and technical experts of the Committee at the time the Bill was finalised, is that the Bills are aligned with the contents of the relevant Treaties. Following the recent processes in the National Assembly, the view is that the Bills are aligned to international Treaties and international obligations.

Definitions: broadcast

- **Comments from the provinces**
- The definition of broadcast is not in line with international treaties (e.g. the WPPT) because it refers to “transmission … by wire or wireless means”. However, in international treaty law broadcasts always entail “wireless” transmission. This should thus be fixed The current definition of “broadcast” in the Performers’ Protection Act, 1967 should be retained.-Free State
- The Copyright Bill proposes replacing the current definition of ‘broadcast’ in the Copyright Act. A major flaw is that the new proposed definition reduces the scope of protection offered by the current definition in the Copyright Act, instead of improving the scope of protection.-Eastern Cape
- It is not clear if the term public reception in the new definition would capture subscription broadcasting services which only broadcast to sections of the public. It is not clear if the definition is meant to expand definition of broadcast to encrypted signals provided on wired platforms such as mobile platforms or online platforms and include online video distribution such as Netflix or ShowMax within the ambit of being a broadcasting organisation for the purposes of the Bill.-North West
- Retain current definition of “broadcast” in Copyright Act, 1978 and delete clause 1(d). -Kwazulu Natal
- Replace proposed definition of "broadcast" with current definition of "broadcast" in the Copyright Act, 1978. Namely, "broadcast," when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs, or signals which - (a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;“-Gauteng

- **the dtic response**
- There were extensive debates in the Portfolio Committee on wire implications and the implication for industries and the policy considerations underway-white paper. Also the recent comments that the definition omits certain transmissions, e.g satellite, and programme carrying signal and the wording in the bill to address the treaty that is unclear.
- The Department recommends that the definition in the current Act be retained. Considering all the discussions and implications and the confusion around the definition.

Definitions: dramatic work

- **Comments from the provinces**
- Proposes the following (separate standing) definition for dramatic work be considered – as well as that the term is added as a separate concept throughout CAB: "dramatic work" means any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise and any compilation of dramatic works.-Gauteng

- **The dtic response**
- On the dramatic work, upon hearing the industry during the public hearing about how the current definition limited their sector and how they were not fully accommodated, the amendment can be considered given that it is not a new definition but an amendment to the existing definition.
- The definition is supported however it is substantive and may affect other sections in the Act. It is recommended that the amendment to the definition be considered in the next legislative process.

Definitions: Wire or wireless

- **Comments from the provinces**
- The lack of definition of the terms “wire” and “wireless” could lead to confusion and interpretation issues. In addition, while internet access is referred to in the Memorandum on the Objects of the Copyright Amendment Bill, it is not specifically referred to in the relevant sections, which could result in interpretational issues for the creative industries and the users of copyrighted works which is especially concerning given their financial obligations.-Gauteng

- **The dtic comments**
- The view is that although these terms are not defined they are used in the treaties and they are not defined (WPPT, WCT, Beijing Treaty). They may not be that common but also generic words that are related with online digital activities (wireless/ wifi and related transmissions). It is recommended that they not be defined.

One Size Fits All Approach on Royalties (sections 6A, 7A, 8A)

- **The comments from the provinces**
- There is a concern that the bill is using a one size fits all approach on the payment of royalties.-Free State
- There cannot be one size fits all approach when determining royalties and it should not be dictated by the Minister. The different sectors should be taken into account when determining the royalties. –Northern Cape
- The problem with these two Bills is for one size fit all system in all the creative industry sectors.-Kwazulu Natal
- The stakeholders argued that a “one size fits all” approach was used or adopted in drafting the Bill. -Mpumalanga

- **The dtic response**
- It is not the intention of the Bill to treat all the copyright based industries the same. Therefore a one size fits all is not the intention.
- The CAB introduces and in some respects strengthens the royalty provisions. The Department recognizes that industries prefer to address issues of remuneration differently.
- The Department recommends that where this clarity is required, wording such as ‘or equitable remuneration’ be considered to allow the industries the discretion on remuneration.

One Size Fits All Approach on Royalties (sections 6A, 7A, 8A)

- **The comments from the provinces**

- Section 8 A: Mandatory royalty entitlement for all audio-visual performers will result in reduced- incomes or performers, reduced engagement of South African performers in audio-visual productions and reduced investment in South Africa. This section proposes to regulate the remuneration terms of private contractual agreements between performers and copyright owners in audio-visual works including music, videos including section 8A(1), 8(A)(2)(a),8A(3),8A(5) and (6). ……..
- remove reference to collecting societies in subsection 2, and to delete subsection 3 which empowers the Tribunal to set royalty rate.
- To delete subsection 5 and 6 which propose mandatory requirements to register agreements and imposes criminal sanctions for failure to register those agreements.-North West
- Section 6A, 7A: Royalties and Fair Remuneration: That at the proposed Sections 6A, 7A be amended to cater for contractual freedom through the introduction of the below phrase where relevant: “In the absence of an agreement to the contrary…” With the appropriate amendments to CAB, authors and creators would be in a position to negotiate alternative terms to the restrictive terms-Gauteng
- Recommendation by Gauteng to include equitable remuneration in 6A and 7A. (summarised, not verbatim)
- The stakeholders further suggested that royalty should be defined as a percentage of the total turnover / revenue generated by the musical work-Mpumalanga
- Clause 5 Insertion of section 6A in Act 98 of 1978: “royalty” new definition means a percentage of the total turnover or revenue generated on the exploitation of a literary work or music work. This definition is aimed at avoiding an artist not being paid if there is no profit. -Limpopo

- **The dtic response**

- The role of the Copyright Tribunal is critical to address disputes related to remuneration. The collecting societies play a role in the facilitation of payments of royalties for their members. Including both provides protection for the performer. The recommendation to remove them is not supported.
- The reporting requirement is a policy decision and was informed by deliberations and consulted upon. It was seen as serious and must be incorporated in the Bill.
- The agreements in section 6A and 7A require contracts in order to take effect. Making a contract optional or discretionary will have a negative impact on authors. This change is not recommended.
- To accommodate other remuneration models, it is recommended that equitable remuneration be included in section 6A and 7A.
- The Bill should be retained as is on profit. The Bill was consulted on and this was not raised as a challenge by many stakeholders.

One Size Fits All Approach on Royalties (sections 6A, 7A, 8A)

- **The comments from the provinces**
- Section 7 refers to (1) royalties on resale; (2) payable at the rate prescribed…; (3) the seller and the art market professional concerned are jointly and severally liable... to pay the royalties… to the author or their heirs… all allows too little scope for unique circumstances, such as when the seller may be the artist him/herself, etc.- Western Cape

- **The dtic response**
- The Bill cannot legislate for all circumstances and unique circumstances or exceptions. In that case, the agreement can be drawn up in a manner that captures this situation. Furthermore, the Art market professional can be the one who addresses the royalties.
- This is a new amendment in the copyright law and will be reviewed in future.
- It is recommended that the provision be retained.

Royalty Rates (section 39)

- **Comments from the provinces**
- The third concern was the way the Bill is drafted. The stakeholders were of the view that the Minister is given wide, vague, and unfettered powers to prescribe compulsory and standard contractual terms and to prescribe royalty rates or tariffs for various forms of use.-Mpumalanga
- The Regulations subsequent to Section 6A (inserted into the principal Act) will prescribe royalty rates as well as minimum terms of contracts. This development is bound to have a material impact on how publishing and production agreements are negotiated, and will likely impacting on contracts terms, like advances, that have up to now been commonplace.-Kwazulu Natal
- It therefore object to Government - imposed contractual terms and royalty rates, as are intended to be introduced by the new Sections 6A, 7A, 39(cG) and (cI), and the declaration as unenforceable of any contractual terms between willing parties by new Section 39B.-Kwazulu Natal
- The provisions also involve the Minister in writing contracts for parties and setting royalty rates and tariffs. However, no guidance is provided to the Minister about how these powers should be exercised or what purpose is sought to be achieved by their regulation.-Eastern Cape
- Artists must own 70% of the royalties and their children must be able to receive income from the artists' estate after death.-Eastern Cape.
- The timeframe to earn royalties should be shortened.-Northern Cape

- **The dtic response**
- Comments are noted. It is recommended that the powers of Minister to prescribe royalty rates be removed in the Bill. This will be in section 39.

- The Bill does not prescribe when royalties should be paid. It only provides a legal framework for royalties and relevant platforms such as a collecting society to facilitate certain acts allowed by the Act. It further provides for dispute resolution when certain rights are abused. The recommendation to shorten timeframe for royalties is outside the scope of the Bill and can be addressed between parties.

Section 8A

- **The comments from the provinces**
- Delete section 8A, as the Performers Protection Bill is the appropriate statutory instrument to deal with performers rights and the inclusion of performers protection provisions in the Copyright Act gives rise to duplication, inconsistency and confusion.-Gauteng
- Section 8A: Mandatory royalty entitlement for all audio visual performers which will result in reduced incomes for performers, reduced engagement of South African performers in audio visual productions and reduced investments in South Africa.-Eastern Cape
- Section 8A should be deleted from the Copyright Amendment Bill and exclusively dealt with in this Bill to avoid overlap and confusion. -Western Cape
- Section 8A-Will result in reduced earnings for audio visual works. Section 8A to provide contractual freedom between performers and copyright owners which allows for different market practices. To remove reference to collecting societies in subsection 2 and to delete subsection 3 which empowers the Tribunal to empowers the Tribunal to set royalty rate.-North West

- **the dtic response**
- The two Bills are interlinked. The measures in Copyright will support the PPAB, such as the Copyright Tribunal and collecting societies.
- Related rights" refer to the category of rights granted to performers, phonogram producers and broadcasters.
- In some countries, such as the United States of America and the United. Kingdom, these rights are simply incorporated under copyright.
- Globally some laws include both copyright and performers. Other countries, such as Germany and France, protect these rights under the separate category called "neighbouring rights."
- In South Africa, related rights are incorporated under copyright and protected under the Copyright Act 98 of 1978 and the Performers Protection Act 11 of 1976.
- It is recommended that section 8A be retained in the Copyright Amendment Bill.

Reporting requirements, section 8A, section 9A

- **Comments from the provinces**
- Section 8A.(6)-Imposing registration and comprehensive reporting would create material administrative burdens and costs on distributors, diverting investment from content, and be practically impossible to comply with. –Gauteng
- Another key problem with the Section 8A royalty entitlement for performers, is the obligation on copyright owners and their licensees, and any other users of audiovisual works, to register each act of commercialization and provide a 'complete, true, and accurate report' to each performer concerned.-Eastern Cape
- Penalties to juristic person disproportionate to reporting on commercial uses. Not clear if contemplation was made in determining suitable penalties for these offences. –North West
- To delete subsection 5 and 6 which propose mandatory requirements to register requirements and imposes criminal sanctions for failure to register those arrangements.-North West
- Furthermore: Section8A(6)(a) which requires that it be proved that someone "intentionally" failed to register an act as per (5)(a) and (5)(b) may be problematic in its application.-Western Cape

- **The dtic response**
- The registration requirements were debated extensively in parliament. They have a historical context linked to non payment of royalties. There are log sheets required in order to facilitate payment of royalties. The Copyright Review Commission also made recommendation on this.
- Performers (actors) have complained that they are not paid their royalties. Their works are broadcasted, repeatedly without remuneration. The same applies to the music industry.
- This is serious, hence the PC crimininalised it.
- The non- reporting is a serious issue that has impacted on many performers whose works is played on radio or television or any medium for commercial purposes without any compensation. There are series played repeatedly on television and actors have indicated that they are not paid for those works.
- The CRC found: music usage information (music log sheets)- It was noted that music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records. -page 77
- The reporting requirements are necessary to provide certainty on payments of royalties for commercial usage.
- The reporting provisions have a rationale and they address the challenges with royalties. This impacts the music and audiovisual sector.
- The reporting and recordal of commercial uses was introduced to address the policy gap of lack of royalty payments and no mechanism to ensure the use of works of performances for commercial purposes are addressed. .
- It is recommended that the reporting requirements be retained.

Powers of the Minister to determine contract standards

- **Comments from the provinces:**
- The Minister should not be given sole responsibility in determining the prescribed standards of contracts.-Free State
- These new powers given to the Minister eviscerate the parties' freedom to contract. On this basis alone, they will not, in our submission, survive a constitutional attack.-Eastern Cape
- The Bill is too prescriptive in terms of the contents of agreements between parties, the fixing of prescribed royalties, etc. This seems to remove some freedoms protected under the Bill of Rights in the Constitution and may result in this Bill being successfully challenged in the relevant court.-Western Cape
- Section 39 Minister to prescribe standard contractual terms is interference of contracting freedom. Authors may choose to publish overseas. Section 39Ch prescribes permitted acts, the numbering is incorrect, 28B, section 28P has no prescribed acts. Proposed 39Cg, Ci, and 39B(1) be deleted.-North West
- That there must be contractual flexibility, as well as recognising the sectors specificity and market practices regarding contractual provisions would help rightsholders to recoup investment in development, production, marketing and distribution, to finance new films and television content; and ensure appropriate and efficient distribution to the marketplace.-Mpumalanga
- The contracts should not be determined by the minister, but it must be determined by the structures within the creative industry.-Kwazulu Natal
- 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:
- 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;
- Section 39(cI) which empowers the Minister to prescribe royalty rates;
- Section 39(cJ) which empowers the Minister to prescribe the percentage and period within which distribution of royalties must be made by collecting societies.-Eastern Cape

- **The dtic response**
- The Bill provides minimum standards that should be included in a contract but not the Department drafting the contract itself.
- The contract can cater for each industry specific requirements and as per negotiation by the parties.
- The powers of the Minister to set minimum contract standards are meant to ensure there is an enabling environment for contacting amongst parties. There are abuses to contracts and it is important that this is addressed.
- The Copyright Review Commission made this recommendation. Although in one industry, the market practices have indicated challenges in contracts and abuse of the agreements.
- The RRR is a Berne convention royalty, in article 14ter. The rates of the royalty can be regulated by the state. An example is the Moroccan law. The Berne convention also addresses the role government can play on this royalty rate.
- On the other types of royalties rates, the concern was that there was uncertainty around them.
- However further consideration is that it may be best to leave other rates to market forces instead of prescribing them.
- So the recommendation is supported. The royalty rates to be prescribed can be only the resale royalty right. The other royalty rates can be removed.

Clause 15, section 12A, Fair use

- **The comments from the provinces**

- Section 12 A: The incorporation of a Fair Use exception alongside that of Fair Dealing raises fundamental problems as the two are jurisprudentially incompatible. Fair Use is a wide and general exception whereas Fair Dealing is a closed and more specific list of exceptions. As such, the two forms of exceptions are fundamentally different. It is important for purposes of legal certainty, to elect one of these instead of attempting to have a legal system that recognises both. Generally, no legal system in any jurisdiction uses both. Delete Section 12A until a proper economic assessment of the impact on the introduction of "Fair Use" is conducted in SA. -Free State

- The new Section 12A introduces an open-ended US-style fair use provision. Section 12A in the Copyright Amendment Bill substantially widens the scope and also widens the meaning of "such as".-Eastern Cape

- It is proposed that section 12A be deleted.-North West

- The Bill struggles with the approaches of fair use and fair dealing both aim to enhance creativity. This hybrid option may complicate matters by continuing to shoehorn some uses into narrow legislative provisions. Northern Cape

- Section 12A: The proposed doctrine of "fair use" is too wide and may subject artists to exorbitant litigation in an attempt to challenge the use of their work under the doctrine of fair use. Section 12A should be deleted and the Department should conduct an economic assessment of the impact of introducing fair use doctrine in South Africa.-Limpopo

- The department submitted that fair use is not defined in the proposed amendments; and that this will create legal uncertainty and increase the risk of litigation. The Committee noted that as stated above, the doctrine of fair use must have a clause in the Bill to state that where reasonably possible, before any copyright holders work is used, prior permission must be sought from the holder, so that the holder can be compensated accordingly at the end. The proposed amendment to Clause 12A of the Bill is, therefore, supported by the Committee.-Mpumalanga

- Fair use is of great concern where productions are being used without the original individual or group's permission resulting in artists dying as paupers. It is recommended that the Bill considers a simple system to ensure that the actual recipients get their due. –Northern Cape

- Section 12 A: The incorporation of a Fair Use exception alongside that of Fair Dealing raises fundamental problems as the two are jurisprudentially incompatible. It is important for purposes of legal certainty, to elect one of these instead of attempting to have a legal system that recognises both. Generally, no legal system in any jurisdiction uses both. Alternatively Section 12A of the Copyright Amendment Bill, which introduces an open-ended US-style fair use provision, be deleted.-Gauteng

- **The dtic response**

- Copyright regimes across the world are slowly moving away from the closed-list system to an open system, which will keep up with innovation, and changing environment. Globally, research has found that fair use has not impacted negatively on the economy. On the contrary, there is evidence that shows that countries with open exceptions and fair use have high levels of innovation, economic growth and development.

- The Bill has adopted the hybrid model based on fair use doctrine that takes into consideration the list of exceptions. The Copyright Act 1978 is based on a fair dealing regime. Fair dealing sets out defined categories of acceptable uses. It only applies to a use of copyright material if the use is for one of the prescribed purposes. If a given use does not fall into one of the categories of use, then it cannot be found to be fair.

- 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 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 owner.

- Fair dealing in our current Copyright Act is outdated, limited and static, and does not address the digital world. Fair use, on the other hand, is progressive, dynamic and future proof and 'digital-friendly'. Fair use has been used in courts in the U.S. and Europe for about 200 years and there is a wealth of jurisprudence to draw on.-Denise Nicholson

- Fair use was coded in the U.S. Copyright Act of 1976 and has not had to be amended, as it applies to new technologies as they arise. Ten other countries have also adopted fair use in their copyright laws and more countries are considering it, because it is 'future-proof' and benefits users and producers of information and knowledge. Its 4 factors give clarity to what can be used and reused, whereas fair dealing does not.-Denise Nicholson

- In terms of experience of the SA judiciary to address fair use, there is evidence of jurisprudence related to fair dealing.

- The SA Bill has the words 'such as', which will ensure that the Bill is future proof.

- WIPO study: The DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.

- Fair use was in the first draft of **the dtic** published Bill in 2015. The Genesis Regulatory Impact Assessment study of 2014, referred to it as a regime South Africa must consider.

- Fair use is a policy decision extensively consulted on. It is recommended that it be retained in the Bill.

Section 12B-12D

- **Comments from the provinces**
- The entire Section 12D should apply only to the extent that there is no licensing scheme in place. Where copying of extracts of books is permitted under license by collective management organisations, section 12D should be inapplicable.-Gauteng
- The use of the term assignment of ownership in section 12B(6) instead of transfer of ownership as used in Article 6(2) of the WCT appears to be a huge error. The term assignment is naturally applied to the right of transfer of copyright not in respect of tangible good.-North West
- Section 12B(1)(b) – reproduction of sound recordings by a broadcaster
- 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 30 days immediately following the date of the making of the reproduction, 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;-Gauteng

- **The dtic response**
- Section 12D was debated extensively in parliament. It is an exception with safeguards. Some experts have noted challenges in the academic sector with licences and the effect on the cost of books in SA. Introducing the licensing scheme may have implications that are unforeseen. This is a new amendment. It is recommended that it be considered in the next amendment stage. This amendment may affect the exception and access to education.
- The terminology of assignment in the Bill is widely used in terms of copyright. The recommended wording in section 12B (6) can be supported. The word ownership is recommended to be removed.
- This exception is currently in section 12(5) of the Copyright Act. The Act is limited to musical or literary works.
- Ephemeral rights form part of exceptions and allow a broadcaster to have a copy of the work such as sound recordings for a limited period of six months without being allowed to distribute it to any person. During live events that are broadcast, the broadcaster may have the copy of the music played. It allows broadcasters the right to use sound recording in their reproductions without paying royalties.
- These amendments regarding ephemeral exception affecting the broadcasters were proposed in the National Assembly. Some submissions proposed the Canadian model which was put to the public. Many unintended consequences and application to the SA context were found. It was advised that the current amendments be retained. Experts advised that the current timeframes and provisions in the Bill and Act were in line with similar provisions globally. It is recommended that these changes not be considered now. That they can perhaps be assessed for future amendments.
- One of the broadcasters indicated that the reduction to 30 days from the operational point of view will be difficult to comply with. For the Radio Division this would mean they have to create and delete content monthly and this may even affect some campaigns, and this could translate into loss of revenue. In respect of the News and Current Affairs Division some of the stories covered may run for more than 30 days or and this will negatively affect the coverage of some newsworthy stories.

Section 12B-12D

- **Comments from the provinces**
- Section 12 B(1)(a), section12 B(1)(h), section 12B(1)(b) opens extensive exclusions that are not adequately assessed in keeping with the three -step test that includes quotation and exception, private copying exception and reproduction 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 necessarily prejudice the legitimate interests of right holders. It is therefore proposed that section 12B be withdrawn. Nonetheless, if the exclusive right of distribution is to be introduced, a provision for the exhaustion of that right must be retained. The best suggested approach will be to follow the example of the UK's Act by inserting the words "not previously put into circulation in the Republic by or with the consent of the copyright owner" in each of new section (eC),7(Dc),8(dc), 9(g),11A(d) and 11B(dc) along the following lines distributing the original or a copy of the work to the public that has not previously put into circulation in the Republic by or with the consent of the copyright owner".-North West

- **The dtic response**
- On distribution, TRIPS article 6 allows exhaustion of rights and for the country to choose which system of exhaustion which then determines how the parallel import will work. The term exhaustion refers to the principle in IP law to the principle that a right holder cannot prevent the further distribution or resale of the goods after consenting to the first sale also known as the first sale doctrine. Once the good has been put on the market by or with the consent of the right holder further circulation cannot be controlled. Parallel imports refer to the original products sold by the right holder or with his consent in another market and then imported through a channel “parallel” to that authorized by the right holder. Parallel imports are not counterfeit or pirated goods and they do not infringe Intellectual Property Rights in the country of Origin.
- On the parallel importation: Parallel importation would allow distributors and booksellers to choose from a range of world markets as opposed to the South African market, which could lead to a more equitable pricing structure. Parallel importation would open access to cheaper copyright works abroad. A relative lack of competition in the marketplace is an important factor. The lack of competition is evident from price of the books. National copyright legislation should therefore follow the rule of international exhaustion rather than the rule of national exhaustion.
- This amendment is important. It can be reviewed further in future amendments.

Section 12D

- **Comments from the provinces**
- The provisions of the new section 12D need to substantially reconsidered as they will limit the normal exploitation of works used in education and prejudice the rights holders of those works. By itself, it's in conflict with the requirements of the three-step test. By opening the door to permission-free copying of the whole books and journals, new section 12D has unintended consequences for South African authors of text books and academic journal articles, as well as the South African publishing industry.- North West

- **The dtic response**
- The Preamble of the World Intellectual Property Organisation (WIPO) Copyright Treaty affirms the "need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information as reflected in the Berne Convention". This could be used to direct interpretation towards a broader construction of the listed exceptions, and to address this newly enshrined balance with a 'fair use' concept, which takes into account the rights of authors and the rights of access to information.
- Section 12D provides for exceptions related to educational and academic activities.
- The existing fair dealing exception in the 1978 Copyright Act fails to provide an exception for education purpose and other uses necessary for teaching.
- The Bill provides 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 Bill permits copies of whole works only where there is an abuse of the market. It authorizes copying of full works only if "a licence to do so is not available from the copyright owner, collecting society on reasonable terms and conditions"; "where the textbook is out of print"; "where the owner of the right cannot be found"; or where the right holder is engaged in anticompetitive conduct in the form of excessive pricing.
- Section 12D(1) and (2), restricted to educational and academic purposes that may not occur for commercial purposes.
- Access to education is a constitutional right and the Bill aims to facilitate this right with this exception.
- South Africa is a developing economy and public policy aims to transform the creative industry and bring access to knowledge and information to all South Africans. The CAB balances various interests including the public interest concerns of access to knowledge and education. The aim is to enhance access to and use of copyright works in a clearly regulated manner and enhance access to information for the advancement of education and ultimately democracy.

Section 19C

- **Comments from the provinces**
- The exception in section 19C(4) will automatically extend to the exceptions in the Performer's Protection Act 12 in terms of new section 8(2)(f) of the same Act, the impact on performers by the exception in favour of libraries, archives, museums and galleries to screen audio visual works and play sound recordings without permission or remuneration must be considered specifically. The detriment impact of this factor on copyright owners of sound recordings and audio visual works will equally impact the rights and remuneration of performers in those works.-North West

- **The dtic responses**
- The exception in 19C(4) provides for users of libraries, museums and archives to be permitted without authorization of the copyright owner, to access sound recordings, compact discs, or musical works, audio video disc and audio visual works in full for educational or research purposes and not for commercial purposes. The user can view the work in a secure computer network or at the premises of the library and museum, institutional classroom or lecture theatre. The user will not be permitted to make a copy or record the viewing. The usage may be permitted.
- This exception may not permit the making of copies, does not permit the recording of the work, is limited to viewing or listening, for educational and research purposes only and not for commercial purposes.
- The rationale is to ensure access to education and learning, to promote knowledge and education using other modes of information such as videos, sound recordings and audio visual works.

Private Copy Levy

- **Comments from the provinces**
- General Exception (Libraries, Archives and Museums) and Private Copy: The Bill introduces many provisions relating to exceptions and limitations to the copyright owner's exclusive rights. In order to balance this situation, there is a strong persuasion for South Africa to follow the example of other jurisdictions (including the likes of Botswana, Algeria, France etc.), by introducing a system of private copy levies, to compensate rights-holders for the loss of income as a result of the wide exceptions and limitations that the Bill introduces., such a system would be good for rights holders as it would provide them with an important alternative source of income This is only a fair way to ensure that rights-holders are not detrimentally affected by the changes proposed in the Bill.-Free State
- Intended authors receive royalties in respect of the provisions of private levies.-Northern Cape
- The advocates of fair dealing further argue that the scope of the personal use provisions in section 12B(h) is too wide and there is a missed opportunity to introduce private copying remuneration for authors.-Kwazulu Natal
- The Copyright Amendment Bill must have a provision where there is a private copy levy, for all those equipment's, instruments which can downloads music, and pay such a levy in the Development Fund.-Kwazulu Natal

- **The dtic responses**
- The recommendation on the private copy levy is a challenging one because this is a system in copyright that is a policy issue.
- It has not been consulted upon or tested in our system. It may have unintended consequences in the South African context.
- It is recommended that more work be undertaken on the private copy levy before introduced in the copyright law of SA.

Clause 27, Chapter 1A, Collecting Societies

- **The comments from the province**

- Artists are being disadvantaged by government bureaucracies in respect of collecting societies and it is requested that the Minister cannot dictate engagements amongst the contractual participants. Furthermore, artists require collecting societies to account to them as well.-Northern Cape
- They reject for collecting societies to keep money of the performers up to six years. The royalties must be distributed within six months and if it happens that collecting societies can't distribute one way or another the money must be kept in the cultural and creative industry Development Fund controlled by organized formation representing the performers. The copyright Amendment Bill must have a provision which establishes the Development Fund.-Kwazulu Natal
- Collective management organizations: The Bill must introduce more robust Regulations for Collective Management Organisations, which are responsible for managing the rights and royalties of copyright owners. This could improve transparency and accountability, which has been a major issue in South Africa.-North West
- They proposed that the laws governing the Collecting Societies should be review.-Kwazulu Natal
- A Non-Profit Organisation needs to be registered in the name of the artist responsible for the establishment of the music venture, production or works.-Eastern Cape
- The Copyright Amendment bill is only crediting the collecting societies. The copyright bill also exclude publishers and does not expose ownership of work.
- Bigger city artists have easier access to South Africas Music Rights Organisation (SAMRO) but not in rural areas like the Northern Cape. The Bill must provide for protection of these rural areas if SAMRO's reach cannot assist in such areas.-Northern Cape
- Section 22C It is suggested that the clause simply read that remittance of royalties is subject to a reasonable and valid agreement between the foreign CMO and the local one.-Gauteng
- All collecting societies must first be accredited before they can perform their functions of collecting royalties on behalf of artists.-Free State
- The amendments need to address the role of actors' collecting agencies and how actors can be remunerated perpetually for works created in the past instead of production royalties only going to the production companies and studios.-Eastern Cape
- Music artists have suffered exploitation for too long by collecting societies therefore the law should be amended to subject collecting societies to be regulated as they are accused of stealing musicians' royalties, and enable artists to be properly compensated for their songs.-Eastern Cape
- There is a lack of accountability around money made by music artists due to many different royalty collecting agencies which are not paid over to musicians.-Eastern Cape

- **The dtic response**

- The collecting societies are necessary, they are not meant to interfere in agreements.
- The regulation of collecting societies in the Bill is an important milestone. It will close the existing challenges with the regulation of collecting societies.
- The collecting societies are necessary and they should be well regulated and the Bill provides for that.
- The Bill provide a legal framework of how they should operate.
- The current practices of some of the collecting societies are concerning but that should not deter the establishment of a clearer legislative framework for them.
- On the section 22C proposed amendment, it in a way already provided for in section 22C (3). The wording used is collecting societies in the SA context. The agreement is important in managing the arrangements between collecting societies and the Bill encourages those arrangements.
- Collecting societies are not forced to conclude reciprocal agreements, they only do so when it is expedient and/or desirable to do so with a treaty supporting the protection of the rights under administration.

Clause 27, Chapter 1A, Collecting Societies

- **The comments from the province**

- Section 22F
- Rewording subsection (5) as follows
- Following the suspension or the cancellation of the accreditation of any Collective Management Organisation, the Commission shall as soon as reasonably practicable, convene an emergency meeting of the members during which members shall elect a suitable person to be responsible for the administration and discharging of the functions of that Collective Management Organisation.
- (6) The person so elected shall be skilled in one or more of the following (a) Collective management and general administration of rights under this Act; (b) business rescue, administration, or liquidation; or (c) other skills deemed appropriate by the Commission and Tribunal.”-Gauteng

- **The dtic response**

- The process in the Bill is objective and independent and takes into account the relevant skills required.
- Leaving this to members may complicate matters and there could be other consequences and further potential disputes.
- The Act does not have to be too prescriptive on meetings and operational matters.
- The process outlined in the Bill is independent and transparent. It is recommended that the subsection in the Bill be retained.

25 years reversion

- **The comments from the provinces:**
- The 25-year limitation for assignment of rights. This limitation should be deleted as it will do much more harm than good. In theory, it will limit the commercial availability of works, and require any such rights to be re-cleared after 25 years - which in many instances will not be possible.-Gauteng
- Limiting the term of assignment of literary and musical works that are created by South African authors and performers to 25 years, meaning audio-visual works (which nearly always contain scripts and musical scores) would have a de facto commercial lifetime of only 25 years.-Eastern Cape
- Section 22(3) should be deleted as it limits the commercial availability of the work to a period of 25 years from the date of commencement of the agreement. It will mean that applications for the rights to use the work post 25 years would have to start afresh, which may be too difficult.-Limpopo
- The Copyright Amendment Bill proposes an unwaivable 25-year limitation on all assignments of rights in literary and musical works that would pose great challenges to a producer's ability to secure rights clearances and consolidate all rights in an audiovisual work.-Kwazulu Natal
- The proposed period of 25 years for assignment of literary or musical work should be less than 10 years. The recording company should recoup within 10 years.-Kwazulu Natal
- The 25-year limitation for assignment of rights. This limitation should be deleted as it will do much more harm than good. In theory, it will limit the commercial availability of works, and require any such rights to be re-cleared after 25 years - which in many instances will not be possible.-Free State.
- Delete the proviso to section 22(3) so that it reads as follows: (3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright in such work shall have effect unless it is in writing and signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub licensor, as stipulated in Schedule 2. Propose that Section 22(3) be rejected, or as an alternative, that the sections be reconsidered with proper research being conducted on the possibility of balancing of rights.-Gauteng
- Section 23(b): The 25-year limitation for assignment of rights. This limitation should be deleted as it will do much more harm than good. In theory, it will limit the commercial availability of works, and require any such rights to be re-cleared after 25 years - which in many instances will not be possible.-Gauteng
- Reversion Clause: There should also be a clear indication that the reversion does not apply to "beneficiary assignment" given to a regulated CMO.-Gauteng

- **The dtic response**
- Clause 25 provides a reversion right for where copyright in a literary or musical work that 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.
- The importance of this is that 25 years has been benchmarked as a sufficient period to recoup the investment made in the work and to make a profit, it also allows the negotiation or brokering of a new agreement after 25 years.
- Historically in contractual terms, authors signed the commercial rights to publishers or producers and forfeited the right to economically exploit the work. The amendment will help relieve the plight of authors whose works still earn large sums of money, which are going to the assignees long after the assignees have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken.
- The capping of the reversion right is flexible as it creates room to negotiate terms under favorable conditions. It seeks to address imbalances of the past where authors assigned their copyright. The USA, UK and some in Europe have a reversionary right as well.
- This clause aims to correct the policy gap by allowing the author to have access to the commercial rights after 25 years. The contract can be re-negotiated.
- Reversion right is not uncommon and it is aligned to the copyright Act.
- The Copyright Review Commission made this recommendation and recommended that the 25 years is sufficient for recouping investment.
- Reversionary provision is for the musical work or literary works not audiovisual works.
- After 25 years the contract can be renegotiated by the parties involved.
- It is recommended that regulations can provide for the details of the implementation of this provision.
- The proposed deletion of the reversion right / Reversion right to be ousted by a contract is not recommended. A reversionary right has a potential to create a playing field. It is more than an ordinary contract.
- On the beneficiary assignment and regulated CMO, the concepts seem to be taken from another jurisdiction and it is unclear what the submission intended. In South Africa the term is collecting societies and the Act does not define beneficiary assignment.

Commissioned works

- **The comments from the provinces**

- Delete clause 24(a) and revert to the current default position and wording in s21(1)(c) of the Copyright Act, 1978, which reads as follows: (c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of an audiovisual work or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

- Amend section 21(3) to read as follows: "'(3) (a) Any agreement reached between the copyright owner and the author may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission. (b) Where an agreement between the copyright owner and author does not specify who the copyright owner is, ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, shall vest in the person commissioning the work, unless limited to such rights as may be necessary for the purpose of the commission. (c) The author of a work contemplated in subsection (1)(c) may, after a period of seven years from the date of the commission, approach the Tribunal for an order— (i) where the work is not used by the copyright owner for the purpose of executing any of the acts contemplated in sections 7, 8 or 9, as may be applicable and the copyright owner has, upon request, refused to license the author to use that work to execute any such acts, licensing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the copyright owner; or (ii) where the work is used for the purposes of an act contemplated in sections 7, 8 or 9, as may be applicable, in respect of which the author is the owner of the rights, ordering the copyright owner to make payment of equitable. Remuneration or royalties to the author for such other use. (d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following: (i) The nature of the work; (ii) the reason why, and period for which, the copyright owner did not use the work; (iii) the public interest in the exploitation of the work; (iv) the purpose for which the work was commissioned; and (v) the consideration received by the author for the commissioned work. (e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work. (f) Any order granted by the Tribunal in terms of subsection (3)(c) shall not be in conflict with a normal exploitation of the work or be unreasonably prejudicial to the legitimate interests of the owner of the copyright."-Gauteng

- **The dtic response**

- The provision applies to commissioned work such as taking photograph, painting, drawing of portrait, making sound recording or audiovisual work. It provides that the ownership of any copyright in a commissioned work shall be governed primarily by a contract. Further that the contract shall limit ownership of copyright so that the exclusive right to do or authorise to do in artistic works, audiovisual works or sound recording is limited to acts necessary for the purpose of that commission and nothing beyond.
- Where the contract does not specify who the copyright owner is, the limited ownership in copyright works shall vest in the person commissioning the work.
- The Commissioned works amendments were seriously considered and debated in parliament.
- The proposed amendments are substantive and have a potential to reverse the rights and protections intended in the Bill.
- The changes are extensive and will need further scrutiny before considered. It is recommended that the amendments in the Bill be retained.
- The commissioned works provisions were informed by challenges with the practices on these works.
- The abuse of contracts and rights of the author were not sufficiently catered for in the Act. Industry practices informed parliament to strengthen the provisions.
- The Commissioned works was deliberated extensively in the PC at the time. Measures were added for more protection and certainty.

Orphan Works

- **The comments from the provinces**
- The new ophan works provision in the Act does not benefit anyone and will improve a legal risk for the CIPC. Compliance is costly and onerous. It is recommended that section 22A be revised.-North West
- It is advanced by other interested parties that the new Section 22A of the Act as introduced by Clause 26 and the definition of “orphan works” by Clause 1(i) of the Copyright Bill should be rejected.-Kwazulu Natal
- Orphan Works 22A – This section proposes to introduce provisions that relate to the licensing of orphan works. They therefore submit that the orphan works regime should not apply in respect of musical works.-Kwazulu Natal
- Section 22A: orphan works regime should not apply in respect of musical works.-Gauteng
- Section 22A is totally impractical. It should be rewritten to allow the use of orphan works, for at least educational, research, and non-commercial purposes relating to orphan works needs to be revised. The process is impractical and costly, and few if any rightsholders who have in fact abandoned their works, are likely to know to claim from the proposed fund.-Gauteng
- That the use of orphan works that are anonymous, under pseudonyms or where right holders are untraceable, should be permitted in Section 22A, under fair practice, and/or addressed under fair use in Section 12A.-Gauteng
- The definition of “orphan work” should add the word “cannot reasonably be identified”. The risks of the amendments on the industry should have been studied by means of a socio-economic study.-Western Cape
- The union submitted that there must be exceptions of orphan works where the rightsholders are untraceable, defunct or have abandoned their copyright work.-Mpumalanga

- **The dtic response**
- The Bill defines orphan work’ as a work in which copyright subsists and the owner of a right in that work, cannot be identified; or is identified, but cannot be located.
- The provision is modelled after the U.K model which introduced a new licencing scheme which allows users to apply for a licence to use an orphan work.
- The clause introduces a process that needs to be followed in making such application before the Commission, i.e. publish the intention to make such application, submit the application accompanied by the publication and payment of prescribed fee.
- Upon receipt of the application, the Commission may hold an inquiry before granting the licence. The applicant needs to demonstrate before the Commissioner that he made reasonable effort to locate the copyright owner, which include: conducting a search of the database of the register of copyright which is maintained by the Commission or any public database available or through internet, search can be done from other available sources, conduct search using appropriate technology tools, printed publications or utilising internal or external expert where possible. The commission may grant the licence with or without conditions.
- Section 22A must be retained as it creates certainty in terms of these works.
- While concerns are raised, when one glances at the UK provisions, they appear to be quite extensive. The provisions should be retained. If after implementation, there are further concerns and implications, they could be amended later on.
- Orphan works can apply to various works, including musical works.

Copyright Tribunal

- **The comments from the provinces**
- A performer's Tribunal is requested to enable performers to claim their royalties.-Northern Cape
- On the Tribunal they recommend that the cultural and creative industry experts like entertainment lawyers, copyright lawyers and industry experts to be included in the panel.-Kwazulu Natal
- They request legal assistance similar to the legal aid board to legally assist artists to protect their rights.-Kwazulu Natal
- The Minister should not be given powers to write contracts. Parties should have the freedom to negotiate their own agreements. The tribunal should deal with the issue of contracts.-Kwazulu Natal
- A tribunal must be established to address artists' matters on the Copyright Act and Performers Protection Act.-Eastern Cape
- The Bill should provide effective enforcement mechanisms to ensure that performers' rights are protected. This could include the establishment of a regulatory body to oversee the industry and investigate complaints.-North West
- The Ministers' powers to prescribe procedure for the conduct of Tribunal hearings and collecting societies is SUPPORTED.-Free State
- Clause 35(b) in the Bill – Delete the proposed sub-section (cG). Insert a new s29A(2)(g) that reads as follows: "(2) The tribunal may - …
- (g) set aside or vary a copyright assignment or copyright licence agreement, or a term of such an agreement, if that agreement or term is unfair, unreasonable, or unjust. A term will be unreasonable, unfair and/or unjust if-
- (i) it is excessively one-sided in favour of any person, including the author of the which is the subject of the agreement;
- (ii) the terms of the agreement are so adverse to one party (including the author) as to be inequitable; or
- (iii) the agreement was subject to a term or condition, the fact, nature, and effect of which was not drawn to the attention of the party prejudiced thereby in a clear and satisfactory manner prior to entering into the agreement."-Gauteng
- Orders of Tribunal: Section 29H(c): "(c) imposing an administrative fine in terms of section 175 of the Companies Act, with or without the addition of any other order in terms of this Act;"; Delete s29H(c).-Gauteng

- **The dtic response**
- The Copyright Tribunal is intended to deal with both Bills, authors, performers, already considered.
- The Copyright Tribunal will provide a cost effective mechanism to address disputes on the copyright legislation. The strengthened Copyright Tribunal will ensure access to dispute resolution mechanism for the creators who have no access to legal avenues.
- The Copyright Review Commission recognized the importance of the Tribunal. It recommended that 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 Tribunal should not be dictated in terms of how to exercise its mandate in this much detail. It should have discretion in its application of the law. The recommendation is not supported.
- The Tribunal should be empowered to impose fines. Tribunals have such powers. It will be important that this Tribunal is well empowered to deal with various disputes and come up with orders that will ensure redress. It is recommended that the subsection be retained.

Piracy and Online Infringements

- **The comments from the provinces**

- Failure to introduce a website blocking remedy will continue to be a material oversight in the Bill. The online enforcement of the new digital rights that are catered for in the Bill will remain deficient in instances where offenders and private site operators are based in other countries. Relevant authorities should legislate new legal remedies to assist rights holders to combat piracy and other infringement in the online environment.-North West
- The Bill could establish stronger enforcement and penalties measures for infringement include to address piracy and counterfeiting.-North West
- Consequences for internet piracy should be addressed in the Bill as well.-Northern Cape
- The organisation submitted that the Bill is failing to introduce meaningful enforcement mechanisms and remedies to assist rightsholders in combatting the scourge of online infringement and piracy.-Mpumalanga
- A concern about the digitisation of the recorded music industry was raised. The stakeholders have complained that the introduction of digitisation contributed to loss of revenue as a result of piracy and infringement.-Mpumalanga
- Some of the stakeholders advanced that the Copyright Amendment Bill does not have effective remedies that would help right holders to combat piracy and other infringement in the online environment.-Kwazulu Natal
- Anti-piracy provisions: Action by owner of copyright for infringement – insert the following as a new s28U under the heading "Automated takedown by Internet Service Providers"-Kwazulu Natal
- Copyright should look at the issue of piracy. There is no time to go to court and piracy must be resolved immediately when you see one.-Kwazulu Natal
- The bill must include information in the prevention of online piracy as it exploits the work of the artists. To protect investments, it is important for the bill to consider online piracy as the bill is silent on this issue.-Free State
- The Bill does not introduce any meaningful enforcement mechanisms or remedies to assist rights holders to combat infringement and piracy in the online environment. The net-effect of the invasive new regime of copyright exceptions and limitations, the weak legal protections proposed for TPMs, and the failure to introduce an effective legal remedy to assist rights holders to combat online infringements and piracy when offenders are located abroad, is that the enactment of the Bill would reduce copyright protections in South Africa to an all-time low, and in a way that would likely breach important international treaties.-Eastern Cape
- The music industry was struggling to make profits even before the Covid19 pandemic largely due to physical piracy and the online streaming of music. The bill must ensure that harsh penalties are put in place for someone caught committing such offence.-Eastern Cape
- The Bill must make sure that artists are capacitated and empowered with 4th Industrial Revolution and be able to benefit in economy through digital. The bill must include information in the prevention of online piracy as it exploits the work of the artists. To protect investments, it is important for the bill to consider online piracy as the bill is silent on this issue.-Free State

- **The dtic response**

- The world has evolved and digitization is upon us. This is not the Bill. Piracy is an ongoing challenge taking place currently.
- The Bills have some measures to address the digital infringements.
- They include remedies on technological protection measures. And technological management information.
- Recently offences on digital rights were added that will deter circulation of works online. This remedy is on section 27(5A). This will apply for commercial and non-commercial purposes. It has been debated if these measures are sufficient, in which case, future avenues for piracy will be explored but will require a new process.
- A new provision on piracy specifically is not encouraged. We need to address existing measures in the Bill and perhaps other related laws in the interim. This will require a new process and further consultations.
- The CAB also provides for greater penalties for natural persons, and extends penalties to firms which may also be found guilty of infringements.
- Other related laws include the Counterfeit Goods Act and the Cybercrimes Act, 2020 that assists with these matters.

Statutory Damages

- **The comments of the provinces**
- The stakeholders were of the view that copyright infringements must not only be limited to criminal law, but authors and copyright owners must be empowered to defend their own property. It is suggested that this can be achieved by bolstering criminal sanctions with statutory damages (financial).-Mpumalanga
- The incorporation of a Fair Use exception alongside that of Fair Dealing raises fundamental problems as the two are jurisprudentially incompatible. Should the Committee be steadfast in the need to introduce the Fair Use doctrine into South African law, there would be even more of a need for the introduction of the Statutory Damages.-Kwazulu Natal
- Statutory Damages: In terms of the current legislation, authors and copyrights owners are afforded three remedies namely, interdict, delivery-up and damages. Digital exploitation of music has spotlighted the shortcomings of each of these remedies thus necessitating additional remedies to be prospected. This can be achieved by bolstering these criminal sanctions with statutory damages. Further, it would serve to discourage professional pirates who would now feel the financial pinch each time they are found to have been infringing copyright. The Bill must clearly state the application of the test to each and every encroachment or exception to the exclusive rights afforded to rightsholders.-Free State
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- **The dtic response**
- The statutory damages recommendation is noted. Given the format of the remedy in the SA context, it is an approach that will require further assessment before included in the Bill. It requires a new process of consultations.
- Section 24 of the 1978 Copyright Act sets out civil remedies. An copyright holder can recover damages from an infringer, alternatively the rights holder may choose to recover a reasonable royalty.
- Section 24(3) of the Act thus introduced an additional category of damages, a species of statutory damage. The petition is thus incorrect when it states that South African copyright law does not include statutory damages because it has done so since 1978. A rights holder need not elect between damages and reasonable royalties at the outset. It is only once infringement has been proved that the appropriate remedy is determined.-Andrew Rens
- In addition to a claim for damages or a reasonable royalty, and statutory damages, a rightsholder can obtain injunctions, which are referred to as interdicts in South African law, seizing infringing copies, and prohibiting an infringer from making or distributing copies.-Andrew Rens

Social Media Platforms

- **The comments of the provinces**
- The Bill should be explicit of protection of all works on social media.-Northern Cape
- Artists must receive royalties for music distributed through social media and all local stations.-Eastern Cape
- Streaming platforms/ social media is becoming prevalent affecting collecting societies and creatives represented negatively. The Bill must be aligned to ensure that the intended participants receive their royalties.-Northern Cape
- The Bills do not take into cognizance other platforms. Facebook and twitter were introduced in the country through other legislations.-Kwazulu Natal

- **The dtic response**
- A separate approach is not recommended for social media only. The Bill provides protections and rights that can create an environment on how the social media plays into the market.
- The other risk is that with the pace of technology changes, some changes may become redundant and they may require constant updating of the law.
- Streaming platforms challenges currently in place are not as a result of the Bill. The measures provided in the Bill such as contract provisions, clarity on royalties, dispute resolution, regulation of collecting societies, will ensure that authors or performers receive their royalties and other rights in the Bill.
- This can be assessed in future if more clarity is required in the legislation.

Offences and penalties

- **The comments from the provinces**
- Propose a new subsection (5A) of section 27: This is extremely problematic as infringement of copyright should not be dependent on whether or not a use is for commercial purposes. Whether a use is for commercial purposes or not, the copyright owner has the exclusive right to authorise the usage of the work. As Slomowitz AJ observed in the Video Parktown North case, the essence of copyright as a right of ownership is that the copyright owner has an exclusive right "to do what he pleases" with the subject-matter of the copyright. Submit that this provision be rejected and that the phrase "and for commercial purposes" must be removed.-Gauteng
- Sections 27(5B) and 28(O): Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures.38 This requires that ss 27(5B) and 28(O) be amended.-Gauteng
- Delete ss 27(5B) and 28O and insert in its place: "Section 23A Subject to s 28P any person who, at a time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—Gauteng
- The new section 27(6) and (9) of the Act increases the penalties for criminal infringement. Where the offender found guilty of an offence is a juristic person, all these provisions prescribe minimum fines calculated on the basis of a percentage of annual turnover, which is a minimum of 5% in section 27(6)(a) and a minimum of 10% in all the other provisions. The high penalties for penalties imposed on the juristic persons are disproportionate to their purpose of generating proper reporting on commercial uses of copyright works. It is not clear if contemplation was made in determining suitable penalties for these offences and consideration of alternative remedies.-North West

- **The dtic response**
- The comment is based on the previous version of the Bill during public participation in parliament. It was undertaken that infringement will apply for both commercial and non commercial purposes. As a deterrence and to deal with piracy related concerns.
- Given the seriousness of online infringements and the need to deter the behaviors that infringe on copyright, also to address the concern that SA laws on IP are not strong on infringements of copyright and on enforcement, the criminal sanctions must be retained. This will send the message of the seriousness of the law on these matters.

Regulations

- **The comments of the provinces**
- There is a concern that the bill is using a one size fits all approach on the payment of royalties.- Free State.

- Clause 35 (c) Section Amend s39(3) to read as follows: "(3) Before making any regulations in terms of subsection (1) or (2), the Minister must publish the proposed regulations for public comment for a period of not less than 60 days.- Gauteng

- **The dtic response**
- The rationale to have royalty rates be prescribed in the Bill was because of the uncertainty around this matter. It was subject of court at some point. This was for legal certainty and clarity. However, it has been reviewed on the basis that market forces and arrangements between parties can best address the royalty rates across various works.
- It is recommended that the powers of Minister to prescribe royalty rates be removed in the Bill.
- It is recommended that this remain like other regulations which is 30 days in practice. The Department does at times given the nature of the policy issue, advertise for 45 days or longer. This does not have to be prescribed in the law. It is standard practice and can be extended even by public request. It is recommended that this not be amended.

Unenforceable Contracts

- **The comments from the provinces**
- Section 39B
- Delete proposed s39B and replace it with a new s29A(2)(h) which reads as follows: "29A(2) The Tribunal may - … (h) declare unenforceable a term of a contract which unfairly prevents or restricts the doing of any act which by virtue of this Act would not infringe copyright or which serves to renounce a right or protection afforded by this Act in circumstances where the party that enjoys the protection has not been adequately compensated for the benefit to the other contracting party of that renunciation."
- This section is overly broad and should either be removed in its entirety or reframed for clarity and to ensure that there are no negative consequences for creators in the value chain.-Gauteng

- **The dtic response**

- The provisions on unenforceable contracts are aimed at ensuring adherence to the Act. Where the rights provided in the Act are violated, the contract becomes unenforceable. This is additional protection provided to right holders.
- The proposed wording is noted however adds an extra process and prescribes how the remedy should be exercised.
- It is recommended that section 39B be retained in the Bill.

Schedules

- **Comments from the provinces**
- Section 22(3) is deemed to be an error as it introduces the formalities for exclusive licenses. The Bill does not amend section 23(2).-North West
- The Bill proposes to introduce Schedule 2 into the Act by amending section 22(3) of the Act in the following terms:
- "(3) No assignment of copyright and no exclusive license to do an act which is subject to copyright in such a work shall have an effect unless it is in writing and signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-license, the exclusive sub-licensor as stipulated in Schedule 2"
- This is deemed as an error because section 22(3) deals with the formalities of exclusive licenses. The decision is taken to introduce statutory licenses that are in line with the Appendix, and therefore ii would be more appropriate to amend section 45 for this purpose.-North West

- **The dtic response**
- Section 22 is about the assignment and licences in respect of copyright. Subsection 3 provides for the reversionary right and the related licences including the agreement. Schedule 2 provides for licences and their application. Section 22(3) is not introducing schedule 2. These are two separate sections of the Act. Section 22(3) has referenced Schedule 2, but not as an introduction of a provision.

Artificial Intelligence

- **Comments from the provinces**
- Section 2: Insert a sub-section in S2A, the clause that deals with what can be copyright, that states: 2A (3) (a) Copyright extends only to the products of a natural person's skill, effort and creativity.- Gauteng

- **The dtic response**
- Although the recommendation is progressive and taking into account current technological trends and developments on artificial intelligence and copyright, it is a new area that has not been tested and may have unintended consequences.
- It is recommended that this inclusion not be considered at this stage and in this legislative process.

Other sections

- **Comments from the provinces**
- Section 24: Insert the following as a new s24(1D) under the heading "Action by owner of copyright for infringement": "(1D) Without derogating from the generality of subsection (1), the High Court may, upon application by a copyright owner who has reasonable grounds to believe that their copyright is or may be infringed by a person situated in or outside the Republic of South Africa, grant an order which it deems appropriate including the following relief– (a) a person enabling or facilitating the infringement of copyright, or whose ….-
- Insert the following associated definitions in s1: "'Internet Service Provider' means any person providing information system services." "'Information System Services' includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service".-Gauteng
- Section 28 U: Insert the following as a new s28U under the heading "Automated takedown by Internet Service Providers" "An Internet Service Provider shall implement automated takedown forms that allow verified owners of copyright works the ability to remove infringing live streaming data immediately.-Gauteng
- Section 2A(1)(b) excludes "computer software interface specifications" from copyright protection. This may amount to an arbitrary exclusion of copyright of such works. There is no definition of the "interface specifications", nor is there a clear policy objective for such exclusion. "Interface specifications" could be entitled to copyright protection as a computer program.-North West

- **The dtic response**
- The amendment in section 24 is a new amendment that was not in the Bill before. It is recommended it be addressed in the next legislative process. It is not described in terms of context.
- The new amendments of internet service provider, is a new amendment. It is recommended that this amendment be considered in the next legislative process.
- It is recommended that the suggested section 28 on the automated takedown by Internet Service Providers be addressed in the next legislative process.
- Computer interface specifications are provided in the Bill and not eligible for copyright protection. To consider them as copyright, subject to further study, will require a process. The ones focused upon are not copyright protected but available for free. The manner interface specification was interpreted is for procedures or method of operation that are availed without copyright protection. If this is to be considered as a works, it will require a process of further consideration as it will be a new amendment to the Bill.

Other sections

- **Comments from the provinces**
- Public domain: The Bill could clarify and expand the rules for determining when works enter the public domain, which could help promote greater access to cultural heritage and encourage creativity.-North West
- The use of an artist's work following their departure should be 75 years not 50. The Committee further also recommends that the years following which an artist's works can be used following their departure should be increased to 70 years.-Northern Cape

- **The dtic response**
- It is unclear what is meant by public domain. Is it online or when the work put to the public in any form. The entire Bill aims to protect and provide rights to engage in the public and amongst parties.
- The duration of copyright protection has not been an amendment in the Bill. This will require a new process.

Technological Protection Measures

- **Comments from the provinces**
- Digital rights managements: The Bill must be strengthened to protect against abusive practices related to digital rights management technologies, which can restrict user's ability to access, use or share copyrighted work.

- **The dtic response**
- The Bill has various remedies on the digital space. It provides technological protection measures, offenses on the gitial rights, offenses on TPMs and penalties. It criminalises the prohibited conducts.
- In addition, the Bill provides for the copyright management information. This is information embodied in a copy of a work that identifies the work or copyright owner or identifies or indicates some or all of the terms and conditions for using the work or indicates that the use of the work is subject to terms and conditions.
- This forms part of the technological protection measures, has prohibited conduct in respect to the information and imposes penalties for temparing with this information as offenses.

Section 28Q: Enforcement by Commission

- **Comments from the provinces**
- Section 28 Q - Enforcement by Commission 28Q. The Commission must enforce this Act by— ….
- Delete s28Q.-Gauteng

- **The dtic response**
- Section 28Q is important to empower the Commission to take enforcement action where necessary in its capacity and in terms of the copyright Act. It is unclear what the problem is with the role of the Commission. It should be retained. Removing their powers will take away an important part of the Act because the role of the regulator is key in enforcing the Act.
- It is recommended that this section be retained.

Transitional provisions

- **Comments from the provinces**
- The Bill does not contain any transitional provisions to allow for phased implementation. It is therefore concerning that the Bill makes a far-reaching change to the copyright regime which will require time to implement. For instance, other businesses are heavily relying on copyright works that will need to be updated in their respective internal business systems are processed and put to place measures to comply with the detailed compliance regime contemplated in the Bill. It is therefore proposed that such must be considered to allow parties to regulate their future contracts accordingly.-North West

- **The dtic response**
- The Bill is long overdue.
- But it can be operationalised by phases.
- Some provisions will need to be operational on proclamation. The notable one is on section 19D related to persons with disabilities.
- The other sections can be addressed upon readiness and be proclaimed.

Investment and the CAB

- **Comments from the provinces**
- It is not clear if the Bill will create investments in Provinces and should be indicated. –Northern Cape

- **The dtic response**
- There is a view held that the Bill will cost the economy job losses, disinvestment and cause authors to stop writing and thereby negatively impact on authors. The exceptions in the Bill are said to be too wide using the US based fair use that will benefit internet-based companies from overseas such as YouTube and Google. It is also argued that big film producers will avoid South Africa as an investment destination and the performers will lose as South Africa will be a less attractive investment destination.
- It has been argued by other experts that research has shown that, overall, adopting fair use and other more open copyright exceptions has positive effects for scholarly production and in investment in the technology sector, without harming publishers or the education industry.
- It is not possible at this stage to predict the impact of the Bill on investments and the economy, in particular, the provincial economies. However, there are indications that contrary to widely held concerns, it may increase innovation and more creativity and create a more enabling environment for creators.
- The US as an example of a country that has a fair use regime, has a thriving and highly recognized successful creative industry with massive investments.

Conclusion

- The Select Committee to note the presentation of **the dtic** in response to the negotiating mandates from the 9 provinces.

Performers’ protection amendment Bill (PPAB)

Definitions

Comments from the provinces

- Definition of broadcast

- Propose a revision of the definition of “communication to the public” in the following manner: “Communication to the public” — i. in respect of the performance of an audiovisual work, means the transmission to the public by any medium, other than by broadcasting of an unfixed performance or of a performance fixed in an audiovisual fixation including making a performance fixed in an audiovisual fixation audible or visible, or audible and visible to the public; and ii. in respect of the performance of a sound recording, means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance.-Gauteng

- The definition of “performer” in section 1(h) should exclude “extras”, in line with the Beijing Audio-visual Performances Treaty and international standard practice. Section 1 (h): “performer’ means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary works, musical works, artistic works, dramatic works, [or works of joint authorship] or traditional works as contemplated in the Copyright Act…’’-Western Cape, Gauteng

- Section 1: the definition of the word "Performer" - is quite narrow and may exclude certain types of performers who deserves protection under law. It is therefore proposed that the definition be broaden to ensure that all classification is covered.-North West

The dtic response

- The detail is as provided in the CAB presentation above. It is recommended that the definition in the Act be retained.

- Communication to the public proposed amendment is not recommended, it is unclear what the issue is with this definition. The definition took the treaty into consideration.

- The definition of performer is aligned to the treaties. Even the treaties do not refer to extras (Beijing, WPPT). Extras do not receive royalties as they do not form part of the main performance. However, the Department is of the view, the suggestion to add wording to exclude the extras can be recommended. Although the Department does not agree with the need for the proposed change, it is one area that can be recommended for amendment to ensure more clarity.

- Few industry stakeholders have raised it.

- The definition of performer is informed by the international treaties and the nature of the law. It is not clear the other performers that can be considered. The current definition should be retained as it sufficiently covers performers.

Definitions

- **The comments from the provinces**
- (k) “reproduction” – insertion of the words the whole or a part of in between the words “copy of” and “an audiovisual-Free State
- (l) “Sound recording” – substitute the words [but does not include a sound track associated with and audiovisual fixation] with other than in the form of a first fixation in cinematographic or other audiovisual work; rights in a sound recording are in no way affected by the subsequent incorporation of a sound recording in any other media, including in an audiovisual work.-Free State
- The definition of "sound recording" should be amended to clarify that rights in pre-existing sound recordings are not affected by their inclusion into audio-visual work.-North West

the dtic response

- The definition proposal is noted. However it may have unintended consequences and requires further consultation. It is not recommended in this process.
- This is a substantive amendment and requires further consideration and consultation. It is recommended it be considered in the next legislative process.
- This proposal will make the definition not to be aligned to the treaty. Parties can address the rights in the contractual arrangements. The safeguarding of the pre existing sound recordings should not be addressed in the definition.

International Treaty Implications

- **Comments from the provinces**
- International harmonization: Given the global nature of the entertainment industry, the bill must harmonize with international standards and convention to ensure that South African performers are protected when working abroad and that foreign performers are protected when working in South Africa.-North West
- Impact assessment study on the exclusive rights is recommended before the implementation of this clause as it has the potential of providing for additional burden and costs on the artists and performers.-Free State
- Negative Implications on International Treaties:
- • The Bill could contravene international copyright laws, potentially causing diplomatic complications and harming our creative industries.
- The Bill violates international treaties because the existing Act is not aligned with the Rome Convention, and the proposed amendment may exclude performances protected under international treaties.-Western Cape

- **The dtic comments**
- South Africa is not a member of the Beijing Treaty or the Wipo Performances and Phonograms treaty (WPPT). The Bill took the treaties into consideration and ensured alignment. There is harmonization with international obligations. The international treaty alignment was deliberated and considered.
- The SEIAS was conducted on the Bill before it was introduced to Parliament. There was extensive consultations on the Bills during the parliament processes. The Department undertook several consultations prior the parliamentary process. The exclusive rights were well considered. They are also informed by the international treaties. The rights will provide benefits to performers.
- The international treaty implications were taken into consideration. The Rome convention was noted given its similarity with the WPPT. It was considered. The Beijing treaty was also considered. In some respects, more rights were considered to ensure more rights for the performers.

Clause 2, 3, 4 and 5: Rights of Performers

- **The comments from the provinces**

- 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.- Gauteng, North West
- The provisions in clauses 2, 3, and 4 (in particular the proposed section 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4) all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights. –Gauteng
- The use of the phrase in in clauses 2, 3, and 4 "against payment of royalties or equitable remuneration" is problematic in that it will not create certainty as to the system contemplated and will spawn disputes. It will not be clear at which state royalties, requiring prior authorization for usages based on exclusive rights, will be payable, and at which a system of equitable remuneration is contemplated. Both the Rome Convention (article 12), the WPPT (article 15), and the Beijing Treaty (Article 11(2)) make provision for a system of equitable remuneration in respect of fixed performances. –Gauteng
- Section 3: Granting audio-visual performers additional rights even after the grant of exclusive rights is not a requirement under the Beijing Treaty which South Africa intends to ratify.- North West

- **The dtic response**

- The reference and content could not be found in the WPPT. It might be in the Rome Convention, Article 5. Those rights are for producers of phonograms not performers.
- The structure of the Bill is aligned to the Performers' Protection Act. The remuneration structure in the PPAB was amended and aligned to the treaties during the parliamentary process.
- Equitable remuneration is widely used in the context of remuneration in copyright and related rights. It also makes allowance for various arrangements of remuneration between parties. Stakeholder submissions and industry view is that it is acceptable to use the wording 'equitable remuneration'.
- It is unclear the additional rights referred to in this comment, however in terms of treaties, they do not have to be worded verbatim. In addition, countries can give more rights in line with their legal contexts, in South Africa's case, the Constitution.

Reversionary clause

Comments from the provinces

- Section 3A(3)(c) should be deleted from the PPAB to prevent constitutional vagueness. Alternatively, it should be made subject to a written agreement to the contrary.-Gauteng
- Clause 3 Insertion of section 3A in Act 11 of 1967: Section 3A(3)(c) should be deleted as it limits the commercial availability of the work to a period of 25 years from the date of commencement of the agreement. It will mean that applications for the rights to use the work post 25 years would have to start afresh, which may be too difficult. -Limpopo

- **the dtic response**
- The reversion right is not unique to SA. It is similar to the one in the CAB.
- The Copyright Review Commission made recommendation on this right and it found 25 years to be sufficient to recoup the investment. Parties can renegotiate the contracts.
- Given the policy context of the abuses in contracts and assignments previously, it makes this amendment crucial.
- Parliament debated on this provision.

Duplication between the CAB and PPAB

Comments from the provinces

- 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.-Gauteng
- Section 3B: It is assumed that the protection of sound recordings is already displayed in section 9 of the Copyright Act, section 3B concerning the "protection of rights of producers of sound recordings" is misplaced and creates legal and commercial uncertainty.-North West
- Lack of clarity and overlap between the two Bills makes the Performers' Protection Bill confusing and problematic
- Confusion Between Performers' Rights and Copyright: The Bill blurs the line between performers' rights and copyright, as seen in Clause 3, leading to uncertainty about ownership and compensation or exclusive rights and remunerative rights.
- The proposed changes may blur the distinction between performers' rights and copyright, leading to uncertainty about ownership and compensation. This confusion could lead to disputes and legal challenges, making it difficult for performers and producers to enforce their rights.
- Section 8A should be deleted from the Copyright Amendment Bill and exclusively dealt with in this Bill to avoid overlap and confusion.
- The bill as it relates to the rate in reporting on performance to Department of Trade, Industry and Competition (DTIC) by the production companies should be reduced as it becomes a duplication because this function is already being performed either monthly or quarterly.-Free State

The dtic response

- The two Bills are interlinked. Both laws can be addressed in the same Bill. The response is similar to the explanation provided for section 8A in the CAB.
- The inclusion of sound recordings provisions in both Bills is not arbitrary. The link will ensure that other remedies in the Copyright Amendment Bill that includes access to collecting societies, the Copyright Tribunal, the Commission amongst others are catered for.

Reporting requirements

Comments from the provinces

- The bill as it relates to the rate in reporting on performance to Department of Trade, Industry and Competition (DTIC) by the production companies should be reduced as it becomes a duplication because this function is already being performed either monthly or quarterly.-Free State
- There is a concern that the bill is using a one size fits all approach on the payment of royalties.-Free State
- Section 5(1B) of the PPAB regarding failure to register or report: Penalties are excessive, the registration and reporting duties are burdensome and this section could have a stifling effect on the creative industries. The quantum of fines must be assessed and determined with reference to failure to comply with a specific section of the Amendment Act, once promulgated. It is undesirable for the Bill to adopt a blanket approach without considering the nuances on a case-by-case basis. The amount of the fine should be proportionate to the severity of the act which is penalised.-Gauteng
- Clause 4(g) Section 5(5): Amend s5(5) to read as follows: "(5) Any payment made to a producer in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out, distributes or causes communication of the performance to pay a royalty or equitable remuneration, whichever is applicable, to- (i) the performer in terms of section 5(1)(b) above or in terms of section 8A of the Copyright Act, 1978 (Act No. 98 of 1978) in respect of the same act; and (ii) the owner of copyright subsisting in the sound recording, in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."'-Gauteng

• the dtic response

- The PPAB has no reporting requirements from the Department of Trade, Industry and Competition by the production companies. The comment is not related to the Bill.
- The PPAB Bill distinguishes remuneration for sound recordings and audiovisual works.
- The reporting requirements and penalties for compliance is a policy decision. The amendment was discussed extensively in parliament. Given its impact on performers, they were seen as critical.
- The amendment is noted however it is a proposed amendment and it is unclear what its meaning and intention is. Changes have to be sufficiently supported by context to assist the process. The amendment is not recommended.

Other sections

Comments from the provinces

- Section 5: Downgrading of performer's rights from exclusive to mere remuneration rights which are less than the requirements of the WPPT and the Beijing Treaty which South Africa intends to ratify.-North West

- Members of the community proposes that the Bill should look into extending the royalties shares from 50 to 70 years after the death of an artist.-Free State

- A further amendment of Section 3(1) is recommended to ensure protection for the recorded performance SA nationals where the performances of SA performers are protected, and for recorded performances published in SA within a period of 30 days of their first publications.-Free State

• the dtic response

- The PPAB provides rights to performers. It is unclear how section 5 downgrades performers' rights from exclusive to mere remuneration rights. The Bill outlines exclusive rights in section 3 and provides other protections in the Bill such as of moral rights. Section 5 provides for the consent of the performer for an unfixed performance or a performance fixed in an audiovisual fixation or sound recording. It provides for availability of the original and copies of a performance fixed in audiovisual fixation to the public and provide for persons who intend to broadcast or communicate to the public a performance fixed in an audiovisual fixation or sound recording of a performer, to record certain acts and submit reports thereon. Failure to do so constitutes an offence.

- The term of performers to receive royalties is related to the lifespan of the work. This is a significant proposed amendment that requires a new process. It is recommended that it can be considered in the next legislative process.
- The proposed amendment seem to be in the Rome Convention, Article 5. A proposal of this nature will require a new process as a new amendment for further consultation. Its inclusion is not recommended.

Other comments

Comments from the provinces	The dtic response
• Currently, performers and actors are treated freelancers, there is no protection under the Labour Act, Copyright Act or any related laws, and cannot earn royalties for their work.-North West	• The Labour Act is not part of Copyright and performers' protection law. The Bill does not address labour related concerns. The performer's protection amendment Bill will provide for rights of performers. Actors are currently not catered for by the law in terms of the Beijing treaty and overall.
• Enforcement mechanism: The bill should provide effective enforcement mechanisms to ensure that performer's rights are protected. This could include the establishment of a regulatory body to oversee the industry and investigate complaints.	• The Bill provides for the role of the Commission and the Tribunal to ensure effective enforcement. This link is provided for in the Copyright Act. That is why sections 8A and 9A are very important in the Copyright Amendment Bill.

Conclusion

- For the Select Committee to note the presentation on the Performers' Protection Amendment Bill and the negotiating mandates from the provinces.

Thank You