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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**The Copyright Amendment Bill and The
Performers Protection Amendment Bill**

**Presentation to the dti Portfolio Committee
30 May 2017
CAPE TOWN**



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Purpose

The purpose of this presentation is to brief the Portfolio Committee (PC) on the Copyright Amendment Bill and the Performers' Protection Amendment Bill.

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- PROBLEM STATEMENT
- OBJECTIVES OF THE BILLS
- TREATIES INFORMING THE BILLS
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Background

Background:

- Intellectual Property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. IP is divided into two categories, namely:
 - ✓ **Industrial Property:** includes inventions (patents), trademarks, industrial designs, and geographic indications of source, AND
 - ✓ **Copyright and Related Rights:** includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.
- In 2013 a Draft IP Policy was published and 118 written submissions were received.
- Copyright Amendment Bill (Copyright and Performers Protection Amendment Bill) were consulted upon and 122 written submissions were received.
- Presidential Task Team (led by DM Manamela at the Presidency) and the Presidency (Budget Speech 2016/2017) want these Bills to be concluded.

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Background

Background:

- Copyright Review Commission (CRC) established and made recommendations of effective collective management system:
 - ✓ The copyright law should be amended **to regulate all Collecting Societies;**
 - ✓ Legislation should be amended **to preferably allow for one collecting society per set of rights with regard to all rights governed by the Copyright Act of 1978** (performance, needle time and mechanical rights, resale right and right for audio visual performers).
 - ✓ Independent Communications Authority of South Africa (ICASA) should include as a condition in the broadcasters' licences that compliance with needle time and copyright obligations is compulsory and that a repeated failure by broadcasters to comply should lead to cancellation of their licences.
 - ✓ Collecting societies that currently fall outside the ambit of the Regulations should be given a time period after the date of amendments to reduce their administration costs in order to be in line with the requirements of the Regulations.

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Background

Background:

- Through the public participation process the **dti** began to unpack the issues facing the audio visual performers in South Africa:
 - ✓ Repeat Fees;
 - ✓ Commercial Exploitation Contracts and
 - ✓ The accession to the Beijing Treaty on Audio Visual Performances.
- Both the Bills are amending Copyright and Related rights and are therefore enriching previous amendments such as the Intellectual Property Laws Amendment Act 2013.
- In 2010 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.
- In 2014 the **dti** commissioned a RIA to be conducted on the Draft National IP Policy 2013.
- In 2016 Socio Economic Impact Assessments (SEIAS) were completed on both Bills; the proposed legislative amendments will achieve the intended outcomes and offer authors and creators of copyright works the benefits due to them if education and awareness and the regulatory capacity of the CIPC are intensified.



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Background

Copyright:

- Original works are eligible for protection i.e. artistic and literary works.
- Comes into being automatically in SA as there is no registration required except for cinematograph films, but must meet certain criteria.
- Author must be a qualified person i.e. regarding an individual - a person who is an SA citizen/ domiciled or resident in the Republic; regarding a juristic person - a body incorporated under the laws of the Republic.
- Work must be original, reduced to material form- written down ,recorded, represented as digital data.
- The duration of copyright is the lifetime of the author plus 50 years from the end of the year when the authors dies.
- The author is conferred with the exclusive right to authorise the doing of certain acts.
- Copyright is transferable by assignment, this must be in writing and signed by the assignor – Author.
- An act of infringement are the use of works without authorisation.
- Remedies available in case of infringement e.g. sue for damages based on a reasonable royalty which would have been payable by a licensee; Interdict; delivery of infringing copies /plates used in making the infringing copies.

Background

Performance Protection – PPA

- Three categories of related rights namely: performers(actors, musicians and dancers), producers of phonograms and broadcasting organisations.
- Live performances are a principal means of generating income for musicians and these performances are regulated through the PPA
- A singer , musician, dancer is one who claims or performs literary or artistic works.
- This Bill does not in anyway restrict or affect the rights provided for by any other law relating to Copyright in literary and artistic works.
- The protection of performance is provided for in S5 of the PPA and it extends to other countries that are members of the World Trade Organisation (WTO)
- Performance must be taking place.
- Broadcast without fixation.
- Royalties are paid for performances depending on contractual terms agreed upon, these royalties are paid to the owner of any copyright subsisting in the fixation in terms of S 9A of the Copyright Act.

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Problem Statement

- The sector is currently not organised for bargaining purposes.
- Lack of formalisation of the creative industry which exposes it to abuse.
- Piracy / Counterfeiting is rife and enforcement agencies not coordinated.
- Unfair Contracts resulting in the perpetual signing away of their economic rights and the lack of updated industry contracts for freelance performers.
- Non - Payment of Royalties in the form of Repeat Fees and Commercial Exploitation for Actors.
- Non – Recognition of the Moral and Economic Rights of performers.
- Non – Ratification of Treaties that make provision for the recognition of the Moral and Economic Rights.
- Non – payment of Needletime royalty.
- Reciprocity regarding payment of royalties from other jurisdictions.
- Disputes not resolved speedily.
- The digital environment is not catered for in the Acts.(Non ratification of digital Treaties)

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Objectives of the Bills

- The Bills seeks to address the challenges facing the creative industry from non-payment of royalties; lack of formalisation of the creative industry which exposes it to abuse; piracy; and rights of performers by making provision for the above mentioned to be addressed.
- To develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa.(CRC Report, NDP and Draft IP Policy)
- To ensure that IP legislation remains updated in view of the ever evolving digital space; that current legislation does not limit access to education; that access to information and resources are available for persons with disabilities and that artists and authors of works do not die as paupers due to ineffective protection.
- To enhance access to information for the enhancement of education and research and payment of royalties to alleviate the plight of the creative industry.

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Objectives of the Bills

- To provide exceptions and limitations in order for South Africa to address national needs, to encourage international organisations to take into consideration "new emerging issues" in the area of Copyright which enhances access to and use of copyright works. (Resale Royalty Right)
- To address the licensing of Copyright works/material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.

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Treaties Informing the Bills

- **Trade Related Aspects of Intellectual Property (TRIPS Agreement)** administered by the World Trade Organisation, South Africa is a member;
- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), South Africa is not a member;
- **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations** administered by WIPO, International Labour Organisation (ILO) and United Nations Educational Scientific and Cultural Organisation (UNESCO), South Africa is not a member; and
- **The Beijing Treaty for Audio Visual Performances (BTAP)** administered by WIPO, South Africa is not a member.

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Treaties Informing the Bills

- **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member;
- **Marrakesh Treaty** (South Africa not a member): to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, South Africa is not a member; and
- **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Definitions

Amendment of section 1 of Act 98 of 1978
Pages 3-10 of the Act

Scope of Copyright Protection

Insertion of section 2A of Act 98 of 1978
Pages 10-11 of the Act

What the Bill provides

Clause 1 proposes amendments to certain definitions and the insertion of definitions of 'accessible format copy', 'audiovisual fixation', 'commercial', 'Companies Act', 'copyright management information', 'orphan work', 'performer', 'person with a disability', 'technologically protected work', 'technological protection measure', 'technological protection measure circumvention device', 'Tribunal'.
Pages 2-3 of the Bill.

Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection... Pages 3-4 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

State Funded Intellectual Property

Amendment of section 6 of Act 98 of 1978
Page 13 of the Act

Communication to the public of a musical work

Amendment of section 6 of Act 98 of 1978
Pages 13-14 of the Act

What the Bill provides

Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for State ownership of copyright funded by the State.
Page 4 of the Bill.

Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.
Page 4 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Communication to the public of an artistic work

*Amendment of section 7 of Act 98 of 1978
Page 13 of the Act*

Communication to the public of a cinematograph film or audio visual fixation

*Amendment of section 8 of Act 98 of 1978
Pages 14-15 of the Act*

Communication to the public of a sound recording

*Amendment of section 9 of Act 98 of 1978
Page 15 of the Act*

What the Bill provides

Clause 5 of the Bill proposes an amendment to section 7 by providing for communication to the public of an artistic work by wire or wireless means, including internet access.
Page 4-5 of the Bill.

Clause 6 of the Bill proposes an amendment to section 8 of the Act by providing for communication to the public of a cinematograph film or audiovisual fixation by wire or wireless means, including internet access.
Page 5 of the Bill.

Clause 7 of the Bill proposes an amendment to section 9 of the Act providing for communication to the public of a sound recording by wire or wireless means, including internet access.
Page 5 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Royalties

*Substitution of section 9A of Act 98 of 1978
Page 15 of the Act*

Resale of Royalty Right

*Insertion into Act 98 of 1978
Pages 15-16 of the Act*

What the Bill provides

Clause 8 of the Bill proposes the substitution of section 9A of the Act. It embodies a variety of additions and amendments pertaining to the payment of royalties in respect of intellectual property rights. *Page 6 of the Bill.*

Clause 9 of the Bill proposes the insertion into the Act of sections 9B to 9F, providing for the resale, duration, assignment or waiver of royalty rights. It also provides for authors to enjoy the inalienable resale royalty right on the commercial resale of his or her work of art, subsequent to the first transfer by the author of such work of art. *Pages 7-9 of the Bill.*

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Fair Use

Amendment of section 12 of Act 98 of 1978
Page 17 of the Act

What the Bill provides

Clause 10 of the Bill proposes an amendment to section 12, providing for fair uses of copyright work. Page 9 of the Bill.

General Exceptions from Copyright Protection

Insertion of section 12A and 12B into Act 98 of 1978
Pages 17-19 of the Act

Clause 11 of the Bill proposes the insertion of section 12A and 12B in the Act, providing for the general exceptions from copyright protection and for parallel importation via an international exhaustion regime. Pages 9-11 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Temporary Reproduction and Adaptation and Reproduction for educational and academic activities

Insertion of section 13A and 13 B into Act 98 of 1978
Page 19 of the Act

What the Bill provides

Clause 12 of the Bill proposes the insertion of sections 13A and 13B in the Act providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process. Pages 11-12 of the Bill.

General Exceptions regarding protection of computer programmes

Amendment of section 19B of Act 98 of 1978
Pages 22-23 of the Act

Clause 17 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rights holder, to observe, study or test the functioning of the program. Pages 12-13 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

General Exceptions regarding protection of copyright work for archives, libraries, museums and galleries

*Insertion of section 19C and 19D into Act 98 of 1978
Page 23 of the Act*

Moral Rights

*Amendment of section 20 of Act 98 of 1978
Page 23 of the Act*

What the Bill provides

Clause 18 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for archives, libraries, museums and galleries, also exceptions regarding protection of copyright work for persons with disability. Pages 13-14 of the Bill.

Clause 19 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author. Page 15 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Commissioned Works

*Amendment of section 21 of Act 98 of 1978
Page 23 of the Act*

Assignment and Licences in respect of Orphan Works

*Insertion of section 22A into Act 98 of 1978
Page 24 of the Act*

Collecting Societies

*Insertion of a new chapter 1A into Act 98 of 1978
Page 24 of the Act*

What the Bill provides

Clause 20 of the Bill proposes an amendment to section 21 of the Act by providing for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission. Page 15 of the Bill.

Clause 22 of the Bill proposes the insertion into the Act of a new section 22A, making provision for assignment and licences in respect of orphan works. Pages 16-17 of the Bill.

Clause 23 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the registration and regulation of Collecting Societies. Pages 17-19 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Infringement of Copyright

*Amendment of section 23 of Act 98 of 1978
Page 25 of the Act*

What the Bill provides

Clause 24 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright, omits to pay the author of the copyright work a royalty fee as and when the copyright work is used and omits to pay the author of artistic work royalty fees as and when the artistic work is sold as prescribed by the Act. Pages 19-20 of the Bill.

Technological Protection Measures and Copyright Management Information

*Amendment of section 27 of Act 98 of 1978
Pages 30 of the Act*

Clause 25 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author. Pages 20-22 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Regulatory and Enforcement Agencies (IP Tribunal)

*Substitution of section 29 of Act 98 of 1978
Page 32 of the Act*

What the Bill provides

Clauses 29 and 30 of the Bill propose the insertion of sections 29A to 29S into the Act, which provide for, amongst others, the establishment of the Intellectual Property Tribunal; its functions; appointment of its members; qualifications for such appointment; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal. Pages 22-28 of the Bill.

Regulations

*Amendment to section 39 of Act 98 of 1978
Pages 38 of the Act*

Clause 32 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies and Contracts.. Page 28 of the Bill.

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Proposed Amendments

Issues to be introduced by the Copyright Amendment Bill

Unenforceable Contractual Term

*Insertion of section 39B into Act 98 of 1978
Page 38 of the Act*

What the Bill provides

Clause 33 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purport to renounce a right or protection afforded by the Act will be unenforceable. Page 28 of the Bill.

Translation Licences

*Insertion of New Schedule 2 into Act 98 of 1978
Page 39 of the Act*

Clause 34 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for "Translation Licences" and "Reproduction Licences". Pages 29-34 of the Bill.

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Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Definitions

*Amendment of section 1 of Act 11 of 1967
Page 1*

What the Bill provides

Clause 1 proposes amendments to certain definitions and the insertion of definitions of "audiovisual fixation", "broadcasting", "communication to the public of a performance", "communication to the public of a phonogram", and "Tribunal" and by the substitution for the definitions of "performer" "phonogram" and "reproduction". Pages 2-3 of the Bill.

Transfer of Rights

*Substitution of section 3 of Act 11 of 1967
Page 2 of the Act*

Clause 3 proposes the insertion of sections 3A and 3B to provide for the transfer of rights where the performer has consented to fixation of his or her performance in an audiovisual fixation, subject to written contractual agreement which shall give the performer the right to receive royalties for any use of the performance. Page 4 of the Bill.

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Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Equitable Remuneration

*Insertion of section 3A and 3B into Act 11 of 1967
 Page 2 of the Act*

What the Bill provides

Clause 3 grants exclusive rights to the producer of a phonogram and the right to earn an equitable remuneration for the direct or indirect use of phonogram to the performer, composer and producer of phonogram.

It also proposes the deletion of a phrase in subsection (1) by virtue of the insertion of the definition of "communication to the public of a phonogram" in section 1 of the principal Act.

Page 4 of the Bill.

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Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Consent for Use of Performers Work

*Amendment of section 5 of Act 11 of 1967
 Page 3 of the Act*

What the Bill provides

Clause 4 provides for the consent of the performer for a performance fixed in audiovisual fixation. It provides for availability of the original and copies of a performance fixed in audiovisual fixation to the public; provide for persons who intend to broadcast or communicate to the public a performance fixed in audiovisual fixation of a performer, to give the performer, trust or community trust or representative or collecting society notice of his or her intention to do so; and provides for a matter to be referred to the Tribunal where the copyright owner, performer, trust, community trust or representative or collecting society rejects the proposal by any person.

Pages 4-6 of the Bill.

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Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Exceptions to Use

*Amendment of section 8 of Act 11 of 1967
Page 5 of the Act*

What the Bill provides

Clause 5 provides for situations where an audiovisual fixation can be used without consent for purposes of private study or criticism etc. *Page 7 of the Bill.*

Technological Protection Measures [TPM]

*Insertion of sections 8A and 8B in Act 11 of 1967
Page 6 of the Act*

Clause 6 provides for the prohibited conduct in relation to a TPM as contemplated in sections 28Q and 28P of the Copyright Act, 1978 as amended, to apply in respect of a performance fixed or fixed in audiovisual fixations; and provide for the prohibited conduct in relation to the removal or modification of copyright management information; and the exceptions relating to such removal or modification contemplated in sections 28Q and 28R of the Copyright Act, 1978, to be applicable in respect of performances that are fixed or fixed in audiovisual fixation. The Bill makes it an offence to contravene these prohibitions. *Page 7 of the Bill.*

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Proposed Amendments

Issues to be introduced by the Performers' Protection Amendment Bill

Beijing Treaty on Audio Visual Performances (BTAP):

*Substitution of section 3 of Act 11 of 1967
Page 2 of the Act*

What the Bill provides

The adoption and insertion of the Beijing Treaty on Audiovisual Performances provisions strengthens the prejudicial position of performers in the audiovisual industry by providing a clearer legal basis for the international use of audiovisual productions, both in traditional media and in digital networks. Such an instrument will also contribute to safeguarding the rights of performers provided by the treaty against the unauthorized use of their performances in audiovisual media, such as television, film and video.

Page 3 of the Bill.

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RECOMMENDATIONS

- The impact of the copyright based industries can be strengthened and their contribution increased by updated legislation, the structure of the economy and incentives provided for the development and growth of the industry e.g. films.
- PC should take note that these Bills do not intend to repeal any law relating to copyright and related rights. Coordinated approach by Government.
- PC should enact the Bills as it confers rights to the vulnerable.
- PC should consider ratification of all treaties/conventions related to these Bills.
- PC should legislate in the area of Copyright; that collecting societies must be statutorily regulated.
- PC should confer with PC of Communications regarding the issue of (music) local content: 80% (public) / 60% (private).
- PC should impose time lines for e.g.: regulations/databases to be finalised.
- PC should foster coordination of enforcement agencies to deal with piracy and counterfeiting.
- Recommendation by WIPO: Statistics SA and the Reserve Bank should separate the statistics related to the copyright based industries and publish them regularly. This will assist with information gathering and measuring the growth and impact of the copyright based industries in South Africa as information is limited.
- PC must take note of the Socio Economic Impact Assessment (SEIAS Report).

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Thank You

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