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Department:  
Trade and Industry  
**REPUBLIC OF SOUTH AFRICA**

**The Performers' Protection Amendment  
Bill**

**Presentation to the Select Committee on Trade  
and International Relations  
6 March 2019  
Parliament - CAPE TOWN**



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## Purpose

The purpose of this presentation is to brief the Select Committee on Trade and International Relations on the responses to the public submissions on the Performers' Protection Amendment Bill (PPAB)



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- **Written Submissions on Performers Protection Amendment Bill:**
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  - **Remuneration Model**
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## Definitions

Stakeholder	Issue in the Submission	Dti Response
<ul style="list-style-type: none"><li>NAB</li></ul>	<ul style="list-style-type: none"><li>The definition of a performer is rather broad and it includes any person who acts, sings, delivers, declaims, plays in, or otherwise performs in any of the specified works.</li></ul>	<ul style="list-style-type: none"><li>The definition of a performer is in line with international best practice and stems from public participation and alignment to the Beijing Treaty on Audio Visual Performances which itself was negotiated with the understanding that extras and ancillary or incidental participants are excluded due to the nature of the performance. Extras or incidental performance cannot qualify as performers. The definition in WPPT exclude extras, also in the US.</li><li>The South African developmental agenda and historical deprivation informs the on-going equitable remuneration.</li><li>The Bill defines producer.</li></ul>
<ul style="list-style-type: none"><li>Netflix</li></ul>	<ul style="list-style-type: none"><li>In the absence of any definition for the term "equitable remuneration", there is no legal certainty as what this entails. Nor is there any clarity as to the manner in which reasonable compensation is to be determined in practice.</li></ul>	
<ul style="list-style-type: none"><li>MNET and Multichoice</li></ul>	<ul style="list-style-type: none"><li>The definition of "producer" is unclear</li></ul>	



## Freedom to contract

Stakeholder	Issue in the Submission	Dti Response
<ul style="list-style-type: none"><li>RISA</li></ul>	<ul style="list-style-type: none"><li>The Stakeholders which cited violation of the freedom to contract have further submitted that the performers too will be restricted the freedom to follow trade, occupation and profession of their choice. the NAB recommends that the provision be redrafted as follows:</li><li>without specifying the content of agreements, the Minister may make regulations prescribing a list of contractual terms which must be included in agreements entered into in terms of this Act.</li><li>The NAB further recommends that clause 3A(3)(a) be revised to read: <i>the written agreement contemplated in subsection 2 must at least address the list of contractual terms as may be prescribed.</i></li></ul>	<ul style="list-style-type: none"><li>Responses on the Minister's powers to stipulate standard contractual terms and royalty rates are applicable. The current wording in the Bill captures the policy intent and addresses similar points as suggested by the comment.</li></ul>
<ul style="list-style-type: none"><li>NAB</li></ul>		



## Remuneration models

Stakeholder	Issue in the Submission	Dti Response
<ul style="list-style-type: none"><li>Cliffe Dekker &amp; Hofmeyer</li></ul>	<ul style="list-style-type: none"><li>It is submitted that the performers in the audio visual sector prefer the buy out model which is international practice as opposed to royalty based model.</li><li>The extension of royalties for "any use" is not in accordance with industry practice. The custom of royalty payments in the music industry has been established, but in the film and television production sector different practices apply, such as the payment of upfront buy-out fees, the payment of residuals or the payment of repeat fees.</li></ul>	<ul style="list-style-type: none"><li>The different remuneration models were taken into consideration and discussed. The language of the Bill had to be considered. It is noted that various models can be considered. The performer must be remunerated and the agreement must take into account the usage of the fixated performances.</li><li>The Bill incorporates Beijing Provisions which statutorily affords performers with exclusive economic rights to continue to earn royalty on use of their performances. SA will be joining the Beijing Treaty. These provisions are introduced to avail a royalty based model for performers. The world is moving in this policy direction.</li></ul>
<ul style="list-style-type: none"><li>Netflix</li></ul>	<ul style="list-style-type: none"><li>Collective bargaining agreements are a better path to balancing interests of talent and producers, rather than legislation creating royalty payments – but in any event legislation should embrace alternative approach as long as the result is obtained.</li></ul>	
<ul style="list-style-type: none"><li>Nambitha Mpumlwana</li></ul>	<ul style="list-style-type: none"><li>Recommends the payment of royalties and syndication fees for episodes of local productions that are broadcast in various countries worldwide. The law needs to be retrospective by at least 10 to 20 years. Residuals should come through structured compensation. Production Houses and SABC to review the payment rates, rationalize and bring them in line with international standards and norms. The Bill needs to include the language of the contracts performers sign as artists.</li></ul>	



## Moral Rights

Stakeholder	Issue in the Submission	Dti Response
<ul style="list-style-type: none"><li>South African Guild of Actors</li></ul>	<ul style="list-style-type: none"><li>It is submitted that Moral Rights for performers are not clearly anchored in the Performers Protection Bill.</li><li>The CAB should include clear provisions granting performers the moral rights of control and integrity on their live performances and on their performances fixed in audio-visual fixations</li></ul>	<ul style="list-style-type: none"><li>Moral Rights are introduced in the Bill. The Copyright Amendment Bill already had provisions for moral rights.</li></ul>



## Reporting

Stakeholder	Issue in the Submission	Dti Response
<ul style="list-style-type: none"> <li>▪ NAB</li> </ul>	<ul style="list-style-type: none"> <li>▪ On reporting requirements, the NAB notes that clause 4(c) of the Performers' Bill seeks to insert a new subsection which requires any person who for commercial purposes intends to inter alia broadcast or communicate to the public an unfixed performance of a performer or copies of that performance fixed in an audio-visual fixation or sound recording, to "register" that act in the prescribed manner and form. The NAB respectfully submits that the proposed section is simply not practical when considering the vast volume of content that is broadcast.</li> <li>▪ NAB suggests that the proposed section prescribing the amount of fine be redrafted to rather defer the determination of the fine to the Copyright Tribunal and that each case will then assessed on its own merit. <b>Proposed wording-section 5(1B) clause 4(c): Any person who intentionally fails to submit a report as contemplated in subsection (1A) without good cause shown, shall be liable to pay fine not exceeding R100 000 to be determined by the Copyright Tribunal.</b></li> <li>▪ NAB suggests that the proposed section prescribing the amount of fine be redrafted to rather defer the determination of the fine to the Copyright Tribunal and that each case will then assessed on its own merit. Proposed wording-section 5(1B) clause 4(c): Any person who intentionally fails to submit a report as contemplated in subsection (1A) without good cause shown, shall be liable to pay fine not exceeding R100 000 to be determined by the Copyright Tribunal.</li> </ul>	<ul style="list-style-type: none"> <li>• Reporting on usage of the fixated performances on audio visual and sound recordings is very important. Given its implications, the penalties are high. The Bill provides for a discretionary sentence by the court. However limiting it to R100 000 is a concerning recommendation</li> </ul>
<ul style="list-style-type: none"> <li>▪ Cliffe Dikker and Hofmeyr</li> </ul>	<ul style="list-style-type: none"> <li>▪ Furthermore, no organisation exists that could calculate, collect, track, report and pay the royalties, and even if such an organisation is formed, Moonlighting's international clients would be reluctant to take on the administrative burden in this regard.</li> </ul>	<ul style="list-style-type: none"> <li>• In light of actors dying as paupers, not paid for rebroadcasts, and repeats, this is necessary. Systems should be put in place to record usage.</li> </ul>



## General Comments

Stakeholder	Issue in the Submission	Dti Response
▪ RISA	<ul style="list-style-type: none"><li>▪ Recommends that section 3A (3)(c ) should be deleted. Alternatively, this section should be amended</li><li>▪ Recommends that SECTION 8a(1) should be deleted or alternatively amended to permit a performer to be remunerated by way of a single payment for a performance in an audio-visual fixation of less than ten minutes duration instead of a royalty</li><li>▪ Recommends that sections 8D and 3A(3)(a) of the PPAB should be removed.</li><li>▪ Recommends that section 3A(3)(c) should be deleted from the PPAB to prevent any constitutional vagueness in the Bill</li><li>▪ Recommends that section 3A(3)(c) should be deleted from the PPAB to prevent arbitrary deprivation of property.</li><li>▪ Section 8D (3) should be deleted from the PPAB.</li><li>▪ Section 8(2)(f) should be deleted.</li></ul>	<ul style="list-style-type: none"><li>▪ The sections suggested to be removed are core to the rights of the performers. They were deliberated at length at the PC. Removing them will disadvantage the performers. The amendments are some of the core proposals to ensure performer's protection and access to economic rights.</li></ul>



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## Conclusion

- The Select Committee on Trade and International Relations to note the public submissions and the responses from **the dti**.



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**Thank You**