



6 February 2017

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: ahermans@parliament.gov.za; dwoodington@parliament.gov.za.

Dear Ms Fubbs

PERFORMERS PROTECTION AMENDMENT BILL, NO. 24 OF 2016: Submission of Comments by the Publishers Association of South Africa, PASA

In response to your Committee's invitation to stakeholders to make written submissions in respect of the Performers' Protection Amendment Bill, No 24 of 2016, the Publishers Association of South Africa, PASA, herewith submits its comments and also requests to be heard at the public hearings on 24 February.

PASA is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the field of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. More information can be found on PASA's website: www.publishsa.co.za.

Our submission is supported by DALRO, the copyright management organisation for the publishing industry, and a letter of support from DALRO will be appended to this submission. DALRO similarly request the opportunity to be heard at the public hearings.

As an association representing publishers, our interest in the Bill is largely limited to items which we expect will have equivalents in the Copyright Amendment Bill, once it is introduced.

In this submission, we therefore only focus on the following topics, recognising that other stakeholders will comment more comprehensively:

1. The need for South Africa to become a party to international treaties on copyright and, by extension, performers' rights
2. Strengthening the rights of authors and publishers and, by extension, performers, in accordance with international norms
3. Miscellaneous points on the conceptualisation and drafting of the Bill

We note that there are a number of provisions in this Bill which cross-refer to the Copyright Act, 1978, as to be amended by the new Copyright Amendment Bill, but that, at the time of writing, the Copyright Amendment Bill had not yet been introduced to Parliament. Both this Bill and the to-be introduced Bill have their origin in the draft Copyright Amendment Bill, 2015, on which we have already commented. A copy of that submission is attached for ease of reference.

Although we welcome the opportunity to comment on the Performers Protection Amendment Bill, we observe that it will not be possible to debate the latter Bill exhaustively until the Copyright Amendment Bill is tabled in Parliament.

The topics listed above are dealt with in greater detail below.

1. The need for South Africa to become a party to international treaties on copyright and, by extension, performers' rights

We note that the new rights to be granted to performers accord with the corresponding provisions of the WIPO Performances and Phonograms of 1996 (WPPT; which South Africa has signed but not yet ratified) and the Beijing Treaty on Audiovisual Performances (the Beijing Treaty, which has been signed by a number of countries but which is not yet in force), and that the existing Performers Protection Act, 1967, was itself based on the terms of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, to which South Africa has not acceded.

Officials of the Department of Trade & Industry have advised PASA's representatives at various meetings that the Government is prepared to move forward on accession to the international treaties which, in the case of copyright, would include the WIPO Copyright Treaty (which South Africa signed in 1997, but has not yet ratified). PASA and its members would therefore welcome a definitive statement from the Government whether it is the intention that South Africa accede to these Treaties or any of them.

South Africa should ratify and implement the Treaties mentioned above so that South African copyright holders and performers can benefit from national treatment in other Treaty countries by the exclusive right of communication of their works to the public and, in the case of copyright owners, the exclusive right of distribution, i.e. the making available to the public of the original and copies of their works through sale or other transfer of ownership.¹

Ratification would require South Africa to update its own copyright legislation to import these rights. The draft Copyright Amendment Bill, 2015, already provided for the addition of the right of communication to the public, and, in our submission in 2015, we pointed to the necessary consequential changes to the Copyright Act, 1978, that still had to be made and stated that the right of distribution should follow.

Ratification and implementation of the above-mentioned Treaties would also bring legal recognition to technological protection measures (TPMs) and rights management information and the ability for South African rightsholders, including performers, to have the same rights recognised subject to the principles of national treatment in other Treaty countries.

In conclusion, PASA would welcome South Africa's accession to WPPT and the Beijing Treaty (once the latter comes into force), but the Bill needs to be reworked substantially to make this possible. Accession to these treaties would give South African performers the benefit of national treatment of their rights in the other respective convention countries.

2. Strengthening the rights of authors and publishers and, by extension, performers, in accordance with international norms

South Africa should aspire to a world-class Performers Protection Act that is consistent with the Beijing Treaty and WPPT. From individual discussions with officials of the Department of Trade & Industry, we understand that they have set this goal for themselves. However, unless the Bill is redrafted, it will fall short of this goal.

Duplication of rights in audiovisual fixations

Different rights for the same fixations are duplicated: The conceptualisation of the Bill by specifying exclusive rights - which have their source in Articles 6-11 of the Beijing Treaty relating to rights in audiovisual fixations - in a new section 3(4) and then specifying parallel

¹ We understand that there may be one reservation to national treatment, which is in relation to "needletime" rights in Section 9A of the Copyright Act and Section 5(1)(b) of the Performers Protection Act, where South Africa may wish to consider a regime of reciprocity instead.

rights for performers under the heading of the existing ‘right to prohibit’ - introduced by the term “No person shall ...” - in relation to audiovisual fixations of their work in the amended section 5, amount to a duplication of different rights for the same work, which is not what is intended by the Beijing Treaty

Section 3 of the Act is no more than an introduction to the rights, which are then detailed in Section 5. Attention must be given how these rights are cast in a reworking of the Bill.

In order to meet the standards set by the Beijing Treaty, we suggest that:

- the treatment of the different kinds of rights in new Section 3(4) and in Section 5 of the Act (as to be amended in terms of clause 4 of the Bill) be reviewed so that they are couched as true economic rights, in the sense of an exclusive right which can only be exercised by, or with the authority of, the performer (subject to the various procedures, deeming provisions and exceptions that the Act will contain);
- the kind of text set out in new Section 3(4) be used, since this text confers such exclusive rights, and that it not be attempted to amend the existing subsections of Section 5 of the Act to cater for audiovisual rights in the way that it has been done in the Bill;
- careful attention be given to correct cross-referencing and to avoid errors.²

Equitable remuneration

WPPT and the Beijing Treaty prescribe equitable remuneration for performers. However, the Bill does not follow international standards in order to achieve this goal in its reliance on:

- contract terms and remuneration prescribed by the Government in new Section 3A,
- prescribed remuneration in new Section 3B(2) – which, incidentally, does not meet the requirements of Article 15 of WPPT, which requires a “*single* equitable remuneration”, and
- an onerous prescribed procedure for obtaining rights set out in new Sections 5(1A)-(1D).

PASA has two fundamental objections to the policy of Government prescription underlying these procedures. First, they undermine, if not completely obviate, freedom of contract, to the detriment of both performers and producers, making it extremely difficult for producers to make investment decisions. Second, we are concerned about a one-size-fits-all approach to regulating, in such a prescriptive way, contracts between creative talent

² An example is the cross reference in Section 5(4)(a), as to be amended, to “fair equitable remuneration” in Section 5(1)(b), which has no provision for “fair equitable remuneration” in its to-be-amended form (nor was it intended to provide for “fair equitable remuneration” – see para 3 below.

(performers, authors, artists, composers, etc) and producers who would invest in their works (producers of performances, publishers, etc) across all copyright industries.

There is no indication that the impact of this prescriptive regulatory approach on the creative industries has been researched and whether any comparison has been made to successful and Treaty-compliant approaches in other countries – certainly the SEIAS assessment of the Bill makes no mention of such research.³

PASA suggests that the method for achieving the goal of equitable remuneration for performers should be entirely reconsidered.

Moral rights

Moral rights for performers are dealt with in new sections 3(2) and (3) (clause 2 of the Bill), following the wording of Article 5 of the Beijing Treaty. The introduction of moral rights for performers is welcomed, but we suggest that these would be better placed in a new section immediately after section 5 of the Act, with an appropriate cross-reference in section 3.

In relation to the introduction of moral rights for performers, we note two substantial departures from the wording of the Beijing Treaty:

- Firstly, these rights are expressed to exist “independently of a performer’s rights *after the transfer of those rights*” (our emphasis, (new subsection 3(2)), which we take to mean a reference to transfer of rights under the new section 3A (clause 3). Section 3A is unclear, even contradictory, and consideration should therefore be given in a reworking of the Bill to the corresponding text of the Beijing Treaty “*even if transferred*”.
- Second, the duration of the moral rights (new subsection 3(3)) incorporates by reference “other provisions of the Copyright Act.” Since performers’ rights are meant to last for a maximum of 50 years and since performers rights are not rights of copyright, it is not clear what is meant by this reference and, due to the uncertainty it could cause, this reference should be deleted.

3. Miscellaneous points on the conceptualisation and drafting of the Bill

a. *Consequential amendments to the Offences and Penalties provision of the Performers Protection Act*

The current list of offences in Section 9 only relates to Section 5 of the Act. Consequential amendments to Section 9 need to be made, following from the

³ Available at https://www.thedti.gov.za/parliament/2016/Performers_Protection_Amendment_Bill_SEIAS_Report.pdf. We would have expected that Part 7, from page 12 onwards, should have dealt with this.

introduction of exclusive rights in respect of electronic communications, as well as offences following from the infringement of the provisions relating to the protection of technological protection measures and rights management information.

- b. The Performers Protection Act should have its own exceptions and its own provisions relating to technological protection measures and rights management information, and not be dependent on the terms of the Copyright Act*

We submit that the simple incorporation by reference in new section 8(2)(f) (in clause 5(a) of the Bill) of all exceptions and all other allowable acts in relation to all kinds of copyright works (“for purposes which are acceptable and exempted in terms of any other provisions of the Copyright Act”) will create unnecessary uncertainty.

It would be better to identify exceptions and permissible acts by reference to the need for such acts to qualify for being the subject of exceptions and to add them to Section 8(2). However, both the Memorandum and the SEIAS assessment are silent on identifying such needs.

We also propose that the Act have its own provisions relating to the protection of technological protection measures and rights management information. For this purpose, one could consider incorporating text allowed by WPPT and the Beijing Treaty for new sections 8A and 8B, such as along the lines set out in the appendix to this letter.

- c. The relation between performers rights and published works*

The Act was already not entirely clear about the relationship between performers’ rights and copyright in copyright works. Some guidance is given in Section 2 of the Act, to the effect that performers’ rights do not impact on the exclusive rights under copyright, which we propose be expanded to all types of copyright works, including published works.

- d. Incorrect adaptation of a provision intended to deal with needletime*

The Bill proposes to amend Section 5(1)(b) by including audiovisual fixations and by adding rights relating to the “sale” and “commercially rent[ing] out” of performances.

We submit that these amendments are based on a misconstruction of Section 5(1)(b). That subsection is the counterpart to the needletime rights in Section 9A of the Copyright Act, 1978, which in effect turn those rights insofar as they relate to certain specified uses of sound recordings (which would invariably be fixations on phonograms)

into remuneration rights for performers. It is therefore not appropriate to include audiovisual fixations here.

In addition to being inappropriate for the reasons set out above, we are concerned by the proposed addition of sub-paragraphs (iv) and (v) in Section 5(1)(b) and the cross-reference to them in Section 5(5) - with new rights to demand remuneration from the sale and rental of performances - since, first, it is not clear what is intended here and, second, they could impact on the exclusive rights of the copyright owner of copyright works containing these performances.

e. *The SEIAS Assessment for the Bill and the need for an independent and objective study to determine the impact of the Bill*

With respect, we find the SEIAS assessment⁴ disappointing, with no attempt seeming to have been made to research any of the policies and procedures underlying the Bill. There are indications in the document itself that the persons who carried out the SEIAS assessment did not even read the Bill.⁵ There is no enumeration of the consultations carried out, and even the underlying reason for the Bill itself is given in the vaguest and generic terms (“Local performers and composers have voiced their dissatisfaction with the current legislation in that it has not offered them adequate protection.”) Here we would have expected a reference to the *Copyright Review Commission* chaired by Mr Justice Farlam, the findings and recommendations of the Commission as set out in its 2011 report⁶ and how the Bill meets those findings and recommendations.

The SEIAS assessment makes the unsupported statement⁷ that, “Incorporation of the fair use provision will afford the public access to protected performances for fair use and dealings such as education, reporting of current events, personal use, research, etc.” Not only does the Bill not explicitly deal with fair use or fair dealing, but the wealth of evidence relating to the impact of importing fair use from the copyright law of the United States, and introducing a fair dealing exception for education on the creative industries (including publishing) has clearly not been considered.⁸ The topics of ‘fair use’ and ‘fair

⁴ At https://www.thedti.gov.za/parliament/2016/Performers_Protection_Amendment_Bill_SEIAS_Report.pdf.

⁵ Page 12 of the SEIAS assessment contains the statement “A performer and the producer of a performance (including phonograms) shall enjoy the right to a *single* equitable remuneration for the direct or indirect use of the performance published for commercial purposes for broadcasting or for any communication to the public, which remuneration *shall be shared equally between the producer on the one hand, who shall receive half thereof, and a performer on the other, who shall receive the other half*, as provided for in this Act.” Wording reproduced in italics do not appear in the Act.

⁶ *Copyright Review Commission* report at <http://www.gov.za/documents/copyright-review-commission-report-2011>.

⁷ On page 5 of the SEIAS assessment.

⁸ See for instance the impact studies conducted by PricewaterhouseCoopers on the consequences of the introduction of fair dealing for education in Canada at http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf, and on the

dealing for education' will be raised when considering the Copyright Amendment Bill, since these are typically defences to the infringement of copyright, not performers' rights.

We are deeply concerned that the undertaking given by the Department of Trade & Industry at the meeting of stakeholders (including PASA) at the Birchwood Hotel in August 2015, at the end of the consultation period of the draft Copyright Amendment Bill, 2015, to commission an independent economic impact study was not followed through.⁹

The SEAIS assessment is, regrettably, no substitute for the promised study and, we submit, not a document that can be relied on in evaluating the impact of the Bill once passed into law.

PASA is ready to engage in the goal of improving South Africa's legislation in the fields of copyright and performers rights, and looks forward to being able to participate in the public hearings.

Yours sincerely



Mpuka Radinku
Executive Director

Enclosure: PASA submission on the draft Copyright Amendment Bill, 2015, dated 16 September 2015

proposed introduction of US-style 'fair use' in Australia at http://www.pc.gov.au/data/assets/pdf_file/0010/195850/sub133-intellectual-property-attachment.pdf.

⁹ A tender request was put out by the Department for such a study on 28 August 2015 – Government Tender Bulletin 2883, p123 for tender no dti-06/15-16 - but the tender was never awarded.

APPENDIX: SUGGESTED PROVISIONS FOR THE PROTECTION OF TECHNOLOGICAL PROTECTION MEASURES AND RIGHTS MANAGEMENT INFORMATION

Prohibited conduct in respect of technological protection measure

8A. (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale, a technological protection measure circumvention device, if such a person knows or has reason to believe that it will or is likely to be used to infringe a right granted to a performer in terms of this Act in respect of a fixation of his or her performance to which a technological protection measure has been applied by the performer or the producer.

(2) No person may provide a service to another person if -

(a) such person intends the service to enable or assist another person to circumvent an effective technological protection measure; and

(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe the rights granted to a performer in terms of this Act in a fixation to which a technological protection measure has been applied by the performer or the producer.

(3) No person may publish information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic.

(4) No person may, during the subsistence of the rights granted to a performer in respect of a fixed performance and without authority, knowingly or having reasonable grounds to know, circumvent an effective technological protection measure applied by the performer or producer to such fixation.

(5) A technological protection measure shall be deemed to be effective where the use of the work is controlled by the performer or the producer or their assignees or successors-in-title through the application of an access control or protection process, such as, encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

(6) The provisions of this section 8A are without prejudice to the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002).

Prohibited conduct in respect of rights management information

8B. (1) No person may knowingly perform any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right granted to a performer in terms of this Act:

(a) to remove or alter any electronic rights management information without authority;

(b) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances or copies of fixed performances or phonograms or audiovisual fixations knowing that electronic rights management information has been removed or altered without authority.

(2) In this Act, "rights management information" means information which identifies the performer, the performance of the performer, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in a phonogram or an audiovisual fixation.