

South African Copyright Amendment Bill and Performers' Protection Bill:

These Bills completely ignore the economics of the entertainment industries and will severely reduce investment and exports to SA, thereby harming the very people they are intended to protect.

Urgent: both have been adopted by the lower chamber of parliament in December 2018, and are now for discussion & vote in the upper chamber (National Council of Provinces).

The government is pushing for adoption of both bills before the elections, due in May.

Procedure:

- Both bills were proposed by the government (DTI); both have been adopted by the National Assembly; now pending before the National Council of Provinces (NCOP)
- Both are "Ordinary Bills" that do not affect the provinces and thus are sent to the National Council of Provinces (NCOP) for concurrence. Delegates in the NCOP vote individually and the Bill must be passed by a majority of delegates present.
- If the NCOP rejects a Bill or proposes its own amendments, the Bill is returned to the NA which will pass the Bill with or without taking into account the NCOP amendments or it may decide not to proceed with the Bill.
- The NCOP's role in Bills that do not affect the provinces is a limited one. NCOP can:
 - 1) Pass the bills without amendments, then they go to the President for assent and signature and become law, or
 - 2) Delay a Section 75 Bill – through hearings or through suggesting amendments (which returns the bill to the NA for reconsideration) – but it cannot prevent it from being passed: the NA can pass the bills with or without the NCOP amendments (or reject the bills)
- Key person at the NCOP: [REDACTED]. The bills will be considered by his committee before the plenary vote:
 - Feb 13th: Briefing of the Committee on Trade & IR by the DTI
 - **Feb 27th: Committee to consider and deliberate on submissions**
 - March 6th: DTI to respond to submissions
 - **March 27th: NCOP to consider the bills and vote in the plenary**

Most problematic provisions in the Copyright Bill:

1. **Sharing of royalties with non-featured performers from any exploitation of the exclusive rights in AV works (incl. music videos) listed under Section 8 of the Copyright Amendment Bill (Section 8A(1) and (3), CAB)** ⇔ interference with contracts and industry economics as

non-featured performers are typically paid on a lump sum basis, also would make most performers worse off as they would have to wait till the recording turns a profit before getting paid. These business realities are at the heart of the production process; freedom of contract means that the parties closest to the case can make their own decision. The effect in practice will be use of fewer background performers, e.g. dancers or session musicians, who are ordinarily paid up front on a one-off basis.

2. **All assignments of copyright in AV works are subject to approval of all performers even when they had assigned their rights (Section 8A(2)(b), CAB):** interference with contracts and impossible in practice, especially when there is a plurality of performers.
3. **Ministerial powers to set “standard and compulsory contractual terms”** (Section 39) in agreements “to be entered in terms of this Act” and ministerial powers to proscribe “royalty rates or tariffs for various forms of use” – an unjustifiable interference into private contractual relations and a ‘command economy’ approach to the entertainment sector
4. **Prohibition on contractual override of any of the provisions in the Act** (Section 39B(1), CAB) ⇔ severe limitation on the freedom of contract
5. **Fair use exception** (Section 12A(a), CAB): an open-ended list of purposes for which the use of a work/performance does not infringe copyright which
6. Other issues abound (see table), some incompatible with the WIPO internet treaties which SA has stated it intends to ratify (e.g. provisions on TPMs are open to abuse).

Most problematic provisions in the Performers’ Protection Bill:

1. **Transfer of rights may be subject to standard and compulsory contract terms as may be proscribed by the minister** (Section 3A(3)(a))
2. **Absolute limitation on the term of assignments of performers’ rights in a sound recording to 25 years** (Section 3A(3)(c):
 - Unwaivable rule and the parties cannot agree otherwise by contract ⇔ substitutes a blunt 25-year rule for the parties’ decision and any review/royalty adjustment clauses that might be agreed by contract; major limitation on the parties’ autonomy and their freedom of contract;
 - the effect will be that recordings cease to be exploitable after 25 years since it would be next to impossible to locate all session musicians, dancers etc and secure extensions to the assignments. Also, performers and producers will stop getting paid and the recordings will go out of (lawful) circulation.
 - Interferes with the economic enjoyment of producers’ own rights in sound recordings (which lasts longer than 25 years and thus with the TRIPS minimum of 50 years)
3. **Retrospective application** of Section 8A of CAB (8A(5));
4. Other issues abound (see table); incl. WPPT/WCT inconsistent definitions; no reflection of Agreed Statement to Art.2(b) WPPT)