PERFORMERS PROTECTION AMENDMENT BILL [B24-2016]
COPYRIGHT AMENDMENT BILL [B13B-2017]

SUBMISSION
on behalf of

THE PERFORMERS' CHAMBER OF THE SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION (SAMPRA)

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16 July 2021

The Honourable Mr. Duma Nkosi

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

Dear Mr. Nkosi,

COMMENTS FOCUSING ON PROVISIONS HAVING A NEGATIVE IMPACT ON THE RIGHTS OF PERFORMER MEMBERS OF SAMPRA

1. INTRODUCTION

The South African Music Performance Rights Association ("SAMPRA") is a non-profit company accredited to administer the **rights of copyright owners and performers, jointly,** under section 9(c), (d), and (e) of the Copyright Act No 98 of 1978, (as amended) (hereinafter the "CA"), and section 5(1)(b) of the Performers' Protection Act No 11 of 1967, (as amended) (hereinafter the "PPA"). SAMPRA was accredited from June 2007 to November 2014 to administer rights under the CA on behalf of Recording Industry South Africa ("RISA") as an organisation representing 50 or more copyright owners entitled to receive payment of royalties for the use of recordings in terms of the Section 9 and 9A of the Copyright Act.

In November 2014, SAMPRA was **accredited to administer rights of copyrights owners and performers, jointly**, under the CA and the PPA. SAMPRA's administration of rights is limited to audio recordings (sound recordings) and the performances embodied therein. SAMPRA has continued to administer copyright owners' and performers' rights in sound recordings as a **joint collecting society** and its current accreditation was issued on 15 June 2019. In view of SAMPRA's status as a joint collecting society of copyright owners and performers, SAMPRA is obliged, in presenting submissions to the Committee to consider the rights and interests of both performers and copyright owners.

In this regard the interests of copyright owners will be considered in the submission made to the Portfolio Committee by RiSA, which is an association of the recording companies / copyright owner members of SAMPRA. This submission is made on behalf of the performer members of SAMPRA and was considered by the Performers' Chamber of SAMPRA. SAMPRA will itself also make its own submission, focussed on its operations as a collecting society.

2. **COMMENTS IN RELATION TO THE PERFORMERS PROTECTION AMENDMENT BILL (PPAB)**

The comments made herein focus mainly on the provisions of the PPAB, in view of their direct impact on the rights of performers. However, since the PPA is connected to the CA, reference will also be made to the amendments proposed in the Copyright Amendment Bill ("CAB") to the extent that those have an impact on the rights and interests of performers. The comments made herein relate to particular provisions of the PPAB and relate to those provisions that have an impact on the constitutionality of the PPAB, compliance with international treaties and the proposed introduction of new exceptions and limitations.

The comments made herein are premised on the issues of constitutionality, compliance with international treaty obligations and the proper introduction of exceptions to prevent the arbitrary deprivation of property raised in the President's letter to the Speaker of Parliament of 16 June 2020. It is further premised on the following related considerations:

1. *The rights contemplated in the PPA and the CAB are rights protected or protectable under the Constitution;*
2. *The rights contemplated in the PPA and the CAB are rights premised on international law obligations;*
3. *The introduction of exceptions and limitations to the rights must comply with international law requirements, in particular the requirement in terms of the three-step test; and*
4. *Legislation must be constitutionally valid and must be capable of giving effect to the rights guaranteed in the Constitution.*

It is important in this regard to observe that the Constitutional Court has held that legislation may be constitutionally invalid if *(i)* its provisions are in conflict with a right in the Bill of Rights and (ii) it was adopted in a manner that is inconsistent with the provisions of the

Constitution.[1] We contend that both conditions exist in respect of the current bills. The rights are rights of property in terms of section 25 of the Constitution. Furthermore, particularly with regard to the introduction of expansive exceptions, the process followed was faulty in that it did not ensure adherence to the three-step test which is mandated under international treaty law.[2]

In relation to this it is important to observe that the Constitutional issues do not only arise from the fact that the rights dealt with in the two bills are rights protected under the Constitution[3] but also on the basis that the Constitution requires adherence to the provisions of international treaties that South Africa is a party to (section 39(1)(b)) of the Constitution). Furthermore, section 233 of the Constitution provides that, when interpreting legislation, courts: "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

It is common cause that South Africa has not acceded to any of the treaties that guarantee protection to neighbouring rights (in this case, the rights of performers), namely the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (hereinafter the Rome Convention); the WIPO Performances and Phonograms Treaty, 1996 (hereinafter the WPPT) and the Beijing Treaty on Audiovisual Performances, 2012 (hereinafter the Beijing Treaty). It is nevertheless important to ensure that South African legislation conforms to the principles enunciated in those treaties, considering also that South Africa has signalled an intention to join those treaties.

[1] *Doctors for Life International v The Speaker of the National Assembly et al* [2006] ZACC 11 at para 16.
[2] The three-step test enjoins member states to ensure that exceptions are only introduced (1) in certain limited cases; (2) that do not conflict with the normal exploitation of the work, and (3) that do not prejudice the legitimate expectations of the rights-holder.
[3] Constitution of the Republic of South Africa, 1996.

This need is further demonstrated by the fact that in article 1(3) of the Agreement on Trade-Related Aspects of Intellectual Property (hereinafter the TRIPs Agreement), of which South Africa is a signatory, the criteria for eligibility for protection provided for in the Rome Convention is clearly indicated as the basis for the protection of "related rights" (including the rights of performers) in treaty.

The comments made hereunder aim to ensure that the proposed amendments are capable of ensuring that the Constitutionally-guaranteed rights of performers can be given effect to without problems, including problems arising from interpretational uncertainties.[4] This thus falls within the ambit of the concerns raised by the President as well as the need to ensure a Constitutionally-valid law.

Preamble

The inclusion of the provisions of Act 28 of 2013 ("2013 Act")[5] in the bills, including definitions, is problematic, because the 2013 Act has not yet been passed into law and thus could not have amended the Performers Protection Act 11 of 1967 ("PPA"). It is acknowledged that clause 10 incorporates transitional provisions that seek to address this situation; the problem however is deeper in that what the bills do is that the arrangement of the sections in the bills is based on the assumption that the additional sections introduced to the bills by the 2013 Act are already in force.

Clause 1 – proposed amendment to section 1

Misplaced / inconsistent definitions

[4] In this regard the Constitutional Court in *Doctors for Life International v The Speaker of the National Assembly et al* [2006] ZACC 11 at para 115 held that the process of public participation in legislative processes is "calculated to produce laws that are likely to be widely accepted *and effective* in practice". Emphasis added. If laws are not aligned to the Constitution and international law and are prone to giving rise to interpretational difficulties then they cannot be said to be "effective".

[5] Intellectual Property Amendment Act 28 of 2013, passed by the National Assembly and signed by the President but awaiting a proclamation by the President in the National Gazette before it can come into force.

There is no consistency in the definition of “audiovisual work” with that in the CA, as no reference is made to “cinematograph works” and in fact the definition of “cinematograph works” in the PPAB is deleted (while not deleted in the CAB). We recommend that the definition be aligned to that in the CA.

Definition of “broadcast”

Since performances are embodied in works that are protected under the CA, namely sound recordings and audivisual works, it is important for the definition of “broadcast” in the PPAB to be consistent with the definition of “broadcast” in the CA. This is in particular because a specific jurisprudence has developed around the meaning of “broadcast” and it would therefore be necessary to ensure consistency in this regard. The definition should also be aligned to the definition in international treaties (e.g. the WPPT) and must therefore not make reference to transmission “by wire” as this would conflict with the provisions of those treaties.

Definition of “communication to the public”

The definition of “communication to the public” is a faulty in the following sense:

- A performance only benefits from the definition if the performance relates to an audiovisual fixation. It does not benefit from the definition if this relates to a sound recording. Instead “communication to the public” is defined in respect of a sound recording (instead of in respect of a performance). But this is remiss because the PPA is not about sound recordings. Sound recordings are protected under the Copyright Act and a provision in relation to communication to the public in respect of sound recordings is provided for in the CAB (clause 10 of the CAB). It is wrong to limit the scope of a performance in this regard. It is understood that the amendments seek to introduce provisions relating to the Beijing Treaty on Audiovisual Performances of 2012. But this should not disregard the fact that the

PPA is also concerned with performances in respect of sound recordings (and not about the protection of sound recordings *per se*).

- Accordingly we propose a revision of the definition of "communication to the public" in the following manner:

' "Communication to the public" —

(a) 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

(b) 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.'

Definition of "fixation"

There is no justification for the deletion of the definition of "fixation" as this provided certainty and is a critical aspect of the definition of a performance. The WPPT contains a definition of "fixation" and we recommend that the definition of "fixation" should thus be retained.

Definition of "Performance"

The definition of "performance" is problematic because it is taken from the 2013 Act (including the deletion of a part of that definition, though that Act is not in force yet). The definition, which may arguably be in order for that Act, which aims to protect traditional works and expressions, is problematic for purposes of the PPA, in particular because it excludes "such performance by the use of a phonogram, a radio, television, diffusion receiver, by the exhibition of a [cinematograph film] audiovisual fixation, by the use of a

record, broadcasting, rebroadcasting or transmission in a diffusion service, and ‘‘perform’’ has a corresponding meaning”. **This is problematic in that those usages are critical for a performance and thus their omission jexcludes important modes of performance and income for performers.**

Definition of “Producer”

Definition of “producer” should add “or the entity which” after the phrase “the person who”, to align fully with the definition used in the WPPT.

Clause 2, 3 and 4

Rental rights versus Exhaustion of Rights

The proposed section 3(4)(e) in clause 2 of the Bill (as well as the proposed sections 5(1)(a)(v) and 5(1)(b)(v)[6] in clause 4 of the Bill) are welcome insertions in the PPA. However, they are in loggerheads with the proposed section 12B(6) in clause 13 of the CAB, which introduces the doctrine of the international exhaustion (so-called first-sale doctrine) of copyright for the first time in South African copyright law. This doctrine also covers the rental of works and in fact virtually any other usages. It is a controversial provision in the CAB. This doctrine also affects sound recordings and audiovisual works / fixations in which performances are embodied. Because sound recordings and audiovisual works are affected by the provisions of the proposed section 12B(6) of the CAB, it will be impossible to enforce the right in relation to rental provided to performers, because such right will be exhausted in respect of sound recordings and audiovisual works under the proposed section 12B(6) of the CAB – considering that performances are embodied in such works.

[6] Although the placing of the provision under the proposed section 5(1)(b)(v) under section 5(1)(b) – which was originally the needle-time provision in the PPA – is itself problematic.

We of course see the solution not in taking away the proposed right of rental from performers, but in ensuring that the same right is given in respect of sound recordings and audiovisual works. We accordingly recommend a proper consideration of the provisions of section 12B(6) in clause 13 of the CAB, to ensure a proper introduction of this exception based on the three-step test, if so required.

Right of Authorisation versus Equitable Remuneration right

- 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 (what is currently “needle-time rights” in respect of sound recordings). The use of the phrase in those sections “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 authorisation 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. However the Beijing Treaty also provides for the possibility of the use of exclusive rights instead of a system of equitable remuneration (right of authorisation v right to equitable remuneration).

- The legislation cannot create a “royalties or equitable remuneration” regime, as it will create uncertainty. In respect of performances embodied in sound recordings, it is clear from the provisions of the Rome Convention and the WPPT that the system has to be that of equitable remuneration. In respect of performances embodied in audiovisual works it can either be a royalties system or an equitable remuneration system. The Act must be clear as to which system will apply and not use an “either or” provision, to prevent potential

disputes. It is critical to do this to also create certainty as to the continuation of the current needle-time rights system.

- The need to make this distinction clear is also borne out of the differing basis for the use of a normal authorisation system versus the use of an equitable remuneration system. In an equitable remuneration system uses are not prohibited, as long as equitable remuneration is paid; but in an authorisation system, each use must essentially be authorised prior to use.[7] This distinction is clear in article 11 of the Beijing Treaty, which provides the following:

> "1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.
> (2) Contracting Parties may in a notification deposited with the Director General of WIPO declare that, instead of the right of authorization provided for in paragraph (1), they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration."

Transfer of Rights and Standard Contractual terms

The proposed section 3A (as well as those of clause 6 of the Bill) may give rise to issues of contractual freedom which may be contested in court, to the detriment of performers who often do not have the means to engage in protracted litigation. It may also deter record companies from investing in performers. In particular the proposed "compulsory and standard contractual terms" should not be imposed on the industry by the Minister but must be based on a system of negotiation such as the negotiated music industry contracts through the American Federation of Musicians (AFM) and SAG-AFTRA[8] in the USA.

[7] In practice what is paid to the rights-holder in each system is invariably called a "royalty", but the distinction between whether the use is authorised or not is critical.
[8] The Screen Actors Guild and the American Federation of Television and Radio Artists.

Government should promote such arrangements and empower performers in this regard. The Minister may only intervene as a last resort, if the parties are not able to reach agreement, as a way of mediating the dispute.

Sharing of Royalties

- The best place for inserting the provisions provided for in the proposed section 3B(2) is as an amendment of the proviso to the current section 5(4) of the PPA as this clearly relates to the needle-time and is based, with some modifications, on the provisions of article 12 of the Rome Convention and article 15(2) of the WPPT. For this reason the proposed insertion in the amendment to section 5(4) of the PPA (in clause 4(f) of the Bill), of rights other than those provided for in section 5(1)(b) of the PPA (i.e. the needle-time rights, extended also in respect of audiovisual performances) is problematic. To illustrate this, section 5(5) of the PPA (even as modified by the proposed amendments in clause 4(g) of the PPB) cross-reference to section 9A of the Copyright Act. Section 9A of the latter Act however is only concerned with needle-time rights. It is submitted that the proposed section 8A introduced in the CAB (which is also cross-referenced in the proposed amendments to section 5(5) of the PPA) should also be limited to the rights of broadcasting, transmission in a diffusion service and communication to the public as contemplated in article 11(2) of the Beijing Treaty.

- Furthermore, based on the agreement / consensus reached by performers and the recording industry, the right to share equal remuneration should not be “subject to an agreement to the contrary” but should be guaranteed, to avoid future disputes.

- With the proposed provision, the proposed amendment to section 5(4)(a) of the PPA (in clause 4) is superfluous and confusing, as it adds rights other than “needle-time rights” to this regime of equitable remuneration (e.g. sale, commercial renting and distribution) – thus relegating these rights to remuneration rather than exclusive rights. If the intention is to regulate the payment of royalties other than those relating to the “equitable remuneration

system" such as the needle-time rights system, then this should be dealt with through a separate paragraph in the following manner:

> *"In respect of all other usages relating to a performance, other than those provided for in paragraph section 5(1)(b), the performer shall receive a royalty in the manner agreed upon between the performer and the producer of the audiovisual fixation or sound recording."*

Misplaced provision – fixed performance versus unfixed performance

The insertion of the phrase "or where that performance is fixed, the applicable audiovisual fixation or sound recording" in the proposed section 5(1)(a)(i) of the Bill misses the point in that what is at issue here is the *unfixed performance*. The fixed performance is dealt with in the next subparagraph (ii). This confusion of matters in the articulation of the provisions will create confusion in the practical application of the Act. The provision should mirror article 7(1)(a) of the Rome Convention and in particular article 6(i) of the WPPT.

A poorly-defined Remuneration Right regime

- The current PPA makes provision for a clearly-defined remuneration right ("needle-time" right) in respect of a fixated performance, in section 5(1)(b). The Bill creates confusion in this regard (clause 4) by:

(i) the use of the phrase "royalty or equitable remuneration", thus creating uncertainty as to what is contemplated, as indicated above;

(ii) The addition of subparagraphs (iv) and (v) in the section, which relate to the selling and rental of copies – usages that relate to exclusive rights and are not connected to the equitable remuneration regime.

- As indicated above, the essence of the equitable remuneration regime is that no authorisation is required for usages, as long as there is a payment of equitable

remuneration (which is, in practice, termed a "royalty"). Apart from this regime, usages in respect of all other rights must be specifically authorised.[9]

- In the proposed amendment to section 5(1)(b), rights that do not form part of the equitable remuneration regime – namely the right of sale of copies and the right of rental – are apparently also subjected to an equitable remuneration regime. From a proper understanding of the nature of remuneration rights, this would mean that authorisation is not required for the sale and rental of copies of fixated performances – which would be against the provisions of section 9(a) and (b) of the Copyright Act, which gives an exclusive right to the owner of copyright in a sound recording to authorise such usages.

- The proposal is that the proposed subparagraphs (iv) and (v) in respect of section 5(1)(b) of the Act must be removed, as these rights do not belong to a remuneration right regime under international treaty law. The rights provided for in those subparagraphs (i.e. the right to sell the original or a copy of the audiovisual fixation or sound recording of the performance; and the right to commercially rent out the original or a copy of the audiovisual fixation or sound recording of the performance) should instead be provided for under section 5(1)(a) of the Act as subparagraphs (iv) and (v) in that section. As indicated above, both under the Rome Convention, the WPPT and the Beijing treaty, it is only the broadcasting and the communication to the public rights (in essence also including the public performance right) that can be subjected to an equitable remuneration regime.

Cumbersome and Impracticable provisions relating to Usage Notification

- The proposed subsection (1A) and (1B) under section 5 of the PPA introduce provisions in relation to the use of performances that are best suited to a compulsory licensing regime and not suited to a negotiated licensing regime. The provisions are also not practicable and would complicate rather than simplify operations in the music and audiovisual

[9] Of course the Bill creates further confusion in this regard by apparently subjecting all rights – including those that are subject to a remuneration regime – to the requirement for prior authorisation of use, as contemplated in the proposed subsections 1A and 1B under section 5(1) of the Bill, after section 5(1)(b).

industries. It will create a cumbersome system which will deter investment in the industry as normal transactions in those industries – which often must be finalised quickly through the use of “release forms” – in line with international practice, will take ages to finalise, frustrating the conclusion of transactions. For example, if a music video producer wants to hire “extras” for inclusion in the music video, they want a quick and economically-efficient process that will enable them to hire the extras without hassles and by using a simple release form. The process required in terms of the proposed subsection (1A) and (1B) is too cumbersome to make this possible.

- It needs to be understood that a large part of the transactions in the music and film industries is based on negotiated deals, based on mutually-agreed terms. Those transactions are also time-based in order to meet budgetary requirements. There are established norms of contract negotiations within the music and film industries – industries that are international in nature – that will be frustrated by the processes contemplated in subsection (1A) and (1B) of the PPB, making South Africa a less-attractive country for concluding entertainment business deals. The proposed changes will thus not aid the industry but negatively impact it.

- Such an arrangement would only work best in a compulsory licensing environment such as the one provided for in section 14 of the Copyright Act (Act 98 of 1978). It would also not work in respect of the collective management of rights in sound recordings and audio-visual works because the changes envisage a transactional licensing regime (i.e. a regime where licensing is done on a work-by-work basis) while the system of collective management is based on a blanket licensing system (where all works controlled by the collecting society, sometimes totalling in the millions, are licensed through one “blanket licence”). In a blanket licensing system therefore work-by-work licensing is ruled out.

- The conclusion therefore is that the regime introduced through the proposed subsection (1A) and (1B) will hinder the progress of the recording and film industries, rather than

support them. It will delay the conclusion of transactions in a fast-paced environment where the majority of deals are based on negotiated transactions. It would also not work in cases where collective management of rights is permissible (such as the needle-time rights system), as this system uses a better system of licensing through the use of blanket licences.

- A more useful provision in relation to this would be a provision that compels a user *of works based on a blanket licence issued by a collecting society*, to report to the collecting society on the usage of such works (rather than requiring reporting prior to use), as contemplated in the proposed section 9A(1)*(aA)* in clause 11 of the CAB.

Clauses 5 and 7

Expansive Exceptions

- The proposed amendment to section 8 of the PPA, in particular in clause 5(f) of the Bill which provides that a performance, an audiovisual fixation or sound recording of a performance or a reproduction of such may be used without the consent required by section 5, if it is for purposes which are regarded as exceptions in terms of the Copyright Act, is as much concerning as the concerns raised in respect of the CAB regarding the proposed expansive exceptions regime in that legislation.

- New exceptions can only be justified if they conform to the three-step test applicable under the Copyright Act, as contemplated in article 15(2) of the Rome Convention read together with article 14(6) of the TRIPs Agreement. Only if a social and economic impact assessment is conducted in respect of each proposed exception may it be determined whether or not the proposed exception conforms to the three-step test. Without doing this the introduction of such exceptions will be in conflict with international law and thus the Constitution, which enjoins compliance with international law, and this would also amount to an arbitrary deprivation of property.

- In particular the proposed introduction of a "fair use" rather than "fair dealing" general exception in the CAB (the proposed section 12A in clause 13 of the CAB), with the addition of the phrase "such as" which was not part of the original submission to the Portfolio Committee and was thus not subjected to debate, would fall afoul of Constitutional requirements and compliance with international law regarding the prerequisite for introducing exceptions and limitations (i.e. the requirement to use a three-step test). In this regard the observations of Sachs J in the *New Clicks* case,[10] namely the fact that the facilitation of public participation in legislative processes required of Parliament amounts to ensuring that "a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say", would have been defeated by the fact that such opportunity was not provided in respect of the revised fair use provision. The succinct observations of Ngcobo J hold true in this regard:

> "It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid."[11]

- Another matter relates to the proposed deletion of the provisions of section 8(3)(a) of the PPA in clause 5(b) of the PPB - namely, the *ephemeral use* provisions. This is problematic and unjustified. This will allow broadcasters to use recorded performances *ad infinitum* without the consent of the performer and / or payment of royalties, where the first broadcast was with the consent of the performer. If a cue is taken from the Canadian position,

[10] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC) at para 630, cited with approval by Ngcobo J in *Doctors for Life International v The Speaker of the National Assembly et al* [2006] ZACC 11 at para 125. As Ngcobo J reiterated in para 129, such reasonable opportunity must afford effective participation in the law-making process. Continuing the learned justice added (at para 129): "Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."

[11] Ngcobo J *id* at para 208.

ephemeral uses should be allowed only for a period of 30 days, after which the copies must be destroyed or only used after authorisation.[12]

- The proposed section 8F in clause 7 of the Bill is problematic as it defeats the purpose of the proposed section 8E, and also on the basis that the usages are allowed based on the expansive exceptions regime introduced in the CAB and the PPAB. Until the problem of the expansive exceptions regime has been adequately addressed, this proposed provision cannot be deemed to be justifiable.

Accession to International Treaties

In conclusion a note on the accession to international treaties is apposite. It is important, in relation to neighbouring rights, that South Africa accedes not only to the WPPT, which ensures protection in the digital environment, and the Beijing Treaty in respect of audiovisual performances, but that it also accedes to the Rome Convention. This is because the Rome Convention is the fountainhead of the rights of performers in international law. In this regard it is important to note that there are countries that have acceded to the Rome Convention that have not acceded to the WPPT. Since the protection of the recorded performances of South African performers in foreign countries is based on reciprocity,[13] the fact that South Africa has not acceded to any of the neighbouring rights treaties will continue to have a negative impact on the ability of South African performers to benefit from the economic exploitation of their recorded performances in foreign countries. It is thus critical that South Africa accedes to all the three treaties providing protection in respect of performers' rights.

[12] The current period for ephemeral uses is six months, which is better than the unlimited period contemplated in the proposed amendment.
[13] This is also the impact of the proviso to section 4 of the PPA.