

THE PERFORMERS PROTECTION AMENDMENT BILL

A Presentation by the South African Guild of Actors



We would like to take the time to thank this committee and industry stakeholders for allowing and providing the platform to potentially make meaningful strides in legislation for the South African Actor.

The South African Guild of Actors continues to work at promoting the rights of actors within the industry, making submissions to government departments in order to improve on those rights. It is our honor to speak on behalf of our membership base and by extension the professional working actor in this country.



Who we are

- The South African Guild of Actors (SAGA) is a non-profit organization (119-128 NPO) constituted on 23 July 2009.
- SAGA has been a member of the South African Screen Federation (SASFED) since 2009.
- SAGA is one of 68 countries elected as a member of the International Actors Federation (FIA) in 2012.

The right to collective bargaining:

- By virtue of the actor's status as an independent contractor in terms of labour law, he or she is denied the right of Collective Bargaining to participate in industry negotiations.
- In the absence of collective bargaining rights, actors are left clinging to opportunities to motivate for amendments in law to seek to recognise and protect their moral and economic rights.

The current Performers Protection Act

- A deficient act, drafted before the advent of the internet age, and even before the emergence of black and white television in South Africa, the question is not whether the Performers Protection Act needs amendment, but rather to what extent.



Speaking of thousands, instead of millions.

- While it is tempting to quantify our proposed amendments into millions of Rands on the bottom line of someone's financial statement, we urge you instead to think of the thousands of South African Actors, who over the course of a career spanning decades, have been denied basic statutory and contractual rights to earn a fair residual income based on the continuous exploitation of audio-visual performances.



The allocation & sharing of Rights

- Actors do not deny the rights of broadcasters and producers to exploit the commercial value of audio-visual production. In fact, actors support a vibrant value chain that produces audio-visual content and that delivers it to a competitive market - It is this process that generates additional work opportunities for actors!
- But we can not deny that actors have a vested interest in the commercial exploitation of their work

Contracts which deny actors moral and economic rights to earn a residual income

- With this in mind, we want to challenge the industry practice of producers and broadcasters presenting actors with contracts which deny them the moral and economic rights to earn a residual income from the commercial exploitation of their audio-visual work.



Context: How the actor earns an income

- Actors generate an income when they are contracted to deliver a performance in an audio-visual production. This is based off auditions where they are required to demonstrate their ability to perform the character they are asked to play.
- Well known actors may attend dozens of auditions a year, and possibly only landing two roles and thus only deriving an income from the days they are required to deliver their performance – their Performance Fee.
- An actor accepts this reality as part of the business, however, regardless of the body of work in the course of their career, their income will only ever be derived from those Performance Fees, while the production itself will continue to be licensed and broadcast into numerous territories around the world, in perpetuity, with the actors image used extensively to promote sales.

What does this mean?

- Even if the actor has accumulated hundreds of roles in Television or Film in the course of their career, they are still denied the rights to earn and participate in the economy in its fullest sense.
- So after 10, 15 or 20 years of work on a Television drama, sitcoms, soapies, movies, an actor still can not earn a cent from a residual income source – enough to persuade banking institutions or insurers that their earnings qualify them to become clients.

And so our ask:

- This committee has the power to achieve two things, which we ask:
 1. Deliver on the intention and purpose of the Performers Protection Act and;
 2. Through the revised Act, effect meaningful, structural transformation of the audio-visual sector that will, in effect, permit actors the right to earn a residual income based on their body of work



Who is to blame?

- It is not only the deficiencies of the current Act that leaves actors exposed to unfair exploitation. Since the advent of the audio-visual medium, the act itself has never been equipped to fulfil its intended purpose – to protect the rights of actors among other performers.
- In any other sectors where there is a deficiency in statute, stakeholders would refer to regulations within the act or to collective bargaining agreements that would establish the legal bases on which to apportion the rights and obligations which govern the sector.
- But as independent contractors, actors are not permitted the rights of collective bargaining to jointly establish sectoral norms and standards.

How has this failed?

- As a substitute for Regulations or Collective Bargaining agreements, the industry uses Standard Performance Contracts.
- Led by its dominant players, the Independent Production Sector has sought to embody in Standard Performance contracts its version of norms and standards that determine the relationships among contracting parties.
- Although SAGA continues to support the need for Standard Performance Contracts, this is dependent on that they are drafted in consultation with all industry stakeholders.
- These contracts need to be underpinned, balanced and contextualised by a revised Performers Protection Act amendment, in accordance with advances in the modern audio-visual industry and the constitution.

A change in the act means a change in contracts.

- The reality is that the statute has failed to establish and enforce an equitable balance of rights, obligations and interests – corporate stakeholders in the audio-visual sector continue to capitalise on their dominance at the expense of the rights of the actor.
- The deficiencies in the current act are alarming enough to motivate amendments which should in turn motivate reform with the standard performer contracts.

The “Standard” SABC contract.

- As a preamble, the SABC has its Standard Freelance Performer’s Agreement issued to every actor on an SABC drama, soapie or sitcom. Drafted through extensive stakeholder engagement and adopted in 1997, this contract is now anything but standard. Since its adoption, various producers have taken it upon themselves to unilaterally adapt this contract to suit their own production and purposes. Amending, deleting and re-wording the terms of a standard agreement has had two serious implications:
 - *All changes inevitably prejudice the actor’s rights to fair treatment and improved working conditions. These amendments don’t create rights for actors, they create onerous obligations.*
 - *This highly unethical practice has further eroded the element of trust and good faith that is so desperately needed at the very foundations of an industry devoid of statutory protection.*

Clause 7 - Commercial Exploitation:

The SABC shall be entitled to commercially exploit the PRODUCTION in any way whatsoever, provided that the SABC has notified the AGENT thereof at its earliest possible convenience, and subject only to its legal rights to do so. No right of the PERFORMER shall inhibit the rights of the SABC to so commercially exploit the PRODUCTION, subject only to the terms of this agreement and specifically what is contained in clause 7.2 hereunder.

7.2 Should the SABC commercially exploit the PRODUCTION using the likeness/image/photograph/performance of a PRINCIPAL PERFORMER, then in such event:

7.2.1 the SABC and such AGENT/PERFORMER shall agree on a lump sum amount to be paid to the PERFORMER, or

7.2.2 failing which, the SABC shall pay such PERFORMER a pro rata share of 2% (two percent) of the GROSS PROFITS received by the SABC by virtue of such exploitation, which pro rata share shall be determined by dividing the said 2%(two percent) of GROSS PROFITS between the PRINCIPAL PERFORMERS of the PRODUCTION in proportion to their total remuneration paid in terms of this agreement.

In the event of either 7.2.1 or 7.2.2 above, the PERFORMER shall have no further rights in terms of any commercial exploitation.



It's in the contract, so surely the actor is getting some form of payment?

- According to the SABC's Commercial Exploitation clause, the broadcaster agrees to pay the actor a lump sum should the SABC exploit the commercial value of its production. This figure should be calculated at a figure in negotiation with the broadcaster and actor and where there is a failure to reach an agreed amount, the broadcaster will revert to paying a pro rata share of 2% of gross profit.
- Despite this, never has the broadcaster entered into any negotiations or arrived at an agreed lump sum payment for commercial exploitation!
- This is a clear indication that the standard contract on its own is insufficient to balance the acknowledged rights of actors with the commercial interests of the broadcaster

But the SABC is not the only one. Another example is the Mnet contract:

Complete consideration/ Buy-out

The Performer acknowledges and agrees that the consideration payable to the Performer by the Producer in terms of the Performer Agreement constitutes the full, complete and sufficient consideration in respect of the rendering of the services by the Performer and the grant of any and all rights by the Performer under the Performer Agreement, and includes:

- the Performer's participation in any money received by M-Net, or profits related to the Series or the exploitation thereof which may accrue to M-Net; and
- any repeat or residual fees of any nature whatsoever in respect of the services rendered by the Performer in terms of the Performer Agreement; and
- You hereby acknowledge and agree that the services fees referred to in clause 3.1 represents a reasonable, full and final consideration for the contribution and all other services rendered under this agreement having regard to the rights granted to M-Net in term of this agreement including, without limitation, the full copyright in relation to your contribution to the Programme. Accordingly, the Performer agrees that M-Net shall not pay the Performer any further fees or royalties in connection to the contribution to the Series including, without limitation, when the Series is rebroadcast or exploited in any other form of media either by M-Net itself or any of its third-party licensees.

For the avoidance of any doubt, it is recorded, acknowledged and agreed that M-Net shall own all right, title and interest in and to:

- the Series, and any portion thereof (and any and all recorded footage); all works and materials underlying the Series, and/or upon which the Series will be based, including, without limitation, all drafts of the Script (including the final shooting version of the Script); and
- all works and materials that may be incorporated in and/or related to the Series, including, without limitation, all off-cuts from the Series and any unused footage and materials, worldwide and in perpetuity.

Accordingly, M-Net shall be entitled to exploit and/or dispose of all copyright and intellectual property rights in and to the Series and all formats, ideas and concepts arising out of the Series, in its sole discretion, anywhere in the world without any further payment to the Performer.

The Performer hereby:

- irrevocably and unconditionally grants to M-Net and the Producer, the right to photograph, portray, make recordings of and/or film the Performer, his/her portrayal and/or performance of the Role and record his/her voice and other sound effects in connection with the portrayal and/or performance of the Role for use in and in connection with the Series ("**the Performance**");
- irrevocably and unconditionally grants to M-Net, the exclusive right to reproduce in any manner or form, use, rebroadcast, exhibit, transmit, communicate or make available to the public, distribute or make an adaptation of (including, without limitation, by editing, cutting, rearranging or dubbing), and otherwise exploit (including without limitation, include in advertisements, promotions and publicity for the Series), the Series (or part thereof), incorporating the Performance (or any part thereof), in any manner and all media whether now known or hereinafter invented, worldwide and in perpetuity, or do, in relation to an adaptation of the Series (or part thereof) incorporating the Performance (or part thereof), any of the aforementioned acts, worldwide and in perpetuity;
- waives in favour of each of M-Net and the Producer, and each of their successors in title and assigns, any moral rights, as envisaged in the Copyright Act, which may vest in the Performer, in respect of any part of the Series, any M-Net programme or other event or function attended, recorded and/or filmed by the Producer, M-Net and/or its agent/s arising out of or related to the Performance; and
- grants to each of M-Net and the Producer, an exclusive transferable licence to use and authorise others to use, produce and exploit in any manner and in all media worldwide and in perpetuity, his/her name, sobriquet, profile, photograph, likeness (whether actual or simulated), biographical material, voice, sound effect, caricature and the like ("**the Performer's Image**") for advertising and publicity purposes in respect of the promotion of the Series and the M-Net Services only. It is specifically recorded, acknowledged and agreed that this paragraph 4.4.4 shall not be construed so as to entitle M-Net to use the Performer's Image for the purposes of the endorsement of any product or service other than (i) the Series or any M-Net Service or (ii) by way of the Performer's indirect association with any sponsor of the Series, by virtue only of the Performer's performance in the Series.



A complete sign away of moral and economic rights

- The Mnet contract is a complete buyout of the actors rights to earn any form of residual income, regardless of how, when or where the broadcaster wishes to license, advertise or otherwise exploit the production.
- Furthermore it demands that the actor sign away any moral right to the integrity of the actors own profile, image, voice and likeness meaning that Mnet reserves the right to edit and distort any aspect of the actor or their performance to advertise the production in any way they see fit – even to the detriment of the actors reputation.

And television contracts are not the only ones, the film contract states:

- **USE OF MATERIAL AND ASSIGNMENT OF RIGHTS**

- * Ownership: All results and proceeds of every kind of the services heretofore and hereafter to be rendered by the Artist in connection with the Film, including without limitation the Artists' performance and all ideas, suggestions, themes, plots, stories, characterizations, dialogue, titles and other material, whether in writing or not in writing at anytime theretofore or hereafter created or contributed by Artist which in any way relate to the Film or to the material on which the Film will be based (collectively, "Material"), are and shall be deemed to be the works made for hire for the Company. Accordingly, the Company is and shall be considered the author and, at all stages of completion, the sole and exclusive owner of the Material and all rights, trademarks and any and all other ownership and exploitation rights in the Material now or hereafter recognized in any and all territories and jurisdictions including by way of illustration, production, reproduction, distribution, adaptation, performance, fixation, rental and lending rights, exhibition, broadcast, re-use and all other rights of communication to the public, and the right to exploit the Material throughout the universe in perpetuity in all media, markets and languages and in any manner now known or thereafter devised (including but not limited to the advertisement, publicity, public exhibition, commercial exploitation and merchandising of the Material and the Film and in connection with other motion pictures. If under any applicable law the Material is no deemed to otherwise considered a work made for hire or not effective to vest authorship and ownership of the Material and the Film and all rights therein in the Company, then to the fullest extent allowable and for the full term of protection otherwise accorded to the artist under such applicable law. Artist hereby assigns and transfers to the Company the Rights and, in connection therewith, any and all right, title and interest of the Artist (including present and future copyright) in the film and any other works now or hereafter created containing the Material.

This causes a major discrepancy between local and international talent

- Although the clause is highly attractive to international producers due to the fact that it negates the possibility of the local actor ever claiming residual income through the distribution of their film, it also sells South African actors short and many of them decide to work in foreign countries where their ability to reap the benefits of a successful production is not limited.
- Why is this? The answer is simple: South Africa does not have the statutory framework that underpins the actors moral and economic rights in audio-visual contracts that would level the playing field between local and international acting talent.

South African Actors will continue to be exploited

- Until such time as this committee addresses the glaring injustice by effecting desperately needed amendments to the Performers Protection Act, actors will continue to be exploited at the hands of industry keyholders who look only to enrich themselves.
- With the following proposals to amend the existing act, we would permit earning opportunities through rights, never before guaranteed by an Act of Parliament, to actors in desperate need of protection.

Moral Rights

- Paternity right - the right to be identified as the performer, except where omission is dictated by the manner of performance (we don't expect credits to roll at the end of a commercial!, but there are other forms of acknowledgement)
- Integrity right – the right to object to distortion or mutilation of the performance that would prejudice reputation.

This would include such issues as

- Suggesting that someone is authorizing or endorsing a product or service (Shubnum Khan - Author)
- Putting someone in a false light or defame someone (Garcia vs. Google – she was prejudiced in that there was no provision in Copyright Law in the US. Taking direction from Beijing Treaty would save us similar heartache.)

Economic Rights

The Beijing Treaty grants performers four kinds of economic rights for their performances fixed in audiovisual fixations, such as motion pictures: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available.

- The right of reproduction is the right to authorize director or indirect reproduction of the performance fixed in an audiovisual fixation in any manner or form.
- The right of distribution is the right to authorize the making available to the public of the original and copies of the performance fixed in an audiovisual fixation through sale or other transfer of ownership.
- The right of rental is the right to authorize the commercial rental to the public of the original and copies of the performance fixed in an audiovisual fixation.
- The right of making available is the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in an audiovisual fixation, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet.

The Beijing treaty makes provision for national laws to stipulate the manner in which these rights are to be transferred once a performer has consented to the audiovisual fixation of a performance.

The PPAB should allow for transfer of these rights separately through contractual agreement.

(A production for broadcast need not secure the rights of the performer to consent that his performance is sold on a DVD or streamed on the internet, for example)

Transfer of Rights

The PPAB has a duty to safeguard the interests of performers by preventing the transfer of ALL his/her economic interests to the producer, which requires the REMUNERATION RIGHTS TO BE UNWAIVABLE FOR PERFORMERS AND SUBJECT TO MANDATORY COLLECTIVE MANAGEMENT

(The performer has freedom to contract and to negotiate, however, the Collective Management Organisation is mandated to act in the performer's best interests at all times).



Statutory Royalty Sharing

For the music industry, the Performers Protection Act was amended in 2002 to stipulate how a performer in sound recordings must share a royalty on commercial use of sound recordings with the producers of sound recordings.

In the absence of a contract between the parties, the default position is that royalties are split 50/50 between the performer and the producer.

This does not apply to performers in audiovisual fixations; the dynamics of the production and commercial exploitation of AV fixations is completely different.

The Beijing Treaty allows for national legislation to make the distinction clear

As to the **transfer of rights**, the Treaty provides that Contracting Parties may stipulate in their national laws that once a performer has consented to the audiovisual fixation of a performance, the exclusive rights mentioned above are transferred to the producer of the audiovisual fixation (unless a contract between the performer and producer states otherwise). **Independent of such a transfer of rights, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under the Treaty.**



Collective Management

Collective Rights Management ensures that the performer's remuneration rights are adequately effected. CMOs provide a type of legal remedy to counterbalance the automatic transfer of exclusive rights.

While the creation and regulation of collecting societies is subject to the Copyright Act, it is important that the PPAB is explicit in making provision for mandatory collective rights management.

This means SAGA requires statutory amendments that enable a dedicated system for the accurate monitoring and tracking of all actors work in audio-visual media including, but not limited to, TV and film in order to collect and remunerate actors for the Commercial Exploitation of their performances. This CMO would be governed by a Board, correctly constituted as a Non-Profit Organisation, to manage all collections and disbursements with a set Administrative Fee deducted by prior agreement, that would need to be capped at an agreed percentage, and with such deductions stipulated by Regulations to the Act



In Conclusion

It is the DTI's stated intention to ensure that South Africa ratifies and joins the Beijing Treaty. However, it is up to this committee to guarantee that the rights granted to performers worldwide are not diluted in the national legislation that gives effect to this treaty. The Performers Protection Amendment Bill provides an opportunity to shore up our last line of defense.

Moreover, in the absence of collective bargaining rights, mandatory Collective Rights Management is vital.

In the entire value chain of the entertainment industry, performers are the most vulnerable, being unprotected by labor legislation while at the same time being denied meaningful contractual freedom by the asymmetrical negotiating circumstances in which they are trapped. (When the big kids pile on to one side of the see-saw, the smaller ones are forced to take their chances on the merry-go-round).

In the production and distribution of audiovisual content, the 'right of title' passes along the value chain, therefore it is essential that the actor retains their exclusive right, whilst having the ability to transfer these rights. The *transfer* of rights does not imply a *waiver* of rights! The Performers' Protection Act should ensure that no actor is forced to relinquish all rights without the opportunity to negotiate; when the odds are stacked, it's the only card they hold.

The economic value of each of the four exclusive rights is independently quantifiable. The law should ensure that each party to an agreement is fully aware of the extent of the commercial privilege being transferred along with each right.

Moral rights, on the other hand, are akin to the *right to dignity*. How does one quantify the right to one's dignity? It should be clear why such a right should not be transferable.

When the Freedom Charter declared that the people shall share in the wealth of this country, were actors not considered people of this country, working to serve our craft and our industry? Were the rights of actors not considered worthy of protection? Prior to our Constitutional democracy, the economy suffered from the deeply divisive notion that the wealth of this country belonged, by law and by assumption, to a privileged few while the majority were made to feel grateful to receive a pittance in exchange for a lifetime of exploitation and servitude. The economy of a participative democracy demands change to give a voice to those who contribute. Actors contribute, but nowhere in our laws is it recorded that our contributions entail a moral and economic right to fair compensation for the Commercial Exploitation of our work.



The South African Guild of Actors wishes to thank the Honourable Members of this Committee in taking the first strides towards averting the injustices faced by the acting community.

Our belief is that through significant reform, the actor will not only be able to attain improved rights, but will also play a greater role within the economy as a whole.

