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South Africa
By email: Mpadayachy@thedti.gov.za

10 September 2015

Dear Ms Padayachy,

Copyright Amendment Bill

The South African Guild of Actors (SAGA) welcomes the opportunity to give our views on the Copyright Amendment Bill which was released for public comment on 27 July 2015.

SAGA represents professional actors as Independent Contractors in the film, television, theatre, commercial and corporate sectors in South Africa. The Guild is constituted as a Section 21 Company and is registered with the Department of Social Development as an NPO.

South Africa's Copyright Act is sadly outdated and, in this regard, we embrace many of the stated intentions in revisiting the *Copyright Act 98 of 1978*. However, there are significant failings in the current draft which, we believe, would lead to serious consequences, whether unintended or by design. We argue that these flaws threaten the rights and livelihoods of our members and may cause damage to the film, media and creative industries in which our members operate.

At the same time, SAGA strongly urges that the *Performers' Protection Act 11 of 1967* be amended in conjunction with the current Bill for reasons which will become apparent during the course of our argument.

International Copyright Regimes

The draft does not take into account South Africa's obligations under international copyright regimes including, but not limited to the *Berne Convention* and the *Rome Convention*. SAGA is particularly concerned that the Bill should acknowledge provisions of the *international Treaty on Audiovisual Performances (2012)*, adopted by members of the World Trade Organisation in Beijing on June 26, 2012 (Beijing Treaty).

A review of the domestic legislation reveals that the definition of 'performer' in the existing *Copyright Act 98 of 1978* is inadequate and the Amendment Bill fails to remedy this shortcoming. Similarly, a 'live presentation' is currently limited to the delivery of "lectures, speeches and sermons", while it is rightly understood internationally to include a unique dramatic interpretation, *incorporating the performer's image*, of a literary, musical, choreographic or other artistic work.

Accordingly, SAGA posits that the definition of 'performer' be amended to include "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore, encompassing such literary or artistic work that is created or first fixed in the course of a performance."

There is, unfortunately, no provision in the Act or the Amendment Bill which acknowledges the performer's ownership of both *moral and economic rights* to their own *image*. SAGA therefore proposes that any amendment to the Act acknowledges such rights: "The right to the performer's own image is the ability to decide when, how and by whom the performer's physically recognisable features (image, voice and name) can be captured, reproduced or published".

SAGA notes that there are efforts in the Bill to redefine 'performance', from that which can be fixed through a purely audio recording, to include Audio Visual fixations, (Section 24 of the Bill inserts sections 20A, 20B, 20C, 20D, 20E and 20F in *Act 98 of 1978*).

However the *Performers' Protection Act 11 of 1967* (PPA) is *lex specialis* (provisions therein would prevail over the more general provisions of the Amendment Bill). Notwithstanding the Amendment of *section 8 of Act 11 of 1967*, as further amended by *section 22 of Act 38 of 1997*, it is imperative that these adjustments are reflected in the PPA, which should be revised accordingly to avoid confusion and unnecessary litigation.

In light of the above, SAGA believes the Bill should, for the sake of legal certainty, clarify that section 24 is meant to replace all relevant residual parts of the PPA that may be interpreted to include AV performers.

Royalties and compensation for further commercial exploitation

SAGA notes the exclusive use of the term 'royalty' in relation to payments due upon the further commercial exploitation of an artistic work. SAGA suggests that the term 'royalty' be defined so as to incorporate "further commercial exploitation of the *performer's image*, including but not limited to residual payments and repeat broadcast fees".

SAGA is extremely concerned that Section 24 of the Bill (20B "Transfer of rights") includes a *mandatory* transfer provision of all exclusive rights to the "producer of such audio-visual fixation, subject to a prescribed written contractual agreement which shall give the performer the right to receive royalties for any use of the performance".

This appears to be an un-rebuttable presumption that attempts to remove a right granted under Section 5 of the PPA, and would in any case be rendered null and void in terms of *lex specialis.* In SAGA's view, this provision should more correctly be rendered, "… which shall give the performer the right to receive royalties for any use of the performance, subject to a written agreement to the contrary".

Furthermore, it should be noted that the *Performers' Protection Act 11 of 1967* was amended by *Act 38 of 1997*, ensuring that performers could *no longer* be deprived of their right to royalty. However, the provisions of the current Bill place the performer at risk of being stripped of this right altogether as they do not provide a mechanism for the calculation of such royalty, deferring instead to 'contractual freedom'. SAGA is of the opinion that the Bill should be explicit in this regard, stating that "the right to receive a royalty payment is not transferable or subject to waiver".

Collecting Societies

SAGA notes the provision for the creation of "collecting societies" in order to recover royalty payments that may be due. Section 9A (1) (b) of the principal act has been amended to provide that royalty payments "shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative Collecting Societies: Provided that in the absence of such agreement, the amount of royalty shall be determined by the Tribunal".

This amendment introduces a cumbersome level of complexity which is further aggravated by the requirement of prior clearing of this right.

SAGA is particularly concerned that Section 9C (3) (c) mandates the collecting society to "distribute such royalties among owners of the rights after making deductions for its own expenses". However there is no limitation on the expenses which may be deducted.

SAGA's archive contains ample evidence of collecting societies that have buckled under the weight of their own administration: the costs of offices, personnel, salaries, pension, medical, transport and bonuses leaves little or nothing to be distributed to the rights holders.

SAGA therefore proposes a qualifying provision to limit such "reasonable deductions" together with a definition as to what can be considered reasonable, possibly a *percentage* of the fees collected, to be agreed on and revised from time-to-time. Such a provision would ideally be located in Section 9C (3) (d) "Control of Collecting Society by owners of rights."

Assignment of copyright in commissioned work

SAGA notes that the DTI has not included in the Amendment Bill revisions to Section 21 (1) (c) of Copyright Act 98 of 1978, under which the sustainability of the creative industries is being threatened by current practices.

The creative sector thrives on *innovation* and the emergence of *entrepreneurs*, but the monopolies of broadcasters are being entrenched by the automatic transfer of ownership of intellectual property (IP) by the provisions of 21 (1) (c) "Where a person commissions the … making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4".

Failure to address this provision ignores the reality of the creative industries and the challenges faced by independent audio-visual producers in a monopolistic broadcast environment. With the current proliferation of alternative platforms for the exploitation of creative works, monopolistic practices threaten the rights and livelihoods of our members. Accordingly, SAGA urges the DTI to give serious consideration to submissions from our partners within this sector, including the South African Screen Federation (SASFED), who are more qualified to provide the necessary detail.

Assignment of Copyright in Orphan Works

No creative work is produced in a vacuum: the creative industries are fuelled by innovation within a functioning Public Domain under the principles of Creative Commons.

SAGA is distressed at the inclusion of clauses which provide for the seizure and control of orphan works by the State, effectively removing them from public view forever.

Section 1 (g) of the Bill defines orphan works as “works in which copyright still subsists but the right (sic) holder, both the creator of the work or the successor in title cannot be located.”

Sect 21(3) provides that “Ownership of any copyright whose owner cannot be located, is unknown, or is deceased shall vest in the state: Provided that if the owner of such copyright is located at anytime, ownership of such copyright shall be conferred back to such owner.”

However, the transfer of such ownership is contradicted by Section 3 (c) “in the case of copyright that vests in the state due to the fact that the owner cannot be located, is unknown or is dead, the term of such copyright shall be perpetual.”

SAGA infers from these provisions that the State will take over, administer, own and receive license fees *in perpetuity* for work from deceased authors despite bequests, wills or legal processes of inheritance. This clearly runs counter to the aims of Public Domain assignments and crushes Creative Commons agreements.

The provisions for assignment of licenses in respect of orphan works as envisaged in Section 22A (1) through to 22A (13) including 22A (6) (a) through to 22A (6) (e) are so onerous as to be unworkable and SAGA strongly urges that these provisions be reconsidered in their entirety.

Assignment of Copyright following Funding

As with the treatment of orphan works, SAGA is distressed at the State’s attempt to seize ownership of work that is funded, whether in full or in part, through any of its agencies.

The provisions of Section 5 (2) imply that the State would be entitled to claim ownership of work produced with the aid of, among other agencies, the Lotteries Distribution Trust Fund, the National Film and Video Foundation, the Department of Art and Culture and the DTI itself.

“Copyright [shall be conferred by this section] on every work which is eligible for copyright and which is made by or funded by or under the direction or control of the state or such international organizations [as may be prescribed] shall be owned by the state or such international organization”

This provision is vague enough to create reasonable doubt as to what methods of funding might trigger an ownership grab. SAGA is particularly concerned at what could happen should a work be funded through a private agency that is underwritten in some way by the government, but where this is not revealed upfront.

In Conclusion

While we welcome attempts to revise the outdated *Copyright Act 98 of 1978*, it is SAGA's contention that the Copyright Amendment Bill (2015) demonstrates some alarming flaws that must be addressed with urgency. Included among these are the implications of *lex specialis* with respect to the *Performers' Protection Act 11 of 1967* (as amended by *Act 38 of 1997* and *Act 8 of 2002*) and South Africa's obligations under international copyright regimes, specifically the *Berne Convention* the *Rome Convention* and the *Beijing Treaty*.

In addition SAGA supports its partners within the creative industries in their opposition to sections of the *Copyright Act 98 of 1978* that the Bill neglects to address.

And finally, SAGA opposes the unnecessary extension of perpetual copyright in works that are managed as part of the orphan works regime, and provisions to confer ownership of work on the State should it agencies play any part in the funding of that work.

SAGA will gladly provide any further information that you may require to assist you in the finalisation of the Bill.

Yours faithfully

Jack Devnarain
SAGA CHAIRMAN