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The Secretary: Mr. Andre Hermans
Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
Parliament Street, Cape Town
South Africa
By email: ahermans@parliament.gov.za

9 July 2018

Dear Mr Hermans

Copyright Amendment Bill: comment on specific clauses of working draft

The South African Guild of Actors (SAGA) welcomes the opportunity to give our input on specific clauses of the working draft of the Copyright Amendment Bill as of 15 June 2018.

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. SAGA is a member of the South African Screen Federation (SASFED), an industry body comprising professional associations representing animators, independent producers, documentary filmmakers, editors and writers. SAGA is also a full member of the International Federation of Actors (FIA), alongside sister organisations from more than 60 countries including SAG-AFTRA from the USA, the Canadian ACTRA, British Equity and unions on the African continent from Morocco, Cameroon, Ghana, and Nigeria, to Zambia and Namibia.

SAGA has made previous submissions on the Copyright Amendment Bills (2015 & 2017); a written submission was made on 10 September 2015 and a subsequent oral presentation was delivered to the Parliamentary Portfolio Committee on Trade and Industry on 4 August 2017. SAGA was supported in these submissions by SASFED and the South African Freelancers' Association (SAFREA).

In our previous submissions, SAGA cautioned against the temptation to conflate the rights of Audiovisual Performers (actors) and Recording Artists (musicians and singers). We take this opportunity to remind the committee that the creation and distribution of phonograms, on the one hand, and audiovisual fixations on the other, are differentiated by their peculiar industry dynamics.

Phonograms, for example, are *primarily* produced for sale, and the broadcast of such recordings is a *secondary* use, generating a 'needle-time' royalty to be equitably shared with the producer.

With audiovisual productions, the *primary* use is through licensed distribution, whether through broadcasting, internet streaming or other methods of "communication to the public and making available". In accordance with the WIPO Beijing Treaty on Audiovisual Performance, the right of communication to the public and making available of the work is granted exclusively to AV performers (namely actors), and is NOT to be shared with the producer.

SAGA has been following the deliberations of the Portfolio Committee on Trade and Industry and the various subcommittees and is concerned that this distinction has not been consistently observed. Accordingly, SAGA will reinforce the distinction throughout this submission by referring to audiovisual performers as 'actors', although 'performer' is the technically correct term.

In addition, many of the specific clauses that have been put forward for comment have bearing on other clauses; where this is the case, we have ventured to comment on these interdependencies.

Submission

In the interests of brevity, SAGA has reserved comment to those clauses that specifically concern the rights of audiovisual performers (actors), unless the clause under review has a bearing on broader principles.

▪ **Clause 1, par *(i)*: The definition of "visual artistic work".**

With reference to Clause 1, par(i), (b), SAGA suggests that audiovisual works should also be expressly excluded as the definitions of "visual artistic work" and "audiovisual work" seem to overlap.

'visual artistic work'—

(a) means an original artistic work that was created for the purpose of being appreciated by the visual sense and includes a painting, a sculpture, a drawing, engraving and a photograph; and

(b) excludes audiovisual work, commercialised artistic work such as industrial design, works of architecture, engineering drawings, digital or graphic design, fashion design, interior design, circuit layouts, commercial logos and icons for applications;''

▪ **Clause 9: Section 8A (4): The minimum content of the agreement related to royalty percentages**.

In commenting on Clause 9: Section 8A (4), it is necessary to provide commentary on certain earlier provisions within this Section insofar as they relate to the clause under review.

In 8A (1), actors should also be entitled to a share of the royalties received by the copyright owner; this would be in agreement with Art. 12 (3) of the Beijing Treaty.

(3) Independent of the transfer of exclusive rights described above, 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 this Treaty including as regards Articles 10 and 11.

In its written submission on the PPAB, SAGA has requested such a provision to be included in the Performers Protection Act, in which case a "without prejudice to" statement should be included here.

It must be noted that the right granted by this Section is not equivalent to a remuneration right (payable by the user). It is more in line with a contractual payment (agreed and paid by the producer).

It is also important to note that in accordance to Section 1 (definitions), the author of the AV work is the producer. Ideally, this definition should be changed to include at least the director and the writer. If this is not possible, Section 8A should expressly refer to the director, the writer and the actors. In other words, “author” should be replaced by “director, writer and the actors” in the text below.

> *8A. (1) Notwithstanding the assignment of the copyright in an audiovisual work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 8.*

Alternatively, SAGA suggests the inclusion of new subsections as outlined below. (As explained in the introduction to this submission, the remuneration right granted exclusively to AV performers (namely actors), differs from that granted to performers of phonograms published with commercial proposes.) Accordingly, while the word “performer” may be more correct from a technical perspective, SAGA suggests the use of “actor” in order to avoid claims from singers and musicians who are catered for by the “needle-time” right.

> *(6) (a) In the absence of the agreement referred to in Subsection 2(a) or unless otherwise authorised by law, no person may, without payment of a royalty to the actor—*
>
> *(i) cause the audiovisual work to be seen in public as contemplated in section 8.1(b);*
>
> *(ii) broadcast an audiovisual work as contemplated in section8.1(c);*
>
> *(iii) cause the transmission of an audiovisual work as contemplated in section 8.1(d);*
>
> *(iv) communicate an audiovisual work to the public as contemplated in section 8.1(d A); or*

(v) make the audiovisual work available to the public as contemplated in section 8.1(dB).

(b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the audiovisual work and the actor or his collecting society.

(c) In the absence of an agreement contemplated in paragraph (b), the actor or his collecting society may refer the matter to the Copyright Tribunal referred to in section 29(1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of1965).]

(7) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.

▪ Clause 11: Section 9A(1)*(aA):* Log Sheets.

This section only relates to audio performers but SAGA would like to make suggestions concerning those aspects that have wider implications, particularly with regards to Collecting Societies.

SAGA suggests that the section refers only to the performer or copyright owner and further clarify that this right must be subject to mandatory collective management.

9A(1)(c), for example, refers to " ... user, performer or owner ..." in which instance "copyright owner" would be more appropriate.

In the absence of such clarity, enforcement of these rights will be cumbersome and individual performers' rights will, in effect, be compromised.

(The question of mandatory collective management also has bearing on 9A (2): once it is asserted that only CMOs can collect and distribute these payments, the first phrase below could be deleted or reference be left there only to collecting societies).

*(2) (a) The owner of the copyright, collecting society or indigenous community who receives payment of a royalty in terms of this section shall ensure that **[share]**such royalty is equally shared between the copyright owner and **[with]** any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).*

▪ **Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence.**

SAGA suggests that these provisions would be rendered practically unenforceable in the absence of mandatory collective management as discussed above.

▪ **Clause 12: Section 11 - Nature of copyright in programme-carrying signals**.

This section seeks to grant broadcast organisations IP protection against signal theft. Should broadcast signals be afforded IP protection, SAGA argues that care must be taken that such protection does not encroach on the content carried by their signals. As it is currently worded, this section does just that; it grants to broadcasters an exclusive right on the content. Clause 11 (1) (b), below explicitly refers to the "work", whereas it should refer to the signal.

***11.** (1) Copyright in programme carrying signals vest the exclusive right to undertake, or to authorize, the—*

(a) direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic;

*(b) communication of the **work** to the public by wire or wireless means;*

It should be noted that the right to "make available on demand" requires a fixation. Protection of the broadcaster's signal must not be allowed to extend to a post-fixation right to the "work".

Clause 11 (1) (a) appears to refer to simultaneous or deferred (re)transmission. SAGA questions how a right on deferred transmission (of the work) can be argued to be in the interests of signal protection.

▪ **Clause 15: Section 15: Panorama rights and incidental use.**

SAGA understands the necessity for the freedom of panorama exception. However, the wording of Section 15 (1) (b) is confusing. Is it necessary to refer to "panorama rights" for an exception to someone else's underlying rights?

(b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the copyright.".

▪ **Clause 22: Section 21(3): New process for commissioned work aimed at giving the author more rights.**

SAGA welcomes the introduction of Section 21 (3), granting the author certain rights to their work when such work was produced as a result of a "commission". However, the provisions introduced could be undermined by the current wording elsewhere in this section.

"(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of ***[a cinematograph film]*** *an audiovisual work 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]*** *the ownership of any copyright subsisting in the work shall, subject to subsection (3), be governed by agreement between the parties.";*

It is not clear what is meant by "... and pays or *agrees* to pay for it in money or *money's worth* ..." SAGA fears that such vague wording is open to abuse.

Furthermore, in regard to audiovisual works, it is essential to make a clear distinction between the copyright owner and the author. An AV work is a joint

work, with several authors, the copyright of which belongs to the producer (unless otherwise agreed). SAGA proposes that the definition of author of an AV work in Section 1 must be changed.

SAGA is particularly concerned at the implications of Section 21 (2)

> *(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international or local **[organization]** organisation concerned, and not in the author.";*

SAGA continues to maintain that the provisions of Section 5 entitle the State 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. The Guild is 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.

▪ Clause 25: Section 22B(7): Transitional provisions to provide for existing Collecting Societies.

It is important to distinguish between a "natural person" and a "legal person" in the wording of this section. This observation has bearing on 22B (1) in addition to 22B (7) on which we've been invited to comment.

> *(7) (a) Any person who at the commencement of the Copyright Amendment Act, 2019, is acting as a representative collecting society in terms of this Chapter must, within 18 months of the commencement of the Copyright Amendment Act, 2019, apply to the Commission in the prescribed manner and form for accreditation.*

In addition, it should also be made clear that such legal person must be not-for-profit and controlled by the copyright owners or the performers, as the case may be. Otherwise any producer or agent could incorporate itself as a collecting society.

In keeping with SAGA's overriding concern that provisions intended for the protection of recording artists do not necessarily incorporate protections for audiovisual performers, we submit that the wording of clause 22B (2) (b) is problematic.

> *(b) performers or owners, or on behalf of an organisation representing performers or owners, has the right to receive payment of a royalty in*

terms of section 5(1)(b) of the of the Performers' Protection Act, 1967 (Act No. 11 of1967).

In its current formulation, this clause limits to singers and musicians the possibility of incorporating a CMO. The last part of the paragraph has to be changed as proposed below.

(b) performers or owners, or on behalf of an organisation representing performers or owners, has the right to receive payment of a royalty in terms of this Act or the Performers' Protection Act, 1967 (Act No. 11 of1967).

In addition to these observations, SAGA wonders whether there is any reason a "traditional community" cannot be considered and act as a Collective Management Organisation (CMO). The inclusion of this term alongside each mention of "collecting society" is either redundant, or it renders the clauses incoherent and unnecessarily lengthy.

▪ Clause 25: Section 22C(3)*(c):* Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries.

It is SAGA's understanding that a CMO will always be obliged to pay foreigners any amounts collected on their behalf, whether there is a reciprocal agreement or not. By way of example, a Collecting Society cannot collect the rights of Chinese performers, and then refuse to pay out such rights just because there is no reciprocal agreement.

(c) only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.

Accordingly, SAGA believes this paragraph should be deleted.

▪ Clause 25: Section 22D(2)*(b)* and 22D(3)*:* How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer.

Insofar as 22D (2) (b) is concerned, SAGA believes that distribution should take place more regularly and at least once a year, where the performers and copyright owner are known to the CMO. The 3 year rule should only apply where

CMOs cannot, despite their best efforts, find the beneficiary. SAGA proposes that the paragraph be reworded to provide for a distribution window of 12 months from January 1st of the year following the collection. The paragraph could contain an additional rider: “unless objective reasons prevent the fulfillment of the said deadline” (for instance the user not facilitating data for the distribution). Concerning 22D(3), SAGA is not aware of any common law provision for a statute of limitations or prescription which would impose a deadline for right owners to claim their payments to the CMO. A limitation clause would prevent a scenario in terms of 22D (3) (a) and (b), whereby undistributed funds are ring-fenced indefinitely. The period should be at least 5 years, during which time the CMO must make its best efforts to identify the right owners. After such period, the undistributed amounts shall be allocated to specific activities.

Conclusion

SAGA’s submission has been primarily driven by the need to differentiate audiovisual fixations from audio recordings; our intention is to help the Committee to understand that the copyright protection mechanisms for performers are unique to each form of fixation.

It is important to note that an audiovisual fixation is the *only* form of artistic expression that requires formal registration to enjoy full copyright protection (with CIPC, in South Africa, or the relevant registries in other jurisdictions). Generally any person, who has written, printed, published, sculpted, painted or recorded a work, is automatically the owner of the copyright to that work. In other words, the author and the copyright owner are one and the same. This is not the case with AV.

An audiovisual fixation is unique in that it is created through the collaborative artistic input of several ‘authors’, including, but not limited to the writer, the director, and the performers. The copyright owner in this joint work is the producer (unless agreed otherwise). For this reason, it is vital to clearly differentiate between “audiovisual works” and other forms of “visual artistic work”. It is equally important to broaden the definition of “author” in an audiovisual work.

Finally, when it comes to the question of collecting and distributing royalty payments, it must be noted that there has *never* been a Collecting Society for audiovisual performers; the legacy CMOs in South Africa have exclusively served the interests of performers in phonogram recordings (musicians and singers). The combined failings of SAMRO, NORM, CAPASSO, SAMPRA and POSA are well documented and there are

lessons to be taken into the creation and registration of a CMO for audiovisual performers. Drawing on these experiences and our research into international best practice, SAGA has come to a firm view, and it is this: the laudable provisions for the establishment and regulation of CMOs contained in the current Copyright Amendment Bill will be largely unenforceable in the absence of a provision for *mandatory* collective management.

The South African Guild of Actors would, once again, like to thank the Portfolio Committee for its tireless work and the Department of Trade and Industry for its commitment to the overhaul of the copyright legislation. We look forward to the implementation of legislation designed to stimulate the creative economy and which will allow South African actors to participate with dignity in the global marketplace of artistic expression.

SAGA is available to give further clarity on any of the issues raised in this submission, whether through a formal oral presentation or other forms of consultation.

Yours faithfully

SAGA Executive Chairman