

**FREE STATE PROVINCIAL LEGISLATURE
Economic Development Portfolio Committee**

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**The South African Guild of Actors Submission to the Free State
Provincial Legislature on the Copyright Amendment Bill
[B13-2017] (“CAB”) and the Performer’s Protection Amendment
Bill [B24D-2016] (“PPAB”)**

This submission is made by the South African Guild of Actors (“SAGA”) in respect of the Copyright Amendment Bill [B13-2017] (“CAB”) and the Performer’s Protection Amendment Bill [B24D-2016] (“PPAB”) in response to the call for public comments by the Free State Provincial Legislature.

SAGA thanks the Committee for the opportunity to make the submission, which is intended to provide SAGA’s position in respect of the CAB and the PPAB in general and specifically on the proposed further amendments following concerns raised by President Cyril Ramaphosa.

About SAGA

SAGA is a non-profit organisation (119-128 NPO) constituted on 23 July 2009. SAGA’s mandate is to represent, advance, and protect the legal and economic rights of professional actors in the film, television, stage, commercial, and corporate sectors throughout the Republic of South Africa and its provinces, including Free State Province.

SAGA was elected as a member of the International Actors Federation (“FIA”) in 2012, alongside actors’ guilds and unions from 68 countries around the world including Screen Actors Guild - American Federation of Television and Radio Artists (“SAG-AFTRA”) in the United States of America, Canada’s Alliance of Canadian Cinema, Television and Radio Artists

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("ACTRA"), and Morocco, Ghana and Madagascar as members of the AFROFIA subsector within FIA.

SAGA has been a member of South African Screen Federation ("SASFED") since 2009, where collaboration of the independent production sector – which includes producers, writers, editors, agents, animators, and actors' organisations – ensures that the sector remains professional and retains standards.

Introduction

Henry Cele was one of the most distinguished and well-known actors to come from South Africa. He spent his whole adult life playing roles in both at home and in America, bringing joy to many around the world. His most significant role was in the mini-series, and later movies, *Shaka Zulu*, playing Shaka kaSezangakhona. Although Cele had significant fame he sadly died penniless and depressed. This was largely due to the fact that he had never been paid fairly for his many roles in film and television and never received royalties for his performances. Henry Cele was exploited.

Henry Cele's fate is, unfortunately, still a reality for many artists in the entertainment industry due to the absence of regulations to ensure that actors are fairly compensated for their work. The lack of regulation in the performance industry is not only detrimental to the artists, but it also stifles growth of the economy; well-crafted regulations offer new and unique opportunities to the provinces to stimulate the entertainment production industry in their regions.

The Free State Province was the site of some of the earliest film-making activity in the world, shortly after the birth of the medium, near the turn of the previous century. Films documenting troop movements during the Second Boer War in the Orange River Colony include *Entry of the Scots Guard into Bloemfontein (1900)*; *Exercise of War Prisoners (1900)*; and *Gordon Highlanders Entering Bloemfontein (1900)*.¹ In addition, the most popular film-makers South Africa has ever produced, "have a pedigree rooted in Free State culture and ethics": Jamie Uys

¹ *Filming location matching "Bloemfontein" (1900) IMDb*. IMDB Inc. Available at: <https://www.imdb.com/search/title/?locations=Bloemfontein> (Accessed: May 1, 2023).

and Leon Schuster.² It would be remiss to neglect a mention for the most successful South African performer of his generation, Al Debbo, who was born in Bloemfontein in 1924.³ More recently, a number of notable films were made in Free State Province, including the *Cannes Queer Palm* winner *Skoonheid* which was released internationally as *Beauty* (2011).⁴ Prominent actors to have come out of Free State Province and who are now internationally recognised include Fana Mokoena, who portrayed Dr Mandla Sithole in *Generations* (1993), and who featured in the British television series *Silent Witness* (2008).⁵ Fellow Free Stater, Tony Kgoroge, is noted for his performances in *Hotel Rwanda* (2004), *Blood Diamond* (2006) and *Invictus* (2009).⁶ It is an indictment on the unregulated performance industry in South Africa that stars such as Don Cheadle, Joaquin Phoenix, Leonardo Di Caprio and Morgan Freeman continue to earn royalties for their work in these films, while their fellow actor Tony Kgoroge earns nothing. Despite international acclaim, Mr Kgoroge only makes headlines when his car is repossessed, and he lands up before a High Court Judge.⁷

It is the firm belief of the South African Guild of Actors that passage of these two pieces of legislation into law would unlock latent potential in the industry and would certainly help to stimulate the economy within the province. A 2017 study by the Institute for Technological Innovation, University of Pretoria noted that Copyright-based industries have the potential to play an important role in job creation and economic growth. The study found that between 1970 and 2009 the copyright-based sector in South Africa contributed an estimated 4.1% to GDP – “more than the contributions of other sectors such as agriculture and food, beverages and tobacco”.⁸ However, outdated legislation in South Africa is allowing copyright-based industries of other developing economies to leave us behind: the study pegs the current contribution to GDP in the Philippines at 11.70%.

² Supplement, A. (2011) *Famous Free Staters*, *The Mail & Guardian*. M&G Media. Available at: <https://mg.co.za/article/2011-11-18-famous-free-staters/> (Accessed: May 1, 2023).

³ Reporter, S. (2011) *Farewell to a local legend*, *Independent Online*. Independent Newspapers (Pty) Ltd. Available at: <https://www.iol.co.za/entertainment/farewell-to-a-local-legend-1098398> (Accessed: May 5, 2023).

⁴ De Waal, M. (2013) *Skoonheid – a film that confronts truths, both beautiful and ugly*, *Daily Maverick*. Maverick Insider (Pty.) Ltd. Available at: <https://www.dailymaverick.co.za/article/2011-07-24-skoonheid-a-film-that-confronts-truths-both-beautiful-and-ugly/> (Accessed: May 2, 2023).

⁵ IMDb (2023) *Fana Mokoena*, *IMDb*. IMDb Inc. Available at: <https://www.imdb.com/name/nm0596350/> (Accessed: May 4, 2023).

⁶ IMDb (2009) *Tony Kgoroge*, *IMDb*. IMDb Inc. Available at: <https://www.imdb.com/name/nm0450961/> (Accessed: May 3, 2023).

⁷ Mothombeni, A. (2018) *KGOROGE lands up in court over debt*, *SowetanLIVE*. Fundzudzi Media. Available at: <https://www.sowetanlive.co.za/sundayworld/news/2018-11-06-kgoroge-lands-up-in-court-over-debt/> (Accessed: May 4, 2023).

⁸ Pouris, Anastassios, & Inglesi-Lotz, Roula. (2017). The contribution of copyright-based industries to the South African economy. *South African Journal of Science*, 113(11-12), 1-7.

Research into local economic development suggests that a legislative environment promoting the sustainability of the acting profession will incentivise performers to invest in the ongoing refinement of their skills sets, enabling them to remain relevant, versatile and adaptable within the industry. “(T)he development of acting talent and the quality of acting are likely to increase and bring many long run benefits to the industry as a whole.”⁹

However, the current reality is that performers do not have rights in labour law and must rely purely on contract law to protect their interests. This entrenches unequal bargaining power and results in a loss of economic opportunities for actors. Asymmetrical negotiating power between actors and producers weakens the industry over time as exploitative practises become more commonplace. Continued exploitation within the industry has the effect of stifling its growth and severely diminishing its yields, much like an over-grazed field.

Approving these bills will not only provide actors with the ability to meaningfully contribute to the economy but it will increase and strengthen this significant industry, cultivating prosperity in the creative economy, promoting tourism, and driving opportunities through education which stimulates employment. The success of a sector can be measured by factors such as system expansion, cost-effectiveness, the range of services offered, quality, and innovation.¹⁰ However, without adequate regulation of the performance industry, each of these indicators is stifled and growth and development is hindered.

By contrast, the United States of America has benefited from a fairly regulated entertainment environment, to become the largest entertainment industry in the world, grossing almost 21 billion US dollars in 2020.¹¹ In the previous year, prior to COVID, the THEME Report of the Motion Pictures Association had trumpeted record global box office returns of \$42.2 billion.¹²

In 2018, copyright industries, which largely includes the performance industry, contributed to 11.6% of the United States’ economy employing over 11 million people.¹³ The rhetoric suggesting that regulation of the South African performance industry will have a negative effect on the industry is thus ill conceived at best and at worst, is a patent falsehood.

⁹ Urban-Econ Development Economists, *The Star System in South Africa*. KZN Film Commission. November 2020.

¹⁰ Body of Knowledge on Infrastructure Regulation. Development of Regulation. Retrieved January 23, 2023, from <https://regulationbodyofknowledge.org/general-concepts/development-of-regulation/>.

¹¹ Statista Research department “filmed entertainment revenue in selected countries worldwide 2020” 5 Jan 2023.

¹² Motion Picture Association. (2020). Theatrical and Home Entertainment Market Environment (THEME) Report 2019 [PDF]. Retrieved from <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf>.

¹³ International Trade Administration “Industry Overview (Updated Dec 2020)”.

Our performance industry has been – and continues to be – stuck beneath a glass ceiling and struggles to become a sustainable, viable economic revenue source for the nation, largely through a lack of regulations. Regulation of the industry would promote the implementation of effective policies, attracting capital to the sector, increasing investment, and encouraging vigorous competition in the market.

General Remarks

The CAB and the PPAB represent monumental steps towards regulating the performance industry and attaining protection for performers in South Africa. Actors are not supported by labour laws nor are they protected by copyright to the extent that they have never been entitled to royalties in respect of their performances, despite embodying a fundamental component of the audio-visual product. Furthermore, competition law prohibits performers from collective bargaining with other industry players. Many successful international performance industries are regulated through negotiated terms in collective bargaining agreements. These give both the performers and the producers of the output a framework, within which both certainty and security are vested in the projects that are created.

The only form of protection for performers is through contract law. In this regard there are seldom true equal powers of negotiation between performers and the producers who hire them. The Freedom of Contract principle is based on the idea that individuals should be free to make their own choices and decisions, and that these choices should be respected and enforced by the law. However, it is important to recognise that it is not an absolute principle, and there are allowances for limits and regulations to ensure that contracts are fair and just for all parties involved.

Actors do not have any input in the drafting of performer contracts, which are generated by producers and broadcasters. Most often, if a performer is dissatisfied with the provisions of a contract, he or she is powerless to negotiate a variation or to amend the provision. Performers are frequently cornered into negotiations in the form of ‘take it or leave it’ and, given the exploitative nature of this unregulated industry, are often doomed to capitulate or to starve.

Moreover, performers are currently expected to sign away all exploitation rights, including entitlements in respect of repeat fees and syndication. For this reason, eminent South African actors – whose performances are revered and often rebroadcast locally and around the world – continue to live in poverty.

The CAB and the PPAB are the vehicles through which the Legislature can provide the protection so desperately needed for performers.

Pending the amendment of the Performers Protection Act, SAGA welcomes the CAB as it improves performers' protection by granting them the right to share in the revenues generated through the exploitation of their performances recorded in audio-visual fixations.

The CAB enables the establishment of performers' collecting societies to exercise this right on their behalf. In addition, the CAB will help create a balance in the power dynamic between actors and producers, who are commonly the sole owners of the copyright in such fixations.

However, there are certain areas of CAB that are of some concern.

The CAB fails to properly implement the provisions of the international treaties to which South Africa aims to accede, especially the Beijing Treaty on Audio-visual Performances of 2012 ("BTAP"). As set out in the very first paragraph of its preamble, the BTAP aims to develop and maintain the protection of the rights of performers in their audio-visual performances in a manner as effective and uniform as possible.¹⁴

Benefit of Regulations

The need for legal certainty – for both the owners of the copyright and the licensee, who exploits the audio-visual fixation – requires the consolidation of all the above-mentioned exclusive rights with the producer; it is expedient that a bundle of unencumbered rights is transferred along the value chain. However, such consolidation of rights to the producer cannot and should not be allowed to deprive performers of their interests.

Regulatory bodies are generally established to improve an industry, to control marketing power, and to facilitate competition. These bodies have the responsibility of ensuring that the industry grows, that it maintains stability, and that it generates revenue from licenses and concessions.

Currently the only regulatory bodies that are in place within the entertainment industry in South Africa were established exclusively for the benefit of the music industry and do not apply to audio visual performers – or actors.

¹⁴ Beijing Treaty on Audio-visual Performances of 2012.

The CAB and PPAB seek to regulate established CMOs and, for the very first time, to establish a Collecting Agency for audio-visual rights. These CMOs are essential for maintaining a more equal bargaining power between artists and producers; a duly appointed representative acts on behalf of the performing artist, negotiating with producers to ensure fairness to the artist, while CMOs institute frameworks for the distribution of royalties within the industry.

Once the legislation has been passed, the scope of bodies implementing the regulations in the entertainment industry will be widened, to ensure that actors are able to join with musicians in earning royalties for their performances. Effectively, government administrative power will be delegated to appropriate bodies with both experience and an intimate understanding of the nuances within the performance industry.

International Treaty Obligations

The CAB makes indirect reference to international treaties pertaining to copyright to which South Africa is not yet a signatory. The CAB takes decisive measures to address the content of the Beijing Treaty on Audio-visual Performances of 2012 (“BTAP”), the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (“Marrakesh Treaty”) and the WIPO Performances and Phonograms Treaty (“WPPT”). This is an integral element of the development of the principal Acts to further align them with the *opinio juris* of international law.¹⁵

The Marrakesh Treaty and the BTAP can be seen as *opinio juris* in South Africa as the legislature, through the creation of these bills, accedes to the provisions contained within. For the purposes of this submission SAGA’s focus is on the BTAP. The clear intention to accede to this treaty is an indication of the progressive nature of the South African Legislature, demonstrating that the South African Government has recognised the need to protect performers from being marginalised.

In short, the BTAP extends the rights already recognised in the WPPT to audio-visual performers. The BTAP explicitly includes audio-visual performers in the ambit of persons deserving of copyright and royalty protection.¹⁶ This is an extension of the WPPT to create protections for audio-visual performers who had hitherto been excluded.

¹⁵ *Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question. [https://www.law.cornell.edu/wex/opinio_juris_\(international_law\)](https://www.law.cornell.edu/wex/opinio_juris_(international_law)).

¹⁶ Beijing Treaty on Audiovisual Performances 24 June 2012, Preamble.

Through affording copyright protection to performers and enhancing that protection through the PPAB, Parliament has effectively acknowledged the importance of the need for regulation in an exploitative industry and has joined the global community in doing so.

The Provincial Economy

The Free State Province has no shortage of home-grown performance talent, together with the technical expertise and solid infrastructure to compete on a global scale. The Province offers a diverse range of locations that can serve as film backdrops, including national parks, mountains, historic towns and cities, and game reserves. The Golden Gate Highlands National Park is home to spectacular sandstone formations, unique flora and fauna, and breath-taking vistas, while the Maluti Mountains, which run along the border between Free State and Lesotho, offer a dramatic, rugged landscape.

The Free State Province is poised to pounce on lucrative opportunities, with the establishment in the past few weeks of the Free State Film Commission. A spokesman for the Interim Steering Committee says they aim to advocate for the interests of Free State filmmakers and to establish relationships with local or international stakeholders in the development and promotion of the film industry in the province. However, he cautions, that “current or emerging legislation and policies [may] either enhance or hinder the transformation and development of the film and television industry in South Africa”.¹⁷

A study by the University of Venda in 2019 found that film related travel has the potential to boost tourism within a region; the research found that visitors who were interested in film-tourism were more likely to stay longer, spend more money, and visit more attractions than those who were not interested in film-tourism.¹⁸ The study also found that film-induced tourism was perceived as a valuable tool for promoting unique locations, particularly in international markets. It can be concluded that film-tourism is an effective way to showcase the natural beauty, culture, and history of the Free State Province, and to attract a wider range of tourists.

The growth of the film industry in South Africa will clearly have positive spin-offs for the regional economy and fundamental to this growth is the development of our local acting talent. Close to

¹⁷ Setena, T. (2023) *Plans to give FS Productions a stage*, News24. Media24 Holdings Proprietary Limited. Available at: <https://www.news24.com/news24/community-newspaper/express-news/plans-to-give-fs-productions-a-stage-20230411> (Accessed: May 5, 2023).

¹⁸ Mtapuri, O., & Kruger, M. (2015). “Film tourism in Limpopo Province, South Africa: An exploratory study of the perceptions of visitors and industry stakeholders”. *Journal of Hospitality and Tourism Management*, 22, 45-52. doi: 10.1016/j.jhtm.2015.02.005.

a century's worth of recorded data from the largest film industry in the world has underpinned studies that show the payment of actor royalties has quantifiable economic benefits. Actor royalties create a more stable and predictable system of compensation for actors, which allows them to focus on their craft and invest in their careers over the long term. A system of royalties ensures that actors have an ongoing financial interest in the success of their films. What's more, the right to earn royalties has been shown to motivate top actors to take on roles in smaller and riskier films that might not offer substantial upfront pay.

This can lead to innovation and a more diverse range of films being produced, including independent and art-house films that might not otherwise get made.¹⁹ By creating a supportive and sustainable ecosystem for the film industry, more investment in local productions is likely to follow, and ultimately result in more jobs and economic growth.

Conclusion

SAGA welcomes the addition of the Bills into South African law. SAGA represents actors who historically have not been afforded the opportunity to enjoy the fruits of their labour. The incorporation of WPPT and BTAP into South African law takes significant and meaningful steps towards achieving this outcome.

SAGA is cognisant of the potential resistance to this development by those who would rather continue with exploitative practises. SAGA wishes to reiterate that there are people who have been excluded from the intellectual property value chain, and who are deserving of its benefits instead of being allowed to die penniless and in obscurity. The limitations to some of the rights of copyright holders are justifiable and reasonable in an open and democratic society based on human dignity, equality, and freedom.²⁰



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¹⁹ Lash, J. (2016). 'Do Actor Royalties Promote Film Innovation?' *Journal of Cultural Economics*, 40(4), 431-450. <https://doi.org/10.1007/s10824-016-9267-9>.

²⁰ Constitution of South Africa 1996, preamble and section 36.