

The Committee on Economic Development and Tourism

THE KWAZULU-NATAL LEGISLATURE

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The South African Guild of Actors Submission to the KwaZulu-Natal 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 KwaZulu-Natal 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.

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 KwaZulu-Natal.

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NPO Registration Number 119-128 NPO (NPC Registration Number 2012/073405/08

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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 (“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 that came from South Africa. He spent his whole adult life playing roles in both South Africa and 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 a magnitude of fame he sadly died penniless and depressed. This is largely due to the fact that he was never paid fairly for his many roles in film and television and never given royalties for his performances. Henry Cele was exploited.

Henry Cele’s fate is, unfortunately, still a reality for many artists in the performance industry due to lack of regulations to ensure that actors get fairly reimbursed for their work. The lack of regulation in the performance industry is not only detrimental to the artists, but 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.

KwaZulu-Natal has a thriving and growing film industry, with a pool of talented and experienced crew members, actors, and other industry professionals. A recent Economic Impact Assessment Study conducted by the NFVF noted a significant growth in the KZN film industry from 9% of total film activity in 2016/17 to a total industry share of South African production of 12% four years later.¹ Long-running television productions, including *Uzalo*; *Durban Beach*

¹ National Film and Video Foundation, *Economic Impact Assessment Study JULY 2021*.14.

Rescue and *Code Green*, have contributed towards a sustained growth of the industry in the province, while feature-film projects completed in KZN, including *My Zulu Wedding*, *Beyond the River* and *Keeping Up with the Kandasamies* have generated significant box-office revenues.²

It is the firm belief of the South African Guild of Actors, that passage of these two pieces of legislation into law, would unlock further latent potential and would certainly help to stimulate the economy within the province. A study commissioned by the KZN Film Commission concluded that a legislative environment promoting the sustainability of the acting profession will incentivise performers to invest in the ongoing development 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.”³

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 common place. 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 performance of a sector is measured by the system expansion, cost efficiency, range of services offered, quality, and the proportion of innovation.⁴ The lack of regulation in the performance industry has the effect of stifling each of these performance indicators.

² KZN Film Commission, An Assessment of Progress Made to Transform the KZN Film Sector in the Last Seven Years. December 2022.

³ Urban-Econ Development Economists, The Star System in South Africa. KZN Film Commission. November 2020.

⁴ Body of Knowledge on Infrastructure Regulation. Development of Regulation. Retrieved January 23, 2023, from <https://regulationbodyofknowledge.org/general-concepts/development-of-regulation/#:~:text=Countries%20almost%20always%20establish%20regulatory%20agencies%20to%20improve,g enerating%20government%20revenues%20from%20licenses%20and%20concessions.%202.>

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 2020.⁵ 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.⁶

In 2018, copyright industries, which largely includes the performance industry, contributed to 11.6% of the United States' economy employing over 11 million people.⁷ The rhetoric that regulation of the South African performance industry will have a damning effect on the industry is thus ill conceived at best and at worst, is a patent falsehood.

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 which give both the performers and the producers of the work a framework to work with and that brings security to 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

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

⁶ 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>

⁷ International Trade Administration “Industry Overview (Updated Dec 2020)”

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 have no input on the drafting of performer contracts 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 starve.

Performers are currently expected to sign away all exploitation rights, including entitlements in respect of repeat fees and syndication. For this reason, famous and important 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 by which the Legislature can provide the protection so desperately needed by performers.

Pending the amendment of the Performers Protection Act, SAGA welcomes the CAB as it improves performer’s protection by granting them the right to share in the revenues from 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.⁸

⁸ Beijing Treaty on Audio-visual Performances of 2012.

Benefit of Regulations

The need for legal certainty – for both the owners of the copyright and the licensee, who exploits the audio-visual fixation – results in the necessary consolidation of all the above-mentioned exclusive rights with the producer. However, such consolidation of rights to the producer cannot and should not be allowed to deprive performers of protection.

Regulatory bodies are 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 generates revenue from licenses and concessions.

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

The CAB and PPAB seeks to regulate established CMOs and for the very first time to establish a Collecting Agency for audio visual rights. These CMOs are essential to maintaining a more equal bargaining power between artists and producers; a representative acts on behalf of the performing artist – when it comes to contracting with producers – making certain that the artist does not get taken advantage of, and CMOs institute frameworks for the distribution of royalties within the industry.

Once the legislation has been passed, the bodies implementing the regulations in the entertainment industry will be widened to ensure that actors join the musicians in earning royalties for their performances. Effectively, government administrative power will be delegated to applicable bodies that have 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.⁹

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 will focus on the BTAP. This is an indication of the progressive nature of the South African Legislature and that the South African government has recognised that it needs to protect performers from being marginalised.

The BTAP extends the rights 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. This is an extension of the WPPT to create protections for audio-visual performers.¹⁰

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

According to a study conducted by the KwaZulu-Natal Film Commission, the film industry contributed R3.5 billion to the economy of KwaZulu-Natal in the 2019/2020 financial year.¹¹ This figure represents a 27% increase from the previous year and demonstrates the significant impact that the film industry has on the province's economy. The study also found that the film industry supported over 14,000 jobs in KwaZulu-Natal, with the majority of these jobs being filled by local residents. This has helped to reduce unemployment rates in the region and provided people with a source of income.

Close to a century’s worth of recorded data has underpinned studies that show the payment of actor royalties to have 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.

⁹ *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)).

¹⁰ Beijing Treaty on Audiovisual Performances 24 June 2012, Preamble.

¹¹ KZN Film Commission, "The Economic Impact of the Film Industry in KwaZulu-Natal Province for the Financial Year 2019/2020" <https://www.kznfilm.co.za/news/economic-impact-of-film-in-kzn-r35-billion-in-2019-2020-fy>.

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.¹² 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.¹³

A handwritten signature in black ink, reading "Adrian Galley", written over a solid horizontal line.

ADRIAN GALLEY
SAGA Vice Chair

¹² 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>.

¹³ Constitution of South Africa 1996, preamble and section 36.