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THE NATIONAL COUNCIL OF PROVINCES
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The South African Guild of Actors Submission to the National Council of Provinces on the Copyright Amendment Bill [B13-2017] ("CAB") and the Performer's Protection Amendment Bill [B24D-2016] ("PPAB")

This supplementary submission on the Copyright Amendment Bill [B13-2017] ("CAB") and the Performer's Protection Amendment Bill [B24D-2016] ("PPAB") is made following National Council of Provinces' ("NCOP") request for comment on further amendments to the CAB and the PPAB. This submission is made by the South African Guild of Actors ("SAGA").

These submissions are intended to provide SAGA's position in respect of the CAB and the PPAB to the NCOP in general and specifically on the proposed further amendments.

SAGA thanks the Committee for the opportunity to make further submissions with regards to the CAB and the PPAB. SAGA requests an opportunity to deliver an oral submission to the NCOP.

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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.

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. The rights afforded to performers would bring income into the provinces where many performers originate, which will stimulate the economy within the provinces by performers.

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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.[1] The lack of regulation in the performance industry has the effect of stifling each of these performance indicators.

The United States of America, having a fairly regulated entertainment industry, is the largest entertainment industry in the world, grossing almost 21 billion US dollars in 2020.[2] In 2018, copyright industries, which largely includes the performance industry, contributed to 11.6% of the United States' economy employing over 11 million people[3]. 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.

[1] 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,generating%20government%20revenues%20from%20licenses%20and%20concessions.%202

[2] Statista Research department "filmed entertainment revenue in selected countries worldwide 2020" 5 Jan 2023

[3] International Trade Administration "Industry Overview (Updated Dec 2020)"

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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 barging 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. 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.

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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.[4]

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.

The CAB and PPAB seeks to regulate established CMO's and for the very first time to establish a Collecting Agency for audio visual rights. These CMO's 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.

[4] Beijing Treaty on Audio-visual Performances of 2012

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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.[5]

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.[6]

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.

Retrospective Arbitrary Deprivation of rights to property.

Section 25(1) of the Constitution states that no law may permit arbitrary deprivation of property.[7] This does not mean that deprivation and/or limitation to a person's property right need automatically be arbitrary. Deprivation is not expropriation, and it need not be an all-encompassing dispossession of the property itself. Through this lens the NCOP should view the manner and aim of the dimensions of the limitation that is created by the PPAB.

[5] *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)
[6] Beijing Treaty on Audiovisual Performances 24 June 2012, Preamble.
[7] Section 25 (1) "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Constitution of the Republic of South Africa, 1996.

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A deprivation of property is arbitrary when the law does not provide sufficient reason for the particular regulatory deprivation in question, or when it is procedurally unfair.[8] In the present matter there are sufficient reasons for the limitation of the section 25(1) right of copyright holders and the bills aim to create procedure which is fair and which recognises that the copyright holder must share in the profits with other co-creators such as performers in audio-visual works that are capable of being exploited.

Copyrights have had limitations and exceptions imposed on them since the recognition of the rights to one's own creation[9]. These limitations have been for the purposes of the public good which include education and accommodation for those with barriers to access such as visually impaired persons.[10]

The deprivation of some part of the copyright holder's benefit is not arbitrary as it is reasonable in terms of the three step test emanating from the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").[11]

Article 9(2) of the Berne Convention introduces the three-Step test which ensures that the limitation is not in and of itself unreasonable to the copyright holder. This is the safeguard that is in place within the CAB already, as the bill specifies what the certain special cases for limitation are, and do not conflict with the normal exploitation of the work. What's more, even if the expectation or limitation does prejudice the interest of the rights holder, that the prejudice is not unreasonable given the purpose for which it is created.

There can be no doubt that there is a change to how much of a profit the copyright holder would be entitled to going forward, but this limitation is not arbitrary. The limitation arises from the recognition that the law has been deficient in recognising the rights of parties that were critical in the creation of the works, and ensuring the fair distribution of the profits that copyright protected material may produce. This is to say that the bills recognise that the initial profit model for copyright holders resulted in limiting the economic rights of others, in relation to the creation of the works. This form of redress for a deficient legal principle is not in and of itself an arbitrary deprivation, but rather a reasonable limitation aimed at providing effective redress for prior deficiencies.

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[8] First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) para 57.
[9] Berne Convention for the Protection of Literary and Artistic Works 1886.
[10] 8 L Guibault 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with regard to General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment '(2003) e-Copyright Bulletin, 1,10.
[11] L Guibault Copyright Limitations and Contracts - An Analysis of the Contractual Overridability of Limitations on Copyright (2002) 28

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Regarding the benefits of copyright which can now be afforded to audio-visual performers, the bills change the way in which a copyright holder to an audio-visual fixation would benefit. The bills focus on the recognition of the rights that performers should previously have been afforded, and which can now be addressed.

The procedure for the mechanism contained within sections 6A(7), 7A(7) and 8A(5) must be fair and certain. To the extent that the legislature can provided more detail within sections 6A(7), 7A(7) and 8A(5) of the CAB – as to the procedures for limitation and attribution – this would be welcomed. This would help to achieve more certainty and ensure fairness and avoid disputes in the future.

Within the South Africa context it is well established law that the commencement and operation of legislation is fundamental to providing certainty of the law to subjects of the legislature in respect of the allotment of rights, the encumbrance of duties and the imposition of penalties. When a law commands a certain status quo it is as important, if not more important, than what the actual status quo commanded is.

It is through this lens that questions surrounding the retrospective application of legislation arise.

Retrospectivity may be divided into two forms, namely 'true' retrospectivity [12] – or 'strong' retrospectivity[13] – and 'weaker' retrospectivity[14]. The Supreme Court of Canada in the matter of *Benner v Canada (Secretary of State)*[15] acknowledges the distinct forms of retrospectivity, however the forms are labelled as 'retroactivity' and 'retrospectivity' and given substance according to the definitions put forward by Elmer A Driedger[16], whom the court quoted with approval as: -

> *"A retrospective statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a*

[12] *Transnet Ltd (Autonet Division) v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) at 7B-D
[13] *Shewan Tomes and Co Ltd v Commissioner of Customs and Excise* 1955(4) SA 305 (A) at 311
[14] *Ibid*
[15] (1997) 42 CRR (2d) 1 (SCC)
[16] (1978) 56 *Canadian Bar Review* 264 at 268-9

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prior event."

In the South African context 'true' retrospectivity is what Driedger describes as retroactivity whereas 'weaker' retrospectivity is what Driedger describes as retrospectivity.[17]

South African law, and the law of foreign jurisdictions, encompasses several presumptions against the retroactive and/or retrospective application of laws which flow from the principle of fairness that individuals should have an opportunity to have knowledge of a law and act in accordance therewith prior to the law coming into force.[18]

The mere fact that presumptions against retroactive/retrospective application of law exist per definition means that there are instances where law does have retroactive/retrospective effect and indeed there are several such instances.[19] The South African legal system through government thus, although it acknowledges the risks involved in retroactive/retrospective laws and attempts to guard against such risk through presumptions, does acknowledge circumstances which give rise to a need for retroactive/retrospective law.

The key considerations which must be taken into account in assessing the lawful retroactivity/retrospectivity of a law are firstly, the common law presumptions against retroactivity/retrospectivity, secondly, section 35 of the Constitution of the Republic of South Africa, 1996, finally, the Constitution in general with specific regard to the fundamental rights set out in the Bill of Rights.

The common law presumptions are likely dealt with through clear expression of the legislature's intention that a law be retroactive/retrospective. Section 35 has no application on the present facts as the current considerations do not involve accused, arrested and/or detained persons. The rights considerations are best dealt with through a balancing exercise vis a vis the rights of holders in contrast to the legitimate expectations and interests of previously deprived performers.

This application of the law is retrospective, not retroactive. There is no suggestion of reparations contained within the bills. Copyright holders of audio-visual works will still benefit economically from the further exploitation of the works. The extent to which audio-visual copyright holders will benefit in the future will be limited, but that limitation will not be arbitrary nor unreasonable. This would be a reasonable and justifiable law of general application, which aims to redress an injustice of the past and provides those who have been deprived of

[17] *National Director of Public Prosecutions SA v Carolus and Others* [2000] 1 All SA 302 (A)
[18] *Landgraf v USI Film Products et al* 511 US 244 (1994) at 265.
[19] The Prevention of Organised Crime Act 121 of 1998 serves as an example of law which does indeed contain retroactive/retrospective provisions, specifically in sections 12(3) and 19(1) as considered in the *Carolus* matter *op cit*.

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the fruits of their labour in the past some benefit prospectively.

For the sake of clarity, the bills do not suggest that performers be entitled to royalties which the copyright holder has already received on account of the exploitation of the work, and thus do not aim at retroactivity. The bills do suggest that performers should be entitled to share in the royalties earned as a result of the future exploitation of a work, even where such work was complete before the coming into law of the bills.

To refer to a previous example on a proper interpretation of the bills: were he alive, Henry Cele would not be entitled to retroactive royalties already received by the copyright holder in respect of his performances in Shaka Zulu. But he should be entitled to such royalties in respect of his work that are to be received by the copyright holder in future. Thus he would be entitled to retrospective royalties.

To simplify the point even further, the bills do not aim to redress previous exploitative practices but rather acknowledge historical shortcomings. The bills merely suggest that if a work generates future revenue, for instance through rebroadcasting, then that revenue should be shared with the performer.

There has long existed a need to limit the rights of copyright holders for the public benefit. This is simply a test that must be applied situationally. This principle was initially codified in the Berne Convention, referred to as the three step test. The limitation on the rights of copyright holders is therefore reasonable.

The addition of the recognition of rights for performers gives credence to the fact that the original contractual standards, wherein performers remuneration was limited, are *contra boni mores,* as those original agreements are unfair.

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.

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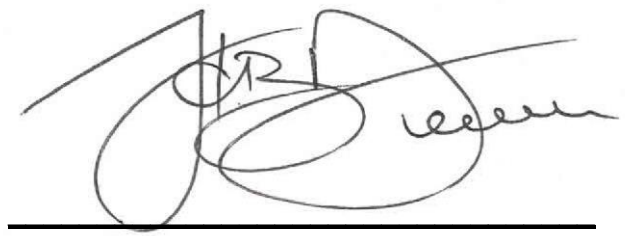
SAGA is cognisant of the potential resistance to this development by those who would rather continue with exploitative practises. SAGA wishes to reiterate that there are people who have been excluded from the intellectual property value chain, and who are deserving of its benefits instead of being allowed 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]



JACK DEVNARAIN
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[20] Constitution of South Africa 1996, preamble and section 36.