

# Actor Royalties in Limbo

by SAGA Vice Chair **Adrian Galley** BA (Hons.), MA, LLB

The Constitutional Court will have the last word on actor residuals and other crucial matters when it considers the Performers' Protection and Copyright Amendment Bills on the 28<sup>th</sup> November.<sup>1</sup>

As for President Cyril Ramaphosa, he has now made it abundantly clear where he stands concerning the plight of actors dying in penury despite reaching the respective pinnacles of their careers. The President had steadfastly avoided signing into law draft legislation that would have secured actors' royalty rights for the first time ever, thus bringing South Africa in step with the rest of the world. It seems a shame that he could not bring himself to sever ties with the apartheid-era legislation that keeps us tethered to our former colonial masters.

Incapable of exercising his constitutional duty to enact legislation – already passed by the National Assembly and the National Council of Provinces – the President has abrogated his executive authority to the judiciary.<sup>2</sup> In referring the Performers Protection Amendment Bill and its linked Copyright Amendment Bill to the Constitutional Court for adjudication, Ramaphosa has invoked the final delaying tactic afforded him by the Constitution, betraying the local artistic community in favour of powerful interests in the United States and Europe, and their local proxies.

## **SAGA's Commitment to the Process**

Nevertheless, the South African Guild of Actors (SAGA) remains committed to securing fair compensation for our members and for all performers in South Africa, and welcomes this latest development in the ongoing legislative reform process for Copyright and Performer's Protection.

---

<sup>1</sup> Broughton, T. (2024) *Concourt Showdown on copyright bill*, *Bizcommunity*. Available at: <https://www.bizcommunity.com/article/concourt-showdown-on-copyright-bill-474689a> [Accessed: 02 November 2024].

<sup>2</sup> Ferreira, E. (2024) *After years of debate in Parliament, Ramaphosa sends copyright bill to Concourt*, *The Mail & Guardian*. Available at: <https://mg.co.za/news/2024-10-16-after-years-of-debate-in-parliament-ramaphosa-sends-copyri-ght-bill-to-concourt/> [Accessed: 02 November 2024].

SAGA has participated in the process actively since at least 2015;<sup>3</sup> our primary goal has always been to establish a statutory right for performers to claim residual or royalty earnings based on the continued exploitation of their work in audiovisual media. This aligns with the World Intellectual Property Organization's (WIPO) Beijing Treaty which grants performers four kinds of economic rights for their performances in audiovisual fixations, such as motion pictures.<sup>4</sup> Unfortunately, South Africa's current performers' legislation, dating back to 1967, predates the advent of television in our country and fails dismally in reflecting the realities of today's digital landscape.

SAGA has made numerous written submissions and oral presentations to both houses of Parliament, as well as to each provincial government, advocating for performer's rights.<sup>5</sup> We believe this reform is crucial for a fair and equitable creative industry in South Africa.

## **Challenges and Roadblocks**

The reform process has faced significant opposition from certain vested interests, both locally and internationally, who have attempted to subvert the democratic process by peddling disinformation and threatening to withdraw from international trade agreements should the President of South Africa perform his constitutional obligation.<sup>6</sup>

The Motion Picture Association (MPA), which represents Hollywood studios, and the International Confederation of Music Publishers (ICMP), were at the forefront, threatening dire consequences in a joint letter to Ramaphosa.<sup>7</sup> They were soon

---

<sup>3</sup> South African Guild of Actors. (2015). Submission on the Copyright Amendment Bill. Submitted to the Department of Trade and Industry, Republic of South Africa. Available at: <https://saguil dofactors.co.za/wp-content/uploads/2023/09/SAGA-Submission-on-CAB-2015.pdf> [Accessed: 02 November 2024].

<sup>4</sup> World Intellectual Property Organization (WIPO). (2012). Summary of the Beijing Treaty on Audiovisual Performances (2012). Available at: [https://www.wipo.int/treaties/en/ip/beijing/summary\\_beijing.html](https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html) [Accessed: 02 November 2024].

<sup>5</sup> SAGA (2023) *South African Guild of Actors archive on Performers Protection Amendment Bill*. Available at: <https://saguil dofactors.co.za/resources/#performers-protection-amendment-bill> [Accessed: 02 November 2024].

<sup>6</sup> Balasubramaniam, T. (2020) *Foia: Film industry lobbies South Africa's Parliament to suspend Copyright Amendment bill, Knowledge Ecology International*. Available at: <https://www.keionline.org/33212> [Accessed: 02 November 2024].

<sup>7</sup> Association of American Publishers (AAP) et al., 2019. *Re: Copyright Amendment Bill and Performers' Protection Amendment Bill* [Letter to the President of the Republic of South Africa, 15 August 2019]. Available at:

joined by the Association of American Publishers (AAP) and others in successfully petitioning the Office of the US Trade Representative to reassess South Africa's eligibility for trade benefits it currently enjoys.<sup>8</sup>

While the U.S. tariff threats appeared to be out in the open, backroom deals were being done, and pressure was being exerted on political structures both in the US and South Africa.<sup>9</sup> The European Commission's campaign to hold up the legislation was equally clandestine. Fortuitously, though, documents have emerged that expose the Brussels-based bullies' efforts to subvert South Africa's democratic processes.<sup>10</sup>

In response, alongside other global unions, the International Federation of Actors (FIA) – of which SAGA is a member – stood up for South African actors, issuing a challenge to the EU to cease its meddling in South Africa's domestic affairs.<sup>11</sup>

Meanwhile, on the home front, powerful incumbent interests seeking to guard their privilege – secured in the apartheid-era legislation – engaged in a concerted disinformation campaign, co-opting the legacy media, prominent academics and celebrities to mount their offensive. Foremost among them is the South African Musical Rights Organisation (SAMRO), which is understandably wary of the transparency provisions contained in the Bills.<sup>12</sup> The proposed regulations threaten to expose some of the skeletons in their closet and disrupt their business model

---

[https://drive.google.com/file/d/1HFwGy00QgAm8v3Mw21WAI\\_i6rQFqu8Zk/view](https://drive.google.com/file/d/1HFwGy00QgAm8v3Mw21WAI_i6rQFqu8Zk/view) [Accessed 02 November 2024].

<sup>8</sup> USTR (2019) *GSP enforcement actions and successes for seven countries*, United States Trade Representative. Available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement> [Accessed: 02 November 2024].

<sup>9</sup> *Notes on Proposed Copyright and Performers Protection Legislation in South Africa\_For Distribution.pdf*, 2018. [Email thread, 4 December 2018]. Available at: <https://drive.google.com/file/d/1wUYHzgwtYUaYiMLLeGfV7ucxk5Q1tpu0/view> [Accessed 2 November 2024].

<sup>10</sup> Kionka, R., 2020. *Letter to the President of the Republic of South Africa, 20 March 2020*. Head of the Delegation of the European Union to South Africa. Available at: [https://drive.google.com/file/d/1Xw\\_wlrWjCDeaKvTSxgABRwsd\\_4ZDKAZB/view](https://drive.google.com/file/d/1Xw_wlrWjCDeaKvTSxgABRwsd_4ZDKAZB/view) [Accessed 2 November 2024].

<sup>11</sup> Luquer, D., Machuel, B. & Studinger, J., 2019. *Re: Industry attempts to sway key copyright reform in South Africa* [Letter to the EU Director of Trade, 15 March 2019]. Available at: [https://drive.google.com/file/d/1qlsI6N8neVzNjGdxBy8us7\\_hpKWtBcmS/view](https://drive.google.com/file/d/1qlsI6N8neVzNjGdxBy8us7_hpKWtBcmS/view) [Accessed 2 November 2024].

<sup>12</sup> Moore, N. (2021) *SA Music Industry exposed: The money is not going to the artists*, GroundUp News. Available at: <https://groundup.org.za/article/sa-music-industry-exposed-money-not-going-artists/> [Accessed: 02 November 2024].

going forward.<sup>13</sup> Another vocal rumourmonger is the Commercial Producers Association of South Africa (CPA) who peddled blatant falsehoods throughout the film production industry in South Africa. Since their client base is largely drawn from abroad, these misrepresentations have no doubt reached foreign shores with the unintended consequence of casting South Africa in a bad light.<sup>14</sup>

## **BlindSA's Role and the Constitutional Court**

It's not the first time that the Constitutional Court has been asked to weigh in on the matter. In March 2019, the Copyright Amendment Bill and the Performer's Protection Amendment Bill had been passed by parliament and awaited presidential assent. After seeing the Bills gathering dust on the president's desk for 15 months, BlindSA asserted the rights of visually-impaired citizens to secure copyrighted works in accessible formats, such as Braille:<sup>15</sup> it brought a legal challenge to the existing 1978 Copyright Act.<sup>16</sup> This prompted the President to exercise his constitutional prerogative to refer the bills back to Parliament in June 2020, citing "constitutional concerns".<sup>17</sup>

In the event, BlindSA's application was successful, with the court declaring sections of the Act unconstitutional.<sup>18</sup> It provided a temporary remedy for people with visual

---

<sup>13</sup> Neille, D. (2024) *An embarrassment of royalties (part one): The music industry's culture of impunity*, *Daily Maverick*. Available at: <https://www.dailymaverick.co.za/article/2024-08-26-an-embarrassment-of-royalties-part-one-wh-at-can-break-the-music-industrys-culture-of-impunity/> [Accessed: 02 November 2024].

<sup>14</sup> Amm, B. (2024) 'Audiovisual Industry's Fate in the Balance', *Business Day*. Sunday Times, 18 March, pp. 4–4. Available at: <https://drive.google.com/file/d/1VAUsRF96dcFEqWTLJvLEQvb2P6oJ1Ixm/view> [Accessed: 03 November 2024].

<sup>15</sup> Erasmus, D. (2024) *This is why Blind SA is taking legal action against Cyril Ramaphosa*, *The Mail & Guardian*. Available at: <https://mg.co.za/thought-leader/2024-10-14-this-is-why-blind-sa-is-taking-legal-action-against-cyril-ramaphosa/> [Accessed: 02 November 2024].

<sup>16</sup> Ncube, C.B. and Samtani, S. (2023) 'Copyright, Disability Rights, and the Constitution: Blind SA v Minister for Trade, Industry and Competition', *Constitutional Court Review 2023 Volume 13*, 471–503, doi:<https://journals.co.za/doi/10.2989/CCR.2023.0016>.

<sup>17</sup> Ramaphosa, C., 2020. *Referral of the Copyright Amendment Bill [B13B 2017] and the Performers' Protection Amendment Bill [B24 - 2016] to the National Assembly* [Letter to the Speaker of the National Assembly, 16 June 2020]. Available at: <https://drive.google.com/file/d/1Qb69BEtixVspqHJIBVFxWLRvvVKYbH48/view> [Accessed 2 November 2024].

<sup>18</sup> *Blind SA v Minister of Trade, Industry and Competition and Others*, 2021. CCT 320/21, Constitutional Court of South Africa, 7 October 2022. Available at: <https://www.concourt.org.za/index.php/judgement/485-blind-sa-v-minister-of-trade-industry-and-competition-and-others-cct320-21> [Accessed 2 November 2024].

and print disabilities to use published works in accessible formats and gave Parliament 24 months to fix the offending sections.

### **Parliament's Response and Continued Lobbying**

Parliament addressed the President's concerns and circulated the amended bills to provincial legislatures for their concurrence, despite advice from the senior parliamentary law adviser that, "Our legal view is that both Bills were correctly classified as section 75 Bills".<sup>19</sup> The unnecessary re-tagging of the Bills sparked a needless, extensive and costly public participation process, and the Bills were duly adopted for a second time.<sup>20</sup> But, true to form, President Ramaphosa froze again as lobbying efforts from foreign interests and their local proxies continued. Professor Owen Dean has long been a vociferous opponent of the Bills, labelling them "atrocious" and calling for them to be scrapped and sent "back to the drawing board".<sup>21</sup> He was swiftly put in his place, however, as respected international legal scholar Professor Thomas Hoeren weighed in, reminding Dean of South Africa's international obligations under the Marrakesh Treaty and arguing against the undue influence of powerful content corporations.<sup>22</sup>

Among the global scholarly collegiate, a number of cool heads have offered their counsel, methodically and rationally analysing the facts.<sup>23</sup> Whether their voices will be heard above the din and dust kicked up by the naysayers remains to be seen.

---

<sup>19</sup> Van der Merwe, C., 2020. *Section 79(1) referral of Performers' Protection-and Copyright Amendment Bills* [Briefing to the Portfolio Committee on Trade, Industry and Competition, 18 August 2020]. Available at: [https://drive.google.com/file/d/1IZo6K5F4\\_9v52FLpJJnXvoP4mOW9fdOk/view](https://drive.google.com/file/d/1IZo6K5F4_9v52FLpJJnXvoP4mOW9fdOk/view) [Accessed 2 November 2024].

<sup>20</sup> Okorie, C. (2024) *Long Walk to Copyright Reform #8: South Africa's Parliament passes the Revised Copyright Amendment Bill, The IPKat*. Available at: <https://ipkitten.blogspot.com/2024/03/long-walk-to-copyright-reform-8-south.html> [Accessed: 02 November 2024].

<sup>21</sup> Ensor, L. (2024) *Ramaphosa sends 'atrocious' copyright bill to Constitutional Court, BusinessLIVE*. Available at: <https://www.businesslive.co.za/bd/national/2024-10-15-ramaphosa-sends-atrocious-copyright-bill-to-constitutional-court/> [Accessed: 02 November 2024].

<sup>22</sup> Hoeren, T. (2024) *Letter: Sign The copyright bill already!, BusinessLIVE*. Available at: <https://www.businesslive.co.za/bd/opinion/letters/2024-10-20-letter-sign-the-copyright-bill-already/> [Accessed: 02 November 2024].

<sup>23</sup> Samtani, S.; Beiter, K.; Flynn, S.; Klaaren, J.; Ncube, C.; Okorie, C.; Oriakhogba, D.; Rens, A.; and Schonwetter, T. "Third Joint Academic Opinion on the South African Copyright Amendment Bill [B13D-2017]." (2023). PIJIP/TLS Research Paper Series no. 91. Available at: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1093&context=research> [Accessed: 02 November 2024].

## Conclusion: The Fight for Fair Compensation Continues

The journey towards securing fair compensation for South African performers has been long and arduous. We have faced opposition from powerful entities, both foreign and domestic, who prioritise profits over the livelihoods of artists. Yet, SAGA stands firm in our belief that a thriving creative industry requires fair treatment for all its participants.

SAGA Chair Jack Devnarain is reassured that the fate of artists is ultimately destined to be decided in the forum tasked with defending the Constitution. “We are actually quite relieved that the president is not going to make a decision on it because we were certainly not expecting him to do that. We believe that if he was going to make a decision on it, he would’ve done so a long time ago.”<sup>24</sup>

The Constitutional Court hearing on November 28th presents a crucial opportunity. A positive ruling would bring South Africa's outdated performer rights legislation into the 21st century, aligning us with international norms and finally granting actors the right to royalties for their work. Perhaps the Constitution will at last stand up for South African actors where politicians previously stood by their gravesides mouthing platitudes. And, of course, actors would not be the sole beneficiaries; a landmark victory would be transformative for the entire South African creative sector.

Here's how you can make a difference:

- Stay informed: Follow SAGA's updates and pronouncements on the court case.
- Spread awareness: Share this blog post and discuss the issue with fellow actors and the public.

Together, we can ensure that South African actors are no longer held hostage by an outdated system. Let's build a future where creativity is valued and rewarded!

---

<sup>24</sup> Tiwane, B. (2024) *Saga chairperson Jack Devnarain slams Ramaphosa for being 'forced' to send Bills to Concourt, The Citizen*. Available at: <https://www.citizen.co.za/entertainment/saga-chairperson-jack-devnarain-slams-ramaphosa-for-being-forced-to-send-bills-to-concourt/> [Accessed: 02 November 2024].