

To: The Portfolio Committee on Trade, Industry and Competition.

Attention: ***Chairperson of the Portfolio Committee on Trade, Industry and Competition: Mr. D Nkosi***

By email: [REDACTED]
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Introduction

This submission on the Copyright Amendment Bill [B13-2017] (“CAB”) and the Performers’ Protection Amendment Bill [B24B-2016] (“PPAB”) (collectively referred to as the “the Bills” herein) is made to the National Assembly at the request of the Portfolio Committee on Trade, Industry and Competition in terms of the Portfolio Committee’s call for comment on 4 June 2021.

These submissions are intended to provide The South African Guild of Actors’ (“SAGA”) position on the consideration of the Bills as per some of the concerns raised by President Cyril Ramaphosa on 16 June 2021.

SAGA thanks the Committee for the opportunity to make written submission on the CAB and the PPAB. SAGA further requests the opportunity to present to the Committee during the oral submissions.

About The South African Guild of Actors

SAGA is a non-profit organisation (NPO number 119-128 NPO) constituted on 23 July 2009 and Public Benefit Organisation (PBO No: 930041853).

SAGA’s mandate is to represent and protect the legal and economic rights of professional actors in the film, television, stage, commercial and corporate entertainment sectors. SAGA was elected as a member of the International Actors Federation in 2012, alongside Actors’ Guilds and Unions from 68 countries around the world including Screen Actors Guild - American Federation of Television and Radio Artists in the United States of America, Canada’s Alliance of Canadian Cinema,

Television and Radio Artists and Equity which is the UK trade union for creative practitioners.

SAGA has been a member of South African Screen Federation since 2009, where collaboration of the Independent Production sector which includes Producers, Writers, Editors, Agents, Animators and Actors' organisations ensures that the sector retains professional standards.

General Remarks

The President has raised issues and concerns with regards to both the CAB and PPAB despite the matter having been robustly considered by both the National Assembly and the National Council of Provinces. Both Bills then remained unsigned by the President for over a year, after being passed by the democratically elected legislature.

The President states in his letter to the National Assembly that he has received further submissions and communications directly. The content and extent of these direct submissions are not publicly available, and the persuasive or cohesive nature of such submissions remains unknown.

We request, in the spirit of democracy and public participation, that these direct communications be made available prior to oral submissions on the Bills.

To this end it is unclear why the reservations of the Bills has taken in excess of two years to be communicated back to the National Assembly in terms of section 79 of the Constitution of the Republic of South Africa, 1996.

While the President raised a number of concerns, SAGA is constrained to respond only to those reservations that have a direct impact on SAGA members and professional actors in our sector.

International Treaty Obligations

The President's letter questions whether the Bills fully and properly implement the contents of the WIPO Performances and Phonograms Treaty ("WPPT")¹ amongst others. This is a curious position as the President fails to mention the Beijing Treaty on Audiovisual Performances ("BTAP")² which affords the rights recognised for audio performers in the WPPT to audiovisual performers as well. The interdependent PPAB gives specific and robust meaning to provisions of both the BTAP and WPPT. The President fails to make clear how the Bills are inconsistent with the provisions of the WPPT.

The BTAP explicitly includes audio-visual performers in the ambit of persons deserving of copyright and royalty protection. This extension of the WPPT creates protections specifically for audio-visual performers as a distinct and separate category to audio performers. In its preamble it states:

*Recognizing that the WIPO Performances and Phonograms Treaty (WPPT) done in Geneva on December 20, 1996, does not extend protection to performers in respect of their performances fixed in audiovisual fixations.*³

Both Bills take decisive measures to accede the content and object of the BTAP. This is an integral element of the development of the principal Acts to further align them with South Africa's *opinio juris* in the context of international law. 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.

¹ WIPO Performances and Phonograms Treaty 10 December 1996.

² Beijing Treaty on Audiovisual Performances 24 June 2012

³ Beijing Treaty on Audiovisual Performances 24 June 2012, Preamble.

Retrospective Arbitrary Deprivation of Rights to Property.

Section 25(1) of the Constitution states that no law may permit arbitrary deprivation of property.⁴ This does not mean that deprivation and/or limitation to a person's property right need automatically be wrongful, unlawful, nor arbitrary. Deprivation is not expropriation and it need not be an all-encompassing dispossession of the property itself. Through this lens the National Assembly should view the manner and aim of the dimensions of the limitation that is created by the Bills.

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.⁵ In the present matter there are sufficient reasons for the limitation of the section 25(1) right of copyright holders; the Bills aim to create procedure which is fair and which recognises that the copyright holder must share the rights that are capable of being exploited with other co-creators such as performers in audio-visual works.

Copyrights have had limitations and exceptions imposed on them since the recognition of the rights to one's own creation.⁶ 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.⁷

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").⁸

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 safe-

⁴ 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.

⁵ 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.

⁶ Berne Convention for the Protection of Literary and Artistic Works 1886.

⁷ 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.

⁸ L Guibault Copyright Limitations and Contracts - An Analysis of the Contractual Overridability of Limitations on Copyright (2002) 28.

guard is already in place within the CAB as this bill specifies what the special cases for limitation are and which do not conflict with the normal exploitation of the work. Even if the exception or limitation does prejudice the interest of the rights holder, that prejudice is not unreasonable given the purpose for which it is created.

There can be no doubt that there is change in the portion of profit the copyright holder would be entitled to going forward but this limitation is not arbitrary. The limitation arises from recognising that the law has been deficient in acknowledging the rights of parties (that were critical in the creation of the works) to share in profits that a copyright protected material may produce. This is to say that the Bills recognise that the initial profit model for copyright holders succeeded 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.⁹

The mechanism contained within sections 6A(7), 7A(7) and 8A(5) must be fair and certain. To the extent that the National Assembly can provide more detail within sections 6A(7), 7A(7) and 8A(5) of the CAB as to the procedures of limitation and attribution, this would be helpful to achieve more certainty and ensure fairness and avoid disputes in the future. To this extent SAGA welcomes further development of the CAB for clarity.

Within the South African 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

⁹ Section 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

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' retrospectivity¹⁰ or 'strong' retrospectivity,¹¹ and 'weaker' retrospectivity.¹² The Supreme Court of Canada in the matter of *Benner v Canada (Secretary of State)*¹³ 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,¹⁴ whom the court quoted with approval as: -

“A retrospective statute is one that operates as of a time prior to its enactment. A retroactive 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 prior event.”

In the South African context 'true' retrospectivity is what Driedger describes as retroactivity whereas 'weaker' retrospectivity is what he describes as retrospectivity.¹⁵

¹⁰ *Transnet Ltd (Autonet Division) v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) at 7B-D.

¹¹ *Shewan Tomes and Co Ltd v Commissioner of Customs and Excise* 1955(4) SA 305 (A) at 311.

¹² *Ibid.*

¹³ (1997) 42 CRR (2d) 1 (SCC).

¹⁴ (1978) 56 *Canadian Bar Review* 264 at 268-9.

¹⁵ *National Director of Public Prosecutions SA v Carolus and Others* [2000] 1 All SA 302 (A).

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.¹⁶

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.¹⁷ 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.¹⁸

The common law presumptions are likely dealt with through clear expression of the legislature's intention that a law be retroactive/retrospective. Section 35 is not applicable 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 authors.

¹⁶ *Landgraf v USI Film Products et al* 511 US 244 (1994) at 265.

¹⁷ 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*.

¹⁸ The Constitution of the Republic of South Africa, 1996 Chapter 2.

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 economically benefit from the exploitation of the works.

The extent to which audio-visual copyright holders will benefit in the future will be limited but that limitation will be neither 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 the fruits of their labour in the past some benefit prospectively.¹⁹

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 contextually. This principle was initially codified in the Berne Convention, referred to as the three-step test; it is similarly applied in the provisions the President mentioned. The limitation on the rights of copyright holders is therefore reasonable.

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 take significant and meaningful steps to achieving this outcome.

SAGA is cognisant of the potential resistance this development may have but wishes to reiterate that there are people who have been excluded from the intellectual property value chain and are deserving of its benefits. The limitations to some copyright holders are justifiable and reasonable in an open and democratic society.²⁰

¹⁹ Note 10 above.

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