

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: ahermans@parliament.gov.za; tmadima@parliament.gov.za; msheldon@parliament.gov.za and ymanakaza@parliament.gov.za

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.

This submission is in response for comment on the consideration of the Bills as per some of the concerns raised by President Cyril Ramaphosa on 16 June 2021 and declares the position of The Personal Managers’ Association (The PMA).

The PMA thanks the Committee for the opportunity to make a written submission on the CAB and the PPAB and also kindly requests the opportunity to present to the Committee during the oral submissions.

About The Personal Managers’ Association:

The Personal Managers’ Association is a diverse group of performer agents who collectively strive to implement and maintain the best industry practices and standards. We actively work in the entertainment industry to further our agencies’ and our performers’ interests to work, grow, stimulate and structure our industry in the best possible way.

We also lobby on several levels with a variety of stakeholders for the overall betterment, transformation and sustainability of our industry.

Our Association was founded in 1980 to serve as a response to the lack of regulation for Performer Agencies and Managers and also to address the lack of certain industry standards and practices at the time.

It is the mission of our membership-driven Association to implement and facilitate ethical & best business practices, cooperation and communication among Agents/Managers and all role-players in the entertainment industry for the benefit and betterment of professional talent and the industry as a whole.

Collectively, our agencies represent a vast majority of the professional stage & screen performers in South Africa.

We are members of The South African Screen Federation (SAFED), Theatre & Dance Alliance (TADA), and work in frequent collaboration with The South African Guild of Actors (SAGA).

Motivating Statements

As a group of associated agents and individual micro-business-owners who, together, represent thousands of performers, we consider it our duty and responsibility to continuously seek to examine and improve our divisions of operation within our industrial ambit.

This is done with the underlying belief that the performer, those who look to us agents for career facilitation, is empowered to reasonably and fairly benefit from working their chosen profession.

However, as we all know, and even as we've recently noticed in the media, it is sadly not the case for many performers, who are often contracted to only be paid a pre-determined singular fee for their performance in an audio-visual fixation, leaving the producer and/or broadcaster able to freely continue to exploit the performer's image for further financial gain, without any obligation towards financially recognising the performer's artistic contribution under reasonable and equitable means, enforced and empowered through this very legislation.

Unless employed long-term, nearly all performers are unable to afford basic human dignities such as insurance and medical aid for example.

They are unable to obtain credit as freelancers due to their infrequent and unpredictable income. None of them is guaranteed work.

The PMA appreciates The President referring the bills back substantiating the necessity of further scrutiny, however, we would like to strongly urge the National Council of Provinces and the National Assembly to expedite and proceed in passing the Bills due to the dire circumstances that performers have been and are currently still faced with.

Due to lack of sufficient legislation, performers are unable to participate economically, self-empower, or sustain an acceptable quality of life that's easily and legally afforded to many others in different sectors.

The South African Bill of Rights states that we have the right to pursue a career and vocation in a profession of our choice, but many fail to understand the negative consequences of what that choice entails for performers.

This is still due to the lack of empowerment and continued operations under laws that are not only outdated but were also formalised during a time when they favoured terms beneficial only to the privileged few, as is still the case today.

Without the Bills passed, we run the risk of repeating these injustices.

The PMA holds the view that performers' circumstances have been significantly worsened with the advent of Covid-19. Also, corruption and misappropriation of funds that were due to performers serve as prime examples. It is therefore our collective duty to ensure that we all see to it that our country's performers are no longer treated and seen as paupers and second-rate citizens, by working to successfully pass these crucial pieces of legislation, and soon.

Submissions with reference to The President's Reservations

- Exceptions that potentially impede the contents and determinations of several International Treaties.

The President's reservations include whether the Bills contents with respect to Exceptions falling under what is deemed Fair Use are aligned with the WIPO Performances and Phonograms Treaty (WPPT) as well as others, including the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty, as well as the Beijing Treaty.

Specific reference is made to Exceptions being considered for the Facilitation of Access to Published Works for Persons who are Blind and/or Visually Impaired.

The Marrakesh Treaty is consistent with the contents of the WPPT, however, whereas the WPPT makes provisions for protections under certain exceptions in relation to musical performers, the nature of audio works is not relevant to print disabilities and visual impairments and therefore regulated separately.

The CAB and PPAB recognise these distinctions and make mention of the contents of the various Treaties.

Furthermore, The Beijing Treaty makes mention of the protection of audio-visual performers also references the same recognition that the WPPT awards audio performers, thus extending the same protection to audio-visual performers.

We are of the opinion that both Bills sufficiently utilise the objectives and terms of the Beijing Treaty (as well as others) in an effective and cohesive manner which will inform the main legislation in a positive manner which will further align our industry with international practices.

Retrospective Arbitrary Deprivation of Rights to Property

- Concern over loss of property and rights of Copyright Owners

The PMA is satisfied with the provisions made in the CAB that pertain to exceptions mentioned by the Bills, but more-so, believe that the protective measures under which certain exceptions and Fair Use may be allowed, will not result in the arbitrary loss of property, due to the safety measures that the Bills make mention of.

These Fair Use exceptions contained in the Bills are specific in their determinations and purposes before Fair Use can be recognised and utilised. These specific determinations are that the allowance for limited and exceptional use shall:

- 1: cover only certain special circumstances
- 2: not conflict with the normal exploitation of the work and:
- 3: shall not unreasonably prejudice the legitimate interests of the rightsholder(s)

This three-step test determined by the Berne Convention aims to serve as the guideline by which exceptions and Fair use may be determined and allowed to proceed. The test explicitly mentions that permission under those terms may not unreasonably prejudice the interests of the rightsholder.

In addition to that, the CAB grants owners of copyright-protected works, the rights to object against the use of their works on a moral basis including others, therefore the Bills empower Copyright Owners to address reservations and objections to authorities

We believe that those very specific allowances will only be permissible once the use of a work has successfully satisfied the specified criteria, and thus cannot be considered as resulting in arbitrary deprivation of property, as it seeks to balance and protect the rights and legitimate interests of the Copyright Owners as awarded to them by both the Bills.

The protective measures mentioned in the Bills serve that very purpose of preventing arbitrary loss of property and rights.

Furthermore, in cases where the required exceptional exploitation falls outside of those restrictions, then the standard procedure for normal and lawful exploitation with fair terms of trade and equitable remuneration between the users and owners, as well as legal compliance to the Bills' contents will be adhered to.

Bodies mandated with copyright asset management and administration such as Collecting Societies may be empowered to scrutinize licensing requests in collaboration with the Rightsholders, for all forms of exploitation. These applications may be normal and paid-for, or exceptional. The licensing body proceeds to obtain the owners' permission before granting a paid-for or possible 'exceptional use' license under the prescribed conditions for exceptions and subject to the three-step test, as contained in the Bills.

Our understanding is that property will only be arbitrarily deprived should the governing laws fail to protect any or both parties and/or if the law is procedurally unfair. The Bills seek to address and balance the rights and legal obligations with respect to the use of copyright-protected works, whilst making provision for the safe and limited use and exploitation of works under very specific and strict circumstances, thus still empowering the rights holder and offering them a legal degree of control which will most certainly avoid arbitrary deprivation and loss of certain rights.

In addition, the Berne Convention clearly makes mention of limitations and exceptions placed on copyright since its very existence. The purposes have been of a similar nature as the CAB defines, and how it's aimed towards the access to information from published works for print and visually impaired parties, educational purposes and for non-commercial communication to the public, among others, and therefore seeks to reasonably balance the use of intellectual property whilst protecting it from abuse. The Berne Convention also states that no limitation may be unreasonable in nature or prejudiced towards the copyright holder.

In cases where disputes are recorded, then the Copyright Tribunal might be appointed and empowered to facilitate and establish the merits of such an act as a mediator, utilising this and other legislation to either establish whether Fair Use under exceptional and permitted circumstances may be granted or whether it is denied and therefore the standard equitable exchange model between rights user and copyright holder would need to be followed.

With respect to, the concern held by rights holders that they will suffer significant losses should they be legally compelled to share the profits resulting from exploitation, international standards and practices have sufficiently addressed this concern and provided a guide for us to follow. This was done by ensuring that the portion of shared and paid equitable remuneration is limited to a low and reasonable percentage that ensures the control and maintains ownership of the property remains vested and intact with the rightsholder.

- Retrospective, not Retroactive Application

Contractually, and in most cases, performer contracts are finite and expire after a certain period. In addition, these contracts only speak to terms surrounding the initial or primary form of exploiting the work.

Initially and prior to the tabling of the Bills, no legal or reasonable provision is made for the contracting parties to establish and agree to terms pertaining to secondary and other subsequent exploitation.

There is a misconception among the detractors of the Bills that the new legislation will have an effect on prior-concluded contracts, but this will not be the case. Not only is that not legally enforceable but speaks to Retroactively pursuing the terms of the Bills, instead of Retrospectively which means that contracts pertaining to works and whereas the objective is future exploitation, that those new agreements be met under the terms of the new legislation.

Performers contractually agree to sign over and assign all their economic and moral rights over to the producer/broadcaster in perpetuity in exchange for a singular fee which far beyond extends to its initial supposed equitable reach, once the work proceeds to be sold or rented or licensed or otherwise commercially exploited.

This is due to lack of regulation with its roots steeped in this very legislation, but also a direct result of the failure of the Acts in their previous iterations.

The PMA strongly feel that by enabling this legislation, that it will reasonably restore the balance and encourage mutual ownership going forward.

Once passed, the Bills will empower standardised agreements to make provision for the acknowledgement of the performer's ownership and share in the work, and also allow for further continued, safe and fair exploitation by the Producer and/or Broadcaster.

Regulation in this manner will enable all parties to benefit fairly based on their shared contributions which will have a minimally negative impact on the income potential or ownership and associated rights embedded within a work, but a potentially life-saving positive benefit for our country's performers.