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To: Parliament of Republic of South Africa.  
Parliamentary Portfolio Committee of Trade and Industry  
Committee Secretaries: Mr André Hermans & Mr Tenda Madima  
Parliament Street, Cape Town  
PO Box 15, Cape Town, 8000

28 January 2022

## **Parliamentary Submissions of Further Clauses Open for Advertisement by the Department of Trade and Industry**

This supplementary submission on the Copyright Amendment Bill [B13-2017] ("CAB") is made following Parliament's request for comment on further amendments to the CAB. This submission is made by the South African Guild of Actors ("SAGA") to the Parliamentary Portfolio Committee of Trade and Industry ("Committee") following their request on 8 December 2021.

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

SAGA thanks the Committee for the opportunity to make further submissions with regards to the CAB.

### **About SAGA**

SAGA is a non-profit organisation (119-128 NPO) constituted on 23 July 2009.

SAGA's mandate is to represent 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 Equity which is the UK trade union for creative practitioners.

### **SAGA EXECUTIVE COMMITTEE MEMBERS**

Jack Devnarain (Chairman) Adrian Galley (Vice Chair CT) Carlynn de Waal-Smit (Secretary/Treasurer) Daniel Janks (Legal) Motlatji Mjamba (Vice Secretary CT) Nambitha Mpumlwana (Media JHB) Ashley Dowds (Workshops) Shadi Chauke (Membership and Governance)  
Londiwe Shange Vice Secretary Durban)

NPO Registration Number 119-128 NPO (NPC Registration Number 2012/073405/08 PBO No: 930041853



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**

The Copyright Amendment Bill and the Performers Protection Amendment Bill are monumental steps forward for the status and protection of performers in South Africa. Performers are not protected by labour laws nor are they protected by copyright to the extent that they have not yet been entitled to royalties. They are further frustrated by competition law which prohibits collective bargaining with industry players.

The only method of regulation for actors is through contract law. In this regard there are seldom true equal powers of negotiation between performers and the producers who hire them. 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 currently expected to sign away all exploitation rights and rights in respect of repeat fees and syndication. For this reason famous and important actors whose performances are revered and often rebroadcast live in poverty.

The Copyright Amendment Bill and the Performers Protection Amendment Bill are the vehicles by which the Legislature can provide the protection so desperately needed by performers.

## **General Remarks**

In general terms, and subject to 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 fixed in audio-visual fixations.

This enables performers’ collecting societies to exercise this right on their behalf and help performers to overcome their weak bargaining position with owners of copyright (commonly producers) of such fixations. However, the CAB has some areas which could be improved upon.

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.

In order to secure such effective protection, the CAB should provide three elements:

1. Substantive rights;
2. A well-defined system for the exercise or transfer of such rights; and
3. A remedy for balancing the bargaining position of performers with producers.

Articles 5 to 11 of the BTAP provide the minimum level of protection that producers must grant performers. The CAB should include clear provisions granting:

1. Performers the moral rights of control and integrity on their live performances and on their performances fixed in audio-visual fixations.<sup>1</sup>
2. Performers should also be granted the exclusive right to authorise the fixation and the communication to the public of their live performances.<sup>2</sup>
3. Performers should also have control over the reproduction, distribution, rental, making available, broadcasting, and communication to the public of their performances fixed in audio-visual fixations.<sup>3</sup>

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

In an ideal world, performers would be in a position to bargain with the producer. This would not be problematic if the bargaining position of both counterparts was balanced, in which case the contractual freedom of the parties would lead to a mutually satisfactory solution. This is however not the case with most performers, who are in a weaker bargaining position than the copyright owner.

With very few exceptions, performers are not in a position to negotiate truly fair terms with the owner of the copyright. In most cases, performers consent, at pains of losing the contract altogether, to transferring all their exclusive rights to the producer, who, in return, usually pays a lump sum to the performer (by way of a singular Performance Fee). This does not represent the value of the exclusive economic rights the performer is “selling” through the “buy-out agreement”.

In the absence of a strong union (i.e. when performers lack collective bargaining power) the remedy is thus a system comprising an un-waivable right to receive equitable remuneration for mainstream uses, payable by the user, and subject to mandatory collective management. In other words, performers’ rights are held to ransom by, and at the mercy of, producers.

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<sup>1</sup> At article 5 of the Beijing Treaty on Audio-visual Performances of 2012.

<sup>2</sup> Article 6 of the Beijing Treaty on Audio-visual Performances of 2012.

<sup>3</sup> Articles 7 through 11 of the Beijing Treaty on Audio-visual Performances of 2012.

## **International Treaty Obligations**

The CAB makes indirect reference to international treaties pertaining to copyright which South Africa is not a signatory to. The CAB takes decisive measures to address the content of the 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. 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.

The BTAP affords 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. 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<sup>4</sup>*

The inclusion of affording copyright protection to performers and enhancing that protection through the PPAB, Parliament has acknowledged the importance of the WPPT.

## **Retrospective Arbitrary Deprivation of Rights to Property.**

Section 25(1) of the Constitution states that no law may permit arbitrary deprivation of property.<sup>5</sup> This does not mean that deprivation and/or limitation to a person’s property right is automatically arbitrary. Deprivation is not expropriation, and it need not be an all-encompassing dispossession of the property itself. It is through this lens that the National Assembly should view the manner and aim of the dimensions of the limitation that is created by the PPAB.

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<sup>4</sup> Beijing Treaty on Audiovisual Performances 24 June 2012, Preamble.

<sup>5</sup> 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.

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.<sup>6</sup> 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 recognise 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<sup>7</sup>. 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.<sup>8</sup>

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").<sup>9</sup>

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

There can be no doubt that there is a change to how much profit a 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) to a share in the 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 and justifiable limitation.

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<sup>6</sup> 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.

<sup>7</sup> Berne Convention for the Protection of Literary and Artistic Works 1886.

<sup>8</sup> 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.

<sup>9</sup> L Guibault Copyright Limitations and Contracts - An Analysis of the Contractual Overridability of Limitations on Copyright (2002) 28.

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 have been afforded and 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 National assembly can provided more detail within sections 6A(7), 7A(7) and 8A(5) of the CAB as to the procedures of limitation and attribution, it should do so. This would be helpful to achieving more certainty, ensuring fairness, and avoiding 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* 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<sup>10</sup> or 'strong' retrospectivity<sup>11</sup> and 'weaker' retrospectivity<sup>12</sup>. The Supreme Court of Canada in the matter of *Benner v Canada (Secretary of State)*<sup>13</sup> 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<sup>14</sup>, 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 prior event.”*

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

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

<sup>12</sup> *Ibid.*

<sup>13</sup> (1997) 42 CRR (2d) 1 (SCC)

<sup>14</sup> (1978) 56 *Canadian Bar Review* 264 at 268-9.

In the South African context 'true' retrospectivity is what Driedger describes as retroactivity whereas 'weaker' retrospectivity is what Driedger describes as retrospectivity.<sup>15</sup>

South African law, and the law of foreign jurisdictions, encompass 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.<sup>16</sup>

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.<sup>17</sup> 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; and 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 applicability 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.

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 not be arbitrary nor unreasonable. This would be a reasonable and justifiable law of general application which aims to redress and injustice of the past and provides those

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

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

<sup>17</sup> 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*.

who have been deprived of the fruits of their labour in the past some benefit prospectively.

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, it is similarly applied in the provisions the president mentioned. 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 the original contractual standards wherein performers remuneration was limited are *contra boni mores* as those original agreements are unfair.

What actors want is to share in the financial benefit of content already produced that will generate future profit.

### **Submission on additional clauses**

#### ***Ad Section 12B***

SAGA recognises the need for exceptions to the Copyright Act be made for various purposes and supports certain of the exceptions which have been listed. At the proposed section 12B(c) SAGA notes that it is not an infringement for a broadcaster to communicate a performer's performance if at subsection (i) is authorised to communicate the performer's performance. This section is problematic in that it fails to provide for who specifically grants the authorization of the said performance. It is unclear if it is the performer herself who provides said authorization or if it is an "authorized entity" as provided in the amended definition section.

It also remains unclear what constitutes authorization in this regard and what steps a broadcaster must take to ensure it is so authorized.

It is further unclear why this section is excluded from copyright protection. A performer who performs in live performances which performance is then recorded and rebroadcast should be entitled to copyright protection. It is not clear why this work is excluded from such protection when the Broadcaster would be in a position to benefit from the transmission.

### **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 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.<sup>18</sup>

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Jack Devnarain', is written over a solid black rectangular redaction box.

Jack Devnarain  
SAGA Chairman

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<sup>18</sup> Constitution of South Africa 1996, preamble and section 36.