



**South Africa National Assembly Hearings
on the Performers' Protection Amendment Bill 2016**

13th & 14th September 2018

Comments and Suggestions

By the International Federation of Film Producers Associations [FIAPF]

1. As a global organisation representing film and TV producers, FIAPF has had a distinguished track-record of supporting audio-visual performers. Our organisation was party to the 2012 Beijing Diplomatic conference that led to the adoption of the WIPO Treaty on Audio-visual Performances, helping, in particular, in collaboration with the International Federation of Actors (FIA), to unlock a 10-year stalemate over finding a workable solution on the complex issue of the transfer of performers' rights in order to enable the unencumbered exploitation of the finished audio-visual work, for the benefit of every creative participant. More recently FIAPF also worked together with performers' representatives on a WIPO initiative to publish a guide entitled *Review of Contractual Considerations in the AV Sector*.
<http://www.wipo.int/publications/en/details.jsp?id=366&plang=EN>
2. FIAPF's commitment to performers' rights is a pragmatic one: if screen actors do not enjoy the protection of a clearly laid out legal framework, it is more difficult for the producers and performers to negotiate together in order to develop workable industry agreements, including collective bargaining agreements when and where deemed the preferred route, that are fair to both sides, that are transparent and that regulate both the transfer of the rights to the producer and the remuneration of actors. Absent such a framework, it becomes all the more difficult to successfully plan a new production, because there are no reliable principles from which to proceed with the recognition and transfer of rights and the mechanisms governing the remuneration of screen actors. Our commitment to orderly industrial relations between producers and screen actors and other AV performers was behind our support for the WIPO Beijing Treaty and we agree unreservedly with this Government's objective to implement this important international accord, into South African law, which will grant appropriate legal protection for local audio-visual performers both at home and abroad.

3. We also observe, that in many thriving national film and AV production sectors, the local legislation governing AV performers' rights tends to focus on two related legal constructs: on the one hand, granting meaningful rights to those performers. On the other hand, to enshrine the principle that these rights may be held by, owned by presumption, transferred to, or otherwise disposed of towards the producer. The latter ensures that the producer may be able to control and license those rights against finance for the Budget of the film and to arrange the licensing of distribution rights at home and abroad and on every platform available.
4. We observe, that best practice in the field of AV performers' rights, their transfer and the remuneration, arises when the law confines itself to identifying and enshrining the economic rights of the performers and establishing basic rules governing the transfer of those rights to the producer. These laws become a framework from which performers and producers may then develop successful agreements, including those based on collective bargaining, and come to terms that both sides will deem fair, transparent and equitable.
5. FIAPF submits that it is preferable to avoid the law crossing the boundary between the necessary legislative framework and such above-mentioned agreements between producers / AV performers, by intervening in detail such as whether the remuneration to the performer (in this instance) should take a certain form and at a certain rate, or dictate how revenue from the commercial exploitation of the film should be shared out between, in this instance, the performer and the audio-visual producer. In this respect, we have some concerns about possible regulatory overreach in the present bill, which allied with some conceptual contradictions, we fear, may not deliver the very important and laudable public policy aims of protecting performers' economic interests and ensuring that South African screen actors are fairly treated.
6. One of the reasons why the detail of rights' transfer and remuneration tends to be left to industry agreements, e.g. in particular collective bargaining agreements, is because of the complexities involved in financing and distributing audio-visual works on a project by project basis and the even more elaborate calculus involved in sharing out the revenues generated by their commercial exploitation, between the talent, investors, public bodies, those service companies such as editing and post-production houses who may have agreed to defer payment against some equity, etc. Also, compared to other forms of cultural production, (e.g. books or songs, or even albums), producing professional-standard content for the cinema, for television or online video platforms, requires an almost incomparably larger quantum of investment. Hollywood blockbuster production nowadays frequently runs into 9 digits (US\$). The median cost of an independent drama feature film in the region Europe is around the \$4 m mark today, though many films are well above this level of budget. For high-end TV drama, this median cost is between US\$400,000 and \$1.5 m per broadcast hour, though again, with the

frenzied rise in global demand for serial drama, the production values have been going steeply up, and easily escalate into several millions per episode on productions for the likes of HBO, Sky, Amazon or Netflix. In South Africa, median production costs for feature films (fiction) is substantially lower. However, relative to the size of the domestic audio-visual sector and the limited choice of commercial investors, local production costs remain, proportionately, very high and raising budgets to finance those is often an uphill struggle for producers.

7. Additionally, film and TV production is characterised by unusually high sunk costs. These are costs that need to be incurred during the often long and arduous process of trying to drive a project from idea-stage towards production and will not be recoverable in the event that the film never goes into production. Owing to the high production costs' barrier and other structural factors such as access to the market, the majority of projects generated by this creative industry do not get financed and produced. The attendant effect, is that large amounts of development costs are written-off each year by production companies.
8. Beyond production, another stark fact is that most films actually lose money, rarely recovering the costs of production through the final revenues generated by their exploitation over many years. It is important to also note that creative contributors to films generally receive payment upfront – including screen actors and other performers - and are thus protected from the film's potential losses.
9. Looking at the idiosyncratic factors above, FIAPF submits that it is essential for legislators and governments not only to grant rights and give requisite legal protection to the stakeholders in audio-visual production but also to empower them to work together to arrive at a contractual environment that reflects the economic vulnerability of the sector and accommodates it. A delicate balance, achieved through e.g. collective bargaining, is needed. This balance can only be successfully engineered by those stakeholders who work in – and understand – audio-visual's stringent economic realities. For governments to try and intervene and 'prescribe' those terms would amount to regulatory over-reach. We respectfully submit that the law should provide a framework to encourage the development of a collective bargaining infrastructure in this industry, not substitute for it.
10. Turning now to the content of the Bill in its current shape, FIAPF submits the following observations and suggestions:
 - a. New section 3A: The clause purports to regulate the transfer of AV performers' rights to the producer, which is a helpful disposition. However, as currently expressed, the performer is deemed to have transferred all rights, but this can only be so upon signature of 'a written contractual agreement'. There are precedents for this in other national laws.

However, the draft also specifies this agreement must be on terms that the bill says are ‘prescribed’, in other words, by regulation by the relevant Minister. As stated in our introduction, we are concerned that this suggests the precise form of the agreement will not be left to industry collective bargaining, but will be the result of direct intervention from a governmental entity.

We submit this is not the optimal way to go about it. If government has a role to play in helping set those transactional parameters, perhaps it should be as catalyst and, possibly, arbiter, but not as a substitute. Incentives for the stakeholders to bilaterally construct standard agreements governing transfer and remuneration bilaterally, are a more productive route to ensuring the fair economic treatment of performers whilst taking care not to undermine the sustainability of this fragile creative sector.

- b. This section also makes clear that the ‘contractual agreement’ *‘shall give the performer the right to receive royalties for any use of the performance’*. This disposition seems overly prescriptive in the context of film or TV production. The recovery of the very high costs of professional-standard production is a perennial challenge. The royalty-based approach may be widespread in the context of the music industry but it isn’t necessarily always so in film. For instance, in the UK, most screen actors working on a big budget film, currently shooting in a UK studio, will be on a remunerative system based on residuals, a.k.a “use fees”. In this system, the producers pre-clear and pre-acquire the usages they will need in order to exploit the films in all media worldwide. Each use is clearly defined and for each of those, an additional payment to the performer based on a percentage of his/her initial Performance salary is paid out upfront. This is a contractual template based on collective bargaining, which means that it has the approval of British Equity, the local screen actors’ union. This approach is realistic and works to both sides’ advantage because the producer can plan the financial outlay upfront, whilst the performer is guaranteed a protected and immediate income from the latter exploitation of those rights. In that sense, he/she is protected from the risk inherent to the film failing to attract substantial revenues. By contrast, requiring a royalty-based approach instead of merely making the transfer subject to a form (or forms) of remuneration to be agreed between the parties, poses the danger of creating a disincentive to invest in new production. Such a rigidly prescribed single solution may negatively affect both domestic South African audio-visual productions and large scale international service productions, the likes of which have been responsible for the expansion of the South African Film Studios’ and film services infrastructure, with attendant benefits for local job creation,

investment in services and infrastructure, increase in income tax revenue, etc.

- c. In current section 3A, the rights in a performance are said to “vest in the copyright owner”. Although the producer and copyright owner are not always necessarily one and the same, the chain of title necessary to put a film project together is normally held by the producer who, under normal circumstances, is also the signatory of the performer’s contract. We suggest therefore, that it would be more accurate to refer to the “producer” and not the “copyright owner” in the context of the transfer provision.
 - d. We also note that – as presently drafted – it isn’t clear whether or not the PPAB does grant exclusive economic rights to performers. There seems to be contradictory language: New Section 3A is meant to work with new Section 3(4) which appears to grant exclusive rights. On the other hand, new Section 5, suggests rather that the Bill grants only prohibition without consent. In the absence of clarification, it will be a challenge to deploy a contractual system for an affected audiovisual work based on clear legal concepts.
 - e. We submit that Section 5 – and in particular 5(1A) to 5(1D) are intensely problematic. The complicated system suggested here, would facilitate the obtaining of consent to use unfixed performances and audio-visual performances. Negotiations governing performers’ rights in AV production are normally driven by producers who will seek to pre-sell or pre-license rights in the project (including those rights in performances) in exchange for discountable sales and distribution contracts. This model works on the basis of contractual and commercial freedom and normally on the basis of exclusivity. It is unclear how Section 5 is meant to interact with this approach and how it can be compatible with the disposition for transfer as laid out in Section 3. The section in effect interferes directly with the exclusive rights of the copyright owner under the Copyright Act. We submit that the entire section needs to be reconsidered.
 - f. Finally, we submit that the Bill should contain clearly laid out provisions regarding exceptions and limitations to the rights therein and that the current catch-all references - (in 8(2)(f) and 5(a) in particular – to the exceptions and limitations in the copyright act are insufficient. Equally, this bill should contain its own bespoke provisions on the legal protection of technical protection measures and rights information.
11. In conclusion, FIAPF reiterates its support for a fair and transparent legal framework for the protection of performers and audio-visual performers’ rights. We express our concern however that the draft currently under

discussion bears the significant risk of overregulating the complex area of rights' transfer and remuneration for audio-visual performers. We also see an opportunity for the honourable law makers in the National Assembly and for the South African government to design a well-balanced act modelled on the provisions of WPPT and Beijing treaties and to accompany the issuance of this new Act with measures to support the local film industry in its endeavours to develop a secure industrial relations' environment and workable agreements based on a realistic appraisal of the idiosyncrasies of film production and the considerable economic risk that attaches to it.

END.

About FIAPF

FIAPF's members are 35 producer organizations from 31 countries on five continents, FIAPF is the only organization of film and television producers with a global reach. FIAPF's mandate is to represent the economic, legal and regulatory interests which film and TV production industries in various continents have in common.

In South Africa, FIAPF works in partnership with the Independent Producers' Organisation [IPO] and has working relationships with other stakeholders in the South African film and TV industry, including the Screen Federation of South Africa [SASFED]

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