

THE PERFORMERS PROTECTION AMENDMENT BILL

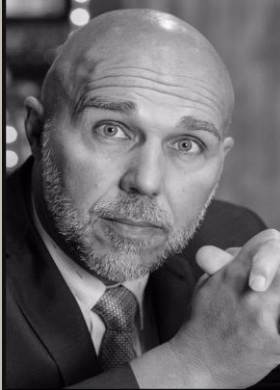
A Presentation by the South African Guild of Actors



04 September 2018
Portfolio Committee on Trade & Industry



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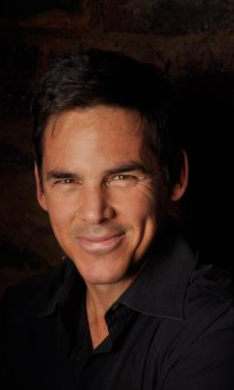
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Who we are

- The South African Guild of Actors (SAGA) is a non-profit organization (119-128 NPO) constituted on 23 July 2009.
- SAGA has been a member of the South African Screen Federation (SASFED) since 2009.
- SAGA is one of 68 countries elected as a member of the International Actors Federation (FIA) in 2012.
- We are a powerful, unified voice for actors in the film, television, stage and commercial sectors in South Africa.
- The Guild exists to promote professionalism in the film industry, to protect and enhance actors working conditions, compensation and benefits.



The current Performers Protection Act

- A deficient act, drafted before the advent of the internet age, and even before the advent of television in South Africa, the question is not whether the Performers Protection Act needs amendment, but rather to what extent.

We're speaking of thousands, instead of millions.

- While it is tempting to quantify our proposed amendments into millions of Rands, we urge you instead to think of the thousands of South African Actors, who over the course of a career spanning decades, have been denied basic statutory and contractual rights to earn a fair residual income based on the continuous exploitation of their audio-visual performances.

SELLO MAAKE KA NCUBE



LELETI KHUMALO



JOE MAFELA
(May his soul rest in Peace)



MARY TWALA
&
SOMIZI MHLONGO



Actors support a value chain in a competitive market place

- Actors do not deny the rights of broadcasters and producers to exploit the commercial value of audio-visual productions. Quite the opposite in fact. Actors support a vibrant value chain that produces audio-visual content and that delivers it to a competitive market place. We have a vested interest in the commercial exploitation of our work under specific conditions.

Context: How the actor earns an income

- Actors generate an income when they are contracted to deliver a performance in an audio-visual production. This is based on attending auditions where they are required to demonstrate their ability to perform the character they are asked to play.
- Well known actors may attend dozens of auditions a year, and possibly only landing a few roles thus only deriving an income from the days they are required to deliver their performance – their Performance Fee.
- An actor accepts this reality as part of the business, however, regardless of the body of work in the course of their career, their income will only ever be derived from those Performance Fees, while the production itself will continue to be licensed and broadcast into numerous territories around the world, in perpetuity, with the actors image used extensively to promote sales.

Deficiencies in the current Act

- Deficiencies of the current Act leave actors exposed to unfair exploitation.
- The issue is two-fold:
 - The Act itself has never been equipped to fulfil its intended purpose in the audio-visual age.
 - All an actor has, as a poor substitute for statutory regulations or Collective Bargaining Agreements, are Standard Performance Contracts.

How effective are these performance contracts?

- Led by its dominant players, the Independent Production Sector has sought to embody in Standard Performance contracts its version of norms and standards that determine the relationships among contracting parties.
- The deficiency of these contracts however, is that they fail to reflect the interests of all major stakeholders.

These Standard Contracts need to be supported by legislation

- Although SAGA continues to support the need for Standard Performance Contracts, these should be drafted in consultation with all industry stakeholders.
- These contracts need to be underpinned, balanced and contextualised by a revised Performers Protection Act amended in accordance with advances in the modern audio-visual industry and with the Constitution.
- SAGA appeals for Standard Contracts to be underpinned and enforced by legislation with regulations for addressing non-compliance.

Actors are forced to take it or leave it

- The reality is that the statute has failed to establish and enforce an equitable balance of rights, obligations and interests – corporate stakeholders in the audio-visual sector continue to capitalise on their dominance at the expense of the rights of the actor.
- Actors have no option but to take it or leave it. There is no in-between, there is no negotiation and there is no recourse.

The “Standard” SABC contract.

- The SABC has its Standard Freelance Performer’s Agreement issued to every actor on an SABC drama, soapie or sitcom. Drafted through extensive stakeholder engagement and adopted in 1997, this contract is now anything but standard. Since its adoption, various producers have taken it upon themselves to unilaterally adapt this contract to suit their own production and purposes.

Clause 7 - Commercial Exploitation:

The SABC shall be entitled to commercially exploit the PRODUCTION in any way whatsoever, provided that the SABC has notified the AGENT thereof at its earliest possible convenience, and subject only to its legal rights to do so. No right of the PERFORMER shall inhibit the rights of the SABC to so commercially exploit the PRODUCTION, subject only to the terms of this agreement and specifically what is contained in clause 7.2 hereunder.

7.2 Should the SABC commercially exploit the PRODUCTION using the likeness/image/photograph/performance of a PRINCIPAL PERFORMER, then in such event:

7.2.1 the SABC and such AGENT/PERFORMER shall agree on a lump sum amount to be paid to the PERFORMER, or

7.2.2 failing which, the SABC shall pay such PERFORMER a pro rata share of 2% (two percent) of the GROSS PROFITS received by the SABC by virtue of such exploitation, which pro rata share shall be determined by dividing the said 2%(two percent) of GROSS PROFITS between the PRINCIPAL PERFORMERS of the PRODUCTION in proportion to their total remuneration paid in terms of this agreement.

In the event of either 7.2.1 or 7.2.2 above, the PERFORMER shall have no further rights in terms of any commercial exploitation.

It's in the contract, so surely the actor is getting some form of payment?

- According to the SABC's Commercial Exploitation clause, the broadcaster agrees to pay the actor a lump sum should the SABC exploit the commercial value of its production. This figure should be negotiated between the broadcaster and actor. Where there is a failure to reach an agreed amount, the broadcaster will revert to paying a pro rata share of 2% of gross profit.
- Despite this, the broadcaster has never entered into any negotiations or arrived at an agreed lump sum payment for Commercial Exploitation!
- This is a clear indication that the Standard Contract on its own is insufficient to balance the acknowledged rights of actors with the commercial interests of the broadcaster.

But the SABC is not the only one. Another example is the M-Net contract:

Complete consideration/ Buy-out

The Performer acknowledges and agrees that the consideration payable to the Performer by the Producer in terms of the Performer Agreement constitutes the full, complete and sufficient consideration in respect of the rendering of the services by the Performer and the grant of any and all rights by the Performer under the Performer Agreement, and includes:

- the Performer's participation in any money received by M-Net, or profits related to the Series or the exploitation thereof which may accrue to M-Net; and
- any repeat or residual fees of any nature whatsoever in respect of the services rendered by the Performer in terms of the Performer Agreement; and
- You hereby acknowledge and agree that the services fees referred to in clause 3.1 represents a reasonable, full and final consideration for the contribution and all other services rendered under this agreement having regard to the rights granted to M-Net in term of this agreement including, without limitation, the full copyright in relation to your contribution to the Programme. Accordingly, the Performer agrees that M-Net shall not pay the Performer any further fees or royalties in connection to the contribution to the Series including, without limitation, when the Series is rebroadcast or exploited in any other form of media either by M-Net itself or any of its third-party licensees.

For the avoidance of any doubt, it is recorded, acknowledged and agreed that M-Net shall own all right, title and interest in and to:

- the Series, and any portion thereof (and any and all recorded footage); all works and materials underlying the Series, and/or upon which the Series will be based, including, without limitation, all drafts of the Script (including the final shooting version of the Script); and
- all works and materials that may be incorporated in and/or related to the Series, including, without limitation, all off-cuts from the Series and any unused footage and materials, worldwide and in perpetuity.

Accordingly, M-Net shall be entitled to exploit and/or dispose of all copyright and intellectual property rights in and to the Series and all formats, ideas and concepts arising out of the Series, in its sole discretion, anywhere in the world without any further payment to the Performer.

The Performer hereby:

- irrevocably and unconditionally grants to M-Net and the Producer, the right to photograph, portray, make recordings of and/or film the Performer, his/her portrayal and/or performance of the Role and record his/her voice and other sound effects in connection with the portrayal and/or performance of the Role for use in and in connection with the Series ("**the Performance**");
- irrevocably and unconditionally grants to M-Net, the exclusive right to reproduce in any manner or form, use, rebroadcast, exhibit, transmit, communicate or make available to the public, distribute or make an adaptation of (including, without limitation, by editing, cutting, rearranging or dubbing), and otherwise exploit (including without limitation, include in advertisements, promotions and publicity for the Series), the Series (or part thereof), incorporating the Performance (or any part thereof), in any manner and all media whether now known or hereinafter invented, worldwide and in perpetuity, or do, in relation to an adaptation of the Series (or part thereof) incorporating the Performance (or part thereof), any of the aforementioned acts, worldwide and in perpetuity;
- waives in favour of each of M-Net and the Producer, and each of their successors in title and assigns, any moral rights, as envisaged in the Copyright Act, which may vest in the Performer, in respect of any part of the Series, any M-Net programme or other event or function attended, recorded and/or filmed by the Producer, M-Net and/or its agent/s arising out of or related to the Performance; and
- grants to each of M-Net and the Producer, an exclusive transferable licence to use and authorise others to use, produce and exploit in any manner and in all media worldwide and in perpetuity, his/her name, sobriquet, profile, photograph, likeness (whether actual or simulated), biographical material, voice, sound effect, caricature and the like ("**the Performer's Image**") for advertising and publicity purposes in respect of the promotion of the Series and the M-Net Services only. It is specifically recorded, acknowledged and agreed that this paragraph 4.4.4 shall not be construed so as to entitle M-Net to use the Performer's Image for the purposes of the endorsement of any product or service other than (i) the Series or any M-Net Service or (ii) by way of the Performer's indirect association with any sponsor of the Series, by virtue only of the Performer's performance in the Series.

Relinquishing of Moral and Economic Rights

- The M-Net contract is a complete buyout of the actors rights to earn any form of residual income, regardless of how, when or where the broadcaster wishes to license, advertise or otherwise exploit the production.
- Furthermore it demands that the actor sign away any moral right to the integrity of the actors own profile, image, voice and likeness, meaning that M-Net reserves the right to edit and distort any aspect of the actor or their performance in any way they see fit – even to the detriment of the actor's reputation.
- Buy-out contracts should stipulate the compensatory amount due to the actor in respect of the buy-out as a separate fee, distinct from the Performance Fee, and that this stipulation be secured in the amended Performers Protection Act.
- It is for this very reason that the Beijing Treaty has articulated the Moral Right, vested in the actor, to claim an interest in the integrity of the actor's own image and how it is used.

TV contracts are not the only ones; the Film Contract states

- **USE OF MATERIAL AND ASSIGNMENT OF RIGHTS**

- * Ownership: All results and proceeds of every kind of the services heretofore and hereafter to be rendered by the Artist in connection with the Film, including without limitation the Artists' performance and all ideas, suggestions, themes, plots, stories, characterizations, dialogue, titles and other material, whether in writing or not in writing at anytime theretofore or hereafter created or contributed by Artist which in any way relate to the Film or to the material on which the Film will be based (collectively, "Material"), are and shall be deemed to be the works made for hire for the Company. Accordingly, the Company is and shall be considered the author and, at all stages of completion, the sole and exclusive owner of the Material and all rights, trademarks and any and all other ownership and exploitation rights in the Material now or hereafter recognized in any and all territories and jurisdictions including by way of illustration, production, reproduction, distribution, adaptation, performance, fixation, rental and lending rights, exhibition, broadcast, re-use and all other rights of communication to the public, and the right to exploit the Material throughout the universe in perpetuity in all media, markets and languages and in any manner now known or thereafter devised (including but not limited to the advertisement, publicity, public exhibition, commercial exploitation and merchandising of the Material and the Film and in connection with other motion pictures. If under any applicable law the Material is no deemed to otherwise considered a work made for hire or not effective to vest authorship and ownership of the Material and the Film and all rights therein in the Company, then to the fullest extent allowable and for the full term of protection otherwise accorded to the artist under such applicable law. Artist hereby assigns and transfers to the Company the Rights and, in connection therewith, any and all right, title and interest of the Artist (including present and future copyright) in the film and any other works now or hereafter created containing the Material.

This causes a major discrepancy between local and international talent

- This clause assures local and international film producers that their agreement with SA actors effectively denies any claim these actors may have over their moral rights and over any residual income based on Commercial Exploitation of their performances.
- South African actors may share scenes as leads or as supporting leads on a feature film or series with international actors, but the difference between them is that our foreign counterparts have a legitimate claim to their Moral Rights and Economic Rights which allow them to generate a sustainable residual income.

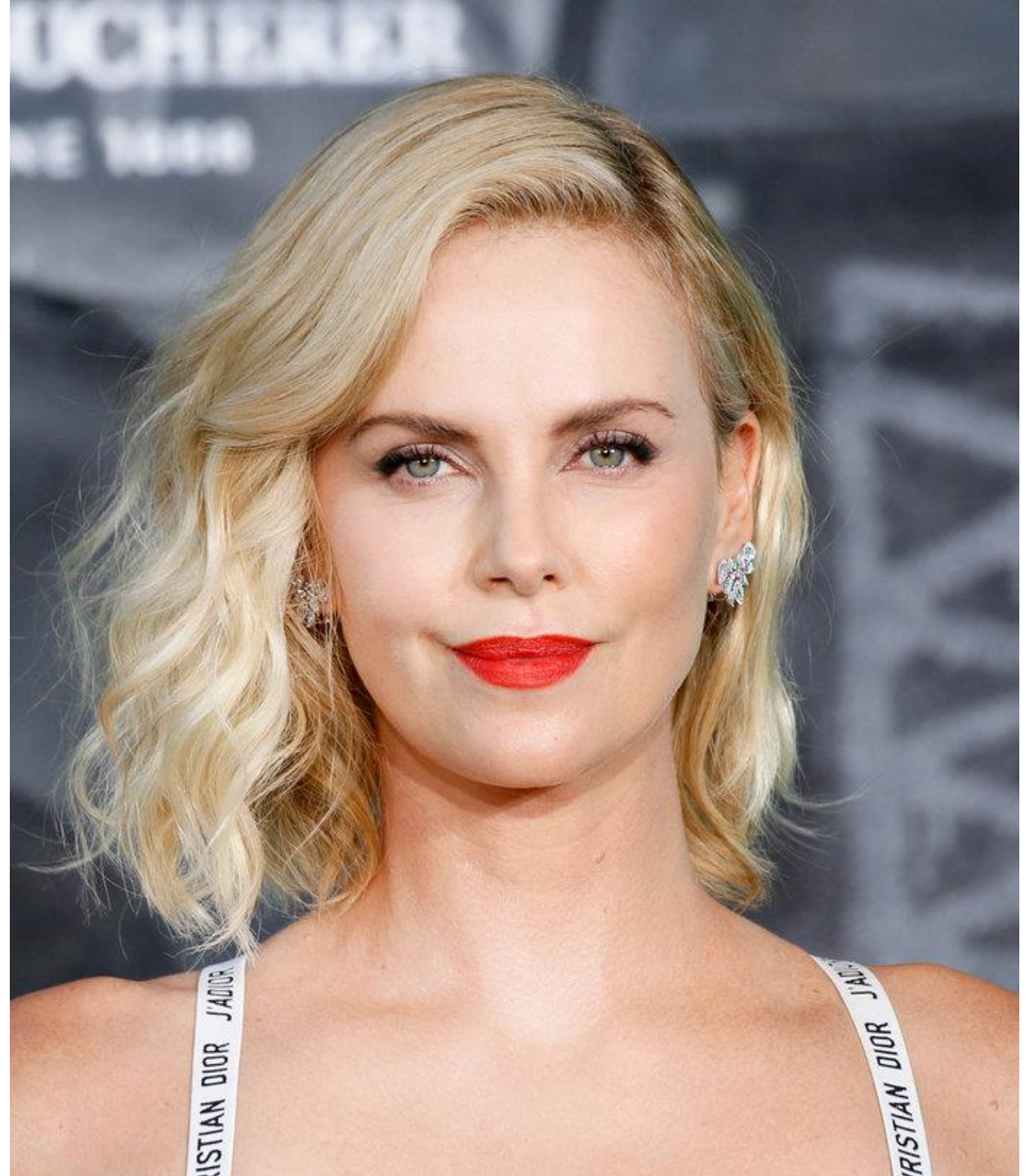
PEARL THUSI



HAKEEM KAE-KAZIM



CHARLIZE THERON



TREVOR NOAH



South African Actors will continue to be exploited

- South Africa still does not have a statutory framework that underpins the actor's Moral and Economic Rights in audio-visual contracts. While this deficiency guarantees the income of South African Producers and facilitators in film, it prejudices the earnings of South African acting talent.

Moral Rights as derived from the Beijing Treaty

- Paternity right - the right to be identified as the performer.
- Integrity right – the right to object to distortion or mutilation of the performance that would prejudice the actor's reputation.

Economic Rights

The Beijing Treaty grants performers Economic Rights for their performances fixed in audio-visual fixations, such as motion pictures:

- **The right of reproduction** is the right to authorize direct or indirect reproduction of the performance fixed in an audio-visual fixation in any manner or form.
- **The right of distribution** is the right to authorize the making available to the public of the original and copies of the performance fixed in an audio-visual fixation through sale or other transfer of ownership.
- **The right of rental** is the right to authorize the commercial rental to the public of the original and copies of the performance fixed in an audio-visual fixation.
- **The right of making available** is the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in an audio-visual fixation, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet.
- **The right to broadcast and communication to the public** is the exclusive right to authorise the broadcasting and communication to the public of their performances fixed in audio-visual fixations.

The Beijing treaty makes provision for national laws to stipulate the manner in which these rights are to be transferred once a performer has consented to the audio-visual fixation of a performance.

The PPAB should allow for transfer of these rights separately through contractual agreement.

(A production for broadcast need not secure the automatic consent of the actor for their performance to be sold on a DVD or streamed on the internet, for example)



Transfer of Rights

- SAGA supports South Africa's ratification of the Beijing Treaty which makes provision for national laws to prescribe the mechanism by which the exclusive rights of authorisation between contracting parties are transferred. It is therefore crucial that the PPAB is explicit in giving effect to this. It is the last level of protection for actors, the most vulnerable of whom may unknowingly relinquish all their economic rights
- The Performers Protection Amendment Bill guarantees that Moral and Economic Rights are exclusively vested in the actor and that remuneration rights are unwaivable, subject to mandatory Collective Management. And it is only through a contractual agreement with the producer that the actor may agree to transfer these exclusive rights in a manner prescribed by statute.

Statutory Royalty Sharing

- The Performers Protection Act was amended in 2002 to stipulate how a performer in sound recordings must share a royalty on commercial use of sound recordings with the producers of sound recordings. In the absence of a contract between the parties, the default position is that royalties are split 50/50 between the actor and the producer.
- This **does not apply to actors in audio-visual fixations**; the dynamics of the production and commercial exploitation of audio-visual fixations is completely different. The Beijing Treaty allows for national legislation to make the distinction clear.
- In the case of actors in audio-visual fixations, in the absence of a contractual agreement to the contrary, the equitable remuneration due to the actor is not shared with the producer by default. The Performers Protection Amendment Bill thus needs to be explicit in this regard due to a possible ambiguity introduced in the 2002 amendment regarding musicians.

Collective Management

- There has never been a Collective Management Organisation for audio-visual performers, because there have never been enabling rights supported in law.
- Collective Rights Management ensures that the actor's remuneration rights are effected. CMO's provide a type of legal remedy to counterbalance the automatic transfer of exclusive rights. While the creation and regulation of collecting societies is subject to the Copyright Act, it is important that the PPAB is explicit in making provision for mandatory collective rights management. Additionally SAGA supports the establishment of a Tribunal specifically mandated to arbitrate in disputes that may arise in the calculation and disbursements of residuals for audio-visual performances.
- SAGA appeals for statutory amendments that would enable a dedicated system for the accurate monitoring, tracking and reporting of all actors work in audio-visual media including but not limited to TV and film. This CMO would be governed by a Board, correctly constituted as a Non-Profit Organisation, mandated to collect and remunerate actors for the Commercial Exploitation of their audio-visual performances.

Summary

- It is up to this Committee to guarantee that the rights granted to actors in the Beijing Treaty are not diluted in the national legislation that gives effect to this treaty.
- In the absence of collective bargaining rights, mandatory Collective Rights Management is essential. In the production and distribution of audio-visual content, the right of title passes along the value chain, so the transfer of exclusive rights is essential.
- The *transfer* of rights does not imply a *waiver* of rights! The Performers Protection Act should ensure that no actor is forced to relinquish *all* rights without the opportunity to negotiate. The economic value of each of the exclusive rights is independently quantifiable. This statute should ensure that each party to an agreement is fully aware of the extent of the commercial privilege being transferred along with each right.

Conclusion

- Prior to our Constitutional Democracy, the economy suffered from the deeply divisive notion that the wealth of this country belonged, by law and by assumption, to a privileged few while the majority were made to feel grateful to receive a pittance in exchange for a lifetime of exploitation and servitude. The economy of a participative Democracy demands change to give a voice to those who contribute. Actors contribute, but nowhere in our laws is it recorded that our contributions entail a Moral and Economic right to fair compensation for the Commercial Exploitation of our work.
- Our submission today in support of the Performers Protection Amendment Bill is, for actors, an opportunity for transformation by granting rights and statutory protections that cannot be opposed in good conscience. We wish to motivate for the meaningful economic reform of a sector, dominated by corporate monopolies, that continue to oppose economic transformation.
- Revise our place in the economy. Allow actors to work, to earn, to be seen and heard by this Legislature. Allow us the right, already permitted to the many countries who already consume our work, to be protected by the very Constitution that we celebrate as the most progressive in the world.