

**The Chairperson: Standing Committee on Finance, Economic Opportunities and  
Tourism, Ms Cayla Ann Tomšs Murray  
Western Cape Provincial Parliament (WCPP)**

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**The South African Guild of Actors Submission to the Western Cape  
Provincial Legislature on the Copyright Amendment Bill [B13-2017]  
("CAB") and the Performer's Protection Amendment Bill [B24D-2016]  
("PPAB")**

This submission is made by the South African Guild of Actors ("SAGA") in respect of the Copyright Amendment Bill [B13-2017] ("CAB") and the Performer's Protection Amendment Bill [B24D-2016] ("PPAB") in response to the call for public comments by the Western Cape Provincial Legislature.

These submissions are intended to provide SAGA's position in respect of the CAB and the PPAB to the Western Cape Provincial Legislature in general and specifically on the proposed further amendments.

SAGA thanks the Committee for the opportunity to make further submissions with regards to the CAB and the PPAB. In addition, SAGA extends its thanks for the kind

**SAGA EXECUTIVE COMMITTEE MEMBERS**

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NPO Registration Number 119-128 NPO (NPC Registration Number 2012/073405/08

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hospitality we received when we delivered an oral submission in the Provincial Chamber earlier this week, 7 March 2023.

### About SAGA

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

SAGA's mandate is to represent, advance, and protect the legal and economic rights of professional actors in the film, television, stage, commercial, and corporate sectors throughout the Republic of South Africa and its provinces, including the Western Cape.

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 Morocco, Ghana and Madagascar as members of the AFROFIA subsector within FIA.

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

Henry Cele was one of the most distinguished and well-known actors that came from South Africa. He spent his whole adult life playing roles in both South Africa and America, bringing joy to many around the world. His most significant role was in the mini-series, and later movies, Shaka Zulu, playing Shaka kaSezangakhona. Although Cele had a magnitude of fame he sadly died penniless and depressed. This is largely due to the fact that he was never paid fairly for his many roles in film and television and never given royalties for his performances. Henry Cele was exploited.

Henry Cele's fate is, unfortunately, still a reality for many artists in the performance industry due to lack of regulations to ensure that actors get fairly reimbursed for their work. The lack of regulation in the performance industry is not only detrimental to the artists, but also stifles growth of the economy; well-crafted regulations offer new and

unique opportunities to the provinces to stimulate the entertainment production industry in their regions.

The Western Cape has a thriving film industry, with a pool of talented and experienced crew members, actors, and other industry professionals. The region has world-class production facilities, including studios, equipment rental companies, and post-production facilities.

Over the years, the Western Cape has served as a base location for many Hollywood productions, including "Blood Diamond," "Invictus," and "Mad Max: Fury Road." The province has also hosted international film festivals, such as the Cape Town International Film Market and Festival, which further highlights its reputation as a hub for the global motion picture production industry.

It is the firm belief of the South African Guild of Actors that passage of these two pieces of legislation into law, would unlock further latent potential and would certainly help to stimulate the economy within the province.

Performers do not have rights in labour law and must rely purely on contract law to protect their interests. This entrenches unequal bargaining power and results in a loss of economic opportunities for actors. Asymmetrical negotiating power between actors and producers weakens the industry over time as exploitative practises become more commonplace. Continued exploitation within the industry has the effect of stifling its growth and severely diminishing its yields, much like an over-grazed field.

Approving these bills will not only provide actors with the ability to meaningfully contribute to the economy but it will increase and strengthen this significant industry, cultivating prosperity in the creative economy, promoting tourism, and driving opportunities through education which stimulates employment. The progress of a sector is measured by the system expansion, cost efficiency, range of services offered, quality, and the proportion of innovation.<sup>1</sup> The lack of regulation in the performance industry has the effect of stifling each of these performance indicators.

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<sup>1</sup> Body of Knowledge on Infrastructure Regulation. Development of Regulation. Retrieved January 23, 2023, from <https://regulationbodyofknowledge.org/general-concepts/development-of-regulation/#:~:text=Countries%20almost%20always%20establish%20regulatory%20agencies%20to%20improve,generating%20government%20revenues%20from%20licenses%20and%20concessions.%202>

The United States of America, having a fairly regulated entertainment industry, is the largest entertainment industry in the world, grossing almost 21 billion US dollars in 2020.<sup>2</sup> In the previous year, prior to COVID, the THEME Report of the Motion Pictures Association had trumpeted record global box office returns of \$42.2 billion.<sup>3</sup> In 2018, copyright industries, which largely includes the performance industry, contributed to 11.6% of the United States' economy employing over 11 million people<sup>4</sup>. The rhetoric that regulation of the South African performance industry will have a damning effect on the industry is thus ill conceived at best and at worst, is a patent falsehood.

Our performance industry has been – and continues to be – stuck beneath a glass ceiling and struggles to become a sustainable, viable economic revenue source for the nation, largely through a lack of regulations. Regulation of the industry would promote the implementation of effective policies, attracting capital to the sector, increasing investment, and encouraging vigorous competition in the market.

### General Remarks

The CAB and the PPAB represent monumental steps towards regulating the performance industry and attaining protection for performers in South Africa. Actors are not supported by labour laws nor are they protected by copyright to the extent that they have never been entitled to royalties in respect of their performances, despite embodying a fundamental component of the audio-visual product. Furthermore, competition law prohibits performers from collective bargaining with other industry players. Many successful international performance industries are regulated through negotiated terms in collective bargaining agreements which give both the performers and the producers of the work a framework to work with and that brings security to the projects that are created.

The only form of protection for performers is through contract law. In this regard there are seldom true equal powers of negotiation between performers and the producers who hire them. The Freedom of Contract principle is based on the idea that individuals should be free to make their own choices and decisions, and that these choices should be

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<sup>2</sup> Statista Research department “filmed entertainment revenue in selected countries worldwide 2020” 5 Jan 2023

<sup>3</sup> Motion Picture Association. (2020). Theatrical and Home Entertainment Market Environment (THEME) Report 2019 [PDF]. Retrieved from <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf>

<sup>4</sup> International Trade Administration “Industry Overview (Updated Dec 2020)”

respected and enforced by the law. However, it is important to recognise that it is not an absolute principle, and there are allowances for limits and regulations to ensure that contracts are fair and just for all parties involved.

Actors have no opportunity for input on the drafting of performer contracts generated by producers and broadcasters. 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 frequently cornered into negotiations in the form of ‘take it or leave it’ and given the exploitative nature of this unregulated industry, are often doomed to capitulate or starve.

Performers are currently expected to sign away all exploitation rights, including entitlements in respect of repeat fees and syndication. For this reason, famous and important actors – whose performances are revered and often rebroadcast locally and around the world – continue to live in poverty.

The CAB and the PPAB are the vehicles by which the Provincial Legislature can provide the protection so desperately needed by performers.

Pending 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 recorded in audio-visual fixations.

The CAB enables the establishment of performers’ collecting societies to exercise this right on their behalf. In addition, the CAB will help create a balance in the power dynamic between actors and producers, who are commonly the sole owners of the copyright in such fixations. However, there are certain areas of CAB that are of some concern.

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.<sup>5</sup>

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<sup>5</sup> Beijing Treaty on Audio-visual Performances of 2012

### Benefit of Regulations

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

Regulatory bodies are established to improve an industry, to control marketing power, and to facilitate competition. These bodies have the responsibility of ensuring that the industry grows, that it maintains stability, and generates revenue from licenses and concessions.

Currently the only regulatory bodies that are in place within the entertainment industry in South Africa were established for the benefit of the music industry only do not apply to audio visual performers – actors.

The CAB and PPAB seeks to regulate established CMOs and for the very first time to establish a Collecting Agency for audio visual rights. These CMOs are essential to maintaining a more equal bargaining power between artists and producers; a representative will act on behalf of the performing artist – when it comes to contracting with producers – making certain that the artist does not get taken advantage of, and CMOs institute frameworks for the distribution of royalties within the industry.

Once the legislation has been passed, the bodies implementing the regulations in the entertainment industry will be widened to ensure that actors join the musicians in earning royalties for their performances. Effectively, government administrative power will be delegated to applicable bodies that have both experience and an intimate understanding of the nuances within the performance industry.

### International Treaty Obligations

The CAB makes indirect reference to international treaties pertaining to copyright to which South Africa is not yet a signatory. The CAB takes decisive measures to address the content of the Beijing Treaty on Audio-visual Performances of 2012 (“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.<sup>6</sup>

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. This is an indication of the progressive nature of the South African Legislature and that the South African government has recognised that it needs to protect performers from being marginalised.

The BTAP extends 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.<sup>7</sup>

Through affording copyright protection to performers and enhancing that protection through the PPAB, Parliament has effectively acknowledged the importance of the need for regulation in an exploitative industry and has joined the global community in doing so.

### The Provincial Economy

The film production industry contributed approximately R5.4 billion (about USD 359 million) to the Western Cape economy in the 2019/2020 financial year.<sup>8</sup> This includes direct spending by production companies on goods and services such as equipment rental, accommodation, and transport, as well as indirect and induced benefits to the broader economy. The film industry in the Western Cape is also estimated to have supported around 6,500 jobs during this period. Close to a century's worth of recorded data has underpinned studies that show the payment of actor royalties to have quantifiable economic benefits.

Actor royalties create a more stable and predictable system of compensation for actors, which allows them to focus on their craft and invest in their careers over the long term.

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<sup>6</sup> *Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question. [https://www.law.cornell.edu/wex/opinio\\_juris\\_\(international\\_law\)](https://www.law.cornell.edu/wex/opinio_juris_(international_law))

<sup>7</sup> Beijing Treaty on Audiovisual Performances 24 June 2012, Preamble.

<sup>8</sup> Western Cape Government. (2020). Annual Report 2019/2020. Department of Economic Development and Tourism pp 52-53. Retrieved from [https://www.westerncape.gov.za/assets/departments/economic-development-and-tourism/film\\_and\\_media\\_development/edat\\_annual\\_report\\_2019\\_20.pdf](https://www.westerncape.gov.za/assets/departments/economic-development-and-tourism/film_and_media_development/edat_annual_report_2019_20.pdf)

A system of royalties ensures that actors have an ongoing financial interest in the success of their films. What's more, the right to earn royalties has been shown to motivate top actors to take on roles in smaller and riskier films that might not offer substantial upfront pay. This can lead to innovation and a more diverse range of films being produced, including independent and art-house films that might not otherwise get made.<sup>9</sup> By creating a supportive and sustainable ecosystem for the film industry, more investment in local productions is likely to follow, and ultimately result in more jobs and economic growth.

### Conclusion

Statistics South Africa rates the Western Cape economy in third place behind Gauteng and KwaZulu/Natal.<sup>10</sup> The film industry may be the jewel in the crown that alters these rankings, were its hidden potentials to be released.

In recommending the Western Cape as an attractive film destination, most will refer to the diverse scenery and Mediterranean climate. It is certainly true that the province offers a diverse range of stunning locations, including mountains, forests, beaches, deserts, and vineyards, that can be used as backdrops for different film genres. Those in the know, however, will praise the Western Cape Government's proactive approach to incentivising film production, including efforts to streamline the process in the issuing of film-permits. The contribution of the province's dedicated Film and Media Promotion Unit and innovative Film and Media Fund should not be overlooked.

When promoting the pool of skilled and experienced professionals that form the backbone of the film industry, mention is frequently made of directors, producers, cinematographers, and crew. While the local workforce is rightly praised, the pool of skilled and dedicated actors rarely gets a mention. It's little wonder that, having found success alongside their imported counterparts, top acting talent migrates to friendlier climes in search of more sustainable prospects. It's been said that one can't export wine without planting vines.

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<sup>9</sup> Lash, J. (2016). Do Actor Royalties Promote Film Innovation? *Journal of Cultural Economics*, 40(4), 431-450. <https://doi.org/10.1007/s10824-016-9267-9>

<sup>10</sup> Statistics South Africa. (2021). Gross domestic product (GDP), 4th quarter 2020 (revised), and annual GDP 2020 (revised). <http://www.statssa.gov.za/publications/P0441/P04411stQuarter2021.pdf>



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 towards achieving this outcome.

SAGA is cognisant of the potential resistance to this development by those who would rather continue with exploitative practises. SAGA wishes to reiterate that there are deserving people who have been excluded from the intellectual property value chain; many of them being allowed to die penniless and in obscurity, mocked by dreams of an open and democratic society based on human dignity, equality, and freedom.<sup>11</sup>

A handwritten signature in black ink, reading "Adrian Galley", written over a solid black horizontal line.

**ADRIAN GALLEY**

**SAGA Vice Chair**

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<sup>11</sup> Constitution of South Africa 1996, preamble and section 36.