

SASFED/IPO Oral Presentation to Parliamentary Portfolio Committee on Trade and Industry regarding The Intellectual Property Laws Amendment Bill (B8-2010)

19th October 2010

Thank you Madam Chair, Honourable Members

I am Ben Horowitz, a producer with over 25 years experience across a variety of sectors of the South African film and television industry. I produced the second and third seasons of The Lab for SABC 3 and am currently the Series Producer of Zone 14 for Bomb Productions and SABC 1. I have been invited by the World Intellectual Property Organisation to present a paper at their conference in Geneva in December on an Anti-Piracy campaign that I headed for 18 months in Johannesburg.

I am an Executive member of the board of the Independent Producers' Organisation which represents 80% of independent producers in South Africa. The IPO is a member of the South African Screen Federation, a federation of 9 independent film, television and audiovisual organisations and the official country representative to the Pan African Federation of Filmmakers. SASFED and its affiliates are progressive organisations dedicated to the advancement of South African culture through our various art forms – we are cultural workers and nation builders. Our submission to the portfolio committee was drafted by the IPO and endorsed by SASFED.

Our members are largely engaged with reflecting and portraying South African life and culture from a South African perspective on television and cinema screens locally and internationally. We are the ones that develop and produce the local TV dramas, feature films, soap operas and documentaries that many millions of South Africans engage with on a daily basis.

We are not the producers driving Lamborghinis and Ferraris through the streets of Sandton and Greenpoint – they are producing television commercials. We are an essential, proactive, skilled, patriotic and dedicated component of South African arts and culture. But unfortunately, we stand before you today as an industry in crisis.

The fiasco at the SABC has sent tsunami-sized ripples through the industry that has literally swept some independent producers away. The independent film sector should be employing 50 000 people but if there are 15 000 working today, it is a lot. While the SABC and government deal with management issues and in-fighting, commissioning of new programmes, payments and our eagerness to move forward is put on the backburner. South African audiences suffer. We bring these issues to your attention in order to bring context and understanding to our position on IP rights and issues regarding South African culture – two things that we are very passionate about.

Because of the monopolistic nature of the broadcasters, producers are forced to negotiate unfavourable contracts that strip us of our rights as authors of our own work. The current law makes it clear that Intellectual Property Rights are vested in the author/owner of original work and if you can prove authorship/ownership you can enjoy those rights. But we end up signing those rights away to the SABC, and MNET, because it's better to work than not to work and we love our work ... we are artists and we live for our craft. The broadcasters leave us dependent and poor. How can we attract young talent and skills to an essential industry that is dependent and poor? Our current battle with the broadcasters is based and supported by our understanding of the current legislation and we fear that interference in this law is going to weaken our position. If anything we want the legislation to strengthen our position.

We are not lawyers, but we know lawyers and they have advised us and we can see for ourselves that many of the proposed amendments are unworkable. This has been highlighted by many of our comrades from other organisations and we do not feel it is necessary to elaborate on the obvious. You have heard it all. We must assume that the gaping loopholes and inadequacies of the proposed amendments will be addressed by minds and skills suited to this task.

We fully support the initiative to protect indigenous and traditional knowledge but do not fully understand why it is not protected under current law. If you can prove authorship/ownership – your IP rights are protected – under the current law.

The establishment of a national database of indigenous and traditional knowledge is of big interest to us. As archivists, historians and cultural workers, we love this idea. What a great venture!! Research, collate and preserve our extraordinarily diverse and complex traditional culture. It promises to be a brilliant resource for all the right reasons. A national dynamic resource that maps, clarifies and protects our cultural heritage. It would be a journey of discovery and major contribution to our history. But why does it have to be written into legislation? Why can't it be a separate agency that is there to assist South Africans and South African communities to prove that they are the authors/owners of the IP in question? If you can prove authorship/ownership, by any means, your work can be protected – under current legislation. Let's not try fix what is not broken. Let's not complicate and in doing so dilute what is already working for us.

If the Database becomes the sole and legislated means of proving authorship – the system, in our view will be unworkable. No one in this room can believe that with less than 200 years of written history and the passing of living knowledge beyond those years, that claims will not be disputed and contested. How much will be contested; 10%, 20% or even 30% of claims disputed – that may work, but nobody knows the answer to that question. No amount of research will answer that question – only the actual implementation of the database will answer the question. Maybe 80% of the claims will be contested. We implore you not to put into legislation something that may well make the whole law unworkable.

We are concerned about amendments that broaden the interpretation of “needle time rights”. Please, tread carefully here. In the current legislation “needle time rights” applies specifically to the music and audio arts industry. It does rely on a legislated collection agency. If one produces a song and you register it with the collection agency, a radio station does not need to seek permission to play it – the collection agency collects royalties on behalf of the rights holder. Any new legislation cannot reflect that if we make a film, broadcasters or exhibitors can show it, or part of it, without permission and a centralised agency will collect on our behalf. It’s completely contrary to international norms and rubbishes our current industry business models. It would create massive problems with our current international agreements regarding the importing and exporting of film products. We trust that the current disingenuous wording is only a rough first draft and our fears will be addressed in due course.

We worry about words like “retroactive”. “Nationalise the mines” sends unsettling tremors through the mining industry. “Retroactive” has the same effect on independent producers. Our industry is dependent and poor and will not sustain unsettling tremors.

Collection Agencies. We don’t want or need a government based collection agency. We want to be self-regulated – we take pride in our independence and believe independence is crucial to maintain the dynamic nature of our work. If we can be independent and self regulated, why would a community that is mature enough to have distinct and exclusive indigenous knowledge want to depend on a government collection agency that in these proposed amendments, seems to want to control and decide on the value of that knowledge. We beg you not to take the IN out of INDEPENDENT, especially when it comes to our arts and culture.

Arts and culture are dynamic, mysterious and very complex concepts that talk to the core of our humanity. Arts and culture become conservative and retroactive when put in the hands of a committee. Leave it in the hands of the artists. Databases and committees are not the custodians of our culture, people are the custodians of our culture. Yes, government must support arts and culture, elevate the status of artists, provide the necessary resources and legislation, but do not try and control it – if you want to control it, you may as well be cutting out the tongues of your children’s mouths so that they cannot talk back.

Madam chair, we thank you for this opportunity to present our views.