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To: Ms J Fubbs,
Chairperson: PC on Trade and Industry
Attention: Mr A Hermans
Box 15, Parliament, Cape Town 8000

From: South African Guild of Actors
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Introduction

The South African Guild of Actors (SAGA) welcomes the opportunity to make the following submissions with regards to the Performers Protection Amendment Bill 2016 [B24-2016]. SAGA is a powerful unified voice for actors in the film, television, stage, commercial and corporate sectors in South Africa, with a mandate to represent and protect the legal and economic rights of professional actors. SAGA is a non-profit organisation (NPO number 119-128 NPO) constituted on 23 July 2009.

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 SAG-AFTRA in the USA, Canada's ACTRA and British Equity, as well as GAG in Ghana, Morocco's SMPT and AGN in Nigeria. SAGA has been a member of SASFED (South African Screen Federation) since 2009, where collaboration within the Independent Production sector, including Producers, Writers, Editors, Agents, Animators and Actors' organizations, ensures that the sector remains professional and maintains standards.

Background

In the Memorandum on the Objects of the Performers' Protection Amendment Bill 2016, it is recorded that

“... the proposed provisions in the Bill are strategically aligned with the priorities outlined in the National Development Plan (“NDP”), with the aim of ensuring effective governance, social protection, employment creation, recreation and leisure”.

SAGA EXECUTIVE COMMITTEE MEMBERS

Jack Devnarain (Chairman) Adrian Galley (Vice Chair) Hans Strydom (Legal Chair)
Carlynn de Waal-Smit (Secretary) Sisanda Henna (Treasurer) Sibulele Gcilitshana Ashley Dowds Francis Chouler Lesoko Seabe



In compiling this submission, SAGA recalled the words of then Minister Trevor Manuel who, on 19 February 2013, characterised the NDP as a plan that defines a desired destination and identifies the role different sectors of society need to play in reaching that goal. The National Planning Commission has set out to imagine a desired future for our country and to put in place strategies for realising that vision; and what better partners in this mission than the performing artists within our communities? The true value of the arts to our civilisation, it is said, is to hold up a mirror to society. However, as our collective gaze is mesmerised by the reflected image, it is the artist's duty to imagine and explore alternatives. "What if?"

The performing arts are at the forefront of imagining and exploring alternative worlds through theatre, film, television, radio and the various hybrid media that continue to emerge in the digital revolution. Not only do these narrative visions give us access to alien planets, they offer alternative perspectives on our own pasts, presents, and possible futures. Our stories reflect our hopes and fears; they suggest the transcendent magic together with the lurking horror embedded in our own realities.

There is none better equipped than the creative sector, and performers in particular, to deliver on the Medium Term Strategic Framework 2014-2019 goal of promoting a diverse, socially cohesive society with a common national identity.¹

Most people would recognise the acting profession as being composed of those familiar faces who appear on television every night to transport us into a make-believe world that exists in parallel to our own humdrum existence. Some might be familiar with the notion that actors appear 'live' on stage in dramatic works or musical theatre entertainment. What is less well known is that many professional actors work in 'applied theatre' where their skills are deployed in an educational, community or therapeutic context. Industrial theatre, for example, fosters dialogue and effective communication between the factory floor and the boardroom. Many actors are engaged in work that aids the re-integration of offenders into communities, while others tour schools and community spaces with educational theatre programmes. SAGA's advocacy on behalf of professional actors helps to sustain all these types of valuable interventions.

In the burgeoning field of narrative psychology there is a wealth of literature attesting to the ability of stories to shape consciousness and identity. "Stories allow us to make sense out of otherwise puzzling or random events ... stories help us smooth out some of the decisions we have made and create something that is meaningful and sensible out of the chaos of our lives," says Dr Dan McAdams, a Northwestern University academic. "We don't just tell stories, stories tell us" adds colleague Sadie Dingfelder, "they shape our thoughts and memories, and even change how we live our lives"²

And yet, so many performing artists struggle to keep their heads above water; they are mentally malnourished, marginalised and excluded from the mainstream by a harsh system - the colonial legacy of an extractive economic model.

¹ Medium-Term Strategic Framework (MTSF) 2014-2019 (2014), Article 6.14 p. 36 by The Presidency. Republic of South Africa. Department: Planning, Monitoring and Evaluation

² Dingfelder, S.F (2011) Our stories, ourselves. Monitor on Psychology January 2011, Vol 42, No. 1. p. 41 American Psychological Association; Washington

There are a host of reasons why performers are vulnerable to exploitation, not least among them being the propensity to be driven by passion for the work itself, rather than by material rewards to be derived from the commercialisation of the work product.

Performers are primarily motivated by the urge to offer social commentary; to tell the stories that reflect our lives and our dreams. Our commentary through performance has spoken truth to power, defied segregation, challenged outdated ways of thinking and inspired humanity to be the best it can be. With so much to offer, performers are frequently consigned to the fringes of society, while their work sustains and grows a lucrative industry that offers them little in return.

For all its rich diversity, technical and performance talent, the entertainment industry in South Africa remains unprotected and unregulated by statute. As a result of this performers remain some of the most exploited.

Performers are seen as freelancers, independent contractors and entrepreneurs who often create much of their own work where the opportunities for formal production contracts are lacking. They are expected to promote themselves and use every opportunity to demonstrate their value, to seek a showcase for potential contractual engagements in future. In addition, performers actively and vigorously seek to develop skills that would increase their earning potential; it is not unusual for performers to act, dance, and sing, to perform voice-overs and MC events. Such versatility is vital in order to sustain a performer's career.

Through all this however the performer remains unprotected by the lack of industry standards and regulations. As a result of the multiplicity of contracting opportunities for actors, their status is often confused when viewed from the Labour perspective or the Income Tax perspective.

The medium of television had not yet come to our shores in 1967, (when the piece of legislation under review was enacted). In addition, the current explosion of digital distribution platforms underlines the urgency with which the very definition of what constitutes a 'performer' should be brought up to date. The medium of television and film has become by far the biggest platform for professional performers in the country, providing more opportunities for performance engagements than any other medium. In effect though, the majority of professional performers are claiming protection under legislation that, in its present form, does not even *acknowledge* the screen medium.

The Challenges Facing Performers

Sustainability: A sustainable income that can be derived from the body of a performer's work. The performer's work can continue to be exploited but the commercial value of that work does not necessarily accrue to the actor.

Exposure/Over exposure: Producers and broadcasters have conspired to further limit the earning potential of a performer by introducing the concept of over-exposure. Whereas the performer may be engaged in several productions in the course of a year, the decision to repeat broadcast these productions is the prerogative of the broadcaster. The frequency with which performers are given exposure through repeats on screen then becomes

prejudicial to them due to their association with those productions. The resultant loss of work by the performer could be mitigated and balanced by their residual earnings from these repeated productions but broadcasters either deny the performers right to earn repeat fees or have cumbersome processes that are not accessible to all performers. The result is a systematic denial of a performer's right to earn additional income from the continued broadcast of their image and likeness. The opportunities for highly skilled actors to continue to work are limited by broadcasters and producers, who among themselves, place a cap on the earning potential on the actor.

Standards: Currently there is no legal requirement enforceable by law for any broadcaster or producer on any medium to adopt a standard performers' contract. The potential for exploitation of performer's rights is therefore magnified. Some producers do not use existing agreed contracts, while others create their own one-sided contracts, leaving performers without enforceable rights.

The Future for performers

In a number of global jurisdictions an actor is granted both *moral* and *economic* rights in connection with the fruits of their efforts. In the US, for example, many older actors are able to survive long after work offers have dried up as they receive residual income from the body of work they have built up during their productive years. Residual income is based on the notion that an actor has the *exclusive right to their own image* and as a result they are able to retain a stake in their work product as the "long tail" niche markets open up. As a film goes from the big screen to successively smaller screens in its journey from the cinema to broadcast television to DVD release in various territories and on to global internet streams, an increasing number of revenue sources come on line and the actor shares the benefits.

SAGA envisages a future for actors where they are able to create sustainable independent businesses; where they are incentivised through tax-benefits to continue to supplement their skill-sets; where their access to revenues are protected and enforceable through IP legislation as they make meaningful investments in their futures through the sweat of their brows; and where they are supported by revised labour legislation which currently excludes them from both UIF and Occupational Health and Safety benefits.

To this end, SAGA is engaging with the various departments of government, including the Department of Trade and Industry. A revision of the Performers Protection Act (Number 11 of 1967) is only the beginning.

SAGA's Submission on the Performers' Protection Amendment Bill 2016

In making this submission, SAGA's point of departure is the Beijing Treaty (2012) of the World Intellectual Property Organisation (WIPO). It is clear that the drafters of the Amendment Bill have taken their lead from this document too, and this is to be heartily welcomed. However, SAGA submits that, in the drafting, certain nuances may have been introduced that may need further clarity. There are also instances of residual verbiage that no longer serves a useful purpose and which may simply create confusion. In each instance, SAGA has taken care to articulate the reasoning behind our proposal and to indicate the suggested changes as they would be rendered in the final legislation.

1. Definitions

Since the Principal Act is designed to protect the rights of performers, the provisions should seek to protect performers' rights in relation to the exploitation of any form of recording. In the interests of 'future-proofing', SAGA subscribes to the view that legislation should seek to rely on technologically neutral umbrella terms. SAGA therefore believes that, ideally, there is no need for a distinction between 'phonograms' and 'audio-visual fixations': The current definition of 'fixation' (inserted by s. 19 (b) of Act 38 of 1997), includes storage of-

- a. Sounds or images or both sounds and images; or
- b. data or signals representing sounds or images or both sounds and images;

However, SAGA acknowledges the distinction as being a historical one that may have reference to other pieces of legislation. Therefore, this submission will be confined to 'audio-visual fixations', unless the context determines otherwise. In these instances, SAGA is guided by WIPO's Performances and Phonograms Treaty (WPPT)

Perhaps more crucially, SAGA would prefer that the definition of "performer" include one who engages in "expressions of folklore" and that provision is made for works that are incarnated at the time of performance (not yet existing in any form). We note that the definition of 'literary and artistic works' was updated by Act 8 of 2002 to include "musical, dramatic and dramatico-musical works and expressions of folklore". However, a statement agreed on article 2(a) of the Beijing Treaty acknowledges that literary or artistic works are able to be "created or first fixed in the course of a performance".

Therefore SAGA submits that, for the avoidance of any doubt, and for extension of protection to performers whose work is 'improvisatory' in nature, the definition of 'performer' read as follows:

"performer" means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary or artistic works or expressions of folklore, that is created or first fixed in the course of a performance, dramatic works or works of joint ownerships.

2. Protection of performers' rights in respect of performances in the Republic

This section provides the cases in which a performer (as defined under section 1) enjoys the protection granted by the Act – the so-called “points of attachment”. It accords with Articles 3 and 4 in the Beijing Treaty.

SAGA submits that this article be split into at least 4 different sections: ‘beneficiaries’; ‘moral rights’; ‘exclusive rights’; ‘transfer of exclusive rights’. These would be, respectively, sections 3, 3A, 3B and 3C.

SAGA believes it is vital that the amended act acknowledges that South African performers compete in an international marketplace. For this reason, the first of these sections, ‘Beneficiaries’, should address issues of reciprocity and obligations:

“Reciprocity” applies in the absence of an International Treaty in force between the concerned countries.

“Obligations” are provided under an International Treaty to which South Africa is, or will be, a party, either multilateral (WIPO treaties, for instance) or bilateral.

Accordingly, SAGA proposes that section 3 be worded as follows:

3. Beneficiaries
The protection provided for in sections 3A, 3B and 3C of this Act shall be granted to:
 - (a) Performers who are nationals of or have their habitual residence in the Republic.
 - (b) Foreign performers when so provided by an International Treaty or Convention to which the Republic is a party.
 - (c) Foreign performers who are nationals of a country whose legislation grants South African performers the same protection as it grants to its own nationals.
 - (d) Performers, regardless of their nationality or place of residence, in respect of their performances -
 - (i) taking place,
 - (ii) broadcast without a fixation, or
 - (iii) first fixed,in the Republic, or in any other country when so provided by an International Treaty or Convention to which the Republic is a party.

3A. Moral Rights

The Bill already includes this provision, although it is listed in section 3. As noted earlier, SAGA proposes that the provision constitutes section 3A. The intention is to reproduce Article 5 of the Beijing Treaty.

It is noted that The Bill under discussion refers to “those” rights, a phrase which could be open to misinterpretation. Given that the moral rights should be provided under an “independent” section (3A), SAGA submits that it is technically more correct to refer to the “exclusive” rights rather than to “those” rights. As noted in the comments to the Basic Proposal of the Beijing Treaty, the only rights which can be transferred are the exclusive rights.

Furthermore, it appears that the drafters of the Bill sought to reproduce Article 5 (2) of the Beijing Treaty, employing the expression “at least”, which accommodates the differing national legislations of Contracting Countries. However, in the context of South Africa’s domestic legislation it can lead to legal

uncertainty. It would be ideal to grant perpetual protection to moral rights, although the most common solution is to grant them the same duration as that of the economic rights. SAGA's suggestion is to refer this question to section 7 of the Act, providing a common term of protection for all rights, both economic and moral.

SAGA therefore proposes that section 3A be worded as follows:

3A. Moral rights

- (1) A performer shall, even after the transfer of his or her exclusive rights, as regards his live performances or his or her performances fixed in audiovisual fixations or phonograms, have the right—
 - (a) to claim to be identified as the performer of his or her performances, except where the omission is dictated by the manner of the use of the performance; and
 - (b) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his or her reputation, taking due account of the nature of audiovisual fixations.
- (2) The rights granted to a performer in accordance with subsection (1) shall, after his or her death, be maintained and exercised by any authorised person until the expiry of the term of protection provided under section 7 of this Act.

3B. Exclusive Rights

The Bill includes this provision, although it is listed under section 3. In keeping with the suggestion outlined earlier, SAGA submits that an independent section (3B) deals with the exclusive rights, as provided under Articles 6 and 11 of the Beijing Treaty. For the purposes of this submission, we include the term 'phonograms' to make clear that such rights cannot be limited to performances contained in audio-visual fixations. (Where the term is excluded, this stems from reference in the Beijing Treaty to audio-visual fixations while the Performance and Phonograms Treaty is silent).

It is SAGA's submission that section 3B be rendered as follows:

3B. Exclusive rights

- A performer shall enjoy the exclusive right of authorising, as regards his or her performances—
- (i) the broadcasting and communication to the public of his or her unfixed performances except where the performance is already a broadcast performance;
 - (ii) the fixation of his or her unfixed performances;
 - (iii) the direct or indirect reproduction of his or her performances fixed in audiovisual fixations or phonograms, in any manner or form;
 - (iv) the making available to the public of the original and copies of his or her performances fixed in audiovisual fixations or phonograms through sale or other transfer of ownership;
 - (v) the commercial rental to the public of the original and copies of his or her performances fixed in audiovisual fixations or phonograms, even after distribution of such copies by, or pursuant to, authorisation by the performer;
 - (vi) the making available to the public of his or her performances fixed in audiovisual fixations or phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them; and
 - (vii) the broadcasting and communication to the public of their performances, fixed in audiovisual fixations.

3C. Transfer of rights on performances fixed in audiovisual fixations

Once again, this provision is included in section 3 of the Bill under discussion. SAGA's proposal includes an independent section (3C) for the transfer of exclusive rights on performances fixed in audiovisual fixations. This follows Article 12 of the Beijing Treaty.

Kindly note that this remuneration right:

- (a) is NOT shared with the producer of the AV fixation, as the remuneration right is justified in the negotiation power of the performer vis-à-vis the producer (and the need of the producer to consolidate all exclusive rights). The producer therefore benefits and exercises the exclusive right, while the performer only enjoys the right to remuneration; and**
- (b) is limited to audiovisual performances, as provided under the Beijing Treaty** (the WPPT (Art. 15) provides for the corresponding remuneration right of certain uses of phonograms, in which case it is shared between the performer and the producer of the phonogram).

Therefore SAGA proposes that Section 3C appears as follows:

- 3C. Transfer of rights on performances fixed in audiovisual fixations
1. Where a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorisation granted to a performer in terms of section 3B (iii), (iv), (v), (vi) and (vii) shall be presumed to be transferred to the producer of such audiovisual fixation, provided that the parties have concluded a prescribed written contract, setting out the full economic terms of the transfer, and subject to any provision to the contrary therein. Unless otherwise agreed in such written contract, the transfer of rights shall be valid for a period of 25 years from the date of commencement of the agreement.
 2. Independent of the transfer of the exclusive rights described in subsection (1) above, and even after the transfer of such rights, the performer shall keep an unwaivable and non transferrable right to receive equitable remuneration for any use of the performance described in section 3B (v), (vi) and (vii). This right shall be made effective by the corresponding collecting society who, under the regulation provided for in Chapter 1A of the Copyright Act, must collect the remuneration from the natural or legal person carrying out any of such uses, as regards of performances fixed in audiovisual fixations, and distribute it accordingly to the concerned performers.

PLEASE NOTE THAT THIS PROPOSAL REFERS TO CHAPTER 1A OF THE COPYRIGHT ACT, BASED ON THE COPYRIGHT ACT AMENDMENT BILL. SHOULD THE COPYRIGHT ACT NOT BE AMENDED, THEN THE EXPRESSION "CHAPTER 1A" SHOULD BE DELETED IN THIS SUBSECTION.

4. Extension of protection of performers' rights to performances in certain countries

SAGA submits that there is no need to keep current section 4 as set out in the Amendment Bill, as the points of attachment concerning foreign performers are already provided (or should be provided) under section 3 above.

5. Restrictions on use of performances.

SAGA notes the possibility that the performer's exclusive rights may have been transferred to a third person ("the rights owner"), in which case it is their consent that would be required for carrying out the exploitation acts described in this section. Since the owner of the exclusive right may be a third person, there is no need to include the expression "of such performer" in this section.

Furthermore, in accordance with Article 6 of both the Beijing Treaty and WPPT, the performer's exclusive right to authorise the broadcasting and communication to the public of his or her performance is granted to **all** performers on their **unfixed** performances. At the same time, Article 11 of the Beijing Treaty grants this right to audio-visual performers on their performances fixed in AV fixations. For this reason, SAGA submits that this provision has to refer to both "unfixed" performances and performances "fixed in AV fixations", as in 1 (a) (i) below, but NOT in any other fixation (i.e. phonograms).

It is SAGA's submission that this provision is rendered as follows: (for the sake of clarity, commentary is interspersed, in parentheses)

5. Restrictions on use of performances

- (1) Subject to the provisions of this Act, no person shall-
 - (a) without the consent of the owner of the exclusive rights provided under section 3B-
 - (i) broadcast or communicate to the public an unfixed performance or a performance fixed in an audiovisual fixation, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; or
 - (ii) make a fixation of the unfixed performance; or
 - (iii) make a reproduction of a fixation of a performance -
 - (aa) if the original fixation, other than a fixation excluded by section 8 from the necessity for obtaining the consent of the right owner, was itself made without his or her consent; or
 - (bb) if the reproduction is made for purposes other than those in respect of which such right owner gave his or her consent to the making of the original fixation or of a reproduction thereof; or
 - (cc) if the original fixation was made in accordance with the provisions of section 8, and the reproduction is made for purposes not covered by those provisions; or
 - (iv) make available to the public the original and copies of a fixation of a performance through sale or other transfer of ownership; or
 - (v) commercially rent out to the public the original and copies of a fixation of a performance; or
 - (vi) make available to the public a fixation of a performance, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

(SAGA calls attention to the last three paragraphs above, which refer just to “fixations” and not “fixations and “AV fixations”)

Continuing ...

- (b) by means of an audiovisual fixation of a performance [published for commercial purposes], without payment of the equitable remuneration provided under section 3C(2) [a royalty] to the collecting society representing the performer concerned-
 - (i) broadcast the performance; or
 - (ii) cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act, 1978 (Act No. 98 of 1978), unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; or
 - (iii) cause any communication of the performance to the public; or
 - (iv) commercially rent out such performance; or
 - (v) make such performance available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them.

(SAGA must point out here that when any of the exclusive rights have been transferred to the producer, in accordance to section 3C, the performer keeps an unwaivable right to remuneration. In this case, paragraph (b) of Subsection 5.1 (above) should reflect the obligation of payment of such remuneration when exploiting the performance.

Continuing ...

- (1A) When the exclusive rights provided under section 3B have not been transferred to the producer of the audiovisual fixation, subsection 1(b) above shall not apply, and a person who intends to—
 - (a) broadcast or communicate to the public a performance fixed in an audiovisual fixation;
 - (b) make a reproduction of a performance fixed in an audiovisual fixation;
 - (c) make available to the public the original and copies of a performance fixed in an audiovisual fixation through sale or other transfer of ownership;
 - (d) commercially rent out to the public the original and copies of a performance fixed in an audiovisual fixation;
 - (e) make available to the public a performance fixed in an audiovisual fixation, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them;

must give the performer or collecting society representing him or her a notice in the prescribed manner of his or her intention to perform such acts, indicating where practical, the date of the proposed performance, the proposed terms and conditions for the payment of royalty and ask the performer or collecting society to sign the proposal attached thereto.

(In those cases in which the performer manages NOT to transfer some of his exclusive rights to the producer (or to any third person), then he or she should be entitled to enter into licensing agreements with the users – directly or through the collecting society representing him or her. This is now reflected in the proposed

subsection 1(A) (above) which, together with subsection 1, covers all possible scenarios).

Continuing ...

- (1B) The performer or collecting society representing him or her must as soon as is reasonably possible upon receipt of such notice respond to such a proposal.
- (1C) If the performer or collecting society rejects such proposal or proposes different terms and conditions and the parties are unable to agree on either of the proposals, either party may in the prescribed manner refer the matter to the Tribunal.
- (1D) The Tribunal must adjudicate such matter as soon as is reasonably practicable and where possible, before the performance which is the subject of the application takes place and may make any order it deems fit, including but not limited to an order that a provisional payment of royalty be made into a trust account of an attorney nominated by the performer or collecting society pending the finalisation of the terms and royalty payable: Provided that such amount shall be paid over to the performer or collecting society as represents the difference, if any, between the amount determined as the appropriate royalty and the amount already paid and any balance, if any, must be repaid.";

(As in the Bill under discussion, even though the reference to the copyright owner is deleted – with the understanding that subsections 1(B), (C) and (D) refer to subsection 1(A), in which the performer has kept the exclusive right. Should subsections 1(B), (C) and (D) also refer to subsection 1(a), in which the consent of the RIGHT OWNER is necessary, then such subsections should maintain the reference to the right owner.

In the following paragraph, the remuneration right also includes the retransmission and, therefore, the performers consent to such retransmission does not relieve the user from its obligation to pay the equitable remuneration.)

Continuing

- (2) In the absence of an agreement to the contrary, and without prejudice to the right to an equitable remuneration provided under section 3C(2), a performer's consent to the broadcasting of his or her performance shall be deemed to include his or her consent to the rebroadcasting of his or her performance, the fixation of his or her performance in an audiovisual fixation for broadcasting purposes, and the reproduction for broadcasting purposes of such audiovisual fixation.
- (3) (a) The amount of the equitable remuneration contemplated in subsection (1) (b) shall be determined by an agreement between the collecting society representing the concerned performers and the person who broadcasts or transmits, or causes communication of, or otherwise exploits the performance, as provided under section 3C(2) of this Act.

(b) In the absence of an agreement contemplated in paragraph (a), any party may refer the matter to the Tribunal.
- (4) Any payment made pursuant to the agreement described in subsection (3) shall be deemed to have discharged any obligation under sections 3C(2) and 5(1)(b) by the person who broadcasts or transmits or causes communication to the public of, or otherwise exploits the performance, as provided under section 3C(2) of this Act.

(As has been previously highlighted, this provision should refer only to the remuneration right and NOT to any other form of right).

6. Collective performances

There is no provision in the Performers Protection Amendment Bill for adjustments to section 6 of Act 11 of 1967, but SAGA proposes that, for the sake of further legal clarity, the changes suggested here are made. SAGA submits that this section refer to “musical” performances. In addition, reference to Copyright Act, 1965 (Act 63 of 1965) is not necessary, and should be removed.

The suggested changes are rendered in the wording below:

6. Collective musical performances

- (1) Where several performers as a group take part in the same musical or sound performance, it shall suffice if the consent required under section 5(1)(a) is given by the manager or other authority in charge of the group or, failing such authority, by the leader of the group.
- (2) In the case referred to in subsection (1) a single payment for the use of the performance shall, unless otherwise stipulated, be made to the manager or other authority in charge of the group or, failing such manager or authority, to the leader of the group, and the manager or authority or leader, as the case may be, shall distribute the proceeds as agreed by the performers or, in default of agreement, the right to remuneration of the respective performers shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act 42 of 1965), or alternatively, at the option of the majority of the performers, by the Tribunal.

7. Term of Protection

There is no provision in the Performers Protection Amendment Bill for adjustments to section 7 of Act 11 of 1967, but SAGA proposes that the changes suggested here are made for further legal certainty. It is proposed that the phrase “prohibition against the use of a performance” is replaced with the phrase “rights granted to performers under section 3”. It is further suggested that reference to “audio-visual fixations” be introduced.

This section of the amended Act would therefore read as follows:

7. Term of protection

The [prohibition against the use of a performance as provided for in] rights granted to performers under section [5]3, shall be protected for a period of 50 years calculated from the end of the calendar year in which the performance was first fixed.

[S. 7 substituted by s. 21 of Act 38 of 1997.]

8. Exceptions from prohibition against use of performance without the consent of the performer

SAGA proposes that the heading of this section be amended in the interests of coherence with the proposed wording of sections 3 and 5, as reflected below. In addition, references to the AV fixations in the Bill are deleted, as “a fixation of a performance” already includes phonograms AND audiovisual fixations.

The proposed wording is as follows:

8. Exceptions from prohibition against use of performance without the consent of the performer or of the owner of the performers' exclusive rights

(1).....

[Sub-s. (1) deleted by s. 22 (a) of Act 38 of 1997.]

(2) A fixation of a performance or a reproduction of such a fixation may be used without the consent required by section 5-

- (a) if it is for the purposes of private study or private use by a natural person, and for ends that are neither directly nor indirectly commercial, on condition that the performer or the right owner receive fair compensation ; or
- (b) if it is for the purposes of criticism or review or for the purpose of reporting on current events, provided that not more than short excerpts from the performance are used and, whenever possible, the performer's name or the names of the leading performers are acknowledged; or
- (c) if it is for the purposes of teaching or for scientific research; or
- (d) if it is for the purpose of legal proceedings; or
- (e) if it is for the demonstration of recording, amplifying or similar apparatus, provided that the demonstration is made by a licensed dealer on his or her premises to a specific client; or
- (f) if it is for purposes which are acceptable and exempted in terms of any other provision of the Copyright Act, 1978 (Act No. 98 of 1978).'

(3) (a) A broadcaster may make by means of his or her own facilities a fixation of a performance and reproductions of such fixation without the consent required by section 5, provided that, unless otherwise stipulated, the fixation or any reproduction thereof-

- (i) is intended exclusively for broadcasts to which the performer has consented;
- (ii) if they are not of an exceptional documentary character, are destroyed before the end of the period of six months commencing on the day on which the fixation was first made or such longer period as may be agreed to by the performer.

[Sub-s. (3) amended by s. 22 (b) of Act 38 of 1997 and substituted by s. 4 of Act 8 of 2002.]

(b) The fixation and the reproductions thereof made under the provisions of this subsection may, on the grounds of their exceptional documentary character, be preserved in the archives of the broadcaster but shall, subject to the provisions of this Act, not be further used without the consent of the performer.

[Sub-s. (3) amended by s. 22 (b) of Act 38 of 1997 and substituted by s.4 of Act 8 of 2002]

(4)

[Sub-s. (4) deleted by s. 22 (c) of Act 38 of 1997.]

In addition to the above, references in the proposed insertion in the Bill to the "AV fixations" are deleted, as "fixed performances" already includes phonograms AND audiovisual fixations.

9. Offences and penalties

SAGA proposes an adjustment that is not in the Performers Protection Amendment Bill, but which should be included, as section 5(1) refers to the need of consent by the copyright owner (when the performers' exclusive rights have been transferred); and (1A) refers to the need of consent by the performer (when his or her exclusive rights have not been transferred).

The adjustment would be rendered as follows:

9. Offences and penalties

- (1) Any person-
- (a) who knowingly contravenes any of the provisions of section 5 (1) and (1A); or
 - (b) who knowingly sells or lets for hire or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, any fixation of a performance or a reproduction of such a fixation made in contravention of section 5; or
 - (c) who makes, or has in his possession, a plate or similar contrivance for the purpose of making fixations of a performance or reproductions of such fixations in contravention of section 5,

shall be guilty of an offence and liable on conviction-

10. Consent on behalf of performers and criminal liability of unauthorized agent

There is no provision in the Performers Protection Amendment Bill for adjustments to section 12 of Act 11 of 1967, but SAGA proposes that “the making available” must be included, as the amended Act will include such rights to performers – in accordance with both the Beijing Treaty and WPPT.

The changes would be rendered as follows:

12. Consent on behalf of performers and criminal liability of unauthorized agent

- (1) Where in any legal proceedings under this Act it is proved-
- (a) that the fixation, the reproduction of a fixation, the making available, the broadcast or the public communication to which the legal proceedings relate, was made with the consent of a person who, at the time of giving the consent, represented that he was authorized by the performers to give it on their behalf, and
 - (b) that the person who made the fixation, the reproduction of a fixation, the making available, the broadcast or the public communication had no reasonable grounds for believing that the person giving the consent was not so authorized,

the provisions of this Act shall apply as if it had been proved that the performers had themselves consented to the making of the fixation, the reproduction of the fixation, the making available, the broadcast or the public communication, as the case may be.

- (2) Where-

- (a) a fixation, a reproduction of a fixation, an act of making available, a broadcast or a public communication is made with the consent of a person who, at the time of giving the consent, represented that he was authorized by the performers to give it on their behalf when, to his knowledge, he was not so authorized, and
- (b) if legal proceedings were brought against the person to whom the consent was given, the consent would by virtue of subsection (1) afford a defence to those legal proceedings, the person who gave the consent shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand, or to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

Conclusion:

The history of exploitation in South Africa is a long one, where performers are used in various situations, sometimes with various agendas to influence a society or to be the face of a country to uplift the down-trodden. In these instances, the very talent that is uplifting and entertaining is neglected and side-lined in many ways.

In addition to the suggestions made on the Amendment Bills in question, SAGA is eager to engage with the DTI on further protection for performers, some of which may well fall within the scope of the Performers' Protection Bill:

1. Provision for a Regulatory Body that monitors international film projects that enter South Africa to ensure they are not merely extracting value, but that they are adding value to our performance industry. Such a gatekeeper would comprise a number of stakeholders who would confer on which actors are vital imports and which roles can be filled locally SAGA would value an opportunity to contribute to such a body in order to maximize opportunities for growth and development of our local talent.
2. Amendments to the DTI's incentive schemes for the Film Industry that would encourage the use of highly skilled local performers in meaningful roles alongside our international counterparts.
3. In the absence of protection from the Department of Labour for freelance performers – and other contingency workers – who are effectively 'self employed' the creation of a legislated Collective Bargaining Forum, where binding agreements can be struck with representative industry bodies, where standardised contracts can be agreed on, and where minimum rates can be discussed without falling foul of Competition Regulations.
4. An alternative dispute resolution mechanism for freelance performers who are excluded from the CCMA.

How will SAGA's proposed changes benefit actors?

Sustainability:

The protection of performers and the economic rights that are supported by SAGA would mean that a residual income stream is forthcoming, accruing through the use and exploitation of the body of work a performer has created; years later there would still be money coming to a performer for work they did in their heyday. This legislation will ensure that performers have ownership and control over their legacy and no longer die as paupers. This would give dignity to those that have entertained audiences for years that they are not only given the accolades in name; they would receive the accolades in their bank accounts too.

Talent will be attracted to the industry as performers are incentivised to invest in their careers. Our history shows a legacy of economic imbalance in the performance industry; the extractive economic model of the colonial era has drained all the value and creativity from this sector without a thought of 'giving back' in order to grow and sustain a vibrant industry. The revised legislation will encourage the sharing of passion and knowledge in a mentorship environment; with no shortage of income for veteran performers, they will be in a position to reinvest in the futures of those who follow in their footsteps..

Exposure:

The penalty that actors currently experience, by being such talented performers that they are in numerous series in their career, would no longer undermine the earning capacity and income of a performer as they would be compensated for being on our screens in various forms. The over exposure argument will not hurt their pocket any longer. SAGA's support of the new legislation and lobbying for Collective Management for these audio visual performers is so that the actors can get the money due to them.

Performers are driven by an impulse of social responsibility, contributing to education, sharing information and ideas through entertainment. This exposure in ethical arenas will continue to add value to our society, where respect is accorded to performers and where they are seen as a profession with professionals who have trained or have the experience behind them.

Standards:

Performers will be protected by statute which therefore can be included in the standard contracts that the industry will subscribe to in support of the performers protection. By clearly stipulating, in standard industry contracts, the various rights due to performers as prescribed, (such as the right to broadcast, reproduce, make available) we will be helping to protect performers from being undermined and ensuring that standards are maintained. There is also the advantage that the South African performance industry will be able to truly compete in the international arena, as these protections are part of the international best practice recognised in many countries around the world. The exploitation of talent will no longer be allowed without the performers rights being compensated accordingly.

We will see an end to predatory behaviour by international companies that target unregulated territories such as ours; no longer will they get away with not paying

performers for their rights while their projects turn into major blockbuster series or features. Performer can finally look forward to a future where standards are upheld and their rights are protected.

The South African Guild of Actors (SAGA) thanks the DTI and the Portfolio Committee for the work they are doing, and for granting us the opportunity to make a meaningful contribution towards updating the statute to the benefit of all.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Jack Devnarain', with a stylized flourish at the end.

Jack Devnarain
SA Guild of Actors Chairman