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SABC II “PROJECT SPEAR” DOCUMENTARY: LESSONS FOR INDEPENDENT FILM PRODUCERS

If you are a film maker / producer you may find the points set out below useful in the light of the decision late last year by the Johannesburg High Court in the case between the SABC and Ms. Sylvia Vollenhoven, Producer of the controversial “Project Spear” documentary:

1. If you have signed a Film Commissioning Agreement in terms of which ownership of copyright and all intellectual property rights in the film is transferred to the broadcaster against delivery of the film and receipt of payment, you have no right to the film / production once you have been paid;
2. Notwithstanding transfer of ownership of ownership of intellectual property rights to the broadcaster, always assert your moral rights in the work – this refers to your right to be identified as the author
3. The broadcaster has a right to decide whether or not to exploit / show the film, seeing as they own the film and the associated copyright / intellectual property;
4. You have no right to exhibit / show the film without the permission of the broadcaster, to do so would constitute infringement of the broadcaster’s copyright in the film.
5. The broadcaster’s refusal / reluctance to broadcast your work does not constitute an infringement of your constitutional right to freedom of expression. This means that while you are entitled to communicate the underlying idea / message contained in the film, you may not use the film or an unauthorised adaptation thereof to do so;
6. Equally, you are not entitled to broadcast / exhibit the film without the consent of the broadcaster on the grounds that the public has a “right to see / view” the content of the film or documentary. In this scenario, the public interest in the content of the film can be met by reporting on the matter / underlying story as long as the copyright of the broadcaster is not infringed;



7. You can compel the broadcaster to enter into good faith negotiations with you regarding the film / documentary if the Commissioning Agreement contains a clause providing for such negotiations should the broadcaster not exhibit / exploit the film within a certain period of time stated in the agreement. Those of you familiar with the Vodacom / Makate “Please Call Me” case will be aware that the Constitutional Court held that such a clause is enforceable in our law;
8. It is highly advisable to negotiate for the inclusion of a deadlock-breaking mechanism in the Commissioning Agreement in case the negotiations on the possible exploitation of the film by you flounder. I recommend that provision be made for the matter of fair and equitable terms on which you may exploit the work be referred to an independent third party for final determination;
9. If the film was produced on behalf of an organ of State, e.g. the SABC, their refusal to exploit / show the film would **not** constitute administrative action that can be taken to Court on review under the Promotion of Administrative Justice Act.
10. You have no right under the Copyright Act to retain so-called “raw footage” collected / generated during the production process, particularly where the Commissioning Agreement specifically states that all material acquired or produced as part of the process of producing the film belongs to and must be handed over to the broadcaster. To retain such “raw footage” would constitute an infringement of the broadcaster’s copyright and breach of the terms of the Commissioning Agreement;
11. You also have no entitlement to retain a “back-up” copy of the film, for any purpose whatsoever. To do so would also amount to an infringement of the film copyright and breach of the Commissioning Agreement.

The law involving film production is complex, as it involves the intersection of intellectual property law, contract law, administrative law and constitutional law. For assistance with navigating this complex field, contact us at www.akinc.co.za or admin@akinc.co.za or 011 431-4029/4034.

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