



PARLIAMENT PORTFOLIO COMMITTEE ON TRADE
& INDUSTRY

COPYRIGHT AMENDMENT BILL
NAB PRESENTATION

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NAB DELEGATION

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Overview of Presentation

- Introducing the NAB
- Summary of key concerns
- Concluding remarks



Introducing the NAB

- A voluntary association formed in 1993, representing all three tiers of broadcasting (public, private and community), signal providers, industry organisations and sector professionals
- The NAB is a non-profit organisation that is funded by its members
- The NAB established the **BCCSA** to administer a Code of Conduct for Broadcasters (recognised in S54(3) of the ECA)

Mandate of the NAB

- To ensure a broadcasting system that provides choice and diversity for audiences
- Create a favourable climate for broadcasters to operate
- Ensure a broadcasting industry grounded in the principles of democracy, diversity and freedom of expression
- Ensure members adhere to the Code of Conduct as administered by ICASA and/or BCCSA

Members of the NAB

Membership includes:

- The three television services and 19 radio services of the **SABC**
- Licensed private/commercial radio broadcasters (includes media groups: **Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM and YFM**)
- All licensed commercial television broadcasters (**e.tv, Multichoice, M-Net, Starsat/ODM**)
- A host of **community radio** broadcasters and one **community television** broadcaster
- Both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, **Sentech** and **Orbicom**
- **Associate** members including **Nemisa, Media Connection, ACM**

COPYRIGHT AMENDMENT BILL SUMMARY OF KEY CONCERNS



Opening Remarks

- The NAB supports the creative industries and the rights of artists to be paid royalties for their works
- Legislation must enable the distribution of royalties in an effective and efficient manner to ensure that artists are compensated as valued participants in South Africa's economy
- NAB Members make significant contributions for the use of creative works and are committed to the growth and sustainability of local artists
- The Copyright Act must be certain, practical and aligned to international treaties

Focus of NAB Submissions

- The NAB supports the general aims and objectives of the Bill
- The NAB is however concerned with the practical implementation of the Bill - its comments are limited to sections of the Bill that affect broadcasters

NAB SUBMISSIONS

As a highly regulated sector, the NAB members are concerned with the following;

1. Powers of the Minister
2. Section 9A Royalties
3. Collecting Societies
4. State funded copyright & Orphan works
5. Artists' resale royalties
6. Residual royalties
7. Unenforceable contractual provisions
8. Tribunal -Translation Licenses
9. Copyright Infringement

Minister's Powers

- Section 192 of the Constitution: national legislation must establish an **independent authority** to regulate broadcasting in the public interest
- The broadcasting authority is ICASA, a Chapter 9 institution as provided for in the Constitution of the Republic of South Africa
- ICASA is the only regulator in the country that is mandated to grant licenses for radio and television services and to determine local music and other genres of content for broadcasters
- The Bill provides (S39, para cL) that the Minister of Trade & Industry be empowered to prescribe local content for television and radio broadcasting - ***this would usurp the powers of ICASA***
- **The NAB respectfully submits that para cL in S39 be removed in its entirety from the Bill**

Section 9A Royalties

- Broadcasters enter into licence agreements with collecting societies to permit use of copyrighted material from repertoire of the collecting society
 - The parties usually agree on a pre-clearance of music in the repertoire
 - Then broadcaster submits cue sheets to collecting society to identify works used so that payment is made
- Proposed amendments to S9A require **prior consent** of the copyright owner **each time** a work is to be broadcast
- Broadcasting is dynamic. Decisions need to be made in real-time
- Administrative infrastructure of collecting societies
- **Effect:** Impractical and could result in deterring broadcasters from using sound recordings, thereby resulting in less exposure for artists and fewer royalties accruing to them – an unintended consequence

Section 9A (continued)

- The proposed amendments to S9A are incompatible with the existing framework for the collection of royalties
- Broadcasters are making royalty payments to collecting societies in accordance with the licence agreements – distribution of royalties to artists is the **responsibility of the collecting society**
- The NAB also notes that S9A and 22B of the Bill includes protections afforded to performers – the NAB proposes that amendments related to performers rights are best dealt with in the Performer's Protection Act so as not to undermine the integrity of the two pieces of legislation

Collecting Societies

- The NAB is of the view that the regulation of Collecting Societies (“**CS**”) goes beyond the scope of the Bill and that the CS Regulations (GG 28894 of June 2006) ought to be strengthened in the public interest
- In general, CS’s should be to the benefit of both rights owners and users and in principle, operate for the benefit of the public
- Members of the NAB are concerned with the lack of transparency in disclosing of relevant information by CS’s – e.g:
 - confirmation of rights in copyrighted works that are claimed to be included in the CS’s repertoire
 - amounts retained by CS’s to off-set administration expenses
 - distribution plans adopted by CS’s and actual distributions made

Collecting Societies (continued)

- Advancements in technology have resulted in the development of numerous distribution mechanisms and an inability of copyright holders to combat the effect of piracy
- Broadcasters seem to be the primary source of revenue for collecting societies in the changing landscape
- The Bill provides that there can be only one society per copyright and per set of rights (performance, needletime, mechanical).
 - This may result in entrenchment of the monopolistic powers currently enjoyed by CS's and could further cement the right of CS's to dictate terms of royalty tariffs
 - It may also undermine their accountability in relation to broadcasters and stakeholders and may create bottlenecks in the system

State Funded Copyright

- Undefined concepts of "*funded by the state*" and "*local and international organisation*" → new addition by the Copyright Amendment Bill in section 5.
- The following is unclear:
 - is there a materiality threshold of funding? i.e. would funding equal to 1% of the total development cost constitute funding to render it wholly owned by the state?
 - what kind of funding will constitute funding by the state?
 - services arrangements (where the state is a client)?
 - R&D grants?
 - tax incentives?
- No room for negotiation with the state → cannot contract out of this.
- Impact would be a reduction in the incentive by authors to contract with the state or accept state contribution or assistance is involved.
- The NAB is of the view that **the amendment should be removed from the Bill** and section 5 of the Copyright Act should remain as is.

State Owned Copyright

- The Bill introduces a prohibition on the assignment of copyright owned by, vested in, or under custody of the State [section 22(a)]
- There is no logical reason why the State should be prevented from exploring a commercial opportunity that generates optimal revenues for the State
- Reduces the incentive to create works of copyright and further entrenches unwillingness to contract with the state (given the default position when receiving state funding)
- The NAB proposes that **mechanisms be developed to mitigate an adverse economic impact** – and that is less intrusive on the underlying aims of the Act, as well as the rights of copyright owners

Orphan Works

- The Bill introduces a new definition of '**orphan work**': a work in which copyright still subsists but none of the rights holders in the works is identified, or even if one or more of them are identified, **none is located**
- The Bill provides that the CIPC (a state entity) has a right to licence orphan works.
- Orphan works are arguably then "*owned by, vesting in or under the custody of the state*" and then cannot be assigned in terms of s22(1)(a)
- Arguably: a person who has died cannot be "located". His/her works then become "orphan works" which the state effectively "owns" perpetually (because it cannot transfer those rights).
 - No justification for the State to acquire these rights on the death of the copyright owner (and receiving the benefits to the exclusion of the heirs)
 - This must be clarified
- The administrative capacity of the State to manage the copyrighted works effectively must also be considered

Artists' Resale royalty rights

- Section 9B of the Bill introduces an inalienable right of authors to claim a royalty (at a rate prescribed by the Minister) on the commercial resale price of their artistic works
- It is unclear whether intention of legislature is that this provision applies strictly to artistic works or should be interpreted more broadly
- The resale royalty in its current form is impractical in the South African industry and will operate contrary to its purpose
- Constitutes a breach of the Berne Convention for the Protection of Literary and Artistic Works of 1886 and is arguably unconstitutional
- The NAB is of the view **that less intrusive and more economically-suitable means are preferred**

Residual Royalties

- For literary works, artistic works, musical works, films and audiovisual fixations, a user, performer, owner, producer or author can "*claim an equal portion of the royalty payable for use*"
- It is unclear from the Bill how this will work in practice:
 - Who owes the royalty?
 - Who is the user?
 - How and on what basis is an "equal portion" calculated?
 - Does this apply to a user, performer, owner, producer and author at any given time?
 - Can this be easily and pragmatically enforced?
 - What will happen to duplicated existing arrangements?
- The NAB is of the view that the residual royalty is too uncertain, too difficult to enforce, and **should be regulated by the industry itself**. A less intrusive mechanism should be adopted

Unenforceable provisions

The Bill provides that:

“to the extent that a term of contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term will be unenforceable”

- Commercial environment must be flexible and dynamic
- The NAB is concerned that the inclusion of this clause will have serious consequences for commercial dealings between broadcasters and copyright owners - it is possible that any contract not found to be in line with the Copyright Act may be declared null and void – notwithstanding the intention of the commercial parties
- **The NAB submits this could not be the intention of the drafter and recommends this section be deleted from the Bill**

Tribunal Licences: Translation Licences

- Sch 2 Part A provides that a person may apply to the Tribunal *for a non-exclusive, transferable license to translate any copyrighted works*, where among others, *the copyright owner has refused such a license and the licenses granted may be only for the purposes of teaching, training, scholarship and research in exchange for just compensation*
- The copyright owner is given the opportunity to be heard before the Tribunal decides to grant a licence
- The NAB is concerned that this provision is contrary to one of the core principles of the Act -- i.e. the copyright owner/s should be entitled to deny access to their works for any reason. **The permissible uses of the translations should be aligned with the exceptions already contained in the Copyright Act** if this is the intention

Translation Licences (continued)

- Sch 2 Part A also provides that *the Tribunal may grant a licence to a domestic broadcasting organisation if certain conditions are met*
- The NAB is concerned that this provision is:
 - a) contrary to the core principles of the Act
 - b) breaches the national treatment principle of the Berne Convention
 - c) unclear insofar as 'commercial purposes' of the translations are not permitted
- The NAB is of the view that the **permissible uses of the translations should be aligned with the exceptions already contained in the Copyright Act if this is the intention** and 'commercial purposes' should be defined more clearly

Copyright Infringement

- Section 23 of the Bill proposes, amongst others, that a copyright shall be infringed by any person who omits to pay the performer, owner, producer or author of copyright work a royalty fee *as and when* the copyright is used or artistic works are sold
- Individual payments for every use of copyright is impractical and undesirable from the perspective of both the broadcaster and royalty-earner
- The NAB submits that the Bill should take into consideration the fragile economic environment the industry operates under and entitle parties to determine when royalties should be payable (through agreement)

Conclusion

- Broadcasters have always acknowledged their obligation in terms of the payment of Section 9A Royalties
- NAB members are making needletime payments in line with the formula determined by the Supreme Court of Appeal (March 2014)
- The NAB supports the objectives of the Bill, however its success will depend on practical and timely implementation
- Greater harmonisation between government departments and recognition of the role of ICASA will assist in finalising this process
- The Copyright Bill requires amendment to improve certainty and address negative unintended consequences (legal, commercial and practical) and align with international standards and treaties



THANK YOU

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