



THE NATIONAL ASSOCIATION OF BROADCASTERS' WRITTEN SUBMISSION ON

THE COPYRIGHT AMENDMENT BILL

SUBMITTED: 28 JANUARY 2022

INTRODUCTION

1. The Parliamentary Portfolio Committee on Trade and Industry (**Portfolio Committee**) published the Copyright Amendment Bill [B13B-2017] (**CAB**) on or about 3 December 2021 for public submission and written comment.
2. The Portfolio Committee initially indicated that interested persons had until midday on 21 January 2022 to submit written comments. The Portfolio Committee subsequently granted an extension to this period to midday on 28 January 2022.
3. The National Association of Broadcasters (**NAB**) thanks the Portfolio Committee for this extension, and for the opportunity to provide a written submission on the CAB. The NAB further requests the opportunity to make oral representations on the CAB, should public hearings be held by the Portfolio Committee.
4. The NAB is a leading representative of South Africa's broadcasting industry, representing the interests of all three tiers of broadcasters. Our members include the public broadcaster (the SABC), all the licensed commercial television broadcasters including e.tv, Multichoice, M-Net, and StarSat-ODM, independent commercial radio broadcasters such as Kaya FM, YFM, Smile FM, Rise FM, YOU FM, Hot 102.7FM and media groups Primedia, Kagiso Media, MRC Management Services, AME, MSG Afrika and a number of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends signal distributors, Sentech and Orbicom, as well as industry associates.

INTRODUCTORY COMMENTS

5. The NAB has participated throughout the legislative review process and provided detailed written input on the various iterations of the CAB in order to assist the Portfolio Committee in respect of the CAB.
6. Broadcasters are significant investors in the creative industries and provide a distribution platform for South African content to other regional and international jurisdictions. Given the symbiotic relationship between broadcasters and the creative industries, these key stakeholders have a vested interest in a stable copyright legislative framework which is conducive to investment in the industry and within South Africa.
7. The CAB presents an opportunity to create an enabling environment for every role-player in the content value chain, which would promote the growth, development, and stability of the creative industries through a careful balancing of the rights and interests of all stakeholders and enable every role-player in the value chain to thrive. The NAB therefore supports the initiative to revise and update

the Copyright Act in light of technological developments. We also support the CAB's objective of ensuring adequate access to works by persons with disabilities.

8. We therefore make this submission to draw the Portfolio Committee's attention to certain significant concerns in the current iteration of the CAB which, if not addressed, will have serious negative implications for all role-players in the value chain. We note that the Portfolio Committee has requested that stakeholders confine their submissions to the amendments set out in blue font in the CAB. However, as will be dealt with in further detail below, the NAB has some concerns regarding certain amendments that resulted from the previous call for comments (set out in green font in the CAB) and existing wording (set out in black font in the CAB). The NAB has consistently raised concerns regarding these amendments as well as the implication of these amendments. We are hopeful that our concerns will be duly considered during this phase of the legislative review process. In addition, certain of the new proposed amendments on which the Committee has now invited comments (e.g. the definition of broadcast) have knock-on effects and accordingly cannot be considered in isolation, without regard to the consequences of the proposed amendments.
9. The NAB trusts that the Portfolio Committee will thoroughly engage with all the various role-players and make the necessary interventions to avoid any unintended consequences of the CAB's proposed amendments.
10. The NAB further notes, that the CAB constitutes a bill in terms a section 76 of the Constitution and the Portfolio Committee has not called for public comments on the CAB as a whole, as part of a *de novo* process. In this respect, the NAB reserves the right to make further submissions on the CAB if and when public comment is sought when the CAB is considered by the National Council of Provinces.

THE LEGISLATIVE PROCESS SO FAR

11. The NAB and its members have continually participated in this legislative review process, and engaged the Department of Trade, Industry and Competition (**DTIC**), the Department of Sports, Arts and Culture (**DSAC**), the Department of Communications and Digital Technologies (**DCDT**) as well as the Portfolio Committee. Regrettably, despite our recommendations, many of the concerns previously raised in our submissions have still not been addressed. The NAB respectfully reiterates the need for adequate consultations with the various sectors affected by the CAB, in order to carefully assess the specific implications for each sector.
12. Many of the fundamental concerns raised by numerous interested parties in the legislative process to date have not been addressed adequately or at all, and fundamental concerns remain, including certain Constitutional concerns (e.g., overly wide discretionary powers afforded to the Minister).

13. The NAB notes that a technical committee comprised of experts was previously appointed to assist the Portfolio Committee and we strongly recommend that such technical committee be reconstituted to provide support throughout this iteration of the legislative review process, considering the complexity of the CAB and its implications across different sectors.
14. Copyright legislation is specialist, technical legislation. While the NAB have sympathy with the drafters who are faced with this complex task, the implications of the CAB are enormous and require thorough, informed analysis to be dealt with appropriately. We also urge the Portfolio Committee to obtain the input of subject matter experts and to engage the Inter-Ministerial Committee on Intellectual Property (**IMCIP**)¹ throughout this process. We further encourage the Portfolio Committee to ensure that this process includes a thorough economic modelling exercise to determine the financial implications of the CAB on various sectors, with particular implications on culture and trade in the provinces, as well as on government as the administrators thereof.
15. We deal with the concerns of the NAB in further detail below

CONCERNS REGARDING THE CURRENT AMENDMENTS TO THE CAB

16. As indicated above, the Portfolio Committee has requested submissions in respect of the amendments set out in blue font in the CAB. These are dealt with below. In addition, the NAB has some concerns regarding certain amendments that resulted from the previous call for comments (set out in green font in the CAB) and existing wording (set out in black font in the CAB). The NAB deals with these in further detail below.

17. *The Definition of “broadcast” in the CAB*

- 17.1 The NAB notes that the definition of “broadcast”² has been amended in the CAB to align with the definition of “broadcast” proposed in the Performers Protection Amendment Bill (**PPAB**)³. While we appreciate the desire to mitigate potential confusion between these two pieces of legislation, we note that the definition of “broadcast” in both bills is inconsistent with the definition set out in the Electronic Communications Act (**ECA**), which is the primary legislation on all broadcasting matters. But it is noteworthy that the ECA definition is also currently under scrutiny in Government’s Draft White Paper on Audio and Audiovisual Services. Specifically, the Draft White Paper process is considering whether the definition of broadcasting should be changed and expanded to include other services, beyond the traditional broadcasting operators. This is not a simple matter as any

¹ The IMCIP comprises representatives from different government departments responsible for implementing programs that either affect, or are affected by, intellectual property. The IMCIP constitutes the Ministries of Trade and Industry, Health, Economic Development, International Relations and Cooperation, Science and Technology, Communications, Telecommunications and Postal Services, Higher Education and Training, Agriculture, Forestry and Fisheries, Arts and Culture, Energy and Environmental Affairs.

² Clause 1 of the CAB.

³ Clause 1 of the PPAB.

change to the definition of broadcasting has a range of consequences including on licensing, regulation, payment of licence fees and use of radio frequency spectrum. The Draft White Paper and the public consultation processes around it have therefore carefully weighed the pros and cons of making such a change and have not yet reached a decision.

17.2 In contrast, the Committee appears to have rushed into amending the current definition of broadcasting in the Copyright Act. The Committee proposes amending the definition of “broadcast” in the Act so as to accord more closely with the definition in the Beijing Treaty, although it has not explained the rationale for doing so. The Committee has also not explained why it has introduced the changes which it has to the definition used in the Beijing Treaty, or indeed what these changes mean or are intended to achieve. The approach is likely to lead to untenable commercial uncertainty as to the scope of “broadcasts” within the meaning of the Act.

17.3 This is not a minor, administrative matter. It is a major material change which will have significant consequences. Unfortunately, the proposed definition is confused and raises numerous questions, for instance:

17.3.1 The definition appears to have been informed by the language in the Beijing Treaty, but it introduces features that have not been properly considered including the phrase “*partially or wholly*” which seems to widen the scope considerably and results in legal uncertainty. Is the definition intended to cover any service, even if the service only uses certain ‘broadcasting’ features on a partial basis?

17.3.2 What is the meaning of the phrase “*by wireless means*”? Does it cover the Internet and Telecommunications?

17.3.3 What is the meaning of the phrase “*for public reception*”? Does it cover transmission to parts of the public – for example a broadcasting service that is aimed at sections of the public rather than the public as a whole?

17.3.4 The definition refers to “*transmission, partially or wholly, by satellite*”. But what happens if one firm does the uplink and the other the downlink? In that case, which party can be said to do the “transmission”? Furthermore, no reference is made to what is being transmitted over satellite – presumably the definition should only capture those services transmitting audiovisual material and not for instance user-generated content broadcast over satellite.

17.3.5 Paragraph (c) is similar to section 6(2) of the UK Copyright Act and is intended to cover broadcasts for which subscription fees are paid to a broadcaster that controls the sale of the decrypting devices. But it includes within its scope a transmission

which is only partly encrypted. The implications of this are not clear. It is also not clear what is meant by “encrypted signals” or to whom the encrypted signals must be sent to qualify as a broadcast.

- 17.4 Since “broadcast” is used in numerous places in the Bill, it is unclear what effect the amendment of the definition will have on other sections of the Bill. The downstream impact does not appear to have been thought through sufficiently. We caution that there could be a number of unintended consequences, which we have not been able to fully consider in the limited period which the Committee has allowed for comments.
- 17.5 With reference to the Beijing Treaty, which was adopted in 2012, the NAB further notes that the Beijing Treaty context is not always applicable to the South African context. In addition, given that a decade has now passed since the signing of this treaty, the definition of “broadcast” used in the Beijing Treaty is outdated and no longer aligns with expansion of broadcasting activities, including, for instance, online platforms.
- 17.6 In addition, the definition of “broadcast” proposed to be used in the CAB and PPAB does not completely align with the definition used in the Beijing Treaty, which reads:

“broadcasting means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;” (our emphasis).

- 17.7 To the extent that the drafters wish to align the CAB and PPAB with the Beijing Treaty then it should be done correctly. There is no doubt that the definition of ‘broadcast’ does at some point need to be expanded to cater for the reality of what broadcasting has become with the continuous emergence of new technologies and the entry of different types of content providers in the market. However, any amendment of the current definition in both Acts should only be done after the Portfolio Committee and all stakeholders have had a meaningful opportunity to consider and engage on the consequences of the definition in the context of its use throughout the copyright and performers protection legislation, in line with recent national policy developments and other legislation. Given the significance of this matter, we propose that the current definition of “broadcast” in the Copyright Act, 1978, and the Performers’ Protection Act, 1967, should be retained.

18. ***Amendments relating to ephemeral rights***

- 18.1 At the outset it is noted that ephemeral rights are important in the broadcasting sector, particularly in the context of live sports broadcast, as broadcasters need to ensure that they are able to cater for live broadcasts where there is not always necessarily the time to clear the use of certain rights with the relevant collecting society.
- 18.2 The provisions of the CAB⁴ appear to be unduly restrictive and could hamper a broadcaster's activities in certain respects. In this respect, we note that the CAB includes that the broadcaster is:
- 18.2.1 authorised to communicate the performer's performance, work or sound recording to the public by telecommunication.⁵ Not only could this restrict broadcaster activities, but the reference to "telecommunication" as a medium of content distribution (where the content distributor is a broadcaster), is inconsistent with the ECA in terms of the specific definition of "broadcasting". Furthermore, the CAB does not define "telecommunication" and as such it is not possible for the public to consider whether broadcasting is deemed to be a subset of telecommunication. This will cause confusion as broadcasters are often "authorised" to communicate the public performance pursuant to a licence from a collecting society which is confined to broadcasting and not telecommunication;
- 18.2.2 required to make the fixation or reproduction itself, for its own broadcasts;⁶
- 18.2.3 prohibited from synchronising the fixation or reproduction with all or part of another recording, or other performance or work.⁷ While section 12B(1)(c)(ii) of the Act above does not prohibit synchronisation with another recording, the exception will not apply where the "reproduction or fixation" is synchronised with another recording. The implication is that a broadcaster will need clear rights for any synchronisations envisaged in terms of section 12B(1)(c)(iii) of the Act. This could result in varying interpretations, which may lead to confusion. By inserting section 12B(1)(c)(iii) of the Act as a proviso, this could be read to include synchronisations with recordings that are not "*...performed live ... (or) at the same time as the performer's performance or work*". For example, if in post-production a recording is used over the live recording to which the exception applies, then a synchronisation license would ordinarily be required for the recording utilised in post-production. However, it is unclear from the current wording of sections 12B(1)(c)(ii) and (iii) of the Act that this is the intention of the amendment. The NAB proposes that the wording of this section should be considered for clarity.

⁴ See clause 13 of the CAB regarding the insertion of clause 12B(1)(b) of the Act.

⁵ See the insertion of section 12B(1)(c)(i) of the Act.

⁶ See the insertion of section 12B(1)(c)(ii) of the Act.

⁷ See the insertion of section 12B(1)(c)(iii) of the Act

- 18.2.4 prohibited from causing the fixation or reproduction to be used in an advertisement intended to sell or promote a product, service, cause or institution.⁸;
- 18.2.5 required to record the date of the making and destruction of all fixations and reproductions and make the record available to owners of copyright in the works, sound recordings or performer's performances within 24 hours of receiving a request.⁹ This timeframe is extremely short and is impractical and unreasonable. The NAB proposes that this time period should be amended to "*within a reasonable time after receiving such a request*".
- 18.3 However, the inclusion of an additional provision to this section restricts the ephemeral rights set out in section 12B(1)(b), by indicating that these provisions are not applicable where "*a licence is available from a collecting society to make the fixation or reproduction of the performer's performance, work or sound recording*".¹⁰
- 18.4 It is further noted that the existing exception to ephemeral rights in the Copyright Act makes specific reference to a numerous works that fall within the exception, whereas the CAB only includes exception for "a performer's performance or work". This appears to limit the ambit of the ephemeral right exception. It is unclear from the CAB why this has been amended.
- 18.5 It is submitted that the inclusion of this section could cause confusion and difficulties for broadcasters as it overlooks the fact that ephemeral rights are designed to cater for live broadcasts where there is no time to clear such rights. By way of example, when broadcasting a sports match and the stadium plays a song, the broadcaster relies on ephemeral rights to ensure that it does not fall foul of legislation. In this instance, although the licence for a song is available from the collecting society, a broadcaster would not be able to anticipate what song is played (and has no control over the song played), and as such the broadcaster would not be able to secure the relevant licence in advance. We would encourage the Portfolio Committee to consider whether the inclusion of this section is necessary, and if so, whether the section can be redrafted for clarity.
19. ***Amendments relating to the limitation of copyright infringements "for commercial purposes" and the burden of proof thereof***
- 19.1 Several provisions of the CAB limit the scope of copyright infringement to conduct that is undertaken "for commercial purposes".¹¹ By including this wording, the CAB does not take into consideration the potential of the internet for mass distribution and consequent economic harm to

⁸ See the insertion of section 12B(1)(c)(iv) of the Act

⁹ See the insertion of section 12B(1)(c)(v) of the Act

¹⁰ See the insertion of section 12B(2) of the Act

¹¹ See, for instance, clause 27 of the CAB inserting section 27(5A)(a) of the Act, although it is noted that this was deleted from section 19C(1)(4) of the Act.

the rightsholder when copyright is infringed by private individuals who distribute it widely with no commercial purpose in mind.

- 19.2 The burden of proof provided for in the CAB is an extremely high and subjective standard, which will be difficult for rightsholders and authorities to prove. In this respect, in terms of the CAB, it will have to be shown that a person must know that they are infringing a copyright in the work in order for the person to be found guilty of an offence.¹²
- 19.3 Proving the subjective knowledge of whether a person knew that they were infringing copyright will be nearly impossible to ascertain. Coupled with the need for the infringement to be undertaken "for commercial purposes", it will be very difficult to successfully prosecute copyright infringement.
- 19.4 We request that the Portfolio Committee consider whether the wording of this section should be removed or amended to make the burden of proof less onerous.

ADDITIONAL CONCERNS REGARDING THE CURRENT VERSION OF THE CAB

20. Although we understand that the amendments in green font are considered changes which are "not material in nature", the NAB notes that the public have not had an opportunity to comment on these sections, in addition, although the NAB has commented on certain sections of the CAB in previous submissions, the NAB still has some concerns. In light of this, the NAB sets out below some additional concerns regarding these sections.

21. *Amendments to the section regarding persons with disabilities*

- 21.1 While the NAB supports the objectives of increasing accessibility for persons with disabilities, it is noted that certain sections of the CAB¹³ raise concerns.
- 21.2 The NAB submits that the proposed use of the term "including" in these sections¹⁴ of the CAB results in a material change to the construct of the provision as the use of "including" expands and widens the provision, resulting in instances of who may access copyright works and how such works may be accessed. The amendments, although minor, are not immaterial, and may lead to unintended consequences which could reduce copyright protection for copyright works.
- 21.3 The CAB has also amended the wording of these sections to align with the text of the Marrakesh Treaty. But the relevant provision of the Marrakesh Treaty was specifically drafted for the purposes of facilitating access to published works for persons who are blind, visually impaired or otherwise

¹² See, for instance, clause 27 of the CAB inserting section 27(5A)(b) of the Act

¹³ Clauses 1 and 20 of the CAB

¹⁴ Clauses 1 and 20 of the CAB

print disabled. Unlike the Marrakesh Treaty, the CAB does not only apply to persons who are visually impaired and does not only apply to printed works, but to all works.

21.4 By way of example, as a result of the amendment to the sections in line with the Marrakesh Treaty a person with a physical disability will be granted the same access rights as a visually impaired person. A person with a physical disability unrelated to their vision does not necessarily need access to a copy of a work in an alternative manner and is able to access such work through ordinary channels.

21.5 While the NAB notes that the Portfolio Committee is not prevented from expanding on the provisions of the Marrakesh Treaty, the Marrakesh Treaty was drafted specifically for the visually impaired in order to allow the visually impaired access to printed works. The inclusion of the specific text of the Marrakesh Treaty in a context for which it is not intended may lead to unintended consequences and reduce copyright protection for copyright works.

22. *Excessive delegation of powers afforded to the Minister*

22.1 The NAB would like to reiterate some of its concerns regarding the extended powers that will be granted to the Minister of Trade, Industry and Competition (**Minister**) by virtue of the CAB.¹⁵ We are concerned that the CAB substantially erodes all of the parties' flexibility to commercialise their rights, through rigid paternalistic legislation.

22.2 Of particular concern is the cumulative effect of the CAB's proposals which permit the Minister to –

22.2.1 prescribe compulsory and standard contractual terms to be included in any agreements to be entered in terms of the Copyright Act.¹⁶ These amendments will provide the Minister with wide, vague and unfettered powers; and

22.2.2 prescribe royalty rates or tariffs for various forms of use.¹⁷

22.3 These amendments will allow the Minister to effectively be involved in writing contracts for the parties. In addition, we note that no guidance or provisions for guidance are provided for in the CAB regarding how the Minister should exercise these powers or the purpose to be achieved by the regulation of compulsory and standard contractual terms.

22.4 By way of analogy, if the principles of the CAB were to be applied in the construction industry, the Minister's powers would allow the Minister to dictate the contractual terms between, for instance, a

¹⁵ Clause 33 of the CAB

¹⁶ Clause 33 of the CAB inserting section 39(cG) of the Act

¹⁷ Clause 33 of the CAB inserting section 39(cI) of the Act

homeowner and a builder, as well as enabling the Minister to dictate how much each role-player should be paid for services rendered.

- 22.5 In this scenario, the Minister would be given unrestrained powers to determine the contractual terms, with no guidance given to the Minister in the legislation regarding the factors to be considered when requiring the compulsory contractual terms or rates. The concern would be that, without guidance, it is possible that the compulsory contractual terms required by the Minister would be based on the equivalent of researching low-cost residential housing, and extrapolating such research to all forms of buildings.
- 22.6 On this basis, it is very unlikely that anyone would build a house if they are unable to independently negotiate contractual terms and / or rates. The same is true of investment in future television shows and films. The likely consequences of the amendments to legislation resulting in the Minister having extended powers over these areas will have negative implications for all creators in the value chain, for investment and for the economy as a whole. Without the ability to negotiate, a fundamental aspect of the content value chain, the foundation of the content value chain, and the content value chain itself is eroded.
- 22.7 The Constitutional Court has held that where the legislature grants functionaries' broad discretionary powers, it must delineate how those powers are to be exercised. The legislature must therefore identify guidelines for the exercise of the power in the relevant statute.¹⁸ The duty to provide guidance for the exercise of a discretion is located in the Bill of Rights.¹⁹
- 22.8 A delegation of legislative powers will only be considered lawful where a sufficiently rigorous framework has been established to direct the exercise of those powers. Where the legislature simply grants a wide unguided power to a functionary, it offends against the rule of law and the provisions are liable to be set aside.²⁰
- 22.9 Without this guidance, there is a risk that the power may be exercised without due regard for the rights of autonomy, property and free trade that may be affected by the regulation.
- 22.10 It is no answer to this risk to contend that the Minister will only prescribe terms that adequately protect rights. The Constitutional Court has made it clear that it is impermissible for the legislature to leave the fine balance that is required for the protection of rights to the functionaries alone.²¹

¹⁸ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 54

¹⁹ "[T]he constitutional obligation on the Legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised." *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 25

²⁰ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 70

²¹ *Dawood* para 50

22.11 In the circumstances, the powers proposed to be given to the Minister in various proposed amendments to the Act are excessively wide, vague and unfettered and are liable to be struck down as unconstitutional. They should, accordingly, be deleted from the CAB.

22.12 In addition to the above, although not a material change, we request that the Portfolio Committee amend the title of section 39(c1) of the Act to “section 39(cL)”, with an upper-case letter “L”, for consistency and to avoid confusion.

23. ***Concerns regarding the provisions relating to Technology Protection Measures***

23.1 By the inclusion of “access control” and “copy control” in the CAB, the type of exceptions that are permitted in terms of technology protection measures (TPM) have been expanded.²² In this respect, exceptions to “copy control” TPM include instances where the purchaser of a DVD or Blu-Ray is permitted to copy the work for personal use (for instance, creating a back-up copy of the DVD or Blu-Ray). However, there are very limited cases where an exception to an “access control” TPM should be permitted to be circumvented. For example, where a broadcaster has conditional access systems, such the TPM on such conditional access systems should not be circumvented.

23.2 It is submitted that the CAB does not make this distinction between TPM that may be circumvented and TPM that may not be circumvented, and as a result broadcaster content that is protected behind paywalls and the associated business models that relate to “access controlled” content could be undermined as a result of the amendments.

23.3 The CAB further includes a number of instances where the burden of proof for a person who incites another person to unlawfully circumvent a TPM is a very high and subjective standard, which will make it difficult to successfully prosecute persons for the infringement.²³

23.4 In this respect, authorities and rightsholders will need to be able to show that the person had the specific intention of inciting another person to unlawfully circumvent TPM. This will be extremely burdensome to prove and the NAB encourages the CAB to consider removing or amending this wording to lower the burden of proof in order to provide greater protection for copyright holders.

23.5 In terms of the specific exceptions set out in the PPAB, the list of exceptions remains extremely wide and allows parties to circumvent the TPM in a number of problematic manners.²⁴ In this respect person may apply to the holder of the right to circumvent the TPM or, alternatively, if the holder of the right refuses or does not respond within in a certain, undefined timeframe, engage the services of a third party to circumvent the TPM. These exceptions do not make provision for a party

²² See clause 29 of the CAB inserting section 28O(3) and clause 7 of the PPAB inserting section 8E(5) of the Act.

²³ See clause 29 of the CAB inserting section 28O(3) and clause 7 of the PPAB inserting section 8E(3) of the Act.

²⁴ See clause 7 of the PPAB inserting section 8F(2) of the Act

to use the appropriate legal channels, such as approaching the authorities or courts for relief. The NAB requests the Portfolio Committee to consider whether amending this section to reflect the appropriate channels available for relief.

- 23.6 In addition to the above, the factors proposed in the CAB that allow for a party to circumvent the TPM do not sufficiently protect the rights of the rightsholder and will allow for unreasonable circumvention of the TPM- which in turn lowers the reward provided to participants in the content value chain and disincentivises investment and content production. We would encourage the Portfolio Committee to consider the factors and how copyright holders can be afforded appropriate protections.

SUMMARY

24. The NAB understands what the CAB seeks to achieve, and the underlying reasons of its objectives. However, we are concerned that, as the CAB stands currently, it will undermine the very objectives it seeks to achieve, especially within the television production and broadcasting sector.

25. In this respect, the NAB has set out the following concerns above:

- 25.1 The proposed definition of “broadcast” is confusing. Furthermore, sufficient attention has not been paid to the unintended consequences which may flow as a result of the change. Since this is a material matter which is currently being debated by Government in the context of the country’s audiovisual policy, the current definition in the CAB should be left unchanged until there is further clarity.

- 25.2 The ephemeral rights are aimed at ensuring that broadcasters are able to cater for live broadcast without falling foul of the relevant legislation. The current version of the CAB is unduly restrictive and could hamper a broadcaster’s activities in certain respects. The provisions of the CAB cause confusion and difficulties for broadcasters, and do not adhere to the current standards that are provided to broadcasters by ephemeral rights. The NAB would encourage the Portfolio Committee to consider whether all of the amendments are appropriate and necessary.

- 25.3 The limitation of copyright infringements “for commercial purposes” and the burden of proof thereof creates difficulties for rights holders to enforce their rights. We would recommend that the Portfolio Committee consider whether the amendments can be deleted or redrafted to be less onerous.

- 25.4 In terms of the section regarding persons with disabilities, the NAB implores the Portfolio Committee to consider amending the wording of the section to remove the term “including to” in order to prevent unintended consequences which could reduce copyright protection for copyright works. In addition, the use of the wording set out in the Marrakesh Treaty is not fit for purpose for

South African legislation. The NAB requests the Portfolio Committee to consider less restrictive wording that will avoid unintended consequences.

- 25.5 The CAB delegates a variety of powers to the Minister, which substantially erodes the parties' flexibility to commercialise their rights. We request that the Portfolio Committee consider whether the powers granted to the Minister are necessary and whether the provisions of the legislation provide a sufficiently rigorous framework that will allow the parties enough legislative independence to operate without Ministerial oversight.
- 25.6 With respect to the TPM, the existing CAB provisions do not provide sufficient protections for the TPM. The provisions also allow for a high burden of proof on a very high and subjective standard, which will make it difficult to successfully prosecute persons for the infringement. In addition, the TPM does not allow for appropriate channels for relief for person who would like access to protected works. The NAB urges the Portfolio Committee to consider whether the amendments in the CAB are necessary and appropriate.

CONCLUSION

26. The concerns we have raised above are not minor concerns – they will result in serious negative implications for all role-players in the value chain. The NAB is of the view that certain portions of the CAB require significant consideration to address the concerns set out both in this submission and in previous submissions.
27. The NAB encourages the Portfolio Committee to consider a wholesale revision and re-drafting of the CAB. As noted above, the NAB reserves the right to make further submissions on the CAB if and when public comment is sought when the CAB is considered by the National Council of Provinces. The successful adoption of a viable CAB is fundamentally important to broadcasters and the sustainability and success of the creative industry as a whole.
28. In conclusion, the NAB thanks the Portfolio Committee for the opportunity to make this written submission. We trust our submission will be considered and we look forward to any further engagements on this process. The NAB requests an opportunity to make oral submissions should the opportunity arise.