



**THE NAB WRITTEN SUBMISSION ON THE COPYRIGHT
AMENDMENT BILL**

INTRODUCTION

- 1 On or about 15 February 2019, the Select Committee on Trade and International Relations (Committee) published a notice on the Parliamentary website inviting the public to submit written comments on the Copyright Amendment Bill (Bill). Interested persons were given until 22 February 2019 to submit their written input. The NAB thanks the Committee for this opportunity and requests to make oral representations should public hearings be held.

- 2 The National Association of Broadcasters (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 (SABC), commercial radio media groups; Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, as well as independents, Classic FM, Kaya FM, YFM, Smile FM, and LM Radio; all the licensed commercial television broadcasters e.tv, Multichoice, M-Net, and StarSat-ODM; a host of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends to the training institute, NEMISA and the broadcast signal distributors, Sentech and Orbicom.

INTRODUCTORY COMMENTS

- 3 The NAB supports the initiative to revise the Copyright Act in line with international treaties¹ and to update the legislation in the light of technological developments. We also support the initiative to reward the creators of works.

- 4 Broadcasters are significant investors in the creative industries and provide a distribution platform for South African content to other regional and international

¹ Bill ultimately seeks to align national legislation with treaties reviewed by South Africa including the World Intellectual Property Organisation (WIPO) digital treaties, namely the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are blind, visually impaired or otherwise print disabled

jurisdictions. Broadcasters play a symbiotic role in the creative industries and have a vested interest in a stable copyright framework which is conducive to investment.

- 5 The Bill 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 as a whole through a careful balancing of the rights and interests of all stakeholders, and allow every role-player in the value chain to thrive.
- 6 Sadly, however, this opportunity has been missed. The legislative process to date has been criticised and controversial. The opportunities for growth, stability and investment have been overridden by short-sighted objectives, with critical concerns being disregarded. Although it may be expected that all of the issues of concern have been thrashed out by the time the Bill was transmitted to the NCOP, fundamentally problematic issues have not been addressed. The Bill which has been sent to the Committee is fundamentally flawed. As a result, many of the Bill's laudable goals will not be achieved.
- 7 The problems with this Bill should not be underestimated. The Bill suffers serious Constitutional issues and major flaws. We are concerned that the Bill, in its current form, will disincentivise investment, including investment in film and television in the provinces. It will face legal (including Constitutional) and implementation challenges. Numerous unintended adverse consequences will flow from this Bill. Most regrettable of all, those who the Bill is intended to benefit, will be undermined by the Bill's flaws.
- 8 We therefore make this submission to draw the Committee's attention to the significant concerns which plague this Bill and which, if not addressed, will have serious negative implications for all role-players in the value chain.

- 9 The NAB trusts that the Committee will thoroughly engage with all of the various role-players and make the necessary interventions to avoid the unintended consequences of the Bill's proposals.
- 10 We have noted that, although the Committee declined our request for an extension, the Committee has indicated that this does not prevent the NAB from further formal engagement with the Committee, for which we thank you. The NAB likewise makes itself available should the Committee require any clarity or further information.

THE LEGISLATIVE PROCESS SO FAR

- 11 This legislative review has been ongoing since 2015 when the Bill initially sought to address matters pertaining to copyright in general and performers' protection in a single, consolidated Amendment Bill. Following extensive input and concerns raised by various stakeholders, the Bill was correctly divided into two Bills with copyright across different types of works being addressed in this Bill, and matters pertaining to performers' moral and economic rights being addressed separately in the Performers Protection Amendment Bill. In May 2017 the Minister of Trade and Industry presented the 'revised' Copyright Amendment Bill in the National Assembly.
- 12 The NAB and its members have continuously participated in this legislative review process, and engaged both the Department of Trade and Industry and the Portfolio Committee on Trade and Industry.² Whilst the Bill, or at times only specific sections, have previously been published for written input, the time frames for written comments were not sufficient for such complex legislation. The NAB also previously submitted that legislation cannot be interpreted with reference to only particular sections in isolation from the rest of the legislation and therefore, the Portfolio Committee ought to have at all times called for inputs on the Bill in its entirety. Regrettably, despite our recommendations, many of the concerns previously raised in our submissions have still not been addressed. The NAB respectfully reiterates

² The NAB's prior submissions are enclosed for the Committee's reference

the need for adequate consultations with the various sectors impacted by the Bill, in order to carefully assess the specific implications of the Bill.

- 13 The process has since progressed up to this point where the Bill has now been referred to the Select Committee. The NAB is gravely concerned that the Select Committee has effectively only been given approximately three months to process a Bill which was before the Portfolio Committee for over two years. Furthermore, the NAB notes that whereas a technical committee was appointed with experts to assist the Portfolio Committee, there is currently no indication whether the Select Committee will receive similar support or whether experts from the technical committee will be afforded an opportunity to engage the Select Committee considering the complexity of the Bill and its implications across different sectors.
- 14 Copyright legislation is specialist, technical legislation. We have sympathy with the drafters who were faced with this complex task. However, the implications are enormous and require thorough informed analysis to be dealt with appropriately.
- 15 Moreover, 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 Constitutional concerns.
- 16 We urge the Committee not to rush this Bill, nor to "rubber stamp" it, but rather to give it the time and attention which it requires. We also urge the Committee to obtain the input of subject matter experts and to engage the Inter-Ministerial Committee on Intellectual Property (IMCIP)³ throughout this process, and that the process should include a thorough economic modelling exercise to determine the financial implications of the Bill on various sectors, with particular implications on culture and trade in the provinces, as well as on government as the administrators of the Bill.

³ The IMCIP comprises of 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

THE NAB'S RECOMMENDED APPROACH

- 17 Given the period of only one week afforded to stakeholders to make written input on the Bill (which we respectfully submit is not sufficient), the NAB submission will focus on the key Constitutional and implementation concerns about the Bill.
- 18 The NAB will also make a separate submission on the Performers Protection Amendment Bill (Performer's Bill), which the Committee is considering together with this Bill. The scope of the Performer's Bill is narrower (it focuses on performers and their rights in respect of live performances, audio-visual fixations and sound recordings).
- 19 Fortunately, the Performer's Bill is not as flawed as the Copyright Bill. Unlike the Copyright Bill, which requires fundamental revisions, the Performer's Bill requires relatively minor amendments before it can be finalised and implemented. The NAB acknowledges the need to address matters pertaining to the economic rights of performers without any undue delays. The NAB therefore recommends that the Committee proceeds to finalise the Performers' Bill without undue delay. We have made constructive proposals, including drafting proposals, to assist the Committee to finalise the Performer's Bill.
- 20 However, the NAB recommends that the Copyright Bill be returned for a substantial review given the critical concerns raised by various stakeholders and to avoid the Bill being delayed by Constitutional and implementation challenges.

CONSTITUTIONAL CONCERNS

(1) Tagging mechanism

- 21 The Bill was tagged and processed as a s75 Bill in terms of s75 of the Constitution.

- 22 However, the Bill has a substantial effect on how copyright must be traded and on cultural matters. This is evident from the extensive proposals highlighted in this submission, including the far-reaching proposals on compulsory agreements to be concluded in the prescribed manner and form, the Minister's power to prescribe compulsory and standard contractual terms and royalty rates/tariffs for various forms of use which we come back to in paragraph 36 below. It is also evident from the royalty provisions in s6A, 7A and 8A. Indeed the Bill goes to the very heart of how intellectual property – and specifically copyright – may be traded.
- 23 The Copyright Act also has a substantial effect on cultural matters, including indigenous cultural expressions.
- 24 The NAB accordingly submits that the s76 process should have been followed and that, by tagging and following the s75 process, the incorrect legislative process has been followed, rendering the Act invalid. For this reason alone, the NAB submits that the Committee should reject the Bill.

(2) Retrospective application

- 25 Sections 6A, 7A and 8A of the Bill seek to introduce new provisions pursuant to which, notwithstanding assignment of copyright, authors of literary, musical works and visual artistic works, and performers in audiovisual works, will be entitled to receive a fair share of the royalty received by the user of the aforementioned works. Furthermore, the Bill currently provides that these sections will apply to literary or musical works, as well as audiovisual works which were assigned *prior* to the commencement of this Amendment Act and are still being exploited for profit.
- 26 If promulgated, the Act will unilaterally alter the rights and negotiated terms of pre-existing commercial arrangements. Essentially, the Bill proposes that even if an author had sold their work and was paid for it, if that work is still used for profit after this Bill commences, then the previous owner will now be entitled to a share of the

royalty received by the user of the work. This is analogous to saying that if a builder built a house, sold it and was paid for it, the builder must receive a percentage of the rental received by the current owner of the house.

- 27 Property rights, including incorporeal property rights such as copyright, are protected by section 25 of the Constitution. The proposed retrospective provisions which impinge upon the property rights of the current owners of copyright in literary, musical, artistic and audio-visual works are likely to be found to constitute a substantial and arbitrary deprivation of property rights. Furthermore, in a number of instances, the current copyright owner would not have had any control over the remuneration paid to authors and performers for their work or performance, as the current copyright owner was not a party to those agreements. The NAB respectfully submits that these provisions may result in a significant dis-investment in the sector as there is no basis for imposing a debt on a party who has no connection to the original agreement between the author or performer and the first copyright owner.
- 28 The NAB and other stakeholders expressed serious concerns that the retrospectivity provisions would not pass Constitutional muster.
- 29 In November 2018 the Department of Justice furnished an opinion to the Portfolio Committee on the legal validity or Constitutionality of certain provisions of the Bill. (A copy of the DOJ's opinion is attached for the Committee's reference.) The DOJ concluded that –

*"The fact that authors who have before the enactment and commencement of the Bill made assignments of copyright, may now under certain circumstances share in royalties, in our view **amounts to substantial interference with the property use or enjoyment found in an open and democratic society and thus amount to deprivation.**"⁴*

⁴ Paragraph 26, page 17 of the DOJ opinion

30 The DOJ opinion continued:

*"The provision is designed to provide relief to authors who live in poverty as a result of not being fairly compensated. ..., it is not an easy task to confine the provision to provide relief only to authors who made assignments to their detriment and it opens the provision to all assignments. The provision further cannot distinguish between the various scenarios that may result from the application of the provision as more research is required to determine the possible extent of the application of this provision. Instead the provision accordingly provides for general application. In our humble view **it is quite conceivable that there may be instances where the harm done by the law (deprivation) would not be balanced by the benefits that it is designed to achieve (providing relief to authors who live in poverty as a result of not being fairly compensated) and accordingly would not be reasonable and justifiable in an open and democratic society.***

Furthermore, the uncertainty regarding a fair process to be followed in order to avoid deprivation being arbitrary could affect the constitutionality of the clause. There is no clarity on how far back the retrospectivity will apply; it is not clear how to deal with further assignments of work (i.e. where the work is now owned by a 3rd or 4th copyright owner) or where the copyright owner is a not for profit organisation; it is not clear how assignment by multiple authors to one copyright owner would work.."⁵

31 This, the DOJ found, offended the principle of the rule of law.

32 The DOJ endorsed a proposal that had been made during deliberations that the Department be instructed "**to do the necessary research and impact assessments in this regard and then revert to the Committee with an Amendment Bill afresh**", to –

"ensure that when relief is provided to exploited authors, all constitutional concerns have been considered and addressed. The proposed process can then also

⁵ Paragraph 32, page 20 of the DOJ Opinion

indicate how the target group will be reached. It is recommended that the committee consider this approach in favour of a delegation to the Minister to establish a process by way of regulation."⁶

- 33 Notwithstanding the serious Constitutional concerns expressed in the DOJ Opinion, the Committee sought to address the issue precisely using the approach rejected by the DOJ, namely to provide for the Minister to make regulations, and even then only to set out the *process* to give effect to the application of the section to a work contemplated in the retrospectivity clause, and conduct an impact assessment of the *process* proposed in the regulations. The Constitutional concerns were therefore not resolved and all of the fundamental Constitutional concerns raised in the DOJ remain.
- 34 The retrospectivity provisions are unlikely to pass Constitutional muster. A legal challenge would delay the implantation of the Bill and delay the achievement of the benefit sought to be achieved, namely to provide relief to authors who live in poverty. While we appreciate the objectives sought to be achieved and their underlying sentiment, the retrospectivity provisions will in fact impede the achievement of these objectives.
- 35 As indicated above, we recommend that the Committee return the Bill to the National Assembly for a substantial review. However, to the extent that the Committee intends to pass the Bill, as a bare minimum, the retrospectivity provisions in the Bill should be deleted. We urge the Committee to delete the proposed new sections 6A(7), 7A(7) and 8A(5) of the Bill.

⁶ Paragraph 32, page 21 of the DOJ Opinion

(3) Excessive delegation of powers to the Minister

36 We are concerned that the Bill substantially erodes all of the parties' flexibility to commercialise their rights, through rigid paternalistic legislation. Of particular concern is the cumulative effect of the Bill's proposals to –

- a. make it compulsory for certain agreements to be concluded in the prescribed manner and form;⁷
- b. make certain terms of certain agreements compulsory, by giving the Minister of Trade and Industry ("the Minister") wide, vague and unfettered powers to prescribe compulsory and standard contractual terms to be included in agreements to be entered into in terms of the Act⁸ and to prescribe royalty rates or tariffs for various forms of use;⁹
- c. dictate provisions that certain agreements must include;¹⁰
- d. prevent any person from choosing to renounce a right or protection offered by the Act (regardless of any benefit they may have enjoyed by doing so), by making any contractual term which purports to do so unenforceable;¹¹
- e. erode existing vested rights by applying certain provisions retrospectively, including requiring the compulsory renegotiation of certain contracts.¹²

37 By way of analogy, if the principles of this Bill were to be applied in the construction industry, it would effectively provide for a single contract, with compulsory terms, whenever someone contracted with a builder to build them a house. The home

⁷ See for example clauses 5, 7 and 9 of the Bill inserting s6A, 7A and 8A of the Act

⁸ Clause 33 of the Bill inserting s39(cG) of the Act

⁹ Clause 33 of the Bill inserting s39(cl) of the Act

¹⁰ See for example clauses 5 and 9 inserting s6A(4) and 8A(4)

¹¹ Clause 34 of the Bill inserting s39B of the Act

¹² See for example clauses 5 and 9 inserting s6A(5) and 8A(5)

owner would have to give the builder a share in any rental earned if he let the house. The Minister would dictate the contractual terms, and ownership of the house would vest in the builder, even if the owner paid the builder to build it. The owner would also have to let the builder reside in a room in his house if the owner was not using that room. Each of these rights would be given to every participant in the building process, including the architect, engineers, bricklayers, tilers, plumbers, electricians, plasterers, painters, etc., notwithstanding their role in the project. The legislation would be based on research done on low cost residential housing perhaps, but would be extrapolated to all forms of buildings. The Minister would be given unrestrained powers to determine the contractual terms, including how much each role-player should be paid, but no guidance would be given to the Minister regarding the factors to be considered. And none of these people could waive any of these protections, even if they were paid for the work they had done. Clearly, no one would build a house on this basis. The same is true of investment in future television shows and films. The likely consequences of the legislation for all creators in the value chain, for investment and for the economy as a whole.

- 38 The Minister is effectively involved in writing contracts for the parties.
- 39 No guidance is given to the Minister regarding how to exercise these powers or the purpose to be achieved by their regulation.
- 40 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 the guidelines for the exercise of the power in the relevant statute.¹³
- 41 The duty to provide guidance for the exercise of a discretion is located in the Bill of Rights.¹⁴

¹³ *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) para 54

¹⁴ "[T]he constitutional obligation on the Legislature to promote, protect and fulfill 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*

- 42 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.¹⁵
- 43 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.
- 44 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.¹⁶
- 45 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 Bill.

IMPLEMENTATION CONCERNS

The misplaced royalty provisions in the Copyright Bill will cause confusion

- 46 The proposed s8A of the Copyright Amendment Bill introduces provisions into the Copyright Act that will serve to allow a "*performer*" to share in any royalties received by the owner of copyright in an audiovisual work (which include television series and films).

Rensburg NO and Another v Minister of Trade and Industry and Another NNO 2001 (1) SA 29 (CC) para 25

¹⁵ *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) para 70

¹⁶ *Dawood* para 50

- 47 It is unclear why *performer* protections are being conferred by way of amendments to the Copyright Act in circumstances where South Africa already has a "Performers Protection Act". The provisions of s8A are very difficult to reconcile with similar protections which are sought to be afforded to performers in terms of the proposed amendments to the Performers Protection Act. The obvious potential for contradiction and inconsistency which arises as a consequence of using two legislative instruments for a single legislative purpose is undesirable and will inevitably lead to difficulties that will involve performers in unnecessary and costly litigation.
- 48 The provisions of s8A simply have no place in the Copyright Act. The attempt to afford very similar, and clearly overlapping, protections to performers in terms of both the Copyright Act and the Performers Protection Act is ill-conceived and will lead to untenable legal uncertainty. Indeed, it is entirely unclear what is meant by "subject to the Performers Protection Act" in s8A(a).
- 49 We therefore recommend that the provisions of s8A be deleted from the Copyright Act. Such protections as are necessary for performers should be afforded to them by way of amendments to the Performers Protection Act.

There will be a chilling effect on commissioned television productions

- 50 There is no exclusion in s8A for audiovisual works that have been commissioned and paid for by a third party. Previous drafts of the Bill contained this exemption and the exemption still exists for artistic works which are commissioned. There is no obvious reason why films should be treated differently to artistic works in this regard.
- 51 The failure to exempt commissioned audiovisual works from the provisions of s8A is likely to have a chilling effect on investment in the South African film and television industry, much of which happens in the various provinces of South Africa. These provinces compete with other countries to attract film-makers to make films in this country. The provisions of s8A, as proposed, will serve as a deterrent to them doing

so, thus warding off much needed foreign direct investment into this country, which in turn would have led to employment.

52 In addition, local production houses (film studios) and broadcasters invest substantial sums of money annually in the production of commissioned audiovisual works such as films and television series. They do so in circumstances where the success of the audiovisual work cannot be guaranteed. In other words, firms that commission audiovisual works do so at their own risk.

53 The proposed section 8A allows performers to share in the rewards which that investor stands to gain from its investment, despite the fact that (i) the performers will already have been paid for their performances; and (ii) the performers take no commercial risk whatsoever insofar as the success or otherwise of the film is concerned. Indeed, the performers will be entitled to share in the royalties earned by the owner of the work even where the audio-visual work is loss-making commercially (thus compounding the losses and further disincentivising investment in local production).

54 s8A thus seriously undermines the incentive of any production house or broadcaster to invest in local productions. It is also likely to cause foreign film makers to make their films elsewhere. This is, ultimately, to the detriment of performers who depend on this investment for their livelihoods.

55 As a minimum, therefore, s8A should have an exclusion for commissioned works in the same way that proposed s7A has for artistic works.

It will be difficult to comply with retrospectivity provisions with no time-limit

56 As stated earlier in our submission, the proposed amendments to s8A detrimentally affect the vested rights of copyright proprietors. The retrospectivity provisions are manifestly unconstitutional and subject to legal challenge.

- 57 As was raised in the DOJ's opinion, there is no time limit imposed in respect of the date on which the work was created – i.e. there is no cut-off for how far back the retrospectivity provisions go. Thus, the authors and performers of works created decades ago will be eligible to receive royalties from the future exploitation of that work and if the works are going to be used in future all past agreements will need to be renegotiated.
- 58 While there are undoubtedly examples of past one-sided agreements, the Copyright Bill presumes that all performers and authors have always been systematically underpaid. But there will surely have been some cases (possibly even the majority of cases) where authors and performers were fairly paid. It does not make sense therefore to impose a blanket obligation compelling a copyright owner to make further payments to the author and/or performer and to renegotiate all these agreements.
- 59 Due regard must be had to the relevant circumstances, including the amounts which the author and/or performer have already received and the success of the work. In many cases the copyright owner would have paid the performer less remuneration had it known that the performer would be entitled to share in the future profits of that audiovisual work (in addition to being remunerated).
- 60 In many instances, the current owner of copyright will have had no control over what the authors and performers were paid for their work or performance, because the current owner was not a party to that agreement. It is, as noted, intrinsically arbitrary to impose responsibility for payment of a debt (to the author / performer) on a copyright owner who has no connection with that debt and who had no control at all over the original agreement between the author or performer and first copyright owner.
- 61 If the retrospectivity provisions are not deleted (as they should be), they should be limited to works created in the past three years (over and above the requirement that it still falls within the application of the Act and is still exploited for profit).

The registration and reporting obligations are unduly onerous

- 62 As we understand it, proposed new s8A(6)(a) of the Copyright Bill requires persons to register every audio-visual work that they reproduce, show in public, broadcast, communicate to the public by wire or wireless means, or distribute to the public.¹⁷ Although it appears that the manner and form of the registration will be contained in the regulations not yet published, it is, in the first instance, unclear where and with whom persons should register their "acts". It is also unclear whether the registration should take place prior to the "acts" being carried out or whether registration after the fact is permitted. These points of clarification are important, in particular given that proposed s8A(7) renders non-compliance an offence with sanctions that are draconian in the extreme.
- 63 More importantly, however, the provisions are unduly burdensome and onerous for broadcasters of audiovisual works and other firms that exploit audiovisual works for commercial gain (such as Netflix, YouTube, Amazon and the like); and the sanctions imposed for non-compliance with them are manifestly unreasonable.
- 64 We estimate that several millions of acts will need to be registered every month.
- a. South African television broadcasters currently broadcast over 200 audiovisual channels on SABC, e.tv, DStv, M-Net, OpenView HD, StarSat and Community television services, which are mostly broadcast 24 hours per day, every day.
 - b. Each month, they broadcast scores of thousands of hours of audiovisual content (films, television series, documentaries, advertisements etc.), involving about a dozen audiovisual works per average broadcast hour (including advertisements).
 - c. Broadcasters will therefore be required to register more than a million "acts" (broadcasts of individual audiovisual works) every month. This task is so vast

¹⁷ We have listed only the acts in s8 that traditional broadcasters would ordinarily carry out

as to render the requirement to do so (on pain of severe punishment) clearly unreasonable.

- d. This is over and above the extensive audiovisual works distributed online on Netflix, ShowMax, etc, with millions of views by users every month.¹⁸
- e. In addition to these registrations are the separate registrations which will now apparently be required under the proposed new s5(1A) of the Performer's Protection Act (PPA). We note that the registrations required under proposed s(1A) of the PPA will be in respect of the same broadcasts and audiovisual works but will require registration for every performance included in that audiovisual work. Assuming (very conservatively) that there are five performances per audiovisual work which is broadcast, then millions of registrations will be required under the proposed provisions of the PPA.
- f. It follows that, if these registration provisions are made law, the department or firm charged with administering the registrations will likely be receiving several million registrations every month from broadcasters and online film distributors.

65 The sheer volume of registrations which will be brought about by proposed s8A(6)(a) does not seem to have been properly thought through by the drafters of the Bill. Broadcasters obviously cannot be expected to register every audiovisual work that forms part of their broadcasts; and in most instances will simply not be able to do so. It is unreasonable and irrational to expect them to do so. Broadcasters aside, the administrative burden on the Department of Trade & Industry (if that is the institution where registrations are to take place) is one which it is simply not equipped to handle.

¹⁸ Every one of these play events is, technically an "act" contemplated in s8 and may therefore have to be registered. At the very least every audiovisual work made available on the platform would have to be registered as being available

66 The provisions of s8A(6)(a) are also unnecessary because every performer that appears in a broadcast will have an agreement with the owner of copyright in the audiovisual work that will set out the royalties to which that performer is entitled. The performer can also call on the owner to provide a statement of account. We submit, for these reasons alone, that the proposed new section is so unduly burdensome that it will never pass constitutional muster. It is irrational and wholly unreasonable. There are, however, further difficulties.

a. First, if it is contemplated that broadcasters should register their "acts" in advance of the "acts" occurring, and that the Department of Trade and Industry should be required to consider those applications for registration in any detail, then one can anticipate that the registration process will come to a standstill, and with it, the broadcasters' business. That, needless to say, will have catastrophic consequences for those who the drafters wish to protect.

b. Secondly, we note that if it is intended that registration of the "acts" can take place after the "acts" have taken place, then it is unclear what time period is permitted for these registrations. Importantly, we note that the non-registration of "acts" is a criminal offence. Clarity is therefore required as to the period within which registration is required.

67 Proposed s8A(6)(b) requires that any person that executes an act contemplated in s8 (including reproduction and broadcast of audiovisual works) for commercial purposes must submit a complete, true and accurate report to the performer (and others) in the prescribed manner for the purpose of calculating the royalties due and payable by that person.

68 The scope of the provision is not clear. However, if what the Portfolio Committee has in mind is that broadcasters must compile a report for every performer that appears on their television channels that they broadcast setting out how many times

that performer's performances appear on those channels, then the provision is again unreasonable and irrational.

- 69 There will be approximately 50 different performances (including the performances of every person that acts in an audiovisual work and every actor or actress in an advertisement) in an average broadcast hour on DStv alone (5 performances per audiovisual work). s8A(6)(b) appears to contemplate that a separate report be sent to every performer whose performance is included in the broadcast. This means that broadcasters will have to generate millions of separate reports every month for every performer whose performances are broadcast on their channels. This is unreasonable. It is also unnecessary for the reasons we have already explained – the performers should, if necessary, seek recourse against the firm with whom they have a contract in respect of that performance.
- 70 We note further that broadcasters have no control over the content of many of the channels that they broadcast. Again, for example, the SABC determines what content is included on its channels and has agreements with the production houses that produce the shows on its channels to do so. Those production houses have agreements with the performers. Broadcasters are therefore often unaware of the names of the actors that appear on the shows that they broadcast. It cannot therefore be incumbent upon M-Net and MultiChoice to submit a report to a performer with whom they have no contractual relationship whatsoever and whose identity is unknown. It is simply impossible for them to do so.
- 71 The reports are not limited to local performers. Aside from the difficulties associated with ascertaining contact details for non-local performers, it seems to us unlikely that the drafters of the Bill had in mind that international performers receive a report from South African broadcasters like the SABC, e.tv and M-Net detailing the fact that their performances were broadcast on their services in a particular month and that they are due a royalty from them. But this will be the effect of the provision. And, we note, that it will not be possible, without breaching South Africa's international obligations, to legislate that only local performers receive these reports. In any

event, even if the provision was limited to local performers, the provisions are wholly irrational and unreasonable for the reasons given. To provide for criminal sanctions in respect of non-compliance in respect of international performers is of highly questionable validity from a jurisdictional point of view. In effect the proposed amendment seeks to extend the reach of our criminal justice system to encompass the protection of foreign nationals.

Draconian fines are unfair to broadcasters

72 The Bills provide that failure to submit a report is a criminal offence. But the wrong (if a wrong has been committed) is a civil one relating to the failure to account by one person to another. It is not a matter that should be dealt with as a crime.

73 Secondly, the "minimum fines" are draconian in the extreme and unreasonable. We note that the fines are orders of magnitude bigger than the fines provided for in the Act (currently), despite the fact that the offences for which the latter fines are imposed are far more serious. In addition, the amount of money involved in any contravention (or even a number of contraventions) is likely to be entirely out of proportion to the very substantial financial fine and imprisonment contained in this proposed section.

74 Beyond the Act, we note that even in respect of cartel conduct prohibited under the Competition Act, 1998, the maximum fine that may be imposed upon a company is 10% of its turnover. This is, however, the minimum fine being contemplated by the Portfolio Committee. In other words, if a broadcaster were to omit one performance from the thousands of hours of content that it broadcasts every month, it would be fined at least 10% of its turnover for that single infraction.

75 The provisions are extreme and draconian and out of proportion to any possible harm that may result from non-compliance. They are, therefore, also irrational and unreasonable. It also bears mention that no exceptions are provided for; and, unlike

in the case of minimum sentences for serious crimes, there is no evidence of the need for minimum fines of this sort.

Interference in the freedom of contract will reduce output

- 76 Earlier on we raised Constitutional concerns about the excessive delegation of powers to the Minister. Not only will the Bill's proposals give rise to legal challenges, but they are also impractical and unworkable, once again undermining the very people it is intended to protect.
- 77 It is our respectful submission that the Bills rigidly and excessively interfere with the parties' freedom to conclude contractual arrangements appropriate for their business models and their sector. Insufficient consideration appears to have been given to the television production and broadcasting context.
- 78 A single production such as a film or series involves extensive role-players, including the production company, and individual writers, directors, actors (key and supporting roles, as well as extras), crew etc. A local drama will usually have a total staff of over 100 people, a writing team of 8 people (each making contributions of different magnitudes). It also has a cast of 16 to 18 lead performers (some taking lead roles, others only speaking one or two lines) and 60 extras.
- 79 Behind every hour of content broadcast are multiple rights holders with whom agreement must be reached.
- 80 Broadcasters conclude thousands of agreements with authors of copyright works in a single year. In the case of an audio-visual work, the "author" is typically a production company (not usually an individual). The production company and broadcaster engage in commercial negotiations regarding the production of a film or television programme. The production company, in turn, contracts with numerous role-players, including scriptwriters, crew, performers, etc. In many cases, given the collaborative nature of television productions, there are multiple authors and rights-

holders in the different works which make up a single production. Across the productions, many individuals make varying levels of contribution.

81 In addition, each production is structured differently taking into account the respective roles of each of the collaborating parties and their contributions, including the funding and risk put up by each party.

82 Despite the immense complexity and nuances, the Bills seem to assume copyright in every audio-visual work is administered in the same way.

83 As a result, some of the provisions are unworkable in the television production and broadcasting context, and will have serious adverse consequences for investment in local film and television content. This would adversely impact on jobs, skills development and enterprise development.

Summary: The Bills will dis-incentivise investment in television production

84 The NAB understands what the Bills seeks to achieve, and the underlying reasons for their objectives.

85 However, we are concerned that, as the Bills stands currently, they will undermine the very objectives they seek to achieve, especially within the television production and broadcasting sector.

86 Television production and broadcasting is a significant contributor to the South African economy and a major funder of creators. Finding ways to increase investment in this industry is therefore vital to the well-being of creators and the broader economy.

- 87 According to the most recent report¹⁹ of the National Film and Video Foundation, the film and television production industry in South Africa contributed R4.4 billion to economic production in the country in the 2016/17 financial year. This direct contribution led to a total rise in economic production of approximately R12.2 billion. The net operational expenditure of the film industry in the four financial years analysed in the study amounted to R17.5 billion.
- 88 Broadcasters are the largest investors in the local production industry. Our entire business is premised on the creation and exploitation of copyright works, including literary works (e.g. scripts), musical works and/or sound recordings, cinematographic films, including audiovisual works (e.g. feature films, television programmes, documentaries, short films, home videos, animated films and cartoons, television commercials, etc).
- 89 Through investments in local content running into billions of Rands, public and commercial broadcasters generate thousands of hours of original South African content annually. This in turn, contributes to economic development, employment, skills development, trade and enterprise development, and broadened economic participation. These are the same objectives which the Bill seeks to achieve.
- 90 It is in the interests of all stakeholders in the entertainment industry that creators remain incentivised to fund the creation of original copyright works. This is also the main purpose of copyright legislation, which serves to incentivise the creation of works by granting exclusive rights in respect of those works to the creators. These rights may be exploited by the author of the work for financial reward.
- 91 Effective IP legislation should strike a balance between the creators, on the one hand, and the commercial interests of those parties who invest in that creation (e.g. broadcasters, production companies and employers more generally) on the other hand. Investors rely on a balanced and predictable legislative framework to

¹⁹ Economic Impact of the SA film Industry Report 2017, Urban Econ, commissioned by National Film and Video Foundation 2017.

protect investments made. If there is no balance, then there will be no investment and no rewards will flow to the creators. We respectfully submit that the Bill has not achieved this balance.

92 The NAB remains committed to investing in the growth of a world-class, sustainable local production industry. However, this industry has unique requirements which must be taken into account. For example:

a. The freedom to contract among role-players in the content value-chain, without undue interference in commercial matters is especially important given the multiple parties which are involved in creating every piece of television content.

b. Adequate legislative protection against copyright infringement and piracy is crucial given the rampant piracy of audio-visual content which affects the ability of rights holders to get a return on their investment.

c. Finally, a framework which is sufficiently flexible to allow all role-players to operate is vital. Importantly in this regard, the film and television sector is currently seeing a marked change in the way in which audiences access audio-visual content, away from traditional broadcasters and toward online content providers. Copyright legislation must remain flexible to keep up and deal with these changes.

93 If legislation is not sufficiently mindful of these requirements for film and television, it would have the unintended consequence of reducing investment.

94 If the incentives or financial ability of broadcasters to invest in local content are reduced, there will likely be a reduction in either the quality or the quantity of local content. This will likely lead to job losses in the sector. Equally if copyright compliance increases the complexity and red tape of doing business, the administrative cost would reduce broadcasters' ability to invest in local production at the current levels of quantity and quality. A complex system of copyright administration is not in anyone's interests. If investment lessens, the entire value-

chain suffers, including local copyright creators, who are precisely the stakeholders the Bill aims primarily to assist.

CONCLUSION

95 The concerns we have raised are not minor. To the contrary, the NAB submits that the Bill is fundamentally flawed and, if passed as is, is likely to face significant Constitutional and implementation challenges.

96 The NAB accordingly urges the Committee to send the Bill for a substantial review.

97 In conclusion, the NAB thanks the Committee for the opportunity to make this written submission. We trust our submission will be considered and we look forward to further engagements on this process. The NAB requests an opportunity to make oral submissions should the opportunity arise.