



**THE NAB WRITTEN SUBMISSION ON THE
PERFORMERS' PROTECTION AMENDMENT BILL**

PERFORMERS' PROTECTION 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 Performers' Protection Amendment Bill (Performers' 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; 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.

BACKGROUND CONTEXT

- 3 The NAB understands that the objects of the Performers' Bill seek to *inter alia* provide for performer's moral and economic rights, and to align national legislation with treaties reviewed by South Africa including the World Intellectual Property Organisation (WIPO) treaties, namely the Beijing Treaty for the protection of audio-visual performances, and the Performers and Phonograms Treaty.

- 4 The NAB acknowledges the need to update South Africa's intellectual property laws and supports the objects of the Performers' Bill. Performers are a vital part of the film and television industry and the NAB supports initiatives to ensure that they are appropriately rewarded.

- 5 Furthermore, the Performers' Bill ought to create an enabling environment for every-player in the content value chain. This requires a careful balancing of the rights and interests of all stakeholders. After all, for performers to thrive, it is essential for the broadcasting industry to thrive. To this end, the NAB trusts that the Committee will thoroughly and equally engage with the various role-players.
- 6 Although the Committee declined the NAB's request for an extension, we welcome the opportunity for further engagement and make ourselves available to the Committee should it require any clarity or further information.

PRIORITISATION OF THE PERFORMERS' BILL

- 7 The NAB and its members have continuously participated in this legislative review process, and our members have previously engaged both the Department of Trade and Industry and the Portfolio Committee. The NAB notes that this Performers' Bill is being considered concurrently with the Copyright Amendment Bill (Copyright Bill). The NAB further notes that currently some of the provisions of the Performers' Bill are to be interpreted and understood with reference to provisions of the Copyright Bill.
- 8 We understand that the Committee intends to consider the Performers' Bill together with the Copyright Bill.
- 9 The Performers' Bill correctly deals exclusively with moral and economic rights of performers, whereas the Copyright Bill deals with the broader scope of intellectual property rights across a spectrum of works, some of which have no bearing on performers.
- 10 The NAB respectfully submits that, subject to our comments below, the Performers' Bill is workable.
- 11 In contrast, the Copyright Bill is fraught with problems, including major Constitutional concerns and implementation challenges. Various stakeholders have expressed serious concerns about the Copyright Bill. There is a significant risk that the

Copyright Bill, if passed as is, would encounter legal delays and implementation difficulties.

- 12 Extensive work is therefore required to revise the Copyright Bill, to address its many issues of concern. Indeed, the NAB believes that the Copyright Bill should be sent back to the National Assembly to review.
- 13 Given the underlying objectives of the Performers' Bill, the NAB wishes to avoid delaying its finalisation solely because of the problems with the Copyright Bill.
- 14 Whilst there are overlapping areas in both Bills, the Performers' Bill may still be considered, processed and finalised independently from the Copyright Bill. The current cross-referencing in the Performers' Bill is consistent with both the current provisions of the Copyright Act, and the proposed provisions in the Copyright Bill.
- 15 Therefore, irrespective of whether or not the Copyright Bill is enacted, the provisions in the Performers' Bill, once enacted will remain consistent with the current application of law. Should there be any terms which are neither defined in the Copyright Act nor the Performers' Protection Amendment Act, regard may be had to the ordinary meaning of the terms, as well as the meanings ascribed to them in the WIPO treaties from which these terms originate. The NAB has sought legal advice on this matter and our legal counsel has confirmed that this approach is legally sound and feasible.
- 16 Therefore, the NAB strongly recommends that the Committee prioritise the Performers' Bill to ensure that matters pertaining to the economic rights of performers are addressed without any undue delays. This will also afford the Committee the opportunity to thoroughly consult on the Copyright Bill, obtain subject matter expert input, and ensure that its significant flaws are addressed.
- 17 However, in recommending that the Performers' Bill be prioritised, there are key amendments and proposed re-drafting of clauses 1, 3A, 4 and 6 that the NAB believes are necessary and submits hereunder for consideration. In order to assist

the Committee, we make the following constructive proposals, including drafting proposals, which we believe will help to iron out remaining issues and finalise the Performers' Bill.

DEFINITION OF PERFORMER

- 18 The current definition of performer is rather broad and includes any person who acts, sings, delivers, declaims, plays in, or otherwise performs in any of the specified works. The NAB respectfully submits that a distinction must be made between a performer for purposes of the statutory rights and obligations and incidental participants who would not in context of the literary, musical or artistic works, be considered as a performer or 'member of the cast'. This distinction is especially crucial as it is only performers who have a statutory right to receive a royalty or equitable remuneration.

- 19 We are aware that the current definition of a "performer" in the Bill is drawn directly from the Beijing Treaty. The DTI have previously stated before the NA Portfolio Committee on Trade and Industry that it is understood that this definition does include "extras". The DTI's recognition of this is welcome. However, the position is without doubt in the context of the Beijing Treaty, not necessarily because the Treaty text is clear, but rather because of reference to the negotiation history on the definition. At the 2000 Diplomatic conference this was captured in the Basic Proposal that stated explicitly that "extras" are not covered. In South Africa, if there is a legal dispute about the interpretation of this definition in the final Act, there is no such similar guidance of who is included or who is excluded (other than the DTI's recognition that "extras" are not included). This could result in disputes in interpretation, leaving the parties with no choice but to approach the courts to decide by applying the legal rules of interpretation. For purposes of legal certainty in South Africa it therefore makes sense for the legislature to expressly provide that guidance in the legislation itself.

- 20 In order to ensure legal certainty, the NAB recommends the following definition of performer:

"an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise viewed in context, performs literary, musical or artistic works, but does not include extras, ancillary participants or incidental participants"

REPORTING REQUIREMENTS

- 21 The NAB notes that clause 4(c) of the Performers' Bill seeks to insert a new subsection which requires any person who for commercial purposes intends to *inter alia* broadcast or communicate to the public an unfixed performance of a performer or copies of that performance fixed in an audio-visual fixation or sound recording, to "register" that act in the prescribed manner and form. This clause further requires the submission of a complete, true and accurate report to the performer, producer, copyright owner, the indigenous community or collecting society as the case may be, for the purposes of, amongst other, calculating the royalties or equitable remuneration due and payable by that person.
- 22 The NAB respectfully submits that the proposed section is simply not practical when considering the vast volume of content that is broadcast. By way of illustration for every hour of broadcast there are approximately 10 audio-visual works. For each channel there is approximately 240 audio-visual works per day, and approximately 7200 audio visual works per month. The proposed section effectively requires registration of each of these works followed by a submission of a report to either of the specified parties. Whilst the intention may be to ensure that there is due compensation to the parties concerned, the NAB respectfully submits that these provisions may have the unintended consequence of a decrease in the amount of broadcast content which falls within the ambit of the Performers' Bill. This may result in a significant decline in investment in the sector.
- 23 The NAB supports the principle that performers must receive equitable remuneration in respect of their works. To this end, the NAB respectfully recommends that for ease of administration the section be revised to instead require

an annual report of usage of the works and that such report be made available within a reasonable time after request from the performer, producer, copyright owner, the indigenous community or collecting society as the case may be. This section will be reinforced by the agreements provided for in clause 6, as the agreements will also address payments of royalties or equitable remuneration. The NAB therefore proposes the following wording:

A person who for commercial purposes ~~intends to~~:

(a) Broadcasts...

(b)...

(c)...

(d)...

(e)...

(f) ...

(g)...

(h)...

must prepare register that Act in the prescribed manner and form and submit a complete true and accurate annual report of such usage and must make the relevant parts of such report available to the performer, producer, copyright owner, the indigenous community or collecting society as the case may be, within a reasonable time after having received a request for such.

FINES

24 Following from clause 4(c), clause 4(1B) proposes a minimum fine of ten percent of annual turnover for failure to register any of the applicable acts listed in clause 4(c), or for failure to submit the report as prescribed. The NAB respectfully submits that the quantum of fines must be assessed and determined with reference to failure to comply with a specific section of the Amendment Act, once promulgated.

25 The NAB respectfully submits that it is undesirable for the Bill to adopt a blanket approach without considering the nuances from case to case. The NAB notes that the Copyright Bill proposes the establishment of a Copyright Tribunal which shall be empowered to *inter alia* adjudicate any referral made to it in terms of any other relevant legislation and may make any appropriate order in respect of a referral.

26 The amount of the fine should be proportionate to the severity of the act which is penalised. Given that this is a reporting requirement, the NAB submits that a maximum fine of R100,000 is appropriate.

27 We suggest that the proposed section prescribing the amount of the fine be redrafted to rather defer the determination of the fine to the Copyright Tribunal, and that each case will then be assessed on its own merits. The NAB therefore proposes the following wording for the proposed section 5(1B)(a) (clause 4(c)):

Any person who ~~intentionally fails to register an act who intentionally fails to submit a report as contemplated in subsection (1A)~~ without good cause shown, shall be liable to pay a fine not exceeding R100,000 to be determined by the Copyright Tribunal.

COMPULSORY AND STANDARD CONTRACTUAL TERMS

28 Clause 6 of the Performers' Bill empowers the Minister to prescribe compulsory and standard contractual terms to be included in agreements entered into in terms of the Performers' Protection Act, as amended. The NAB supports the principle that contracting parties must negotiate in good faith and that the written agreements must clearly provide adequate protection of the rights of the respective contracting parties.

29 The NAB submits that whilst it may not be the intention of the legislature, the current wording may be interpreted to mean that the Minister must prescribe the *content* of the compulsory and standard contractual terms. The NAB respectfully recommends that the role of the Minister should rather be to guide on some of the specific *items* to be included in agreements concluded pursuant to the Performers' Bill once enacted. In order to ensure legal certainty, the NAB recommends that the provision be redrafted as follows:

(3) Without specifying the content of agreements, the Minister may ~~must~~ make regulations prescribing ~~compulsory and standard~~ a list of contractual terms to

~~be included which must be included in agreements to be entered into in terms of this Act. which contractual terms must~~ Such list may include:

~~(a) the rights and obligations of the parties; performer and the producer, broadcaster or user;~~

~~(b) the royalties or equitable remuneration payable to the performer including the timeframe for payment;~~

~~(c) the method and period within which any royalty or equitable remuneration payable to the performer must be paid;~~

~~(d) the period of the agreement; and~~

~~(e) the dispute resolution mechanism.~~

~~(f) that both parties sign the agreement.~~

30 Following from the recommendation in the preceding paragraph, the NAB further recommends that clause 3A(3)(a) be revised to read:

The written agreement contemplated in sub-section 2 must at least address the list of contractual terms as may be prescribed.

CONCLUSION

31 The NAB thanks the Portfolio Committee for the opportunity to make this written submission. The NAB and its members remain committed to advancing the rights of performers who are central to the film and television industry. We look forward to further engagements with the Committee and we trust that our submission will be of assistance.

32 For the Committee's ease of reference, our drafting proposals are summarised in the schedule below.

THE NAB'S DRAFTING PROPOSALS ON THE PERFORMERS PROTECTION AMENDMENT BILL

Item	Topic	Clause of the Bill and section of the Act	Existing clause	Proposed drafting amendment	Comments
1.	Definition of performer	Clause 1(d) of the Bill amending s1 of the Act	'performer' means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary, <u>musical</u> or artistic works;	Amend to read: "performer' means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise <u>viewed in context</u> performs literary, musical or artistic works, <u>but does not include extras, ancillary participants or incidental participants</u> ";	
2.	Reporting requirements	Clause 4(c) amending s 5(1) of the Act	(1A) A person who for commercial purposes intends to: (i) Broadcast... (j) ... (k) ... (l) ... (m) ... (n) ... (o) ... (p) ... must register that Act in the prescribed manner and form and submit a complete true and accurate report to the performer, producer, copyright owner, the indigenous community or collecting society as the case may be, in the prescribed manner, for the purposes of calculating the royalties or equitable remuneration due and payable by that person.	(1A) A person who for commercial purposes intends to: (q) Broadcasts... (r) ... (s) ... (t) ... (u) ... (v) ... (w) ... (x) ... must <u>prepare</u> register that Act in the prescribed manner and form and submit a complete true and accurate <u>annual report of such usage and must make the relevant parts of such report available</u> to the performer, producer, copyright owner, the indigenous community or collecting society as the case may be, <u>within a reasonable time after having received a request for such.</u> in the prescribed	

				manner, for the purposes of calculating the royalties or equitable remuneration due and payable by that person.	
3.	Fines	Clause 4(c) amending s 5(1) of the Act	(1B) (a) Any person who intentionally fails to register an act who intentionally fails to submit a report as contemplated in subsection (1A) shall be guilty of an offence. (b).... (c)... (d)....	(1B) (a) Any person who intentionally fails to register an act who intentionally fails to submit a report as contemplated in subsection (1A) <u>without good cause shown</u> , shall be liable to pay a fine not exceeding R100,000 to be determined by the Copyright Tribunal, <u>guilty of an offence</u> . Delete (b), (c) and (d).	
4.	Compulsory and standard contractual terms	Clause 6 of the Bill amending s 8D of the Act	(3) The Minister must make regulations prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act, which contractual terms must include: (g) the rights and obligations of the performer and the producer, broadcaster or user; (h) the royalties or equitable remuneration payable to the performer; (i) the method and period within which any royalty or equitable remuneration payable to the performer must be paid; (j) the period of the agreement; (k) the dispute resolution mechanism; (l) that both parties sign the agreement.	(3) <u>Without specifying the content of agreements</u> , the Minister <u>may</u> must make regulations prescribing compulsory and standard <u>a list of contractual terms to which must be included in agreements to be entered into</u> in terms of this Act. which contractual terms must <u>Such list may include:</u> (m) the rights and obligations of the <u>parties</u> ; performer and the producer, broadcaster or user ; (n) the royalties or equitable remuneration payable to the performer <u>including the timeframe for payment</u> ; (o) the method and period within which any royalty or equitable remuneration payable to the performer must be paid ; (p) the period of the agreement; <u>and</u>	

				(q) the dispute resolution mechanism. (r) that both parties sign the agreement.	
		Clause 3 amending s 3 of the Act	3A(3) The written agreement contemplated in sub-section 2 (a) must at least contain the compulsory and standard contractual terms as may be prescribed.	3A(3) The written agreement contemplated in sub-section 2 must at least <u>address</u> contain the list of contractual terms compulsory and standard contractual terms as may be prescribed.	