



**THE NATIONAL ASSOCIATION OF BROADCASTERS' WRITTEN
SUBMISSION TO THE DEPARTMENT OF TRADE AND
INDUSTRY ON THE COPYRIGHT AMENDMENT BILL**

16 September 2015

1. Introduction

- 1.1 On 27 July 2015, the Minister of Trade and Industry (the "**Minister**"), under Government Gazette 39028, published the Copyright Amendment Bill 2015 (the "**Bill**"), which is intended to amend the Copyright Act 98 of 1978 (the "**Act**"), together with a notice inviting interested persons to submit written comments on the Bill.
- 1.2 The National Association of Broadcasters (the "**NAB**") welcomes proposals to amend the Act. The NAB and its members ("**Members**") have long been concerned about the impact of the arguably outdated Act on the conduct of business, the development of creative works and access to materials, particularly in the digital age.
- 1.3 However, while the NAB is generally supportive of the broader aims and principles contemplated in the Bill, it has concerns that the adoption of the Bill, in its current form, would have serious adverse consequences for the South African economy and particularly the South African broadcasting industry (the "**Industry**").
- 1.4 The purpose of this submission is to summarise the NAB's comments and concerns in respect of the Bill, which are primarily limited to matters which affect the interests of its Members and/or the interests of the Industry as a whole.
- 1.5 In order to provide a context to the NAB's submission, an outline of the NAB's mandate and membership may be found in the ensuing sections. The NAB's submissions follow thereafter.

2. The NAB's Mandate and Membership

- 2.1 The NAB is the primary representative of the Industry. It represents all three tiers of broadcasting (i.e. commercial, public service and community television and radio broadcasting services) as well as signal distributors and associate members, including but not limited to:
 - 2.1.1 the three television public broadcasting services, and nineteen sound public broadcasting services of the South African Broadcasting Corporation of South Africa ("the **SABC**");

- 2.1.2 the commercial television broadcasters (e.tv, DStv, M-Net and ODM) and the commercial sound broadcasting licensees (that include media groups Primedia, Tsiya, Kagiso, MSG Africa and AME, Classic FM, YFM, Smile FM and Vuma FM);
 - 2.1.3 the licensed common carrier as well as the selective and preferential carrier broadcasting signal distributors, Sentech and Orbicom;
 - 2.1.4 over thirty community sound broadcasting licensees and the community television broadcasting service, Trinity Broadcasting Network (TBN) trading as Faith Terrestrial; and
 - 2.1.5 a range of industry Associates, including training institutions.
- 2.2 As a non-profit organisation, the NAB does not carry on a business intended for gain. It was established in 1993 for the purpose of (i) furthering the aims of the Industry, and (ii) providing a voice and platform for considering, debating and responding to all matters affecting the Industry and/or which are germane to the Members. Furthermore, the NAB's formal mandate is to:
- 2.2.1 *"promote a system of broadcasting in South Africa that respects freedom of choice of viewers, listeners and broadcasters, whether such broadcasters are privately or publicly owned, or operating as community sound or television broadcasting services;*
 - 2.2.2 *support and foster the creation of a favourable climate for broadcasting in South Africa;*
 - 2.2.3 *support and foster the principles of democracy, freedom of expression and the multiplicity of voices;*
 - 2.2.4 *consider and respond to matters affecting the Industry in the territory and formulate policies in regard to such matters; and*
 - 2.2.5 *generally, do things incidental, necessary and proper to attain and further the above objects, and to encourage and promote practices which will strengthen and maintain the broadcasting industry in South Africa so that it may best serve the public".*

2.3 Given the NAB's membership and the role that the NAB has historically played in the Industry, the NAB is self-evidently an interested party in relation to the Bill and welcomes the opportunity to make its written submission to the Bill. It is also in the public interest that the NAB's comments and recommendations be taken into account by the lawmakers as the Members (to whom the NAB is ultimately responsible) serve the interests of the public at large.

3. **The process leading up to the publication of the Bill**

3.1 Before turning to the substance of the Bill, the NAB wishes to record its concerns about the process leading up to the publication of the Bill.

3.2 Firstly, the Bill is not accompanied by an explanatory memorandum or any other document explaining the intention behind the amendments it proposes. This is a requirement of Rules of the National Assembly (see rule 241(3)), and for good reason as it is difficult for interested parties to comment meaningfully and effectively on a bill without being informed of the purposes it seeks to achieve. The failure to publish an explanatory memorandum has considerably impeded the NAB's ability to make meaningful comments on the Bill and has therefore affected the fairness of the comment process.

3.3 Secondly, the Bill was not preceded by a green or white paper process. While the DTI advised at the Copyright Amendment Bill Conference (held in Johannesburg on 27 August 2015) that the Bill was informed by the draft National IP Policy and the recommendations from the Copyright Review Commission, the NAB is of the view that a legislative amendment process as significant as this, ought to follow a fair administrative process. It is accepted practice that the process of making law begins with a green paper. A green paper is an initial discussion document that provides insight into the thinking around the policy underpinning the new legislation or an amendment, and is published for public comment. The comments received inform the development of a subsequent, more refined discussion document – a white paper – which may also be published for comment from interested parties. The white paper usually forms the basis for a more concrete legislative proposal, in the form of a draft bill, which is only then submitted for Cabinet approval. The publication of a green and white

paper, which give interested parties a chance to comment on a legislative proposal at its formative stage, improve policy and the law making process. The Bill has not had the benefit of this process.

- 3.4 Finally, as far as we are aware, no regulatory impact assessment has been completed on the Bill to assess the costs and benefits, both economic and non-economic, of the Bill's proposed amendments. The NAB has been made aware that after the publication of the draft Bill the DTI invited bids to appoint a service provider to conduct an economic and social impact assessment of the proposed amendments to the Copyright Act. It is inappropriate to conduct an impact assessment after the publication of the Bill and the public participation process. This alone prompts the withdrawal of the Bill, as due process was not followed which ought to have preceded the drafting and publication of the Bill. All government departments are required to conduct regulatory impact assessments before amending existing legislation (see para 2.3.2 of the Presidency's *Guidelines for the Implementation of the Regulatory Impact Analysis/Assessment Process in South Africa* (2012)). It is good governance to ensure that legislative amendments do not have any unintended consequences – particularly in laws dealing with intellectual property, where a legislative amendment may have significant and wide-ranging economic effects. The NAB therefore suggests a regulatory impact assessment is conducted before the Bill is introduced to the National Assembly.

4. **Minister's powers**

- 4.1 The NAB is concerned that the Bill grants the Minister wide powers. These powers are far-reaching and include, *inter alia*:
- 4.1.1 to prescribe compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;
 - 4.1.2 to prescribe royalty rates or tariffs for various forms of use; and
 - 4.1.3 to prescribe the local music content for television and radio broadcasting.

4.2 The NAB submits that providing the Minister with such extensive powers without guidance as to how these powers should be exercised is unconstitutional and should be removed from the Bill.

5. Local content

5.1 The Bill proposes the insertion of a new section 10A into the Bill. The amendment seeks to, amongst others, introduce local content quotas for both television and radio broadcasting services.

5.2 The NAB submits that the inclusion of section 10A into the Bill is unconstitutional and this is discussed further in 5.6 below. Furthermore, it is inappropriate to regulate local content allocations in the Copyright Act, the provisions relating to local content should therefore be removed from the Bill entirely.

5.3 At the outset it is noted that the amendments to section 10A are riddled with outdated and inappropriate terms. Section 10A(1)(b) incorrectly refers to the Independent Broadcasting Authority Act, which was repealed by the Electronic Communications Act, 36 of 2005 ("**ECA**"). In addition, the use of the terms such as, "*public channels*", "*private channels*", "*private radio stations*", and "*local broadcasting*" are inconsistent and out-of-date with the current legislation.

5.4 Furthermore, the NAB is gravely concerned by the inclusion in the Bill that Section 10A "*shall have retrospective operation, as the date of publication and adoption of quotas for programming of local content as may be developed for the broadcasting industry*"¹. This section will have serious consequences for broadcasters if enacted. However, the section is vague and its meaning is not clearly drafted. It is accordingly in breach of the rule of law and is liable to struck down on this basis alone.

5.5 The NAB submits that the attempt by the Bill to prescribe local content quotas for broadcasting services is unconstitutional in that it attempts to regulate broadcasting without a mandate to do so.

Independent Regulation of Broadcasting guaranteed in the Constitution

¹ Section 10A (2) of the Bill.

5.6 The Independent Communications Authority of South Africa (“**ICASA**”) is the only independent regulator of broadcasting services. Section 192 of the Constitution provides that:

“National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”

5.7 To give effect to this provision, Parliament enacted the Independent Communications Authority of South Africa Act 13 of 2000 (“**the ICASA Act**”). One of the objects of the ICASA Act is:

“to establish an independent authority which is to ... regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution”.

5.8 Accordingly, ICASA is the only independent body empowered to regulate broadcasting.

5.9 The Constitution is the supreme law of the Republic and any law or regulation which is inconsistent with the Constitution is invalid. Any legislative amendment empowering the Minister of the DTI to regulate broadcasting by prescribing local content quotas for broadcasting service licensees, would be inconsistent with the provisions of section 192 of the Constitution as it:

5.9.1 encroaches on the constitutionally-mandated role of ICASA to regulate broadcasting in the public interest; and

5.9.2 fails to meet the constitutional requirement that an authority regulating broadcasting must be “independent”.

ICASA empowered to prescribe regulations for South African programming and South African Music

5.10 Section 61(1) of the ECA empowers ICASA to prescribe regulations applicable to broadcasting service licensees regarding the commissioning of independently produced South African programming.

- 5.11 Furthermore sections 61 (3) of the ECA expressly authorises ICASA to, “*in respect of television broadcasting service licence, impose and specify in that licence such conditions, as prescribed, regarding local content and independent production...*”
- 5.12 Similarly, section 61(4) of the ECA authorises ICASA to, “*in relation to sound broadcasting services, prescribe conditions in terms of which the broadcasting service licensee is required to broadcast a specific minimum percentage of music works as South African music.*”
- 5.13 The amendments proposed by section 10A of the Bill, which purport to compel the broadcasting service licensees to increase their SA local content quotas would be in conflict with section 192 of the Constitution and is accordingly unlawful, as ICASA is the only body empowered to regulate broadcasting.
- 5.14 The NAB therefore proposes that section 10A of the Bill be deleted in its entirety.

6. Fair Dealing

- 6.1 The Bill makes provision for general exemptions from protection of copyright for fair use. While the NAB supports the principles of fair use, there is a concern that section 12A of the Bill is too broad and could be open to abuse, consequently, clarity is also sought on section 12A(4). The NAB is of the view that:
- 6.1.1 the present draft of the exception under section 12A(4) implies a rigid legal definition on whether a particular piece is defined as a piece of satire or parody. The preferred position is that one protects all similar artistic devices and focuses the enquiry rather on whether the particular use is fair;
- 6.1.2 the exception under 12A(4) should include reference to satire;
- 6.1.3 the exception under section 12A(4) should not be –

- 6.1.3.1 limited to ...“some limited and reasonable use”.....
- 6.1.3.2 restricted to works "for non-commercial use"; and,
- 6.1.3.3 limited in terms of the scope set out in the second sentence;
- 6.1.4 the wording of section 12(a)(3) is unclear. It is not understood what is meant by "digitised copyright material".

7. Section 9A royalties

- 7.1 The NAB has long been concerned about the collection and administration of royalties paid by broadcasters to collecting societies. Commercial and Public Service television and sound broadcasting licensees are required by the Copyright Act to pay royalties to the holders of the copyright in musical works and where music videos are broadcast, to the holders of the copyright in a cinematographic film.
- 7.2 At the outset, The NAB notes the poor draftmanship displayed in the Bill: Sub-clauses (b) to (d) of the amendment to section 9A has been completely duplicated in sub-clauses (g) to (i), creating considerable confusion in this section.
- 7.3 The 2002 amendments to the Copyright Act and the Performers' Protection Act, 1967 ("**the Performers' Protection Act**") (by virtue of the Copyright Amendment Act, 2002 and the Performers' Protection Act, 2002, respectively "**the 2002 Amendment**") put in place a statutory licence for those who intend to perform the acts referred to in Section 9 (c), (d) and (e) of the Copyright Act without the permission of the rights holders.
- 7.4 Section 9, in relation to a sound recording, vests the copyright owner with the exclusive right to do the following acts:

“(a) make a record embodying a sound recording;

(b) let, offer or expose for hire by way of trade, a reproduction of a sound recording;

(c) broadcast the sound recording;

(d) cause the sound recording to be transmitted in a diffusion service (excluding where such transmission amounts to a lawful broadcast by the original broadcaster); and

(e) communicate the sound recording to the public,”

7.5 The 2002 Amendment created section 9A of the Copyright Act, which provided for the payment of a 'needletime' royalty for the broadcast of a sound recording, both to the owner of the copyright in the sound recording; and any performer whose performance is featured on the sound recording:

"9A(1)(a) In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9 (c), (d) or (e) without payment of a royalty to the owner of the relevant copyright."

7.6 In terms of section 9A, the amount of the royalty payable is by agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.²

7.7 The Bill seeks to amend Section 9A by providing that *before* a potential user begins to perform any of the acts set out in Section 9 (c), (d) or (e) of the Copyright Act the potential user must *inter alia*:

7.7.1 Give the copyright owner or collecting society notice of the intention to perform the act in question, indicating where practicable the date of the proposed performance and asking the copyright owner or collecting society to propose terms and conditions of payment of royalty;³

7.7.2 Wait for a response from the copyright owner or collecting society after sending the notice and the proposed terms of payment;⁴ and

7.7.3 Apply to the Tribunal to settle the terms of payment in the event the proposal is rejected after negotiations.⁵

² Section 9A (B) of the Copyright Act.

³ Section 9A(aA) of the Bill.

⁴ Section 9A(aB) of the Bill.

- 7.8 The NAB submits that the amendments to Section 9A are impractical and will create an unnecessary burden on both the collecting societies and the broadcasters.
- 7.9 In order to comply with the provisions of the Copyright Act, commercial and public service television and radio broadcasters have typically entered into negotiations and/or agreements with one or more collecting societies, including the Southern African Music Rights Organisation ("**SAMRO**"), the National Organisation for Reproduction Rights in Music in South Africa Limited ("**NORM**") and the Recording Industry of South Africa ("**RiSA**").
- 7.10 The usage of copyrighted material by broadcasters is largely administered in accordance with licence agreements. In most instances, NAB members have been granted licences by collecting societies which allow for the use of the copyrighted material over a set period of time. These licence agreements permit the broadcasters to use the copyrighted material included in the repertoires of the collecting societies. In order to monitor a broadcaster's usage of copyrighted works, the parties usually agree that pre-clearance of the music in the repertoire is granted to the broadcaster and thereafter, the broadcaster submits cue sheets to the collecting society to identify those copyrighted works which have been used and for which the collecting society must receive payment.
- 7.11 The proposed amendments to Section 9A are impractical as they require the *prior consent* of the copyright owner every time a work is broadcast. The amendment to Section 9A will result in substantial problems in practice because of the difficulty in procuring the participation of rights holders in what would become a multiplicity of negotiations with potential users and copyright owners. This is not in line with commercial realities and conflicts with the existing agreements in place between the broadcasters and collecting societies. The effect of the amendments may result in deterring broadcasters from using sound recordings. For these reasons, the NAB submits that the amendments to Section 9A are incompatible with the existing framework for the collection of royalties and should not form part of the Copyright Act.

⁵ Section 9A(aD) of the Bill.

7.12 It appears that the proposed amendments to section 9A have been introduced into the Bill in light of a perception that broadcasters are not making royalty payments in terms of their section 9A obligations. Indeed, at the Copyright Amendment Bill Conference it was publically stated that broadcasters have failed to deal adequately with the 2002 Amendments which introduced the need to make royalty payments for the use of copyright in sound recordings. The NAB would like to clear up any misconceptions regarding the non-payment of royalties. Broadcasters have always acknowledged their obligations in terms of the payment of section 9A royalties. We attach (as Schedule A to this submission) a chronology of events for the period 2002 to date in respect of the payment of section 9A royalties, evidencing the fact that the delays in payment are not solely attributable to broadcasters. Accordingly, the statements made publically in respect of the broadcasters are not only inappropriate, but are unfair.

8. **Communicating the sound to the public by wire or wireless means**

8.1 Royalties in Section 9A are payable by a person who intends to broadcast, transmit or play a sound recording as contemplated in section 9(c), (d) or (e). Paragraph 8 of the Bill amends section 9(e) to include the words "*wire or wireless*":

"(e) communicating the sound recording to the public [...] of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these work from a place and at a time individually chosen by them."

8.2 However, the words "*wire*" or "*wireless*" are not defined in the Bill and the reader is forced to speculate as to the circumstances in which section 9(e) will apply and when royalties in terms of Section 9A will be payable.

8.3 In addition, the NAB notes that the exclusive right to communicate a work to the public by *wire or wireless means* has not been extended to copyright owners of broadcasts, programme-carrying signals and computer programs. There is no rational reason for this exclusion and may merely be an oversight on the part of the DTI. The NAB requests that this should be corrected and new sections should be introduced providing the same exclusive right to copyright owners of broadcasts, programme-carrying signals and computer programs.

9. Performers

- 9.1 Another cause for concern to the NAB and its members is the inclusion of protections afforded to performers under section 9A, 20 and 20A-F of the Bill. It appears that these amendments have been made to "address the plight of musicians and performers by ensuring that royalties are paid on time by recording companies and broadcasters as most of them are dying as paupers"⁶.
- 9.2 In addition, the Bill attempts to bring South African law in line with the Beijing Treaty on Audio-visual Performances ("**the Beijing Treaty**"). The Beijing Treaty deals with the intellectual property rights of performers in audio-visual performances.
- 9.3 While the NAB appreciates the efforts of the DTI to address the plight of artists and to domesticate the Beijing Treaty, it submits that provisions dealing with performers should be addressed in the Performer's Protection Act and not the Copyright Act.
- 9.4 The Performers' Protection Act gives users of commercial recordings a statutory licence to broadcast, transmit in a diffusion service or communicate to the public these recordings, provided they pay the performers royalties agreed between the users and the performers or their representative collecting societies, or in the absence of such agreement determined by the Copyright Tribunal or an arbitrator.⁷
- 9.5 The owners of copyrighted material who receive payment of royalties under Section 9A of the Copyright Act are obliged to share the royalties with any performer whose performance is featured on the recording in question and on whom a right to receive a royalty is conferred by Section 5 of the Performers' Protection Act. The performer's share is to be determined in terms of an agreement between the copyright holder and the performer or their representative collecting societies. In the absence of agreements to the contrary, performers who have authorised the fixation of their

⁶ See *Statement on the Cabinet Meeting of 24 June 2015*.

⁷ Section 5(3) of the Performers Protection Act.

performances are deemed to have granted to the persons who arranged their recording the exclusive right to recover their royalties.⁸

9.6 Performers' rights under the Performers' Protection Act are not copyright, but are rather moral and economic rights which vests in the performer. Repeating some of the provisions of the Performers Protection Act dealing with performers in the Copyright Act is inappropriate and will lead to confusion and will undermine the integrity of both pieces of legislation.

9.7 Accordingly, the NAB submits that any amendments relating to performers should be removed from the Bill and dealt with in terms of the Performer's Protection Act.

10. **Collecting societies**

10.1 The NAB and its members are concerned with the attempt by the Bill to regulate collecting societies and submit that this goes beyond the scope of the Copyright Act.

10.2 A collecting society is an organisation set up by the various categories of rights owners to administer their rights collectively. In general, collecting societies are supposed to make the copyright system more effective and efficient, promote the dissemination of works and tend to enlarge the choice of works made available to the public. Collecting societies should be to the benefit of both rights owners and users and, in principle, operate for the benefit of the public. However, the reality is that there is a lack of transparency and information sharing between broadcasters and collecting societies.

10.3 The Collecting Society Regulations published pursuant to the Copyright Act under Government Gazette 28894 of 1 June 2006 ("**the Collecting Society Regulations**") were introduced to address some of the problems facing both the owners of copyrighted work and broadcasters. The Collecting Society Regulations provide, amongst other things, for:

⁸ Section 5(4)(a) of the Performer's Protection Act.

- 10.3.1 the accreditation of collecting societies to administer the collection and payment of needletime royalties in terms of Section 9A of the Copyright Act; and
- 10.3.2 the conclusion of framework agreements between collecting societies, trade associations and representative bodies of potential users of sound recordings, including negotiating a tariff in respect of the needletime royalties payable.
- 10.4 At all times during their relationships with collecting societies, members of the NAB have recognised the relevant legislation and have ensured that they comply with such legislation. It is of grave concern to the NAB that despite the introduction of the Collecting Society Regulations, collecting societies in South Africa still do not disclose relevant information which the broadcasters should legitimately have access to, including *inter alia*:
 - 10.4.1 confirmation of the rights in copyrighted works that are claimed to comprise the collecting society's repertoire;
 - 10.4.2 the methods used in the valuation of the royalties in respect of the use of copyrighted works;
 - 10.4.3 the amount of royalty payments received by the collecting societies from the various users of the copyrighted works;
 - 10.4.4 the amounts retained by the collection society to off-set administration expenses and the expenses which comprise the administration expenses;
 - 10.4.5 the distribution plan adopted by the collecting society; and
 - 10.4.6 the distributions actually made to members.
- 10.5 These concerns have been exacerbated by advancements in technology resulting in numerous distribution mechanisms and the inability on the part of copyright holders to combat the effect of piracy. The failure on the part of collecting societies to take account of, and align their practices with technological developments which have taken place in the broadcasting industry is a further factor contributing to the ineffectiveness of collecting societies. As a result, broadcasters have become a primary source of

revenue for collecting societies. Notwithstanding the already significant contribution which is made by broadcasters in respect of music royalties, the tendency is to ever increasingly look to broadcasters for further contributions in a landscape that is evidencing diminishing returns.

10.6 With the exception of the collecting societies that administer mechanical reproduction royalties, currently each collecting society exclusively administers collection of royalties for a particular category of copyright holders. In this way a collecting society enjoys a monopoly with regards to the access to the repertoire it administers. The monopoly is entrenched by virtue of the fact that some collecting societies typically require their members to assign their rights (in perpetuity with no revision mechanism) to claim royalties for the use of their works to the collecting society. This practice has the effect that collecting societies have become the single source through which broadcasters and other users of copyrighted works are able to obtain access to these works.

10.7 This monopoly means that:

10.7.1 collecting societies are in a position to dictate the terms of royalty tariffs; and

10.7.2 collecting societies are not required to engage with broadcasters (television, or otherwise) regarding the royalty that is imposed on users.

10.8 The Bill attempts to regulate Collecting Societies by including a number of provisions dealing with their registration, administration, control, and obligations. Whereas previously collecting societies were regulated in terms of the Collecting Society Regulations, the Bill attempts to regulate these societies in terms of the Copyright Act. The NAB submits that this is misplaced.

10.9 The Bill provides that there shall be *one* collecting society per copyright and per set of rights with regard to all music rights such as performance,

needletime and mechanical, to be registered and regulated by the Commission⁹;

- 10.10 The Bill's provision that there can be only one society per copyright will result in a further entrenchment of the monopoly powers currently enjoyed by collecting societies. This will result in further cementing a collecting society's position to dictate the terms of royalty tariffs and will undermine their accountability in relation to broadcasters.
- 10.11 Section 9B(2) of the Bill provides that, "*in cases where there is no collecting society, contractual arrangements between copyright owners and creator shall be allowed as prescribed by the Minister.*"
- 10.12 At the outset it is noted that the Bill introduces the concept of "*creator*", however it fails to define this term resulting in confusion as to who would be considered a "*creator*" in terms of the Copyright Act. The Copyright Act uses the terms "*author*" and "*owner*" to differentiate between those who create a work, and those who own it. The inclusion of a "*creator*" in the Copyright Act without a definition will create significant commercial difficulties for broadcasters who are unable to determine who to negotiate with in the absence of a collecting society.
- 10.13 Section 9B(2) also prescribes minimum contractual standards which will be applicable between copyright holders and users of copyrighted material. This contravenes the principles of freedom of contract as it does not allow for authors and copyright owners to contract freely with each other.
- 10.14 The NAB submits that the attempt to regulate collecting societies in the Bill goes beyond the scope of the Copyright Act. The inclusion of provisions dealing with collecting societies in the Bill is misplaced and will not address the needs of broadcasters and those of collecting societies. Rather these provisions should be removed from the draft Bill entirely and the issues pertaining to collecting societies should be addressed through different legislation.

⁹ Section 9B(1) of the Bill.

11. Restrictions on assignment

11.1 Paragraph 26 of the Bill introduces two major restrictions on the assignment (transfer of ownership) of copyright. In particular, paragraph 26 states that:

11.1.1 copyright owned by the State will not be transferable (paragraph 26(a) of the Bill); and

11.1.2 assignments of copyright will only be valid for 25 years (paragraph 26(b) of the Bill), which implies that the ownership of a copyrighted work will revert to the first owner after 25 years.

11.2 If enacted, these limitations will have significant commercial and practical implications for both the State and the Industry. In particular, both the State and other copyright owners will be limited in their ability to monetise their respective copyrights and will largely be restricted to exploring models and arrangements centred on licensing.

11.3 It is common cause that copyright ownership brings several benefits, including (i) largely unrestricted freedom of use, (ii) an ability to control third party exploitation, and (iii) revenue generation opportunities.

11.4 Insofar as the State is concerned, it is the NAB's respectful submission that there is no logical reason why the State should be prevented from exploring and selecting a commercial opportunity that, in its opinion, generates the most revenue for it. As it stands, the State would be prevented from exploring an opportunity, no matter how lucrative, that would involve the transfer of its copyright. This position not only limits the third parties exploring commercial opportunities with the State but also the State itself. The proposed limitation may also deter third parties, who may not be willing to accept licensing models, from exploring commercial opportunities involving copyright with the State.

11.5 Depending on the facts, licensing models may not be advantageous for the State and may involve protracted expenses and administration in order to manage, protect and enforce the copyright. In some cases, an assignment of copyright would make more business sense, insofar as it would enable the realisation of the copyright value in one transaction and reduce the

human and financial resources that would otherwise be required for copyright management and licensing on an ongoing basis. This underscores the importance of flexibility in the context of copyright ownership and use. The fundamental principle is that the relevant parties to a transaction (including the State) should have the opportunity to decide on the commercial arrangements which suit them best.

11.6 The NAB envisages situations where Members, as a consequence of the limitation, are (i) forced not to contract with the State, and/or (ii) unwilling to accept sub-optimal licensing arrangements. This will have a negative impact on the Industry and the economy as a whole.

11.7 For similar reasons, the NAB is of the opinion that the time limitation on copyright assignment validity is deeply problematic. The inclusion of this provision will affect the ability of authors and creators of copyrighted works to freely deal with their works in a commercial context. This 'free dealing' right is a fundamental principle of copyright law and incentivises the creation of copyrighted works, viewed to be valuable cultural goods necessary for economic and social growth (which includes the material created by Members and the Industry at large). On a practical level, this time limit is also likely to reduce the financial consideration that the authors and creators would otherwise have received if the assignment had been effective on a perpetual basis. This will have a negative impact on businesses of all sizes and, in particular, the sustainability of smaller businesses and individuals who (i) already have less bargaining power, and (ii) often work intensively to convince customers and investors of the value of their copyrighted works. Although the NAB understands the need to mitigate the potential risk of exploitation of authors or first owners (who, for instance, may not understand the true commercial value of their works), the NAB maintains that this risk could be mitigated through mechanisms that (i) will have less of an adverse economic impact, and (ii) are less intrusive on the underlying aims of the Act as well as the rights of copyright owners that are currently entrenched in the Act.

12. **Copyright and the State**

12.1 **State funded copyright**

- 12.1.1 The Act currently provides that the State will own the copyright in all works made by (or under the direction or control of) the State (section 5(2) of the Act). This position has been expanded under the Bill to include works that have been funded by the State (paragraph 3 of the Bill).
- 12.1.2 The NAB notes that the Bill does not specify any guidelines or thresholds regarding the value of State funding required for the vesting of the copyright in the State. It is not clear whether this provision will be limited in its application to works that are wholly funded by the State or whether the provision will also apply to works that are only *partially* funded by the State. The intention of the legislature must be clarified in this regard.
- 12.1.3 It is also noted that the concept of 'funding' is not defined and is left open to interpretation. As a consequence, the term could arguably be construed not only to include funding in the form of financial contributions, but also non-pecuniary forms of funding, such as the use of State-owned resources or facilities.
- 12.1.4 In the view of the NAB, section 5(2) of the Act should not be amended to include State-funded works. The likely impact of section 5(2) is that many persons, including those in core sectors of our economy, which currently interact with the State and accept direct or indirect State funding will be discouraged from doing so in future due to the fact that doing so may place in jeopardy their rights of ownership in and to any copyrighted works created by them with the direct or indirect assistance of the State. It is common cause that copyright ownership and the economic and social benefits arising therefrom (i) incentivise the creation of copyright works and (ii) underpin the operations, business models and balance sheets of various significant industries and sectors, including the Industry. Without ownership of these copyrighted works, there is a high probability that these businesses will be stifled, which will, of course, have a corresponding effect on employment opportunities and job creation.
- 12.1.5 Furthermore, it is the NAB's submission that the issue of copyright ownership should be open to negotiation between the State and the

other contracting party/ies. If this provision is retained, then the parties must be allowed to agree to a different position in their contract (i.e. such that one or more other parties may own the copyright instead of the State). The Bill will need to be tailored in the latter instance, as it currently does not permit assignment of copyright by the State, which is likely to be required in order to give effect to the intention of the parties (i.e. that the State does not own the copyright).

12.2 Orphan Works

12.2.1 The Bill defines 'orphan works' to mean works in which "*copyright still subsists, but the right holder, both the creator of the work or the successor-in-title cannot be located*" (paragraph 1(c)).

12.2.2 Paragraph 25 of the Bill provides that ownership of any copyright whose owner cannot be located, is unknown or is *deceased*, will vest in the State. The NAB has assumed that this provision was intended to refer to orphan works, but we note that its reach extends further than orphan works (as defined under the Bill) by including works in respect of which the owner is deceased. The implication is that on the death of the owner, copyright ownership will not pass to the heirs, executors or deceased estate of the owner of copyright, but rather to the State.

12.2.3 Paragraph 2(c) of the Bill also purports to refer to orphan works. It provides that "*in the case of copyright that vests in the state due to the fact that the owner cannot be located, is unknown or is dead, the term of such copyright shall be perpetual.*"

12.2.4 Paragraph 27 of the Bill sets out a detailed procedure for the licensing of orphan works. Specifically, paragraph 27 provides that:

12.2.4.1 A person who wishes to obtain a licence must make an application to the Companies and Intellectual Property Commission (the "**Commission**") and must publish his/her/its intention to make such an application in the Government Gazette and two daily newspapers;

- 12.2.4.2 The Commission may, after holding any inquiry as may be prescribed, grant a licence to the applicant to do such act which is subject to copyright, subject to the payment of a royalty and such other terms and conditions as the Commission may determine; and
- 12.2.4.3 The Commission will only grant the applicant such licence if it is satisfied that the applicant has taken reasonable and appropriate steps to locate the copyright owner.
- 12.2.5 The consequences of these provisions include the following:
- 12.2.5.1 the State will eventually (i.e. upon the death of a copyright owner) own the copyright in all or most works; and
- 12.2.5.2 once those rights are acquired, the State will:
- 12.2.5.2.1 hold those rights perpetually;
- 12.2.5.2.2 have a monopoly on the royalties (which it will receive to the exclusion of the heirs and beneficiaries of the owner) as well as other terms and conditions associated with the licensing and use of the relevant works; and
- 12.2.5.2.3 pursuant to the amendment in paragraph 26, not be able to assign of the copyright in those works to any person.
- 12.2.6 The NAB has grave concerns regarding these proposed provisions.
- 12.2.7 It is in the public interest for copyright owners and their chosen beneficiaries to receive the full benefit of the copyrighted works for as long as those works are eligible for copyright protection. The NAB is of the respectful opinion that there is little justification for the State acquiring these rights on the death of the copyright owner and receiving the benefits to the exclusion of the heirs and beneficiaries of the owner.
- 12.2.8 Furthermore, it is arguably incongruent for the State to hold copyright perpetually and thereby effectively extend the term of protection for so-called orphan works (especially works where the author is known

but deceased) beyond those already contemplated in the Act. This contradicts one of the core principles of copyright laws, which calls for a balancing act between copyright protection and public access to copyright works, with the result that all works must ultimately fall into the public domain (such that no licence from any person will be required for the lawful use thereof). If a perpetual monopoly was permitted, it would limit access and use of valuable works and, as a consequence, suppress the development of further copyrighted works that may otherwise have been inspired or derived from the former works.

- 12.2.9 Finally, the NAB respectfully calls into question the human resource and administrative capacity of the State to manage all such copyrighted works effectively. This would undoubtedly be an enormous burden on any entity and would require a substantial investment, particularly as regards the technology and the legal, technical and commercial expertise required for operational efficiency and sound decision making in this area. The NAB is troubled by the possibility that, as a result, the use and access by its Members of such works would be severely curtailed - on both a legal and practical level.

13. Artists' resale royalty rights

- 13.1 In paragraph 6 of the Bill, a resale royalty right is introduced in respect of 'original works of art'. The Bill makes reference to 'artistic works' (a term already defined in the Act) later in that same paragraph. It is therefore assumed that the intention, in referencing 'artistic works', was to widen the reach of the provisions in paragraph 6 to include the wider defined meaning of artistic works, although this should be clarified in the next draft of the Bill.
- 13.2 In terms of the new section 7A, as proposed by paragraph 6 of the Bill, artists will enjoy a right to a 5% royalty on all commercial sales of their artistic works following the first sale/transfer of such works. Paragraph 6 states further that the artists' resale rights cannot be waived or transferred (except on death) and generally apply for the life of the artist and for a period 50 years from his/her death.

- 13.3 An 'Artistic work' is defined in the Act to mean "*irrespective of the artistic quality thereof... (a) paintings, sculptures, drawings, engravings and photographs; (b) works of architecture, being either buildings or models of buildings; or (c) works of craftsmanship not falling within either paragraph (a) or (b)*".
- 13.4 Based on media reports,¹⁰ the NAB understands that the intention behind this provision is to protect members of creative industries who are perceived to have limited bargaining power and who may prematurely assign their works, thereby reducing their ability to generate a sustainable income. The NAB respectfully requests clarity on whether the intention is for the resale rights to apply only to artistic works or for these rights to also extend to other types of "creative" works, such as musical works, sound recordings and cinematograph films. If it is intended to apply more widely to other types of works, then consideration should be given as to whether the resale royalty provisions are practical and make commercial sense in respect of the new category (bearing in mind, for example, whether there will be a substantial disparity between the initial sales price and the price for which it is sold later.
- 13.5 It is noted that the Bill contemplates a category of works referred to as 'craft works' (which includes works of pottery, glasswork, tapestry folk art and handmade toys). It is unclear whether these craft works are intended to be equivalent to 'works of craftsmanship' (as contained in paragraph (c) of the existing definition of artworks in the Act) or if this is intended to be a new, stand-alone category with a different meaning to works of craftsmanship. The NAB is of the view that this requires clarification, particularly in light of the proposed resale royalty right provisions which could arguably then extend to craft works.
- 13.6 The NAB questions whether the economic reality in South Africa is conducive to the benefits intended by the resale royalty rights. It is conceivable that potential purchasers would generally take possible future royalties into account when negotiating purchase prices and, on average, therefore pay less for the artworks. This will have a negative impact on

¹⁰ <http://allafrica.com/stories/201508220107.html>

artists who do not have a large resale market and whose works do not increase in value (and may, in fact, decrease in value). Similarly, the NAB envisages situations where potential purchasers (particularly those concerned with purchasing art for investment purposes) would be less inclined to purchase the artworks of less experienced or well-known artists since their margins or rates of return on investment may be heavily reduced by the resale royalties.

- 13.7 The resale royalty rights may only be invoked by an artist who is a South African citizen or resident at the time when the contract for resale of the artistic work is completed. In addition, the resale or any part of the transaction must have taken place within South Africa. It is respectfully submitted that this provision constitutes a breach of South Africa's international law obligations, particularly under the Berne Convention for the Protection of Literary and Artistic Works of 1886 ("**Berne Convention**") and, as a consequence, is arguably unconstitutional. One of the fundamental principles of the Berne Convention is that of 'national treatment', which provides that all member countries (including South Africa) must give residents and citizens of other member countries the same rights under the copyright laws that they give to their own residents and citizens. Accordingly, it would arguably be unlawful for the proposed resale royalty rights to apply only to South African citizens and residents and not those of Berne Convention member countries as well.

14. **Unenforceable contractual provisions**

- 14.1 The Bill provides that:

*"to the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term will be unenforceable"*¹¹.

- 14.2 The NAB is concerned that the inclusion of the above clause in the Copyright Act will have serious consequences for commercial dealings between broadcasters and copyright owners.

¹¹ Section 39A of the Bill.

14.3 It may have a number of unintended consequences. It is possible that any contract that has provisions which are found not to be in line with the Copyright Act may be declared null and void. This may further extend to everyday commercial contracts and even website terms and conditions.

14.4 The NAB submits that these consequences could never have been envisioned by the drafters of the Bill and it should be deleted from the draft Bill.

15. Tribunal Licences

15.1 The Schedules to the Bill contemplate translation and reproduction licences that can be obtained through the Copyright Tribunal (the "**Tribunal**").

15.2 Translation licences

15.2.1 Schedule A states that a person may apply to the Tribunal for a non-exclusive, transferable licence to translate any copyrighted works, which have been published in printed or analogous forms of reproduction into one of the official languages. The licences granted may only be for the purposes of teaching, training, scholarship and research in exchange for '*just compensation*' (effectively linked to what is reasonable and normally charged) for publication within South Africa.

15.2.2 The Tribunal must make a number of determinations before granting the licence, including whether the applicant for the translation licence has established that he/she has made requests to the copyright owner but has been denied authorisation, or after due diligence on his/her part, was unable to find such owner; provided that no licence will be granted unless the copyright owner is known or located, and has been given an opportunity to be heard. The NAB has concerns about the fact copyright owners are given a mere opportunity to be heard. One of the core principles of the Act is that copyright owners should be entitled to deny access to their copyrighted works for whatever reason, regardless of whether or not they have acted reasonably in the grant or refusal of such access. Furthermore, if this is intended to be an exception to the exclusive rights granted to

copyright owners, then the exception should be aligned with the existing exceptions in the Copyright Act.

15.2.3 It is also envisaged that the Tribunal will be able to grant licences to the domestic broadcasting organisations, provided that a number of conditions are met, including that:

15.2.3.1 the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialised technical or scientific research to experts in a particular profession;

15.2.3.2 sound or visual recordings of the translation may not be used by broadcasting organisations except those having their headquarters in South Africa; and

15.2.3.3 the use of the translation is not for commercial purposes.

15.2.4 The above conditions are problematic in a number of respects. As mentioned above, the permissible uses of the translations should be aligned with the exceptions already contained in the Copyright Act. Furthermore, the extension of the right to broadcasters headquartered in South Africa is arguably unlawful in light of the national treatment principle under the Berne Convention. Finally, the meaning of 'commercial purposes' should be defined more clearly. A number of broadcasters operate for commercial gain and therefore the translation of a particular broadcast may be construed as being for 'commercial purposes.' It is arguable that it is in the interests of all broadcasters to maximise their audience numbers, which requires the content and language of those broadcasts to be appropriate to such audiences. Accordingly, it is arguable that any proposed translations (regardless of whether the broadcast relates to teaching or research) would be in furtherance of the relevant broadcaster's business and therefore for commercial purposes. It is the respectful view of the NAB that this condition cannot operate to the exclusion of all broadcasters who operate for commercial gain.

15.2.5 The Tribunal may also grant a domestic broadcasting organisation a licence, subject to the conditions listed in 15.2.1 above, to translate

any text incorporated in an audio-visual fixation that was prepared and published for the sole purpose of being used in connection with '*systematic instructional activities*'. 'Systematic instructional activities' is not defined in the Bill and the NAB submits that this should be remedied.

15.3 **Reproduction Licences**

15.3.1 A person may apply for a non-exclusive, transferable licence, in exchange for '*just compensation*', to reproduce or publish a work in printed or analogous forms of production or audio-visual forms for use in connection with '*systematic instructional activities*'. As previously mentioned, '*systematic instructional activities*' must be defined.

15.3.2 The licence granted may only allow for publication within South Africa and generally may not extend to the export of copies made under the licence unless certain requirements are met. Before the Tribunal grants a reproduction licence, it is required to confirm (among other things) that the applicant for the licence has established that he/she has made requests to the copyright owner but has been denied authorisation, or after due diligence on his/her part, was unable to find such owner; provided that no licence will be granted unless the copyright owner is known or located, and has been given an opportunity to be heard. As noted above, the NAB is concerned about the possibility that licences may be granted against the wishes of copyright owners. This concern is compounded in the case of reproduction licences, particularly where the affected copyrighted works could constitute or contain valuable confidential information or trade secrets or are intended to be commercialised by the copyright owner. The NAB strongly recommends that these proposed limitations on the rights of copyright owners be aligned more closely with the related exceptions contemplated in the Act.

16. **New Criminal Offences**

16.1 The Bill proposes a number of new criminal offences that could result in 10 years' imprisonment and/or a fine not exceeding ZAR50,000 where the relevant person is convicted. These include:

- 16.1.1 omitting to a royalty as and when the copyrighted work is used;
- 16.1.2 unreasonably refusing to grant permission for use of a copyrighted work for educational purposes, judicial proceedings, translations into 'usable languages' or in the context of 'format shifting';
- 16.1.3 collecting fees outside of a collecting society; and
- 16.1.4 a failure by a broadcaster to promote local content.
- 16.2 The NAB notes that the DTI intends to impose a fine for failure by a broadcasting service licensee to promote local content. The NAB submits that the DTI does not have the power to impose a fine for non-compliance with local content regulations. As discussed above, ICASA is the only independent body empowered to regulate broadcasting in terms of the ICASA Act. Accordingly, only ICASA has the power to impose a fine for non-compliance with its own local content regulations. In light of this, the offence in clause 16.1.4 should be deleted in its entirety from the Bill.
- 16.3 In addition, the NAB submits that parties should be entitled to determine when royalties should be payable - such payments should not hinge on whether the copyright is, in fact, used. Moreover, greater guidance should be provided as to the meaning of an 'unreasonable' refusal to grant permissions in the proposed contexts, as this would otherwise create uncertainty and arguably unreasonable limitations on commercial dealings between parties. Finally, it is submitted that the proposed penalties are not proportional to so-called offences and would ultimately have the harmful economic effect of discouraging the conduct of business with copyrighted works. Accordingly, the NAB respectfully proposes that the new criminal offences be revisited and considered more closely, especially in light of their severity and the impact that they are likely to have on commercial dealings as well as the broader economy.
- 16.4 The Bill also introduces "*offences by companies*" in Section 27A where directors of companies, or those in charge of or responsible for the conduct of the business, may be held liable for offences committed under the Copyright Act. The NAB is concerned that section 27A(2) has a reverse onus provision and may be an infringement of the presumption of

innocence. Accordingly, this section may be unconstitutional and should be deleted from the Bill.

17. Conclusion

- 17.1 The NAB appreciates the opportunity to participate in this important public process.
- 17.2 Given the critical concerns as spelt out above, the NAB humbly submits that the DTI withdraws the Bill and re-publishes a new version once it has considered all submissions and input from experts in the field of copyright law.
- 17.3 The NAB would also propose that in taking this process forward, the DTI engages with all affected government entities and stakeholders toward possibly establishing an inter-departmental task team to avoid duplication of effort and overlapping of mandates.
- 17.4 It is also proposed that any regulatory impact assessment is conducted in a manner that is robust and that aims to engage all affected stakeholders.
- 17.5 The NAB is available to participate in any meetings and/or public hearings that the DTI may call on this process.

Schedule A - Chronology of events

DATE	EVENT
25 June 2002	Amendments to the Copyright Act, 98 of 1978 and the Performers' Protection Act, 11 of 1967 come into force.
1 June 2006	The Minister of Trade and Industry publishes the Collecting Society Regulations
31 May 2007	SAMPRA writes to members of the NAB informing each of them that they have been broadcasting sound recordings under non-exclusive licenses and that needletime royalties are payable. At this date SAMPRA was not an accredited collecting society.
20 July 2007	SAMPRA is accredited as a collecting society in terms of the Collecting Society Regulations.
October 2008	The NAB launches proceedings in High Court to clarify whether the Copyright Tribunal has jurisdiction to determine certain issues raised by SAMPRA.
12 December 2008	SAMPRA lodges a referral with the Copyright Tribunal in terms of section 9A (1) (c) of the Copyright Act, 98 of 1978.
19 January 2009	The NAB writes to SAMPRA requesting opportunity to meet to discuss how best to achieve a composite resolution of all matters in dispute and to avoid incurring legal costs and further inordinate delays. SAMPRA does not respond to this letter.
23 January 2009	The referral is advertised in the Government Gazette number 31798 (69 of 2009).
10 April 2009	The NAB applies to be a party to the Copyright Tribunal proceedings.
21 November 2011	The matter is heard before the Copyright Tribunal.

30 May 2012	The Copyright Tribunal hands down judgment (per Sapire J).
5 October 2012	NAB applies for leave to appeal against the judgment of the Copyright Tribunal. Application for leave to appeal is opposed by SAMPRA and the application is refused by the Copyright Tribunal.
29 October 2012	The NAB applies for leave to appeal to the Supreme Court of Appeal (" SCA "). The application is opposed by SAMPRA.
23 January 2013	The SCA grants application for leave to appeal.
17 February 2014	The appeal is heard by the SCA.
14 March 2014	Judgment is handed down by the SCA.
9 April 2014	SAMPRA applies for leave to appeal to the Constitutional Court against the SCA judgment. The application is opposed by the NAB.
4 August 2014	The Constitutional Court dismisses SAMPRA's application for leave to appeal.