



**NAB Written Submission to the DTI on the Draft National Policy on
Intellectual Property**

4 October 2013

1. INTRODUCTION

1.1 The National Association of Broadcasters ("the NAB") is the leading representative of South Africa's broadcasting industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB members include:

1.1.1 Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa ("the SABC");

1.1.2 All the commercial television and sound broadcasting licensees;

1.1.3 Both the major licensed signal distributors (electronic communications network service operators), namely Sentech and Orbicom;

1.1.4 Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network ("TBN").

1.2 Intellectual property is critical to the broadcasting industry. Not only are broadcasters the creators and owners of IP rights, they are extensive users of IP rights owned by third parties. Accordingly, the members of the NAB have a significant interest in any policy developments related to IP.

1.3 On 4 September 2013, the Department of trade and Industry (the DTI) published in government gazette number 36816, an invitation to the public to comment on the Draft National Policy on Intellectual Property 2013 (the draft Policy). Interested persons were given 30 days from the date of publication of the notice to comment. The NAB welcomes the opportunity to submit its written representations to the DTI. If the DTI elects to hold hearings on the draft Policy, we would like to be given an opportunity to participate in oral hearings.

2. PROCEDURAL CONCERNS

2.1 The NAB has actively participated in numerous Policy and Regulatory processes. To this end, the NAB has made submissions on behalf of its members on parliamentary

bills, proposed amendments to legislation, draft policies and discussion papers emanating from various government departments and regulatory bodies.

2.2 While the NAB supports the DTI's initiative of drafting an IP Policy, we are concerned about the process which culminated in the draft Policy. In particular it appears that there has been:

2.2.1 **No public consultation** - the broadcasting sector is not aware of any public consultation process undertaken by the DTI prior to the publication of the draft Policy;

2.2.2 **No inter-departmental consultation** – errors in the draft policy suggest that no consultation has been had with other government departments;

2.2.3 **No subject matter expert consultation** - once again, errors and misstatements contained in the draft Policy suggest that subject matter experts were not consulted prior to the publication of the policy. Since IP is a specialised field of law, coordinated internationally through international Conventions and Treaties and legislated nationally, input from subject experts on the various aspects of IP is critical.

2.3 We urge the DTI to remedy this lack of consultation. This cannot be done in a single round of written submissions and the DTI should give serious consideration to withdrawing the current draft Policy and commencing the process afresh.

SPECIFIC CONCERNS FOR BROADCASTERS IN THE DRAFT POLICY

3. Draft WIPO Treaty for the Protection of Broadcasting Organisations

3.1 The draft Policy states at page 15 that:

“...broadcasters want to own the content of their broadcasts. This means that if the SABC broadcasts a song as Mbube to the Russian counterpart, the SABC would like to be the copyright owner of Mbube. There is an outcry against this proposal at an international level (WIPO), where formulation of a treaty is taking place. South Africa is not supporting the proposals by the broadcasters.”

- 3.2 It is clear from this statement that the DTI did not consult the Department of Communications (DoC) before preparing this draft Policy. The DoC, together with broadcasters, supports the Treaty and has been actively involved in its drafting. In particular, South Africa and Mexico have made a joint proposal to WIPO in this regard.
- 3.3 The recommendation in the draft Policy that “South Africa should not support the development of a treaty that seeks to give ownership of contents of broadcasters/webcasts to broadcasters”¹ is misguided and does not accurately capture the provisions of the Treaty:
- 3.3.1 The Treaty seeks to grant protection to broadcasting organisations against piracy of their broadcast signals. Contrary to the view held by the DTI, the protection does not apply to works or other protected subject matter carried by such signals i.e. broadcast content.
- 3.3.2 The draft treaty distinguishes broadcast signal from broadcast content, and defines signal as “the electronically generated carrier of information, and data and /or other content, consisting of sounds or images or representations thereof, whether encrypted or not”.
- 3.3.3 It is clear from the definition of signal that the intent of the treaty is not to grant ownership of content of broadcasts to broadcasters, as stated in the draft Policy.
- 3.4 In fact, it would be detrimental for South Africa, if it did not support the Treaty, as it would lose the international protection it and other African countries seek.

¹ Page 17 of the Draft Policy

4. Minimum contractual terms

- 4.1 The draft Policy contains some far reaching proposals on contractual matters. By way of example, the draft Policy proposes that that the Minister should prescribe conditions for contracts between recording companies, promoters, producers and artists, that contracts "should contain the bare minimum conditions as prescribed by the Minister" and that if contracts contain conditions which are too stringent and unfair against the artist, then such contracts must be void/
- 4.2 The draft Policy is effectively proposing that the Minister should dictate to private parties how they should conduct their commercial affairs in relation to intellectual property rights. This interference in commercial property rights is not explained or justified in any way.
- 4.3 Not only does the Minister not have the power to prescribe contract terms, it is highly unlikely that any attempt to give the Minister such powers would pass Constitutional muster. Such interference in commercial property rights is also extremely undesirable and unworkable in practice.

5. Collective Administration

- 5.1 Broadcasters rely extensively on sound recordings and musical works. For this reason, the members of the NAB have blanket licences with various music collecting societies. Not all collecting societies are regulated. There is also inadequate compliance with and enforcement of the Collecting Society Regulations, 2006. This poses huge challenges for broadcasters as in their interaction with some collecting societies, broadcasters are led to operate in an environment where there is little or no monitoring of the activities of these collecting societies.
- 5.2 In general, the absence of regulations for all collecting societies and the compliance and enforcement difficulties experienced, together with the lack of an adequate legal framework against which collecting societies can conduct their activities, has led to a lack of transparency and information sharing between broadcasters and the collecting societies.

- 5.3 Over and above the need for greater transparency from music collecting societies, the NAB has a number of concerns about the proposals in the draft Policy related to collective administration:
- 5.3.1 It appears from the proposals on page 17 that the draft Policy is suggesting that collective administration would be appropriate for every kind of copyright, although no justification is given for this statement. Collective administration is and should remain specific to music rights.
- 5.3.2 The draft Policy is also suggesting, ostensibly in reliance on the recommendations of the Copyright Review Commission, that collecting societies must be administered by Government. However, the suggestion does not accurately reflect Copyright Review Commission's recommendations.
- 5.3.3 The NAB does not endorse these proposals in the draft Policy.

6. **CONCLUSION**

- 6.1 The NAB supports the introduction of a National IP Policy. However, IP protection is so critical in a knowledge economy that it would not be advisable to proceed with a Policy which is inaccurate and potentially damaging to the IP regime.
- 6.2 Given the procedural concerns raised in this submission, the NAB is of the view that proper consultation must be conducted and that this process be started afresh.
- 6.3 We trust our submission is of assistance to the DTI.