



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

7 July 2017

1. Introduction

- 1.1 On 16 September 2015, the National Association of Broadcasters (the "**NAB**") made written submissions in response to the invitation to comment on the Copyright Amendment Bill of 2015. The purpose of the Bill is to amend the Copyright Act 98 of 1978 (the "**Act**").
- 1.2 On 16 May 2017, the Minister of Trade and Industry (the "**Minister**") under Government Notice 799 of 201 published an amended version of the Bill, being, the Copyright Amendment Bill of 2017 (the "**Bill**"). This was accompanied by an invitation to forward written submissions to the Portfolio Committee on Trade and Industry.
- 1.3 As has been previously stated, the NAB is generally supportive of the broader aims and principles contemplated in the Bill. The NAB does however have 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 these written submissions is to present the NAB's comments and concerns in respect of the Bill, which concerns are limited to matters which affect the interests of the NAB's members ("**Members**") and the interests of the Industry as a whole.

2. Minister's powers

- 2.1 The NAB is concerned that the Bill grants the Minister wide powers. These powers are far-reaching and include, *inter alia*:
 - 2.1.1 to prescribe compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;
 - 2.1.2 to prescribe royalty rates or tariffs for various forms of use; and
 - 2.1.3 to prescribe the local music content for television and radio broadcasting.
- 2.2 Providing the Minister with such extensive powers without guidance as to how these powers should be exercised is, in the NAB's view, unconstitutional and should be removed from the Bill.

3. Section 9A royalties

3.1 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 broadcasters 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.

3.2 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.

3.3 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.

3.4 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."

- 3.5 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.¹
- 3.6 The Bill amends 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*:
- 3.6.1 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;²
- 3.6.2 Wait for a response from the copyright owner or collecting society after sending the notice and the proposed terms of payment;³ and
- 3.6.3 Apply to the Tribunal to settle the terms of payment in the event the proposal is rejected after negotiations⁴.
- 3.7 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.
- 3.8 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 (as are appropriate to its activities), including the Southern African Music Rights Organisation ("**SAMRO**"), the South African Music Performance Rights Association NPC ("**SAMPRA**") and the Recording Industry of South Africa ("**RiSA**").

¹ Section 9A(B) of the Copyright Act.

² Section 9A(aA) of the Bill.

³ Section 9A(aC) of the Bill.

⁴ Section 9A(aD) of the Bill.

- 3.9 The usage of copyrighted material by broadcasters is largely administered in accordance with licence agreements. In most instances, 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.
- 3.10 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 and this will have adverse commercial consequences for the copyright holders. 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.
- 3.11 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.

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

4.1 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 by wire or wireless means, including by means of internet access and the making of the sound recording available to the public in such a way that any member of the public may access the sound recording from a place chosen by that person whether interactively or non-interactively".

4.2 The words "*wire*" or "*wireless*" are however 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.

4.3 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 Department of Trade and Industry ("**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.

5. **Performers**

5.1 Another cause for concern to the NAB is the inclusion of protections afforded to performers under section 9A and 22B 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"⁵.

5.2 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.

5.3 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.

5.4 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 arbitrator⁶.

5.5 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 performances are deemed to have granted to the persons who arranged their recording the exclusive right to recover their royalties⁷.

5.6 Performers' rights under the Performers' Protection Act are not copyright, but rather moral and economic rights which vests in the performer. Repeating some of the provisions of the Performers Protection Act dealing

⁵ See *Statement on the Cabinet Meeting of 24 June 2015*.

⁶ Section 5(3) of the Performers Protection Act.

⁷ Section 5(4)(a) of the Performer's Protection Act.

with performers in the Copyright Act is inappropriate and will lead to confusion and will undermine the integrity of both pieces of legislation.

5.7 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.

6. **Collecting societies**

6.1 The NAB is concerned with the attempt by the Bill to regulate collecting societies and submits that this goes beyond the scope of the Copyright Act.

6.2 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.

6.3 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:

6.3.1 the accreditation of collecting societies to administer the collection and payment of needletime royalties in terms of Section 9A of the Copyright Act; and

6.3.2 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.

6.4 At all times during their relationships with collecting societies, the Members 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*:

- 6.4.1 confirmation of the rights in copyrighted works that are claimed to comprise the collecting society's repertoire;
- 6.4.2 the methods used in the valuation of the royalties in respect of the use of copyrighted works;
- 6.4.3 the amount of royalty payments received by the collecting societies from the various users of the copyrighted works;
- 6.4.4 the amounts retained by the collection society to off-set administration expenses and the expenses which comprise the administration expenses;
- 6.4.5 the distribution plan adopted by the collecting society; and
- 6.4.6 the distributions actually made to members.

6.5 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.

6.6 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.

- 6.7 This monopoly means that:
- 6.7.1 collecting societies are in a position to dictate the terms of royalty tariffs; and
 - 6.7.2 collecting societies are not required to engage with broadcasters (television, or otherwise) regarding the royalty that is imposed on users.
- 6.8 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.
- 6.9 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 Commission⁸.
- 6.10 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. This exacerbates the relations between the broadcasters and the collecting societies and does not enhance the effectiveness and efficiency of the royalty payment system. Rather it has the potential to create unnecessary bottlenecks in the system.

⁸ Section 22B(6) of the Bill.

- 6.11 Section 22B(7) 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.*"
- 6.12 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.
- 6.13 Both sections 22B(7) and 39 of the Bill prescribe 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.
- 6.14 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.

7. Restrictions on assignment

- 7.1 Section 22 of the Bill introduces two major restrictions on the assignment (transfer of ownership) of copyright. In particular, paragraph 21 states that:
- 7.1.1 copyright owned by the State will not be transferable (section 22(a) of the Bill); and
- 7.1.2 assignments of copyright will only be valid for 25 years (section 22(b) of the Bill), which implies that the ownership of a copyrighted work will revert to the first owner after 25 years.

- 7.2 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.
- 7.3 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.
- 7.4 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.
- 7.5 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.
- 7.6 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.

7.7 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.

8. Copyright and the State

8.1 State funded copyright

8.1.1 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).

8.1.2 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.

- 8.1.3 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.
- 8.1.4 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.
- 8.1.5 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 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).

8.2 Orphan Works

8.2.1 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(f)).

8.2.2 Paragraph 22 of the Bill sets out a detailed procedure for the licensing of orphan works. Specifically, paragraph 22 provides that:

8.2.2.1 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;

8.2.2.2 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

8.2.2.3 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.

8.2.3 The consequences of these provisions include the following:

8.2.3.1 the State will eventually (i.e. upon the death of a copyright owner) own the copyright in all or most works; and

8.2.3.2 once those rights are acquired, the State will:

8.2.3.2.1 hold those rights perpetually;

8.2.3.2.2 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

8.2.3.2.3 pursuant to the amendment in paragraph 26, not be able to assign the copyright in those works to any person.

- 8.2.4 The NAB has grave concerns regarding these proposed provisions.
- 8.2.5 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.
- 8.2.6 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.
- 8.2.7 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 the Members of such works would be severely curtailed - on both a legal and practical level.

9. Artists' resale royalty rights

- 9.1 In paragraph 9 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 9 to include the wider defined meaning of artistic works, although this should be clarified in next draft of the Bill.

- 9.2 In terms of section 9B as proposed by paragraph 9 of the Bill, artists will enjoy a right to a royalty on all commercial sales of their artistic works following the first sale/transfer of such works. This royalty shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts and culture. 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.
- 9.3 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)*".
- 9.4 Based on media reports,⁹ 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.
- 9.5 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 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

⁹ <http://allafrica.com/stories/201508220107.html>

since their margins or rates of return on investment may be heavily reduced by the resale royalties.

- 9.6 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.

10. **Unenforceable contractual provisions**

- 10.1 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"*¹⁰.

- 10.2 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.

- 10.3 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.

¹⁰ Section 39B of the Bill.

10.4 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.

11. Tribunal Licences

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

11.2 Translation licences

11.2.1 Schedule 2 Part 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.

11.2.2 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.

- 11.2.3 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:
- 11.2.3.1 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;
 - 11.2.3.2 sound or visual recordings of the translation may not be used by broadcasting organisations except those having their headquarters in South Africa; and
 - 11.2.3.3 the use of the translation is not for commercial purposes.
- 11.2.4 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.
- 11.2.5 The Tribunal may also grant a domestic broadcasting organisation a licence, subject to the conditions listed in 11.2.1 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.

11.3 **Reproduction Licences**

11.3.1 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.

11.3.2 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.

12. **Copyright Infringement**

12.1 Section 23 of the Bill proposes, amongst other things, that a copyright shall be infringed by any person who:

12.1.1 tampers with information managing copyright, as contemplated in the Bill;

- 12.1.2 omits to pay the performer, owner, producer or author of copyright work a royalty fee as and when the copyright is used;
 - 12.1.3 omits to pay the author of artistic work a royalty fee as prescribed by the Bill as and when the artistic work is sold; and
 - 12.1.4 misuses copyright and technological protection measures in order to constitute a defence to any claim of copyright liability or any independent cause of action that may be pursued either as a counterclaim in an action for infringement or instituted independently.
- 12.2 The NAB submits that the Bill should take into consideration the fragile economic environment the Industry operates under and parties should be entitled to determine when royalties should be payable.

13. Ministerial Powers With Regard To Prescribing Local Content

- 13.1 The NAB notes the provisions of section 32 of the Bill which include the proposed insertion of paragraph (cL) into section 39 of the Act such that the Minister is to be empowered to make regulations “in consultation with the Minister responsible for communication, to prescribe “the local music content for television and radio broadcasting”.
- 13.2 The NAB has a number of serious constitutional, statutory and regulatory concerns with the proposed paragraph (cL) of section 39 of the Act. These concerns have been set out in previous NAB submissions to the DTI (September 2015) and are re-stated below.

13.3 Constitutional Concerns

- 13.3.1 The first concern is that the prescribing of local content regulations falls outside the scope of the Minister’s powers as it constitutes an unconstitutional usurpation of the powers and duties of a Chapter 9 institution as provided for in the Constitution of the Republic of South Africa, 1996 (the "**Constitution**").

- 13.3.2 Chapter 9 institutions are created to strengthen South Africa's constitutional democracy and in order to do so, they are required to be independent and subject only to the Constitution and the law¹¹.
- 13.3.3 Section 192 of the Constitution requires that “[n]ational legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society.” In this regard the Independent Communications Authority of South Africa (“**ICASA**”) has been established as the independent authority to regulate broadcasting in terms of section 192 of the Constitution and delegated legislation through the ICASA Act 13 of 2000 (the “**ICASA Act**”).
- 13.3.4 Regulating broadcasting content, whether by prohibitions or mandatory content rules, falls squarely within the remit of the constitutionally-mandated broadcasting regulator, ICASA, and no person or organ of state may interfere with ICASA’s role in this regard. Section 181(4) of the Constitution also prohibits any person or organ of state (such as a Minister) from interfering with the functioning a chapter 9 institution. This would include the usurpation of the powers of the broadcasting regulator.

¹¹ EFF v The Speaker of the National Assembly and others CCT 143/15 and CCT 171/15.

13.3.5 ICASA is an institution that was established as an independent body and is “subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice”¹². Consequently, it is unconstitutional for the Minister (regardless of prior consultation with the minister responsible for communications) to make regulations prescribing content rules for broadcasters. The making of these regulations falls within the powers and functions of ICASA and the Minister is accordingly not empowered to make regulations which prescribe local content. This is beyond the scope of the Minister's powers and usurps the broadcasting regulatory function of ICASA as is provided for in section 192 of the Constitution.

13.3.6 This argument is reinforced by the principle that was set out by the Constitutional Court in the case of *New National Party v Government of the Republic of South Africa*¹³ and later confirmed in the case of *Independent Electoral Commission v Langeberg Municipality*¹⁴. In the *New National Party* case, Langa DP (as he then was) set out the principles of “administrative independence” that are enjoyed by a Chapter 9 institution¹⁵. Writing for the court on this issue, the learned Judge held that administrative independence “implies that there will be no control over those matters directly connected with the functions which the Commission (referring to the Independent Electoral Commission) has to perform under the Constitution and the Act (referring to the Independent Electoral Commission Act)”¹⁶. The Constitutional Court's support for this position was confirmed in the *Langeberg Municipality* case where the Constitutional Court dealt with a similar case regarding the administrative independence of the Independent Electoral Commission¹⁷.

¹² Section 3(3) of the ICASA Act.

¹³ 1999 (4) BCL 489 (CC).

¹⁴ 2001 (9) BCLR (833) (CC).

¹⁵ Paragraph 99.

¹⁶ *ibid.*

¹⁷ Paragraph 29.

13.4 **Statutory Concerns**

- 13.4.1 The second concern is that this is beyond the scope of the Minister's powers as it is inconsistent with the statutory power given to ICASA in terms of the ICASA Act and Electronic Communications Act 36 of 2005 (the "**ECA**").
- 13.4.2 Section 3(4) of the ICASA Act, provides that ICASA must function without any political interference.
- 13.4.3 Section 4(1)(a) of the ICASA Act requires that ICASA exercises the powers and perform the duties conferred and imposed upon it by the ICASA Act, the underlying statutes and any other applicable law. The definition of "underlying statutes" in section 1 of the ICASA Act includes the ECA.
- 13.4.4 Section 61 of the ECA is a critical provision that is directly relevant to the Bill. It empowers ICASA to prescribe regulations:
- 13.4.4.1 imposing conditions regarding, *inter alia*, local television content as provided for in section 61(3) of the ECA; and
 - 13.4.4.2 imposing conditions on sound broadcasters specifying a minimum percentage of "musical works which qualify as South African music as provided for in section 61(4) of the ECA.
- 13.4.5 With regard to paragraphs 13.4.4.1 and 13.4.4.2 above it also is important to note that the terms "local television content" and "South African music" are defined in sections 61(2)(a) and 61(2)(c) of the ECA respectively.
- 13.4.6 From this it is reasonable to deduce that both the ICASA Act and the ECA intended that ICASA, acting alone, would be responsible for prescribing regulations on local content for both sound and television services as is required by section 192 of the Constitution as discussed above.
- 13.4.7 Neither the ICASA Act nor the ECA empower the Minister to be involved with prescribing local content.

13.4.8 Consequently we submit that the proposed paragraph (cL) in section 39 of the Act as introduced by the Bill will fly in the face of existing statutory provisions relating to the prescribing of local content requirements and will culminate in an undesirable conflict of laws.

13.4.9 Such an empowering provision would also be *ultra vires* the powers of Minister in terms of the Constitution, the ICASA Act and the ECA.

13.5 **Regulatory Concerns**

13.5.1 For decades, ICASA (and before it, its predecessor the Independent Broadcasting Authority) prescribed local content regulations for the television and sound broadcasting sectors in accordance with the provisions of the ICASA Act and the ECA (and its preceding legislation, the Independent Broadcasting Authority Act, 1993).

13.5.2 In doing so, ICASA has never required the approval of any Minister, including the minister responsible for communications or trade and industry.

13.5.3 However, as is required in terms of section 4(5) of the ECA, ICASA does provide the minister responsible for communications, with a copy of any proposed regulations not less than 30 days prior to making these regulations.

13.5.4 The latest local content regulations prescribed by ICASA are:

13.5.4.1 the South African Music Content Regulations contained in Notice No. 344 published in Government Gazette No. 39844 dated 23 March 2016; and

13.5.4.2 the South African Television Content Regulations contained in Notice No. 345 published in Government Gazette No. 39844 dated 23 March 2016.

13.5.5 Nothing in the above-mentioned regulations makes provision for any role for the Minister to prescribe local content regulations.

13.5.6 In the circumstances, the NAB respectfully submits that the proposed paragraph (cL) should be deleted in its entirety.

14. **Conclusion**

- 14.1 The NAB appreciates the opportunity to participate in this important public process.
- 14.2 The NAB notes that a socio-economic impact assessment system ("**SEIAS**") was adopted by Cabinet in 2015 and that the DTI conducted a SEIAS for this process. However, the NAB would respectfully submit that to ensure consistency, harmonisation and coherence in aligning the approach of various government departments to intellectual property matters, the DTI should engage more robustly with all affected stakeholders.
- 14.3 The NAB looks forward to the next phase of the public engagement 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 Regulation
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.