

SUBMISSION BY

THE NATIONAL ASSOCIATION OF BROADCASTERS OF SOUTH AFRICA

COMMENTS ON THE AMENDMENTS TO:

THE COPYRIGHT ACT, NO 98 OF 1978; AND

THE PERFORMER'S PROTECTION ACT, NO 11 OF 1967,

AS PUBLISHED IN GOVERNMENT GAZETTE NO 21156, 10 MAY 2000 UNDER
GENERAL NOTICE 1805 OF 2000

1. Introduction

- 1.1 The National Association of Broadcasters of South Africa ("**NAB**") was established during the course of 1992 to represent the collective interests of South Africa's broadcasting industry. Presently, amongst NAB's 70 members are the majority of commercial, religious, community and greenfields broadcasters in the areas of radio and television in South Africa. In addition, NAB represents 15 organisations which are not directly engaged in broadcasting, but conduct businesses related to the broadcasting industry, including the Association of Marketers.
- 1.2 The members of NAB will be dramatically and adversely affected by the proposed amendments to the Copyright Act, No. 98 of 1978 ("**the Copyright Act**") and the Performers Protection Act, No. 11 of 1967 ("**the Performer's Protection Act**"), as published by the Department of Trade and Industry under Notice 1805 of 2000 in Government Gazette No. 21156 of 10 May 2000. Accordingly, NAB has a variety of comments to the proposed amendments which are detailed in this document. The comments made in this document are the unanimous views of the members of NAB.

2. Amendments at issue

- 2.1 The proposed amendments which are of primary concern to NAB and comprise the basis of this document, are those relating to section 9(c) of the Copyright Act, when read with the proposed amendments to section 5 of the Performer's Protection Act.
- 2.2 The amendments proposed in section 9(c) of the Copyright Act, when read with the proposed amendments to section 5 of the Performer's Protection Act, amount to the introduction of what is popularly termed "needletime". Needletime refers to the payment of a royalty for the broadcast of a sound recording to a performer and the owner of copyright in a sound recording.
- 2.3 The introduction of needletime has been the subject of ongoing and intensive debate between all stakeholders in the music industry and is erroneously perceived to be a solution to certain problems affecting the music industry. NAB has always been proactive and dedicated to finding a lasting solution to the problems faced by all stakeholders in the music industry, including

performers, writers, producers and recording companies. NAB does believe however, that any solution must be well considered and appropriate to the local music industry and to the unique circumstances in South Africa.

- 2.4 This document will show that the introduction of needletime is inappropriate for the South African context. Furthermore, it will be shown that needletime will compound, and not resolve, the difficulties faced by the music industry. The Department of Trade and Industry is therefore requested to consider the comments below and to reconsider the proposed amendments to section 9(c) of the Copyright Act and section 5 of the Performer's Protection Act.

3. **World Intellectual Property Organisation Performers and Phonograms Treaty ("the Treaty")**

- 3.1 One of the reasons for the introduction of "needletime" in South Africa may be as a result of South Africa's adoption of the World Intellectual Property Organisation ("**WIPO**") Performers and Phonograms Treaty ("**the Treaty**"). Paragraph (1) of Article 15 of the Treaty provides as follows:

"Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public."

- 3.2 Paragraph (3) of Article 15 of the Treaty, however, gives Contracting Parties the discretion of whether to adopt the provisions of paragraph (1) in whole, in part, or at all. Paragraph (3) provides that:

"Any Contracting Party may in a notification deposited with the Director General of WPO, declare that it will ... not apply the provisions of paragraph (1) at all."

- 3.3 It is submitted that the reason why Contracting Parties are granted a discretion to adopt the provisions of paragraph (1), is that it is recognised that each Contracting Party is unique and it may therefore be inappropriate and unsuitable for every Contracting Party to adopt paragraph (1). South Africa is such a situation where the ill considered adoption of international trends will be detrimental to the local broadcasting and music industry at such a critical stage of its development.

- 3.4 The Department of Trade and Industry is urged to take advantage of the reprieve provided by paragraph (3) of the Treaty and to seek alternative solutions to the unique problems and challenges encountered in South Africa.

4. **South African Broadcasting and Music Industry**

- 4.1 The South African Broadcasting Industry in recent years has grown exponentially and is in a state of flux by virtue of the fact that free market forces have not prevailed in this industry until recent years.
- 4.2 Whilst Government is rightfully committed to "levelling the playing fields", this will not occur overnight and the effects of the past SABC monopoly will be experienced in South Africa for many years to come. Whilst the rest of the western world has experienced organic growth in the radio industry over many years, and has been able to accommodate the changes that the new electronic age has brought upon it, in South Africa it is as if the industry has had to start afresh without the benefits of having been established under a free market regime for a few decades.
- 4.3 The new entrants into the broadcasting industry have either had to pay huge capital costs to acquire existing radio stations from the SABC, having the benefits of an established listener base but with the uncertainty of the effects which new competition will have on that listenership base or, alternatively, have had to lay out large capital expenditure to establish new radio stations without any listenership base at all and without any established advertising. This has also been compounded by an evolving regulatory regime.
- 4.4 An essential ingredient in the development of the local music industry, is the investment and continued existence and growth of the broadcasting industry. Broadcasters and musicians are dependant on one another and have a symbiotic relationship. In the event that excessive demands are made on the broadcasting industry, many broadcasters will be required to stop operating. Accordingly, should the local broadcasting industry falter, local musicians and the local music industry will not prosper.
- 4.5 A delicate balance therefore needs to be struck between the interests of performers and broadcasters. In particular, Government is urged to be sensitive to the considerable challenges already being faced by fledgling

broadcasters who have shown faith in the local industry by investing considerable sums of money in South Africa, yet are struggling to survive.

5. Community and Greenfields Broadcasters will be undermined

The imposition of a new levy will be in contradiction to the South African government's endeavours to encourage through broadcasting the maintenance of a South African Identity, universal access, equality, unity and diversity. The South African government will only be able to achieve these goals and promote the entire spectrum of cultural backgrounds through the development of community broadcasters and so-called "greenfields broadcasters". NAB submits that it is essential that these new and emerging broadcasters ought to be incentivised and promoted as far as possible. The introduction of needletime at this juncture in the development of the broadcasting industry will stifle emerging voices and undermine all the positive measures taken by the South African government to develop the broadcasting industry.

6. Diminishing revenue and the inability of broadcasters to afford a new levy

6.1 A vital source of revenue for broadcasters is fees paid by advertisers. As a result of the dramatic growth of the broadcasting industry, far more broadcasters are now competing for the share of advertising revenue. Advertising revenue available to the market has not grown commensurate with the growth in the broadcasting industry. Indeed, advertising revenue has diminished. The huge competition for the advertising Rand, as a result of media diversity, fragmentation and decreasing total advertising revenue, has resulted in diminishing income for what is essentially a fledgling industry in this country.

6.2 The imposition of a needletime levy will disturb the equilibrium of costs and revenues which exists between broadcasters, composers, record companies, performers and advertisers. Broadcasters are placed in a double bind as they wish to secure advertising revenue, yet have no option but to pass unrecoverable costs such as a needletime levy on to advertisers. Advertisers will in turn pass their additional costs on to vendors, who will ultimately have to pass their higher costs on to consumers.

7. Increasing the burden on the broadcasting industry

- 7.1 Each year members of the broadcasting industry pay millions of rands in royalty payments to the holders of copyrights in musical works. These payments are made to the South African Musical Rights Organisation ("**SAMRO**"), the South African Recording Rights Association Limited ("**SARRAL**") and the National Organisation for Reproduction Rights in Music ("**NORM**"). SAMRO collects royalty payments on behalf of composers and lyricists. While SARRAL and NORM collect royalties in respect of mechanical reproduction of musical works.
- 7.2 Apart from the royalties mentioned in 7.1 above, broadcasters are also regularly required to pay significant amounts towards the MIT levy, the Skills Development levy, and the Independent Broadcasting Authority levy.
- 7.3 In addition, the costs of competing in the increasing technological era, with a greater demand from a sophisticated listening public for higher quality sound in smaller niche markets has meant that the costs of providing broadcasting services has risen exponentially in the past few years.
- 7.4 Accordingly, given all of the above factors, the new broadcasting industry in South Africa finds itself in the double bind of having diminishing returns and ever increasing costs, exacerbated by high start up costs which have not been possible to amortise over the last few decades, which the industry's counterparts in the rest of the western world have been able to do. Thus the economics of the broadcasting industry in South Africa are extremely precarious and it is submitted that given all of the above factors, there is no western country which faces comparable circumstances to those faced by the radio industry in South Africa. It is accordingly submitted that the South African government must take into account, when considering the introduction of needletime, all of the financial difficulties faced by broadcasters and, primarily, the ability of broadcasters to pay. South Africa is an inflationary society and publicly owned companies are under huge pressure to deliver real returns to their shareholders, something which is well nigh impossible in the current environment. On the other hand, community based radio stations rely on outside donations for their existence whilst fulfilling a very valuable need in society, as part of the reconstruction of a country which has for many years, suffered a communications vacuum.

7.5 The introduction of a further levy, such as needletime, will render broadcasting commercially unviable. As a country competing with other developing countries for limited foreign investment, the introduction of a needletime levy will act as a deterrent to further in-flows of foreign capital as it will be levied as an additional tax on income. Thus, South Africa may lose out to those developing countries which do not impose needletime.

8. **Unjustified enrichment of the recording industry**

8.1 Needletime's introduction into South African legislation will result in record companies receiving payment from a source which was never intended by the Copyright Act. As NAB has pointed out in the past, the Minister of Economic Affairs (as the Minister of Finance was known then) in 1965 considered the distinction between a copyright in musical works and a copyright in sound recordings sufficient enough to exclude needletime from the Copyright Act of 1965 and again from the Copyright Act of 1978.

8.2 The extensive Parliamentary debates of the time illustrate the length to which the needletime issue was debated. In addition to the argument contained in 8.1, the Minister of Economic Affairs of the time concluded that "copyright law without a needletime provision:

"... gives the manufacturer (of a sound recording) the right to prevent anyone from copying his record and this is all the protection he needs. He (the manufacturer) makes his profit from the sale of recordings and, as I have said, I am convinced that it was never the intention to permit him to charge fees for the playing of his record in public."

8.3 The primary source of revenue for record companies is derived from the selling and hiring of sound recordings. And as the Copyright Act presently protects record companies' right to control the selling and hiring of sound recordings, it is the NAB's submission that a needletime royalty would unfairly provide an additional source of revenue for the record industry at the expense of broadcasters.

8.4 Logic dictates that broadcasters should charge record companies and performers for the airtime they use to broadcast sound recordings. This arrangement would be equitable because broadcasters provide a service to

record companies and performers whereby their sound recordings are broadcast to the public at no charge to them. If record companies and performers wish to penalise broadcasters for this service by demanding that broadcasters pay a needletime levy, it seems only fair that broadcasters exercise their commercial prerogative to recoup any losses they may incur from needletime's imposition, by charging record companies and performers for broadcasting their sound recordings. This is an undesirable situation for all concerned and one which NAB wishes to avoid. The commercial realities, however, may compel broadcasters to pass their increased financial burden on to performers and the recording industry.

9. Undermining the protection and development of performers

- 9.1 NAB supports the endeavours of musicians and performing artists to gain greater recognition for their efforts. Broadcasters contribute to the development of the local music industry by featuring local music during prime time. This is despite foreign music proving to be more popular than local music. The economic imperative in the broadcasting industry demands that broadcasters feature music which will attract the most listeners because that will translate into higher adspend and revenues for broadcasters.
- 9.2 The irony is that the introduction of needletime is supposed to inure to the benefit of performers and producers of South African music. But if needletime is introduced into South Africa, in light of the current appeal of foreign music, broadcasters may be compelled to play more foreign music during prime time to attract more listeners which will result in greater advertising revenue. Broadcasters will have to take this route to recoup revenues lost as a result of needletime.
- 9.3 The playing of more foreign music during prime time will lead to local music being played at obscure times of the day. Local record companies and artists may find that their record sales will plummet if their music is not played during peak listening hours.
- 9.4 While the advocates of needletime demand that broadcasters play more local music, they also insist that broadcasters pay them a needletime royalty. The current popularity of foreign music renders this scenario an uneconomical option for raising funds for the local music industry. The introduction of

needletime may force broadcasters into an economically harmful position which may only damage the local music industry. The answer is not the imposition of a needletime levy, but instead for record companies, performers and broadcasters to promote local music which will increase local music's sales.

10. Needletime may jeopardise the relationship between broadcasters and the music industry

- 10.1 Broadcasters are the primary means by which record companies and performers advertise their best and latest sound recordings to the public at large. In this regard, broadcasters can be analogised to concert promoters. One does not hear of recording companies and performers demanding a fee from promoters for the service promoters provide for the record industry. On the contrary, the flow of fees is the other way around. And it can be argued that, like broadcasters, promoters derive commercial and monetary gain from the service they render to the music industry. But promoters do not pay a fee to the record companies and performers for any enrichment they obtain from servicing the music industry. The question then is why should broadcasters be treated any differently?
- 10.2 Instead, record companies and performers pay promoters because they recognise the value promoters add to their business by attracting more fans to concerts and other events, which promotions translate into increased record sales. Reference should again be made to paragraph 8.1 and 8.2 above where it was pointed out, as far back as 1965, that the selling and hiring of sound recordings is the primary source of revenue for record companies; and hence, the only right worthy of copyright protection.
- 10.3 Record companies and performers fail to recognise and acknowledge the benefit broadcasters provide to them. Broadcasters do not levy a fee against record companies and performers for advertising and promoting the products of the music industry, when in all justification they could and should. Rather, broadcasters only look to advertisers for compensation for their contribution to the development of the local music industry.

11. Needletime is inappropriate compensation for piracy

NAB is opposed to music piracy in any form. However, the NAB is of the view that the introduction of needletime is not the appropriate means by which to compensate the music industry for losses it suffers as a result of music piracy. As an alternative, NAB supports the establishment of a blank tape levy payable on every blank tape purchased as a means of compensating the music industry for losses due to music piracy.

12. Exploitation of performers

NAB is aware of the complaint, common amongst performing artists, that they are exploited. In particular, performing artists generally point to the source of their exploitation as being the record companies. The proposed amendments to section 5 of the Performer's Protection Act provide that performers will be entitled to be paid an unspecified percentage of the royalties paid by broadcasters under the proposed section 9(c) of the Copyright Act. Generally, the royalties paid under section 9(c) will be paid to record companies. Once again, performing artists will be reliant on record companies and subject to further exploitation.

13. Conclusion

- 13.1 NAB is committed to exploring and implementing measures which will provide lasting solutions to the difficulties presently being encountered by performers and the music industry. As the South African position is unique, international developments will not necessarily be suitable in a South African context.
- 13.2 Although the motivation behind the implementation of needletime is honourable, stakeholders must be aware that the implementation of needletime will have severe and detrimental consequences for the development of the local music industry, the broadcasting industry and performers.
- 13.3 The local broadcasting industry has been subject to dramatic changes in recent years which have seen the introduction of numerous commercial and community broadcasters. These broadcasters have been required to make large capital investments without the security of a return on such investments. In addition, the evolving regulatory regime and technological advancements have posed further burdens on local broadcasters.

- 13.4 South African government wishes to encourage, through broadcasting, the maintenance of a South African identity, universal access, equality, unity and diversity. Broadcasters support the government's endeavours, however, broadcasters face a constant struggle to achieve the government's goals while trying to cope with the commercial realities of broadcasting, including increased competition, diminishing revenue and increasing operating costs. The introduction of a needletime royalty, in addition to the considerable royalties already being paid by broadcasters, will compromise the survival of broadcasters. Should broadcasters be unable to remain financially viable, the South African government will not be able to achieve its honourable goals of universal access, equality, unity and diversity.
- 13.5 NAB has always supported the development of local performers and the local music industry. For this reason, the products of local performers and record companies have been broadcast for free with a view to encouraging the development and popularity of local music. Should needletime be introduced however, broadcasters will be compelled to pass this cost on to others. This may require broadcasters to start charging record companies every time a record company's product is played. Should broadcasters start charging local performers and record companies, this will undermine the purpose of needletime and will be detrimental to the local music industry.
- 13.6 As the introduction of needletime will affect the revenue of broadcasters, they will seek to increase their popularity in an effort to secure valuable advertising revenue. Due to the popularity of foreign performers as opposed to local performers, broadcasters will be required to broadcast the works of foreign performers at the expense of local performers. Needletime will therefore be detrimental to the development of the local music industry.
- 13.7 NAB is committed to the development of local performers and the local music industry. NAB also supports the efforts of the South African government to promote broadcasting in a democratic dispensation. NAB submits that the introduction of needletime will have no lasting positive effects and will be detrimental to all stakeholders. NAB accordingly requests the Minister of Trade and Industry to reconsider the proposed implementation of needletime.

13.8 Any solution which the South African government wishes to implement must be well considered, long lasting and benefit all South Africans. The introduction of needletime is not such a solution.

**THE NATIONAL ASSOCIATION OF BROADCASTERS OF SOUTH AFRICA
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