



**NAB**  
National Association of Broadcasters

**NAB WRITTEN SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND  
INDUSTRY ON THE PERFORMERS' PROTECTION AMENDMENT BILL**

**[B24-2016]**

**13 February 2017**

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## **1. Introduction**

- 1.1. The National Association of Broadcasters (the NAB) is the leading representative of South Africa's broadcasting industry, established in 1993. The NAB aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The current NAB members are:
  - 1.1.1. the three television services and 18 radio services of the SABC;
  - 1.1.2. licensed commercial radio broadcasters (including: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, TMG, Classic FM, Kaya FM, YFM, Smile FM and Vuma FM);
  - 1.1.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat);
  - 1.1.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;
  - 1.1.5. both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, Sentech and Orbicom;
  - 1.1.6. associate members, including training institutions.

## **2. Background**

- 2.1. The Portfolio Committee on Trade and Industry (the Portfolio Committee) published the Performers' Protection Amendment Bill (the Bill) for public comments. The closing date for written comments was 6 February 2017. The Portfolio Committee has further scheduled oral hearings for 21 and 26 February 2017. The NAB welcomes the opportunity to make its written comments, we also wish to thank the Portfolio Committee for having given us an extension to 13 February 2017.
- 2.2. On 27 July 2015, the Department of Trade and Industry (the DTI) published the Copyright Amendment Bill for public comment. The NAB made a written submission to the DTI in this regard. In its written submission, the NAB had raised a number of concerns pertaining to the Copyright Amendment Bill and these were: the broad scope of the Copyright Amendment Bill as well as issues around the Beijing Treaty. The NAB

is encouraged by the steps taken by the Portfolio Committee in separating elements relating to performers from the Copyright Amendment Bill, which led to the Bill addressing performers' issues specifically. The NAB is however of the view that further improvements are still necessary, before the Bill can be passed into law.

### **3. Copyright Amendment Bill**

3.1. While the NAB commends the Portfolio Committee for having separated the two Bills, we believe that interested parties cannot make meaningful inputs to the Bill without having sight of the Copyright Amendment Bill. This is due to the fact that the Bill makes reference to the Copyright Amendment Bill in several places, and there is a need to harmonize the two Bills. It is therefore our view that both Amendment Bills ought to have been published concurrently, and should be processed together.

### **4. The Beijing Treaty**

4.1. The NAB observes that the Bill seeks to bring South African law in line with provisions of the Beijing Treaty on Audio-visual Performers (the Beijing Treaty)". To our knowledge, South Africa has not ratified the Beijing Treaty. We are of the view that the amendments to the Bill incorporating the Beijing Treaty provisions are premature and do not accord with international law principles as well as the provisions of section 231 of the Constitution of South Africa that deals with International Agreements.<sup>1</sup>

4.2. Therefore, South Africa should not enact elements of the Beijing Treaty into the Bill without first having ratified the Beijing Treaty.

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<sup>1</sup> Section 231 provides:

1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament

4.3. We further submit that a mere ratification may not justify an enactment of the Beijing Treaty into law, as critical procedural steps would still need to be undertaken nationally. Before ratification of the Beijing Treaty, the Department would need to conduct a cost benefit assessment and a socio-economic impact assessment (SEIAS) as provided for by a cabinet framework, to ensure the suitability and adaptability of the Beijing Treaty into national legislation.

4.4. One of the ways in which the Bill implements provisions of the Beijing Treaty is by introducing new definitions which are aligned to the Treaty. While the NAB will not make detailed inputs on these definitions, we wish to highlight some of the affected definitions, as the Bill does not seem to have taken into account existing definitions, in the Copyright Act or definitions of the same concepts in the Copyright Act. The definitions are:

4.4.1. Audiovisual fixation;

4.4.2. Communication to the public of a performance;

4.4.3. Performer.

4.5. and we would recommend that the Portfolio Committee makes the necessary adjustments

## **5. Comments on specific provisions of the Bill**

### **5.1. Definition of Broadcasting**

5.1.1. The Bill proposes the inclusion of the definition of "broadcasting". The NAB recognises a misalignment between the proposed definition and existing definitions of "broadcast" and "broadcaster", as contained in the Copyright Act 98 of 1978 (the Act). The Copyright Act states:

"broadcast", when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which-

(a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and

(b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly.

“broadcaster” means a person who undertakes a broadcast;

5.1.2. The Bill should adopt the definition of "broadcast" as in the Copyright Act to cure this misalignment.

## **6. Practical Concerns**

6.1. The proposed insertion of sections 5(1A) to (1D) in the Bill sets out the process to be followed by any person who intends to distribute a fixed or unfixed performance. While the NAB supports measures to protect performers, the proposals in their current form do not consider the realities of the broadcast environment and will negatively impact production and scheduling – the notice and response procedure will be difficult to implement for live broadcasts and will unduly delay production schedules. Furthermore, the proposed referral to the Tribunal to resolve disputes will be too costly and time-consuming for all parties concerned. NAB members were recently involved in a dispute which was referred to the Tribunal. The matter was referred in 2007 and was only resolved in 2014, after going through the full Tribunal process and then an appeal to the Supreme Court of Appeal. The proposals in the Bill will allow parties to effectively delay broadcasts pending the outcome of tribunal proceedings, which could take years.

6.2. In order to ensure that broadcasts are not unfairly and unnecessarily delayed, we propose that the Bill provide for a right of equitable remuneration rather than a right of authorization.

## **7. Transitional arrangements**

7.1. The NAB is of the view that a transitional period on the implementation of the Bill will need to be written into the Bill to facilitate a smooth transition by performers and broadcasters. This will allow broadcasters the opportunity to do financial planning, and negotiate royalties, as the proposals made in the Bill will have financial implications on

broadcasters, and are likely to cause a disruption to the broadcasting sector. It will also allow performers to structure themselves appropriately.

## **8. Conclusion**

- 8.1. The NAB would like to thank the Portfolio Committee for the opportunity to make its written comments.
- 8.2. In our view both the Copyright Amendment Bill and the Performers' Protection Amendment Bill ought to have been published concurrently, to ensure alignment.
- 8.3. The inclusion of the provisions of the Beijing Treaty into the Bill is premature, as South Africa has not yet ratified the treaty.
- 8.4. The NAB encourages the Portfolio Committee to provide some transitional periods for the broadcasting sector, to allow for the smooth implementation of the Bill once passed into law.
- 8.5. For the sake of completeness the NAB attaches hereto, copy of its written submission to the DTI on the Copyright Amendment Bill.