



**THE NAB WRITTEN SUBMISSION ON THE COPYRIGHT  
AMENDMENT BILL**

## **INTRODUCTION**

- 1 On or about 4 June 2021 Portfolio Committee on Trade and Industry (Committee) published a notice on the Parliamentary website inviting the public to submit written comments on the Copyright Amendment Bill (CAB) as well as the Performers' Protection Amendment Bill. Interested persons were initially given until 9 July 2021 to submit their written input, we thank the Portfolio Committee for granting us an extension to 16 July 2021. The NAB thanks the Committee for this opportunity and requests to make oral representations should public hearings be held.
  
- 2 The National Association of Broadcasters (NAB) is a leading representative of South Africa's broadcasting industry representing the interests of all three tiers of broadcasters. Our members include the public broadcaster (SABC), commercial radio media groups; Primedia, Kagiso Media, MRC Management Services previously known as Tsiya Group, AME, MSG Afrika, as well as independents, Classic FM, Kaya FM, YFM, Smile FM, Rise FM and YOU FM; all the licensed commercial television broadcasters e.tv, Multichoice, M-Net, and StarSat-ODM; a number of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends to broadcast signal distributors, Sentech and Orbicom, as well as Associate membership of the training institute, NEMISA and the MDDA (Media Development and Diversity Agency).

## **INTRODUCTORY COMMENTS**

- 3 The NAB has participated throughout the legislative review process and provided detailed written input to guide the Committee. Whilst we were concerned that the CAB had been passed by both the National Assembly as well as the National Council of Provinces with little consideration of the input from the broadcasting industry, we were encouraged by the Honourable President's remittal in June 2020.

- 4 Broadcasters are significant investors in the creative industries and provide a distribution platform for South African content to other regional and international jurisdictions. Given the symbiotic relationship between broadcasters and the creative industries, these key stakeholders have a vested interest in a stable copyright framework which is conducive to investment.
- 5 The CAB presents an opportunity to create an enabling environment for every role-player in the content value chain, which would promote the growth, development, and stability of the creative industries as a whole through a careful balancing of the rights and interests of all stakeholders and enable every role-player in the value chain to thrive. The NAB therefore supports the initiative to revise the Copyright Act in line with international treaties and to update the legislation in light of technological developments. We also support the CAB's objective of ensuring adequate compensation to the creators of works.
- 6 The legislative process to date has been criticised and controversial. It is regrettable that stakeholders have been requested for input on the same version of the CAB which was remitted by the Honourable President notwithstanding his clearly articulated reservations. In particular, we note that the Honourable President highlighted the following concerns regarding the CAB in his letter addressed to the Speaker of the National Assembly dated 16 June 2020:
  - a. incorrect tagging;
  - b. retrospective and arbitrary deprivations of property;
  - c. impermissible delegation of legislative power to the Minister;
  - d. the copyright exceptions;
  - e. fair use provisions; and
  - f. International Treaty implications.
- 7 The problems with the CAB should not be underestimated. The CAB suffers serious Constitutional issues and major flaws. We are concerned that the CAB, in its current form, will disincentivise investment, including investment in film and television in the

provinces. It will face legal (including Constitutional) and implementation challenges. Numerous unintended adverse consequences will flow therefrom. Most regrettable of all, those who the CAB is intended to benefit, will be undermined by the CAB's flaws.

- 8 We therefore make this submission to draw the Committee's attention to the significant concerns which plague the CAB and which, if not addressed, will have serious negative implications for all role-players in the value chain. We note that the Committee has requested stakeholders to confine their submissions to the concerns raised by the President. The NAB has consistently raised the very same concerns as well as their implications, we are hopefully that they will be duly considered during this phase of the legislative review process.
- 9 The NAB trusts that the Committee will thoroughly engage with all of the various role-players and make the necessary interventions to avoid the unintended consequences of the Bill's proposals.

## **THE LEGISLATIVE PROCESS SO FAR**

- 10 The NAB and its members have continuously participated in this legislative review process, and engaged the Department of Trade, Industry and Competition (DTIC), the Department of Sports, Arts and Culture, the Department of Communications and Digital Technologies as well as the Portfolio Committee on Trade and Industry. Regrettably, despite our recommendations, many of the concerns previously raised in our submissions have still not been addressed. The NAB respectfully reiterates the need for adequate consultations with the various sectors impacted by the CAB, in order to carefully assess the specific implications thereof.
- 11 The NAB notes that a technical committee was previously appointed with experts to assist the Portfolio Committee and we strongly recommend that it be reconstituted to provide support throughout this iteration of the legislative review process considering the complexity of the CAB and its implications across different sectors.

- 12 Copyright legislation is specialist, technical legislation. We have sympathy with the drafters who were faced with this complex task. However, the implications are enormous and require thorough informed analysis to be dealt with appropriately. We also urge the Committee to obtain the input of subject matter experts and to engage the Inter-Ministerial Committee on Intellectual Property (IMCIP)<sup>1</sup> throughout this process, and that the process should include a thorough economic modelling exercise to determine the financial implications of the CAB on various sectors, with particular implications on culture and trade in the provinces, as well as on government as the administrators thereof.
- 13 Moreover, many of the fundamental concerns raised by numerous interested parties in the legislative process to date have not been addressed adequately or at all, and fundamental concerns remain, including Constitutional concerns.

## **CONSTITUTIONAL CONCERNS**

### **(1) Tagging mechanism**

- 14 The CAB was tagged and processed as a section 75 Bill in terms of section 75 of the Constitution. However, the CAB has a substantial effect on how copyright must be traded and on cultural matters. This is evident from the extensive proposals highlighted in this submission, including the far-reaching proposals on compulsory agreements to be concluded in the prescribed manner and form, the Minister's power to prescribe compulsory and standard contractual terms and royalty rates/tariffs for various forms of use which we come back to in paragraph 50 below. It is also evident from the royalty provisions in sections 6A, 7A and 8A. Indeed, the CAB goes to the very heart of how intellectual property – and specifically copyright

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<sup>1</sup> The IMCIP comprises of representatives from different government departments responsible for implementing programs that either affect, or are affected, by intellectual property. The IMCIP constitutes the Ministries of Trade and Industry, Health, Economic Development, International Relations and Cooperation, Science and Technology, Communications, Telecommunications and Postal Services, Higher Education and Training, Agriculture Forestry and Fisheries, Arts and Culture, Energy and Environmental Affairs

– may be traded. The Copyright Act also has a substantial effect on cultural matters, including indigenous cultural expressions.

- 15 Whilst the Committee has agreed that the Bill ought to be retagged and processed as a section 76 Bill, we note that paragraph 6.8 of the Memorandum on the CAB which stakeholders have been requested to comment on indicates that the CAB the Bill “must be dealt with in accordance with the procedure set out in section 75 of the Constitution.” It is therefore not clear whether the correct section 76 process is now being followed.

## **(2) Retrospective application**

- 16 Sections 6A, 7A and 8A of the CAB seeks to introduce new provisions pursuant to which, notwithstanding assignment of copyright, authors of literary, musical works and visual artistic works, and performers in audiovisual works, will be entitled to receive a fair share of the royalty received by the user of the aforementioned works. Furthermore, the CAB currently provides that these sections will apply to literary or musical works, as well as audiovisual works which were assigned *prior* to the commencement of this Amendment Act and are still being exploited for profit.
- 17 If promulgated, the Act will unilaterally alter the rights and negotiated terms of pre-existing commercial arrangements. Essentially, the CAB proposes that even if an author had sold their work and was paid for it, if that work is still used for profit after the CAB commences, then the previous owner will now be entitled to a share of the royalty received by the user of the work. This is analogous to saying that if a builder built a house, sold it and was paid for it, the builder must receive a percentage of the rental received by the current owner of the house.
- 18 Property rights, including incorporeal property rights such as copyright, are protected by section 25 of the Constitution. The proposed retrospective provisions which impinge upon the property rights of the current owners of copyright in literary,

musical, artistic and audio-visual works are likely to be found to constitute a substantial and arbitrary deprivation of property rights. Furthermore, in a number of instances, the current copyright owner would not have had any control over the remuneration paid to authors and performers for their work or performance, as the current copyright owner was not a party to those agreements. The NAB respectfully submits that these provisions may result in a significant dis-investment in the sector as there is no basis for imposing a debt on a party who has no connection to the original agreement between the author or performer and the first copyright owner.

19 The NAB, other stakeholders as well as the Honourable have also expressed serious concerns that the retrospectivity provisions will not pass Constitutional muster.

20 In November 2018 the Department of Justice (DOJ) furnished an opinion to the Portfolio Committee on the legal validity or Constitutionality of certain provisions of the Bill. (A copy of the DOJ's opinion is attached for the Committee's reference.) The DOJ concluded that –

*"The fact that authors who have before the enactment and commencement of the Bill made assignments of copyright, may now under certain circumstances share in royalties, in our view **amounts to substantial interference with the property use or enjoyment found in an open and democratic society and thus amount to deprivation.**"<sup>2</sup>*

21 The DOJ opinion continued:

*"The provision is designed to provide relief to authors who live in poverty as a result of not being fairly compensated. ..., it is not an easy task to confine the provision to provide relief only to authors who made assignments to their detriment and it opens the provision to all assignments. The provision further cannot distinguish*

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<sup>2</sup> Paragraph 26, page 17 of the DOJ opinion

*between the various scenarios that may result from the application of the provision as more research is required to determine the possible extent of the application of this provision. Instead the provision accordingly provides for general application. In our humble view **it is quite conceivable that there may be instances where the harm done by the law (deprivation) would not be balanced by the benefits that it is designed to achieve (providing relief to authors who live in poverty as a result of not being fairly compensated) and accordingly would not be reasonable and justifiable in an open and democratic society.***

*Furthermore, the uncertainty regarding a fair process to be followed in order to avoid deprivation being arbitrary could affect the constitutionality of the clause. There is no clarity on how far back the retrospectivity will apply; it is not clear how to deal with further assignments of work (i.e. where the work is now owned by a 3<sup>rd</sup> or 4<sup>th</sup> copyright owner) or where the copyright owner is a not for profit organisation; it is not clear how assignment by multiple authors to one copyright owner would work.."<sup>3</sup>*

22 This, the DOJ found, offended the principle of the rule of law.

23 The DOJ endorsed a proposal that had been made during deliberations that the DTIC be instructed "**to do the necessary research and impact assessments in this regard and then revert to the Committee with an Amendment Bill afresh**", to –

*"ensure that when relief is provided to exploited authors, all constitutional concerns have been considered and addressed. The proposed process can then also indicate how the target group will be reached. **It is recommended that the committee consider this approach in favour of a delegation to the Minister to establish a process by way of regulation.**"<sup>4</sup>*

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<sup>3</sup> Paragraph 32, page 20 of the DOJ Opinion

<sup>4</sup> Paragraph 32, page 21 of the DOJ Opinion



- 24 The retrospectivity provisions are unlikely to pass Constitutional muster. A legal challenge would delay the implantation of the CAB and delay the achievement of the benefit sought to be achieved, namely to provide relief to authors who live in poverty. While we appreciate the objectives sought to be achieved and their underlying sentiment, the retrospectivity provisions will in fact impede the achievement of these objectives.
- 25 We urge the Committee to delete the proposed new sections 6A(7), 7A(7) and 8A(5) of the CAB. Whilst the Committee has conceded to these provisions being removed, it is concerning that they have not been removed from the version which stakeholders have been requested to comment on.

***There will be a chilling effect on commissioned television productions***

- 26 There is no exclusion in section 8A for audiovisual works that have been commissioned and paid for by a third party. Previous drafts of the CAB contained this exemption, and the exemption still exists for artistic works which are commissioned. There is no obvious reason why films should be treated differently to artistic works in this regard.
- 27 The failure to exempt commissioned audiovisual works from the provisions of section 8A is likely to have a chilling effect on investment in the South African film and television industry, much of which happens in the various provinces of South Africa. These provinces compete with other countries to attract film-makers to make films in this country. The provisions of section 8A, as proposed, will serve as a deterrent to them doing so, thus warding off much needed foreign direct investment into this country, which in turn would have led to employment.
- 28 In addition, local production houses (film studios) and broadcasters invest substantial sums of money annually in the production of commissioned audiovisual works such as films and television series. They do so in circumstances where the

success of the audiovisual work cannot be guaranteed. In other words, firms that commission audiovisual works do so at their own risk.

- 29 The proposed section 8A allows performers to share in the rewards which that investor stands to gain from its investment, despite the fact that (i) the performers will already have been paid for their performances; and (ii) the performers take no commercial risk whatsoever insofar as the success or otherwise of the film is concerned. Indeed, the performers will be entitled to share in the royalties earned by the owner of the work even where the audio-visual work is loss-making commercially (thus compounding the losses and further disincentivising investment in local production).
- 30 Section 8A thus seriously undermines the incentive of any production house or broadcaster to invest in local productions. It is also likely to cause foreign film makers to make their films elsewhere. This is, ultimately, to the detriment of performers who depend on this investment for their livelihoods.
- 31 As a minimum, therefore, section 8A should have an exclusion for commissioned works in the same way that proposed section 7A has for artistic works.

***It will be difficult to comply with retrospectivity provisions with no time-limit***

- 32 As stated earlier in our submission, the proposed amendments to section 8A detrimentally affect the vested rights of copyright proprietors. The retrospectivity provisions are manifestly unconstitutional and subject to legal challenge.
- 33 As was raised in the DOJ's opinion, there is no time limit imposed in respect of the date on which the work was created – i.e. there is no cut-off for how far back the retrospectivity provisions go. Thus, the authors and performers of works created decades ago will be eligible to receive royalties from the future exploitation of that work and if the works are going to be used in future all past agreements will need to be renegotiated.

- 34 While there are undoubtedly examples of past one-sided agreements, the Copyright Bill presumes that all performers and authors have always been systematically underpaid. But there will surely have been some cases (possibly even the majority of cases) where authors and performers were fairly paid. It does not make sense therefore to impose a blanket obligation compelling a copyright owner to make further payments to the author and/or performer and to renegotiate all these agreements.
- 35 Due regard must be had to the relevant circumstances, including the amounts which the author and/or performer have already received and the success of the work. In many cases the copyright owner would have paid the performer less remuneration had it known that the performer would be entitled to share in the future profits of that audiovisual work (in addition to being remunerated).
- 36 In many instances, the current owner of copyright will have had no control over what the authors and performers were paid for their work or performance, because the current owner was not a party to that agreement. It is, as noted, intrinsically arbitrary to impose responsibility for payment of a debt (to the author / performer) on a copyright owner who has no connection with that debt and who had no control at all over the original agreement between the author or performer and first copyright owner.

***The registration and reporting obligations are unduly onerous***

- 37 As we understand it, proposed new section 8A(6)(a) of the CAB requires persons to register every audio-visual work that they reproduce, show in public, broadcast, communicate to the public by wire or wireless means, or distribute to the public.<sup>5</sup> Although it appears that the manner and form of the registration will be contained in the regulations not yet published, it is, in the first instance, unclear where and with whom persons should register their "acts". It is also unclear whether the registration

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<sup>5</sup> We have listed only the acts in s8 that traditional broadcasters would ordinarily carry out

should take place prior to the "acts" being carried out or whether registration after the fact is permitted. These points of clarification are important, in particular given that proposed section 8A(7) renders non-compliance an offence with sanctions that are draconian in the extreme.

38 More importantly, however, the provisions are unduly burdensome and onerous for broadcasters of audiovisual works and other firms that exploit audiovisual works for commercial gain (such as Netflix, YouTube, Amazon and the like); and the sanctions imposed for non-compliance with them are manifestly unreasonable.

39 We estimate that several millions of acts will need to be registered every month.

a. South African television broadcasters currently broadcast over 200 audiovisual channels on SABC, e.tv, DStv, M-Net, OpenView HD, StarSat and Community television services, which are mostly broadcast 24 hours per day, every day.

b. Each month, they broadcast scores of thousands of hours of audiovisual content (films, television series, documentaries, advertisements etc.), involving about a dozen audiovisual works per average broadcast hour (including advertisements).

c. Broadcasters will therefore be required to register more than a million "acts" (broadcasts of individual audiovisual works) every month. This task is so vast as to render the requirement to do so (on pain of severe punishment) clearly unreasonable.

d. This is over and above the extensive audiovisual works distributed online on Netflix, ShowMax, etc, with millions of views by users every month.<sup>6</sup>

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<sup>6</sup> Every one of these play events is, technically an "act" contemplated in s8 and may therefore have to be registered. At the very least every audiovisual work made available on the platform would have to be registered as being available

- e. In addition to these registrations are the separate registrations which will now apparently be required under the proposed new section 5(1A) of the Performer's Protection Act (PPA). We note that the registrations required under proposed section (1A) of the PPA will be in respect of the same broadcasts and audiovisual works but will require registration for every performance included in that audiovisual work. Assuming (very conservatively) that there are five performances per audiovisual work which is broadcast, then millions of registrations will be required under the proposed provisions of the PPA.
- f. It follows that, if these registration provisions are made law, the department or firm charged with administering the registrations will likely be receiving several million registrations every month from broadcasters and online film distributors.

40 The sheer volume of registrations which will be brought about by proposed section 8A(6)(a) does not seem to have been properly thought through by the drafters of the CAB. Broadcasters obviously cannot be expected to register every audiovisual work that forms part of their broadcasts; and in most instances will simply not be able to do so. It is unreasonable and irrational to expect them to do so. Broadcasters aside, the administrative burden on the Department of Trade, Industry and Competition (if that is the institution where registrations are to take place) is one which it is simply not equipped to handle.

41 The provisions of section 8A(6)(a) are also unnecessary because every performer that appears in a broadcast will have an agreement with the owner of copyright in the audiovisual work that will set out the royalties to which that performer is entitled. The performer can also call on the owner to provide a statement of account. We submit, for these reasons alone, that the proposed new section is so unduly burdensome that it will never pass constitutional muster. It is irrational and wholly unreasonable. There are, however, further difficulties.

- a. First, if it is contemplated that broadcasters should register their "acts" in advance of the "acts" occurring, and that the Department of Trade and Industry

should be required to consider those applications for registration in any detail, then one can anticipate that the registration process will come to a standstill, and with it, the broadcasters' business. That, needless to say, will have catastrophic consequences for those who the drafters wish to protect.

- b. Secondly, we note that if it is intended that registration of the "acts" can take place after the "acts" have taken place, then it is unclear what time period is permitted for these registrations. Importantly, we note that the non-registration of "acts" is a criminal offence. Clarity is therefore required as to the period within which registration is required.

- 42 Proposed section 8A(6)(b) requires that any person that executes an act contemplated in section 8 (including reproduction and broadcast of audiovisual works) for commercial purposes must submit a complete, true and accurate report to the performer (and others) in the prescribed manner for the purpose of calculating the royalties due and payable by that person.
- 43 The scope of the provision is not clear. However, if what the Portfolio Committee has in mind is that broadcasters must compile a report for every performer that appears on their television channels that they broadcast setting out how many times that performer's performances appear on those channels, then the provision is again unreasonable and irrational.
- 44 There will be approximately 50 different performances (including the performances of every person that acts in an audiovisual work and every actor or actress in an advertisement) in an average broadcast hour on DStv alone (5 performances per audiovisual work). Section 8A(6)(b) appears to contemplate that a separate report be sent to every performer whose performance is included in the broadcast. This means that broadcasters will have to generate millions of separate reports every month for every performer whose performances are broadcast on their channels. This is unreasonable. It is also unnecessary for the reasons we have already

explained – the performers should, if necessary, seek recourse against the firm with whom they have a contract in respect of that performance.

- 45 We note further that broadcasters have no control over the content of many of the channels that they broadcast. Again, for example, the SABC determines what content is included on its channels and has agreements with the production houses that produce the shows on its channels to do so. Those production houses have agreements with the performers. Broadcasters are therefore often unaware of the names of the actors that appear on the shows that they broadcast. It cannot therefore be incumbent upon M-Net and MultiChoice to submit a report to a performer with whom they have no contractual relationship whatsoever and whose identity is unknown. It is simply impossible for them to do so.
- 46 The reports are not limited to local performers. Aside from the difficulties associated with ascertaining contact details for non-local performers, it seems to us unlikely that the drafters of the Bill had in mind that international performers receive a report from South African broadcasters like the SABC, e.tv and M-Net detailing the fact that their performances were broadcast on their services in a particular month and that they are due a royalty from them. But this will be the effect of the provision. And, we note, that it will not be possible, without breaching South Africa's international obligations, to legislate that only local performers receive these reports. In any event, even if the provision was limited to local performers, the provisions are wholly irrational and unreasonable for the reasons given. To provide for criminal sanctions in respect of non-compliance in respect of international performers is of highly questionable validity from a jurisdictional point of view. In effect the proposed amendment seeks to extend the reach of our criminal justice system to encompass the protection of foreign nationals.

### ***The misplaced royalty provisions in the CAB will cause confusion***

- 47 The proposed section 8A of the CAB introduces provisions into the Copyright Act that will serve to allow a "*performer*" to share in any royalties received by the owner of copyright in an audiovisual work (which include television series and films).
- 48 It is unclear why *performer* protections are being conferred by way of amendments to the Copyright Act in circumstances where South Africa already has a "Performers Protection Act". The provisions of s8A are very difficult to reconcile with similar protections which are sought to be afforded to performers in terms of the proposed amendments to the Performers Protection Act. The obvious potential for contradiction and inconsistency which arises as a consequence of using two legislative instruments for a single legislative purpose is undesirable and will inevitably lead to difficulties that will involve performers in unnecessary and costly litigation.
- 49 The provisions of section 8A simply have no place in the Copyright Act. The attempt to afford very similar, and clearly overlapping, protections to performers in terms of both the Copyright Act and the Performers Protection Act is ill-conceived and will lead to untenable legal uncertainty. Indeed, it is entirely unclear what is meant by "subject to the Performers Protection Act" in section 8A(a).

### **(3) Excessive delegation of powers to the Minister**

- 50 We are concerned that the CAB substantially erodes all of the parties' flexibility to commercialise their rights, through rigid paternalistic legislation. Of particular concern is the cumulative effect of the CAB's proposals to –
- a. make it compulsory for certain agreements to be concluded in the prescribed manner and form;<sup>7</sup>

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<sup>7</sup> See for example clauses 5, 7 and 9 of the CAB inserting s6A, 7A and 8A of the Act



- b. make certain terms of certain agreements compulsory, by giving the Minister of Trade and Industry (the Minister) wide, vague and unfettered powers to prescribe compulsory and standard contractual terms to be included in agreements to be entered into in terms of the Act<sup>8</sup> and to prescribe royalty rates or tariffs for various forms of use;<sup>9</sup>
- c. dictate provisions that certain agreements must include;<sup>10</sup>
- d. prevent any person from choosing to renounce a right or protection offered by the Act (regardless of any benefit they may have enjoyed by doing so), by making any contractual term which purports to do so unenforceable;<sup>11</sup>
- e. erode existing vested rights by applying certain provisions retrospectively, including requiring the compulsory renegotiation of certain contracts.<sup>12</sup>

51 By way of analogy, if the principles of the CAB were to be applied in the construction industry, it would effectively provide for a single contract, with compulsory terms, whenever someone contracted with a builder to build them a house. The home owner would have to give the builder a share in any rental earned if he let the house. The Minister would dictate the contractual terms, and ownership of the house would vest in the builder, even if the owner paid the builder to build it. The owner would also have to let the builder reside in a room in his house if the owner was not using that room. Each of these rights would be given to every participant in the building process, including the architect, engineers, bricklayers, tilers, plumbers, electricians, plasterers, painters, etc., notwithstanding their role in the project. The legislation would be based on research done on low cost residential housing perhaps, but would be extrapolated to all forms of buildings. The Minister would be given unrestrained powers to determine the contractual terms, including how much each

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<sup>8</sup> Clause 33 of the CAB inserting s39(cG) of the Act

<sup>9</sup> Clause 33 of the CAB inserting s39(cI) of the Act

<sup>10</sup> See for example clauses 5 and 9 inserting s6A(4) and 8A(4)

<sup>11</sup> Clause 34 of the CAB inserting s39B of the Act

<sup>12</sup> See for example clauses 5 and 9 inserting s6A(5) and 8A(5)

role-player should be paid, but no guidance would be given to the Minister regarding the factors to be considered. And none of these people could waive any of these protections, even if they were paid for the work they had done. Clearly, no one would build a house on this basis. The same is true of investment in future television shows and films. The likely consequences of the legislation for all creators in the value chain, for investment and for the economy as a whole.

- 52 The Minister is effectively involved in writing contracts for the parties.
- 53 No guidance is given to the Minister regarding how to exercise these powers or the purpose to be achieved by their regulation.
- 54 The Constitutional Court has held that where the legislature grants functionaries broad discretionary powers, it must delineate how those powers are to be exercised. The legislature must therefore identify the guidelines for the exercise of the power in the relevant statute.<sup>13</sup>
- 55 The duty to provide guidance for the exercise of a discretion is located in the Bill of Rights.<sup>14</sup>
- 56 A delegation of legislative powers will only be considered lawful where a sufficiently rigorous framework has been established to direct the exercise of those powers. Where the legislature simply grants a wide unguided power to a functionary, it offends against the rule of law and the provisions are liable to be set aside.<sup>15</sup>
- 57 Without this guidance, there is a risk that the power may be exercised without due regard for the rights of autonomy, property and free trade that may be affected by the regulation.

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<sup>13</sup> *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) para 54

<sup>14</sup> "[T]he constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised." *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 25

<sup>15</sup> *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) para 70

- 58 It is no answer to this risk to contend that the Minister will only prescribe terms that adequately protect rights. The Constitutional Court has made it clear that it is impermissible for the legislature to leave the fine balance that is required for the protection of rights to the functionaries alone.<sup>16</sup>
- 59 In the circumstances, the powers proposed to be given to the Minister in various proposed amendments to the Act are excessively wide, vague and unfettered and are liable to be struck down as unconstitutional. They should, accordingly, be deleted from the CAB.

***Interference in the freedom of contract will reduce output***

- 60 Not only will the CAB's proposals give rise to legal challenges, but they are also impractical and unworkable, once again undermining the very people it is intended to protect. It is our respectful submission that the CAB rigidly and excessively interferes with the parties' freedom to conclude contractual arrangements appropriate for their business models and their sector. Insufficient consideration appears to have been given to the television production and broadcasting context.
- 61 A single production such as a film or series involves extensive role-players, including the production company, and individual writers, directors, actors (key and supporting roles, as well as extras), crew etc. A local drama will usually have a total staff of over 100 people, a writing team of 8 people (each making contributions of different magnitudes). It also has a cast of 16 to 18 lead performers (some taking lead roles, others only speaking one or two lines) and 60 extras. Behind every hour of content broadcast are multiple rights holders with whom agreement must be reached.
- 62 Broadcasters conclude thousands of agreements with authors of copyright works in a single year. In the case of an audio-visual work, the "author" is typically a production company (not usually an individual). The production company and

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<sup>16</sup> *Dawood* para 50

broadcaster engage in commercial negotiations regarding the production of a film or television programme. The production company, in turn, contracts with numerous role-players, including scriptwriters, crew, performers, etc. In many cases, given the collaborative nature of television productions, there are multiple authors and rights-holders in the different works which make up a single production. Across the productions, many individuals make varying levels of contribution.

- 63 In addition, each production is structured differently taking into account the respective roles of each of the collaborating parties and their contributions, including the funding and risk put up by each party.
- 64 Despite the immense complexity and nuances, the CAB seems to assume copyright in every audio-visual work is administered in the same way.
- 65 As a result, some of the provisions are unworkable in the television production and broadcasting context, and will have serious adverse consequences for investment in local film and television content. This would adversely impact on jobs, skills development and enterprise development.

**Summary: The CAB will dis-incentivise investment in television production**

- 66 The NAB understands what the CAB seeks to achieve, and the underlying reasons of its objectives.
- 67 However, we are concerned that, as the CAB stands currently, it will undermine the very objectives it seeks to achieve, especially within the television production and broadcasting sector.
- 68 Television production and broadcasting is a significant contributor to the South African economy and a major funder of creators. Finding ways to increase investment in this industry is therefore vital to the well-being of creators and the broader economy.

- 69 According to the most recent report<sup>17</sup> of the National Film and Video Foundation, the film and television production industry in South Africa contributed R4.4 billion to economic production in the country in the 2016/17 financial year. This direct contribution led to a total rise in economic production of approximately R12.2 billion. The net operational expenditure of the film industry in the four financial years analysed in the study amounted to R17.5 billion.
- 70 Broadcasters are the largest investors in the local production industry. Our entire business is premised on the creation and exploitation of copyright works, including literary works (e.g. scripts), musical works and/or sound recordings, cinematographic films, including audiovisual works (e.g. feature films, television programmes, documentaries, short films, home videos, animated films and cartoons, television commercials, etc).
- 71 Through investments in local content running into billions of Rands, public and commercial broadcasters generate thousands of hours of original South African content annually. This in turn, contributes to economic development, employment, skills development, trade and enterprise development, and broadened economic participation. These are the same objectives which the Bill seeks to achieve.
- 72 It is in the interests of all stakeholders in the entertainment industry that creators remain incentivised to fund the creation of original copyright works. This is also the main purpose of copyright legislation, which serves to incentivise the creation of works by granting exclusive rights in respect of those works to the creators. These rights may be exploited by the author of the work for financial reward.
- 73 Effective intellectual property legislation should strike a balance between the creators, on the one hand, and the commercial interests of those parties who invest in that creation (e.g. broadcasters, production companies and employers more

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<sup>17</sup> Economic Impact of the SA film Industry Report 2017, Urban Econ, commissioned by National Film and Video Foundation 2017.

generally) on the other hand. Investors rely on a balanced and predictable legislative framework to protect investments made. If there is no balance, then there will be no investment and no rewards will flow to the creators. We respectfully submit that the Bill has not achieved this balance.

74 The NAB remains committed to investing in the growth of a world-class, sustainable local production industry. However, this industry has unique requirements which must be taken into account. For example:

a. The freedom to contract among role-players in the content value-chain, without undue interference in commercial matters is especially important given the multiple parties which are involved in creating every piece of television content.

b. Adequate legislative protection against copyright infringement and piracy is crucial given the rampant piracy of audio-visual content which affects the ability of rights holders to get a return on their investment.

c. Finally, a framework which is sufficiently flexible to allow all role-players to operate is vital. Importantly in this regard, the film and television sector is currently seeing a marked change in the way in which audiences access audio-visual content, away from traditional broadcasters and toward online content providers. Copyright legislation must remain flexible to keep up and deal with these changes.

75 If legislation is not sufficiently mindful of these requirements for film and television, it would have the unintended consequence of reducing investment.

76 If the incentives or financial ability of broadcasters to invest in local content are reduced, there will likely be a reduction in either the quality or the quantity of local content. This will likely lead to job losses in the sector. Equally if copyright compliance increases the complexity and red tape of doing business, the administrative cost would reduce broadcasters' ability to invest in local production at the current levels of quantity and quality. A complex system of copyright

administration is not in anyone's interests. If investment lessens, the entire value-chain suffers, including local copyright creators, who are precisely the stakeholders the Bill aims primarily to assist.

## **CONCLUSION**

- 77 The concerns we have raised are not minor. To the contrary, the NAB submits that the CAB in its current form is fundamentally flawed. It should have been revised toward addressing the Constitutional and implementation concerns as already spelt out by stakeholders over the last few years. A revised and re-drafted version ought to be published for further input. Importantly, the correct process ought to be followed as prescribed in the Constitution.
- 78 In conclusion, the NAB thanks the Committee for the opportunity to make this written submission. We trust our submission will be considered and we look forward to further engagements on this process. The NAB requests an opportunity to make oral submissions should the opportunity arise.