

NAB
National Association of Broadcasters

**NAB SUBMISSION:
THE COPYRIGHT AMENDMENT BILL
AND
THE PERFORMERS' PROTECTION AMENDMENT BILL**



14 MARCH 2023





An introduction to the NAB

- A **voluntary association** formed in 1993, representing all three tiers of broadcasting (public, commercial and community), signal providers and industry associates
- The NAB is **funded by its members**
- The NAB is a **consensus driven** organisation
- The NAB established the **BCCSA** in 1993 (to administer a Code of Conduct for Broadcasters, provided for in S54 of ECA and recognised by ICASA)
- The NAB has been at the **forefront of representing the broadcasting industry on policy and regulation** since the introduction of the IBA (predecessor to ICASA)



NAB Members

Current members include;

- The three television services and 19 radio services of the **SABC**
- Licensed private/commercial radio broadcasters (includes **media groups: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika**, Kaya FM, Rise FM, Hot/Classic FM, Smile FM, YouFM and YFM)
- All licensed commercial television broadcasters (**e.tv, Multichoice, M-Net, Starsat/ODM**)
- Over 40 **community radio** broadcasters and one **community television** broadcaster
- Both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, **Sentech** and **Orbicom**, as well as **Globecast** and **Telemedia**
- **Associate** members including **ACM, MDDA, Nemisa** and **Arena Holdings**

NAB Members



NAB Members

702



DIS DIE EEN



StarSat



EastCoastRadio KZN'S NO.1 HIT MUSIC STATION



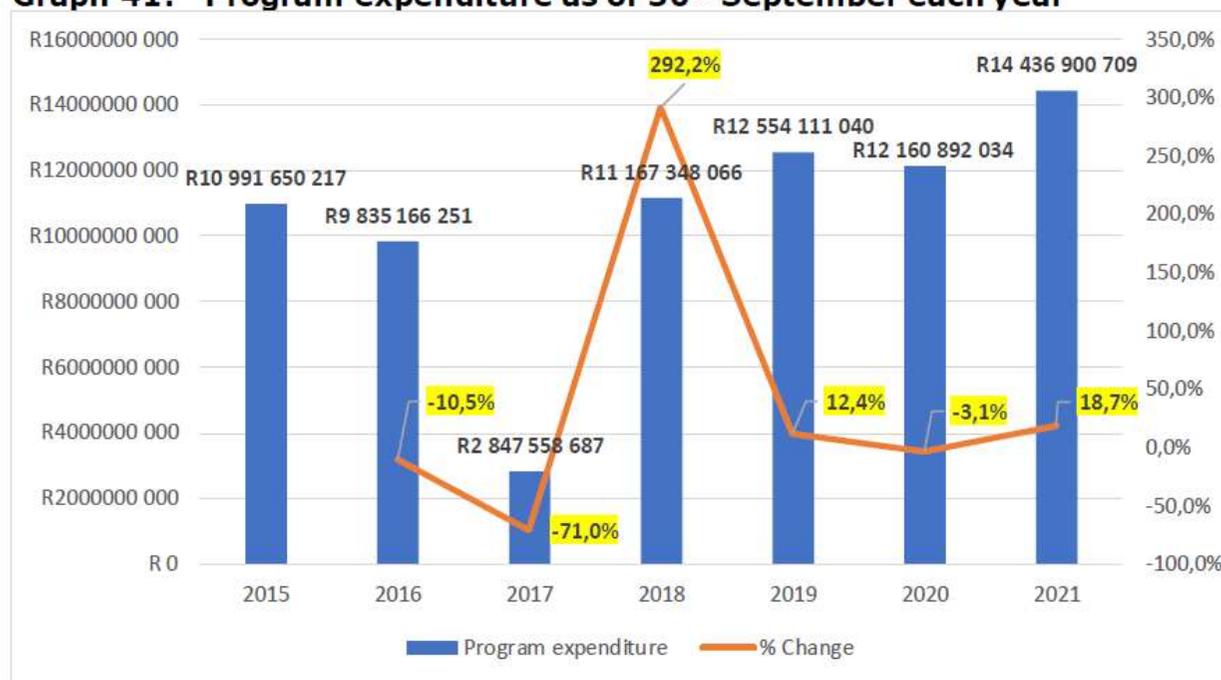
ICASA State of ICT Sector Report 2022: Investment in Content



- Broadcasters are **significant investors** in the creative industries and provide a distribution platform for content
- Broadcasters have a vested interest in a stable copyright legislative framework - **conducive to investment in the industry and South Africa**

Programme expenditure increased by 18.7% from R12.1 billion in 2020 to R14.4 billion in 2021. For a period of 7 years, it increased by 4.7%.

Graph 41: Program expenditure as of 30th September each year



Source: ICASA Broadcasters Questionnaire, December 2015- 2021

R14.4 billion

Programme expenditure for 2021

Introductory comments on the Bills



- The NAB has participated throughout the legislative review process and provided detailed written input at every stage
- Areas raised in NAB's previous submissions have not been addressed
 - Constitutional concerns - wide discretionary powers afforded to the Minister
 - Need for adequate consultation on implications for various sectors
- Many flaws in the CAB need to be addressed during this process
- The PPAB grants important protections to performers
 - The PPAB can be severed from CAB
 - Duplication in the CAB and PPAB should be removed
 - Focus should be on finalising the PPAB as a priority



The legislative process so far

- Implications of the Bills are enormous - require thorough, informed analysis
- Copyright legislation is specialist, technical legislation
 - Technical committee comprised of experts was previously appointed - should be reconstituted to provide support on the legislative review process
- Input from subject matter experts should be obtained
- A thorough socio-economic modelling exercise is needed to determine the financial and other implications of the Bills on various sectors, culture, and trade in provinces and government



CAB - definition of “broadcast”

Section 1 - “broadcast” amended to align with the definition in section the PPAB

- Aims to mitigate potential confusion, but both Bills inconsistent with ECA
- DCDT Draft White Paper on AAVCS will likely amend the definition in the ECA to include other services
- Definition will have consequences for licensing, regulation, payment of licence fees and use of radio frequency spectrum
- Definition must, in due course, be expanded to cater for new technologies and the entry of different types of content providers in the market but:
 - the proposed amendment in the Bills is vague and could create uncertainty for the creative sector.
- “Broadcast” is used throughout the Bills – impact on other sections is unclear and could lead to interpretation problems.
- Until the Draft White Paper process is finalised, the current definition of “broadcast” in the Copyright Act, 1978 should be retained



CAB - nature of copyright in works

Amendments to sections 6, 7, 8 and 9 of the CAB

- Provides for inclusion of communicating or making the work by “wire or wireless means” - Not defined in the CAB.
 - Memorandum on the Objects of the Copyright Amendment Bill refers to distribution of a sound recording “by wire or wireless means, including internet access”
- The lack of definition of the terms “wire” and “wireless” could lead to confusion and interpretation issues
- “Internet access” is not specifically referred to in these sections - could result in interpretational issues for the creative industries and the users of copyrighted works
 - especially concerning, given financial obligations



CAB - shares in royalties regarding audiovisual works

Section 8A - performers share in royalties received by the copyright owner

- The NAB supports increased protection of performers
- PPAB is more appropriate than CAB - duplication will cause confusion
- CAB provisions provide only one form of payment - royalties. PPAB provides greater flexibility and is aligned with Beijing Treaty - “royalties” and “equitable remuneration”
- Onerous registration and reporting requirements - multi-channel broadcasters have millions of performances that require registration and reporting - already addressed between parties on a contractual basis when the content is produced
- Onerous penalties for failing to register or omitting to submit a report are excessive and likely to have a stifling effect on the creative industries
- Given significant problems with section 8A, NAB recommends:
 - Removing section 8A of the CAB in its entirety – CAB will take too long to finalise
 - PPAB should deal with performer issues, rather than the CAB
 - This will allow performer issues to be addressed timeously, without further delays

CAB - ownership of commissioned works



Section 21(1)(c) – ownership in a copyright

- Previously: a party who commissioned a work owned the copyright in the work
- The proposed amendment: ownership of any copyright commissioned will be governed by written agreement between the parties
- Written agreements may limit the ownership of a copyright in a work so that the exclusive right to do or to authorise a work can be limited to the purpose of that commission
- Requiring agreements for commissioned works and limitations thereof could create confusion
- The NAB opposes the proposed amendment of section 21(1)(c) and recommends keeping current version of section 21 of the Copyright Act

CAB - Minister's power to make regulations



Section 39 - the Minister's power to make regulations

- The amendments provide the Minister with broad powers to prescribe:
 - compulsory and standard contractual agreements between parties; and
 - royalty rates
- The proposed amendments provide the Minister with powers that are overbroad, will interfere in the freedom to contract and will likely be found to be unconstitutional
 - The Minister will effectively be involved in the drafting of contracts for parties
- Parties are unlikely to enter into agreements if they are unable to independently negotiate contractual terms and / or royalty rates
- Negative implications for all creators in the value chain, as well as for investment and for the economy as a whole.
- Sections 39(cG) and (cI) should be removed - the powers are excessively wide, vague and unfettered and could be struck down as unconstitutional

CAB - unenforceable contractual terms



Section 39B - unenforceable contractual terms

- Any contractual terms would be unenforceable if such terms prevented or restricted any Act that does not infringe copyright, or renounces a right or protection afforded by this Act
- This section is overly broad and should either be removed in its entirety or reframed for clarity to ensure that there are no negative consequences for creators in the value chain



PPAB - definitions

Section 1 - definitions

- “broadcast” - until the Draft White Paper process has been finalised, the current definition of “broadcast” in the Performers’ Protection Act, 1967 should be retained
- “performer” and “producer” - these definitions are vague, and should be reframed to ensure that there is clarity for the creative industry
- Distinction between a performer and incidental participants (such as extras) must be made – only performers have statutory rights to royalties or equitable remuneration
- A broad definition could result in disputes in interpretation, resulting in legal debates in court – the legislation must expressly provide that guidance
- A proposed amended definition was included in the NAB submission to exclude extras, ancillary participants or incidental participants



PPAB - registration and reporting requirements

Section 5(1A) - registration and reporting requirements

- This section requires registration and reporting of performance for the purposes of calculating the royalties payable to the performer
- These obligations in this section are extremely onerous and are not practical
 - Multi-channel broadcasters have millions of performances to register and report
 - Already addressed between parties on a contractual basis at the production level
- Extremely burdensome requirements may have a stifling effect on creators in the value chain - could lead to a decrease in broadcast content, which may result in a significant decline in investment in the sector
- The NAB proposed amended wording in its submission, requiring annual usage reports to be made available within a reasonable time after a request from the performer, producer, copyright owner, the indigenous community or collecting society



PPAB - failure to register or report

Section 5(1B) failure to register or report

- Person can be convicted of a criminal offence or held liable for a fine of at least 10% of annual turnover for failing to register an act or submit a report
 - Penalties are excessive, registration and reporting duties are burdensome - this section could have a stifling effect on the creative industries
 - Undesirable to adopt a blanket approach without considering the nuances on a case-by-case basis
 - The amount of the fine should be proportionate to the severity of the act penalised with a maximum fine of R100,000
- The NAB proposed amended wording in its submission that determinations of fines should be deferred to the Copyright Tribunal, with each case assessed on its own merits

PPAB - Minister's powers to make regulations



Section 8D – the Minister's powers to make regulations

- The Minister is provided with powers to enact regulations prescribing compulsory and standard contractual terms for performer's agreements with a broadcaster, producer or user of a performance
 - Overly broad powers will restrict a party's freedom to contract and allows the Minister to prescribe the content of the compulsory and standard contractual terms
 - Parties will be unlikely to enter into agreements - cannot negotiate independent contractual terms: negative impact on creators in the value chain
- The proposed powers are excessively wide, vague and unfettered, and are liable to be struck down as unconstitutional
- The Minister's role should be to guide on specific items to be included in agreements. The NAB proposed amended wording in its submission that addresses these items, such as the rights and obligations of the parties, the royalties or equitable remuneration payable and the method of payment, dispute resolution mechanism, etc



Conclusion

- The concerns raised in this submission will have serious negative implications for all role-players in the value chain
- Certain portions of the CAB require significant consideration to address the concerns set out both in this submission and in previous submissions
 - The Honourable President remitted the Bills based on several of the reasons that have been reiterated by the NAB
 - It is crucial that the concerns be substantively addressed by the Select Committee
- The Select Committee is encouraged to:
 - consider a wholesale revision and re-drafting of the CAB; and
 - delink the PPAB from the CAB process to ensure clarity for members of the creative industry.
- The successful adoption of a viable CAB and PPAB is fundamentally important to broadcasters, and to the sustainability and success of the creative industry as a whole



Q&A and Closing





NAB
National Association of Broadcasters

www.nab.org.za

Email: info@nabsa.co.za

Twitter: [@NAB_SouthAfrica](https://twitter.com/NAB_SouthAfrica)