



NAB presentation to the Parliamentary Portfolio Committee on Communications on the Films and Publications Amendment Bill

B37-2015
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NAB Delegation

- Chairperson- Philly Moilwa
- Deputy Chairperson- Ms Lara Kantor
- TV Committee Chairperson- Kwezi Mtenganya
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NAB Mandate

The NAB is a non profit voluntary association that is funded solely by its members, established in 1993 to:

- Ensure a broadcasting system that provides choice and diversity for audiences
- Create a favourable climate for broadcasters to operate within
- Ensure a broadcasting industry grounded in the principles of democracy, diversity and freedom of expression
- Ensure that Broadcasters adhere to a Code of Conduct

Who is the NAB?

- The NAB represents all three tiers of broadcasting (public, community, commercial) as well as signal providers, industry professionals and associates;
- The NAB established the Broadcasting Complaints Commission of South Africa - **BCCSA**

NAB Members include:

- The three television services and 19 radio services of the **SABC**;
- Licensed commercial radio broadcasters (includes media groups: **Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Times Media LTD, as well as, Kaya FM, Classic FM, and YFM**);
- All licensed commercial television broadcasters (**e.tv, Multichoice, M-Net, ODM-StarSat**);
- A host of **community radio** broadcasters and a **community television** broadcaster;
- Both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, **Sentech** and **Orbicom**;
- Associate members include: **SADIBA, eAcademy, Association for Christian Media, Media Connection, Media Mark and Nemisa.**

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Introduction

- The NAB welcomes the opportunity to participate in these oral hearings
- This presentation will address key constitutional issues covered in the NAB's written submission
- The PPCC is therefore requested to read this presentation in conjunction with the NAB's written submission
- The NAB supports constitutional arguments made by its members

Scope of the Bill and Impact on Broadcasters

- The NAB supports the protection of children from harmful content
- The NAB supports the rapid policy and regulatory responses to technological advances
- The proposed amendments are however far reaching as they seek to extend the scope of the FPB to cover broadcasters' online content
- In the process the Bill introduces terms that are not defined
- The term “streaming” is not defined- The NAB encourages the PPCC to consider drafting suggestions already provided by other parties in formulating the definition
- The proposal to extend the ambit of the FPB is impractical and may yield undesired consequences

Constitutional Concerns- S192

- The provisions of s18(7), s18(9) & 18(9) of the Bill seek to:
 - Limit the exemption afforded broadcasting licensees by way of section 18(6) of the FP Act
 - instruct ICASA not to renew a broadcasting licence of a licensee who is not registered with the FPB
- In our view these provisions are *ultra vires*, and in violation of the provisions of the Constitution
- In terms of s192 of the Constitution, no other body is empowered to regulate broadcasting

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society

Constitutional Concerns- S192(2)

- To give effect to this provision, Parliament enacted the ICASA Act. One of the objects of the ICASA Act is:

to establish an independent authority which is to ... regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution

- S3(3) of the ICASA Act stipulates:

the Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice

- S18(7) of the Bill which instructs ICASA not to renew a licence of a broadcaster who streams content, is *ultra vires*

Constitutional Concerns- S192(3)

Consequently the NAB recommends:

- S18(8) and 18(9) be deleted from the Bill in their entirety as they encroach on the independence of ICASA
- The exemption afforded by s18(6) of the FP Act be modified to cater for broadcasters' online content that is already classified:

a broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall for purposes of broadcasting be exempted from the duty to apply for classification of a film or game and, shall in relation to a film or game not be subject to any classification or conditions made by the Board in relation to the film or game. The exemption in this section shall apply to all films and games which were previously, or are simultaneously, broadcast on a broadcasting service and distributed online by the broadcaster concerned.

Constitutional Concerns- S16

- S18(7) of the Bill proposes to remove the broadcasters' exemption afforded by s18(6) of the FP Act, and stipulates that the exemption shall not apply to a broadcaster who streams content through the internet

- S16 of the Constitution seeks to protect the freedom of expression:

Everyone has the right to freedom of expression, which includes

Freedom of the press and other media

Freedom to receive and impart information or ideas....

- Furthermore, s53(2) of the EC Act protects editorial independence:

Nothing in this Act may be construed as requiring or authorising the Authority or the Complaints and Compliance Committee, in the performance of its functions, to view programmes prior to their being broadcast.

Constitutional Concerns- S16(2)

- Case law has made pronouncements on FP Act provisions which were found to violate the freedom of expression
- The Constitutional Court held that the regime of prior classification introduced by s16 of the FP Act limited the right to freedom of expression

PMSA v Minister of Home Affairs and ano. 2012(12)BCLR 1346(CC)

- It is therefore our view that s18(7) of the Bill is in violation of the citizenry's right to freedom of expression and amounts to pre-classification
- The NAB therefore proposes that s18(7) be deleted from the Bill

Foreign Classifications

- The NAB supports the provisions of s18D which recognises the accreditation of foreign classification systems
- However the Bill does not provide any guidance on the conditions for approval of a foreign classification system
- The NAB proposes that the board must prescribe regulations regarding the applicable conditions, to ensure uniformity and consistency in application for accreditation
- Such regulations must also empower the Board to approve foreign classification systems on a reciprocal basis - i.e. only if the corresponding classification authority/body recognises and approves the reciprocal use of the FPB Classification Guidelines

FPB Online Content Policy Regulations

- The FPB published an Online Content Policy Regulation for public comment in March 2015
- The NAB participated in the public consultation process initiated by the FPB
- The NAB is hopeful that the Online Content Policy Regulations will be held in abeyance until the primary Bill has been passed into law

Conclusions and Recommendations

- The NAB supports the protection of children from harmful content
- Provisions of the Bill that are *ultra-vires* the Constitution must be deleted in their entirety from the Bill
- The exemption afforded broadcasters by way of s18(6) of the FP Act be extend to broadcasters' online content that has already been classified
- The NAB once again thanks the PPCC for the opportunity to participate in the oral hearings
- We wish the PPCC well in its future deliberations



THANK YOU

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