



**THE NAB RESPONSE TO  
ICASA'S DISCUSSION DOCUMENT ON THE COMMISSIONING OF INDEPENDENTLY  
PRODUCED SOUTH AFRICAN PROGRAMMING  
PUBLISHED IN TERMS OF SECTION 61(1) OF THE ELECTRONIC  
COMMUNICATIONS ACT 36 OF 2005 DUE FOR SUBMISSION ON  
28 JANUARY 2009**

## **1. INTRODUCTION**

- 1.1 On 7 November 2008, in government gazette 31580, Notice 1388 of 2008 (the Notice), the Authority published in terms of section 61(1) of the Electronic Communications Act 36 of 2005, a notice of its intention to make regulations for Commissioning of independently produced South African Programming (the Regulations).
- 1.2 In the said notice, the Authority has published a discussion document on the Commissioning of Independently Produced South African Programming (the discussion document), the findings of which the Authority will utilize in drafting the regulations. The NAB welcomes the opportunity to respond to the discussion document, and hope the findings of the discussion document will assist in the formulation of the regulations to be drafted.
- 1.3 The NAB is the leading representative of South Africa's Broadcasting Industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes:
- Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa ("the SABC");
  - All the commercial television and sound broadcasting licensees;
  - Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;
  - Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, Trinity Broadcasting Network (TBN)

## **2. BACKGROUND OF THE LEGISLATIVE LANDSCAPE**

### **2.1 INDEPENDENT BROADCASTING ACT**

- 2.1.1 Prior to the coming into effect of the EC Act, the former legislative regime in South Africa did not recognise the need for the Authority to regulate the commissioning of independently produced SA programming. Section 53 of the Independent Broadcasting Act (the IBA) only went as far as directing the Authority to impose and specify conditions regarding local television content and independent

television production in the television broadcasting service licences, without making any reference to the regulation of the commissioning procedures for independently produced SA programming.

2.1.2 In terms of Regulation 7 of the ICASA South African Television Content Regulations published in 2006, *“public, commercial and subscription television broadcasting licencees are to ensure that their terms of trade and commissioning procedures are, inter alia fair, transparent, and non discriminatory.”*

2.1.3 It would seem from the spirit of the law that it was not the intention of the legislature, nor the intention of the Regulator to exercise control over the commissioning of independently produced SA content. The legislature was cognizant of the fact that commissioning procedures are commercial matters and needed to be handled by the broadcasting licencees individually.

### **3. THE EC ACT**

3.1 The coming into effect of the EC Act on 19 July 2006 introduced a paradigm shift in as far as the commissioning of independently produced South African programming is concerned. As opposed to a light touch approach the IBA adopted, regarding the commissioning of independently produced SA programming, the EC Act provides the Authority with a discretionary power to regulate the same. Section 61(1) of the EC Act provides:

*“the Authority **may** prescribe regulations applicable to broadcasting service licencees regarding the commissioning of independently produced South African programming”*

3.2 Needless to say, the use of the term *“may”* in the provisions of section 61(1) of the EC Act denote that it is not mandatory on the Authority to prescribe the said regulations, but rather the Authority is given discretionary powers, on whether to prescribe such regulations or not. In exercising its discretion, it is imperative for ICASA to establish whether there is a need for the regulation of the commissioning of independently produces SA content, and consider the options available to it in carrying out the discretionary mandate. Section 61(1) must also be interpreted in line with the objects of the EC Act, in particular section 2(y) which requires the

Authority to refrain from undue interference in the commercial activities of a licensee.

- 3.3 ICASA is a statutory body, deriving its mandate from the ICASA Act and the EC Act. For all intents and purposes, ICASA is mandated to regulate broadcasting in the public interest. In terms of the objects of the EC Act, the EC Act *inter alia* aims to promote the development of public commercial and community broadcasting services which are responsive to the needs of the public. Neither do the objects of the EC Act, nor the provisions of the ICASA Act provide for ICASA to regulate the independent production sector. In its attempt to comply with the provisions of section 61(1) of the EC Act, the Authority should not lose sight of its statutory obligations towards broadcasting, and attempt to regulate outside of its jurisdiction.
- 3.4 The provisions of section 61(1) of the EC Act introduce a whole new playing field, on which the Authority has never played. As such the NAB welcomes the consultative process the Authority has adopted in introducing a discussion document on the commissioning procedures of independently produced SA programming. The introduction of regulations and procedures for the commissioning of independently produced SA content does not only amount to breaking new ground for the broadcasting industry, but also has the potential of negatively impacting on both the independent production sector and the broadcasting industry if not carried out properly from the onset.
- 3.5 In dealing with the questions asked in the discussion document, the NAB will deal with the questions according to themes which will be outlined in the subsequent sections of the submission.

#### **4. REGULATION VERSUS OVER REGULATION**

- 4.1 ICASA has played a crucial role in carrying out its mandate by *inter alia* creating a level playing field, creating stability, encouraging competition and growth in the broadcasting industry through regulation. The Authority continues to play a crucial role in ushering South Africa into the era of digital broadcasting. Digital broadcasting in South Africa, as in most jurisdictions, presents enormous

opportunities for the independent production sector, and the broadcasting industry as a whole. Among the opportunities presented by digital migration is that there will be more channels as a result of the freed-up spectrum, there will therefore be a need for more diverse content delivered to the South African public.<sup>1</sup> As a result of the need for locally produced content in the digital domain, both the broadcasting and the independent production sector are faced with challenges.

- 4.2 In order to ensure continued viability and development in the broadcasting sector, the Authority should avoid imposing stringent regulation on the broadcasting licencees and the independent production sector.
- 4.3 When over imposed, on industry, regulations have the potential of causing more damage than good to the industry. As such in prescribing regulations, as provided by section 61(1) of the EC Act, the Authority should aim to provide and maintain an appropriate regulatory environment to foster market-led growth rather than seek to stifle growth. The Authority should be limited only to promoting fairness, transparency and non-discrimination in the manner in which broadcasting licencees commission independently produced SA programming, leaving room for the parties to negotiate suitable commercial terms of the commissioning agreements.
- 4.4 By over-regulating commissioning procedures for SA programming, the Authority runs the risks of:
- Regulating on issues that are catered for in other legislations. In particular, the Authority is referred to the fact that Intellectual Property issues do not fall under ICASA 's domain, and are adequately regulated in terms of the Copyright Act 98 of 1978 (the CR Act);
  - The commissioning relationship between broadcasting licencees and independent producers is of a commercial nature, and ICASA should not be seen or attempt to interfere in these activities.

4.5 Consequently, the NAB proposes that:

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<sup>1</sup> Department of Communications: Broadcasting Digital Migration Policy, at page 4

- Television broadcasting licencees currently have in-house independent production commissioning policies and procedures. The NAB therefore proposes that the Authority should satisfy itself that the in-house independent production commissioning policies adopted by individual broadcasters are adequate, transparent, and non discriminatory. The Authority should then monitor the compliance of these policies, and entertain disputes that may arise as a result of the breach of same.
- Alternatively, should the Authority view section 61(1) as imposing an obligation to publish some regulations of some sort, then the Authority should publish guidelines and codes of good practice, and not mandatory regulations. These codes will provide a yardstick and not create strict rules which will hamper smooth relations between the parties involved. The code will have statutory force and its compliance will be ensured by the Authority.

## **5. RIGHTS**

5.1 According to OH Dean,<sup>2</sup> copyright is defined as”

*“the exclusive right in relation to work embodying intellectual content (ie the product of the intellect) to do or authorize others to do certain acts in relation to that work which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit”*

5.2 In other words, a copyright is the right of the owner of work, to do certain acts and restrain others from doing certain acts.

5.3 As already articulated, intellectual property matters are regulated by the CR Act, and this is amplified by the object of the CR Act which is to regulate copyright and to provide for matters incidental thereto. By purporting to regulate IP related issues, ICASA would be creating a duplication of duties, and acting *ultra vires* its statutory mandate as IP issues do not fall under the domain of ICASA. ICASA's involvement in intellectual property will create confusion in the broadcasting industry, and will result in forum shopping on the part of the industry.

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<sup>2</sup> OH Dean 1987, Handbook on South African Copyright Law, Juta

5.4 Indeed, looking into international best practice is an appropriate and effective way of benchmarking with other jurisdictions, however, international best practice should not be looked into in isolation, but should rather be looked at in conjunction with the empowering legislation in the concerned jurisdictions. ICASA should be aware that as a result of the different legislative regimes, it may not be possible to entirely transpose the practices of other jurisdiction into the South African context in as far as IP is concerned.

5.5 Unlike in the Canadian example the Authority has cited in the discussion document, the CR Act does not provide a definition for producer<sup>3</sup>, however the Act defines an author *“in respect of a cinematograph film as a person by whom the arrangements for the making of the film were made”*.

5.6 Generally speaking, in terms of the law, the author is the owner of the work, however Section 21(1)( c) of the CR Act provides an exception to this general rule. In terms of the provision,

*“Where a person commissions ...the making of a cinematograph film...and pays or agrees to pay for it in money or money’s worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein....”*

5.7 The CR Act vests rights on the person who commissions and finances the making of a film.

## **6. PROGRAMME PRICING**

6.1 The object of the EC Act is to *inter alia* refrain from undue interference in the commercial activities of licencees<sup>4</sup>. As such, when prescribing the regulations, the Authority should avoid interfering in issues of commercial nature. The Authority should only set the bare minimum guidelines, and leave the negotiation aspect to the parties concerned.

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<sup>3</sup> Page 18 of the Discussion Document

<sup>4</sup> Section 2(y) of the EC Act

6.2 Interference by the authority on the commercial activities around the commissioning procedures and processes will not only jeopardize the relationship between the broadcasting industry and the independent production sector, but will also affect the financial viability of broadcasting licencees. It is a known fact that the cost of commissioning locally produced programming far outweighs purchasing international content. The insistence of a high percentage local content requirement together with the need to commission independently produced SA programming will have a drastic adverse effect on broadcasters especially the community broadcasting licencees.

## **7. DISPUTE RESOLUTION**

7.1 The ICASA Act establishes a Complaints and Compliance Committee (CCC), a body mandated to hear and resolve disputes arising out of allegations of non-compliance of the ICASA Act and the EC Act. Therefore any disputes arising out of non-compliance of the EC Act, and the ICASA Act fall under the jurisdiction of ICASA and should be referred to ICASA.

7.2 Similarly, the CR Act establishes its own dispute resolution mechanisms. The Act outlines what constitutes infringements of copyright, and stipulates applicable remedies<sup>5</sup>. The CR Act further recognises the establishment of the Copyright tribunal.<sup>6</sup> Therefore, in order to avoid forum shopping by the parties, it is imperative that conflicts relating to IP rights should be handled under the CR Act.

7.3 The NAB is therefore of the view that there should be a clear-cut distinction between the roles of ICASA vis-à-vis the role of the Department of Trade and Industry (the DTI) concerning IP. The Authority's role should be restricted to matters falling under its statutory mandate, and not involve itself with regulating IP as it falls outside of its statutory mandate.

7.4 It is also important to note that in any event section 61(1) of the EC Act does not provide the Authority or the CCC with the power to resolve any commercial disputes which arise from a commissioning agreement between a broadcasting

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<sup>5</sup> Chapter 2 of the CR Act

<sup>6</sup> Chapter 3 of the CR Act



service licensee and an independent producer. In areas where the legislature intended the Authority to engage in dispute resolution it made express provision for this, no such express provision is made here. Any involvement by the Authority or CCC would be limited to complaints against a broadcasting service licensee of non-compliance with the regulations, if any, made in terms of section 61(1) of the EC Act.

## **8. CONCLUSION**

8.1 In summary, and as a way forward, the NAB has the following recommendations to make to the Authority:

8.1.1 Before the authority decides to exercise its discretion to publish regulations in terms of section 61(1) of the EC Act, the Authority should consider all options available to it. The NAB recommends that the Authority should adopt the existing independent commissioning policies individual broadcasting licencees have devised, as these have proved to be workable in the past. However should the Authority feel compelled to publish some regulations, the NAB is of the view that this should be done by way of publishing a code of good practice, setting out bare minimum requirements.

8.1.2 In setting out the bare minimum requirements for the commissioning of independently produced SA programming, the Authority should not unduly interfere in the commercial activities of licencees, by being prescriptive on terms of agreements between the parties,

8.1.3 The Authority should stay within its jurisdiction and not exceed its statutory mandate and seek to regulate on issues of IP, as these are best dealt with by the DTI through the Companies Intellectual Property Registry Office (CIPRO).

8.1.4 In order to alleviate confusion on the part of the industry, the roles of ICASA as opposed to those of the DTI must be clearly defined.

- 8.2 The NAB would like to thank the Authority for giving it an opportunity to express its views on the discussion document on Commissioning of Independently Produced South African Programming.
- 8.3 The NAB trusts that the inputs set out in its submission will be given due consideration by ICASA in drafting the draft regulations for Commissioning of Independently Produced South African Programming.
- 8.4 The NAB is forever available and committed to participating in consultative processes set by ICASA.