



**SUBMISSION BY THE NATIONAL ASSOCIATION OF
BROADCASTERS IN RESPONSE TO THE NOTICE IN
RESPECT OF THE DRAFT LOCAL AND DIGITAL
CONTENT STRATEGY**

20 October 2009

1 INTRODUCTION

- 1.1 The National Association of Broadcasters (NAB) thanks the Department of Communications (the Department) for the opportunity to make written submissions to the Department on the draft Local and Digital Content Strategy (the Strategy) published in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (EC Act) on 4 September 2009.¹
- 1.2 The NAB wishes to place on record that it would like to be given the opportunity to make oral representations should the Department deem it fit to hold oral representations with regards to the Notice.
- 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");
 - Commercial television and sound broadcasting licensees;
 - Both the licenced Electronic Communications network Operators, namely Sentech and Orbicom;
 - Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, Trinity Broadcasting Network (TBN)
- 1.4 As NAB's response is focused on serving the interests of its membership, it has not addressed all of the issues raised by the Strategy but has focused in this submission mainly on those issues which pertain to broadcasting services.

¹ Notice 987 of 2008 published in Government Gazette No 31333 dated 15 August 2008.

2 NAB SUPPORT

- 2.1 The NAB in principle supports the objective of the strategy in so far as it seeks to develop local and digital content. However, from the NAB point of view, there are various sections of the strategy that require some attention, before the strategy is finalised. In the following sections of the submission, the NAB will outline these sections.

3 SCOPE, DEFINITIONS AND STRUCTURE

- 3.1 The scope of the Strategy is very unclear as it begins by suggesting that it is in response to the opportunity presented by the broadcasting migration from analogue to digital transmission technologies and the multi-channel broadcasting environment that will result, but then shifts to discussing content that is clearly not broadcasting programme content -- such as ringtones, games, and museum repositories.
- 3.2 The scope is made even more vague by the fact that the definitions provided in the Glossary clearly indicate that when the terms “content”, “digital content” and “local content” are used in the Strategy they refer to any text, still images, audio-visual content that are capable of being stored, manipulated, retrieved or communicated electronically or being transmitted over electronic platforms. By implication all content whether it is supplied by means of the internet, mobile platforms, or broadcasting platforms (terrestrial, cable satellite) falls within the scope of this content strategy.
- 3.3 The result of this over-broad scope and definitions is that it is never precisely clear when problems are identified or solutions are presented to which sector it is intended to apply – is it the internet, the mobile applications environment or the broadcasting environment? This lack of detail also results in the Strategy appearing to be stepping into the jurisdiction of other government departments such as the Department of Trade and Industry, the Department of Arts and Culture (the DAC) and

other statutory bodies such as the Film and Publications Board (the FPB) which do not fall within the control of the Department.

- 3.4 The NAB would highly recommend that the Strategy be divided into clear sections that deal with digital content which is supplied only to market sectors that fall within the ambit of the Department of Communications.
- 3.5 The Strategy should deal with “traditional” content markets which continue to exist despite the re-alignment of some market structures post technical (digital availability of audio-visual content across platforms) and economic convergence (horizontal integration of some entertainment companies leveraging their IP assets across different media). The Strategy then needs to address the tendency for different content formats such as audio, video, text, images to reach the public via a range of different digital networks including internet, mobile cellular infrastructure, satellite, digital terrestrial and so forth and the resulting change in the supply and consumption of that content. The markets that result from this are often called converging markets, but it is probably more correct to talk about “old” and “new” media since the traditional content markets continue to exist and have not been replaced by the new content markets that have opened up as a result of the digitisation of content and growth of digital networks.
- 3.6 In view of the above, the NAB would highly recommend that the Strategy deals separately with local content intended for regulated markets such as sound and television broadcasting. The Strategy can then in another section focus on new media markets created by digital downloads and online streaming such as the market for digital audio, the market for digital video, and the market for user-generated content.
- 3.7 The NAB would also propose that the Department should take into consideration that content creation is only one part of the content value chain and that the objectives set out for the Strategy can only be achieved if the content that is created is fit for purpose and worthy of

investment otherwise it will never be distributed to the public and represent wasteful and fruitless expenditure of government funds. The content value chain in the electronic communications sector remains the same whether one speaks of old or new media, the content value chain spans content creation, content aggregation, content distribution, receiving devices, navigation and consumption by the consumers.

4 COMMISSIONING

- 4.1 The strategy makes states that commissioning has constrained the growth of the industry in a number of ways². However, the strategy does not provide any factual or statistical backing of the assertion. It is important to note that a policy of this nature, proposing major strategic interventions must be based on some factual analysis.
- 4.2 The NAB would like to humbly state that over the years, both independent producers and broadcasting licencees have benefited from the commissioning of independently produced local content. Commissioning local content does not only assist broadcasting licencees meet their legislated local content quotas, but it also assists in the promotion and exposure of the local producers themselves.
- 4.3 Both the broadcasting and independent production sector depend on each other for survival, in terms of promoting the public interest of providing relevant local programming. It is worth pointing out that the independent production sector has realised a growth from 20 companies in 2004 to 408 in 2009.³
- 4.4 Instead of writing off commissioning altogether, the Department should rather consider additional avenues that will augment the commissioning practices that are already in place, and also focus on strengthening relations between the two sectors. This will indeed assist with the generation of the much needed digital local content.

² Notice number 1218 published in government gazette 32553 dated 4 September 2009, page 5

³ SABC written submission on the Commissioning of Independently Produced SA Programming 28 January 2009

4.5 In order to substantiate this view, the NAB sought some inputs from its free-to-air broadcasting service members, namely the SABC and etv, to provide information on its commissioning practices, in order to illustrate to the Department that commissioning of independent producers does add significantly to the industry.

4.6 **ETV**

4.6.1 E.tv commissions numerous productions from the independent production industry each year and has done this consistently since it was licenced to broadcast, thereby providing a significant source of revenue to the local production industry.

4.6.2 E.tv's invitations are open to producers country wide, and below is a breakdown of proposals e.tv received from independent producers from as far back as 2000:

- 87% of programming proposals from Gauteng and CT
- 5.3% unspecified
- 7.7% from outside Gauteng & CT

4.6.3 The number of unsolicited proposals received by etv during the period 2002 and 2003 is 132, while in 2008, unsolicited proposals received were 457.

4.7 **SABC**

4.7.1 The SABC sources all of its local content from the independent producers except for sports and re-versioning. Between 2006 and 2007, the SABC received 937 proposals from solicited briefs.

4.7.2 In addition to proposals received per brief, the SABC received over 550 unsolicited briefs from producers.

- 4.7.3 Apart from commissioning local content from independent producers, the SABC runs the Sediba Programme, which provides Master Class training for commissioning editors, script writers, directors and producers on commissioned SABC programmes.
- 4.7.4 By providing this information, the NAB is attempting to demonstrate that there is a basis from which the strategy can start in terms of outlining other avenues of digital local content, without totally doing away with commissioning.
- 4.8 Furthermore, the Department sees the need for South Africa to shift from a commissioning driven approach⁴. In the same vein, the Department does not provide alternative approaches to follow.
- 4.9 The NAB wishes to point out that commissioning is a normal practice in any broadcasting industry, the Strategy appears to be operating under a misapprehension that the practice of commissioning in the broadcasting sector only occurs in a prescriptive manner which stifles creativity. This is most definitely not the case. Commissioning can actually occur in three ways. Firstly through the receipt of unsolicited proposals, secondly solicited briefs and thirdly a specific commission. It should be kept in mind that commissioning is only used for independent productions; broadcasters can also produce content for themselves. However, in terms of regulations issued by the Independent Communications Authority of South Africa (ICASA), television broadcasters are required to have at least 40% of local content be from independent producers. ICASA, therefore, through South African content regulation has an indirect impact on the creation of local content.
- 4.10 There is also a concern that producers do not retain copyright or ownership of the content which they produce in the broadcasting sector. This view does not appear to take into consideration that producing content for television is a capital and labour intensive process. It is also

⁴ Ibid at page 6

very high risk, in that it requires a huge investment, but little or no guarantee of return. Commercial agreements therefore have to seek to strike a balance between the parties who finance the production and take all the risk and the parties who produce. Broadcasters do share copyright with producers where the financial risk has been shared through co-productions and where content is developed in terms of licences held by producers the copyright vests with the producer not the broadcaster.

- 4.11 Intellectual property is a natural outcome of market forces and this is why section 21(1)(c) of the Copyright Act provides that the person who commissions and pays for the making of the film is the owner of the copyright in the film. As intellectual property and copyright fall under the ambit of the Department of Trade and Industry (the DTI), the NAB would recommend that issues raised in the Content Strategy in relation to this should be phrased as recommendations to the DTI rather than final policy statements in the Strategy.

5 DIGITAL CONTENT FUND

- 5.1 The NAB supports any government initiatives aimed at providing assistance and/or funding sound and television content production. However, there are already a number of government initiatives that support the production of film and television productions and it is not clear how the Digital Content Fund would differentiate itself from them. There is the Film and Television and Co-Production Incentive, which was launched in 2008 by the DTI, there is also the National Film and Video Foundation (NFVF) which is a statutory body that spearheads the equitable growth and development of the South African film and video industry, there is the Industrial Development Corporation of South Africa (IDC) which funds motion pictures or films through direct investment into the project.
- 5.2 The NAB is also concerned that the funding of this body would place yet another regulatory financial burden on broadcasters who already pay

annual licence fees, music royalties, contributions to the Universal Service and Access Fund (USAAF) and contributions to the Media Development and Diversity Agency (MDDA).

- 5.3 In addition, with the advent of digital migration, broadcasting service licencees are going to carry out enormous investments to make this a success. In addition to broadcasting in double illumination, broadcasting service licencees will be required to provide attractive digital content for the new digital channels, and this is highly capital intensive. It is worth pointing out that during this time, there will not be any rise in the broadcasting service licencees' revenue streams but rather a decline as there would be more broadcasting services competing for the unchanged revenue.
- 5.4 It appears that the Department has misinterpreted section 61(3)(a) of the EC Act. The Act only provides for ICASA to direct a broadcasting service licensee to spend this sum on local television content, not for ICASA to require the payment of such funds to another third party for distribution to producers.

6 CONTENT GENERATING HUBS

- 6.1 It is important to remember that content should not be generated for the sake of generating content. It must be for the purpose of meeting a need or to satisfy a demand otherwise it ends up like a huge shopping mall built in a small town where there is no sustainable market for the shopping mall, in other words deserted and unused.
- 6.2 The main reason there being no independent producers currently based in rural areas for television is because there are no television broadcasters in rural areas. Producers naturally tend to congregate around the broadcaster that they supply with content. One can incentivise that productions be filmed in out-of-metro areas through rebates, and various incentives, but until there are community television stations or regional television channels creating a demand in those

areas or infrastructure that supports production there, it is not sustainable. These content generating hubs may be more successful in those areas if they target new media content.

7 CONTENT OF NATIONAL INTEREST

- 7.1 The NAB would caution how the Department approaches this issue, as if it is mishandled it could have a negative impact on various government initiatives that focused on attracting international film production and foreign investment in film co-productions in South Africa.
- 7.2 The NAB is also concerned that there is no definition of what would constitute content of national interest and that the concept of prohibition of acquiring such rights as articulated in the Strategy may undermine the principle of private ownership and property rights as captured in the South African Bill of Rights. Consequently, the NAB would highly recommend that the Department consult further on this issue and consider taking legal advice on the legal implications of such steps.

8 REGULATING DIGITAL CONTENT

- 8.1 The EC Act does not govern the production of local and digital content, nor is ICASA the body responsible for the production of content in South Africa. However, the EC Act states that the Authority may by way of licence conditions, prescribe local content and independent production obligations of a broadcasting service licensee⁵. As such it is inappropriate for the strategy to reference the objectives of the EC Act when discussing content creation as has been done in para 2.1.1 of the strategy or seek to place ICASA as the central point for co-ordination of content regulation and activities aimed at developing the local content production industry. This role is vested with the DTI and the DAC.
- 8.2 In our opening remarks on the Strategy we indicated that the content value chain spanned content creation, content aggregation, content

⁵ Section 61(3) of the EC Act.

distribution, receiving devices, navigation and consumption by consumers. The EC Act objectives clearly show that its focus is on regulating and licensing those elements of the value chain that deal with provision of electronic communications to the public, sections of the public or subscribers, in other words it deals with the content aggregation and content distribution elements of the content value chain only. The impact on content creation is an indirect impact which results from licensing broadcasting services and electronic communication services, licensing the provision of electronic communications networks and, only in the case of broadcasting, setting expenditure requirements, quotas and independent production requirements for South African television and music content on broadcasting service licensees. ICASA has no jurisdiction at all over content supplied by electronic communication services.

- 8.3 The NAB supports the primary purpose of the Strategy, which is to encourage the development of local and digital content in South Africa. However, the NAB submits that the role contemplated for ICASA extends far beyond the statutory mandate of ICASA as set out in the EC Act and the ICASA Act, which is not to promote the growth and sustainability of the independent production sector across the country. This in the view of NAB has in the past primarily been the responsibility of the DTI and the DAC and not ICASA.
- 8.4 Furthermore, the strategy makes mention of the fact that the emergence of self-regulatory bodies such as the BCCSA, ASA and the FPB are a consequence of the fact that “the Authority does not have capacity and expertise to deal with these new responsibilities”.
- 8.5 It is worth pointing out that all these bodies have been established through legislation, and are recognised as self-regulatory bodies, independent from ICASA or any government department, hence the assertion that these bodies have been established to alleviate the regulatory burden from the Authority is unfounded.

8.6 The strategy makes a valid proposal for the establishment of a Content Regulatory Coordination Board (the board), and the NAB supports this notion. The NAB is however of the view that the board must be chaired by the Department where other government departments, regulators, statutory bodies, industry bodies, licensees, content creators and consumers can meet for the purposes of co-ordination and to provide advice to the Minister of Communications.

9 CONCLUSION

9.1 In conclusion, the NAB would like to thank the Department for the opportunity of making its written submission.

9.2 In summing up, the NAB would like to draw the Department's attention to the following pertinent issues:

9.2.1 In formulating the local and digital content strategy, the Department should guard against the policy straddling the jurisdiction of other government departments', such as the DTI, DAC etc;

9.2.2 The Department must be conscious of the fact that broadcasting content is not only made up of independently produced content and that broadcasting service licencees also produce their own content internally. As a result the strategy should seek to balance both these interests;

9.2.3 Creating digital hubs in rural areas is a noble concept, however the department must ensure that there will be demand for locally produced content in the respective communities;

9.2.4 In formulating a funding model for the production of local and digital content, the Department should guard against creating yet another levy, which will add on to the multiple levies the broadcasting industry is already contributing to. Also, such a levy or fund should not seek to duplicate other initiatives already put in place by government.

9.3 The NAB hopes that its inputs will add value to the final Local and Digital Content Strategy by the Department. The NAB will also gladly provide further information or clarity in relation to this submission, should the department require it.