



**THE NATIONAL ASSOCIATION OF BROADCASTER'S
WRITTEN SUBMISSION ON THE INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA'S DISCUSSION DOCUMENT ON THE REGULATION OF IPTV AND
VOD**

26 MARCH 2010

1. Introduction

- 1.1 The National Association of Broadcasters (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:
- 1.1.1 Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (the SABC);
 - 1.1.2 All the commercial television and sound broadcasting licensees;
 - 1.1.3 Both the major licenced signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
 - 1.1.4 Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network (TBN).
- 1.2 On 16 February 2010, the Independent Communications Authority of South Africa (ICASA), published in Notice 142, Government Gazette 32961, a notice of its intention to develop a framework for Internet Protocol Television (IPTV) and published a Discussion Document on IPTV and Video on Demand (VOD) ("the discussion document"). Interested parties were invited to submit their written representations on the discussion document by 26 March 2010.
- 1.3 The NAB welcomes the opportunity to submit its written representation. The NAB hereby requests the opportunity to participate in oral representations at a hearing to be conducted by the Authority in respect of the discussion document.

2 Conceptual Issues

- 2.1 The NAB agrees with the approach taken by ICASA in differentiating between Internet TV and IPTV, namely, that Internet TV is an unmanaged service using the same publishing model that exists on the public Internet and can be accessed globally in the same way and fashion as any other website. It can be made available free or on a restricted basis by the formal sector or the informal sector namely the User Generated Content (UGC). One can watch the content live or in real time if the personal computer (PC) and connection can stream the video quick enough for a reasonable quality viewing. If the PC and connection are not capable then it is possible to download the entire video file before viewing. The downside of downloading the entire

file on slow connections is that it can take hours and as the files are very large they can also use up a consumers data cap. In contrast, IPTV is the making available of video and television-type content through secure and protected Internet Protocol (IP) telecommunications networks. As the service provider has complete control of the network used for the delivery of content to the subscriber, they can ensure quality of service, quality of experience and speed of the connection, as well as security. IPTV is interactive, and allows subscribers to easily switch from television to computer mode, and provides the viewer a choice of what to watch and when to watch it, with its rewind and fast forward functionalities. The only common element between IPTV and internet TV is that they both use IP.

- 2.2 Mostly, IPTV services are provided by telecommunications over their Asymmetric Digital Subscriber Lines (ADSL) networks, cable and satellite operators in other jurisdictions.
- 2.3 The term VOD refers to a number of technologies offered over private networks and the Internet, all of which allow the selection and rental or download to own in a virtual or electronic form of video content for immediate or later viewing on range of devices such as computers, television sets, portable players and mobile phones. From a conceptual perspective even Internet TV is no more than VOD offered over the Internet. There are a broad range of business models for VOD such as the traditional rental model or free VOD (FVOD) financed by advertising, but the most common model is subscription VOD (SVOD)
- 2.4 The NAB believes that at a conceptual level the term 'Internet TV' as used by ICASA in the discussion document is overly broad and should be divided into Internet TV as being the formal or business provision of video content to subscribers to a service, and UGC which is the informal sharing of video content on websites or peer-to-peer networks by internet users. Based on these suggested distinctions the NAB sees Internet TV as a service which in the long term may require some form of higher regulatory scrutiny if the medium becomes pervasive in South Africa, while UGC sharing between internet users now and in the long term should remain subject only to the laws of general application which provide protection for copyright holders and for the public against defamation or hate speech.

3 Legislative Framework – What constitutes Broadcasting and a Broadcasting Service?

3.1 A central debate in the discussion document is what is the distinction between linear and non-linear services is, but as ICASA is a statutory body and must work within the framework of its legislative mandate this debate should properly be defined as being the distinction between what is a broadcasting service and what is an electronic communication service. It is only by interrogating this legal distinction in terms of the Electronic Communications Act 36 of 2005 (the EC Act) that it becomes possible to place IPTV and VOD services within the licensing framework, which was designed to address the convergence of services, networks and devices.

3.2 In order to properly interrogate this legal distinction it is necessary to set out the definitions of certain key terms in the EC Act with certain phrases emphasized.

3.2.1 **"Broadcasting"** means "any form of unidirectional electronic communications intended for reception by –

- (a) the public;
- (b) sections of the public; or
- (c) subscribers to any broadcasting service,

whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and 'broadcast' is construed accordingly".

3.2.2 **"Electronic communications"** means "the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service".

3.2.3 **"Broadcasting service"** means "any service which consists of broadcasting and which service is conveyed by means of an electronic communications network, but does not include –

- (a) a service which provides no more than data or text, whether with or without associated still images;

- (b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or
- (c) a service or a class of service, which the Authority may prescribe as not falling within this definition".

3.2.4 **"Electronic communications service"** means "any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications networks, but excludes broadcasting services".

3.3 In previous broadcasting legislation in South Africa, point-to-point and on-demand services were specifically excluded from the definition of broadcasting service and such services operating on traditional telecommunications networks were either unlicensed or licensed in terms of the Telecommunications Act, which has subsequently been repealed. In stark contrast, the EC Act deleted the concept of point-to-point and on demand services from the definition of broadcasting services.

3.4 In summary then, a contemplation of the above definitions and interpretation accorded to them means that from a legal perspective, the main element which is essential for a service to be considered a broadcasting service is that the transmission of the signals is unidirectional¹. However, whether the transmission of the signals is on a point-to-multipoint² basis is not, in terms of the statutory definitions, an essential requirement. The implication of this is that the supply of broadcasting content on traditional telecommunications networks even where the connection between the subscriber and the service is point-to-point, such as in IPTV on a broadband connection for instance ADSL, now falls within the definition of broadcasting and broadcasting service contained in the EC Act. However, VOD which is not provided on a unidirectional basis would not fall within the definition of broadcasting and broadcasting service and would instead be viewed as being an ECS.

¹ The term 'unidirectional' is not defined in the ECA, the Compact Oxford English Dictionary defines it as an adjective meaning 'moving or operating in a single direction'.

² The statement that the "ECA defines broadcasting as a point-to-multipoint distribution systems (*Sic*)" on p.11 of the ICASA Discussion Document is accordingly incorrect

4 Legislative Framework – Exemption or Exclusion

- 4.1 There has been some discussion in the past on whether IPTV and VOD should be exempted or excluded from the ambit of broadcasting regulation or licensing by ICASA. The NAB is of the view that the intention of the legislature in section 6 of the EC Act is fairly clear: while ICASA is empowered to exempt certain listed categories of services from requiring a licence it is not so empowered in relation to broadcasting services.
- 4.2 The intention of the legislature appears to be to exclude services which, whilst they may appear, from a technological perspective, to be broadcasting services, are not to be regarded as such, either, by virtue of the nature of the content for instance paragraph (a) of the definition states *“a service which provides no more than data or text, whether with or without associated still images”*; or since the audio-visual and audio material is incidental to the provision of the service (see paragraph (b) of the definition); or given the rapid rate of convergence the legislature recognized that it cannot anticipate every type of service that may be provided in the future, and accordingly the Authority ought to be empowered, to add to the list of services which are not to be included in the definition of "broadcasting services". This is evident in paragraph (c) of the definition which states that *“a service , which the Authority may prescribe as not falling within this definition”*..
- 4.3 The NAB is of the view that this 'exclusion power' given to ICASA is limited to dealing with "grey areas" raised by convergence, but this power would not allow ICASA to prescribe that a service, which on the facts clearly falls within the definition of a "broadcasting service", does not fall within this definition. In other words, this power granted to ICASA to add to the list of exclusions in the 'broadcasting service' definition does not empower the regulator to exempt a broadcasting service, such as IPTV, which clearly falls within the ambit of the definition from requiring a broadcasting licence. Nor would there be any need to rely upon this power to specifically exclude VOD from the definition of 'broadcasting' or 'broadcasting service' as it very clearly falls within the definition of an ECS.

5 Policy and Regulatory Questions

What parameters should be put in place to create the necessary separation between IPTV and Internet broadcasting which is not susceptible to regulation?

- 5.1 IPTV programming video streams function is carried out in exactly the same way as digital terrestrial television (DTT) and satellite television (ST). The television content is packaged and distributed in a unidirectional fashion over an electronic communications network to a subscriber's home where a set top box decoder is used to decode the signal for the purposes of viewing on a television set or similar receiving device equipped with a viewing screen. In contrast Internet TV is not being packaged and delivered to the subscriber's home, the individual has to access the internet by using a web browser to surf the Internet TV website where they select the content they wish to view. The content supplied by Internet TV is not live and the viewer can exercise editorial control over what he wishes to view and when he will view it, in contrast to the IPTV where the television channels are still supplied in a traditional planned and scheduled manner. The editorial control exercised by the user here is post-broadcast where he uses the functions of the electronic programme guide (EPG) and personal video recorder (PVR) STB to time shift programming for later viewing.
- 5.2 In the view of the NAB the EC Act already provides sufficient parameters to distinguish between IPTV and Internet TV.

What licensing framework should be put in place to license IPTV without regulating Internet broadcasting services?

- 5.3 European countries have adopted a technology neutral approach, wherein to the extent that an IPTV provider is offering live television services, such a provider is subject to the same licencing requirements imposed on television broadcasters. In Canada for instance, any television service including VOD provided over managed IP network is required to have a "Broadcast Distribution Undertakings" licence³.
- 5.4 As previously stated IPTV is a broadcasting service available to a section of the public or subscribers, while Internet TV is no more than an unmanaged multimedia website which can be accessed by anybody at whatever time they so wish and this service does not currently fall within the jurisdiction of the ICASA. However, this does not mean Internet TV is not regulated as local and international websites would remain

³ <http://www.ictregulationtoolkit.org/en/Section.3425.html>

subject, for example, to general laws in South Africa relating to copyright, defamation, hate speech and pornography.

Is there social and economic value in the current separation of non-linear services as electronic communications and linear services as broadcasting services?

5.5 The NAB notes that ICASA has done an extensive study of the approach taken in other jurisdictions to IPTV and VOD. It is important, however, to realise that the approaches taken in each of those jurisdictions are a direct result of the history of the broadcasting sector in that country, the current broadcasting environment and the legislative and regulatory provisions in place in those jurisdictions. ICASA can learn from approaches taken in other jurisdictions, but this must be applied within the unique South African context and our own legislative framework. Instead of using terms such as linear and non-linear, ICASA should use the language of its enabling legislation and speak of unidirectional and bidirectional. It must also realise that this is only one element to be used when determining if a service is a broadcasting service, before making such a determination consideration must also be taken of the nature of the content which is being transmitted. For example, is it data or text both of which are excluded from ambit of broadcasting by the definition even when transmitted in a unidirectional fashion.

5.6 When the printing press was developed in 1440 it was intensely regulated, but over the course of its existence that level of regulation declined to none, at least in democratic countries. One would expect broadcasting to follow the same decline in regulatory intensity, especially as bottlenecks such as scarcity of frequency decline and multiple alternative sources of audio-visual content become easily accessed over multiple platforms. The NAB is of the view that the distinction between broadcasting and electronic communication services, however, will continue to remain relevant for some time to come and this is reflected in section 192 of the Constitution where broadcasting is specifically highlighted as a matter of constitutional concern requiring an independent regulator.

How does the current separation between linear and non-linear services in terms of the ECA inhibit the growth of the sector?

5.7 While electronic communication services are rapidly growing in South Africa, the main limitation to date on providing VOD or Voice-over-Internet Protocol (VOIP) services has been the delay in unbundling the local loop, determining essential

facilities and the penetration and speed of available broadband networks. The bottlenecks identified relate to infrastructure issues, not definitions or the separation between broadcasting and electronic communication services. While the broadcasting sector has realised some massive liberalization since 1994, it is worth pointing out that in contrast to electronic communication services, there has been a gradual introduction of broadcasting services. This is among others, because of lack of frequency spectrum, which will be addressed by the migration to digital broadcasting transmission systems, resulting in a frequency spectrum dividend.

Should the EC Act be amended to allow a unified licensing regime to allow convergence between broadcasting and electronic communications?

- 5.8 There has been no indication that the EC Act is not capable of dealing with the converged services that have been offered to date. Furthermore, the Constitution specifically mentions broadcasting and it would thus be difficult to do away with broadcasting as a legislative concept.

Should the Authority opt for a separation between linear and nonlinear services, will it be necessary or feasible to regulate the content provided by non-linear services?

- 5.9 ICASA does not have a choice between opting for a separation or not as the EC Act clearly provides for this separation between broadcasting and electronic communication services. The EC Act also very clearly in Chapter 9 only provides ICASA with jurisdiction over content of broadcasting services. This jurisdiction is specifically constrained so as not to unduly interfere with freedom of expression beyond that required by the public interest. The EC Act does not provide ICASA with jurisdiction over content provided by electronic communication services which jurisdiction resides with other statutory bodies and Law of general application.

Which specific sections of the EC Act will require amendment or addition to enable the rollout of your proposed approach to IPTV and VOD?

- 5.10 No amendment of the EC Act is required. it may be necessary however, to obtain legal advice to determine if any amendments are required to some existing regulations which have not been drafted in a technology neutral fashion. For example, do the platform specific definitions of cable and terrestrial television in the Subscription Broadcasting Regulations capture the concept of IPTV.

Should there be a link between the rollout of IPTV and the review of the Digital Dividend to enhance broadband connectivity?

5.11 In an inquiry into the Digital Dividend it would be expected that ICASA would be asking questions on what services should be identified in addition to broadcasting to benefit from the freed-up spectrum. If appropriate, IPTV can be identified at that time. However it has always been the view of broadcasters that the digital dividend should be earmarked for providing enhanced broadcasting services.

6 Conclusion

6.1 In the view of the NAB there is no need for a separate regulatory framework for IPTV. IPTV in terms of the EC Act is a broadcasting service. There may be elements of IPTV such as VOD, VOIP and internet service provision (ISP) which do not fall within the ambit of a broadcasting service licence, but these types of services would fall under an ECS licence as provided for in the EC Act. In terms of the technological-neutral broadcasting licensing framework, IPTV can be offered as a public, commercial, or community broadcasting service.

6.2 The NAB thanks the Authority for making its written submission, and believes the submissions made will add value to this process.