



NATIONAL FILM AND VIDEO FOUNDATION

**SUBMISSION TO THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

ON

**DRAFT REGULATIONS ON INDEPENDENTLY PRODUCED
SOUTH AFRICAN PROGRAMMING**

04 AUGUST 2009

1. Background

The National Film and Video Foundation (NFVF) is a statutory body created in terms of the National Film and Video Foundation Act 73 of 1997. The NFVF submission to the Authority is informed by our legislative mandate which is to develop the industry as well as the legislated collaborative relationship between the NFVF and the Authority as provided by section 4(2) of the NFVF Act to encourage the use of local content programmes on television.

The Independent Communications Authority of South Africa (ICASA) published a Discussion Document on Independently Commissioned South African Television Programming – Notice No 1388 in Gazette No 31580 of 07 November 2008 for public comment. The Discussion Document was published in line with Section 61 of the Electronic Communications Act which states that the Authority may prescribe regulations applicable to broadcasting service licensees regarding commissioning of independently produced South African programming.

Independent producers and other stakeholders including the broadcasters were requested to submit written submissions to the Authority by or on the 29th of January 2009. Oral submissions were held in February 2009. The Discussion Document addressed the following areas:

- Relationship between broadcasters and independent producers
- Copyright Ownership
- Regulatory Approach
- Definition of an Independent Producer
- Terms of Trade
- Commissioning Methods

- Monitoring Methods

On the 13th of July 2009, ICASA hosted a briefing session on the Regulations regarding the Commissioning of Independently produced South African Programming. The purpose of this session was to brief the stakeholders on the draft regulations on Commissioning of Independently produced South African Programming. Submissions on the draft regulations are due on 04 August 2009.

2. NFVF Submission

The National Film and Video Foundation submission will focus on the following areas:

- Definitions
- Copyright
- Commissioning Protocol
- Penalty Clause
- General Comments

NFVF proposed wording on the Draft Regulations appears in bold italic throughout this submission while any text in italics is used for emphasis.

2.1 Definitions

Clause 7 of the ICASA South Africa Television Content Regulations provides that “public, commercial and subscription television broadcasting licensees/services shall ensure that their terms of trade and commissioning procedures are, inter alia, fair, transparent and non discriminatory”.¹ The ICASA Local Content Regulations cited above do not define what “*fair, transparent and non-discriminatory*” means in this context. Clause 2 (c) of the Draft Regulations

¹ ICASA South African Television Content Regulations Notice 154 Gazette No 28454 of 31 January 2006, p 13

states that the purpose of these Regulations is to “ ensure that such commissioning practices are conducted in a manner that is fair, transparent and non-discriminatory, without hampering the flexibility of broadcasting service licensees to deal with the pertinent commercial issues in any manner they deem appropriate”.²The notion that commissioning practices must be conducted in a manner that is fair, transparent and non-discriminatory should be separated from the rest of the paragraph, as the Authority has provided a scope of the regulations in Schedule A and Clause 3 of the Draft Regulations.

The NFVF hereby proposes that the Authority defines what fair, transparent and non-discriminatory means in this context.

“fair, transparent and non-discriminatory commissioning practices” means broadcasting service licensees’ commissioning protocols submitted to the Authority for approval that meet the requirements stipulated by the Authority in Schedule A of these regulations.

This section must be read together with submissions under Commissioning Protocols in paragraph 2.3 below.

2.2 Copyright

Numerous written and oral submissions to the Authority under this process made reference to the issue of copyright ownership. The NFVF acknowledges that copyright or regulation thereof is a matter which falls outside this process. However, the challenges for the industry posed by the copyright and intellectual property rights regime and how it operates within the commissioning landscape

² ICASA Draft Regulation and Position Paper on the Commissioning of Independently Produced South African Programming 13 July 2009. Clause 3 of the Authority’ Commissioning of Independently Produced Programming Document

still exist and will continue to hamper the growth and development of the local independent production sector.

Whilst the Authority's policy stance to leave this matter for affected parties to take it up to the Department of Trade and Industry and CIPRO is valid, the NFVF is of the view that there are regulatory tools at the Authority's disposal to remedy the situation. The NFVF would like to suggest an alternative, which could address this issue for future consideration. This suggestion has taken into account the current notion that the cost of producing local content is high which has a devaluing effect on local programmes based on the amount paid for the acquisition of American and foreign content. This suggestion requires that a monetary value be attached to the license of independently produced South African programming. The value of a local license will have to be defined.

The NFVF propose that the value of a license of an independently produced programme must be of reasonable proportion and a fair amount to be determined by the Authority. Some principles that may inform such a framework include but not limited to:

- Broadcasters pay a determined percentage of the full cost of the production in return for the retention of the right to broadcast on television in perpetuity. The rest of the exploitation rights could vest with the independent producers. The remaining percentage of the cost of a given production could be derived from other incentives and funding sources. This proposal is also relevant to Clause 6 of the South African Television Regulations which provide for a minimum 40% of public, commercial and subscription television licensees of South African television programming to be sourced from local independent television productions.

- In addition to the above suggestion, the minimum 40% local content quota from the independent production sector may be further divided into two equal percentage proportions of a license and commission split.

2.3 Commissioning Protocols

In Clause 3 of the Findings and Clause 2(a) of the draft regulations, the Authority states that the regulations seek to introduce the requirement for broadcasting service licensees to submit to the Authority for approval commissioning protocols in order to enable the Authority to monitor the commissioning practices of independently produced South African programming. However, the Authority does not provide clarity or detail on how this monitoring will be conducted.

Clause 3(a) provides that *broadcasting service licensees must compile and maintain a "Commissioning Protocol for Independently Produced South African Programming"*. The NFVF is of the view that this provision is not sufficient and the proposed wording will be provided below. The use of the word "compile" does not suggest new processes as broadcasters do have existing policies or frameworks on how to procure independently produced South African programming. The Draft regulations seek to introduce a new framework that must be entrenched in the Protocols.

Clause 3(b) of the Draft Regulations on the Commissioning of Independently Produced South African Programming provides that within one hundred and twenty days (120) of promulgation of the regulations each broadcasting service licensee must submit its proposed protocol to the Authority for approval. The Authority shall consider and approve or reject the protocol within thirty (30) days of submission thereof '.

The NFVF proposes that the Authority opens up the protocol for scrutiny by interested parties including but not limited to independent producers, industry associations as well as other parties who have an interest in matters concerning the procurement and production of local content. This would ensure that broadcasters' commissioning protocols meet the objectives of this regulations as well as terms of trade (Schedule A) objectives.

NFVF Proposed reading of Clause 3 (a) and (b)

a) Broadcasting service licensees must develop and maintain a Commissioning Protocol for Independently Produced South African Programming.

i) Within one hundred and twenty days (120) of promulgation of the Regulations, each broadcasting service licensee must submit its proposed protocol to the Authority for approval.

ii) The Authority shall publish the broadcasting service licensees commissioning protocols in the gazette for public comments.

iii) The Authority shall approve or reject the protocol after considering submission from interested parties within thirty (60)³ days of submission thereof.

2.4 Penalty Clauses

The Draft Regulations do not provide for a penalty clause for non compliance by the broadcasters. The NFVF submits that monitoring is essential. The Authority

³ The suggested 60 days is to give the Authority time to consult interested parties or a longer period if necessary.

must provide for punitive measures in cases of non compliance for enforcement by its Complaints and Compliance Committee (CCC). The NFVF has noted the provisions of section 74 of the Electronic Communications Act on penalties and offences.

The NFVF proposes the following punitive mechanism:

Should a broadcaster be found in breach of any section of the proposed regulations, a fine in the form of a specified fee should be payable. The fee should either be the equivalent of the value of a commissioned programme in the affected time slot or double that amount. The NFVF proposes that such a penalty fee should be paid into an institution that would ensure that the money is used for the development of the industry. In this way, the Authority will ensure compliance from broadcasters, while the non complying broadcaster will contribute positively to the development of the film industry. The Authority, together with interested parties, may determine which institution should be appropriate for this, or a separate inquiry could be conducted by the Authority enabling interested parties to motivate why there should be an institution for this purpose.

Clause 7 of the Draft Regulations refers to a complaints handling mechanism. However, the section does not stipulate the role of the Authority's CCC. A further clause should be inserted to the effect that in the event that broadcasting service licensees complaint handling mechanism does not resolve a dispute concerning commissioning practices, it should be escalated to the Authority's CCC for determination.

2.5 General Comments

This section deals with general comments on this process that the NFVF would like to highlight.

2.5.1 NFVF Submissions

In considering whether the Authority should opt for self regulation or regulation, the Authority states in its findings that, "the independent producers through IPO, SASFED and NFVF are of the view that the Authority is mandated by section 61....."⁴

The above paragraph may be construed to suggest that the NFVF made its submission on behalf of the independent producers. The NFVF`s participation during this process is informed by its legislative mandate and objectives as stated in sections 2 and 4 of the NFVF Act respectively - and not on behalf of any person(s).

2.5.2 ICASA`s Regulatory approach

In Clause 1.2 of the Findings, it is stated that "in-equality in the bargaining position of the independent producers as against the broadcasting service licensees results in unfair terms of trade for commissioning of local independently produced programming".⁵ This is a reality and the NFVF suggests that the Authority should ensure as the Regulator, that this position does not find its way into the protocols. This can only be achieved by subjecting the protocols submitted for approval to the Authority to public scrutiny by giving interested parties an opportunity to comment on broadcasters` protocols before they are rejected or approved by ICASA as part of its regulatory and administrative

⁴ ICASA Draft Regulation and Position Paper on the Commissioning of Independently Produced South African Programming 13 July 2009, Clause 1.1

⁵ Id, Clause 1.2 paragraph 2

process subject to principles of the Promotion of Administrative Justice Act 3 of 2000. The NFVF is of the view that self regulation in this area is not feasible as the Authority has observed. A self regulation approach may leave the door wide open for anti competitive behaviour such as collusion between the broadcasters. This practice has been demonstrated in other sectors of the economy where little competition exists.

3. Conclusion

The NFVF thanks the Authority for the opportunity to make submissions at the various stages of this process. This process has an important role in the development of the local production industry which is key to the development of content subject to Section 61 of the Electronic Communications Act, ICASA South African Television Content regulations (2006), as well as the bigger objective to develop a sustainable film and production industry. Although broadcasters, the Authority, and independent producers may operate from different objectives and mandates, the common good that cuts across is that of contributing towards a sustainable and viable South African production sector that will deliver on government objectives such as job creation and telling South African stories while contributing meaningfully to our democracy and economic development.