
GENERAL NOTICE

NOTICE 1594 OF 2009

Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton

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**FINDINGS DOCUMENT ON THE COMMISSIONING OF INDEPENDENTLY
PRODUCED SOUTH AFRICAN PROGRAMMING IN TERMS OF SECTION 4(C)
OF THE ICASA ACT NO 13 OF 2000, READ WITH SECTION 61(1) OF THE
ELECTRONIC COMMUNICATIONS ACT NO 36 OF 2005.**

I, Mr. Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("the Authority"), hereby confirm that the findings contained herein were made in terms of section of 4(C) the ICASA Act No 13 of 2000, read with section 61(1) of the Electronic Communications Act No 36 of 2005, and approved for final publication by the Council of the Authority.



**PARIS MASHILE
CHAIRPERSON**

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ACKNOWLEDGEMENTS

The Independent Communications Authority for South Africa ("the Authority") would like to acknowledge the contributions of various stakeholders and other members of the public who participated in the discussion document, public hearings and draft regulations to develop and finalise the regulations on Commissioning of Independently Produced South African Programming.

The consultation was undertaken by a Council delegated committee comprising the following ICASA officials:

- | | |
|-------------------------|--------------------------|
| 1) Mr. Robert Nkuna | Councillor (Chairperson) |
| 2) Ms. Nomvuyiso Batyi | Councillor |
| 3) Ms. Mamedupe Kgatshe | Project Leader |
| 4) Mr. Siphwe Hlongwane | Researcher |
| 5) Mr. Paseka Maleka | Licensing Officer |
| 6) Mr. Sean Rankin | Licensing Officer |
| 7) Mr. Fumani Baloyi | Legal Adviser |

The following stakeholders participated in the consultation process:

- 1) Independent Producers Organisation (IPO)
- 2) M-NET
- 3) On Digital Media (ODM)
- 4) South African Screen Federation (SASFED)
- 5) South African Broadcasting Corporation (SABC)
- 6) Walking On Water Television (WOWtv)
- 7) e.TV
- 8) National Film and Video Foundation (NFVF)
- 9) Telkom Media
- 10) National Association of Broadcasters (NAB)

SECTION A: INTRODUCTION AND BACKGROUND

1. INTRODUCTION

- 1.1. The Authority had a number of consultations on Commissioning of Independently Produced South African Programming to solicit information from the industry players which will assist in determining the appropriate regulatory mechanisms to be applied in addressing the problems in relation to commissioning.
- 1.2. On 7 November 2008 the Independent Communications Authority of South Africa ("**the Authority**") published the Discussion Document on Commissioning of Independently Produced South African Programming ("**the Discussion Document**¹") in the Government Gazette ("**the Notice**").
- 1.3. Hearings were held on 23 and 24 February 2009, in which the broadcasting service licensees (SABC, e.tv, M-NET, WOW Tv, Telkom Media and ODM), the IPO, SASFED, and NFVF presented their submissions in response to the matters raised in the Discussion Document.
- 1.4. The Authority further published a Position Paper and Draft Regulations on the 19th of June 2009 in the Notice with the closing date for submissions as the 4th of August 2009. Most of the submissions on the Draft Regulations did not raise new issues addressed in the submissions on the discussion document. Where new issues were raised in the submission to the draft regulations, they are reflected in this document.
- 1.5. This report sets out the submissions of the various participants and the findings and conclusions. It also sets out the approach the Authority followed in addressing the matters as raised in the Discussion Document, Hearings and Draft Regulations.

¹ Government Gazette, no. 31580, 7 November 2008

2. LEGISLATIVE FRAMEWORK

2.1. The Authority is empowered in terms of Section 61(1) of the Electronic Communications Act, 36 of 2005 ("**EC Act**") to prescribe regulations regarding the commissioning of independently produced South African programming. Section 61 (1) states that:

"The Authority may prescribe regulations applicable to broadcasting service licensees regarding the commissioning of independently produced South African programming."

2.2. The South African Television Content Regulations ("**Television Content Regulations**") define "Independent Television Production"² as:

"a production of South African television content by a person not directly or indirectly employed by any broadcasting licensee or by a person who is not controlled by or is not in control of any broadcasting licensee".

2.3. The Copyright Act 98 of 1978 ("**Copyright Act**") regulates aspects of intellectual property pertaining to copyright. Section 21(1) (a) thereof provides the general rule regarding the ownership of copyright. In terms of this section the author of the work will be the first author of the copyright. However, there is an exception to the general rule, namely where the making of a cinematographic film has been commissioned by a third party. In such event the ownership of the copyright in the cinematographic film may belong to the commissioning party³.

2.4. In order to discharge the above objects, the Authority has appointed a committee in terms of section 17 of the Independent Communications Authority of South Africa Act, 2000 Act, No 13 of 2000 ("**ICASA Act**")⁴. The tasks of the

² See Government Notice No. 28454, 31 January 2006

³ Section 21(1)(c) Copyright Act

⁴ Sections 17(1) and (2), ICASA Act

committee were to develop the discussion document, hold hearings and draft and finalise the regulations.

2.5. We set out below summaries of the submissions by the various participants.

SECTION B: SUBMISSIONS

3. ANALYSIS OF SUBMISSIONS PRESENTED ON THE DISCUSSION DOCUMENT AND DRAFT REGULATIONS

It is noted that the conventional way of analysing submissions is to deal with each submission received in its totality. However, for the purposes hereof the Authority will depart from this convention and rather deal with each question raised in the Discussion Document followed by an analysis of each party's submission in respect to the question posed. To the extent that any of the participants did not respond to a specific question posed by the Authority, no response in respect of such question shall be recorded against that participant. The Discussion Document raised thirty eight pertinent questions and in analysing the submissions the order followed in the Discussion Document will be adhered to. Furthermore the analysis will include new issues that are raised in the submissions to the Draft Regulations. The analysis of all the questions raised follows hereunder.

3.1. WHAT ARE THE MAIN CHALLENGES CONFRONTING A POSSIBILITY FOR A SMOOTH COLLABORATION BETWEEN BROADCASTING SERVICE LICENSEES AND INDEPENDENT PRODUCERS?

3.1.1. NFVF submits the following are the challenges facing the industry:

- 3.1.1.1. insufficient budgets;
- 3.1.1.2. licensing of South African programs based on the dumping prices of foreign programs;
- 3.1.1.3. full ownership of intellectual property rights on all/most platforms by the broadcasters means that independent producers are un-able to secure ancillary revenue from other platforms;
- 3.1.1.4. extensive bureaucratic contractual processes;
- 3.1.1.5. continuous use of "one budget fits all" approach; and
- 3.1.1.6. continued resistance by broadcasters to use seasons for programming.

3.1.2. ODM is of the view that the current challenges would be the undue and unnecessary regulatory burden that would prevail if regulations were to be introduced.

3.1.3. SASFED identifies the following challenges:

3.1.3.1. a lack of negotiating strength by the independent producers;

3.1.3.2. extreme delay in the signing of contracts;

3.1.3.3. lack of transparency;

3.1.3.4. very poor budgets;

3.1.3.5. poor internal communication within the SABC; and

3.1.3.6. unethical use of intellectual property by the SABC.

3.1.4. IPO contends that there is currently no independent framework that monitors and intervenes to ensure that terms of trade are fair and commissioning procedures and management by broadcast service licensees of independent producers are in keeping with the definition of independent production. IPO contends further that the current terms of trade are one sided and oppressive and that there is no latitude ability for the independent sector to realistically negotiate with broadcasters. Accordingly, the independent producer is left vulnerable as there is no legislation to protect him or her from exploitation.

3.1.5. e.tv states that it has not encountered any difficulties in its collaboration with independent producers.

3.1.6. According to the SABC, the main challenge for smooth collaboration between broadcasters and independent producers is the failure by the independent producers to acknowledge the current legislative regime that governs intellectual property rights and its (SABC) limitations on funding. Other challenges relate to the sourcing of funding for producers. This apparently affects mostly small to medium size black companies. In an attempt to

address these challenges the SABC encourages a practice of co-productions within the industry.

3.1.7. WOW identifies as main challenges lack of resources by independent producers to provide quality productions within the required time frames, lack of understanding by independent producer of WOW TV's programme taste and core values and lack of financial resources on the part of independent producers to finance their productions without assistance of the broadcaster.

3.2. SHOULD THE AUTHORITY INTERVENE, THROUGH REGULATION, TO ENHANCE THE COLLABORATION BETWEEN THE TWO, OR SHOULD THE COUNTRY OPT FOR A SELF REGULATORY MECHANISM?

3.2.1. MNET is of the view that a self-regulating environment would be more appropriate. However, it submits that the Authority could restrict its involvement through a set of guidelines whose primary focus would be on the public broadcaster and whose principles could be observed/taken into account by commercial and subscription broadcasters in their own commissioning practices. MNET is further of the view that the regulations could include a provision requiring broadcasting service licensees to draw up and publish Codes of Practice, settling out the principles that they will apply when agreeing terms for the commissioning of independent programmes. The Codes of Practice would comprise a set of guiding principles that will govern the relationship between broadcasting service licensees and independent producers. The regulations would provide for the drafts Codes of Practice or any revisions thereof to be submitted to the Authority for approval. In the alternative, MNET submits that the Authority could issue a set of non-binding guidelines which would set out the broad principles that broadcasting service licensees may include in their Codes of Practice.

3.2.2. The NFVF has mixed views in respect to this issue, being a combination of both self regulation and regulatory intervention by the Authority.

- 3.2.3. ODM was of the view that self regulation would be more appropriate for the industry, and that market forces would provide for growth and a more vibrant broadcasting and independent production sector.
- 3.2.4. SASFED proposes a combination of self regulation and regulation by the Authority. However, they further state that any regulation by the Authority should take a light touch approach.
- 3.2.5. NAB is of the view that the Authority should not intervene through regulations, but should rather adopt the existing independent commissioning policies that individual broadcasting licensees have devised as these have proved to be workable in the past.
- 3.2.6. IPO prefers self regulation in the long term. However, it argues that there is a need for intervention by the Authority to create an equitable environment for both independent producers and broadcasters as the current standard commissioning agreements give all the intellectual property rights and ownership to broadcasters. In addition to the concerns raised above, IPO argues that the public broadcaster's micromanagement of all aspects of production should be reviewed in the light of the definition of 'independent producer'. It submits that the Authority has an important role to play in setting the framework for fair play and equitable terms of trade and monitoring.
- 3.2.7. e.tv does not see the need for the Authority to intervene in the relationship between broadcasters and independent producers as it contends these issues are a matter for commercial negotiations.
- 3.2.8. SABC submits that the Authority's intervention in this regard may be viewed as undue interference in the commercial dealings of the broadcasters. It argues that the commercial agreements between broadcasters and producers should be left to those parties as they do not fall within the jurisdiction of the Authority. SABC prefers self regulation which it says will lessen the administrative burden to be incurred by the Authority. SABC argues further that the Authority's intervention should be limited to monitoring compliance

with the commissioning procedures. It submits that any dispute arising there from should be referred to the Copyright Tribunal.

3.2.9. WOW prefers self regulation because, in its view, the relationship between independent producer and broadcasters is purely a commercial one. It urges the Authority not to intervene through regulations but rather to produce general non-binding guidelines which provide a framework of accepted commissioning policies.

3.3. IS SELF REGULATION, THOUGH DESIRABLE, FEASIBLE WITHOUT THE GUIDANCE OF THE AUTHORITY? FOR EXAMPLE CAN SELF-REGULATION BE TRUSTED TO ENHANCE THE EMPOWERMENT OF HISTORICALLY DISADVANTAGED PEOPLE, INCLUDING THE PRACTICE OF PREFERRING FEW EMPOWERED COMPANIES AT THE EXPENSE OF THE GROWING INTEREST FROM UPCOMING INDEPENDENT PRODUCTION COMPANIES?

3.3.1. NFVF is of the view that the national programmes in place on Preferential Procurement do facilitate the procurement of programming from previously disadvantaged people. However, the NFVF highlights that the role of the Authority will always be necessary to ensure compliance.

3.3.2. ODM is of the view that the current national Preferential Procurement Policy caters sufficiently for the empowerment of historically disadvantaged people.

3.3.3. IPO states that self regulation and discussions between the public broadcaster and the independent sector have achieved some positive results in that many more companies are now empowered and the number of new entrants has increased. However, it believes that self regulation is not viable at this present time as the relationship between the broadcaster and the independent sector has deteriorated. IPO contends that commissioning alone does not sustain independent producers; hence the Authority has to consider the sustainability of these companies.

- 3.3.4. e.tv submits that its licence conditions already require it to promote the development of historically disadvantaged people. Furthermore, e.tv submits that it has a preferential procurement policy which prefers historically disadvantaged producers in the commissioning of local content programmes. e.tv states that it requires all producers commissioned by it to institute training programmes which results in the development of young historically disadvantaged television professionals.
- 3.3.5. It argues that the onus for the empowerment of historically disadvantaged producers cannot be entirely placed on broadcasters. State intervention is required.
- 3.3.6. e.tv disagrees with the Authority's statement that there is a practice of preferring few empowered companies at the expense of the growing interest from upcoming companies. It supports its arguments by stating that the two production companies that produce its daily dramas have provided new opportunities to existing producers. It has undertaken to promote the empowerment of previously disadvantaged communities with specific focus on the provinces that have previously been overlooked.
- 3.3.7. SABC prefers self regulation. It supports its position by stating that its commissioning policies and procedures demonstrate the viability of self regulation.
- 3.3.8. WOW points out that self regulation is feasible. It says that historically disadvantaged producers have to step up to the market requirements. However, it acknowledges that these producers might require some form of assistance from broadcasters.
- 3.4. IF SELF REGULATION IS PREFERRED, WHAT SHOULD REMAIN THE ROLE OF THE AUTHORITY IN THE ADJUDICATION OF CONFLICTS?**

- 3.4.1. MNET was of the view that the Authority should have no role to play in adjudicating conflict between broadcasting licensees and the independent

producers. MNET submits that conflict resolution is governed by contract and should be left to the parties to determine.

3.4.2. NFVF submits that the role of the Authority leans more towards ensuring and enforcing compliance by broadcasting service licensees as opposed to the adjudication of disputes.

3.4.3. ODM is of the view that the role of the Authority should be restricted to its functions as outlined in respect of the Complaints and Compliance Committee⁵ (“CCC”), and that the Authority should act as an arbiter of last resort only where the dispute fails to be resolved through the appointed industry body.

3.4.4. SASFED proposes that the Authority’s role should remain that of enforcing and monitoring regulations, as well as acting as an (intervener) in disputes.

3.4.5. NAB is of the view that the role of the Authority in the adjudication of conflict should be confined to those issues for which it has jurisdiction i.e. allegations of non-compliance in terms of the ICASA Act and the EC Act. This view is shared by the SABC.

3.4.6. IPO submits that the Authority should play the role of a mediator to ensure that broadcasters institute fair and transparent terms of trade and commissioning agreements. It further submits that the Authority should oversee the implementation of fair commissioning agreements and procedures.

3.4.7. e.tv submits that the relationship between independent producers and the broadcasters is a commercial one and that it is therefore undesirable for the Authority to play any role in this relationship in the event of conflict. In view of the existing BBBEE requirements, e.tv argues that any involvement by the Authority in the contractual relationship between broadcasters and

⁵ See Section 17A, ICASA Act

independent producers would constitute over-regulation of the broadcasting sector.

3.4.8. WOW suggests that the Authority should limit its role to formulation of a general guideline to commissioning briefs without interfering with negotiations between the parties.

3.5. WHAT ARE THE QUALITY ISSUES THAT CONFRONT THE COMMERCIAL FEASIBILITY OF MOST INDEPENDENTLY PRODUCED PROGRAMMES FROM HISTORICALLY DISADVANTAGED COMMUNITIES?

3.5.1. MNET's submission does not directly address this issue. However, it does highlight steps that have been taken by organisations such as the Department of Arts and Culture ("DAC"), Department of Trade and Industry ("DTI"), the Industrial Development Corporation ("IDC") and the NFVF towards assisting the independent production sector and correspondingly programming from historically disadvantaged communities.

3.5.2. NFVF highlighted insufficient funds/small budgets as having an adverse effect on the production value as a quality issue facing the industry. However, the NFVF did indicate that this issue should not be viewed in isolation without taking into account contributory factors. Another quality issue, it argues, would be the irregularity of commissions especially for new entrants.

3.5.3. SASFED identified the following quality issues:

3.5.3.1. lack of funds and insufficient profits means that independent producers cannot respond to Request For Proposal (RFP's) or develop unsolicited concepts as these require substantial investment, time and resources;

3.5.3.2. lack of funds to invest in the more expensive HD/HDV format which produces better quality programming;

3.5.3.3. high usage of local languages means that the programming is not commercially viable for the international market;

- 3.5.3.4. limited availability of further local funding; and
- 3.5.3.5. lack of training, skills, experience and understanding of technology which increase barriers to entry.
- 3.5.4. IPO opines that budgets, coupled with experience and talent determine technical and creative standards and these together impacts on commercial feasibility. Consequently all local content producers struggle to deliver quality on very tight budgets. It contends that the biggest challenge to quality is the irregularity of work. This irregularity of work results in many companies becoming unsustainable. IPO suggests that mechanisms such as ownership of intellectual property have to be reviewed to encourage independent sustainability.
- 3.5.5. e.tv points out that there is mainly a lack of easily accessible quality and professional facilities such as studios and post houses. It argues that many disadvantaged producers cannot afford the latest equipment that complies with its technical requirement. Furthermore, it argues that it does not make good business sense to establish production companies in areas where there are limited opportunities.
- 3.5.6. SABC submits that it mitigates challenges on quality by ensuring that all companies are contracted on the basis of having gone through workshops on quality benchmarks set up for each programme commissioned.
- 3.5.7. According to WOW quality issues that confront the commercial feasibility of most independently produced programmes from historically disadvantaged communities is a result of lack of funding.
- 3.6. **SHOULD THE AUTHORITY REGULATE COMMISSIONING AS PART OF THE BBBEE FRAMEWORK AND THE PREFERENTIAL PROCUREMENT POLICY TO ENSURE THAT COMMISSIONING FULFILS THOSE REQUIREMENTS?**

- 3.6.1. MNET is of the view that matters concerning preferential procurement and black economic empowerment of the independent production sector are adequately provided for in the Preferential Procurement Policy Framework Act 5 of 2000 and the Broad Based Black Economic Empowerment Act 53 of 2003, and that the Authority need not regulate this further in the commissioning guidelines.
- 3.6.2. The NFVF does not state whether their position is one in favour of regulation or otherwise, but they do state that any such regulations should be in line with the national Preferential Procurement Policy.
- 3.6.3. ODM is of the view, that there is no legislation empowering the Authority to regulate the commissioning practices to ensure compliance with BBBEE. ODM argues that the national Procurement Policy provides an adequate framework within which the broadcasters and independent producers should operate.
- 3.6.4. SASFED submits that the current national Preferential Procurement Policy framework should be sufficient to facilitate BBBEE within the production industry. However, SASFED is of the view that the Authority should impose this framework upon the broadcasters, and production companies that have an average turnover of R 15 million per year. SASFED's proposal is based on the view that imposing the requirement on the entire industry would be an added cost which would be a further barrier for new companies from historically disadvantaged communities.
- 3.6.5. IPO is of the opinion that the public broadcaster does fulfil the requirements and that this is not where the key challenges lies. However, IPO fails to address this question in relation to commercial broadcasters.
- 3.6.6. e.tv argues that it is already subjected to BBBEE requirements in relation to preferential procurement and any further regulation by the Authority would constitute over-regulation.

3.6.7. SABC contends that it already reports to the Authority on employment equity and commissioning as part of the compliance with BBBEE requirements and does not appreciate the need for further regulation in this regard.

3.6.8. WOW submits that the Authority should provide guidelines in this regard without making statutory obligations.

3.7. WHAT HAVE BEEN THE LESSONS LEARNT IN REGARD TO THE EMPOWERMENT OF HISTORICALLY DISADVANTAGED COMMUNITIES IN THE LAST FEW YEARS, SINCE THE PUBLICATION OF THE 2000 DISCUSSION DOCUMENT ON DIVERSITY IN THE INDEPENDENT PRODUCTION SECTOR?

3.7.1. NFVF advise that they were unable to source the 2000 Discussion Document, and could therefore not accurately determine what the lessons have been learnt since its publication. However, they did highlight that the growth in production companies warrants that the broadcasting licensees should treat production companies differently, depending on their size, experience, and according to their needs.

3.7.2. SASFED identified the following as the lessons which have been learnt since the 2000 Discussion Document:

3.7.2.1. that the poor administration at the SABC has a profound negative impact in that it hampers producers from effectively planning their respective businesses;

3.7.2.2. poor budgets have contributed to the continued poor quality productions;

3.7.2.3. the SABC's dependence on advertising revenue results in more emphasis being given to audience sizes rather than audience appreciation;

3.7.2.4. the lack of growth in the industry has resulted in black talent being drawn towards areas of work that produce job satisfaction and provide healthy career prospects. The industry's inability to retain and or draw in sufficient numbers means that the demographic make-up is not shifting from its highly skewed past fast enough;

3.7.2.5. the unprecedented increase in local content has left the Content Hub at the SABC functioning under constraints due to the frequently new and inexperienced staff; and

3.7.2.6. a lack of centralised decision making at the Content Hub.

3.7.3. With regard to ownership and equity, IPO's understanding is that almost all the bigger production entities are now BBBEE compliant. It submits that the coming together of practitioners from previously disadvantaged communities and the skilled ones should be encouraged as it results in transformation and positive results for broadcasters. IPO believes that empowerment needs to run much deeper than ownership if sustainability is to be built. It argues that this requires assistance through innovative funding mechanisms. Budgets, it suggests, need to take training into account.

3.7.4. The identity of the story teller, their language, and the region the story emanates from and the producer's background are some of the lessons learnt by the SABC since the publication of the 2000 Discussion Document.

3.8. GENERALLY, HOW CAN THE RELATIONSHIP BETWEEN THE BROADCASTERS AND LOCAL INDEPENDENT PRODUCERS BE IMPROVED?

3.8.1. The NFVF submits that the following would be ideal in improving the relationship between the parties: terms of trade; fair commissioning practices; and the existence of a strong industry representation.

3.8.2. ODM agrees that an improvement in the relationship between broadcasters and independent producers is required. It states that the following could assist in achieving this: transparent and predictable commissioning processes; fair terms of trade that reward risk taking by both parties; and more equitable sharing of ownership in intellectual property rights.

3.8.3. SASFED is of the view that a change in the way intellectual property rights are shared, as well as changes to the current commissioning processes as further

highlighted in the MHA Report would go a long way in improving the relationship between the broadcasters and the independent producers.

- 3.8.4. IPO is of the view that fair terms of trade, efficient operational systems, efficient and timely contracting and payment process will contribute towards improving the relationship between broadcasters and local independent producers. According to IPO the increasing tension in the relationship is the result of unfair terms of trade. It argues that negotiations for fair terms of trade and intellectual property rights failed to yield positive results for independent producers as the broadcaster has increasingly made terms of trade more onerous, reduced budgets and secure tighter intellectual property right control. This, it argues, results in the lack of trust between broadcasters and independent producers. IPO further argues that commissioning agreements need to be brought in line with international examples cited in the Discussion Document. Primary rights and secondary rights need to be separated. The commissioning agreements need to facilitate the independent sector rather than over regulate the functions of the independent producer.
- 3.8.5. e.tv submits that it has had no difficulties in its relationships with independent producers.
- 3.8.6. SABC states that it has started a stakeholder management forum to build smooth relations with local independent producers.
- 3.8.7. WOW submits that the relationship between broadcasters and local independent producers can be improved by having an unregulated environment where commissioning briefs are based on generally acceptable guidelines that afford the broadcaster the liberty to select the producer based on quality and workmanship of each independent producer.
- 3.9. **SHOULD THE AUTHORITY ASK THE BROADCASTING SERVICE LICENSEES TO DEVELOP AND PUBLISH A STANDARD COMMISSIONING POLICY WHILE AT THE SAME TIME ALLOWING**

SCOPE FOR LICENSEES TO ADD OTHER REQUIREMENTS PROVIDED THEY DO NOT CONFLICT WITH THE REGULATORY FRAMEWORK?

- 3.9.1. MNET argues for the introduction of Guidelines, which would stipulate the minimum requirements to be addressed by each broadcaster in its Code of Practice. The Codes of Practice would set out a broad framework within which the details of the commissioning process may be established. The Draft Codes of Practice would be submitted to the Authority for approval. MNET further argues that over and above such Codes of Practice providing a standard framework, they should be informed by the nature, mandate, funding and respective degrees of influence of the broadcasting service licensee. With regards to the draft regulations MNET submits that broadcasters not involved in commissioning must notify the Authority of this in writing within the 120 day period specified in this clause.⁶
- 3.9.2. NFVF is of the view that a standard commissioning policy should be developed by the Authority in consultation with broadcasting licensees and the independent production sector.
- 3.9.3. ODM submits that the publishing of standard commissioning policies would encourage the transparency required in the industry. However, ODM felt that a heavier burden to publish detailed commissioning policies should be placed on the public broadcaster which has a broader mandate than other commercial free to air and subscription broadcasters. ODM is of the view that whilst the latter should also publish such policies, they should have the flexibility to amend and customise these as the market would dictate.
- 3.9.4. SASFED is of the view that the best approach would be for the Authority to develop (in consultation between industry stakeholders) genre specific policies.

⁶ Mnet submission to the draft regulations

3.9.5. IPO answers this question in the affirmative. It suggests that the Authority should facilitate the commissioning process and put forward a framework within which to negotiate.

3.9.6. e.tv contends that it has standard commissioning requirements which are published each and every time it issues an invitation for programming proposals.

3.9.7. The SABC cautions that the Authority should avoid over regulating the industry as this may have unintended consequences despite its good intentions. In response to the draft regulations SABC suggest that the commissioning protocols be submitted for monitoring and compliance as the SABC consults before finalising their protocols.

3.9.8. WOW suggests that the Authority should develop, with the involvement of all stakeholders, a standard commissioning policy as a general rule.

3.10. WHAT METHODS OF PUBLICITY SHOULD BE USED TO COMMUNICATE WITH INDEPENDENT PRODUCERS? SHOULD THIS BE INCLUDED IN THE REGULATORY FRAMEWORK, OR SHOULD THIS BE LEFT TO THE LICENSEES?

3.10.1. NFVF submits that whatever methods are chosen, they should be informed by principles of accessibility, equitability and transparency. NFVF further states that this issue should be left to the broadcasting service licensees and the independent producers to determine.

3.10.2. ODM submits that broadcasters should be left to determine the most appropriate means of communicating with independent producers. It feels, however, that a heavier burden should be placed on the public broadcaster in this regard.

- 3.10.3. SASFED submits that the Authority could impose a levy which would be paid by the broadcasters to SASFED, or any other like organisation, which would use the funds to disseminate information to the industry.
- 3.10.4. IPO suggests that website, mass emails, trade publications and industry forums should be used as a means of communication. It submits that communication should be easily and widely accessible.
- 3.10.5. e.tv states that it posts invitations for proposals on its website and uses on-air promotions to publicise such invitations. It submits that the means of communicating with independent producers should be left to broadcasting licensees as it has significant financial implications for licensees. This latter view is shared by the SABC and WOW.

3.11. ARE THESE THE ONLY METHODS OF COMMISSIONING INDEPENDENTLY PRODUCED LOCAL CONTENT?

- 3.11.1. SASFED identified pre-sale agreements as the other means through which programming is acquired. They however point out that it would be beneficial for the Authority to define relevant commissioning methods.
- 3.11.2. IPO answered this question in the negative. It submits that there are co-production opportunities and licensing of product when a programme is made.
- 3.11.3. e.tv, NFVF, SABC and WOW stated that apart from the commissioning methods highlighted in the discussion document, they are not aware of any other method of commissioning independently produced local content.

3.12. WHAT ARE THE OPPORTUNITIES AND CHALLENGES THAT GO WITH THE CHOICE OF ANY OF THE HIGHLIGHTED COMMISSIONING METHODS?

- 3.12.1. The NFVF identified the following opportunities: the size of the industry means that there are many independent production houses from which to source programming. The NFVF identified the following challenges: limited knowledge by commissioning officers at the national broadcaster, irregular system of briefs; and a lack of transparency on the procedures used to accept unsolicited briefs.
- 3.12.2. SASFED submits that the challenges that go with commissioning are: administrative red tape; problems with getting hold of the right people; and no clear processes for taking unsolicited proposals forward.
- 3.12.3. IPO is of the view that the current practice has become overly bureaucratic and is not geared towards the reward of experience or talent. It believes that the current brief system is open to abuse and overly prescriptive. It argues that the challenge for producers is that they are expected to provide programming that fits an imagined, middle-class view of the world that sees the South African society as homogenous.
- 3.12.4. According to e.tv, the choice of methods is not about challenges and opportunities, but about what is appropriate for the broadcaster. It submits that it is critical that broadcasters are allowed the maximum flexibility in employing the different commissioning methods appropriate to the broadcaster's own strategy.
- 3.12.5. SABC submits that the opportunities and challenges will always hinge on its funding model.
- 3.12.6. WOW sees the existing programmes as a challenge in the sense that they may require further editing in order to fit the broadcaster's requirements. With regard to opportunities, WOW's view is that the broadcaster's increased control over the production results in a quicker realisation of the desired outcomes.

3.13. WHAT IS THE DEFINITION OF AN INDEPENDENT PRODUCER FOR THE PURPOSES OF THIS REGULATORY DISCUSSION?

- 3.13.1. The NFVF argues that the definition of an independent producer as highlighted in the Discussion Document bears no resemblance to the reality of what an independent producer is in South Africa. The NFVF therefore proposes that international best practice should be researched and adopted appropriately before the proposed definition is adopted.
- 3.13.2. ODM makes reference to the definition of "*independent television production*" in section 61(2) (b) of the ECA and states that this definition is sufficient for the purposes of the Discussion Document.
- 3.13.3. SASFED agrees with the proposed definition of an "*independent producer*" as highlighted in the Discussion Document. They do however propose that the definition be modified and amended to include that the independent producer hold a majority of the intellectual property rights in any specific programming.
- 3.13.4. IPO agrees to the definition of 'independent producer' contemplated in paragraph 6.1 of the Discussion Document. It believes that central decision making, ownership of copyright, control of rights and licensing should be core elements in the definition of independent producer. It is of the view that the current terms of trade produced by the SABC contravene the foundation of independence.
- 3.13.5. e.tv submits that an independent producer is one that is not controlled by the broadcasting licensee.
- 3.13.6. The SABC prefers the definition of the independent television production as contained in the Local Content Regulations. It defines an independent producer as the person not directly or indirectly employed by any broadcasting licensee and who has the overall creative responsibility for a programme from beginning to end.

3.13.7. WOW argues that the definition of an 'independent producer' used in the Discussion Document goes far beyond what an independent producer does in South Africa. It suggests the following definition: *"an independent producer is a person who is involved in overseeing and supervising the actual production activities to ensure that the output meets the desired objects concept as originally developed"*.

3.14. SHOULD THE AUTHORITY MAKE IT MANDATORY FOR INDEPENDENT PRODUCERS TO BE REGISTERED EITHER IN THE FORM OF A REGULATORY REQUIREMENT OR THROUGH A SELF REGULATION ARRANGEMENT?

3.14.1. The NFVF states that registration would be beneficial for the industry. However, it is of the view that against such proposed registration, international best practice should be researched to see how similar arrangements work elsewhere.

3.14.2. ODM states that it does not think registration of independent producers is necessary. It further states that the current representation of independent producers is sufficient.

3.14.3. SASFED is of the view that it should not be mandatory for independent producers to be registered as a form of regulatory requirement. However, it proposes that independent producers register themselves with organisations such as SASFED, and that the SABC could then meet its local content quota only with independent producers already registered with such organisations.

3.14.4. According to IPO some form of regulation on this aspect is necessary, but self regulation remains preferable to them.

- 3.14.5. e.tv submits that it is not necessary or desirable to have independent producers registered in the form of a regulatory environment. It prefers a light touch approach instead.
- 3.14.6. The SABC argues that the Authority does not have authority over independent producers hence it rejects this proposal.
- 3.14.7. WOW argues that there is no need for the Authority to make it mandatory for the registration of independent producers as it is the broadcaster's prerogative to perform sufficient background verification on any producer prior to engaging them.

3.15. WHAT ROLE SHOULD THE AUTHORITY PLAY IN THE REGULATION OF INTELLECTUAL PROPERTY RIGHTS, TAKING INTO CONSIDERATION THE ROLE CURRENTLY PLAYED BY THE DTI AND CIPRO?

- 3.15.1. MNET is of the view that that the Authority should not play any role in regulating intellectual property rights as the regulation of these issues fall outside the mandate of the Authority as provided for in the EC Act and the ICASA Act.
- 3.15.2. The NFVF is of the view that the Authority should assist in creating an enabling environment for the exercise of intellectual property rights that is mutually beneficial for all the parties involved. It is noted however, that the difficulty with achieving this, is the current broadcasting service licensees' failure to leverage other revenue streams other than those derived from the commissioning of programming.
- 3.15.3. ODM is of the view that the Authority does not have any role to play in the regulation of intellectual property. It contends that these issues fall under the purview of the DTI and CIPRO only. This view is shared by WOW.
- 3.15.4. SASFED proposes that the role the Authority could play would be to deal with intellectual property rights in the code of commissioning practice.

- 3.15.5. IPO refers to the Recommendations proposed in the MHA Report ⁷ on this question. However, it goes further to say that there is a need for the Authority to provide a regulatory framework on the issue of intellectual property rights as this issue is central to creating a more equitable relationship with broadcasters.
- 3.15.6. e.tv contends that the Authority does not have legislative authority to regulate intellectual property rights as such matter is one for negotiations between the parties. It argues that should the Authority do so, it would be in contravention of the principle that the Authority should refrain from unreasonable intervention in the commercial activities of licensees.
- 3.15.7. SABC strongly argues that the Authority has no role to play in the regulation of intellectual property rights. It submits that intellectual property rights should be adjudicated upon by the Copyright Tribunal.

3.16. IS THERE AN EXPLICIT LEGISLATIVE BASIS FOR THE AUTHORITY TO REGULATE INTELLECTUAL PROPERTY RIGHTS? PLEASE ELABORATE.

- 3.16.1. MNET expressly submits that there is no explicit legislation that allows for the Authority to regulate intellectual property rights.
- 3.16.2. ODM is of the view that the Authority does not have any role to play in the regulation of intellectual property. It maintains that these issues fall under the purview of the DTI and CIPRO only.
- 3.16.3. SASFED was of the view that although there was no legislative grounds for the Authority to change the Copyright Act, the Authority should nonetheless support any industry initiatives to make the necessary changes to the Copyright Act, interpret all possible changes to commissioning regulations

⁷ Unlocking The Creative and Economic Potential of the South African Television Sector-Recommendations for Legal, regulatory and Commissioning Practice Changes, Pg 145-147, November 2008.