

Dr Stephen Ncube

Chairperson – Independent Communications Authority of South Africa (ICASA)

For Attention: Mamedupe Kgatshe

Block A, Pinmill, Farm, 164 Katherine Street, Sandton

Per email: mkgatshe@icasa.org.za

Dear Mamedupe Kgatshe

WRITTEN SUBMISSIONS ON THE ICASA DRAFT SOUTH AFRICAN MUSIC
CONTENT REGULATIONS

Submitted by: Linda Maseko

on behalf of MentalWave (PTY) Ltd, a private copyright and related rights company conducting business as a label, publisher and management company. Maseko is the managing member;

Office: +27113122854 / Fax: +27865391924 Mobile: +27 73 560 4399
Address: 526 16th Road, 18 Constantia Square Office Park, Midrand Gauteng www.mentalwave.co.za

And

Graeme Gilfillan

on behalf of Nisa Global Entertainment (PTY) Ltd, a private company conducting business as a Copyright Law consultant, Business Affairs and Copyright Forensics and valuations; Gilfillan is a copyright lawyer and director;

Office: +27114842406 / Fax: +27114841306 Mobile: +27
83 555-3747 Address: 4th Floor, Building D, Sunnyside Office Park,
32 Princess of Wales Terrace, Parktown, Johannesburg
www.nisaonline.com

What are our concerns?

- The quota's suggested are not aligned with DTI and DAC and are less than half of what such should be
- The bill does not enable local culture and instead reinforces foreign cultural hegemony
- The language used is not firm and offers loop-holes to circumvent compliance and opportunities for abuse
- With every second of foreign music played money leaves South Africa – the country cannot afford such currently and
- South Africa, with 5% of Africa's population, currently contributes 72% (over US\$2 billion per annum) to Africa's creative services licensing deficit.
- The current Bill structure is cumbersome to administer and manage when such can be simplified and made easier to administer
- Compliance enforcement is weak and in its present form will not be effective
- No lessons are being learnt from the most important player in the creative service licensing business, the USA, where 92% of all music purchased is local US made and 94% of all films viewed are 94% US made, with the consequence that the US has arguably the most powerful domestic market in the world. The moral is support local culture and one has a local industry
- Undermines the South African music and related industries

- The outcomes suggested favours untransformed companies (major record and publishing companies) with no local equity and discriminates against transformed and local equity companies
- The issue of 18 months after the Gazette period is questioned as being extremely expensive to the country and unnecessary in an environment overstocked with digital musical content supply
- Contributes to unemployment in the sector
- Is prejudicial to the interests of the music and related industries
- Does not seek to deploy the models of progressive countries and international best practice where the outcomes have all been productive and positive e.g. Nigeria and Venezuela
- The Bill does not acknowledge or speak to an economy in transition...an economy in development such as South Africa's is
- Biased and partial to the interests of the few

Why is the bill important and how it will affect you or the public?

The Bill is important to us as it speaks directly to

- the livelihood of the creative industries generally
- reduction in foreign exchange requirements
- strengthening South Africa cultures
- alignment with the national agenda
- significantly improving the financial health of the SA cultural industries as a whole
- opportunity to move away from the foreign cultural hegemony that has

characterised the past two decades

The impact on the public of the Bill

- is significant from a local cultural industries
- see more monies than previously stay in and circulate in the country
- significantly increase the opportunities for local content creators and owners
- seeing better practice and governance increases confidence
- awakening to how other countries, particularly in Africa, do things

Problems with the bill and proposed solutions or recommendations

With respect to the opening paragraph that advises

“The Independent Communications Authority of South Africa (ICASA) has in terms of section 4(j) of the ICASA Act read with section 61 of the Electronic Communications Act (Act 36 of 2005 as amended) made the regulations in the Schedule”

Suggestion

Amend to include “....and read with the Copyright Act 98 of 1978 as amended, the Regulations, the Performers Protection Act 11 of 1967 and the Collection Society Regulations”

Reason

The Copyright Act and its related Acts form the governance of copyright i.e. Music content in South Africa

1. With respect to Definitions

1.1 Suggestion

Delete definitions for “Interview” and “New Musician” or “Documentary”

Reason

- Neither constitute music content
- Language inconsistent with Copyright Act – what is the meaning of a musician? Or “content”?
- None of the above are licensed and have no cost to the broadcaster as such do not constitute music (as is licensed and paid for)
- Form the basis for a license holder loophole to evade and avoid compliance

1.2 Suggestion

Include definition of:

- “content” – word is used 9 times in the Bill
- “sound broadcasting licence” – used 7 times in the Bill – not defined in the EC Act

Include proviso that all terms used where applicable is as used have meaning as per the Acts meaning the collective of “section 4(j) of the ICASA Act read with section 61 of the Electronic Communications Act (Act 36 of 2005 as amended), the Copyright Act 98 of 1978 as amended, the Regulations, the Performers Protection Act 11 of 1967 and the Collection Society Regulations”

Reason

Improves understanding and use of the Bill, and decreases future argument over what would termed bad drafting – definitions are the backbone here

1.3 Suggestion

Amend definition of 'South African Music' by the addition of a proviso saying

"Provided that the ownership of any musical work, sound recording or performance must be domiciled in South Africa"

Reason

The domicile of the works is central as to whether an intended impact of the Bill (which is to increase the equitability of South African music available on radio in the country) will occur.

It should be noted that a musical work is defined in law as music only (no lyrics) and so the reliance on the 3 uses of the phrase technically excludes words

2. With respect to "Application of these regulations

Suggestion

Amend the sentence to include 'music videos'

Reason

Music is communicated directly to the public in primarily two ways – sound broadcast and music videos (cinematographic films) – addressed only one would leave the other, which bears direct relation; music videos are royalty bearing from the VPL point of view and musical/literary work point of view and a hit track has a music video typically

3. With respect to "Imposition of Sound Broadcasting Licence conditions regarding South African Music"

3.1 Public Sound Broadcasting Licensees

Suggestion

Amend to read

“(1) A holder of a public sound broadcasting licence must ensure upon the next renewal of their sound recording license, a minimum of 90% of the sound recordings and music videos broadcast in the performance period, consist of South African musical content and that such South African music is spread evenly throughout the performance period”

Reason

Public funds have the requirement of:

- Supporting local culture
- Providing South Africans with access to their cultures
- Interacting with culture as education

There is no basis for public funds to be used to pay, on a policy basis, any less

3.2 Commercial Sound Broadcasting Licensees

Suggestion

Amend to read

“(2) A holder of a commercial sound broadcasting licence must ensure upon the next renewal of their sound recording license, a minimum of 80% of the sound recordings and music videos broadcast in the performance period consist of South African musical content and that such South African music is spread evenly throughout the performance period”

Reason

If the sector with the largest financial impact in the music industry and the largest generator of royalties for copyright owners is not locally focused then the cost to the country and music industry is extremely prejudicial

To significantly blunt the imbalance of trade occurring with music, in South Africa (See UNCTAD figures). The US Exports US\$89.5 billion (2012) and the whole of Africa's deficit is US\$2.7 billion. South Africa exports US\$63 million versus importing US\$2.1 billion

3.3 Community Sound Broadcasting Licensees

Suggestion

Amend to read

(3) A holder of a community sound broadcasting licence must ensure upon the next renewal of their sound recording license, a minimum of 90% of the sound recordings and music videos broadcast in the performance period, consist of South African musical content and that such South African music is spread evenly throughout the performance period

Reason

Public funds have the requirement of:

- Supporting local culture
- Providing South Africans with access to their cultures
- Interacting with culture as education

There is no basis for public funds to be used to pay, on a policy basis, any less

3.4 Subscription Sound Broadcasting Licensees

Suggestion

Amend to read

Every holder of a subscription sound broadcasting licence must ensure upon the next renewal of their sound recording license, a minimum of 51% of their bouquets consist of channels made up of South African music content.

Reason

Cost to the country is equitable and fair at 51%

4. With respect to General Provisions

4.1 Suggestion

Amend sub-regulation (1) to read

A sound broadcasting service licensee that cannot meet the local content requirements must, in order to be considered for a broadcast license, must apply to the Authority for exclusion, and must submit proof that there is limited music supply in their defined format.

Reason

The purpose of the law would be ineffectual without such. The issue of compliance should be linked to the broadcast license and its renewal.

4.2 Suggestion

Amend sub-regulation (2) to read

A sound broadcasting service licensee that cannot meet the local content requirements must first cease broadcasting to avoid being in breach of its license and then submit proposals, with their renewal application in terms of sub

-regulation (1), on how they will work with the music industry to address the shortage of music supply in their defined format.

Reason

The law should not be made that it can easily be circumvented and broken with penalty. The issue of non-compliance must have 'teeth' – i.e. have enforceability and meaning

4.3 Suggestion

Delete sub-regulation (4)

Reason

Has no logic or basis to be in the Act – no meaning - “encourage”

5. Contraventions and penalties

5.1 Suggestion

Amend sub-regulation (1) to read

A licensee that contravenes any regulation of these Regulations is liable to a fine not exceeding the greater of R5 000 000 (five Million Rand) or 10% of the licensee's annual turnover for every day or part thereof during which the contravention continued **and the suspension of the contravener's broadcasting license for a period at the discretion of the Authority i.e. off-air**

Reason

There is a need for appropriate and real penalty that relates to the broadcast license to the extent that all licensees are in clear understanding how serious the

matter of local content is

5.2 Suggestion

Delete sub-regulation (2)

Reason

Redundant if subregulation (1) is amended. There should be break – a breach is a breach

6 Formulas (Format Factors)

Suggestion

Delete the entire section

Reason

Do not constitute content

Loophole to avoid and evade compliance

7. Records

Suggestion

Amend sub-regulation (2) to read

(2) The logs, statistical forms and records contemplated in sub -regulation (1) must be preserved in original for a period of not less than 7 (seven) years after the date of last entry

Reason

These are copyright records and may be referred to years ahead

In a digital world storage of records is easy, efficient and takes not space – it is not a burdensome compliance

Thank you for the opportunity to make this submission. In the event that such is deemed worthy the submitters are prepared to give an oral presentation.