National Association of Broadcasters

NAB SUBMISSION TO ICASA ON THE DRAFT SOUTH AFRICAN MUSIC CONTENT REGULATIONS AND DRAFT SOUTH AFRICAN TELEVISION CONTENT

31 August 2015

1. Background

1.1. The National Association of Broadcasters ("the NAB") is the leading representative of South Africa's broadcasting industry, established over 20 years ago. The NAB aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The current NAB members are:

1.1.1. the three television services and 18 radio services of the SABC;

1.1.2. licensed commercial radio broadcasters (including: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM and YFM);

1.1.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat);

1.1.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;

1.1.5. both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, Sentech and Orbicom;

1.1.6. associate members, including training institutions.

1.2. On 18 June 2015, the Independent Communications Authority of South Africa ("ICASA") published for public comment, the Draft South African Radio and Television Content Regulations, ("Draft Regulations"). The closing date for written submissions on the Draft Regulations was initially set as 14 August 2015. ICASA held a series of consultative workshops on the Draft Regulations and following the workshop held in Gauteng on 31 July 2015 ("ICASA's public consultation"), it became apparent that the public would require additional time to review their submissions. A request for an extension to the 31 August was therefore put to ICASA by various stakeholders and the NAB appreciates ICASA's acceding to that request.

1.3. The NAB welcomes the opportunity to make its written submission to the Draft Regulations, and we request to be given an opportunity to participate in oral hearings should these be conducted.

1.4. In this written submission, the NAB will address overarching policy principle issues and then address television and radio concerns separately.

2. ICASA's Mandate to Regulate Broadcasting

2.1. The NAB attended ICASA's public consultation process on the Draft Regulations, and is encouraged to note that during that session, ICASA indicated that it will be approaching the Department of Trade and Industry ("the DTI") on its Copyright Amendment Bill process. Broadcasters are concerned that (amongst others) the Bill sets out a section specifically on SA Local Content (new section10A). It is apparent that the DTI seeks to "regulate" South African content and the NAB looks to ICASA and the Department of Communications ("the DoC") to ensure inter-government alignment and curtailment of overlapping mandates and processes of public entities.

2.2. The NAB also trusts that ICASA has considered its written submission made on 10 October 2014 on ICASA's Discussion Document on the Review of Regulations on the SA Local Content ("the Discussion Document"), where we addressed related copyright issues as well as the Copyright Review Commission ("the CRC") Recommendations. It is regrettable that ICASA did not reflect on these key issues in its Position Paper as published with the Draft Regulations on 18 June 2015. We believe that the issues we raised are of critical importance and ought to have been addressed in the Position Paper.

2.3. ICASA is aware that the CRC operated within set Terms of Reference ("the ToR"), and to our knowledge none of the ToR required the CRC to make recommendations for the regulations on SA Local Content. We still hold the view that the CRC's proposals relating to SA Local Content are *ultra vires.* We therefore encourage ICASA to address these concerns during its engagement with the DTI on the Copyright Amendment Bill given that the DTI has simply transposed the CRC recommendations into the Bill.

2.4. We believe that the recommendations relating to the increase of SA music quotas, emanating from the CRC Recommendations are ultra-vires the powers of the CRC as well as the DTI, and not in line with section 192 of the Constitution.

3. ICASA's Local Content Review Process

3.1. The NAB supports ICASA's process to review the SA Local Content Regulations and we have noted the steps taken by ICASA to ensure wide and robust consultation in developing the Draft Regulations.

3.2. However, having attended the public consultation session at ICASA's auditorium in Gauteng, it became apparent that the Authority has not adequately considered the feedback from the research and consultation regarding the supply-side of South African music and television content. It is also regrettable that the Authority has not undertaken a regulatory impact assessment in support of the Draft Regulations.

3.3. The NAB wishes to point out, as it did in its previous submission that the basic principle of regulation in any market is to intervene where there is market failure. The SA Local Content Regulations were introduced to address market failure in local content supply and acquisition in South Africa, and the approach worked well.

3.4. The NAB cautions ICASA that if there is continued intervention, then the Regulator runs the risk of stifling free choice and commercial freedom and at worse, contributing to the closure of broadcasters, some of whom simply cannot meet the minimum threshold of the proposed South African content quotas based on unavailability of supply of local content for the type of service set out in their licence.

3.5. SA Local Content continues to play a pivotal role in preserving the cultural identity and ethos of the South Africans society. The Electronic Communications Act 36 of 2005 as amended ("the ECA") enjoins both television and radio licensees to:

> *"Promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups, and provide entertainment, education and information;*
>
> *Provide for regular-*
> - *News;*
> - *Actuality programmes on matters of public interest;*
> - *Programmes on political issues of public interest;*
> - *Programmes on matters of international, national, regional and local significance;*
> - *Cater for a broad range of services and specifically for programming needs of children, women and the youth and the disabled…."* [1]

3.6 The NAB is of the view that both television and radio will for at least the next decade be the preferred electronic media platform for national access to information,

[1] Section 2 (s) of the ECA.

education and entertainment in South Africa. ICASA is aware that SA Local Content has been a key driver for the consumption of television and radio programming. The broadcasting industry responds to local audience tastes, needs, languages and preferences.

3.7 It would have been preferable for the Authority to adopt a forward-looking approach to regulation, instead of regulating only for the dual illumination period. However, if the Authority persists with this approach, then the SA Local Content obligations for both sound and television broadcasting services would have to be reviewed once again before the analogue switch-off. This is of greater importance for analogue broadcasting service licensees who will be migrating to digital broadcasting. After the migration, we recommend that a 'light touch' approach be adopted to allow for a smooth transition. ICASA is also reminded of the costs associated to dual illumination and the migration process.

4. Monitoring and Compliance

4.1. In its Position Paper, ICASA states *that "there are no complaints or suggestions with regard to monitoring sound broadcasting licensees, therefore the compliance monitoring mechanisms currently used will remain as is*"[2]. This is despite the inadequacies in monitoring identified by various respondents to the Discussion Document. Respondents advocated for less complex methodologies and a simpler process of monitoring[3]. Other respondents proposed less reporting obligations and reduced costs of compliance[4]. Furthermore, the NAB is concerned that ICASA seems to have ignored its written submission that reporting is administratively onerous on both radio and television licensees. NAB members have also confirmed that reporting is labour intensive as it is done manually, and automation software is costly, and not readily available. Broadcasters are further concerned that often they are required to re-submit information already provided to ICASA. On the other hand, licensees are not confident that monitoring is satisfactorily done as it is based on spot checks, and this does not necessarily reflect a true compliance picture of a licensee.

4.2. ICASA would have also noted that this same concern was raised during its public

[2] At page 58 paragraph 3.13 of the Position Paper.
[3] Kagiso Media and M-net.
[4] The SABC.

consultation session held in Gauteng.

4.3. The NAB submits once again that there is a lack of alignment in ICASA's systems, and that there is a need to simplify and standardise reporting mechanisms. It is our view that ICASA ought to speedily and timeously provide licensees with their monitoring reports. ICASA must ensure that there is consistency in reporting timelines.

4.4. The NAB believes a standardised and simplified approach to compliance can alleviate non-compliance and be less burdensome on ICASA in monitoring the sector. ICASA should also consider reducing non-compliance penalties, as it is often ICASA that does not respond to licensees in a timely fashion – if at all.

4.5. *Submission of Audited Monitoring Reports*

4.5.1. While still addressing monitoring, In terms of Clause 8(3) of the draft Regulations, TV broadcasting licensees are required to submit audited monitoring reports. This is notwithstanding the constant reminder to ICASA that current monitoring methodologies need to be simplified. The NAB is opposed to this clause and proposes for its deletion in total. The requirement to submit audited monitoring reports is onerous on broadcasters, and adds another administrative layer and will add to an escalation of costs for broadcasters.

4.5.2. It is on these grounds that the NAB proposes that ICASA reviews its decision not to change its monitoring systems as these are out-dated and after twenty years of monitoring, ICASA ought to invest in appropriate technologies that enable efficient monitoring capabilities.

5. Contraventions and Penalties

5.1. In the draft Regulations ICASA seeks to introduce penalties which can only be described as excessive. The NAB notes that despite the caution for ICASA to ensure some alignment of penalties for non-compliance with existing regulations namely, the Compliance procedure Manual[5] and the Standard Terms and

[5] Which imposes a R50 000 penalty.

Conditions for Individual licences Regulations[6], there appears to have been no attempt to make such an alignment.

5.2. While the NAB does not condone non-compliance, it is concerning to note that the proposed penalties for the contravention by both commercial television and radio broadcasters is set at a staggering R5 million or 10% of the licensee's annual turnover for each day, or part thereof, during which the contravention continued. While the penalty for community sound and television licensees is a fine not exceeding R50 000. The NAB wishes to point out to ICASA that a penalty based on annual turnover is exceptionally onerous.

5.3. In terms of section 17B (a) of the Independent Communications Authority of South Africa Act13 of 2000 ("ICASA Act") as amended, the Complaints and Compliance Committee of ICASA ("the CCC") *"must investigate, and hear if appropriate, and make a finding on all matters referred to it by ICASA".*

5.4. Section 17D (2) of the ICASA Act empowers the CCC to make recommendations to ICASA on the action to be taken against a licensee on any matter heard by the CCC. In our view, this also includes making a recommendation of a penalty to be imposed by ICASA on non-compliance of SA Local Content quotas.

5.5. Based on section 17H of the ICASA Act, the recommendation by the CCC and the quantum of a fine to be imposed may not be in excess of R1 million. The maximum penalty recommended in section 17H of the ICASA Act is R1 million or imprisonment not exceeding 5 years. ICASA has therefore, in proposing a fine of R5 million or 10% of the licensee's annual turnover, overstepped its legislative mandate. It is against this backdrop that the NAB proposes that:

5.5.1. Any contraventions of the SA Local Content Regulations be referred to the CCC for determination;

5.5.2. The quantum of a fine recommended by the CCC should not exceed R1 million;

5.5.3. ICASA to harmonise the contraventions and penalties of its Regulations to align them with the sections 17B, 17D and 17H of the ICASA Act.

[6] Regulation 12 of the Regulations published in government gazette 33294 dated 14 June 2010 which imposes a maximum fine of R1 million.

5.5.4. Fines are adequately provided for in the ICASA Act and there is no need to insert penalty provisions in the draft regulations.

6. Demand and Supply of SA Local Content

6.1. The draft Regulations provide for an increase of SA Local Content quotas across all tiers of broadcasting. This proposal ignores the fact that sound broadcasting licensees are licenced according to genre/format, which is highly dependent on the actual availability of music –supply side. Broadcasters where possible, exceed the requisite quotas. However, the ICASA Study conducted in 2014[7], has also shown that certain stations are struggling to reach their quotas, mainly due to limited supply of SA Local Content. Radio stations that meet their quotas do so purely due to the availability of music genres they are licenced to broadcast. ICASA must be minded that the availability of volume should not be the only consideration. Quality should also be taken into account. Licensees have an obligation to promote culture and should not be forced to accept sub-standard offerings.

6.2. A number of respondents to the Discussion Document cautioned ICASA that in considering quotas, demand side should be considered which focuses on audiences' reflections of choice and preferences. The Freedom of Expression ("the FXI") further cautioned that consumer choice and preference are seldom captured to emphasise the promotion of local content and plurality of views.[8] It was further indicated by the SABC in its response to the Discussion Document that any attempt to increase local content quotas should be informed by consumer research which should form a vital component to gauge consumer preferences and demand. It is concerning that despite these observations which the NAB supports, ICASA has decided to increase the level of local content quotas across all three tiers of broadcasting.

6.3. During the consultative workshop, the South African Music Performance Rights Association ("SAMPRA") raised a concern questioning the extent to which ICASA had consulted the music fraternity to address issues of supply in relation to the

[7] ICASA Study: Conducting a thorough assessment of the cultural, economic and social benefits brought about by the preservation of South African programming regulations and to perform a sound cost-benefit analysis, 2014.

[8] FXI's written submission on the Discussion Document at pages 3 and 4.

requisite increase.

6.4. The NAB believes that the current SA Local Content quotas are adequate. These quotas were developed to ensure that there is a minimum threshold for new entrants into the market. However, ICASA has successfully licenced radio broadcasters (through competitive licensing processes), to exceed the basic threshold. Radio broadcasters have, in addition to these quotas, also made promises of performance with ICASA – thus going beyond the minimum quota, which are captured in their specific licence conditions. Many licensees find it challenging to meet their unique quota's (these exceed the minimum threshold), and therefore cautions ICASA from applying a one size fits all approach. The radio industry continues to support local music; however they are dependent on the availability/supply of local music and development of new music genres.

6.5. Radio members of the NAB have raised a number of challenges relating to the increase of quotas:

6.6. <u>*Community Sound Broadcasting Services*</u>

6.6.1. Community sound broadcasting has grown exponentially since the introduction of community radio and television licensing in South Africa. Whilst the NAB encourages and supports the continued growth of this tier of broadcasting, the NAB is concerned that reliance on sponsorships, donations and volunteers to run these services, impact on the ability of a range of community broadcasters to provide the levels of local content proposed by ICASA.

6.6.2. For community radio broadcasters of interest, the pool of SA Local Music is limited. In the event that ICASA increases the quotas it would have to continue to apply exemptions and concessions where licensees are able to provide evidence of the non-availability of music. The music industry's growth is organic and unpredictable; ICASA must consider this in weighing up the reasonableness of any increased quotas. In addition the emphasis on sourcing geographically from local productions is illogical, particularly for community of interest stations.

6.6.3. The NAB therefore proposes that the status quo of 40% be retained for community sound licensees. Where possible, community sound broadcasters should have individual engagements with ICASA to agree on promises of performances toward increasing music quotas (over an agreed period of time) to a threshold that is feasible for the radio station.

6.7. *Public Service Sound Broadcasting Services*

The expectations on the public broadcaster are on the other hand unique. While the NAB notes that it is costly, and sometimes difficult for the Public Broadcaster to increase its quotas to above the threshold, the Public Broadcaster is committed to its public mandate. To this end the SABC indicated in the response to the Discussion Document that it is prepared to increase its SA local music broadcasted on its 14 public service stations (language stations) excluding Lotus FM up to 60%, with an increase by 5% over a period of three years, on the commercial sound services of the SABC. This should of course be subject to there being sufficient supply of music. It must be noted that the decision by the SABC to commit to such increases was well thought through and ICASA's proposed increase to 70% of local content on all SABC sound broadcasting services is unachievable.

6.8. *NAB Role in Formats Development*

The NAB welcomes ICASA's view that the NAB should be at the fore front of reviewing music formats. As suggested in the NAB's written submission on the Discussion Document, a consultative committee, comprising of all key stakeholders, ranging from radio broadcasters, music producers musicians, as well as government departments including the DTI, be established to consider music formats that are unique to South Africa, and establish a strategy to encourage the creation of good quality music. The NAB has further learned during its engagement with the DTI, that the Department of Arts and Culture ("the DAC") is also addressing issues of SA Local Content. The NAB therefore proposes that ICASA, as the mandated Authority on broadcasting matters, engages the DOC to lead a collaborative consultation with all government departments that seek to address the growth and sustainability of South African content.

7. Television

7.1. *Independent Television Production*

7.1.1. The NAB welcomes the unchanged quotas for independent television production for public, commercial community and subscription broadcasting licensees. The NAB is however concerned about the obligation being imposed to television broadcasting licensees to ensure that independently produced content is <u>evenly spread</u>. In our view this obligation is ambiguous and subject to multiple interpretations. The NAB therefore proposes that the clause be amended as follows:

> *"A public, commercial, community, and subscription television broadcasting licensees must ensure that a minimum 40% of their South African television content programming consists of programmes which are independent television productions and the independent television productions**. [are spread evenly between, South African arts programming, South African drama, South African documentary, South African knowledge-building, South African children's and South African educational programming."]***

7.2. *<u>Production of South African Local Content Television</u>*

7.2.1. In commissioning and procuring content generally, the TV broadcasting members of the NAB plan well in advance for the scheduling of such programming for the year ahead. Any increase of their SA Local Content offering within a period of 18 months, will unduly interfere with the inventory that is already on schedule. Particularly for the Public Broadcaster, this may amount to fruitless and wasteful expenditure.

7.2.2. Though costly for television broadcasters to meet their SA local content quotas, and despite the limited supply of locally produced programming, and associated costs, television broadcasters invest considerably to meeting their quotas. The SAARF TAMS release have proved that the highest rated programmes (most watched) are SA local programming vis-à-vis other type of programming.

7.2.3. ICASA is reminded that broadcasters have to respond to audience tastes and preferences and even if there are no quotas in place, local content will still thrive – this is evidenced in the SAARF TAMS figures where the top TV programmes are all local SA productions.

7.2.4. The NAB proposes therefore that in the event that ICASA reaches agreement with incumbent licensees on revised quotas, that any increase in the quota must be based on a phased-in approach that exceeds the proposed 18 month period. ICASA should allow for at least 3 years, considering the economic climate, pressures in industry on the supply side and most importantly, the costs associated to digital terrestrial television migration.

7.3. <u>*Repeats*</u>

7.3.1. The Authority's observation that *"ICASA does not interfere in the number of repeats a broadcaster can have, but rather set a limit on the repeats that contributes towards compliance with the local content quotas" is not correct.* The draft Regulations allocates 50% for a first and second repeat of SA Local Content. Any other repeat thereafter will not count towards compliance. In a digital environment, this will be severely limiting.

7.3.2. During digital migration, television broadcasters will need more SA local content than ever. Television broadcasters have a wide range of archive programming that can be broadcast during this period. Further, it is the very nature of multi-channel broadcasting that there is a high level of repeats. This is critical to ensure that the multi-channel broadcaster remains viable and is consistent with programming patterns for multi-channel broadcasters across the world. Repeats also provide licensees an opportunity to recoup a return on investment (ROI) in programming.

7.3.3. It is on this background that the NAB recognises the importance of repeat programming, and proposes that the proposed restrictions on repeats be relaxed. In our view, the number of repeats should be increased to nothing less than 5 repeats, with a sliding scale for the scoring.

8. <u>Bouquet Reporting</u>

8.1. The NAB welcomes the approach ICASA adopts of applying SA Local Content per digital bouquet, rather than per channel. As with the subscription broadcasting service licensees, free to air TV licensees ("FTA") broadcasters are no longer confined to a handful of channels but are offering multi-channel bouquets to audiences.

8.2. The draft Regulations stipulate in Clause 8 (1) that *"SA Local Content requirements will apply per bouquet and not per channel approach for any new digital broadcast* *service licensee and incentive channels"*. The NAB is concerned that this drafting is ambiguous, especially in light of the Position Paper which states that "a bouquet rather than per channel approach will be put in place". The NAB therefore proposes that Clause 8 of the draft SA Television Regulations be amended to read as follows:

> *"South African Local Content requirements will apply to all tiers of TV broadcasting licensees, and shall apply per bouquet and not per channel* ***[approach for any digital broadcast service licensees and incentive channels."]***

8.3. *Community Television*

8.3.1. In the case of community television services that are religious based, the SA Local Content should specifically relate to the religious services and not general in nature as would be the case for a full-spectrum community television licensee that serves a particular geographic area. It is therefore costly for this class of license to commission SA Local Content. The revenue models pertaining to these licensees do not enable sufficient revenue to afford the current SA Local Content quotas, let alone the proposed increase. It must be noted that the revenue model for some community television broadcasters is based on airtime sales with limited investment in local content. The air-time sales remain challenging for this tier of broadcasters and an increase in quotas would be unachievable and financially unviable.

8.3.2. ICASA would have noted that the issue of financial constraints experienced by community television broadcasters was discussed during ICASA's public consultation session in Gauteng. In addition, representatives from community television broadcasters lamented the fact that they pay the same rates for signal distribution as commercial broadcasters. ICASA was cautioned against raising local content quotas without weighing up all the associated costs of providing a broadcasting service.

8.3.3. The NAB has also noted that in the Draft Community Broadcasting Support Scheme of the DOC (published on 1 July 2015), there is acknowledgement that community television is "constantly shunned over doubts on its financial ability to procure content".[9]

[9] See page 16 of DOC Draft Community Broadcasting Support Scheme - government gazette 38947 of 1 July 2015

8.3.4. NAB community members are concerned that achieving compliance in 18 months is simply unrealistic. The time frames prescribed tend to ignore practical limitations experienced by community broadcasting licensees. It is important for ICASA to give meaningful consideration to this fact in view of the penalty provisions for non-compliance (R 50 000), as iterated by the Draft Regulations.

8.3.5. It is the NAB's view that the proposed increased quotas for community broadcasters within an 18 month period will yield undesired and unavoidable results. There are very practical limitations to the ability of community television broadcasters to reach South African local content quotas of 65% envisaged in the Draft Regulations.

9. Exemptions

The NAB notes that the exemptions proposed in the draft Regulations have not changed from the 2006 Regulations. ICASA has over the years had to consider exemption applications for specific stations which do not have an adequate supply of music in their licenced format. Based on the studies ICASA conducted, it is evident that licensees are meeting their current quotas, and where possible exceed these quotas. On the backdrop that quotas across all tiers remain unchanged, the NAB welcomes the retention of the exemption clause to further cater for licensees that are unable to meet their current quotas.

10. Implementation Timeframes

10.1. ICASA proposes increased SA Local Content over a stipulated time period from the coming into effect of the Regulations for both TV and sound broadcasting licensees, i.e. *"18 months of the gazetting of these regulations, and a further increment in the following year".*

10.2. These timeframes overlook factors the NAB addressed regarding enough supply of content to meet these increments. Furthermore, broadcasting licensees require adequate time to procure and commission the requisite content. In our view the prosed timelines are a cause for unintentional non-compliance by licensees.

10.3. ICASA is reminded of those broadcasters who will require additional time in which to comply due to the paucity of available local content in their specific formats, as well as the prohibitive costs of local television production.

10.4. In the event that ICASA decides to increase the local content quotas, the NAB urges ICASA to consider extending the implementation date from 18 months to 36 months, to engage broadcasters on exemption requirements and most importantly, to set local content quota's that represent the floor, not the ceiling as this can be an immediate barrier to entry. To that end, ICASA is reminded that licensees offer a 'promise of performance' to exceed the minimum local content threshold and in so doing, broadcasters provide greater choice and diversity in a manner that is feasible and sustainable.

11. Closing Remarks

11.1. The NAB commends ICASA for meeting its local content objectives. The SA Local Content regulations are a unique example of a well-functioning and effective regulatory intervention. The uptake of SA Local Content by viewers and listeners bear testimony to this. As indicated in our previous submission, the top five most listened to stations are South African language stations, while the most viewed television programming is locally produced. Broadcasters respond to audience tastes and preferences and South African content is favoured across the entire three tier broadcasting landscape.

11.2. Any additional intervention and increased local content quota's must be evidence based - informed by the cost of local production, the availability of local music in a range of formats, and the value chain of broadcasting in a converging environment.

11.3. The NAB welcomes the opportunity to make its submission and trusts that the inputs made will add value to ICASA's deliberations.