ICASA, for attention of
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11 March 2019

Madams/Sirs,

Re: Draft Sports Broadcasting Services Amendment Regulations 2019

We are writing in response to the call for comments on the proposed regulations promulgated in the Government Gazette No. 42115, 14 December 2018.[1] We are both active researchers in telecommunications, broadcasting and information technology economics, and have published extensively in the international scholarly literature in these fields. Our work has been cited in recent regulatory proceedings in the United States, Europe, Australia and New Zealand. We are both board members of the International Telecommunications Society (ITS). Our interest in this matter is purely as academics and members of the public.

First, we acknowledge ICASA's 2018 review of South Africa's Audio-Visual and Digital Content Policy. Such a review is both timely and important, given the extensive changes that have taken place in the internet access, broadcasting and digital content distribution markets since the current Electronic Communications Act 2005[2] was passed and the Sports Broadcasting Services Regulations were promulgated in 2010.[3]

However, the proposed changes to the Sports Broadcasting Services Regulations presume that broadcast television will continue to be the predominant means by which South African citizens will access national and international sports content. While this may have been the case in the past, with a limited number of established broadcasters (Multichoice SA, ODM, e.tv, Siyaya etc.) acquiring broadcast rights and packaging sports and other entertainment content into channel and programme packages distributed over dedicated broadcast platforms (satellite, analogue terrestrial) to end-consumers receiving it either in exchange for a fee (pay television) or free-to-air (FTA),[4], it is not axiomatic that this arrangement will prevail in the future.

Substantive changes in the means of distributing content to end consumers – notably the convergence of digital content distribution to a single internet platform – are altering both the physical and economic relationships between participants in the video content distribution value chain.

We note that:

1. Internet-based content distribution removes many of the competitive advantages held by incumbent broadcasters' ownership of content distribution infrastructures. The original creators of content may choose to bypass intermediate local distributors

[1] https://www.icasa.org.za/uploads/files/Draft-Sports-Broadcasting-Services-Amendment-Regulations-2018-42115.pdf

[2] https://www.wipo.int/edocs/lexdocs/laws/en/za/za082en.pdf

[3] https://www.wipo.int/edocs/lexdocs/laws/en/za/za082en.pdf

[4] Competition Commission of South Africa, Agenda Item 3a. Competition issues for the sale of audio-visual rights for major sporting events, Presentation to the United Nations Conference on Trade and Development Intergovernmental Group of Experts on Competition Law and Policy, 12 July 2018. Available at https://unctad.org/meetings/en/Contribution/ciclp17th_c_compcomsa_aud_en.pdf.

to engage directly with consumers worldwide. To the extent that these international distributors may have no meaningful commercial presence in South Africa, they will lie outside ICASA's jurisdiction. It will likely prove impossible for ICASA to compel them to treat sports content in the same manner as licensed South African broadcasters. A direct comparison exists in the form of international entertainment providers such as Netflix and YouTube, which are already competing directly with and taking market share from South African broadcasters in both pay and free-to-air entertainment content markets.

2. In the face of competition from other platform operators using different web-based business models (such as pay-per-game/match, per-hour/day/week) or capable of providing functionality not offered by (notably) terrestrial networks (e.g. interaction, mobile viewing) the upstream power of incumbent broadcasters with regard to obtaining or renewing rights to existing content is diminishing. Barriers to entry for these new distributors (e.g. Internet Service Providers, able to bundle content with internet access) are declining. The new entrants, who bring important competition to an upstream rights-purchasing market characterised by the dominance of a single firm may choose to enter by specialising in one sport or competition alone (or a very limited range of content). For example, in New Zealand, ISP Spark has outbid incumbent Sky Television for the rights to distribute the 2019 IRB Rugby World Cup entirely over the internet.

3. The current arrangements (even without the proposed amendments) serve to discourage the entry of ISP-based competition in the South African content distribution market, further entrenching the dominance of existing participants for obtaining distribution rights in the first place, and by extension their dominance in the downstream markets for end-consumer (viewer) patronage. Or alternatively, the current arrangements create an artificial barrier to entry that protects the incumbent operator(s) from competition by local internet-based distributors (who would be required to obtain a broadcasting licence and make the content available as per the regulations) but not from competition by a foreign content owner that chose to interact directly over the internet to distribute listed sports content to South African viewers (thereby avoiding both the licensing requirement and the obligation to provide listed content free-to-air as these obligations would be unenforceable).

We further note that:

4. Both the existing and proposed regulations refer to "Super 14 Rugby" (5(1)(l) and 5.2.1 a) respectively) – a competition that last ran in 2010.[5] The competition intended is "Super Rugby".[6] The Sports Broadcasting Services Regulation 7(a) requires the criteria used in the listing of national sporting events and the list of national sporting events to be reviewed every four years after the date of the publication of the 2010 regulations. That the omission has not been corrected, some eight years and potentially two reviews later and continues into the proposed new regulations draws into question ICASA's commitment to Section 237 of the Constitution,[7] which specifies "constitutional obligations must be performed diligently". Regulation 5(2) specifying that the regulations will continue to apply "irrespective of any changes in

[5] https://en.wikipedia.org/wiki/Super_Rugby

[6] http://www.superxv.com/

[7] https://www.gov.za/documents/constitution-republic-south-africa-1996-chapter-14-general-provisions#237

the name of the competition or the sponsorship of the listed event" does not excuse the error in the current proposals

5. The original regulations focused on coverage of specific competitions or events, both national and international. Group A is described "Compulsory Listed National Sporting Events for a Free-to-air licensee." This decription is misleading. The events are both national and international competitions. The 'national' aspect is that it is deemed in the national interest for them to be broadcast free-to-air. The wording used should make this distinction clear, both in the Regulations and Section 60(1) of the Electronic Communications Act.

6. Group B is described as "National Sporting Events offered to a subscription broadcasting licensee on a non-exclusive basis under sub-licensing conditions." This makes a set of assumptions about the nature of the commercial offers for content distribution that, as identified in points 1 to 3 above, are unlikely to prevail in their current form under the introduction of an undoubtedly imminent internet-based content distribution model. It begs the question therefore of what purpose Group B designation will serve, especially if the original rights-owner decides to deal direct with end-viewers.

7. The purpose of Group B designation is given effect in the proposed changes to Regulation 6, where "[a] broadcasting service licensee who has acquired rights or failed to acquire rights in terms of regulation 5.2 must inform other broadcasting service licensees within five (5) days of acquiring such rights or failure to do so for the opportunity by other broadcasters to tender for the same rights if the rights are not acquired." As well as making heroic assumptions about the nature of prevailing commercial arrangements, this regulation appears to mix up two different concepts: notifying other broadcasters who was successful in acquiring the relevant rights, so that subsequent between-broadcaster bargaining can occur for the purposes of sub-licensing agreements; and notifying other broadcasters of the failure by the incumbent owner to acquire rights for a future period, so that they can enter negotiations to acquire them. The latter case makes an assumption that the licensee has some preferential ability to 'bid first' for rights and only if these are not acquired can others enter the competition to bid for them. If the rights are subject to contestable bidding, then this situation will not arise. If the arrangement if the former – that is, a private one (i.e. not an open, contestable auction) – then it is surely the responsibility of the original rights owner, and not the unsuccessful negotiator, to notify other potential purchasers that the rights are 'on the open market' as a consequence of failing to come to an agreement with the preferred bidder. Otherwise, Regulation 6 would appear to place an obligation on all unsuccessful bidders in a simultaneous open auction to notify other firms of their failure to acquire the rights, at the same time as the successful acquirer is obliged to notify the same parties of success.

8. Group C designation adds a new obligation on all free-to-air and subscription service broadcasters to supply content covering at least two of the nominated codes. This appears to be the case regardless of whether or not they are supplying Group A and/or Group B content. First, this appears to impose an unreasonable coverage obligation on licensed broadcasters serving niche audiences who may have no other interest in delivering sports content. Second, the rationale behind determining which codes (in the public interest) were added to this list, and which were unsuccessful, is dubious. For example, there is no apparent requirement that this coverage be of South African participants. Neither is it clear that coverage of indigenouse games be

of indigenous South African games. Arguably, any content from any country or tournament, however abstruse, would satisfy this obligation. The contribution of this requirement to the South African national interest is therefore dubious.

9. The criteria for compiling the list in Group C are not discussed. We believe the inclusion of ice hockey and chess in the list (for example) likely invokes little conceivable public or national interest. This is not only obvious but also constitutes unfair discrimination in view of games and/or sports that could be of interest to a significant number of South African residents but do not appear to have been considered for inclusion, e.g. competitive poker, backgammon or online computer gaming. We note that computer gaming, in particular, attracts growing interest, and is being considered for inclusion as an Olympic Games sport.[8]

10. In our reading, the ECA[9] allows for detailed obligations to be placed on broadcasters with regard to content in terms of their licence. Otherwise, the ECA allows only for decision in terms of exclusive rights for "national sporting events" as identified "in the public interest". We question whether ICASA's authority to regulate the broadcasting of sport goes beyond this and remain convinced that it does not extend as far as envisioned by these draft regulations.

We thank you for the opportunity to comment on this matter and would be glad to provide further information, if requested.

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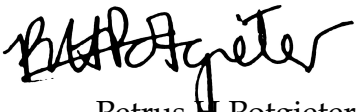

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[8] https://www.olympic.org/news/communique-of-the-olympic-summit

[9] https://www.gov.za/sites/default/files/gcis_document/201409/37536act1of2014eleccommamend7apr2014.pdf