



INDEPENDENT PRODUCERS' ORGANISATION OF SOUTH AFRICA (IPO)

SUBMISSION

**TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
(ICASA)**

**ON THE ELECTRONIC COMMUNICATIONS ACT, 2005:
DISCUSSION DOCUMENT ON COMMISSIONING OF INDEPENDENTLY PRODUCED
SOUTH AFRICAN PROGRAMMING.**

**(NO 31580 AS PUBLISHED IN GOVERNMENT GAZETTE, 7 NOVEMBER, NOTICE
1388 OF 2008)**

28 January 2009

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1. INTRODUCTION

- 1.1 The Independent Producers' Organisation (IPO) of South Africa is the longest standing and largest organization representing producers of television and films in South Africa.
- 1.2 IPO members are the major suppliers of local content programming (with the exclusion of news and sports programming) to the South African Public Broadcaster (SABC) as well as to the commercial broadcasters (eTV and MNET). Our Producers are responsible for drama, actuality, documentary, children, youth, variety, entertainment and educational programmes screened by the South African broadcasters.
- 1.3 We acknowledge the email (22/12/2008) from ICASA with the notice of extension for date of submission for comments on the discussion document.
- 1.4 IPO acknowledges ICASA's invitation for submission with thanks. Our response is set out below.
- 1.5 The IPO would like to have the opportunity to make an oral representation further to this submission. This representation would require 1 hour.

PREAMBLE

- The IPO is committed to the stated aims of our constitution - to promote the economic and cultural interests of the South African film, television, and video production industry.
- In particular we are committed to ensuring the long term sustainable growth of our industry.
- Our response and submission below is guided by this commitment.
- We are of the view that the current relationship between the independant production community and the public broadcaster is in a critical condition and needs urgent intervention and addressing. As such, we welcome ICASA's discussion document and commit ourselves to engaged participation with the process.

SECTION A

IPO POSITION AND PROPOSAL

We note that 1.2 and 1.3 refers to a position paper of 2002. We wish to point out that since 2002 many issues regarding commissioning and the terms of trade between broadcasters and independent producers have shifted significantly, and while commissioning procedures have improved substantially since then, bureaucracy that seeks to control every aspect of our businesses with the public broadcaster has increased exponentially; to the point that the IPO is of the opinion that no production entity contracted to the SABC can be regarded as an independent producer.

Issues such as ownership of intellectual property, micro management and price fixing are just a few of the oppressive conditions which have been brought to ICASA's attention by the IPO, SASFED and TPA directly and via

the Portfolio Committee and thus a key request from our members is that in this process, ICASA considerations are not narrowly confined to commissioning but more importantly 'terms of trade' between the broadcasters and the independent production sector which is broader and more substantial to the survival, growth and creation of employment opportunities within the independent production sector.

By **terms of trade** we refer to the conditions of commissioning, contracting and payment.

Therefore we would like to propose that the objectives be rephrased to read:

1.3.1 start a process towards the development of regulations on the terms **of trade** of independently produced South African content.

1.3.2 and 1.3.3 – as is

1.3.4 mediate **terms of trade** disputes in a fair, proportionate and transparent manner

1.3.5 establish a framework to guide broadcasting service licensees in the development of **fair terms of trade** with the independent production sector

1.3.6 create a predictable, equitable and transparent commission environment and fair **terms of trade**.

BACKGROUND

2.1 We bring attention to the sentence 'some of the programmes are by the broadcasting service themselves'. This is not the norm and in particular we

believe not with the public broadcaster which claims that 100% of local content is produced by independent producers. This is only relevant in so much as the argument can be made that the independent production sector creates 100% of the highly successful and popular local programmes on SABC and does not share in the profits that flow from this success..

In addition the SABC claim all right and title to the concept, ideas and creative IP of any production without due payment for such. (this extends across all broadcasters)

2.2 We acknowledge the interdependence of the Broadcasters and independent producers and fiercely believe we should be in a mutually respectful and beneficial relationship which will harness our diversity, language and cultural programming and importantly create sustainability and growth for our sector.

We wish to collaborate in the spirit of fair and equitable terms and welcome ICASA's observations and consideration that self regulation or a light touch approach is desirable.

We enter into this discourse in the spirit of seeking ICASA's intervention to "level the playing field" in the terms of trade between the broadcaster and the independent producer.

We believe ICASA'S role should be one of mediation as a regulatory body to ensure that broadcasters institute fair terms of trade. For too long have they been left to meet "mandates" without anyone looking into the unfair mechanisms of "how" they achieve this.

Our current circumstance is that we are 'David' to the broadcasters 'Goliath' and we have to play by their rules and terms or close our doors. We believe that we will prove to ICASA that this is not best or profitable practice to the broadcasters.

SECTION B: COMMISSIONING INDEPENDENT PRODUCTIONS

4.1.1 This is an important observation and we draw attention to the fact that the independent producer organisations such as the IPO and SASFED receive no formal funding and thus struggle to maintain up-to-date statistics which could be used for comparative studies to broadcaster's stats. We have on many occasions requested that the broadcasters apply a small levy to assist with the survival and efficiency of these organisations and believe that some form of subsidy to formal independent producer organisations would be of great value to ICASA and the sector in providing vital information.

4.1.2. We draw attention to the last sentence which refers to 'collusion'. We are concerned about the inference of this and request some unpacking of its meaning.

4.1.3 Whilst this was certainly the case in 2002, we are of the opinion that this is no longer the situation. The SABC itself has stated that it has seen a substantial shift in the past 6 to 8 years - from some 7 to 10 predominantly large white owned companies producing the bulk of content to some 300 companies, predominantly black owned/empowered, actively working in the sector in 2008. Most, if not all the previously white owned production companies have complied with BBBEE requirements.

There is an increase of integrated companies with pooled resources, reflecting the diverse nature of South African society. Our information (untested) is that the majority are black empowered in accordance with the current BBBEE ratings as determined by the Department of Trade and Industry (DTI).

We wish to stress that the production environment needs to become equitable for all players in the industry. The current commissioning, contracting and management procedures of the public broadcaster need to facilitate rather than undermine the survival of all producers involved in the production of local content.

The SABC's restrictive terms of trade affect all production companies but small and emerging companies, which are predominantly black owned, new and vulnerable (as they have no trading record) are the most affected. Producers do not receive payment for their ideas, nor for the time invested in meeting requirements set out in commissioning briefs, which is where IP is born. Thereafter, should they be successfully commissioned they are paid only for implementing their ideas to a broadcast product, with a rigid price structure and very controlled fiscal and editorial process. They are never paid for rights such as sequels, DVD, merchandising, etc. This coupled with restrictive margins makes development and sustainability very difficult.

Inefficiency and bureaucracy around contracting and payments affect cash flow and the ability to do business effectively, often resulting in smaller companies closing down.

These issues affect large and small producers alike. Larger companies are equally vulnerable as they have to carry substantial overheads to meet the requirements of the broadcasters and the current practice is that profit margins are paid on a sliding scale and contracts can be cancelled unilaterally with little or no recourse. It appears that the more reliable and successful a production company is, the less profit they make. This is contrary to normal business or world trends and discourages innovation and investment from the independent production sector.

It is important to note that small and big companies are equally important to the growth of the sector and the ability to meet the ever increasing needs of content consumption. There is a symbiotic relationship.

Herewith our responses to the questions posed by ICASA:

QUESTION 1. What are the main challenges confronting a possibility for a smooth collaboration between broadcasting service licensees and independent producers?

There is 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'.

The current terms of trade are one-sided and oppressive and there is no ability for the independent sector to realistically negotiate, despite the broadcasters' claims that they set aside time and processes for negotiation. The independent producer has no legislation to protect him/her from exploitation.

QUESTION 2. Should the Authority intervene, through regulation, to enhance the collaboration between the two, or should the country opt for a self regulatory mechanism?

Self regulation is preferable in the long term; however we believe that ICASA does have an important role to play in setting the framework for fair play and equitable terms of trade and for monitoring this.

There is certainly a need for an intervention to create an equitable environment for both independent producers and the broadcasters as at the moment the

relationship is not equitable, to the detriment of both. For example, current standard commissioning agreements give all the intellectual property rights and ownership to the broadcaster, stripping the creators of any rights and ownership in what they create, thereby dis-incentivising the producer and reducing the inclination for maximum creative participation. In addition the public broadcaster's micro management of all aspects of production including the creative and financial aspects of production to the point of counter-productivity should be reviewed in the light of the definition of 'independent production'.

QUESTION 3 Is self regulation, though desirable, is it feasible without the guidance of the authority?

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 ICASA needs to consider the sustainability of these companies as the real test of success.

The IPO believes that self regulation is not viable at this present time and that the relationship between the broadcasters and independent production sector has deteriorated. Whilst the SABC should be complimented on its commitment and implementation of mechanisms to help transform the industry and empower new emerging production companies through initiatives such as Sediba, caution is needed to ensure that the new entrants (and experienced entrants) are not dumbed down and treated like junior staff members, thereby disempowering the very foundations of independence.

Commissioning alone does not sustain these companies when there are no mechanisms in place for establishing long-term sustainability. This applies equally to new and emerging companies from historically disadvantaged groups as to the industry as a whole. The link between the two is umbilical in that

experience and hands-on knowledge is paramount to chrysalising fresh new ideas.. New Talent/Old Skills.

QUESTION 4 If self regulation is preferred, what should remain the role of the Authority in adjudication of conflict?

ICASA should play the role of mediator to ensure the public broadcaster (and indeed all broadcasters) institutes fair and transparent terms of trade as well as overseeing the implementation of fair commissioning agreements and procedures.

4.2 GROWTH OF CONTENT PRODUCTION SECTOR

Whilst growth is of great concern for the IPO, we believe that sustainability is paramount and will ultimately fuel long term growth. By nature, our industry is volatile as it is based on creative processes, public sentiments and passing trends, therefore there is already an element of 'Boom or Bust' and our business relationship with the public broadcaster should be mindful not to exacerbate this.

'Boom or Bust' is unsustainable and detrimental to the long term success of the sector.

We believe that long term sustainable growth has its roots in fair and equitable practices within our industry, specifically in the terms that govern the public broadcaster and independent production sector.

The IPO outlined the following challenges in its presentation to the portfolio committee for communications in 2007 (attached as addendum b), in a bid for state intervention in the terms of trade with the public broadcaster with a specific focus on sustainable growth.

Challenges for the independent production sector

- To create sustainability in our industry that will lead to growth and development.
- To create employment and minimize underemployment
- To speed up transformation
- To use the opportunities created by government through initiatives such as AsgiSA and grow the independent production industry to be an economically profitable industry; creating jobs, attracting investment and penetrating international markets
- To capture our rich cultural heritage
- To ensure that ownership of intellectual property vests in the creators thus empowering and creating long term viability
- To make our industry more alluring for story tellers and investors
- To access capital for development and research
- To ensure that the South African public has a choice
- The creation of small, medium and micro enterprises (SMMEs) and self-sustaining jobs for people in the cultural, arts and heritage sectors

4.2.4 We believe this is an important point. We wish to state that the current practice of the public broadcaster in determining what the challenges are and how to address them cannot continue without the independent production sector making a meaningful contribution in this context both in determining the critical issues and challenges, and being party to the solutions.

As producers we currently we find ourselves being 'nannied'; by the public broadcaster and the public broadcaster decides what the independent production community need without meaningfully engaging with any input from the community. This practice is disempowering and while it may be of value to the public broadcaster, it is of little value to the sector as a whole.

QUESTION 5. What are the quality issues that confront the commercial feasibility of most independently produced programmes from historically disadvantaged communities?

The budget, coupled with experience and talent determine technical and creative standards and together these impact on commercial feasibility.

Most locally commissioned programmes are limited by the monies available for local production. Quite simply lower budgets mean less time and resources. As such, this question should not be limited to programmes from historically disadvantaged communities. All local content producers are increasingly struggling to deliver quality on very tight budgets. Often they spend their production fees on subsidising the broadcaster.

Challenges are exacerbated in the case of new entrants who do not have the advantage of experience in finding cost effective solutions. We are of the opinion that the public broadcaster needs to make a space for new entrants to 'practice their craft' without the onerous demands of commercial viability, at least initially. Nowhere in the world does a broadcaster anticipate that a new filmmaker will immediately make commercially feasible content.

The biggest challenge to quality is the irregularity of work. The public broadcaster, in its important efforts to fast track companies from HDC now find an industry with many small companies comprising emerging producers that all look to the broadcaster to sustain themselves. As work flow is irregular and there is no possibility of earning from other rights, many companies become unsustainable. Therefore we believe that seeking mechanisms to encourage independent sustainability is vital. IP ownership is one such mechanism.

5. REGULATORY INTERVENTION

We concur with 5.1.

We concur with 5.2

QUESTION 6. Should the Authority regulate commissioning as part of the BBBEE framework and the Preferential Procurement Policy to ensure that commissioning fulfils those requirements?

We are of the opinion that the public broadcaster does fulfil the requirements and that this is not where the key challenges lie for ICASA.

QUESTION 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 of the Independent production Sector?

Transformation in our sector got off to a slow start but we believe that there have been great strides in the past three years. Certainly in terms of ownership and equity we are of the understanding that almost all the bigger production entities are now BBEE compliant.

There have also been some success stories of transformation due to the coming together of practitioners from previously disadvantaged communities and those that are skilled in the production environment that have produced good results for the broadcaster. We believe this should be encouraged. Instead of hundreds of small companies competing and not having access to experience, pooling is an effective way of creating a 'win-win' situation.

We believe that empowerment needs to run much deeper than ownership if we are to build sustainability. This requires the assistance of funding mechanisms. Broadcasters are reducing budgets, thereby cutting time and forcing increased output, whilst at the same time wanting to provide empowerment opportunities. The two agendas cannot be achieved simultaneously. Therefore budgets need to take training into account.

5.3

We concur with the idea expressed; however wish to point out that with regard to the last sentence of Point 5.3.2 , in South Africa, the broadcasters have all these rights and many more. Producers retain no rights, not even moral rights in some cases.

QUESTION 8. Generally, how can the relationship between the broadcasters and local independent producers be improved?

Fair terms of trade; efficient operational systems; efficient and timely contracting and payment processes together with mutual respect and the desire to understand each others' challenges and to seek mutually beneficial solutions.

The increasing tension in the relationship is based on unfair terms of trade and what is perceived as the broadcaster not acting on promises made.

There is a growing sense within the independent sector that the public broadcaster does not have a realistic grasp of the challenges that producers face and do not understand the crisis around sustainability and the huge stress that the independent sector constantly operates under as a result.

In addition, during the two years that we have been negotiating for fairer terms of trade and IP rights, the broadcaster has increasingly made the terms more onerous, reduced budgets and secured tighter IP control. This feels contrary to the spirit of discussions and as a result there is a growing lack of trust.

The commissioning agreement needs to be brought in line with international examples cited in this document. Primary rights and secondary rights need to be separated. The commissioning agreement needs to facilitate the independent

sector rather than over regulate the functions of the independent producer – creatively and financially.

QUESTION 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 requirement provided that they do not conflict with the regulatory framework?

Yes. But the crisis is not so much in the commissioning process as in the standard commissioning agreement which has to be renegotiated with input from the broadcasters and the independent sector. This process should be facilitated by ICASA. The Authority should put forward a framework within which to negotiate.

NB: We bring attention to ADDENDUM A attached: Recommendations for Legal, Regulatory & Commissioning Practices produced for the IPO/SABC and SASFED entitled: 'Unlocking the Creative and Economic Potential of the South African TV sector'.

QUESTION 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.

Communication should be as easily and widely accessed as possible. Currently the public broadcaster makes use of its website; the IPO, SASFED and other industry bodies; mass emails; and trade publications and industry forums such as DIFF. This is generally effective and the other broadcasters should do the same. The NFVF could be an additional communication source.

5.4 METHODS OF COMMISSIONING

We do not concur with the statements made here.

Methods of commissioning are not devised in a mutually beneficial manner. Whilst they have improved significantly, they are very one-sided and costly/time consuming for the producers.

We do not agree with 5.4.2.1 which states that in the brief process the SABC conceive the “ideas’, thus insinuating an IP right. Our view is that these briefs are broad frameworks and not ’ideas’.

(The broadcaster gives the framework of the brief when it invites the submission of programme proposals but it is the producer who generates the creative response to the briefs.)

QUESTION 11. Are these the only methods of commissioning independently produced local content?

No. There are co-production opportunities and licensing of product when the programme is made as well as at the inception of the idea before development. This should be workshopped with stakeholders.

QUESTION 12 What are the opportunities and challenges that go with the choice of any of the highlighted commissioning methods?

The current practice has become overly bureaucratic and is not geared towards the reward of experience or talent. We work in a medium that is talent driven. Often good directors or writers are not articulate and not good at pitching their ideas, etc. The current process does not seek to find or reward talent that produces reliably, consistently and at high levels of quality.

We believe it is problematic to imagine that a small pool of people working within the corridors of a broadcaster can provide briefs that encompass and imagine the broad range of stories across South Africa. The challenge for producers is that they are expected to provide programming that fits an imagined, middle-class view of the world that sees South African society as homogeneous. The independent production sector is wide and active in communities throughout the country and more likely to provide a diverse range of stories and interesting voices, this needs to be encouraged, not stifled.

We believe also that the current brief system is open to abuse and overly prescriptive.

6. RIGHTS

We refer you to the Recommendations for Legal, Regulatory & Commissioning Practice Changes produced by Mkhabela Huntley Adekeye Inc and Spoor and Fisher attorneys for the IPO/SABC and SASFED entitled: **'Unlocking the Creative and Economic Potential of the South African TV Sector**

Note: No question 13,14,15,16 in the ICASA discussion document.

QUESTION 17. What is the definition of an independent producer for the purposes of this regulatory discussion?

We believe an independent producer is defined as per 6.1 with the emphasis on central decision making, and holds copyright, controls rights and licensing. In addition one needs to consider what the word 'independent' means. The Electronic Communications Act (Act 36 of 2005) defines independent production as " a person not directly or indirectly employed by a Broadcasting service

licensee or a person who is not controlled by or is not in the control of any Broadcasting service licensee’.

In this regard we believe that currently the SABC does not meet its mandate regards independent production as determined by ICASA ,as the terms of trade directly contravene the foundation of independence.

QUESTION 18. Should the Authority make it mandatory for independent producers to be registered in the form of a regulatory requirement or through self regulation arrangement?

This is an interesting consideration that needs to be caucused with stakeholders. There needs to be some form of regulation, but caution needs to be taken not to create gate keeping. Self regulation would be preferable, but this requires some financial support for organisations to get up and running. This should be researched to ensure best practice and not create difficulties for newcomers and talent to enter the market.

QUESTION 19. 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?

We refer you to the Recommendations for Legal, Regulatory & Commissioning Practice Changes produced by Mkhabela Huntley Adekeye inc and spoor and fisher attorneys for the IPO/SABC and SASFED entitled: **Unlocking the Creative and Economic Potential of the South African TV Sector.**

The issue of intellectual property rights is central to creating a more equitable relationship with broadcasters in south Africa and needs the authority to provide a regulatory framework .

QUESTION 20. Is there an explicit legislative basis for the Authority to regulate intellectual property rights?

We refer to the recommendations for Legal, Regulatory & Commissioning Practice Changes produced by Mkhabela Huntley Adekeye Inc and Spoor and Fisher attorneys for the IPO/SABC and SASFED entitled, '**Unlocking the Creative and Economic Potential of the South African TV Sector**'.

QUESTION 21. Is intellectual property not supposed to be based on a commercial agreement between the commissioning parties?

We believe that is correct and that the current copyright act is narrowly interpreted to protect the self interests of the broadcaster. We refer to the recommendations for Legal, Regulatory & Commissioning Practice Changes produced by Mkhabela Huntley Adekeye Inc and Spoor and Fisher attorneys for the IPO/SABC and SASFED entitled, '**Unlocking the Creative and Economic Potential of the South African TV Sector**'.

QUESTION 22. How should conflict related to intellectual property rights be adjudicated?

We refer to the recommendations for Legal, Regulatory & Commissioning Practice Changes produced by Mkhabela Huntley Adekeye Inc and Spoor and Fisher attorneys for the IPO/SABC and SASFED entitled, '**Unlocking the Creative and Economic Potential of the South African TV Sector**'.

7. PROGRAMME PRICING

7.1/ 7.2/ 7.3 is not an accurate picture of the current situation in South Africa with the public broadcaster. There is little or no negotiation with regard to rights and its bearing on price.

We thus regard these points as an overview of world trends and not specific to practice in South Africa.

7.4 This is untrue. Many South African programmes have sold well, it depends on the format, concept and intent of the programme, and the person or body doing the selling. It is true the world over that some programmes are more saleable than others; some are made to meet specific mandates; some very localised and thus not intended for international sale; and yet others have extreme marketability. The deep frustration for independent producers is that we have no control, opportunity or incentive to increase the standards of our content as we own no rights from which to recoup via secondary rights. Worse still where we do have programmes we feel we could market, we do not have the rights to do so and often have potential sales turned down when brought to the broadcaster. Thus any form of additional revenue is snuffed out.

QUESTION 23. Should the Authority require the broadcasting service licensees to publish generic pricing schedules in their commissioning policies?

Whilst it is useful for the broadcaster to give an indication of the level of budget they wish to spend on a project, we do not believe it is relevant other than transparency to publish a generic pricing schedule. Projects should be priced on their specific merits, requirements and viability. Viability should not be measured by commercial terms alone. If a project assists the broadcaster to meet its niche mandates, then this should add points to viability, for example.

QUESTION 24. Should the Authority be involved in the commercial negotiations or leave those to the parties? If yes, to what extent and if no why?

Yes, to the extent that this is with regards revising the principals that govern the contracting and terms of trade between the parties and ensuring that the contracting regime reflects this. Yes, to the extent that ICASA mediates/facilitates the process between the independent producer organisations and the broadcasters. However, it should not be necessary for ICASA to be involved with regard to individual commercial negotiations thereafter. This should be left to the parties concerned once the legislative framework has been put in place.

SECTION C: INETRATIONAL BENCHMARKING

There are a number of positive indicators looking at both the Canadian CBC example as well as the UK Channel Four examples.

CBC has creative rights and rights of approval but this does not mean dictating the creative. There is respect inherent in the relationship the broadcaster has with proven producers in the production sector, and mechanisms for new entrants are facilitated by the broadcaster. They do not hold all the rights. They have their broadcast rights for a restricted time frame in a specific area. They do not hold the copyright over the independent producer's creation. They respect the risk taken by the independent producer offering some upside for the independent producer. They ensure that both parties are adequately compensated for risks taken.

Channel Four in the UK recognise a mutually dependent relationship that should be mutually beneficial. Their code of practice is designed to support creative and financial aspirations of its supply base

QUESTION 25. What would be the reasonable time to secure a commissioning contract?

This needs to be negotiated, we believe four months is optimal but a maximum of six months should be set from brief to contract.

QUESTION 26. Are the producers clear about different rights that the broadcasters seek to secure and the duration?

There is no negotiation. The broadcaster takes all.

QUESTION 27 – 38.

We refer to the Recommendations for Legal, Regulatory & Commissioning practice changes produced by Mkhabela Huntley Adekeye Inc and Spoor and Fisher attorneys for the IPO/SABC and SASFED entitled, '**Unlocking the Creative and Economic Potential of the South African TV Sector**'.

CONCLUSION

We would like to refer ICASA to the two documents attached.

- A) The Recommendations for Legal, Regulatory & Commissioning Practice Changes produced by Mkhabela Huntley Adekeye Inc and Spoor and Fisher attorneys for the IPO/SABC and SASFED entitled, '**Unlocking the Creative and Economic Potential of the South African TV Sector**'.**
- B) The IPO's presentation to parliament, '**Setting a Course for Sustainability**'.**

We thank you for your time and interest in this important matter. We confirm we would like to make an oral submission.