

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 521

Pretoria, 7 November 2008

No. 31580

CONTENTS • INHOUD

No.	Page No.	Gazette No.
GENERAL NOTICE		
Independent Communications Authority of South Africa		
<i>General Notice</i>		
1388 Electronics Communication Act, 2005: Discussion Document on Commissioning of Independently Produced South African Programming	3	31580

GENERAL NOTICE

NOTICE 1388 OF 2008



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

**DISCUSSION DOCUMENT ON
COMMISSIONING OF INDEPENDENTLY PRODUCED SOUTH AFRICAN
PROGRAMMING**

The Independent Communications Authority of South Africa ("the Authority") hereby gives notice of its intentions to make regulations in terms of section 61(1) and (2) of the Electronics Communication Act, 2005 ("ECA"). In particular, these regulations will be made in terms of Section 61(1) which states that:

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

The Authority invites written submissions on issues raised in the discussion document from all interested parties. The closing date for submissions is **16 January 2009** by no later than 16h00 (there will be no extensions), by post, hand delivery, facsimile transmission or electronically (Microsoft Word or Adobe PDF file) for the attention of and should be directed to:

Contact Person	Ms Mamedupe Kgatshe
Physical Address	ICASA HEAD OFFICE Pinmill Farm Block D 164 Katherine Street Sandton 2146
Postal Address	ICASA Private Bag X10002 Sandton 2146
Facsimile	011 556 3246/3260

Where possible, written representations should also be e-mailed to: mkgatshe@icasa.org.za or lpholosi@icasa.org.za

The Authority will consider all submissions when drafting regulations for further public comment. In order to facilitate focused discussion, each section of this discussion document is accompanied by a set of questions which should be engaged by all stakeholders.

The Authority may publish all or any part of the written submissions on its website; www.icasa.org.za. The Authority will consider stakeholders to have consented to the publishing by making a submission, unless it is clearly specified otherwise in a submission.

Stakeholders are kindly advised to indicate any objection to the release of information contained in a submission, which is considered as confidential. Motivations in this regard shall include reason(s) for such information not to be made public. The Authority will take into account all such objections when responding to requests for copies and information on submissions to this document.

Persons submitting written representations are further invited to indicate, as part of their submissions, whether they require an opportunity to make oral representations and the estimated duration thereof, which duration shall not exceed one hour.

The Authority will review and analyze all submissions received from stakeholders in response to this DISCUSSION DOCUMENT. Findings emanating from this consultation exercise will form a foundation in the development of draft regulations for further public consultation.

PARIS MASHILE

CHAIRPERSON

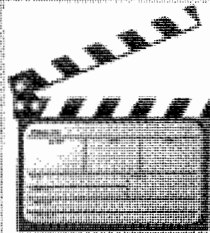


**INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA (ICASA)**

DISCUSSION DOCUMENT

COMMISSIONING OF INDEPENDENTLY PRODUCED SOUTH AFRICAN PROGRAMMING

NOVEMBER 2008



<u>INDEX</u>	<u>PAGE NO</u>
SECTION A: INTRODUCTION.....	7
1. Introduction.....	7
2. Background.....	8
3. Methodology.....	9
SECTION B: COMMISSIONING INDEPENDENT PRODUCTIONS.....	10
4.1 Independent production content supply market.....	10
4.2 Growth of the content production sector.....	11
5. Regulatory intervention.....	13
5.1 Towards regulating the independent production sector.....	13
5.2 Procurement policies.....	13
5.3 Commissioning Processes.....	14
5.4 Methods of commissioning.....	16
6. Rights.....	18
7. Programme pricing.....	20
8. Impact of terms of trade.....	22
9. Complaints and Compliance.....	23
SECTION C: INTERNATIONAL BENCHMARKING.....	24
10. Canadian Broadcasting Corporation.....	24
10.1 Commissioning guidelines.....	24
10.2 Commissioning proposals.....	25
10.3 Commissioning mode.....	25
10.4. CBC Rights.....	27
10.5 Producer rights.....	28
11. Channel 4.....	28
11.1 Commissioning guidelines.....	29
11.2 Editorial guidelines.....	30
11.3 Proposal development.....	30
11.4 Terms of trade.....	31
12. Native American Public Telecommunications.....	34

12.1 Programme rights.....	34
13. Conclusions.....	37
14. References.....	38

SECTION A: INTRODUCTION

1. INTRODUCTION


1.1 The Authority is mandated by Section 61 (1) of the Electronic Communications Act (ECA) to prescribe regulations regarding the commissioning of independently produced South African programming. Section 61(1) states that:

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

1.2 The previous legislation, the Independent Broadcasting Act of 1993 (now repealed by the ECA) did not provide for the regulation of the commissioning of independently produced local content. Over the years, independent producers have complained about unfair, inaccessible commissioning procedures. The current legislative provisions can thus be attributed to the need to address the needs of the independent production sector. According to the Position Paper on South African local content published by the Authority in 2002, independent producers recommended that the Authority should intervene to create a level playing field. "The Independent Producers Organisation (IPO) and other role players, in the independent production sector, alleged that the existing commissioning practices of all television broadcasting service licensees were not transparent and therefore open to abuse The potential of poor procedures undermining the purpose of independent production quota cannot be underestimated."¹

1.3 It is therefore in an attempt to implement the new legislative provisions that the Authority undertakes this process to consult with the broadcasting industry, the independent sector and the general public. The objectives of this discussion document are to;

¹ Page 18 and 38 of the Position Paper on South African Television and Radio Content

- 
- 1.3.1 start a process towards the development of regulations on the commissioning of independently produced South African content;
 - 1.3.2 promote the growth and sustainability of independent production sector across the country;
 - 1.3.3 maintain the commercial viability and sustainability of broadcasting service licensees;
 - 1.3.4 mediate commissioning disputes in a fair, proportionate and transparent manner;
 - 1.3.5 establish a framework to guide broadcasting service licensees in the development of their internal commissioning policies;
 - 1.3.6 encourage the development of quality programming; and
 - 1.3.7 create a predictable, equitable and transparent commissioning environment

2. BACKGROUND

2.1 Over the years, the local sector has been one of the major sources of local content programming, although it continues to be dominated by few players, besides the growth of the sector in light of increasing competition in the broadcasting sector. The strategic nature of the local production sector is evident in the popularity of local programmes across the different broadcasting media platforms. While indeed the success of many local programmes cannot be entirely attributed to the sector (as some programmes are produced by the broadcasting service licensees themselves), prevailing trends suggest that there are many opportunities for local production. This reality will increase with the advent of digital switchover which will transform the television broadcasting landscape, as we have come to know it².

2.2 Broadcasting service licensees and the independent producers have an interdependent relationship which should be harnessed to increase diversity, language and cultural programming. It is in the interest of both role players to

² OFCOM, Review of the Television Production Sector, page 17

develop a long term vision for collaboration. It is also in the interest of achieving a common vision that the ECA provision (in section 61) and this regulatory process should not be seen as punitive, but they should be seen and understood as the best way forward to achieve shared vision of both sectors. As an outcome of this consultative process, the Authority is in favour of a regulatory landscape that addresses specific regulatory problems which otherwise cannot be addressed by the market environment. As stated above, the advent of the current legislative provision can be attributed to the inability of the broadcasting service licensees and the independent production sector to reconcile their respective interests and challenges. The Authority proposes that a self regulatory or light touch approach should not be ruled out, provided it does manage to address the challenges and constraints that are behind the current legislative discourse. A choice of whether to introduce self regulation or not will finally be informed by empirical evidence emanating from this consultation exercise.

3. METHODOLOGY

3.1 This discussion document is informed by interviews with all the television broadcasting service licensees in South Africa (SABC, E-TV, Multichoice, M-Net, WOW, Telkom Media and On Digital Media), the IPO, the South African Screen Federation (SASFED) and the Southern Africa Communications for Development (SACOD). The Authority opted for this approach to ensure that the implementation of section 61 (1) of the ECA is evidence driven. Industry views have been analysed and summarised as the initial intention is to provide a holistic view or context that will underpin a future regulatory regime, irrespective of which form it will ultimately take. During the consultation process, stakeholders were asked questions, including a right to raise additional issues that they believed will be relevant to the study. The Department of Trade and Industry (DTI) and the Companies and Intellectual Property Registration Office (CIPRO) were also consulted on the implications of this regulatory trajectory on intellectual property rights. Furthermore, literature from different countries, especially those with established regulatory mechanisms, was consulted for benchmarking purposes.



SECTION B: COMMISSIONING INDEPENDENT PRODUCTIONS

4. 1 INDEPENDENT PRODUCTION CONTENT SUPPLY MARKET

- 4.1.1 In South Africa, accessing up to date information on the independent production sector remains a big challenge, as there are limited structured documentary evidence. As such, the exact size of this sector, including its commercial value as well as its social contribution is not well known.. The public broadcasting service through its database of commissioning proposals can only estimate the size of the sector. Additional information can also be sourced from the independent producers' affiliated organisations that keep and maintain membership databases.
- 4.1.2 With the advent of new content aggregators and packagers and the introduction of new broadcasting platforms around the world, broadcasters are faced with challenges to produce and broadcast content that appeal to consumers than other media such as the Internet. Building relationships with consumers, through relevant programming, allows broadcasting licensees to attract and maintain loyal viewership. Independent producers compete with each other in the content market while others strengthen their lobbying power through vertical and horizontal integration or even collusion.
- 4.1.3 It emerged, from the consultations with stakeholders, that white owned production companies have resources and skills compared to their black counterparts, more specifically black women. This can be attributed to limited skills to produce quality programmes. As a result many black independent producers, who are awarded opportunities or commissioning contracts, still depend on white owned companies for technical and other support. In turn, the lack of skills and other related limitations continue to affect the global competitiveness of South Africa's content industry, when compared with others such as the United Kingdom and Canada.

- | |
|---|
| <p>1. What are the main challenges confronting a possibility for a smooth collaboration between broadcasting service licensees and independent producers?</p> |
|---|

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. Is self regulation, though desirable, is it 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?
4. If self regulation is preferred, what should remain the role of the Authority in the adjudication of conflict?

4.2 Growth of the content production sector

- 4.2.1 International cases have shown that the production sector needs state intervention in order achieve growth, thus helping to position local content production as a competitive sector of the economy. In Canada, support to the independent production sector is provided through the Canadian Television Fund (CTF), which is Canada's largest production fund. The CTF prioritises film and television production with significant social and cultural development of Canada.
- 4.2.2 The primary goal of the CTF is to support the production of films and television programs made in Canada, which speak to Canadians about Canadian themes.³ Producers in Canada have grown through these support mechanisms, and are able to sell their products in the global market, making the country one of the key contributors to the globalisation of culture. Producers also take responsibility to raise funds for their work, as the government can be limited to address all the needs of the sector.
- 4.2.3 In South Africa, the DTI provide assistance in the form of a rebate to independent producers on the condition that they should own the work thus making sure that the rebate is used to facilitate the growth and development

³ Canadian Film and Television Production Association, The Economic Impact of Non-CTF Certified Canadian Film and Television Production, Page 5

of the sector and the economy. This developmental intervention provides independent producers with the necessary bargaining power. The National Film and Video Foundation (NFVF) under the Department of Arts and Culture also support the local film industry.

4.2.4 The introduction of new broadcasting service licensees as a result of digitisation will also increase the demand of locally produced television content. This possibility has also raised questions about the correct timing for the implementation of section 61 (3) of the ECA which, amongst others, mandate the Authority to set conditions that require broadcasting service licensees to set aside a portion of their revenue for the purposes of addressing the local content production challenges. Although the Authority has taken a deliberate decision not to include the setting aside of a revenue target, in the short term, it remains important to suggest that the imposition of such conditions will go a long way in building a sustainable independent production environment.

4.2.5 The Authority's current approach to defer the imposition of a revenue target for the purposes of local content production is informed by a desire to first create a stable market for digital terrestrial television (DTT). Linked to this, the Authority is of the view that the independent sector should be properly incentivised ahead of the review of content quotas and the setting aside of a revenue target to boost local content programming. The Authority believes that once the market structure is created, it will be possible to value the size of local content requirements. At the ultimate analysis, this will benefit, mainly small companies, especially those that operate in historically disadvantaged communities, whose stories remain untold.

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



5. REGULATORY INTERVENTION

5.1 Towards regulating the independent production sector

- 5.1.1 While the South African independent production sector has shown great potential, it continues to be plagued by challenges that can only be addressed through a regulatory intervention, whether mandatory or self regulation. As stated above, the Authority does not believe that it is necessary to over regulate the sector, except that a guiding framework is needed to ensure a coherent development path. Underlying this discussion is the need to create a transparent, non-discriminatory regime that also empowers people from historically disadvantaged communities.
- 5.1.2 Whatever intervention is agreed to at the end must serve the relevant purpose and not to punish any of the parties as they need each other to survive as businesses. In this regard, the Authority's intervention should be crafted as a facilitation role as opposed to a strict policing role. In other words, regulation should be focused on addressing a well defined policy problem.
- 5.1.3 In South Africa, like in the UK and other jurisdictions, independent producers have indicated that current negotiation trends around the commissioning of independent producers remain largely skewed towards the broadcasting service licensees, who dominate contractual negotiations, in the process undermining the bargaining power of the independent sector. It was in an attempt to address a similar policy or regulatory problem that the Office of Communications in the UK (OFCOM) intervened by providing general guidelines, to create basic commissioning requirements, as mandated by the Communications Act of 2003. The guidelines are not only on the negotiation of rights but also talks to the procurement of production companies.

5.2 Procurement policies

- 5.2.1 Commissioning can, at best, be understood as a procurement process used by broadcasting service licensees to source content through the independent sector. Across the world, many broadcasting service licensees have introduced procurement policies, geared towards bringing on-board emerging



producers, particularly those outside the developed cities and from training institutions. In South Africa government policy interventions such as the Preferential Procurement Policy Framework Act and the BBBEE Act require, especially state owned institutions, to put into practice certain preferences when procuring services.

- 5.2.2 The broadcasting service licensees and the independent production sector agree that the current procurement environment can still be improved. Engagement with the two stakeholders suggests that in some areas, improvement which will include diversity in regard to language, race and gender is underway. It is indeed important and necessary to ensure that the focus on historically disadvantaged communities does not result in the domination of the sector by few companies, even if they are owned by people from these communities.

- | |
|---|
| <p>6 Should the Authority regulate commissioning as part of the BBBEEE framework and the Preferential Procurement Policy to ensure that commissioning fulfils those requirements?</p> <p>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?</p> |
|---|

5.3 Commissioning Processes

- 5.3.1 International experience suggests that transparency forms a cornerstone for a stable commissioning environment. Transparency start with the availability of information, which allows all interested parties to be informed and exposed to the needs and expectations of the broadcasting service licensees. It is therefore considered important that broadcasting service licensees should be required to make available all relevant policies and technical specifications to enable independent producers to prepare in time, thus enhancing the quality of their work. Such policies and technical specifications must be detailed and clear to avoid misunderstandings between the two commissioning parties. These should include periods that the broadcasters are likely to advertise

inviting interested parties to tender for available opportunities. Radio Telefís Éireann (RTE), the public broadcasting service Ireland, publishes schedules for advertising content production opportunities, making it easy for those interested in participating in the procurement process to prepare in advance. Deviation from this approach only takes place when there are urgent production needs that are likely to be delayed by implementing an elaborate commissioning project⁴. Experience from different established jurisdictions indicate that commissioning processes work better if communicated properly, whether through advertisements, in a fair, transparent and equitable manner. A fair, transparent process usually takes time since a broadcasting service licensee has to ensure that a proper selection process is followed. Yet the benefits of a transparent commissioning exercise are enormous.

5.3.2 Developing economies are beginning to model their commissioning processes by building a relationship with independent producers. In particular, public broadcasting service licensees are taking a lead as they have more public service obligations in their license conditions. Increasingly, as a result, independent producers are establishing more reciprocal trust with public service broadcasting service licensees than with their commercial counterparts. This development should be encouraged as a benchmark towards creating the same climate with commercial services. This partnership is also enhanced by agreements which give broadcasters rights to edit content to comply with their respective technical and other standards and codes. In this regard, broadcasting service licensees retain a right to edit any material before it is broadcast.

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

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?

⁴ Ibid



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?

5.4 Methods of commissioning

5.4.1 Methods of commissioning are devised in a mutually beneficial manner, recognising the roles played by both broadcasters and independent producers. From consultations with the producers' representatives and the broadcasters in South Africa, it emerged that the following five steps are commonly used in commission of independent produced local content:

5.4.1. Pre-existing programmes

5.4.1.1 These are complete programmes, produced and packaged by independent producers without financial or any contribution from broadcasting service licensees. Broadcasting service licensees can still edit programmes if they believe that they do not meet their standards. However, independent producers argue that their productions should not to be edited in order to reflect the original idea behind any final product. Yet, broadcasting service licensees indicate that any broadcasting material should comply with editorial standards and codes. In terms of intellectual property rights, broadcasting service licensees and independent producers agree on what part of the IP should reside with either party.

5.4.2 Briefs from broadcasters

5.4.2.1 In this case, programme production is driven by broadcasting service licensees, who first conceive an idea, before it is commissioned to independent producers. Once an idea is conceived broadcasting service licensees prepare a brief to the production industry, before soliciting interest from the independent sector. Independent producers are invited to express interest using established channels such as advertising in the

news media, broadcasters' websites and directly through the representatives of the independent sector. Evidence on the ground suggests that broadcasters prefer closed briefs, depending on the size of the project. It would appear that closed bids are used in instances where big programmes are involved. Open bids are generally used for the purposes of advancing the empowerment of historically disadvantaged communities. Closed bids are limited to independent producers who are on the database, while open bidding is seen as time consuming.

5.4.3 Unsolicited idea

5.4.3.1 This commissioning practice allows independent producers to approach broadcasters once they have programme ideas they want to suggest to them. Established practice in South Africa and elsewhere, suggest that broadcasters have scheduled periods for pitching unsolicited ideas. Such ideas are subjected to rigorous teams of dedicated people within the broadcasting service licensee who then decide whether a particular idea is in line with the needs of the concerned broadcaster.

5.4.4 Adapting programmes

5.4.4.1 According to this approach, broadcasters licence existing international formats and adapt them to the local environment. This allows them to own intellectual property rights to local production only, while international broadcasters assume any other rights. The issue of rights is usually a commercial agreement between the parties, taking into consideration the existing property laws within a particular jurisdiction.

5.4.5 Re-commissioning of programmes

5.4.5.1 Re-commissioning entails commissioning previous programmes that were successful in the past, with potential to further develop. This practise is easy to implement as the two entities involved have an experience of working together in the past.

11. Are these the only methods of commissioning independently produced local content?
12. What are the opportunities and challenges that go with the choice of any of the highlighted commissioning methods?

6 RIGHTS

6.1 Before discussing the ownership of intellectual property rights, it is important to first deal with the definition of a producer.

“The producer is the person who is responsible for acquiring and developing the script, supervising production arrangements, hiring key talent, arranging financing, and controlling the exploitation of the completed production. The producer is the central decision-maker and point of control for an entire production. The producer’s company holds the copyright in the production, controls licensing of all distribution, broadcast and ancillary rights, and contracts with all key creative and technical talent.”⁵

6.2 Given this definition, it follows that producers can either be a broadcasting service licensee or an independent person or entity. Where broadcasting service licensees purchase content from independent producers, the two parties enter into a commercial discussion around the ownership of intellectual rights. In other words, any of the parties can own intellectual property rights depending on the nature and scope of the negotiations.

6.3 In the past, in South Africa, broadcasting service licensees enjoyed absolute rights to intellectual property. There have been limited cases of independent producers opting to sign off part of their primary rights, while retaining secondary rights.

⁵ Canadian Film and Television Production Association, The Economic Impact of Non-CTF Certified Canadian Film and Television Production, Page 26

6.4 Rights can be divided into the primary and secondary rights such as the DVD rights and other media rights, local rights and international rights. Depending on the negotiations between the independent producer and the broadcasting service licensee the agreements around rights can fall either under primary or secondary rights. In practice, a commissioning contract should detail primary rights, whether those can be extended and the period that they can be extended for. OFCOM mandates that the period for the primary rights be five years that can be extended upon expiry by at least two years.⁶

6.5 Both parties should afford each other the opportunity to negotiate other related rights such as transmission on other platforms and sales in the international markets. OFCOM is however sensitive to the issue of broadcasting the programme in one locality through traditional broadcasting and at the same time the rights being sold to other new platform service providers in the same locality.

6.6 Although rights form an integral part of commissioning, the involvement of the Authority is not clear cut given the role of the CIPRO and other laws such as the Cinematographic and Contract Act. At the outset, it would seem like the ownership of rights of independently produced programming is thus informed by the Copyright Act and the Authority has no clear legislative basis to act outside these statutes.. This differs markedly with the practice in the UK where OFCOM is mandated to deal with rights issues in terms of the Communications Act of 2003.

17. What is the definition of an independent producer for the purposes of this regulatory discussion?
18. 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?
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?
20. Is there an explicit legislative basis for the Authority to regulate intellectual property right? Please elaborate.

⁶ OFCOM, Terms of trade for independent producers finally arrive, Page 2



21. Is intellectual property right not supposed to be based on a commercial agreement between the commissioning parties?
22. How should conflict related to intellectual property rights be adjudicated?

7. PROGRAMME PRICING

7.1 Agreements on rights are followed by discussions on price issues. In many instances the broadcasting service licensee has an upper hand in the negotiations, a reality that can be attributed to information gaps between the two entities. Lack of transparency on the pricing of rights creates uncertainty in the independent production market. This lack of clarity or transparency may make it difficult for the production sector to separate its costs from profit. In the European Union, productions include feature films, drama and documentaries where drama is cheaper, but feature films are expensive productions and often require multi-party co-production in order to deliver the intended quality which justifies a public broadcaster's license fee subsidy.⁷ While the cost is often much smaller for documentaries, they are considered a higher risk by broadcasting service licensees, because they attract a relatively smaller audience.

7.2 To ensure the stability of the independent sector, it is important to ensure that all pricing issues are addressed in advance, including the method of payment for such rights. The setting of price on a programme will depend on the rights allocated, the period of the contract, the quality of the programme and the involvement of the commissioning broadcaster in ensuring that the programme is of acceptable standard.

7.3 Net revenues generated from the selling of other rights during the licensing period by the producers can be negotiated, especially with regard to whether they should be shared amongst the parties and how much percentage should be allocated to each. According to the British Broadcasting Corporation (BBC)

⁷ International Federation of Film Producers' Associations, Cultural Diversity and the Promotion of European and Independent Audiovisual Production, Page 4

decisions in this regard are informed by the amount of work broadcasting service licensee add to the programme before it is a final broadcast material. In the case of Channel 4, in the United Kingdom, any value added in terms of editorial input, promotion and marketing, or any other such intervention, influences tariffs that they will charge if secondary rights are sold. These factors as preferred by Channel 4 are difficult to measure since issues like editorial input depend on how much input was made, which makes it difficult to agree on, and consequently delay negotiations. PACT (trade union association representing the independent production sector) had to intervene in the UK and come up with a 15% revenue share towards the primary right holders⁸.

7.4 Some of the Broadcasting service licensees in South Africa believe that the programmes produced from the local market are not saleable internationally or looks cheaper to the international market than their priced value and as a result they do not put much effort on selling the programmes but to archive them. This challenge is exacerbated by the fact that some of the production companies are small and do not have skills to market their products which puts them at the mercy of broadcasters to assist them with running their businesses. As a result, in a number of instances, smaller companies prefer to only sell their products to the broadcasting service licensees as they have limited scope to market them to a much wider market. This challenge is further highlighted in a study conducted by RTE in Ireland which shows that some programmes are not internationally saleable, leading to independent producers declining the secondary rights.⁹

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

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?

⁸ OFCOM, Terms of trade for independent producers finally arrive, Page 3

⁹ http://www.rte.ie/commissioning/commissioning_cycle.html

8. IMPACT OF COMMISSIONING POLICIES

8.1 With the introduction of what the production sector have been waiting for being the regulation of commissioning both the broadcasting service licencees and the producers expect changes towards the way things were done before and this might be negative or positive effects. Few countries regulate commissioning with the following consequences as recorded in the UK;

- a) Increased revenue for the independent producers,
- b) Producers being able to launch their own VOD platforms,
- c) Independent producers manage to attract more investment, and
- d) An increase in the international rights sales.¹⁰

8.2 CRTC in Canada uses the UK model as a result of these positive impacts. It is not clear whether South Africa's Independent Production can thrive by adopting the same model as a developing country that is still trying to grow its export industry and also producing some of the programmes locally that are adapted from international programmes with regards to content.

9. COMPLAINTS AND COMPLIANCE

In a standard contractual environment it is possible for conflict to arise between the contracting parties. Conflict can include disagreements around pricing and quality issues. While the Authority is of the view that some mechanism should be set in place, it is of the view that the most cost-effective approach should be preferred to reduce administrative burdens on all role players, including the Authority. In this regard, the regulator led model and the independent arbitration arrangement should be evaluated. Commissioning guidelines from OFCOM and CRTC create an enabling environment for the parties to resolve their disputes without third party intervention rather than interfering in the details of the contracts. CRTC will intervene only if parties reach a deadlock in terms of the prescribed terms of trade but anything beyond that will be left up to the parties. In the South African context, the question is

¹⁰ OFCOM, Terms of trade for independent producers finally arrive

whether conflict resolution should be referred to the Complaints and Compliance Committee or is it sufficient to leave matters to external arbitration.



SECTION C: INTERNATIONAL BENCHMARKING

10. CANADIAN BROADCASTING CORPORATION (CBC)

- a) According to the Canadian regulator, the CTRC, it is not possible to ensure the health of the independent production industry simply by making sure that its productions get on the air. There are major changes happening in the broadcasting system that make life difficult for everybody involved, including broadcasters and regulators as well as producers.

- b) Broadcasters find that their traditional viewing platforms are in decline because of audience fragmentation. They hope to gather these scattered audiences back in through consolidation of major broadcasting groups. This means that independent producers have fewer doors to knock on when selling their ideas and their work.

- c) Also, broadcasters are also trying to acquire rights that cover all the new media platforms so they can regain and monetize viewership. Broadcasters say it is difficult to negotiate appropriate payment for these various rights because there is not yet any clear evidence of what their value may be. Commissioning policies are a meaningful addition to the industry and will create an efficient, balanced and productive relationship between producers and broadcasters. CRTC expect licensees to provide draft, or signed, terms of trade agreements with independent producers as part of their licence renewal applications.

10.1 Commissioning Guidelines

10.1.1 The CBC, as a public service broadcaster, has a responsibility to ensure that diverse Canadian Cultures are reflected and represented in the national airwaves. It is out of this legislative context that the CBC proclaims to be "...committed to programming that is distinctive in that it reflects Canada and its regions and contributes to Canadian cultural expression and shared national consciousness and



identity.”¹¹ With regard to commissioning guidelines, the CBC states that commissioning guidelines should be seen as “... a starting point and reference guide for completing contracts.”¹² Guidelines are not legally binding, thus Individual contracts will have some standard similarities, but will be treated on case by case basis.

10.2 Commissioning Proposals

10.2.1 Proposals can be submitted either as fully developed or in their early stages of development. Developing a proposal generally include business plan highlighting the resources and time frames required to complete a proposed product. This seen as an important step in the commissioning environment as it creates certainty about the capacity of an independent producer to meet their commitments to the broadcasting service licensees. Business plans also enable the CBC to evaluate the of investment in developing a particular proposal. “The total amount of CBC's contribution will ordinarily be an advance (the “**Development Advance**”) against any future licence fee which may be payable to the Producer, or production company, for the production of an identified program.”¹³ The CBC expects to have creative and any other related rights to any production which they either fully or partially support. In the early stages a development contract is not be treated as equivalent to a commissioning licence (these are dealt with as different phases) as the CBC can still decide, after negotiations with the producer, not to proceed with commissioning a program.

10.3 Commissioning Mode

10.3.1 Methods of commissioning include producers submitting program proposals to the CBC, acquisition of independently produced

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

programs, pre-sale licensing, bartering and CBC Funded Commission. Producers can submit unsolicited briefs/proposals or respond to the broadcasters' concept/brief.

10.3.2 Acquisition of independently produced programs

10.3.2.1 "An "**Acquisition**" is an independently produced program which is fully completed prior to CBC's entering into negotiations to acquire specified rights, for which CBC pays a licence fee (the term "Acquisition" may also be referred to as "Procurement"). CBC does not acquire any interest in the copyright to an Acquisition."¹⁴

10.3.2.2 The acquisition of independently produced programs can take place in three possible ways. It can either be a producer submitting an unsolicited idea to a CBC producer, or a distributor submitting it on behalf of the producer. A CBC representative can also contact a producer or distributor after being aware of the existence of a completed program through various channels.¹⁵

10.3.3 Licensed independent productions

10.3.3.1 "Licensed Independent Productions" are programs which are produced by Independent Producers in association with CBC"¹⁶. There are two types of licensed independent production. There are agency productions, which are funded by any of the many agencies funded independent productions, and non-agency productions which are produced without the financial assistance of the agencies.

10.3.3.2 Once an agreement has been reached with the producer to commission a program that will have third party (agency) funding, the CBC representative will negotiate for substantial creative and technical

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

rights of approval during production and in post-production stages. The agreement can only be reached if the CBC is given the rights. Various projects are negotiated separately and are treated as distinct, and the CBC does not normally stake claim to Internet rights although there is caution on part of the CBC that this might change as technology evolves.

10.3.4 Pre-sale

10.3.4.1 "A "Pre-sale" agreement is essentially an Acquisition contracted prior to commencement of production of the program."¹⁷ The CBC normally uses pre-sale commissioning when dealing with established producers who have long relationships with the producer. In most cases it has to do with existing formats that will be adapted to the Canadian context. The CBC enters into negotiations with the expectations that they will have approval rights in creative and technical aspects during production and in post-production stages.

10.3.5 Barter

10.3.5.1 "A "Barter" agreement is one in which the CBC Facilities and/or billboard and/or commercial air time are exchanged for telecast and other rights in a program."¹⁸ The value of CBC's facilities to be used in production will be set off against the licence. The greater the value of the facilities used, the more rights that the CBC will claim. The use of the CBC's billboards and/or commercial airtime will be subjected to editorial guidelines.

10.4 CBC rights

10.4.1 The CBC does not own the copyright of the programmes they commission. The CBC owns licence telecast rights for a certain

¹⁷ Ibid.

¹⁸ Ibid.

number of years and specific number of uses that will be decided by the individual producer and the broadcaster. In some cases, various modes of commissioning might produce a different set of rights for both the CBC and the independent producer. However, all the rights in the CBC commissioned programmes are structured in a manner that ensures "... that both parties are adequately compensated for the risks they have taken."¹⁹

10.5 Producer rights

10.5.1 "CBC recognizes the importance to Producers of the rights in the programs they produce, and their desire to ensure that such rights are fairly remunerated and fully exploited."²⁰ Independent producers own copyright of all the programmes they produce for or in conjunction with the CBC. It is only in unique cases the CBC owns copyright of the commissioned programmes, and that is also discussed by the CBC and the independent producer.

11. CHANNEL 4 (UNITED KINGDOM)

a) In the UK the Commissioning Code of Practice came out of a review undertaken by the Independent Television Commission (ITC) into the UK programme supply market in May 2003 as part of the passage of the Communication Bill (which became the Communications Act 2003). The review revealed that the independent production sector was operating in a highly uncompetitive market, which was stifling the development of the independent production industry. Accordingly, the ITC recommended some changes to the way public service broadcasters dealt with independent producers, and issued guidelines for codes of practice which governed dealings between producers and the public service broadcasters. These guidelines were to be followed in drafting new codes of practice, which would

¹⁹ Ibid.

²⁰ Ibid.

more closely follow the model operated by ITV (which was established under the Broadcasting Act 1990). After six months of negotiation (involving the public service broadcasters and Pact, the trade association representing the independent production sector), Ofcom, the 'super regulator' established by the Communications Act 2003 (and the successor to the ITC) finally approved the new Codes.

11.1 Commissioning guidelines

11.1.1 The code of practice, which defines and details the terms of relations between the broadcaster and the independent producers, states that relations between the former and the latter are mutually dependent and should be mutually beneficial.

11.1.2 "Channel 4's Code of Practice is based on the following key principles, all of which were advocated by the ITC Review and are designed to support the creative and commercial aspirations of Channel 4's supply base";

- a) Clarity over the different categories of rights that Channel 4 is seeking to secure in programmes it commissions from independent producers
- b) Clarity over the duration for which Channel 4 seeks to secure these different categories of rights
- c) Clarity over the prices that Channel 4 is willing to pay for these different categories of rights
- d) A clear commissioning process with a reasonable timetable for negotiations
- e) Provisions for monitoring the application of this Code and resolving any disputes.²¹

11.1.3 Through the provisions above producers are able to; "build valuable rights catalogues/archives, choose the deal structure that best supports their creative and commercial aspirations for a given

²¹Ibid.

project, participate more fully in the value of their Secondary Rights, find Channel 4 professional and timely to do business with.”²²

11.2 Editorial guidelines

11.2.1 Channel 4 commissioning editors are available to help the independent producers with the process of complying with editorial guidelines. “The Editorial Specification shall include a detailed statement of the proposed programme covering such matters as the individual producer, the director, principal cast, contributors, presenters, storyline/script, programme description, length, locations archive material, music, senior crew, and other details where agreed that they are appropriate.”²³

11.3 Proposal development

11.3.1 Proposed ideas that are deemed not to be ready for commissioning, but have great potential are put through the development stages. The proposal development stages are separate and distinct from the commissioning process. All proposals that go through the development stages and are deemed to be ready for commissioning will still have to go through the commissioning process²⁴.

11.3.2 “Channel 4 may be prepared to provide development finance for specific projects identified by the commissioning team....”²⁵ However, it should be noted that Channel 4 may, in certain cases, also decide not to fund proposal development process. In such instances the producer will be asked to do so using own funds or third party funds where available. “Channel 4 will require the security of ownership of all rights and material acquired, commissioned,

²² Ibid

²³ <http://www.channel4.com/corporate/4producers/resources/documents/TermsOfTrade2004.pdf>

²⁴ <http://www.channel4.com/corporate/4producers/resources/documents/C4%20Code%20of%20Practice%20Feb%202005.pdf>

²⁵ Ibid.

created, or provided as part of the development project it funded, and adequate security of ownership or co-ownership in respect of rights and material funded by the Producer or other parties which are essential to the development project.”²⁶ When a channel 4 funded proposal is not commissioned, the producer may repurchase the rights and security from the broadcaster.

11.4 Terms of trade

11.4.1 Channel 4’s terms of trade are meant to benefit both the broadcaster and the independent producers. The broadcaster’s terms of trade give greater intellectual property rights, autonomy and independence to the producers. Channel 4 aims to maintain cordial relations with independent producers by adhering to the following principles:

- a) To support the commercial and creative strength of the independent production sector in order to help ensure its long-term vitality.
- b) To support a large and diverse production sector to ensure that Channel 4 is able to fulfil the terms of its remit to provide experimentation, innovation, diversity and originality in its programmes and services.
- c) To support a collaborative creative relationship between Channel 4 and its producers to maintain the highest standards of programme quality.
- d) To maintain the commercial viability and sustainability of Channel 4’s financial model.²⁷

11.4.2 Rights and financing

11.4.2.1 Channel 4 contracts programmes on fixed price deals or on a budget basis. The Channel preferred mode of financing is fixed price deals, which is done under the following circumstances:

- a) series where the editorial specification is sufficiently detailed and agreed in advance of pre-production;

²⁶ Ibid

²⁷ <http://www.channel4.com/corporate/4producers/resources/documents/TermsOfTrade2004.pdf>

- b) for second and subsequent series;
- c) when commissioning a Producer that is an established programme supplier in that programme genre.²⁸

11.4.2.2 Any overspend in fixed price deals will be covered by the producer, except in cases where changes that led to overspend have been agreed to by the independent producer and the commissioning editor and in instances where the producer underspent, the producer will retain the funds²⁹. The producer is responsible for drafting the initial budget in programmes contracted on budget basis. The final budget has to be agreed to by channel 4 and the producer. "It will be the Producer's responsibility to work within that agreed budget and cashflow."³⁰

11.4.3 Channel 4 rights

11.4.3.1 Channel 4 has divided rights in independently commissioned programmes to core and secondary rights. Core rights are those required by channel in any commissioned programmes from independent producers and secondary rights are those entitled to the producer.³¹ Channel 4's exclusive Core Rights are defined as follows:

- a) Rights to transmit the programme on the core Channel 4 service in the UK & Republic of Ireland, however distributed, including Channel 4 catch-up services.
- b) Rights for contemporaneous programme support services targeted at the UK and Republic of Ireland, including but not limited to promotional extract and synopsis rights, premium telephony rights, Teletext rights, secondary on-line and interactive TV rights and mobile technology rights (those new media rights not required to support the programme by Channel 4 will be returned to the Producer).

²⁸ <http://www.channel4.com/corporate/4producers/resources/documents/C4%20Code%20of%20Practice%20Feb%202005.pdf>

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

- c) Rights for exploitation of the programme format in the UK and Republic of Ireland.
- d) The ability to exercise a holdback on the rights to exploit the programme on any platform targeted at the secondary transmission market in the UK and Republic of Ireland, including but not limited to multi-channel television, video-on-demand, near video-on-demand, pay-per-view, primary on-line and broadband internet rights.³²

11.4.3.2 The exclusive Core Rights are licensed from the producer for a specific period. At the end of that period, they will be returned to the producer, who will decide on an option to take.

11.4.3.3 The licence period for the Core Rights will last for as long as Channel 4 is commissioning the programme (i.e. for programmes with multiples episodes / series) and for a 5-year period thereafter. Channel 4 will also require an automatic option to extend this licence for Core Rights for an additional two years on the payment to the Producer of an advance that is equivalent to 2 off-peak repeats payments. On the occasions where Channel 4 wishes to extend its licence period beyond this two-year extension, this should be achieved through commercial negotiation between Channel 4 and the Producer.³³

11.4.3.4 Channel 4 can decide to negotiate for exclusive Core Rights and Secondary at the same time. The negotiations for both rights vary from individual deals agreed to by the broadcaster and the specific producer. "Channel 4 will (also) require the right to use commissioned programmes, and additionally to make such programmes or material included therein, available for research, non-broadcast archival and historic purposes."³⁴

³² Ibid.

³³ Ibid.

³⁴ For more on channel 4's archival usage; educational/non-theatrical, and off-air usage, limited cable relay rights, check,

<http://www.channel4.com/corporate/4producers/resources/documents/TermsOfTrade2004.pdf>



11.4.4 Producer rights

11.4.1 Secondary Rights belong to and can be exploited by the producer at any period the producer so wishes to, except in circumstances where both the producer and channel 4 decide otherwise. Producers can also expect to be paid for repeats after 3rd and subsequent transmission.”³⁵

11.4.2 Channel 4 Expects to share in the revenue generated through Secondary Rights, especially in programmes where it had substantial contribution. “However, it is not the intention (of channel 4) that the relative position of a Producer should be worse than that of the Corporation.”³⁶

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

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

27. What lessons can be adopted from Channel 4?

12. NATIVE AMERICAN PUBLIC TELECOMMUNICATIONS³⁷

12.1 Programme Rights

12.1.1 In terms of rights the PBS assumes exclusivity of rights during the license period whereby the PBS's exclusivity applies to all other forms of television transmission, distribution and exhibition to ensure that the producer does not broadcast, transmit or distribute the program(s), or license anyone else to do same, within the PBS license area during the PBS license term. The restrictions refers to commercial and non-commercial broadcast, cablecast, satellite transmission, wireless, microwave, video-on-demand, video dial tone, videostreaming, downloading, podcasting (including video podcasting), download-to-own, pay-per-view, and Internet protocol television (“IPTV”) distribution, and shall apply to all versions and

³⁵ <http://www.channel4.com/corporate/4producers/resources/documents/TermsOfTrade2004.pdf>

³⁶ Ibid.

³⁷ <http://www.nativetelecom.org/>

formats of the program(s) in any language, and to all display and transmission standards, now known or hereinafter devised, including, but not limited to standard television, high definition television, digital television, and advanced, enhanced, and interactive television.

12.1.2 Theatrical releases prior to and during the PBS License term are permitted only with the prior written permission of PBS. In addition, PBS generally requires a period of exclusivity against any distribution of the program in Canada prior to and within a prescribed time period following the initial PBS release. Producers must grant to PBS, at a minimum, the non-exclusive right to advertise and promote the program online throughout the broadcast and video license term and to use all program related promotional materials to that end. Additional online rights may be negotiated separately depending on the particular programs.

12.1.3 PBS may also require institutional education (audio-visual), direct response, video-on-demand, IPTV, home video, digital television distribution and other rights (including, but not limited to, audio recording and soundtrack rights, electronic version, merchandising, and/or publishing rights) depending on the particular programs. Producer must grant to PBS the right to use and authorize others to use the program and series titles, the names, voices, likenesses and biographies of all persons or characters appearing on, or performing services in connection with, the programs, including the right to quote portions of the program or program element of no longer than three minutes in aggregate length, for the purpose of advertising, promoting and publicizing the program or for institutional promotion in any medium.

12.1.4 Producers must agree to defend, indemnify and hold harmless PBS (and those authorized by PBS to use the programs) from and against any and all claims, damages, costs and expenses, including

reasonable attorneys' fees and costs, that may result from any authorized use of the program by PBS. Producers must secure a policy of liability insurance that is acceptable to PBS, which insures the producer against copyright infringement, defamation, invasion of privacy, and unauthorized use of titles, ideas or characters unless otherwise prohibited by state or local laws. The policy must name PBS and all public television stations as additional insureds during the program rights period. The limit of liability should be \$1,000,000 for each occurrence and \$3,000,000 in the aggregate, with a deductible, which is affordable to the producer.

28. What should be the basis for assessing the independent producers by broadcasters to procure the right programme?
29. What will be a fair time period for broadcasters to come up with their policies for commissioning of independently produced South African programming?
30. Learning from international experience, which commissioning method(s) will be preferable in South Africa and why?
31. What examples can be extracted from the above international cases to have effective terms of trade?
32. Should the Authority require broadcasters to submit their commissioning policies for approval or filing?
33. Should the Authority ask broadcasters to keep the files of procured independent producers for submission whenever the Authority requires those?
34. Can this information be contained in the websites of the broadcasters for public inspection to promote consumer involvement?
35. Should the Authority advise broadcasters to put their commissioning details including schedules on their website, advertise from time to time on Television and inform the producers' organisations about those?
36. Please make suggestion on an efficient monitoring mechanism for compliance with the regulations on commissioning.
37. Any suggestions on the drafting of these regulations?
38. Are there other relevant issues that the Authority need to consider that are not raised in this document?

13. CONCLUSIONS

- 13.1 International trends show that national regulations agencies (NRAs) develop generic commissioning code, which are adapted by broadcasters for the purposes of their internal policies. Since commissioning is a complex undertaking, the Authority will not be able to deal with every detail of commissioning, except setting out a generic framework as a guide to independent producers and broadcasters. Such a guideline must ensure that commissioning processes are acceptable, fair, proportionate and transparent, while taking into account the commercial needs of broadcasters.
- 13.2 The commissioning regulatory framework should among others include the renegotiation of rights if the broadcaster is no longer using them for a long period of time or either party feels the need to re-open negotiations. Internal policies should include a detailed sample contract which outlines the necessary requirements to obtain a tender with the broadcaster. These can include a possibility of renegotiating rights for buying rights back from broadcasters.
- 13.3 In addition, commissioning procedures must ensure that the parties are certain about the procedures involved in commissioning and negotiate the terms in the best interest of all parties. Decisions on commissioning should consider the nature of broadcasting as an industry that must be sustainable and at the same time promoting the growth of the production sector.

14. REFERENCES

1. British Broadcasting Corporation, Available online at http://www.bbc.co.uk/commissioning/tv/business/terms_trade.shtml
2. Canadian Broadcasting Corporation, Available online at http://www.cbc.ca/independent_producers/termsoftrade.pdf
3. Canadian Film and Television Production Association, 2002, The Economic Impact of Non-CTF Certified Canadian Film and Television Production. Available online at <http://www.ctfpa.ca/government/pdfs/2002SubNon-CTFProd.pdf>
4. Canadian Radio-television and Telecommunications Commission, Available online at <http://www.crtc.gc.ca/eng/welcome.htm>
5. Channel 4, Terms of Trade 2004. Available online at http://www.channel4.com/corporate/4_producers/resources/documents
6. ICASA, 2002, Position paper on South Content on Television and Radio.
7. ICASA, 2000, The Discussion Paper on the Review of Local Content Quotas
8. International Federation of Film Producers' Associations, 2005, A response by the International Federation of Film Producers' Associations to the Issues Papers for the Liverpool Audiovisual Conference: "Cultural Diversity and the Promotion of European and Independent Audiovisual Production". Available online at http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip1-3-fiapf.pdf
9. Native American Public Telecommunications, available online at <http://www.nativetelecom.org/>

10. Office of Communications, Review of the Television Production Sector,
Available online at <http://www.ofcom.org.uk/consult/condocs/tpsr/tpsr.pdf>
 11. Office of Communications, Terms of trade for independent producers finally
arrive. Available online at http://www.harbottle.com/hnl/pages/article__view__hnl/679.php
 12. Radio Television Hong Kong, 2008 Programme Commissioning Procedures,
Available online at <http://www.rthk.org.hk/tvcommissioning/tvce.htm>
 13. Radio Telefís Éireann, Available online at <http://www.rte.ie/commissioning/commissioning>
-