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## GENERAL NOTICE

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### NOTICE 529 OF 2014



Independent Communications Authority of South Africa  
Pinmill Farm, 164 Katherine Street, Sandton  
Private Bag X10002, Sandton, 2146

## DISCUSSION DOCUMENT ON

### **Review of Regulation on South African Local Content: Television and Radio**

JULY 2014


## INVITATION FOR WRITTEN REPRESENTATIONS

In terms of Section 4B of the Independent Communications Authority of South Africa Act (Act No 13 of 2000), interested persons are hereby invited to submit their written representations on the Discussion Document regarding the review of South African Local Content on Television and Radio Regulation published herewith by the Authority. A copy of the Discussion Document will be made available on the Authority's website at <http://www.icasa.org.za> and in the Authority's Library at No. 164 Katherine Street, Pinmill Farm, (Ground Floor at Block D), Sandton between 09h00 and 16h00, Monday to Friday.

Written representations with regard to the Discussion Document must be submitted to the Authority by no later than 16h00 on 10 September 2014 by post, hand delivery or electronically (in Microsoft Word) and marked specifically for attention: **Mamedupe Kgatshe/Hilda Mashapha**. Delivery address: **Block A, Pinmill Farm, 164 Katherine Street, Sandton**. Where possible, written representations should also be e-mailed to: [mkgatshe@icasa.org.za](mailto:mkgatshe@icasa.org.za) and [hmashapha@icasa.org.za](mailto:hmashapha@icasa.org.za) or by facsimile: 011 566-3260/3802. Enquiries should be directed to 011 566-3259/3801; between 10h00 and 16h00, Monday to Friday.

Written representation(s) received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library and such copies will be obtainable upon payment of the prescribed fee.

At the request of any person who submits written representations pursuant to this notice, the Authority may determine that such representations or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be allowed to withdraw such representations or portion(s) thereof.



DR STEPHEN MNCUBE  
CHAIRPERSON

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## EXECUTIVE SUMMARY

South African television and radio need to reflect and engage with the life experiences, cultures, languages, aspirations and artistic expressions that are distinctly South African. Through South African music and television programming, radio and television can make a vital contribution to democracy, nation building and development in South Africa. The content quotas seek to protect and develop the country's national cultures and identities, and to extend choice for the public. South African music and television programmes need to be produced by a wide range of South Africans, for South African audiences, in languages of their choice.

This draft Discussion Document is the culmination of an inquiry in terms of section 4B of the Independent Communications Authority of South Africa Act ("the ICASA Act") into the review of South African Local Content on Television and Radio. The Authority appointed Consultants to conduct a thorough analysis and assessment of the cultural, economic and social benefits brought about by the preservation of South African programming regulations and to perform a sound cost-benefit analysis on behalf of the Authority<sup>1</sup>. The outcome of this assessment leads to the following three broad considerations that underpin the proposed recommendations:

**Firstly**, the proposals have been drafted in recognition of the current Ministerial ICT Policy Review Process<sup>2</sup>. The new White Paper and resultant legislative amendments could result in significant changes to the overarching policies and regulatory approach to promoting South African content. Thus there is a need to take into account this processes before a definite stance is to be established on new regulatory regime. As according to the ICASA Act and the ECA, the Authority is expected to play a key role in informing, advising and contributing towards the new policy, given its statutory role and legislative functions.

**Secondly**, the advent of migration into digital terrestrial media/television will not only highlight the importance of/in appreciating how convergence of different media platforms will impact on the technological advancement in the broadcasting sector. Furthermore, this will

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<sup>1</sup> [www.icasa.org.za](http://www.icasa.org.za)

<sup>2</sup> The National Integrated ICT Policy Green Paper published under GN 44 in *Government Gazette* 37261 of 24 January 2014

be compounded by the urgent need to recognize and understand complexities involved in assessing the impact this transformation will have on the audiences, content providers, broadcasters and advertising revenue.

In light of these intense transformations as indicated above, coupled with desktop research, international benchmarking, questionnaires and interviews with stakeholders, perhaps a flexible regulatory approach which is driven by evidence of the impact of regulations will suffice in addressing unintended consequences such as the uncertainty in the purchasing of the Set-Top-Boxes (STB's), disturbances convergence is likely to bring in the broadcasting sector, facilitating convenient and conducive environment to respond to the impending public inquiries, the assurance government would be compelled to make to the immediate stakeholders (broadcasters, independent producers) about the losses they may incur during the migration period, and the rigorous procedures and processes that will be involved in catering for the needs of wide ranging audiences.

**Thirdly and finally,** ensuring that the Authority's values are relevant and that its commitment to evidence based regulation and simplifying the legislative requirement are possible. This is stressed in the Authority's principles that: The need to regulate as per its legislative mandate and regulatory compliance must not *"become a barrier to the development of a sustainable ICT sector"*.<sup>3</sup>

In the context of South African content regulation, this will require that the Authority consider among other things, how to meet its dual mandates in relation to local content which is;

- to ensure that it is seen and heard on air;
- to develop local industries; and
- ensuring a diverse, viable and vibrant broadcasting sector and promoting fair competition.

Closely linked to this is ensuring the usage of all official languages, encouraging regional and cultural diversity and allowing freedom of expression.

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3 ICASA, 'Value System' <http://www.icasa.org.za/AboutUs/VisionMission/tabid/57/Default.aspx>



## 1. INTRODUCTION AND BACKGROUND

### 1.1 BACKGROUND TO THE REPORT

1.1.1 The Authority published a final report on the Review of broadcasting regulatory framework towards a digitally converged environment in South Africa under General Notice 643 in *Government Gazette* 36598 of 25 June 2013. The objective of the review was to assess the suitability of the current regulatory framework arrangements for the new digital platforms and consumer technologies, and in helping meet the core Government's broadcasting policy on cultural, economic and social goals. As an outcome of this process the Authority prioritised regulations to be reviewed in the short to medium term. The process was informed by the stakeholder's submissions, the socio-economic impact, the competing demands it has to meet and the legal obligation of such regulations<sup>4</sup>.

1.1.2 The Authority decided that in order to conduct substantive, efficient and valuable reviews there is a need to focus on a lesser number of regulations. The Local Content Regulation<sup>5</sup> was identified as one of the prioritised regulations that required urgent attention as this regulation is critical for the success of digital broadcasting. It is on this basis that the Authority carried out an analysis of the cultural, economic and social aspects of the preservation of South African content.

1.1.3 This discussion document contains findings of the research conducted<sup>6</sup>, presenting the overarching findings and recommendations.

1.1.4 The recommendations suggest overarching approaches to Local Content Regulations given the changing environment, as well as proposals on how the

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4 ICASA Final Report: the Review of Broadcasting Regulatory framework towards a digitally converged environment in South Africa under GN 643 in *Government Gazette* 36598 on 25 June 2013

5 The ICASA South African Music Content Regulations published under GN 153 in *Government Gazette* 28453 of 31 January 2006, and the ICASA South African Television Content Regulations published under GN 154 in *Government Gazette* 28454 of 31 January 2006

6 [www.icasa.org.za](http://www.icasa.org.za)

Authority may efficiently and effectively fulfil its responsibilities to monitor and enforce compliance with regulations. Policy/regulatory gaps that are linked to the Authority's mandate of promoting South African cultural expression in all South African languages but not directly part of this review are also identified.

- 1.1.5 Local content regulations should be viewed in the context of broader government policies relating to the development of cultural industries and the principles of plurality of views, freedom of expression, cultural diversity, and access to information and language rights. The Authority plays a critical role in ensuring that these policies are met; however the Authority and the broadcasting sector cannot alone ensure that the policy objectives are met in this regard. The recommendations therefore set out in this document, were prepared taking into account the overarching country objectives in relation to these areas and the specific role of the regulator in achieving these and general principles of good regulatory practice.

## 1.2 METHODOLOGY

- The discussion document is based on a number of methodologies, including:
  - A legislative analysis considering the policies, legislation and international instruments<sup>7</sup> that have an impact on the content industry in order to establish the basis for regulating local content;
  - An analysis of the Authority's processes and reports, and interviews with key industry stakeholders to assess the effectiveness of processes used to monitor and ensure compliance by broadcasting service licensees with local content related requirements;
  - Industry surveys and analysis of industry reports to gauge the costs and benefits associated with creating and broadcasting local content;
  - Interviews with broadcasters, independent television producers and music industry representatives to gain perspectives regarding the local content

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<sup>7</sup> Includes the United Nations: International Covenant on Economic, Social and Cultural Rights (1966) and Southern African Development Community: Protocol on Culture, Information and Sport (2000)

regulations, their views of the future, and preliminary strategic proposal on the way forward; and

- A benchmark of Australian, Canadian and United Kingdom's approach to local content regulation and enforcement in the light of convergence and emerging technological developments.

## **2. LEGISLATIVE AND POLICY ANALYSIS**

This chapter sets out the policy and legislative context of local content regulation in South Africa. It provides an analysis of the relevant international, regional and South African policies and legislative provisions underlying the regulation and therefore sets the policy basis for the review and recommendations.

### **2.1 International Conventions**

- 2.1.1 International Conventions, African and SADC instruments and agreements are relevant to local content regulation in as far as they inform the development of South Africa's cultural industries and the role that broadcasting of local content plays in promoting freedom of expression, diversity of views and cultural expression.
- 2.1.2 The principles promoted by these conventions, agreements and instruments are the bases of the constitutional protection that broadcasting enjoys in South Africa and underpin regulation of South African broadcasting content.

### **2.2 The South African Policy Environment**

- 2.2.1 In coming up with Local Content regulations the Authority has to consider specific policies and laws relating to the sector as well as broader policies and laws dealing with cultural industries and the principles of plurality of views, freedom of expression, cultural diversity and language rights.
- 2.2.2 Broadcasting, and consequently the regulation of television and radio content in South Africa, is constitutionally protected and the Authority is guided by the rights set out in the Constitution in developing its approaches to this.
- 2.2.3 Relevant related Constitutional rights include: Rights of all to use the language and "participate in the cultural life" of their choice,<sup>8</sup> to freedom of expression<sup>9</sup> and access to information<sup>10</sup> and administrative justice<sup>11</sup>.

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8 Articles 30 and 31

9 Article 16

10 Article 32

11 Article 33

2.2.4 The Authority's regulations further impact, albeit indirectly, on the mandate of the Departments of Arts and Culture (DAC), Trade and Industry (DTI), and agencies such as the National Film and Video Foundation (NFVF). These departments and agencies play an important role in the development of the music, television and film industries, and consequently, their policies are considered in the context of the regulation of local content. The most recent policy processes that relate to local content regulations are:

2.2.4.1 The Ministry of Communications' ICT Policy Review (launched in 2013) which is revising all existing policies including the White Paper on Broadcasting. This could impact on the overall approach to audio-visual content.

2.2.4.2 The Copyright Review Commission (CRC) appointed by the Minister of Trade and Industry in 2010 to make recommendations, regarding the distribution of royalties to musicians and composers of music. It published its report in 2011, and some of its findings relate to content quotas imposed on broadcasters.

2.2.4.3 The 2013 appointment by the Minister of Arts and Culture of two advisory committees to make recommendations on approaches to television content and the music sector. These reports were reportedly due to be released before the end of the 2013/2014 financial year.<sup>12</sup>

### **2.3 The South African Legislative Environment**

A timeline of the Authority's local content regulatory framework and primary objectives is illustrated below.

#### **2.3.1 *The Triple Inquiry Report (1995)***

The Authority's predecessor, the Independent Broadcasting Authority (IBA), submitted its Triple Inquiry into the Protection and Viability of Public Broadcasting, Cross Media Control of Broadcasting and South African Television Content and South African Music Production to Parliament in 1995. While the report was drafted by the regulator, recommendations were considered by Parliament which decided which of these to approve. The recommendations outlined in the Triple Inquiry Report on South African content were later (1997) developed by the IBA into the first South African content regulations.

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<sup>12</sup> While the Authority has sole responsibility for determining the regulatory approach to South African content, and therefore is not bound by any recommendations from the DTI or DAC, it is still important to note these.

### **2.3.2 The White Paper on Broadcasting Policy (1998)**

2.3.2.1 The White Paper on Broadcasting Policy (the White Paper) was adopted by Government in 1998. It is currently being reviewed by the Minister of Communications, and any new stipulations related to Policy will inevitably have to be considered by the Authority in reviewing South African content regulations. The Authority can further make recommendations on related policy issues and amendments to legislation, if any, through this review process.

2.3.2.2 The 1998 White Paper set out Government's approach to broadcasting policy and outlined the different roles of Parliament, the Minister of Communications and the regulator. The White Paper further brought the SABC clearly under the remit of the regulator for the first time by requiring that the Authority monitor compliance with the public broadcaster's charter and that the regulator issue licence conditions for each SABC service.

2.3.2.3 In relation to South African content, the White Paper states specifically that the regulator should review its South African content regime and develop a strategy to "achieve a broadcasting system which is predominantly South African in content" and determine a timetable to achieve this within 10 years.<sup>13</sup>

2.3.2.4 In its 2002 review of the previous regulations, the Authority asked for submissions regarding this requirement and questions were raised by stakeholders about the interpretation of the word "predominant". The National Association of Broadcasters (NAB), for example, stated that the term applied to the broadcasting system as a whole and not necessarily to individual broadcasters. In the final Position Paper on South African content, the Authority stated that:

*"The Authority, as the national custodian of South African content, is committed to the ideal espoused in the White Paper on Broadcasting Policy that television and radio should be predominantly South African. The Authority does not wish, however, to put static numbers to this crucial concept, which can be realised in many ways, including percentages of airtime devoted to content, broadcasters' use of images and sounds to characterise and market*

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<sup>13</sup> White Paper on Broadcasting, section 3.3.2

*themselves, and the development of South African talent and creativity. However, in the process of ensuring that content on television and radio does become predominantly South African, quotas will be set to benchmark progress and monitor compliance. It is clear from the hearings and the monitoring of licensees that broadcasting South African content is not regarded as a burden. Indeed, broadcasters see South African content as an opportunity to meet changing audience needs and to grow the South African industry, while contributing to the emerging democratic culture of the country.*

*"What is also clear as a result of the public process is that not all categories of programming and all stations need to be regulated to ensure they become predominantly South African. The Authority believes that, in the light of the shortage of resources within the sector and within the Authority itself, the Authority should only regulate that which requires regulation."<sup>14</sup>*

**1. Do you believe the television and radio broadcasting sector is predominantly South African in content?**

2.3.2.5 Government's White Paper also outlined the following content related policies:

2.3.2.5.1 It reinforced the Triple Inquiry stipulation that all broadcasters should have South African content obligations – varying in relation to the type of service offered (public, private, community, free-to-air or subscription).

2.3.2.5.2 The Paper (and subsequent legislation) divided the SABC into two divisions – public and public commercial. The public services provided by the SABC have specific obligations in terms of the White paper to provide comprehensive programming targeting all South African audiences, to support the arts, to produce their own programmes and commission content from outside companies and to reflect the country's cultural diversity. The public commercial wing has to comply with requirements for private broadcasters.

2.3.2.5.3 The policy specifically states that private broadcasters must play a role in promoting South African content and should:

- Broadcast predominantly South African programming;

<sup>14</sup> The Authority, "South African Content on Television and Radio: Position Paper", 15 February 2002, Section 10: Increasing the Quota, page 19

- Broadcast South African drama, documentaries and children's programmes that reflect South African themes, literature and historical events that make significant use of South African writers, directors, musicians, actors and craftspeople; and
- Acquire appropriate amounts of their programming from the independent production industry.

2.3.2.6 Community broadcasters according to the White Paper should focus on covering grassroots community issues and reflect local culture/s.

2.3.2.7 The White Paper further provides for the multi-channel environment and digital migration (Chapter Seven). Among other things, it states that the objectives for regulation and policy in the multi-channel environment pertinent to South African content should be to:

- 2.3.2.7.1 Prioritise South African content;
- 2.3.2.7.2 Provide a diversity of types of programming aired; and
- 2.3.2.7.3 Deliver services in all official languages.

### **2.3.3 *Broadcasting Digital Migration Policy***

2.3.3.1 Cabinet approved the Broadcasting Digital Migration Policy<sup>15</sup> and amended this policy in 2012<sup>16</sup>. Policy positions relevant to the review of South African content include:

- 2.3.3.1.1 A requirement that the Authority review the South African content quotas as the existing framework is based on factors applying to a single channel analogue environment.
- 2.3.3.1.2 The aims outlined for the migration to DTT include the possibility of strengthening existing broadcasters and introducing new services to increase diversity of programming and services available to audiences. The Policy further highlights the need to address what it calls gaps in provincial content and in parliamentary and government information.
- 2.3.3.1.3 That the migration to DTT should further facilitate the development of the creative industries.

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<sup>15</sup> Published under GN 958 in Government Gazette 31408 of 8 September 2008

<sup>16</sup> Published under GN 124 in Government Gazette 35051 of 17 February 2012



- 2.3.3.1.4 An injunction that the regulator must take national objectives, such as those related to equitable use of all official languages and increasing access by people with disabilities, set in related policies and legislation when licensing new channels and services. The Policy states that the migration will “create opportunities for the development, use and wide dissemination of local content in all eleven official languages”.
- 2.3.3.1.5 A commitment to establishing Digital Content Generation Hubs (DCGHs) “aimed at generating content” for digital broadcasting, “contributing to the development of the Creative Industries as well as job creation”.

## 2.4 The Authority's Regulations

The Authority's predecessor, the IBA, promulgated the first television content regulations in 1997. These were repealed by the South African Music and Television Content Regulations gazetted in 2002, and subsequently amended in 2006. Regulations on Commissioning of Independently Produced South African Programming were gazetted in 2009.

### 2.4.1 Minimum South African Content requirements

Table 1: South African Television Content Requirements for free-to-air Television broadcasters

Requirements	Public TV	Community TV	Commercial TV (incl. public commercial)
Minimum weekly average over performance period measured over a year	55%	55%	35%
Drama	35%	No content requirements	20%
Current affairs	80%		50%
Documentary Programming	50%		30%
Informal knowledge building	50%		30%

Requirements	Public TV	Community TV	Commercial TV (incl. public commercial)
Educational	60%		
Children's programming	55%		25%

Source: South African Television Content Regulations (2006)

*Table 2: South African Television Content Requirements Subscription broadcasting*

Requirements	Terrestrial broadcaster subscription	Satellite broadcaster subscription
General	At least 10% weekly average measured over a year during performance period must be South African content	At least 10% of the channel acquisition budget must be spent on channels with South African content that are compiled and uplinked from South Africa
Drama	At least 2% of its South African content must consist of South African drama programming	-

Source: ICASA South African Television Content Regulations (2006)

2.4.1.1 In addition to the minimum SA content requirements set out in table 2 above, the Authority may direct that the licensee must annually spend a specified sum of money, subject to a reasonable yearly escalation or alternatively, a specified minimum percentage of the licensees' gross revenue on programming which has South African television content.

2.4.1.2 The regulations also require that 40% of the SA television content broadcast by television services must consist of programmes that are classified as 'independent television productions', defined as a production (i) by a person not directly or indirectly employed by any broadcasting service licensee; or (ii) by a person who is not controlled by or is not in control of any broadcasting service

licensees<sup>17</sup>. Broadcasters can consequently not restrict their broadcasts to content that is internally produced.<sup>18</sup>

2.4.1.3 The relevant content requirements for South African music are summarised in the table below.

*Table 3: South African music content regulation (2006)*

Public Sound Broadcasting	Commercial Sound Broadcasting (including public commercial)	Community Sound Broadcasting	Subscription sound Broadcasting
Minimum of 40% of musical works in the performance period <sup>19</sup> must be South African music spread reasonably evenly over the broadcast period	Minimum of 25% of musical works in the performance period must be South African music spread reasonably evenly	Minimum of 40% of the musical works in the performance period consist of South African music spread reasonably evenly	Minimum of 10% of bouquets consist of channels made up of South African music content

2.4.1.4 In addition to the above local television and music requirements, specific South African content requirements are set out in the licence conditions based on promises of performance submitted by licensees during their application for a service licence.

<sup>17</sup> Section 61 (2)(b) of the Electronic Communications Act, No 36 of 2005

<sup>18</sup> Note that e.tv has higher quotas set out in its licence conditions than those required by the regulation. This includes quotas for independent production. Its licence conditions are based on promises of performance.

<sup>19</sup> "Performance period" means the period of 126 hours in one week measured between the hours 05h00 and 23h00 each day.

### 3. APPROACHES TO REVIEWING LOCAL CONTENT REGULATION

This section of the discussion document summarises key findings and emerging issues that have arisen from the research process. The process followed in identifying the issues that emerged from the policy and regulatory analysis, also incorporates the views from the industry stakeholders consulted.

#### 3.1 Definitions relating to South African Television and Music Content. <sup>20</sup>

Concept	Definition
<b>Broadcaster</b>	Means any legal or natural person who composes or packages television or radio programme services for reception by the public or sections of the public or subscribers to such a service irrespective of technology used
<b>Broadcasting Service</b>	Means any service which consist of broadcasting and which service is conveyed by means of an electronic communications network, but does not include: <ul style="list-style-type: none"> <li>a) A service which provides no more than data or text whether with or without associated still images;</li> <li>b) A service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or</li> <li>c) A service or a class of service, which the Authority may describe as not falling within this definition.</li> </ul>
<b>local television content</b>	Means a television programme, excluding transmission of sporting events and compilations thereof, advertisements, teletext and continuity announcements, which is produced: <ul style="list-style-type: none"> <li>a) By a broadcasting service licensee;</li> <li>b) By a person who is a citizen of, and permanently resident in, the Republic;</li> <li>c) By a juristic person, the majority of the directors, shareholders or members of whom are citizens of, and</li> </ul>

<sup>20</sup> Section 61, Electronic Communications Act, No 36 of 2005

Concept	Definition
	<p>permanently resident in, the Republic;</p> <p>d) In a co-production in which persons referred to in subparagraphs (a), (b), or (c) have at least a fifty percent financial interest.</p> <p>e) By persons referred to in subparagraphs (a), (b), (c) or (d), in circumstances where the prescribed number of key personnel who are involved in the production of the television programme, are citizens of, and permanently resident in, the Republic; or</p> <p>f) By persons referred to in subparagraphs (a), (b), (c) or (d) in circumstances where the prescribed percentage of the production costs are incurred in the Republic.</p>
<b>South African Music</b>	<p>A musical work broadcast by a broadcasting service licensee qualifies as "South African" music if such work complies with at least two of the following criteria:</p> <p>a) If the lyrics (if any) were written by a South African citizen;</p> <p>b) If the music was written by a South African citizen;</p> <p>c) If the music or lyrics was or were principally performed by musicians who are South African citizens;</p> <p>d) If the musical work consists of a live performance which is:</p> <p>i) recorded wholly in the Republic; or</p> <p>ii) performed wholly in the Republic and broadcast live in the Republic.</p>
<b>Independent Television Production</b>	<p>Means a production of local television content:</p> <p>a) By a person not directly or indirectly employed by a broadcasting service licensee</p> <p>b) By a person who is not controlled by or in control of any broadcasting service licensee</p>

**Table 4: Definitions related to South African Television and Music Content**

- 3.1.1 The issue of whether or not definitions should be removed from legislation allowing the Authority more flexibility to amend these if necessary was raised during the previous process of reviewing the regulations.
- 3.1.2 The Authority itself cannot vary these definitions as they are contained in the legislation, though it can make recommendations to the Minister in this regard.

- 2. Is the definition of local content still relevant to meet regulatory objectives?**
- 3. Is the definition of independent television production satisfactory? Should it be strengthened, if so, please provide suggestion(s).**

- 3.1.3 One of the core issues raised is the definition of broadcasting service given that television and radio licensees will increasingly be competing with other audio-visual content providers and services. This will have a potential impact on the ongoing viability of radio and television licensees and therefore on future approaches to promoting South African creative content.
- 3.1.4 Several stakeholders, in the interviews, raised the inclusion of sport in the definition of South African television content and proposed that the exclusion of sport from the definition of local content be reviewed. The SABC proposed in interviews that this issue again be discussed, highlighting that it could assist in ensuring that its mandate to cover developmental sport is met. Kagiso Media raised similar issues.
- 3.1.5 From an international perspective, it is worth noting that sport programming is also considered Canadian content if a Canadian producer is involved and provides a commentator, whether or not the match takes place in Canada. In the event of coverage of sport played abroad, the production will be considered Canadian content when Canadian teams or Canadian athletes participate.<sup>21</sup> The definition of European content contained in the European Union Audiovisual Media Services Directive (AVMS) however excludes sporting events.<sup>22</sup>

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<sup>21</sup> CRTC, 1991, 10

<sup>22</sup> Article 16 of the EU AVMS Directive

3.1.6 The CRC appointed by the Minister of Trade and Industry made recommendations in its final report on amendments to the definitions of South African music in the ECA. The CRC asserted that the definition in the ECA is “too narrow” and “compromises the income of South African composers”. It thus recommended that additional concessions be applied to classical music. It also proposed that the definition should require that a song must have been written or composed by a South African resident. In the case of classical music, it should include music performed by South African musicians and recorded in the Republic even if the performance is not live.

3.1.7 The Commission argued that under the current definition a musical work where the lyrics were written by a foreigner, the music co-written by a foreigner and local artist and performed by a South African would qualify as South African music. In such instance a large portion of the performing rights royalties would go to the foreign artist thus defeating the objectives of Local Content regulation.

3.1.8 The NFVF indicated in interviews that it has been reviewing the existing definitions of South African television content used by the Foundation itself. However it argued that all the primary stakeholders dealing with Local Content should come up with a uniform definition of South African television content.

#### **4. Should local sport be considered as local content? Please substantiate**

### **3.2 Overall regulatory approach**

3.2.1 One of the predominant issues raised relates to the overarching regulatory approach by the Authority resulting in differential regulation for free-to-air (FTA) and subscription broadcasters. Several stakeholders questioned whether or not the lighter touch approach to subscription services was still justified given that these services now compete directly with FTA services for advertising revenue.<sup>23</sup> It was argued that the legislative limitation on advertising revenue for subscription broadcasters (section 60(4)) had become meaningless as subscription revenue has overtaken total TV

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<sup>23</sup> This was raised by all FTA television services that participated as well as by Kagiso Media

advertising revenue. Moreover, it was posited, that since the Authority had first adopted this regulatory approach, DSTV's share of adspend had grown from under 10% to over 30% - more than e.tv's share. DSTV was however, unlike FTA services, not required to expend any of this revenue on meeting obligations set in legislation for the broadcasting sector.

3.2.2 Subscription broadcasters interviewed however strongly disagreed with this view, emphasising that the real issue is that all broadcasters will face increasing competition from unlicensed content services. They further argued that the motivation for lighter touch regulation of pay-tv services was the greater control subscribers had over content as they could discontinue their subscriptions if these broadcasters did not fulfil expectations.

**5. Should the Authority continue differentiating local content quotas for FTA and subscription broadcasters? To what extent should the differentiation be?**

### **3.3 Local Content Quotas**

3.3.1 The Authority's and broadcasting service licensees' reports on compliance show that radio and television broadcasting licensees generally meet or exceed the minimum quotas set in regulations and licence conditions.

#### **Television**

3.3.2 Licensees emphasised that they generally exceed the overall quotas as well as quotas in certain genres. They indicated that broadcasting South African content has shifted from being a regulatory requirement to a commercial imperative. However this was not true across all genres such as children's programming. Interviewees stated that the emphasis on South African content in government and regulatory policies could thus be seen as successful and that any review should therefore consider what regulatory requirements were still necessary.

3.3.3 Independent producers and industry organisations, generally agreed with this assertion, emphasising that certain genres would be neglected if not regulated. Their



major concern however related to the need to enforce compliance with requirements. They also noted that the 2009 SABC financial crisis had negatively affected the sector, but that those companies that had survived diversified their sources of income.

3.3.4 Television broadcasters also emphasised that the new converged and multi-channel environment would require different approaches to regulation to ensure ongoing viability of the sector<sup>24</sup>. The following issues were raised:

3.3.4.1 It will be in broadcasters' interests to have programming that would attract viewers, as incentive channels would run at a loss without significant uptake by audiences of Set Top Boxes (STBs).

3.3.4.2 A multi-channel environment, required a more flexible regulatory approach, and for example the Authority should adopt cross-bouquet rather than per channel regulations.

3.3.4.3 New terrestrial broadcasters, it was argued by aspirant licensees, should have reduced quotas for a set period, recognising that they would not be able to exploit archives built up over years by existing services to meet quotas.

3.3.5 Concerns were meanwhile raised by independent producers that the increased need for content in a multi-channel environment could result in broadcasters paying less for programmes and therefore impact negatively on the quality and range of programming. They stated that this trend is already evident in the industry where more South African productions are commissioned, but the overall budgets allocated by broadcasters, as well as per minute budgets have decreased. There was general agreement between both broadcasters and producers on the need for creative approaches to the acquisition of content and that regulation should not therefore stipulate that programmes should be "commissioned" by broadcasters from independent producers. Some broadcasters interpret the word "commission" in the narrow sense, leaving no

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<sup>24</sup> In the UK sponsorship and advertising requirements have been relaxed, and in Australia the format factors were reduced (overall score calculation approach relaxed). However the trend indicates that the intention is to incorporate broadcast-like services into the regulatory framework to level the playing field.

room for co-productions, acquisition of rights to air programmes or other approaches<sup>25</sup>.

- 3.3.6 Requirements regarding the percentage of content to be sourced from independent producers (currently 40%) were generally supported, although e.tv for example, highlighted that it was required to outsource 100% of its programming to independent companies in terms of its licence conditions and that this should ideally be reviewed in a multi-channel environment.
- 3.3.7 In relation to specific genre quotas, all stakeholders agreed that these should be individually reviewed and where possible simplified considering whether or not there was evident need to regulate individual genres.
- 3.3.8 TV licensees interviewed all indicated that they did not generally use the incentives introduced in the 2002 regulations as they met the quotas set by focusing on adherence to their licence conditions. The SABC further stated that the incentives offered were not worth the burden of calculating them, and that the format factor categories and incentives should be reviewed to, for example, encourage investment by a broadcaster in developing new licensable/exportable content formats.
- 3.3.9 The SABC in particular suggested: *"that more "credits" are given for very expensive programming. We also think that it would be worthwhile introducing incentives for 'ground breaking' programming and innovation. So that we encourage and recognise when we come up with formats that are exportable and our own shows that can be licensed by us rather than us paying licensing fees for formats from overseas (as we do with some of the reality type formats such as strictly come dancing and so forth)"*
- 3.3.10 Another issue raised by free to air television licensees and aspirant broadcasters was the current limitations on the number of repeats that could

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25 The SABC has developed a new IP Policy to partly address this matter that was based on an international study on Copyright and IP in the broadcasting environment that was jointly commissioned by the SABC, the IPO and SASFED.

count towards South African content. Concerns raised in essence centred on three issues:

3.3.10.1 That the regulations did not take into account the costs of particular genres of programming and thus treated drama the same as less expensive types of programmes. This, it was stated, results in licensees not exploiting the rights fully to recover the costs of such programmes thus making compliance more expensive.

3.3.10.2 The regulations did not recognise the specific requirements of children's programming. It was argued that children of a particular age actually demand repeats of certain programmes and this enhanced the educational value of such programming. It was also stated that as programming targeted very specific age groups, there are continual "new" audiences for such programmes and that the regulations in effect inhibited exposure by such new audiences to often very valuable programmes.

3.3.10.3 That the limitations would need to be reviewed in a multi-channel environment as, given the range of channels and content available, audiences would inevitably miss programmes they wanted to view if more repeats were not allowed.

6. Should the percentage of content sourced from independent producers be amended? If yes, to what percentage?
7. How should the Authority regulate South African content in the converged and multi-channel environment?
8. Since the Authority's and broadcasters' reports on compliance show that radio stations and television services generally meet or exceed the minimum quotas set in regulations, should the Authority increase current quotas? If yes, to what percentage? Please elaborate on community, public, public commercial, commercial and subscription broadcasting service licensees.
9. Which television genres (as reflected on table 1 above) should be lightly regulated? And which ones should strongly be regulated? And why?
10. Should the Authority amend the points awarded for repeat programmes? Which genres should be awarded more? Which ones should be awarded less?
11. How can the Authority improve the incentives system introduced in the 2002 regulations?

**12. How can the Authority improve on programming in marginalised languages and production areas?**

**Radio**

3.3.11 The ideal quotas for South African music on radio are in some ways more contested. While SABC public radio services and many community radio stations generally exceed the 40% South African music quota set in regulations, both public and public commercial services indicated in interviews that it would be difficult for them to meet increased South African music quotas given limited production of music across all formats. Musicians and music related organisations however stated that the 25% South African quota for music on commercial radio stations is far too low and should be increased substantially.

3.3.12 Many of the radio stations interviewed suggested that a licensee's capacity to meet the requirements would depend on their licensed format. The Authority noted in the 2002 Position Paper that there was a need to further explore the possibility of format specific quotas in radio, however, it stated that there was currently very little agreement within the radio industry on definitions of specific formats and that this would make any format driven quota system difficult to determine and impose. It was thus proposed that the radio industry itself agree on common definitions of the different formats and make recommendations in this regard to the Authority.

3.3.13 The DTI's CRC in its final report recommended increased music quotas on radio. It proposed that;

3.3.13.1 the quotas for public and community radio be increased to 80% effective one year from the finalisation of regulations.

3.3.13.2 the quotas for commercial radio to be increased to 50% to be implemented over five years, with a 5% increase imposed each year.

3.3.13.3 talk stations should also be required to adhere to quotas.

3.3.14 The CRC report based its recommendations on the quotas for public and community radio on its findings that most public stations already met or

exceeded 80% South African music. It stated that between 1980 and 2000 the average music content (with the exclusion of SAFM and XKFM) was between 70% and 80% and that in 1996 stations had already generally achieved 80% South African music content. The report includes a table that it states reflects actual South African music content achieved by individual public radio services in 2010.

3.3.15 According to this table eleven of the 14 stations listed (TruFM is excluded), broadcast at least 80% South African music. The exceptions cited are Radio Lotus (reportedly 27%), Thobela FM (78%), and SAFM (71%). However according to the information provided by the SABC for the purposes of this discussion document, stations generally broadcast between 60% and 79% South African music (there are exceptions to this).

3.3.16 In interviews for the review process the SABC stated that its capacity to meet South African music targets was limited in some instances by music available. For example, the recording industry published a great deal of Afrikaans music but not necessarily in more marginalised languages.

3.3.17 The White Paper on Broadcasting noted that there are challenges in the supply of music in all languages and formats and suggested that Parliament hold an inquiry to address this. To date such an inquiry has not been held, though as noted previously the DTI and DAC have indicated they would be developing strategies on South African content. It is unclear if these would focus on addressing supply-side challenges.

3.3.18 Unlike television, many of the licensees that participated in this research stated that the format factors and incentives promoting South African music are valuable. Many commercial radio licensees use the incentives in their calculations of compliance. The SABC stated that as they were already generally exceeding the requirements on their public radio services, thus it was unnecessary to spend time calculating the impact of incentives. They suggested that the value of such incentives should increase so that it would be worth the administration required to use them.

3.3.19 One issue that has emerged subsequent to the interviews is the issue of horizontal integration between broadcasters and recording companies. According to Times Media Group Limited, it has acquired controlling shares in two radio stations (Mpower FM and Vuma FM).<sup>26</sup> Times Media Group also owns Gallo Music Group which is one of the top five sources of music for radio stations<sup>27</sup>. This might raise issues of diversity of sources of music by the stations and possibly lead to potential abuse by the stations of this relationship resulting in possible unfair competition.

- 13. Should the Authority increase the current music quotas on radio? If yes, to what percentage should there be an increase for public, community and commercial radio?**
- 14. Should music quotas be introduced to talk radio broadcasters? If yes, what percentage should be set?**
- 15. What is your view on horizontal integration between recording companies and licensees? Should the Authority intervene in those? Please substantiate**

### 3.4 Monitoring and Compliance

3.4.1 There were concerns about the workability of the timeframes contained in the television content regulations stating that licensees were required to meet quotas over a year, making it difficult for the Authority to measure overall compliance. Broadcasting licensees however stated that the nature of television required this as programming is seasonal and thus quotas could not be adhered to over a shorter period. Licensees suggested that the Authority follow the methodologies of external financial auditors and in essence find a way to verify the reliability and accuracy of information provided by broadcasters.

3.4.2 In Australia, the regulator relies on self-regulation (together with licensees and relevant industry stakeholders such as music industry representatives) and auditing. The ACMA compliance strategy comprises of self-reporting of points, licensee education

<sup>26</sup> Times Media Group Limited, "Voluntary Announcement: Acquisition of a 60% interest in Vuma FM, In KwaZulu Natal, South Africa", 30 January 2014, [http://www.sharenet.co.za/v3/sens\\_display.php?date=20140130165000&seq=39](http://www.sharenet.co.za/v3/sens_display.php?date=20140130165000&seq=39)

<sup>27</sup> EMI, Sony, Universal, Gallo Music, Select Music as noted from the Radio Broadcaster Survey

and consultation, and targeted audits. All five of the regional commercial television broadcasters affected by the local content licence condition (Prime, NBN, WIN, Seven Queensland and Southern Cross) are subject to an independent assessment for compliance with local content requirements. An example of such an audit is one that was conducted in May-June 2007. In this instance ACMA engaged two external consultants to conduct three audit projects as part of its targeted audit strategy to assess compliance with local content requirements for regional television broadcasting licensees.

3.4.3 The licensees interviewed stated that they were unsure how the Authority used the reports they were required to submit and that it seemed these were often not considered in any way as they were often requested to submit information that they had repeatedly sent to the regulator. This in effect, they alluded, implies that the reporting requirements in regulations such as those dealing with South African content are particularly onerous on licensees.

3.4.4 Similar concerns were highlighted by the DTI-appointed CRC as they stated that the Authority was unable to provide them with comprehensive or reliable information on compliance by licensees.

- 16. Does the Authority's monitoring provide accurate results? Please substantiate**
- 17. How can the current monitoring methods be adapted to become more user-friendly to both broadcasters and the Authority?**
- 18. Please suggest alternative monitoring methods that will be feasible and cost effective?**
- 19. Are the current penalties for non-compliance in the local content regulations adequate? Please submit a suggestion to improve penalties for non-compliance with the regulations. Should the regulation include penalties regarding submission of reports?**

### 3.5 Other matters

3.5.1 A number of interviewees raised concerns about intellectual property. It was suggested in these discussions that the Authority should consider whether or not it should amend

any of its related regulations to ensure that they covered not only commissioning of content but also allow for securing licence rights to programmes. Additionally, it was submitted that the Authority has to be more active in highlighting intellectual property challenges in the broadcast space.

3.5.2 The DTI's CRC in its final report further suggests that the Authority should include in its regulations and licence conditions a requirement that broadcasters adhere to copyright rules. The report stipulates that repeated failure to comply with such rules should result in an operator's licence being removed.

3.5.3 Another matter highlighted is the fact that the Digital Migration Regulations do not specifically require that television licensees only include licensed radio stations in their bouquets and thus that services provided might not necessarily promote or broadcast South African music.



## 4. SOCIAL AND CULTURAL ASSESSMENT OF LOCAL CONTENT REGULATIONS

### 4.1 Introduction

- 4.1.1 South African music and television content regulations were initially developed within a very specific historical context in South Africa. The dominant political imperatives were of social transformation, political transition and economic emancipation, coupled with the need to ensure equality of all. The need to ensure that all official languages were treated and recognised equally was a component of this as well as an emphasis on the promotion of indigenous forms of cultural and artistic expression. Redressing past inequities in the media in general and promoting freedom of expression, including artistic expression was a key component of this.
- 4.1.2 These imperatives informed the introduction of a constitutional mandate to all state institutions to grow and develop all languages on an equitable basis and provided the legal framework for the development of languages, literature and other art forms across a variety of media, including, radio and television.<sup>28</sup> The focus of this review is on the latter, given the scope and application of the local content regulations, there is a link with these and the growing audience demand for original literature/writing and audiovisual content in all South African languages.
- 4.1.3 It is difficult to establish a direct causal link between the development of cultural identity and content regulations for radio and television, but social and cultural indicators can be used to assess if local content in South Africa reflects the rich cultural diversity of the population. This then also allows the researchers to identify where caveats still exist and where regulations might be needed to encourage broadcasting or production of specific types of content.

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<sup>28</sup> S 6(1) of the Constitution of the Republic of South Africa Act, 108 of 1996.

## 4.2 Summary of Policy Objectives of Local Content Regulations

4.2.1 Key public policy objectives for regulating local content in South Africa include<sup>29</sup>:

4.2.2.1 The promotion of a national identity and a sense of national pride and social cohesion;<sup>30</sup>

4.2.2.2 The development of a national culture;

4.2.2.3 The promotion of freedom of expression and cultural diversity;

4.2.2.4 The development of a domestic market and industry for indigenous content; and

4.2.2.5 The development of an export market and globally competitive industry.

**20. Do you believe that these objectives are met through the Authority's Local Content regulations? How can the regulations be improved to enhance the objectives.**

**21. Does the broadcast sector reflect cultural diversity?**

4.2.2 Similar objectives drive content in other countries benchmarked as part of this study and, for example, Australia specifies that content-related regulations are intended to *"promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the communities' continued access to television programmes produced under Australian creative control"*.

4.2.3 In South Africa however the added dimension is the need to actively redress the past where certain identities, languages and cultures were promoted at the expense of others.

<sup>29</sup> This list is not comprehensive but meant to highlight the policy aims that are most often articulated by government and policy makers in different countries surveyed.

<sup>30</sup> Defining social cohesion: The department of Arts and Culture defines social cohesion as the degree of social integration and inclusion in communities and society at large, and the extent to which mutual solidarity finds expression among individuals and communities. In terms of this definition, a community or society is cohesive to the extent that the inequalities, exclusions and disparities based on ethnicity, gender, class, nationality, age, disability or any other distinctions which engender divisions distrust and conflict are reduced and/or eliminated in a planned and sustained manner. This, with community members and citizens as active participants, working together for the attainment of shared goals, designed and agreed upon to improve the living conditions for all (White Paper on Arts, Culture and Heritage, Version 2 (4 June 2013)).

**22. Have the overall socio-cultural objectives been achieved by the South African content regulation? If not, what can the Authority do to ensure the objectives are achieved?**

### **4.3 Radio**

4.3.1 In South Africa, language is often linked to cultural identity and language is therefore used in this study as one means of assessing the South African music content regulatory framework. Four of the top five radio stations in South Africa are SABC African Language Stations, namely Ukhozi FM which broadcasts in Zulu, Umhlobo Wenene which broadcasts in IsiXhosa, Lesedi FM in Sesotho and Motsweding FM in Setswana. The fifth largest radio station (by listenership) is Metro FM, which broadcasts in English.<sup>31</sup>

4.3.2 IsiZulu speakers are a significant sector of the radio audience in South Africa accounting for 7 million listeners. This in part explains the popularity of Ukhozi FM. This is followed by Afrikaans and Xhosa audiences with more than 4 million listeners each.<sup>32</sup> The African language stations and Afrikaans public radio services broadcast a high proportion of 'traditional' music, and music in the language of broadcast. While it is not possible without extensive audience research to link their popularity to their focus on South African music in the language of their target audience, it is interesting to note that all of these stations, in addition to Metro FM broadcast significantly more local music than is required by the Authority's regulations.

4.3.3 Public radio stations broadcast in all of South Africa's eleven official languages as well as in !Xun and Khwe (Radio XK) and in Urdu, Tamil, Gujarathi and Hindi (Radio Lotus).<sup>33</sup> Community radio services include a wide range of South African languages and dialects, whilst commercial radio services predominantly broadcast in English.

4.3.4 From the interviews conducted, it seems most radio stations play music in the languages they are required to broadcast in as per their licence conditions. While

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<sup>31</sup> AMPS 2006 RA and 2012 B

<sup>32</sup> PWC Entertainment and Media Outlook 2013-2017.

<sup>33</sup> SABC Annual Report 2011-2012.

limited data available on the music industry (such as a national top20 charts) inhibited a study of whether or not the introduction and increase in quotas has resulted in increased production and sales of local music, international research reviewed indicates that there is a direct link.<sup>34</sup>

4.3.5 Moreover, from the interviews and research conducted, it is clear that the 2006 regulations have resulted in an increase in the amount of “new” and live music broadcast. Public, community and commercial stations all indicated an increase in this, with commercial stations in particular stating that they used the format factor incentives introduced by the Authority in 2002 to ensure compliance with quotas. These incentives have therefore fulfilled their objective of contributing to the general promotion of South African music.

#### 4.4 Television

4.4.1 It is important to consider whether television content contributes toward South Africa’s public interest and speaks to its culturally diverse audience. This is best done through an analysis of the language and genre of popular programming.

4.4.2 An assessment of the most popular television shows and movies screened over the past number of years provides some insight into the popularity of locally produced television content. South African content, in particular dramas and soaps, remains very popular. This reinforces the need to ensure such content is broadcast to meet audience needs. According to the responses by broadcasters to the Television Broadcaster Survey (confirmed by Television Audience Measurement Survey (TAMS<sup>35</sup>) data from SAARF), the three most popular programmes in 2011/2012 were *Generations*, *Soul City* and *Zone 14* which are all multi-lingual dramas.

4.4.3 In terms of content that attracts the largest audiences on DSTV, SAARF/Marklives Top 40 TV ratings show that only one international programme (a movie) made it to the top

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34 Paul Mason, “Assessing the impact of Australian music requirements for radio”, Music Council of Australia, October 2003

35 There have been disputes around the validity of all TAMS information but that do not significantly affect the results of this analysis.

programmes on the DSTV platform between 24 February 2014 and 02 March 2014. Seven of the top ten programmes were multilingual South African dramas (all broadcast on free to air channels simulcast on DSTV). IsiZulu news and the ABSA Premiership match also made it into the top 10 most viewed programmes on DSTV in that period.<sup>36</sup> The demand for local content even on the satellite platform is further evident from the fact that Multichoice offers 44 local channels, 26 of which are produced by its sister company M-Net. Furthermore, the most popular channels on the DSTV bouquets (DSTV Compact and DSTV Premium) are free to air services.

4.4.4 Television licensees interviewed for this research confirmed that broadcasting multilingual dramas has become a commercial rather than regulatory imperative.<sup>37</sup> The audience attracted by this in some ways mitigate the increased costs of this genre comparative to others. During an interview with a producer<sup>38</sup> it was mentioned that it is cheaper to produce reality programming which is also gaining prominence due to increasing audience demand for such content. Children's content, in contrast, although relatively cheaper to produce, does not attract the type or size of audiences that advertisers require and is consequently broadcast at a loss. One broadcaster interviewed said that their South African children's programming had always run at a loss.<sup>39</sup>

4.4.5 Given its reported poor levels of profitability, broadcasters would in all likelihood limit screening South African children's programming in the absence of a regulatory framework. By virtue of its educational nature, children's content specifically plays an important public interest role and needs to be regulated to ensure production and airing.

**23. Have the regulations resulted in more diverse South African languages being used in various programming?**

36 SAARF/MarkLives, "#Top49TVratings", 6 March 2014, <http://www.marklives.com/2014/03/saarfmarklives-top40tvratings-absa-premiership-game-scores/?category=shot#.Ux-kOYUXWZQ>

37 All television licensees interviewed for the research emphasised this

38 Interview Notes. Quizzical Pictures, 9 October 2013.

39 Interview with e.tv

- 24. Do the growth of multi-lingual dramas and other genres encourage or undermine the use of “minority” languages in programming?**
- 25. Should the Authority introduce language quotas for various genres like drama? If yes please elaborate.**
- 26. Is there any other suggestion to promote the use of historically marginalised languages?**

#### **4.5 Conclusion**

4.5.1 The cultural and social assessment presented above suggests that, to a large extent, the objective of the content regulations to promote the development of South African radio and television content has been achieved. This aspect of the study was based mainly on an analysis of literature sources, demographic and economic indicators as well as the content of stakeholder interviews.

4.5.2 The other parts of this review have dealt with the challenges faced by the independent production sector, and yet despite these problems and shrinking budgets, as reported by some independent producers, South African content continues to garner local and international awards. Government support for the sector is steadily increasing both in terms of rand value and also in terms of the complexity and number of different support measures. The music industry in particular is now attracting greater attention, with numerous government initiatives addressing supply-side and demand-side measures.

## **5. ECONOMIC ASSESSMENT OF THE IMPACT OF LOCAL CONTENT REGULATIONS ON THE MARKET**

### **5.1 Impact of the South African Music Content Regulation on Radio**

- 5.1.1 The radio licensees have generally either met or exceeded local content requirements. They are predominantly dependent on advertising revenue. Radio broadcasters' percentage share of South African advertising spend is almost 15% of all advertising expenditure.
- 5.1.2 Some broadcasters indicated that increasing music quotas substantially could result in audience decline as (unless the recording industry increased its productions across all music formats) broadcasters could be forced to repeat tracks to reach the quotas. Others raised a concern about the effect this might have on diversity of format, stating that there would be more "format creep" (station's broadcasting music not strictly within the definitions of their licensed formats) to meet the quotas.

**27. What has been the impact of advertising on local content music?**

**28. If the licensees have been meeting/exceeding the local content requirements, what could be the barrier if the quotas are increased?**

### **5.2 Impact on the Music Production Sector**

- 5.2.1 The research indicated that there has been a significant drop in total revenue for recorded music sales. The vast majority of revenue from music sales comes from physical sales, with only 6% of revenue generated by digital sales. Although the increase in digital sales in South Africa does not match that of other countries, downloading of music is increasing.
- 5.2.2 SAMRO indicated that the contribution of South African music to total licence fee and royalty income has meanwhile increased from 32% to 38% of all royalties and licence fees between 2007/2008 and 2010/2011. These results are largely driven by increased airplay by radio and television broadcasters.

5.2.3 Commercial radio stations contribute 14.7% to the licence fee and royalty income and thus an increase in the local music quota would boost royalty revenues for local music, unlike the public radio stations since they already exceed the quotas.

5.2.4 It was stated that the range of South African music released is limited to particular formats (e.g. Afrikaans music, gospel and kwaito) and that government entities and other music industry stakeholders will need to address this holistically in strategies to ensure that a wide range of South African music is recorded.

**29. Should the Authority intervene in music formats? Please elaborate on your response**

### **5.3 Impact of Local Content Regulations on Television**

5.3.1 According to research conducted, public, public commercial, commercial free-to-air and terrestrial subscription broadcasters all exceed the minimum required overall quotas set in the regulations.

5.3.2 SABC 1, SABC 2 and SABC 3 reported that the percentage of local content declined during the period of 2007/2008 and 2011/2012. Research conducted stated that it was due to the financial crisis that the SABC faced in 2009. However, e.tv reported that they broadcast a relatively constant level of South African content between 2008 and 2012 (an average of 48%).

5.3.3 The data collected showed that both public and public commercial broadcasters derive a large proportion of their advertising revenue from local content whilst the subscription broadcaster M-Net derives more advertising revenue from international programming.

5.3.4 On the cost side, data provided by SABC 1 and SABC 2 suggest that the proportional cost associated with acquiring local content has increased over the period reviewed (2007/2008 – 2011/2012). SABC 3 information though, indicated that in 2011/2012 the cost of local content was proportional to the amount screened. M-Net indicated that this relative cost has remained relatively constant. This could however be a function of



the type and genre of local content that has been produced as some genres (such as drama content) have a higher per minute production cost than others.

5.3.5 In considering the preference for local versus international content by audience members in different LSM groups, the results suggest that genre and language play a more important role in audience preferences than whether content was locally or internationally produced. This could however be a function of the type and genre of local content that has been produced as some genres (such as drama content) have a higher per minute production cost.

5.3.6 Although international content appears to be more cost-effective, this is due to the relatively low cost of acquiring such content and not due to it attracting higher revenue. Local content plays a particularly important role in driving up audiences and therefore generating revenue from advertising and sponsorship and as such has become a commercial imperative for broadcasters.

<b>30. What are the key drivers behind the costs increase in acquiring the local content?</b>
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#### **5.4 Impact on the Independent production sector**

5.4.1 Information provided by DTI and the NFVF among others indicates that there has been substantial growth over the past decade in both the film and television production industries, resulting in growth in the number of producers and therefore employment in the industry. In recent years (since 2010) the number of local content channels on subscription satellite services (e.g. Mzansi Magic) has increased significantly.

5.4.2 Specifically, the DTI has assisted in growth of the industry through its targeted production incentives, though it seems that the film industry (rather than the television production sector) has benefited most from this. However, as the film and television production industries in many instances rely on the same set of resources, the growth in the film industry can be expected to hold positive spin-offs for television production. Some broadcasters noted, however, that the industry could benefit even more if television licensees are also awarded rebates for their productions.

- 31. Besides those mentioned in this document, what other sources have assisted in the growth of this sector?**
- 32. Are there any suggestions on how the Authority can facilitate the growth of the independent production sector?**

## 6. ASSESSMENT OF TECHNOLOGICAL CHANGES

### 6.1 General projected trends

The latest Entertainment and Media Outlook 2013-2017 projects a consolidated annual growth of 10.9% for the whole entertainment and media market segment between 2013 and 2017 driven largely by increasing internet penetration which will widen access to entertainment and media products and services.

<b>33. How can regulation ensure that the above is achieved?</b>
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### 6.2 Impact of technology on the Radio Broadcasting Industry

6.2.1 Convergence and the expansion of broadband access allow people to listen to a greater range of music and radio services from South Africa and around the world via the Internet or mobile platforms.

6.2.2 SAARF AMPS 2013 reports that about 29% of All Adults (16+) use their phones for listening to radio. This proportion appears to have increased consistently over the past three years as the study indicates that about 23% of cell phone users download or listen to music on their phones. Data showed that convergence could increasingly put pressure on listener loyalty to particular traditional licensed radio stations. The impact will depend on a range of factors, including broadband penetration, the cost of bandwidth and access to devices to "tune in" to such alternative services.

6.2.3 PwC projects that radio as a platform for advertising will grow strongly over the next five years, from R3.6bn in 2012 to R5.5bn in 2017. According to PwC, radio will remain one of the few advertising platforms to reach a national audience as a large share of the population at this stage does not have internet access. Increasing car ownership and urbanisation (with commutes getting longer and traffic congestion) PwC projects, will further contribute to the attractiveness of radio as an advertising platform.

**34. Is there anything that the Authority can do in order to ensure that South African listeners grow in numbers, even though the recent platforms allow them to access world-wide web?**

### **6.3 Impact of Digitisation on the Music Production Industry**

The Outlook report states that over the period music revenues overall will increase only marginally from R2.15 billion in 2012 to R2.20 billion in 2017. However, both DTI and the DAC have stated that they will be developing strategies to boost the music industry in South Africa in the 2013/2014 financial year.

**35. What measures can be used to improve the projected marginal growth?**

### **6.4 Impact of Technological Development on Television Content**

#### **New services**

6.4.1 Over-the-Top (OTT) TV or TV over the internet bundled with other services requires fast, reliable and affordable broadband access. Furthermore, what is often called “second screen” engagement with television programming is likely to grow. This involves viewers interacting with each other, the programmes and programme makers via social media and other networks. This offers opportunities for broadcasters to engage more intensely with viewers and use this engagement to generate revenue.

6.4.2 The Outlook Report stated that low fixed broadband access will affect access to OTT services, and by 2017 only 18% of South Africans are expected to have fixed broadband access (13% in 2012). It further stated that revenues from filmed entertainment will grow due to increased internet access, with revenue from electronic home video services such as video-on-demand increasing significantly over the next five years (to over R1 544 million in 2017, up from R816 million in 2012).

6.4.3 According to PwC, by 2017 revenue from OTT services will still remain only a fraction of overall pay-TV revenues. It states that in 2012 DSTV's BoxOffice recorded 400 000 rentals per month from both broadband and DSTV subscribers but that the impact of

such services would have on subscription TV revenues over the next five years would be minimal.

6.4.4 PwC further expects that subscriptions to pay-TV services will continue to grow from over four million subscribers in 2012 to six million in 2016, with subscription revenues reaching nearly R20 billion by 2017 despite the introduction of internet television services and free to air multi-channel television (via DTT and satellite).

6.4.5 In terms of DTT migration, it would be difficult to predict the impact this will have. It is argued that aspects of a successful migration would not be solely determined by the Authority. To the contrary, the following factors would determine successful digital migration;

- 6.4.5.1 the appeal of programming on incentive channels to audiences,
- 6.4.5.2 the effectiveness of marketing and awareness campaigns, the rollout of set top boxes (STBs) to outlets, and
- 6.4.5.3 the implementation of the STB subsidy scheme by government.

**36. How should the Authority review regulations to ensure that they are in line with technological developments?**

***Impact on the television broadcaster business model***

6.4.6 During the migration period, broadcasters will continue to broadcast their analogue services, while developing and broadcasting incentive channels to attract audiences to invest in STBs. In the initial stages of migration (the first year) it is unlikely that a significant number of TV households would have purchased and/or activated STBs and viewership of the DTT only channels will be limited thus limiting the possibility of revenue from advertising for broadcasters. Take up of the devices will depend on network rollout, STB and antennae distribution and logistics and promotion of the new service/s and it is thus difficult to project figures for this.

6.4.7 e.tv stated that it estimates that it will need at least one million viewers to break even on new incentive channels. Licensees will consequently have to bear the costs of these new incentive channels during the initial periods of the migration, while having

to ensure that their programme offering is sufficiently attractive to persuade audiences to purchase the STB.

6.4.8 It is expected that free-to-air broadcasters will lose money in the initial phases of DTT migration as they will not be able to cover the costs of providing incentive channels. M-Net however will be able to recover at least some of their costs if they aggressively market their channels and therefore recoup expenses from subscription fees.

6.4.9 The Authority needs to explore the validity of the claims that the initial stage of digital platforms would result in the broadcasting industry becoming expensive without ever striking a cheaper mark as more new entrants and independent producers gain more access in creating, delivering and packaging their own material.

6.4.10 It is further important for the purposes of this study to consider the growth of Pay-TV generally in South Africa and the effects this has had on the overall viability of free to air services. While the ECA states that revenue from advertising or sponsorship or a combination thereof *"cannot be the largest source of annual revenue"* for Pay-TV, total subscription revenue in South Africa has exceeded total television advertising and sponsorship revenue since 2009, essentially rendering the provision meaningless.

6.4.11 PwC predicts that subscription TV will continue to grow in South Africa over the next five years, with subscription revenue projected to grow from just over R15 billion in 2012 to R19.6 billion in 2017. Similar to this report, the latest Outlook report states that the launch of DTT could affect Pay-TV subscriber growth, but emphasises that this will depend on the quality of content on the free-to-air services. It further states that while DTT will fragment audiences per channel, it will create opportunities for more effective and targeted advertising on niche channels and programmes.

**37. How should the Authority ensure that local content programming is not compromised during the migration to digital broadcasting?**

**38. How should the Authority reduce the burden of local content requirements for broadcasters who are required to dual illuminate?**

## **6.5. Impact on the independent production sector**

- 6.5.1 The independent production sector, as with all broadcasters, stands to benefit most from the digital switchover, first through cost reductions given the lower costs of producing in a digital format, and second as a result of the growing demand for new and original content.
- 6.5.2 With regard to access, what is noteworthy is the extent to which the independent production sector has embraced digital technology, and the growing number of production and post-production companies and facilities houses that have invested in digital equipment and facilities. This provides some insight on the impact that convergence and the digital switchover have had on the sector.
- 6.5.3 The cost of cameras, sound and lighting equipment, and especially post-production facilities and editing software has been steadily decreasing. This has opened up opportunities for smaller and emerging producers to enter the market, given the lower barriers to entry.
- 6.5.4 South African broadcasters are starting to demand that all new programming is delivered in HD, and as the migration to DTT picks up pace, there is going to be an even wider choice available to broadcasters and consumers. This is choice of content, but more importantly choice of what content to view, and over what kind of device at a time to suit the viewer.
- 6.5.5 The content delivered over the traditional broadcast distribution platforms is now supplemented and complemented by content that has been made for viewing on smaller screens and mobile devices. However of greater significance still is the nature of the engagement between the producers/broadcasters on the one hand and viewers or consumers on the other that has been affected by these technological advances. Consumers have become creators and producers of content, some of which finds its way onto traditional TV channels and new web-based distribution channels.

<b>39. How will new ways of creating content affect television independent production?</b>
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- 40. What is your view on horizontal integration between production companies and licensees? Should the Authority intervene in those? Please substantiate**
- 41. Since the digital switch-over is likely to have a positive impact in the production sector, what is the possible plan of ensuring that there is diversity of programme offerings?**



## **7. GENERAL QUESTIONS: OVERARCHING REGULATORY REVIEW OF THE REGULATIONS**

7.1 Two free-to-air satellite platforms were launched by a broadcasting services licensee and ECS/ECNS licensee during the process of the study (FreeView and OpenView).

- 42. What approach do you propose the Authority should follow regarding local content regulation of free to air multichannel satellite platforms?**
- 43. Should new free to air digital only licensees that might be introduced during the digital migration period be subject to the same regulatory regime as existing players or should they have lighter touch regulation until they have either been established for a certain number of years, or have access to a set percentage of audiences and/or share of TV ad spend?**
- 44. What approach do you propose the Authority should follow regarding local content regulation of Community Television Services? Please include requirement for independent production.**
- 45. What interim local content measures should the Authority put in place, if any, in relation to terrestrial television broadcasters, for the dual-illumination period?**
- 46. Please provide suggestions regarding how the Authority should regulate local content for DTT channels?**
- 47. What are your views regarding a progressive introduction of regulatory quotas that will apply during the dual illumination period dependent on activation of set top boxes?**
- 48. How should the Authority regulate local content on satellite and terrestrial multi-channel subscription services post analogue switch off?**
- 49. Is the differentiation between subscription and free to air services, with a lighter touch approach to regulating Pay-Tv licensees still relevant?**

7.2 EPG listings are regulated in Canada. Canadian licensees may appeal the listing of a non-Canadian service which is thought to compete with a Canadian pay or speciality service and the CRTC will then decide whether or not to remove such services from the list, or shift them into a less competitive location on the channel dial.

7.3 In the UK, Ofcom administers a Code of practice on Electronic Programme Guides. This Code sets out the practices to be followed by EPG providers to amongst others; give appropriate prominence for public service channels; provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and to secure fair and effective competition.<sup>40</sup>

**50. In a multi-channel environment, should the Authority set specific requirements in relation to the prominence of South African content on any Electronic Programme Guides (EPGs)?**

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<sup>40</sup> <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/epg-code/>

## 8. CONCLUSION

- 8.1 The main issues raised relating to the definitions relate to the loopholes within the current Local Content regulations. It is noted the Authority 2002 Position Paper raised a number of proposals regarding definitions and highlighted these during consultative processes. The report notes that since these were contained in legislation, the Authority is not in a position to amend them, but could leverage the ICT Policy review underway to make necessary recommendations.
- 8.2 To illustrate, the current definition of **broadcasting services** does not account for the competition posed to traditional broadcasters by audio visual content providers and services that might not have the same local content and other regulatory requirements placed on the former.
- 8.3 There were questions about the basis on which the Authority differentiates between the regulation of free-to-air and subscription television broadcasters and the impact of this differentiation on their ability to compete fairly.
- 8.4 According to both the Authority and broadcasters' reports, television services do comply with the Local content requirements as they either meet or exceed the minimum quotas set in the regulation. Though, research suggests that certain genres could, based on the cost associated with their production, benefit from continued regulation.
- 8.5 Independent producers and free to air broadcasters noted that the converged platforms and services in a multi-channel environment would require inventive regulatory approaches in order to attract further investment and to ensure the ongoing viability of the broadcasting sector.<sup>41</sup>
- 8.6 Radio licensees generally met or exceeded the SA music content quotas.<sup>42</sup> However, commercial services in particular indicated that it would be difficult for them to meet

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41 In the UK, sponsorship and advertising requirements have been relaxed, and in Australia the format factors were reduced (overall score calculation approach relaxed).

42 There are exceptions to this, such as Radio Lotus, but the community radio stations that were surveyed achieved on average 60%, while commercial achieved an average of 27%, and public radio stations, between 63% and 72%.

increased South African music quotas given limited production of music across all formats.

8.7 The Authority's ability to monitor compliance with regulations and license conditions and/or the regulatory burdens associated with both reporting on compliance or proving non-compliance repeatedly emerged during the review process. Suggestion from research conducted is that the Authority should consider applying methodologies of external financial auditors and in essence find a way to verify the reliability and accuracy of information provided by broadcasters.

8.8 The socio-cultural analysis focused on assessing the impact of the South African content regulation. It has shown that, the regulatory approach has contributed to an increased audience demand for South African content, particularly multi-lingual drama programming resulting in it becoming a commercial imperative for broadcasters. The assessment has highlighted which genres of television are important to focus regulation on, in order to ensure that social and cultural objectives of the relevant laws are effectively met.

8.9 The market and cost-benefit analysis conducted as part of this project provided an analysis of audience trends, and assessed the impact of South African music and television content regulations as well as the impact of future regulatory options.

8.10 The study found that radio broadcasters are predominantly dependent on advertising revenue and that above the line South African advertising spend is almost 15% of all advertising expenditure. The results suggest that the music content regulation did not affect the cost structure of radio broadcasters, and that the cost of acquiring local content is comparable to that of foreign content. Commercial broadcasters that responded with the necessary data stated that expenditure on South African music content remained at around 25% of total spend on music.

8.11 It was further noted that while the available data did not allow to forecast how the music recording industry will be affected by a change in music content requirements for radio broadcasters or the effect this will have on production and release of different music formats, it was anticipated that broadband penetration creates a

larger platform for artists to showcase their music and makes them less reliant on traditional means such as radio. Radio is however likely to remain an important component in any musician's effort to reach audiences, but is no longer the only means of doing so.

8.12 While it was difficult to make final conclusions on the impact of the SA television content regulation on the independent production industry, information gathered through the interviews and from an assessment of industry studies, there has been substantial growth over the past decade in both the film and television production industries, resulting in growth in the number of producers and therefore employment in the industry.

8.13 On the contrary Independent production organisations have submitted some research that indicates that this growth might have been partially reversed as a result of the 2009 SABC financial crisis. In recent years (since 2010), however, the number of local content channels on subscription satellite services (e.g. Mzansi Magic) has increased significantly and this has in some ways addressed the challenges relating to the SABC crisis.

8.14 While increased access to the internet will facilitate easier access to a range of audiovisual content, it is not expected that new internet-based content services will have a significant effect on licensed television services in the near future.

8.15 There is a potential increase of competition between channels and licensees for programming, audiences and advertising revenue, due to audience fragmentation that occurs in a multichannel environment.

**51. Are there any other issues/suggestions/comments you would like to raise that are relevant to the review?**





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