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**30 August 2015**

## **The South African Screen Federation (SASFED) written representation on ICASA Draft South African Television Content Regulations.**

SASFED notes the invitation for representation on the “ICASA Draft South African Television Content Regulations” published per Government Notice 532 from page 82 of Government Gazette No 38890 – Published on 18th June 2015

SASFED regrets its lack of capacity which prevented us from offering direct input into the previous round of written submissions towards the “Discussion Document on the Review of Regulations on South African Local Content: Television and Radio”, which in turn was summarised in the “Position Paper: Review of Regulations on South African Local Content: Television and Radio” published per Government Notice 530 from page 6 of Government Gazette No 38890.

SASFED, as a member of the Support Public Broadcasting Coalition (SOS), did input on the SOS submission to ICASA. As SOS is itself a coalition, its views represent the collective majority view of its broad membership, and so may not be as specific a submission to our needs as we might have presented ourselves. SASFED, however, does endorse and support the SOS submission both on this round and the previous, as we were extensively consulted in both their submissions.

SASFED wishes to herewith make its own written submission, and requests the opportunity to make oral representation to support this written submission.

SASFED is a federation, which is made up of professional bodies across the value chain in the independent film, and television production industry as detailed below, and as such SASFED has limited the scope of its response to the Television side of the Position Paper and Draft South African Television Content Regulations. SASFED wishes to place on record that it strongly supports regulation to further support the production of local music by setting and increasing local music obligations on South

Full SASFED Member Organisations:

DFA - The Documentary Filmmakers Association / IPO - The Independent Producers Organisation / PMA - The Personal Managers' Association / SACIA - The Southern African Communications Industries Association / SAGA - South African Guild of Actors / SAGE - South African Guild of Editors / WGSA - Writers Guild of South Africa

African radio broadcasters. Local music is often vitally important in the production of South African television. In fact, SASFED feels that any support of the music industry is likely to have a positive impact on our own industry.

SASFED acknowledges the resilience of the Authority in the drafting of many sections of these proposed amendments to the set of regulations. SASFED thanks the authority for recognising the value and importance of South African local content as well as independently produced local content in a diversity of genres, South African languages and regions.

SASFED supports the key principles of “technology neutrality” alluded to by the Authority in the position paper, and we believe it is vital to adopt this stance in a rapidly changing and evolving “audio visual” as opposed to “television” space.

However, SASFED is deeply concerned that there is ambiguity around the term “independent TV production” as, with little to no rights ownership by the content production industry, it is to the greatest extent dependent on broadcaster commissioning and cannot be considered to be “independent”.

SASFED recommends that a higher percentage of content is sourced from independent producers than is currently the case, and that the sourcing of such work is consistent and dependable. This, in SASFED’s view, will be a more appropriate way to grow an industry on a truly national basis, also in decentralised areas and in African languages.

While SASFED applauds the good intentions of the Authority, we have to draw attention to some flaws in logic in this submission, which may have been perpetuated through a lack of guidance from our industry, for which we apologise. We hope the detailed input provided here will be of value to the Authority in taking this process forward. If the Authority is unclear on any of the points made below, we request that the Authority seeks clarity from SASFED.

Finally, we respectfully request that the Authority does not consider points made in our submission in isolation of each other, but to rather view each point as part of a greater submission, as it was intended.

## **Introduction to SASFED**

The South African Screen Federation (SASFED) is the national federation of independent film, television and audio-visual content industry organisations in South Africa. Founded in 2006 in response to Government’s call for the independent production sector to speak with a united voice, SASFED represents a broad spectrum of industry players, via a combination of industry organisations, guilds and associations who represent either individual members (which currently total close to a thousand people), or member companies (of which there are several hundred), which employ between a few hundred to several thousands of people. As such, SASFED acts in the common interests of many thousands of practitioners across the value chain of the independent production sector. SASFED is guided by a constitution, which states that individuals may not join SASFED directly, but only via bona fide industry bodies.

SASFED has signed a Terms of Engagement with the National Film and Video Foundation (NFVF), an entity of the Department of Arts and Culture, and more recently with the Ministry and Department of Communications (DOC) and the SABC

itself, which binds parties to quarterly stakeholder meetings respectively to engage on industry strategy, policy and interventions.

SASFED also has active representation on the premier South African Film and Television Awards (SAFTAS) Board, where it holds two permanent seats, and two alternate seats.

SASFED is a Working Group and Coordination Committee member of SOS: The Support Public Broadcasting Coalition, an advocacy group which drives industry oversight and dialogue on critical policy, legislation, regulatory and management matters pertaining to the local broadcast sector and, in particular, the public broadcaster - the South African Broadcasting Corporation (SABC).

Finally, SASFED also has a seat alongside the broadcasters, SOS, and MMA on the ICASA Digital Content Advisory Board (DTCAG), where the SASFED representative has made several presentations and attends DTCAG bimonthly meetings.

The current membership of seven independent film and television industry organisations, associations and guilds is in ultimate control of SASFED via their allocated members, who collectively make up the SASFED Council. The Chair Person(s), Treasurer, Deputy Chair and Communications Officer are elected annually from the Council in terms of the SASFED Constitution, and make up the Secretariat which is responsible for the day-to-day running of SASFED and for the dissemination of information to all its member organisations. The Council meets quarterly to discuss industry issues, or meetings can be called to deal with crisis situations.

SASFED is opposed to all forms of discrimination and oppression and stands for a united, non-racial, non-sexist and democratic South Africa. In particular, the federation believes that, for the film and television industry to thoroughly fulfil its economic, social and cultural potential in society, it has to overcome the racial inequalities created under apartheid. To this end, SASFED encourages all members to adopt policies and implement programmes ensuring deliberate access by historically disadvantaged South Africans at all levels of their organisations and industry sectors.

Full SASFED member organisations currently include: The Documentary Filmmakers' Association (DFA), The Independent Producers' Organisation (IPO), The Personal Managers' Association (PMA), The Southern African Communications Industries' Association (SACIA), South African Guild of Actors (SAGA), South African Guild of Editors (SAGE) and Writers' Guild of South Africa (WGSA).

## **Introduction to SASFED engagement with ICASA**

Looking back is sometimes seen as negative, but just as we dare not forget the many and often outrageous wrongs of our past, we also need to be mindful of the strengths and lessons learnt in our recent democratic history. SASFED believes it is important to benefit from and be guided by those lessons, and to monitor similar thought processes made in previous submissions. Over the last fourteen years, SASFED has built a significant institutional memory on its engagement with ICASA, which we feel adds value to this submission, especially since that engagement was focused mainly on South African Television Regulations.

The Independent Producers Organisation (IPO), one of SASFED's member organisations, began extensive dialogue with ICASA during May 2001, when it gave

written and oral submissions, which resulted in the SA Content Position Paper and Regulations of 15 February 2002. The major impact of that IPO submission was to address the issue of repeats, and as a result the Authority agreed to place a limit on repeats by broadcasters which count towards local content quotas. There was some confusion in the first position paper as to how the proposed implementation of repeats should be dealt with, but that was addressed later by separating repeats from the "Format Factors", which were also motivated for, but handled separately. The addition of "Format Factors" was a new mechanism implemented by ICASA in the 2002 final regulations, which was motivated largely by the IPO's concerns regarding diversity in regional commissioning and the commissioning of smaller, especially black, production houses.

On the 29th of October 2002, the then chair of the IPO, who now acts for SASFED on matters related to ICASA, had a meeting with the then acting head of the Monitoring Complaints Unit of ICASA (MCU), Ms. Willie Tlale. The results of that meeting were, amongst others, ICASA's realisation that a previous set of regulations required it to do compliance reports on the public broadcaster (which it had not done), and that the methodology for monitoring, especially based on the new regulations, would have to be improved.

During 2003, the IPO further explored monitoring and compliance methodology adopted by ICASA, interrogated source data provided by M-Net and e.tv in their compliance submissions to ICASA, and made recommendations for a quantitative and qualitative online monitoring and compliance system, the logic of which was accepted by the new head of the MCU, Ms. Lydia Jordaan, on the 7th of October 2003.

Since then and for the following 14 years, first the IPO, then the Television Industries Emergency Coalition (TVIEC), and finally SASFED (which assumed the responsibilities of the TVIEC and to which the IPO now belongs as a federation member) has continued to engage with ICASA on more effective and accurate independent monitoring of local television content quotas, both in terms of licence conditions and specifically in terms of regulations.

In July 2013, SASFED was invited by ICASA to appoint a representative for the independent production sector to serve on the Digital Television Content Advisory Group (DTCAG).

The first meeting of the DTCAG took place on 24th January 2014, and continued at fairly regular intervals until recently, when ICASA failed to be consistent. The lack of accurate and independent monitoring of local content quotas was raised during these meetings as one of the major obstacles in quantifying a content driven strategy in a digital television environment, as mandated by the group. It was also pointed out that, for all intents and purposes, production funding for locally produced television content is mainly supplied by broadcasters. While in theory the Department of Trade and Industry's (DTI) Film and Television Production Incentive was designed to supplement funding for productions and allow independent producers to see greater rights ownership, in reality the commissioning process of the broadcasters usurps all chain of title rights and as such prevents producers from accessing DTI funding. The loss of rights ownership also prevents producers from marketing and exploiting their projects in an increasingly multichannel environment, which broadcasters have now started doing - for their own and not the industry's benefit.

SASFED is convinced that a greater proportion of co-productions and pre-sales with shared rights rather than full commissioning, where the broadcaster owns all

copyright in perpetuity, is the best way to grow an independent production sector and to offer true empowerment and transformation within our industry.

### **Comments on the proposed regulations: Definitions and Schedule.**

1. In the SCHEDULE at the top of page 84, there appears to be an error in the section of the ICASA Act being referred to. This should read 4 (3) (j), and the sub-section 3 has been omitted. There is no clause 4 (j), and we assume this to refer to the clause which reads:  
*may make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the authority.*
2. Other than this error we understand the need for the update of the SCHEDULE to no longer reference the repealed IBA Act of 1993, but caution that the obligation placed on the Authority by the IBA act of 1993 in terms of monitoring is arguably then also reduced in terms of this change, something which SASFED is deeply concerned about, and would ask the Authority to investigate.
3. We note the deletion of the definition of “Independent Television Production” which is already clearly defined in Section 61 (2) (b) of the ECA.
4. The definition of “Local television content” as defined in section 61 (2) (a) of the ECA however differs from the terms still used within the regulations of “South African Television Content”, and SASFED strongly urges the Authority to adjust the wording to be consistent with the ECA, as drafting errors will create confusion and/or misinterpretation.
5. Further, we urge the authority to make it clear that the definitions and interpretations should be read in conjunction with Section 1 of the Broadcasting Act no 4 of 1999, especially as the definition for “Community Broadcasting Service” has been omitted from the Definitions of these draft regulations.
6. “Children’s Drama” and “Children’s Information Knowledge Building Programming”, which were previously defined, have been dropped from the definitions, but are still referenced in Section 10 (3), where format factors are awarded against those very terms which are now not clearly defined. While it might be assumed that the defined term for “Children’s Programming” could be read in conjunction with those for “drama” and “knowledge-building programmes”, the words are inserted in the middle and may be read incorrectly.
7. SASFED further notes that on page 92 under Section 8 (2) the wording “*Broadcasters must obtain genre points only for one category of genre*” has been added. We agree with the intents of this section, but are concerned that it may not be clear as “genre points” are not defined or referenced again. We would propose this clause be re-worded as follows: “*Broadcasters may count a Production only towards compliance within a single genre in terms of these regulations of their licence conditions.*” But this is contradicted by Section 10 (3) referenced above, where effectively rewards are being given for a combination of genres listed, unless those are separately defined.
8. We note with concern the entire removal of “Co-production” from the definitions and elsewhere in the regulations. Section 5 of the original ICASA SA Content Position Paper and Regulations of 12 February 2002 made particular reference to Co-Productions and concluded “*It was suggested that the Act be amended to*

*recognise that co-productions are often opportunities for South African producers to gain access to funding from other countries.”*

To date, co-productions have been nearly exclusively restricted to feature films in South Africa. We urge the Authority to motivate the creation of co-productions in the television sector, which would allow for more rights ownership by producers and the sharing of IP and broadcast rights, resulting in higher quality productions.

9. SASFED notes the dropping of “Documentary Drama”, “Episodic Drama Series”, “Magazine Programming”, “Multilingual Drama” and “Talk Shows”, as well as the narrowing of “Educational Programming” to support structured educational activity, and “Knowledge-Building Programming” to support personal experience programming. SASFED has no objection to this adjustment and the removal of clauses which have no further reference in the regulations in principle, provided that South African Documentary, Drama and Children’s Programming will continue to be balanced with other protected genres in terms of the section now under 7. (1), which calls for an even spread in terms of independently produced content. SASFED wishes to see accurate and independent monitoring by ICASA in this area, especially as certain broadcasters no longer seem to air a reasonable balance of these “regulation protected genres”. In fact, SASFED’s own research shows that some genres like independent documentaries have been dropped almost completely.
10. SASFED notes an apparent error in the definition for “Repeat”, which has been carried over from the previous regulations: *“Repeat” means television programming that is not a first broadcast by a South African television licensee and has been broadcast by another South African television licensee.* The Word “and” should surely be “or” in order for this to read: *“Repeat” means television programming that is not a first broadcast by a South African television licensee or has been broadcast by another South African television licensee;*

### **Sections 3, 4 and 5: Public, Community and Commercial Broadcasting**

The drafting of these clauses is very unclear, and SASFED is concerned about resultant ambiguity.

11. Section 12 suggests that these regulations repeal the entire existing 2006 ICASA South African Content Regulations. SASFED draws attention to the fact that these new regulations can only take full effect with any broadcaster some 18 months after promulgation, which means that effectively NO regulations would be enforceable during that period.

SASFED therefore proposes that the existing regulations are not repealed until the greater local content requirements have been met in 18 months time, or that this Section is re-drafted to set the starting point as per the current regulations, adding that the broadcasters are not permitted to go below the existing quotas during the 18 months needed for the new regulations to take effect. The public broadcaster, in particular, has proven not to be consistent or reliable in its commissioning practices, with only one Request for Programming issued in the past five years in October 2014. At the time of this submission to the Authority, the independent production sector has not reported any notable commission in response to submissions made with regard to the Request for Programming.

12. SASFED is concerned that there is no definition for “incentive channel”, nor is it clearly explained what is meant by a 10% increase on an annual basis for these channels. For example, does this refer to 10% of 30% for public broadcasting (i.e., increasing to 33% in year 2) or 10% of 100% (i.e., increasing from 30% to 40%)? We assume the latter is what was intended, but SASFED strongly suggest a draft, which cannot be misinterpreted.
13. SASFED notes Section 8 (1) of General Provisions, which suggests the local content requirements will now apply on a “per bouquet and not per channel approach”. Given the fact that the authority has failed to independently and effectively monitor broadcaster compliance with far less complex current regulations, the independent monitoring over a bouquet of channels can only be seen as impractical and extremely challenging. This, in addition to reduced requirements for any broadcaster’s “incentive channels” over a bouquet and their impact on the overall universe compliance percentage over the next 4 years, forces SASFED to strongly oppose the proposal of monitoring all broadcasters over their bouquets, especially while reducing the requirement on incentive channels and phasing in the percentages.
14. SASFED believes the overall increase in local broadcasting quotas on public broadcasting from 55% to 65% is now more in line with international best practice, and we support this increase. But we actually suggest the overall percentage should be as high as 70% for public broadcasters. We would have proposed 80% in line with what the DTI’s copyright amendment bill is putting forward, but given that, in the wisdom of the Authority and per the ECA, South African sport is still excluded from the definition of local content, we feel that 70% would be appropriate and in line with best practice (BBC1, 2,3, 4, CBBC, etc., in the UK at 70%).<sup>1</sup>
15. In terms of sub-section 3, which deals with percentages, we have found that broadcasters have frequently not commissioned in specific genres like “Documentary” over an extended period of time. Since 50% of nothing is nothing, the result is that very little - if any – local documentary content is produced or broadcast. In theory, the clause which deals with an “even spread” of genres in “Independent Television Production” should have regulated this, but the Authority’s failure to monitor this critical area has resulted in the near annihilation of this genre specific producers in South Africa. SASFED requests that this clause is reworded to refer to a percentage of ALL programming, which also makes it easier for the Authority to monitor compliance. SASFED would like to work with the Authority to find a logical range of percentages for each genre from the full universe of time.
16. In terms of Community Broadcasting, SASFED recognises the difficulty of community broadcasters to survive economically while having high carriage costs and trying to compete for advertising revenue with national broadcasters. Community broadcasters already have great difficulty funding the creation or licensing of local content, so language, regional and even independent television production requirements in addition to an increased overall quota is simply not sustainable for them. In our view, this is what leads to bundling and monopolistic ownership of what should be independent “community” broadcasters. SASFED proposes that community broadcasters are encouraged to work more with

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<sup>1</sup> [http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2015/PSB\\_compliance\\_report\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2015/PSB_compliance_report_2015.pdf)

professional independent producers, and that there is enough money and incentive for them to do so. As such, we suggest the Authority considers:

- 16.1. Making the local content requirement 55% across the board immediately, also for new incentive channels.
  - 16.2. Removing the “Format Factors” requirement for all community broadcasters, as this adds too much administrative burden and will anyway be ignored in reporting.
  - 16.3. Reducing the requirement for an “even spread” of drama programming in Section 7 (1) for community broadcasters, as drama is too expensive for them to produce individually.
  - 16.4. Given the nature of community broadcasters, higher rewards on repeats should be allowed for them than for other classes of broadcasters.
17. With regard to Commercial Television Broadcasting Licences, we are disappointed to see that no effective increase in local content quotas is on the cards for e.tv.
18. SASFED welcomes the Authority’s decision to apply the principle of “technology neutrality” in monitoring local content obligations, as referenced in 3.7.6.3 and page 40 of the South African Local Content Position Paper.

However, SASFED is concerned that this has not been made clear in the actual regulations. The assumption is that the regulation effectively covers the monitoring of all the Open View HD Satellite Bouquet channels of the e.tv universe. But the diversity of brands, ownership structure of the bouquets and mix of channel types used by Open View HD makes it likely that the network may escape regulation in this case. SASFED requests that the drafting is tightened in terms of the regulations to also include any VOD or “catch-up” service provided by the broadcast licences. SASFED believes there will be a serious shift in the broadcasting modus operandi within the next 3-4 years, and that the Authority has not properly integrated these dynamics into their current draft of the regulations.

19. In terms of Subscription Television Broadcasting, while we appreciate the small 5% increase in this area, SASFED is disappointed that the Subscription Television space remains monitored as a percentage of the acquisitions budget, rather than a percentage of its broadcast time. SASFED questions how that was originally negotiated, considering that all classes of broadcasters are now in a multi-channel environment.

The creation of new bespoke content always costs much more than licensing existing content, and in South Africa the problematic commissioning model strips independent producers of the right to licence their content to other parties. As such, a spend of 15% by a Subscription Television Broadcast network results in a very small percentage of broadcast time - probably less than 7%. SASFED feels that this is too small an obligation for the wealthy and powerful Subscription Broadcast Networks.

SASFED recognises that a percentage of an acquisitions budget is easier to monitor with such broadcasters, but strongly proposes that the Authority implements at least a doubling of the existing quotas to 20% of the acquisitions budget. Given the success of Local Content on these networks, we believe this quota increase is easily attainable by the Subscription Broadcasters, and will hopefully lead to a scenario where Subscription, Commercial and Public Broadcasters work together to create new content to be released in “windows” on the various broadcaster platforms. The powerful growth impact and massive



boost to the production industry, which local content obligations on subscription television broadcasters have had in countries like Brazil and Canada, can be clearly seen in case studies conducted by their relevant Production Industries.

20. SASFED notes that the Independent Television Production Percentage remains at 40% of the Local Production Quota. SASFED strongly motivates that; this should be at least 50% in line with international best practice.
21. While recognising the importance of growing the independent production sector all over South Africa, and producing content in marginalised local African languages, SASFED objects in the strongest terms to the poorly considered methodology which the Authority has adopted in Section 7 (2) to achieve this. While the balance of regional productions and language equity should be considered, singling them out to the detriment of programming which reflects the views of women, the old, the disabled, the youth, the labour market, children, the poor, the unemployed, rural and informal settlement residents and LGTBIAQ+ communities can be seen as discriminatory.

There are numerous problems with this proposal, which according to this clause, the Authority plans to implement immediately with the promulgation of these revised regulations:

- 21.1. The Authority has chosen to monitor compliance of this particular new regulation for language and region as a percentage of money spent on independently produced programmes. This will place an additional and significant strain on Public, Commercial and Community broadcasters who are otherwise monitored on compliance in terms of a percentage of time against the “performance period”.
- 21.2. Most Independent productions rely on equipment rental houses, post-production facilities, studio hire and freelance crew to make a television production. Only a handful of the larger Independent production houses have studios and facilities in-house. This handful of Independent production houses works almost exclusively with long running drama, magazine and soap opera productions, and all are based in the major centres.
- 21.3. The Television industry commissioning cycles have been extremely irregular, especially in genres like documentary, drama and educational programming. As a result, Independent producers have to up- or down-scale their capacity for each project or lack of it. If a production is green-lit, producers require instant access to a pool of actors, crew and equipment, which is usually managed via professional agents and facility houses.
- 21.4. The agents, facilities and talent also work in other genres, like long form feature films and short form commercials. These industries in fact sustain this pool of people for the extended periods where broadcasters delay on their commissioning cycles. The irregular work and sudden peak periods in the Television Industry place extreme pressure on existing infrastructure with excessive demand for short periods, which reduces the benefits of economy of scale. This makes long running daily soaps and drama series as well as bigger feature films more attractive to industry professionals than the unstable and irregular world of broadcaster commissioning which, by rights, should provide the largest pool of potential work and employ the greatest work force. The major film schools in South Africa, which are tasked with developing our talent pools, are almost exclusively based in one of the three major cities of South Africa. Any talented person outside of these cities has to move to obtain their qualifications in a complex and highly competitive industry, with often very

little – if any - financial reward. Except for employment on a daily soap, our industry sector is not as financially attractive as the commercials industry or international movies and television productions, which has resulted in a serious loss of talent and experience as new and existing talent seek out greener pastures in other industries and countries. Further, there is a large attrition with each year of study within an institution, as well as on graduation, when students struggle to find their feet within the erratic freelance nature of the industry. The people who stay and are available to work are largely based in Johannesburg, Cape Town or Durban, and the new talent, which enters the industry via the training organisations in those centres, also stays, as they have built contacts in these cities and proceed to enter the industry via mentorship programmes. When they are ready to turn professional, they remain in the major centres, because this is where their contacts and their work is.

- 21.5. While there has been significant transformation in the television industry over the last 15 years, it is true that only a few black producers and directors at the top of their game work in the Independent television production sector. The reason for this has nothing to do with transformation, but has to be blamed on job security and financial stability, which is lacking in the Independent television production industry as described above. Many black filmmakers who are passionate about television have opted for secure employment at one of the broadcasters, or within one of the government entities related to or serving our industry, which creates a further drain within our own independent industry sector.
- 21.6. The result of the above is a lack of experienced writers, editors, camera operators, directors and producers within the independent television industry. The few existing pools can only be found in one of the major centres, and consist of people who speak a multitude of African languages. As English is common to all, it is the language used on set and for all instructions / scripts.
- 21.7. The public broadcaster and E.TV specifically have tried to move production to areas outside of the major centres, and has come up against many of the obstacles named above. SASFED is aware of occasions where broadcasters have literally assisted experienced producers to “set up offices” in other areas and to film there. While there may have been limited skills transfer, this way of working has raised the cost factor of such productions. Crew and actors have to be brought in from the major centres and have to be provided with meals and accommodation for the duration of the project. Equipment also has to be transported to the out of town set, which increases the risk of a lack of maintenance and difficulty with repairs, as the technicians responsible for this operate from their companies in the major centres. For example, a set may have to shut down for a couple of days at tremendous cost while repairs are done on a camera or generator in the city.

Given the above and the submissions, which were made on this point, SASFED strongly feels that there are more organic ways to build new centres of production in the country and to deal with marginalised languages. We believe a 50% obligation on this kind of spending from public, commercial and subscription broadcasters will only result in excessive production costs, “creative accounting” and other fraudulent practices. As a national federation, we know our industry well and can assure the Authority that 90% of the talent and resource pool on which our industry relies is based in the three major centres solely for economic reasons.

SASFED would rather see a case where the broadcasters are encouraged by way of regulation to spend on mentorship projects; for example, with industry organisations like WGSA for scriptwriting, or by mentoring people drawn from the regions and different language groups on larger productions.

It will be completely impossible for the broadcasters to afford and implement the proposal as drafted by ICASA, and our industry will oppose it in the strongest way as it will lead to more job losses and even the total destruction of our sector, which is already on very fragile ground. It will also not do much to stimulate empowerment and transformation, since the larger, white owned companies, which have the capacity to open “regional offices”, will do this to feed the demand.

SASFED believes it would be more appropriate to encourage broadcasters to take the lead in industry development in the smaller provinces by offering ongoing mentorship in various languages and technical support for new entrants in outlying regions. In fact, several of SASFED’s member organisations have approached not just the public broadcaster, but also Pay-TV operators, with full action/business plans to collaborate with the broadcasters in such growth and mentorship programmes. This is where the Authority should place its emphasis for transformation, and not at the foot of a fragile independent production sector, which relies on a regional base for its own supply chain and the economy provided by pooled resources.

22. Clause 8 (1) of General Provisions references the Authority’s vision to monitor all SA Local Content Requirements as a bouquet and not per channel. This will not affect the subscription broadcasters much as they are already monitored in this way and on a percentage of their acquisitions budget. Where Public, Commercial and Community broadcasters, who are presently monitored on time based compliance over a year, are concerned, SASFED believes that monitoring compliance across all the bouquet channels will create a completely impractical burden for the Authority.

SASFED notes that the Authority has changed the wording with regard to Public and Community Broadcasting, to compel them to spread their local content evenly throughout the said performance period and prime time. As all broadcasters have a minimum weekly average, measured over a year, why does the Authority not simply change the wording to say the broadcasters must meet this requirement weekly, or at worst monthly? This would allow the Authority to do random spot checks of a month’s or week’s compliance, and not have the loophole where broadcasters can claim that they had adjusted for any shortfall in subsequent weeks / months. SASFED proposes that the Authority requires all broadcasters to reach this minimum requirement across their bouquet every calendar month or, ideally, every week.

23. Section 8 (2) has already been referenced above, and is problematic from a definition point of view. We are concerned that this section might be incorrectly applied to “Format Factors”, where it actually refers to “genre categories” as per the definitions, and is then referenced under sub section 3 of Public and Commercial Broadcasters, as well as sub section 2 of Subscription Television Broadcasters.
24. In SASFED’s view, Section 8 (3) is not clearly drafted, as “audited monitoring reports” are not defined in any way. Who would audit these reports, and what qualifies them to do so? This is a completely different field to financial reporting, where auditing standards exist, and SASFED is of the view that ICASA may not,

and should not, attempt to shift its responsibility as regulator onto some undefined third party. ICASA must make public any required formats for monitoring reports, and allow SASFED to engage with these on behalf of the independent production sector. This is an area where SASFED believes the Authority has failed in its duty as independent regulator and, as such, has indirectly contributed to the serious damage, which the stability of the independent production sector has experienced. SASFED cannot see how the Authority, acting as regulator, can support any reports based solely on a financial audit opinion by an auditor who is paid for by a Broadcast Licensee and has no experience or clear terms of reference.

25. Drafting of Section 9, which relates to “Contraventions and Penalties”, also creates confusion. It reads as if the Authority is attempting to increase the fines it can impose from those defined in Section 17H of the ICASA Act. However, this is not clear if these clauses are read in isolation. Also, section 9 (2) makes reference to clause 4, and is therefore assumed to refer only to a breach by a community broadcaster. It is requested that the Authority properly articulates who and what is meant in this section.
26. SASFED notes the deletion of the clause on “Commissioning Procedures” from the local content quotas. While SASFED recognises that the Authority may assume that the wording of this clause (before removal) is covered by the “Regulation of the Commissioning of independently produced South African Programming”, as issued by General Notice 1596 on page 3 of Gazette 32767, it is SASFED’s considered opinion that the wording in the local content regulations should stay, especially as the regulation on commissioning does not include the words: “fair and non-discriminatory”, which currently exist only in the Local Content regulations. SASFED would only support the removal of the clause on “Commissioning Procedures” from these regulations if the words “fair and non-discriminatory” are added to the Regulation of the Commissioning of independently produced South African Programming, and ICASA agrees to publish their reports on the Commissioning Regulations annually.
27. Section 10 of the new proposed regulations, which deals with Formulas (Format factors), is in SASFED’s view problematic for several reasons:
  - 27.1. While the IPO, a SASFED member, and some of the people presently involved with SASFED motivated what became known as “Format Factors” in 2001, it has since become clear that the system has failed in its current version. As such, SASFED no longer supports the use of “Format Factors” at all.
  - 27.2. SASFED has seen the Drama genre become sustainable in South Africa on its own merit and due to public demand, but we have not seen a proliferation of broadcaster involvement in feature films other than within the Subscription Broadcast climate. It appears these “Format Factors” do not apply to Subscription Broadcasters, as they reach compliance as a percentage of budget rather than time.
  - 27.3. African Languages have become the highest percentage norm in the mix of languages used in local Drama today, but because of the proliferation of languages it has become impossible to accurately calculate the “Format Factor”. In practice, broadcasters tend to ignore this calculation, as the potential percentage added over a week hardly makes a difference.
  - 27.4. The Children’s and Art programming score has typically been ignored. Where it has been included by a broadcaster in its report, the Authority does not have the data or underlying evidence to confirm or deny accuracy, leaving it open to manipulation and abuse.

- 27.5. The score for diversity in Commissioning and African Languages is, in our experience, massively manipulated by the broadcasters who choose to report on this. While broadcasters like e.tv have always had added obligations regarding especially regional commissioning requirements in their licence conditions, they also understand the regional reality of our industry as previously articulated. As such, they “help” producers to “report” as if they are based in a minority province, and then work partially in the required languages. SASFED does not endorse this practice, and would rather collaborate with the regulator to devise real and meaningful ways to drive transformation and regional growth for its industry.
- 27.6. SASFED does not believe the Formulas or “Format Factors” should be retained in the local content quotas. Instead, after proper and due consultation, a new set of regulations should be devised which address the core issues in a meaningful way.
28. Section 10 (which was previously Section 8) of the Local Content Regulations provides certain formulas to calculate additional “Format Factors”, through which compliance with the various thresholds can be bolstered, helping broadcasters to meet required local content quotas. Section 10.8 (previously 8.7), however, deals with “Repeat Scores”, which refers to a rebroadcast of local content programmes. This differs from the “Format Factors”, which were designed to encourage easier compliance by producing content in minority regions and in minority languages.

In the 2002 amendments to the regulations, sub-section 8 was added to deal with Repeats. This was handled separately from “Format Factors”, which was never intended to be linked to repeats “scores”. This is clear when one looks at the following:

- 28.1. The SA Content Position Paper and Regulations Document of 15 February 2002, Section 21.5 (First Release Programming and Repeats) of the Position Paper, includes the wording:

*“.. The new regulations therefore distinguish between first release programming and repeats.*

*Only first screenings will contribute fully to licensee’s fulfilment of their South African content requirements. First repeats, targeted at different audiences from those of the first screening, will qualify at a level of 50% of the first screening. Any other repeats of the programming will not count towards compliance with the South African content quota. The repeat of a program on a different channel will also count for half the value of the first screening.”*

The wording “targeted at a different audience” was dropped from the final draft regulations in 2002, per the amendment of regulations detailed below, as it caused confusion for the broadcasters.

- 28.2. While the wording then mistakenly mentions these as “Format Factors”, the Authority’s own understanding of what is meant by repeats is documented in its final amendment to the regulations:

**AMENDMENT OF REGULATIONS:**

**ICASA SOUTH AFRICAN TELEVISION CONTENT, 2002,**

in which the Authority details wording changes to, amongst others, section 8.6 Repeats, to make it clear that repeats have nothing to do with “Format Factors”. This is singled out in clause 8A, which deals with percentages rather than format factor numeric references. The same changes also added the following wording under 8A(d):

*“... any further repeats of the programme shall not count towards compliance with the South African content quota.”*

The Authority ended its “changes to the regulations” document in 2002 by stating at the bottom of page 4:

*“ICASA would also like to state that Repeats are Not Format Factors.”*

- 28.3. We’d like to draw your attention to an ICASA internal document of 2003 by the then head of the Monitoring Compliance Unit, Ms. Lydia Jordan, a copy of which was given to the IPO and is now in SASFED’s possession. It gave a detailed example of how repeats would practically be calculated:

*“If a 90 minute drama is repeated the MCU will count only 45 minutes for the repeats. All repeats after that repeat will not be taken into account.”*

- 28.4. It is clear that, at best (as detailed below) 50% of the DURATION of repeated programmes should be used, when it comes to adding up minutes of local content compliance towards the “universe” of 18 hours of “performance period” broadcast hours, per channel, per day.
- 28.5. In 2006, an unfortunate drafting error appears to have crept into the updated draft of the regulations, where section 8A was erroneously renumbered as 8.7, which placed “Repeat Scores” back under “Format Factors”, causing confusion in today’s Compliance Department at the Regulator.
- 28.6. Considering the above, SASFED requests that the Regulator brings back the original intended meaning of this clause by separating “Repeats” ENTIRELY. Repeats should be dealt with in a newly created Section 11, with “Records” renumbered to 12, “Repeal” to 13, and “Short title” to 14.
- 28.7. SASFED also would like to see the Authority encourage the re-sale of material from one Broadcasting Licensee to another, allowing programming to move between bouquets. This could add value to the rights ownership of independent producers, and be a strong motivation for rights ownership by independents, allowing them to re-sell a Production to another Broadcast Licensee, who can count the first re-broadcast as one full compliance to their quota. This is a very important consideration in rights ownership and monetisation of programming, which will also encourage inter-broadcaster deals to be made - something which our industry supports in a multi-channel, multi-broadcaster space.

In addition, SASFED recognises that actors, writers as well as other applicable talent like, for example, musicians whose compositions are featured in a production, should receive compensation for further exposure of a production on a different platform or by a different broadcaster in the form of repeat fees/residuals/royalties as the case may be, paid to their collection agencies for distribution. This payment by the broadcaster is in addition to the licence fee paid to a producer, unless the

producer has negotiated such rights and the dispersion of repeat/exploitation revenues contractually with the broadcaster and the relevant talent, and has been appropriately compensated or agreed to a pre-arranged split of revenue earned by the programme's further exploitation. Community broadcasters will also be encouraged to create new original content and licence already produced content to other broadcasters via our new proposed repeat structure, detailed below.

28.8. Clearly repeats have no bearing on Subscription Broadcasters, who are measured on a percentage of their acquisitions budget and not on time.

28.9. We thus propose that the Section on repeats now reads as follows:

*11. Repeats are calculated as a percentage of that Production's duration, in the case of Public, Community and Commercial Television Broadcasters as follows:*

- 11.1 for the first repeat of a South African programme on a Public or Commercial Television Broadcaster = 50%;*
- 11.2 for the first repeat of a South African programme on a Community Television Broadcaster = 100%;*
- 11.3 for a South African programme originally screened on another South African television channel within the same Public or Commercial Television Broadcaster's bouquet = 50%;*
- 11.4 for a South African programme originally screened on another South African Public, Community or Commercial Television Broadcaster's bouquet = 100%;*
- 11.5 for a rebroadcast of the week's episodes of a South African programme originally screened on the same television channel within a Public or Commercial Television Broadcaster's bouquet = 50%; and*
- 11.6 any further repeats of the programme shall not count towards compliance within the South African content quota.*

28.10. SASFED encourages the Authority to devise an accurate and fool proof way to track every production for the life of that production, including its movement from one broadcast network to another and its repeats within each bouquet of a broadcast network over a specific number years. SASFED proposes the Authority sets up and manages a register for every production, whether produced by a broadcaster or independently, for which it issues a unique and traceable reference code. The broadcaster is compelled by an addition to the "Record's Section" requirement (currently shown as 11, but proposed to become 12) to enter this reference code into an electronic system which, in turn, reports back to the Authority on a daily basis as the programme is flighted. This system can track repeats over many years for each unique Production, and also allows and encourages the broadcasters to accurately track Productions licensed from other broadcaster networks. A similar system is in use in Canada, and SASFED strongly supports such a monitoring methodology for an accurate and accountable reporting system under this set of regulations.

29. With reference to Section 12, (which we propose be re-numbered Section 13 as detailed above), we have already articulated the problems with repealing regulations while a “phased approach” to compliance and an 18 months commencement period are allowed. The result of this can be a total lack of compliance monitoring for 18 months until the new regulations come into effect, which SASFED cannot support as it would decimate an already fragile industry.
30. Finally, SASFED is concerned that the Authority has not included a clause for Review of these regulations within three years of their coming into effect. We propose that such a Review clause is included, as has been the case in the past.

## **Conclusion**

SASFED wishes to thank the Authority for the opportunity to make its detailed written submission on the Draft South African Television Content Regulations of 18 June 2015, and hopes it will be of value to the Authority. SASFED reiterates that we would like to be given an opportunity to do an oral submission as well.

SASFED hopes that the substantial input of the independent production sector will assist the Authority to structure a sound and well-informed proposal for the way forward; a proposal which we hope will lead to South African Television Content Regulations that build and empower our industry and the various sectors of our broadcaster partners, and bring about true transformation with a diversity of quality voices for the people of our great country be enlightened by and to enjoy.