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TO:
The Acting Director-General, Department of Communications and Digital Technologies
Block A3, iParioli Office Park
1166 Park Street
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Pretoria

Dear Madam/Sir,

Submissions by WarnerMedia on the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020

1. Introduction

1.1 AT&T and its WarnerMedia group wishes to thank the Minister of Communications and Digital Technologies (**Minister**) for affording it an opportunity to comment on the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 (**White Paper**).[1]

1.2 WarnerMedia is a prominent international media conglomerate with well-known brands, channels and services such as Warner Bros, CNN, Cartoon Network, Adult Swim and HBO and a broad global digital offering, including HBO Max which WarnerMedia intends to roll out globally. We also distribute CNN International, Cartoon Network, Boomerang, Toonami, TNT and Boing linear pay TV channels in South Africa. Additionally, we license content to a wide range of South African entities including a range of broadcasters. We also have produced content in South Africa, including the popular series "Raised by Wolves" and the film "Invictus".

1.3 We are supportive of government's efforts to create an enabling environment for the provision of inclusive audio and audiovisual content services (**AAVCS**) for the benefit of all South Africans in a manner that: (i) facilitates growth and competition; (ii) caters for consumer choice and protection; and (iii) promotes socio-economic development and investment in South Africa's AAVCS sector and local creative industries. We further take note of the recently issued Summary Report and Recommendations made by the Presidential Commission on the Fourth Industrial Revolution[2] in setting South Africa's strategy for leveraging digital transformation as a means of attaining a globally competitive, inclusive and shared South African economy capable of delivering on South Africa's societal, economic and developmental goals.

1.4 In commenting on the proposals in the White Paper, we will mainly focus on the policy recommendations pertaining to the licensing of on-demand AAVCS and the proposed obligations of application to such services. We will also touch on issues pertaining to content regulation and content protection. We understand that important details on the scope and implementation of the policy recommendations in the White Paper will be set out in future amendments to the Electronic Communications Act, 2005 (**ECA**) or in other future legislation that will be put to public consultation

[1] Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020[1] published under Notice 664 of 2020 in Government Gazette No 43797 on 9 October 2020.
[2] Report of the Presidential Commission on the 4th Industrial Revolution published under Notice 591 of 2020 in Government Gazette 43834 dated 23 October 2020.

separately. We look forward to commenting on those proposals as well, but we will nonetheless briefly address the aspects highlighted above in the present contribution.

2. Licence Framework and Thresholds for AAVCS

2.1 As the current broadcasting licensing regime is confined to traditional linear broadcasting services, one of the key proposals of the White Paper is the licensing of bi-directional or on-demand audio and audiovisual services and to cater for the licensing of such services within the current licensing framework of the ECA. To broaden the regulatory scope of the ECA to include on-demand audio and audiovisual services, the White Paper proposes replacing the current licence category of broadcasting services, with the broader category of AAVCS, which will consist of three sub-categories, namely:

(a) **Broadcasting Service**: This category will include all linear audio and audiovisual services (i.e. the traditional broadcasting services).

(b) **An on-demand content service (OCS)**: This category includes all on-demand audio and audiovisual services.

(c) **A video sharing platform service (VSPS):** This category includes all online video sharing platforms that store a large amount of programmes or user generated content that is not subject to the editorial control of the platform provider.

2.2 The effect of these proposed changes is that broadcasting services and audiovisual OCS services will require a licence in order to be lawfully provided to consumers in South Africa. With regard to audiovisual OCS, an on-demand content licence will be required to lawfully provide OCS to South African consumers.

2.3 Broadcasting services are categorised under the ECA into individual and class licences. Individual licences are subject to substantial regulatory oversight whereas class licences are subject to a 'light touch' regulatory regime. The White Paper proposes the application of certain thresholds to determine whether an individual or a class licence is required. An individual OCS licence will be required if the OCS provider's annual turnover in respect of its provision of audiovisual OCS in South Africa meets or exceeds the threshold of ZAR 100 million or if the Independent Communications Authority of South Africa (**ICASA**) finds that the OCS provider has the ability to create an economic effect beyond its audience size in South Africa, irrespective of whether the annual turnover for the provision of audiovisual OCS in South Africa meets the monetary threshold for an individual licence. A class OCS licence will be required, if the OCS provider's annual turnover in respect of its provision of audiovisual OCS in South Africa exceeds ZAR 50 million but is below ZAR 100 million.

2.4 The licensing proposal is motivated by the perceived need to create a level playing field between traditional linear services and on-demand content services and to foster fair competition between domestic AAVCS and international AAVCS that are actively targeting South African audiences and generating revenue in terms of advertising, subscription fees or other sources from South Africa. It is not clear to us whether an economic or competitive assessment has been undertaken or is intended to be undertaken to determine the actual impact of licensing on the AAVCS sector. Economic and competitive assessments play a critical role in assessing the impact of regulatory interventions on markets and in ensuring that such interventions are proportionate and minimal in nature.

2.5 We note that the decision to pursue a licensing regime for audiovisual OCS is based in part on the finding that there has been a shift in the way consumers' access and enjoy AAVCS due to increased internet access, reduced data charges, the mass availability of connected smart devices and the rapid growth in smart phone penetration. These findings do not accord with recent research undertaken in respect of the state of South Africa's ICT sector by ICASA[3] and other independent research entities.[4] All of these reports have consistently demonstrated that data costs are high, internet access and broadband penetration low and smart devices not readily available or affordable for South African consumers. For similar reasons, it is also notable that in its pay television inquiry findings, ICASA specifically found that although on-demand content services are expanding in South Africa and are changing the manner in which viewers are consuming content, *"the impact of OTTs is still muted, given the relatively limited level of internet access, the high costs of data and low average internet speeds. The lack of access to local content and sports content also limits the rapid growth of OTTs in South Africa. As a result, OTTs are seen as an out of market constraint on subscription television services."*[5]

2.6 We do not believe that there is a legal basis to impose a licence requirement where ICASA has not been able to demonstrate any market failures as a result of the presence of OTTs in the AAVCS sector. In addition, any decision to require the licensing of foreign OTTs based on the concepts of significant economic impact and pervasiveness/influence based on global size or audience size[6] or whose businesses are capable of *"affecting economic activity"*[7] under circumstances where the proposed thresholds are not met, will require a comprehensive market inquiry and through competition analysis before making such a determination. Moreover, such potential criteria seem vague and means OTT providers may face ongoing uncertainty as whether they may or may not be subject to a licensing regime. This would not foster a regulatory regime that is transparent, provides business with certainty and encourages investment.

2.7 From an international perspective, it is recognised that OTTs play a significant role in contributing to economic development and it has not been established that the growth of OTT services results in any apparent market failures.

2.8 The reliance on the scarcity rationale, the public interest rationale and the pervasiveness/influence rationale for the licensing of audiovisual OCS should be reviewed and reconsidered in the context of the actual impact of audiovisual OCS. As scarce radio frequency spectrum is not used by audiovisual OCS, there is no basis for relying on this principle as a justification for the licensing of audiovisual OCS. That this is so, is also acknowledged in the White Paper.[8] It is generally accepted that as a medium, audiovisual OCS play a significant role in connecting audiences globally to diverse and rich content offerings thereby facilitating inclusivity and access to a plurality of voices and a diversity of opinions. (Moreover, such services invest in local content in order to appeal to local consumers and attract subscribers.) As audiovisual OCS already give effect to the public interest rationale, licensing is not necessary to give effect to this principle. Most audiovisual OCS providers have extensive content catalogues covering a wide selection of content genres catering for every conceivable taste. This fact coupled with the fact that content selection is audience driven, negates the need for any licensing regime.

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[3] In ICASA's State of ICT in South Africa Report, 2020, ICASA found that most South Africans cannot afford to go online due: (i) to data costs; (ii) lack of internet-enabled devices; and (iii) a lack in digital literacy. ICASA. State of the ICT Sector Report. March 2020. Available at https://www.icasa.org.za/uploads/files/State-of-the-ICT-Sector-Report-March-2020.pdf.

[4] Research ICT Africa’s Retail African Mobile Pricing (RAMP) Index shows that South Africa is amongst the most expensive African countries when it comes to data, ranking 33rd out of 46 countries in terms of data per gigabyte (GB) costs (as found in the first quarter of 2020). Available at: https://researchictafrica.net/ramp_indices_portal/. The price of data in South Africa ranks 143rd in the world and access to Wi-Fi and fixed broadband connections are not the norm for most South Africans, who rely largely on mobile data packages. Available at: https://www.cable.co.uk/mobiles/worldwide-data-pricing/.

[5] ICASA Draft Findings Document on Inquiry into Subscription Television Broadcasting Services published under Notice 573 in Government Gazette 42391 on 19 April 2019 at para 1.2.3.

[6] White Paper at para 3.3.7.

[7] White Paper at para 3.3.12 and at page 80.

[8] White Paper at para 2.1.10 where the following is stated - *"Digital disruption and the Internet have lowered the costs of entry and are changing the business models of providing goods and services. In this new model, platforms have become the name of the game. What this means is that scarce radio frequency spectrum is no longer an issue for broadcasting and broadcasting no longer needs to originate in the country whose audience it is targeting."*

We are concerned that the licensing recommendation made in respect of audiovisual OCS is based on a misconception of the commercial realities of the on-demand AAVCS industry and could result in unintended consequences to the detriment of the stated objectives of the White Paper and ultimately to the detriment South African consumers.

2.9 From an international perspective, the approach to regulating audiovisual OCS has been one of 'light touch' regulation with the main focus being on the curtailment of online harms. We note that the White Paper has referenced the European Audio Visual Media Services Directive (**AVMSD**) and the Australian Convergence Review 2012 (**Convergence Review**), as a basis to impose licensing and regulatory obligations for audiovisual OCS. Although, certain regulatory requirements are prescribed under the AVMSD and under the Convergence Review, neither the European Union (**EU**) nor Australia have imposed licensing obligations on audiovisual OCS.

2.10 The United Kingdom's Office of Communications (**Ofcom**) has a notification procedure for on-demand programme services, but it does not prescribe any licensing regime for OTT providers, as the White Paper is suggesting in paragraph 3.4.3.1. During 2015, Ofcom stated that it would be disproportionate to automatically extend the scope of the EU Regulatory Framework for Electronic Communications to incorporate all OTT services.

2.11 In addition, the Body of European Regulators for Electronic Communications (**BEREC**) has distinguished between what it considers: (i) OTT-0 (traditional ECS); (ii) OTT-1 (that does not qualify as ECS but potentially competes with ECS); and (iii) OTT-2 (that is considered not ECS and does not potentially compete with ECS). In this regard, OTT-2, which includes OCS, is not in the scope of national regulatory authorities' powers in the EU.

2.12 Furthermore, OTT internet video services are not licensed by any federal or state regulator in the United States.

2.13 International approaches to the regulation of OTTs recognise the important role played by OTTs in facilitating digital transformation, the roll out of new services and broadband infrastructure. These are all critical factors to ensuring that South Africa is able to harness the many benefits associated with the 4IR and that the other goals of social and economic development, competition and investment in the AAVCS sector set out in the White Paper are realised. In seeking to introduce a licensing regime for OTTs, governments may end up introducing rigid frameworks that stymie innovation and competition or cause irreversible consumer harms. Whilst, there may be various valid public interest reasons to regulate OTTs such as to cater for online harms, such regulation should be targeted. Imposing a rigid regulatory framework based on traditional approaches to the regulation and licensing of broadcasting services goes further than this, and risks forfeiting potential opportunities for widespread economic growth, social development and investment.

3. Regulation of Audio and Audiovisual Content Services

3.1 Local content quotas and local language obligations:

(a) We recognise that the proposal that international audiovisual OCS comply with local content quotas and language obligations is motivated by the concern that in the current international media landscape with nearly unlimited choice of content from all over the world, may mean that it could be increasingly difficult for South African culturally-significant and relevant productions to maintain visibility and reach South African consumers.

(b) WarnerMedia is a prominent international media conglomerate with well-known brands, channels and services. We fully recognise the importance of not only supporting local talent but also investing in a wide range of local content that appeals to consumers. In particular, where we operate OTT services, we share the goals not only of growing local content production but also then, underpinned by applicable copyright law, making such content available both locally and globally. In our view, however, we do not consider that local content investment obligations are necessary nor are they the most effective way to increase local content production. Indeed we are in fact deeply involved in local audiovisual content where we contribute to the development of culturally significant productions and distribution thereof to national and international audiences. This can be seen, for example, with our investment in a wide range of local content with examples such as 30 Coins Patria, Vota Juan, 4 Blocks, Wataha, Beforeigners which we have produced in different countries for our local audiences and have sought to make available internationally. Further, productions undertaken in South Africa provide for the advancement of local cast and crew for employment and training opportunities, the expansion of the local vendor base to our industry, and infrastructure development in the form of enhanced studio space. Regarding our work in South Africa and by way of example of our involvement in South Africa's production sector, we set out the following examples:

(i) Raised by Wolves season 1 was filmed in Cape Town for WarnerMedia's HBO Max in 2019 and has been reported by some media as the biggest budget show to be filmed in South Africa.[9] As is customary, the filming was done by engaging a local production company, Film Afrika (and other contractors), but the series was financed by WarnerMedia;

(ii) Trackers, a South African crime thriller series based on the well-known South African crime writer, Deon Meyer's book of the same name, was filmed in locations across South Africa as a co-production between M-Net, HBO's sister network Cinemax and German broadcaster ZDF. South African production companies, writers and performers were all engaged in the production. Trackers is to date the biggest co-production undertaken in South Africa.[10]

(iii) Warrior, seasons 1 and 2, an action series was filmed in Cape Town by Cinemax, and for each series local labour spend exceeded ZAR 40 million, local production spend exceeded ZAR 280m and in each case there were over 2,500 local cast and crew hires.

(iv) The Clint Eastwood film *Invictus*, based on the book *Playing the Enemy: Nelson Mandela and the Game That Made a Nation*, filmed in both Cape Town and Johannesburg, spending more than US$11 million [Note 2009 dollars] locally in South Africa, hiring more than 175 local cast members and 631 crew members during the course of production.

(c) We recognise the importance of the cultural needs the proposal seeks to address. Nonetheless we do have some general observations and some specific remarks that we believe may help the legislator in drafting a more balanced proposal that encourages investment and growth of the local content production as well as being, ultimately to the benefit of South African consumers.

(d) In our experience, creating an enabling environment for the production of local content on a domestic basis is the optimum way to achieve such goals. The essential component of any framework to encourage investment in audiovisual cultural content is flexibility; therefore regulatory interventions and instruments such as subsidies, tax incentives or tax credits are better suited to securing investment on a sustainable basis for South Africa's production and creative industries. Indeed, South Africa's existing film incentive programs have already demonstrated their ability to attract globally recognized investment including some of the

[9] https://www.capetownetc.com/news/raised-by-wolves-is-the-biggest-budget-show-to-be-filmed-in-south-africa/
[10] https://theplumlist.com/new-series-based-on-deon-meyers-trackers-is-going-global/

WarnerMedia productions noted above and continued enhancements to such programs will only build on existing successes. A further benefit of deploying such initiatives has been the delivery of high value productions that are better able to develop and showcase domestic talent and skill sets and thereby attract further investment into the sector. This too benefits consumers and is to be contrasted with the reality that local content quotas tend to result in the churning out of low cost, low value productions to meet content quotas and which often have limited audience appeal.

(e) In order to ensure that the proposed regulatory framework will be effective in encouraging the growth of the South African audiovisual cultural sector, the alternative proposal that licensees be offered an opportunity to pay a specified sum of money or minimum percentage of gross revenue into a fund that supports the creation of South African content, should be carefully considered with regard to whether the proposal in the White Paper is the optimum lever for securing investment into South Africa's production industry. As discussed above, financial investment incentives are better suited to attracting investment and as such, the imposition of no investment or low investment obligations that are fair and non-discriminatory, is the preferred approach. Where investment obligations are of application, at a minimum, these should be nominal with maximum flexibility in terms of sub-quotas for national content, language requirements or use of independent producers, as well as the time period over which obligations are applied. In addition, no limitations should be placed on the rights of rights-holders or on the rights that can be acquired for content as the goal should be to encourage investment in productions rather than making it harder to raise finance. Further, any investment credits should be capable of applying broadly across group companies and services so as to ensure that all group company investments count toward the AAVCS investment obligation. Lastly, investment credits should be of broad application to cover a wide range of content and also investments of any kind (i.e. production, co-production and acquisition). A 'level playing field' must be created in terms of which all eligible expenses count towards investments, including marketing costs and expenses related to theatrical distribution. Consideration should also be given to a phased approach to the implementation of investment obligations for new services and to cater for the economic difficulties faced by the AAVCS industry on a global basis as a result of the COVID-19 pandemic, the impact of which is still ongoing. Where an international audiovisual OCS' audience levels or annual turnover in South Africa is low (or the service is new) or where the international audiovisual OCS' focus is the provision of thematic channels, consideration should be given to exempting such OCS provider from the investment obligation all together.

3.2 Regulatory Oversight

In the White Paper, there is a proposal that the provisions of section 192 of the Constitution which gives effect to the independent regulation of the broadcasting sector will be extended to cover all AAVCS services (i.e. traditional broadcasting and OTT services). We note, however, that it is proposed in the White Paper that all audiovisual OCS should be subject to regulation by the Films and Publications Board (**FPB**) in respect of the classification of content on their platforms and as set out in the Films and Publications Act, 1996 (**FPPA**). If audiovisual OCS are subject to a licensing requirement then they should be subject to regulation by ICASA. In addition and in order to ensure that proper effect is given to the parity principle in the White Paper, all audiovisual OCS should like traditional broadcasters be entitled to rely on the exemption granted to broadcasters in section 18(6) of the FPA in terms of which traditional broadcasters are exempt from having to register with the FPA as a distributor and from having to submit all of their content to the FPA for classification purposes. Like traditional broadcasters, audiovisual OCS should be entitled to comply with a code of conduct acceptable to ICASA which would then entitle them to perform self-classification as is the current position in respect of traditional broadcasters.

3.3 News reporting

We note the exemption proposed for VSPS and are of the view that this exemption should be widened to include the use of news clips on websites that are derived from AAVCS channels or services. We thus recommend that the definition of a VSPS be amended to specifically cater for such an exemption.

3.4 Content Protection

We fully support the recommendations in the White Paper that there is an urgent need to introduce legislative and regulatory mechanisms to counter content piracy and protect intellectual property. Robust and effective enforcement against content piracy is one of the most important ways to support content creators and to ensure the development and growth of content generation and of the AAVCS industry. It is our experience that the blocking of pirate sites and services by ISPs is a proven and effective way to disrupt access to illegal content and we support the recommendation in the White Paper that ISPs be required through statutory mechanisms to co-operate with rights-holders and government to block access to pirated sites and services. We would also support urgent action to ensure that existing laws and regulations are being used to address content piracy.

4. Conclusion

4.1 WarnerMedia would like to thank the Minister for affording it the opportunity to comment on the White Paper and looks forward to participating should hearings be held regarding the White Paper.

4.2 WarnerMedia is committed to engaging further in the process initiated through the White Paper and to ensuring that the stated objectives of creating an enabling environment that is conducive to competition, economic growth and investment in the audio and audiovisual content market are realised for the benefit of all South Africans.

Sincerely,

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