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INDEPENDENT BLACK FILM MAKERS' COLLECTIVE: WRITTEN SUBMISSION ON THE DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES

1. INTRODUCTION

1.1. The Independent Black Filmmakers Collective (IBFC) is a collaborative business to business network and advocacy group formed in late 2017 by wholly black-owned South African film and television companies, representing filmmakers, content creators, film and television/commercials directors, producers, marketers, facilities and services industrialists and entrepreneurs.

1.2. The IBFC notes the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 (the Draft White Paper) which is contained in Notice 1081 of Government Gazette No. 43797 dated 9 October 2020. The submission date for public comment was extended to 15 February 2021 by Notice 1267 in Government Gazette No. 43938, dated 26 November 2020.

1.3. The IBFC adds its voice to the industry concerns and proposals included herein. However, the IBFC also wishes to raise its voice on the particular position that independent black film-makers

find themselves in because it is particularly dire and requires urgent and ongoing attention, beyond the attention that is required to be paid to the sector as a whole.

- 1.4. In our view, black film-makers are often among the last to be approached by broadcasters in respect of individual independently-commissioned or co-produced works because the patterns of the past continue to favour mainly white owned or white managed companies works because the film industry is one of the most untransformed industries.
- 1.5. Further, Covid-19 has had a devastating impact on black filmmakers and on black owned film production companies, many of which have simply closed as a result of the lack of financial and other support provided by the state at this time.
- 1.6. The IBFC is concerned to ensure that government, who are including the DCDT, DSAC, DTIC are aware of the very real hurdles that exists for black filmmakers and black owned film companies. In reconsidering a number of policy initiatives since the 1993 transformation of the country, a thorough assessment has to be made not only of the strengths and weaknesses and areas of support required by the industry as a whole, but also of the particular position faced by black filmmakers and black-owned film companies.
- 1.7. It is imperative that black filmmakers and black filmmaking companies have access to earmarked resources of funds and projects. But there should be measures that ensure that black independent filmmakers are not excluded from the industry because of systemic racism. If this is not addressed black owned film companies and black filmmakers themselves will continue to find themselves on the periphery of the local production sector and the transformation of the local production sector will remain unfinished.
- 1.8. For the purposes of this submission, the IBFC is to focus is to be on audiovisual content and services. The IBFC is of the respectful view that while many different governmental departments and institutions clearly recognise the vital importance of the IBFC to the economy and the country's national identify and sense of self, there has been no clear unified approach which has hamstrung various efforts and left the IBFC frustrated and under-resourced. Indeed this is recognised by the drafters of the draft White Paper in the summary of the key draft policy proposals in respect of independent production on page 134:

There are numerous ministries, departments and national public entities that are involved in the development and funding of the audiovisual content industry, resulting in a confusing mess that creatives and aspirant independent producers have to navigate through to find funding for their projects.

2. ICASA: PROBLEMS WITH MONITORING AND ENFORCEMENT COMPLIANCE OF LOCAL AND INDEPENDENTLY COMMISSIONED QUOTAS, REGULATIONS AND LICENCE CONDITIONS.
 - 2.1. The IBFC is of the respectful view that it is essential that the entire local content and independent commissioning classification and verification process must be simplified to guard against platform shopping by AVCS, that is, to create more equitable and implementable regulatory obligations as between qualifying broadcasting and qualifying On-demand AVCS.
 - 2.2. ICASA must be required, empowered and funded to be able to conduct monitoring and enforcement of compliance with all local conduct broadcast and local original production quotas, including funding obligations and independent production obligations. These, of course, must include being able to monitor and enforce compliance with terms of trade requirements such as annual inflationary increases on the cost per minute paid.
 - 2.3. These are currently extremely complicated and ICASA appears to find it difficult to monitor/report on in a transparent and independently-monitorable way due to the lack of a prescribed reporting form that provides for all regulatory and licence condition local content and independent production variables. Obligations in terms of regulations and licence conditions must be amended and simplified so that they are workable and enforceable and so that monitoring is transparent and able to be checked by the independent production industry too.
 - 2.4. In this regard, we attach hereto two draft milestone reports commissioned by the IBFC which focus, respectively, on current difficulties in monitoring and enforcing compliance with local content quotas imposed by way of regulation and/or licence conditions together with a proposed draft reporting template of the kind that would be required to report transparently and accurately on compliance by each of the licensed television broadcasters with its respective obligations. As you can see – it runs to dozens of pages. As you must be aware, there is no prescribed reporting format for television broadcasters to complete to report on local content and independent commissioning requirements in the Compliance Manual Regulations contained in Notice 902, Government Gazette No 34863 dated 15 December 2011, despite the peremptory obligation on ICASA to prescribe same in terms of section 10(1) of the Local Television Content Regulations contained in Notice 346, Government Gazette No, 39844, dated 23 March 2016. Instead, such reporting is done as per non-public, informally-agreed reporting requirements between the respective broadcasters and ICASA. This has undoubtedly contributed to a lack of reporting by ICASA on compliance by television broadcasters. In this regard, the latest publicly available (that is on ICASA's website or in its library) compliance reports for:

2.4.1. SABC, is for 2008;

2.4.2. E-tv, is for 2017/18;

2.4.3. DStv, is for 2018/19;

2.4.4. M-Net, is for 2011/12;

2.4.5. Starsat, is for 2018/19; and

2.4.6. Deukom, is for 2017/18.

Needless to say we are particularly horrified at the single report on SABC compliance with local content compliance which is from 13 years ago.

2.5. The IBFC is of the view that it is essential to build in robust transparency in respect of reporting obligations upon qualifying broadcasters and qualifying On-demand AVCS to assist in enabling outside parties, such as government, members of the public, competitor broadcasters and the IBFC itself, to ensure that ICASA is carrying out its monitoring and enforcement obligations in accordance with the law.

2.6. Consequently, the IBFC respectfully submits that all qualifying broadcasting and qualifying on-demand AVCS be required to submit compliance reports to ICASA in a properly prescribed format and that all reports are to be made immediately available on the ICASA website. Thereafter, ICASA's draft annual compliance reports in respect of each service is to be published for public notice and comment to allow for cultural industries and other interested parties to comment on compliance matters. Further ICASA must issue finalised compliance reports on each qualifying service annually. A failure to comply with these transparency obligations on the part of ICASA and/or any qualifying service would of course entitle a member of the public to lay a format complaint before ICASA's Complaints and Compliance Committee.

3. LOCAL CONTENT, ORIGINAL PRODUCTION AND INDEPENDENT COMMISSIONING QUOTAS

3.1. In broad terms the IBFC wants to see both quotas in respect of the amount of local content to be flighted on various audiovisual platforms AND we want to see the imposition of financial obligations to "spend" a percentage of turnover revenue on original local production and independently commissioned content. However, we note that in South Africa satellite operators are considered to be broadcasters as opposed

to AVCS distributors which is the world-wide practice. The IBFC is of the view that this anomaly must be addressed in detail in the next version of the Draft White Paper.

- 3.2. Without proper regulation of South Africa's AV sector to take account of the disruption brought about by the 4th IR, economic power will be concentrated in this area and the country's cultural identity will be eroded.
- 3.3. Therefore, the IBFC respectfully proposes that all AVCS meeting the regulatory thresholds (whatever these are ultimately to be and we urge the DCDT to ensure a proper economic modelling on this issue to inform its ultimate policy proposal to be put forward in the next version of the Draft White Paper for public comment) will have obligations to flight local content.
- 3.4. There are two aspects to our proposal on the content and independent production quota issue:

3.4.1. Broadcast quota:

3.4.1.1. We think it fundamental for all qualifying television broadcasters to be required to flight a certain percentage of the hours of programming flighted on any linear broadcasting service.

3.4.1.2. For legacy terrestrial free-to-air television broadcasters, we would suggest that there be no reduction in the overall local content percentage requirements applicable to public, commercial and community services. However, in order to take account of the African Continental Free Trade Agreement (AfCFTA), we would like to see a small percentage (of not more than five percent) to be imposed on top of the local content quota for content from other African Union countries, but only where there are reciprocal, bi-lateral agreements with such other African Union countries that impose a reciprocal quota to encourage the flighting of South African content.

3.4.1.3. For new free-to-air terrestrial and satellite television broadcasters, the percentage of programming required to be local is to be 20% initially, with an obligation to climb to the following quotas within five years:

3.4.1.3.1. 45% for commercial operators;

3.4.1.3.2. 65% for community operators;

3.4.1.3.3. 65% for SABC television services.

3.4.1.4. For existing subscription television broadcasters, we submit that the percentage of programming required to be local is to be 15%

3.4.1.5. For new subscription television broadcasters, we submit that the percentage of programming required to be local is to be 5% with an obligation to climb to 15% within five years.

3.4.2. Local Original Production Quota:

3.4.2.1. We reiterate that the IBFC wants to see both quotas in respect of the amount of local content to be flighted on qualifying broadcasting services AND we want to see the imposition of financial obligations to “spend” a percentage of turnover revenue on original local production for all entities involved in the AV sector, from television broadcasters, AVCS as well as ECS and ECNS licensees, all of whom benefit from, and are dependent on, the content flighted on or over their services/networks for advertising revenues, subscriptions, data income, network/signal distribution fees etc.

3.4.2.2. Consequently, we propose the following quotas be included as a matter of policy by the DCDDT in the next version of the draft White Paper:

3.4.2.2.1. commercial and community terrestrial free to air or subscription television broadcasters, funded through subscription, advertising or a mix of them, should spend a minimum of 20% of their annual turnover on the production or coproduction of original local content;

3.4.2.2.2. public terrestrial broadcaster (SABC) should spend a minimum of 25% of its annual turnover on the production or coproduction of original local content;

3.4.2.2.3. satellite broadcasters or AVCS distributors should spend a minimum of 10% of their annual turnover on the production or coproduction of original local content;

3.4.2.2.4. qualifying on-demand AVCS should spend a minimum of 15% of their annual South African turnover on the production or coproduction of original local content; and

3.4.2.2.5. further, 65% of all amounts referred to in paragraphs 3.4.2.2 to 3.4.2.2.2 above must be spent on independently-commissioned productions.

4. ADDITIONAL FUNDING SUPPORT FOR THE AVCS SECTOR AND THE NEED FOR A CONSOLIDATED POLICY-FORMULATION PROCESS

4.1. In addition to the local and original local content and independent commissioning obligations set out in paragraph 3 above, we think that it is critical there be a properly resourced fund (we suggest that it be named Creative Audiovisual Production Industry Fund) to support the production of local content. The contributions ought to be made for all entities that benefit from content-driven income, including: television broadcasters, AVCS as well as ECS and ECNS licensees, all of whom benefit from, and are dependent on, the content flighted on or over their services/networks for advertising revenues, subscriptions, data income, network/signal distribution fees etc.

4.2. In our view, all Electronic Communications Network Services (ECNS), Electronic Communications Services (ECS) and qualifying AV operators (whether broadcasters or on-demand AVCS) must contribute to a local audiovisual content fund to support the production of local content and the South African independent creative production industry as a whole (details to be clarified in through the Masterplan process but which need to be embedded in the next version of the Draft White Paper). In this regard:

4.2.1.all beneficiaries of the AV content distribution chain who benefit from the distribution of audiovisual content ought to contribute to such an audio-visual content fund which fund supports the production of independent original South African audiovisual content;

4.2.2.we propose that this be done on the basis of an annual levy based on a percentage of turnover generated in South Africa to be paid into the fund and we suggest that such percentages be as follows:

4.2.2.1. 3% on annual turnover of qualifying AVCS whether broadcasters on-demand or AVCS and on cinema operators; and

4.2.2.2. 1% of annual turnover of all ECNS and ECS

- 4.3. It remains to be determined as to where this fund should sit. Ought it to be an extension of the National Film and Video Foundation Fund or an amalgamation therewith, or an entirely separate, stand-alone fund? Careful consideration must be given to this, ideally in consultation with recognised industry organisations, as to where this fund should reside and by whom it should be administered, to ensure it delivers optimal benefit to the industry while remaining cost effective. Whereas the NFVF has a developmental mandate, we believe this fund should have a commercial mandate which seeks to rapidly grow the sector.
- 4.4. Further, the Masterplan must be incorporated into a single national effort spearheaded through this Draft White Paper process, precisely to avoid the existing “confusing mess” so characterised by the DCDT and as quoted above. This requires a break with the different reviews/policy development processes being undertaken by, among others, ICASA’s Digital Terrestrial Content Action Group, the Department of Science, Arts and Culture’s Reference Group’s efforts and the Small Business Department’s Masterplan.
- 4.5. An overarching review is, of course, required to be undertaken, as the DCDT correctly sets out on page 134 of the Draft White Paper. Such a review must be undertaken (jointly by the DTIC, DSAC, Treasury, SARS and, importantly, the main industry producer organisations) of all current funding mechanisms and instruments for the sector, including with regard to:
- 4.5.1. assessing the current production rebate system in the context of incentive systems such as tax credits that exist in other jurisdictions, and are administered by the revenue services of those countries, to determine if one or the other, or a mix, is more optimal for South Africa;
 - 4.5.2. whether tax credits, rebates or tax incentives, the administration of these must be reliable in the manner of VAT refunds so that they can be financed by regular banks; and
 - 4.5.3. the considerations of other tax benefits such as Section 12O (an incentive to stimulate the production of films within the country; an exemption from normal tax, specifically income derived from the exploitation rights of a film) and 12J (incentivises South African taxpayers to invest in local companies and to receive a tax deduction of up to 100%) of the Income Tax Act 58 of 1962 (as amended) in regard to their current usefulness so that they better fulfill their purpose of encouraging more private investment in the sector.

4.6. Finally, direct public funding that is distributed via the national government, provincial governments, local governments, and any other public service funding based on state obligations to particular groupings, including Broad-based Black Economic Empowerment, language usage, youth, women, disabled people, regional representation and the like, is another key area of support that is required to be dealt with in the overarching review.

5. SABC-SPECIFIC SUBMISSIONS

5.1. As the public broadcaster with, currently, three free-to-air television services, the SABC has a particularly important role to play in the creative industries sector.

5.2. However, the IBFC has found it extremely frustrating to deal with the SABC for a number of reasons articulated below:

5.2.1. First, the provisions of the Public Finance Management Act, 1999, together with certain relevant and certain Treasury requirements, make it impossible for the SABC to react with any agility to coproduction opportunities including with regards to intellectual property in respect of commissioned content. This results in significant international content sales opportunities being lost for commissioned content. We think it is imperative that this is addressed as part of the White Paper finalisation process. We propose that the National Treasury be approached to delegate a certain level of authority to the SABC itself enabling it to make decisions in respect of the commercial licensing of commissioned content with requiring all necessary PFMA permissions.

5.2.2. Second, assuming SABC is successful in lobbying for its “must pay” position in respect of its free to air channels being hosted on subscription broadcasters, independent producers and other creatives must benefit from such income generation. An equitable model must be identified to quantify revenue split to individual productions as it is most likely that the broadcaster will negotiate large multichannel deals.

5.2.3. Third, the SABC’s Terms of Trade are moribund. For example, despite the provisions of the Annexure of the Commissioning Regulations which require Terms of Trade to set out price determinants such as inflation, no inflationary adjustments have been made by the SABC for at least the past decade and so commissioning fees are effectively 40% of what they were a decade ago in terms of pricing parity. The White Paper must stipulate an annual, for example, inflation/CPIX-based Terms of Trade review, negotiated with the recognised producing bodies and as facilitated and approved by ICASA.

The White Paper must deal with this issue in detail as ICASA has failed to act to safeguard independent commissioning to the extent required by the regulator of these issues.

5.2.4. The IBFC trusts that the DCDT will take these concerns regarding the SABC seriously.

6. NFVF-SPECIFIC SUBMISSIONS

6.1. The IBFC also has specific concerns regarding the operations of the National Film and Video Foundation (NFVF), the Department of Trade, Industry and Competition (DTIC) and the Industrial Development Corporation (IDC) all of which are supposed to play a critical role in the sustainability of the local production sector.

6.2. The specific concerns are set out below and the IBFC requests the DCDT to ensure that these matters are raised and dealt with as part of the searching sectoral review/Masterplan/White Paper policy formulation process. The areas of concern are:

6.2.1. NFVF/DTIC rebates must count towards the Independent Producer's share of the project;

6.2.2. there must be more transparency in respect of the NFVF's income and funding. For example, audited accounts of the NFVF should be publicly available so that independent assessments can be made as to whether or not the NFVF is complying with the statutory obligation of ensuring that 75% of Treasury funding is paid out as 'grants' in compliance with the NFVF Act and not used internally for marketing or other expenses;

6.2.3. any funds received by the NFVF, for example from Deukom in lieu of investing in local content, must be added to the 75% and not absorbed into the NFVF's operational budget;

6.2.4. the NFVF must assist, where requested, in administrating a project that requires liaison with other funding bodies such as the DTI and the IDC etc to obtain/justify tax credits, loans, guarantees and the like;

6.2.5. the NFVF must be staffed by people with specialist cultural industry expertise with a particular focus on film;

6.2.6. the NFVF Act must be amended to make provision for an industry liaison/advisory grouping to meet with NFVF at least quarterly to discuss issues of mutual concern with representatives from bodies such as: IBFC, SASFED, IPO etc.;

6.2.7. NFVF funding should be increased from R 140 million to R 250 – R 300 million to support the development of commercially viable content with universal market appeal and investment recoupment potential as low-budget productions will not be able to be saleable internationally. Similarly, NFVF Development and Production grant allocations to be increased from R 150 000, 00 for script development to R 350 000, 00, and production funding should be increased from R 1.8 million to R 3.8 million as this will attract investment from other investment agencies such as the IDC, the National Empowerment Fund, private equity investors and also secure interest from international distributors/ sales agents and broadcasters.

6.3. The IBFC looks forward to working with the DCDT and others to develop firm policies in regard to the above.

7. OTHER CONCERNS

7.1. Intellectual Property/exploitation rights must be negotiated within the Term of Trade negotiations with broadcasters and on-Demand AVCS to ensure producers retain rights in the medium to long term bases and to secure and future income from their work.

7.2. The Copyright Amendment Bill and the Performers Protection Bill in their current forms present significant threats to the financial viability and growth of the independent production sector and ALL workers therein. This has been tacitly recognised by the Presidency which referred the Bills back to Parliament in June 2020 citing constitutionality concerns. The IBFC therefore urges that any further amendments are informed by a series of consultations with all relevant government departments and all affected stakeholders, facilitated by experts in this field and taking into account international best practice, to ensure a copyright and royalties regime that will stimulate rather than stifle the sector.

7.3. The IBFC respectfully submits that the financing criteria of the IDC's Film Finance Division needs to be realigned from the current investment principle of "last in, first out" to "first in, last out" as this would ensure the capacity to carry Return on Investment (ROI) for longer periods. This in accordance with the need to resuscitate the industry, also to attract other private equity investors, including distributors.

8. The IBFC looks forward to continued engagement in this regard and trust that the next version of the draft White Paper will contain concrete proposals for specific assistance to be given to black filmmakers and black-owned film companies.

Sincerely

Zikethiwe Ngcobo

Policy Development Coordinator