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The Director-General

Department of Communications and Digital Technologies

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ISPA SUBMISSIONS: DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL MEDIA SERVICES AND
ONLINE SAFETY: A NEW VISION FOR SOUTH AFRICA

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa (July 2023) published for public comment on 31 July 2023 ("**the Draft AAVCS Policy**") and sets out its submissions below.

Introductory remarks

2. ISPA's members are not involved in the delivery of traditional broadcasting services but have played a substantial role in enabling the growth of AAVCS in South Africa by facilitating content distribution and consumption over Internet Protocol ("IP") networks.
3. ISPA's independent internet exchanges (INX-ZA) have also facilitated local caching of content: keeping IP traffic local to reduce the cost to communicate for South Africans, in particular the cost of accessing audio and audio-visual content from international streaming platforms.
4. ISPA agrees that it has been clear for some time that the current policy and legislative framework in South Africa – with its narrow definition of "broadcasting services" – is outdated and urgently requires review.
5. In ISPA's view, the Draft AAVCS Policy as a whole represents an appropriate and welcome response which can drive a new legislative licensing framework for the regulation of audio and audio-visual content services into the future.
6. ISPA is, however, uncertain as to the future of traditional broadcasting which will steadily continue to decrease its market share of AAVC consumed. Forward-looking policy and regulation should be mindful of a future where almost all audio-visual content is consumed through IP networks.

Scope of submissions

7. ISPA's submissions are largely limited to the proposals in the Draft AAVCS Policy for legislative and regulatory mechanisms to strengthen protection against "signal piracy".

8. ISPA has understood “signal piracy” to be a legacy term referring broadly to the activity of infringing on the intellectual property rights of another using electronic communications.

Submissions on intellectual property rights protection proposals

9. The Executive Summary of the Draft AAVCS Policy notes that:

From the Department of Communications and Digital Technologies, given the ISPs provisions are contained in the Electronic Communications and Transaction Act 2002; the Draft White Paper recommends for the inclusion of the provisions for a streamlined and fast track process for removal and site blocking by ISPs upon notification by verified rights holders without the need to approach the court. To further provide for penalties for submitting a site blocking request against a non-infringing website; to include search engine operators in in the scope of site blocking to allow for the indexing of infringing websites. This review will complement the Copyright Amendments Act.

10. ISPA and its members are committed to lawful conduct and to interacting with law enforcement authorities and other third parties strictly within the framework of applicable law¹. ISPA expends considerable resources on conducting training workshops for SAPS and maintaining clear and constructive relationships with all government stakeholders with an interest in some form of online content control.

11. ISPA agrees that:

11.1. There is currently no legal framework for the blocking of sites and notes that it has over the years interacted with a variety of third-party rights holders to facilitate use of existing laws to take down unlawful content.

11.2. A joint effort by the relevant government ministries through an Inter-Ministerial Committee or a similar forum is required. Government needs to work with Government.

12. ISPA notes the global trend towards providing a mechanism for site blocking and recognises that such mechanisms – properly constructed and implemented – may have a role to play in protecting intellectual property.

¹ ISPA’s Code of Conduct expressly stipulates that members (a) bind their subscribers to a commitment to lawful conduct in the use of the services, including copyright and intellectual property rights and (b) themselves respect intellectual property rights.

13. It is also the case that the take-down notice process under Chapter XI of the ECT Act has most frequently been used to request removal of copyright infringing material from locally hosted sites.
14. Proposals to place obligations on ISPs in respect of the protection of third-party intellectual rights must, however, be subject to a regulatory impact assessment with particular reference to their:
- 14.1. Impact on accessibility to the internet: site-blocking is an imperfect mechanism which will lead to lawful content being blocked.
 - 14.2. Impact on the cost to communicate: the cost of site-blocking will be passed on to consumers.
 - 14.3. Impact on the local content industry: based on its experience ISPA predicts that the vast majority of blocking requests will be received from outside of South Africa. While the Draft Policy emphasises the need to protect the local content industry it is not at all clear that this will be the result. What is more likely is that local ISPs will be subject to an onerous compliance burden and local consumers to higher costs in order to benefit copyright holders in other countries.
 - 14.4. Impact on entry and the ability of SMME ISPs to comply: site-blocking can be technically complex and requires additional human resources. ISPs should be compensated by rights-holders to mitigate this and the impact on the cost to communicate.
 - 14.5. Technical basis for site blocking: there are a variety of technical measures to block sites each with their advantages and disadvantages.
 - 14.6. Effectiveness of site blocking: The DCDT should be clear that blocking at ISP level can be easily circumvented using a virtual private network or free recursive DNS resolver such as [quad9](#).
 - 14.7. Interaction between site-blocking obligations and other legislation: ISPA requires a clear legal position that site-blocking will not constitute an offence under RICA and that ISPs will receive the same conditional legal immunity as is provided for under the take-down notice process when acting on a lawful instruction to block a site.
 - 14.8. Constitutional balancing of rights: site-blocking mechanisms must be properly grounded in the Constitution as it is a limitation on the right to freedom of expression.

- 14.9. The broader implications of such a mechanism and its potential for abuse: once such a mechanism is established other third parties will seek to utilise it to block sites other than those infringing intellectual property rights. There is also a clear potential for bad faith actors to use this mechanism for anti-competitive ends or to silence lawful speech.
15. ISPA suggests that an appropriate model for South Africa is that utilised in Australia to block access to offshore gambling sites.
- 15.1. Sites are blocked through invocation of the obligations of telecommunications carrier services intermediaries under section 313 read with section 314 of the [Telecommunications Act, 1997](#), read with the [Interactive Gambling Act, 2001](#). A blocking mechanism is explicitly provided for in primary legislation.
- 15.2. Secondary legislation in the form of [Policies and procedures for the lawful disruption of access to online services under section 313\(3\) of the Telecommunications Act, 1997](#) provides a clear framework for the processing of “disruption requests” and the range of factors to be considered “to determine whether the disruption request is appropriate when balanced against Australia’s commitment to promoting an open, free and secure internet”.
- 15.3. Further information is available from <https://www.acma.gov.au/blocked-gambling-websites>.

Institutional framework

16. Provisions in the Draft AAVCS Policy relating to a future institutional framework to regulate AAVCS are confused and confusing.
17. The following positions are taken.
- 17.1. All licensed on-demand content services shall continue to be subject to the FPB content classification requirements.
- 17.2. Licenses for on-demand content services issued by ICASA will therefore need to be aligned with the regulatory framework under the Films and Publications Act.
- 17.3. The merging of ICASA, the FPB and .ZADNA is to be fast-tracked to create a “single digital regulator”.
18. There is no assessment of how this single digital regulator would impact on the current institutional framework.

- 18.1. The 2016 ICT White Paper talks to the creation of a “super regulator” with a focus on economic regulation. Noting that Government has publicly abandoned this proposal it is assumed that a different intervention is being proposed in the AAVCS Draft Policy.
 - 18.2. ISPA has noted the commitment to Generation Five Regulation as promoted by the ITU which requires rationalisation of regulatory bodies active in the digital space and formation of a Digital Regulators’ Forum. This is a useful initiative which will lay the groundwork for more effective cooperation but there is also evidence of regulators in the space competing with each other to maintain budget and relevance.
 - 18.3. ISPA supports alignment of codes of conduct and other mechanisms for addressing online harms as between broadcasters and providers of AAVCS. From a consumer perspective the method of delivery of the content is irrelevant and it appears logical that the same content regulation rules should apply.
19. A major challenge to creating a merged regulatory entity comprising ICASA, the FPB and .ZADNA is the very different Constitutional nature of these regulators.
- 19.1. The FPB and .ZADNA are not independent from government in any sense.
 - 19.2. ICASA is, at least partly, a Chapter 9 institution and ISPA has noted the discussion in the Draft AAVCS Policy relating to whether this status should be extended to ICASA as a regulator of electronic communications.
 - 19.3. Extending Chapter 9 status to AAVCS and not just broadcasting on the face of it would require that AAVCS are regulated by ICASA as a Chapter 9 entity (as opposed to the FPB which has no independence from Government).
 - 19.4. National policy advocating for a single digital regulator needs to provide far more detail on how this will be achieved.

Protection of Children and Consumers

20. The Executive Summary of the Draft AAVCS Policy sets out the following:
- 53. The online safety section of the White Paper is meant to make the internet a safer place for all users by prohibiting providers of user-to-user services (i.e., social media platforms) from hosting illegal or harmful content. The provisions will also include the prohibition of online advertising to children. The section will ensure that the online environment remains a safe space, safeguarding freedom of expression and opportunities for digital businesses. In other jurisdictions such as UK, Australia, Canada, Ireland, and the USA which is adding new requirements on its online Safety Bill, hold social media platforms and search engines accountable for scam or*

fraudulent adverts that appear on their sites. This provision will ensure that all users in an online environment are equally provided as the offline customers.

21. The “single digital regulator” to be established will be responsible for implementation and enforcement.
22. ISPA agrees that there is a pressing need for South Africa to have a comprehensive policy and legislative approach complemented by an appropriate institutional framework to address online harms.
23. ISPA also agrees that addressing online harms requires a multi-faceted approach that involves legislation, regulation, technology, and education.
24. There is, however, very little in the Draft AAVCS Policy setting out substantial proposals on what is to be done.
25. ISPA has placed on the record its view that the current piecemeal approach to dealing with online harms is inadequate and that there needs to be a separate process to determine how South Africa will deal with a highly complex and dynamic problem.
 - 25.1. The Films and Publications Act as amended is poorly drafted and duplicates provisions of the Cybercrimes Act and other legislation. The best efforts of the FPB notwithstanding, this Act is not a proper basis for making the internet safer.
 - 25.2. Legislation originating from the Department of Justice and Constitutional Development (DOJCD) such as the Cybercrimes Act, Domestic Violence Act and the Protection from Harassment Act has already created mechanisms to combat and criminalise some forms of online harms.
 - 25.3. There is a clear lack of alignment between the DCDT and the DOJCD.
 - 25.4. If a “single digital regulator” is to be established then addressing online harms must be central to its mandate as set out in comprehensive enabling legislation referencing international best practise.
26. There are significant issues generating global debate, and it is a pity that the Draft AAVCS Policy misses the opportunity to make concrete policy proposals.

Contributions to AAVCS sector by ICASA licensees

27. The Department notes its support for a proposal “that there should be financial obligations to all television broadcasters, AVCS, ECS as well ECS and ECNS licensees to spend a certain percentage of turnover revenue to Audio Visual sector”.
28. ISPA strongly opposes this proposal as illogical and likely to result in unintended consequences.

- 28.1. The cost to communicate – how much it costs a consumer to access AAVCS – is a fundamental factor in the uptake of AAVCS. Increasing the cost to communicate by placing an additional licence fee obligation to support the local AAVCS industry has the opposite effect.
- 28.2. ECNS and ECS licensees already contribute a percentage of revenue derived from providing licensed services to the Universal Service and Access Fund (USAF) to support the expansion of access to affordable, high-quality ECS to all South Africans. This is already a contribution to growing the local market for AAVCS.
- 28.3. It is not clear why parties holding a licence authorising provision of connectivity and routing services should be forced to contribute to the local content industry.
- 28.4. While ISPA does not support the #fairshare narrative being promoted by the GSMA and local MNOs, it is noteworthy that globally arguments are being raised that the content industry needs to support the telecommunications industry in meeting the cost of rolling out next generation networks over which AAVCS will be consumed.

Conclusion

29. ISPA trusts that these submissions assist in the finalisation of the Draft AAVCS Policy.

ISPA