



**SABC Television**

**Intellectual Property Policy**

**September 2012**

### Table of Definitions

Ancillary Rights	Shall mean any supplementary or subordinate right arising from the primary broadcast rights such as merchandising and digital media rights
Channel	Shall mean all SABC TV Channels
Donor Funded Programmes (DFP)	A fully funded non-commercial programme that meets donor and platform mandate requirements where the SABC maintains editorial input but does not own the IP
Fully Funded Programme (FFP)	A fully funded programme that meets platform and funder requirements where the SABC has editorial input but does not own the IP
Intellectual Property (IP)	Any and all patents, designs, design rights, copyrights, trademarks, source codes, inventions, trade secrets, confidential information and all other intellectual property rights of a similar character whether registered or capable of registration and all applications and rights to apply for the protection of any of the same
License	Means the right and authority granted by a licensor or rights holder to a licensee to utilise and or exploit specific content and or programmes and or intellectual property for a defined period of time, within a defined territory and subject to such limitations, terms and conditions as may be contained in a license agreement.
Rights Management Unit	Shall mean a unit within the TV Division that is responsible for the management of SABC's TV rights

### Table of Acronyms

AFP	Advertiser Funded Programmes
FFP	Fully Funded Programme
IP	Intellectual Property
DAF	Delegation of Authority Framework
GE	Group Executive
SABC	South African Broadcast Corporation Limited
TV	Television

## 1. POLICY RATIONALE

- 1.1. The SABC's Policy and Procedures for the Procurement of Local Television Programmes outlines the Corporation's approach to content acquisition, and includes guidelines as to how intellectual property rights will be managed, protected and exploited. However, the current policy has not been updated since 2004 and there is a need to review and outline in a revised policy document a governing framework for Intellectual Property for SABC Television Programmes.
  - 1.2. The SABC uses four broad approaches in acquiring television programme content:
    - 1.2.1. *Commissioning:* The SABC provides 100% of the financing for a programme that is yet to be produced. Subsequently, the SABC has full editorial control and all the Intellectual Property (IP) rights in and associated with the production, as well as all the rights to commercially exploit the production, vest exclusively in the SABC.
    - 1.2.2. *Co-Producing:* The SABC enters into a co-financing agreement with a third party, or parties, for a programme that is yet to be produced. Subsequently, the SABC shares on a pro-rata basis, editorial control, the IP rights and the returns on exploitation of the programme with the other parties.
    - 1.2.3. *Licensing:* The SABC acquires limited rights in a programme that is fully produced, including the number of transmissions, license period, exclusivity, merchandising and sub-licensing. Ownership is retained by the licensor.
    - 1.2.4. *Pre-Sale:* The SABC licenses limited rights, as per 1.2.3, in a programme or format that is yet to be produced.
  - 1.3. Commissioning is the most expensive of the SABC's acquisition models, but while this ensures that the SABC owns all the rights, it is no longer sustainable at the current levels in which more than 80% of SABC's Television Content budget is allocated to commissioned works.
  - 1.4. Costs are offset by advertising and sponsorship revenues and through the exploitation of IP rights. However, the SABC has not maximised the value of the IP contained in its commissioned stock.
  - 1.5. The local production industry has lobbied the SABC for many years with regard to retaining some of the IP in commissioned content, arguing that the SABC does not recognise their contribution in the creation of commissioned content, or allow them the right to exploit that content freely after broadcast.
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- 1.6. However, while retaining all its rights, the SABC currently pays the producers of its commissioned content 15% of all net profits derived through the exploitation of the broadcast rights as a whole to third parties anywhere in the world. The producer receives a further 10% of net profits as a finder's fee should the producer materialise a formal introduction of a third party to the SABC which concludes with a sale of broadcast rights to a third party. A producer, therefore, may receive a maximum of 25% net profit from the sale of a programme it was commissioned to produce by the SABC.
- 1.7. It must be noted that the SABC is the only local broadcaster in South Africa that gives a share of net profits to producers in perpetuity on the exploitation of its commissioned works.
- 1.8. The SABC remains cognisant of its role as the Public Broadcaster to support and contribute to the development of the local production industry. To this end, producers must be empowered to the point where they can share more of the financial risk of production and not to be overly dependent on the SABC for funding.
- 1.9. Producers already enjoy the right to approach the SABC with proposals to co-produce or to license content in which the producer retains part or all of the IP. These models allow producers and other third parties to share the risk with the SABC and also to participate in the rewards of exploiting the production outside of the SABC's domain.
- 1.10. This Policy introduces a relaxation of the current SABC IP framework in order for producers to derive improved benefits with regard to Commissioned Content, and sets out clear rules and guidelines which will inform and guide the acquisition, management, protection and exploitation of all intellectual property rights in an ever changing environment.

## **2. POLICY STATEMENT**

- 2.1. This document provides a policy framework according to which all intellectual property rights in the SABC will be managed, protected and exploited, and covers the following:
  - 2.1.1. The ownership and exploitation of all content which is commissioned and fully paid for by the SABC;
  - 2.1.2. The licensing and exploitation of pre-recorded content;
  - 2.1.3. The rights acquisition and exploitation of content which is co-produced by the SABC and third party funders including independent producers;

- 2.1.4. Merchandising of characters, trademarks and other elements in the production;
- 2.1.5. Licensing of pre-existing intellectual properties other than programmes
- 2.1.6. The licensing of SABC owned television formats
- 2.1.7. Sale and exploitation of SABC IP;
- 2.2. This policy applies to all permanent employees of the SABC as well as fixed-term contractors and short-term contractors (i.e. freelance service providers and agencies contracted to undertake specific short-term assignments).
- 2.3. The distribution of this policy document will be the responsibility of the Group Chief Operations Officer.

### **3. DEFINITION OF INTELLECTUAL PROPERTY**

- 3.1. Intellectual Property (IP) refers to the creations of the mind of which there are three aspects; IP copyright (literary and musical works etc); trademarks and thirdly patents and design.
- 3.2. The above can be further divided into two further categories: Industrial property which is registered, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and non registered Copyright, which includes Literary and Artistic Works such as novels, poems and plays, Films, Musical Works, Artistic Works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to Copyright include those of performing artists in their performances, producers of records in their recordings, and those of broadcasters in their radio and television programs.
- 3.3. IP rights therefore protect the interests of creators and those who commission such creations by giving them property rights over such creations.
- 3.4. In South Africa, the following are some of the legislation governing IP rights:
  - 3.4.1. Intellectual Property Amendment Act, No. 38 of 1997;
  - 3.4.2. Copyright Act, No. 98 of 1978 ("Copyright Act");
  - 3.4.3. Designs Act, No. 195 of 1993
  - 3.4.4. Performers' Protection Act, No. 11 of 1967;

- 3.4.5. Patents Act, No. 57 of 1978 (Patents Act);
- 3.4.6. Registration of Copyright in Cinematograph Films, No. 62 of 1977;
- 3.4.7. Trade Marks Act, No. 194 of 1993 (Trade Marks Act);
- 3.4.8. Merchandise Marks Act, No. 17 of 1941 (Merchandise Act).

#### **4. OWNERSHIP AND COMMERCIAL EXPLOITATION COMMISSIONED IP**

- 4.1. Commissioned IP refers to all content (including sports and news programmes) which is commissioned and paid for in full by the SABC.
- 4.2. It is well known that most of South Africa's historical and cultural content was, for many years, recorded and owned by foreign broadcasters and private individuals due largely to the SABC being, at that time, an apartheid state broadcaster which did not see the need to invest in the recording of South Africa's diverse culture and historical content.
- 4.3. Since 1994, the SABC, as the only public service broadcaster, has the following obligations:
  - 4.3.1. to tell stories which reflect South African history and its diverse culture;
  - 4.3.2. to record and preserve South Africa's history and diverse culture; and
  - 4.3.3. to ensure that as much of this content as possible is owned by all South Africans through the public broadcaster.
- 4.4. The SABC's philosophy on the ownership of IP is informed, primarily, by the historical context, the obligations set out above and its public service mandate. Therefore, the SABC will continue to commission a significant proportion of its local content, and ownership of all commissioned IP will be retained by the SABC in line with the SABC's Policy on Procurement of Local Television Programmes
- 4.5. The SABC is also aware that the obligations set out above must be balanced with the SABC's mandate to develop the independent production sector and the music industry.
- 4.6. The SABC acknowledges that it has, in some instances, been unsuccessful in exploiting some of the Commissioned IP outside actual broadcast on SABC platforms and producers have little incentive to actively pursue the commercial exploitation of SABC's Commissioned IP. In order to correct this, the SABC will amend its commissioning agreements to ensure these objectives.

4.7. A Producer will be entitled to 25% of net profits derived through the exploitation of the broadcast rights and exploitation through the sale of DVDs, as a whole to third parties anywhere in the world, regardless of whether the sale originates with the SABC, the Producer or a third party.

4.7.1. The 25% share will be applicable for a two year period of two years from the date of last broadcast of the final episode of the first broadcast of the series or programme. This eliminates the current dissatisfaction over the administration of the 10% 'finder's fee', and incentivises producers to exploit their content to the mutual benefit of themselves and the SABC.

4.7.2. The 25% share applies to any net sales (gross sales less costs) received from licence of programming or series

4.8. Once the initial two years has lapsed, as per clause 4.7.1, the Producer will be entitled to 30% of net profits derived through the exploitation of the broadcast rights as a whole to third parties anywhere in the world, regardless of whether the sale originates with the SABC, the Producer or a third party. The escalation in share of profits to the Producer is premised on the notion that this will incentivise producers even further at a point in which the SABC is focussing on the exploitation of more current content.

4.9. Consideration is given to the sharing of ancillary rights e.g. merchandising of image rights for use on clothing and other Products and DVD and CD sales and/or further income or benefits derived from the production, with the producer or third party provided there's a sound business case for the SABC to do so.

4.9.1. In order to enter into such the SABC shall put together a business case for approval by relevant levels as per DAF. The proposed business case shall be evaluated on a case-by-case basis, but must always involve some commercial benefit to the SABC, the prospect of which must be better than the SABC exercising its rights by itself.

4.9.2. This could be a direct financial benefit, or an indirect benefit, such as increasing brand value.

4.9.3. In such cases, the basis of income/benefit sharing shall be negotiated between the SABC and the producer or third party on an ad hoc basis.

- 4.9.4. In any instance the SABC's share should never be less than 50% of net profits (Gross sales less costs), and will always be informed by each parties contribution.
- 4.9.5. SABC approval will be on a project-by-project basis and approved in line with the DAF.
- 4.9.6. Producers would be invited to make proposals for involvement in future ancillary rights exploitation at pitching sessions and that these may be negotiated during the Budget phase of a Commissioning Process.
- 4.10. From the amounts paid to producers as per clauses 4.7, 4.8 and 4.9, all royalties due to principle actors, scriptwriters, authors and composers, shall be deducted.
- 4.11. Exploitation through digital media and merchandising will be negotiated upfront and treated separately on a case by case basis, but will however form part of the original programme agreement as an annexure.
- 4.12. All final negotiations and contracts with potential licensees will be conducted by the SABC and not by the producers.
- 4.13. Quarterly statements are provided to independent producers setting out details of the third party licensee, the net amount received and the royalties payable, if any, to the independent producer and the relevant creative talent. Payments of royalties must be done within 30 days of receipt of a valid tax invoice from the independent producer and/or relevant creative talent. The same should apply in circumstances where the independent producer is responsible for the commercial exploitation unless the SABC has determined otherwise;
- 4.14. Independent producers may not approach SABC's direct competitors for exploitation of SABC content , which will include, but not limited to, all broadcasters, webcasters, IPTV and mobile television owners operating within South Africa;



## 5. LICENSED CONTENT

- 5.1. Licensed content refers to any content which is owned by third parties and licensed to the SABC for exploitation on its platforms. It is proposed that even in the case of licensed content; the SABC will consider on a case by case basis, supported by a business case, acquiring ancillary rights outside broadcast e.g. internet, mobile, merchandising and DVD rights.
- 5.2. The benefit to the SABC is that quality content may be licensed at a fraction of the cost of commissioning in which the SABC provides 100% of the funding. A not so insignificant percentage of content used by the SABC in its broadcast is licensed from third parties who own the IP in such content.
- 5.3. As the licensing of content fulfils an important business need for the SABC, the SABC may license content from third parties for broadcast on any of its platforms provided that consideration is given to:
  - 5.3.1. the number of SABC platforms (including terrestrial, satellite, mobile, online and any other new media platforms owned or controlled by the SABC) on which the content may be broadcast;
  - 5.3.2. ancillary rights such as merchandising, home entertainment, sub-licensing;
  - 5.3.3. the number of transmissions across all SABC platforms;
  - 5.3.4. the duration of the license;
  - 5.3.5. exclusivity of the license;
  - 5.3.6. the territory within which such content may be broadcast taking into account the must-carry legislation and the footprint of the broadcasters required to carry SABC channels;
  - 5.3.7. the right to use the name and likeness of performers and other relevant creative personnel for the purposes of promoting the broadcast and exploitation of the licensed content;
  - 5.3.8. securing a full indemnity against any claim which may arise out of SABC's exploitation of the licensed content;
- 5.4. Depending on its requirements, the SABC may enter into pre-sale agreements in respect of content which is still to be produced subject to the prior written approval of the relevant Group Executive member.

- 5.5 The exploitation of licensed content shall be strictly in accordance with the terms and condition of the license granted to the SABC by the relevant Licensor, and any breach of such license will be regarded as a misconduct which will be dealt with in accordance with the SABC's Human Capital policies.
- 5.6 A check list of all the rights which must be acquired by the SABC from third party licensors shall be drafted upfront by the Rights Management unit and signed off by the relevant Group Executive member.

## **6. FULLY FUNDED PROGRAMMES**

- 6.1 Fully Funded Programme's (FFP's) include Advertiser Funded Programmes (AFP's) and Donor Funded Programmes (DFP's). The purposes of FFP's in the SABC are to:
- 6.1.1 provide cash saving
  - 6.1.2 Generate revenue and/or
  - 6.1.3 Provide editorially guided content to the SABC Platforms at no cost to the SABC.
- 6.2 AFP's can originate from more than one source – internal requests (in response to an RFP) and external submissions (through an unsolicited submission).
- 6.3 AFP's are fully funded by commercial entities and must comply with SABC Editorial guidelines and meet the SABC's mandate and commercial imperatives.
- 6.4 DFP's can originate from more than one source – internal requests and external submissions.
- 6.5 DFP's are fully funded by non-commercial entities but must meet the SABC's mandate delivery and business imperatives and are required to comply with SABC Editorial guidelines.
- 6.6 IP for AFPs and DFP shall be negotiated upfront and will be dealt with on a case by case basis dependent on contract requirements
- 6.7 The SABC will be allowed to transform an AFP programme from an AFP into a commissioned piece of work/SABC production should the sponsor not continue with the series/programme after its first run and the SABC funds the subsequent

programme/series. At which point the SABC will hold IP rights in direct relation to its equity investment.

- 6.8 For FFP a check list of all the rights which must be acquired by the SABC from third party licensors shall be drafted upfront by the Rights Management unit and signed off by the relevant Group Executive member, as these rights are not owned by the SABC.

## **7. CO-PRODUCTIONS/JOINT VENTURE AGREEMENTS**

- 7.1. Joint venture agreements include co-production, co-financing. A co-production/co-financing agreement is one in which the SABC will jointly contribute with other parties towards the financing of a programme which is not yet completed. Such other parties may either be investors who merely make a financial contribution and who are not directly involved in the production as such, or they may be an investor who is directly involved in the production.
- 7.2. An investor in a co-production/co-financing agreement is defined as a party who makes a contribution, whether in cash or kind, towards the funding or making of a production prior to its completion.
- 7.3. Such investment will involve a sharing of risk and the parties' respective rights and obligations, the sharing of editorial control as well as equity and copyright will be agreed on a project-by-project basis.
- 7.4. A check list of all the rights which must be acquired by the SABC from third parties shall be drafted upfront by the Rights Management unit and signed off by the relevant Group Executive member.
- 7.5. SABC will continue to pursue Co-Productions as they reduce the cash investment required by the SABC whilst, at the same time, securing quality content for the business as well as first to market broadcast rights. Consequently, the SABC may conclude co-production agreements subject to the following:
- 7.5.1. a detailed evaluation and assessment of the business case is undertaken in which financial and business risks are considered;

- 7.5.2. warranties that co-financing monies for all parties are in place before entering into co-production or co-financing agreement;
- 7.5.3. the SABC's right to approve the total production budget as well as the production and delivery schedule to ensure that they are in line with the SABC's business case;
- 7.5.4. the rights acquired must be in line with the investment made;
- 7.5.5. the principles set out in the Policy for the Procurement of Local Television Programmes are complied with.
- 7.5.6. The co-production business case must be approved in line with the Delegation of Authority Framework and comply with the Public Management Finance Act or any other legislation applicable to co-production agreements.
- 7.6. The SABC should work together with the independent production sector to find practical ways of securing funding for co-production including engaging the Department of Trade and Industry, Department of Arts and Culture, Independent Development Agency and related organisations.