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## **Exclusivity in the 6<sup>th</sup> edition of Nigeria Broadcast Commission (NBC) Code and a glimpse of the practice in South Africa and the United Kingdom**

Nkem Itanyi, \* Jade Kouletakis\*\* and Ayoyemi Lawal-Arowolo\*\*\*

### **Abstract**

Ignorance, illegal, infringement of rights, political propaganda by the have nots to reap from the haves, are examples of the responses from those in the film and sports broadcast industry on the 6<sup>th</sup> edition of Nigeria Broadcast Commission Code in Nigeria. The giants in the broadcast of films and sports perceive the Code as a means to allow others to benefit from their hard work in the industry for next to nothing. The provision in the NBC Code that makes it an obligation for broadcasters to sub-license their acquired or generated creative content to other broadcasters is tantamount to an infringement of their exclusive rights according to copyright law, they say. Even though NBC has tried to justify its actions by claiming it is to promote competition, most perceive the provision as anti-competitive and the provisions will cripple the industry by discouraging the haves. This article critically examines the provisions of the Code on the broadcast of films and sports. In addition, the practice in South Africa and the United Kingdom is explored to find out if a similar practice occurs in these jurisdictions. The article suggests a collective and negotiation approach between the regulators and the stakeholders (including the haves and the have-nots) in amending the Code should yield better results.

**Keywords:** Exclusivity, Broadcast, Copyright, Nigeria, South Africa, United Kingdom

### **Introduction**

The entertainment industry has witnessed enormous growth in the past few years in Nigeria. The music, film and sports industries are the means by which Nigerians entertain themselves indoors and outdoors. These activities are made possible by broadcast organisations which have two categories of the haves and the have-nots. The haves generate a high revenue or income and they are well established, while the have nots do not generate as much revenue as the haves. Regardless, viewers have become more dependent on broadcasters generally due to the COVID 19 pandemic, since it is expected that staying at home is the safest. Both categories have their subscribers; however, the have-nots aspire to broaden their coast of subscribers in the film and sports sector to generate a higher income.

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Broadcasters hold a key position in the entertainment industry as it is reflected in the Copyright Act and the Nigerian Broadcast Commission (NBC) code.<sup>1</sup> Consequently, they are regulated by two bodies regarding the broadcast of copyright content. The Copyright Act in section 8 and 9 provide specifically for this industry.<sup>2</sup> They hold the position of owner, assignees or exclusive licenses. Conversely, the NBC code has a provision on the approval of broadcast organisation and what is required of these organisations. NBC, however, took a step further by prodding into the issue of exclusivity in film and sports in the recent amendment to generate the 6<sup>th</sup> edition of the Code.

The NBC claims its actions on amending the Code in June 2020 is based on the power granted to it in section 2 of the NBC Act.<sup>3</sup> The Code represents the minimum standard of broadcasting in Nigeria. It provides regulations for broadcasters and provides amongst its objectives the provision of a functional level of enlightenment for the Nigerian populace; and stipulates that the regulation will “ensure that broadcasting played a pivotal role in the social, cultural, technological, economic, and political lives of Nigerians.”<sup>4</sup>

The actions of NBC has received many reactions from broadcast organisations stating the provisions in the Code infringes their rights as provided in the Copyright Act, and it is discouraging to continue to invest in this industry. The CEO of IROKOTv<sup>5</sup> has been vocal on the impact of the Code on pay-tv, and he is of the perception the Code will cripple the industry. He asked for ‘an inclusive and robust regulatory framework that recognises creativity, rewards creativity and provides an enabling environment for investment and growth.’<sup>6</sup> He questioned the legality of the Code with regards to copyright laws and international treaties as well as the

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<sup>1</sup> Davidson Oтуру and Kehinde Takuro, *Regulating Nigerian Content on Broadcasting Platforms: An Examination of the Amendments to the 6<sup>th</sup> Edition of the Nigerian Broadcasting Code, June 2020* AELEX Article Series. Innocent Paschal Ihechu and Uzoma Chukwuemeka Okugo (PhD), *Broadcasting Regulation and Broadcasting in Nigeria: An Overview of the Approaches*, (2013) 3(2) *Research on Humanities and Social Sciences*, 15.

<sup>2</sup> Copyright Act 1988 as amended in 1992 and 1999, Cap 28 Laws of the Federation of Nigeria 2004.

<sup>3</sup> NBC-Code-6TH-EDITION <<https://www.nta.ng/wp-content/uploads/2019/09/1494416213-NBC-Code-6TH-EDITION.pdf>> accessed 5 October 2020.

<sup>4</sup> Ibid. See 0.2.2.1 and 0.2.3.

<sup>5</sup> IROKOTv originally started out as YouTube company is a web platform that provides paid-for Nigerian films on demand. It was the first company to put Nollywood content online legally. In 2011, it moved to its own platform, iROKOTv.com and began licensing and developing its own content. It is one of Africa’s mainstream online movie streaming websites, giving instant access to over 5,000 Nollywood film titles.

See also ‘Nigeria’s Film Industry Goes Global Online’ <[https://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2017/05/article_0002.html)> accessed 6 December 2018.

<sup>6</sup> Digital Times, ‘Njoku IROKOTv TV Boss Charges NBC to clear Ambiguities in the New Broadcast Code’ <<https://digitaltimesng.com/njoku-iroko-tv-boss-charges-nbc-to-clear-ambiguities-in-new-broadcast-code/>> 5 October 2020.

legality regarding restriction of parties' rights to freely contract by the NBC.<sup>7</sup> There are claims that for economic and regulatory reasons brought about by the new Code, IROKOTv has reduced its investments in Nigeria.<sup>8</sup>

The uproar has also attracted the attention of the Federal government of Nigeria. Through a virtual response to the situation, the vice president of Nigeria Yemi Osinbajo said the government would reexamine the Code due to the complaints received. 'Basically, what it says is that if you have a licensed product for TV or film, you're expected to share it with other platforms. I understand the argument of those who say this is a violation of copyright and intellectual property, which is a very strong point,' he said.<sup>9</sup> The intentions of NBC to foster competition is commendable; however, the approach is totally out of line legally and economical. The NBC provisions are examined in this article. In addition, the practice in other jurisdictions, South Africa and the United Kingdom are examined in comparison to the situation in Nigeria.

### **Exclusivity in sports and films in the sixth NBC Code**

The purpose of the amendments to the NBC Code is to make provisions for the use of Nigerian content and broadcasting content online, and the determination of acceptable local content for a broadcaster in Nigeria which was omitted in the Code. The amended Code stipulated a promotion of Nigerian content with a requirement that the production and target audience of content should be Nigeria, and that the directors or authors of programmes broadcast should be Nigerians.<sup>10</sup> The amendment provides that broadcast content must have 75 per cent input from Nigerians. The key amendments to the Code, as it affects intellectual property rights are discussed below.

#### **Prohibition of exclusive sports rights**

The amended NBC Code provides the terms upon which parties are expected to contract so as to acquire rights in works sought to be broadcast in Nigeria. Also, it provides that broadcasters shall share the rights they acquire in works with other organisations in the broadcast industry.

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<sup>7</sup> Digital Times, 'Njoku IROKOTv TV Boss Charges NBC to clear Ambiguities in the New Broadcast Code' <<https://digitaltimesng.com/njoku-iroko-tv-boss-charges-nbc-to-clear-ambiguities-in-new-broadcast-code/>> 5 October 2020.

<sup>8</sup> Tonmiwa Onaleye, FG to Review Ban on Content Exclusivity in Amended NBC Code, <<https://technext.ng/2020/09/21/fg-to-review-ban-on-content-exclusivity-in-amended-nbc-code/>> accessed

<sup>9</sup> Tonmiwa Onaleye, FG to Review Ban on Content Exclusivity in Amended NBC Code, <<https://technext.ng/2020/09/21/fg-to-review-ban-on-content-exclusivity-in-amended-nbc-code/>> accessed 5 October 2020.

<sup>10</sup> See Article 3 of the NBC Code as amended.

Article 6.2.5 of the Code provides a means, ‘to ensure fair and effective competition on all platforms at an agreed fee, rights owner to Live Foreign Sporting Events shall offer the rights to Broadcasters on different platforms stated below: Satellite (DTH), Multipoint Microwave Distribution System (MMDS), Cable (Fibre Optics)’<sup>11</sup>

Article 6.2.8 provides: ‘the broad national interest, the exclusivity of sporting rights in Nigeria is prohibited.’<sup>12</sup> Thus where a broadcaster acquires a right to broadcast live foreign sports events, the broadcaster must make the right available to other broadcasters at commercially agreeable terms. Broadcasters are also required to grant access to its premium content and news genre to all Pay-tv platforms.<sup>13</sup>

### Prohibition of exclusive licensing

Paragraph 9.0.1 of the amended Code provides that ‘the Broadcaster or licensee shall immediately after the coming into force of this amendment be prohibited from entering into any form of agreement, contract, concerted practices or take any decision which have as their object and intendment the prevention, restriction or distortion of competition in, or in any part of, the broadcast media industry in Nigeria; and for this purpose, no broadcaster or licensee shall enter into any form of broadcasting rights acquisition either in Nigeria or anywhere in the world to acquire any broadcasting rights in such a manner as to exclude persons, broadcasters or licensees in Nigeria from sub-licensing the same.’<sup>14</sup>

Article 9.0.2 voids any agreement by a broadcaster or decision which is in contravention of the provisions of Paragraph 9.0.1 above. The Amendment Code in Article 9 thus prohibits broadcasters or licensees from entering into any form of broadcasting rights acquisition that excludes sub-licensing. Particularly, paragraph 9.1.1.8 states that ‘the broadcaster shall comply with directives by the Commission that compel any broadcaster in the broadcast industry to license its broadcast and/or signal rights in any genre of programming to another licensee or broadcaster in Nigeria ...’<sup>15</sup>

## **Exclusivity in Broadcast in the Copyright Act of Nigeria: The Friction**

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<sup>11</sup> Ibid Article 6.2.5.

<sup>12</sup> See generally Article 6.

<sup>13</sup> Article 9.1.1.

<sup>14</sup> Article 9.0.1.

<sup>15</sup> Article 9.1.1.8.

The implications of the exclusivity provision and the effect of Article 9.1.1.8 is that it will compel sublicensing where “the genre of programme(s) enjoys compelling viewership by Nigerians.” The Code does not define the phrase: “compelling viewership” however, as it stands, it is submitted that the provision is contrary to exclusive protection that copyright offers. Nigeria’s Copyright Act<sup>16</sup> grants the owner of a copyright in a work the exclusive licence over his work, and the Act permits him to control how he wishes to deal with his work.

Section 1(1) (f) of the Copyright Act, broadcasts are eligible for copyright. Progressively, Section 6 provides that ‘subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the following acts ...’ The only exception to the exclusive copyright in broadcast is in respect of fair dealing, research, criticism and educational instruction specified in paragraphs (a), (h), (k) and (o) of the Second Schedule to the Act.

Section 8 of the Copyright Act gives the copyright holder in a broadcast the exclusive right to control the recording, (re) broadcast, communication and distribution for commercial purpose of such work by way of rental, lease, hire, a loan or similar arrangement.<sup>17</sup> The crux of this provision is the “exclusive right” of a copyright holder in a broadcast. Progressively, Section 10 of the Act provides: (1) Subject to the provisions of this section, copyright shall be transmissible by assignment, by testamentary disposition or by operation of law, as movable property. (2) An assignment or testamentary disposition of copyright may be limited so as to apply to only some of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.<sup>18</sup>

Exclusive licenses, when granted, must be in writing and satisfy the general rules as to contract; proper execution, capacity, consideration and the permissible limits of fairness.<sup>19</sup> Beyond that, there are no further requirements under the Act. The compulsory balance interests of right owners and the need to give society greater access to information and knowledge materials are the only exception provided under the Act, and entertainment cannot be placed in this category.

A combined reading of sections 8 and 10 of the Copyright Act, logically infers that while a copyright holder in broadcast has the exclusive right to the broadcast, he is not restricted

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<sup>16</sup> Cap C28, Law of the Federation of Nigeria, 2004.

<sup>17</sup> See section 8.

<sup>18</sup> Ibid. See section 10.

<sup>19</sup> See J O Asein, *Nigerian Copyright Law & Practice* (Books and Gavel Publishing 2012) 155.

from transmitting same either by testamentary disposition or by operation of the law as movable property. Notably, these sections do not limit the nature of persons to whom this right could be transferred.

Article 9 is an infringement on the rights of the producer if NBC says broadcasters cannot acquire exclusive content. Does this amendment therefore not strike at the core of broadcast rights? The NBC lacks the legal backing to mandate a content producer to license its broadcast to a specified broadcast media as this contradicts the provisions of Section 10 of the Copyright Act, and works injustice, in certain circumstances, against the broadcasting sector. Exclusivity in the licensing of programmes may promote technology transfer, innovation, even fair pricing and quality. It can sometimes even promote efficiency.

The question is whether the outright prohibition of windowing truly takes cognisance of Nigeria's developmental stage, especially in its creative sector. Windowing is "the process of managing the release sequence for content so as to maximise the returns from intellectual property rights (IPRs)"<sup>20</sup> It is a crucial factor that drives contract negotiations and agreements. The effect of the amendments means online platforms like IROKOtv and Netflix, who recently opened an office in Nigeria to expand its business and invest in local content<sup>21</sup> will now be required to be registered with NBC. In addition, they are required to license their exclusive content to other broadcast media in Nigeria at prices that NBC will regulate.<sup>22</sup>

These platforms have invested a lot into exclusive/original content from local movie producers in Nigeria, and have exclusivity have as their business model. Exclusivity appears to be favourable to content owners and producers who may prefer cash in upfront in contracts with online platforms because of peculiarities in Nigeria, principal of which is piracy.<sup>23</sup> Mandating these online platforms to sublicense their broadcasting rights to third parties appears to infringer on the general principle of freedom of parties to contract and may stifle investment in Nigeria's creative sector and may impede foreign direct investment. Indeed, independent producers should be encouraged and given be an enabling environment to maximise returns on

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<sup>20</sup> Gillian Doyle, 'Digitization and Changing Windowing Strategies in the Television Industry: Negotiating New Windows on the World' [2016] *Television & New Media* 1 <<https://journals.sagepub.com/doi/10.1177/1527476416641194>> accessed 30 September 2020.

<sup>21</sup> 'Netflix Opens Office in Nigeria to Invest in Original Contents' (*Afrikan Heroes*, 27 February 2020) <<https://afrikanheroes.com/2020/02/27/netflix-opens-office-in-nigeria-to-invest-in-original-contents/>> accessed 26 August 2020.

<sup>22</sup> Emmanuel Paul, 'Nigerian Broadcasting Agency Seeks to Regulate Exclusive/Original Local Content on Netflix, IROKOtv, Pay-TV' (*Techpoint Africa*, 10 June 2020) <<https://techpoint.africa/2020/06/10/nigerian-broadcasting-commission-acquisition-exclusive/>> accessed 2 October 2020.

<sup>23</sup> Temi Bamgbose, 'Can Nollywood Beat Piracy? | TRUE Africa' <<https://trueafrica.co/article/for-every-legitimate-copy-sold-nine-are-fake-can-nollywood-win-the-fight-against-piracy/>> accessed 26 September 2020.

investment. Streaming giants that cannot enter an exclusive deal in their contracts may decide to pull out of contracts.

The NBC amendment Code prohibits exclusivity of sporting rights as earlier mentioned, and this may not be unconnected with the high charges in subscription fees of some Pay-tv companies; however, there was no definition of “premium content.” What does this phrase cover? What is the scope of the subject matter referred? A definition of this term will help define the scope anticipated by the regulation.

Nigeria is a signatory to several treaties covering copyrights such as the Berne Convention,<sup>24</sup> Trade Related Aspects of Intellectual Property (TRIPS)<sup>25</sup> and the WIPO Copyright Treaty.<sup>26</sup> The provision in these different treaties is to ensure that the signatories to these international instruments protect the right of copyright owners in different jurisdictions; Nigeria is a signatory to these treaties. Article 9 (2) Berne Convention provides that it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain exceptional cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 13 of TRIPS provides that members shall confine limitations or exceptions to exclusive rights to certain exceptional cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Additionally, Article 8 of the WIPO Copyright Treaty (WCT) exclusively provides authors with the right of communication of their works to the public either by wire or wireless means. The necessary inference is that authors can license their rights in the works to third parties and prescribe terms that will protect their interest in the works being licensed.

Even though NBC has good intentions, the process is flawed. It may be premature to make a regulation such as this without an in-depth study of how this will affect the media market in Nigeria. What NBC has done is an overreach of their powers. NBC should not bow to political pressure or some other forms of pressure. NBC and the relevant stakeholders are disconnected. There is no evidence that relevant stakeholders in the industry were consulted before this Code was put together.

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<sup>24</sup> Berne Convention for the Protection of Literary and Artistic Works 1886.

<sup>25</sup> Trade Related Aspects of Intellectual Property 1994 (TRIPS Agreement)

<sup>26</sup> WIPO Copyright Treaty, signed by Nigeria on 24 March 1997.



Indeed, there have been strong criticisms against the NBC Code amendments and its provisions,<sup>27</sup> with complaints about how they unfavourably affect Nigeria’s broadcast media industry. Key amongst these criticisms is the requirement for owners of rights to be able to transmit prime foreign sports events; they must invest 30% of the cost of such rights acquisition in a prime local sports event in Nigeria of the same category. This requirement imposes a financial burden on these broadcasters and defies the logic of demand and supply.

There are no incentives in the entire piece of legislation which is favourable to content owners. The nuances in Nigeria cannot be ignored. The Commission needs to redesign the framework, establish definitions for what they intend to do. The amendments in the NBC Code may stifle the efforts of hardworking Nigerians in the entertainment industry. PwC has estimated growth in the industry and described the industry in Nigeria as the “world’s fastest-growing E&M market over the coming five years.”<sup>28</sup> Exclusivity encourages and stimulates the entertainment industry and encourages increased production of movies and higher incomes as regards licensing fees paid to movie producers. The regulatory environment should take cognisance of these benefits. The outright prohibition of exclusivity does not take cognisance of Nigeria’s developmental stage, especially in its creative sector. We submit that what should be addressed is the maximum period or minimum period of exclusivity.

### **South Africa’s Draft Sports Broadcasting Services Amendment Regulations 2018**

In South Africa, the Copyright Act 1978 regulates copyright. Broadcasts are recognised as being works eligible for copyright.<sup>29</sup> Under section 10, copyright in a broadcast vests the exclusive right to do or to authorise the doing of the following acts within South Africa:

- (a) Reproducing, directly or indirectly, the broadcast in any manner or form, including in the case of a television broadcast, making a still photograph of an individual image;
- (b) Rebroadcasting the broadcast

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<sup>27</sup> ‘There’s Need to Take Another Look at Amended NBC Code - Osinbajo - P.M. News’ <<https://www.pmnewsnigeria.com/2020/09/19/theres-need-to-take-another-look-at-amended-nbc-code-osinbajo/>> accessed 1 October 2020.

See also ‘Movie Company Sues NBC over Amendment of Broadcast Code’ (*Vanguard News*, 9 September 2020) <<https://www.vanguardngr.com/2020/09/movie-company-sues-nbc-over-amendment-of-broadcast-code/>> accessed 1 October 2020.

<sup>28</sup> PricewaterhouseCoopers, ‘Nigeria Will Be the World’s Fastest Growing E&M Market– PwC Report’ (*PwC*) <<https://www.pwc.com/ng/en/press-room/nigeria-will-be-the-worlds-fastest-growing-e-m-market-pwc-report.html>> accessed 1 October 2020.

<sup>29</sup> Section 2(1) (f).

(c) Causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.

According to section 22(1), copyright is transmissible as moveable property by assignment, testamentary disposition or operation of the law. Copyright will initially vest in the author or a different party depending on contractual terms, such as employment. In the case of a broadcast, it will be the first broadcasting corporation who is the first owner.

South Africa published their Draft Sports Broadcasting Services Amendment Regulations 2018 (“the regulations”), inviting written representations and comments on the document by 4 February 2019. The regulations are intended to control the broadcasting of “national sporting events” in the public interest within South Africa so as to ensure such events would reach a wider audience and enable a greater level of competitiveness amongst broadcasters.

The regulations define “national sporting events” as those “that are deemed to be of national interest”.<sup>30</sup> Of course, this, in turn, begs the question of what is meant by a sport which is “deemed to be in the national interest”. The regulations provide a further definition of this as “an event that does not necessarily involve a Senior National Team but appeals to the majority of [the] South African populace”.<sup>31</sup> As such, one would reasonably assume that what is meant is sporting events which enjoy a significant viewership amongst South Africans; however, the lack of clarity leaves much to be desired.

Setting this initial ambiguity aside, the regulations seek to divide national sporting events into three distinct categories based on the degree to which they “appeal to the majority of [the] South African populace”.<sup>32</sup> The first of these categories (“Group A”) consists of the most popular national sporting events such as the ICC Cricket World Cup and National Netball. These listed events must be broadcast as full live coverage on a free-to-air (FTA) broadcaster. If an FTA broadcaster cannot acquire these rights for any reason, they must inform subscription broadcasters who will be only then able to bid for the rights to a non-exclusive license over the said event.<sup>33</sup> This means that, even if FTA broadcasters do not obtain the initial rights to air the national sporting event, they will be able to broadcast the events all the same.

The second category (“Group B”) consists of events which, in Goldilocks terms, are neither too popular nor too unpopular (the regulations do not make clear what the viewership

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<sup>30</sup> Draft Sports Broadcasting Services Amendment Regulations 2018, regulation 2(g).

<sup>31</sup> Draft Sports Broadcasting Services Amendment Regulations 2018, regulation 2(h).

<sup>32</sup> Draft Sports Broadcasting Services Amendment Regulations 2018, regulation 2(h).

<sup>33</sup> Draft Sports Broadcasting Services Amendment Regulations 2018, regulation 5(1).

distinction is between these three categories and therefore one is unclear as to what the threshold requirements are to qualify as, e.g. Group B but not Group A). These middle-of-the-line sporting events include the Premier Soccer League and the Comrades Marathon. These sporting events are able to be offered to a subscription broadcaster directly (i.e. without the right of first offer being extended to FTA broadcasters as required for Group A sporting events). However, as in the case with Group A events, subscription broadcasters are only able to bid for a non-exclusive license, these being under sub-licensing conditions.<sup>34</sup> Once again, this ensures that – even if FTA broadcasters are not able to secure the rights to these events – FTA broadcasters will be able to broadcast the events all the same.

The final category (“Group C”) consists of what one must assume the regulations unflatteringly deem to be the least popular of all. These include so-called minority and developmental sporting events. The regulations define “minority sports” with an air of mystery as “any sport that does not have the majority of [the] population’s following or a sport having a less distinctive presence within a larger audience”. “Developmental sports” are defined as “sports aimed at promoting social change and enlarging the population’s choices and increasing opportunities to all members of society”. Confusingly, this includes such sports as golf and tennis but excludes such events as the Paralympics, the latter of which falls into Group A. For sporting events in Group C, FTA and subscription broadcasters must broadcast events from at least two of the listed sporting codes per annum.<sup>35</sup>

### **Concerns with South Africa’s Draft Sports Broadcasting Services Amendment Regulations of 2018**

There are many issues with these regulations. First, it is unclear what constitutes a “majority” viewership sufficient for one sporting event to fall in Group B but not Group A. If sporting events in Group A, appeal to the majority of the South African populace and events in Group C do not, then how are the events in Group B decided? Does the South African populace consider the sporting events in Group B to be appealing but only a little bit so? This is hardly a precise measure for the scope of application afforded these regulations. The lack of certainty means that national federations who own the copyright to sporting events which are not listed in the regulations for each group provided risk breaching the terms if they should self-identify

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<sup>34</sup> Draft Sports Broadcasting Services Amendment Regulations 2018, regulation 5(2).

<sup>35</sup> Draft Sports Broadcasting Services Amendment Regulations 2018, regulation 5(3).

as being in one group and not the other. On the other hand, if the list of sporting events within the regulations are intended to be a closed-list, then one questions the reasonableness with which each sporting event has been assigned its relevant category.

Another concern relates to whom the regulations refer when speaking of “the South African populace” that finds these sporting events appealing or not. It is unclear if the regulations envision merely capturing the viewing habits of those who own audio-visual mediums of viewership, or something more. For example, many South Africans have access to audio-visual mediums of viewership while not owning these mediums or possessing them within their household.<sup>36</sup> Some may prefer - for socio-cultural reasons - to view sporting events in a communal setting, such as one of South Africa’s many sports bars or “shebeens”, the latter of which is an alternative to a pub or bar which exists within South Africa’s predominantly black informal settlements.<sup>37</sup>

However, it is the prohibition upon exclusive licensing in Group A and B sporting events which presents the most contentious concern. The regulations have not found support amongst key stakeholders, including the national federations themselves.<sup>38</sup> Many national federations rely upon the revenue received through the exclusive sale of licenses to broadcasters and their financial viability risks being jeopardised by the regulations. This could have more widespread, significant consequences than there being less to do on Saturday afternoons.

One such example is Netball South Africa (“Netball SA”), the only body responsible for the administration, control and governance of netball in South Africa. It is also the biggest woman’s sports organisation in South Africa, with netball being the most popular participation sport for women in South Africa and the second most participated in team sport in South Africa

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<sup>36</sup> For example, according to Statistics South Africa, 64.7 percent of South African households had at least one member who had access to or used the internet either at home, work, place of study or internet cafés, in 2018. Only 13 606 household across the country owned their own television set and fewer still - 3 543 households – owned a computer. See: Statistics South Africa, ‘General Household Survey 2018’ <<http://www.statssa.gov.za/publications/P0318/P03182018.pdf>> accessed 6 September 2020.

<sup>37</sup> For more information on “shebeens” in the South African context, see: Kgotso Masola et al, ‘The impact of shebeens on the local economy: evidence from Soweto, South Africa’ (2019) 54 4 *Journal of Public Administration* 861; AJE Charman, ‘Shebeens as spaces and places of informality, enterprise, drinking and sociability’ (2014) 96 1 *South African Geographical Journal* 31; South Africa.Net, ‘Shebeens – your uniquely South African local tavern experience’ <<https://www.southafrica.net/uk/en/travel/article/shebeens-your-uniquely-south-african-local-tavern-experience>> accessed 6 September 2020.

<sup>38</sup> All public submissions on the regulations can be found at the following: Independent Communications Authority of South Africa, ‘Sport Broadcasting Services’ <<https://www.icasa.org.za/legislation-and-regulations/regulations-underway/sports-broadcasting-services>> accessed 6 September 2020.

(second only to soccer) with well over 2 million participants all over South Africa.<sup>39</sup> Netball SA relies almost entirely upon the income stream generated through the exclusive licensing of events such as the Netball Provincial Premier League. Using this income, Netball SA is able to pay their predominantly female sportspeople a liveable wage of ZAR 5000 per month in a country where the labour market is more favourable to men than it is to women and men are more likely to be in paid employment than women.<sup>40</sup>

According to Statistics South Africa, the expanded unemployment rate - which does not take job searching into account - increased from 30.9 percent in 2008 to 37.2 percent in 2018, with both the official and expanded definition of unemployment rates being higher amongst women than men. The report concludes that “the labour market position of women hasn’t changed much over the last decade; in fact, it has deteriorated in some respects”.<sup>41</sup> The same can be said about women and gender-based-violence. President Ramaphosa has stated that South Africa is “one of the most unsafe places in the world to be a woman, with levels of violence that are comparable to countries that are at war”.<sup>42</sup>

The South African Medical Research Council has reported that more women are murdered by their partner or ex-partner in South Africa than anywhere in the world.<sup>43</sup> A key factor that works to mitigate against such violence against women is financial independence and economic empowerment amongst women.<sup>44</sup> By providing women in sport with a liveable wage, it decreases their risk of falling victim to gender-based violence in the first instance and increases their likelihood of successfully coming out of an abusive environment.<sup>45</sup>

Another example can be seen in the example of the Premier Soccer League (“PSL”). In the 2018 financial year, the PSL generated revenue of ZAR940 million compared to revenue

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<sup>39</sup> Netball South Africa, ‘Netball SA submission on Draft Sports Broadcasting Services Amendment Regulations 2018’ available at <<https://www.icasa.org.za/legislation-and-regulations/netball-sa-submission-on-the-draft-sports-broadcasting-services-amendment-regulations>> accessed 8 September 2020.

<sup>40</sup> Statistics South Africa, ‘How do women fare in the South African labour market?’

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[http://www.statssa.gov.za/?p=11375&gclid=CjwKCAjw19z6BRAYEiwAmo64LfXOuzOgYMuEu6IDs1T1ff3tgFUIsBuEZQIXwEzBC-VaFPKsZs\\_OMBoCbPwQAvD\\_BwE](http://www.statssa.gov.za/?p=11375&gclid=CjwKCAjw19z6BRAYEiwAmo64LfXOuzOgYMuEu6IDs1T1ff3tgFUIsBuEZQIXwEzBC-VaFPKsZs_OMBoCbPwQAvD_BwE)> accessed 6 September 2020.

<sup>41</sup> Statistics South Africa (note 12).

<sup>42</sup> Mava Lukani, ‘Violence against women in South Africa comparable to countries that are at war – Ramaphosa’ <<https://www.parliament.gov.za/news/violence-against-women-sa-comparable-countries-are-war-ramaphosa>> accessed 6 September 2020.

<sup>43</sup> Naemah Abrahams and Bianca Deke, ‘South African Medical Research Council research on Femicide and Child homicide’ <<https://www.samrc.ac.za/research-for-our-people/samrc-research-femicide-and-child-homicide>> accessed 6 September 2020.

<sup>44</sup> R Jewkes et al, ‘Effective design and implementation elements in interventions to prevent violence against women

and girls. What works to prevent violence?’ <<https://whatworks.co.za/documents/publications/373-intervention-report19-02-20/file>> accessed 6 September 2020.

<sup>45</sup> R Jewkes et al (note 16).

of ZAR885 million in 2017, 64 percent of which was generated from the sale of its broadcast rights to Multichoice.<sup>46</sup> The result of this increased revenue from the sale of broadcasting rights means soccer clubs now receive substantially higher revenues than in previous years. In the past, PSL clubs received grants of ZAR400 000 per month but are now receiving ZAR 2 million a month plus up to ZAR10 million per annum in service fees (in total ZAR 496 million in 2018). Without this support from the PSL largely generated by the sale of broadcasting rights, most soccer clubs would not be able to participate in professional football at all. They would not be able to meet the financial burdens of running a professional club which includes the onerous and costly governance and compliance of the National Soccer League and mandatory legal requirements.

Additionally, it has enabled clubs to recruit skilled young players, many of whom come from previously-disadvantaged and more impoverished communities; pay for the schooling, accommodation and training of young soccer players in their academies; provide players with substantially higher income, therefore extending careers and resulting in higher player retention; increasing overall club value; and the support of small vendors/entrepreneurs who benefit from employment opportunities and sales due to increased support for the games played.

### **The United Kingdom’s Approach to Regulating Exclusive Licensing**

In section 6 of the Copyright, Designs and Patents Act 1988, a “broadcast” is defined as an electronic transmission of visual images, sounds or other information which is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or is transmitted at a time determined solely by the person making the transmission for presentation to members of the public and which is not excepted by subsection (1A). The person or body making the broadcast will be considered the author of the broadcast.<sup>47</sup> Generally, the author will also be the first owner of the copyright vesting within the broadcast.<sup>48</sup>

The question of exclusive broadcasting of sporting events in the United Kingdom (UK), is much more flexible than it is in both Nigeria and South Africa, with a case-by-case approach being the method of choice in balancing the interests relating to FTA and subscription broadcasting. The Broadcasting Act 1996 as amended by the Television Broadcasting

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<sup>46</sup> National Soccer League, ‘NSL Submission on Draft Sports Broadcasting Services Amendment Regulations 2018’ <<https://www.icasa.org.za/legislation-and-regulations/nsl-submission-on-the-draft-sports-broadcasting-services-amendment-regulations>> accessed 2 October 2020.

<sup>47</sup> Section 9(2) (b).

<sup>48</sup> Section 11.

Regulations 2000 and the Communications Act 2003 restricts the acquisition by television programme providers of exclusive rights to live television coverage of “listed events” and the broadcasting on an exclusive basis of such coverage without the previous consent of the Office of Communications (Ofcom).<sup>49</sup>

A request for Ofcom’s consent for exclusive live coverage of a listed event must be made in writing to Ofcom by the broadcaster wishing to transmit the event and be accompanied by full reasons and justification for the request and all relevant supporting information.<sup>50</sup> As a first step in considering the request, Ofcom will normally issue a public notice inviting broadcasters, rights holders and other interested parties to comment on the request before deciding whether to approve the application.<sup>51</sup>

The Broadcasting Act also requires Ofcom to draw up, and from time to time review, a code giving guidance on certain matters relating to the televising of “sports and other events of national interest” which have been listed by the Secretary of State for Culture Media and Sport.<sup>52</sup> The current Code on Sports and Other Listed and Designated Events was published in 2008. It contains a list of sporting events of national interest, meaning that the broadcast rights to these events must be offered to “the main FTA terrestrial broadcasters” on “fair and reasonable terms”. Whether a body qualifies as a “main FTA” or, in the language of the Broadcasting Act, a “qualifying service”,<sup>53</sup> depends upon criteria including whether the channel is received by 95% of the UK population.<sup>54</sup> This is subject to change, as evidenced by the list of “qualifying services” recently having been broadened to include the following: BBC1, BBC2, BBC Four, CBBC, CBeebies, BBC News, BBC Parliament, Channel 3 Network (broadcast as ITV, STV and UTV), ITV2, ITV3, ITV4, Channel 4, More 4, Film 4 and – most recently - Channel 5.<sup>55</sup>

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<sup>49</sup> Sections 98 – 101.

<sup>50</sup> Code on Sports and Other Listed and Designated Events 2008.

<sup>51</sup> Code on Sports and Other Listed and Designated Events 2008.

<sup>52</sup> Section 104.

<sup>53</sup> Section 2(2).

<sup>54</sup> For more detail on this precise methodology, please see: Ofcom, ‘Listed Events - Identifying services that are free-to-view and widely available’ <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0020/155090/listed-events-statement.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0020/155090/listed-events-statement.pdf)> accessed 6 September 2020.

<sup>55</sup> Ofcom, ‘Listed Events - Identifying services that are free-to-view and widely available’ (note 26); Ofcom, ‘Statement: Listed Events’ <[https://www.ofcom.org.uk/consultations-and-statements/category-1/listed-events?utm\\_medium=email&utm\\_campaign=Update%20Listed%20events&utm\\_content=Update%20Listed%20events+CID\\_495e41f651ef00b7e0a23b7aa804c51f&utm\\_source=updates&utm\\_term=published%20an%20updated%20list%20of%20TV%20services%20that%20are%20free%20to%20view%20and%20widely%20available](https://www.ofcom.org.uk/consultations-and-statements/category-1/listed-events?utm_medium=email&utm_campaign=Update%20Listed%20events&utm_content=Update%20Listed%20events+CID_495e41f651ef00b7e0a23b7aa804c51f&utm_source=updates&utm_term=published%20an%20updated%20list%20of%20TV%20services%20that%20are%20free%20to%20view%20and%20widely%20available)> accessed 6 September 2020.

A ‘listed event’ in the Code is defined as a ‘sporting or other event of national interest’ which is included in a list drawn up by the Secretary of State.<sup>56</sup> The concept of national interest is not clearly defined in the Broadcasting Act, though as per section 97(4) it includes interest within either England, Scotland, Wales or Northern Ireland. This is the basis on which the Scottish FA Cup Final, for example, has been listed, as the Broadcasting Act enables those events to be shown only in the relevant part of the UK in which there is likely to be most viewer interest.<sup>57</sup>

The Department for Digital, Culture, Media and Sport offers more clarity on the question of national interest, stating that a listed event is “one which is generally felt to have special national resonance” and which contains “an element which serves to unite the nation, a shared point on the national calendar, not solely of interest to those who follow the sport in question”.<sup>58</sup>

The list within the Code comprises of the following two groups. Group A events are those in which full live coverage must be offered on FTA broadcasters. This group includes the FIFA World Cup Finals Tournament, the Rugby World Cup Final and the Olympic Games. Group B events are those that can have live coverage on subscription television provided that secondary coverage is offered to the FTA broadcasters as highlights or delayed coverage. This group includes the Commonwealth Games, the Ryder Cup, and cricket test matches played in England.

### **Striking a Fair Balance**

The UK parliament has acknowledged the importance of FTA broadcasting, most recently in a House of Lords Briefing Paper which highlights the following: Public service broadcasting remains essential to the UK media and losing it would leave UK society and democracy worse off. Public service broadcasting can bring the nation together in a way in which other media cannot and can ‘raise the level’ of quality, as well as ensuring continued investment in original UK content across a range of programming [...]. At a time of division, public service broadcasters play a role in unifying the country through shared experiences.<sup>59</sup>

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<sup>56</sup> Section 97(1). The current Minister of State for Sport, Media and Creative Industries is Nigel Adams.

<sup>57</sup> Code on Sports and Other Listed and Designated Events 2008.

<sup>58</sup> Department for Culture, Media and Sport, ‘Coverage of Sport on Television’ <[https://webarchive.nationalarchives.gov.uk/http://www.culture.gov.uk/PDF/sport\\_on\\_television.pdf](https://webarchive.nationalarchives.gov.uk/http://www.culture.gov.uk/PDF/sport_on_television.pdf)> accessed 9 September 2020.

<sup>59</sup> Select Committee on Communications and Digital, *Public service broadcasting: as vital as ever* (HL 2019, 16-I).



These benefits have also been acknowledged by the UK executive, who state: [FTA] provides significant cultural, economic and democratic value to the UK. It is free at the point of use, universally available and works for the public benefit to foster shared experiences, stimulate learning, and to reflect communities from across the country.<sup>60</sup> However, the importance of subscription broadcasting has also been acknowledged, with investment in UK content amounting to over £1 billion from 2017 - 2019.<sup>61</sup> The government has stated that it believes the current regime, and the list itself, strikes an appropriate balance between retaining the benefits of FTA sporting events for the public while allowing rights-holders to negotiate agreements in the best interests of their sport and – subsequently – the nation as a whole. It does not plan to review the list in the immediate future.<sup>62</sup>

What is most notable about the UK's approach is not the execution of their policy, but its formation. In striking a balance between seemingly competing interests, the approach chosen by the UK is both inclusive and flexible. In drafting the list of Group A and B events, the Secretary of State is at liberty to add and delete events from the list at any time provided he does so after consultation with the BBC, the Welsh Authority, Ofcom and the holder of the rights for the event in question.<sup>63</sup> The list of events is, therefore, always reflective of collective – and changing - considerations.

In 2019 the then Secretary of State, Jeremy Wright, announced that he would be consulting with the relevant bodies on adding the Paralympic Games to the Group A list of events and said that he planned to consult later in the year on adding women's equivalents of men's events to the list.<sup>64</sup> The former was supported by all stakeholders and therefore successful, while the latter is pending.<sup>65</sup> That the list of national interest sporting events is able to be amended regularly in part or *in toto* so as to reflect changing standards and interests demonstrates the flexibility embedded within the UK's approach.

In amending the list, legislation mandates that consideration must be paid to the views of *all* relevant stakeholders, including the national federation bodies themselves, evidencing

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<sup>60</sup> Government Response, 'House of Lords Select Committee on Communications and Digital: Public service broadcasting: as vital as ever' <<https://committees.parliament.uk/download/file/?url=%2Fpublications%2F55%2Fdocuments%2F690&slug=governmentresponsepsbasvitalaseverpdf>> accessed 12 September 2020.

<sup>61</sup> The Association for Commercial Broadcasters and On-Demand Services, '2019 Content Report' <[https://www.coba.org.uk/coba\\_latest/coba-content-report-2019-investment-in-uk-content-by-members-crosses-1-billion-pa/](https://www.coba.org.uk/coba_latest/coba-content-report-2019-investment-in-uk-content-by-members-crosses-1-billion-pa/)> accessed 6 September 2020.

<sup>62</sup> Government Response (note 32).

<sup>63</sup> Section 97(2).

<sup>64</sup> HC Deb 18 July 2019, vol 663 col 47WS.

<sup>65</sup> Nigel Adams, 'Statement UIN HCWS66 made on 27 January 2020' <<https://questions-statements.parliament.uk/written-statements/detail/2020-01-27/HCWS66>> accessed 8 September 2020.

the inclusive nature of this undertaking. To this end, it should be noted that Ofcom has been particularly generous in their granting of permission for the exclusive licensing of listed sporting events.<sup>66</sup> For example, Ofcom granted consent for Sky Limited (the UK's leading subscription broadcaster) to broadcast exclusive live coverage of the final, semi-finals and matches involving the Home Nations' teams in the ICC Cricket World Cup in 2019. Under South Africa's regulations, this event would fall under Group A, and it would therefore automatically not have been possible for a subscription broadcaster to acquire these rights.

## **Conclusion**

Indeed the Code is rigid regarding what is required of broadcasters, specifically in the film and sports sector. Even though other aspects of the provisions in the Code are commendable, the flaws regarding these sectors outshine them and make it the talk of the town. The government has noticed the uproar, and it is expected that the right thing will be done as soon as possible. Stakeholders should be engaged in a negotiation process regarding their rights, and feedback from stakeholders should be encouraged to produce a Code that will be favourable to all concerned. Nigeria's creative industry should unite and engage with the government to prevent stifling regulations.

The atmosphere in South Africa appears tense as well in comparison to Nigeria, and key stakeholders do not support the broadcast regulations. Many are dependent on revenue received from exclusive sale of licenses to broadcasters which is jeopardised by the regulations. Again the process of drafting these regulations are flawed by the failure to involve those that matter the most in the industry. A Yoruba is saying in Nigeria that you do not shave the head of a person in his absence. In similarity to this situation, issues pertaining to stakeholders in the broadcast industry should not be done in their absence.

The question of exclusive broadcasting of sporting events in the United Kingdom is better than the situation in both Nigeria and South Africa. The United Kingdom must have adopted a different approach to the same issues. This approach is a case-by-case approach which is inclusive and flexible and balances the interests relating to FTA and subscription broadcasting.

The United Kingdom is more concerned with the formation rather than the execution of policies. New events can be added and old events deleted from the list of events in Group

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<sup>66</sup> A full list of approved applications can be found at the following: Ofcom, 'Approved applications' <<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/code-sports-events/approved>> accessed 6 September 2020.

A and B by the Secretary of State when necessary subject to consultation with the BBC, the Welsh Authority, Ofcom and the holder of the rights for the event in question. Permitting such modifications on the list of event shows it is a collective and changing scenario suitable to all concerned.

Indeed the amended provisions of the 6<sup>th</sup> NBC Code goes against the provisions of the Copyright Act and appears unfair and unreasonable. It is recommended that the Code be revised to reflect the protection which the Copyright Act intends while still maintaining the objectives of the amended Code.