



RESPONSE OF THE INTERNET SOCIETY, SOUTH AFRICA CHAPTER, TO THE CONVERGENCE BILL

This response has been drafted to a request by the Department of Communications to the Convergence Bill that was made public in March 2005 and is required to be submitted by April 08, 2005.

THE INTERNET SOCIETY OF SOUTH AFRICA

The Internet Society is a non-profit, non-governmental, international organisation. It has more than 24,000 individual members in over 180 countries worldwide who represent a vast and diverse group of the Internet user community.

The work of the Internet Society focuses on four "pillars:" standards, public policy, education and outreach, and membership. The Internet Society South Africa chapter (ISOC-ZA) was formed in 1997. Today there are over 250 members of ISOC-ZA that are individual Internet users of all ages, cultures and racial groups.

THE STRATEGIC LANDSCAPE

- 1) Information, communications and technology has the potential to stimulate employment, development and wealth creation in all sectors of the South African economy. Drafters of legislation should aim to make the laws governing the country's ICT sector as simple as possible in order to enable this employment creation and skills development, while benefiting South African consumers, who are the backbone of such an industry.
- 2) Successful expansion in the telecommunications industry has been seen in the areas where competition exists. Over the past 10 years, the cellular telephone industry has seen enormous growth, overtaking the teledensity of fixed line telephone services. During the same period technologies earmarked for exclusive use by certain companies have failed to keep South Africa competitive on the global stage. For example, South Africa's connectivity rating has slipped dramatically when compared to other developing economies.
- 3) While the Internet Society of South Africa (ISOC) wants to see greater competition in the sector, it also recognises that total deregulation is not desirable either. Areas where government has a role include the licensing of radio spectrum and other such potentially scarce resources. ISOC believes that less regulation means more development for the ICT sector.
- 4) Government also has a role in protecting the consumer against unscrupulous business practices, while at the same time putting in place the mechanism to ensure free and fair commercial competition.

WHAT IS GOOD AND WELCOME

- 5) ISOC, once again welcomes the Convergence Bill and sees it as an important step in bringing South Africa in line with best international practice. The Bill goes a long way to improving the state of competition within the country's ICT sector as well as regulating the competition that exists.
- 6) ISOC believes that legislation should be as simple and light as possible that is aimed at lessening the burden on the regulator, ensuring that consumers and providers alike understand their rights while reducing the potential for unenforceable laws. The Society welcomes the increased muscle given the regulator – the Independent Communications Authority of SA (ICASA) – this will help ensure that an impartial and publicly accountable body will be able to ensure free and fair competition, whilst breaking the incumbent monopoly. It also welcomes the clarity that has been provided by the Bill as regards the new powers of ICASA.
- 7) ISOC applauds the proposal to make ICASA a self funded body with a larger proportion of license fees going to it. A well funded and resourced regulator will markedly increase its abilities to carry out its duties. However it notes that funding for ICASA is less clear in the Convergence Bill than in

- the previous draft Convergence Bill.
- 8) The introduction of forced interconnection between networks will hopefully mean consumers will not have to pay high interconnection costs.
 - 9) The aspects in the Draft Bill covering a strong and self-funded regulator, consumer protection and interconnectivity are seen as very necessary and welcome developments.
 - 10) ISOC welcomes the intended repeal of the Telecommunications Act, amongst others, by the Convergence Bill and sees this move as a positive move to allow for a single piece of legislation to drive communications in South Africa.
 - 11) ISOC notes that the Convergence Bill has increased the level of public participation and wishes to welcome this addition.
 - 12) ISOC welcomes the introduction of consumer codes of conduct as a measure to protect the consumer. ISOC assumes that the drafting of these codes of conduct will be subject to public participation and notes further that this is not required in terms of section 60.
 - 13) The addition of a transitional section to allow for current licence holders to continue to provide services is to be welcomed as this will hopefully provide legal certainty during the transition period.

CONCERNS

- 14) The Convergence Bill appears to be very general in its scope and so does not provide certainty with regard to a multitude of issues. Specifically, the lack of certainty with regard to definitions results in a great deal of confusion. As many of the definitions relate to further definitions, which in turn relate to further definitions, it is easy to imagine that confusion could result from this Bill.
- 15) ISOC notes that in its previous submission it asked for "some indication of the future regulations that will affect communications providers". It would like to restate this request, bearing in mind the judgement of *In Re Pharmaceuticals* where it was held that the lack of regulations created a legal lacuna that allowed drugs to be dispensed without any guidelines. In order to prevent a similar situation ISOC requests that the regulations that would be put in place in terms of the Bill be provided at the same time as the Bill itself. This would have the effect of clarifying the intention of the legislator and could allow for all parties to have a clearer understanding of the intention of the Bill and in turn allay some of the fears expressed by the public.

NEED FOR PUBLIC PARTICIPATION IN FORMULATING LEGISLATION

- 16) While ISOC does acknowledge the addition of public hearings that can be requested by the Authority, it wishes to reiterate its suggestion that final regulations be subject to mandatory public hearings while interim regulations can be implemented immediately but would have a limited life span.
- 17) ISOC also wishes to note that the deadline of 08 April 2005 provided insufficient time for a full consultation of ISOC's members, which it regrets.

LICENSING CONTENT AND APPLICATION PROVIDERS

- 18) Once again ISOC is particularly concerned about the apparent need for a website owner or other types of content providers and application providers to obtain a licence. Malaysia, a developing with a vibrant and fast growing ICT sector, has adopted similar convergence, legislation, but licences for content providers are not required. ISOC anticipates that the licensing of content providers will have the following effects:
 - a) Website owners (and other content creators) and application service providers would move their services offshore.
 - b) Investment in communications in South Africa would be discouraged.
 - c) Free speech would be discouraged.
 - d) Further complications would be placed before small business owners.
 - e) Innovation within the sector would be discouraged.
- 19) Even if it is the intention of the Minister to exempt web site owners (and other content creators) or application services from having to obtain a license, ISOC believes that this intention should be made clear in the legislation and this decision should not remain in the province of the Minister. ISOC submits that it is inappropriate to create the possibility for licensing of web sites only for them to be exempted again.
- 20) The concept of a licence for both application providers and content providers remains an area of concern. While the concept of regulating a finite resource, such as the radio broadcast spectrum or telecommunications infrastructure should be subject to enabling legislation, ISOC is concerned that

even the allowance for a requirement that application or content providers should require a licence will have a tremendous and unnecessarily chilling effect on ICT in South Africa. ISOC would further request clarification as to any global precedents that may exist regarding the licence of application and content providers.

- 21) ISOC notes that a fee of 1 percent of the annual turnover of licence holders could be required in terms of s81(2) of the Bill. While in certain circumstances this may be appropriate, such as in the case of Communications Network providers, clarity on this point, in the form of regulations, is necessary. Content and application services often only make up a small portion of a companies turnover. Does the company now pay a fee based on the total turnover or must the accounting be separated? Either way it places an unfair burden on companies, SMMEs in particular which is contrary to an object of the act.
- 22) While ISOC understands that this legislation is meant to enable the Authority to regulate the communications environment with as free a hand as possible, it considers the "framework" of the Convergence Bill to be overbroad in that it allows for the possibility of content providers and application providers requiring a licence. ISOC cannot envision the need for content providers to be controlled in this manner and notes that illegal content is generally governed by the applicable legislation such as the Gambling Act, Banking Act, ECT Act and common law. The addition of further unnecessary legislation is seen as counter-productive.

THE DIFFERENCE BETWEEN INFRASTRUCTURE AND CONTENT PROVIDERS

- 23) ISOC would like to emphasise the differences between infrastructure providers ("communications network service providers") and "content" and "application" providers. In order to speak intelligently about "infrastructure providers" and "content" and "application" providers ISOC has been forced to assume what each of these phrases meant as the definitions contained within the Bill were too wide to be of use. In many cases the relationships between definitions appear to be incorrect. Content and application service providers merely use telecommunications as a more efficient way of delivering content and services to clients and have erroneously been drawn into the ambit of telecommunications. For example banks now provide online banking, an application service, which uses telecommunications. Online banking is not telecommunications just as over the counter banking is not telecommunications.
- 24) Infrastructure providers generally deal with limited resources, such as a limited frequency spectrum for radio waves. As such, there tends to be a finite number of possible infrastructure providers. An independent authority such as ICASA needs to appropriately manage these scarce resources in order to prevent unfair competition and the potential for chaos.
- 25) Keeping the current monopoly in infrastructure providers, especially in the area of fixed line providers, is disastrous for the consumer. ISOC hopes that this Bill will be used to expand competition in the area of infrastructure providers in a controlled but rapid way, and looks forward to the time when local telephone calls will be on a par with other forward thinking developed and developing economies.
- 26) In contrast to infrastructure providers, content and application providers deal with unlimited resources and so the number of websites and other content and application services in existence are only limited by our imaginations. *The requirement to licence these entities, even at no cost to the licence holder, is seen as an unnecessary barrier to entry and having a chilling effect on the sector with the resultant loss of jobs and unenforceable law. ISOC is opposed to the issuing of licenses in this area of communications.*

CONCLUSION

- 27) ISOC believes that the Convergence Bill is a welcome development which needs to be refined to make it enforceable and appropriate to South Africa. While a broad approach to communications may be necessary in order to ensure that every communication type is caught in the legislative net, ISOC believes that the current legislation, notwithstanding the need for flexibility and the improvements on the Draft Convergence Bill, is still overbroad and confusing. It is hoped that some of the issues contained in this document could be clarified in order for ISOC, and indeed all of South Africa, to be able to accurately assess the impact of the Bill.
- 28) The Internet Society of South Africa would like to thank the Department of Communications for their consideration.

CONTACTS

Alan Levin Chairman: ISOC Cape Town Email: alan@isoc.org.za Phone: +27 21 4097997

Web: <http://www.isoc.org.za/>