

28 October 2020

RESPONSE TO CONSULTATION

PUBLIC CONSULTATION NOTICE

PROPOSED PROMULGATION OF THE LESOTHO COMMUNICATIONS AUTHORITY (INTERNET BROADCASTING) RULES, 2020

<https://www.lca.org.ls/proposed-promulgation-of-the-lesotho-communications-authority-internet-broadcasting-rules-2020/>

INTRODUCTION

The Internet Society's purpose of existence is to promote the open development, evolution, and use of the Internet for the benefit of all people throughout the world.

Internet Society Lesotho Chapter's mission is to act locally to support the mission of the Internet Society.

This document is an official response of the ISOC Lesotho Chapter to the draft rules in terms of the public notice on the LCA website.

SUMMARY OF RESPONSE:

ISOC Lesotho is opposed to the rules in their entirety. These draft rules, if promulgated, will interfere with the rights and freedoms of citizens enshrined in the Constitution of Lesotho. These are the freedom of expression, the freedom of peaceful assembly and the freedom of association. The Internet is used by individuals and organisations to share information and knowledge freely and to conduct business. These rules will impede the ability of individual and organisations, including our organisation, to communicate and conduct business freely. We acknowledge that there is a public interest in the regulation of harmful behaviours on the Internet. However, these draft rules are an inappropriate instrument for dealing with what may amount to criminal acts. The draft rules are so disproportional that if enforced, will effectively shut down any content production and social media communication in Lesotho. If this extends to resources hosted abroad that will result in one of the most strict content blocking regime. In addition, the draft rules if promulgated have investment implications, and as such would likely kill innovation and incentives for investment, either foreign or local. They create a constricted environment where investment will not be a recommended option. This means that Lesotho will need to depend for many years on foreign companies and will not be

able to create its own digital economy. The objectives of the draft rules are vague, and it is not clear what outcome the draft rules are supposed to achieve. It is our considered view that these rules are not necessary and should not be promulgated.

DETAILED RESPONSE

1. DEFINITIONS

The draft rules provide the following definitions contradicting definitions:

- a) “private communication” means any message, whether text, picture, video or audio that is sent between two specific and identifiable persons;

What if communication is between 3 and 99 persons?

- b) “Internet broadcasting” (under Objectives and Application):

(4) Without limiting the generality of rule 3(2), the following shall be deemed internet broadcasting:

- (a) Internet posts accessible to at least one hundred internet users in Lesotho, whether individually or in a series; and
(b) Internet posts by users who have more than one hundred followers in Lesotho.

Our submission is that the definition of Internet Broadcasting amounts to the misappropriation of the *Communications Act 2012* and *Broadcasting Rules 2004*.

Figure1 - Extract from the Communications Act 2012

PART IX – BROADCASTING (page 229)

Broadcasting Licensing

38. (1) In granting licences for the provision of broadcasting service, the Authority shall seek to ensure that the public has access to

- (a) a diverse range of broadcasting services, including -

- (i) public broadcasting services;
- (ii) private broadcasting services;
- (iii) commercial broadcasting services; and
- (iv) community broadcasting services;

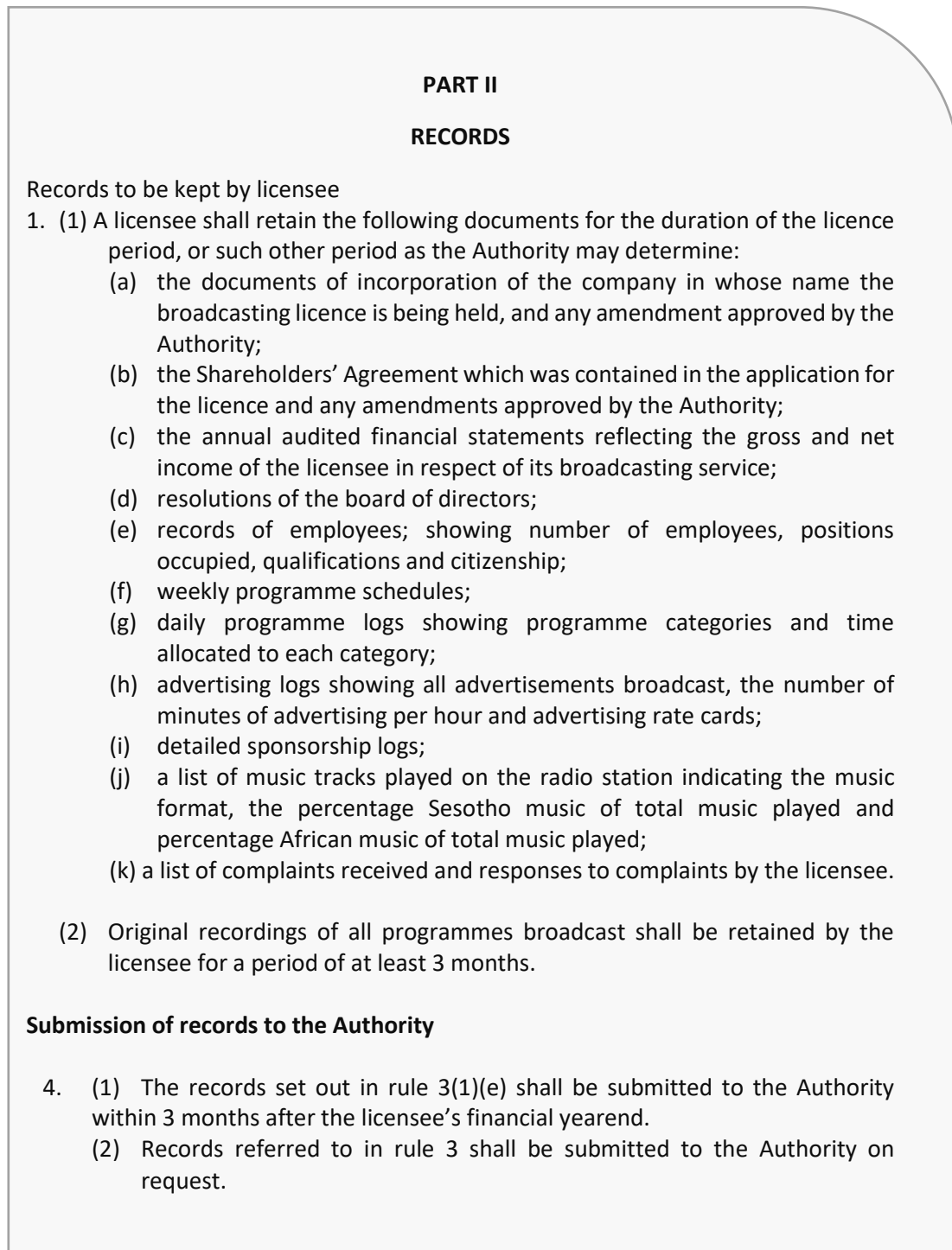
- (b) a diverse range of broadcast content, including -

- (i) news;
- (ii) educational;
- (iii) cultural;
- (iv) religious; and
- (v) sports and entertainment programming;

- (c) a diverse range of opinions regarding matters of public interest.

(2) Audio, video or any content distributed through the internet may be licensed or regulated as broadcasting.

Figure 2: Extract from Broadcasting Rules 2004



- a) Communication on the Internet does not fit the definition of a broadcasting service envisaged by the Communications Act 2012. Posting content, regardless of how many people may see it, is not necessarily a broadcasting service as defined by the Act. We place the extract from the Act in Figure 1 for reference. Individuals talking on the Internet cannot be presumed to be providing a broadcasting service which the Act refers to.
- b) The Broadcasting Rules (2004) even has categories of broadcasting licenses because it envisages broadcasting service providers eligible for licensing as organisations or business entities, not

individuals or business intending to use the Internet for regular communication or conducting business, other than a broadcasting service. For instance, Part II on “Records” requires things that an individual would not ordinarily have:

2. IMPLICATIONS OF THE DRAFT RULES ON INTERNET USERS IN LESOTHO

Internet users can be classified into different groups: individuals, groups based a particular interested, governments and their agencies, private businesses, international organisations, political parties and religious organisations. All these internet user groups have the ability to post content and to comment on content posted by others.

The condition inherent in the definition of Internet Broadcasting, that the poster must register as an internet broadcaster if their post will be seen by 100 or more users in Lesotho poses an impossible situation for the following reasons:

- a) **Individual users:** When a person posts content on a website or digital platform, there is no way to anticipate what number of users in Lesotho will see the posted content. There is no way the poster can determine how many other Internet users in Lesotho have indeed seen the content so that they know that if they pass the threshold of 100 viewers.
- b) **Organisations (Government agencies, private business, civil society groups etc.):** When an organisation publishes content on a website or digital platform, the intention is to reach as many people on the Internet as possible. The Internet does not observe geographic boundaries. By implication of the definition of Internet broadcasting, LCA will require all organisations that have websites or presence on the digital platforms to register as Internet Broadcasters and comply with the Broadcasting Rules of 2004. This will make the cost of doing business unnecessarily high for the organisations in Lesotho.

The net effect of these rules will be to interfere with the freedom of expression of persons and organisations and decrease the revenue of Internet Services Providers (ISPs) and related businesses that drive content development. The rules will also increase the cost of doing business for organisations that rely on the Internet for communication and transacting.

3. IMPLICATIONS FOR THE DIGITAL ECONOMY IN LESOTHO

The need to contain the spread of COVID-19 has demonstrated to the world, the importance of a digital economy in making social distancing possible in the delivery of most services. Lesotho is not excluded from countries that have to take advantage of innovations that make social distancing possible. However, the draft rules will thwart such innovation in the provision of various services including education through locally based e-learning, webinars, retailing of goods and services online, and access to government services.

- c) The draft rules do not indicate the modalities that users might use to register. We are concerned that LCA may not have the capacity to handle initial applications and the annual administrative processes involved.
- d) Most internet users are going to be excluded from meaningful use of the Internet due to their inability to meet the Broadcasting Rules 2004 requirements for registration. Individual internet users will most likely not be able to complete an application process that requires audited financial statements. The submission of audited financial statements is, but one

example of the hurdles imposed by the 2004 broadcasting rules. Even several small businesses do not have audited financial statement to submit to LCA annually to be able to publish content online. This requirement automatically denies most internet users in Lesotho the freedom to conduct business or express themselves on the Internet lawfully.

- e) By the draft rules, civil society groupings such as churches, political parties, societies and clubs based in Lesotho, with more than 99 members are expected to register with LCA before they can conduct their business on the Internet. The adversely affects the freedom of association.
- f) The draft rules are so disproportional that if they are enforced they will effectively shut down any content production and social media communication in Lesotho. If this extends to resources hosted abroad that will result in one of the most strict content blocking regime. In addition, the draft rules if promulgated have investment implications, they would likely kill innovation and incentives for investment, either foreign or local. It creates a constricted environment where investment will just not be a recommended option. This means that Lesotho will need to depend for many years on foreign companies and will not be able to create its own digital economy.

4. CONCLUSION

It is not prudent for LCA to promulgate the draft Internet Broadcasting rules; the 2004 Broadcasting rules are not an appropriate regulatory instrument for application on individuals and businesses not dealing in the broadcasting business. The only impact is to curtail fundamental freedoms that the Constitution of Lesotho has granted to citizens.

5. RECOMMENDATIONS

- a) Make the government of Lesotho aware of the urgent need for the promulgation of the cybersecurity and cybercrime laws that will contain legal provisions which will define crimes committed within Lesotho or involve persons or organisations in Lesotho.
- b) Encourage the government of Lesotho to sign up to the international treaties that will make it possible to deal with cybersecurity threats of different types. One treaty that should be considered is the Convention on Cybercrime (2001) by Council of Europe.
- c) Advise the government of Lesotho to develop and implement a national cybersecurity strategy that will inform it of actions needed to manage cyber threats facing the country.
- d) The regulator implements an impact assessment to determine the unintended consequences of the draft rules. This is especially important since the rules for an old communications medium (broadcasting) are being imposed on a fundamentally different communications architecture (i.e. the Internet).