

EXPLANATORY MEMORANDUM ON THE DRAFT ONLINE REGULATION POLICY TO BE ADOPTED BY COUNCIL IN TERMS OF SECTION 4A OF THE FILMS AND PUBLICATIONS ACT, 65 OF 1996, AS AMENDED.

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1. BACKGROUND

This is the first policy developed to create a framework and give effect to the Films and Publications Act, 65 of 1996 (the "Act"), as amended in relation to online content distribution in the Republic of South Africa. The Draft Online Regulation Policy once adopted will bring about a comprehensive and fundamental transformation for online content regulation in the country and for the first time, industry, civil society and the Film and Publication Board ("FPB") will join hands and share the costs and responsibility for digital content classification and compliance monitoring to ensure that children are protected from exposure to disturbing and harmful content. For all intents and purposes, content includes films, games, publications and self-generated content uploaded or posted on social media platforms.

Prior to the development of the Draft Online Policy, the FPB consulted extensively with industry, civil society and key stakeholders. What came out of these engagements and consultations was that, in the context of ever greater convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the need for a comprehensive review of classification laws and regulations became apparent. In keeping with these findings the FPB in 2013 amended its Regulations to the Act which became operational in February 2013 and recently finalised the review of the Films and Publications Amendment Bill 2014. The review of the Regulations to the Act was predicated on the realisation that although the Act provides for platform neutrality in its application, the Regulations to the Act were ambivalent in relation to the process for classification of digital content.

2. POLICY DEVELOPMENT CONTEXT

Since March 2012 the FPB has been in discussions with some of the major distributors who requested the FPB to come up with a solution which would enable them to distribute digital content

in the country without risking contravening the Act. For example, one of the six major distributors currently distributing digital content in the country indicated to the FPB that as at the end of April 2012, it had sold 100 million ipads, in its apps stores in 155 countries worldwide, of these only three including South Africa did not have gaming apps. The distributor further indicated that as at the end of March 2012 it had developed in excess of 700 000 apps, of which more than 100 000 of them are gaming apps. Furthermore, 435 million store accounts have been opened, indicating the level of take - up by consumers of its services. On average, the distributor indicated that one consumer downloaded 100 apps and that 35 billion apps have been downloaded since launch of the service.

Although at the time the FPB was not specifically provided with statistics relating to the South African situation, industry trends in South Africa show an increase in the use of portable devices for gaming and social networking, and the expected boom in online gaming over the next few years. While these are positive developments and will be economically beneficial for the country, the downside to this is that there is also a proliferation of illegal content in and the abuse of social media platforms which are at times used by sexual predators to lure their child victims and people who advocate racist ideologies and therefore use these platforms to undermine the government's agenda on social cohesion. This was further confirmed during the FPB public awareness and education campaigns wherein parents, learners and society at large raised concerns about the rise of self-generated content, most of which involved school learners engaging in sexual activities and uploading images or video footages thereof on Facebook, Twitter, You-Tube or distributing same amongst their peers using mobile phones and similar devices.

The key concern for these parents and learners was that whilst there is a need for adults to be free to make their own informed media choices and for children to be protected from material which may cause harm, there continues to be a community expectation that certain media content, including digital content, be accompanied by classification information based on decisions which reflect the community's moral standards.

Recently there has been a several reports in the print media about the spate of hate speech and racist comments posted on public platforms such as Twitter and Facebook. Examples of such cases as reported in the media are the following:

- In February 2015 Sunday Times*(1) published an article about a case which came before the Human Rights Commission in which an individual posted racist comments on his Facebook page wherein he wrote "when I see a white man, I see someone who has robbed me of the privilege I was supposed to have." Thereafter he invited his friends on Facebook to join him at a "Big Black Braai" to celebrate the death of 42 people with white sounding names who died when the bus they were travelling in plunged into the Westdene Dam.

In the same article it was also reported that "in 2014 cases related to freedom of speech increased from 3% to 22% of the more than the 10 000 cases dealt with by the Human Rights Commission. Furthermore, social media platforms such as Facebook and Twitter contributed to this increase and appear to have shifted the discourse of free speech. These cases are often complex, containing elements of racism, poverty, ignorance and misguided hatred."

- In October 2014, the Financial Mail published an article about one of the Pretoria's top school being in a state of panic after naked pictures of at least 20 teenage boys were posted on Twitter in the country's biggest sexting scandal.

*(1) Article by Ahmed, CEO of the South African Human Rights Commission, page 21 of the Sunday Times published on February 1 2015.

The posting which was from a fake Twitter account depicted the boys in compromising sexual positions. It was further reported that despite the account and a Gmail address which was used to receive the photos being shut down within hours of the pictures being uploaded, school principals, parents and pupils involved are now worried about where the pictures will end up. The postings also sparked outrage on social media

- In January 2015 a video was uploaded on social media showing a popular pastor from KZN walking around naked in his home. The video also went viral and was accessible to persons of all ages.
- In September 2014 a Pastor from one of the popular churches in Pretoria made headlines when a video clip was uploaded on You-Tube showing him ordering members of his congregation, some of whom were minors, to graze like cattle and drink petrol to prove that humans can eat anything provided by God.

Upon classification, it was found by the Classification Committee of the FPB that although the themes of the video aforementioned are centred on religion, faith, scripture, miracles and beliefs, the video contained some instances of harmful imitative acts and techniques of a moderate nature. The footage of human consumption of petrol which is shown in the video clip may be harmful to young children under the age of 13 as their moral development is not complete. The video clip also appears to use religion to encourage or promote harmful behaviour which is in contravention of Section 18(3)(b)(ii) of the Act.

Although the other cases mentioned were not referred for classification by the FPB, it goes without saying that some of these videos, Twitter and Facebook posts, especially the ones which have elements of racism, contain hate speech and exposing the genitals of young boys can cause irreparable harm to developing minds. Furthermore, hate speech, racism and propaganda for war are prohibited and not protected by freedom of expression as provided for in section 16 of the Constitution.

3. PROBLEMS WITH THE CURRENT FRAMEWORK

A strong underlying theme of many of the submissions, particularly from industry players, was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content which is now available to South Africans. The Act lacks clarity in relation to the classification process for digital content and online media.

Most online distributors and members of civil society drew attention to aspects of the classification and content regulation framework in that it is failing to meet intended goals, and that it creates confusion for media content industries and the wider community. More specifically, the main problem identified was the piecemeal regulatory responses to changes in technologies, markets and consumer behaviour which have the potential to create uncertainty for both consumers and industry. These may raise questions about where responsibilities lie for driving change.

Against this background and in order to give effect to section 16 and 18 of the Act, it became imperative for the FPB to develop the attached Online Regulation Policy and to open the process for public consultations and inputs. Public participation and transparency in the process is a vital aspect of public policy formulation.

4. KEY FEATURES OF THE DRAFT ONLINE POLICY

Key features of the Draft Policy's model are:

- Platform-neutral regulation
The One legislative regime establishing obligations to classify content across all media platforms
- Clear scope of the type of content to be classified
This includes self-generated content uploaded on platforms such as You-Tube, Facebook and Twitter, feature films, television programs and certain computer games which are distributed online by streaming through the internet.
- Co-regulation and industry classification
This refers to classification of content by the industry subject to the FPB's regulatory oversight.
- Regulatory Oversight and guidance by the FPB
The role of the FPB in the application of the Policy and co-regulation scheme is defined.
- Platform-neutral regulation
Although the Act confers upon the FPB, jurisdiction over all distribution platforms, the FPB's classification and compliance monitoring activities have been until recently focused predominantly on physical distributions and less on online platforms. The convergence of media platforms brought by technology has made traditional distinctions based on how content is accessed or delivered less relevant. Accordingly, this Policy seeks to elevate the Act's 'platform-neutrality' to ensure uniform compliance by all content distributors regardless of whether the content is screened in cinemas, streamed via the internet to television, sold in retail outlets, provided online, or otherwise distributed to the South African public.

- The intention is to avoid inconsistencies manifest under the current classification regime and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence.

- Clear scope of what must be classified and self-generated content

The volume of media content available to South Africans has grown exponentially. There are currently over million web sites and hundreds of thousand 'apps' available for download on mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content, particularly self-generated content to be classified, it is the responsibility of the platform provider in consultation with the FPB to determine the scope of what must be classified.

Accordingly the obligation to classify content will not generally apply to persons uploading online content on a non-commercial basis. Child exploitative and pornographic posting, hate speech and racism may be prosecuted and the content creators be convicted and sentenced,

Internet intermediaries, including application service providers, host providers and internet access providers will bear the responsibility of putting in place content filtering systems to ensure that illegal content or content which may be harmful to children is not uploaded in their services.

In addition to the above the FPB through its online compliance monitoring work, may refer any self-generated video that is found to contain classifiable elements for classification to its classification committee, instruct the distributor to take down the unclassified content and only reinstate it after having complied with the FPB classification decision. In such an event the costs for classification will be borne by the online distributor. This is aimed at ensuring that the online distributors remain vigilant and that their filtering mechanisms are adequate to protect children against exposure to harmful content and that people with racist ideologies do not use these platforms to undermine Government's social cohesion and transformation agenda.

- Co-regulation and industry classification

FPB has come to the realisation that by assigning a greater role to the industry in terms of classification can thus focus on the content that generates the most concern in terms of community standards and the protection of children. In this regard, once adopted, the Policy will introduce elements of co-regulation into the classification system.

The co-regulation scheme provides for innovative and efficient classification decision-making mechanisms. Content may be classified by online distributors using the FPB classification guidelines and the Act, but subject to FPB's regulatory oversight and review. This will facilitate the provision of South African classification information in a media environment characterised by vast volumes of content.

- Regulatory Oversight and guidance by the FPB

Once the Policy is adopted, the FPB will retain the primary responsibility for regulating the application thereof. The FPB will be responsible for a range of functions, including but not limited to:

- encouraging, monitoring and enforcing compliance with the Act;
- auditing distributors complaints handling mechanism in relation to digital media content;
- auditing all media content self-classified by online distributors using the Act and the Classification Guidelines.
- providing and rolling out classification training to all registered online distributors;
- coordinating joint public awareness and education campaigns on cyber safety and digital content classifications with online distributors;
- liaising with relevant South African and international media content regulators, online distributors and law enforcement agencies to combat child pornography and sexual exploitation on the internet; and
- educating the public together with online distributors about the new Online Regulation Policy and promoting cyber safety.

5. POLICY CONSULTATION PROCESS

Public consultation is central to public policy making processes to firstly educate members of the public on the possible interventions to the challenge at hand, secondly to also obtain the necessary buy-in that is essential for the success of the policy. Public consultations will be as inclusive as possible. Consequently, FPB will visit all 9 provinces and mount an extensive public consultation campaign across the country.

6. CONSULTATION PARTICIPANTS

- Once adopted, the policy will have an impact on all South Africans and foreign companies distributing media content in the Republic of South Africa in relation to the manner in which they engage and use media platforms. In this regard, regulatory partners identified below and the industry are urged to consider the attached Draft Online Regulation Policy and submit their inputs or comments to the Film and Publication Board as directed.
 - ICASA, SABC
 - WASPA, ISPA
 - Universities, NYDA, Film and Media Schools and youth formation
 - MDDA, DOC, Brand South Africa
 - All content broadcasters and Distributors
 - Telecommunications and Network mobile operators
 - Online and gaming distributors

- Film distributors and content creators, including creators of self-generated content uploaded or posted on social media platforms
- FPB Employees at large
- Classifiers;
- Parents;
- Educators;
- Civil Society Organisation; and
- Internet users and bloggers
- Law Enforcement Agencies
- South African Police Services
- National Prosecuting Authority

SIGNED AND DATED AT CENTURION ON THIS 13TH DAY OF FEBRUARY 2015

(Signed)

Mrs. NFT Mpumlwana

Council Chairperson

Film and Publication Board