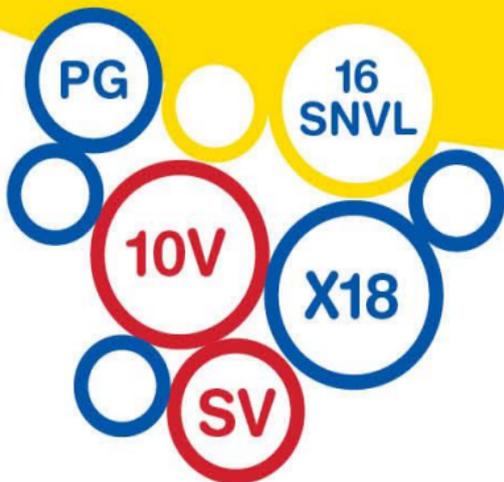


## DRAFT ONLINE REGULATION POLICY /2014



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**Abbreviations and acronyms:**

DOC – Department of Communications

EA – Executive Authority

Board – Film and Publication Board

## **DEFINITIONS**

**“Act”** – means the Films and Publications Act of 1996, Act No. 65 of 1996, as amended.

**“Board”** – means the Film and Publication Board

**“Online content”** – in relation to the distribution of films, games and certain publications, means distribution that is connected by computer or electronic devices to one or more other computers, devices or networks, as through a commercial electronic information service or the Internet.

**“Self-generated content or user-generated content”** (UGC) – refers to a variety of media available in a range of modern communications technologies. UGC is often produced through open collaboration by one or more people or coordinated participants, who interact to create a product or service online, which they make available to contributors and non-contributors alike.

## **1. INTRODUCTION**

The Film and Publication Board (Board) is a public entity of the Department of Communications, established in term of the Films and Publications Act 65, 1996 (as amended in 2004 and in 2009).

### **1.1 The mandate of the Board can be summarised as follows:**

- 1.1.1 To regulate the creation, production, possession and distribution of films, games and certain publications by way of classification;
- 1.1.2 To protect children from exposure to disturbing and harmful material and from premature exposure to adult material;
- 1.1.3 To criminalise child pornography and the use and exposure of children to pornography.

Section 18(1) of the Films and Publications Act requires any person who intends to distribute any film or game and certain publications in the Republic of South Africa first to register with the Board and to submit to the Board for examination and classification such film, game or publication. Although the current legislation is not platform-specific, the Board's compliance and classification activities have over the year focused more on physical platforms and less on the online space, resulting in children being exposed to unclassified content accessed through the internet and other mobile platforms.

Media convergence – a new technology trend enabled by the digitisation of media content, the widespread availability of high-speed broadband connections, and the proliferation of Internet-enabled devices – has fundamentally transformed the way media content is distributed and consumed. Consumers can now access media content across geographic boundaries, anytime, anywhere, and however they want it.

Until recently the Board adopted a fragmented approach in responding to the demands of industry players and online distributors for a solution to enable them to classify and distribute online content in the Republic of South Africa.

Council and several stakeholders have argued strongly for the need to move from piecemeal responses that apply the existing classification framework to each new technological development, towards one that is framed in such a way as to be adaptive to broader convergent media trends. Further, the Executive authority has also called for a framework

that can adapt to 'the rapid pace' of technological change in media available to and consumed by the South African community.

Strategic object 4 of the Board's five-year strategic plan requires it to ensure the effective and innovative regulation of content distributed online, mobile and related platforms to protect children and inform the general public. In response, in August 2014 Council approved the Board's Online Content Regulation Strategy. This strategy lists as its core objectives the following:

- to ensure classification and compliance monitoring of digitally-distributed content;
- to provide appropriate technology for online content regulation;
- to inform and educate the community on the challenges of digital content; and
- to partner with national and international regulators on cross-border regulation.

Further, the Board has recently finalised the review of its legislation, the Films and Publications Amendment Bill, 2014 ("the Bill"), and submitted it to the Minister of Communications. Once enacted and applied in conjunction with the approved Online Content Regulation Strategy, the Bill will create a legislative framework that will ensure a greater role for online distributors in classifying their own content on behalf of the Board, using the Board's Classification Guidelines and the Act. Further, in the context of the ever-greater convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the framework will also make it possible for the industry to enter into co-regulation agreements with the Board for the purposes of content classification and compliance monitoring.

Section 4A of the Act empowers Council, in consultation with the Minister, to issue directives of general application, including classification guidelines, in accordance with matters of national policy that are consistent with the purpose of this Act. Thus on 16 October 2013 Council resolved to enact an online policy that issues directives on how the Board must regulate the distribution of online content in the Republic of South Africa.

Against this background, in order to give effect to the above Council resolution, the goals set out in the Online Content Regulation Strategy, and the Bill, the Online Regulation Policy is hereby enacted. This policy, read with the Online Regulation Strategy and the Bill, will also ensure that classification focuses on media content, rather than on platforms or delivery technologies. This is necessary because regulatory frameworks for media based upon their delivery platform have proven to be unsustainable over time.

## **1.2. The context of media convergence**

Developments associated with media convergence in South Africa include:

- increased household and business access to high-speed broadband internet;
- the digitisation of media products and services, as seen with the rise of YouTube, Apple iTunes, and other global digital media platforms; the convergence of media platforms and services for both established and new media; the globalisation of media platforms, content and services, making nationally-based regulations more difficult to apply;
- the acceleration of innovation, characteristic of a more knowledge-based economy;
- the rise of user-created content, and a shift in the nature of media users from audiences to participants; greater media user empowerment, due to greater diversity of choices of media content and platforms, and the increased ability to personalise media; and
- the blurring of lines between public and private media consumption, as well as the difficulty of applying age-based access restrictions, as more media are accessed from the home through converged media platforms.
- piecemeal regulatory responses to changes in technologies, markets and consumer behaviour, resulting in uncertainty for both consumers and industry, and raising questions about where responsibilities lie for driving change.

## **2. APPLICATION OF THE POLICY**

This Online Regulation Policy applies to any person who distributes or exhibits online any film, game, or certain publication in the Republic of South Africa. This shall include online distributors of digital films, games, and certain publications, whether locally or internationally. Upon approval this policy shall have the full effect and force of law, as stipulated in section 4A of the Act.

## **3. OBJECTIVES OF THE POLICY**

The objective of this policy is to create a regulatory classification and compliance monitoring framework, giving effect to sections 18(1) and (2) of the Films and Publications Act 65 of 1996 as amended (“the Act”), by enabling effective regulation and speedy classification of

digital content by the Board, and to create an opportunity for co-regulation between the Board and the industry for the classification of digital content distributed on mobile and digital platforms.

#### **4. GUIDING PRINCIPLES FOR AN ONLINE CONTENT REGULATION POLICY**

The Board has identified eight guiding principles for a policy that aims to provide an effective framework for the classification and regulation of online media content in South Africa.

The eight guiding principles are that:

- (1) South Africans should be able to read, hear, see and participate in media of their choice;
- (2) communications and media services available to South Africans should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;
- (3) children should be protected from material likely to harm or disturb them;
- (4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;
- (5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;
- (6) the classification regulatory framework should not impede competition and innovation, nor disadvantage South African media content and service providers in international markets;
- (7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and
- (8) classification regulation should be focused on content rather than on platform or means of delivery.

Against this background, this policy seeks to create and enhance cooperation between the Board and the industry to ensure uniform classification, labelling and compliance monitoring of digitally distributed content.

Co-regulation between the Board and the industry will also ensure that the industry assists to efficiently provide classification information to South African consumers under the scope of the Act.

## **5. POLICY ON ONLINE DISTRIBUTION OF DIGITAL FILMS, GAMES, AND CERTAIN PUBLICATIONS**

5.1. In order to ensure the uniform classification of content and the effective regulation of digital content distribution by the Board in the Republic of South Africa, the following policy is hereby enacted:

5.1.1 Any person who intends to distribute any film, game, or certain publication in the Republic of South Africa shall first comply with section 18(1) of the Act by applying, in the prescribed manner, for registration as film or game and publications distributor.

5.1.2. In the event that such film, game or publication is in a digital form or format intended for distribution online using the internet or other mobile platforms, the distributor may bring an application to the Board for the conclusion of an online distribution agreement, in terms of which the distributor, upon payment of the fee prescribed from time to time by the Minister of DOC as the Executive Authority, may classify its online content on behalf of the Board, using the Board's classification Guidelines and the Act; or

5.1.3 Upon payment of the prescribed fee for each title submitted, submit electronically each digital game or film by providing the Board with a link from which the Board will access the online game or film for classification.

5.1.4 Where it is convenient and practical to do so, the Board may dispatch classifiers to the distributors' premises for the purposes of classifying digital content. In such an event the classification shall be deemed to be the classification process of the Board, and the distributors shall ensure that the work of classifiers takes place unhindered and without interference.

5.1.5 In the event that an online distributor arranges to have online content classified by the Board's classifiers in terms of clause 5.1.4, the distributor shall first satisfy the Board that it has storage facilities to store all classified content for audit and related purposes.

5.1.6 The dispatching of classifiers in terms of clause 5.1.4 shall be subject to the Board and the online distributor concluding an agreement in terms of which the online distributor, amongst others, indemnifies the Board for any claim, loss or damage arising from the classification services being rendered at the online distributor's premises.

5.1.7 For the purposes of this policy, the words 'online' and 'digital' are used interchangeably.

5.1.8 The terms 'distributor' and 'content provider' are also used interchangeably.

5.1.9 Online distributors of digital content classified in terms of either clause 5.1.2 or 5.1.3 shall ensure that, in all content distributed via the various media distribution platforms, they display the Film and Publication Board classification rating and logo, as prescribed in Regulation 21 of the Regulations to the Act and as shown in the example below:



## **5.2. Classification pursuant to an online distribution agreement**

In the event that a content provider or distributor chooses to classify its own content in terms of 5.1.2 above, the distributor shall first satisfy the Board that the rating system to be used for classification is aligned with the Board's classification system and Classification Guidelines, and that the distributor is capable of generating classification ratings and symbols as indicated in 5.1.9 above.

## **5.3. Labelling of digital content distributed online**

5.3.1. Upon classification of digital content in terms of either clause 5.1.2 or 5.1.3, all registered online distributors of digital content shall ensure that, prior to distributing any film, game or publication online, they submit to the Board an application, in the prescribed form, for permission to use the FPB logo.

5.3.2. Upon granting such permission, the Board shall also issue the online distributor with a series of barcodes that will have to be displayed by the content distributor along with the classification decision.

5.3.3. In all classification decisions for digital content, the online distributor must ensure that the Board's classification decision and logo is conspicuously displayed on the landing page of the website, in the website catalogue of the online distributor's website landing page, at the point of sale, and during the streaming of the digital content.

#### **5.4. Transitional arrangements**

5.4.1. It is hereby recorded that the Board has entered into transitional agreements with a number of online distributors who are already distributing digital content in the Republic of South Africa using a classification rating system not aligned with the Board's Classification Guidelines and the Act.

5.4.2. Notwithstanding the duration of each individual contract concluded with online distributors, all online distributors shall ensure that on or before the 31<sup>st</sup> of March 2016, The ratings systems used for the classification of content intended for distribution in the Republic of South Africa are aligned with the Board's Classification Guidelines and the Act.

5.4.2. As at the 31<sup>st</sup> of March 2016, no online distributor shall be allowed to distribute digital content in the Republic of South Africa unless such content is classified in terms of the Board's Classification Guidelines, or a system accredited by the Board and aligned with the Board's classification Guidelines and the Act.

5.4.3. All content distributed in the Republic of South Africa at the end of the transitional period shall have been classified in terms of the Board Classification Guidelines and shall display the Film and Publication Board classification decision and logo as illustrated in clause 5.1.9.

#### **5.5. Authorisation of distributors' classifiers**

5.5.1. No classification of online media content shall be undertaken by any distributor unless the distributor has been authorised by the Board.

5.5.2 The Board shall not grant authorisation to any distributor unless the distributor satisfies the Board that it has in place a classification and rating system in terms of which the classification process and classification decisions are founded upon the decision-makers consistently applying the Act and the Board's Classification Guidelines, adhering to agreed standards, and employing sound decision-making practices.

5.5.3 The object is that all classification decisions, whether made by the Board or by distributors, will be made in the same way, using the same classification tools for the same classification outcome.

5.5.4 To ensure that all distributor classifiers are classifying content consistently and are properly applying the statutory classification criteria, the distributor's classifiers must have been trained and certified by the Board. The Board will only certify such classifiers if they have completed training approved by the Board and have demonstrated competencies in the application of the Board's Classification Guidelines and the Act.

5.5.5 In granting authorisation, the Board shall retain the power periodically to renew authorisations and to undertake refresher training to ensure that classifiers stay up to date with changes in legislation, including the statutory classification guidelines, and to maintain their classification skills and knowledge at the required level of competence.

5.5.6 Authorised classifiers may be employed full-time by major online content distributors, or they may be engaged by content providers on a classification task basis. Classifiers who are authorised and trained to meet the same minimum requirements and standards may have greater mobility and opportunities to work across media content industries.

## **5.6. Training**

5.6.1 In order to meet the training requirements in terms of clause 5.5 above, the Board shall develop material for a classification course, and shall deliver classification training for online distributor's classifiers.

5.6.2. The training provided by the Board shall be robust and comprehensive in order to ensure that there is consistency and accuracy in classification decisions.

5.6.3. Such training shall be conducted by professionals with appropriate qualifications to maintain a high level of public confidence in the quality of classification decision-making and in the integrity of the self classification arrangement.

5.6.4. The training shall include a requirement that provides for consistent, minimum classification standards, skills and knowledge for all authorised classifiers by mandating that they complete the training program provided by the Board.

5.6.5. Only the Board shall the power to determine the methodology and duration of the training, which may not last more than five days.

## **6. ONLINE DISTRIBUTION OF TELEVISION FILMS AND PROGRAMMES**

6.1. All digital content in the form of television films and programmes streamed online via the internet shall first be submitted to the Board for pre-distribution classification.

6.2. In relation to online television films and programmes streamed via the internet, the Board shall in certain circumstances, and for commercial and practical reasons, have the power to determine that such films, television programs and related content that have been classified under an authorised classification system are 'deemed' to have an equivalent Board classification.

6.2. However, to maintain the integrity of the Board's classification scheme, the Board shall only authorise robust and comprehensive classification processes that incorporate the Board's Classification Guidelines and are comparable to those provided for under the Act and the Board Classification Guidelines as reviewed from time to time. Essentially, the Board must be satisfied that authorised classification systems deliver classification decisions comparable to those that might be made if content were classified by the Board's classifiers operating under the Act.

6.3. Where the Board considers that a particular item of media content has generated controversy in another jurisdiction, or is likely to have a high profile on release, it shall have the capacity to call it in for classification by the Board or to request the content provider to classify the product, rather than allow it to be 'deemed'. Content providers will be required to make similar judgements of their own volition to minimise the risk of complaints or of an application for review of the classification.

6.4. The Board's determination concerning what content is to be classified by the Board is intended to operate in parallel with the content provider's determination about content that is deemed to be classified.

6.5. For the purposes of this clause 6, the online distributors shall ensure that their websites contain all classification decisions made by the online distributor, along with an explanation to consumers about how their classification systems work, and what content is 'deemed'.

## **7. PROHIBITION AGAINST CHILD EXPLOITATIVE MEDIA CONTENT AND CLASSIFICATION BY THE BOARD OF SELF-GENERATED CONTENT**

The rise of user-created content, supported by technological advancements in 'smart phones' and the availability of user distributor tools such as YouTube and other global digital media platforms, has shifted the nature of media users from being audiences to being participants. More and more South Africans, the majority of which are children are using "Contact services 'such as facebook and Twitter. The bulk of this media content is unclassified, and children are therefore left exposed to unclassified content on online platforms.

In order to minimise the risk of children's exposure to unclassified content on online platforms, it is hereby recorded that:

7.1 user created content includes any publication as defined in section 1 of the Act to include, inter alia, a drawing, picture, illustration or painting; recording or any other message or communication, including a visual presentation, placed on any distribution network including, but not confined to, the internet.

7.2 it is a criminal offence in terms of section 24C the Act, for any person to distribute or upload child pornographic images, posts, publications or videos on online distribution networks or social media platforms for the purposes of child exploitation.

7.3 online distributors must ensure that they comply fully with their obligations as set out in section 24C and 27A of the Act by ensuring that they take reasonable steps as are necessary to ensure that their online distribution platforms are not being used for the purposes of committing an offence against children, and report suspicious behaviour by any person using contact services to the Board and South African Police Services.

7.4. With regard to any other content distributed online, the Board shall have the power to order an administrator of any online platform to take down any content that the Board may deem to be potentially harmful and disturbing to children of certain ages.

7.5. In the event that such content is a video clip on YouTube or any other global digital media platform, the Board may of its own accord refer such video clip to the Classification Committee of the Board for classification.

7.6. The decision of the Board's Classification Committee shall be final and binding on the distributors, subject to the online distributor's right to appeal such a decision to the Board's Appeal's Tribunal.

7.7. Upon classification, the Board shall dispatch a copy of the classification decision and an invoice payable by the online distributor within 30 days, in respect of the classification of the content in question.

7.8. The fee payable in respect of the classification of content by the Board in terms of sub-clause 7.7 above shall be the sum equivalent to what the Board charges per title in respect of boxed films or games submitted to it for classification.

7.9. Failure to pay the said classification fee within the stipulated period may result either in the Board withdrawing the online distributor's registration certificate until the fee is paid, or in the online distributor being penalised and legal action being taken against the distributor in terms of section 24A of the Act

7.10. The online distributor shall, from the date of being notified by the Board in writing of the classification decision, take down the unclassified video clip, substitute the same with the one that has been classified by the Board, and display the Film and Publication Board Logo and classification decision as illustrated in clause 5.1.6.

7.11. Where the user-created content is prohibited or illegal content, the Board shall have the power, in addition to ordering the online distributor concerned to take down the content , to refer the offending and illegal content to the South African Police Services for criminal investigation and prosecution.

## **8. MATTERS THE BOARD MUST CONSIDER**

8.1. It is important that consumers are confident that the online distributor or content provider's system has been thoroughly assessed before being authorised. Consumers must be assured that the online distributor or content provider's systems have been carefully assessed so that the integrity and value of Board classification decisions is not compromised.

8.2. While no two classification systems will be entirely aligned, the Board considers it important that elements of the Board's Classification Guidelines be reflected in the authorised classification system, including:

- (i) independent decision-making;
- (ii) regard for community standards, particularly the need to protect children from harm;
- (iii) meaningful classification information;
- (iv) transparency of decisions and classification processes;
- (v) availability and integrity of review mechanisms;

- (vi) efficient and accessible public complaints processes;
- (vii) comparable classification categories and criteria, and endorsement by governments in other jurisdictions.

## **9. CHECKS AND SAFEGUARDS**

9.1. Allowing industry to classify its own content may raise concerns in certain sectors of South African society about achieving an acceptable balance between content providers' commercial interests and community needs and concerns.

9.2. Accordingly the Board shall retain the power to monitor industry classification decision-making and to penalise serious breaches.

9.3. In the event that an online distributor is found to have manipulated or provided false information to the Board or any other person with the sole object of achieving a classification decision that advances its own commercial interest, the Board may withdraw the online distributor's registration certificate, bar the distributor from the co-regulation regime, and direct that all media content belonging to the distributor be submitted to the Board for classification by the Board.

9.4. Under this policy, all industry classifiers, whether they classify for television networks, film distributors, or other content providers, are subject to the Board's regulatory oversight.

## **10. ONLINE DISTRIBUTION LICENSING FEE AND CLASSIFICATION FEE PER TITLE**

10.1. No online content distributor shall be authorised by the Board to distribute online content in the Republic of South Africa unless it has registered with the Board as an online distributor and has paid the prescribed online distribution licensing fee as determined by the Minister, and any other fees that the Minister may determine from time to time.

10.2. The above online licensing fee shall be paid annually, and shall escalate at the rate to be determined by the Minister.

10.3. Notwithstanding the provision of clause 10.1, the Board shall have the power to charge a classification fee per title submitted for the classification of digital content distributed in the Republic of South Africa. In this regard, the classification fee payable shall vary from case to case, but shall be based on the fee tariff prescribed by the Minister from time to time.

## **11. COMPLAINTS**

11.1. Complaints about the classification of content will be directed, in the first instance, to the content provider responsible for the classification decision. A complainant may lodge a complaint with the Board where that complainant considers that the complaint has not been satisfactorily resolved. Under the Board's model, the Board shall have power to investigate all valid complaints.

11.2. A content provider or online distributor authorised by the Board to classify its own content must develop a complaint-handling mechanism.

11.3. The complaint-handling mechanism must cover:

- (i) awareness and accessibility of the complaints mechanism;
- (ii) response time frames, and recording and reporting processes;
- (iii) processes for escalating serious complaints; and
- (iv) the review and reclassification of classification decisions, where appropriate.

11.4. The Board shall retain the authority to investigate complaints about classification decisions and about unclassified or unrestricted media content. In the course of investigating complaints (especially those that are more complex or serious), the Board may liaise with the content provider or online distributor to ascertain how the original complaint was initially addressed, to obtain reasons for the classification decision (if the content has been classified), or to discuss options for resolving the complaint.

11.5. The Board may, in response to a valid complaint about media content, issue the content provider or online distributor with a 'classify' notice or a 'restrict access' notice.

11.6. The Board may of its own accord direct the content provider or online distributor to classify content or review the original classification decision, arising from investigation into a complaint.

## **12. REVIEWS OF CLASSIFICATION DECISIONS**

12.1. A review of a classification decision involves the making of a new decision on the merits, which replaces the original decision.

12.2. Under this policy, all classification decisions for all media content, including television programs streamed through the internet, are reviewable.

12.3. The Board shall have the power and authority to review all content, including content that has been voluntarily classified by the online content provider or distributor.

### **13. AUDITS OF INDUSTRY CLASSIFICATION DECISIONS**

- 13.1. As part of the quality-assurance process and monitoring of industry classification decision-making, the Board shall have the power to undertake post-classification audits of media content that must be classified and of media content that must be restricted to adults.
- 13.2. In conducting audits, the Board may draw on the classification experience of its classifiers as the independent benchmark decision-maker.
- 13.3. The Board shall use the audits as the primary mechanism by which the Board proactively manages industry classifiers and classification activities, to maintain a high standard of decision-making.
- 13.4. Further, the Board shall use the audits as the means for advising content providers and/or individual classifiers about any issues identified with the classification decision-making process, and may initiate remedial action to assist classifiers to improve their job performance. This might involve liaising with the online distributor or content provider and suggesting additional training or supervision. In some cases, audit outcomes might require content providers to revisit decisions as appropriate.
- 13.5. The Board will also use audits as an evidence base of serious and repeated misconduct, in which case the Board will have the power to impose sanctions.

### **14. SANCTIONS REGIME FOR INDUSTRY CLASSIFIERS**

14.1. Sanctions are another means of protecting consumers and of ensuring that the integrity of the entire classification scheme is maintained. Sanctions are intended to be a 'last resort' to prevent industry classifiers from continuing to make classification decisions that are repeatedly misleading, incorrect, or grossly inadequate.

14.2. In keeping with the above principle, all content provider or online distributors authorised to distribute online content in the Republic of South Africa are subject to the penalty regime of the Board in terms of the Act, this policy, and any other directive that the Board may issue from time to time.

14.3. The Board shall have the power to impose fines and/or withdraw the authorisation of any content provider or online distributor who repeatedly makes decisions that are misleading, incorrect, or grossly inadequate..

## **15. CLASSIFICATION DECISIONS DATABASE**

15.1. Every content provider or online distributor authorised in terms of this policy shall establish and administer a centralised database to record classification decisions made by the classifiers of the content provider or online distributor.

15.2. The database shall include details such as the classification decision and any consumer advice, whether it is a Board or industry classification, the responsible organisation or classifier, and whether the content is original or modified.

15.3. The Board shall publish on its website a central and reliable database to enable online distributors and content provider to check whether content has already been classified.

## **16. POLICY REVIEW**

This policy shall be reviewed annually, based on legal and operational requirements.

16.1. The Chief Operations Officer (“COO”) shall coordinate the review of the policy.

16.2. This policy shall be reviewed when required by the Office of the Chief Operations Officer (“COO”), and approved by the Council. It shall become effective from the date approved or indicated by the Council.