FILM AND PUBLICATION BOARD
DRAFT ONLINE REGULATION POLICY

Submission by
The South African and Communications Forum

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SACF SUBMISSION ON THE DRAFT ONLINE REGULATION POLICY

1. Introduction

THE South African Communications Forum ("SACF") thanks the Film and Publication Board ("FPB") for the opportunity to participate in the shaping of the regulatory policy in respect of online content in South Africa by commenting on the Draft Online Regulation Policy, published in gazette No. 38531 dated 4 March 2015 (the "Draft Policy"). The SACF recognises the critical role that a reasonable and practicable online content regulation policy will play in furthering the development of the ICT sector which will further the development of the economy as a whole.

The SACF submission is comprised of three parts:

- Executive summary
- General comments
- Specific comments

SACF would like to confirm its willingness to participate in any further consultative process which the FPB may undertake in this regard.

PART A: EXECUTIVE SUMMARY

The Draft Policy states that on the 16 October 2013 the Film and Publication Board's Council resolved to "…enact an Online Regulation policy that would issue directives on how the Board must classify and regulate the distribution of online content in the Republic of South Africa to ensure cyber safety of children and that children are protected from disturbing and harmful content accessed through social media and mobile platforms."[1] a term such as "enact" is associated with legislation and is not recommended and is not recommended for use in a policy document.

The Draft Policy is very broad with many of its aspects either external to, or in direct contradiction and/or contravention of the legislation establishing and governing the Film and Publication Board.[2] This is problematic as a Draft Policy cannot confer additional powers outside those that the enabling legislation confers. Furthermore, in many respects the policy reads like a set of regulations as it imposes obligations and makes provision for sanctions for non-compliance.

The SACF notes that the release of the Draft Policy takes place against the backdrop of a comprehensive review of the Film and Publication Board Act and the ICT review process which was initiated by the Ministry of Communications with the publication of the Framing Paper (23 April 2013) followed by the ICT Green Paper published (24 January 2014) and the National Integrated ICT Policy Discussion Paper (14 November 2014). This process is expected to culminate into a complete

[1] Draft Online Regulation Policy, Government Gazette Number 38531 of 4 March 2015.
[2] The Film and Publication Board was established in terms of section 3 of the Film and Publication Act (No. 65 of 1996)

overhaul of the current legislative and regulatory framework governing films and publications and electronic communications. The SACF submits that the FBP should await the finalisation of the review process prior to finalisation of the Draft Policy.

The SACF submits as follows in respect of key aspects of the Discussion Document:

- The Draft Policy should be informed by Films and Publications Amendment Bill of 2014 and the Board's Online Content Regulation Strategy, both of which have still to be finalized and made public
- The Draft Policy should be withdrawn until the finalization of the ICT Policy Review Process and after the contemplated cooperation between various institutions responsible for regulating the ICT sector has taken place.
- The intended objective of protecting children from all forms of abuse has already been catered for by other legal instruments such as the Electronic Communications and Transaction Act and Sexual Offences Act among others.
- The SACF is of the view that the conduct of an impact assessment will assist the FPB in determining the financial burden and other implications of the Draft Policy to service providers who will be affected by it.
- Provisions relating to prior classification amount to prior constraint and limitation of freedom of expression without a just cause
- Draft Policy should be subjected to an impact assessment which could give an indication of the additional financial burden to local content creators and distributors
- The Draft Policy must be in line with the powers and functions legislated in the Act. Any attempt to broaden the application can only be done by Parliament through an amendment to the Act and not in the form of a policy document
- the Draft Policy document should only be limited to setting the goals of the FPB and the methodology that will be followed in order to achieve those goals

PART B: GENERAL COMMENTS

2. General Commentary to the Draft Online Regulatory Policy

- **The changing landscape of communication must be understood before embarking on an online content regime**

There is not only convergence between fixed and mobile technologies in the provision of telecommunications services, but there is also convergence in the methods by which telecommunications and broadcasting services are provided.

Previously two types of conceptual networks were conceived for very specific purposes:

a. The uni-directional broadcasting network was designed to distribute broadcasting content from a single point to multiple points (citizens); and

b. A bi-directional communication network enabled interactive voice communication between two citizens with each having terminal equipment connected to the common network.

Today all networks are technically capable of facilitating bi-directional communication (both for sound and pictures/video). The observable trend throughout the world is that the digitisation era has resulted in convergence at different levels: from broadcasting and telecommunications services at the network level to customer terminals at the subscriber level.

Competitive tension is emerging between signal distribution companies and telecommunication providers; whereas on the content layer there is tension between Internet content providers and broadcasters.

Competition is also occurring across international boundaries where content providers in one country are providing content services in another country without the required licences, using the local telecommunication networks as platforms.

Traditionally content providers made use of national broadcasters. Currently every communication network end-user has the potential to be a content generator and provider. Common content distribution platforms facilitate this content distribution to the mass market via bit/byte distribution networks.

The Figure below shows how an underlying network needs to adjust to accommodate the exponential rise in the conveyance of digitized information over the so-called NGN.

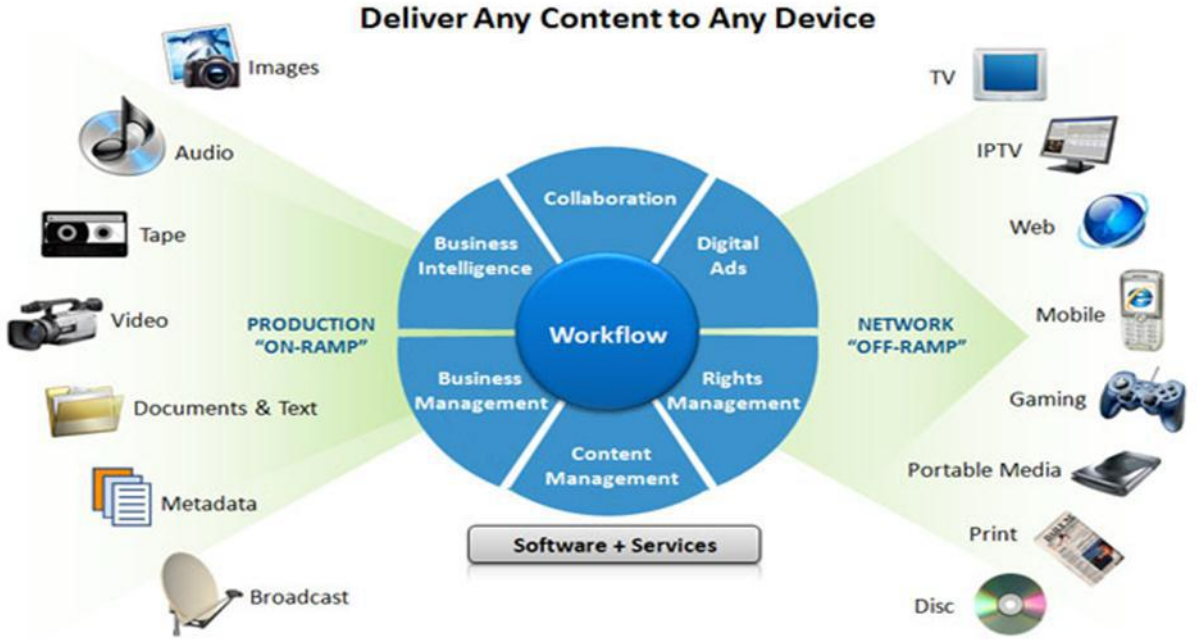

Figure 6: The Impact of Digitization on a Network
Source: http://www.cmswire.com/cms/web-engagement/enterprise-content-management-for-converging-media-channels-007804

But more importantly policymakers such as the Film and Publication Board must have appreciation for the new breed of content providers in this new dispensation, how citizens' rights are to be protected and how such a regime should be defined and enabled. At the core of this evolution lie the two sides of freedom of expression found in the Constitution namely the right of choice versus

the right of expression of citizens. Without mapping this new landscape and identifying each new role player, the development of any content regulation framework will be difficult and contentious.

- **Alignment with the ICT Policy Review Process**

In April 2012 the then Minister of Communications (now the Minister of Telecommunications and Postal Services) commenced with a comprehensive policy review for the information, communications and technology (ICT) sector. This ICT policy review process is expected to overhaul the current legislative framework for electronic communications sector. To this end the overriding objective of the Draft Policy should be to advance access to online content by the majority of South Africans. The SACF is concerned that the Draft Policy goes against this objective by prescribing provisions which amounts to censorship and which eventually undermines the right to freedom of expression and the right to receive and impart information using any medium as guaranteed in section 16 of the Constitution of the Republic of South Africa (Act 108 of 1996).

The SACF further notes that the Draft Policy is not aligned with the ICT policy review process relating to Audio and Audio-visual Content Services, Protection of children, classification, content standards institutional framework and specifically the recommendations of the ICT Policy Review Panel. The Integrated ICT Green Paper, which forms part of the ICT review process (published in Government Gazette 37261 of 24 January 2014) called for the definition of roles and responsibilities for different role players with the purpose of fostering collaboration in order to achieve specific policy objectives outlined in various laws governing the ICT sector. The Policy Review Panel has recommended that the DTPS work together with the Department of Communications (DoC) to facilitate cooperation between regulatory authorities (such as The Independent Communications Authority of South Africa (ICASA), the Advertising Standards Authority of South Africa (ASA), The Film and Publication Board (FPB), The Broadcasting Complaints Commission of South Africa (BCCSA) and the press ombudsman to ensure coordination and address protection issues in an era of technological convergence of the global ICT industry.

In light of the above the SACF is of the view that the draft policy is premature and suggests that the Draft Policy should be withdrawn until the finalization of the ICT Policy Review Process within a framework of cooperation among the various institutions responsible for regulating the ICT sector has taken place. A new Online Content policy should be born out of the ICT Policy Review process. This cannot be done in isolation by the FPB without proper consultation and without regard to the ICT Review Panel recommendations.

Further, it is clear that the Draft Policy is intended to be read in conjunction with the Films and Publications Amendment Bill, 2014 ("**Bill**") and the Board's Online Content Regulation Strategy ("**Strategy Document**"). Although the Bill has been submitted to the Minister for consideration, as we understand, it is not yet in the public domain. To the best of our knowledge, the Strategy Document is also not publicly available, which makes it difficult for the SACF to make informed comments on the Draft Policy.

- **Classification of content**

Section 18(1) of the Draft Policy provides that it is impermissible to distribute digital content in South Africa unless such content is first classified and the classification is displayed on the online content. This assertion is contrary to and goes against the decision of the Constitutional Court, in

Midi Television (Pty) (Ltd) v Director of Public Prosecutions (Western Cape) No. 100/06 of 2007 where the court held that "the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice." The judgement further stated "freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the rights amounts to limiting it". The SACF believes that provisions relating to prior classification amount to prior constraint and limitation of freedom of expression without a just cause.

- **Policy formulation**

Policy should inform regulations that implement the policy and shape the actions of operators. It is important that there should be a distinction between a policy and regulations. Since the document has been titled "policy document" it is important that its formulation reflect its nature of being a policy rather than regulations. It therefore should not contain any obligations or impose penalties.

Further, the SACF would like to recommend that the Draft Policy be subjected to an impact assessment which could give an indication of the additional financial burden that would be borne by local content creators and distributors due to the implementation of the Draft Policy. The impact assessment must also focus on the potential damage caused by the Draft Policy to South Africa's economic growth prospects, income inequality, poverty alleviation and job creation. A brief overview of this latter threat to South Africa's growth prospects is provided below.

- **Relationship between Socioeconomic Development and Converged ICTs: Potential Impact of the Draft Policy**

The catalytic role played by ICTs in socioeconomic development, poverty alleviation, job creation, societal stability etc. is recognised by the world through reports by entities such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) representing the whole United Nations Statistics South Africa. Such recognition has been instrumental in setting South Africa's national and ICT development targets in the National Broadband Development Policy (South Africa Connect) and is captured fully within South Africa's National Development Plan and other instruments of the National ICT Policy. In finalizing the Draft Policy, it is absolutely necessary to evaluate its potential impact on the national development targets. The short extracts below presents a brief statistical overview of the possible impacts of the Draft Policy that demand closer, intensive scrutiny through a formal impact assessment before finalizing the clearly well-intended policy draft.

a. Potential impact on the National Broadband Policy targets:

The National Broadband targets specified in the South Africa Connect policy and plan are:

SOUTH AFRICA CONNECT TARGETS (2013 – 2030)

Target	Penetration measure	Baseline (2013)	By 2016	By 2020	By 2030
Broadband access	% of	33.7% Internet	50% at 5Mbps	90% at 5Mbps	100% at 10Mbps

in Mbps user experience	population	access		50% at 100Mbps	80% at 100Mbps
Schools	% of schools	25% connected	50% at 10 Mbps	100% at 10Mbps 80% at 100Mbps	100% at 1Gbps
Health facilities	% of health facilities	13% connected	50% at 10Mbps	100% at 10Mbps 80% at 100Mbps	100% at 1Gbps
Public sector facilities	% of government offices		50% at 5Mbps	100% at 10Mbps	100% at 100Mbps

A closer examination of the above baselines and targets suggests a mammoth task of addressing inequality-based connectivity challenges in South Africa. It is critical that the Draft Policy should not have an impact that would further exacerbate the problem by placing further restrictions on internet access and affordability. The challenges are clearly exposed by Statistics South Africa's most recent publication (18 March 2015) on household ICT access:

Percentage of households with access to the Internet by type and per capita income, 2013

Quintile	Population (Million)	Fixed broadband	Mobile broadband	Access at work	Access elsewhere
Wealthiest	11	71.0%	64.0%	36.9%	35.7%
Quintile 4	11	18.8%	24.6%	23.8%	23.6%
Quintile 3	11	5.2%	7.5%	15.1%	15.7%
Quintile 2	11	2.8%	2.1%	13.4%	13.5%
Poorest	11	2.3%	1.1%	10.9%	11.5%

b. Direct Economic Contribution

In 2012 two global studies of the economic contribution of the internet in the G20 countries[3] and in South Africa[4] estimated the direct contribution of internet usage to the economy. For South Africa, the estimated economic contribution of the internet in 2012 was 1.9% of GDP, approximately R 70 Billion at the 2012 GDP level. The equivalent contributions in the BRICS community and in two of the leading internet-driven economies were: Brazil 3.0%; Russia 1.9%; India 4.1%; China 5.5%; South Korea 7.3%; United Kingdom 8.3%. Clearly, South Africa's internet has the potential for a quantum improvement in its contribution to the national economy: this contribution could rise to more than R200 billion if the same level of contribution realized by the United Kingdom (8.3%) could be achieved in South Africa.

South Africa' s GDP growth potential made possible by the internet presents a significant lever to advance the South African economy, and therefore the impact of a Draft Policy must be well understood so as not to impede unnecessarily the valuable upside potential to advance the national development agenda. Overly rigid attempts to control information and knowledge content by controlling the internet itself may result in a counter objective outcome.

[3] The Internet Economy in the G-20: https://www.bcg.com/documents/file100409.pdf
[4] Internet Matters: The Quiet Engine of the South African Economy: http://hsf.org.za/resource-centre/focus/focus-66/AGoldstuck.pdf

c. Impact on Inequality and Poverty.

South Africa has been recognized by the international community and by South Africa's own analyses, through Statistics South Africa, to be one of the most unequal countries in the world, with a national income GINI Coefficient of 0.69[5], reaching a height of 0.74 in South Africa's major cities[6]. As explained in the referenced STATS-SA document, a GINI of 1 implies total inequality in which one person consumes the total national income, whereas a GINI of 0 implies perfect equality in utilization of the gross national income. The international alert line is a GINI of 0.4, nearly half that of South Africa's major cities.

The UN Habitat report referenced under footnote 6 proposed a solution to gross income inequalities: empower youth in poor urban residential enclaves to utilize broadband internet to run their own micro-businesses, and thus spread both knowledge and new income streams. Brazil, China and South Korea have used this growth philosophy very well to reduce extreme poverty and inequality: Brazil's LAN House policy has succeeded in diverting the energies of its youthful slum dwellers (favelas) from crime to productive delivery of internet access to poor peers; China drove its phenomenal internet and economic growth through internet bars and cafes, which are now on the decline as more Chinese citizens now have broadband internet at home; South Korea's PC Bangs (PC rooms or public internet facilities) were introduced in the late 1990s as a direct response to the Asian Economic Crisis of 1997/1998, and were instrumental in the county's early economic recovery and current global broadband leadership status.

The common feature amongst all three countries discussed in the preceding paragraph, in the context of the Draft Policy, is that they strongly protected their ICT networks and service providers (i.e. ISPs) from liability for all forms of 3rd party online content, a philosophy which promoted rapid growth and utilization of the internet for socioeconomic development. Each country has specialized institutional arrangements external to the ICT industry itself, with specific powers to deal with the full range of undesirable online content, without impeding the growth of the internet. Each of these countries provided participants to and signatories of the March 2015 Manila Principles on Intermediary Liability[7], which can be summarized through the following six overriding principles:

1. Intermediaries should be shielded by law from liability for third-party content.
2. Content must not be required to be restricted without an order by a judicial authority.
3. Requests for restrictions of content must be clear, be unambiguous, and follow due process.
4. Laws and content restriction orders and practices must comply with the tests of necessity and proportionality.
5. Laws and content restriction policies and practices must respect due process.
6. Transparency and accountability must be built in to laws and content restriction policies and practices.

[5] STATS SA: http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf
[6] UN Habitat Report2010/2011: http://unhabitat.org/?wpdmact=process&did=MTY0NS5ob3RsaW5r
[7] The Manila Principles on Intermediary Liability: https://www.manilaprinciples.org/

It is important to note that the United Nations Educational, Scientific and Cultural Organization (UNESCO) representing the whole United Nations system and its members, contributed extensively to the development of the Manila Principles through extensive prior research.

d. Summary:

The key question arising from this short summary of the socioeconomic value of the internet is: will the proposed regulation of online content promote the internet economy or will it impose severe restrictions to the growth of the internet and its contribution to socioeconomic development, particularly by South Africa's youth and vast unconnected citizens? The proposed impact assessment should focus on this potential threat to development, while using other available means to protect children from the harmful effects of criminal and/or illegal content disseminated over the internet.

3. PART C: SPECIFIC COMMENTS ON THE DRAFT ONLINE REGULATION POLICY

The proposed registration fee of R750, 000 per annum, as contained in the regulations of 2014, applied to online distributors, has the potential to severely impede South Africa's ICT growth trajectory, and therefore the nation's recovery from extreme poverty, inequality and youth unemployment by imposing costly and cumbersome regulatory burdens on online distributors. If South Africa is to achieve its Information and Knowledge Society ambitions, a clear distinction must be made between content creators, producers and distributors, and those ICT infrastructure businesses that merely provide the transport layers for content creators, producers and distributors.

All national ISPs and other ICT infrastructure developers and owners must be fully excluded from these or any future draft regulations of a similar nature, must not be obliged to pay any additional registration fees, and must be encouraged to expand and provide the information transport paths so critical for South Africa's development. There are significant developments in progress in the ICT Policy Review process, and in the Justice and Correctional Services cluster, to deal with criminal abuse of these vital information and knowledge transport infrastructures without impeding their rapid development.

3.1 Application of the policy

The Draft Policy defines online content as follows:

> "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."

Section 18 (1) of the Films and Publications Act (No. 65 of 1996) ("FP Act") only requires distributors of films and games to register as distributors. On the other hand, the Draft Policy requires that distributors of films, games and certain publications to be registered. This extension is unwarranted and is ultra vires the provisions of section 18(1) of the FP Act. In addition, the inclusion of "certain publication" in the Draft Policy is exceedingly vague and could include almost anything. It is important to note that the FP Act does not deal with online distribution of child sexual abuse imagery. It only makes provision for the registration of Internet Service Providers. To this end the requirement for intermediaries/ISPs to register as online distributors is not founded on the FP Act.

Section 24 C of the Film and Publications Act requires any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet to take reasonable steps as are necessary to ensure that such services are not used by any person for purposes of the commission of an offence against children. Chapter XI of the Electronic Communications and Transactions Act Electronic Communications and Transactions Act, No 25 of 2002 (ECTA) provides that intermediaries with limited liability if they are a member of an Industry Recognised Body (IRB) that has been recognised by the Minister of Communication, if they conduct their activities according to certain conditions and if they have "adopted and implemented the official code of conduct of that representative body,"[8] under certain conditions. The 'Guidelines for recognition of Industry Representative Bodies of Information System Service Providers' were published in December 2006. The Internet Service Providers Association was finally recognized by then Minister of Communications Siphiwe Nyanda as an IRB in May 2009 and the limitations on liability now apply to its members, provided they adhere to the ISPA code of conduct.[9] It is important for the FPB to ensure that the Draft Policy is aligned to the governing legislative framework including the ECTA.

Specifically the SACF would like to bring the following section to the attention of the FPB:

- Section 73 of the ECTA provides that ISPs operate as a mere conduit of information and are excluded from any liability for information which is transmitted on its network.
- Section 78 of ECTA provides that ISPs do not have an obligation to monitor content which it transmits, it states that, "When providing the services contemplated in this chapter, there is no general obligation on a Service Provider to (a) monitor the data which it transmits; or (b) actively seek facts or circumstances indicating an unlawful activity."

Thus there is no provision in the Act for creating the obligation by ISPs or any other internet intermediary to become licensed as an online distributor.

The application of the Draft Policy, according to its current wording, would also apply to broadcasters in contradiction to the FB Act as well as section 192 of the Constitution which states that "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society." The Draft Policy appears to encroach on to the regulation of broadcasters which should remain under the oversight of ICASA.

[8] ECTA Section 72.
[9] The code of conduct can be found here: http://ispa.org.za/code-of-conduct/.

The application of the Draft Policy, for various reasons, overreaches the mandate of the FPB in terms of the FP Act. The SACF submits that the Draft Policy must be in line with the powers and functions legislated in the Act. Any attempt to broaden the application can only be done by Parliament through an amendment to the Act and not in the form of a policy document.

3.2 Objectives of the draft policy

It is not clear how the Draft Policy will ensure speedy classification. Self-regulation has proved to be effective as illustrated by industry standards for self-classification. For example, some of the measures that Google has implemented to inform consumers about content includes Flagging, Age-restrictions and a Safety Mode. It would be impractical and impossible to classify all online content. It is submitted that only "films" and "games" as defined in the Act be classified[10]. Industry associations such as Internet Service Providers Association (ISPA), the Wireless Access Providers' Association (WAPA) and others already have self-regulation requirements for their members that obliges them to report any suspicion of criminal or illegal activity taking place over their networks to the appropriate crime prevention and prosecution authorities or other national institutions set up for the purpose. Furthermore, self-regulation promotes the individual's right to privacy by refraining from restricting any illegal monitoring of the traffic passing through their facilities, unless instructed to do so in accordance with prevailing national laws and international best practices.

3.3 Guiding Principles for an Online Content Regulation Policy

The FPB has identified eight guiding principles which are said to have been considered when drafting the Policy. It is noted that these guiding principles appear in the Australian Law Reform Commission Report on 'Classification - Content Regulation and Convergent Media'. The SACF further notes that this document has not been credited as a source in the Draft Policy. The SACF would like to make the following comments in respect of the stated guiding principles:

i. South Africans should be able to read, hear, see and participate in media of their choice.

The SACF is in agreement with this principle and would like to point out that the Draft Policy contradicts this principle.

ii. Communications and media services available to South Africans should broadly reflect community standards, while recognizing a diversity of views, cultures and ideas in the community;

The expression "community standards" is not defined in the Draft Policy and is subjective. South Africa has many communities which have their own set of rules and standards which guide the behavior of members of those communities. In this regard and to ensure uniformity of applicable

[10] This was the approach taken by Australia where it was recommended that classification be confined to feature films, television programs and higher-level computer games. Australian Law Reform Commission Report Classification—Content Regulation and Convergent Media

standards the SACF recommends that "community standards" be replaced with "constitutional values" as enshrined and protected in the Bill of Rights of the Constitution of South Africa.

iii. Children should be protected from material likely to harm or disturb them;

While the SACF is very much in agreement that children should be protected from material that would harm or disturb them we are however of the view that this cannot be achieved using the approach proposed by this Draft Policy.

It is important to note that the Department of Justice and Correctional Services has a mandate, and is empowered, to protect children from any form of online abuse, by "taking down" such material and prosecuting perpetrators where possible. The process of addressing this issue started in 2009 and has resulted in the Cyber Crime and Related Matters Draft Bill. It must also be noted that child sexual abuse imagery is currently criminalized. It is therefore not necessary to further deal with such illegal activity other than to ensure that it is reported to the relevant authorities.

In terms of ensuring the protection of children the FPB should not ignore self-regulation and the efforts of current market players to protect children from harmful content. For example, Google's YouTube platform applies the following measures in ensuring that consumers are adequately informed about content and able to report inappropriate content;

- Flagging content
- Country / Age-restricted content
- Safety Mode

Further it has self-classification models such as Play Store Ratings. Google also works with global harmonized classification models such as the International Age Rating Coalition (IARC) as well as the Pan European Game Information (PEGI).

The above indicates the levels to which operators have gone towards providing consumers with information on the content they are receiving in order to make informed decisions about the consumption thereof. The SACF recommends that the FPB consider placing emphasis on self-regulation, education, digital literacy and digital citizenship in order to protect children from harmful content.

iv. 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;

There is an indication that some operators, by way of self-regulation and within the limitations of prevailing laws and best practices, are already providing such services. These include the membership of ISPA, WASPA and WAPA. Many of the operators are also members of or affiliates of the SACF. Some of these industry associations have Codes of Conduct which are in compliance with the guidelines for the recognition of an Industry Representative Body in terms of the ECT Act.

v. The classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;

Taking into account the way in which the Draft Policy has been crafted, it does not seem that it will achieve this guiding principle.

vi. The classification regulatory framework should not impede competition and innovation, nor disadvantage South African media content and service providers in international markets;

The SACF believes that the requirement for payment of a 'licensing fee' of 'up to' R750, 000 per annum per service at the discretion of the executive committee for online distribution would impede competition by constraining new and small players from entering the market and as such countering the stipulated guiding principle. Furthermore, the fact that the licensing fee payable in each case would be based on a subjective criterion, which is at the discretion of the executive committee, brings uncertainty into the exact fee payable and the real possibility of an unfair fee regime. The SACF propose that FPB should introduce a single fee structure that applies equally to all applicants.[11]

vii. Classification regulation should be kept to the minimum needed to achieve a clear public purpose;

While the SACF agrees with this principle the Draft Policy is not worded in such a way as to support this statement. The Draft Policy is very wide and as such it is questionable whether it can be successfully implemented in a manner that would keep classification regulation to a minimum needed to achieve a clear public purpose from a practical point of view. The expression "any person" is overreaching.

viii. Classification regulation should be focused on content rather than on platform or means of delivery.

The SACF submits that classification regulation should be focused on content which is classifiable in terms of the Act, i.e. games and films. The Daft Policy seems to contradict this principle by attempting to assign the responsibility for classification to the operators of the platforms that enable delivery.

3.4 Policy on Online distribution of digital films, games, and certain publications

Clause 5.1 of the Draft Policy reads: "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." The use of the word "enacted" is problematic since it implies legislative making. Currently the role of passing legislation falls squarely within the purview of Parliament. The FPB cannot grant itself powers that are performed by the legislature. Furthermore, a policy document cannot create obligations and sanctions for failing to meet those obligations. To

[11] This proposal does not mean that the SACF supports the payment of licence fees.

this end the SACF is of the view that the Draft Policy document should only be limited to setting the goals of the FPB and the methodology that will be followed in order to achieve those goals.

Clause 5.1.1 states "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 FP Act by applying, in the prescribed manner, for registration as film or game and publications distributor." The expression "any person" falls beyond the ambit of the Act. The Act is only applicable to distributors and exhibitors of films and games. In this regard the requirement that "any person" register is ultra vires the provisions of the FP Act.

Clause 5.1.2 of the Draft Policy states "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 the Department of Communications as the Executive Authority, may classify its online content on behalf of the Board, using the Board's classification Guidelines and the Act." The Act does not make provision for online distribution licences. It is therefore not clear how and why the policy intends to implement an online licensing regime that is not provided for in the Act.[12]

3.5 Classification pursuant to an online distribution agreement

Clause 5.2 of the Draft Policy provides that 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.

The SACF is of the view that this amounts to prior classification which is at odds with section 16 of the Constitution – freedom of expression including the right to receive or impart information or ideas as well as the freedom of the press and other media. To this end the SACF propose that it should be removed.

3.6 Transitional arrangements

Section 5.4 of the Draft Policy states 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 Board's Classification Guidelines and the FP Act. Further, it indicates that by the 31 March 2016, no online distributor shall be allowed to distribute digital content in 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.

[12] It is noted that the fee of R750, 000 has been inserted in the fee schedule of 7 April 2014 government gazette No. 37531, however, the Act does not make provision for this fee for online distribution or a license. The insertion is therefore *ultra vires* the FB Act

There are a number of problems with the above statement. Firstly, the Act does not make provision for any transitional arrangements. Secondly, a policy should not contain a statement that an agreement was reached with online content providers. Thirdly, as a representative body of a number of service providers within the ICT sector the SACF is not aware of such transitional agreements.

3.7 Authorization of distributors' classifiers

Clause 5.5 deals with self-classification. It is indicated that providers will be given training on self-classification. The SACF would like to find out why providers who provide training are required to pay the fees?

3.8 Training

Clause 5.6.1 reads: "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".

This is intended to be a self-classifier (classifying own material). It is indicated that only the Board shall determine the classification training. The policy makes reference to "any person". Does this mean that the whole SA population should be trained?

Further, the Draft Policy provides that any person who intends to "exhibit" shall be required to apply. Exhibit is not defined in the policy. This stipulation is unrealistic and can/should be challenged.

3.9 Online distribution of television films and programmes

Clause 6.1 stipulates that 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.

It is SACF's submission that clause 6.1 as it stands is unconstitutional. By whom must the digital content be submitted for pre-distribution classification? This is in violation of Section 16 of the Constitution of South Africa.

The Board shall in certain circumstances have the power to determine that certain material that has been self-classified to have equivalent board classification.

Clause 6.3 states "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."

The phrase "...have generated controversy in another jurisdiction or is likely to have high profile" brings a level of subjectivity in making this determination. This is **not** an objective criterion. What is meant by the stipulation that the Board will have the power to call it in for classification or call the content provider to classify the product? Furthermore, the norms of other jurisdictions would not necessarily be those of South Africa. For example, highly restrictive non-democratic foreign jurisdictions which apply high levels of censorship do not set the same standards applied to content classification in South Africa which is a democratic country.

3.10 Prohibition against child exploitative media content and classification by the Board of self-generated content

This section of the policy allows the FPB to order an administrator of an online platform to take down content that the FPB ***deems potentially*** harmful and disturbing to children. This is in violation of section 16 of the Constitution of South Africa which speaks to the freedom of expression including the right to receive information. Furthermore, it is not clear from the FP Act that the FPB has the authority to order that any content be taken down. Further, the FPB is encroaching on the jurisdiction of the ECTA which makes provision for a take-down notification to be issued to a service provider with respect to unlawful activity.[13] To this end the SACF submit that the FPB must refer illegal content to the police or appropriate law enforcement agencies for removal of the offending content, and/or prosecution of the offending parties.

Clause 7.1 states that user created content includes any publication as defined in clause 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.

This is a broad statement that includes anything. As an example, an e-mail could be included in this definition. This potentially gives the FPB excessive powers to censor, control or regulate any content irrespective of the freedom of access to information conferred on all South Africans by the Constitution. This is concerning for a number of reasons. Firstly, this document is intended to be a policy, such sweepingly vague language goes beyond the ambit of the Act or the protection provided by the Constitution. Secondly, the vague nature of the document leaves the door open to abuse. In its current form, the policy could be used as a censorship tool to prevent any number of user generated content regardless of whether it is actually in conflict with our constitutional values (i.e. amounts to hate speech), is unlawful (child sexual abuse imagery) or genuinely should be classified in order to protect our children from harmful exposure (pornography, explicit sex and violence).

Sub-clause 7.3 requires online distributors to ensure that they take reasonable steps to ensure their online distribution platforms are not used for purposes of committing offences against children and to report suspicious behavior by any person using contact services to the Board and the South African Police Services. This requirement is already provided for in the existing laws and related regulations, hence its inclusion in the Draft policy may be perceived or viewed as an attempt by the FPB to usurp the powers of the institutions and agencies already set up to provide the protection of

[13] Section 77 of the Electronic Communications and Transaction Act

children, and to prevent other criminal abuses of the internet. Furthermore, sub-clause 3 makes reference to "reasonable steps" without defining what constitute such reasonable steps. This is open to interpretation and is likely to cause confusion. The SACF would propose that the Draft Policy clearly define what steps are contemplated in sub-clause 7.3.

Sub-clause 7.4 of the policy empowers the Board 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. This sub-section is subjective as it addresses ***"potentially harmful material"***. Further, it is broad and confers unwarranted powers on the Board. The classification and reporting of illegal content may be done but ***the Board does not have power to order that content be taken down.*** Content may only be taken down in terms of ***s***ection 77 of ECTA which makes provision for a take-down notification to be issued to a service provider with respect to unlawful activity.

Sub-clause 7.6 stipulates that the decision of the Board's Classification Committee shall be final and binding on distributors, subject to their right to appeal such a decision to the Board's Appeal's Tribunal. The SACF recommends the following language: *Subject to the online distributor's right to appeal a decision to the Board's Appeal's Tribunal, the decision of the Board's Classification Committee shall be final and binding on the distributors*. The proposed language ensures that the point is much clearer.

Sub-clause 7.8 requires that the fee payable in respect of the classification of content by the Board shall be the sum equivalent to what the Board charges per title in respect of boxed films or games submitted to it for classification. This is a general statement of policy and as such ***may not*** include obligations. There can be no obligations in policy statements including that of fees payable.

Sub-clause 7.9 speaks to consequences of failure to pay the stated classification fee by the online distributor. The SACF is of the view that this is an obligation and reiterates that policy statements *may not contain* obligations.

Sub-clause 7.10 specifies that an online distributor shall take down an unclassified video clip and substitute it with one that has been classified by the Board and display the FPB logo and classification decision. This is again an obligation in a policy statement. It is the view of the SACF that if an online distributor voluntarily takes down a video clip, the distributor is under no obligation to put up a new version. This requirement is already provided for in the existing laws and related regulations, hence its inclusion in the Draft Policy may be perceived or viewed as an attempt by the FPB to usurp the powers of the institutions and agencies already set up to provide the protection of children, and to prevent other criminal abuses of the internet.

Sub-clause 7.11 stipulates that the Board, over and above ordering a distributor to take down prohibited or illegal content, shall have the power to refer offending and illegal content to the South African Police Services for criminal investigation and prosecution. The SACF is of the view that the taking down of the said material would have to be done in terms of the ECTA and not in terms of this policy. *The FPB has an obligation to refer material to the police but not to order that it be taken down.*

3.11 Matters the Board must consider

This section speaks to the assurance that must be given to consumers that the provider's systems have been carefully assessed so that value and integrity of the Board's classification decisions are not compromised. One of the elements that the Board believes should be reflected in the authorized classification relates to community standards. It is the SACF's view that community standards should be replaced with constitutional values which are underpinned by the Bill of Rights in the Constitution. The reason for this being the subjective nature of the term 'community standards' which have not been defined and which vary among different communities.

SACF questions the practicality of clause 8.2 (vii), "comparable classification categories and criteria, and endorsement by governments in other jurisdictions". Is such a requirement, built into national policy, feasible or practical given the very broad range of approaches to online content regulations by governments in other jurisdictions?

3.12 checks and safeguards

The SACF sees sub-clause 9.1 of the Draft Policy as being a general statement and accepts it as such. Sub-clause 9.2 stipulates that the Board shall retain the power to monitor industry classification decision-making and to penalize serious breaches. As this is a policy, it cannot purport to impose penalties. Sub-clause 9.4 requires all industry classifiers, whether they classify for television networks, film distributors, or other content providers, are subject to the Board's regulatory oversight. The SACF is of the view that not all industry classifiers should be under the Board's oversight. Further that the Board in carrying out this oversight function cannot do so in a subjective manner.

3.13 Online distribution licensing fee and classification fee per title.

Sub-clause 10.1 stipulates that an online content distributor may not distribute online content in 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 fee that the Minister may determine from time to time. The FP Act does not give the FPB the right to licence online content distributors or providers and therefore this sub-clause should be removed.

Sub-clause 10.2 requires that the licensing fee referred in 10.1 be paid annually, and to escalate at a rate to be determined by the Minister. The SACF is of the view that this cannot be the case as the FPB does not have the right to licence in the first place.

Sub-clause 10.3 empowers the Board to charge a classification fee per title submitted for the classification of digital content distributed. Such fee to vary from case to case but shall be based on the tariff prescribed by the Minister from time to time. This cannot stand as there is no licensing provision in the enabling Act.

3.14 Complaints

As a general comment a complaint mechanism should not be included in a policy document.

Sub-clause 11.1 purports to allow a complainant to 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 the power to investigate all valid complaints. We find sub-clauses 11.2 and 11.3 to be in order and therefore acceptable.

Sub-clause 11.4 stipulates that the Board shall retain the authority to investigate complaints about unclassified or unrestricted media content. This cannot be done under this policy document. Sub-clause 11.5 indicates that 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.

Sub-clause 11.6 empowers the Board to direct the content provider or online distributor to classify content or review the original classification decision, arising from investigation into the complaint. This cannot be done under this policy. For example, where reviews of the BCCSA are carried out by ICASA, it is normally to check on the procedural fairness and not the merits of the decision.

3.15 Reviews of classification decisions

Sub-clause 12.2 stipulates that all classification decisions for all media content, including television programs streamed through the internet are reviewable. The FP Act excludes broadcasting from the Film and Publications Board ambit. In this regard classification decisions applicable to the broadcasting sector should be reviewed by another body such as the BCCSA and not FPB.

The FPB should recognize the inevitability of technological convergence that will profoundly affect all forms of content and other information delivery: the growth of nonlinear broadcast content delivery; the rapidly expanding proliferation of user devices that enable both the creation and receipt of increasingly complex content by anyone anywhere. The practicability of such a stipulation should be tested against the vast volume of media content transported over converged networks before such a stipulation is built into policy.

3.16 Audits of industry classification decisions

The FP Act contains no provisions empowering the FPB to engage in auditing, monitoring and enforcement. To the extent that the policy purports to give such powers, it is unlawful.

This clause of the policy stipulates that 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. The right to audit should not be included in policy as it is the kind of stuff that should be in regulations and as such is incorrectly located in policy.

Further, since the classifiers would be employees of the FPB, it would be difficult to view them as 'independent benchmark decision-maker' in the proposed audits of industry classification decisions, even if the Draft Policy as well as the regulations derived from it are adopted.

The FPB should not audit industry decisions but only review decision on complaints focusing on issues of procedural fairness.

3.17 sanctions regime for industry classifiers

SACF is of the view that there should be no penalty regime under a policy.

3.18 Classification decisions database

It is the view of the SACF that industry classification bodies should keep their own records of classification decisions and not have to submit them to the FPB.

4. Conclusion

The SACF is grateful for the opportunity to comment on the Draft Online Regulation Policy and believes that this public consultation process will ensure that the end result is shaped by all interested parties and that it is supported by a shared vision for a thriving ICT sector which promotes universal access to information and knowledge in full compliance with the objectives of the World Summit on the Information Society (WSIS) of which South Africa is a signatory and full participant.

The SACF therefore thanks FPB for the opportunity to make a submission on the Draft Online Regulation Policy and would appreciate the opportunity to make further oral submissions should the FPB hold further hearings or workshops in this regard.