



FILM AND PUBLICATIONS AMENDMENT BILL 2015

30 AUGUST 2016



INTRODUCTORY REMARKS

- **Overall intent of the Bill to allow the Board to extend its offline classification activities into the online environment is welcome**
- **ISPA has made detailed submissions on the Bill but will focus in these hearings on**
 - The scope of regulation
 - Criminal law provisions in the Act and the Bill
 - The intersection between ISPs and the Act / Bill



- **Shared responsibility**

- Recognition on the part of players in the content delivery chain that there is a shared responsibility in offering better protection to children and other vulnerable groups when they are online and in how they use online resources.
- Children, parents, schools, communities, ISPs, distributors, content providers, law enforcement agencies, NGOs, Government and others all have a role to play
- Various processes being undertaken require a far greater degree of coordination to ensure that they are effective
- Digital literacy programmes such as that set out in South Africa Connect remain the key intervention as more and more people get access to broadband



INTRODUCTORY REMARKS

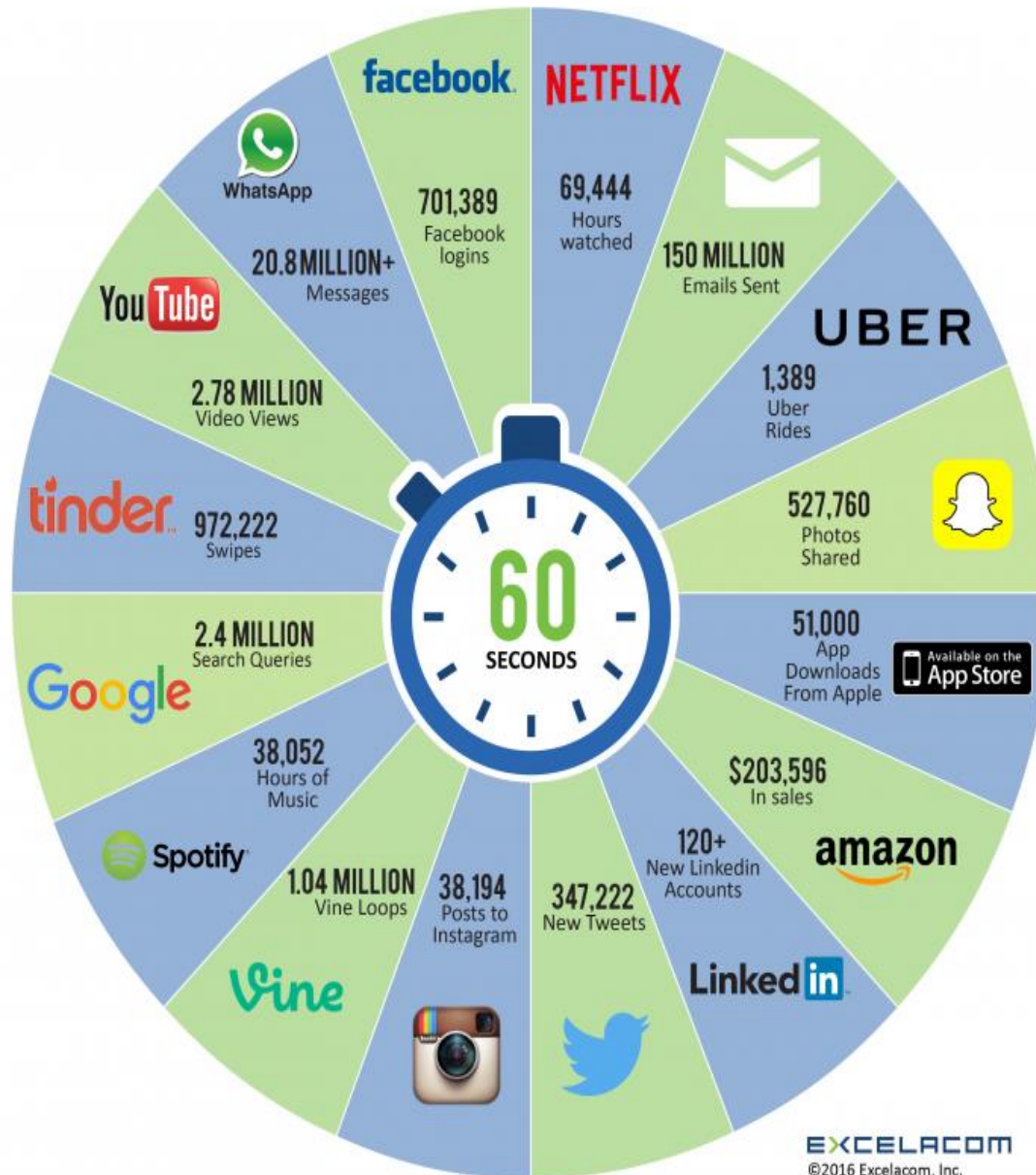
- Clear definitions are required to ensure effective implementation of the finalised Act - these must be consistently applied
- It is time for South Africa to remove the term “child pornography” from the statute books
- The Portfolio Committee is requested to consider the insertion of a procedure for public participation in the finalisation of policies and regulations under the Act
- ISPA wishes to explicitly acknowledge the efforts of the Board to consult with the electronic communications industry and the broader community



WHAT ARE WE TRYING TO REGULATE?

- Board has recognised that it cannot classify all online content
- If not all content is required to be classified, then the Act must make it clear which content is required to be classified
- Range of online content:
 - Video-on-Demand
 - Games
 - User-Generated Content: Social media platforms
 - User-Generated Content: Peer-to-Peer
- Divergence between Bill and Online Regulation Policy
- The Act must also make it clear who bears the obligation to register with the Board and to submit content for classification

2016 What happens in an INTERNET MINUTE?





THE FPA IS NOT CRIMINAL LEGISLATION

- **FPA is intended to regulate a trade, occupation or profession as contemplated by section 22 of the Constitution**
 - “distributor” is “a person who conducts business in the selling, hiring out or distribution of films [including the streaming of content through the internet, social media and other electronic mediums;]”
 - the terms “films”, “games” and “certain publications” define the scope of the content being published or distributed and which is therefore to be regulated
- **Criminalisation of child abuse material, grooming and related criminal offences has nothing to do with the administration of a trade, occupation or profession or the classification of content and should not be provided for under the Act or dealt with by the Board.**



THE FPA IS NOT CRIMINAL LEGISLATION

- Board has a mandate to protect children from exposure to disturbing and harmful materials and premature exposure to adult experiences: relates to administrative not criminal matters
- The Board acts, primarily, as a classification agency: if in the course of its classification activities it comes across material which it has regards as falling within the definition of “child pornography” then it must refer the matter to SAPS.

18(3) Where a film or game submitted to the Board in terms of this section contains child pornography, the chief executive officer shall refer that film or game to a police official of the South African Police Service for investigation and prosecution.



THE FPA IS NOT CRIMINAL LEGISLATION

- **Distinguish between:**

- CAM - criminalised under the current FPA and under the SOA.
- Grooming - criminalised under the SOA and proposed criminalisation under the Bill.
- “Revenge porn” - not criminalised but proposed amendment of the SOA through cybercrimes legislation.
- Exposure of children to pornography - not criminalised unless intentionally or negligently done and appropriate legal response still being developed, *inter alia* through the Bill and the work of the South African Law Reform Commission and other Government Departments.



THE FPA IS NOT CRIMINAL LEGISLATION

- **The FPA should not provide for criminal offences.**
 - Criminal offences are dealt with by SAPS, the NPA and Courts
 - Criminal offences currently in the Act and proposed in the Bill are already provided for/to be provided for in other legislation
- **Criminal provisions currently in the Act and proposed in the Bill should be deleted**



INTERNET SERVICE PROVIDERS

- **WHAT IS AN ISP?**
 - “any person who carries on the business of providing access to the Internet by any means”
 - Biggest ISPs in South Africa
 - Access Providers vs Hosting Providers
- **ISPs UNDER THE ECT ACT**
 - Framework for limitation of liability for intermediaries
 - Mere conduit, hosting, caching, information location tools
 - No general obligation to monitor
 - Standards of conduct for Industry Representative Bodies
- **No reason for the Bill to propose a parallel mechanism to the existing framework**
- **ISPs are not “distributors” or “online distributors” of content for the purposes of the Act**



- **ISPs AND LAW ENFORCEMENT AUTHORITIES**

- ISPs cooperate directly with the Department of Justice and Constitutional Development in respect of a range of legislation
 - Criminal Protection Act
 - RICA
 - Protection from Harassment Act
 - Cybercrimes and Cybersecurity Bill
- The DOJCD already administers databases of ISPs. ISPs also work directly with SAPS in assisting with the investigation and prosecution of cybercrime
- Extensive interaction with SAPS in investigation of a range of criminal matters including CAM, fraud and other offences
- Interaction with SARS, FSB, NGB, CIPC and others to assist with enforcement activities



- **ISPs AND THE FPA**

- Currently required to register under section 27A for the purpose of assisting in the fight against CAM
- But no interaction with the Board pursuant to this registration: work with SAPS not the Board
- Provisions in FPA which conflict with SAPS instructions

- **ISPs AND HATE SPEECH / ADVOCACY OF RACISM**

- Bill seeks to expand section 27A to cover hate speech and advocacy of racism
- What a local ISP can and cannot do to help
- Hate Crimes Bill and draft National Action Plan under development
- Complex legal concepts which ISPs cannot be the judge of...



INTERNET SERVICE PROVIDERS

- South African ISPs are unable to “take-down” or otherwise deal with content which is placed on social media platforms based outside of South Africa.
- There is nothing local access or hosting providers can do about this material, even if they are provided with a court order notifying them that it is in fact illegal speech.
- As regards locally-hosted content, the question must be asked as to at what stage there is knowledge that a service is being used for the dissemination of illegal speech? Defining what is and what is not hate speech is a notoriously difficult exercise properly in the domain of the courts: ISPs are not in any position to make such a determination.
- Where an ISP is presented with a court order or similar document notifying it of the hosting or distribution of illegal speech it will comply with such order expeditiously