



*Catalyst for the development
of the South African
ICT industry*

SACF Presentation to the Public Hearings

on

Film and Publications Amendment Bill



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

30 August 2016

Some of the SACF Members:



Free your imagination



Catalyst for the development of the South African ICT industry



Introduction

Purpose of the Amendment

- *to regulate online distribution of digital films and digital games;*
- *to extend the functions of the Film and Publication Board of monitoring compliance with the Films and Publications Act;*
- *to include online distributors in respect of the requirements to comply with the Films and Publications Act;*

We acknowledge the Film and Publication Board for the positive changes to the Internet Regulation Policy which reflect a realisation from the board that the Internet is a very complex instrument which would be almost impossible to regulate.

Introduction continued

- The SACF recognises that there was a need for the Films and Publications Board to update the primary legislation which was promulgated in 1996.
- We further recognise the need to increase the scope of the legislation and that the ICT industry is dynamic and that innovation can be disruptive and swiftly change the environment
- We recognise the difficulty of trying to create legislation that addresses such a fast moving industry. Broad or vague definitions of key terms should be avoided as they may result in negative unintended consequences which can make it difficult for certain providers to continue operating in the country.
- We hope that the Film and Publication Board would continue to be circumspect when regulating online content.

Differentiating the distributor and the ISP

Definition of “distribute”

- The definitions of a “*distributor*” and “*online distributor*” are clearly defined as “...*a person who conducts business in the selling, hiring out or exhibition of...*”
- The definition of “*distribute*” does not include “*a person who conducts business in the selling, hiring out or exhibition of...*” This should be included in the definition of “*distribute*”.
- It is essential that a very clear distinction be made between someone who **conducts the business of** distributing content, as opposed to an **Internet Service Provider** which is defined as “...*any person who carries on the business of **providing access to the Internet** by any means.*”
- Social media platforms should not be required to register with the Board or to pre-classify content.
- Section 73 of the Electronic Communications and Transactions Act exempts Service Providers from liability where they merely provide access, operate facilities or act as mere conduits.

Definition of “distribute”

We recommend that the definition of ‘distribute’ be improved by adding the text in red and removing the underlined text.

‘distribute’ in relation to a film, game or a publication, without derogating from the ordinary meaning of that word, **is for a commercial purpose and** includes –

- a) To stream content through the internet, social media or other electronic mediums **for a commercial purpose**;
- b) To sell, hire out or offer or keep for sale or hire; and
- c) For purposes of sections 24A and 24B to hand or exhibit a film, game or a publication to a person under the age of 18 years **for a commercial purpose** and also the failure to take reasonable steps to prevent access thereof by such a person.

Comments on Specific Provisions

- In general, it is submitted that the FPB's functions and powers are administrative in nature.
- Any criminal aspects should therefore be administered by the Department of Justice.
 - For example, under the Sexual Offences and Related Matters Amendment Act, and
 - The proposed Cybercrime Bill.
- The Criminal Procedure Act 51 of 1977 ("the CPA") and the Regulation of Interception of Communications and Provision of Communication-related Information Acts 70 of 2002 ("RICA") provide procedures to law enforcement authorities for the investigation of child pornography and grooming offences.

Comments on Specific Provisions

Amendment to Section 1 of the Act

The term “**Child Sexual Abuse Material**” is preferable to “Child Pornography” and is increasingly being adopted in other jurisdictions. We would welcome the adoption of this term as it brings clarity to the kind of image that may be deemed unacceptable and offensive.

Comments on Specific Provisions

Functions and powers of compliance officers

Proposed amendments to 15A (1A) the powers of compliance officers are very broad and open to abuse. These powers should be curtailed to align with the administrative nature of their duties. For example:

- Certificate of appointment to be presented by compliance officer
- Production of a warrant on search and seizure

Comments on Specific Provisions



“Hate Speech”

For certainty, the SACF proposes that the definition of Hate Speech should be aligned with Section 16 of the Constitution of the Republic of South Africa. SACF proposes the inclusion of the underlined wording and the deletion of the words in brackets:

*“**hate speech**” includes any speech, gesture, conduct, writing, display or publication which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996 which are propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. [, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group;”]*

Comments on Specific Provisions

Section 18(8) – renewal of broadcasting licences by ICASA

- To the extent that section 18(8) seeks to impose restrictions on ICASA regarding the issue or renewal of broadcasting licences, the SACF submits that this would amount to encroaching on the mandate of ICASA as guaranteed in section 192 of the Constitution read with section 3(3) of the ICASA Act.
- It is not clear if the intention is to amend the Electronic Communication Act which could not be done through this amendment. As such we recommend that this section be deleted.

Section 18E dealing with complaints against content distributed online

- It is also noted that the section 18E process does not make any provision for the party against whom the complaint is made to represent themselves (*Audi alteram partem* rule).
- The SACF submits that these provisions are unconstitutional until such time as a process for the other side to be heard is incorporated.

Provisions which SACF supports

18C, 18D

- Introduction of independent classification body (18C);
- approval of foreign classification systems (18D); and
- self-classification also be included in the Bill as provided for in the online regulation policy.
- The Bill has been brought in line with changes in Technology.
- We support the light touch approach.

Overlap in legislation / processes

Current and planned

Current / proposed legislation	Matters addressed / to be addressed
Electronic Communications and Transactions Act 25 of 2002	Governs ISP's and provides a framework for take down notices.
Sexual Offences and Related Matters Amendment Act 32 Of 2007	Criminalisation of child pornography or child sexual abuse material.
Cybercrimes and Cybersecurity Bill	Proposed amendments to the Sexual Offences Act in relation to child abuse material, grooming and "revenge porn".
Proposed Hate Crimes Legislation (Hate Speech Bill)	To address hate speech on social media in addition to existing mechanisms such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Human Rights Commission.
ICT Policy Review Process	The Review Report of March 2015 made several recommendations, including recommendations on Protection of children, classification and content standards.

South African ICT Industry Associations Forum

In September 2015 ten ICT industry associations during the iWeek conference came together and discussed calls from the Portfolio Committee on Telecommunications and Postal Services and the ICASA CEO for industry representatives to speak with one voice.

In a historic first, the associations committed themselves to reducing fragmentation in the industry and to ensure that there is a common message on issues of general industry concern through the South Africa ICT Industries Associations Forum (SAIIAF)

Participants in SAIIAF include:

▸ Fibre to the Home Council Africa (FTTH Council Africa) ▸ Institute of Information Technology Professionals of South Africa (IITPSA) ▸ Internet Service Providers' Association (ISPA) ▸ Internet Society Gauteng (ISOC – Gauteng) ▸ Internet Society South Africa (ISOC – ZA) ▸ National Association of Broadcasters (NAB) ▸ South African Communications Forum (SACF) ▸ Wi-Fi Forum of South Africa (WFFSA) ▸ Wireless Access Providers' Association (WAPA) and the ▸ Wireless Application Service Providers' Association (WASPA)

South African ICT Industry Associations Forum

SAllAF members agreed that it is not always feasible for industry to speak unanimously, however there are areas where industry bodies could collaborate better and have a common message.

SAllAF is not a consolidation of associations and each association respects the role and mandate of the others, including the positive benefits of cross-membership.

One of the first projects agreed to be taken up by SAllAF member is the development of a Consumer Digital Literacy Programme

Consumer Digital Literacy Programmes

We pledge our support to government in developing appropriate Consumer Digital Literacy Programmes that will focus on preventing exposure to and empower responses by parents, children and civil society to Cyber bullying, Child Sexual Abuse, Grooming for sexual abuse, Privacy and the internet, and Other abuses of the internet.

Digital literacy initiatives provide an opportunity for partnerships among government, communications sector and civil society for comprehensive reach. Such initiatives include the following:

- Frequent public awareness campaigns through various mediums.
- Education on technical aspects of digital literacy.
- Educating parents on how to implement “parent-control” on the technology their children use to access content.
- Programs at school, educating children on risks & precautions to be taken when using the internet.
- Ensure simple access to information on means provided by operators to protect children from undesirable material.
- Harmonization of frameworks for child protection across operators to ensure ease of application by consumers.

Consumer Digital Literacy Programmes

SACF members including Google, Facebook, Vodacom, MTN, Cell C, Microsoft and others already have significant consumer programmes in place.

SACF and its members are working on developing appropriate Consumer Digital Literacy programme.

SACF and FPB are planning a joint workshop on the 15 September 2016 to consider the framework for a comprehensive Digital Literacy that can be rolled out in schools through the length and breadth of the country.

THANK YOU

- SACF thanks the Portfolio Committee on Communications for this opportunity to present our views on the Films and Publications Amendment Bill.
- We appreciate that the Amendment Bill is intended to bring clarity to certain definitions and to provide for exemptions in respect of online distribution of films and games. This amendment will achieve its objective only if the triggering definitions are clear and precise, and all ambiguity is removed. Such clarity will result in improved regulatory certainty which is good for all concerned.