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The Film and Publication Board

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ISPA SUBMISSIONS ON THE DRAFT FILMS AND PUBLICATIONS REGULATIONS, 2020

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the Draft Films and Publications Regulations, 2020 published for public comment in Government Gazette 43495 on 3 July 2020 ("**the Draft Regulations**") and sets out its submissions below.
2. ISPA welcomes the decision by the Film and Publication Board (FPB) to conduct a public participation process prior to finalising the Draft Regulations.
3. ISPA's comments are limited to Schedule 1 to the notice under which the Draft Regulations were published.

Films and Publications Amendment Act 11 of 2019

4. ISPA understands the rule-making process represented by the Draft Regulations to be borne of a need to update the existing Films and Publications Regulations, 2014 and to align the regulatory framework with amendments to the legislative framework occasioned by the future coming into force of the Films and Publications Amendment Act 11 of 2019 ("**the 2019 Amendment Act**").
5. ISPA was involved at all stages of the drafting and consideration of the 2019 Amendment Act and its objections to provisions relating to ISPs and the impracticality of implementation of much of that Amendment Act is a matter of record. While ISPA acknowledges that the 2019 Amendment Act has received Presidential assent, many of the submissions below flow from what ISPA regards as problematic definitions and provisions introduced in the 2019 Amendment Act.
6. The result is that the Draft Regulations have a potential scope of application far beyond what is ordinarily regarded as the trade of distribution of publications, films and games.

7. ISPA has restricted its submissions below to those relating to “internet service providers”, but places on record its concerns about the constitutionality of certain provisions of the Draft Regulations, particularly those relating to pre-publication classification of publications and the role of the FPB in determining what is and what is not protected speech under the South African Constitution.

Existing relationship between the Board and ISPA

8. ISPA has a long history of engagement with the FPB over a variety of matters, ranging from presenting on each other’s platforms, producing educational materials for child online safety and addressing the implementation of the legislative and regulatory framework. ISPA has also reviewed its Code of Conduct to ensure alignment with such framework.
9. The FPB and ISPA entered into a Memorandum of Understanding (MoU) during 2020 to formalise and deepen this cooperation on matters of mutual interest. Upon finalisation of the Draft Regulations and the commencement of the amended Act, ISPA will seek to engage with the FPB on the review of the MOU to reflect the new framework.

Drafting suggestion

10. ISPA submits that there is no need for the Draft Regulations to set out definitions of terms already included in the Films and Publications Act as amended. The removal of these definitions would make the Draft Regulations more manageable and accessible.

Deeming provisions

11. There are numerous provisions in the Draft Regulations which require the Board to advise an applicant of the outcome of a duly made application or appeal within a period of days¹.

¹ E.g. Application for the accreditation of any foreign or international classification system in relation to the classification of films or games in terms of section 18D

12. Such provisions are welcome but they do not contribute to commercial certainty unless there is further provision stipulating that the application will be deemed to have been granted in the event that the Board does not respond within the allowed period.

13. If desirable, such a position can be softened by allowing the Board to advise the applicant before the expiry of the time period allowed of the need to extend this period due to specified factors.

Part 11: Obligations of internet service providers in relation to duty to register with the FPB and online submission of publications, films and games for classification

Drafting suggestion

14. Part 11 of the Draft Regulations is titled “Obligations of Internet Service Providers in relation to [the] duty to register with the FPB and online submission of publications, films and games for classification”.

15. It appears, however, that this Part deals only with the obligation on Internet service providers to register (and to display registration certificates). It does not in any manner deal with the “online submission of publications, films and games for classification”.

16. We suggest therefore that the title of Part 11 be amended as follows:

“Obligations of Internet Service Providers in relation to [the] duty to register with the FPB and display registration certificates ~~online submission of publications, films and games for classification~~”.

What is an “internet service provider” for the purposes of the Act?

17. The Draft Regulations adopt a single definition of the term “internet service provider” – applicable to the Draft Regulations in their entirety – in Regulation 1(v):

v) “internet service provider” means the service provider contemplated in section 70 and section 77 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

18. The Act, however, contains two distinct definitions:

18.1. Section 1 sets out a general definition:

“Internet service provider” means any person who carries on the business of providing access to the Internet by any means;

18.2. Section 18E(5) sets out a further definition which is only applicable to the interpretation of section 18E of the Act.

18(5) For the purposes of this section an “internet service provider” means the service provider contemplated in section 70 and section 77 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

19. ISPA’s view is that the definition in section 1 is of general application and applies to all provisions in the Act other than where the definition in subsection 18E(5) specifically applies. The correct definition to be applied in the context of section 27A is that set out in section 1 of the Act.

20. Care should be taken when finalising the Draft Regulations that the correct definition is used in context.

Registration of Service Providers

21. Regulation 28 imposes an obligation on “internet service providers” to register with the Board in terms of section 27A of the Films and Publications Act as amended using the relevant form and including the provision of:

21.1. proof of registration of the business of the applicant in terms of the applicable legislation;

21.2. a document confirming that the applicant's tax affairs are in order;

21.3. a declaration that the applicant warrants that it complies with all laws and regulations applicable to it, with its legal obligations pertaining to its business in general and undertakes to continue to take all reasonable and necessary steps to ensure that such compliance is maintained;

21.4. a statement of all measures or steps taken or put in place to ensure that children are not exposed to child pornography and pornography (with the Board reserving the right to require demonstration of the effectiveness of such measures or steps); and

21.5. proof of payment of the prescribed fee.

22. Sub-regulation 28.4 sets out a prohibition on any person hosting a website or providing access to the internet as an internet service provider unless such person is registered with the Board in terms of section 27A of the Films and Publications Act as amended.
23. Regulation 29 requires that an internet service provider so registered must conspicuously display its registration certificate in the premises at which the business of the internet service provider is being conducted.
24. ISPA makes the following submissions regarding Regulations 28 and 29:
 - 24.1. As noted above, the Draft Regulations apply the incorrect definition of “internet service provider” to the obligation to register under section 27A. The definition in section 1 of the Act is applicable.
 - 24.2. The section 1 definition references “*any person who carries on the business of providing access to the Internet by any means*”. A provider of hosting services is not a provider of access to the Internet. It follows that there is no basis for requiring hosting providers to register with the FPB under section 27A.
 - 24.3. It follows further that Regulation 28.4 is *ultra vires* the Act insofar as it extends the prohibition on operating without being registered under section 27A to a person who hosts a website.
 - 24.4. ISPA is unsure how to approach the fact that section 27A(2) imposes an obligation on “internet access providers” and not to the defined term “internet service providers”. This is ignored in the Draft Regulations.
 - 24.5. The requirement in sub-regulation 28.1.3 to provide a warranty of compliance with “all laws and regulations” does not serve any purpose related to registration. Given the plethora of general and sector-specific law and regulation applicable to Internet service providers this is an unrealistic warranty to expect.
 - 24.6. ISPA requests that the FPB consider softening the language of the undertaking required, perhaps through a reference to materiality.

24.7. It would make far more sense for an “internet service provider” to display their registration certificate on their website, rather than at a physical premises which no subscriber may ever visit and where it never be seen. ISPA members are required under the ISPA Code of Conduct to display the ISPA logo and a link to the Code of Conduct on their websites, as well as information relating to the take-down notice mechanism created by section 77 of the ECT Act.

Part 12: Complaints against prohibited content, distribution of private sexual photographs and films and filming and distribution of films and photographs depicting sexual violence and violence against children

25. Regulation 30 provides that complaints regarding “unclassified, prohibited content, or potential prohibited content in terms of services being offered online, the distribution of private sexual photographs and films and filming” made under sections 18G – 18H of the Act must be made electronically using a form to provided on the Board’s website.

26. Sub-regulation 30.3 is set out in full below:

30.3. Should the FPB establish after investigation that there is merit in the complaint and/or that the prohibited content or content being hosted or distributed using the internet constitutes prohibited content in terms of the Act or has not been submitted for examination and classification as required in terms of section 16, 18, 18C or 18D, the FPB may –

30.3.1. compel the internet service provider concerned to furnish the FPB or a member of the SAPS with information of the identity of the person who published the private sexual photograph or film, or a film or photograph depicting sexual assault and violence against children; and

30.3.2. in the case of either a non-commercial online distributor or internet service provider, issue a take-down notice in accordance with the procedure in section 77 of the Electronic Communications and Transactions, 2002 (Act No. 25 of 2002).

27. Under Regulation 30.3 “the FPB may...compel the internet service provider concerned to furnish the FPB or a member of SAPS with information of the identity of the person...”. ISPA has several submissions in this regard:

27.1. The Board cannot compel “internet service providers” to provide it or SAPS with the personal information of its subscribers.

27.1.1. Section 18E of the Act does not give the Board the power to compel “internet service providers” to disclose subscriber information. Section 18E(3) reads:

18E (3) For the purposes of this section and sections 24E, 24F and 24G, the internet service provider shall be compelled to furnish the Board or a member of the South African Police Services with information of the identity of the person who published the prohibited content.

27.1.2. Section 18E(3) does not state that the FPB may compel: it states that the internet service provider “shall be compelled”.

27.1.3. Further, while Regulation 30(3) is largely a restatement of section 18E(3) of the Act, there is a crucial omission: the reference to the FPB’s actions being “subject to due process of law”.

27.1.4. There is a well-established procedure under the Criminal Procedure Act for the issuing of a section 205 subpoena by a Court and this process is implemented daily in practice between SAPS and service providers.

27.2. ISPs cannot provide “information of the identity of the person”: ISPs can at best provide information to SAPS about the subscriber who has entered into an agreement with an ISP for the provision of services.

28. ISPA will seek to engage with the FPB on the implementation of these provisions insofar as they are a reflection of the Act and suggests that such engagement include representatives from SAPS.

Tariffs

29. ISPA understands that the tariff review process has been delayed by events beyond the control of the FPB but wishes to stress the importance of aligning the tariff framework with the Act as amended and the Draft Regulations once finalised.

30. In particular ISPA requests that the Board ensure the alignment of the categories in respect of which tariffs are specified and the categories contemplated in the Act.

Conclusion

31. ISPA trusts that these submissions assist the drafters of the Draft Regulations in finalising them and we look forward to continued engagement with the Board.

ISPA CHAIR