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The Film and Publications Board

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SUBMISSIONS ON THE DRAFT ONLINE CONTENT REGULATION POLICY

Please find set out below the submissions of the Internet Service Providers' Association (ISPA) in response to the invitation to comment on the Film and Publications Board's Draft Online Content Regulation Policy.

PER

ISPA REGULATORY ADVISOR

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INTRODUCTION

1. We refer to the Draft Online Regulation Policy to be adopted by Council in terms of Section 4A of the Films and Publications Act, 65 of 1996, as amended ("**the Draft Document**") and the Explanatory Memorandum on the Draft Online Regulation Policy to be adopted by Council in terms of Section 4A of the Films and Publications Act, 65 of 1996, as amended ("**the Explanatory Memorandum**").

2. It is ISPA's view that the Draft Document – for the reasons documented below - is not capable of being finalised and demonstrably impossible to implement.

3. Notwithstanding ISPAs' views, the Draft Document has served the greater purpose of raising in the public discourse a variety of issues which South Africa will need to adopt practical responses to. While the Draft Document itself is flawed, the resulting debate and self-examination is a useful starting point for what will be a far longer and more in-depth process.

4. While many of the submissions set out below are critical of positions taken in the Draft Document, ISPA wishes to make its underlying position clear:

    4.1. ISPA recognises the rights of the child as set out in section 28 of the Constitution and regional and international charters and treaties.

    4.2. ISPA recognises the mandate of the Board as set out in section 2 of the Act.

    4.3. ISPA recognises that there is a need, not only in South Africa but also globally, to address the exposure of children to harmful content and experiences when online or otherwise using electronic communications.

    4.4. ISPA recognises that Internet intermediaries are amongst a range of many stakeholders with a role to play in addressing this problem. For ISPA's members this role is already set out in the ECT Act, as discussed in detail below.

    4.5. ISPs and other Internet intermediaries are recognised by the South African Government and internationally as critical to the exercise of fundamental human rights through electronic communications.

    4.6. ISPA's members are committed to co-operation with law enforcement agencies and government bodies within the framework of the law: a commitment which has been demonstrated over time.

4.7. ISPA's members are not law firms and should not be placed in the position of adjudicating legal disputes or being required to infringe the privacy and freedom of expression rights of their customers without a clear legal framework applying.

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EXECUTIVE SUMMARY

5. There is no doubt that a strategy needs to be adopted and implemented to ensure children are better empowered and able to utilise broadband communications and are able to protect themselves and be protected from harmful content and experiences when online or using electronic communications.

6. The Draft Document, however, does not constitute a valid or constructive starting point for the development of such a strategy and accompanying legislative and regulatory framework. This is because the Draft Document is, *inter alia*:

   6.1. Undoubtedly ultra vires the Film and Publications Act ("the Act");

   6.2. Likely to fail constitutional scrutiny;

   6.3. Likely to contravene the requirement set out in section 192 of the Constitution regarding an independent broadcasting regulator;

   6.4. In conflict with primary legislation such as the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act") and the Regulation of Interception of Communications and Provision of Communication-related Information Acts 70 of 2002 ("RICA");

   6.5. Unclear in its definition of central concepts and in its scope of application to the extent that it is difficult to deliver meaningful comment thereon or to determine whether platform neutrality is being applied; and,

   6.6. Conflates illegal content in the form of "child pornography" with other content, including pornography.

7. The work of the Board in pursuing its mandate must take into account related processes involving a number of Government Departments which are seeking to address the issues raised in the Draft Document. These include:

   7.1. The South African Law Reform Commission (SALRC) Project 107

   7.2. The ICT Policy Review Process;

   7.3. The Broadcasting Policy Review process;

   7.4. The development of the Cybercrimes and Related Matters Bill by the Department of Justice and Correctional Services; and

7.5. South Africa Connect: National Broadband Policy with particular reference to the demand-side strategy to be deployed around education and digital literacy

8. Within this context ISPA has set out a number of specific submissions relating to the text of the Draft Document and Explanatory Memorandum.

9. ISPA has also made a set of submissions regarding the application of the Act to ISPs and the role of Internet intermediaries in facilitating the exercise by South Africans of their fundamental rights.

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THE VALIDITY OF THE DRAFT DOCUMENT

10. As noted above, ISPA has reservations about the legal status of the Draft Document. It is neither necessary nor appropriate at this time to set out detailed argument in this regard and it is ISPA's understanding that such argument will in any event form the heart of a number of other submissions made in response to the invitation to comment on the Draft Document.

11. It is not clear where the Board or its Council derives its power to enact the Draft Document. The Draft Document states that it shall, upon approval, "have the full effect and force of law, as stipulated in section 4A of the Act", but that section does not permit the enactment of a policy.

12. The Board itself appears to be confused as to the nature of the Draft Document.

    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.[1]

13. This is not a draft policy but, in fact, an attempt to draft regulations. It imposes legal obligations and makes provision for sanctions for non-compliance. It is submitted that the Board does not have the power to do this.

14. The Draft Document is in many aspects *ultra vires* the Act.

15. On a fundamental level this is manifested in the Board – by its own admission - basing the Draft Document on the Act as if it has already been amended by a set of amendments proposed by it to the Minister of Communications. This is a profound misunderstanding of the legislative process.

    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. [2]

[1] Draft Document, page 6
[2] Explanatory Memorandum, page 1

16. The Board and the Minister are aware of the proposed amendments, nobody else is. ISPA is not aware of the "Online Content Regulation Strategy" being made available to the public notwithstanding that it forms a context for the Draft Document.

17. The Draft Document indicates that the framework to be developed will make it possible for co-regulation agreements to be entered into: the fact that the framework does not yet exist is not however holding the Board back from already trying to enter into such agreements.

18. ISPA anticipates that proposed amendments will in due course be debated and finalised through the Parliamentary process, at the discretion of the Minister of Communications. Thereafter there will be a legislative basis for the Board to further its mandate and objectives regarding online content regulation. Currently this does not exist.

19. ISPA submits that it would be preferable for relevant policy to first be finalised and thereafter for the Act to be reviewed in its entirety, given that it remains pre-Internet legislation which should not form the basis for classification of content in a world where communication by electronic means is pervasive. The Act may require platform-neutrality but the drafters – even in respect of the 2009 Amendment – had no conception of the realities of modern communications.

20. This would also enable the drafters to take into account the outputs of the processes mentioned in paragraph 7 above.

21. As regards constitutionality, there is no doubt that issues raised in the Draft Document - or even the Draft Document itself - may in future be the subject of challenges to be considered and adjudicated on by the Constitutional Court.

22. While any definitive pronouncement prior to the decision of that Court is premature, it seems unlikely to ISPA that the Draft Document will pass constitutional scrutiny in that it is likely to be found to be overbroad3 in regards to the limitations imposed on:

    22.1. the right to freedom of expression (section 16),
    22.2. the right to administrative justice (section 33) and
    22.3. the right of access to the courts (section 34).

23. The take-down power contemplated in paragraph 7.4 of the Draft Document[4] cannot be reconciled with the right to freedom of speech and the rights to administrative justice and access

[3] See Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others 1996 (5) BCLR 609 (CC)

[4] 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.

to the courts, does not comply with the principles of *audi alteram partem* and ISPA submits is overbroad in regards to its limitations. No detail is provided as to how this process would be implemented but as presented it reveals a lack of any attempt to observe the principles of natural justice, while the views of the Constitutional Court regarding pre-publication classification are well known.

24. We have set out further information regarding the take-down notice provisions of the ECT Act below, but note for now that these can be used to remove locally-hosted content where the requirements of the ECT Act are met.

25. Paragraph 11 of the Draft Document provides, inter alia, that the Board may issue a "'classify' notice or a 'restrict access'" notice to a "content provider or online distributor" in response to a valid complaint about media content. No further information is regarded as to the process to be followed or the effect of such notices but their constitutionality is in doubt for the reasons advanced in the previous paragraph.

26. It is further unlikely that the introduction of countervailing rights such as the rights of the child (section 28) through the application of the limitations clause (section 35) will serve to save the Draft Document.

27. Paragraph 6.1 of the Draft Document raises a further constitutional issue:

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.

27.1. ISPA suggests that the FPB consult the classification set out in the Final Report in ICASA's Review of the Broadcasting Regulatory Framework towards a Digitally Converged Environment (published on 25 June 2013)[5]. This can be summarised as follows:

27.1.1. IPTV services which fall within the ITU definition of IPTV services[6] are regarded as broadcasting services for the purposes of the Electronic Communications Act (the ECA) and an individual or class broadcasting service licence will be required.

27.1.2. VOD services (not including on-demand services provided over the public Internet) are regarded as electronic communication services for the purposes of the ECA and a class ECS licence will be required.

[5] Available from http://www.ellipsis.co.za/wp-content/uploads/2012/01/Final-Report-on-Review-of-Broadcasting-Regulatory-Framework-June-2013.pdf

[6] IPTV is defined as multimedia services such as television/video/audio/text/graphics/data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability (International Telecommunication Union focus group on IPTV (ITU-T FG IPTV)

27.1.3. Programming content made available over the public Internet (Web TV / Internet TV / Internet broadcasting) falls outside ICASA's regulatory jurisdiction and no licensing under the ECA is required.

27.2. To the extent that the Draft Document seeks to regulate Internet Protocol Television (IPTV) providers the Board should note that the provision of this service requires a broadcasting service licence issued by ICASA. Regulation by the Board would violate section 192 of the Constitution which requires independent regulation of the broadcasting sector.

28. The Draft Document is in conflict with primary legislation. To the extent that the Draft Document requires the interception and monitoring of communications flowing over a communications network it may effectively require entities to act in breach of the provisions of RICA.

29. As discussed further below, to the extent that the Draft Document requires ISPs to monitor content flowing over their networks it is in conflict with the provisions of Chapter XI of the ECT Act.

30. In this regard ISPA notes that there is a hierarchy of legislation under our Constitutional dispensation. In this hierarchy, simply put, national legislation trumps regulations, and regulations trump standards. Accordingly, ISP's will not have any other option, considering the hierarchy of statutes, to give effect to RICA at the expense of any regulations proposed by the Board providing for something to the contrary.

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SCOPE OF APPLICATIONS AND DEFINITIONS

31. The proposed scope of application of the Draft Document is unclear, mainly as a result of failures to clearly define key terms and inconsistent use of terms.

32. It is ISPA's view that the vagueness which permeates the Draft Document would have the effect of making it impossible to implement.

33. The Explanatory Memorandum identifies "Clear scope of the type of content to be classified" as a key concept underlying the model adopted in the Draft Document.

Clear scope of the type of content to be classified

This includes self-generated content uploaded on platforms such as You-Tube, Facebook and Twitter, feature films, television programs and certain computer games which are distributed online by streaming through the internet.

34. Furthermore the Draft Document is intended to apply to both local and international distributors:

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[7]

35. This is a scope of application which is almost as broad as it could be.

36. ISPA has noted and agrees with the principles proposed to guide online content regulation as set out in the Draft Document, noting that these are taken directly from those developed by the Australian Law Reform Commission (ALRC) in its Report on Classification –Content Regulation and Convergent Media, published in February 2012[8].

37. The seventh guiding principle states that:

(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and

38. While the principles identified by the ALRC call for less classification, the Draft Document has close to the maximum possible scope of application in respect of online content.

39. The ACLR Report[9] in fact suggests a far more practical approach with a far more:

[7] Draft Document, paragraph 2

[8] Australian Law Reform Commission, Classification - Content Regulation and Convergent Media (ALRC Report 118), February 2012 (available at http://www.alrc.gov.au/publications/classification-content-regulation-and-convergent-media-alrc-report-118).

[9] ACLR Report p26

As it is impractical to expect all media content to be classified in Australia, the scope of what must be classified should be confined to feature films, television programs and higher-level computer games.

A classification obligation that applies to content must be focused on material for which Australians most need and demand classification information. Therefore, importantly, feature films, television programs and computer games should only be required to be classified if they are both made and distributed on a commercial basis and likely to have a significant Australian audience.

Obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis. Internet intermediaries, including application service providers, host providers and internet access providers, would also generally be excluded from classification-related obligations other than those concerning Prohibited content.

40. ISPA believes that the Board should – in line with the above suggestion – accept that content regulation in the form of classification should be limited to what it practically achievable and proportionate. Ideally this would be guided by a form of regulatory impact assessment.

41. The section of the Explanatory Memorandum dealing with the scope of application of the Draft Document also quotes directly from the ACLR Report:

Clear scope of what must be classified and self-generated content

The volume of media content available to South Africans has grown exponentially. There are currently over million web sites and hundreds of thousand 'apps' available for download on mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content, particularly self-generated content to be classified, it is the responsibility of the platform provider in consultation with the FPB to determine the scope of what must be classified.

41.1. The ACLR Report was published in February 2012. In July 2015 Google reports the following statistics relating to the YouTube service[10]:

- *YouTube has more than 1 billion users*
- *Every day people watch hundreds of millions of hours on YouTube and generate billions of views*
- *The number of hours people are watching on YouTube each month is up 50% year over year*
- *300 hours of video are uploaded to YouTube every minute*
- *~60% of a creator's views comes from outside their home country*
- *YouTube is localized in 75 countries and available in 61 languages*
- *Half of YouTube views are on mobile devices*

[10] https://www.youtube.com/yt/press/statistics.html

41.2. Most major content providers have adopted their own system of self-classification. In some cases, these voluntary ratings are more granular (and stricter) than the FPB ratings systems (for example, pornography is not allowed on Microsoft Windows Store, Google Play and YouTube).

42. The definition of content / online content / digital content can be used to illustrate this:

42.1. The Draft Document defines "online content" as follows:

"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.

42.2. This definition does not make sense. It seeks to define "online content" in relation to the activity of distribution of content: it is not a definition of content. It may be the case that what is intended here is a definition of "online content distribution" or "online distribution of content", but a proper definition of online content will still be required.

42.3. The Explanatory Memorandum states that:

For all intents and purposes, content includes films, games, publications and self-generated content uploaded or posted on social media platforms.[11]

42.4. "Self-generated content or user-generated content" is in turn defined as follows:

"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

42.5. Again this definition seems problematic: it is not clear whether it refers to content or to social media platforms.

42.6. It is correct that – as noted by the ACLR Report[12]:

3.38 The rise of user-created content, and the shift in the nature of audiences towards a more participatory media culture, is associated with greater user control over media. This is partly related to a greater diversity of choices of media content and platforms, but also in the ability to achieve greater personalisation of the media content that one chooses to access.

[11] Explanatory Memorandum p1

[12] ACLR Report paragraph 3.38

42.7. Paragraph 7 of the Draft Document sets out steps designed to "minimise the risk of children's exposure to unclassified content on online platforms"

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.

42.8. The breadth of this definition of "user created content" is startling. A "publication" is defined in the Act as

"publication" means -
(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
(b) any writing or typescript which has in any manner been duplicated;
(c) any drawing, picture, illustration or painting;
(d) any print, photograph, engraving or lithograph;

(e) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;

42.9. The definition proposed appears to include all content placed on the Internet or any other public or private distribution network, whether commercial or non-commercial.

42.10. Section 24C of the Act sets out the following definitions of "content" and "content service":

(c) "content" means any sound, text, still picture, moving picture, other audio visual representation or sensory representation and includes any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated but excludes content contained in private communications between consumers;

(d) "content service" means-
(i) the provision of content; or
(ii) the exercise of editorial control over the content conveyed via a communications network, as defined in the Electronic Communications Act, 2005 (Act No. 35 of 2005), to the public or sections of the public;

42.11. In the circumstances it is impossible to determine the scope of application of the Draft Document.

43. The definition to be given to the term "online distributor" – as ISPA understands it - is also extremely broad. This broadness is central to the difficulties which ISPA has with the Draft

Document as it appears to ISPA that the Board is conflating the terms “Internet service providers” and “distributors”.

44. The Act does not provide a definition for “online distributor” but provides the following definitions of “distribute” and “distributor”:

"distribute" in relation to a film or publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of section 25(a), (b) and (c), 26 (1)(a) and (b) and 28(1) and (2), includes to hand or exhibit a film or a publication under the age of 18 years and also the failure to take reasonable steps to prevent access thereto by such a person.

"distributor" in relation to a film, means a person who conducts business in the selling, hiring out or exhibition of films;

44.1. While it can be said that an ISP provides Internet access and connectivity over which content is distributed, it is clear that an ISP does not conduct the business of selling, hiring out or exhibiting films.

44.2. As per the definition of “Internet service provider” in the Act, an ISP is rather in the business of providing access to the Internet. It does this generally by offering services which allow a subscriber to purchase access to the Internet and other electronic communications services: it does not sell access to any specific content nor does it control the content which a subscriber may wish to access.

44.3. It is implicit in the definitions of “distribute” and “distributor” that the entity distributing must have knowledge of the content which they are distributing. ISPs do not have such knowledge, nor – as set out further below – are they obliged to monitor the communications flowing over their networks unless required to do so under applicable law.

44.4. It is important to recognise that what is being considered is an “Internet service provider” which is acting in such capacity. A company like MTN, for example, acts as an “Internet service provider” for the purposes of the Act or as a “service provider” for the purposes of the ECT Act. It also offers a wide range of other services which are not related to being an ISP. These include a VoD service. In this scenario MTN can act both as an ISP and as a distributor of content (and consequently would need to register under both section 18 and section 27A of the Act).

44.5. The confusion in the Draft Document is apparent from paragraph 7.3 (our emphasis):

7.3 <u>online distributors must ensure that they comply fully with their obligations as set out in section 24C and 27A of the Act</u> 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.

44.6. Distributors are not required to register under section 27A of the Act. Section 24C of the Act which purports to impose obligations on "internet access and service providers" does not in fact do so: rather it imposes obligations on providers of child-oriented services.

45. Paragraph 5.1.7 of the Draft Document states that the words 'online' and 'digital' are used interchangeably. ISPA submits that these terms should not be equated. Digital content is not necessarily online content: this submission is digital content but not online content.

46. Paragraph 5.1.8 of the Draft Document states that the terms 'distributor 'and 'content provider' are also used interchangeably. It is not clear, however, that these terms can be equated when considering online content regulation.

47. It is not only the definitions in the Draft Document which are problematic. The Film and Publications Tariff Regulations 2015[13] also introduced a number of categories of entities required to register or interact with the Board without making any attempt to define these categories or to relate them to the provisions of the Act. These include:
    47.1. Mobile cellular content providers
    47.2. Internet content providers
    47.3. Online distributor

48. All of the above categories are required in terms of the Film and Publications Tariff Regulations 2015 to register with the Board, but there is no clarity as to which entities are required to register within which category.

49. Again it would seem that these terms are to be interpreted in accordance with a "Draft Online Content Strategy" and proposed amendments to the Act which are not in the public domain.

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[13] General Notice 253 ,GG 37531, 7 April 2014

PLATFORM NEUTRALITY

50. ISPA supports the key concept of "platform neutrality" but is concerned that the Draft Document creates different approaches in the treatment of offline and online content.

51. Distribution in the ordinary grammatical sense of the word occurs as a matter of necessity in both the offline and online realms. Distribution in the ordinary grammatical sense of the word forms part of the definition of "distribute" in the Act.

52. In the ordinary sense of the word, the stakeholders involved in the movement of content on physical medium in the offline world also form part the distribution chain and be regarded as distributors.

53. However, when a direct comparison is drawn between the distributors (in the ordinary grammatical sense of the word) in the offline and online realms, then ISPA notes that there is a significant discrepancy in the treatment of the distributors (in the ordinary grammatical sense of the word) between the offline and online realms. This discrepancy in illustrated in Table 1 below:

	Offline	Online
Content rights owner	Publications/drafter of letter/sender of packet	Publications/drafter of letter/sender of packet
Infrastructure used to convey "packets"	Road networks Rail networks	Electronic Networks
"Service Provider" that conveys packets	Licensed postal services companies and couriers	Electronic Communications Service Providers
Legal Requirement to inspect packets without warrant	Yes[14]	Forbidden[15]
Liability for conveying packets	No	Yes in terms of the draft policy

Table 1:Overview of "offline" vs "online" under the Films and Pubications Act and Draft Policy

[14] Regulation 4.7 of the REGULATIONS ON THE CONVEYANCE OF MAIL 2009 Published under Government Notice R981 in Government Gazette 32644 of 16 October 2009 provides that conveyors of mail must ensure that that suspicious mail is detected and disposed.

[15] Interception and monitoring of electronic data of third parties without a supboena/warrant is an offence under the provisions of RICA

54. As can be seen from table 1 above, there is a direct "like-for-like" comparison between the offline and online distribution chains (in the ordinary grammatical sense).

55. Despite the direct comparison, ISPA has not been able to find any Acts, Regulations, Policies, or case-law where any liability for the movement of unclassified or illegal materials in physical form was ever attributed to the owners of the road networks or the postal services companies. This is notwithstanding positive obligations to ensure that the roads are used legally and that the parcels in transit do not contain illegal content. This is because "South African law has never imposed liability on common carriers unless the corporation was actually party to a civil wrong or criminal offence."[16]

56. It is not clear to ISPA how the electronic version of roads and postal services any different, especially considering that the ability to monitor the packets of third parties is an offence under South African Law?

57. This position, ISPA submits, is created by the use of a single word that attempts to conflate all the players in the value chain (the content producers, the post-production players, the marketers, the exhibitors, down to the local DVD or CD retail outlet) as "distributor". Such conflation ought not serve as a "loophole" to include unrelated logistical service providers (whether offline or online) into that chain so as to create liability where the Board find it impossible or too difficult to impose sanctions where they should lie.

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[16] Rens, A: South Africa Censorship on Demand: Failure of Due Process in ISP Liability and Takedown

DISTINCTION BETWEEN ILLEGAL CONTENT AND CLASSIFICATION OF CONTENT

59. It is critically important at the outset to distinguish between illegal content in the form of "child pornography"[17] and the separate issue of protection of children from harmful content.

60. These issues are unfortunately often conflated by the Board and the media.

61. Illegal content is not a matter for classification. The Act is clear that the Board must refuse to classify such material and refer it to SAPS for further investigation.

62. Different conduct relating to "child pornography" as defined in the Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 has been criminalised.

    62.1. Section 24B of the Act criminalises the possession, production and distribution of child pornography.

    62.2. Section 18(1) of the Sexual Offences Act criminalises the supply, exposure or display of child pornography or pornography to a third person with the intention to encourage, enable, instruct or persuade such third person to perform a sexual act with a child as the offence of promoting the sexual grooming of a child.

    62.3. Section 18(2) of the Sexual Offences Act criminalises the supply, exposure or display of child pornography or pornography to a child with the intention to encourage, enable, instruct or persuade the child to perform a sexual act. This includes a person who commits any act with or in the presence of a child or describes the commission of any act to or in the presence of a child with the intention to encourage or persuade the child or to diminish or reduce any resistance or unwillingness on the part of the child to be exposed to child pornography or pornography as the offence of sexual grooming of a child.

    62.4. Section 20 makes it a crime to use children for or benefit from child pornography. The relevant sections in the Sexual Offences Act are as follows:

63. Furthermore under the Act, the Criminal Procedure Act 51 of 1977 ("the CPA") and the Regulation of Interception of Communications and Provision of Communication-related Information Acts 70

[17] "**child pornography**" includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years-
(a) engaged in sexual conduct;
(b) participating in, or assisting another person to participate in, sexual conduct; or
(c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation; (section 1 of the Act)

of 2002 ("RICA") there are procedures available to law enforcement authorities for the investigation of child pornography and grooming offences.

64. There is no reason or authority for the Board to concern itself with "child pornography" other than to refer it to SAPS. The investigation and prosecution of offenders is the task of SAPS and the National Prosecuting Authority (NPA). Where required they are assisted by ISPs and other communications providers in accordance with the applicable legal framework.

65. The Board does have a mandate in respect of protecting children from exposure to disturbing and harmful materials and from premature exposure to adult experiences. This is not a mandate which relates to criminal matters but rather to administrative law and classification under the Act.

66. "Child pornography" and other illegal conduct such as grooming and sexual predation should not be used to direct a discussion on the protection of children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

67. There is a clear example in section 2 of the Explanatory Memorandum, which makes the leap from increased use of portable devices for gaming and social networking to child predators and plots to undermine social cohesion:

Although at the time the FPB was not specifically provided with statistics relating to the South African situation, industry trends in South Africa show an increase in the use of portable devices for gaming and social networking, and the expected boom in online gaming over the next few years. While these are positive developments and will be economically beneficial for the country, the downside to this is that there is also a proliferation of illegal content in and the abuse of social media platforms which are at times used by sexual predators to lure their child victims and people who advocate racist ideologies and therefore use these platforms to undermine the government's agenda on social cohesion. [18]

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[18] Explanatory Memorandum, page 2

OTHER PROCESSES CONSIDERING THE PROTECTION OF CHILDREN AND ONLINE CONTENT REGULATION

68. There are a number of processes which should be considered by the Board in its deliberations on how to execute its mandate.

69. In particular ISPA notes the consideration by the South African Law Reform Commission (SALRC) under its Project 107 of the need for reform of the law relating to children and pornography.

70. The Final Recommendations Report of the ICT Policy Review Process ("**the ICT Policy Recommendations**"), emphasises the need for greater co-operation between regulatory authorities to ensure protection of vulnerable groups.

R172. COOPERATION BETWEEN REGULATORY AUTHORITIES TO ENSURE PROTECTION

The Panel notes that:

- *In view of convergence there are challenges in relation to ensuring common approaches to protection of children and setting of content standards across all platforms*
- *There is a need for organisations such as the FPB, the BCCSA and ICASA to review the way they work collaboratively.*
- *Concurrent jurisdiction issues need to be resolved.*

The Panel therefore recommends that
a) The DTPS together with the DOC must facilitate cooperation between regulatory authorities (such as ICASA, the ASA, FPB, BCCSA and the press ombudsman) to ensure coordination and to address protection issues in an era of convergence.
b) Consideration be given to the development and formalisation of co-regulation mechanisms to encourage such practices while protecting the public interest. As stated previously, government should consider developing common criteria for approval of co-regulatory structures across all spheres.
c) Policy should recognise that co-regulation has worked relatedly well to date in relation to broadcasting and consider how this model could be extended.

71. The ICT Policy Recommendations include specific recommendations regarding the protection of children from harmful content, which should be taken into account by the Board.

R112. PROTECTION OF CHILDREN

It must be noted that some aspects of protection have been dealt with in the Institutional Frameworks Chapter. In addition to those, the Panel proposes that the following issues be considered in the future White Paper.

a) Should on-demand providers be regulated by the FPB as currently, or does the extension of the definition of those that are regulated mean that they fall under ICASA and/or any approved co-regulatory structure.

b) Consideration must be given to which body (FPB or ICASA's CCC/the BCCSA) should be responsible for complaints about online content provided by broadcasters on their web-pages.

c) How must similar criteria be applied by all statutory regulators in approving co-regulatory and self-regulatory mechanisms and institutions; and whether ICASA must be required to consult the FPB and ensure any criteria it sets are in line with FPB approaches?

d) Policy must ensure that complaints procedures are streamlined so that audiences and end-users can easily complain and do not have to first research which regulatory body deals with content it is concerned about. Consideration should be given to whether the FPB and ICASA should be required to set up a portal/complaints office together with other regulatory bodies (statutory, self-regulatory and co-regulatory) to establish a one-stop-shop complaints mechanism.

e) The means to protect children and provide adequate audience advisories will depend on the medium and platform. Consideration must thus be given to whether there is a need to put in place explicit requirements and develop uniform approaches to, for example, classification and labelling. Policy must guide as to whether the FPB and/or ICASA be charged with developing these, together with co-regulatory and self-regulatory bodies.

f) Consumer education will become increasingly important to ensure citizens are aware of mechanisms in place to protect children, avoid content and complain about alleged breaches of codes. ICASA requires broadcasters to provide regular information about the code of ethics and how to complain if they believe standards have been breached. Policy must thus guide whether the regulator must require all relevant licensees to provide similar information about these issues.

g) Policy must guide whether ICASA be specifically charged with promoting media literacy, and whether specific provisions and powers in relation to this be added to their mandate.

h) Policy must consider if it is necessary for the regulator to require providers to warn audiences if they are moving from a managed platform that adheres to such standards to an unmanaged platform (e.g. the Internet) given that audiences might not necessarily be aware of this when they shift programmes.

72. ISPA notes the uncertainty around the future institutional framework for content regulation and the emphasis on consumer education.

73. The South African Law Reform Commission (SALRC) is expected to release an Issue Paper on "Children and Pornography" later this year.

74. ISPA submits that the Board should also consult with the Department of Telecommunications and Postal Services with respect to the implementation of the South Africa Connect National Broadband Plan, which sets out aggressive targets for deploying broadband connectivity to all South Africans. A key demand side strategy under this Plan is digital literacy and this should be an

important avenue for the Board in educating new users of communications about the dangers thereof.

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SELF-REGULATION AND CO-REGULATION

75. Co-regulation and industry classification is noted in the Explanatory Memorandum as referring to classification of content by the industry subject to the FPB's regulatory oversight.

FPB has come to the realisation that by assigning a greater role to the industry in terms of classification can thus focus on the content that generates the most concern in terms of community standards and the protection of children. In this regard, once adopted, the Policy will introduce elements of co-regulation into the classification system.

The co-regulation scheme provides for innovative and efficient classification decision-making mechanisms. Content may be classified by online distributors using the FPB classification guidelines and the Act, but subject to FPB's regulatory oversight and review. This will facilitate the provision of South African classification information in a media environment characterised by vast volumes of content.

76. The Final Recommendations of the ICT Panel of Experts emphasise the need to consider self-regulatory and co-regulatory mechanisms:

R172. COOPERATION BETWEEN REGULATORY AUTHORITIES TO ENSURE PROTECTION
….
b) Consideration be given to the development and formalisation of co-regulation mechanisms to encourage such practices while protecting the public interest. As stated previously, government should consider developing common criteria for approval of co-regulatory structures across all spheres.
c) Policy should recognise that co-regulation has worked relatedly well to date in relation to broadcasting and consider how this model could be extended.

77. Further:

R169. PROVISIONS FOR SELF- REGULATION AND CO-REGULATION
The Panel notes

- *The general concurrence that self-regulation should be encouraged where appropriate.*
- *The principle of self- and co- regulation in policy has an important role in addressing consumer complaints.*

The Panel therefore recommends
a) That a model be developed and applied to support, where appropriate, co-regulation, and to encourage self-regulation.
b) Co-regulation be instituted where necessary, to promote and enforce public interest objectives.
c) The co-regulation framework must entail the development of consensus-based and enforceable set of standards approved by the regulator. Such codes of conduct must include

proportionate compliance and enforcement mechanisms, with compliance and enforcement for non-signatories at the hands of the CCC.

d) Such a model must comprise a clear framework for the accreditation of co-regulatory mechanisms.

e) That the model provides for cross-sector co-regulation.

f) In addition, there should be a common approach across government and public entities on the criteria to be used to accredit such bodies.

78. This reflects the recommendations of the "Market research on the prevalence of online and informal Film and video game content distribution channels in South Africa" undertaken by Deloitte on behalf of the Film and Publications Board ("**the Deloitte Report**"). Deloitte report strongly suggests a formal working relationship between the FPB and ISPA (and WASPA). The recommendations of the Deloitte report include the following:

After considering the information on how benchmarked countries implemented online content regulation, and, taking into account the input from desktop research and interviews with industry stakeholders, it appears the FPB has a number of options at their disposal when it comes to regulating online content including:

- *Partnering with ISPA and WASPA (in the case of online content accessed via mobile) and allowing these associations to regulate using their Codes of Conduct, complaints mechanisms and take-down notices; and*
- *Accept the classification of content that has already been classified by other international bodies;*
- *Promote awareness around age restrictions and the importance of content classification amongst online consumers; and*
- *Promote a system of accredited self-regulation which allows online content vendors to display a digital certificate or "seal of approval" issued by the FPB which informs consumers that the vendor only sells duly classified content. This will provide a competitive advantage to such vendors as consumers generally prefer to purchase rated content*[19]

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Section 24C of the Act requires internet access and service providers providing child-oriented services such as chat rooms and social media to moderate these services "to ensure that such services are not being used by any person for the purpose of the commission of any offence against children."

The FPB should assist industry bodies which represent service providers in the online environment in self-regulating their members based on the principles contained in the FPB Act. A self-regulation model based on formal collaboration will ease the burden currently placed on

[19] Deloitte report para 9.3.4

the FPB while holding the industry bodies accountable to complying with guidelines issued by the FPB.[20]

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[20] Deloitte report para 9.3.4.1

THE DRAFT DOCUMENT, THE ACT AND INTERNET SERVICE PROVIDERS

79. The submissions set out in this section are not restricted to the Draft Document but provide broader commentary on the application of the Act to ISPs and an explanation of the provisions of Chapter XI of the ECT Act.

Definition of "Internet service provider"

80. Section 1 of the Act sets out the following definition:

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

81. ISPA has corresponded at length with the Board with regard to the interpretation of this definition and has advanced in this correspondence and in meetings its reasons for questioning the interpretation adopted by the Board.

82. In ISPA's view this interpretation is overly broad.

82.1. The Board does not attach sufficient weight to the words "carries on the business of providing access". As a result it includes under the definition of ISP entities such as hotels, airports, coffee shops and fast food outlets.

82.2. While it is correct that Internet access is available in these places, it is absurd to argue that any of the companies involved carry on the business of providing access to the Internet. Neither ACSA nor McDonalds would ever be logically considered to be an ISP.

82.3. When a traveller uses a Wi-Fi service in an airport that service could be provided by a number of different ISPs using for example the AlwaysOn platform. A coffee shop does not itself install equipment and build links to the Internet but rather contracts with an ISP to provide these services.

82.4. The fact that the coffee shop may share in revenue derived from the sale of access to the Internet by the ISP does not change this understanding: the coffee shop remains in the business of selling coffee and not in the business of providing access to the Internet.

83. Of far greater concern for the execution of the Board's mandate is its failure to recognise that entities such as the mobile networks – Vodacom, MTN, Cell C and Telkom Mobile – as well as Government entities such as SITA also fall within the definition of "Internet service provider".

83.1. It is inarguable that these entities are not in the business of providing access to the Internet.

83.2. As a direct consequence the entities which by some orders of magnitude are the biggest "Internet service providers" in South Africa, are not required by the Board to register with it for the purpose of combating child pornography as set out in section 27A of the Act.

Registration of ISPs under the FPA

84. ISPs as defined are required to register with the FPB under section 27A of the FPA.

27A. Registration and other obligations of Internet service providers

(1) Every Internet service provider shall -

(a) register with the Board in the manner prescribed by regulations made under this Act; and

(b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.

(2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall -

(a) take all reasonable steps to prevent access to the child pornography by any person;

(b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and

(c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.

(3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.

(4) Any person who-

(a) fails to comply with subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; or

(b) fails to comply with subsection (2) or (3) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

85. Section 27A deals exclusively with the obligations of ISPs in respect of child pornography and the intention of the legislature in introducing this section through the 2004 Amendment Act is explicit.

86. The Memorandum on the Objects of the Film and Publications Amendment Bill B61 of 2003[21] states that one of those objects is "to address the problems of child pornography on the Internet by bringing Internet service providers within the jurisdiction of the Act".

87. Section 27A does not:

87.1. Impose any obligation on ISPs to monitor the content flowing over their electronic communications networks.

87.2. In any way indicate that ISPs should be - or that it was the intention of the legislature that ISPs should be – regarded as distributors as that term is defined in the Act. Rather it is clear that the ambit of the Act was to be broadened to bring ISPs within its ambit for the sole purpose of addressing the problems of child pornography only once they had knowledge thereof[22].

87.3. Impose any obligations on ISPs in respect of anything other than child pornography[23].

88. The Film and Publications Regulations 2014 ("the 2014 Regulations") state that application for registration must be submitted on the prescribed form and must be accompanied by (a) proof of payment of the prescribed fee (currently R529), (b) an original valid tax clearance certificate and (c) the SA registration number of the business[24].

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[21] http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/040812b61-03.pdf

[22] See remarks made by Ms A Van Wyk (ANC) and Advocate K Malatji (Chief Director: Legal Services) in the Minutes of the HOME AFFAIRS PORTFOLIO COMMITTEE - 19 November 2003 at https://pmg.org.za/committee-meeting/3064/

[23] See minutes of the HOME AFFAIRS PORTFOLIO COMMITTEE - 19 November 2003 at https://pmg.org.za/committee-meeting/3064/

[24] "PART 7: OBLIGATIONS OF INTERNET SERVICE PROVIDERS IN RELATION TO DUTY TO REGISTER WITH BOARD AND ONLINE SUBMISSION OF FILMS, GAMES AND PUBLICATIONS FOR CLASSIFICATION**Internet service providers**

21.(1) An application for registration as an internet service provider in terms of section 27A of the Act shall be made on Form BOARD/E, attached as Annexure "A"

(2) An application contemplated in subregulation (1) shall be accompanied by the following documents:

(a) Proof of payment of the prescribed fee;

(b) an original valid tax clearance certificate issued by the South African Revenue Service; and

(c) the registration number of the business in terms of the applicable South African laws.

(3) Every internet service provider shall, when making an application for registration as internet service provider, indicate in the application form all measures or steps taken or put in place to ensure that children are not exposed to child pornography and pornography.

(4) The Board may, in terms of section 27A of the Act, require an internet service provider to demonstrate that the measures contemplated in subregulation (3) are still effective.

(5) No person may host any website or provide access to the internet as an internet service provider, unless such person is registered with the Board in terms of section 27A of the Act.

88.1. An applicant ISP must further indicate in its application form all measures or steps taken or put in place to ensure that "children are not exposed to child pornography and pornography" and the FPB may request an ISP to demonstrate that these measures/steps remain effective.

88.2. The regulations explicitly state that "No person may host any website or provide access to the internet as an internet service provider, unless such person is registered with the Board in terms of section 27A of the Act".

89. ISPA submits that the 2014 Regulations unlawfully expand the scope of section 27A in at least the following ways:

89.1. This section explicitly links registration with combating child pornography but the requirement now relates to exposure of children "to child pornography and pornography".

89.2. Exposure of "children to child pornography" is a crime on more than one basis. It has nothing at all to do with an "Internet service provider" acting in such capacity.

89.3. Furthermore, as noted above, section 27 does not in any manner deal with pornography outside of the scope of child pornography nor does it in any manner deal with exposure of children to pornography.

90. It is not clear to ISPA on what basis or for what specific purpose the Board has extended the requirement to register under section 27A to "persons who host websites". ISPA submits that this extension is *ultra vires* the Act as persons who hosts websites are not engaging in the business of providing access to the internet by any means.

91. The practical benefits flowing from registration of ISPs under section 27A are not clear. ISPA and its members have and will continue to cooperate directly with SAPS as required under section 27A without reference to the Board.

92. ISPA notes that the Department of Justice and Correctional Services already holds at least two databases of ISPs / electronic communications service providers and ISPs will in any event be required to cooperate with SAPS.

ISPs under the Electronic Communications and Transactions Act 25 of 2002

93. The Minister of Communications formally recognised ISPA as an Industry Representative Body ("IRB") in terms of section 71 of the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act") on 20 May 2009.

94. The effect of formal recognition as an IRB is that ISPA's members are entitled to claim the limitations on liability in respect of content carried over their networks which are created by Chapter XI of the ECT Act.

95. Under section 71(2) of the ECT Act the Minister of Communications may only grant such recognition to a representative body if he or she is satisfied that its members are subject to a code of conduct which requires continued adherence to prescribed standards of conduct and that the representative body is itself capable of monitoring and enforcing its code of conduct.

96. Entities falling within the definition of "service provider" set out in section 70 of the ECT Act will only be entitled to the limitations of liability set out in Chapter XI where:
    96.1. They are members of a recognised IRB; and
    96.2. They have adopted and implemented the official code of conduct of the IRB.

97. The Minister of Communications has prescribed standards of conduct to be incorporated into representative body codes of conduct through the publication of Guidelines for the Recognition of Industry Representative Bodies ("the IRB Guidelines").

98. ISPA undertook a lengthy process of amendments to its Code of Conduct and interaction with the DoC to ensure that the Code complies with the criteria set out in the IRB Guidelines. ISPA was recognised as an IRB on 20 May 2009.

99. The current version of the ISPA Code of Conduct is available at www.ispa.org.za/code-of-conduct. Further information on ISPA and the various activities it engages in is available from www.ispa.org.za.

ISPA's members act as "mere conduits"

100. Section 73 of the ECT Act stipulates that a service provider "is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control".

101. This immunity holds only where the service provider:
    101.1. is a member of an IRB and has adopted and implemented the code of conduct of that IRB;
    101.2. does not initiate the transmission;
    101.3. does not select the addressee;
    101.4. performs the functions in an automatic, technical manner without selection of the data; and
    101.5. does not modify the data contained in the transmission.

102. The section 73 "mere conduit" immunity does not interfere with the right of the courts to order a service provider to terminate or prevent unlawful activity in terms of any other law which may apply.

103. In simple terms: ISPA's members, when acting in the capacity of service providers, are provided with legislative immunity from liability in respect of the content which flows over their networks.

104. Even where ISP's are not members of ISPA, there is other legislation – aside from the common law relating to defamation - that reinforces the "mere conduit" principle, albeit by exclusion rather than inclusion. The Consumer Protection Act imposes liability of defective goods and services on the entire value chain involved in the production, distribution, sale and installation of goods and services. To this extent, all parties involved in such value chains (save for those specifically excluded) must register with the Consumer Goods and Services Ombud and are subject to the Industry Code of Conduct. In terms of regulation 4.4, electronic service providers are excluded from the application of the code. ISPA submits that this is a clear indication and recognition that (a) ISP's are adequately regulated, and (b) are mere conduits in the distribution chain.

105. We have highlighted in paragraph 53 above that electronic networks are nothing more than the offline equivalents of roads and railways, whilst ISP's are nothing more than the electronic version of post offices and courier companies. In other words, they are the electronic version of common carriers. In this regard, ISPA notes that there is no legal precedent that imposes liability on common carriers for the goods that are conveyed over or by them in the lawful execution of its functions and duties.

Hosting, caching and information local tools

106. This legislative immunity also covers hosting of content, caching of content and the provision of tools such as hyperlinks which are designed to assist users to find information. In all of these instances there are further requirements set out in the relevant section and which in essence stipulate that the provision of the service or performance of the activity must take place at arm's length, in accordance with industry standards and that the service provider should not have knowledge of unlawful activity.

107. Section 76(d) of the ECT Act holds that the immunity for providers of information location tools only applies where the provider "removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person".

Take-Down Notice Procedure

108. Section 77 of the ECT Act creates a procedure which allows a complainant to notify a service provider or its designated agent (such as ISPA) of unlawful activity in a written notice which sets out the right which has been infringed and the location or nature of the infringing material or activity under the control of the service provider.

109. A service provider is obliged to act expeditiously to remove or disable access to infringing content, failing which it may lose the immunity it has in respect of hosted content under section 75 of the ECT Act.

110. ISPA has established a Take-Down Procedure and Take-Down Guide as well as an online facility that allows for the lodging of take-down notices in respect of infringing content or activities hosted or under the control of ISPA members in their capacity as service providers[25.]

111. It should be noted that concerns have been expressed regarding the constitutionality of the current take-down notice procedure, in particular because it does not provide the party affected with an opportunity to be heard prior to the take-down being effected[26].

112. The Explanatory Memorandum to the Electronic Communications and Transactions Amendment Bill, 2012[27] states that:

"12.5 After further consideration, the Minister considers that any notice or take-down procedure should allow for the right of reply in accordance with the principle of administrative justice and the audi alteram partem rule. Changes have been proposed in this regard to section 77 and a new section 77A is proposed."

No general obligation to monitor

113. Section 78 of the ECT Act explicitly states that services providers are not under any general obligation to monitor the data which it transmits or stores or to actively seek facts or circumstances indicating an unlawful activity.

114. This is recognition of practical reality: even a small Internet access provider would find it impossible to monitor all the content flowing over its systems due to the volume of content and the speed at which it travels.

115. Internet access providers are further under a Constitutional imperative to respect the privacy of their subscribers and, as previously mentioned, are prohibited under RICA from any unauthorised interception and/or monitoring of electronic communications.

116. It is important to note that as soon as a service provider becomes aware of conduct or content which it knows to be illegal or unlawful it can no longer rely on the Chapter 11 limitations of liability.

[25] http://ispa.org.za/code-of-conduct/take-down-guide/

[26] See Rens, A: South Africa Censorship on Demand: Failure of Due Process in ISP Liability and Takedown Procedures in Global Censorship and Access to Knowledge, International Case Studies, Nagla Rizk, Carlos Affonso de Souza and Pranesh Parakesh (eds) Information Society Project, Yale Law School (available on request)

[27] General Notice 888 of 2012, GG 35821, 26 October 2012

117. While a service provider is under no obligation to monitor the data which it transmits or stores or to seek out facts or circumstances which indicate an unlawful activity, once it becomes aware of such facts or circumstances it is obligated to respond thereto with reasonable expediency.

118. This obligation to act may take a number of forms but will generally involve reporting a matter to the SAPS or Film & Publications Board, retention of evidence and/or the disabling of access or taking down of content.

Guidelines for the recognition of Industry Representative Bodies

119. As a recognised IRB ISPA's Code of Conduct is compliant with the requirements of the Guidelines for Recognition of the Industry Representative Bodies of Information System Service Providers contemplated in Chapter XI of the ECT Act ("**the IRB Regulations**") as promulgated by the Minister of Communications.

120. The IRB Regulations underpin the approach of placing the emphasis for control on self-regulation by the industry rather than directly applicable legislation or government regulation and intervention.

The only monitoring or control done by the state in the above process is to ensure that the IRB and its ISPs meet certain minimum requirements laid down in the ECT Act.

The ECT Act is also quite emphatic that there is no general requirement on ISPs to monitor whether the recipients of the service are transgressing the law or to monitor data that it transmits or stores. This is simply a realistic approach, taking cognisance of economic and practical realities in the internet environment.

This set of guidelines provides assistance to Industry Representative Bodies and ISPs on the minimum requirements regarded as adequate by the Minister and against which any application for recognition will be measured. It also contains guidelines on what is viewed as international best practice and the standards that should ultimately be striven for.[28]

121. The IRB regulations set out minimum criteria to be included in an IRB's Code of Conduct, including criteria relating to the protection of children, which are observed by all ISPA members.

5.9. Protection of Minors
5.9.1. Members will take reasonable steps to ensure that they do not offer paid content subscription services to minors without written permission from a parent or guardian.

[28] IRB Regulations paragraph 1

5.9.2. Members undertake to provide their recipients of Internet access with information about procedures, content labelling systems, filtering and other software applications that can be used to assist in the control and monitoring of minors' access.

5.9.3 Paragraphs 5.9.1 and 5.9.2 do not apply when Members offer services to corporate recipients of their services, where no minors have Internet access.

ICT Policy Review Process

122. In its Final Recommendations Report the ICT Panel of Experts makes the following policy recommendations regarding Internet intermediary liability:

R85. INTERNET INTERMEDIARY LIABILITY

The Panel notes the following views expressed by stakeholders that:

- *The limitation on liability should be general and not reliant on membership of an accredited body.*
- *The memorandum on the ECT Amendment Bill and provisions in current law be reviewed to ensure fairness and constitutionality.*
- *Limited liability be extended to other service providers including those that operate platforms.*
- *Additional mechanisms are required to ensure the integrity of complainers in line with international best practice. This may include requiring that take down notices should be pursuant to a court order, affidavits from complainers to ensure these are in good faith and that the complainer has authority and requirements that information be specifically identified so that it can be easily found.*
- *That a Cybercrime Bill developed by the Department of Justice, will deal with this issue to some extent.*

The Panel recommends that:

a) Current provisions should remain in place but be extended to ensure they cover all technologies and platforms and that the process of accrediting self-regulatory entities is strengthened.

The Manila Principles on Internet Intermediary Liability

123. ISPA subscribes to the Manila Principles on Internet Intermediary Liability, available from https://www.manilaprinciples.org/. The Principles recognise that

"all communication over the Internet is facilitated by intermediaries such as Internet access providers, social networks, and search engines. The policies governing the legal liability of intermediaries for the content of these communications have an impact on users' rights, including freedom of expression, freedom of association and the right to privacy.

124. These Principles can be summarised as follows:

124.1. Intermediaries should be shielded by law from liability for third -party content

124.2. Orders and requests for the restriction of content must be clear and unambiguous

124.3. Content restriction policies and practices must be procedurally fair

124.4. The extent of content restriction must be minimized

124.5. Transparency and accountability must be built in to content restriction practices

124.6. The development of intermediary liability policies must be participatory and inclusive

125. ISPA requests that the Board take these Principles into account in their further deliberations regarding the role of ISPs in Internet content regulation.

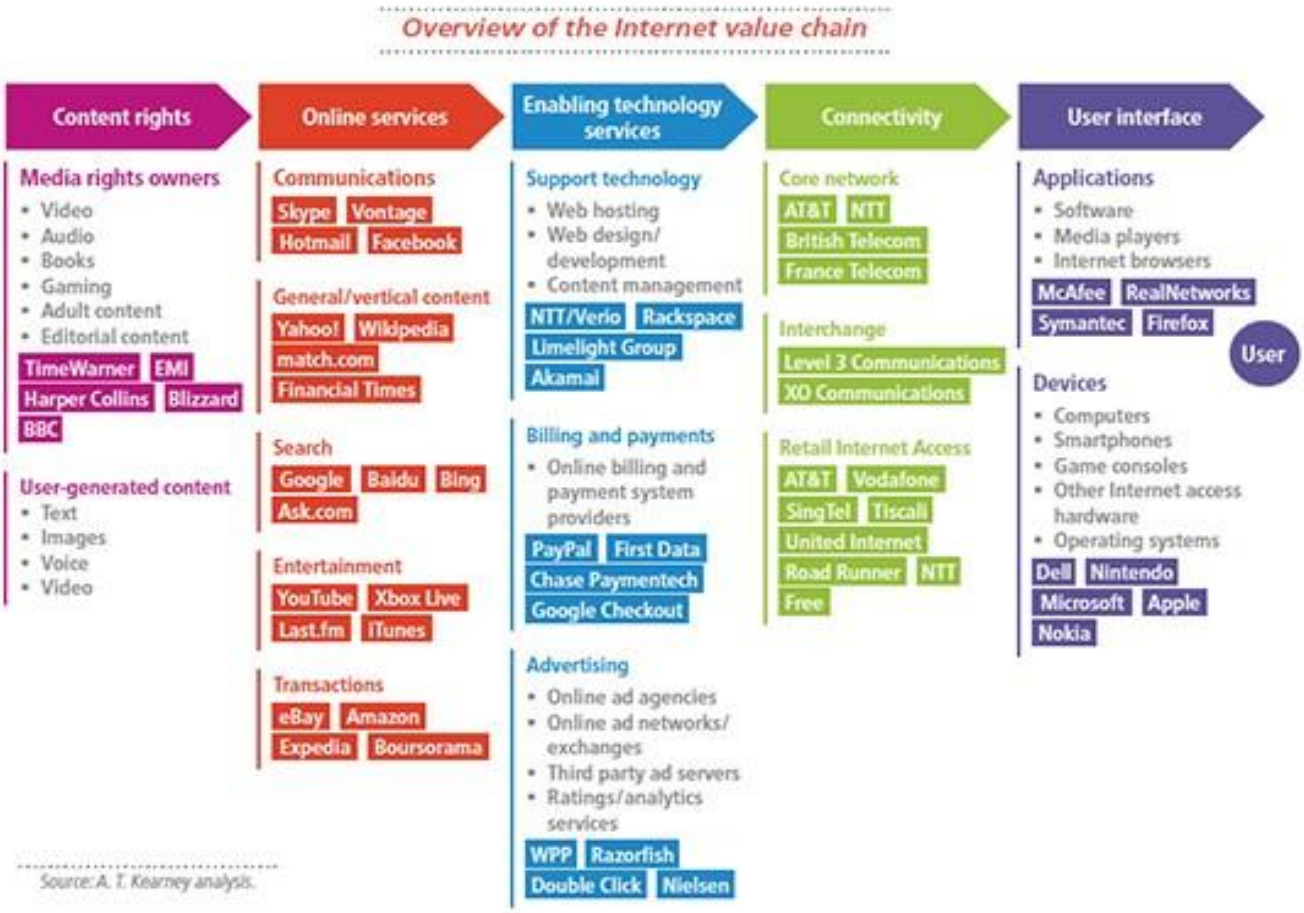
Role of ISPs in the content distribution chain

126. Over the past few years the Board has increasingly adopted the view that ISPs are "distributors" for the purposes of the Act and therefore supposedly subject to the obligations imposed on distributors in terms of, inter alia, section 18 of the Act.

127. This tendency is reflected in:
127.1. The Draft Document.
127.2. The Film and Publications Tariff Regulations 2015 which provides for separate registration fees for "distributors" and "internet service providers" but only caters for a single fee for "Annual Renewal of Distribution Certificate".
127.3. The adoption of the process and requirements for registering as a "distributor" with those for registering as an "Internet service provider".

128. ISPA submits that this is (a) due to the conflation of the entire industry being equated with the term "distributor" and as already pointed out this also creates untenable consequences in the offline world.

129. In the ordinary grammatical meaning, "film distribution" is the entire process of making a film available for viewing by an audience, and that process incorporates mulitiple roleplayers. Figure 1 below provides an overview of the entire value chain involved in the creation and distribution of, and provision of access to online content to consumers.



130. As can be seen from Figure 1 above, retail internet access providers are part of an industry that forms but one part of a complex system of stakeholders involved in the delivery of content to a user. Due to its enabling nature, it will similarly form part of complex systems in almost any conceivable industry. If a farmer (incorrectly) decides to plant seeds based on a weather report obtained on the Internet, is the ISP responsible for the farmers' losses? This question illustrates why the neutrality of ISP's must be held in high regard, and any precedent to the contrary will lead to absurd unintended consequences.

131. Compared to online content providers, the value of the role that ISP's play in the distribution of content is very small. The value of the top 15 internet content companies is equal to the value of the top 100 internet service providers.[29] ISPA notes in this regard that for this reason, certain companies that are also ISP's may wish to "move up the value chain". A great example would be the MTN Frontrow service. [30] This service is a Video-On-Demand service. Who is legally accountable for the content of this service – the ISP of the user accessing it or MTN?

29 Telecom 2020:Preparing for a very different tomorrow, a presentation by Rob Van Den Dam, Global Telecommunications Industry Leader for the IBM Institute for Business Value at IBM
30 https://mtnfrontrow.discoverdigital.co.za/#/home

132. Not only are ISP's part of a much larger complex systems, they are in themselves also part of a complex system. To this extent, no one single ISP can provide access to the internet on its own, because the internet by definition is a network of interconnected networks over which data is conveyed by a network of parties, the identity of whom is often not known to all the parties in the delivery of the service.

133. By way of example, the drafter traced the route from his personal computer to Facebook and noted that the data traversed the networks of his ISP, Neotel, Tata Communications, NTT and of Facebook, travelling through data centres located in South Africa, Portugal, England, the USA and Ireland. ISPA submits that this one of the reasons why the ECT Act does not define an electronic communications service as access to the Internet and discontinued the use of the term “Internet Service Provider” as was used in the Telecommunications Act and prior versions of RICA. Instead, an electronic service is defined as the conveyance of data over an electronic network. ISPA submits that by these definitions the legislature clearly intended that the conveyance of data necessitates at least an electronic communications service provider and an electronic communications network provider. If these providers are not the same parties, and are all referred to Internet Service Providers under the Films and Publications Act, then the question is who is the responsible Internet Service Provider that acted as the distributor?

134. In lieu of the above comments, ISPA is of the view that to make detailed comments on specific requirements such as take-down, filtering and the likes is not practical due to the overbroad definitions of “ISP” applied to a complex system of stakeholders. This is so because the definition is so broad that while a particular obligation may make perfect sense to a specific “piece of the puzzle” it would appear to be absurd to the rest of the stakeholders that are included in the same definition.

135. ISPA there submits that in order to progress constructively with its mandate, it needs to unpack and more clearly define the various stakeholders involved in the value chain of online content that is more consistent with existing regulatory regimes. Only then can it define policies, roles, responsibilities and liability in respect of each of such stakeholders. Public participation would be then be far more constructive and relevant.

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CONCLUSION

136. ISPA agrees on the need to review the scope of application of the current classification scheme and that there needs to be a considered response to the challenges of technological and media convergence as well as new methods of distribution of content. The Act, notwithstanding its subsequent amendment in a piece-meal effort to update it, remains pre-Internet legislation which could not have even begun to comprehend the massive changes in the way in which South Africans would generate, use and share information online.

137. Unfortunately the Draft Document represents another piece-meal response to these challenges, creating more confusion than previously existed.

138. ISPA has noted the Board's intention to review its tariffs and submits that it should at the same time undertake a regulatory impact assessment to guide it on the impact of its proposed intervention on the local content industry and associated elements.

139. In the event that the Board elects to hold further public hearings relating to the Draft Policy, WAPA hereby records its intention to participate.