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26 July 2022

Film and Publication Board

Attention: Ms Linda Mkhwanazi / Interim Chief Executive Officer: Dr Mashilo Boloka

Per email: Linda.Mkhwanazi@fpb.org.za

Dear Dr Boloka

CONSULTATIVE HEARING – FILMS AND PUBLICATIONS ACT, 65 OF 1996, AS AMENDED

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the correspondence from the Board dated 27 June 2022 and the invitation to participate in the consultative process being conducted by the Board in relation to its expanded mandate under the Films and Publications Act 103 of 1996 as amended by the Films and Publications Amendment Act 11 of 2019 ("**the FPA**").
2. ISPA has set out below written responses to the issues raised in the correspondence under reply and confirms its willingness to participate in the hearings scheduled for 26-28 July 2022.

About ISPA

3. ISPA is a registered non-profit company which represents the majority of Internet service providers (ISPs) in South Africa. ISPA is recognised by the Minister of Communications and Digital Technologies as an Industry Representative Body (IRB) under Chapter 11 of the Electronic Communications and Transactions Act 51 of 2002 ("**the ECT Act**").
4. ISPA's core activities relevant to this process include:
   4.1. Mediation and complaints handling: ISPA handles many requests from consumers to mediate in disputes with ISPs. ISPA's mediation process ensures relevant information is collected about the matter and that it is escalated to the appropriate point of contact, to maximise the chances of a swift resolution. In cases where the mediation process does not resolve the problem, the formal complaints process supports an independent adjudicator review process.
   4.2. Code of Conduct enforcement: All ISPA members are bound by the ISPA Code of Conduct. This Code requires all members to meet certain standards in terms of privacy, consumer protection, and protection of vulnerable persons. Members of the public buying services from ISPA members know that they are being presented with honest and accurate information about those services and have recourse if they are not.

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4.3. The ISPA Code of Conduct is required to comply with the standards of conduct set out in the Guidelines for the Recognition of Industry Representative Bodies of Information System Service Providers promulgated by the Minister of Communications and Digital Technologies. Standards of conduct include commitments to the protection of minors and obligations in respect of illegal use of services.

4.4. Take-down notice process: In accordance with its recognition as an IRB, ISPA operates a take-down notice process on behalf of its members. This process allows for unlawful content hosted by ISPA's members to be reported, and, where necessary, acted upon. This process facilitates the removal of phishing and fraud sites from the South African Internet.

4.5. ISPA maintains detailed statistics in respect of take-down notices lodged with it and the manner in which these are handled by ISPA and its members.

5. As an IRB, ISPA is required to file an annual report with the Minister of Communications and Digital Technologies setting out detailed information on the steps it has taken to ensure compliance with Chapter XI of the ECT Act, including steps taken to enforce its Code of Conduct and the manner in which take-down notices have been dealt with.

ISPA and the Board

6. ISPA has a long history of constructive engagement with the Board, dating back to 2004, and has participated in all processes leading to the finalisation of the FPAA as well as the development of the regulatory framework under the FPA.

7. In March 2020, ISPA and the Board entered into a Memorandum of Understanding (MOU) which set out the framework for future engagements. Paragraph 2.7 of the MOU specifically recognises the impact of the Films and Publications Amendment Act 2019 ("**the FPAA**") and the need for the relationship between the parties to be aligned with the FPAA.

8. ISPA appreciates that the Board is gearing up to implement the FPAA and that it's core focus is on developing the regulatory framework for content distribution in South Africa.

9. As such the specific queries raised are for the most part not applicable to ISPA's members as providers of Internet access services. ISPA will seek to engage with the Board on the ISP-specific issues set out below at the appropriate time and under the MOU framework.

ISPs and the FPA

10. The FPA contains two definitions of "Internet service provider":

10.1. "Internet service provider" means "any person who carries on the business of providing access to the internet by any means". This definition is in section 1 and is of general application.

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10.2. "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)". This definition applies to the interpretation of section 18E (Prohibited content) and the reference to section 77 of the ECT Act indicates the purpose of this second definition is to capture service providers subject to the take-down notice process.

11. ISPA and the Board have not managed to reach agreement on the interpretation of the section 1 definition with the Board adopting what ISPA regards as an overly wide interpretation. Notwithstanding which ISPA agrees the majority of its members fall within this definition.

12. The following provisions of the FPA apply directly to ISPs:

12.1. Section 27A: Registration and other obligations of Internet service providers

12.2. Section 18E: Complaints against prohibited content

13. ISPA seeks engagement with the Board on the following aspects of section 27A of the FPA[1]:

13.1. What constitutes "taking reasonable steps" under subsection (1)?

[1] ***Registration and other obligations of internet service providers***
27A. (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 access provider has knowledge that its services are being used for the hosting or distribution of child pornography, propaganda for war, incitement of imminent violence or advocating hatred based on an identifiable group characteristic and that constitutes incitement to cause harm, 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 subsections (1) and (2) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 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 not exceeding R750 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

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13.2. The overlap between subsection (2)(b) and section 54 of the Cybercrimes Act 19 of 2020 ("**the Cybercrimes Act**") which provides for the reporting obligations of electronic communications service providers in respect of specified offences.

13.3. The overlap between subsection (2)(c) and the provisions of the Cybercrimes Act providing for the preservation of evidence by electronic communications service providers, such as preservation directions.

13.4. The overlap between subsection (3) and the provisions of the Cybercrimes Act providing for the disclosure of evidence by electronic communications service providers, such as disclosure directions.

13.5. The circumstances under which an ISP will be regarded as having "knowledge that its services are being used for the hosting or distribution of child pornography, propaganda for war, incitement of imminent violence or advocating hatred based on an identifiable group characteristic and that constitutes incitement to cause harm".

13.5.1. While instances of conduct of this nature may be obvious, it is more often the case that determining whether speech is Constitutionally protected is an extremely complex legal exercise.

13.6. The meaning to be ascribed to the term "Internet access provider" as it occurs in subsection (2).

14. ISPA seeks engagement with the Board on the following aspects of section 18E of the FPA[2]:

[2] ***Complaints against prohibited content***
18E. (1) Any person may complain to the Board about unclassified, prohibited content, or potential prohibited content, in relation to services being offered online by any person, including commercial online distributors and non-commercial online distributors.
(2) If, upon investigation by the Board or by the compliance officers in terms of section 15, it is established 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 this Act or has not been submitted for examination and classification as required in terms of sections 16, 18, 18C or 18D, the matter must be referred to the Board which may, subject to due process of law—
(a) in the case of a non-commercial online distributor, issue a take-down notice in accordance with the procedure in section 77 of Electronic Communications and Transactions, 2002 (Act No. 25 of 2002); or
(b) in the case of internet service providers, issue a take-down notice in terms of section 77 of Electronic Communications and Transactions, 2002 (Act No. 25 of 2002).
(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.
(4) In the case of content hosted outside of the Republic that is found to contain child pornography, the Board shall refer the matter to the South African Police Service or to the hotline in the country concerned for the attention of law enforcement officials in that country.

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14.1. ISPA does not understand subsection (2)(b) and why a distinction is drawn between subsections 2(a) and 2(b).

14.2. The overlap between subsection (3) and the provisions of the Cybercrimes Act providing for the disclosure of evidence by electronic communications service providers, such as disclosure directions.

15. Importantly, the following provisions of the FPA do not apply to ISPs:

15.1. ISPs are not distributors as that term is defined in the FPA: ISPs are not providers of content but rather provide the routing and related services which allow their subscribers to choose and consume content. ISPs do not select the content viewed by their customers and have no knowledge of what content their subscribers consume (this information may be obtainable in response to a court order).

15.2. Section 78 of the ECT Act sets out an important legislative principle:

78.(1) When providing the services contemplated in this Chapter there is no general obligation on a service provider to—-

(a) monitor the data which it transmits or stores; or

(b) actively seek facts or circumstances indicating an unlawful activity.

15.3. Section 24C: Obligations of internet access and service providers

15.3.1. Notwithstanding the title of this section, it does not impose any obligations on Internet service providers.

15.3.2. ISPs are not providers of "content services" as defined in this section.

Overlaps between the FPA and other legislation

16. A critical point of engagement for ISPA is the overlap between the FPA and other legislation, principally the Cybercrimes Act.

17. The majority of the Cybercrimes Act came into force on 1 December 2021. Consultations are ongoing to finalise Standard Operating Procedures required under section 26 of that Act as well as the reporting obligations of electronic communications service providers under section 54 of the Act. SAPS anticipates full implementation of the Cybercrimes Act on 1 December 2022.

(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).

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18. ISPA is aware that the FPAA and the Cybercrimes Act were developed in parallel but notes that this has resulted in several overlaps between the two Acts. These overlaps are both:

    18.1. Substantive – for example both Acts create offences in respect of the distribution of private sexual material / disclosure of intimate images.

    18.2. Procedural – both Acts create obligations on ISPs / electronic communications service providers to preserve and disclose information.

19. These overlaps are complicated by the different definitions applied in the two Acts. While the FPA has its own definition of "Internet service provider", legislation which falls under the DOJCD uses the term "electronic communications service provider" which references the service licensing framework under the Electronic Communications Act 36 of 2005 ("**the ECA**").

20. The Cybercrimes Act, for example, has the following definition:

    *"**electronic communications service provider**" means—*

    (a) any person who provides an electronic communications service to the public, sections of the public, the State, or the subscribers to such service, under and in accordance with an electronic communications service licence issued to that person in terms of the Electronic Communications Act, 2005, or who is deemed to be licenced or exempted from being licenced as such in terms of that Act; and

    (b) a person who has lawful authority to control the operation or use of a private electronic communications network used primarily for providing electronic communications services for the owner's own use and which is exempted from being licensed in terms of the Electronic Communications Act, 2005.

    20.1. This definition is both broader than that in the FPA – in the sense that it is not limited to Internet access services – and narrower than that in the FPA – in the sense that the definition is tied to licensing and licence exemptions provided for under Chapter 3 of the ECA.

21. From an ISP and consumer perspective it is critical when dealing with subscriber information for the law to be absolutely clear as to the circumstances under which this personal information may be disclosed.

22. ISPA submits further that duplication of offences, obligations and procedures is undesirable.

23. To be clear: ISPA's members do not seek to avoid legislated obligations relating to "prohibited content" but they do require clarity on the clear overlaps between the FPA and the Cybercrimes Act in particular. Noting the heavy sanctions that apply to ISPs/ECSPs for non-compliance with the FPA/Cybercrimes Act there is clear legal prejudice to ISPs if applicable legislation is not aligned.

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24. ISPA's view is that criminal matters fall within the competence or jurisdiction of the DOJCD. Where there is an overlap there is a need for rationalisation of the law and the relevant provisions of the FPA should be deleted.

25. ISPs – in the guise of electronic communications service providers already work extensively with the DOJCD in the implementation of:

    25.1. The Cybercrimes Act

    25.2. The Regulation of Interception of Communications and Provision of Communication-related Information Act

    25.3. The Protection from Harassment Act

    25.4. The Domestic Violence Act

    25.5. The Maintenance Act.

26. As such the ISP community has an extensive and constructive relationship with the DOJCD, SAPS and other law enforcement agencies. When it comes to dealing with criminal matters, ISPA submits that its primary relationship should be with DOJCD and law enforcement agencies.

Process and Procedure Beyond the Films and Publications Amendment Regulations, 2021

27. ISPA has no submissions relating to the specific queries raised other than to note that regulations under the FPA must ensure that all processes contemplated in the FPA are operationalised. For example: the FPAA introduced a new procedure allowing a distributor to apply for an exemption in respect of X18 content (as provided for in section 24(3)). The regulatory framework must enable section 24(3) applications, including setting out the applicable tariff.

Process and Procedures for the Applications for the Approval of Accredited Foreign or International Classification Systems

28. ISPA has no submissions to make in respect of the specific queries raised.

Process and Procedures for Dealing with Complaints lodged at the FPB

29. The Board seeks input on the development of an instrument to provide for the processes and procedures for complaints lodged at the FPB relating to:

    29.1. The distribution of unclassified, prohibited content, or potential prohibited content, in relation to services offered online by either a commercial online distributor or a non-commercial online distributor (prohibited content);

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29.2. The distribution of private sexual photographs and films through any medium without the consent of the individual/s who appear in same and with the intention of causing that individual/s harm;

29.3. The creation, production or distribution in any medium films or photographs depicting sexual violence and violence against children; and

29.4. The distribution through any medium any film, game or publication which amounts to propaganda for war, incitement of imminent violence or advocates hate speech.

30. Distribution of "prohibited content"

30.1. ISPA is confused by the reference in this question to "prohibited content", which is a defined term in the FPA referring to hate speech and not to unclassified content.

30.2. ISPA has taken note of the provisions in the FPA which authorise the Board to lodge a take-down notice in respect of specified content distributed by a non-commercial online distributor. As an Industry Representative Body ISPA has extensive experience in managing the take-down notice procedure provided for in the Electronic Communications and Transactions Act 25 of 2002.

30.3. As the custodian of the take-down notice process in South Africa, ISPA offers its assistance to the Board in respect of any aspect of the ECT Act take-down notice process with which the Board may wish to consult.

30.4. It is further important for the Board to understand the limitations of the ECT Act take-down notice process and particularly that it cannot be used in respect of content published on social media platforms.

31. Distribution of "private sexual photographs"

31.1. ISPA has taken note of section 18F of the FPA.

31.2. ISPA submits that the conduct contemplated in section 18F is provided for in the Cybercrimes Act 19 of 2020 ("**the Cybercrimes Act**"), which came into force on 1 December 2022.

31.3. The Board under the FPA does not have jurisdiction over criminal matters or the power to undertake criminal prosecutions.

31.4. Conduct covered by section 18F should be reported to SAPS, not to the Board. Creating a process for reporting this conduct to the Board will create confusion.

31.5. ISPA submits that the Board should consult with the Department of Justice and Constitutional Development (DOJCD) regarding the implementation of section 18F.

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31.6. ISPA further draws the attention of the Board to the provisions of the Domestic Violence Act 116 of 1998 as amended by the Domestic Violence Amendment Act 14 of 2021 ("the Domestic Violence Act").

31.6.1. The Amendment Act expands the scope of domestic abuse: the conduct contemplated in section 18F of the FPA falls within the scope of the definition of "domestic violence".

31.6.2. The DOJCD is finalising regulations, forms and tariffs which will apply to new procedures for involving electronic communications service providers (ECSPs) in protecting victims of domestic abuse.

31.6.3. ECSPs will be required to:

31.6.3.1. Provide information on electronic communications used to perpetrate domestic violence, including available information about the perpetrator and an indication of whether the offending content can be removed or access thereto disabled.

31.6.3.2. **Remove or disable access to content forming part of the domestic violence where ordered to do so by a court**.

31.6.3.3. Inform their subscriber of the information provided and steps taken.

31.6.4. These provisions supplement those in the Protection from Harassment Act and the Maintenance Act which also impose obligations on ECSPs to help in tracking down those unlawfully harassing or defaulting on their maintenance obligations.

31.6.5. The Domestic Violence Amendment Act will come into force once the regulations, forms and tariffs are finalised.

32. It follows that:

32.1. The Cybercrimes Act creates a criminal offence for the unlawful disclosure of intimate images which completely or substantially overlaps with section 18F of the FPA.

32.2. The Domestic Violence Act creates a mechanism for a court to order an ECSP to remove or disable access to electronic communications forming part of domestic abuse. This would include private sexual photographs distributed as contemplated in section 18F.

32.3. It is ISPA's frank view that section 18F should be deleted as the conduct it seeks to address is already provided for in more appropriate legislation.

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33. Creation, production or distribution of media depicting sexual violence and violence against children

    33.1. ISPA submits that this conduct is criminalised in, *inter alia*, the Sexual Offences Act and reiterates its comments as set out above regarding the dangers of the Board exercising a parallel jurisdiction.

34. Distribution of "hate speech"

    34.1. ISPA has noted the comments of the Board that it will be guided by court precedent in exercising its powers under the FPA to determine whether a film, game or publication contains or constitutes hate speech.

    34.2. This is an incredibly complex and difficult determination to make and ISPA submits that the Board should be exceptionally circumspect in the manner in which it proceeds.

    34.3. ISPA refers to Part II of the Cybercrimes Act which creates offences in respect of unlawful malicious communications. Again there is clear overlap between the FPA and the Cybercrimes Act insofar as both attempt to define what constitutes free speech and to enforce this definition through the application of sanctions.

    34.4. ISPA refers to the Prevention and Combating of Hate Crimes and Hate Speech Bill currently before Parliament, which also creates a criminal offence in respect of hate speech.

35. Complaints procedure

    35.1. ISPA provides a complaint resolution process to the public offering mediation and independent adjudication procedures in respect of conduct by its members alleged to be in breach of the ISPA Code of Conduct.

Guidelines on Video-sharing

36. ISPA notes that no detail is provided together with this request for comment.

37. It is assumed that the Board intends to attempt to regulate the sharing of films on peer-to-peer networks by regarding people sharing films on these networks as non-commercial distributors. It would follow that there would be no requirement for classification but that films shared would be subject to being reported to the Board.

38. ISPA has participated on the Committee for Project 107 of the South African Law Reform Commission (SALRC) which delivered a Final Report on Sexual Offences: Pornography and Children in March 2022. ISPA submits that the Board should consider those aspects of this Report dealing with file-sharing and the particularly complex issue of sexting or self-generated sexual images produced and distributed by children.

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Process and Procedures for dealing with matters presented before the Enforcement Committee

39. ISPA has no submissions to make in respect of the specific queries raised. There are a number of examples of quasi-judicial bodies in South Africa which can be used as a procedural model.

Amendments to the Films and Publications Tariffs

40. ISPA notes the following:

    40.1. The Films & Publications Tariffs Regulations 2020 require revision to ensure that tariffs are prescribed for all applicable procedures provided for in the FPA.

    40.2. With regard to tariffs potentially applicable to complaints lodged by members of the public:

        40.2.1. ISPA refers to its comments above regarding the overlap between the FPA and other legislation such as the Cybercrimes Act and reiterates its view that the Board's mandate should not be expanded to cover criminal matters.

        40.2.2. It feels intuitively wrong to charge victims of crimes who wish to exercise their rights. ISPA agrees with the view expressed that a fee would act to hinder the lodging of complaints.

        40.2.3. ISPA suggests that the Board may need to develop a nuanced approach to when fees are charged for receipt of complaints from the public.

    40.3. ISPA strongly supports steps taken in the formulation of tariffs to protect the local content creation industry, including distinctions between small, medium and large content distributors.

Conclusion

41. ISPA trusts the above is of assistance to the Board and looks forward to further engagements,

Regards

Dominic Cull

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ISPA Regulatory Advisors