



NAB
National Association of Broadcasters

**NAB written submission to the Parliamentary
Portfolio Committee on Communications
on the Films and Publications Amendment Bill**

B37-2015

26 May 2016

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1. Introduction

- 1.1. On 7 April 2016, the Parliamentary Portfolio Committee on Communications (“the PPCC”) invited written submissions on the Film and Publications Amendment Bill (“the Amendment Bill”) by 29 April 2016, thus affording the public and interested parties only 22 calendar days in which to prepare submissions. The National Association of Broadcasters (“the NAB”) requested an extension and appreciates that the extension was granted by the PPCC, to 26 May 2016. The NAB would like to be given an opportunity to participate in oral hearings.
- 1.2. The NAB is the leading representative of South Africa’s Broadcasting sector. The NAB aims to further the interests of the broadcasting sector in South Africa by contributing to its development. The NAB membership includes all three tiers of broadcasting as well as signal distributors and associate members, these include:
 - 1.2.1. the three television services and 18 radio services of the SABC;
 - 1.2.2. licensed commercial radio broadcasters (including media groups and independents: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM, YFM, Smile FM and Times Media Ltd-Vuma FM);
 - 1.2.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat-ODM);
 - 1.2.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;
 - 1.2.5. both the licensed common carrier broadcast signal distributor and the selective and preferential broadcast signal distributors, Sentech and Orbicom;
 - 1.2.6. a range of associate members, including training institutions.
- 1.3. The NAB welcomes the opportunity to make its written submission to the PPCC on the Amendment Bill. The PPCC would have noted that prior to this process the Film and Publications Board (“the FPB”) published a Draft Online Regulation Policy (“draft Policy”) on 4 March 2015.¹ This draft Policy was met with an outcry from a wide range of stakeholders and public interest groups. It was regarded as

¹ Published in Government Gazette 38531 on 4 March 2015.

problematic in that the FPB over-reached its mandate and also sought to promulgate regulations in the absence of national policy. The NAB formally submitted its concerns to the FPB and these included:

- 1.3.1. the draft Policy was untimely, as the Minister had not yet published the Film and Publications Amendment Bill for public comment. The draft Policy was therefore regrettably published in a policy vacuum;²
 - 1.3.2. there was no clarity as to whether the draft Policy was based on evidence based studies and research, and whether any regulatory impact assessment had been conducted³;
 - 1.3.3. the draft Policy overlooked existing self-regulatory and co-regulatory systems in place, which include the Broadcasting Complaints Commission of South Africa ("the BCCSA"), and the classification systems employed by these bodies.⁴
- 1.4. The NAB engaged with the FPB to highlight these critical issues⁵. Upon the publication of the Amendment Bill, the NAB further corresponded with the FPB proposing that the draft Policy be suspended until the Amendment Bill has been passed into law. However, despite numerous interventions by stakeholders, the FPB has published the "final" Online Regulations Policy ("the Policy") in April 2016 and subsequently held a stakeholder feedback workshop on 18 May 2016. During this workshop the FPB acknowledged that the proposed Policy would still need to be aligned once the FPB Amendment Bill has been passed into law. This duplication is regrettable and the NAB trusts that the PPCC will ensure that the required administrative process is adhered to. The NAB is therefore encouraged by the publication of the Amendment Bill, as it provides the necessary legislative framework for the regulation of online content.
- 1.5. In this submission the NAB will focus on constitutional issues impacting its members in so far as the Amendment Bill is concerned. Individual members will also be making submissions that will supplement areas of specific concern.

² At page 8 of the NAB written submission on the draft Online Regulations Policy dated 15 July 2015.

³ Ibid at page 4

⁴ Ibid pages 9-10

⁵ NAB held a meeting with the FPB on 13 July 2015.

- 1.6. The NAB submission will address the following:
 - 1.6.1. The scope of application of the Amendment Bill;
 - 1.6.2. Constitutional concerns pertaining to section 192 and 16 of the Constitution of the Republic of South Africa;
 - 1.6.3. Foreign classification system.

2. Scope of application of the Film and Publications Amendment Bill

- 2.1. The Amendment Bill seeks to widen the scope of the Film and Publications Act (“the FPA”) to regulate the online distribution of digital films and digital games. The Memorandum of the Objectives of the Amendment Bill stipulates:

"Until recently, the Board has predominantly focused its classification and monitoring attention and activities on physical platforms and less on digital platforms and social media. The increasing demands for online content and technological advances require the Board to extend its focus to the regulation of content on these diverse platforms. In this regard, it is necessary for the applicable legislation, policies and procedures to reflect these demands and technological advances.

In view of the aforementioned, it has thus become necessary to evaluate ... whether ... the Act makes adequate provisions for technological advances, especially on online, social and media platforms”.

- 2.2. Whilst the NAB supports the need to respond to technological advances and to develop mechanisms to protect children from harmful content, the concern is that the proposed expansion of the mandate of the FPB through the Amendment Bill is potentially unfeasible. Furthermore in attempting to extend its mandate, the Amendment Bill introduces a number of new definitions, and also introduces certain terms in the Amendment Bill which are not defined:
- 2.3. The Amendment Bill proposes a definition for digital film. In our view the proposed definition is too wide, and purports to cover “any” content on “any” medium, which is capable of being viewed as a moving picture. This suggests that ALL video content

available on any medium including for example YouTube and user generated content, is subject to regulation.

- 2.4. Furthermore, a term that is used in the Amendment Bill which has not been defined is streamed content. "Stream" is referred to in the fundamental definitions of "distribute" and "distributor", as well as clauses 18(7), (8) and (9). (Clause 18(7) of the Amendment Bill proposes that the exemption accorded broadcasters in section 18(6) of the Act shall not apply "to a broadcaster who streams content through the internet".) It is therefore critical for the term "streamed content" to be defined. Notwithstanding this submission, the NAB proposes later that clause 18(7), 18(8) and 18(9) be deleted in its entirety, as it is inconsistent with the Constitutional protections regarding independent regulation of broadcasting.

3. Constitutional concerns

3.1. Section 192 of the Constitution- Independence of ICASA

- 3.1.1. As mentioned, the current FPA exempts broadcasters from the FPB classification obligations. Section 18(6) of the Act provides as thus :

"a broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall, for purpose of broadcasting, be exempt from the duty to apply for classification of a film or game and, subject to section 24A (2) and (3), shall in relation to a film or game, not be subject to any classification or condition made by the Board in relation to that film or game"

- 3.1.2. However, the Amendment Bill proposes the inclusion of clause 18(7), which seeks to limit the exemption afforded in section 18(6) by suggesting that a broadcaster who streams content through the internet will not enjoy the exemption. The Amendment Bill further proposes the inclusion of clause 18(8) which mandates ICASA not to issue or renew any broadcasting licence of a broadcaster who also streams content through the internet, unless such a broadcaster is also registered with the FPB as a distributor.

- 3.1.3. The exemption provided in section 18(6) of the FPA is in line with section 192 of the Constitution of South Africa, which provides for the establishment of an independent Regulator for broadcasting. In terms of section 192 of the Constitution, no other body may regulate broadcasting. Section 192 provides:

“National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”

- 3.1.4. To give effect to this provision, Parliament enacted the Independent Communications Authority of South Africa Act (“ICASA Act”). One of the objects of the ICASA Act’s is:

*“to establish an independent authority which is to ... regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution”.*⁶

- 3.1.5. Any attempt by the Amendment Bill to regulate broadcasting services is unacceptable and in conflict with the Constitution. The NAB is therefore of the view that⁷ the provisions of clauses 18(7), 18(8) and 18(9) are *ultra-vires* and encroach on ICASA’s jurisdiction and should be deleted from the Amendment Bill.

- 3.1.6. The proposed clause 18(7) seeks to take away the exception afforded broadcasters in section 18(6) of the FPA. It is also not permissible to dictate what is or is not included in “broadcasting”, as clause 18(9) does. Broadcasting is clearly defined in the Electronic Communications Act, 36 of 2005, (“the EC Act”) and includes distribution not just on radio frequency spectrum, but also on “any electronic communications network”. The NAB wishes to point out that broadcasting content that is available on a broadcasters’ linear broadcasting platform and also provided online, is already classified. It is our view therefore that the FPB should regard broadcasters’ online films, television and related content that has been

⁶ Section 2(a) of the ICASA Act.

⁷ Section 1 of the Electronic Communications Act.

classified under an authorised classification system as having been classified accordingly. To this end, the NAB proposes that the exemption in section 18(6) of the FPA be retained in line with the following drafting suggestions:

“a broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall for purposes of broadcasting be exempted from the duty to apply for classification of a film or game and, shall in relation to a film or game not be subject to any classification or conditions made by the Board in relation to the film or game. The exemption shall apply equally to the broadcaster’s online content that has already been broadcast and classified.”

3.2. Section 16 of the Constitution- Pre-classification

3.2.1. One of the principles of freedom of expression is freedom of editorial control. The issue for consideration is whether it is constitutional to institute a form of pre-classification on “digital films” broadcast. Section 53(2) of the EC Act states as follows with regards to editorial independence:

“Nothing in this Act may be construed as requiring or authorising the Authority or the Complaints and Compliance Committee, in the performance of its functions, to view programmes prior to their being broadcast.”

3.2.2. While section 53(2) of the EC Act refers only to broadcasting, the effect of requiring that content streamed online must be pre-classified would be that content which is both streamed and broadcast would need to be pre-classified. Consequently, section 53(2) is undermined – as broadcast programmes would need to be classified before being broadcast.

3.2.3. The NAB is of the view that subjecting broadcasters’ streamed content to a classification by the FPB will amount to pre-classification of content, and subsequently in violation of section 16 of the Constitution as it amounts to a limitation to freedom of speech. Broadcasters’ streamed content should

be recognised as already classified, and hence be treated in terms of section 18(6).

- 3.2.4. It must be noted that the Constitutional Court struck down the provisions of the FPA which required publishers (except newspapers which are subject to the jurisdiction of a separate press code) to submit intended publications which contained particular kinds of sexual conduct for prior approval to an administrative body)⁸. The Constitutional Court held that the regime of prior classification limited the right to freedom of expression and that this limitation was not justifiable as it did not achieve its purpose in a proportionate manner. Skweyiya J held that:

"the mainstay of the law is to encourage lawful conduct rather than to seek to guarantee lawfulness by restricting conduct altogether. As Blackstone suggested, should a publisher choose not to pursue the avenues available to gain certainty about the lawfulness of intended publication, then he must bear the risks, attendant upon the decision to publish. Such is the cost of free expression."

- 3.2.5. In this regard, the Constitutional Court has stated that where a right is being limited, a less-restrictive means available by which the same end could be achieved must be used. In the current instance, the purpose for the limitation of the right to freedom of expression is to protect children particularly from access to harmful content on the internet.
- 3.2.6. The NAB is therefore of the view that not only does section 18(7) amount to pre-classification of broadcasting content, but is also in violation of the freedom of expression, and it should be deleted in its entirety.

3.3 Foreign classification systems

- 3.3.1 The Bill proposes empowering the Board to accredit foreign classification systems and approve the use of classification ratings issued by a foreign classification authority.⁹ As foreign classification systems are based on local norms and values, classifications may differ from country to country. NAB is of the view that care should be taken when accrediting foreign

⁸ Print Media South Africa v Minister of Home Affairs and Another 2012 (12) BCLR 1346 (CC).

⁹ Proposed s9A(2)(d)(i) and s18D

classification systems to ensure that the foreign classification ratings are in accordance with Bill of Rights as set out in Chapter 2 of the Republic of South Africa Constitution.

4. Concluding remarks

- 4.1. The NAB welcomes the opportunity to make its written submission and looks forward to participating in the PPCC oral hearings.
- 4.2. The NAB proposes that clauses 18(7), (8) and (9) be deleted in their entirety from the Amendment Bill, as they are *ultra vires* and in conflict with the Constitution.
- 4.3. The NAB is of the view that the requirement to classify films should extend only to films that have not previously been classified to avoid duplication.
- 4.4. Content that has already been classified by a self-regulatory body should be deemed to be classified regardless of the platform where it is accessed. The broadcasting exemption should apply equally to a broadcaster's online content that has already been broadcast and classified.
- 4.5. The NAB notes that there are other processes underway to deal with child protection. These include the South African Law Reform Commission's Issues Paper on Sexual Offences and Pornography and the Department of Justice and Constitutional Development's draft Bill on Cybercrimes and Cybersecurity. The NAB therefore proposes that the PPCC engages these institutions during this important legislative amendment process toward developing the most feasible and legally sound way forward, and to avoid duplication.
- 4.6. The NAB is supportive of initiatives aimed at educating, empowering and protecting children from accessing harmful content online.