NAB SUBMISSION ON THE FILMS AND PUBLICATIONS BOARD DRAFT ONLINE REGULATIONS POLICY

Due: 15 July 2015

1. Introduction

1.1. On 4 March 2015, the Films and Publications Board ("the FPB") published the Draft Online Regulations Policy ("draft Policy") for public comment. The National Association of Broadcasters ("NAB") welcomes the opportunity to make its written submission, and we would like to be given an opportunity to participate in oral hearings should the FPB decide to hold any.

1.2. The NAB is the leading representative of South Africa's Broadcasting industry. The NAB aims to further the interests of the broadcasting industry 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. Three television public broadcasting services, and eighteen sound public broadcasting services of the South African Broadcasting Corporation of South Africa ("the SABC");

1.2.2. The commercial television broadcasters (e.tv, DStv, M-Net and ODM) and sound broadcasting licensees (that include media groups Primedia, Tsiya, Kagiso, MSG Africa and AME);

1.2.3. Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;

1.2.4. Over thirty community sound broadcasting licensees and a community television broadcasting service, Trinity Broadcasting Network (TBN).

1.2.5. A range of industry Associates, including training institutions.

1.3. Any service which meets the definition of broadcasting currently contained in the Electronic Communications Act 36 of 2006 (the ECA), is exempt from the classification obligations set out in the Films and Publications Act 65 of 1996 as amended ("the FPA"). As the Films and Publications Board ("the FPB") is aware, this exemption is in line with section 192 of the Constitution which provides that:

"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."

1.4. To give effect to this provision, Parliament enacted the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act"). One of the ICASA Act's objects 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".[1]

1.5. Accordingly, ICASA is the only independent body empowered to regulate broadcasting. The FPA recognises this and section 18(6) provides as follows:

"*A broadcaster who is subject to regulations by the Independent Communications Authority of South Africa shall, for the purposes 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 film or game, not be subject to any classification of condition made by the Board in relation to that film or game"*

1.6. Notwithstanding that broadcasters are exempted from classification, the NAB and its members are committed to the protection of children from harmful content and are participating in this process in support of government's initiatives in this regard. We are, however, concerned with the manner in which the FPB is seeking to achieve this objective.

1.7. The NAB has become aware that the FPB has agreed in principle, to defer the regulation of online press content to the Press Council of South Africa[2]. Based on existing precedence set in section 18(6) and other provisions of the FPA, we urge the FPB to consider an exemption on behalf of online/streamed broadcasting content.

[1] Section 2(a)
[2] http://www.techcentral.co.za/fpb-wont-regulate-online-media/58191/

1.8. Below we will outline specific concerns we have with the Draft Policy.

2. Overarching Concerns

2.1. The draft Policy marks a fundamental shift in the FPB's approach to content. A policy shift of this magnitude needs to be evidence based and supported by extensive research. The published version of the draft Policy has not been supported by any research and/or benchmarking. In addition, it does not appear that the FPB has considered the impact of the draft Policy.

2.2. Based on the Presidential Guidelines for the Implementation of Regulatory Impact Analysis/Assessment Process in South Africa ("the RIA Guidelines")[3] it is critical for policy formulation to be preceded and supported by regulatory impact assessment. The RIA Guidelines observed among others that:

> *"RIAs are an extension of a broader commitment to the quality of government through evidence based policy making. The advantage of instituting RIA is that RIA adds structure, predictability, and methodological clarity to assessment while also ensuring that the right information is available to decision making….."*[4]

2.3. The FPB requires all online content distributors to register and submit content for classification. A proper impact assessment would reveal the implications of this proposal - there are millions of online content distributors locally and internationally, and attempting to have all these registered with the FPB would be an impossible task. In addition, the sheer volume of content being uploaded would make registration and classification unachievable. For example, it is estimated that up to 300 hours of content is uploaded on YouTube alone per minute[5]. For the FPB to attempt to classify and regulate this type of internet traffic, and traffic emanating from other internet content providers is impractical from a monitoring and administrative point of view.

[3] Published in 2012
[4] At page 2 of the RIA Guidelines.
[5] https://www.youtube.com/yt/press/statistics.html

2.4. The FPB should be wary of attempting to over-regulate South African online content distributors at the expense of their international counterparts. The FPB should strive for parity, and ensure that South African online content providers compete on an equal footing and ensure that the model it proposes applies evenly across like-services.

2.5. It must also be noted that in 2012, government embarked on a national integrated ICT Policy review process and recently published the National Integrated ICT Policy Review Report[6]. The NAB is aware that the FPB made presentations to the ICT Review Panel, however it seems the FPB has not considered the findings and recommendations published in the Review Report, in particular sections dealing with content and the internet as well as institutional frameworks. The report calls for a closer working relationship and alignment between the FPB, ICASA and co-regulatory and self-regulatory bodies such as the BCCSA, ASA and Press Ombudsman.

2.6. Notably, the ICT Policy Review Panel recommends that external internet content providers should be regulated in the same way as local providers, if they specifically target South African audiences and/or revenue and reach the minimum threshold of influence set by the regulator[7]. This in our view will provide the necessary regulatory parity.

2.7. The NAB believes that a draft policy and regulations as far reaching as proposed by the FPB requires national policy alignment and collaboration between all key stakeholders.

2.8. It is also imperative that best practice be considered and applied. It is regrettable that substantive research and benchmarking does not seem apparent in the FPB's process of policy development. This concern was also articulated during the FPB's public consultation process held in Johannesburg on 28 May 2015, and further on 3 July. The overwhelming concern was that the FPB is over-reaching its mandate and does not have the authority to proceed with any regulation making process for online content, or to monitor the internet.

3. Self-regulation/co-regulation and other Initiatives

[6] http://www.dtps.gov.za/mediaroom/popular-topics/466-ict-policy-review-reports.html
[7] At page 90 of the National Integrated ICT Policy Review Report

3.1. It is important for the FPB to have regard to work done by other jurisdictions in addressing issues of online content regulation and classification. In other jurisdictions (which will be outlined below) online content providers have their own voluntary systems of self-classification. For instance YouTube has a self-regulatory mechanism that ensures the safety of content posted on YouTube.[8] Google similarly has its own self-regulatory framework, which ensures ethical behaviour on its platform.[9]

3.2. Furthermore, the NAB had the opportunity to study online regulatory content co/self-regulatory trends in other jurisdictions.

3.2.1. The EU

In the EU, the Audio Media Services Directive ("the AVMSD") is responsible for the promotion of co-regulation. It applies to audio-visual media services on a tech-neutral basis, including traditional television and VOD.

3.2.2. The UK

Ofcom has delegated functions and powers of online content co-regulation to the Association for Television on Demand ("ATVOD"). ATVOD is responsible for co-regulation of the UK video-on-demand services.

3.2.3. Canada

The Canadian Broadcast Standards Council ("CBSC") is the body involved in the regulation of audio-visual media services in Canada. The CBSC is funded by the Canadian broadcasters. Internet and mobile TV are specifically exempted from the regulation by the Canadian Radio and Television Commission ("CRTC"), and are dealt with by way of a code administered by the Canadian Association of Internet Providers ("CAIP").

3.2.4. The US

The US government introduced online content protection by enacting the Children's Internet Protection Act in 2000. The Act requires, on voluntary basis, schools and public libraries to regulate children's access to obscene or harmful content over the Internet, and requires subscribing schools and

[8] https://www.youtube.com/yt/policyandsafety/communityguidelines.html
[9] https://www.google.co.za/intl/en/policies/privacy/frameworks

libraries to filter information. The application of the Act was initially mandatory to schools and libraries in the US, and was subjected to constitutional challenges.[10]

3.3. Locally there are several self-regulatory bodies, that administer codes of conduct to regulate their members' online services, to name but a few:

3.3.1. **The Wireless Application Service Providers' Association ("WASPA")** was launched with the full support of South African mobile network operators. It plays a key role in regulating the provision of mobile applications and has a detailed Code of Conduct which all members of the Association must adhere to, and the Code has well established formal complaints process. The code further addresses issues of the right not to receive unsolicited content by allowing consumers to "opt out" from receiving such content.[11]

3.3.2 **The Internet Service Provides' Association ("ISPA")** is another voluntary industry body that administers a self-regulatory code. It has mechanisms that enable consumers to have undesired content taken down from the service providers' sites.

3.3.3 **The Interactive Advertising Bureau of South Africa ("the IAB")** is an independent, self-regulatory body responsible for online content regulation. The IAB represents interests of more than 250 large, medium and small businesses, playing a leading role in the growth and development of the South African digital economy. Its members range from online publishers, including print and television broadcasters as well as advertising agencies and a number of NAB members belong to the IAB.[12] The IAB has been progressive in developing a media code that intensively addresses issues of user-generated content/text, and categorically outlines guiding principles for content classification.[13] The IAB is in the process of formulating a consolidated 'Cross Platform Code' that will regulate online content of its members, and possibly have complaints mechanisms to address issues of non-compliance.

[10] ACMA: International Approaches to Audiovisual Content Regulation- A comparative Analysis of the Regulatory Framework May 2011.
[11] https://waspa.org.za/
[12] http://iabsa.net/about-us/
[13] Clauses B2 and B3 of the IAB Code

3.4. The NAB therefore urges the FPB to consult with existing self-regulatory bodies, and where necessary strengthen codes already administered by these bodies.

4. Procedural Concerns

4.1. In her Budget Vote Speech delivered on 20 May 2015, the Minister of Communications announced that the Department of Communications ("the DOC") would introduce amendments to five pieces of legislation, namely the Independent Communications Authority of South Africa Act ("the ICASA Act"), the Broadcasting Act, the Media Development and Diversity Act ("the MDDA Act"), the Brand SA Bill and the FPA.

4.2. Since the FPB is a creature of statute, the NAB proposes that the FPB awaits the legislative amendments before finalising the draft Policy. It would be inappropriate and a waste of resources for the FPB to engage any further on a policy document which may change if the empowering legislation is substantially amended.

4.3. Furthermore, initiatives are underway by the Department of Justice and Correctional Services ("the DOJCS"), on online child abuse. The department also deals with cyber bullying and sexting and child abuse material[14].

4.4. It is against this background that the NAB believes that the FPB awaits clarity on the issue of regulating online content. In the meantime, the FPB is encouraged to engage at an inter-departmental level, and collaborate with other government departments on work already done towards child online protection and awareness, to avoid duplication of efforts. The FPB is further encouraged to collaborate with the DTPS and DOC in coordinating efforts based on the recommendations of the ICT Policy Review Panel.

5. Constitutional Concerns

5.1. The Draft Policy applies to any person who distributes or exhibits online any film, game, or certain publication in the Republic of South Africa and includes distributors whether locally or internationally.

[14] http://www.justice.gov.za/cybersafety/cybersafety.html

5.2. The Draft Policy prohibits the distribution of digital content in South Africa unless such content is *first classified* and the classification is displayed on the content. From the NAB's point of view, this amounts to an administrative prior restraint, in other words, an instance where control is exercised before publication by an administrative body.

5.3. 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)[15]. 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."*

5.4. From the NAB's view the same argument could be made against the prior classification scheme required by the Draft Policy (even where a distributor self-classifies its own content - because of the added expense associated in order to become accredited and because of the significant time delays that prior classification might add).

5.5. 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 from harmful content. However, there may be various less-restrictive mechanisms which exist to achieve this purpose.

6. Recognising prior classification

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

6.1. From the premise that broadcasters are subject to the ICASA Code of Conduct as well as the BCCSA Codes, broadcasting content that is available on a broadcasters' linear broadcasting platform and also provided online, has already been classified.

6.2. Further to this, the draft policy states that for online television films and programmes streamed via the internet, the FPB shall in certain circumstances and for commercial and practical reasons, have the power to determine that such films, television and related content that have been classified under an authorised classification system are "deemed" to have an equivalent FPB classification. Broadcasting content ought to be regarded as "deemed" given that it has already been classified.

7. Timelines

The Draft Policy sets out a number of deliverables that need to be met by 31 March 2016, and these include ensuring that all ratings of online distributors are aligned with those of the FPB. We note that, even if the policy were to be published over the next few months, the proposed deadline is unfeasible for online content distributors to ensure that they comply with the policy. Presently, the FPB has not outlined its timelines for the final version of the policy and it is therefore uncertain how much time distributors will have to comply after the policy has been finalised. The NAB is of the view that the proposed deadline is impractical given that wider inter-government departmental consultation is required, as well as the finalisation of legislative amendments.

8. Conclusion

8.1. The NAB welcomes the opportunity to make this written submission. A summary of our key proposals is set out below:

8.1.1. A change of this magnitude should be informed by extensive research and international benchmarking. We propose that any legislative and/or policy making process should be preceded by a proper regulatory impact assessment;

8.1.2. The draft Policy must align with the overarching legislation and, for this reason, the current draft Policy should be withdrawn and republished once the Act has been amended;

8.1.3. The option of self-regulation or co-regulation should be thoroughly explored and the FPB should engage with self-regulatory bodies on this option.

8.2. Under the circumstances highlighted above, the publication of the draft Policy is clearly premature and the NAB urges the FPB to withdraw the draft Policy until such time that legislative amendments are concluded and a regulatory impact assessment has been conducted.