

# **Submissions:**

# **The Films and Publications Amendment Bill**

# Introduction

The **Interactive Advertising Bureau South Africa (IAB)** is an independent, voluntary, non-profit association focused on growing and sustaining a **vibrant and profitable digital industry** within South Africa.

The IAB presently represents approximately **180 members** including online publishers, brands and educational institutions, as well as creative, media and digital agencies.

# Introduction

1. Constitutional backdrop to regulating online media
2. The exemption for publishers of newspapers, magazines and advertisements
3. Creation of independent classification bodies infringes media freedom
4. The Bill is unconstitutionally broad and vague
5. The Bill provides the Board with censorship powers
6. The Bill is not aligned with the National Development Plan and would have an adverse impact on SA's Internet economy

# Constitutional backdrop to regulating online media

S16 of the Constitution provides:

*“Everyone has the right to freedom of expression, which includes—*

- freedom of the press and other media;*
- freedom to receive or impart information or ideas”*

# Constitutional backdrop to regulating online media

*“The importance of the right to freedom of expression cannot be gainsaid. Freedom of expression is an important instrument to a democratic government...*

*Free expression of opinion, including critical opinion, is essential to the proper functioning of our constitutional democracy.”*

ConCourt in *Citizen v McBride* [2011] JOL 27 088 (CC)

# Constitutional backdrop to regulating online media

ConCourt in *Print Media South Africa and Another v Minister of Home Affairs and Another* (2012):

- Prior classification limited the right to freedom of expression
- This limitation was not justifiable as it did not achieve its purpose in a proportionate manner.

# Constitutional backdrop to regulating online media

*“The prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should be only be ordered where there is a substantial risk of grave injustice.” – Lord Scarman, English Court of Appeal*

*“The mainstay of the law is to encourage lawful conduct rather than to seek to guarantee lawfulness by restricting conduct altogether.”*

ConCourt in *Print Media South Africa v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC)

# Constitutional backdrop to regulating online media

According to ConCourt:

- **The rule:** free-flow of constitutionally protected expression
- **The exception:** administrative prior classification

# Constitutional backdrop to regulating online media

However, the Bill makes administrative prior classification the rule.

As such, both the Film and Publications Act and the Bill are unconstitutional.

# The exemption for publishers of newspapers and advertisements

Differentiation between “newspaper” and “magazine” is irrational, impractical and outdated.

Rather, all publications which are a member of the Press Council of South Africa should be exempt (FPB agreed this in principle at 2015 SANEF AGM). Press Council also amended its Code to take into account digital publication.

Exemption should extend to cover all “*online distributors*” who are members of the Press Council - an increasing number of publishers operate online.

# The exemption for publishers of newspapers and advertisements

Proposed S16(1) wording:

*“Any person may request, in the prescribed manner, that a publication, other than a publication ~~bona fide newspaper, or magazine~~ that is published by a member of ~~a body[,]~~ that is recognised by ~~the Press Ombudsman~~ the Press Council of South Africa and which member subscribes, and adheres, to a code of conduct that must be enforced by that body, and other than an advertisement that falls within the jurisdiction of the Advertising Standards Authority of South Africa, which is to be or is being distributed in the Republic, be classified in terms of this section”.*

# The exemption for publishers of newspapers and advertisements

Definition of “*publication*” – proposed wording:

(a) *“any newspaper, magazine, book, periodical, pamphlet, poster or other printed matter;”*

and

(i) *“any website, social media, message or communication, including an audio, visual, or audio-visual (that is, including video) presentation (whether live-streamed, streamed or otherwise) placed on any distributed network including, but not confined to, the Internet;”*

# The exemption for publishers of newspapers and advertisements

Problematic differentiation in Bill between *online* video content and *broadcast* video content.

In many instances, the content which is broadcast via linear channels and online media is the same (e.g. SABC, eTV, DSTV).

S18(6) exemption for broadcasters regulated by ICASA should be extended to include online distribution.

# The exemption for publishers of newspapers and advertisements

Proposed S18(6) wording :

*“A broadcaster who is subject to regulation by the Independent Communications Authority of South Africa shall, for the purposes of broadcasting or online distribution, 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.”*

# Creation of independent classification bodies infringes media freedom

Bill provides for creation of an independent classification body to conduct “*classifications of digital films, digital games and publications*”.

Unclear how body will be set up or funded, and no guidelines as to how it should function.

The relevant provisions are vague and impose severe financial and practical burdens on online publishers.

# Creation of independent classification bodies infringes media freedom

Furthermore, time periods and delays with classification will:

- Diminish benefits of online publication
- Stunt the media and obstruct publication of public interest speech

# The Bill is unconstitutionally vague

Vagueness a self-standing ground for striking down laws and policies.

Basic principle: law must be sufficiently clear so that people can adjust their conduct to comply with it.

# The Bill is unconstitutionally vague

Broad/vague terms:

- “*online distribution*” and “*distribution*”
- “*publications*”
- “*digital film*” (which overlaps with definition of “*film*”)
- “*certain publications*” (not defined, but definition of “*publication*” in the Act is extremely broad)

# The Bill provides the Board with the power to censor content

S18E of the Bill provides that any person may complain to the Board about unclassified/prohibited conduct.

Powers of the Board include:

- (a) “in the case of a hosting service, issue a take-down notice;*
- (b) in the case of a live content service, issue a service cessation notice to; and*
- (c) in the case of a link service, issue a link-deletion notice of.”*

# The Bill provides the Board with the power to censor content

Board's power to take down content = censorship.

*“Would censorship based on vague and overly broad criteria be any more constitutionally acceptable if it does not appear in the context of prior restraint, or specifically administrative prior restraint? I do not think so.” – Van Der Westhuizen J.*

ConCourt, *Print Media SA*

# Adverse impact of Bill on the development of SA's Internet economy

*“South Africa needs to use its knowledge and innovative products to compete...Innovation is necessary for a middle-income country to develop.*

...

*South Africa needs to sharpen its innovative edge and continue contributing to global scientific and technological advancement....the institutional arrangements to manage the information, communications and technology (ICT) environment need to be better structured to ensure that South Africa does not fall victim to a ‘digital’ divide”.*

National Development Plan 2030

# Adverse impact of Bill on the development of SA's Internet economy

*“79% of investors are uncomfortable investing in countries where freedom of expression is restricted or highly regulated.*

*71% of investors are uncomfortable investing in Internet businesses that would be obligated to remove content upon receiving a request from an organisation, private or government entity without a court order.”*

“Report: 2016 - The Impact of Internet Regulations on Investment”, Fifth Era

# Adverse impact of Bill on the development of SA's Internet economy

*“In summary, 100% of South African investors believe the legal environment has a negative impact on their investing activities...There is also a risk of reducing FDI [Foreign Direct Investment] investment capital from overseas investors who share these concerns.”*

“Report: 2016 - The Impact of Internet Regulations on Investment”, Fifth Era

# Adverse impact of Bill on the development of SA's Internet economy

*“Conversely, South African and overseas investors agree that there are many ways in which government can support the local investment environment which would make them willing to bring additional capital and invest more in local business.*

*These findings highlight the concern of many lawmakers that unintended consequences might result from potential new internet regulations. Our findings illustrate that there is a risk that potential regulations might greatly curtail or cut off capital from the Internet companies that are driving global innovation, GDP growth and new job formation.”*

“Report: 2016 - The Impact of Internet Regulations on Investment”, Fifth Era

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# Conclusion

1. Pre-classification requirements are unconstitutional
2. Exemptions in S16(1) and 18(6) should be extended to include all members (including online distributors) of the Press Council and ICASA
3. Creation of independent classification bodies may infringe on freedom of media
4. The Bill is unconstitutionally broad and vague
5. The Bill empowers the Board to censor content, and violates principles of administrative justice and procedural fairness
6. The Bill is not aligned with the National Development Plan 2030, and will have an adverse/prejudicial impact on development of South Africa's Internet economy