



**Remarks from the Association for
Progressive Communications on the Draft
Online Regulation Policy of the Film and
Publication Board of South Africa**

*Association for Progressive Communications (APC)
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1. Introduction

On 4 March 2015, the Film and Publication Board (FPB) gazetted the Draft Online Regulation Policy (hereafter referred to as “the Policy”) and opened it for public comment.¹ The stated purposes of the Policy are to “bring about a comprehensive and fundamental transformation for online content regulation in the country”, “ensure that children are protected from exposure to disturbing and harmful content”² and “ensure that classification and compliance monitoring focuses on media content, rather than on platforms or delivery technologies.” In effect the policy would allow the FPB, at its discretion, to classify user-generated content (or as termed by the FPB, “self-generated content”) on any online content platform.

The Policy in its current form is problematic, in that:

- [It would stifle freedom of expression and access to information, as enshrined in the Constitution.
- [It would be unworkable from a practical perspective and be in contravention of Section 78 of the Electronic Communications and Transactions Act of 2002 (as amended).
- [It would stifle local online content creation and distribution by small and medium-sized enterprises.
- [It does not reflect adequate recognition of children's rights and could, contrary to its intended goals, be harmful to children, to survivors of abuse, and to LGBTI communities.

2. General comments on the FPB Policy

APC thanks the Film and Publication Board for initiating a public debate on the nature of online content and its impact on our society and for inviting public comment on the draft Policy. We hope that the remarks below are of value to the FPB as they face the challenges brought about by changes in how content is distributed via the internet.

2.1 The Policy could potentially stifle freedom of expression and access to information, as enshrined in the Constitution

The Policy is far too broad in its scope and application and would give the Film and Publication Board wide-ranging powers to censor internet content and could encourage self-censorship of content.

The FPB defines content as including “films, games, publications and self-generated content uploaded or posted on social media platforms”³ and further states that the scope of the type of content to be classified “includes self-generated content uploaded on platforms such as You-Tube,

¹Film and Publication Board. (2015, 4 March). Draft Online Regulation Policy: Notice for Public Comment. Government Gazette Notice 182 of 2015. Schedule 6, p. 5.

²Draft Online Regulation Policy, Explanatory Memorandum, Section 1, p 8.

³Ibid.

facebook [sic] and Twitter, feature films, television programs and certain computer games which are distributed online by streaming through the internet.”⁴

The classification of self-generated or user-generated content is particularly worrying as it would have chilling effects on freedom of expression and access to information just as South Africans of all races and classes are increasingly making use of social media platforms to participate in the public sphere and generate and share local content that contributes to transparent and accountable governance. Classification of self-generated content introduces the possibility that such classification of content could be used to censor, or self-censor, political and social commentary, as well as information in the public interest.

APC is concerned that the language of the document undermines the diversity of views and opinions that we have as a society, and which is protected by the Constitution. In particular, the expressed view that people could “use these [social media and user-generated content] platforms to undermine Government’s social cohesion and transformation agenda”⁵ could send a message that undermines the right that South Africans have to hold and express diverse opinions and viewpoints.

2.2. The Policy would be unworkable from a practical perspective and be in contravention of the Electronic Communications and Transactions Act of 2002 (as amended)

The Policy would implement a system of intermediary liability⁶ which would require intermediaries to police content by monitoring, censoring and filtering content. The Board acknowledges the reality that “it is impractical to expect all media content, particularly self-generated content to be classified.”⁷ It responds to these impracticalities by promoting two strategies: “co-regulation” for large content distributors and platform providers, and a system of intermediary liability in which internet intermediaries are required to implement content filtering, blocking and take-downs (removal of content).

The Policy states that “Accordingly the obligation to classify content will not generally apply to persons uploading online content on a non-commercial basis.” However, it still reserves the right for the FPB, in the course of monitoring compliance, to “refer any self-generated video that is found to contain classifiable elements for classification to its classification committee, instruct the distributor to take down the unclassified content and only reinstate it after having complied with the FPB classification decision.”⁸ This strategy not only gives the FPB huge censorship powers over any internet content, but also aims to introduce heavy costs and liabilities on content distributors and internet intermediaries for content that they (in the view of the FPB) fail to censor: “In such an

⁴Draft Online Regulation Policy, Explanatory Memorandum, Section 4.2, p 13.

⁵Draft Online Regulation Policy, Explanatory Memorandum, Section 4.4, p 15.

⁶“Internet intermediary liability” means the legal responsibility (“liability”) of intermediaries for illegal or harmful activities performed by users through their services. “Liability” means that intermediaries have an obligation to prevent the occurrence of unlawful or harmful activity by users of their services. Failure to do so may result in legal orders compelling the intermediary to act or expose the intermediary to civil or criminal legal action. <https://www.apc.org/en/pubs/frequently-asked-questions-internet-intermediary-l>

⁷Draft Online Regulation Policy, Explanatory Memorandum, Section 4.4, p 14.

⁸Ibid.

event the costs for classification will be borne by the online distributor. This is aimed at ensuring that the online distributors remain vigilant and that their filtering mechanisms are adequate to protect children against exposure to harmful content and that people with racist ideologies do not use these platforms to undermine Government's social cohesion and transformation agenda.⁹

The Policy states that "Internet intermediaries, including application service providers, host providers and internet access providers will bear the responsibility of putting in place content filtering systems to ensure that illegal content or content which may be harmful to children is not uploaded in their services."¹⁰

The Policy requires intermediaries to actively monitor and police content, which is incompatible with the exceptions from liability given to intermediaries in Section 78 of the Electronic Transactions and Communications Act (ECTA) of 2002 (as amended), which states that "there is no general obligation on a service provider to monitor the data which it transmits or stores; or actively seek facts or circumstances indicating an unlawful activity."

Requirements for active monitoring of content could greatly increase the costs of connectivity and stifle the flow information necessary for the information society and knowledge economy. Technologies to monitor traffic, in accordance with the wishes of the FPB, could include technologies like deep packet inspection (DPI) which could also potentially be used for surveillance. The Policy would in short require internet service providers (ISPs) and content intermediaries to implement mechanisms that support both censorship and surveillance.

We recommend that the FPB take steps to ensure the protection of intermediaries from liability due to third party content in accordance with the ECTA. We recommend that the FPB also refer to the international best practices on internet intermediary liability captured in The Manila Principles on Intermediary Liability¹¹ which were launched in early 2015. Principle 2 states that "Intermediaries must not be required to restrict content unless an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful," while Principle 4 establishes that "Laws and content restriction policies and practices must respect due process."

2.3 The Policy would stifle local online content creation and distribution by small and medium-sized enterprises

While the Policy may smooth over some of the obstacles for the entry of large foreign digital distributors like Apple's iTunes, Google Play (games), Netflix and others, it could greatly stifle the business of smaller local South African distributors and content creators.

The Policy would require distributors to pay fees for registration, classification of content, the contracting of FPB classifiers, or the training of in-house classifiers. This could seriously stifle small internet-based business. The information age promises opportunities for anyone to become a

⁹Ibid.

¹⁰Ibid.

¹¹<https://www.manilaprinciples.org/principles>

distributor of content, creating great opportunities for independent artists and small businesses in the content distribution, film, music, game development and other cultural industries.

It remains questionable as to whether independent artists or small businesses would be able to survive under the new regime proposed by the FPB. The FPB could thus pose serious threats to the diversity of content; we may see a situation in which there is even less content in local languages and reflecting local culture, created and consumed in South Africa.

If it is cumbersome to adhere to, the Policy could cause producers of self-generated content to migrate to foreign content platforms that do not recognise the jurisdiction of the FPB.

2.4 The Policy does not reflect adequate recognition of children's rights and could, contrary to its intended goals, be harmful to children, to survivors of abuse, and to LGBTI communities

The Policy makes highly improbable and completely unsubstantiated claims about user-generated content and how children use the internet. The Policy states that "learners and society at large raised concerns about the rise of self-generated content, most of which involved school learners engaging in sexual activities and uploading images or video footages thereof on Facebook, Twitter, You-Tube [sic] or distributing same amongst their peers using mobile phones and similar devices."¹²

This is a limited, exaggerated and somewhat unfair view of how learners and youth make use of social media and user-generated content platforms. Furthermore, it does not take into account that learners and youth may make use of the internet to learn about sex, sexual health, how to protect themselves from abuse, and where to get help regarding these issues when they need it.

In 2010-2011, APC conducted research¹³ in seven countries, including South Africa, that showed that the term "pornographic" content is often used to describe sexual material or expression that is healthy and important for youth to access, such as information related to LGBTIs, safe sex, and women's sexual expression, among other things. This content is then censored or regulated, violating users' rights to access this information. The research also showed that the debate around what is "harmful" is often posed from a protectionist lens that does not take into account the voices of youth, women or LGBTs. This Policy could limit or prevent children from gaining access to sexual content, claiming protection of children, but actually resulting in infringing on children's rights to access to educational content.

As the research demonstrated, LGBTI communities, sexual and reproductive health and rights activists, and child protection support groups use the internet to talk about and organise around sexual issues where mainstream media still consider them taboo. Tagging website or social media content with umbrella terms such as "pornographic" violates the right to organise, as well as youth and activists' safety and security. It is important to protect the rights of sexual minorities to be able to access information, form communities and ultimately find help if they need to. We know that the internet is a way for people from marginalised communities to circumvent taboos and become

¹²Draft Online Regulation Policy, Explanatory Memorandum, Policy Development Context, p. 9.

¹³APC. (2011). *EROTICS: Sex, rights and the internet*. erotics.apc.org/research/erotics

more empowered. We are concerned that the provisions in the Policy could have a negative effect these types of internet usage.

Sometimes in our haste to protect children from harm, we can forget that children have rights too. On 13 March this year, the UN Committee on the Rights of the Child, the Special Rapporteur on Human Rights Defenders of the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and a group of human rights experts issued a statement calling on states "to comply with their obligation to respect, protect and fulfill the rights of all children and young adults without discrimination, to ensure that lesbian, gay, bisexual, transgender and intersex children and young people are consulted and participate in discussions on policies and laws that impact on their rights."¹⁴

The statement acknowledged that "Violence and discrimination against LGBT and intersex children and young persons take place at home, in schools and in institutions. LGBTI young people too often face rejection by their families and communities who disapprove of their sexual orientation or gender identity." It warns that "Societal attitudes against LGBT and intersex persons should not be used as justification to promote discriminatory laws and policies, to perpetuate discriminatory treatment, or to fail to investigate and prosecute those responsible for violence against LGBT and intersex children and young people." It emphasises that "The health and well-being of all children and young adults must be protected, including through ensuring access to non-discriminatory health services and comprehensive sexuality education, and by protecting the rights of all children and young adults to their identity, autonomy, and physical and psychological integrity."

At APC we take child protection seriously. We believe that in addition to protecting children from harmful material on the internet, the internet can be a powerful tool in protecting children from harm. Should the proposed draft regulations be adopted, we would be creating an internet which children cannot fully utilise to protect themselves from harm, both online and offline. The internet can and does provide avenues for children to seek help from abuse, to report abuse, to learn about abuse, to discuss abuse, and the opportunity to heal – whether that involves discussing abuse, or using the internet to learn about the things they like, to consume the media they like, and to create and maintain real-life and online social networks.

As a society we must be careful about using our values to impose means of internet control on children and youth that can fundamentally deprive them of their rights, and of recourse to the violation of their rights.

Children have, for example, the right to information, and this includes information about relationships, sexual orientation, safe sex, abuse, and a whole range of topics involving sex. If the draft regulation policy is imposed, a great deal of content that may be useful to children and youth, such as information dealing with sexual orientation, the challenges of puberty, love, longing and abuse, may be closed off to them.

Child abuse is perhaps one of the most egregious and prevalent human rights violations of our time, and even perhaps of all of history. Child abuse is a human rights violation that most often

¹⁴OHCHR. (2015, 13 May). Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights International Day against Homophobia, Biphobia and Transphobia - Sunday 17 May 2015. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E

happens behind closed doors, hidden from society. It is a rights violation that continues to deprive human beings of their rights in a lasting way throughout much of adult people's lives. First, it initially violates the right to safety and security. Second, the abuse survivor is deprived of the rights to physical and mental health. Third, it can deprive survivors of their right to free speech, as the structures of power imposed on them by society, communities and families can deprive them of the ability to talk about and address abuse. Fourth, arising from these dynamics, abuse survivors are deprived of the rights to justice and of access to justice. These situations can perpetuate conditions allowing abuse to happen again, and to be sustained over time.

This vicious cycle that starts with an egregious human rights violation and continues to deprive survivors of their rights for years to come cannot simply be addressed by depriving children and youth of the right to access information that adults deem inappropriate for them.

If we create a society in which children, youth, sexual minorities, or LGBTI communities are deprived of this information, then we also build a society in which survivors of physical abuse, rape, sexual abuse and child sexual abuse lack certain avenues to break the cycle of abuse.

3. Recommendations

- [APC notes that the Policy is incongruent with the aims of freedom of expression and access to information as enshrined in the constitution. We recommend that the Policy ensure that any limitations to freedom of speech and to lawful content be in line with international law and within the narrow confines of the three-part test¹⁵ in Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR).
- [APC notes that the Policy in its current state is in contravention of the Electronic Communications and Transactions Act, Section 78, and recommends that the Policy be either withdrawn or revised accordingly. We recommend that the FPB take steps to ensure the protection of intermediaries from liability due to third party content in accordance with the ECTA.
- [We recommend that the FPB also refer to the international best practices on internet intermediary liability captured in the Manila Principles on Intermediary Liability¹⁶ which were launched in early 2015.
- [APC recommends that the Policy take into account the effect it would have in its current form on local content creation and on small to medium-sized enterprises, as well as on the local media industry.
- [APC recommends further consultation on the effects that the Policy in its current form would have on the rights of children, survivors of abuse, and sexual minorities.
- [APC welcomes the extension of the public consultations around the Policy and suggests that more public consultations be held to incorporate the problems and viewpoints raised by the public comments received.
- [APC recommends that the Policy not be adopted in its current form.

¹⁵Limitations on freedom of expression must: 1) be provided by law, in sufficiently clear terms to make it foreseeable whether or not statements are permissible; 2) be directed at one of the following goals: ensuring respect of the rights or reputations of others, or protecting national security, public order, public health or public morals; and 3) be strictly necessary for the achievement of that goal, including that no suitable alternative measure exists which would be less harmful to freedom of expression.

¹⁶<https://www.manilaprinciples.org/principles>

The Association for Progressive Communications (APC) is an international network and non-profit organisation founded in 1990 that wants everyone to have access to a free and open internet to improve lives and create a more just world. APC's chief operating office is located in South Africa.

Contact: Emilar Vushe emilar@apc.org - www.apc.org