

TERMS OF REFERENCE FOR THE APPOINTMENT OF SERVICE PROVIDER TO DEVELOP GUIDELINES FOR THE PEER-TO-PEER VIDEO SHARING

1. INTRODUCTION

- 1.1 The Film and Publication Board (FPB) is a state entity established in terms of the Films and Publications Act, 1996 (Act No. 65 of 1996), as amended (FP Act), whose main objective is to regulate, both on physical and online platforms, the creation, possession and distribution of films, games and certain publications. Such regulation is amongst others in order to protect children from disturbing and harmful content and to provide content information to adults that will enable them to make informed reading, viewing and gaming choices for both themselves and children in their care.
- 1.2 The Films and Publications Amendment Act, 2019 (Act No. 11 of 2019) (FPA Act) came into operation on 1 March 2022 in line with the proclamation published in the Government Gazette by the President and in line with extended mandate the FPB is empowered to develop regulations and guidelines among other things to guide the conduct of the industry and regulatory decisions.
- 1.3 The FP Act provides for various approaches to the classification of online content. The first, through the application of the exemption provisions in the Act, entails the FPB entering into license agreements with online distributors. The agreement will allow for accreditation of the online distributor to undertake its own process of classification making use of the Classification Guidelines of the FPB.
- 1.4 In this scenario, FPB outlines the rules of classification through the Classification Guidelines, and online distributors are required to comply with same in the provision of age-ratings and consumer advice. The FPB will conduct regular

training to the online distributors on the application of the Classification Guidelines and will conduct regular audits of films and games to ensure that they are appropriately classified.

- 1.5 Should a Commercial Online Distributor not wish to enter into an agreement as stated above, they will be required to submit all titles to the FPB for classification.
- 1.6 Section 18C of the FP Act provides for another scenario where a Commercial Online Distributor may on application and payment of a prescribed fee be accredited by the FPB to conduct classifications of films, games and certain publications, i.e. self-classification, of such content.
- 1.7 The FPB may also approve the use of classification ratings issued by a foreign or international classification authority or body, on application by a Commercial Online Distributor who wishes to distribute films, games or publications in South Africa using a classification rating issued by such a foreign or international classification authority or body.
- 1.8 The FP Act draws a distinction between Commercial Online Distributors and Non-Commercial Online Distributors. It is important to emphasize that it is only Commercial Online Distributors who will be required to register and classify films, games and certain publications which limits the scope of the regulatory authority of the FPB. The FPB will only have jurisdiction over Non-commercial Online Distributors in respect of complaints and take down notices, they will not be required to pay a distribution fee or submit content for classification.
- 1.9 In this regard the FP Act provides for the prohibition against the distribution of private sexual photographs and films, the prohibition against the filming and distribution of films and photographs depicting sexual violence and violence against children and the prohibition against propaganda for war; incitement of

imminent violence and advocacy of hatred that is based on identifiable group characteristics, and that constitutes incitement to cause harm.

2. THE REGULATORY SCOPE OF THE FILM AND PUBLICATION BOARD

Regulatory scope of the Films and Publications Act, 1996 (Act No. 65 of 1996)

- 2.1 It is to maintain the required proportionality and balance between respecting the freedom of expression and protecting the rights of persons, in particular those of children, that the FP Act, has been promulgated. The FP Act repealed the Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967), and the Publications Act, 1974 (Act No. 42 of 1974), and created a new comprehensive regulatory framework for films, games and certain publications. The FP Act provides for the establishment of the FPB that is responsible for the classification of both films, games and certain publications and no film or game may be distributed or exhibited in public unless it has been classified by the FPB.
- 2.2 The FP Act is a “law of general application” as required by section 36 (1) of the Constitution. The Constitutional Court has held that such a requirement derives from an important principle of the rule of law, namely that “rules be stated in a clear and accessible manner”.¹
- 2.3 To this end the Legislature may and has, consistently with the Constitution of the Republic of South Africa, 1996 (Constitution), promulgated the FP Act to regulate the creation, production, possession and distribution of films, games, certain publications and the internet by way of classification to:

¹ Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 47.

- 2.3.1 protect consumers against harmful and disturbing material while allowing adults to make informed choices for themselves and the children in their care by providing consumer advice;
 - 2.3.2 protect children from exposure to disturbing and harmful material and from premature exposure to adult material;
 - 2.3.3 make the use of children in pornography and exposure to pornography punishable;
 - 2.3.4 criminalising the possession, production and distribution of child pornography; and
 - 2.3.5 creating offences for non-compliance with this Act.²
- 2.4 In doing so the provisions of the FP Act are justifiable noting that the nature of the right and the extent of the limitation, on the one hand, and the purpose of the limitation on the other need to be considered.³
- 2.5 Acknowledging that the freedom of expression is an important right in our Bill of Rights, there is nonetheless a legitimate government purpose to empower the FPB to execute its legislative mandate. The main purpose of the FP Act, through the regulatory tool used by the FPB, is to classify content to provide age-ratings and consumer advisories to ensure that consumers make appropriate viewing and gaming choices for themselves and children in their care. The FPB classification regime is premised on the formulation of classification guidelines⁴ which is informed by empirical evidence on what can be deemed harmful for

² Section 2 of the Films and Publications Act, 65 of 1996.

³ S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) paras 65-66.

⁴ Section 4(A) (1)(a) of the Films and Publications Act. 65 of 1996

adults and children. The formulation of the classification guidelines entails extensive public consultations, ensuring the standards placed within the classification guidelines are in-line with public expectations. This means the classification guidelines formulation process is evidence based, transparent and has accountability mechanisms, with all these essential in regulatory policy formulation of a democratic state. Such a process is undertaken however within the framework of the Bill of Rights so as to ensure compliance with section 8 (1) and (3) of the Constitution which provides with regards to the former that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state and with regards to the latter that in giving effect to the Bill of Rights one must apply or if necessary develop the common law to the extent that legislation does not give effect to any right and develop rules of the common law to limit any right provided that the limitation is in accordance with section 36 (1) of the Constitution.

2.6 Since its inception approximately 25 years ago, the FPB has had the responsibility of classifying films, games and certain publications in line with South African values and norms under the overarching application of the Bill of Rights. This approach has a distinct difference from the censorship regime used by the Apartheid government to advance the then state's discriminatory and dehumanising political agenda. The role of the FPB has previously been regulating the distribution of content, which was easily identifiable. Films were either distributed via VHS, disc (DVD and Blu ray) and in cinema format, and games were likewise distributed in disc format whereas publications were in pre-packaged magazines and books. With developments in technology, content has moved to online streaming or digital platforms. Consumers, and particularly children, now can access content which may not have been appropriately classified and labelled through such online streaming and digital platforms.

2.7 Such progress has necessitated the introduction of amendments to the FP Act to address the following challenges:

- 2.7.1 Align the definition of child pornography to the definition in terms of the Constitutional Court judgment in the case of *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC);
 - 2.7.2 Give effect to the constitutional amendments of section 16 (2)(a) as instructed by the Constitutional Court in *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC);
 - 2.7.3 Decriminalize the online distribution of adult content on all platforms including digital platforms; and
 - 2.7.4 Provide for the establishment of a co-regulation system that will allow for accreditation by the FPB of independent classification bodies to classify their own digital films, games and publications.
- 2.8 The purpose of the amendments in the FP Act therefore is to close the regulatory gap that currently exists in the expanded market. Consumers, and children in particular, run a risk of exposure to harmful content which is distributed on online streaming and digital platforms. It is important to note that what is deemed to be harmful content may differ from one jurisdiction to the next. Harmful⁵ content is a value laden concept and it is important for it to reflect the societal values and norms of that country. The amendments therefore extend the current rating system and content regulatory regime to digital and online content providing services. This enhances the protection of children and limit consumer concerns and confusion.

⁵ The word “harmful” is defined in the FP Act to mean the causing emotional, psychological or moral distress to a person, whether it be through a film, game or publication through any on or offline medium, including through the internet and “harm” has the corresponding meaning.

- 2.9 It must be acknowledged that there is a need to improve coordination in regulating the creation, possession and distribution of films, games and certain publications and by same ensure the protection of children and consumers from harmful and illegal digital and online content on all platforms including those which such content is distributed. Co-ordination and collaboration amongst and between organs of state and industry is required to ensure future-proof classification regime for the films, games and the publication sector.
- 2.10 The FPB classifies films, games and certain publications through the provision of age-ratings and consumer advisories. This ensures that consumers of content, and particularly parents and guardians, by being informed of what may be contained therein are able to ensure that children are not prematurely exposed to harmful content that may have a socio-psychological impact on their development.
- 2.11 The FPB model is aligned with international standards as is found in the United Kingdom (UK), Australia, New Zealand and Singapore. All films, games and certain publications that are distributed within the Republic of South Africa are required to be submitted to the FPB for classification. Importantly, this requirement does not extend to broadcast material and publications that have been published by a member of the Press Council of South Africa (PCSA) or an advertisement that falls under the jurisdiction of the Advertising Regulatory Board of South Africa, which is being distributed in the Republic. The FPB only classifies publications (such as books, paintings, magazines etc.) once a public complaint is received and therefore, these are not required for submission and pre-distribution classification.

3. THE REGULATORY MODEL

3.1 The International Telecommunications Union (ITU) defines three criteria to determine whether ex ante regulation should be considered to address a market failure:

- 3.1.1 high and non-transitory structural, legal or regulatory barriers to entry are present;
- 3.1.2 market structure does not tend towards effective competition within the relevant time horizon; and
- 3.1.3 competition law alone is insufficient to adequately address market failure(s).⁶

3.2 The international approach to the regulation of the on-demand audio and audio-visual sector has been to adopt the following principles:

- 3.2.1 The United Nations Special Rapporteur on Freedom of Expression has noted that "... unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users."⁷
- 3.2.2 In alignment with this statement, international territories have generally decided not to introduce a licensing regime for over-the-top (OTT) services as the regulatory effects may be disproportionate to OTT services.

⁶ ITU-T. D.261 (10/2016).

⁷ United Nations: Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

3.2.3 The UK, in conjunction with the European Union (EU) have undertaken to implement a technological-neutral and consumer-protection focused framework, while OTT services are subject to 'light touch' regulation. The UK's regulatory framework for on demand programming focuses mainly on:

- (a) the protection of children;
- (b) Content that may incite hatred; and
- (c) Commercial references in programmes (and that online content providers comply with the rules pertaining to product placements and sponsorships), without a licensing regime being prescribed.

3.2.4 Similarly in Australia, there are no specific licensing requirements for OTT services.

3.2.5 In the United States of America, OTT internet video services are not licensed by any federal or state regulator.

3.2.6 The EU and Australia has imposed licensing obligations on audio-visual service providers but these territories have a 'light touch' regulatory regime where the key focus areas relate to:

- (a) the regulation of possible harmful content;
- (b) advertising; and
- (c) quality standards.

3.2.7 The UK's Office of Communications (Ofcom) has a notification procedure for on-demand programme services and does not prescribe any licensing regime for OTT providers.

3.2.8 It is on this premise that the amendments to the FP Act should be considered.

4. OBJECTIVE

4.1 The purpose of appointing the service providers is for the provision of legal services for the drafting of:

4.1.1 The regulations, rules and/ or guidelines dealing with peer-to-peer video sharing.

5. INVITATION

5.1 Service Providers are invited to send proposals to the FPB for consideration. In preparing a proposal, it is crucial that a Service Providers demonstrate expertise in the development of regulatory instruments to a public institution.

5.2 The proposal must be limited to a maximum of three (3) pages.

6. SCOPE OF WORK

6.1 The Service Providers will be required to produce the following instrument:

6.1.1 Regulations, rules and/or guidelines dealing with peer-to-peer video sharing;

6.2 In doing so the Service Provider should, for each regulatory instrument referred to above, ensure the following is undertaken:

- 6.2.1 Define the problem to be addressed;
- 6.2.2 Conduct research and gather information;
- 6.2.3 Determine the scope and objectives of the regulatory instrument;
- 6.2.4 Choose the appropriate legal basis for all the regulatory instrument;
- 6.2.5 Write the text of the regulatory instrument in clear and concise language;
- 6.2.6 Include relevant definitions and clarifications;
- 6.2.7 Consider necessary exemptions and transition periods;
- 6.2.8 Include implementation and enforcement provisions; and
- 6.2.9 Ensure consistency with existing laws and regulations.

7. REPORTING RELATIONSHIP

7.1 The Service Provider will report to the Executive: Regulatory Development and Enforcement of the FPB as and when required to do so.

8. CONDITION OF BID

8.1 Intellectual property rights

- 8.1.1 All copyright and intellectual property rights that may result as consequences of the work to be performed will be become the property of the FPB.
- 8.1.2 The Service Provider must hand over all documents and information in any format, including copies thereof, that it received from the FPB or that it had access to during the assignment immediately after completion of the assignments to the FPB.
- 8.1.3 Submission of Company Profile: The Company profile to also indicate how the bidder will assist FPB in achieving the objective to the provision of legal services for the drafting of:
- 8.1.3.1 The regulations, rules and/ or guidelines dealing with peer to peer video sharing;

9. Functional Evaluation Criteria

1. The regulations, rules and/ or guidelines dealing with peer-to-peer video sharing.

Functional criteria	Weight	Applicable scores					
		1 Poor	2 Fair	3 Average	4 Good	5 Excellent	Total Score
Experience in the provision of the regulations, rules and/or guidelines dealing with peer-to-peer video sharing.							
Criterion							
Years of Experience in in the drafting	50	N/A	N/A	5 – 10 years' experience	More than 10 – 15	15+ years' experience	

of the regulations, rules and/ or guidelines(Company profile must be attached)					years' experience		
The proposal must include the list of services relating to the drafting of regulations, rules and/or guidelines)							
Reference letters in respect of the provision of regulations, rules and/or guidelines. (the reference letter must be on the letterhead, dated and signed).	50	N/A	N/A	Three (3) reference letters from clients	Four (4) Reference letters from clients	Five (5) + reference letters from clients	
Minimum qualifying score	70						

The minimum overall qualifying score is 70

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