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INTERACTIVE ENTERTAINMENT SOUTH AFRICA

Comment on the Films and Publications
Amendment Bill [B 37-2015]

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Introduction

Interactive Entertainment South Africa is a non-profit company that is mandated to lobby, develop policy and help grow the South African games, serious games, simulation, board-game, augmented reality and virtual reality sectors of the interactive entertainment industry. Historically the interactive entertainment industry has been subjected to classification of the majority of its content, and we welcome the opportunity to give comments on the Films and Publications Amendment Bill as it directly affects the industry and how we operate.

Objection to “other publications” and prior classification

As a point of departure, we think it is important to deal with prior administrative classification system that the Films and Publications Board Act (“the Act”) promotes, and the broad range of content that the Films and Publications Board (“the Board”) has the power to classify. We will be referring extensively to the Constitutional Courts judgement in *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (12) BCLR 1346 (CC) as a basis for our argument. In particular, we would like to make reference to the following statements of Justice Skweyiya;

At para 45 *“In my view the respondents have failed to demonstrate that the **Act’s administrative prior classification system** is constitutionally defensible”* (our emphasis);

At para 51 *“Because **freedom of expression**, unlike some other right, **does not require regulation** to give effect, **regulating the right amounts to limiting it**. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. **Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless.**”* (our emphasis);

At para 52 *“As I see it, **the free flow of constitutionally protected expression is the rule and administrative prior classification should be the exception.**”* (our emphasis);

At para 60 *“Equally, **if a publisher were not to submit material that, on the face of it, fell to be submitted, but would ultimately have emerged unrestrained, he could still be prosecuted for breaching the very duty to submit**”.* (our emphasis);

At para 61 *“Quite remarkably, **no timeframe is stipulated on the classification process**. Moreover, **an onus is placed on a publisher to justify the expression sought to be made**”.* (our emphasis)

At para 63 *“On analysis of the statutory scheme, **there is little doubt that section 16(2)(a) is not the exclusive means through which the Act’s purposes and its own purposes may be achieved**. In fact, **prohibiting the publication and creation of child pornography and the exposure of children to pornography are already governed by two other sections of the Act, which are altogether independent of the classification system**. Consequently **section 16(2)(a) is not necessary to achieve the Act’s purpose** insofar as they pertain to children”.* (our emphasis);

At para 70 *“**Administrative prior restraint is also not the only way in which the state can promote lawful conduct on the part of publishers**”.* (our emphasis);

At para 71 *“In my view, **the mainstay of the law is to encourage lawful conduct rather than to seek to guarantee lawfulness by restricting conduct altogether.**”* (our emphasis);

At para 72 *“In my view, **the central constitutional deficiency lies in the administrative and compulsory nature of the Act’s prior classification scheme, in circumstances where there are less restrictive alternatives for achieving important legislative purposes**”*. (our emphasis); and

At para 73 *“As the applicants correctly pointed out, the lamentable reality is that sexual offences, besting our communities, are perpetrated with alarming frequency and cruelty. The need for redress is immediate and crucial. **It is, however, difficult to conceive of how section 16(2)(a) might contribute to solving this problem.**”*

Based on the above comments we make the following submissions;

- We recognise that the in the matter above, that it was primarily concerned with “other publications”, however we argue that the arguments are valid for games and films as well.
- It is now settled law that administrative prior classification of “other publications” as defined in the Act, except where the content advocates or promotes propaganda for war, incites violence or advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, is unconstitutional (“**listed grounds**”). We submit that this argument holds true for films and games as well.
- The entire administrative prior classification system promoted by the Act, regardless if it is for games, films or other publications, is unconstitutional and has no place in our constitutional democracy, and is an unjustifiable limitation of the freedom of expression.
- The board has failed to produce sufficient rationale to date, on why all content, be it games, films or other publications should be subjected to administrative prior classification.
- There are less restrictive alternatives to achieve the same legislative purpose.
- We recognise that the prevention and detection of child abuse is an important issue. However prior classification of *all* games and films does not in any way solve this issue.
- The current system of prior administrative classification has not and does not prevented child abuse from happening, as criminals are not in the habit of obeying the law in the first place, as a result all the administrative prior classification system does is put an undue burden on lawful distributors of films and games.
- The purpose of the board to provide “consumer information” is not a justifiable reason to warrant an administrative prior classification system for *all* games and films.
- As such we call that the Bill be expanded to address the deficiencies in the administrative prior classification system, by scrapping the administrative prior classification system completely and instead be replaced with a system that only requires administrative prior classification of content that constitutes promotes or advocates listed grounds or content that would be classified as R18, X18, XX or unclassifiable in terms of the current legislation.

Comments on the expansion of the definition of “Child Pornography” and related offenses

We welcome the expansion of the definition of “child pornography” but would suggest that it be change to “child sexual abuse material” as follows the international norm.

Similarly the creation of new crimes against “revenge porn” is needed, but we question if these clauses should not rather be incorporated in the Criminal Procedures Act.

Comments on the addition of “digital” distributors, games and films

If the prior administrative classification system is to remain, we believe that the addition of “including the streaming of content through the internet, social media and other electronic mediums” should be moved from the definition of “distributor” to the definition of “online distributor”, as that seems to make more sense and fit the intention of the distinction between the two types.

Comments on the proposed classification regime for online content

If the prior administrative classification system is to remain, we welcome the additions that allow for self-regulation and the use of foreign classification systems. We would argue that a definition and exemptions for the classification of user-generated content (as envisaged by the Films and Publications Board Policy for online content regulation) be included in the Act itself.

Further we would suggest that the proposed section 18(1)(b) be amended as follows:

“if it is a digital film, digital game or publication approved for sale or hire online, must conspicuously display the Board’s classification decision and logo on the landing page of the website [of the digital film or digital game],...” To add clarity where exactly the logo should appear.

Conclusion

We believe that the presentation of this bill before parliament is an excellent opportunity for the house to update the out-dated and unconstitutional administrative prior classification system advocated by the Act. We would welcome the opportunity to present a further oral submission in support of these comments.



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