

CHANGING THE INTERNET AS WE KNOW IT

Category: Commercial Law,Media and OTT,Privacy Law, Infosec, and POPIA,Technology Law
written by Yashoda Rajoo | March 10, 2020



In October last year, President Cyril Ramphoasa signed the Films and Publications Amendment Bill (“**the Bill**”) into law. The Bill first entered the National Assembly in 2015, but not before it was widely criticised as archaic, vague and broad enough to include everything from hard-core pornography to cat videos on Youtube. The last four years before the Bill’s enactment, have seen several amendments, tweaks and changes until it was finally passed in December 2018 by the National Council of Provinces and thereafter returned to the National Assembly for consideration.

Whilst the Film and Publication Board (“**FPB**”) prides itself on reflecting the opinions of the public as well as prevailing social concerns, the Bill has attracted controversy as being dubbed the “Internet Censorship Bill^[1]”. According to the FPB, the changes in legislation allow the Bill to progress in line with the changes in technology. New digital content platforms could cause harm to consumers, specifically children, if they are not regulated^[2]. In addition, the amendments, specifically Section 18 of the Bill, make specific provisions that outlaw the sharing of revenge porn as well as cyberbullying – acts which have led to a rise in the number of suicides^[3] over the past few years.

The Bill has prompted a national outcry as the main objective of the FBP has become sterner in regulating the creation, possession, production and online distribution of content such as films and games. The Bill provides for the establishment of an enforcement committee that will deliberate on unlawful content or unlawful distribution of content by enforcing fines or referring the cases to law enforcement for criminal prosecution. Further, the Bill allows for commercial online content distributors and commercial distributors to enter into a co-regulation arrangement with the FPB to assess and recognise international content regulation systems that are in alignment with the basic principles of protecting consumers.

The outcry is based on Section 16(1) of the Constitution of the Republic of South Africa which provides that everyone has the right to freedom of expression. Two broad questions arise with the enactment of the Bill. Firstly, if I, as a private citizen, upload content onto YouTube will the amendments apply to me? And secondly, if I, as a private citizen, livestream without getting a stream classified, will I face any punishment?

According to the FPB, content created by the general public for non-commercial distribution, will only be affected if the content created falls foul of the laws prohibiting the distribution of child

pornography, hate speech, incitement to violence, violence or sexual violence, which includes cyber social ills such as revenge porn. However, livestreaming does not fall within the ambit of the Bill. Where livestreaming exhibits any form of illegal content, the community standards of platform owners and the regulations of the Internet Service Providers (“ISP”) would apply.

As mentioned previously, another issue with the Bill is that the language is vague and difficult to understand. For example, if an individual makes money from YouTube, is the individual considered a distributor? Further, there is fear that the amendments could be used to stifle content that **could be** interpreted as hate speech or child pornography. Another example would be the artwork of The Spear by Cape Town based artist, Brett Murray. The Spear depicted former President Jacob Zuma in a painting that generated sparks of criticism from the presidency and the ANC. In 2012 the FPB ultimately classified the artwork with a rating of 16 for nudity.

It is important to remember that although individuals have a right to freedom of expression, the FPB performs a delicate balancing act between the various rights held by citizens and the concern in protecting all South African children from premature exposure to content which could harm their psychological or mental development.

In this regard, any person who knowingly distributes private sexual/photographs and/or films without the necessary, required consent will be liable to a fine up to R150,000.00 or two years imprisonment. If the individual is identifiable in the distributed content, the fine doubles to R300,000.00 and up to 4 years imprisonment. If a person knowingly creates, produces or in any way contributes in any film or photograph which contains any form of sexual assault and violence against children, they will be liable for a fine of R150,000.000 and/or imprisonment of 2 years. In addition, if any person knowingly makes statements of hate speech in any medium, including the internet and social media in particular, the person will be subjected to a fine up to R150,000.00 or 2 years imprisonment.

If you have a question about the Bill and how it might affect you, contact us for more good, clear, precise advice.

^[1] *“What the new internet censorship bill means for you”* (Author: Lucinda Dordley) (2 October 2019) (<https://www.capetownetc.com/news/what-the-new-internet-censorship-bill-means-for-you/>) (Accessed: 1 March 2020)

^[2] *“FPB Amendment Bill – What it means for streamers and Youtubers according to the FPB”* (Author: Brendyn Lotz) (8 April 2019) (Accessed: 1 March 2020)

^[3] *“Revenge Porn: What it is and why you should be aware of it”* (Author: Dial a Nerd) (22 March 2017). *“Women are mainly the victims of revenge porn, of the 139 cases reported in the UK between January and April 2015, 80% were women. Research from the “End Revenge Porn Campaign” put the figures even higher, at 90%. The same research highlights the very real impact of the “revenge porn phenomenon” as follows – 93% of the victims, said they suffered, “significant emotional distress”; 82% claimed, “significant impairment in social occupational, or other important areas of functioning” due to be a victim, 51% had suicidal thoughts due to being a victim, 42% sought psychological services”.* – <https://dialanerd.co.za/revenge-porn-aware?> (Accessed: 1 March 2020)