

SA Films and Publications Amendment Act comes into force

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The Films and Publications Amendment Act 11 of 2019 (FPAA) came into effect on 1 March 2022. The primary amendments introduced by the FPAA are the regulation of the online distribution of films, games and publications, and the extension of the operations of the Film and Publications Board's (FPB) compliance and monitoring obligations to online distributors and the classification of online films, games and publications.



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Following the growth of electronic communications, social media platforms and the availability of digital content, it was deemed necessary to extend the operations of the Films and Publications Act, 1996 by introducing the FPAA, to cater for the creation, possession, production and distribution of online content.

Wide application

The FPAA is wide in its application and includes within its ambit all user generated content (UGC) made available on social media and video sharing platforms. A film is widely defined as "any sequence of visual images recorded in such a manner that by using such recording, such images will be capable of being seen as a moving picture, and includes any picture intended for exhibition through any medium, including using the internet, or device", and brings UGC within the operations of the FPAA.

Classification

In terms of the FPAA, all online distributors will be required to register with, and submit all content to the FPB for classification. Considering UGC is posted online on a minute-to-minute basis, compliance with this stipulation is likely to prove impossible. As part of this classification process, a fee is payable to the FPB on a per title basis. Given the proliferation of UGC online, the cost of submitting discrete items of UGC to the FPB for classification will be prohibitive. It is

also unlikely that the FPB has the resources to deal with this scenario.

As an alternative to this requirement, the FPAA introduces a system of self-classification in terms of which commercial online distributors may apply to the FPB to be approved and accredited to perform self-classification. Commercial online distributors accredited to perform self-classification are not required to submit all of their films and/or games to the FPB for classification, but will still be required to register with the FPB. If an online distribution agreement is entered into with the FPB as part of the self-classification approval process, an annual online distribution licence fee is payable to the FPB. These fees are applied incrementally but subject to a maximum cap of R2m.

Commercial online distributors who wish to self-classify their films and games must comply with certain prescribed requirements, including ensuring that their classification of films and games is in line with the FPB's classification guidelines, decisions and requirements, and must advise the FPB of all their "XX" and "X18" classifications and other classifications for publication in the Government Gazette.

In addition, commercial online distributors who have been approved for self-classification may be required to furnish the FPB with the details of their classification decisions for auditing purposes, and the FPB is entitled to suspend an accreditation granted to a commercial online distributor, if such distributor fails to comply with the prescribed requirements for self-classification. All self-classified online distributors are required to display age ratings, as well as the classification information together with the FPB's logo on, or in connection with, any film or game.

The FPAA also provides for the approval of accredited foreign or international classification systems by the FPB's Council. In terms of the foreign accreditation provisions, an online distributor wishing to distribute films in South Africa may apply to the Council to use classification ratings issued by a foreign or international classification authority or body. The Council may approve the application to use the classification ratings issued by a foreign or international classification body subject to such conditions, as the Council may consider necessary in relation to the online distribution of films.

Factors that will be taken into account in considering an application for the accreditation of foreign or international classification systems include the FPB's ability to access the distributor's online service for compliance monitoring and auditing purposes and the alignment of the foreign or international ratings to the ratings in the FPAA and the FPB's classification guidelines.

International classification systems

Although the FPAA provides for self-classification and the use of accredited foreign or international classification systems as an alternative to submitting all films and games to the FPB for classification prior to distribution, it is unfortunate that the FPAA still requires adherence to the FPB's classification guidelines and to a number of other onerous and administratively intensive obligations. These requirements will be particularly onerous for global content providers. Most global content providers have implemented their own classification and ratings systems, which they will have to adapt to ensure that all South African content is classified in line with the FPB's classification guidelines, as determined by the FPB and any possible new decisions made by the FPB from time to time. The approach adopted in the FPAA is out of step with

international approaches to the classification of content on global platforms, in terms of which the platform owner is given full autonomy over its self-classification decisions.

International regulators have recognised that the preferable approach to online content regulation is to rely on self-regulation as an '*ex ante*' measure to prevent the occurrence of harm and are increasingly recognising the importance of platform-specific architectural designs to support such self-regulation. Self-regulation is considered the most appropriate approach to the regulation of online content and has proved to be an effective means for the regulation of online harms. This is evidenced by the fact that all major global content platforms have detailed content rules and policies that all users are required to adhere to.

Such rules do not permit harmful content, which includes, for example, pornography, hate speech, incitement to violence, sexual violence, among others. Such platforms employ large teams of global content moderators whose sole focus is to ensure that content posted online is not harmful. Extensive content moderation systems are already in place on all global platforms. These are supported by sophisticated technological measures - such as algorithms that pick up harmful content. All content not in line with the guidelines is taken down. The global platforms also offer parental controls, whereby parents can set access parameters for their children. There are also sophisticated complaints procedures - whereby complaints are investigated and if a post is found to be problematic, it is removed.

One of the acknowledged benefits of self-regulation is that it does not have a 'chilling effect' on the right to freedom of expression and has an immediate effect on the behaviour of the regulated industry, while prescriptive regulation can take years to materialise and implement. In an increasingly global world where digital platforms are not confined to nation states, it would have been preferable for the FPAA to have been aligned more closely to the international approaches adopted to the regulation of online content and online harms.

Traditional broadcasters

The FPA is currently not applicable to traditional broadcasters. Such broadcasters are exempt from the requirements of the FPA, in recognition of the fact that broadcasting is entitled to constitutional protection in terms of section 192 of the Constitution. Per the Constitution, broadcasting must be independently regulated, in the public interest, and in a manner, that ensures fairness and a diversity of views. Central to this is the realisation of the right to freedom of expression. As traditional broadcasters are able to self-regulate the content on their platforms, the same right should be accorded to all online content.

The FPAA Regulations and Draft Classification Guidelines

The draft Films and Publications Amendment Regulations (Regulations), were published for public comment in South Africa in 2020 to clarify some of the aspects detailed in the FPAA. The regulations had significant implications for online distributors and applied to the sale, hiring and streaming of content on various digital platforms in South Africa.

The Regulations, as well as the Draft Classification Guidelines for the Classification of Films, Games and Certain Publications (published on 4 February 2022 for public comment) both seek to give effect to the FPAA, and were published for public comment at a time when the FPAA was not yet in force. Interested parties should expect these documents to be published in final form soon, despite the fact that the correct procedure - to publish the documents for comment only after the FPAA came into effect - was not followed.

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