UNIVERSITIES SOUTH AFRICA

COMMENT ON DRAFT ONLINE REGULATION POLICY PUBLISHED IN NOTICE 182 OF 2015

Submitted to the Film & Publication Board – 12 August 2015

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1. Introduction

1.1. Universities South Africa, formerly Higher Education South Africa (HESA), was formed on 9 May 2005, as the successor to the two statutory representative organisations for universities and technikons (now universities of technology), the South African Universities Vice-Chancellors Association (SAUVCA) and the Committee of Technikon Principals.

1.2. The Legal Advisory Committee ("**LAC**") of Universities South Africa is responsible for technical comment on draft legislation that has a direct bearing on the higher education sector, with specific reference to universities. It also advises Universities South Africa on the impact of specific pieces of legislation on the functioning of universities and is responsible for the preparation of draft alternative legislation on its own initiative, or on issues referred to it by Board and/or Executive Committee of the organisation.

1.3. Through its individual members, the committee assists Universities South Africa to identify legislation, in final or draft format, which should be brought to the attention of all universities, as well as to monitor the legislative process in respect of legislation relevant to higher education.

1.4. The LAC has noted the publication for public comment of the Draft Online Regulation Policy ("**Draft Policy**") in Government Notice 182 of 2015 and hereby makes a submission in response thereto.

1.5. We wish to record the LAC's gratitude for the extension that has been granted to the LAC for making a submission after the date of the published deadline for public comment.

2. General position

2.1. The LAC is fully aligned with and supportive of the objects of the Act, as set out in section 2 thereof, and is likewise generally supportive of initiatives to bring about the achievement of these objects in terms of the guiding principles set out in section 4 of the Draft Policy.

2.2. The LAC, however, questions –

2.2.1. whether the Draft Policy fully falls within the legislative mandate and authority of the Films and Publications Act, No 61 of 1996 ("**FBA**") and its board ("**Board**"), notably whether it is constitutional for the intervention sought to be implemented by way of a policy directive, whether requiring pre-approval is justifiable and whether same is administratively fair; and

2.2.2. whether the nature and extent of the intervention sought is appropriate in view of the anticipated regulatory impact.

2.3. For purposes of this submission, the LAC limits its response to the latter aspect, as contained in 2.2.2, and the anticipated implementation issues pertinent in the South African higher education environment.

3. Relevant background information on the South African higher education environment

3.1. Higher education institutions are constituted in terms of the Higher Education Act, No 101 of 1997, as amended ("**HEA**"), which legislates their establishment, composition, functions, funding and oversight. In particular, the HEA establishes the Council for Higher Education with the mandate to –

3.1.1. promote quality assurance in higher education;

3.1.2. audit the quality assurance mechanisms of higher education institutions; and

3.1.3. accredit programmes of higher education.

3.2. Higher education institutions play an ever important role in an open and democratic society and to effectively fulfil their obligations to society, require to operate with academic freedom. It is often necessary, and desirable, for higher education institutions to research and comment on contentious issues and material.

3.3. Higher education institutions, of course, appreciate that academic freedom cannot be exercised without restraint, and therefore have established ethical committees consisting of skilled and experienced domain experts in each particular field to provide oversight and guidance to the academic community at each institution.

3.4. In the furtherance of its statutory mandate, higher education institutions employ technology to undertake their research and to facilitate learning. As such, higher education institutions make available tools and Internet access to its staff and students in the ordinary course of their business.

3.5. Generally speaking, higher education institutions are not subject to regulation by the Independent Communications Authority of South Africa ("**ICASA**").

3.6. As is to be expected from institutions positioned as leaders in the knowledge economy, large volumes of Internet and other data pass through and/or are stored on the networks and platforms of higher education institutions.

3.7. Principally, the communication and data exchange at higher education institutions takes place within a closed user group consisting of staff and students. Almost without exception, the students at higher education institutions are at least 18 years of age.

4. General issues with the Draft Policy

4.1. Less restrictive interventions

The explanatory memorandum is not convincing in terms of the scale of the problem. The question has to be asked whether the extent of the proposed measures are, in fact, justified and whether less restrictive interventions will not serve the objects of the FBA and the Board adequately.

The explanatory memorandum does not provide any evidence of a regulatory impact assessment having been done.

Internationally there are many notable cases where self-regulatory frameworks have proven successful. By enabling such self-regulatory frameworks to be adopted via the existing requirements for classification systems, a lesser burden can be placed on distributors, or certain types of distributors such as higher education institutions which, for the largest part, are well-regulated, incidental and not-for-profit distributors.

4.2. Cost of compliance

It is a national priority to keep the cost of higher education contained, and the concern is that these costs will increase to recover the cost of compliance with the Draft Policy. Particularly as there are a myriad of applications, registrations, agreements, fees and attendances that the Draft Policy proposes to introduce.

Since there is no differentiation between a dedicated and incidental distributor, for neither a profit or a non-profit distributor, the full cost of compliance will affect every organisation falling within the ambit of the very broad definition.

The Draft Policy gives no indication of whether such fees and expenses will be nominal, or prohibitive. Given the vast volume of data passing through and stored on the computing facilities of higher education institutions, this is a major concern.

4.3. No mechanism for industry-wide classification systems

As mentioned in the background section of this submission, higher education institutions are already well regulated in terms of the HEA and have of their own accord established ethical committees to preserve the integrity of their activities through self-regulation.

Any risk to the public at large is very limited because, for the largest part, higher education institutions work with closed groups consisting of academics and students.

The Draft Policy makes no provision for industry-wide classification systems to be adopted for well-defined industries with a homogenous profile, such as higher education institutions. The result of this may be unnecessarily inefficient, onerous and/or disparate approaches.

In our assessment, the object of the FBA and Draft Policy will be better served if the Board were to take the initiative in such cases and come to an agreement with well-defined industries with a homogenous profile with regard to their compliance with the FBA and the proposed Draft Policy.

4.4. Implementation

The target date of 31 March 2016 is, with respect, very ambitious. We seriously doubt that the Board will be able to deal with the magnitude of the applications the Draft Policy will trigger within the stated timeframe, which will also make meaningful industry engagement as proposed above, extremely difficult.

5. Specific issues in respect of Draft Policy

5.1. Section 5.3.3 of the Draft Policy

One of the stated objects of the Draft Policy is to be technology neutral. Prescribing compliance formalities for a "landing page" is not in keeping with this approach, as not all technologies will have a "landing page". Moreover, it may well not be possible to display the Board's classification decision and logo "during the streaming of the digital content".

If the person distributing the content is merely acting as a distributor, adaptation of the work in question to comply with the requirement may be required, which implies that copyright infringement will be committed through unauthorised adaptation.

5.2. Section 5.4.2 of the Draft Policy

Please refer to our concerns about the ability of the Board to comply with its own deadline at paragraph 4.4 above. If the Board is unable to process the application, the prohibition contained in this section may severely prejudice higher education institutions.

The Draft Policy gives no undertakings as to the speed of processing of applications, nor any deeming provisions should applications fail to be processed timeously.

5.3. Section 5.5 and 5.6 of the Draft Policy

We would question the need for the proposed training and certification regime to be universally applied, especially in the case of a well-defined industry with a homogenous profile, such as higher education institutions. If the classification system to be applied in respect of educational content is clear and concise, it should be capable of consistent application independently of the Board.

Should any person be of the view that an item has been inappropriately classified, they have access to remedies in terms of the FBA, and where some form of illegal action was involved, the rights and remedies stated in the FBA will come into play. The Draft Policy provides for reviews and audits in this regard, as well as other administrative penalties such as the withdrawal of registration as distributor (refer to section 9.3 of the Draft Policy).

Again, please also refer to our concerns about the ability of the Board to comply with its own deadline at paragraph 4.4 above.

5.4. Section 6.1

The term “television films and programmes” is not defined. Is the intent that reference be made to “films” as defined in the FBA and if so, when is it classified as for “television”?

The language is ambiguous and not in keeping with the philosophy of being technology neutral.

5.5. Section 6.3

We respectfully submit that the last sentence, which requires content providers to take cognisance of internationally controversial content, cannot be enforced due to the vagueness of the provision.

5.6. Section 7.3

It is not entirely clear whether this section seeks merely to confirm the provisions of section 24C of the FBA, or whether it intends to assign to online distributors additional monitoring duties otherwise reserved by the FBA for Internet service providers.

We submit that assigning additional obligations in the face of the existing obligations in the FBA, such as the active duties contained in section 24B(2), would place an undue burden on higher education institutions.

6. General comment on FBA

6.1. In addition to our comments on the Draft Policy, we wish to comment shortly on the FBA itself in expectation that the working committee on the Draft Policy may also consider them as part of their legislative process.

6.2. It appears to us that the drafters of the FBA wrote the FBA with reference to the classic, but now dated, scenario where films and games were released by the entertainment industry in the normal distribution channels of the time. In this scenario, the classification of films and games as prescribed by the FBA was workable. As the explanatory memorandum, however, points out, a decade later the FBA is being subjected to new scenarios, notably the ubiquitous use of technology and the pursuant changes in criminal behaviour.

6.3. In our assessment the FBA is out of step with the aforegoing realities and it is to be asked, with merit we would argue, whether the FBA as it stands provides a suitable legislative framework within which to address new challenges in the online world. Specifically the definition of “distribute”, read with the definition of “film”, appears to

potentially be so wide that all manner of content may unintentionally fall within the scope of the FBA.

7. Conclusion

7.1. For the reasons set out above, we cannot support the proposed Draft Policy in its current form.

7.2. In our view, the Draft Policy is comparable to the Government's recent amendments to visa regulations, which while pursuing a noble goal, has had serious consequences that far outweigh the problems it seeks to address. Certainly, the examples listed in the explanatory memorandum, do not make a compelling case for the introduction of the Draft Policy.

7.3. We thank you for your consideration and welcome further debate on the issues raised.

Submitted on behalf of the LAC Chairperson, Prof Niek Grové
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