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Parliamentary Portfolio Committee on Communications  
Cape Town  
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Dear Committee Members

## **REPRESENTATIONS ON CONVERGENCE BILL**

### **Introduction**

- 1 The Online Publishers' Association of South Africa ("OPA") wishes to thank the Parliamentary Portfolio Committee on Communications ("the Committee") for an opportunity to comment on the Convergence Bill ("the Bill") introduced into Parliament earlier this year.
- 2 OPA currently has 24 members<sup>1</sup>, which include amongst them some of South Africa's most professional online publishers.
- 3 OPA is a voluntary, non-profit association whose primary aim is to ensure a sustainable and vibrant online publishing industry in South Africa. OPA seeks to address issues which are of common interest to its members, and to represent its members in relation to the public, the rest of the media, government, and the advertising community.
- 4 Our objectives include the following –
  - 4.1 the endorsement of the highest standards in online publishing with respect to editorial quality and integrity, credibility and accountability;
  - 4.2 the development and promotion of standards across all aspects of the online publishing industry; and
  - 4.3 the enhancement of the trust necessary to support sustainable online publishing businesses.
- 5 In making these representations, OPA will focus on those aspects of the Bill which are of particular concern to our members.

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<sup>1</sup> 365 Digital Publishing, 5fm, Ananzi, BDFM Publishers, Business in Africa, CareerJunction, CreamerMedia, iafrica.com, Independent Online, ITWeb Limited, JHBLive, Johnnic Communications, Mail & Guardian Online (M&G Media Ltd), Moneymax, M-Web, Media24, Moneyweb Holdings, Ramsay, Son & Parker, SABCnews.com, Supersport Zone, Tiscali, Private Property and Biz-community.com

**Bill unclear as to whether it requires the licensing and regulation of online publishing and information services**

- 6 Our primary concern is to ensure that the Bill does not require the licensing and regulation of online publishing and information services. In many instances, it would appear that the intention of the drafters of the Bill is indeed to ensure that the Bill does not require the licensing and regulation of online publishing and information services. However, by virtue of a number of the definitions in s1 of the Bill, and a limited number of other provisions in the Bill, this is not clear.
- 7 These representations will deal with these definitions and provisions, and propose solutions.
- 8 However, prior to doing so, we will explain why it is so important that online publishing and information services are not required to be licensed and should not be regulated in terms of the Bill.

**Limitation on right to freedom of expression**

- 9 s16(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) provides:

“(1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.”

- 10 If the Bill were to require online publishing and information services to be licensed, and were to seek to regulate these services, this could limit the constitutional right to freedom of expression. The only permissible limitation of this right would be if the limitation was “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (refer to s36(1) of the Constitution). We are advised that the state would be unable to demonstrate that this limitation is reasonable and justifiable.
- 11 Nor would the Bill accord with the approach adopted in open and democratic societies. For example, the European Community, in its new regulatory Framework for the communications sector, has specifically provided that the Framework does not apply to content and information society services. In relation to "information society services", the Framework Directive has stated that these span "a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks".<sup>2</sup> Similarly, other jurisdictions such as the USA, Australia and India do not regulate on-line publishing and information services.
- 12 The only content medium where licensing requirements and the regulation of that medium would be justifiable is broadcasting, on the basis that “scarce” spectrum is being used by broadcasting services. In contrast, online publishers and information services are not using these scarce resources. In all these circumstances, the licensing and regulation of online publishing and information services would be unconstitutional.

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<sup>2</sup> Para (10), recital to Framework Directive

## **Unfair discrimination against online publishers and information services**

13 s9 of the Constitution, which deals with equality, provides:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. ...
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds ...
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). ...
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

14 As we pointed out in the section on freedom of expression, the state may only limit the right to freedom of expression if the limitation is reasonable and justifiable. It is for this reason that the print media, including publishing and information services, are not required to be licensed, nor are they regulated, other than by way of the general laws of South Africa.

15 If the Bill were to provide for the licensing and regulation of online publishers and information services, the anomalous situation would arise that a publisher who publishes content offline (for example a newspaper) and who does not require to be licensed, nor is regulated, as regards this activity, would, in relation to online content (which may be identical to the offline content), require a licence and be subject to regulation.

16 We are advised that the state would be unable to establish that any such provisions of the Bill which discriminate against online publishing and information services would be fair.

## **Adverse consequences if Bill were to require the licensing and regulation of online publishing and information services**

17 If the provisions of the Bill were to require the licensing and regulation of online publishing and information service, this would result in numerous adverse consequences. Thousands of persons – individuals, corporate entities and public bodies – would be hit by these provisions. Many of these individuals and corporate entities are small and medium economic enterprises (“SMMEs”). Examples of persons and activities which would be hit include guesthouses who market their accommodation and services online, corporate newsletters, state libraries, anyone who has a website, and all newspapers who publish online – in fact everyone who has an online presence. This would undermine the objective of creating a greater diversity of voices within South Africa's online publishing sector. It would also serve to hinder addressing the "digital divide".

18 Many of these persons are fledgling businesses (and are likely to include amongst them many black economic empowerment enterprises), who can only afford and in fact are best placed to market and/or provide their services online. The Bill would adversely impact on their ability to do so. The costs of licensing and compliance with the provisions of the Bill would have adverse consequences for these enterprises, and is likely to result in the closure of some of them.

19 The Bill would stifle the development of the provision of online content, and of all the associated businesses and organisations.

- 20 The Bill, in turn, would discourage investment in the business of the provision of online content and the associated businesses and organisations, many of whom, as we have already indicated, are SMMEs. This would result in adverse economic consequences for this sector, and for the wider South African economy.
- 21 Furthermore, these provisions would disadvantage persons in South Africa providing web content, since they would be regulated, and yet would be competing with persons overseas who provide web content, but who are not regulated.
- 22 Persons and entities involved in online publishing and information services may respond by moving their businesses outside of South Africa.
- 23 The right of persons to freedom to receive or impart information or ideas, and the allied rights contained in s16 of the Constitution, would also be adversely limited.
- 24 Any such provisions in the Bill would run counter to the approach adopted in other democracies, and will have a negative impact on the way in which South Africa is viewed constitutionally and politically. This negative image would discourage national and international investment in South Africa's economy.

#### **Detailed concerns and our proposed solutions**

- 25 The definitions which concern us are those of "application", "application service" (and therefore "application service licensee"), "communications", "communications network", "communications network service", "communications service", "content", "content service" and "subscriber".
- 26 Assuming these definitions could be amended so as to address our concerns, the only remaining provisions of the Bill which concern us are s8(2)(a) and, to a far lesser extent, s(2)(x) and (y). (Whilst the term "content" is used on its own in a number of other contexts, the use of this term in those contexts does not pose any problems.)
- 27 We propose that these problematic definitions be dealt with as set out in the paragraphs below:
- 27.1 We propose that the Bill should not provide for the specific licensing of "application services" – these ought to be dealt with as part and parcel of "communications" services. Accordingly, the definitions of "application", "application service" and "application service licensee" ought to be deleted.
- 27.2 We propose that the definition of "communications" be amended so that it reads as follows: "the emission, transmission, or reception by any means of voice, sound, audio, data, text, visual material, visual images, signals or a combination thereof (whether with or without the addition of value by means of technological interventions), by means of electricity, magnetism, radio or other electromagnetic waves or any agency of a like nature (whether with or without the aid of tangible conductors)".
- 27.3 Whilst we will not attempt, at this stage, to propose amendments to the definition of "communications network" as a whole, we strongly advocate the deletion towards the end of that definition of all references to the term "content services".
- 27.4 We propose that the definition of "communication service" be amended so that it means "a service provided for remuneration to the public, sections of the public, or the subscribers to such service, which consists wholly or mainly of the conveyance of communications over communications networks, but excludes broadcasting services".

- 27.5 We propose the definition of "communications network service" be substantially amended, so that it means "a service whereby a person makes available a communications network, whether by sale, lease or otherwise –
- (a) for that person's own use for the provision of a communications service or a broadcasting service; or
  - (b) to another person for that other person's use in the provision of a communications service or a broadcasting service; or
  - (c) for resale to a communications service or a broadcasting service".
- 27.6 We propose that the definitions of "content" and of "content service" be deleted.
- 27.7 We propose that the definition of "subscriber" be amended so that it means "a person who receives a communications service or a broadcasting service under an agreement with, or according to terms and conditions determined by, the provider of that service".
- 28 As regards s2(x), we propose that it be reworded as follows: "ensure that persons who provide broadcasting services have access to communications network services in order to provide such broadcasting services".
- 29 As regards s2(y), this paragraph makes no sense: members of the public who have appropriate receiving facilities will automatically receive broadcasting services. The paragraph accordingly ought to be deleted.
- 30 Finally, as regards s8(2)(a), in which there is a reference to "content services", the paragraph does not make any sense, and needs to be reworked, including so as to delete the reference to "content services".

### **Conclusion**

- 31 We look forward to a favourable consideration of our representations, and request an opportunity to make oral representations to the Committee concerning the Bill.

Yours faithfully

The members of the Online Publishers Association of South Africa

[www.opa.org.za](http://www.opa.org.za)

*Dedicated to building a sustainable online publishing business*