

Full title	ISPs, child sexual abuse material and the requirement to register with the Film and Publication Board
Status	Registration requirement has been effective since the 2 nd of November 2004
Applies to	ISPA members providing Internet access services
Summary	<p>“Internet service providers” as defined in the Films and Publications Act are required by law to register with the Film and Publication Board for the purpose of combating the distribution of child sexual abuse material online.</p> <p>While there is a clear legal obligation to register, it is not clear how this serves any useful function and there is widespread non-compliance in the ISP industry.</p>

Introduction¹

Section 27A of the Films and Publications Act imposes an obligation on all Internet Service Providers (ISPs) to register with the Film and Publication Board (FPB). This obligation has been in place since 2004 and is reinforced by a provision in the Films and Publications Regulations 2014 which prohibits carrying on the business of an ISP if not registered with the FPB.

ISPA has engaged with the FPB on this requirement since it was introduced but there are still issues with:

- What the FPB understands to be an ISP;
- Non-enforcement of the obligation; and
- The lack of any meaningful interaction between the FPB and the ISP community.

Who is affected?

The Films and Publications Act defines an “Internet service provider” as:

“any person who carries on the business of providing access to the Internet by any means”.

The FPB has adopted a “literal”² interpretation of this definition. As a result, it regards any business at which Internet access is available as an ISP and has set about registering hotels, coffee shops, airports and retail outlets providing Wi-Fi access as ISPs.

While this seems crazy, there is no doubt that ISPA members that sell Internet access are carrying on the business of providing access to the Internet by any means and are required to register.

¹ At the time this advisory was drafted the Films and Publications Amendment Bill 2016 was nearing finalisation. ISPA will update this advisory once this Bill has been signed into law. You can keep updated at <https://www.ellipsis.co.za/the-film-publications-board-and-online-content-regulation/>.

² By “literal” we mean “wrong”.

Why are ISPs required to register?

Section 27A imposes the following obligations on ISPs:

- Take all reasonable steps to prevent the use of their services for the hosting or distribution of child sexual abuse material.
- Where an ISP has knowledge that its services are being used for the hosting or distribution of child sexual abuse material, it must (a) take all reasonable steps to prevent access to the child sexual abuse material by any person³, (b) report this content and the details of persons involved to SAPS, and (c) take all reasonable steps to preserve relevant evidence.
- Where requested by SAPS, an ISP must furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child sexual abuse material.⁴

Registration with the FPB is meant to facilitate ISPs complying with the above. In ISPA's experience, however, there is very little interaction between the FPB and ISPs for the very good reason that the primary interaction around the investigation and prosecution of child sexual abuse material is between ISPs and SAPS.

What happens if I don't?

Under section 27A criminal sanctions apply:

- A fine or imprisonment for a maximum of 6 months or both in respect of a failure to register with the FPB or to take reasonable steps to prevent the use of services for the hosting or distribution of child sexual abuse material.
- A fine or imprisonment for a maximum of 5 years or both in respect of a failure to observe obligations where the ISP has knowledge of the use of services for the hosting or distribution of child sexual abuse material.

Under the Films and Publications Regulations 2014:

"No person may host any website or provide access to the internet as an internet service provider, unless such person is registered with the Board in terms of section 27A of the Act."

ISPA is not aware of any sanctions being imposed as a result of non-compliance with section 27A.

What is the process for registering?

An application for registration must be submitted on the prescribed form⁵ and must be accompanied by:

³ It is important to note that this may conflict with explicit instructions from SAPS, which wants to gather information about persons and content involved. It would be advisable to obtain these instructions in writing and thereafter to follow them.

⁴ See the ISPA advisory on interacting with law enforcement authorities for more information.

⁵ Available from <http://www.fpb.org.za/wp-content/uploads/2016/08/BOARD-E-Application-for-FPB-License.pdf> or request from regulatory@ispa.org.za

- proof of payment of the prescribed fee (currently R561)⁶ – previously there was a requirement to renew the registration annually but there is no tariff for this;
- an original valid tax clearance certificate;
- a CIPRO certification reflecting the SA registration number of the business; and
- a statement of measures or steps taken or put in place to ensure that children are not exposed to child sexual abuse material and pornography (the FPB may request an ISP to demonstrate that these measures/steps remain effective).

If you are struggling with the process or just feeling overwhelmed then send an email to secretariat@ispa.org.za and ISPA will gladly help out.

In reality...

As noted above there is little enforcement of the registration requirement and compliance levels are extremely poor for (real) ISPs although the FPB has registered more than 800 locations at which Internet access is available. At the same time ISPA and its members have a constructive working relationship with SAPS and actively assist in the investigation and prosecution of child sexual abuse material cases in South Africa (and in this way achieving the purpose of registration with the FPB).

ISPA will continue to engage with the FPB to arrive at saner practical outcomes.

Conclusion

ISPA cannot remedy the various difficulties with the Films and Publications Act which currently seem to make registration pointless. Ultimately, there is a clear legal obligation to register with the FPB and this should be complied with.

Last updated: February 2019

⁶ These fees are periodically reviewed and adjusted (and, as at February 2019, there is a review process underway). Any change will be published in the Government Gazette and ISPA will let you know.