



Independent Communications Authority of South Africa
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**ON DIGITAL MEDIA (PTY) LTD - CHANNEL AUTHORIZATION
APPLICATION
REASONS DOCUMENT**

1. INTRODUCTION

On 13 September 2011, the Independent Communications Authority of South Africa (“the Authority”) received an application from On Digital Media (Pty) Limited trading as Top TV, a subscription broadcasting services licence holder, to authorize three (3) pornographic channels for broadcast on its subscription television broadcasting service licence in terms of regulations 3.1 and 3.2 of the Subscription Broadcasting Services Regulations published in the Government Gazette Number 28452 dated 31 January 2006. The Authority, upon receipt of the application, established a Council Committee in terms of section 17 of the ICASA Act, 2 000 (Act No. 13 of 2 000) with a view to consider the said application and to convene public hearings, if needs be. One of the tasks of the committee is to prepare and publish in the Government Gazette a notice extending an invitation to interested parties to submit written representations to the Authority within a period of thirty (30) days from date of publication of such a notice.

The said notice was indeed published in Government Gazette Number 34760 dated 17 November 2011 and thirteen (13) written representations were received on or before 7 December 2011 from interested parties and members of the public. A further two (2) written representations were received shortly before the public hearings held on 16 January 2012. The committee took a decision to condone the late submission of the two (2) written representations and were thus considered for purposes of the process. The committee afforded an opportunity to interested parties to make oral representations in public hearings held on 16 January 2012. The committee, during the public hearings, allowed three (3) stakeholders who had missed the closing date for submission of written representations to make oral representation before the committee and to provide written representations the following day in the public interests of hearing all views on the subject under consideration. In short the committee received in total eighteen (18) written submissions and heard four (4) oral representations at the public hearings held on 16 January 2012.

Organisations making written representations included, amongst others, Christian Action Network; Film and Publications Board; African Christian Democratic Party; Freedom of Expression Institute; Doctors for Life and the applicant. In addition, eleven (11) individual members of the public also made written representations. The committee does not intend to comprehensively analyse the views of each written submission and the oral representations made before it in the public hearings, but will merely draw on their views in the body of the reasons enunciated hereunder.

It must be put on record that the applicant had chosen, for some inexplicable reasons, not to participate in the public hearings held on 16 January 2012. It must further be noted that the committee did not receive a courtesy of a communiqué advising of the licensee's decision not to participate in the public hearings. This has, resultant therefrom, hamstrung the ability of the licensee or applicant to respond to some of the pertinent issues or questions that other stakeholders and members of the committee wanted to pose or raise to the applicant. It is indeed regrettable that such a golden opportunity had been missed. The committee, however, has not made an adverse finding on the absence of the applicant in the public hearings and had considered its written representations as well as the letter dated 17 January 2012 that attempts to respond to some of the issues raised during the public hearings. The committee will, in conclusion of its mandate, make recommendations to council and the latter may approve the proposed recommendation as the decision of council.

2. LEGISLATIVE FRAMEWORK

The Subscription Broadcasting Services Regulations were published in Government Gazette Number 28452 dated 31 January 2006. The regulations were promulgated in terms of section 78(1) read with sections 56 and 57 of the now defunct Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993). The objectives of these regulations is, amongst others, to regulate subscription broadcasting services in the Republic of South Africa; and to prescribe the procedure and the appropriate conditions for the authorisation

of channels in a multi-channel environment for subscription broadcasting services.¹ Regulation 3 of the regulations sets out an explicit process that must be followed by subscription broadcasting service licensees in securing an additional channel to its services. Regulation 3(1) provides that *a subscription broadcasting service licensee may not add a channel to its service unless the Authority, on application by the licensee, has authorised the channel*". The regulation makes it crystal clear that a licensee may not add a channel to its services without the prior approval by the Authority. Regulation 3(2) of the regulations state that *an application by a subscription broadcasting service licensee to the Authority for the authorisation of one or more channels must be made in writing..... and must be accompanied by the prescribed fee.*²

Regulation 3.4 of the Subscription Broadcasting Service Regulations provides that *within sixty (60) days of receipt of an application made in terms of this regulation, the Authority shall issue a certificate authorising or refusing to authorise the channel*"; and regulation 3.5 further provides that *if, upon the expiry of the sixty (60) day period contemplated in regulation 3.4, the Authority has not issued such certificate, the channel shall be regarded as having been authorised*". Regulation 3(6) provides that *if the Authority refuses to authorise a channel, the Authority shall give written reasons thereof to the applicant within thirty (30) days of the issuing of the certificate*".

Section 2(a) of the Broadcasting Act, 1999 (Act No. 4 of 1999) is a further legal basis to consider the application for additional channels by the applicant. This section provides:

"The object of this Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose to-

- (a) Contribute to democracy, development of society, gender equality, nation building, provision of education and **strengthening** the spiritual and **moral fibre of society**" (our emphasis).

The public interest requirement is further fortified in section 192 of the Constitution, 1996 where it provides *"National legislation must establish an*

¹ See regulations 1.1 and 1.3 of the Subscription Broadcasting Services Regulations, 28452 dated 31 January 2006

² See regulation 3.3 of the Subscription Broadcasting Services Regulations, 28452 dated 31 January 2006

independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”

3. FREEDOM OF EXPRESSION AND ITS LIMITATIONS

In limiting the right to freedom of expression, the Authority considered the body of foreign jurisprudence available to it as well as the limitation of rights in terms of section 36 of the Constitution.

The question of whether the state can legitimately exercise power against the will of an individual remains a debate in most jurisdictional systems and is to a large extent an academic issue. However, the body of comparable jurisprudence indicates that the State has a legitimate right in certain circumstances to prohibit consenting adults from private consumption of pornographic material.

John Stuart Mill (English Philosopher) states that *“the only principle for which power can be rightfully exercised over any member of the civilized community against his will is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant”*³

Ronald Dworkin (American philosopher and scholar of constitutional law) states that *“When an individual’s private activities cause harm to others then they become no longer merely a private matter, but of legitimate public interest and the state may be justified in regulating them. Thus when excessive consumption of pornography is shown to cause absenteeism from work, then the public and the state might have some legitimate interest in preventing it”*⁴

The Authority is regarded as pro-active as opposed to a re-active regulatory body. Therefore, where necessary, the Authority must consider the probable consequences and harmful effects that pornography has as a contributory factor to violence against women and children. The next enquiry must then relate to whether the limitation to freedom of expression has been carefully considered in terms of the relevant section of the Constitution.

Section 16 of the Constitution states that everyone has the right to freedom of expression. The right to freedom of expression includes the right to:

³ Pornography and Censorship, Stanford Encyclopedia of Philosophies, first published Wed 5 2004, accessed on 19-01-2012

⁴ Pornography and Censorship, Stanford Encyclopedia of Philosophies, first published Wed 5 2004, accessed on 19-01-2012

- Freedom of press and other media;
- Freedom to receive and impart information or ideas;
- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research.

Subsection (2) states that: the right in subsection (1) does not extend to -

- propaganda for war;
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

This limitation is significant, particularly as the channels have not been pre-viewed. Therefore the extent of hate speech, implied gender equality and /or unintended consequences advanced in the films remains unknown.

In the absence of whether the limitations in section 16 can apply to this matter, the Authority considered whether the right to freedom of expression can be limited and/or weighed against other constitutional rights. It is important to point out that the right to freedom of expression is weighed in a similar way during the Films and Publication Boards classification process.

In **S v Mamabolo**⁵, Judge Kriegler held: “In South Africa freedom of media or freedom of expression is not a pre-eminent right, and we have to debate how it relates to other rights of equality and human dignity”

In **De- Reuck v Director of Public Prosecutions**⁶, the Constitutional Court held that: (with regards to pornography) that expression that is restricted is, for the most part, expression of little value, which is found on the periphery of the right and is a form of expression that is not protected as the freedom of expression in many democratic societies. The right to pornography is therefore a fringe right.

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on *human dignity, equality and freedom*, taking into account all relevant factors, including:

⁵ CCT 44/00 [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001)

⁶ 2004 (1) SA 406 (CC)

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.⁷

1. The law of General Application

The right to freedom of expression is limited in *inter alia* the Electronic Communications Act 36 of 2005: Section 2(r), The Films and Publication Act and the Films and Publication Amendment Act 3 of 2009 and the Sexual Offences Act. The Films and Publication Amendment Act states that material of an adult content may only be distributed from licensed premises,

2. The nature of the right

The right to freedom of expression originated from principle of anti-censorship and the acknowledgment that consenting adults can freely express them in a democratic society subject to certain qualifications. It is however not a pre-eminent right and where here necessary it must be weighed against other constitutional rights

3. The importance and purpose of the limitation

The importance of limiting the right to freedom of expression is to protect children and those who may be involuntary exposed to offensive material. As well as to protect society against the probable effects and harm or excessive consumption of porn, In a South African society the alarming rate of rape and violence against women cannot be overlooked.

4. The nature and extend of the limitation

⁷ Section 36 of the Constitution

The Film and Publications Amendment Act states that material of an adult nature should be sold and distributed by a licensed holder of a licence to distribute pornographic material, from licensed premises. Although this may be regarded as an inconvenience or result in further embarrassment on the consumer, the cost are relatively small compared to the level of offence it may cause. We submit this is neither an infringement on privacy nor does it amount to censorship.

5. The relation between the limitation and its purpose.

There is a clear relation between the limitation and its purpose. By limiting the right to porn to adult shops, the possibility of premature consumption of porn by minors is considerably reduced.

6. Less restrictive means to achieve purpose.

The watershed period is implemented as a means to ensure that the exposure of pornographic material is avoided as times when children are normally expected to be at home or awake. The Applicant has addressed this issue with regard to their double pin code mechanism. The double pin code is commendable however, it can never be said that this mechanism is 100% full proof, more-so where the channels are available for 24hours during which hours children are sometimes home alone and have ample time to unlock the code(s).

4. Code of Conduct/ Watershed Period

The Applicant states that the BCCSA code only regulates material which has been broadcast and is not applied as a pre – broadcast. While there is some merit in the Applicant’s argument, its stands to reason that it would irrational to authorise material that would otherwise be prohibited post facto.

The Applicant further argues that sexually explicit material is not expressly prohibited by the code except where it is broadcasted before the watershed period. This matter has been considered and is in fact the case. The code does however, prohibit –

- Explicit violent sexual conduct;

- Explicit sexual conduct which violates the right to human dignity of any person or which degrades a person and which constitutes incitement to cause harm....

In terms of the Films and Publication Act (Amendment Act) a film shall be classified as XX if it contains explicit sexual conduct which violates or shows disrespect for the right of human dignity of any person.

The Films and Publication Board is yet to make a classification of the three proposed channels, however based on the description of one Adult XXX, which is defined a XXX service which focuses on a different genre each day, and which the films are reduced to the sex scenes so that satisfaction can be immediate whenever a viewer tunes does cause some alarm bells, and on the face of may be classified as XX.

In addition, the direct feed to Top TV from its foreign supplier, poses some practical difficulties, in ensuring that the classification of these films will not be unilaterally altered by the supplier .In receiving a direct link from a foreign source, there is an inherent risk that prohibited material may be broadcasted outside of the watershed period. But this does not in itself; warrant a justifiable exemption from the watershed period. The double – pin code should be seen in this regarded as an added safety feature but it is not meant to replace the watershed period.

Further the Applicant is arguably targeting a lower to middle income group. We argue that not responsible adult who should reasonably be at work for at least 8 hours requires the services of a 24 hour pornography channel.

5. DECISION

The Authority refused On - Digital Media's application for the authorisation of three pornographic channels on 20 January 2012.

Reasons for the decision

In analysing this matter and in reaching its decision, the Authority was guided by *inter alia* its constitutional obligation to regulate broadcasting in the public interest, and to ensure fairness and diversity of views representing South African Society.

Through the public consultation process the Authority sought to comply with its constitutional obligations in the following manner:

- **Public Interest:** A public consultation process was undertaken as a matter of public interest, which was done with the primary aim of *inter alia* eliciting a diversity of views regarding the broadcasting of pornographic material in South Africa.
- **Fairness:** the *Audi Alteram Partem* rule applied throughout the public consultation process. The Applicant was called on to respond to written submissions and make an oral representation. Despite the Applicant's failure to respond timeously, the Authority took into account the written submissions from the Applicant received on 17 January 2012.
- **Diversity of Views:** The public consultation process was open to anyone whether they wished to express their opposition to the proposed channels or were in favour of pornographic material. No submissions were received from parties who were expressly in favour of pornographic channels either from individuals or by way of statistical information presented by the Applicant to further its argument that a significant number of individuals are in favour of pornography on TV.

In making its decision, the Authority considered the submissions made by stakeholders and members of the public in light of the South African Constitution and relevant broadcasting laws. The Authority also considered the written response of the Applicant to those stakeholder viewpoints. The key point of deliberation revolved around how to balance the right of the Applicant in terms of its right to freedom of expression with the right of women to equality and human dignity.

South Africa is experiencing very high levels of violence against women, perpetrated in the main by men. Recent research has shown that "South Africa has some of the highest levels of both HIV and gender-based violence (GBV) worldwide."⁸ The South African Police Service's Crime Reports show a pattern of a high incidence of sexual offences:

2003/4: 142.5 sexual offences per 100,000;

2004/5: 148.4 sexual offences per 100,000;

2005/6: 145.2 sexual offences per 100,000;

⁸ Ghanotakis, E. Mayhew, S. and Watts, C., 2009. Tackling HIV and gender-based violence in South Africa: how has PEPFAR responded and what are the implications for implementing organisations? *Health Policy and Planning*; 9 June, 24(5), p357.

2006/7: 137.6 sexual offences per 100,000;
2007/8: 133.4 sexual offences per 100,000;
2008/9: 144.8 sexual offences per 100,000;
2009/10: 138.5 sexual offences per 100,000;
2010/11: 132.4 sexual offences per 100,000.

The South African Government has actively engaged the issue of violence against women through its support for the '16 days of Activism for No Violence against Women and Children' Campaign.

The Bill of Rights of the South African Constitution has two articles that are relevant to the protection of the rights of women. Article 9(1) on equality states that: 'Everyone is equal before the law and has the right to equal protection and benefit of the law' and in article 9(3) that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' Further, in article 9(4) 'no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)'. Article 10 on human dignity states that 'everyone has inherent dignity and the right to have their dignity respected and protected.'

Pornography is sometimes defined as any material that is sexually explicit or as an obscene form of speech. The Authority views pornography not as sexually explicit material per se or as obscene forms of speech but as that subset of sexually explicit material which is objectionable because it harms women and children. Pornography is sexually explicit material that depicts women's subordination in such a way as to endorse that subordination. In other words, not all sexually explicit material is pornographic. The Authority views pornography as a systematic practice of sexual discrimination that violates women's right to equality and human dignity. This perspective is captured in the following definition:

We define pornography as the graphic sexually explicit subordination of women through pictures and words that also include (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy humiliation or pain; or (iii) women are presented as sexual objects experiencing sexual pleasure in rape, incest or other sexual assault; or (iv) women are presented as sexual objects tied up, cut up or mutilated or bruised or physically hurt; or (v)

women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts – including but not limited to vaginas, breasts, or buttocks – are exhibited such that women are reduced to those parts; or (vii) women are presented being penetrated by objects or animals; or (viii) women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.⁹

The Applicant describes the nature of the three channels in its application as follows:

Playboy Europe is a mix of soft erotic and single X adult content (Content rated R18). The channel is made up of episodic and movie content and covers many erotic genres.

Private Spice is the finest XXX action from the top studios in Europe and the US (Content rated R18).

Adult XXX is a XXX service which focuses on a different genre each day. Films are reduced to just sex scenes so satisfaction can be immediate whenever a viewer tunes in.

The Applicant's failure to attend the public hearing meant that the Authority could not question it about whether the three channels contained representations of women that could be described in terms of the following three elements of the above-mentioned definition:

- (i) women are presented dehumanized as sexual objects, things, or commodities;
- (ii) women are presented in postures or positions of sexual submission, servility, or display;
- (iii) women's body parts – including but not limited to vaginas, breasts, or buttocks – are exhibited such that women are reduced to those parts.

In the absence of this input from the Applicant, the Authority makes the presumption that the three channels do dehumanise women as sexual objects in the three ways mentioned above and would have the effect of undermining their constitutional right to equality and human dignity, and could lead to an increase in the incidence of violence against women in South Africa.

⁹ MacKinnon C., "Not a Moral Issue" and "Francis Biddle's Sister: Pornography, Civil Rights and Speech" in *Feminism Unmodified*, Harvard University Press, 1987, p176.

The Authority is not saying that there is a direct causal relationship between the consumption of pornography and violent sexual crimes against women. The empirical evidence for this is not conclusive and it is certainly not so that all men who consume pornography will suddenly transform into rapists. However, consumption of pornography may contribute to the incidence of rape by making it more likely that those who are already inclined to rape may feel validated by seeing women as sexual objects to actually rape, thereby increasing the overall incidence of rape. Of course, pornography may not be the only contributing factor to violent sexual crime. The factors contributing to violence against women are likely to be numerous and connected in complex ways and may include alcohol abuse, 'macho values' or childhood events and circumstances. But the mere fact that there may be other factors influencing sexual violence against women does not show that consumption of pornography cannot also be able to play a role. Consumption of pornography may, on its own, be neither necessary nor sufficient for violent sexual crime (or for sexist attitudes and behaviour more generally); yet it might still contribute to violent sexual crime if it validates social norms of sexual abuse. It is telling that on 18 January 2012, the Congress of South African Trade Unions (COSATU) sent a letter to Collin Matjila, Chief Executive Officer of Kopano ke Matla Investment Company (Pty) Ltd, which is a shareholder in On Digital Media which included the following:

COSATU is totally opposed to such channels, which we believe will exploit and demean women and girls, reinforce sexist attitudes and encourage the abuse of women, which is already a massive problem.¹⁰

The Authority is of the view that pornography should be regulated because it contributes significantly to a regime of sexual inequality and may be one of the contributing factors to increasing the incidence of violence against women in South Africa.

South Africa is a signatory to the United Nations Convention on the Elimination of all forms of Discrimination against Women and has committed in a legally binding convention to 'take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.¹¹ In Article 5, the South African government has committed 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are

¹⁰ Statement issued by Patrick Craven, COSATU national spokesperson, January 18 2012

¹¹ Convention on the Elimination of all forms of Discrimination against Women, United Nations, 1979, Article 2(e).

based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.

The South African government played a key role in the framing of the Platform of Action of the United Nations Fourth World Conference on Women, which in its section on Women and the Media, proposes actions to be taken to promote a balanced and non-stereotyped portrayal of women in the media. One such action is to ‘take effective measures or institute such measures, including appropriate legislation against pornography and the projection of violence against women and children in the media’.¹²

The South African government is a signatory to the African Union’s Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. Article 13(m) on Economic and Social Welfare Rights reads that States Parties shall ‘take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography’.¹³

Anne Mayne, co-founder of Rape Crisis Cape, Robyn Fudge, former Senior State Advocate and the Christian Action Network all made reference to the above-mentioned international Human Rights instruments to support their arguments against the Applicant being authorised to screen pornographic channels. Robyn Fudge stated that ‘in pornography women are reduced to objects whose sole purpose is the indiscriminate sexual pleasure of men. They are routinely subjected to physically harmful acts and referred to in degrading terms. Some pornography may even amount to hate speech against women’.

The Applicant’s failure to attend the public hearing meant that the Authority could not question it about its views on the implications of these international instruments on its application. However, inasmuch as pornography can be seen as contributing to the idea of the inferiority of women or on stereotyped roles for men and women, the Authority has a duty to eliminate such prejudice in terms of the Convention of the Elimination of all forms of Discrimination against Women. Inasmuch as the Authority is responsible for regulating the airwaves which carry the broadcast signals into the home, the Authority as a constitutional institution of the state may not violate Article 9(3) of the Constitution which says that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including gender and sex.

¹² Platform of Action of the United Nations Fourth World Conference on Women, Beijing, 1995, Strategic objective J.2. 243.f.

¹³ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, African Union, 2003, Article 13(m).

The Authority is also required to uphold Article 16 on freedom of expression. The Freedom of Expression Institute (FXI) made the argument in the public hearing that notwithstanding its commitment to the right of freedom of expression, when it comes to pornography, the rights of women and children should take precedence. Elston Seppie, the Executive Director of FXI said:

I have to say that sitting here I have heard compelling argument in support of the rights of children, women and families and I think, as I said earlier on, those are important rights and as FXI we think that in instances where we have to balance rights in relation to those, that those ones should take precedence. We would like to commend the opponents of this application for making such compelling arguments in relation to this issue. We are also very disappointed that ODM did not take this opportunity to come and present their case and hopefully also present some argument in support of their right to air this kind of channel.

However, in their written submission received the day after the hearing, FXI changed its position to argue that in balancing the rights of women and children against the right of freedom of expression, the Authority should give precedence to freedom of expression and said the following:

FXI understands that the Top TV application for authorisation of the adult content channels includes additional mechanisms they will put in place to ensure that only adults who elect to subscribe will have access to the channels. Given that such content is fairly easily available to such audiences either through shops or via the internet, FXI suggests that ICASA should concentrate more on whether or not the mechanisms proposed by Top TV to for example limit subscriptions to adults are sufficient and how to enforce such provisions through licence conditions.

The African Christian Democratic Party (ACDP) argued that pornography is a home wrecker and that families and children need to be protected. They stated that:

Although Top TV may argue that access to its porn channel can be controlled by pin codes, this is not a realistic defence. Children are not always supervised and many children know more about recording machines and technology than their parents anyway – even double or triple PIN codes may not be a challenge to them.

The Applicant's failure to attend the public hearing meant that the Authority could not question it about the extent to which its proposed Parental Blocking mechanism with a double digit pin code would in practice protect children from viewing the channels.

The Authority is concerned about the possible impact on children of the delivery of pornography into the home over the airwaves. The possibility of the neglect or abuse of children in households where pornography is consumed may violate children's rights in the South African Constitution in Article 28(1)(d) that provides that 'every child has the right to be protected from maltreatment, neglect, abuse or degradation'.

In its oral and written submissions to the Authority, the Film and Publications Board had the following to say:

We as the Film and Publication Board are aware that we do not have authority to regulate broadcasters. However, in light of the recent developments in which Top TV intends to broadcast three additional channels which contain content, which if it were to be submitted for classification would be given a 'X18' rating in accordance with Section 18(3)(c) of the Films and Publications Act 65 of 1996, as amended. Further Section 24(1) of the same Act requires that any person may exhibit in public or distribute any film, game or publication classified as 'X18' if such a person is a holder of a licence to conduct a business of adult premises, issued by licensing authority in terms of the relevant national, provincial or local government laws, provided that such exhibition or distribution takes place on or from within premises forming part of a building. Based on the above-mentioned sections of the Act and the accompanying Regulations 17(3) and 17(4) of the Act, the broadcasting of such channels by Top TV will be in contravention of these laws:

Regulation 17(3), distribution by a distributor of adult content can only happen:

- (a) From within licensed premises; and
- (b) After the distributor has personally established that the consumer is above the age of 18 years.

Regulation 17(4), material classified X18 may not be distributed –

- (a) By mail order;
- (b) On the internet;

- (c) On mobile phones;
- (d) On social networking sites; or
- (e) Audio visual entertainment such as iPods, television, or any other means in conflict with the provisions of the Act.

It is clear from this submission that the South African government has taken steps to limit access to certain forms of pornography (classified X18) to licensed physical premises and has thereby already limited citizens' rights to freedom of expression with respect to the manner in which a citizen may receive certain forms of pornography. Were the Applicant's programme content to be classified X18 by the Film and Publications Board, it would be limited to adult premises and could not be broadcast on the airwaves.

The Applicant did make a written submission to the Authority after the public hearing had taken place. In its submission it had the following to say about freedom of expression, moral objections and public outcry:

It should also be pointed out that a significant number of the so-called objectors are based or founded on religious objections. Whilst it is commendable that these organizations seek to be seen to be representing their respective quarters, it should also be noted that they do not exist in a homogenous society which subscribes to the Constitution of the Republic of South Africa, underpinned by a Bill of Rights with freedom of expression as one of the most fundamental rights. Further these organizations exist with a secular Republic not based on adherence to any religious system, let alone a reliance on religious morals.

Perhaps if the Applicant had taken the Authority's public consultation process seriously, it would have read the written submission of the Christian Action Network and listened and responded to its oral representations. The Christian Action Network did not argue against the Applicant's application for authorisation on moral or religious grounds. Christian Action Network argued on the basis of the rights of women and children within the framework of the Constitution's Bill of Rights and the law as encapsulated in the Film and Publication Act No 65 of 1996, jurisprudence from the courts and the international human rights instruments on the rights of women. Christian Action Network mentions the statement of Judge Kriegler in the *etv vs Mamabolo* judgement 'that in South Africa, freedom of the media or freedom of expression is not a pre-eminent right and we have to debate how it relates to other rights of equality and human dignity'. Christian Action Network also states:

Not only does pornography infringe on the constitutional rights of children to be protected from harm, it also discriminates against the rights of women to dignity, equality and protection from hate speech. Pornography often depicts women in degrading, humiliating ways and as sex objects – existing only for men’s sexual pleasure.

In conclusion, the Authority refused On Digital Media (Pty) Ltd.’s application to broadcast three pornographic channels for these reasons:

1. On the issue of balancing the rights of women to equality and human dignity with the right of freedom of expression, the Authority is of the view that the right of women to equality and human dignity overrides the Applicant’s right to freedom of expression, as well as the rights of viewers to receive pornography on television in the home. The Authority holds this view because it regards the consumption of pornography as one contributing factor, amongst others, to the normalisation of violence against women in South Africa.
2. The Applicant’s failure to take the Authority’s public consultation process seriously fatally damaged its application in that the Applicant:
 - (a) Misconstrued the objections to its application as moral or religious grounds rather than as serious stakeholder engagement on constitutional and legal grounds;
 - (b) Failed to participate in the public hearing in order to expand on its application and take questions from the Authority and the public or to rebut stakeholder views opposed to its application.
3. The Authority notes that the South African government has already limited citizens’ right to freedom of expression with regard to the consumption of pornography by law. Accordingly, the Authority sees no reason to expand access to pornography on the airwaves into the home.



Dr Stephen MNCUBE

Chairperson

Date: 07/03/2012