



WASPA Advisory

on

The Distribution of XX and X18 Material over Mobile Phones & the Internet

16 February 2007

1. Introduction

The Film and Publication Board is responsible for the implementation of the Films and Publications Act, Act 65 of 1996.

The Board does this in various ways, in particular by registering distributors of films and interactive games and classifying such films and games prior to distribution.

The board has a very limited enforcement role and generally refers possible offences under the Act to the South African Police for an arrest and the National Prosecuting Authority for prosecution.

This advisory describes, in broad terms, the situation regarding XX and X18 material as at February 2007. There are certain proposed changes to the Act which may alter this situation.

For a WASPA response to the proposed changes see the WASPA Submission on the Films and Publications Amendment Bill available on the Members' Section of the WASPA Web site

<http://www.waspa.org.za/login/index.shtml>

This advisory describes what material a WASP and/or its Information Providers may legally distribute.

You are strongly encouraged to consult your own legal counsel if you are unclear about any of the issues raised in this advisory.

WASPA, WASPA's officers, WASPA's secretariat, and its advisors will not be held liable for any acts or omissions of any party that relies on the information contained in this advisory.

2. Definitions

In this advisory, the following expressions and words have the meanings assigned to them and derivative expressions and words will have a corresponding meaning:-

2.1. "Act" means the Films and Publications Act, Act 65 of 1996;

2.2. "Board" means the Films and Publications Board, created in terms of the Act;

2.3. "GSM" means the Global System for Mobile Communications, a set of open technical standards for digital mobile telephony and data exchange;

2.4. "SMS" means the GSM Short Message Service over SS7;

2.5 “Vodacom Adult Rules” means rules set out by Vodacom regarding classification, display and sale of adult services.

2.6 “WAP” means the GSM Wireless Application Protocol.

2.7. “WASP” means a Wireless Application Service Provider;

2.8. “WASPA” means the Wireless Application Service Providers Association; and

All other critical definitions from the Act itself are described below.

3. XX and X18 Material

The Schedule to the Act contains the following definitions of XX and X18 material.

SCHEDULE 1

XX CLASSIFICATION FOR PUBLICATIONS

A publication shall be classified as XX if, judged within context—

(1) it contains a visual presentation, simulated or real of—

(a) bestiality, incest or rape;

(b) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or

(c) the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm;

(2) it describes predominantly and explicitly any or all of the acts mentioned in Schedule 1 or item (1).

SCHEDULE 2

X18 CLASSIFICATION FOR PUBLICATIONS

A publication shall be classified as X 18 if, judged within context—

(1) it contains a visual presentation, simulated or real, of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals;

(2) it describes, otherwise than in the case provided for in Schedule 1(2), predominantly and explicitly any or all of the acts described in Schedule 1 or clause (1).

SCHEDULE 6

XX CLASSIFICATION FOR FILMS

A film shall be classified as XX if, judged within context, it contains a scene or scenes, simulated or real, of any of the following:

(1) explicit violent sexual conduct;

(2) bestiality, incest or rape;

(3) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or which constitutes incitement to cause harm; or

(4) the explicit infliction of extreme violence or the explicit effects of extreme violence which constitutes incitement to cause harm.

**SCHEDULE 7
X18 CLASSIFICATION FOR FILMS**

A film shall be classified as X18 if it contains a scene or scenes, simulated or real, judged within context, of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals.

**SCHEDULE 11
SEXUAL CONDUCT**

For the purpose of these Schedules “sexual conduct.” means genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; the penetration of a vagina or anus with any object; oral genital contact; or oral anal contact.

Some of the elements of the definitions are rather subjective and are considered by the classifiers at the Board, having regard to the in the context of the film as a whole. So for example, 2-3 minutes of rather graphical sexual content in a film of over 90 minutes in length may not warrant an X18 classification, however if 85 of the 90 minutes are devoted to graphical sexual content, the film may warrant the X18 classification.

4. Offences relating to Distribution of XX and X18 material

The Act makes it clear that mere possession of “child pornography” is illegal. Please note that this includes representations of performers who are over the age of 18 as being under such age. Anyone distributing so-called “school girl” erotica or content should be very aware of this restriction. This is not XX or X18 material, but a different category of totally prohibited material.

While possession of XX material is not unlawful, distribution thereof is not allowed.

Distribution of X18 material is allowed, however only from a licensed premises, in accordance with any restrictions the classifiers may have imposed.

5. Some Key Definitions in the Act

The Act contains various definitions, some of which are rather straight forward, while others are rather strange, in particular the definition of “film”.

- ‘distribute’, in relation to a film or a publication, without derogating from the ordinary meaning of that word, includes to sell, hire out or offer or keep for sale or hire and, for purposes of sections 25(a), (b) and (c), 26(1)(n) and (b) and 28(1) and (2), includes to hand or exhibit a film or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person;
- ‘film’ means –
 - (a) any sequence of visual images recorded on any substance, whether a film, magnetic tape, disc or any other material, in such manner that by using such substance such images will be capable of being seen as a moving picture;
 - (b) the soundtrack associated with and any exhibited illustration relating to a film as defined in paragraph (a);
 - (c) any picture intended for exhibition through the medium of any mechanical, electronic or other device;
- ‘publication’ means —
 - (a) newspaper, book, periodical, pamphlet, poster or other printed matter;
 - (b) any writing or typescript which has in any manner been duplicated;
 - (c) any drawing, picture, illustration or painting;
 - (d) any print, photograph, engraving or lithograph;
 - (e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
 - (f) computer software which is not a film;
 - (g) the cover or packaging of a film;
 - (h) any figure, carving, statue or model; and
 - (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet.

'sexual conduct' includes —

- (i) male genitals in a state of arousal or stimulation;
 - (ii) the undue display of genitals or of the anal region;
 - (iii) masturbation;
 - (iv) bestiality;
 - (v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
 - (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
 - (vii) the penetration of a vagina or anus with any object;
 - (viii) oral genital contact; or
 - (ix) oral anal contact;
- 'visual presentation' means —
 - (a) a drawing, picture, illustration, painting, photograph or image; or
 - (b) a drawing, picture, illustration, painting, photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout.

This has the effect of making that any animation or video content is regarded as a "film" for the purposes of the Act. Pictures, graphics and the like, viewed on the screen of a mobile device and which are not a "film", are a publication.

6. XX and X18 Content Prohibitions:

- 6.1. The Board has indicated that any content (i.e. falling within the definition of film **OR** publication) that is classified as XX or X18 (or would be so classified if it were submitted for classification) may **NOT** be distributed to nor be made accessible to mobile phones in South Africa, nor be accessed via a WAP link, whether or not the server is inside South Africa or outside South Africa.
- 6.2. The same prohibition applies to Web-based access.
- 6.3. The prohibition will apply **EVEN** if the mobile link/shortcode to X18 material is available from a publication distributed from licensed adult premises where the purchaser of that adult publication has been age-verified face-to-face.
- 6.4. XX material cannot be distributed, even from licensed premises.
- 6.5. Adult text chat services and adult voice chat services (where the voice is not the access medium to obtaining XX or X18 'film or publication-type' content) are **NOT** covered by this prohibition for now. WASPs are however reminded of the requirements of age verification in the WASPA Code of Conduct.
- 6.6. The Board uses the definitions of XX and X18 in the Act and **NOT** the Vodacom Adult Guidelines.

WASPs will thus need to comply with BOTH the Act and the Vodacom Adult Guidelines, but especially the rules contained in the Film and Publication Act concerning XX and X18 material.