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GOVERNMENT NOTICE

DEPARTMENT OF COMMUNICATIONS

No. 1283

14 December 2006

ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 2002 (ACT NO. 25 OF 2002)

GUIDELINES FOR RECOGNITION OF INDUSTRY REPRESENTATIVE BODIES OF INFORMATION SYSTEM SERVICE PROVIDERS

I, Dr. Ivy Matsepe-Casaburri, Minister of Communications, hereby make the Guidelines in the Schedule for Recognition of the Industry Representative Bodies of Information System Service Providers contemplated in Chapter XI of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002)(the Act).

Industry Representative Bodies are hereby invited to apply for recognition in terms of Chapter XI of the Act in accordance with the Guidelines.



Dr. Ivy Matsepe-Casaburri
Minister of Communications

SCHEDULE

**GUIDELINES: RECOGNITION OF
INDUSTRY REPRESENTATIVE BODIES
OF INFORMATION SYSTEM SERVICE PROVIDERS**

(These guidelines have been prepared for a specific category of Information System Service Providers i.e. Internet Service Providers. These guidelines will, however, also serve as a guideline for other categories of Information System Service Providers and should be applied *mutatis mutandis*)

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PART 1

BEST PRACTICE CODE OF CONDUCT

1 Background

1.1. Growth of internet and its importance

The exponential way in which the internet has grown in importance in all spheres of modern life is trite. It is an important phenomenon of modern society touching the lives of everybody in some way or another. The ease of access and relative cheap cost of disseminating information have changed many of the ways in which information is gathered or disseminated today.

This new phenomenon has brought with it new challenges and dangers to previously existing legal rules and mechanisms. For instance the delictual and criminal rules for defamation or the infringement of copyright had been fairly settled before the advent of the internet. Suddenly the application of the rules relating to publishers such as newspapers, journals and even radio and television, did not quite seem fit in respect of parties such as Internet Service Providers ("ISPs" hereinafter) who technically were publishing information, but had very little control over the content which they published on behalf of others. This problem is not a uniquely South African problem, but exists wherever the internet exists.

ISPs play an important role in the provision and availability of internet services to the public at large. However, the potential for delictual and criminal liability under the provisions of the South African common and statutory law was huge and potentially very dangerous for the continued existence of ISPs and the effective functioning of the internet.

This particular problem was recognised by the South African legislature when the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act" hereinafter) was drafted and specific provision was made for the protection of ISPs in Chapter XI. The objectives of the provisions are to provide protection to responsible ISPs that meet certain minimum criteria broadly described in the ECT Act and to be refined by the Minister of Communications. These Guidelines provide the minimum requirements, but also provide

guidance in respect of best practice that should be the ultimate goal of all responsible ISPs.

1.2. Self regulation rather than legislation

The legislative approach in Chapter XI, as is the case elsewhere in the world, is to place the emphasis for control on self-regulation by the industry rather than directly applicable legislation or government regulation and intervention. It provides that ISPs will receive protection against third party claims where the ISPs activities relate to acting as a mere conduit, the temporary storage of data (caching), hosting or where it provides information location tools. The protection, however, is only available where the following requirements are met:

- (a) The ISP must belong to an Industry Representative Body (IRB) recognised by the Minister of Communications;
- (b) The ISP must have adopted and implemented the Code of Conduct of the IRB;
- (c) The ISP must not be primarily responsible for the creation, sending, manipulation of or linkage to the infringing data; and
- (d) The ISP must timeously respond to a legitimate take-down notice.

The ECT Act also provides protection in the case of a response to a wrongful take-down notice.

The only monitoring or control done by the state in the above process is to ensure that the IRB and its ISPs meet certain minimum requirements laid down in the ECT Act.

The ECT Act is also quite emphatic that there is no general requirement on ISPs to monitor whether the recipients of the service are transgressing the law or to monitor data that it transmits or stores. This is simply a realistic approach, taking cognisance of economic and practical realities in the internet environment.

This set of guidelines provides assistance to Industry Representative Bodies and ISPs on the minimum requirements regarded as adequate by the Minister and against which any application for recognition will be measured. It also contains guidelines on what is viewed as international best practice and the standards that should ultimately be striven for.

2 Principles

These guidelines are based on the following Principles:

- 2.1. *Self regulation*: It is preferred that the regulation and control of illegal or unacceptable conduct and content by ISPs and the recipients of their services should be exercised by the industry itself rather than the state. There should be a voluntary acceptance of this policy and these standards by the internet industry. This is in conformance with the provisions of the ECT Act.
- 2.2. *Effectiveness*. Any measures put into place by an IRB and its Members should be effective, realistic, practical and achievable with reference to the mischief to be controlled and the objectives of the ECT Act.
- 2.3. *Constitutional values*. The guidelines are based on and consistent with the constitutional values contained in the Constitution of South Africa, Act 108 of 1996, Chapter 2 and more specifically the provisions on human dignity (s 10), privacy (s 14), freedom of belief, religion and opinion (s 15) and freedom of expression (s 16). The basic values underlying a democratic society such as freedom of speech, protection of privacy and informational integrity, legality and the protection of minors should be respected by ISPs.
- 2.4. *Minimum standards of professional conduct*. The guidelines specify the minimum mandatory requirements that need to be met, having reference to the objectives of the ECT Act, but they also give guidance as to what is considered international best practice and professional conduct. Compliance with these minimum standards does not necessarily guarantee that conduct will be legal.
- 2.5. *No basis for liability*. Acceptance or subjection to these standards by an ISP will not constitute an independent basis for legal liability other than for compliance purposes and any complaints or disciplinary proceedings of the IRB.
- 2.6. *Preferred standards of conduct*. The preferred standards of conduct specify a higher standard based on the requirements of the ECT Act as a whole and international best practice and are not mandatory requirements.
- 2.7. *Protection of consumers and public*. Chapter XI of the ECT Act is aimed at providing protection to ISPs, but also at providing effective remedies to affected third parties in

respect of unlawful or illegal content or conduct on the internet. The minimum requirements set out below reflect these objectives. The ECT Act also provides other kinds of consumer protection and protection of privacy in Chapters VII and VIII. The preferred standards of conduct include these objectives and provisions. The Department of Communications (DOC) has an obligation in terms of the ECT Act and to the public at large to ensure that IRBs set an acceptable minimum level of professional conduct for their members to qualify for a limitation of liability.

- 2.8. *Law enforcement.* Effective law enforcement is an important part of effectively controlling illegal content and conduct on the internet. Very often this will require the co-operation of ISPs. The mandatory standards of conduct include a commitment to assist authorities in the legitimate investigation of illegal conduct or content and the enforcement of measures to combat such conduct or content.
- 2.9. *No general obligation to monitor (section 78).* These minimum requirements and guidelines are premised on the principle contained in s 78 of the ECT Act, namely that there is no general obligation on ISPs to monitor the conduct or content of the recipients of their services except as provided in South African law such as the requirements in the Films and Publications Act, 1996(Act No. 65 of 1996) on the prevention of child pornography, but they also recognise that responsible ISPs should not be allowed to turn a blind eye where they become aware of illegal content or conduct within their sphere of operation and control.
- 2.10. *Equality and technological neutrality.* There should be equality and technological neutrality in the applicable control measures introduced in respect of Internet Service Providers (ISPs), taking into account the advantages provided by Chapter XI of the ECT Act.
- 2.11. *Fairness.* Requirements should be fair and not adversely affect the economic viability of ISPs.

3 Objectives and scope

Applicability to all Information System Service Providers:

As stated above, these guidelines have been prepared for a specific category of Information System Service Providers i.e. Internet Service Providers. These guidelines will, however, also serve as a guideline for other categories of Information System Service Providers and should be applied *mutatis mutandis*. Practical restrictions may, however, prevent other Information System Service Provider from complying in full due to the use of different technology. Such Information System Service Providers should propose, in its application to the Minister for recognition, how it can achieve the same objectives in a different way. A Wireless Application Service Provider, for instance, may not have a website where it can comply with the informational requirements in paragraph 5.14.1. to provide a link to the IRB's Code of Conduct. That Wireless Application Service Provider can propose to comply with said requirement by ending all its own SMS messages with:

Code of Conduct->www.nameofirb.co.za

Applicability to Internet Service Providers:

These guidelines are aimed at:

- 3.1. Ensuring compliance by ISPs and their Industry Representative Bodies with the requirements contained in the ECT Act before the protection of Chapter XI will be granted.
- 3.2. Ensuring that minimum standards of acceptable content and conduct are specified and complied with.
- 3.3. Ensuring that affordable, quick and effective public access to complaints and disciplinary procedures and redress mechanisms is available and that such procedures and mechanisms are fair, unbiased and transparent.
- 3.4. Preventing the illicit or potentially offensive use of the internet.
- 3.5. Ensuring that information and procedures are available for content classification.
- 3.6. Ensuring that complying ISPs receive the protection that they are entitled to.

- 3.7. Increasing the legality, integrity and safety of the internet.
- 3.8. Providing guidelines on higher standards or preferred standards of conduct that the industry should ultimately be aiming at, having regard to the provisions of the ECT Act in general and international best practice.
- 3.9. Ensuring respect for fundamental rights and freedoms and principles governing public order and safety.
- 3.10. Promoting confidence in the use of the internet.
- 3.11. Recognising and supporting industry standards that have already been developed.

4 Definitions

In these guidelines the following terms will have these meanings ascribed to them:

Cybercrime: means any conduct on the internet or connected with the internet or internet usages which constitutes a crime in terms of the South African criminal law, including any conduct punishable in terms of Chapter XIII of the ECT Act.

Data Subject: means any natural or juristic person from or in respect of whom personal or business information has been requested, collected, collated, processed or stored.

ECT Act: means the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

Enforcement Authorities: means any governmental department, body or person in the service of such department or body, who has the power or authority to officially investigate any illegal or unlawful conduct or to enforce any law, including the common law.

Illegal Content or Conduct: means any information in respect of which it is illegal or unlawful to create, possess, publish or copy or any conduct that is illegal in terms of the South African common or statutory law.

IRB: means Industry Representative Body.

ISP: means Internet Service Provider.

Spam: means unsolicited commercial communications that do not comply with the provisions of section 45(1) of the ECT Act.

5 MINIMUM REQUIREMENTS

5.1. Professional Conduct

- 5.1.1. Members shall at all times conduct themselves in a professional manner in their dealings with the public, the recipients of their services, other ISPs and the IRB.
- 5.1.2. Members shall be committed to lawful conduct at all times and compliance with all legal requirements and shall co-operate with Enforcement Authorities where there is a legal obligation to do so.

5.2. Standard Terms of Agreement

- 5.2.1. Members shall have Standard Terms of Agreement that can be accessed from their websites containing all information and terms relevant to their relationship with the recipients of their services. Such Standard Terms shall be made available to any potential recipient of the service prior to the commencement of any service agreement.
- 5.2.2. The Standard Terms shall contain:
 - (a) A commitment that the recipient of the service shall not knowingly create, store or disseminate any illegal content or intentionally conduct itself in an illegal manner in its usage of the Member's services.
 - (b) An undertaking that no material that infringes copyright will knowingly be created, displayed, published or copied by the recipient of the service.
 - (c) An undertaking that the intellectual property rights of third parties will not knowingly be infringed.
 - (d) An undertaking that they will not send or promote the sending of spam.
- 5.2.3. The Standard Terms shall contain a right on the part of the Member to take down any content hosted by that Member which it considers illegal or where it has received a take-down notice.
- 5.2.4. The Standard Terms shall contain a right on the part of the Member to suspend or terminate the services of any recipient of the service that does not comply with these or any other related contractual obligations.

5.3. Service levels

- 5.3.1. Members may only offer or promise service levels which are reasonably feasible having regard to their technical capabilities, know-how, the area in which the services are to be delivered and other practical restraints.
- 5.3.2. In their dealings with consumers, other businesses and each other, Members shall act professionally, fairly and reasonably.

5.4. Content control

- 5.4.1. There is no general obligation on any Member to monitor the content of the recipients of its service, except as provided in South African law such as the requirements in the Films and Publications Act, 1996(Act No. 65 of 1996) on the prevention of child pornography, but a Member is obliged to take action where it becomes aware of any illegal or unlawful content or conduct.
- 5.4.2. A Member shall not knowingly host or provide links to content that it knows is illegal or unlawful, except when required to do so by law, or engage in conduct that is illegal or unlawful.
- 5.4.3. Members shall adhere to the Code of Conduct, the Disciplinary Procedure and the decisions of the IRB.
- 5.4.4. Where a Member becomes aware of illegal conduct or content, it shall suspend or terminate the recipient of the service's services and report the conduct or content to the relevant Enforcement Authority. In all instances Members shall report such conduct or content and the steps taken to the IRB within a reasonable period of time.
- 5.4.5. Members shall keep a copy or record of all take-down notices received in terms of the ECT Act and materials that have been taken down as a result for a period of three years, unless possession of such materials is illegal. In the latter instance such copies should be provided to the relevant Enforcement Authorities.

5.5. Consumer protection

- 5.5.1. Members are committed to honest and fair dealing.
- 5.5.2. Members shall comply with all applicable compulsory advertising standards and

regulations.

5.6. Privacy and Confidentiality Protection

- 5.6.1. Members shall respect the constitutional right of internet users to personal privacy and privacy of communications.
- 5.6.2. Members shall not deal in or with personal information of data subjects other than for their own needs or with the prior written permission of the data subject.
- 5.6.3. Members shall respect the confidentiality of electronic mail and messaging.
- 5.6.4. Members shall only disclose confidential information if obliged to do so in terms of law or with the prior written permission of the data subject.

5.7. Copyright and Intellectual Property Protection

Members shall respect the intellectual property rights of the recipients of its services and third parties and shall not knowingly infringe such rights.

5.8. Spam Protection

- 5.8.1. Members shall not send or promote the sending of spam and will take reasonable measures to ensure that their networks are not used by others for this purpose.
- 5.8.2. Members must provide a facility for dealing with complaints about spam originating from their networks and must react expeditiously to complaints received.

5.9. Protection of Minors

- 5.9.1. Members will take reasonable steps to ensure that they do not offer paid content subscription services to minors without written permission from a parent or guardian.
- 5.9.2. Members undertake to provide their recipients of Internet access with information about procedures, content labelling systems, filtering and other software applications that can be used to assist in the control and monitoring of minors' access.
- 5.9.3. Paragraphs 5.9.1 and 5.9.2 do not apply when Members offer services to corporate recipients of their services, where no minors have Internet access.

5.10. Cyber crime

Members will take all reasonable measures to prevent unauthorised access to, interception of, or interference with data on its network and under its control.

5.11. Complaints Procedure

5.11.1. The IRB shall establish a complaints procedure that can be used by recipients of the Members' services and third parties to make complaints and that will be applicable to its Members.

5.11.2 The complaints procedure shall be published on the IRB's website and Members shall provide a link to such procedure from their websites.

5.11.3. Members shall be committed to receive and investigate complaints made in accordance with the complaints procedure, unless such complaints are frivolous, unreasonable, vexatious or in bad faith.

5.11.4. Members shall make all reasonable efforts to resolve complaints in accordance with the complaints procedure. If the complaint cannot be resolved within the time specified in the complaints procedure, the complaint shall be referred to the IRB for a decision.

5.11.5. The complaints procedures shall contain an acceptable turn-around period for dealing with a complaint.

5.11.6. Members shall comply with decisions of the IRB.

5.11.7. The complaints procedure should allow direct referral of a complaint to the IRB in the event of a Member's transgression of or non-compliance with the IRB's Code of Conduct.

5.11.8. The IRB may refer any complaint received to the Member in question for resolution.

5.12. Disciplinary Procedure

5.12.1. The IRB should establish a Disciplinary Procedure that sets out fair procedures that will be followed in the event of a Member's transgression of or non-compliance with the IRB's Code of Conduct.

5.12.2. The IRB shall have the right to investigate any transgression of or non-compliance with the IRB's Code of Conduct by a Member.

5.12.3. Members shall be obliged to provide their co-operation to the IRB in accordance with the procedure set out in the Disciplinary Procedure.

5.12.4. In the event that the IRB finds that a Member has transgressed the IRB's Code of Conduct, the IRB may take one or more of the following actions against such Member:

- (a) Order take-down in accordance with a take-down notification;
- (b) Issue a reprimand;
- (c) Temporarily expel (suspend) the Member from the IRB subject to conditions which may include a written undertaking from the Member;
- (d) Expel the Member from the IRB;
- (e) Publish details of the identity of the transgressor, the transgression and action taken;
- (f) Report illegal or unlawful conduct or content to the relevant Enforcement Authority.

5.12.5. The IRB shall retain records of all disciplinary proceedings for a period of 3 years.

5.13. Monitoring of Compliance

5.13.1. Members shall submit a report to the IRB of all steps taken as a result of a take-down notice within a reasonable period of time after a take-down notice has been lodged.

5.13.2. Members shall submit an annual statement to the IRB confirming their compliance with the Code of Conduct.

5.13.3. The IRB shall have the right to investigate the conduct and compliance with the Code of Conduct by Members on its own initiative and to institute disciplinary proceedings if appropriate.

5.14. Informational requirements

5.14.1. The IRB shall publish the Code of Conduct on its website. Members shall prominently display the IRB membership logo, and provide a link to the Code of Conduct from their websites.

5.14.2. Members shall provide full identificatory details on their websites, including but not limited to their registered name, electronic contact details, physical address and telephone and fax details.

5.15 Take-down procedure

5.15.1. The IRB shall establish a take-down procedure in accordance with section 77 and other relevant provisions in Chapter XI of the ECT Act.

5.15.2. The take-down procedure shall be applicable to all the Members of the IRB.

5.15.3. The take-down procedure shall be published on the IRB's website and Members shall provide a link to such procedure from their websites.

5.15.4. The take-down procedure shall contain an acceptable turn-around period for dealing with a take-down notice.

5.16. Review and Amendment

5.16.1. The IRB shall be entitled to review the Code of Conduct from time to time and to amend it where necessary subject to reporting such amendment to the Minister. Such amendments shall be binding on all Members.

6 PREFERRED REQUIREMENTS

NB These requirements are in no way mandatory but comprise of provisions which are in line with international best practice. They provide guidelines in respect of conduct and provisions that are regarded as desirable for responsible ISPs to aim for.

6.1. Professional Conduct

No further requirements are necessary.

6.2. Standard Terms of Agreement

The Standard Terms shall contain:

- (a) A commitment that recipients of the service shall adhere to the provisions of Chapter VII of the ECT Act (the Consumer Protection Provisions) if applicable.
- (b) A commitment that clients shall adhere to the provisions of Chapter VIII of the ECT Act (the Privacy Provisions) if applicable and that it shall have a privacy policy which is prominently displayed on and accessible from the client's website.
- (c) A commitment that a client shall have adequate safeguards to assist in the control and monitoring of minors' access.

6.3. Service levels

- 6.3.1. Members shall make commitment to maintain and provide users with minimum service levels as contained in their Standard Terms and Conditions.
- 6.3.2. A Member shall not be liable for any non-compliance with minimum service levels due to circumstances beyond its control (*force majeure*).
- 6.3.3. Members shall comply with any Code of Practice endorsed by their IRB regarding the transfer of domain names.
- 6.3.4. Members who register domain names for users will inform the user of the terms and conditions on which the domain name is made available to the user, including any conditions of use and restrictions that may apply.
- 6.3.5. Members must offer recipients of the service the option of retaining their respective

domain names, other than where such domain names are sub-domains of the relevant Member's own name, where recipients of the service choose to transfer to another ISP, whether that ISP is a member or not.

- 6.3.6. Members shall provide redirection facilities for a reasonable period of time and at a reasonable cost to recipients of the service who change to another ISP.
- 6.3.7. Members should take reasonable steps to respect and implement the caching directions or restrictions of the recipients of their services.

6.4. Content control

- 6.4.1. Members shall have an Acceptable Use Policy that is binding on all the recipients of their services.
- 6.4.2. Members shall require the recipients of their services to adopt and use a system of content classification or labelling capable of identifying content or services as:
- (a) Educational or children's content or services and as suitable for children;
 - (b) Adult services in order that users may restrict or exclude unwanted material by the use of content filter technology or software. Such material shall be preceded by suitable on-screen warnings on the home or title page and access control.
- 6.4.3. Members shall require a commitment from the recipients of their services that they will not contravene the provisions of the Films and Publications Act 65 of 1996.

6.5. Consumer protection

- 6.5.1. Members shall comply with the provisions of the ECT Act Chapter VII.
- 6.5.2. Members shall not use advertising that is illegal, offensive or deceptive.
- 6.5.3. Members shall not knowingly disseminate information that is false or deceptive.
- 6.5.4. Members shall not knowingly exploit the lack of experience or knowledge of the recipients of their services.
- 6.5.5. Members shall have a clear and binding refund and exchange policy.
- 6.5.6. Members shall provide prospective recipients of the service with full particulars of software licences and conditions when offering software for purchase or use.

- 6.5.7. Members shall provide full details on the professional qualifications and any post occupied by an expert or specialist when offering consultancy services.
- 6.5.8. Members shall give adequate notice of information, data or circumstances that are likely to undergo changes that will affect the service delivered to recipients of the service.
- 6.5.9. Members shall contractually require the recipients of their services to comply with the ECT Act Chapter VII and all of the above commitments and obligations if applicable.

6.6. Privacy and Confidentiality Protection

- 6.6.1. Members shall comply with the provisions of the ECT Act Chapter VIII.
- 6.6.2. Members shall advise users on software tools, which they can use to protect their privacy and integrity of their systems and data.
- 6.6.3. Members shall take reasonable precautions in line with accepted industry practice in the storing of passwords and other confidential information of recipients of the service.
- 6.6.4. Members must review the provisions on the prohibition of interception of communications in Chapter 2 of the Regulation of Interception of Communications and Provision of Communications-related Information Act 70 of 2002 and implement measures to comply with the those provisions.
- 6.6.5. Members must review the provisions applicable to private bodies in Part 3, Chapters 4 and 5 of the Promotion of Access to Information Act 2 of 2000 and implement measures to comply with those provisions.
- 6.6.6. Members must make their Promotion of Access to Information Act manuals available on the web.
- 6.6.7. Members shall have a Privacy Policy that shall be accessible from their respective websites.
- 6.6.8. Members shall contractually require the recipients of their services to comply with the ECT Act Chapter VIII and all of the above commitments and obligations if applicable.

6.7. Copyright and Intellectual Property Protection

Members who offer webpage developing and writing services shall ensure that the ownership of the copyright in any work created for the client, or the terms of the client's licence to use such work, is agreed with the client before work is commenced.

6.8. Spam Protection

Members shall follow the best industry practice in providing anti-spam software to recipients of the service in order that recipients of the service can elect to minimise the amount of spam received on their e-mail accounts.

6.9. Protection of Minors

No further measures are required. See 6.4 on Content Control above.

6.10. Cybercrime

6.10.1. Members shall take all reasonable steps to prevent cybercrime of any form.

6.10.2. Members shall inform the recipients of their services and the public about available software and technical measures to protect their information and systems against cybercrime, including hacking and the spreading of viruses.

6.10.3. Members shall take reasonable measures to establish the identity of all recipients of the service and to retain records of such information.

6.10.4. Members shall report any illegal or suspected illegal conduct or content to the relevant Enforcement Authority.

6.10.5. Members shall provide a round the clock point of contact to Enforcement Authorities.

6.11. Complaints and Take-Down Procedures

Members shall provide recipients of the service and the public with a round the clock hotline to make complaints, receive take-down notifications and to receive reports on any illegal or unlawful conduct or content.

6.12. Informational and educational services

Members shall be committed to provide public education on internet issues and on the industry, including: