

15 February 2021

**The Minister of Communications and Digital Technologies**

Per email: [aacs@dtps.gov.za](mailto:aacs@dtps.gov.za)

ISPA SUBMISSIONS: DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES POLICY  
FRAMEWORK: A NEW VISION FOR SOUTH AFRICA 2020

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published for public comment in Government Gazette 43495 on 3 July 2020 (**"the Draft AAVCS Policy"**) and sets out its submissions below.

**Introductory remarks**

2. ISPA's members have not been involved in the delivery of traditional broadcasting services but have played a substantial role in enabling the shift towards content distribution and consumption over Internet Protocol ("IP") networks.
3. ISPA's independent Internet Exchanges (INX-ZA) have also facilitated local caching of content: keeping IP<sup>1</sup> traffic local to reduce the cost to communicate for South Africans. The effect of the COVID-19 pandemic has accelerated an existing trend towards adoption of local and international video-on-demand and live streaming services, resulting in ISPs and Internet Exchanges seeing record traffic volumes over the last year.
4. As such, it has been clear for some time that the policy and legislative framework in South Africa – with its narrow definition of "broadcasting services" – is outdated.
5. In ISPA's view, the Draft AAVCS Policy as a whole represents an appropriate and welcome response which can drive a new legislative framework for the regulation of audio and audio-visual content services into the future.

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<sup>1</sup> As an association of Internet people, "IP" will always be "Internet Protocol" for ISPA and it is used this way in this submission (rather than referring to "Internet Protocol").

### Scope of submissions

6. ISPA's submissions are limited to the proposals in the Draft AAVCS Policy for legislative and regulatory mechanisms to strengthen protection against "signal piracy".
7. ISPA has understood "signal piracy" to refer broadly to the activity of infringing on the intellectual property rights of another using electronic communications.

### Submissions on intellectual property rights protection proposals

8. The Draft AAVCS Policy notes that:
  - 8.1. It is government policy to encourage the development and growth of local content generation and the local content industry, and that an element of this is a legal framework which ensures that this industry is able to benefit from the exploitation of intellectual property rights in the content created.
  - 8.2. Piracy and intellectual property rights infringements threaten revenue streams and future investment into the industry, and this is felt across the content distribution value chain. The impact is felt disproportionately in the developing world and South Africa is no exception.
  - 8.3. In taking steps to protect "South African content and intellectual property rights-holders", there is "a critical need for legislation that will impose requirements on ISPs to co-operate with rights-holders and government to police illegal file-sharing or streaming websites". Such a requirement is not imposed under the Electronic Communications Act or current copyright legislation.
  - 8.4. Although the Copyright Act is currently under review in Parliament, the current version does not address "signal piracy" or provide for technology-based protection measures for broadcasting technology. Similarly, the Cybercrimes Bill awaiting Presidential assent does not contain provisions addressing "signal piracy".
  - 8.5. The "growing challenges posed by the Internet relating to the protection and enforcement of Intellectual Property rights and South African audio and audiovisual content requires a joint effort by the relevant government ministries through an Inter-Ministerial Committee or a similar forum".

9. To this end the Draft AAVCS Policy proposes:

9.1. The introduction of legislative and regulatory mechanisms to strengthen protection against signal piracy must be introduced in the Electronic Communications and Transactions Act 25 of 2002 (“**the ECT Act**”).

9.2. Co-operation between government departments “to ensure that statutory prohibitions against piracy and circumvention of technological protection measures are regularly reviewed to ensure they remain effective against the evolving technology solutions employed by persons engaging in the piracy of South African audio and audiovisual content”.

10. ISPA does not support these proposals for the reasons set out below:

10.1. ISPs enable access to the Internet, over which an increasing percentage of content is being consumed. Proposals to place obligations on ISPs in respect of the protection of third-party intellectual rights must be subject to a regulatory impact assessment with particular reference to the impact on accessibility of access to the Internet and the cost to communicate.

10.2. The correct location for the “regulatory and statutory mechanisms” proposed in the Draft AAVCS Policy is copyright legislation, not the ECT Act.

10.3. The legislative processes for the Copyright Amendment Bill and the Cybercrimes Bill are ongoing and proposals of the nature made in the Draft AAVCS Policy have been considered as part of these processes. In both such cases, Parliament has – to date – decided not to include in these Bills statutory mechanisms such as those proposed.

10.4. There is evidence that the existing take-down notice procedure is effective in removing infringing content expeditiously where an ISPA member is able to effect such take-down.

10.5. The vast majority of infringing content is hosted or made available from outside of South Africa. Jurisdictional challenges impose real, practical limitations.

11. Before expanding on these points, ISPA wishes to make the following clear:

11.1. ISPA and its members are committed to lawful conduct and to interacting with law enforcement authorities and other third parties strictly within the framework of applicable law. ISPA expends

considerable resources on conducting training workshops for SAPS and maintaining clear and constructive relationships with all government stakeholders with an interest in some form of online content control<sup>2</sup>.

- 11.2. ISPA agrees that piracy of content and other intellectual property rights infringements enabled by the Internet are very real challenges with substantial economic impact and supports government policy relating to the promotion and protection of the local creative industries.
- 11.3. ISPA participates in events led by CIPC to stimulate SMME growth in the creative and manufacturing industries. The most recent such engagement was in June 2020 when ISPA presented on “Take-Down Notices as a tool for protecting intellectual property online”.
- 11.4. ISPA has previously engaged extensively with representative bodies such as the Recording Industries of South Africa (RISA) and the South African Federation Against Copyright Theft (SAFACT), including developing a bespoke take-down notice form for RISA to accommodate take-down of infringing material in compliance with the ECT Act.

### **ISPs enable access to content**

12. Firstly – stating the obvious – ISPs as their core function enable access to the Internet and to content. Moreover, they do so as “mere conduits” which give effect to subscriber-initiated choice of transmission or access to content in an automatic, technical manner<sup>3</sup>.
13. While the focus in the Draft AAVCS Policy is on the facilitation of copyright infringement imposing obligations on ISPs, ISPs in fact provide access for consumers to the new models of music distribution and new sources of revenue for the creative industries which continue to evolve, as well as the massive benefits of connectivity falling outside of providers of copyrighted content.

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<sup>2</sup> Including the National Gambling Board (NGB), Film and Publication Board (FPB), Companies and Intellectual Property Commission (CIPC), the .za Domain Name Authority (ZADNA), the .za Central Registry (ZACR), SAPS and the Financial Intelligence Centre (FIC).

<sup>3</sup> This description is based in section 73 of the ECT Act.

14. Consumers access and pay (through subscription or advertising) for music and other content from Showmax, YouTube, Spotify, Apple Music, Netflix, HBO and the like through connectivity to the Internet, routing and other services provided by ISPs.
15. While no detail is provided in the Draft AAVCS Policy on the types of legislative and regulatory mechanisms to be implemented, the debate is not new and the various options and their relative efficacy (or inefficacy) is reasonably well-established. What these options do have in common is that:
  - 15.1. They are expensive and this expense will scale with the continued exponential growth in demand for content and data services. It is neither technically feasible, nor affordable, for the bulk of small and medium ISPs to implement any sort of monitoring or filtering of this nature<sup>4</sup>.
  - 15.2. They have the potential to infringe fundamental rights such as the right to freedom of expression (for example, where a site is wrongfully blocked or a subscriber's access to the Internet suspended) and the right to privacy (as all of these options involve some degree of interception and monitoring of communications).
  - 15.3. They are not particularly effective, can be circumvented and have the unintended consequence of wider consumer use of virtual private networks (VPNs) and other forms of encryption.
  - 15.4. They fail to treat the problem of copyright infringement online at its source in favour of a blunter and more convenient tool: disabling or filtering access and blocking content. The Draft AAVCS Policy identifies imposing legislative obligations on a particular set of third parties – Internet Service Providers – as the silver bullet – while completely neglecting, for example, the role of consumer education and education of intellectual property creators.
16. ISPA is not asserting that measures implemented to protect against infringement of intellectual property rights online will be *per se* unconstitutional. Such measures will, however, have to be formulated taking into account the balancing of competing fundamental rights and the need for

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<sup>4</sup> An analogy can be drawn with the challenges of ISPs implementing an interception and monitoring capability as required under RICA. Under RICA an ISP Assistance Fund was to be formed to fund the acquisition of the required equipment so that this could be made available to small and medium size ISPs on an "as-and-when-required" basis. This Fund was never established and the relevant provisions never implemented.

alignment with legislation such as the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (“**RICIA**”) and the Protection of Personal Information Act 4 of 2013 (“**POPIA**”).

17. Noting the clear focus in the Draft AAVCS Policy on the protection of South African content and the promotion of South African creative industries, ISPA is unaware of any research or study undertaken into the extent to which (a) South African content is pirated and (b) the extent to which pirating is undertaken in South Africa by persons using local electronic communications network and services.
18. The role of the ISP and the underlying network is critical in matching eyeballs to content: any measures which may impact on this role and the cost of providing it should be subject to a regulatory and socio-economic impact assessment, with particular reference to the impact on the cost to communicate for South African consumers.

#### **The proposals should not be enacted through amendments to the ECT Act**

19. The correct location for the “regulatory and statutory mechanisms” proposed in the Draft AAVCS Policy is copyright legislation, not the Electronic Communications and Transactions Act 25 of 2002 (“**the ECT Act**”).
20. The mechanisms proposed relate foremost to the protection of copyright and it is logically and intuitively correct that provisions giving effect to such mechanisms be grouped with other provisions explicitly relating to the protection of copyright, i.e. in the Copyright Act<sup>5</sup>.
21. Emplacing provisions relating to intellectual property protection in the ECT Act ignores the fact that the Copyright Review Commission and the drafters of the Copyright Amendment Bill explicitly sought to update copyright legislation and align it with the current digital reality (i.e. the subject matter of the Draft AAVCS Policy proposals was considered). It would also amount to an undesirable fragmentation of legislation given that the ECT Act does not – by design – currently deal with intellectual property protection at all.

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<sup>5</sup> This debate appeared to have been settled at the time of the drafting of the ECT Act in 2002 and the preceding Green Paper on Electronic Commerce for South Africa.

### **The proposals have already and will further be considered by Parliament**

22. As noted in the Draft AAVCS Policy, the Copyright Amendment Bill<sup>6</sup> and the Performers' Protection Bill<sup>7</sup> are currently before Parliament after being referred back to that institution by the President due to concerns about the constitutionality of the Bills placed before him for signature. The President's concerns related to, *inter alia*:

- 22.1. Provisions which diminished the rights of copyright owners to share in the fruits of their work could be seen as amounting to a retrospective and arbitrary deprivation of property.
- 22.2. There was a failure by Parliament to undertake proper consultation on amendments to the section of the Copyright Amendment Bill dealing with the fair use exception, which the President characterised as material to the scheme of the Bill as a whole.
- 22.3. Sections of the Copyright Amendment Bill conferred substantial discretionary powers on the Minister of Trade and Industry, which could be viewed as an impermissible delegation of legislative authority.
- 22.4. Provisions of the Copyright Amendment Bill were in conflict with international treaties to which South Africa is a party.

23. ISPA has participated in all relevant steps of the long-running process to review copyright legislation in South Africa with the express purpose of providing information on proposals relating to protecting copyright in the online environment. It is ISPA's understanding that proposals to include the kind of mechanisms proposed in the Draft AAVCS Policy were rejected and not included in the current form of the Bill. ISPA is further unable to determine anything in the President's terms of referral back to Parliament that is relevant to this issue.

24. ISPA assumes that the DCDT is actively participating in this process as the appropriate avenue to address concerns regarding intellectual property rights and the creative industries.

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<sup>6</sup> [B13B – 2017]. See <https://pmg.org.za/bill/705/> for a full history of the processing of this Bill.

<sup>7</sup> [B24B – 2016]. See <https://pmg.org.za/bill/677/> for a full history of the processing of this Bill.

## Chapter 11 of the ECT Act

25. Chapter 11 of the ECT Act creates a legislative framework for the limitation of liability of service providers, which includes provisions creating a take-down notice procedure in South Africa.
26. As members of an Industry Representative Body (IRB) recognised by the Minister under Chapter 11, ISPA members operate within the legal framework for information system service providers under Chapter 11, read with the Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers (“the IRB Recognition Guidelines”)<sup>8</sup>.

### *No obligation to monitor*

27. Section 78 of the ECT Act is a fundamental provision establishing the “neutrality” of ISPs and other Internet intermediaries:

#### *“No general obligation to monitor*

**78. (1)** *When providing the services contemplated in this Chapter there is no general obligation on a service provider to—*

*(a) monitor the data which it transmits or stores; or*

*(b) actively seek facts or circumstances indicating an unlawful activity.”*

28. The importance of this position in protecting the privacy and freedom of expression of South Africans is underscored in Chapter 8 of the Cybercrimes Bill (awaiting Presidential assent)<sup>9</sup>, which sets out the obligations of electronic communications service providers where they become aware that their computer systems are involved in the commission of specified offences.

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<sup>8</sup> Government Notice 1283, Regulation Gazette 29474, 14 December 2006.

<sup>9</sup> [B6D-2017]. Full history available from <https://pmg.org.za/bill/684/>



## **CHAPTER 8 - REPORTING OBLIGATIONS AND CAPACITY BUILDING**

### ***Obligations of electronic communications service providers and financial institutions***

**54.** (1) *An electronic communications service provider or financial institution that is aware or becomes aware that its computer system is involved in the commission of any category or class of offences provided for in Part I of Chapter 2 and which is determined in terms of subsection (2), must—*

*(a) without undue delay and, where feasible, not later than 72 hours after having become aware of the offence, report the offence in the prescribed form and manner to the South African Police Service; and*

*(b) preserve any information which may be of assistance to the law enforcement agencies in investigating the offence.*

(2) *The Cabinet member responsible for policing, in consultation with the Cabinet member responsible for the administration of justice, must by notice in the Gazette, prescribe—*

*(a) the category or class of offences which must be reported to the South African Police Service in terms of subsection (1); and*

*(b) the form and manner in which an electronic communications service provider or financial institution must report offences to the South African Police Service.*

(3) *An electronic communications service provider or financial institution that fails to comply with subsection (1), is guilty of an offence and is liable on conviction to a fine not exceeding R50 000.*

*(4) Subject to any other law, or obligation, the provisions of subsection (1) must not be interpreted as to impose obligations on an electronic service provider or financial institution to—*

*(a) monitor the data which the electronic communications service provider or financial institution transmits or stores; or*

*(b) actively seek facts or circumstances indicating any unlawful activity.*

(ISPA's emphasis)

29. The IRB Recognition Guidelines recognise the practical reality also underpinning this position:

*“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.”<sup>10</sup>*

(ISPA’s emphasis)

30. ISPA believes it would be an error to compromise this position through any statutory or regulatory mechanism intended to facilitate the protection of copyright online. Acknowledging that there are competing rights and principles at play, caution should be exercised not to elevate narrow interests over the broader public interest in an open Internet.

#### *ISPA’s Code of Conduct*

31. ISPA’s Code of Conduct expressly stipulates that members (a) bind their subscribers to a commitment to lawful conduct in the use of the services, including copyright and intellectual property rights and (b) themselves respect intellectual property rights.

32. These provisions are aligned as required with the IRB Recognition Guidelines and are binding on all ISPA members:

*“8. ISPA members must have policies for acceptable or fair use for their Internet access services. This policy must be made available to customers prior to the commencement of any such service agreement and at any time thereafter, on request.*

*9. Policies for acceptable or fair use must include:*

- *a requirement that the customer will not knowingly create, store or disseminate any illegal content;*
- *a commitment by the customer to lawful conduct in the use of the services, including copyright and intellectual property rights; and*
- *an undertaking by the customer not to send or promote the sending of spam.*

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<sup>10</sup> IRB Recognition Guidelines, para 1.2

**14. Terms and conditions must give an ISPA member the right to remove any content hosted by that member which it considers illegal or for which it has received a take-down notice.**

**15. Terms and conditions must give the ISPA member the right to suspend or terminate the service of any customer that does not comply with the terms and conditions, acceptable or fair use policies, or any other contractual obligations.**

**24. ISPA members must respect intellectual property rights and not knowingly infringe such rights.**"

33. Compliance with these requirements is verified during the new member application process.

34. Contraventions of the Code of Conduct are dealt with initially under ISPA's mediation process and referred to an independent adjudicator if mediation is not successful.

*The take-down notice procedure*

35. ISPA acts as an agent for its members in the take-down notice process and reports annually to the Minister in respect of take-down notices received and the manner in which these are processed.

36. In the context of these submissions, ISPA wishes to highlight the following:

36.1. There is no cost to lodging a take-down notice with ISPA. ISPA provides clear information on the process to be followed<sup>11</sup> as well as an easy-to-use online form<sup>12</sup>. The take-down notice remedy offers an affordable (no-cost) avenue for redress.

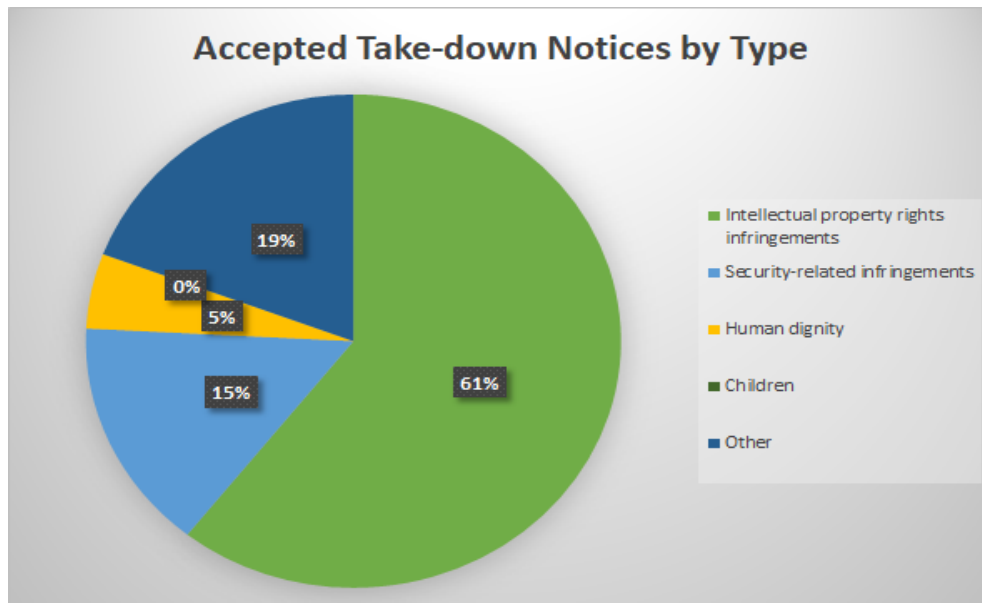
36.2. **The majority of take-down notices received target intellectual property rights infringements.**

This is illustrated in the graphic below as well as in *Annexure A - Classification of Take-Down Notices*.

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<sup>11</sup> See <https://ispa.org.za/tdn/how-to/>

<sup>12</sup> See <https://ispa.org.za/tdn/take-down-form/>



36.3. A consistently high percentage of take-down notices result in expeditious removal of targeted content: 95% in 2019 (which is the average for the past 6 years). This is illustrated in *Annexure B – Outcome of Take-Down Notices received*.

36.4. ISPA’s records indicate that the requirement to act “expeditiously” is being met: most content targeted by valid notices is removed by the targeted host or target within 24 hours.

36.5. The remedy of an action for wrongful take-down remains where a notice is lodged in bad faith: to ISPA’s knowledge this remedy has not been utilized in South Africa to date.

37. On the basis of this evidence, ISPA submits that:

37.1. The take-down notice procedure is affordable, accessible and effective.

37.2. The take-down notice procedure is specifically effective in providing a remedy for online infringements of intellectual property rights. This is borne out by historical data reflecting the use of take-down notices for this purpose.

37.3. There is evidence that self-regulatory mechanisms – such as that created by Chapter 11 of the ECT Act – provided a balanced and effective means to resolve certain forms of online dispute.

38. The take-down notice remedy is limited in scope and it is only where the targeted service provider is (a) subject to local law and (b) able to exercise control over the content targeted, that it is useful. The vast

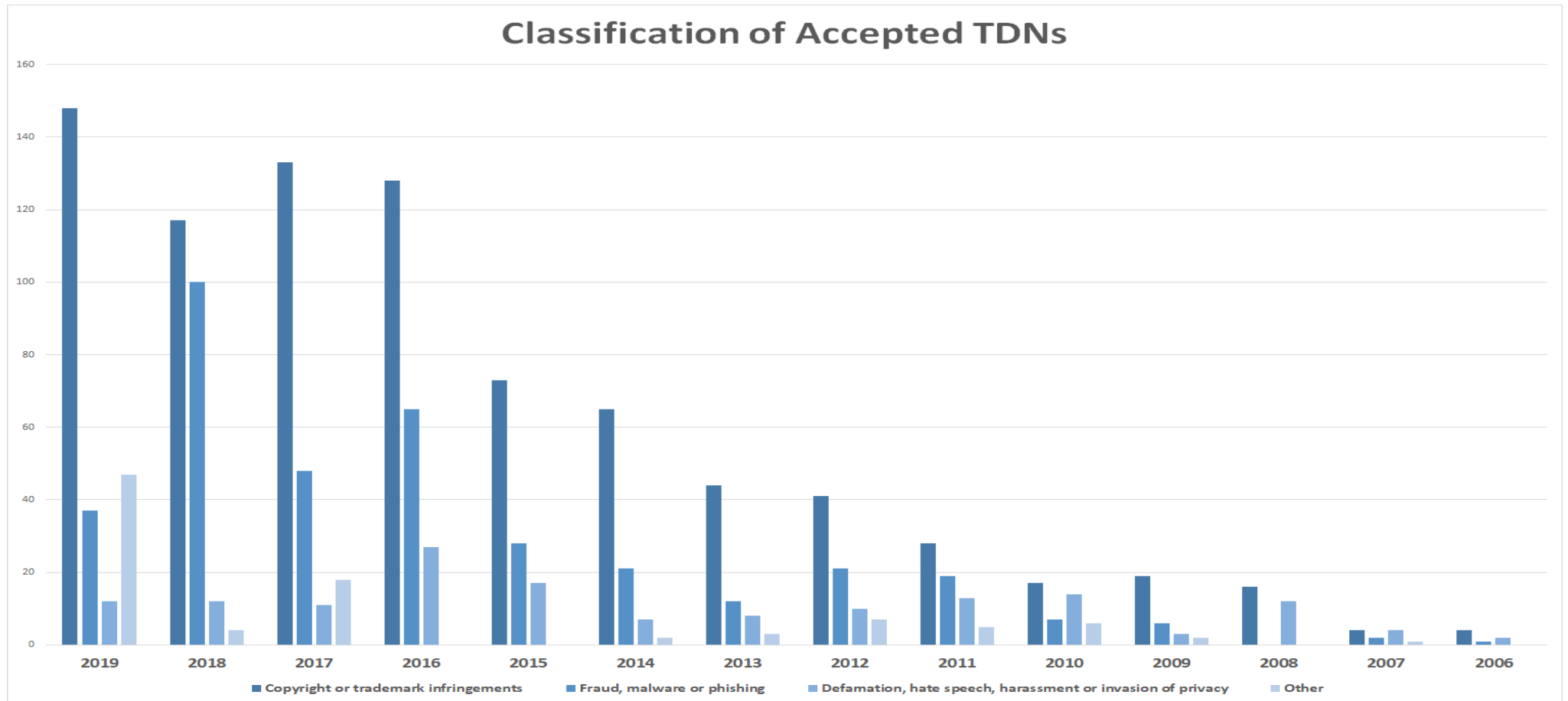
majority of targeted and unlawful activity is hosted outside of South Africa, particularly by the large platform providers. ISPA accordingly suggests that paragraph 5.3.7 of the Draft AAVCS Policy – which refers to “prohibited content which VSPS distribute must be taken down following the process outlined” in the ECT Act — be reviewed.

### **Conclusion**

39. ISPA understands the rationale behind proposals in the Draft AAVCS Policy relating to the protection of intellectual property rights but, for the reasons set out above, that such proposals should be reviewed.
40. ISPA trusts that these submissions assist in the finalisation of the Draft AAVCS Policy and once again extends its congratulations to the drafters of what is overall an excellent document.

ISPA CHAIR (electronic signature)

**Annexure 1: Classification of Take-Down Notices received by ISPA**



**Annexure 2: Outcome of Take-Down Notices received by ISPA**

