

SILVER BULLETS AND GOLDEN EGGED GEESE: A COLD LOOK AT INTERNET CENSORSHIP

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I. INTRODUCTION

Telecommunication systems are developing to resemble the Internet more than the other way around. Voice over Internet protocol is treated as a serious threat by carriers and, from a technical perspective, is the logical evolution from circuit switched telephony. It is not difficult to envisage a time when people will use a multipurpose data line based on packet switched technology for all of their communication needs. Moreover, in a market which is becoming both increasingly global and increasingly services based, one of the main price differentiators will not be geography, but rather the efficiency of the communications medium and the delivery or carriage costs of the provision of those services. However, despite all of this, neither the legislature nor the broader community appears concerned about the impact of recently introduced restrictions on Internet communications.

This paper seeks to analyse the impact of censorship provisions targeting service providers in the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ("*Online Services Act*"). It discusses, primarily from a business perspective, some of the likely effects of Internet censorship at the carrier level. While Internet censorship also raises obvious freedom of speech and quality of life issues, these are addressed only incidentally in this paper. The discussion does, however, include some examples from the author's own experience where the *Online Services Act* has materially interfered with 'real life' electronic commerce and telecommunications negotiations and decision making. The author concludes that censorship at the service provider level has no precedents in other areas of human activity and necessarily inflicts collateral damage on the Internet industry and all businesses reliant on it.

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1 Nor does it discuss the possible application of proposed State based legislation.

This paper does not discuss in detail the operation of the *Online Services Act*.¹ Suffice to say that the legislation establishes a regime in which carriers are liable for the content they host or provide access to. In either case, liability is usually triggered by a notice from the Australian Broadcasting Authority (“ABA”). However, that notice can be received by way of substituted service: effectively, that the carrier “ought to have known” about the notice.²

The author has argued elsewhere that the *Online Services Act*: contains manifold technical deficiencies; practically requires content hosts to monitor all content hosted in order to avoid liability; requires Internet industry participants to adopt irrelevant responsibilities through codes of practice; provides inadequate protection against civil liability to third parties regarding compliance with its provisions; forces the export of money to overseas carriers; hampers domestic carriers from reaching equitable interconnection arrangements with foreign carriers; inhibits consumer choice by reducing the attractiveness of ‘unbundled’ access service solutions (thereby preferencing the current market incumbent); detrimentally impacts on a carrier’s ability to forward plan its capacity requirements; and applies an inappropriate regulatory model (ie a broadcast model).³ These arguments will not be revisited in this paper.

II. ARGUMENTS AGAINST CARRIER BASED LEGISLATION

One of the reasons that carriers have been targeted by the *Online Services Act* is that they are the easiest to identify on the Internet since they are non-transitory and have established places of business. They have an interest in acquiring and/or maintaining market goodwill. They have carriage infrastructure and an interest in defending it against pecuniary penalties. Further, it seems that carriers are the group most readily recognised by middle Australia in the context of the Internet. The distinction between information *provided by* a service provider and information *accessed through* a service provider is readily blurred. Since all of the information arrives via the service provider, it can easily appear to be their responsibility.

On the surface, these appear to be perfectly reasonable reasons for attaching liability to the carrier. However, adopting a similar approach in other areas of human endeavour is consistently unpersuasive. Two examples can be used to illustrate this point.

A. Property Owners Example

Property owners are not liable merely because their lessee commits a crime on their premises. In particular, they are not required to police, on pain of pecuniary penalty, their lessee’s use of the premises. While they may do so if they choose, and may include in the contract an ability to terminate the lease if the lessee

2 *Broadcasting Services Act* 1992 (Cth), Schedule 5, s 51 (as amended by the *Online Services Act*).

3 For example, see B Scott, “A Layman’s Guide to Internet Censorship in Australia” (1999) 1(2) *BNAL World Internet Law Report* 15.

commits a crime, there is no legal sanction if they do not. In fact, the law recognises a positive obligation on a landlord to refrain from such things and severely limits a landlord's right to interfere with the lessee's enjoyment of the property. An analogy can be drawn between the owner of a property that another person leases to store their possessions in and an Internet carrier, who owns an Internet server and leases space on that server to another person to store their content.

B. Airlines Example

If a person wishes to fly to or from another country to engage in the drug trade, their airline of choice is not under any obligation to prevent them. Airlines are not required to monitor or 'screen out' individuals flying to or from known drug trafficking destinations. As with the property owner above, an airline may choose not to provide carriage service to an individual under certain circumstances, but they are not subject to any legal sanction if they do provide it. In this case, there is an analogy between a carrier who provides Internet access to illegal material and an airline providing similar access.

C. Why Carriers Are Bad Targets

Although not exact, the analogies above offer some clues as to why carrier liability is inappropriate. They suggest that such regulation forces a carrier to go outside its primary capabilities and to accept risks that are inappropriate for it to bear. For example, if an airline was forced to accept the risk associated with persons flying with them in the course of committing a crime, it would be reasonable to expect the price of airline tickets to increase to reflect the additional security measures required. Airlines could also be expected to begin discriminating against 'high risk' customers, and perhaps, to begin conducting routine body searches!

The main reason why carriers are bad targets is that the value of having a carrier lies in its ability to carry. If the carrier is forced to divert its resources into other things, such as screening, then it will not perform its primary function as well as it could. This will have a measurable effect, by way of cost and/or service, on any person who is relying on the carrier for the performance of carriage services. For example, a carrier will need to acquire skills that it does not already have; that is, the ability to review content. These are skills that should already be present in the content supply chain (ie with the content originator), and are therefore being duplicated. The carrier must establish business procedures to deal with new issues in both a practical and legal sense, even to the extent of being forced to reengineer its carriage business in order to comply with the regulations. A further problem is that all of these costs must be incurred whether or not they have a significant effect on compliance with the regime. If no notices are ever issued by the ABA, the carrier must still establish procedures to deal with them in case they are issued.

III. EXAMPLES

A. The Carriage Service Reseller's Nightmare

Carriage service providers are placed in an invidious position under the *Online Services Act*. A person is defined as an "Internet service provider" ("ISP") whenever they provide Internet access to people outside their "immediate circle" (effectively composed of officers and employees).⁴ So every person who resells (or even 'on-provides')⁵ any carriage service which is used to access the Internet is subject to the operation of the *Online Services Act*. This includes instances where the reseller merely provides carriage from one point to another without any routing function⁶ (and therefore, no ability to filter access). In fact, technically, the *Online Services Act* turns all businesses that permit contractors to use their Internet access into ISPs. Taken to its extreme, the *Online Services Act* can also be read as making 'mums and dads' who acquire Internet access and then on-supply that access to their children, into ISPs.

In addition, the *Online Services Act* allows notices issued by the ABA to be served by way of substituted service. This means a reseller can potentially be liable even though it is not aware of a notice, or even of the access giving rise to the liability. Industry codes available to date, (in particular the Internet Industry Association Codes of Practice),⁷ are based on a common sense understanding of "service provider", not the *Online Services Act's* expansive definition. The practical consequence of this is that the provisions set out in the codes are of little help to a reseller as they do not properly anticipate the reseller's circumstances. They may, in fact, compound the reseller's problems. It is unreasonable to expect a reseller of carriage services to, in effect, wager its business on whether or not it falls within the "technically or commercially feasible" exceptions in the *Online Services Act*, given that the legislation contains no real guidance on what these terms mean. Finally, where there is a 'chain' of resellers (as is often the case), the *Online Services Act* will *prima facie* require each of them to comply with filtering requirements,⁸ resulting in unnecessary replication.

4 Section 8 of Schedule 5 of the *Broadcasting Services Act* 1992 (Cth) defines an Internet service provider in terms of supply to the public. Section 9 defines supply to the public in terms of supply to persons outside the "immediate circle" of the person providing the Internet carriage service. "Immediate circle" is defined in s 23 of the *Telecommunications Act* 1997 (Cth).

5 "On-provide" means to provide on to someone else.

6 "Routing" means to direct the flow of traffic. At nodes in the network, each packet must be inspected by a router and routed accordingly; that is, forwarded to the next node in the network on the way to the packet's ultimate destination.

7 December 1999, available at <www.iiia.net.au> at 1 February 2000 (Copy on file with author).

8 One of the key deficiencies of the *Online Services Act* is that these filtering requirements are unclear. The argument is that the *Online Services Act* *prima facie* imposes filtering obligations on each carriage service provider. If each reseller is a carriage service provider, then it is *prima facie* bound by the filtering obligations. The legislation does have an exception regime but it is unlikely to be of practical value.

B. The Computer Store

Like the reseller example above, under the *Online Services Act* the provision of Internet access to customers in a computer store transforms the store into an ISP and, consequently, creates an obligation to comply with access restriction notices. Again, relevant codes and the substituted service provisions will work against the store. It is unreasonable to force the store to assume such a large liability in order to make use of a simple and effective marketing tool. Of course, these are only two of a myriad of examples where a person resupplies a service to another person that enables that person to access the Internet.

C. The Content Provider

The obvious people for a carrier to transfer responsibility to are the content providers: the people who create and sell content to Internet content hosts. As a result of the complexity of the legislation, negotiations between carriers and content providers can be sidetracked into irrelevancies, holding up the negotiation of an appropriate commercial deal. In particular, carriers who do not properly understand the legislation will seek to require content providers to give broad indemnities against a possible breach of the *Online Services Act*, even from content providers who have no real likelihood of ever breaching it. Content providers understandably feel the urge to resist such indemnities on principal. This is especially so where they are struggling to afford legal advice in relation to both the negotiation of a contract with a carrier and the operation of the *Online Services Act*. The legislation has the practical effect of transforming what should have been fast and simple negotiations into long and hard ones. Moreover, negotiations are often delayed without good reason because many content providers simply lack the resources to meet the demands of such indemnities if called upon to do so.

IV. CONCLUSION

While it is unlikely that electronic commerce in Australia will 'grind to a halt' as a result of the *Online Services Act*, there can be little doubt that the new regime will impact adversely on Australian growth in the area. The additional regulatory burden will fall hardest on small enterprise; simply obtaining legal advice on both the operation of the *Online Services Act* and the putting in place of procedures to address its requirements will involve significant expense for these operators. With the explosive growth in the Internet to date, any inhibition experienced now will quickly compound in years to come. Further, the Internet is likely to evolve into the delivery and communications medium of choice for businesses worldwide. One does not have to look long to find a serious economic commentator touting the Internet as the 'golden egg' of a globalised service economy. With a three to seven per cent increase in delivery costs, the Australian economy will be at a disadvantage when compared to other economies.

Given the stated intention of the *Online Services Act* to keep impact on Internet businesses to a minimum,⁹ it appears that proper consideration has not been given to its likely effects. This is not altogether surprising given that the Senate Select Committee on Information Technologies considered the legislation over a very short period, (the Bill was released on 21 April 1999, with the Senate Select Committee reporting back on 11 May 1999 – less than 3 weeks in all), especially given the number of submissions it received (over 100).

The *Online Services Act* is likely to have a substantive impact on the conduct of business over the Internet within Australia and, consequently, will have an impact on the conduct of Australian business generally. It imposes liability on carriers not because they are 'guilty', but because they are stationary targets. In this way, it imposes liability on unsuspecting people who are ill equipped to deal with it. Finally, the *Online Services Act's* mere presence has already begun to impede ordinary commercial arrangements on the Internet, even in the absence of any real possibility of it being practically enforceable. Ironically, given the very real impact the legislation is having on the Internet in Australia, the 'word on the street' or rather, on the 'information superhighway', indicates that it is unlikely to be more than marginally effective in achieving its stated aims.

It seems that the Government has simply reached for a silver bullet to resolve what are, in reality, very complex issues of citizens' rights, obligations and responsibilities. In doing so, it has failed to consider where responsibility really should lie. Moreover, the Government appears to consider that any old silver bullet will do, provided there is something stable to shoot at (ie Internet carriers). Little thought (or even understanding) seems to have been given to the likely consequences of the *Online Services Act* actually 'hitting its target'. The community should seriously reassess whether the current approach is an appropriate one before too much damage is done.¹⁰

9 The Explanatory Memorandum to the Broadcasting Services Amendment (Online Services) Bill 1999 states: "The Government takes seriously its responsibility to provide an effective regime to address the publication of illegal and offensive material online, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy".

10 On 30 September 1999, the Australian Senate passed the following motion:

That the Senate –

- a. notes the range of recent criticism and developments surrounding the Government's Broadcasting Services Amendment (Online Services) Act 1999 (the Act);
- b. recognises that:
 - i. the Act will not achieve the Government's stated objectives,
 - ii. the Act will impact adversely on the emergent Australian e-commerce and Internet industry, which are strong employers of young Australians,
 - iii. the Act will discourage investment in information technology projects in Australia and will force Australian business offshore, and
 - iv. the most appropriate arrangement for the regulation of Internet content is the education of users, including parents and teachers, about appropriate use of the Internet, the empowerment of end-users, and the application of appropriate end-user filtering devices where required; and
- c. calls on the Government:
 - i. to immediately address the concerns raised by industry and the community about the unworkability of the Government's approach, and the Act in general,
 - ii. to urgently revisit aspects of the Act, prior to its commencement on 1 January 2000, and
 - iii. to table a report on the effectiveness and consequences of the Act in the Senate at 6-month intervals from the date of implementation of the regulatory regime.