

INTERNET CONTENT REGULATION: AN AUSTRALIAN COMPUTER SOCIETY PERSPECTIVE

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For five years, the Australian Computer Society ("ACS") has been involved in making submissions to State and Federal governments on Internet content regulation. This has included making appearances before the Senate Standing Committee on Community Standards and writing submissions to the Australian Broadcasting Authority ("ABA"), the Department of Communications, and the State and Federal Attorneys-General.

In all cases, the ACS has stressed that the debate is not a censorship versus no censorship debate. There is a genuine need to protect young people against exploitation and it is a legitimate objective of governments to prohibit the availability of material that could make child pornography commercially lucrative. Although philosophically opposed to censorship, the ACS has sought to orientate the debate towards the mechanisms employed in implementing a workable system of censorship rather than advocating the abolition of a generally accepted censorship regime.

Published and/or broadcast material has historically been subject to consideration by the Australian Office of Film and Literature Classification ("OFLC"). The result of that body's deliberations was a classification of material under a classification scheme (carrying certain legal consequences for retailers of the classified material). Australian law has never required intermediaries either to take on the role of the censor, or to be liable as a content provider, especially where the intermediary was not aware of the content. For example, it has never been the law that the mail carrier was liable for the carriage and delivery of pornographic material, or that a truck driver was liable for the carriage and delivery of pornographic magazines, or even that Telstra was liable for people who swear during a telephone conversation. This was the case even when those people knew the subject matter they were carrying.

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The ACS believes that Internet content should not be regulated in a fundamentally different way to other material. In particular, carriers should have no liability for material they carry without knowledge of its content. Even with knowledge of the content, carriers should not be in the position of having to determine how the material would be classified if reviewed by the OFLC. Under the new laws created by the *Broadcasting Services (Online Services) Amendment Act 1999* (Cth) ("*Online Services Act*"), the OFLC will remain the classification body and the ABA will take on the roles of coordinating the new regulatory regime and advising Internet service providers ("ISPs") on the results of the OFLC's activities.

The Government should be cautious against creating unrealistic public expectations as to the effectiveness of the *Online Services Act*. The suggestion that the legislation will successfully prevent objectionable material being available to Australian citizens is a fantasy that should not be promulgated. People will always be able to dial overseas to access material that is unavailable locally. People will also be able to utilise tunnelling techniques and anonymisers to avoid restrictions on adult Internet users. The ACS does not support the imposition of any legal requirement that ISPs implement technical mechanisms that degrade the performance of their service, or which require filtering and blocking to be performed on all material coming through their service.

Often overlooked by those contending that the new laws are unworkable, however, is the fact that the majority of objectionable material is still contained in Usenet newsgroups, the replication of which is easily and economically managed by ISPs. The assumption that the *Online Services Act* is directed only at material available on the World Wide Web is inappropriate and leads to misplaced vehemency in criticism of the legislation. Furthermore, the objectionable component of much web-based material is pictorial in nature, and no technology exists to recognise pictorial matter and automatically block or filter it. Therefore, such material can only be dealt with by exception, which is what the new regime proposes.

In summary, the ACS has supported the general thrust of the Federal Government's approach to the extent to which Government policy accepts the key points raised by the ACS. However, the ACS has expressed concern lest the public be led to expect a perfect result, and has pointed out that, apart from Usenet newsgroups, any requirement on ISPs to implement technical means of blocking or filtering web-based material is likely to be infeasible or unaffordable. All the states have agreed to implement complementary legislation. At the time of writing, however, the only example sighted is one proposing to place criminal legal liability directly on ISPs, except when they are "merely" carrying on their normal business.¹ Presumably, this protection is lost to a particular ISP as soon as it is put on notice of allegedly objectionable material. The State proposal requires the ISP to know how the material has been classified

1 The proposed new Part of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), circulated for comment by the NSW Attorney General's Department in late 1999. It was stated to be a "draft model State/Territory provisions... prepared... at the request of State and Territory Censorship Ministers".

“or, would, if classified, be classified”. This is a totally unacceptable approach. In overturning the ill fated *Communications Decency Act 1996* (USA), the US Supreme Court considered that such an approach will result in ISPs erring on the side of caution and thus suppressing material to which no reasonable objection should be taken.²

Clearly the debate is not over. Implementation of the regime will not quell the discussion of these important public issues.

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Reno v American Civil Liberties Union 117 S Ct 2329 (1997).