transmitted via their service, it may be at risk if a particular subscriber is a person or group known to be involved in the dissemination of objectionable material.

The Act does force ISPs to exercise some degree of control over subscribers in respect of the content of material. This may have implications for the operation of defamation law. The position of ISPs in the context of Australian defamation law is yet to be determined. The liability of an ISP for defamatory material will most likely depend upon whether the ISP is classified as a publisher (such as a newspaper proprietor or publisher) or a mechanical distributor (such as a bookseller, library or telephone carrier). If ISPs are regarded as publishers, they will be liable for defamatory material published on the internet via their service. However, if they are classified as mechanical distributors, their exposure to liability will be significantly reduced.

The United States experience suggests that if an ISP exercises editorial control it will be classified as a publisher, and conversely if an ISP has no effective influence over content it is likely to be classified as a mechanical distributor.[8] While the Act makes it prudent for an ISP to exercise some degree of control over the content of material on its service, the downside is that by doing so an ISP may increase its exposure to liability for defamation by being classified as a publisher. This is an unsatisfactory state of affairs.

The piecemeal approach to internet censorship and the uncertain position of ISPs in Australian defamation law calls for uniform national legislation with the following objectives:

- to achieve consistent and workable internet censorship laws throughout Australia; and
- to clarify the status of ISPs for the purposes of defamation law so that they will not be regarded as publishers unless the level of control they exercise equates them with a newspaper proprietor or publisher.

In relation to the first objective, even uniform national legislation is unlikely to be effective in regulating internet activity because the internet transcends national boundaries. However, if the internet is to be regulated in Australia, common sense dictates that such regulation should be uniform because of the frequency of transmissions from one Australian jurisdiction to another. The second objective is more worthy of address and could easily be achieved by legislation.

1 Section 57(1)
2 Section 58(1)
3 Section 58(4)
4 Section 59
5 Section 56
6 Section 56
7 Section 56
8 See *Cubby Inc v Compuserve* (776 F Supp 135)

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The Net: the beginning or the end for free speech?

Harley Wright

In the face of Net nasties such as porn, violence and race hate web sites, governments around the world have quickly developed an enthusiasm for censorship legislation. Can the free speech promises of the Net be realised?

To even suggest censoring the Net provokes anger among Net users who have long believed in the promises of free speech on the Net. By allowing people to overcome the costly barriers to communication in the print medium; dealing with publishers, paying the printer, organising distribution; the internet promised to radically enhance the ability for people to communicate; increasing the opportunities for self expression, enhancing the functioning of democracy through free-for-all on-line discussion groups, even aiding the search for the (increasingly unfashionable) ideal of truth.

It now seems that just when everyone was about to access cyberspace and exercise a technologically turbo charged version of 'free speech' - of a magnitude that John Stuart Mill could not have even dreamed of - government censors wind themselves up and pass legislation to ban anything unsuitable for the average six year old.

While users appreciate the free speech promise of the Net, governments hear far more strongly the cries of anguished voters who are concerned with their technologically literate kids logging into the nasties on the Net.

As a result, almost every government in the world wants to regulate the Net. New Zealand was one of the first to draft legislation, and came up with a law that made Internet service providers liable for all offensive material transmitted over their service - whether they knew it was being transmitted or not. In Australia, WA was first out of the blocks with the Censorship Bill, a law which prohibits the transmission of 'objectionable material' - the other states are following closely behind. Even the United States, home of the First Amendment - the grand

constitutional guarantee of free speech - has passed the Communications Decency Amendment *(CDA)* which makes it an offence to post 'indecent material' in places accessible by kids.

The news gets worse, not only are the laws getting passed but they are having substantial impact. In December 1995, one of the world's largest service providers - Compuserve - cut access to over 200 internet news groups that it had identified as illegal under German law. The legal advisor to On Australia, Philip Argy, has warned that if NZ's bizarre and unreasonable law is replicated here it would be a virtual death sentence for on-line services in Australia.

So is it the beginning of the end for free speech on the Net?

Reactions from the cyberspace community to this legislative activity has been mixed. Many remain aloof, believing the new laws to be misguided and largely ineffective. They argue that the pivotal concepts of a terrestrial legal system: jurisdiction, property, identity, and responsibility are very difficult to establish on the Net. For these reasons cyberspace will remain immune from legal regulation.

Typical of this approach is the response of John Perry Barlow (co-founder of the Electronic Frontier Foundation; a cyber-rights lobby group) to the passing of the Communications Decency Amendment in the United States. On February 9 this year, Barlow, in his characteristically grandiose style, posted on the Net a Declaration of the Independence of Cyberspace, claiming that governments do not possess any methods of enforcement.

Others however do not share the optimism generated by a view that cyberspace is legally untouchable. Rather more pessimistically they see the growth of the Net as potentially threatening to free speech. As long ago as 1983, Ithiel de Sola Pool prophesied in his book 'Technologies of Freedom' that as communications move from the unregulated world of print to the electronic media, governments will find excuses to regulate the new media - compromising freedom of speech.

Much of the impetus of Pool's argument is gained from the view that free speech is only truly guaranteed for the print media. Electronic media, particularly the broadcast media - with its restrictions on ownership and content - are (in his view) severely compromised by government regulation.

As a consequence Pool advocates the principles of the print model - with its very limited role for governments - as being appropriate to the Net.

It is further argued that regulation of communications in the past have been arbitrarily based upon the technological differences between each method of communication. This meant that you could not necessarily say in print what you could say on the phone, and you couldn't necessarily say on TV what you could say in print. The Net now provides the chance to erase these arbitrary distinctions because the post, the fax, the phone, even the radio, stereo, video and TV (given enough bandwidth) are starting to look like one thing - a computer.

Although Pool's 'leave us alone' argument is attractive as it appears 'technologically neutral' (not too discriminating on the basis of the technology used to communicate), it is not without difficulty. Ironically, it shares a problem with the knee jerk 'regulate everything' response of governments.

Both assume that the Internet can be summed up in a single metaphor. Governments tend to argue that the Net is like an on-line book store - a parallel that makes it legitimate to assume that service providers have complete control over (and therefore should have complete responsibility for) the material passing over their networks. Pool, Barlow and others argue that the Net should be treated no differently to the print media; a medium subject to few, if any, restrictions.

The problem with both of these approaches is that they overlook the many different goals of communications regulations. One metaphor, one legal regime, is simply inadequate to deal with the many different types of communication on the Net. It is simplistic to argue that telephones should be regulated in the same way as televisions. For telephones (and mail and email) the two important issues are user access, and the privacy of user communications. For television (and radio and publicly accessible web sites) the important issue is the degree to which the user controls their access to information.

The arguments in this area are not yet sophisticated. Just because kids can download nasty information from the Net does not mean that private emails should be restricted - as the WA legislation would require. Nor does the mere ability to engage in many different forms of communication on the single medium of the Net mean that all these communications should be unregulated, or regulated in the same way. Both legislators and freedom fighters have yet to learn that regulating the Net is more complex than simply saying 'yes' or 'no'.

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