



US Act sets off a 'tidal wave of net censorship'

The Telecommunications Act of 1996 was finally signed into law by President Clinton on 8 February 1996. Most of the legislative package contained in the Act is deregulatory and removes long-standing restrictions on competition in the radio, television, and telephony markets. However one of the regulatory components of this package - The Communications Decency Act of 1996 (the 'CDA') - is throwing sparks. The CDA has already provoked: two constitutional challenges, two amendments proposed by members of Congress, and a 48 hour internet community protest.

The issues raised by the current US debate are both interesting and relevant to the regulatory approach taken in Australia.

Two sections of the CDA have generated most of the controversy: the first criminalises certain offensive and indecent communications to minors (s502) and the second amends an existing prohibition on conveying certain abortion related information by post, and extends it to cover communication by interactive computer services (s507).

There are reports that the US Justice Department has acknowledged that s507 is unconstitutional, and the majority of the controversy is now centred on s502.

For example, one subsection of s502 criminalises the use of an 'interactive computer service' to display certain 'patently offensive' material in a 'manner available to a person under 18 years of age'.

The CDA allows for two key defences. Firstly, there is no violation of the section where reasonable and effective good faith measures are taken to restrict or prevent access by

minors, specifically including the use of verified credit cards or adult access codes.

Secondly, a person will not be liable for merely providing access or connection to or from a facility not under that person's control. This defence appears to be intended to protect parties such as Internet Service Providers (ISPs) when acting as mere conduits for offending material. However, the meaning of 'control' is problematic. For example, an ISP providing users with access to Usenet news messages which originate on servers over which the ISP has no 'control', may nevertheless be in 'control' of the Usenet data files residing on its own server. Is the ISP therefore in 'control' over access to the Usenet newsgroups?

Furthermore, one of the important exceptions to the latter defence is where a person 'knowingly advertises' the availability of prohibited communications - an exception which may haunt web indexing services such as Yahoo! and Lycos.

The Electronic Frontier Foundation (EFF) has argued that the effect of the CDA is that ISPs only have a defence if they take an active role in censoring public and private messages. The EFF therefore claims that the CDA sets off a 'tidal wave of censorship to avoid real and perceived liability' which will inhibit the further development of the internet by infantilising it.

Democrat Senator Patrick Leahy, one of the few Senators to vote against the CDA, has announced he intends to reopen congressional debate by proposing a bill to repeal the CDA.

The most vocal opponents of the CDA, including the EFF and the American Civil Liberties Union (ACLU), have launched a constitu-

tional challenge to the CDA in a Pennsylvanian district court. The challenge consists of several arguments.

One argument is that the terms the CDA relies on - 'indecent' and 'patently offensive' - have never been clearly defined by the Supreme Court or Congress, are vague, and that the resulting uncertainty regarding the scope of the restrictions will 'chill' speech. A related argument is that the CDA does not exempt material which has serious scientific, education or cultural value, and is therefore overly broad.

A further argument is that even if restrictions must be put on communications in order to protect minors then only the 'least restrictive means' necessary to achieve this purpose are constitutional. The challengers assert that effective filtering, rating and labelling technologies and services which enable parents to restrict children's access to offending material are already available, and that therefore the CDA provisions are overly restrictive.

Finally, the challengers employ arguments based on the rights to privacy and anonymous speech, and economic practicalities.

Supporters of the CDA, such as the Christian Coalition, 'a pro-family citizen action organisation' and the Family Research Council, deny the CDA is unconstitutional or will slow the development of the internet, and that '...even if they're right, tough. Our children come first.'

The outcomes of the constitutional and congressional actions are unpredictable. However it is certain that if the CDA survives, the interpretation and application of its wording will trigger a 'tidal wave' of frustration. □

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