How not to be offensive online

After an initial moral panic, there now appears to be a trend toward self regulation of online services via industry drafted codes of conduct aimed at avoiding offences. Anthony Philips, a lawyer at Freehill Hollingdale & Page, reports

The self-regulatory approach toward Internet content seems the most appropriate. Because technological changes are so rapid, static legislative regulation becomes unwieldy and is soon outdated. The current proposals favour codes of conduct but with offences as a stopgap measure. This trend towards self-regulation notwithstanding, Victoria, Western Australia and the Northen Territory have already introduced provisions into their respective censorship legislation1 which create specific offences involving certain online content.

General censorship framework

The current legislative regime governing online content essentially has two levels: the censorship legislation and Crimes Acts provisions. The censorship legislation creates offences in relation to "publications", "films" and "computer games". It is based on a National Classification Code established under the *Classification (Publications, Films and Computer Games) Act* (Cth) 1995. This Code is given effect by state and territory enforcement legislation that refers to the Code. In both NSW and Victoria that legislation is the *Classification (Publications, Films and Computer Games) Enforcement Act* 1995 (the "Censorship Act").[2]

The Crimes Acts establish specific offences such as section 578C(2) of the NSW *Crimes Act* 1900, which proscribes the publication of an indecent article. There are similar provisions under the Crimes Acts and Codes of the other states and territories. The Commonwealth *Crimes Act* 1914 includes section 85ZE which provides that, among other things, a person must not knowingly or recklessly use a telecommunications service in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

Specific online offences

Unlike the NSW Censorship Act, the Victorian, Northern Territory and Western Australian Acts all have specific provisions relating to online material.[3] Section 56 of the Victorian Censorship Act defines an online service to mean "a service which permits through a communications system online computer access to or transmission of data or computer programs". It seems likely that this definition applies to all common uses of the Internet such as email, bulletin boards, chat groups and the World Wide Web. The offence provisions, sections 57 and 58, make it an offence to create and disseminate objectionable material through an online service and to publish or transmit to a minor material unsuitable for minors of any age. An Internet Service Provider ("ISP") may claim a defence under sections 57(3) or 58(3) on the basis that it did not knowingly publish, transmit or make available for transmission the material in question. It appears that an ISP may claim this defence so long as it is unaware of any potentially offending material disseminated by its customers. If an ISP is put on notice by a complaint, for example, it is possible that it can no longer claim the defence.

Effectiveness of current legislation

Ideological concerns aside, some commentators have noted that the censorship legislation (with the exception of the Victorian and Western Australian Acts' online provisions) is not well adapted to online content. Generally, the censorship legislation does not appear to regulate the distribution of material without some form of physical embodiment with the result that some provisions have awkward application to online content.[4] For example, it appears that most of the provisions governing computer games appear to be directed to those games which are distributed in tangible form such as CD ROM.

On the other hand, it is arguable that the advertisement provisions in the censorship legislation (such as those in Part 5 of the NSW Censorship Act) may catch some online activity so long as the term "publish" includes publication online. For example, it is possible that a so-called "banner" advertisement for a site appearing on another party's web page may be caught by this provision. But the global nature of the Internet means that this may also have some undesirable consequences. For example, a person publishing an advertisement on the WWW promoting an overseas film scheduled for Australian general release, but not yet classified in Australia, may be committing an offence unless an exemption has been granted.[5]

It is early days yet but it appears that the Commonwealth *Crimes Act* may be effective in governing online content. On March 5, it was reported that in Launceston a man arrested for the possession of child pornography which had been downloaded from the Internet was fined after pleading guilty to making improper use of a telecommunications service.

Developments in online content regulation

In April 1996, the NSW Government prepared controversial draft legislation which was never officially released. The legislation was shelved and is now defunct. In June 1996, the Australian Broadcasting Authority's report titled "Investigation into the Content of On-Line Services (the "ABA Report")[6], recommended that, among other things, the most appropriate regulation for the Internet industry (principally the ISPs), was self regulation governed by industry drafted codes of conduct.

In July 1997, the present government issued "Principles for a Regulatory Framework for On-Line Services in the Broadcasting Services Act 1992" (the "Framework")[7]. The Framework appears to be the blueprint for reform of online content regulation and is largely consistent with the ABA Report. It proposes that the *Broadcasting Services Act* 1992 be amended in order to regulate online services. Under this proposal, the ABA would be responsible for online industry codes of conduct. It is proposed that so long as ISPs comply with the codes, they should not be liable for merely acting as a conduit for another party's content. The Commonwealth Attorney General proposed to consult with the states and territories to establish uniform laws regulating online content.

Theoretically, these laws would complement the proposed Commonwealth regime governing ISPs.

At a December 1997 meeting of Attorneys General it was resolved that the Parliamentary Council would prepare draft legislation which might be adopted by the states and territories. This legislation will govern the conduct of content providers and end users of online services. On March 16, 1998, the Attorneys General confirmed that the scope of the proposed uniform legislation would be consistent with the national Framework.

In January 1998, the Senate Committee on Information Technologies commenced an inquiry titled "Self Regulation in the Information and Communications Industry". The Committee is inquiring into the self regulation of television, the press and the Internet, with emphasis on privacy concerns and complaints procedures. It is expected that the report will be tabled in late June 1998.

Non-regulatory solutions

A possible scenario for the future is that reforms similar to those presently proposed will be enacted. But the most effective measure against offending material disseminated over the Internet may be software based such as the Platform for Internet Control Selection ("PICS")[8]. PICS enables a user to, among other things, choose online content according to the ratings of an organisation whose moral or political values they consider to be appropriate. Thus, a child using a PICS protected Internet browser may be prevented from viewing certain sites and protected from material that the child's parent or guardian considers to be harmful.

In a press release that accompanied the Framework, Senator Alston indicated an interest in this sort of technology and stated that the "government would seek international cooperation on content labelling techniques and codes of practice".

If PICS does turn out to be effective in regulating online content at a user level, its implementation may reduce the urgency for legislative reform. <

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[1] The Victorian Act may be found at www.dms.dpc.vic.gov.au and the online provisions of the Western Australian legislation are provided at www.waia.asn.au/Documents/CensorshipAct96.html.

[2] There is similar classification in the other states and territories.

[3] Only the Victorian Act will be discussed here. Some commentators have questioned the validity of the Victorian legislation. See Tracy Francis, "Victorian Internet Censorship Legislation - Is it Constitutionally Valid?", Communications Law Bulletin, Winter 1997, page 7.

[4] Similar observations have also been made concerning section 578C(2) of the Crimes Act (NSW) 1900. See Brendan Scott, "Censoring the Internet - The Application of Existing Censorship Legislation to the Internet", www.gtlaw.com.au/gt/bin/frameup.cgi/gt/pubs/webcensorship.html

[5] See Brendan Scott.

[6] www.dca.gov.au/aba/olsrprt.html

[7] www.dca.gov.au/policy/framework.html

[8] www.w3.org/pub/WWW/PICS also Esther Dyson, Release 2.0 (1997). Book review, page 23, Communications Update June 1998