Presentation details for Community Networking 99: Engaging Regionalism

Provisional Title:

Internet Regulation: Is it possible, is it practical, or just a political wild goose chase?

Abstract:

Governments (including our own) are busy the world over trying to regulate on-line content on the Internet. The Australian Government has introduced the Broadcasting Services Amendment (On-Line Services) Bill in 1999 which is designed to respond to community concerns about illegal and offensive material on-line. The Bill is intended to be consistent with the regulation of conventional media such as print, radio and television.

This is where the problem is, because the Internet is different from conventional media. The Communication Law Centre like so many other groups and organisations, think that the Government have got this regulation all wrong.

As Governments and the law struggle to organise the Internet there are suggestions that the cyberspace should be treated as a separate legal jurisdiction. Logging on would be like crossing a state or national boundary and specific laws would apply while you were there.

There are also arguments that a new legal system will develop on the Net through self-regulation and codes of practice.

Others argue that a United Nations like global federation needs to be set up. Although many might see this as far fetched from where we stand now, the European Union is already applying consistent laws across its member nations, in a way that few would have thought credible but a few decades ago.

Short Biography:

Brief biography of Bruce Shearer

I am a Research and Policy Adviser at the Communication Law Centre's Melbourne office. I have taught the Centre's media law courses for five years, lectured journalism students and community and public broadcasters. My specialist areas are children's media, media ownership, digital broadcasting, Internet regulation, copyright and information poverty.

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It is often when new technology starts to cross the threshold into some form of consistent mass use which displays commercial potential that legal regulation is called for. Commercial operators rely on the law to protect their interests. All to often it is felt that only laws can provide such protection. It is believed that e-commerce will never fully flourish on the Internet until people feel confident that their resources are protected and that the general public particularly children are adequately protected from objectionable material.

Almost all the laws of the analogue world, based and refined over hundreds of years, will apply to this new on-line world which is hardly more than in its infancy. It of course makes sense that the regulation of cyberspace was consistent with that of the real world.

On-line services, both in infrastructure and content are under 'telegraphic, telephonic and other services' in Federal Constitution and are thus Federal powers.

(Classification in Australia is based on the National Classification Code (NCC) the following principles are the basis on which the Office of Film and Literature Classification Boards operate.

Adults should be allowed to read, hear and see what they want;
Minors should be protected from material that may harm or disturb them; and
Everyone should be protected from exposure to unsolicited material that they find offensive.

The NCC also notes the need to take into account community concerns about:

Depictions that condone or incite violence, particularly sexual violence; and
Portrayal of persons in a demeaning manner.)

Existing laws regulating other parts of the media, also relate to the Internet and on-line services.
Victoria, WA and NT have Acts directed to on-line services and content. For the system to work efficiently Australia wide, other states also needed to introduce complementary legislation.
In Victoria, the *Classification (Publications Films and Computer Games) (Enforcement) Act 1995,* in WA it is the *Censorship Act 1996*, in the NT, *Classification of Publications, Films and Computer Games Act 1995.*

In each jurisdiction it is an offence to transmit 'objectionable material' and an offence to transmit to minors material that is unsuitable for minors. It is also an offence to advertise that 'objectionable material' is available on-line.

All three State Acts allow concessions to articles of recognised literary, artistic, political, educational or scientific merit or bona fide medical articles.

Before the sudden move toward Federal legislation in 1999 it was suggested that a co-operative scheme may be the best and most accepted method of regulation of the Internet.

In a joint media release in August 1997, the Minister for Communications and the Arts, Senator Richard Alston, and the Attorney-General, Mr Daryl Williams announced principles for a national approach to regulate the content of on-line services such as the Internet.

Offensive material or protected behaviour off-line should also be protected behaviour on-line. What this meant was that material viewed as offensive under existing OFLC guidelines, would be viewed as offensive on-line.

They encouraged on-line service providers to establish industry codes in consultation with the ABA. Complaints could be firstly made to the ISP's and then investigated by the ABA if still unresolved.

Since this time governments (including our own and I will return to the detail of the Government's Bill) are busy the world over trying to regulate on-line content on the Internet. The US Government's Communication Decency Act 1996 was designed to restrict access to objectionable material. It was hotly debated and many free speech groups lobbied heavily against its introduction.

Such groups gained new hope when it was struck down as violating the First Amendment of Free Speech of the American Constitution. Australia has no clear free speech provision in our Constitution, although the High Court has found a narrow right of political discussion in some recent decisions.

An attempt at French censorship law on the Internet, the 'Fillon amendment' was also struck down as being in violation of free speech rights.

These setbacks have not necessarily discouraged these governments from trying again. In fact the US Government has more legislation planned that free speech organisations also argue will breach the Constitution.

The Singapore Broadcasting Authority has introduced stringent regulations concerning objectionable sites and this approach has been approved in China where similar actions have been taken.
It has been reported that Indonesian authorities detained a democracy activist who posted a message on an Internet mailing list, and that in Burma it is considered an offence to even have the means to access the Internet.

The Australian Government has introduced the Broadcasting Services Amendment (On-Line Services) Act in 1999 (it will commence operation on January 1st 2000) which is designed to respond to community concerns about illegal and offensive material on-line. The Bill is intended to be consistent with the regulation of conventional media such as print, radio and television.

This is where the problem is, because the Internet is different from conventional media.

One of the crucial problems with the Bill is the political environment which has produced it. Key legislation such as that concerning the GST, Telstra privatisation and even the 1999 budget all depended on a majority in the Senate supporting the Government. Many argue that Brian Harradine who supported Internet regulation required the Bill in order to support the Government on its other crucial legislation.

Under the Act as it stands, complaints can be made to the Australian Broadcasting Authority concerning on-line material which would be either R, RC, refused classification or rated X if hosted in Australia, or RC or X if hosted overseas. The ABA will refer the material to our classification organisation, the Office of Film and Literature Classification to see if the material is of that classification.
The definition of 'Internet content' will exclude e-mail and live content.

This is basically what happens in relation to complaints relating to material available on our existing media. But under the new Act the ABA will then issue interim 'take-down' notices to the Internet Service Providers and Internet Content Hosts who are involved, to prevent access to the material if it is hosted in Australia, and if it is sourced overseas, to take reasonable steps to prevent access if this is technically feasible.

The Communications Minister Senator Alston in recognising that there may be limited ways that ISP's can deal with unacceptable foreign material, has said 'In relation to content on foreign sites, they must do what is technically feasible and commercially viable to prevent access.'

If the material is of the nature complained of, and if it is Australian hosted it must be removed by 6.oopm on the next business day and an age verification mechanism must have been placed on the site.
ISP's and CH's are unlikely to be fined immediately, but will be fined if they continually fail to respond.

A recent report from the CSIRO, *Blocking Content on the Internet*(1), has already informed the Government that attempting to prevent access to overseas material is completely impractical. There are no reasonable steps that can be taken. This process can be expensive and restrictive to ISP's but not actual serve the purpose it is designed for.

Many people argue that filters are the way to protect minors and deal with the relatively small amount of unacceptable material on the Internet. The *Blocking Content on the Internet* report has informed the Government that such technology will achieve this effect much more readily than legislation.

The Communication Law Centre like so many other groups and organisations, think that the Government have got this regulation all wrong for four reasons. (2)

1. It is wrong in its administrative process which treats on-line services like conventional media and will involve ISP's and ICH's who receive a take-down notice having to check all material to ensure that there is 'substantially similar' material on their sites.

2. The timing is wrong because most of our other regulation relates to mature industries whereas on-line services and the Internet are still in their infancy and we are yet to see how they will evolve.

3. The priorities are wrong. There are other important issues such as the future of the ABC and its funding etc that the Government could be dealing with and spending money on.

4. The philosophy and the approach of the Bill is wrong. It goes too far in trying to prevent what is a relatively small amount of objectionable material. The approach is too traditional and doesn't come to grips with the fact that the Internet is an entirely new medium.

We don't expect Telstra to vet phone calls which might relate to the planning of crime and we don't expect Australia Post to vet each letter and parcel in case it contains some sort of illegal material because it would critically disrupt our telecommunications and postal services, why then do we in this legislation, expect so much of ISP's (703 in Australia) and CH's in an infant industry.

In practice the Internet Industry Association and its code of practice will form the prime basis of regulation of the industry. If the industry regulates itself and its members successfully, there will be less need for ABA involvement.

The latest Internet Industry Association draft code has just been released. (3) The view taken in the code is that end user filtering (eg. Net Nanny, Cyber Surfer) at fairly minimal cost to consumers (as little as $5), will be the best way to deal with objectionable material in a manner which will least impede the operation of ISP's and CH's. The question that remains to be answered is whether this practical approach will satisfy the legislation when it is at odds with the original intention of the legislation which made much heavier demands on the ISP's and CH's to monitor objectionable material.

It must be remembered the the legislation was produced in a particular political atmosphere created by Brian Harradine's balance of power in the Senate. This produced a particular piece of legislation which may be viewed differently by a Federal Government which no longer has to appease Senator Harradine.
The Communications Mininister Senator Alston seems so far to be positive towards the IIA code and the ABA is waiting for others to comment on the code before they come to a final decision on whether to register it. If the code was not accepted by the ABA, they may be forced to draft their own code.

The issue of overseas hosted material is an ongoing issue that only international conventions and treaties will be able to deal with.

As Governments and the law struggle to organise the Internet there are suggestions that the cyberspace should be treated as a separate legal jurisdiction. Logging on would be like crossing a state or national boundary and specific laws would apply while you were there.

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How effectively and successfully the Broadcasting Services Amendment (On-Line Services) Act will regulate objectionable material, while allowing on-line services to freely develop will not be clear until after January 1st 2000. The approach adopted by the IIA code may provide the best balance between these two
objectives.

Notes:

(1) Blocking Content on the Internet: A Technical Perspective, Philip McRea, Bob Smart, Mark Andrews, CSIRO Mathematical Information Sciences 1988

(2) Opening Statement to Senate Committee on the Broadcasting Services Amendment (Online Services) Bill 1999, CLC, Director, Jock Given April 29 1999. See also Communications Update,May 1999 ‘Censoring the Internet, Australian Style
p.3-4.

(3) Internet Industry Association, Code of Practice (Draft Version 5.0)