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## Censorship and the Internet — not a good start

*John Lambrick*

On 1 January 1996 the Victorian *Classification (Publication, Films and Computer Games Enforcement) Act 1995* ("the Act") came into effect. The Act has significant implications for users of on-line services, including customers of internet service providers ("ISPs"). In some respects the Act is a product of the hysteria which has arisen (mainly in the United States) concerning offensive material transmitted by the internet. One must query the effectiveness of

the legislation. Even assuming that it is effective to curb the transmission of offensive material via the internet from Victoria, it is unlikely to prevent the transmission of such material into Victoria from other Australian jurisdictions and certainly not from outside Australia. Given that only a minuscule proportion of internet material emanates from Victoria, the Act cannot have a significant impact on internet activity.


Nevertheless, other state and territory legislatures have now followed suit and it is likely that before long users of the internet in Australia will find themselves subject to a range of censorship laws which lack uniformity. This is unfortunate in a new political climate which has at last recognised that Australia's federal system overburdens businesses with unnecessary regulation.

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Whatever reservations we may have, the Act is there and users of the internet should recognise the provisions of the Act which relate to them. The Act contains a number of prohibitions on certain types of material which can be distributed on-line by computer.

The relevant provisions prohibit a person from:

- using an on-line information service to publish or transmit, or make available for transmission, objectionable material;<sup>1</sup>
- using an on-line information service to publish or transmit, or make available for transmission, to a minor material unsuitable for minors of any age;<sup>2</sup>
- using an on-line information service to publish or transmit, or make available for transmission, material to a minor under fifteen knowing it to be material

unsuitable for minors under fifteen; and<sup>3</sup>

- knowingly allowing an on-line information service to be used for publishing or transmitting, or making available for transmission, an advertisement or notice that objectionable material is available for on-line computer access.<sup>4</sup>

“Objectionable material” is extensively defined and includes objectionable publications, objectionable films and particular types of computer games.<sup>5</sup> “Material unsuitable for minors of any age” includes additional types of films and publications which would not otherwise be regarded as being “objectionable material” for the purposes of the Act, and “material unsuitable for minors under fifteen” means a film which is or would be classified as MA or a computer game which is or would be classified as MA(15+)<sup>6</sup>. The Act contains a heavy emphasis on the protection of minors

from objectionable material transmitted on-line.

“On-line information service” is defined to mean a service which permits through a communication system, on-line computer access to or transmission of data or computer programs.<sup>7</sup> This definition will clearly include the internet and there is no reason why it would not include intranets.

There are significant penalties for breaching the Act. However, the Act recognises the position of ISPs, and what has been to date their limited editorial role in the content of material transmitted via the internet. Generally, the prohibitions outlined above do not apply to a person who provides an on-line information service or telecommunication service unless that person created or was knowingly involved in the publication or transmission of the proscribed material. While in most instances an ISP will not have knowledge of the material



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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.<sup>8</sup> 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.

<sup>1</sup> Section 57(1)

<sup>2</sup> Section 58(1)

<sup>3</sup> Section 58(4)

<sup>4</sup> Section 59

<sup>5</sup> Section 56

<sup>6</sup> Section 56

<sup>7</sup> Section 56

<sup>8</sup> 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*

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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