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The Supreme Court's Ruling on the Communications Decency Act: A Victory for Free Speech

John Corker and Pauline Sala examine the recent US Supreme Court decision in Reno, Attorney General of the United States, et al v American Civil Liberties Union et al.

The Supreme Court on 26 June 1997 ruled for the first time that the Internet is fully protected by the First Amendment to the US Constitution. In upholding the earlier decision of the District Court for the Eastern District of Pennsylvania, the Supreme Court declared unconstitutional two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet in the *Communications Decency Act* of 1996 ("CDA") as a violation of both freedom of speech and personal privacy.

Judge Stewart Dalzell in the District Court stated in his decision:

> *"Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."*

The District Court Decision

Two provisions of the CDA seeking to protect minors from harmful material on the Internet were challenged in this case. The first provision, described as the "indecent transmission" provision, prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age (section 223(a) of the CDA).

The second, known as the "patently offensive display" provision, prohibits the sending or displaying of patently offensive messages in a matter that is available to a person under 18 years of age (section 223(d) of the CDA). A number of plaintiffs filed suit challenging the constitutionality of these provisions.

The three judge District Court concluded that the terms "indecent" and "patently offensive" were too vague. They found that "the special attributes of Internet communication", with regard to the application of the First Amendment, denies Congress the power to regulate the content of protected speech on the Internet. The Court unanimously entered a preliminary injunction against both challenged provisions. However, the Court preserved the Government's right to investigate and prosecute for breaches of certain criminal provisions dealing with obscenity and child pornography.

The Government appealed to the Supreme Court under the CDA's special review provisions.

The Supreme Court Decision

The Supreme Court affirmed the judgment of the District Court and accepted the conclusion that :

> *"the CDA places an unacceptably heavy burden on protected speech, and that the defences do not constitute the sort of "narrow tailoring" that will save on otherwise patently invalid unconstitutional provision."*

Absence of Regulatory Precision

The Supreme Court accepted the first argument that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials it held that the CDA pursues

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that interest by suppressing a large amount of speech that adults have a constitutional right to send or receive. The Government may not:

> *"reduce the adult population...to...only what is fit for children".*

Further, the Supreme Court objected to the fact that the CDA:

> *"does not allow parents to consent to their children's use of restricted materials,"*

and the fact that it:

> *"omits any requirement that 'patently offensive' materials lack socially redeeming value."*

In fact, the Supreme Court stated that the general, undefined terms "indecent" and "patently offensive" cover large amounts of non pornographic material with serious educational or other value. It was argued that possible alternatives, such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into home, were the appropriate way to approach this issue.

In a dissenting opinion Justice O'Connor stated:

> *"the Communications Decency Act of 1996 is little more than an attempt by Congress to create "adult zones" on the Internet. The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if*
>
> *(i) it does not unduly restrict adult access to the material; and*
>
> *(ii) minors have no First Amendment right to read or view the banned material.*
>
> *As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecent transmission" fail to adhere to the first of these limiting principles by restricting adults' access to the protected materials in certain circumstances."*

Internet as a Unique Medium

The District Court's second argument was that the Internet is a unique medium different from television or radio and holds an enormous opportunity as a global market place of ideas and a powerful new engine of commerce.

> *"Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry."*

The District Court presumed that Government regulation will undermine the substantive, speech enhancing

benefits that have flowed from the Internet and will:

> *"threaten to torch a large segment of the Internet community."*

Judge Stewart Dalzell in the District Court wrote in part:

> *"If the goal of our First Amendment jurisprudence is the 'individual dignity and choice' that arises from 'putting the decision as to what views shall be voiced largely into the hands of each of us', then we should be specially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions."*

The Supreme Court accepted this approach and rejected the Government's argument that availability of "indecent" and "patently offensive" material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

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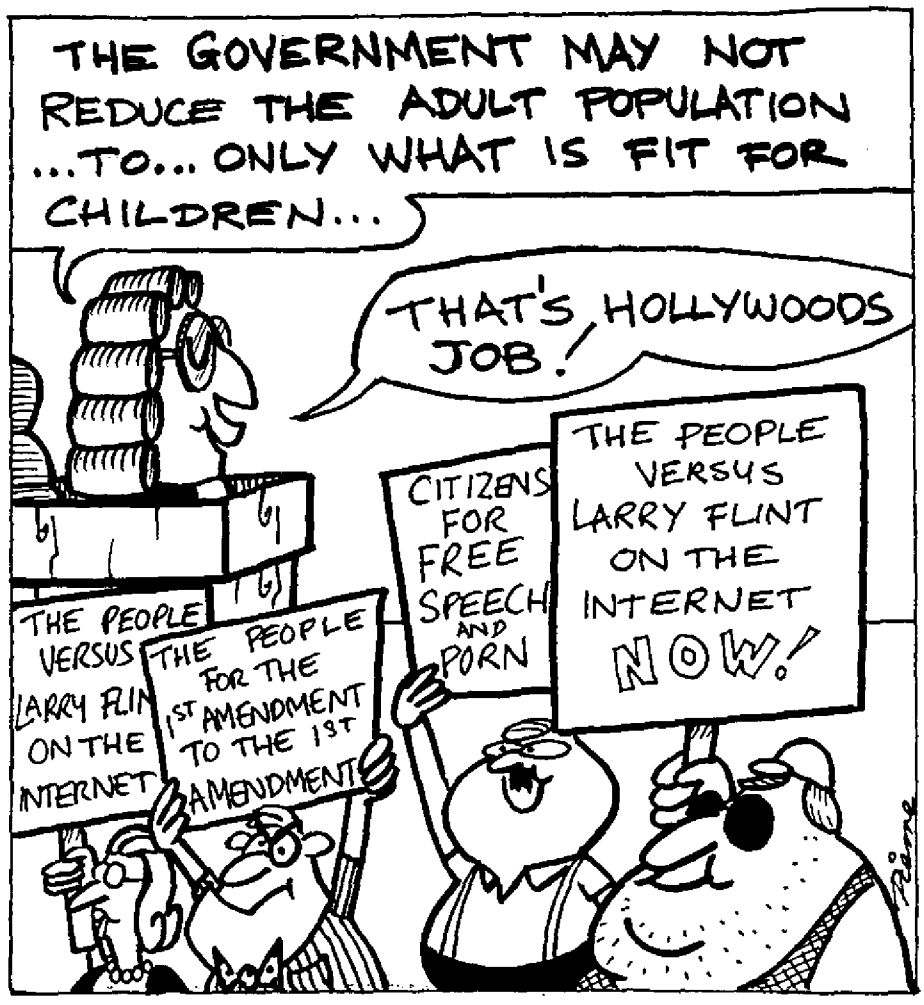

Self-regulation v. Censorship – ISPs & Internet Content Legislation in Australia

Andrew Lambert looks at the differing approaches taken at a State and Federal level with regard to the censorship of on-line content and some of the implications for Internet Service Providers.

Internet enthusiasts may argue the intrinsic value of free expression and the benefits of the free flow of information. However, this is not nearly as newsworthy as the idea of technologically literate kids surfing an Internet awash with pornography, neo-Nazis, paedophiles and bomb-making recipes. Media focus on the potential for the Internet to expose minors to harmful or inappropriate material has understandably led to concern in the community.

Politicians at a State and Territory level in Australia, responding to the imperative of such media attention, have taken an interventionist approach and have moved to censor content on the Internet. The Federal Government has been more reluctant to regulate on-line services, preferring to promote industry self-regulation and to refer specific issues, including copyright, to a variety of advisory bodies. The past few years have seen a profusion of Government enquiries relating to Cyberspace issues.

The most important has been the *Investigation Into the Content of On-line Services* by the Australian Broadcasting Authority (**"ABA"**) released on 30 June 1996 (the **"Report"**). This seems to have been adopted by the Federal Government as its preferred approach (discussed below). This has not prevented Victoria, Western Australia and the Northern Territory passing specific laws relating to content on the Internet.

State and Territory moves for On-line Censorship Laws

Recently there have been concerted moves by various States and Territories to introduce specific criminal offence provisions in relation to on-line content in Australia, which have attempted to co-ordinate their legislative response through the forum of the Standing Committee of Attorneys General ("SCAG"). However, there is some doubt as to whether the States and Territories actually have the power to do so given