REGULATION OF CONTENT OF ON-LINE INFORMATION SERVICES - CAN TECHNOLOGY ITSELF SOLVE THE PROBLEM IT HAS CREATED?

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I. INTRODUCTION

> The worst possible thing that you can do at the moment is legislate in anticipation of abuse in an embryonic industry.[1]

Strong words from Gerry Davis, the CEO of On Australia Pty Ltd, in response to the Federal Government's announcement, on September 5 1995, of an inquiry by the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies (Senate Select Committee) into the regulation of computer on-line services. Understandably so. The fear of the on-line networking community is that heavy handed regulation may prevent Australia from becoming a major exporter of content for computer networks. However, the availability of offensive, pornographic, or otherwise harmful material within on-line information and entertainment services, available on personal computers in the home does call for some form of regulation.

Growing public concern about such unsuitable material being accessed by children has been a driving force behind the Federal Government's examination of

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1 As reported by J Robotham, "Hands on or off, censor debate rages" *Sydney Morning Herald*, 12 September 1995.

the issue of regulation of content of on-line computer information services, such as Bulletin Boards and the Internet. There have been three governmental inquiries into the issue of censorship or regulation of material accessed via computer networks.

The Senate Select Committee inquiry was the third inquiry commissioned during the flurry of governmental activity in 1995. It produced a two part report on regulation of computer on-line services, released in September and November respectively.[2]

On 24 July 1995, the Australian Broadcasting Authority (ABA) was directed by the then Minister for Communications and the Arts, the Hon Michael Lee MP, to "investigate the content of emerging on-line information and entertainment services" and prepare a report to the Minister by 30 June 1996.[3] In the interim, the ABA released a discussion paper in December 1995[4] calling for submissions from interested parties by 16 February 1996. The ABA consulted widely with the representatives of the on-line community and produced recommendations in it's report to the Minister on 30 June 1996.[5]

On 7 July 1995 the Department of Communications and the Arts (DCA) and the Attorney-General's Department released a joint community consultation paper.[6] The Consultation Paper proposed a three part strategy - a self-regulatory regime, an education program to reinforce the regime and legislation containing offence provisions to provide sanctions against individuals who deliberately breached community standards.

On 14 July 1995, the then Commonwealth Attorney-General, Mr Michael Lavarch, announced that Australia's State and Territory Censorship Ministers unanimously endorsed the strategy set out in the Consultation Paper and indicated that they would amend State laws to give 'teeth' to the strategy.

Western Australia was the first State to act, introducing the Censorship Bill 1995 (WA) on 31 October 1995. On 2 April 1996, the Attorney-General for New South Wales, Mr Shaw, announced that draft legislation for New South Wales had been submitted to the Standing Committee of Attorneys-General and that New South Wales would enact comprehensive protective legislation with tough penalties regardless of whether the States agreed.[7]

In light of the proposed regulatory legislation for Western Australia and New South Wales it is obvious that a regulatory environment for on-line information services is being introduced in Australia. This paper considers whether the

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2 Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-line Services- Part 1*, September 1995; Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Regulation of Computer On-line Services- Part 2*, November 1995.

3 Australian Broadcasting Authority (Investigation) Direction No 1 of 1995, 24 July 1995.

4 Australian Broadcasting Authority, *Investigation into the Content of On-Line Services, Issues Paper*, 1995 (ABA Issues Paper).

5 Australian Broadcasting Authority, *Investigation into the Content of On-Line Services*, 1996 (ABA Report).

6 Attorney-General's Department and Department of Communications and the Arts, *Consultation Paper on Regulation of On-Line Information Services*, 1995 (Consultation Paper).

7 Hon JW Shaw QC MLC, "NSW clamps down on pornography on the Internet" Media Release, 2 April 1996.

strategy proposed in the Consultation Paper,[8] which has been endorsed by the States and Territories Censorship Ministers, and underpins the draft legislation, provides the most appropriate regulatory model. Consideration is also given to the Senate Select Committee's recommendations following it's inquiry into computer on-line services, to the ABA Report and to the approach being taken to the regulation of content of on-line services in the United States, Canada, New Zealand and the United Kingdom.

II. WHAT ARE ON-LINE SERVICES?

Put simply, on-line services are "large computers that often have the capacity to host thousands of users simultaneously."[9] Well known American examples include Compuserve, America Online and Prodigy, and more recently in this country, On Australia. Anyone with a computer, a modem and a telephone line can connect to a service by purchasing a personalised account. By entering a unique name and password each time they log on to the service, users can access, utilise and contribute to a range of services such as e-mail, comprehensive databases, current news and financial information, public discussion areas and libraries of electronic publications. One activity that has contributed to the popularity of on-line services is real-time 'chats' with other people who are logged onto the system at the same time.

The Internet is the world's biggest collection of computer networks. The actual size of the system is unknown. It has been likened to "an enormous spider web comprising thousands of smaller webs, permitting a continuous line to be traced from any point on any of the smaller webs to any point on any other web."[10] Once a user has access to the Internet - for example via an Internet access provider such as Oz-Email - that user is free to move, uncontrolled, through countless networks. There is no central server through which all data passes and no-one regulates the flow or content of information transmitted through the Internet.

Computer Bulletin Board Systems (BBS) are a type of on-line service. It is acknowledged that "the distinction between large BBS and on-line services is often difficult to see."[11] BBS also allow users to access systems by having an account with a System Operator (known as a sysop) who runs the Board. The sysop transfers mail and files between areas, enabling the network to function. However, some commentators have succinctly noted the difference between on-line services and BBS as follows:

> The vast majority of BBS in existence are operated on small personal computers with a single phone line and have a relatively small number of users. More often than not, there are no access charges since the sysop is running the [B]oard as a hobby. BBS

8 Note 6 *supra*.

9 E Cavazos and G Morin, *Cyberspace and the Law: Your Rights and Duties in the On-Line World*, MIT Press (1994) p 3.

10 RL Dunne, "Deterring Unauthorised Access to Computers: Controlling Behaviour in Cyberspace Through a Contract Law Paradigm" (1994) 35 *Jurimetrics Journal of Law, Science and Technology* 1 at 2.

11 E Cavazos and G Morin, note 9 *supra* at 3.

> tend to emphasise electronic mail, message bases and software trading. Many systems also host games, and some of the larger multi-line systems offer user chat.[12]

There has already been a BBS Task Force inquiry into an appropriate system for the regulation of BBS. This inquiry resulted in the release of the BBS Task Force Reporton 8 August 1994.[13] However, since the release of that report, it has become apparent that community concern about home computers sourcing offensive material via BBS has grown to encompass other emerging technologies, particularly the Internet. The focus has therefore moved to regulation of on-line computer information services. Accordingly, the Consultation Paper used the BBS Task Force Reportas a basis to address the regulation of content issue in relation to a wider range of services:

> Many of the concerns arising from the BBS context are also relevant to other on-line services such as the Internet. There is a clear need for a consistent approach in the regulation of content that is available through various media sources.[14]

It is interesting that the ABA Report notes that targeted searching for offensive material that would be refused classification (or classified as restricted under the existing classification regime) revealed such material was difficult to find, at times difficult to download, and was more prevalent on Usenet newsgroup files than on the World Wide Web (WWW).[15] However, it is also worth noting that the ABA Report reveals that community concerns about the content of on-line services extend well beyond concerns with adult material and pornography, to concerns about privacy, defamation, vilification and the protection of consumer interests.[16]

III. DEFINITION OF ON-LINE SERVICES - CONSULTATION PAPER

The Consultation Paper defines an "on-line information service" to mean:

> A system of stored information accessed by computer through the use of a telecommunications network which allows a bi-directional transfer of files or messages between the user and the system.[17]

This definition is almost identical to the definition of BBS in the BBS Task Force report.[18] The Consultation Paper notes that there is an issue as to whether the scope of the definition of "on-line information service" is appropriate.[19] In the writer's opinion, it is inaccurate to include BBS and the Internet in the same

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12 *Ibid.*

13 BBS Task Force, *Regulation of Computer Bulletin Board Systems*, 8 August 1994 (The BBS Task Force report).

14 Note 6 *supra* at 2.

15 ABA Report, note 5 *supra* at 62. The World Wide Web is a part of the Internet which works like a giant hypertext stack. Hypertext on each screen points to other sources of similar information and by clicking on it a user can follow links to Web sites all over the world to pursue a single piece of information.

16 *Ibid* at 10.

17 Note 6 *supra* at 15.

18 However, the definition of BBS in the BBS Task Force report stated that the information was *electronically* stored.

19 Note 6 *supra.*

category because technical and qualitative differences between the two preclude the possibility that they can be regulated in the same way. BBS are significantly easier to regulate because they are individual systems with an identifiable sysop located in Australia, who has a fair degree of control over who accesses the system and what material is made available. Internet service providers on the other hand, have very little control over the material transmitted on their systems because of the sheer volume and rapidity of transmission.

Further, given the rapid advancement of technology and the development of new services, there is little value in defining on-line information services as narrowly as is proposed. The definition is not broad enough to cover regulation of broadband services[20] which will soon be able to deliver content to consumers in a form that is presently only available through the broadcasting medium.

IV. DEFINITION OF ON-LINE SERVICES - PROPOSED STATE LEGISLATION

In the Western Australian Censorship Bill 1995, the expression "computer service" rather than "on-line information service" is used. It is defined in clause 100 as:

> ...a service provided by or through the facilities of a computer communication system allowing:
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> (a) the input, output or examination of computer data or computer programmes;
> (b) the transmission of computer data or computer programmes from one computer to another; or
> (c) the transmission of computer data or computer programmes from a computer to a terminal device."

The draft New South Wales legislation contains a very similar definition for "on-line service".

It is questionable whether this definition is preferable to the definition in the Consultation Paper. It still seems to be too narrow. As stated in Part 2 of the Senate Select Committee's report,[21] it should be clear from the definition that on-line service includes "future interactive services based on broadband capabilities as well as the current generation of services obtainable through narrowband."

Before examining the Consultation Paper in detail it is instructive to discuss the background to the Federal Government's initiative outlined in the Paper.

A. Current Legislation

It is arguable that until the enactment of the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth), the content of on-line information services was not specifically regulated under Australian law as it falls outside the scope of the *Broadcasting Services Act* 1992 (Cth), the *Telecommunications Act* 1991 (Cth) and the *Crimes Act* 1914 (Cth).

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20 See Part C *infra*.

21 Note 2 *supra* at 17.

(i) Broadcasting Services Act 1992 (Cth)

Section 6 of the *Broadcasting Services Act* 1992 (Cth) states that the jurisdiction of the Act does not cover data services or services that "make programs available on demand on a point-to-point basis, including a dial-up service". Traditionally, 'point-to-point' distribution has been through the telecommunications network and is therefore governed by the *Telecommunications Act* 1991 (Cth). The question therefore arises whether the content of point-to-point services might be regulated under the *Telecommunications Act* 1991 (Cth).

(ii) Telecommunications Act 1991 (Cth)

The *Telecommunications Act* 1991 (Cth) does not have content regulation as one of its objectives. Content regulation has historically been the domain of the *Broadcasting Services Act* 1992 (Cth). Under the *Telecommunications Act* 1991 (Cth) point-to-point services are regulated in terms of the delivery technology but not in terms of content.

That said, there are Guidelines for the provision of Video and Audio Entertainment and Information Services (VAEIS).[22] The Guidelines set out content and licensing requirements for VAEIS, which form the basis of a self-regulatory code of practice to be observed by VAEIS providers, regardless of the method of delivery.

However, it is questionable whether the VAEIS Guidelines can control the content of services provided by telecommunications service providers. After all, they are only a guide, not part of a service provider's class licence itself and their subject does not fall within any of the objectives of the *Telecommunications Act* 1991 (Cth).

The telecommunications regulator, AUSTEL, has clearly indicated that it does not believe it has any role to play in regulating the content of services delivered through the telecommunications system. In evidence to the Senate Select Committee inquiry into telephone message services (such as 0055 information services)[23] AUSTEL argued that it was an inappropriate body to establish, monitor or enforce a code of conduct because it is a technical and economic regulator, not a censor. Further, AUSTEL argued it has no power to determine or monitor community standards in the area of content under the *Telecommunications Act* 1991 (Cth) - issues of content are not related to the means of delivery.[24]

(iii) Crimes Act 1914 (Cth)

Section 85ZE of the *Crimes Act* 1914 (Cth) provides that a "person shall not knowingly or recklessly ... use a telecommunications service supplied by a carrier in such a way as would be regarded by reasonable persons as being ... offensive".

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22 VAEIS are "transmissions of programs by telecommunications technology on a point-to-multipoint basis to identified categories of non-domestic environments," such as hotels, motels and educational institutions. See *Guidelines for Provision of Video and Audio Entertainment and Information Services*, 12 July 1991 at [2].

23 Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications, *Technologies Report on the Telephone Message Services*, May 1992.

24 *Ibid*, see recommendation 98.

The object of this provision is to deal with obscene and harassing telephone calls, that a recipient does not wish to receive. It is not intended to deal with the contents of a private telephone call between consenting parties. Therefore, s 85ZE has not traditionally been regarded as applying to censorship of private correspondence over the telecommunications system. It has further been argued that to extend the censorship regime to what might be semi-private correspondence over the telecommunications system (that is, not one-to-one correspondence but several-to-several type correspondence through a bulletin board) may be stretching s 85ZE beyond its policy origins.[25] An on-line service would have to be defined as use of a telecommunications service for the purpose of 85ZE of the *Crimes Act* 1914 (Cth) if the existing prohibition against offensive use of the telecommunications service is to be extended into the area of information technology.

(iv) Crimes Amendment (Child Pornography) Bill 1995 (NSW)

Although the United States enacted legislation in 1986 to outlaw trade in computer child pornography, Australia has been slow to move in enacting such legislation, with the Commonwealth leaving the issue to the States. However, the development of technologies allowing people to download pornography and extensive recent press coverage that sexually explicit material and child pornography are rife on the Internet, have now spurred governments across Australia into action.

In May 1995, the New South Wales Government introduced the Crimes Amendment (Child Pornography) Bill 1995 (NSW) (the Bill) which would make the possession of computer-generated child sex images illegal. The object of the Bill is to amend the *Crimes Act* 1900 (NSW) to prohibit the possession of films, computer games and publications containing child pornography. The Bill would also amend the *Film and Computer Game Classification Act* 1984 (NSW), the *Indecent Articles and Classified Publications Act* 1975 (NSW) and the *Search Warrants Act* 1985 (NSW).

The Bill only covers publications in tangible form. That is, it would only prohibit the possession and depiction of child pornography. It does not cover communication nor does it specifically address the transmission of child pornography through computers, material which is often sourced from or sent outside the jurisdiction. Under the Bill it would not be an offence *per se* to use BBS to advertise, solicit or promote child exploitation and pornography. Therefore, although the Bill does go some way towards appeasing public concern, its effectiveness is doubtful.

(v) Classification (Publications, Films and Computer Games) Act 1995 (Cth)

Material on BBS may be caught by the definition of "film" or "publication" under s 5 of the *Classification (Publications, Films and Computer Games) Act*

25 Michael Hutchinson, Deputy Secretary of DCA, Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Public Seminar on the Regulation of Bulletin Board Systems*, Official Hansard Report, 4 April 1995 at 63.

1995 (Cth) (*Classification Act*) recently passed by the Federal Government. The Explanatory Memorandum to the Classification Bill explains that the Government intended that BBS should be caught by the *Classification Act*. The words stipulating that BBS were not "films" or "publications" were therefore removed from the Classification Bill. The removal of this exclusion leaves open the possibility for the Office of Film and Literature Classification (OFLC) to classify material on BBS should there be a future requirement to do so.

However, as discussed below, despite the *Classification Act* there is still uncertainty about the ability of existing legislation to address the problem of objectionable material obtained via the Internet. Using the strategy outlined in the Consultation Paper, some States have therefore resolved to enact legislation to specifically address this issue.

B. Proposed State Legislation

(i) Censorship Bill 1995 (WA)

The Censorship Bill 1995 (WA) was enacted on 31 October 1995. The second reading was agreed to in the Legislative Assembly on 30 April 1996. Clause 102 of the Bill makes it an offence for a person to transmit, possess, demonstrate, advertise or request transmission of material knowing it to be objectionable. Objectionable material is defined in clause 100 as material that would be refused classification, such as child pornography, bestiality and acts of extreme violence or cruelty. The penalty is $15,000 or 18 months imprisonment for an individual and $75,000 in any other case. It is also an offence to make restricted material available to a minor through a computer service.[26]

(ii) New South Wales

On 2 April 1996 the Attorney-General for New South Wales announced that legislation drafted by the New South Wales Parliamentary Counsel would make it an offence to transmit, advertise, permit access to and retrieval of offensive material such as pornography and sexually explicit games through on-line services. Individuals contravening the proposed laws could face prison sentences of up to one year or fines of up to $10,000. The penalty for a corporation would be a fine of up to $25,000.[27]

The planned legislation captures anyone who introduces offensive material - both users and service providers. Further, the draft legislation endorses the Consultation Paper[28] strategy by promoting the development of industry codes of practice in consultation with on-line users and service providers stipulating guidelines for service providers. The Consultation Paper strategy is discussed in full below.

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26 See clause 103.

27 Hon JW Shaw, note 7 *supra*.

28 Note 6 *supra*.

V. HISTORY OF GOVERNMENT INITIATIVES PRIOR TO THE CONSULTATION PAPER

The increase in the number of services which are provided on a point-to-point basis in recent years has led to parliamentary debate and a number of Senate Select Committee inquiries relating to how to deal with the issues raised by such services. These inquiries have considered 0055 services, pay television content, video and computer games and, as noted above, bulletin boards.

A. Senate Select Committee Inquiries

The Senate Select Committee was established in 1991. As a result of community concern about the content of some 0055 recorded telephone messages, the Senate Select Committee was required to consider existing regulation of all film, video, literature and other publications and consider whether similar arrangements were applicable to regulating the provision of commercial recorded information or entertainment services via networks utilising telecommunications technologies. The Senate Select Committee's main recommendations were that sexually suggestive or offensive 0055 messages be migrated to the 'opt-in' 0051 closed user service restricted to adults who have been allocated a PIN number, and that 0055 services should not contain messages which contain material that a reasonable parent would not wish his or her child to hear.

From 3 August 1992, under a contract with Telecom (as it was then), the OFLC examined the content of 0055 and 0051 recorded message services through the Telephone Information Services Arbitrator. On 31 May 1994 the arrangements with Telecom were terminated by mutual agreement and they were replaced by a similar arrangement with the Telephone Information Services Standards Council (TISSC). The principles to be applied in assessing the services are embodied in the TISSC Code of Practice which includes the recommendations of the Senate Select Committee.

The Senate Select Committee first drew attention to the problem of bulletin boards in its October 1993 report on Video and Computer Games and Classification Issues, as follows:

> The specific problem of the availability of pornographic and ultra-violent material on bulletin boards, accessed from overseas sources via telephone lines, raises even more complex regulatory problems, especially given the difficulty of prohibition at source. This is a matter which the Committee will have to pursue in future hearings but this report urges censorship Ministers to give consideration to immediate remedial measures.[29]

As a result of this recommendation the Federal Attorney-General and the Minister for Communications and the Arts established the Task Force on the Regulation of Computer Bulletin Board System (BBS Task Force) in November 1993 to examine the regulatory options for BBS. Industry commentators were very critical of the proposals contained in the BBS Task Force report. As a result, the Senate Select Committee held a public seminar in response to community and

29 Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Report on Video and Computer Games and Classification Issues*, October 1993 at 13.

industry concerns.[30] At the seminar, the Senate Select Committee took formal evidence from a range of computer industry experts and the public. The respective merits of regulation and self-regulation were debated; censorship at source compared with self-censorship; the availability of technical barriers to offensive material; and the issue of ensuring that any legislation aimed at enabling prosecutions for transmitting offensive material is directed at the source of the material, and not the carriers.

The Senate Select Committee regarded the release of the Consultation Paper as representing "significant progress,"[31] although it is questionable as to whether the on-line services industry would agree.

In September 1995 the Senate Select Committee released Part 1 of its own report on the regulation of computer on-line services.[32] Part 1 provides a good historical background to the inquiry and summarises the evidence taken at the public seminar on 4 April 1995. There was a great deal of discussion at the seminar as to the role of parents and teachers in supervising children's access to unacceptable material because on-line services are currently neither censored nor classified. There was considerable disagreement as to what role parents and teachers should and, realistically, could play. However, the computer industry's view generally was that parents and teachers have a pivotal role in children's use of the Internet. It was noted in Part 1 that while children are often the computer experts in the family and can get around PIN or password systems, it is expected that within the next few years "tamper-proof" blocking devices will become part of Internet software.[33]

Part 1 also reviewed some of the following difficulties in regulating content: due to the volume of material it is impossible to censor or classify the flow of data; it is difficult to identify the originators of objectionable material; and with a global network such as the Internet, there are no wholesalers, retailers or distribution networks so there are difficulties in identifying on whom content regulation would be imposed.[34]

Part 1 did not critique the Consultation Paper but foreshadowed that it would conduct a program of hearings with Government representatives, technical experts and the community on the adequacy and technical feasibility of the Government's initiatives. Submissions were sought and public hearings were held in this process.[35]

In November 1995 the Senate Select Committee released Part 2 of its report.[36] Part 2 made eight recommendations as follows:

1. That it should be an offence to use a computer service to transmit, obtain possession of, demonstrate, advertise or request the transmission of material equivalent to the RC, R and X categories.

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30 The seminar was held on 4 April 1995.

31 See Part 1, note 2 *supra* at 21.

32 Note 2 *supra.*

33 *Ibid* at 106-7.

34 *Ibid* at 103.

35 Submissions were sought by 29 September 1995 and public hearings were held in Canberra on 22 September 1995, and in Sydney on 12 October 1995.

36 Note 2 *supra.*

2. That the Government give consideration to making the use of strong cryptography by service providers obligatory as a means of overcoming perceived enforcement problems with s 85ZE of the *Crimes Act* 1914 (Cth).
3. That subject to the making of contractual arrangements with access providers/service providers to require their compliance with the law, network operators should bear no responsibility or liability for material which passes over their networks.
4. That Access and Service Providers be required to verify the identity of all clients and that all clients are over the age of 18 years.
5. In any offence provision, a clear distinction must be drawn between the liability of the originator of objectionable material and a carrier of that material, in the manner of s 85ZE of the *Crimes Act* 1914 (Cth).
6. That where Service Providers can demonstrate that action had been taken in good faith to restrict access to objectionable material they should have a defence from liability for carriage of such material.
7. (a) That a system of self-regulation be instituted for the on-line industry based on codes of practice and the establishment of an independent, authoritative complaints body with a capacity to impose realistic sanctions over breaches of the codes, including on-the-spot fines;
   (b) That the Telephone Information Services Standards Council and its codes of practice provide a model for the proposed on-line services complaints body;
   (c) That 50 per cent of the membership of the body should be user representatives, with overall gender equity and with representation specifically from the education sector.
8. That the Australian Government pursue at appropriate international forums the concept of classification at source of all material placed on-line, based on an agreed set of classification standards.

The sole charter of the Senate Select Committee was to examine the issue of regulation of obscene, offensive or otherwise undesirable material available through on-line services. Nevertheless, it was conscious in its examination that "a fine balance needs to be struck between the retention of the many positive features available on-line and the regulation of the undesirable elements".[37]

Despite its recommendations, the Senate Select Committee noted that because the rapid development of technology may place on-line services beyond effective regulatory reach, consumers themselves will ultimately have to decide what material they view. The Government has a responsibility to ensure that consumers are adequately educated to make informed decisions. To this end, the Senate Select Committee intends to sponsor a conference to examine how widespread education and public debate might be fostered. At the time of writing, this conference had not taken place.

B. BBS Task Force Report

The BBS Task Force was directed to consider options for developing a system of regulation of BBS that would:

- allow bulletin board users to make informed choices about the material they access; and

37 *Ibid* at 33.

- provide adequate protection for children from material that might harm or disturb them.

The BBS Task Force Reportwas released on 8 August 1994. It identified four options for the regulation of BBS content:

A. Development and adoption of guidelines by the BBS community with a complaints based system of enforcement;

B1. Application of partial classification to BBS by prohibiting material which would be 'refused classification', and developing guidelines for 'restricted material';

B2. Application of partial classification to BBS and a legal obligation on BBS operators regarding 'restricted classification' material; and

C. Application of full classification to BBS including compulsory classification.

The BBS Task Force Reportrecommended that the Government adopt option A - no legislative regulation of BBS. If option A was not accepted, the Task Force's second preference was option B2 - offence provisions forming part of uniform censorship legislation and enforceable by State and Territory law enforcement agencies.

The BBS Task Force Reportalso recommended that any regulatory scheme which was adopted should be reviewed, to allow the Government to reassess the issue of regulation in light of the Government's content regulation policies for other forms of communications. This was to take into account the fact that the Minister for Transport and Communications had established the Broadband Services Expert Group Inquiry into New Communications Services (the BSEG Inquiry) which was due to report four months after the BBS Task Force Reportwas handed down.[38] Obviously, the BBS Task Force felt that any regulatory option that it recommended should be subject to review after the findings or comments of the BSEG Inquiry were released.

C. Broadband Services Expert Group

The brief of the BSEG was to inquire into issues relating to the delivery of broadband services to homes, schools and businesses. The term "broadband services" encompasses a range of telecommunication and radio communication network applications, including high definition video, audio, text and data services, which cannot currently be offered over existing telephone networks or which will only become commercially viable once the technology to support such broadband services is in place.

The BSEG handed down its final report, in December 1994.[39] In the final report the BSEG clearly acknowledged industry opportunities for Australia arising out of the evolving communications services:

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38 The BSEG Report was due in December 1994.

39 Broadband Services Expert Group, *Networking Australia's Future*, December 1994.

> The spectacular growth of the Internet and commercial on-line services is evidence of strong demand for new communications services. We can build on that demand now to create an on-line services industry that will enable creators, large or small, to make interactive content for the new medium, building on the initiatives outlined in *Creative Nation*, the Government's cultural policy statement. An interactive multimedia industry can develop using narrowband platforms and CD-ROM that will enable participants (creators, users and service providers) to develop their skills."[40]

The BSEG recognised that privacy, copyright and censorship concerns would arise in relation to broadband services, noting that "privacy concerns loom large for many people". The BSEG put forward the view that the privacy of users needs to be protected by codes of practice under the *Privacy Act* 1988 (Cth).

The BSEG noted that access to information on networks is affected by copyright laws. There must be a balance between the rights of intellectual property holders and facilitating access to material for multi-media content creators. In August 1994 the Copyright Convergence Group had recommended creating a new right of transmission to the public.[41] The BSEG supported that recommendation and it also supported the Government's decision to ask the Copyright Law Review Committee to conduct a wide-ranging review of the *Copyright Act* 1968 (Cth).

The BSEG Inquiry noted that there are some practical questions about offensive material on new networks, such as the difficulties associated with future censorship. The BSEG suggested that network operators and service providers should be required to offer the capacity to restrict children's access to objectionable material.

The BSEG recommended that Australia develop a strategy in order to face the technical, social, economic and regulatory issues arising from new communications services. It also supported the prime minister's announcement that he would establish a broadband services council and suggested that the council be called the National Information Services Council (NISC).

D. National Strategy

On 6 April 1995 the prime minister announced the Government's decision to "develop a national strategy for the adoption and use of new information and communications services and technology". The prime minister stated that "we have the opportunity to plan for a fairer, healthier, better educated and more productive `information society', through a managed and consultative approach to the use of information and communications services and technologies".[42]

During 1995 the prime minister established the NISC to serve as a focal point to co-ordinate information and communication services and technology issues in government and to ensure that the implementation of the broadband communications services benefits all Australians. Further, as part of the structures set up to lead the national strategy, DCA was charged with co-ordinating national policy issues. One such issue is the regulation of on-line services.

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40 *Ibid* at 5.

41 Copyright Convergence Group (Australia), *Highways to Change: Copyright in the New Communications Environment*, 1994.

42 Consultation Paper, note 6 *supra*.

E. Telecommunications Policy Principles: Post 1997

On 1 August 1995, the Minister for Communications and the Arts released the Telecommunications Policy Principles: Post 1997 (TPPs). The TPPs are 99 principles upon which changes to the legislation will be based. At the time of writing, draft legislation had not been tabled in Federal Parliament. Two of the TPPs that touch on the issue of content are TPP79 and TPP96.

TPP79 provides that issues associated with censorship of content be dealt with in the National Strategy on Information and Communications Services.

TPP96 provides that there will continue to be separate administration of carriage and content regulation post 1997. This means that the ABA will continue to be responsible for regulation and administration of industry codes of practice in relation to the content of broadcast services. Although it has been considered likely that the ABA's mandate will be expanded to cover the content of on-line services, the TPPs are silent on the point and the Government has not yet made a policy announcement on the issue.

F. ABA Investigation

On 24 July 1995, the ABA was directed by the Minister for Communications and the Arts to investigate the content of on-line information entertainment broadcasting services and the appropriateness and development of codes of practice for those services that are, as far as practicable, in accordance with community standards. The investigation took a consultative approach, with the ABA seeking the views of service providers, network providers, business, consumer and user groups, academics, parents, teachers, children and the general community. The ABA was directed to investigate technological advances and service trends in the provision of on-line information and entertainment services by the broadcasting industry, including the use of the emerging broadband networks. The ABA was also directed to consider the extent to which on-line information and entertainment broadcasting services are accommodated by the operation of the *Broadcasting Services Act* 1992 (Cth).

The principal difference between the ABA investigation and the Consultation Paper was that the ABA inquiry involved a broader examination of content available for on-line services than was addressed in the Consultation Paper. The ABA was directed to investigate the next generation of on-line services; those made possible with broadband capability and which, to consumers, will have characteristics closer to those of the current broadcasting services than of the current narrowband on-line system.

The ABA's charter was to build upon the Consultation Paper and all the other reports produced from previous inquiries regarding on-line services. The ABA Report, released on 30 June 1996, in turn may serve as a contribution to the deliberations of the NISC.

As part of its inquiry into regulation of content of on-line information and entertainment services, the ABA was to look at the issue of minimum levels of Australian content. The ABA Chairman, Mr Peter Webb, stated: "The real policy

question is not whether a minimum level of Australian content is desirable, but whether it is practicable and, if so, how might it be achieved."[43]

Mr Webb said that the ABA intended to explore thoroughly the feasibility of obligatory content levels and to see what potential there is for giving effect to the spirit of the BSEG which recommended that providers of broadband entertainment and information services should be obliged to commit at least ten per cent of their expenditure on content to new Australian content.

As an indication of how the ABA might approach this issue, Mr Webb pointed to the ABA's Guidelines on how pay television operators might honour their obligations to allocate ten per cent of their drama channel program expenditure to new Australian drama.

The ABA Issues Paper,[44] released in December 1995, outlined the scope of the ABA's investigation, identified concerns within the community about on-line services and considered options for addressing those concerns. It did not indicate the ABA's final view on the matters raised in the Minister's direction; it merely called for comments on the views expressed. The Issues Paper contained a thorough non-technical outline of the regulatory issues and considered principles and objectives that could be taken into account to achieve outcomes acceptable to the community and to industry.

The ABA Report, released on 30 June 1996, recommended that industry codes of practice be developed by on-line service providers, with the ABA taking a monitoring role in relation to such codes. The ABA Report also recommended that a specific on-line services complaints handling regime be developed, with the ABA performing an independent appeals function for any unresolved complaints. In the opinion of the ABA, any codes of practice referred to in the proposed regulatory legislation endorsed by the State and Territory Censorship Ministers should be developed before any model legislative provisions come into effect. In this way, there would be a co-ordinated regulatory and enforcement strategy applicable to the on-line services industry.

The ABA Report also recommended that a purpose-built labelling scheme for on-line content be developed, based on the principles that underpin the existing classification regime for other media. Recent international technological developments in content and selection software called the Platform for Internet Content Selection (PICS) would provide technical infrastructure for the labelling of on-line material. The ABA clearly supports the development of a labelling system for Australian content providers and consumers, which would utilise a set of standards incorporated within the PICS, or any other standards that might be developed. The ABA Report recommended that Australia participate in the PICS development process in the international arena, to maximise Australian labelling consistency with overseas ratings schemes.

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43 ABA, *News Release* 72/1995, 22 October 1995.

44 Note 4 *supra*.

VI. PROPOSED REGULATORY REGIME IN THE CONSULTATION PAPER - WILL IT WORK?

The Government recognises that any regulatory regime that is applied to new information and communication services needs to meet the competing objects of freedom of expression and protection from exposure to unsolicited offensive material. The regime must also take into account a number of other issues, such as ensuring that it is aligned with censorship regimes for other media; that emerging services industries are not stifled; and that Australia's competitiveness in the international communications forum is not curtailed.

To achieve these objectives the Government proposed a three part strategy in the Consultation Paper:

- A *self-regulatory regime* with a code of practice and a complaints handling procedure;
- A comprehensive *education program* to reinforce the regime and assist in protecting children from unsuitable material; and
- Legislation containing *offence provisions* to provide sanctions against individuals who deliberately breach community standards.

A. Self-Regulatory Regime - Proposal

The first element of the Government's proposal requires on-line information service providers to adhere to a self-regulatory framework with a voluntary application of classification standards, a code of practice, and a complaints handling procedure. On-line services material would not be compulsorily classified by the OFLC. Rather, guidelines for classification would be developed in consultation with the industry and the community. If material classified as restricted material was not removed, a sanction could be cancellation of membership of the relevant organisation.

To encourage on-line information service providers to develop and implement appropriate procedures under a code of practice, the Consultation Paper proposes that the legislative sanctions would provide that compliance with code of practice procedures would be a defence to liability where objectionable material was found on the network. An independent body would handle any complaints that remained unresolved after a direct approach to a sysop or a service provider. It is envisaged that the objective of the complaints handling body would be to resolve complaints regarding material before resorting to the offence provisions.

B. Self-Regulatory Regime - Critique

There are numerous problems with practical implementation of the proposed self-regulatory regime. The proposed classification system may be unworkable in the case of computer networks because overseas content providers might not be required to classify their material, and if they were, their classification standards may be inconsistent with Australian community standards.[45] Further, consensus on

45 G Davis, note 1 *supra*.

a code of practice will be almost impossible - a code of practice envisages a cohesive industry when in fact there is a wide division between commercial service providers and hobby BBS operators. Operators of commercial on-line services, BBS operators, Internet service providers, WWW sites and Compuserve have far less in common than, for example, operators of commercial television stations or providers of telephone information services.[46] Further, the range in size and activities of industry players, ranging from amateur BBS sysops to communication on-line service providers, may lead to rules that suit the mass market but are unduly restrictive on some service providers. A code of practice may in fact end up being a divisive force.

The sheer volume of Internet material, its transient nature and the rapidity of transmission make inspection of content almost impossible. The Internet has doubled in size every nine months for the last ten years and currently has over 50 million participants. The quantity of information that passes through the Internet every day cannot be visually scanned. Each day, over a million web pages appear, disappear or are subject to change.

Authentication difficulties pose a main obstacle to the force of law on the Internet. There are immense problems with establishing from whom the material originated, as anyone can purchase an Internet account and represent themselves as somebody else.

The suggestion of a code of practice follows the approach that has been taken in relation to telephone information message services. The Telephone Information Service Standards Council (TISSC) could be used as a model for the on-line information services industry to develop its own code. It should be noted however that the TISSC model does not involve regulation of content; it is based on contractual relationships between Telstra and premium rate telephone service providers.

The code of practice approach is also consistent with the provisions in relation to radio and free-to-air and pay television in the *Broadcasting Services Act* 1992 (Cth). However, in the broadcasting sphere the ABA can intervene in cases of clear non-compliance.

C. Education Program - Proposal

The education strategy is intended to address the major concern of access by children to inappropriate material. It is proposed that a program of advice to schools and parents on the measures that are available to manage access to on-line services is developed together with the implementation of safeguards by government education agencies. An accreditation scheme is suggested which would allow schools to identify service providers that would provide properly monitored information systems to schools which meet specific educational requirements.

The Consultation Paper notes that it may be possible to design computer network systems servicing the education sector to give schools the choice of

46 A comparison made by P Leonard, "Censors Come On-Line" *Sydney Morning Herald*, 26 September 1995.

limiting the material that students can access. To this end the Education Network Australia (EdNA) initiative could be utilised.

D. Education Program - Critique

These initiatives are sensible - education will empower parents and teachers to understand the nature of the services available and the ways in which they can control or counsel the use of those services. Community concern is more likely to be adequately addressed through an information program than it is through imposing restrictive standards on the industry. In the words of Jonar Nader, the president of the Australian Information Technology Society:

> The legal complexity will never settle down. Who is liable and who is an accomplice? In a world of limited resources, we'd do better to educate hearts and minds than try to regulate what people do with their hands.[47]

One of the most effective forms of protection is the use of software filters such as 'Net Nanny' and 'SurfWatch' which are currently being developed in the United States and Australia to block access to certain sites on the Internet. They work either by detecting references to sex-related words or by maintaining a list of sites that a committee of parents and teachers have decided are inappropriate for children.

'Net Nanny' filtering software, which has been available in Australia since mid-November 1995, is based on a dictionary of banned words which parents construct themselves. The list is not restricted to adult material. It may include a parent's credit card number so that a child cannot shop at the parent's expense and it may also prevent a child from typing his or her real name and phone number, making it harder for a paedophile encountered on-line to arrange an illicit meeting. 'SurfWatch' employees surf the Internet everyday seeking out material which they believe should be placed on a 'restricted sites' list.

There are a number of other Internet content filters that are being developed by industry participants who argue that such filters will provide sufficient regulation and make centralised regulation unnecessary. Other filters include 'CyberPatrol', available in Macintosh and Windows; 'Cybersitter' which concentrates on pornographic material; Compuserve's 'Crossing Guard' which allows parents to set timers to control the length of time their children surf the Internet; 'WEBTrack', which monitors sites visited; and 'SafeSurf', an international parents group that codes sites according to levels of parental concern.

Part 2 of the Senate Select Committee report noted that a product that has apparently proven popular with secondary schools in Victoria is CensorMan, which applies a blocking mechanism on the server for a whole network.[48] The school can choose what material is to be blocked and staff access can be different to student access.

It would appear now however that filter software may be overtaken as the favoured technical means of managing on-line access by the recent development in technology known as PICS. This collaborative effort between the United States

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47 J Robotham, note 1 *supra*.

48 Note 2 *supra* at 31.

and France entails a scheme for labelling the suitablity of Internet material for children, whereby labels embedded in the material can be recognised by browser software which can block material considered unsuitable by the user.[49] In the ABA Report it was noted that while content filtering software can provide parents with a degree of control over children's use of on-line services, it is not a complete solution, and can restrict access to some valuable material. The ABA Report therefore supported the PICS initiative as the "only feasible means of applying an Australian labelling system to on-line material".[50]

E. Offence Provisions - Proposal

The proposed offence provisions do not introduce liability for operators of on-line information services for all material that passes through their system. Rather, they are included as an ultimate sanction against individuals who deliberately breach community standards regarding material they transmit, or those who fail to exercise any effective controls over the material publicly available through their information services.

The provisions create an offence of using an on-line service to transmit or advertise as available for transmission, objectionable material. Objectionable material is defined very broadly as material that:

> ...depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that the material should be refused classification.[51]

The definition goes on even further to include material which depicts a minor in an offensive way; promotes, incites or instructs in matters of crime or violence; or computer games which are unsuitable for a minor to see or play.

It is a defence if a person who "controls" (undefined) an on-line service reasonably believes that material was not objectionable material or took reasonable steps to avoid contravention of the offence provisions. These steps may include compliance with procedures for dealing with restricted material set out in a code of practice.

F. Offence Provisions - Critique

Industry response to the proposed offence provisions has been critical. Representatives of the Australian on-line networking community have "warned the Federal Government that ill-considered legislation to curb on-line sex and violence will lead to serious electoral ramifications."[52] The on-line computer service industry believes that efforts to impose censorship requirements on them would be technically unfeasible and may also stifle Australia's ambition to become a leading content provider for the information superhighway. In the words of Gerry Davis:

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49 For more detail on PICS see Chapter Nine of the ABA Report, note 5 *supra*.

50 *Ibid* at 158.

51 Consultation Paper, note 6 *supra* at 15.

52 "On-line porn inquiry warned" (1995) 112 *Communications Update* 1.

> If we want to export we have to follow world's best practice and in this case that means regulatory framework best practice. If we don't, the industry will simply go off-shore."[53]

The practical effect of the offence provisions is that service providers will have to develop access and retrieval restrictions on restricted material and exclude objectionable material from their services. It is not clear how intermediate providers such as Internet access providers, gateways and database replicators will fare under the proposed offence provisions as it not clear whether they 'control' the on-line service available at a remote site. As David Spence, the managing director of Oz-Email said:

> There is a responsibility on service providers to eliminate areas of concern where they are able to. It is possible to regulate and it can be enforced on providers where they are able to control content, but I can't see how we can be held responsible for something we can't control.[54]

The same problems as outlined under the critique of the self-regulatory regime above, arise regarding the practical implementation of the offence provisions. In addition, concern has been expressed that the implementation of offence provisions would be a serious infringement of user privacy and an impairment of freedom of communication.

G. Regulation Overseas

The technological developments in the communications industry, in particular the developments in digital technology, combined with the competition generated by internal telecommunications deregulation and liberalisation mean that telecommunications networks will be able to deliver a previously unforeseen wide range of applications. The band width of optic fibre cable, particularly when combined with digital compression, is so high that it can cope with any imaginable application.

These developments have facilitated an internationalisation of the telecommunications industry and the Internet is an example of this growth. One of the biggest challenges facing the formulation of Government policy on regulation is the fact that the on-line services industry is a global industry.

Internet technology allows participation by people from every continent. In the circumstances, it is important to ensure that any regulations imposed on on-line services by different jurisdictions are broadly consistent. As industry participants and regulators in other countries are grappling with similar issues, it is worthwhile considering the approaches that are being taken overseas. National governments will need to co-operate if they hope to regulate trans-border data flow and formulate international standards for content.

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53 J Robotham, note 1 *supra*.

54 *Ibid.*

(i) United States of America

The United States National Information Infrastructure has been deliberating over the contents of the 'rules of the road' of the 'information superhighway' for over two years.

In 1994 the US Intellectual Property Task Force released a study of copyright and electronic transmission (known as the Green Paper).[55] The paper decided that although the framework for copyright protection was sound, there should be changes in United States law to strengthen the rights of the copyright proprietor over electronic transmission. The Green Paper recommended that it should be a violation of the US *Copyright Act*[56] for a person to deal in devices or provide services used primarily to defeat technological methods of protecting a copyright work against infringement. Violation of these provisions would constitute copyright infringement of the work that uses the technological protection. It has been argued that such amendments are particularly necessary as pay television and other subscription based services roll out in Australia and as the Internet is increasingly used for encrypted communications.[57]

The Green Paper predicted that copyright management information related to a work, such as the name of the copyright owner and the conditions for use of the work, will be essential to the effective and efficient operation of the National Information Infrastructure. It therefore recommended an amendment to the US *Copyright Act* to prohibit fraudulent inclusion of copyright management information and its fraudulent removal or alteration.

Unfortunately, the Green Paper was silent on the actions and needs of the rapidly increasing and resourceful users of digital systems. The final version of the Green Paper was released at the end of 1995.[58]

In June 1995, the United States Senate passed a Communications Decency Bill, proposed by a conservative Senator named James Exon. The Exon Bill was enacted by Congress earlier this year as the *Communications Decency Act.*[59] The Act provided sanctions for placing and transmitting objectionable material on the Internet. It placed criminal liability on service providers for any indecent, lewd, threatening or harassing messages available on the Internet, forcing service providers to censor all material. Opponents of the *Communications Decency Act* maintained that the Act would unfairly allow the prosecution of Internet service providers (or access providers) who 'unwittingly' transmit such material.

The American Civil Liberties Union and other groups then sued, arguing that the Act violated the First Amendment.[60] On 11 June 1996, the Philadelphia

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55 US Intellectual Property Task Force, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights*, July 1994.

56 US *Copyright Act* 17 USC.

57 P Leonard, "Legal Issues Arising from the new Digital Environment: Copyright and Moral Rights", presented at *Tales from the Infobahn- Arts Law Seminar*, 24 May 1995 at 4.

58 The final version of the Green Paper is entitled *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, 5 September 1995 (the White Paper).

59 US *Communications Decency Act- Telecommunications Act* of 1996 PL 104-104.

60 *ACLU v Reno* (unreported, Federal Ct of Philadelphia, Sloviter CJ, 11 June 1996). The First Amendment limits governement interference with free speech.

Federal Court struck down the *Communications Decency Act* as unconstitutionally restricting free speech on the Internet. The Department of Justice filed an appeal on this ruling on 1 July 1996, in the Supreme Court of Philadelphia. Supreme Court arguments are expected to occur late in 1996, with a decision expected in early 1997.

In response to the Exon Bill, the US House of Representatives passed its own Bill in 1995. The Internet Freedom and Family Empowerment Bill[61] aims to put in place procedures which allow users, including parents and teachers, to make decisions regarding the content they are willing to view. It provides that service providers and users of interactive computer services may not be held liable as a result of:

- Any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively insolent, harassing or otherwise objectionable, whether or not such material is constitutionally protected; or
- any action taken to make available to information content providers or others the technical means to restrict access to material described above.

(ii) Canada

Studies in Canada have recognised that the role of regulation is limited. In 1981 the Economic Council of Canada presented the following question and answer with respect to the role of regulation in Canada:

> How can we offset the tendency in the policy-making process to adopt new regulations uncritically and to maintain existing ones long after they have outlived their usefulness? ... what is required are policies to offset the attraction of regulation or, alternatively, to make regulation a much more difficult instrument to employ.[62]

Despite the Economic Council's call for policies to make regulation difficult, the Canadian Governments have nevertheless demonstrated that they intend to move towards regulating the Internet. Two discussion papers have been produced. One by the Government of New Brunswick and the other by a Federal Government body called Industry Canada.

Industry Canada's paper outlines the Canadian vision, objectives and guidelines for the development and implementation of "The Canadian Information Highway". The paper is clearly intended as a tentative first step towards more concrete proposals. It identifies a large number of issues that must be dealt with to facilitate the formation of a coherent and complete plan for Canadian regulation of the Internet.

The Government of New Brunswick's paper provides two recommendations as follows:

1. The Government pro-actively intervenes in support of the industry to create a more streamlined and appropriate regulatory framework; and
2. Necessary structures are put in place to influence and monitor the development of the information highway.

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61 House of Representatives, 1978.

62 Economic Council of Canada, *Reforming Regulation*, 1981 at 5.

Canada's Information Highway Advisory Counsel will be calling for negotiation of international agreements to control offensive communications on global networks, and to educate the police and the public to apply existing laws to all computer based communications.[63]

(iii) United Kingdom

In the United Kingdom, the House of Commons Home Affairs Committee published a report on computer pornography on 9 February 1994. This report suggested legislative changes, such as amending the definition of child pornography to include computer generated images which appear to be photographs, but are not, and matters concerning computer games. The Government responded by amending legislation to incorporate these changes.

The UK report also suggested increasing the penalties for transmitting obscene matter by telecommunications lines, and the Government responded by amending the *Telecommunications Act* 1984 (UK) accordingly. Section 43(1)(a) of the Act provides that it is an offence to send any message by telephone, originating in the United Kingdom, which is grossly offensive or of an indecent, obscene or menacing character. This extends to data transmitted by a telephone line and therefore catches the use of the Internet.

It is likely that are sufficient to criminalise transmission of objectionable material by the telecommunications system. However, the ambit of the *Telecommunications Act* 1984 (UK) is to catch the originator, rather than the distributor of the material. It is therefore unlikely that a service provider will be caught by this provision in the Act.

(iv) New Zealand

In New Zealand, the *Films, Video and Publications Classification Act* 1993 (NZ) has been described as "the world's strictest legislation covering computer publication."[64] Under the Act it is an offence to possess an objectionable "publication". The definition of "publication" not only covers films, videos and books, but it could also include a computer disk containing data "capable of being reproduced" as objectionable material. The Act is intended to operate in much the same way as the Australian classification legislation.[65]

More recently, a Private Members Bill, the Technology and Crimes Reform Bill, was introduced by Howick MP, Trevor Rogers. The Rogers Bill seeks to prevent objectionable material being bought into the country via the telecommunications network.

In a press release issued on 23 March 1994 Trevor Rogers stated that he regarded the Rogers Bill as "the second half of the films, video and publications legislation that I was involved in introducing two years ago. I was concerned that electronically transmitted images and sounds were not included."

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63 Senate Select Committee, note 23 *supra* at 130.

64 "Cybersex-censoring fantasy" (1995) 110 *Communications Update* 6.

65 That is, service providers can seek classification for such material in the same manner as in Australia.

The Rogers Bill has been widely criticised as "draconian" and "a collection of unworkable ideas written by someone who obviously had no idea what they were doing."[66]

In summary, the Rogers Bill proposes that all New Zealand network users should be cut off from any site that transmits objectionable material to any user. There is no age restricted classification. Under s 12(3), transmitting and receiving anything deemed objectionable to a child would be considered to be an offence.

Any person found guilty of sending or receiving a single objectionable item could lose the right to own a telephone for five years and face a fine of up to $5,000 ($1,000,000 and/or seven days off the air for a broadcaster). As Richard Vowles points out, under the Rogers Bill, sending Mr Rogers an objectionable image encoded in an e-mail would result in his own prosecution.[67]

The Rogers Bill is still before the New Zealand Parliament.

VII. REGULATION ISSUES

A. Is the Internet a Broadcasting Medium?

Public debate on regulation of the Internet does not appear to have resolved the question of whether the Internet is a form of broadcasting or a point-to-point communication. The issue has been regarded as important for determining whether any classification of content should follow the television regulatory model or the private communication model.

The Electronic Frontiers Australia Inc (EFA) Task Force on "Freedom in Cyberspace" stated in its draft report[68] that the appropriate analogy in current law for the Internet is not the regulatory scheme covering newspapers, television and film but rather the common carrier regulations of the telecommunications industry.

The Senate Select Committee on the other hand, considers that although some communications on the Internet are one-to-one (ie email and encrypted messages), the main problem areas are the open newsgroups and sites, where objectionable material can be downloaded by thousands of people. The Senate Select Committee considers that the difference between this process and conventional broadcasting is purely a matter of technology.[69] However, as John Dickie, the Chief Censor of the OFLC, stated to the Senate Select Committee hearing on 4 April 1995, "one of the dangers that we have perceived in Government is that if you rush into these things too quickly you tend to discriminate against the technology rather than the content".[70]

It is a mistake to try and classify the Internet as either point-to-point communication or broadcasting. Rather, it is a hybrid. On one view, the on-line information service industry can be distinguished from subscription pay television

66 R Vowles, "Censorship and Privacy on the New Zealand Internet" (1995) 1(8) *Internet Australasia* 57 at 58.
67 *Ibid* at 59.
68 Electronic Frontiers Australia Inc, *Freedom in Cyberspace*, 29 March 1995.
69 Senate Select Committee, note 2 *supra* at 21.
70 Senate Select Committee, note 23 *supra* at 194.

and other broadcasting services by its interactive capacity. While on-line users can browse passively through information they can also take an active role in receiving information, by determining exactly what material is accessed, and by choosing to contribute material and disseminate information. An on-line subscriber can effectively be regarded as the censor, with a much more definitive role than the service provider, in determining what he or she actually views.

At the same time, a feature of on-line technologies is the expanded scope for point-to-multi-point transmissions. The complexity of communications networks means that one network may offer multiple services via the same technology, such as one-to-one communications (e-mail), one-to-many communications (live broadcasts over the Internet) and many-to-many communications (electronic discussions fora).

Services can be either private or public, depending on a unique decision by the content generator and the subscriber. For example, an e-mail from one person to another is clearly a private communication but the same message distributed simultaneously to 1,000 people is more like a public communication - either broadcasting or narrowcasting.

Clearly the regulatory framework for on-line services needs to be flexible enough to respond to the range and complexity of functions and the different issues that each of them raise. A 'one size fits all' approach is clearly not appropriate or feasible for the different types of communication that can be covered under the umbrella of the computer on-line industry. For example, privacy is the paramount interest demanding protection in the context of e-mail, whereas censorship is the main consideration in relation to BBS and chat sessions.

B. BBS Operator and Internet Service Provider Responsibility

Computer pornography and obscene material on the Internet are not the only cause for concern. Material on the Internet may be defamatory or an infringement of intellectual property rights such as copyright and moral rights. It may raise issues of data protection and security, trade practices, treason and incitement of racial hatred. The question is, with whom should responsibility lie if content is, for example, obscene, defamatory or a breach of another's copyright? Who should be held liable and, more importantly, from an enforcement point of view, who *can* be held liable? Should a BBS sysop or an Internet service provider simply be regarded as a conduit for information - like the telephone and postal industries? Or should they be liable for the material on their services? These issues have been considered in a number of cases dealing with breach of copyright and defamation on on-line services.

(i) Copyright

There have been a number of cases in the United States involving bulletin boards containing copyright material which could be downloaded by users accessing the boards. In *Sega v Maphia*,[71] the defendant operated a BBS on which users uploaded and downloaded copies of Sega's copyrighted video games without

71 857 F Supp 679 (ND Cal 1994).

Sega's authorisation. The defendant knew what his BBS was being used for. In fact, he sold video game copiers which could be used to make unauthorised copies of the games. The Court held that the defendant, in facilitating unauthorised copying, was himself infringing Sega's copyright.

In *Playboy v Frena*,[72] the defendant's bulletin board had distributed unauthorised copies of photographs from *Playboy* magazine. Frena's defence was that he never uploaded the material himself; it was uploaded by his subscribers. The Court held that Frena had violated *Playboy's* exclusive rights - intent was irrelevant. Therefore, even an innocent infringer is liable for infringement.

In the unreported case of *Frank Music v Compuserve*,[73] Compuserve was sued by a group of music publishers claiming that Compuserve's bulletin board, which allowed subscribers to upload and download music compositions in electronic form, was an infringement of their copyright. The parties settled the matter with Compuserve agreeing to pay royalties to the music publishers pursuant to licence agreements, but Compuserve did not admit liability.

No cases in Australia have considered the liability of an on-line service provider for material placed on a BBS by a user. However, for infringement of copyright the High Court has held that a person "authorises", and is therefore liable for indirect infringement, where the person "sanctions, approves and countenances" illegal copyrighting.[74] This issue has arisen in relation to home-taping of audio material and photocopying in educational institutions. As it is well-known that a BBS or on-line forum may be used for illegally reproducing copyright material, it is likely that an Australian court would hold that a service provider or BBS operator may attract direct or indirect liability for the content of the on-line service.

(ii) Defamation

Defamation is a particularly prominent area of potential liability on the Internet due to the popularity of 'flaming' and trading rumours. With respect to a BBS sysop or service provider, the question of liability may depend on whether he or she is treated as analogous to a newspaper publisher, to a newspaper distributor or a librarian.

In May 1995, New York Judge, Justice Ain, ruled in a US$200 million libel law suit that Prodigy, one of the largest United States on-line service providers, was a publisher of information, not just a distributor. The law suit arose from a number of messages posted on Prodigy's "Money Talk" electronic bulletin board in October 1994 by an unknown Prodigy user. The messages portrayed the President of Stratton Oakmont Inc, a Long Island securities investment firm, as a criminal and characterised the firm's dealings as fraudulent. Justice Ain held that Prodigy was acting as a publisher because it held itself out to the public as a "family-oriented" on-line service that screened all messages posted on its BBS (it was irrelevant that in fact complete control was impossible because of the sheer

72 839 F Supp 1552 (MD Fla 1993).

73 See P Leonard, note 57 *supra*.

74 *University of New South Wales v Moorehouse* (1975) 133 CLR 1.

volume of messages - over 60,000 per day). By monitoring, editing and censoring transmissions, Prodigy exercised control over the content. Prodigy's own actions took it outside the mere distributor model and into the publisher model. As the New York State Court stated: "Prodigy's conscious choice, to gain benefit of editorial control, has opened it up to a greater liability than other computer networks that make no such choice."[75] It is important to note that the Court then attempted to downplay the impact of this comment on the industry:

> For the record, the fear that this Court's finding of a publisher status for Prodigy will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure.[76]

In Australia, in *Rindos v Hardwick*[77] it was held that a user, who employed a science anthropology bulletin board to defame a colleague, was liable for defamation. However, it was the individual who was sued, not the provider of the university electronic bulletin board on which the material appeared. The Court did not consider whether or not the owner or operator of the bulletin board might also have been liable.

VIII. CONCLUSION

There is a need for some form of regulation of content of on-line services in order to address public concern about pornography, violent images and racist propaganda, not to mention breach of copyright, defamation and privacy issues. However, it is doubtful that the proposal put forward in the Consultation Paper, and which underpins the proposed Western Australian and New South Wales legislation, is an appropriate model. Practical implementation of the Proposal is almost impossible due to the nature of on-line services. Some of the major problems with the Consultation Paper proposal arise from the following: the vast amount of material that travels on on-line services and the speed with which it travels; the ability of members of the public to view material and place it onto the service; the lack of ability to quarantine Australian services from overseas services; the placement of liability; and policing and enforcement difficulties.

An alternative to the model in the Consultation Paper which has been put forward is the telephony/postal model. No requirement is placed on carriers of telephone and postal services to check or monitor content. On-line service providers would be treated as carriers rather than originators or editors of content. However, in light of a Full Federal Court decision handed down on 23 August 1995, which reversed the first instance decision,[78] it would appear that liability might be imposed on a telecommunications carrier for transmission of copyright

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75 "US Court clears way for Prodigy suit" *Australian Financial Review* (quoting the *New York Times*), 29 September 1995, p 35.

76 *Ibid.*

77 Unreported, Western Australian Supreme Ct, 1993.

78 *Australasian Performing Right Association Limited v Telstra Corporation Limited* (1993) 46 FCR 131, where it was held that on-hold music was not performing work in public.

material over its network, regardless of the carrier's consent to the use of the equipment (such as a BBS) from which the material originates.

On-line information services clearly cover a wide range of legal rights. Rather than introduce one piece of legislation to cover the on-line services industry, it might be more appropriate for the Government to review the adequacy of the range of current laws with a view to amending each of the Acts governing the respective areas of law to take into account their relationship with on-line services. For example, the *Privacy Act* 1988 (Cth) should probably be re-examined to place controls on information about a person's use of the Internet and sending intrusive information such as electronic junk mail and defamatory material across it. Currently the privacy principles in the *Privacy Act* 1988 (Cth) concern protection of personal material primarily held by Commonwealth Government organisations.

Clearly, for the Government to change its stance on the industry specific regulation proposed in the Consultation Paper, and now being implemented by the States, and opt for amendment of existing legislation there would need to be a dramatic change in Government approach to the whole issue of regulation of content of on-line services. This change could perhaps be brought about by the industry's successful implementation of a comprehensive education program relating to on-line services combined with the successful development and implementation of blocking devices such as 'SurfWatch' and 'Net Nanny' and use of the recently developed PICS technology.

Ideally, the risks and benefits associated with a child having open access to on-line information services such as the Internet need to be minimised and maximised respectively. Currently, the risk of a child being exposed to offensive/obscene material is very high. The material is easy to access and research has shown that the *Playboy* magazine site is the most frequently visited site on the Internet and news groups with sex stories are the most popular among all Internet users. Increasingly, paedophiles are using the Internet to trade images or contact children for illicit sexual encounters.[79] On the other hand, the benefits of open access are the tremendous educational benefits for students who can obtain a wealth of information from the Internet. Perhaps the only practical way to address this is to develop effective blocking devices whether in the form of software filters or PICS compatible selection software that will enable children to access educational material while shielding them from offensive and harmful material.

The danger of imposing a regulatory regime on an embryonic industry is that it may stifle the development of the industry and remove Australia from the international scene. Considering the issue from a cost/benefit analysis, it is necessary to weigh up whether the cost to the potential for Australia to become a major player is worth the benefit derived from shielding children from inappropriate material. This process of striking a balance will be best achieved by an under-inclusive regulatory regime - if Government regulation should be attempted at all.

As on-line services cannot be pigeonholed into a clear area of law, technology may provide the only effective solution to regulating content. Indeed, it appears

79 Senate Select Committee, note 23 *supra* at 6.

that the on-line service industry itself is already developing a technological solution to the issue of regulation of content - at least in relation to issues of pornographic and offensive material, with the development of PICS. The most appropriate way to address the other issues arising from the currently unregulated Internet such as breach of copyright, defamation and privacy is to amend the current laws governing them.

In the early days of the debate, many industry players took the view that the status quo is adequate and the existing self-regulatory culture among BBS and Internet service providers is an adequate mechanism for dealing with objectionable material. However, the debate has now moved forward and is unlikely to go back. As undesirable as it is, the State Governments have chosen to move forward with a regulatory regime, in accordance with the following view: "Some kind of gentle regulation is probably desirable. Some kind of self-regulation is sensible and some teeth behind it would be a good idea."[80]

However, it is questionable just how much bite those teeth can realistically have without stifling a still emerging industry. Technology has shown that it can solve the problem it has created and the on-line services industry should be allowed to grow its own teeth. Government 'braces', as it were, may be necessary at a later stage. To put them on now is premature.

80 R Clarke, Australian Computer Society, note 1 *supra*.