

Will content regulation encourage ISP rationalisation?

Peter Chen has been following the path of the Broadcasting Services Amendment (Online Services) Bill 1999 through the Senate Committee of Information Technologies

The aim of media ownership diversity has had a sad history in Australia. Since the introduction of broadcasting, competitive pressures combined with industry structure and slight regulation have only managed to lightly constrain the development of media networks and the consolidation of ownership within a number of national and multinational media corporations. These organisations have consistently used their existing market position to establish entry in markets driven by new technology.

In recent years, the provision of services for accessing the Internet has been seen as a promising exception to this rule. While existing media owners and telecommunications corporations have established leading positions in the new Internet Service Provider (ISP) industry, the market for connectivity has seen a wide range of new small- and medium-sized businesses established and the introduction of a new significant player: OzEmail. Current estimations of this industry place the number of ISPs at about 640 (www.consult, 1999), with Telstra, OzEmail, Optus and Connect.com representing the largest players in Australia.

In the US, substantial ISP consolidation has been going on for nearly three years, with a wide range of takeovers significantly altering the shape of the market. During 1998, a number of mergers and acquisitions accelerated (Barrett, 1998), which, according to Berst (1997), is the final result of unrealistic pricing in an industry where large players can sacrifice immediate profits for longterm market share.

Similar pressures are felt in Australia with Bushell (1997) stating that small- and medium-sized ISPs face considerable threat from telecommunications giants operating in an unregulated commercial environment. This problem has been recognised in the US as well, with Paulak (1998) identifying that non-carrier ISPs will face significant commercial disadvantage when competing against companies who provide access to infrastructure they already own and operate.

Into the complex mix of technical requirements and commercial pressures the Australian government has finally decided to regulate Internet content. After almost five years of inquiries and debate, the Minister for Communications, Information Technology and the Arts, Senator Alston, has introduced a Bill into the Senate designed to prevent access by Australians to Internet material that would be classified "X" and "RC" under the existing film, video and computer game standards, and reducing access to material classified "R". Included in this legislation are two regulatory tools: a complaints and take down procedure aimed at removing material from machines based in Australia, and some form of blocking scheme aimed at material that is located overseas.

While groups like Electronic Frontiers Australia have attacked the Bill as a whole, industry concerns have focused on the issue of content blocking outlined in the proposed legislation. Under the Bill, ISPs will be required, either through their relevant Industry Code or a set of stan-

dards determined by the Australian Broadcasting Authority, to take "...all reasonable steps to prevent end-users from accessing the [restricted offshore] content" (29), however this is specified within an overriding framework to comply to the public interest and "...in a way that does not impose unnecessary financial and administrative burdens on Internet Content Hosts and Internet Service Providers..." (3).

What is uncertain is how this section of the new legislation will be interpreted by the Australian Broadcasting Authority (ABA), which has discretion in how it acts under the legislation in its present form. In testimony before the Senate IT Committee, the chair of the ABA, Professor David Flint, considered the use of latest technology as reasonable under the Bill. If this technology means the adoption of filtering of all requests and packets of Internet data, then the cost to small ISPs may be great as they conform to requirements to install new parallel computing equipment and the software required to run these machines, or purchase value-added bandwidth feeds from their upstream providers.

Small ISPs commonly do not use proxy servers, and as the big four currently service more than half of all Australian Internet accounts, the remaining 636 ISPs compete for relatively small target markets. Concern about competition by diversified companies has already been expressed by US industry bodies, such as ISP/C, an organisation representing small service providers. ISP/C's executive director, Deborah Howard (1998), in testimony before the House Judiciary Committee, stated concerns about the ability of large, vertically integrated companies dominating regional markets and stifling competition. As new multinationals enter Australia (America Online began operations here six months ago), requiring small ISPs to diversify into additional filtered services in the face of increasing competition with large

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Classification Board, which might look at hundreds of these films, can become a bit desensitised and I think they're just concerned that ordinary citizens' views are fully taken into account. Now at the end of the day if you go through all the processes and you come up with a decision, well I think most people would live with that.

Laws:

Yeah. Have you seen a film called *Natural Born Killers*?

Alston:

No, I think I saw excerpts of it a couple of years ago. I don't specialise in these things, John.

Laws:

Neither do I.

Alston:

I take your point.

Laws:

Yeah, well the only reason I saw it was a couple of our kids were looking at it and I ripped it out of the machine because it was just simply outrageous. It makes *Lolita* look like

Mary Poppins.

Alston:

Is this one of those Tarantino films?

Laws:

I think so and it's just blood and guts and death and immorality and amorality and hideous. So I would, you know, if you could encourage your colleagues to look at that sort of thing instead of getting their knickers in a knot about *Lolita* which is a classical book anyway and was done with a great deal of sensitivity, I think we'd all be better off.

Alston:

Alright, point taken. <

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market players who already maintain filtering infrastructure may be beyond their capital base.

But the ABA's view on filtering is not universally held across government. In testimony before the Committee, the National Office for the Information Economy saw the provision of Industry Codes as a method in which small and large ISPs may be allowed differential rates of compliance with the blocking section of the Bill (128). Given that NOIE is the originator of the legislation while the ABA is the implementor of it, it seems likely that we will not know the extent of compliance costs until after its introduction and subsequent interpretation by the ABA.

For the Australian ISP industry, the Bill appears to propose a significantly tighter regulatory system than they had anticipated in negotiations with government. If industry-wide blocking of offshore content is mandated, then large ISPs with the finan-

cial resources to invest in the staff and equipment will be better placed than small firms to meet the expectations of government. What this may mean is that the government, in attempting to limit the access of unsavoury material by Australians, may speed what is seen as an inevitable rationalisation of the ISP industry in Australia, limiting the market to those companies able, not only to get the best price for bandwidth, but also to comply with the new strict content regulation laws.

Peter Chen is a research student at the Australian National University. He is working on his PhD thesis studying computer network content regulation in Australia over the past decade. (<http://www.anu.edu.au/postgrad/peter.chen>)

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