Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions

11 March 2011

Standing Committee on Legal and Constitutional Affairs
The Senate
Parliament House
Canberra
ACT 2600
Australia

Submission re Inquiry into the Australian Film and Literature Classification Scheme

The Cyberspace Law and Policy Centre was invited to make a submission to the Committee concerning its inquiry into the Australian Film and Literature Classification Scheme. Due to the nature of the Centre's expertise, we have focussed our comments on the relationship between the Scheme and the classification and censorship of on-line content. We thus focus on paragraphs (l), (m) and (n) of the Terms of Reference. Overall, our recommendation is that, given the current government's intention to apply Australian classification standards (and, in particular, restrictions on content classified Refused Classification) to on-line content hosted overseas, the category should be changed to better reflect a growing international consensus on prohibited material.

1. **The Refused Classification (RC) category goes beyond "illegal" material**

   Currently, the RC category goes beyond content that is "illegal" per se. While possession of child pornography or child abuse material is an offence, it is not illegal (except in Western Australia) to possess material that is Refused Classification because, for instance, it contains sexual violence. For example, in New South Wales, it is illegal to sell or publicly exhibit such material, but presumably legal to share it amongst adult friends.

2. **The RC category goes beyond material that is subject to international condemnation**

   Types of prohibited material vary significantly between countries according to their culture, history and value on freedom of speech.[1] For example, some historical, widely available Japanese artwork from the Edo Period depicts bestiality, which would be prohibited according to the Australian RC category.[2] A Japanese film trilogy from the early 1970s, entitled "Hanzo the Razor", contains sexually violent scenes which would fall under the RC category, despite being widely available.

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1 Dieter Grimm, 'Freedom of Speech in a "Globalized World" in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009).
2 "The Dream of the Fisherman's Wife" (, *Tako to ama*), published 1814. This image is available on Wikipedia.

3. **Need for proper rationale for censorship, especially on-line censorship**

The RC category is based around assumptions about public attitudes to particular categories of content. Similarly, a strategy to restrict access to RC content (for example, through filtering by Internet Service Providers either on the current optional basis or on a mandatory basis) is based around assumptions about public concerns and in particular attitudes of children and their parents towards risks associated with on-line content. A better empirical understanding of such concerns would inform policies and laws surrounding classification and censorship of types of content, in particular on-line content. We note, in particular, that calls for submissions in relation to the Internet filtering proposal avoided seeking input on the objectives of a mandatory Internet filter, the ways in which other interests would be affected, or the relative effectiveness of filtering as a methodology. While classification in Australia is theoretically already based on "community standards", the concept is a slippery one.[3]

4. **Need to consider how on-line content is treated**

There is a need for careful consideration as to how off-line classification and censorship regimes are made to extend to on-line content. As argued in a recent article,[4] it cannot be assumed that parity between on-line and off-line classification and censorship schemes in terms of how laws are formulated or what outcomes are sought is appropriate or cost-effective. In particular, achieving similar outcomes for on-line and off-line censorship is not practicable. The sheer size and constant evolution of Internet content makes it impossible to achieve similar classification outcomes off-line and on-line cost-effectively, especially given the subjectiveness of classification criteria. Complete or partial automation of classification or censorship through filtering has its own problems, which are beyond the scope of this submission.

There are currently many anomalies in the treatment of on-line content. For example, on-line content, including text, is classified according to film classification criteria.[5] Further, to the extent the ACMA black list is already the basis for voluntary censorship by Internet service providers, there is a greater risk of overreach than in an off-line context. In particular, the Classifications Board decisions are public,[6] so over-reach of the RC classification can be avoided through appeal and reclassification processes. The ACMA black list is, however, not permitted to be published. Such secrecy is of concern even where blocking the

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3   There is inevitable difficulty in describing *the* "community standards" of a country like Australia with citizens of diverse religious, political and cultural backgrounds. This is not new issue: compare *American Civil Liberties Union v Reno* 929 F Supp 824 (1996) on s.233 of the *Communications Decency Act* 1996, and subsequent cases. There is a risk that vocal advocacy groups will claim to speak for the entire community, which may be more tolerant on many issues. Regular research may help constrain this effect, though the notion of a single 'community' is intrinsically problematic in such a diverse society, and the US Supreme Court has consistently rejected the easy application of an undifferentiated "community standards" rubric across a whole country on the basis that community standards vary between places and populations, as well as changing over time.

4   See Lyria Bennett Moses (2010), 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' 33(2) *University of New South Wales Law Journal* 581 < http://search.informit.com.au/documentSummary;dn=680160331452095;res=IELFSCL > at 10 March 2011.

5   *Broadcasting Services Act 1992* (Cth) sch 7 cl 25 (unless it is an electronic version of a print publication).

6   In fact, their list of RC material can be generated at <http://www.classification.gov.au/www/cob/find.nsf/Search?OpenForm>.

ACMA list is "voluntary," as the choice remains with Internet Service Providers rather than consumers. Many of the categories of content subject to an RC classification are sufficiently vague that the risk of inappropriate censorship is high.

For new forms of content, existing models of classification may prove problematic. This is because the censorship and classification system was designed to regulate centralised distribution of commercially created content, while there is now greater decentralised distribution and creation. For example, there has been a suggestion that mobile phone and social networking applications ('apps'), such as those distributed through Apple's iPhone app store or Facebook, ought to go through a classification process prior to sale or distribution.[7] This would involve a fee ranging from $470 to $2040.[8] The ease of distribution of user-generated content means that many mobile phone and social networking apps are produced by individual amateur developers. Further, some apps are distributed through mobile app stores or social networking sites freely or very cheaply. Such classification fees, when applied to individual developers rather than companies, can be onerous and severely hamper innovation and enterprise. The application of classification standards and enforcement to user-generated content needs to balance the goals of classification with the economic benefits of innovation.

FeesforClassification_FeesforClassification-ComputerGames

5. **If Australian laws seek to restrict access to on-line content generated overseas, there is a need to re-examine classification categories, in particular the RC category**

The government's proposed Internet filter aims to block access to RC content hosted overseas. Even in the absence of such a filter, ACMA's blacklist (which is privately filtered by some Internet service providers) is based on whether content would be classified as RC. As noted above, the RC category is uniquely Australian. To the extent the government wishes to control access to on-line content hosted overseas, it is more efficient to focus on content in narrower internationally-agreed categories, thus enabling international co-operation in having such content removed from the Internet.

Yours sincerely,
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7   Michael Bodey, 'Apps and games to face censor, says ALP' (August 16, 2010) *The Australian* < http://www.theaustralian.com.au/business/media/apps- and- games- to- face- censor- says- alp/story-e6frg996- 1225905609780> at 11 March 2011.
8   See http://www.classification.gov.au/www/cob/classification.nsf/Page/Industry_