Electronic Frontiers AUSTRALIA 20 YEARS

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House, Canberra ACT 2600

1st May 2014

Via online submission

Re: Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014

Dear Committee Secretary,

Electronic Frontiers Australia (EFA) appreciates the opportunity to comment on the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014 (hereafter referred to as the Bill).

EFA's submission is contained in the following pages. EFA is happy to appear before the Committee and to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with on-line freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer based communications systems.

EFA's website is at: www.efa.org.au.

Yours sincerely,

Jon Lawrence, Executive Officer

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Introduction

Classification is central to how digital media is consumed and EFA is a regular contributor to the classification debate in Australia (for example previously arguing in support of an R18+ rating for games).

Australians are increasingly accessing media digitally and this Bill is the first step towards defining how classification of digital content will be handled into the future. It is important to equip Australian internet users to protect themselves from undesirable or inappropriate content – as they currently do with television and film – while preserving their right to view what they choose.

In 2011 EFA made a submission to the ALRC Classification Review whose recommendations resulted in this Bill. In that submission EFA described the difficulties in applying the traditional model of classification to the online environment. The Bill fails to acknowledge these difficulties or provide any policy direction for the Internet other than the status quo. This is a fatal flaw at a time when media is increasingly being consumed online and these difficulties compromise the effectiveness of the entire classification scheme.

The ALRC is not similarly silent; they recommend heavy-handed and inappropriate measures for online classification that would attempt to impose liability at the Internet Service Provider (ISP) level and force non-compliant websites to be taken offline. These particular recommendations are not implemented in the Bill, which is described as a "first tranche" of changes, but they are compatible with it in its current form.

In the age of 'Web 2.0', the majority of online content is created, shared, republished and uploaded by users, not traditional 'content providers'. This means that viewable content, such as YouTube videos and social media profiles, can be uploaded, shared or copied momentarily. With each user now a 'content provider', the ALRC would have a tough task ahead of them in trying to regulate rapidly changing online content.

To ensure that classification enforcement is not farcical the Government should push for reform according to EFA's recommendations, described below, which take into account practical realities, achieve appropriate classification outcomes and provide consistency.

Suitability of applying film and TV guidelines to digital content

There are several aspects of traditional television and film classification that do not translate well to the Internet.

1. Different types of media are classified differently

Different rules apply for the classification and distribution of magazines, films and games. Increasingly all of this content will be delivered online and these distinctions will become meaningless. Many forms of media delivered online either are more appropriately classified by other guidelines, or do not fit clearly into an existing category.

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2. Content is vetted by a central authority

The Internet is borderless, and the majority of Internet content viewed by Australians is not produced, or hosted, within Australia. There is no practical method for preventing viewing of such content, so there is no practical method of enforcement.

3. Content viewed by the authority

There are over one trillion web pages and more than one hundred hours of video are uploaded to YouTube every minute. That's the equivalent of 400,000 full-length movies in cinemas each week. No authority can view more than an insignificant fraction of the material.

4. Ratings applied by the authority

Even if Australian authorities could view a piece of content and decide on a rating, there is no obvious mechanism – equivalent to a label on a box – to advise Australian consumers about this rating.

5. Ratings are enforced at point of importation and sale

There is no importation of Internet content except by analogy. The passage of packets through a router via an undersea cable does not lend itself to inspection by Customs officials. A point of sale, such as it can be said to exist, is likely to be outside Australia. On the Internet, the act of publication and distribution are the same and occur in a matter of moments.

6. Ratings are consistent within a single country

Every country has its own set of ratings – yet countries are technically meaningless in the distribution of online content. To meet traditional classification requirements in every country where it could be accessed, a single piece of content might have to be assessed one hundred different ways.

As it stands this Bill addresses only issue 3, in a way that is incompatible with issue 6, which is discussed in the next section. If a serious attempt was made to enforce this traditional type of classification online it would fail spectacularly.

The weaknesses in the classification scheme are compounded by the Bill's proposal to allow potentially RC content to be referred to the Australian Federal Police. When the Internet contains effectively infinite quantities of RC material, government agencies have the ability to enforce it selectively. In this way censorship can be levelled at particular individuals, organisations or businesses on the basis of classifications that are not applied uniformly to everybody else.

This has a parallel in the existing world of classification. In Jeff Sparrow's Money Shot he researched in detail the minimal and arbitrary enforcement of Australian shops selling X-rated and RC material, numerous and brazenly signposted on city streets. He described it as "the bizarre status quo, in which retailers selling X-rated content were technically illegal but mostly tolerated: a weird equilibrium between competing pressures, a shabby evasion that kept most censorship, most of the time, a safe non-issue."

The standards of the Classification Board also cause much content to be prohibited that is arguably not so serious – for example, fetish pornography involving "candle wax". Australians can currently obtain this material online quite easily. The Australian community will not possibly accept enforcement of a classification scheme for online material unless the ratings provide them the information and flexibility that they want.

EFA's view is that consenting adults should have the right the search for and view or consume any content they wish online, including that which would traditionally be refused classification. Exceptions of course apply for content that is illegal on account of abuse – child abuse and rape, as two examples. Otherwise, the concept of an RC or Prohibited category has no place online.

Tools for self-classification of content

Section 22CA of the Bill will enable classifications to be generated by self-assessments. EFA questions the purpose of these self-assessments on the grounds that they cannot be enforced.

One possible, but flawed, point of view is that because such tools eliminate the labour bottleneck that currently exists in the Classification Board, all online content providers could later be made responsible for correctly classifying their own content in order for it to be legally distributed to Australians. When there is no practical method of enforcing those assessments and large amounts of content available from foreign providers, this serves no purpose.

Practical considerations of online classification enforcement

The Classification Board could be permitted several options when presented with online material that is either misclassified or would be refused classification. It could try to make contact with the owner of the service and request reclassification or removal, force a company over which it has legal jurisdiction to reclassify or remove the content, or utilise law such as section 313 of the Telecommunications Act 1997 to block Australians' access to the service at the ISP level.

EFA believes that all of these options would be a waste of resources and introduce new problems, as elaborated below.

Requesting reclassification or removal

Some content providers take a keen interest in regulating their content. Taking YouTube as an example, they have rules on what types of video can be uploaded , have guidelines for whether a video should be restricted based on the age of the viewer and provide a system by which videos can be flagged for review by a team of humans . This is a fine example of an online content provider self-regulating to protect the interests of both itself and its customers.

The Classification Board has no meaningful role to play. Australian YouTube users who are concerned about a misclassification have the same ability as any government agency to flag a video for review.

Other content providers and websites have no established system for classifying or regulating their content. In the best case a request might bring an issue to their attention and they decide to resolve it in the way the Classification Board would like. With the amount of content available on the Internet, making a request concerning a single item or a single website will not be efficient use of government resources. This is especially true when a provider is indifferent to classification.

In short, non-legally binding requests are, at best, an inefficient use of resources.

Apply legal power to force reclassification or removal

Online content providers who have a presence in Australia or who use Australian hosting providers could potentially be targeted with regulation that compels them to comply with classification requirements. This is a pointless exercise.

If the desired outcome is to prevent consumer access to content that has been refused classification or would be RC, then legal compulsion is completely useless. An Australian who wishes to view that content will be able to purchase it from a provider who is not under Australian jurisdiction, or otherwise obtain the content illegally, probably with minimal difficulty. The result would simply be to prevent Australian businesses from participating effectively in the pornography industry.

If the desired outcome is to prevent incidental viewing of inappropriate content by minors or other vulnerable people, this will again fail to provide any benefit. Australia has no jurisdiction over the vast majority of the enormous quantities of such material online. Particular content providers may aim to provide child-friendly content for those who wish to have it. In this case it will be in the provider's commercial interest to regulate itself effectively. No involvement from the Classification Board is required.

Block services at the ISP level

Blocking internet content that would be refused classification has been the Australian Labor Party's policy for a number of years, although they are not pursuing it at present. As EFA has stated previously this is not an effective solution to any of the described problems and carries serious risk of undemocratic censorship. The policy does not have public support. Enforcing classification decisions online by incorporating ISP-level blocks is not a viable solution.

The ALRC report recommendation 5-7 goes further and proposes that "obligations in relation to Prohibited content apply to … application service providers, host providers and internet access providers." This will impose on businesses severe obligations that have nothing to do with their core business. If enforced, they will be driven out of Australia. It is literally impossible to block access to Prohibited content effectively, for all of the same reasons it is impossible for the ALP's proposed filter to work effectively.

Ignore the content

With the Internet containing ever-increasing quantities of mature and RC content and no practical means of enforcing a classification, ignoring the content is the option that makes the most sense from the point of view of the Classification Board.

EFA believes that Australian Internet users should have responsibility for their own Internet use. Even if it there was a practical way to enforce classification, this would be an unnecessary imposition on everyday people's ability to decide for themselves what they want to view, especially on a non-broadcast medium.

Accordingly, EFA strongly supports empowering Internet users to make decisions about what content should and should not be accessed on their computers. This can be best achieved by means other than enforced classification: educating children and parents about how to use the Internet safely, and promoting the use of voluntary computer and ISP-level filtering products to assist parents, teachers and employers in managing Internet use.

Conclusion

EFA asserts that any attempt by the Classification Board to regulate the online sphere would be inherently futile, and a misallocation of limited government resources. As mentioned above, the internet is, by its nature, difficult to regulate. Content that has been classified or blocked is easily replicated, diverted and can be accessed by a skilled user. Online content is not subject to cross-jurisdictional borders, and any attempts to regulate locally hosted content would serve to direct consumer traffic to overseas hosts.

In accordance with proposed amendments to section 22CA, the classification tools proposed thus far are limited to one – an online questionnaire. EFA is not in a position to submit recommendations on the viability of classification mechanisms if they are limited to one proposal with little substantial elaboration. EFA does not wish to submit any alternative classification tools, as we are firmly against any online content classification in any form.

Most online content that is consumed by Australians is oligarchic in nature - it is hosted by a relatively small number of companies who contain Australian subsidiaries, such as Google and YouTube, Facebook, Twitter, Instagram, Vimeo and other like hosts. These content hosts have, and still do, operate rather effectively on a 'crowd-sourced' classification system; users may either 'flag' offensive content, and/or the host classifies content autonomously. Self-regulation is a modern, effective system that will encompass most online content, with minimal government resources or intervention.

EFA also expresses concern over the methods the Classification Board has at their disposal to classify and block online content. It is of grave concern to EFA that any powers granted to the Classification Board to regulate online content may create a hybrid of Labor's formerly proposed internet filter,

mentioned above. EFA is strongly against any form of censorship, filtering or blocking of online content, save for content deemed to be criminal in nature.

Recommendations

Accordingly, EFA makes the following recommendations:

1. Abolishment of a classification system for online content;
2. The phasing out, or minimisation, of the regulatory role of the Classification Board for online content;
3. Improvement of the relationship and communication between the government and online content hosts, so as to encourage a more efficient self-classification system;
4. The restricted use of existing laws that allow a public authority to block online content, such as s 313 of Telecommunications Act 1997 (Cth), with the exception of criminal content; and
5. Review laws regarding illegal content (such as child abuse material) and adequately resource the enforcement of these laws; and/or,
6. In the alternative, classification tools (such as those proposed in s 22CA) be substantiated and clarified, before becoming subject to further input from stakeholders. As they stand now, they are limited to one proposed tool (online questionnaire) which, in itself, lacks any deeper explanation.

EFA asserts that the Classification Board would be largely powerless to classify online content, and that any attempts to do so would be an inefficient use of resources. EFA also asserts that the existing system of self-classification by larger hosts is an effective strategy. These hosts are generally compliant with user or government requests, and if not, fall within the jurisdiction of Australian law.

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