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Creating Parallels in the Regulation of Content: Moving from Offline to Online

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I INTRODUCTION

The regulation of obscene and controversial content in works available in Australia has a long and equally controversial history. In its current state, this regulation forms a complex maze of federal and state legislation, the effect of which is to restrict the availability of some publications, films and computer games based on their content. The rationales for such restrictions are various, but include: the desire to protect children from material that might harm or disturb them; the desire to forewarn people so they are not exposed to material they may find offensive; and the desire to respond to community concerns about certain categories of material, such as depictions that condone or incite violence (particularly sexual violence) and the portrayal of people in a demeaning manner.[1] There are also restrictions on illegal content, including child pornography and encouragement of crime or terrorism.[2]

The same concerns, about children as well as unsolicited and harmful material, apply to content available through traditional means such as retail outlets and to content accessible on the internet. Accordingly, there have been various amendments to Australia's content laws that draw on traditional regulation of content to inform the regulation of materials online. Currently, most regulation of online content is limited to that hosted in Australia. The current political landscape features a proposed mandatory internet filter at the Internet Service Provider ('ISP') level, including for mobile devices.[3] The logic behind this new proposal is similar to that behind earlier extensions of content regulation into the online context, namely that what applies offline ought to apply online.[4] What I shall refer to as an argument for parity has in this way justified both past and current attempts to regulate internet materials.

Despite the intuitive appeal of parity – treating like cases alike – there are difficulties in applying this to online/offline content regulation. Parity is a word of many meanings: one can strive for consistency of purpose, consistency of outcome or consistency of terminology. Each type of parity has a different rationale that only applies in some circumstances. The fact that a law does not apply in a new context, for example, may result from either under inclusiveness of language or deliberate and justifiable narrow drafting. Further, focusing on the need for parity ignores other aspects of the interaction between technological change and pre-existing law. New technologies (such as the internet – relatively new at least in the context of content regulation) require a holistic legal response that recognises both the extent to which existing rules will already apply to new forms of conduct enabled by those technologies and the fact that new technologies can undermine the basis for those rules even when applied to old forms of conduct.

In order to evaluate arguments that an internet filter is necessary in order to enhance parity between online and offline content regulation, it is helpful to begin with a short background summary of existing content regulation in Australia (Part II below). Part III of the paper demonstrates that the *perceived* need for offline/online parity has been a significant part of the motivation for past and proposed regulation of internet content. Part IV explains the diverse meanings and justifications for arguments based on the desirability of parity. Part V outlines some of the arguments commonly made against parity of regulation online and offline, namely that the internet either *cannot* or *should not* be subjected to similar regulation as exists for offline materials. Part VI explains how a focus on the need for parity between offline and online content regulation distorts the debate surrounding online content regulation and proposes a more holistic perspective for law reform in this area. Part VII concludes.

II THE LANDSCAPE OF CONTENT REGULATION IN AUSTRALIA

Content regulation in Australia is complex and stems from a range of federal and state laws. As well as direct censorship measures (prohibiting particular conduct, such as publication, in relation to some categories of material), there are indirect controls on content (through laws such as those concerning defamation and copyright). This article's focus is on direct censorship, primarily of material that is or would be rated 'Refused Classification' ('RC'), which is the focus of the filtering proposal. In this

sense, the Australian content regulation regime centres around the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and the various state enforcement Acts.[5] Under this regime, classifications are formally assigned to books, films and computer games by the Classification Board (and, on appeal, by the Classification Review Board). Classification decisions are guided by the *Act* itself, in particular section 11, as well as various enacted guidelines and codes.[6] The legislation provides for a range of classifications for content in each of three categories – publications, films and computer games. For films, a classification (G, PG, M, MA15+, R18+, X18+ or RC)[7] is given to indicate the level of classifiable elements (themes, violence, sex, language, drug use, nudity) contained therein.[8] Where a classification other than G or RC is given, the Classification Board also determines what consumer advice should be given about the content of the film.[9] RC is the highest (most restrictive) classification for publications, films and computer games.[10] The RC rating can be given for a variety of reasons, including the advocacy of terrorist acts,[11] instruction in crime including the use of proscribed drugs or promotion of proscribed drug use, [12] and incorporation of sexual violence or live portrayals of certain sexual 'fetishes'.[13] In July 2010, the government proposed a review of the RC category to bring it into line with community expectations.[14] The precise scope of content to be subject to the proposed internet filter, which is to find its basis in the RC category, is thus, at this stage, unknown.

Under the state and territory enforcement legislation, material classified RC cannot be sold, publicly exhibited or possessed with intention to sell.[15] There are further restrictions that vary by jurisdiction and type of material. In Western Australia and parts of the Northern Territory, *possession* of RC material is prohibited (elsewhere possession is only an offence if combined with an additional element, such as intention to sell).[16] In NSW and the Northern Territory, it is illegal to disseminate 'indecent articles', even on a non-commercial basis.[17] Delivery of RC films and computer games is illegal in Tasmania.[18] Child pornography is subject to strong (criminal) restrictions throughout Australia – possession of child pornography is prohibited in every Australian jurisdiction[19] and its distribution using a telecommunications service is prohibited at the national level.[20]

There are significant differences between the treatments of publications, films and computer games. The sale and public exhibition of unclassified films and computer games (with the exception of exempt films and computer games)[21] is prohibited in *every* state and territory.[22] The onus is thus on the publisher or distributor to apply for classification and pay the required fee.[23] A publication does not need prior classification unless it is 'submittable', meaning it contains descriptions or depictions that either are likely to cause it to be classified RC or are likely to cause offense to a reasonable adult to the extent that it should not be sold or distributed as an unrestricted publication, or are unsuitable for a minor to see or read.[24]

Television and radio broadcasting are regulated under the *Broadcasting Services Act 1992* (Cth). Under this *Act*, the government uses licences to exercise extensive controls over who may make television and radio broadcasts (whether using the radiofrequency spectrum or otherwise).[25] The purposes of this legislation include but go well beyond the goals of restrictions on content to include such matters as promotion of the Australian content.[26] Among other things, licensees are prohibited from broadcasting material classified RC by the Classification Board.[27]

In addition, schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth) are relevant to online content regulation.[28] Schedule 7 regulates 'content services', defined as services that deliver content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of a carriage service and also services that allow end users to access content using a carriage service.[29] There are a list of exclusions, including traditional broadcasting, 'datacasting', search engines and ephemeral communications such as internet telephony, email and instant messaging.[30] As well as containing provisions that regulate content directly, the schedules provide for the registration of codes of practice prepared by relevant industry bodies. Codes of practice are registered pursuant to these provisions, creating a scheme of co-regulation.

Schedule 7 contains detailed provisions for content provided by a hosting service with a connection to Australia. Rather than classify the entire 'Australian' internet, there are provisions under which content hosts *can* apply to the Classification Board for classification of content.[31] However, content hosts are not required to apply for classification. Instead, regulation relies on consumers to lodge complaints when they see what they believe is 'prohibited content' or 'potential prohibited content'. 'Prohibited content' includes content classified RC or X18+ as well as content classified R18+, which is not subject to a restricted access system, and some content classified MA15+, which is not subject to a restricted access system.[32] 'Potential prohibited content' is unclassified content where there is a substantial likelihood

that, if classified, the content would be prohibited. Unless it believes a complaint is frivolous, vexatious or not made in good faith, the Australian Communications and Media Authority ('ACMA') must investigate such a complaint. If ACMA forms the view that the content is prohibited or potentially prohibited and the content is hosted in Australia, ACMA must issue a final or interim take down notice (depending on whether the content is prohibited or potentially prohibited). If an interim take down notice is issued, ACMA must apply to the Classification Board to have the content classified. Take down notices must be complied with by 6pm on the next business day.[33]

Some states also have specific laws concerning the distribution of 'objectionable material' or 'objectionable matter' online. Victoria and South Australia both prohibit (subject to defences) the use of an online information service to make such material available.[34] Similarly, Western Australia and the Northern Territory prohibit (again, subject to defences) both transmission and obtaining of such material via a computer service.[35]
In addition to these existing measures, the government has proposed the introduction of a mandatory internet filter to be installed at the ISP level throughout Australia. The proposal stems from a 2007 election promise by Senator Stephen Conroy, then the Shadow Minister for Communications and Information Technology, in the Labor party's 'Plan for Cyber-safety' ('the Plan').[36] The Plan included a promise that, if Labor won the election, it would require ISPs to offer a 'clean feed' internet service to homes, schools and public internet points accessible by children.[37] The Plan morphed in various ways after Labor won the 2007 election and, by December 2009, comprised a proposed *mandatory* internet filter installed at the ISP level blocking access to material that would be classified RC.[38]

Under the proposed filter, complaints about material will be made to ACMA in the first instance. Material assessed by ACMA as potentially RC will be added to the RC Content List for filtering immediately, but will also be referred to the Classification Board, whose decision will ultimately bind ACMA. Unless requested by the Australian Federal Police not to do so, ACMA will also inform the owner of the material or content service provider, if either is readily contactable and identifiable, of its decision and reasons. The RC Content List will also include Uniform Resource Locators ('URLs' – the unique identifiers of individual sites) of child abuse imagery on international lists from 'highly reputable overseas agencies'. Those seeking access to a filtered URL will see a standardised 'block' page, which will include information about avenues for appeal or review, as well as information on how to obtain from ACMA its reasons for blocking the site. The processes leading to placement of URLs on the RC Content List will be subject to an annual review by an independent expert.

The ultimate fate of the internet filtering proposal is unclear. The government has acknowledged concerns about the internet filter but expressed confidence in Senator Conroy's ability to design an appropriate filtering scheme.[39] No legislation had yet been introduced into Parliament prior to the announcement that a federal election would be held on 21 August 2010. Senator Conroy has stated that legislation establishing mandatory internet filtering would be postponed until after a review of the RC category to decide whether changes are necessary to reflect changes in community standards.[40] However, it seems likely at this point that, having been re-elected, the Labor government will seek to establish an internet filtering scheme similar to that proposed during its previous term.[41] Politically, the question is whether such a scheme would be passed by Parliament, given the likely opposition of the Liberal Party, the Greens and independent Rob Oakeshott.[42] Even if no internet filtering policy results during the current government's term, the internet will remain a primary source of content and concern. Thus governments will continue to fret about its regulation, citizens will continue to insist that certain materials in any medium demand restricted viewing, and arguments about how best to regulate the internet will remain at the fore.

III THE SEARCH FOR ONLINE/OFFLINE PARITY

The extent of content regulation in Australia is inevitably controversial. Whatever one's view on censorship, there are at least some circumstances in which the dissemination of information and images causes harm. Child pornography is an example – it is generally accepted that children are harmed whenever child pornography is created, disseminated and viewed.[43] There is less consensus surrounding the harm caused by commercialisation and public display of other RC material, but there are nevertheless evidence and arguments in favour of this view.[44] Although commercialisation and public display of RC material is prohibited throughout Australia, there is divergence in how mere possession is treated, presumably reflecting a view either that RC materials are not universally harmful or that prosecution for possession would not be a cost effective means of countering harm. On the assumption that harm is caused by the sale of RC material (as presumably determined by democratic state and federal governments), it can occur equally whether the material is sold in retail outlets or available commercially for

download in Australia. It is thus not surprising that politicians have sought to exercise similar control over online content as they have traditionally exercised over offline content, at least with respect to content that has been or would be classified RC.

While early reports on the extension of content regulation to internet services took a variety of approaches, nonetheless most referred to online/offline parity. The Broadband Services Expert Group recommended in 1994 that *existing* classification systems be applied to equivalent material commercially available online, with liability focussed on content providers rather than carriers.[45] The Computer Bulletin Board Systems Task Force considered the application of laws regulating content to material disseminated through bulletin boards and noted the importance of consistency between offline and online classifications, as did some of those making submissions.[46] The Attorney-General's Department and the Department for Communications and the Arts released a consultation paper in 1995 identifying the need to align content regulation regimes for new services with regimes that have been adopted for other media.[47] The Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies in its reports released in November 1995 and June 1997 expressed the belief that 'Australia must consistently apply its standards to new technologies'.[48] The Australian Broadcasting Authority released a report in 1996 adopting a more nuanced approach to parity between online and offline content regulation, stating: 'it is desirable that there is some consistency between online services and the traditional media in terms of compliance with community standards' and that publication of objectionable material 'should not have a place online'.[49] But it also recognised that the *enforcement mechanisms* online would be different to those in the offline world.[50] It was attracted to the Platform for Internet Content Selection ('PICS') rating system,[51] which would allow for internet content to be subject to a similar rating system as was applied to offline content.

Following a further report by the Minister for Communications and the Arts and the Attorney-General in July 1997,[52] the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) was introduced. The second reading speech notes that 'it [is not] acceptable that community standards applicable to conventional media do not apply to the Internet – what is illegal or controlled offline should also be illegal or controlled online'.[53] Then Senator Richard Alston commented separately that to do nothing 'would mean that community standards applicable to other media would not apply to the Internet'.[54] At around the same time, a press release by the acting Minister of Communications, Information Technology and the Arts stated that '[c]laims that the new legislation is aimed at censorship are completely untrue. It merely applies to the internet the same classification systems as apply to other forms of media.'[55] The idea that online censorship should be imposed along the same lines as offline censorship was often cited by supporters of the law.[56] Even some opponents to the legislation implicitly embraced the desirability of parity between offline and online content regulation, opposing the legislation on the grounds that it imposed *greater* censorship of online content (for example, bringing certain forms of expression under the regulatory regime for the first time[57] and treating websites viewed privately as being on public display).[58]

The *Communications Legislation Amendment (Content Services) Act 2007* (Cth) was also motivated by a desire for equivalent treatment of different media, in particular by creating a common regime for internet content and content delivered over mobile devices. The second reading speech notes that '[t]he main focus of the [B]ill is to extend the general approach adopted by the government in relation to content regulation to those services where it considers adequate safeguards are not currently in place'.[59] The amendments to the *Broadcasting Services Act 1992* (Cth) in 1999 and 2007 ensured that content hosted in Australia is subject to some regulation.[60] However, content hosted outside Australia and available inside Australia over the internet is subject to very little regulation. Service providers are required to make available filtering products for those who wish to use them, but are not penalised for making available abroad content that has been or would be rated RC. This 'gap' in the regulation of online content has motivated the current proposal for a mandatory internet filter. Like its predecessors, desire for parity between offline and online content regulation fuels this latest proposal.

Although legislation has not yet been introduced into Parliament, statements by Senator Conroy evidence this motivation. In a Senate Estimates hearing, he described the proposed filter as 'enforcing existing laws'.[61] He has stated on radio that an internet filter is 'designed to try and make it the same in a library, the same in a newsagency, the same at your cinema, the same on your TV, and the same that currently applies under Australian law for Australian hosted websites'.[62] Senator Conroy's perspective is supported by Prime Minister Gillard, who stated in a radio interview during the 2010 election campaign,

> I am happy with the policy aim [of the internet filtering proposal] and the policy aim is … if there are images of

> child abuse, child pornography that are not legal in our cinemas, you would not be able to go the movies and watch that ... why should you be able to see them on the internet?[63]

In a speech at the Sydney Institute, Senator Conroy criticised those who 'want to argue that on the internet, people should be able to publish anything they like – regardless of whether it contravenes laws in the offline world'. [64] He has also argued against internet exceptionalism, pointing out that the internet is not 'something special' or 'a mythical incredible thing', but is 'just a communication and distribution platform'.[65] Supporters of the internet filtering proposal make similar observation, as evidenced in the submissions to the DBCDE of the Uniting Church of Australia Synod of Victoria and Tasmania[66] and Wireless Broadband Australia.[67] As was the case with the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), its opponents also use parity arguments to express concern about over regulation. Electronic Frontiers Australia is concerned that a filter will censor *more* than is censored offline; for example, it argues that the filter should not censor RC material as most RC material can be legally *possessed* throughout most of Australia.[68] Other opponents of the proposed internet filter confirm the desirability of parity between offline and online content regulation.[69] For cyber-libertarians concerned that online censorship goes further than would be permitted in other media, the call for parity takes the form that 'what is legal offline, should be legal online'.[70]

IV THE PROBLEMS OF PARITY

Like the related but distinct notion of 'technological neutrality', the quest for parity between offline and online regulation appears to be undeniably good.[71] The logic is attractive – if society has decided to punish copyright infringement, defamation, fraud and the distribution of child pornography for good reasons, then prima facie it should not matter that the conduct concerned takes place using a different technological environment.[72] Thus the notion that 'what applies offline should apply online' has found its way into a variety of policy documents internationally, at least as a starting point for regulation.[73] The real difficulty with the notion of parity is that, like the related but distinct concept of technological neutrality, it conceals a range of meanings.[74] The focus can be on the purposes of the regulation, the outcome of the regulation or the formulation of the regulation.[75]

A focus on *purposes* suggests that a regulatory regime should have a non-technological objective. For example, content regulation should have goals such as 'protecting Australian children from harmful and obscene content', not 'protecting Australian children from harmful and obscene television programs'. Thus, parity of purpose would suggest that it would be inappropriate for government to consider the need for content regulation only in an offline context.

A focus on the *outcome of regulation* goes further than this, suggesting that the outcome of regulation ought, to the extent possible, to be the same independent of media. According to this logic, content regulation ought to be crafted to increase the extent to which it is equally difficult to access illegal or restricted content whatever medium is employed. The focus here is on outcome rather than drafting – in order to achieve a particular outcome, it may be necessary to treat different technologies differently. For example, because receipt of unsolicited faxes costs more than receipt of unsolicited emails, creating parity in the costs incurred due to unsolicited communications would require more restrictions on unsolicited faxes than on unsolicited emails.[76]

A goal aligned to a focus on achieving the same outcome in offline and online contexts is the avoidance of inefficient discrimination between technologies. If two technologies can deliver similar outcomes, the government should not 'pick winners' but should draft laws in ways that make relevant distinctions only. If a legislature wants to ensure cars sold in its jurisdiction have safe braking systems, the most efficient method is to mandate performance standards, leaving technical details to the market. A policy of non-discrimination goes some way towards explaining why parity of outcome may be thought to be a desirable goal. However, it is not relevant in every circumstance. The link between non-discrimination and parity of outcome assumes that the availability of a technology is only important to the extent that it helps achieve a goal specified in the legislation. In a sense, a government that states that only communications technologies that allow for a particular level of government control over content are permitted is not discriminating between different communications technologies. It is allowing the market to determine which technologies will meet what it considers to be society's needs. Nevertheless, such a law could effectively render internet communication illegal.

The difficulty of an argument for parity of the outcome of regulation online and offline is that significant costs may be incurred in achieving that parity. If the costs (both economic and otherwise) of imposing regulation online and offline differ, then achieving equivalent *effectiveness* online and offline does not guarantee equivalent *cost effectiveness*.

A focus on *formulation* suggests that laws should be written in technology neutral terms. If parity is a goal in this sense, censorship laws would not refer to 'films', 'television' or the 'internet' but would rather be crafted in the neutral language of 'content' and 'media'. The usual reasons that this is considered to be desirable are the need to avoid unintended discrimination between technologies (and users of different technologies)[77] and the need to ensure that the law's objectives continue to be achieved as technology evolves.[78] Assuming continued evolution and convergence of communications technologies, the use of overly technology specific language in censorship laws risks arbitrariness when the law is applied in the future, generating a need for frequent amendment. Parity in the formulation of legislation also decreases the costs of having multiple legal regimes governing similar conduct.[79]

While technology neutral drafting in legislation can go some way towards achieving longevity, there are also hazards. A loss in precision can render legislation too broad to be operationally effective.[80] As the Earl of Northesk stated during a House of Lords debate on the *Regulation of Investigatory Powers Act 2000* (UK), 'in [the bill's] strident efforts to be technology neutral, it often conveys the impression that either it is ignorant of the way in which current technology operates, or pretends that there is no technology at all'.[81]

In conclusion, the notion that there should be parity between content regulation offline and online can be interpreted in various ways. Since these different meanings of parity can have different justifications and exceptions, it is important to consider which meaning has been embraced in a censorship context in Australia. It cannot be a focus on formulation as content regulation (past, current and proposed) is replete with distinctions based on the form of content and the medium employed in its dissemination. Much of the language used by politicians, especially in relation to earlier amendments, reflects a focus on parity of purpose. There is concern about doing nothing but there is also recognition that the regulation will not only look different, but also have different outcomes.[82]

The rhetoric surrounding the current proposal to filter the internet goes beyond purpose, to a focus on outcome. The filter will block a prescribed list of URLs, making it more difficult (but not impossible) for Australians to access content that has been reported to the ACMA and found to deserve an RC rating. Paraphrasing Senator Conroy and Prime Minister Gillard, if RC content is hard to find in a library, it should be hard to find on the internet. In other words, the goal of the filter is to create parity in the degree of difficulty encountered by Australians seeking to access RC content in online and offline environments. The parity sought is parity in the effect of the filtering scheme compared with the effect of censorship law operating offline. While achieving parity in outcome is a significant motivation for the filtering policy, Senator Conroy has recognised that the filter is not a 'silver bullet'.[83] Parity in material available online and offline is thus seen as something to work towards rather than something the filter will achieve absolutely.

The desire for similar outcomes for offline and online content regulation is, however, a contested ambition. If similar outcomes are impossible or can only be achieved with significant costs or negative side effects not encountered offline, then an attempt to achieve parity of outcome is undesirable. These counter arguments are explored below.

V TRADITIONAL ARGUMENTS AGAINST PARITY

A Arguments that Parity of Outcome for Online and Offline Regulation is Impossible

The first potential objection to the aspiration of achieving a similar level of content regulation online as offline is the argument that the internet extends beyond national boundaries and hence *cannot* be regulated. This idea stems from the mid-1990s and is typified by three oft cited sources. The first is John Perry Barlow's *Declaration of the Independence of Cyberspace*, which sought to tell the governments of the 'Industrial World' that 'You have no sovereignty where we gather'.[84] The second is an article by Johnson and Post claiming that Cyberspace was essentially a new jurisdiction.[85] The third is the comment of John Gilmore that the internet 'interprets censorship as damage and routes around it'.[86]

Today, the facilitators of such cyber-libertarian sentiments are online mechanisms for anonymity and encryption as well as peer-to-peer networks. The government is aware of the fact that sophisticated users will be able to avoid the filter through circumvention techniques.[87] It is also aware of the fact that the proposed internet filter will not have any effect on material distributed over peer-to-peer networks,[88] as this is not yet possible with current technology without negatively affecting legitimate peer-to-peer traffic.[89] This limitation is seen as especially relevant to the government's internet filtering proposal, as peer-to-peer networks are significant distribution platforms for child pornography.[90]

The decentralised and international nature of the internet changes *how* it can be regulated, but it does not make regulation impossible. Ultimately, if the government were to place its goal of content regulation above all other goals (including economic progress and future electability), it could ensure that its content regulation regime remained as robust as it was pre-internet. For instance, the government could (in theory) ban the sale or use of devices capable of accessing the Internet or outlaw the provision of internet access in Australia. In either case, it would become as difficult to obtain RC rated material online as it is offline. Neither would render access impossible, in that underground networks would continue both online and offline, but levels of offline *and* online access would be low. Marginally less drastic would be restricted internet access (for example, requiring user licenses), extensive filtering and surveillance, combined with severe penalties for those caught disseminating or possessing illegal material. These options may be distasteful, but illustrate that arguments countering the objective of achieving parity in the outcome of offline and online content regulation need to rest on why this is *undesirable* rather than assume that it is *impossible*.

Thus the current consensus is that many aspects of the internet can be and have been subjected to a level of control, both directly and indirectly.[91] The availability of technologies that identify the location of an internet user make it easier to assert jurisdiction over sites hosted internationally.[92] More importantly, there is greater awareness of indirect means by which control can be exerted (and not only by governments), generally through pressure on intermediaries to prevent their users accessing, finding or paying for particular content.[93] Around the world, internet service providers, search engines and domain name registries are pressured or required by governments to remove access to prohibited material.[94] Financial intermediaries such as credit card companies and banks can block the flow of money to sites making illegal sales, whether of cigarettes or child pornography.[95] Major distributors of content such as YouTube have policies concerning offensive and pornographic material, which in practice has a significant impact on the content people will 'stumble across' online.[96] Where the government has strong concerns about content, as in the case of child pornography, finding and penalising individuals will also have some effect in controlling would be creators, distributors and users.[97] Although the internet is in many ways anonymous, there are still means to track down perpetrators, including through credit card payments.[98] There are also aggressive techniques available to control information online (especially by authoritarian governments) including denial of service attacks and surveillance designed to 'encourage' self-censorship.[99]

While control over content disseminated online is never perfect, in that it will not prevent all access to all prohibited material, online content regulation need not be a 'silver bullet' to be effective at limiting access to certain categories of material.[100] Even the offline content regulation regime does not attempt prevent all access to material that has been or would be rated RC. In many states, most RC material can be possessed, or even disseminated for free, without penalty. Thus parity in the outcome of online and offline content regulation may be possible; the real question is whether it is desirable.

B Arguments that Online Regulation Potentially Imposes Greater Costs than Offline Regulation

The primary question that an attempt by government to further restrict the accessibility by Australians of RC content must answer is whether the benefits of such regulation outweigh its costs. As well as the financial costs of implementing filtering at the ISP level, there are risks that filtering will have significant negative effects, in particular on freedom of speech.[101]

Enhanced freedom of speech is generally seen as a particular advantage of internet communication. On the internet, publication is not restricted to an 'elite'. Internet users are both content creators and content consumers and the two roles often work in dialogue. As a result, the internet has been described by one commentator as 'the most democratic speech technology yet invented',[102] and by a US federal judge as 'the most participatory form of mass speech yet developed'.[103] The uniqueness of the internet as a platform for free speech was a point made by Google in its submission to the DBCDE and by the US Ambassador to Australia.[104] The international nature of the internet makes filtering particularly problematic as it may encourage or confer legitimacy on filtering by repressive regimes and may weaken Australia's ability to adopt a stance on repressive censorship internationally.[105]

The actual impact of an internet filter on free speech will depend on its accountability and transparency.[106] It is here important that the government will not publish (nor permit to be published) the list of URLs that are blocked by its filter.[107] Publication of a list URLs where RC material is found would generate a guide to prohibited content for those able to circumvent the filter. In particular, it would be a helpful tool for those searching for child pornography material abroad, making Australia unhelpful, to say the least, in international efforts to limit the dissemination of child pornography. However, failure to publish the list raises significant concerns. It generates a risk that the filter could be used to screen out politically controversial

material, as was the case when it was discovered that the ACMA blacklist included a pro-abortion site.[108] Transparency and accountability measures, such as the appointment of an independent expert with oversight powers, may go some way towards reducing this risk, but no measure is likely to be as effective as the level of publicity given offline classification decisions.

Whatever measures are introduced into the legislation to reduce the likelihood of material outside the RC category being filtered, there remains the concern surrounding 'scope creep'. Once hardware and software is installed at nodes through which Australians access the internet, future governments may be tempted to extend the scope of the filter.[109] There will be pressure from powerful players and political lobby groups to prevent Australians accessing sites used for file sharing (legal and illegal), gambling sites, more pornography sites (such as those that have been or would be rated X18+) and, possibly, sites promoting unpopular political ideas.

As well as significant potential negative impacts on freedom of speech, internet filtering may reduce international collaboration in removing child pornography material from the internet and prosecuting those who disseminate it.[110] National efforts to protect content reaching a particular country such as Australia could arguably be better directed towards international efforts to remove material from the internet.

Unlike the arguments that online content regulation cannot be as effective as offline content regulation, arguments that online content regulation can only be as effective at greater cost can counter arguments based on parity of outcome. If similar outcomes can only be achieved by incurring greater costs (both economic and non-economic), then internet filtering is not as cost effective as offline content regulation. The existence of offline content regulation cannot, of itself, justify legislation designed to achieve similar restrictions online. If content regulation were considered supremely important, society should perhaps avoid the internet altogether. However, the question of how existing policies and laws should 'keep up' with new technology is more complex than either prohibition or transposition.

VI BEYOND PARITY

The debate surrounding regulation of online content has a tendency to become simplified and polarised. It has been compared to debates about other sensitive and polarising topics such as abortion.[111] In the course of the political debate, reference to the idea that 'what applies offline, should apply online' is often countered by arguments about the internet's uniqueness. Ultimately, both sides talk past one another.

The debate around internet filtering is further complicated by the fact that the existing regime of content regulation is controversial, even offline. It has been criticised because of its complexity,[112] the potential for over censorship,[113] and the risk that changing cultural standards have rendered existing classification criteria obsolete.[114] No doubt some of these concerns have led to the decision to prioritise review of the RC category ahead of implementation of internet filtering. For current purposes, it is useful to place these general critiques to the side in order to consider the interaction between a relatively new technology (the internet) and the existing legal regime for limiting content to which Australian adults and children are exposed. Clearer thinking about this relationship, guided by experience with past technologies, can offer some useful insights.[115]

New technologies, such as the internet, enable new forms of conduct. Most relevantly, it is now possible to download content from computers abroad in less than a minute. While much content downloaded or accessed over the internet consists of useful information, political ideas, social networking, and commercial advertising and products, there is also material that many are concerned will cause harm, either to individuals (as in the case of defamatory material), children (as in the case of pornography) or to the population generally (as in the case of material that has been or would be classified RC). In the case of some technologies, such as human reproductive cloning, concerns are sufficiently strong to justify a ban. While a ban on using the internet would clearly be extreme, there remain strong concerns about content and a push for greater regulation.

While in its earliest days the internet was not subject to any explicit regulation, new forms of conduct taking place online were not free from all regulation. It is rather like an observation by Oliver Wendell Holmes, that suit could be brought for breaking a churn despite the absence of any law concerning churns.[116] Thus, even before Australia's first internet specific content regulation,[117] certain conduct on the internet was already illegal. For example, the fact that possession and dissemination of child pornography was illegal made it illegal to post such materials to a website or send them to another person by email. Similarly, Australian defamation law has been held applicable to websites accessible from Australia.[118] For at least some aspects of content regulation, parity between offline and online regulation already existed *in the sense that the language of statutes was sufficiently broad to extend to online conduct*. However such parity

of formulation does not guarantee parity of outcome: it remains easier to bring defamation proceedings against local defendants, and child pornography remains relatively easy to access online.

Of course, not every statute regulating content offline has always been applicable to the internet. Those creating, hosting or transmitting content online did not require a broadcasting licence. But broadcasting legislation was limited to broadcasts for a reason. It would have been possible to employ technology neutral drafting in that legislation had it been seen as applicable to any means of communication. But it was not seen that way. The goals underlying the legislation (including matters such as spectrum allocation) were seen as having limited applicability. Regulation of the internet that mirrored the main provisions of the *Broadcasting Services Act 1992* (Cth), effectively requiring that every provider of online content be licensed, would be absurd. Among other problems, it would have a far greater impact on freedom of speech than a similar requirement for broadcasters. However, few have argued for parity in online and offline content regulation in this sense.

The fact that some legislation predating the internet does not apply to conduct taking place online does not necessarily mean that the legislation ought to be amended to increase its scope. In other words, parity of formulation is not always appropriate. Generally speaking, an argument for such parity will only be appropriate (without further justification) where (1) the goal underlying the original legislation applies equally to old and new forms of conduct, and (2) the legislation will be as cost effective in the new context as in the old and, in particular, negative side effects will not be greater. Sometimes, existing laws can be extended to new contexts, justified by parity of formulation, without extensive controversy. For example, pre-internet, many types of contract needed to be written and signed in order to be binding. There was a great deal of uncertainty as to whether and how transactions entered into online could meet these requirements. The solution was the *Electronic Transactions Act 1999* (Cth), enacted throughout Australia.[119] The goal of this legislation was to ensure that, provided equivalent standards could be met, documents could be signed electronically and still meet the requirements of existing legislation. Words such as 'writing' and 'signature' in most legislation thus took on a technology neutral meaning.

An argument for parity of formulation in the *Classification (Publication, Films and Computer Games) Act 1995* (Cth) and state enforcement legislation presents a more difficult case. The purpose of this legislation is to assist consumers who may wish to avoid some categories of content, protect children from harmful content, and restrict the circulation of content that has been or would be rated RC (in the states, X18+ content is also technically restricted, although can be easily obtained by mail order from the ACT). Assuming that these goals are worthwhile, they are equally applicable offline and online.

Nevertheless, a case for equivalent treatment of online and offline communications technologies in the formulation of legislation regulating content would be less straightforward, and would depend on the provision being considered. There is no question of extending broadcasting requirements to Australian websites. However, aspects of the formulation of schedule 7 of the *Broadcasting Services Act 1992* (Cth) closely track the *Classification (Publication, Films and Computer Games) Act 1995* (Cth) and state enforcement legislation, at least for content hosted in Australia. In particular, schedule 7 employs the same classifications that are used for films offline (G, PG, M, MA15+, R18+, X18+ and RC) and the same classificatory body makes final decisions on classification. There are, however, significant differences. For example, online text is generally classified on the same criteria as offline films rather than offline publications.[120] In addition, the availability of X18+ films in the ACT is not mirrored online and non-commercial dissemination of RC content online is prohibited even where it would be permitted offline. The latter distinction means that the web is effectively treated as a public place, despite the fact that access may be in private, illustrating the difficulties in drawing parallels between online and offline conduct.[121]

One aspect of existing legislation that the government intends to include as part of its internet filtering proposal is the RC classification (albeit potentially modified after a general review of that category). The logic (as was the case for schedule 7 of the *Broadcasting Services Act 1992* (Cth)) is that the same definition should apply to content that is censored both offline and online. However, as noted above, this logic is only compelling if the RC category is as cost effective to apply in the new context as in the old. The difficulty with the RC category in the context of content hosted abroad is that the category is purely Australian. There are significant differences between countries as to what types of content are prohibited, depending on culture, historical content and differences of opinion on where the balance between freedom of speech and other interests lies.[122] While national divergence due to cultural sensitivities may be justifiable offline and for online content hosted in Australia, it may be easier to regulate international content by reference to international categories. For example, there is some level of international consensus

surrounding child pornography, with international efforts to stem its production, distribution and possession.[123] Requests for assistance from abroad content hosts and law enforcement can be used to remove child pornography sites from the internet. These techniques are not available for all content that falls within a uniquely Australian category such as RC. In an international context, it may be worthwhile focussing on the narrower categories of child pornography[124] and instruction in terrorism, rather than insisting on broader national standards.

The parity argument underlying the government's internet filtering proposal goes beyond parity of purpose, but does not (except for adoption of the RC category) focus on parity of formulation. Rather, the concern is to go some way to equalise the effect or outcome of online and offline censorship, and in particular the availability online of content that has been or would be rated RC. However, an argument relying on the need for greater parity in the outcome of content regulation online and offline requires further justification. Pre-internet, moderately effective restrictions on RC materials had few negative side effects outside that content range. The government could maintain enough control to be sure that the chances of RC material being purchased in a news agency or rented from a store were slim. Further, it could do this with minimal impact on speech outside the RC category. Large publishers and distributors could afford the costs of classification. Because decisions of the Classification Board were public,[125] appeal and reclassification processes could minimise the risk of mis-classification.

While a mandatory filter at the ISP level would go some way to enhancing parity in the effects of content regulation online and offline, it would do so only by incurring economic costs associated with installation of filters and accepting the negative side effects outlined in Part V above. As well as greater costs, internet filtering is unlikely to attain similar levels of effectiveness as offline content regulation. At least on the basis of current technology, the filter will be able to be circumvented.[126] Even older Australians, not generally considered technology savvy, are being trained in internet filtering by euthanasia advocates.[127] Further, the proposed filter will only block URLs that have been reported and will have no effect on distribution through peer-to-peer networks, where most child pornography is traded.[128] Thus the cost effectiveness of the proposed internet filter cannot be assumed on the basis of the presumed desirability of the offline content regulation regime.[129] This does not mean that internet filtering is not worth doing, but it does to an extent undermine an argument based on parity of outcome.

Ultimately, mandatory ISP level internet filtering needs to be justified from first principles and its cost effectiveness cannot be assumed on the basis of past political decisions. In particular, it needs to be shown that it can effectively deliver what are assumed to be desirable goals (such as restrictions on the availability of RC material in Australia) without unacceptable side effects. The cost effectiveness of filtering needs to be evaluated in light of existing public and private regulation of online content,[130] existing international efforts to control child pornography and sites promoting terrorism, as well as alternative or complementary approaches such as subsidies for user installed filtering software, education in media literacy and critical thinking.[131]

There is another benefit of going back to first principles. The introduction of internet technology into the world of content regulation raises fundamental questions for the entire regime. In the past, governments could exercise a relatively high degree of control over what content Australians could access. If this is no longer possible, we need to ask what content regulation overall can realistically achieve. It is still possible for government to make a symbolic point about certain categories of content[132] and restrictions on access in public places are to some extent achievable, but we can no longer achieve similar effectiveness for censorship with similar impacts on freedom of speech. In light of this, the entire regulatory regime for content both online and offline may need to be revisited.[133]

VII CONCLUSION

The current government's internet filtering proposal seeks to reduce the extent to which content hosted on foreign websites that has been or would be rated RC is available within Australia. While admitting filtering is not a 'silver bullet', the government has justified its proposal in part by a reference to the desirability of parity between online content regulation and offline content regulation. However, while seductive, such rhetoric is simplistic. Arguments based on the benefits of consistency can take a variety of forms, each of which relies on a different rationale that applies only in particular circumstances. None of the possible interpretations of the government's arguments for parity justify mandatory internet filtering of content that has been or would be rated RC. A proper evaluation from first principles of the benefits and negative implications of the government's proposal is thus essential.

Before implementing a filtering scheme, the government should consider which goals associated with content regulation remain viable, worthwhile and continue

to be supported by a majority of Australians. Having determined this, the government should consider the cost effectiveness of internet filtering in achieving this goal as compared to alternative and complementary policy options. This has not been done; to date the government has focussed only on technical questions and measures to increase transparency and accountability. The government has instead assumed that the presumed workability and cost effectiveness of the content regulation regime offline justifies any means by which a similar outcome is achieved online. At least to this extent, its logic is flawed.

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1 *National Classification Code 2005* (Cth) cl 1.

2 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A; *Guidelines for the Classification of Films and Computer Games 2005* (Cth) (Refused Classification category). 'Illegal' in this context refers to materials that it is forbidden to even produce, as distinct from materials that might be restricted from viewing by (and therefore effectively illegal for) certain categories of viewer.

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4 See Part III below.

5 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification of Publications, Films and Computer Games Act 1985* (NT). In Queensland, there are three separate Acts: *Classification of Computer Games and Images Act 1995* (Qld); *Classification of Films Act 1991* (Qld); *Classification of Publications Act 1991* (Qld).

6 *National Classification Code 2005* (Cth); *Guidelines for the Classification of Films and Computer Games 2005* (Cth); *Guidelines for the Classification of Publications 2005* (Cth).

7 G-rated films are suitable for general viewing (all ages); parental guidance is recommended for PG films; M-rated films are recommended for mature audiences aged 15 years and over; MA15+ films are restricted to mature audiences aged 15 years and over; R18+ films are restricted to audiences aged 18 years and over; X18+ films are restricted to audiences of 18 years and over because of sexually explicit content; RC films are refused classification, meaning they are deemed unsuitable for any audience due to a breach of perceived base-line community standards.

8 *Guidelines for the Classification of Films and Computer Games 2005* (Cth).

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12 See *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 225.

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15 See *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A; *Guidelines for the Classification of Films and Computer Games 2005* (Cth).

16 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (WA) ss 62, 81(1), 89(1); *Classification (Publications, Films and Computer Games) Act 1995* (Cth) pt 10.

17 *Crimes Act 1900* (NSW) s 578C; *Criminal Code Act 1983* (NT) ss 125A (definitions of 'indecent article' and 'publish'), 125C.

18 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ss 32, 52.

19 *Crimes Act 1900* (NSW) s 91H; *Classification of Films Act 1991* (Qld) s 41(3); *Classification of Publications Act 1991* (Qld) s 14; *Classification of Computer Games and Images Act 1995* (Qld) s 26(3); *Criminal Law Consolidation Act 1935* (SA) s 63A; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 74A; *Crimes Act 1958* (Vic) s 70; *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) s 60; *Crimes Act 1900* (ACT) s 65; *Criminal Code Act 1983* (NT) s 125B.

20 *Criminal Code* (Cth) ss 474.19–474.24.

21 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5B.

22 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 6, 27; *Classification of Computer Games and Images Act 1995* (Qld) ss 9, 13A, 19; *Classification of Films Act 1991* (Qld) s 21; *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 28, 37, 54; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ss 20, 32, 49; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 6, 15, 34; *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) ss 66, 73, 82; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 7, 16, 38; *Classification of Publications, Films and Computer Games Act 1985* (NT) ss 35, 45, 63.

23 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 13, 14, 17.

24 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 5 (definition of 'submittable publication').

See also *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 19; *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 46; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 25; *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) s 61; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) s 28; *Classification of Publications, Films and Computer Games Act 1985* (NT) s 54. Compare *Classification of Films Act 1991* (Qld); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 17.

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26 *Broadcasting Services Act 1992* (Cth) s 3.

27 *Broadcasting Services Act 1992* (Cth) sch 2 cls 7(1)(g), 9(1)(g), 10(1)(g), 11(3)(a), 11(4).

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108 Stilgherrian, 'So Conroy's Internet Filter Won't Block Political Speech, Eh?', *Crikey*, 23 January 2009.

109 Commonwealth, *Parliamentary Debates*, Senate, 12 May 2010, 34 (Scott Ludlam).

110 Nart Villeneuve, 'Barriers to Cooperation: An Analysis of the Origins of International Efforts to Protect Children Online' in *Access Controlled: The Shaping of Power, Rights and Rules in Cyberspace* (MIT Press, 2010).

111 Niranjan Arasaratnam, 'Brave New (Online) World' (2000) 23 *University of New South Wales Law Journal* 205, 205.

112 Reed, above n 71, 277.

113 Michael Ramaraj Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37 *Federal Law Review* 133; Andrew Koppelman, 'The Morality of First Amendment Jurisprudence: Why Phyllis Schlafly is Right (But She's Wrong) about Pornography' (2008) 31 *Harvard Journal of Law and Public Policy* 105, 123.

114 John Hartley and Leila Green, Submission No 277 to the DBCDE, *Mandatory Internet Service Provider (ISP) Filtering: Measures to Increase Accountability and Transparency for Refused Classification Material*, 10 March 2010.

115 See generally Bennett Moses, above n 78.

116 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

117 *Broadcasting Services Amendment (Online Services) Act 1999* (Cth).

118 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

119 *Electronic Transactions Act 1999* (Cth); *Electronic Transactions Act 2000* (NSW); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions Act 2003* (WA); *Electronic Transactions Act 2001* (ACT); *Electronic Transactions (Northern Territory) Act 2000* (NT).

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

121 Cf Beattie, above n 58, 50.

122 Dieter Grimm, 'Freedom of Speech in a Globalized World' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009).

123 *Convention on Cybercrime*, opened for signature 23 November 2001, CETS No 185 (entered into force 1 July 2004), art 9.

124 The definition of child pornography used in Australia is broader than that used in most jurisdictions, including sexual imagery involving child cartoon characters. It may thus be preferable to use a consensus definition of child pornography that involves sexual imagery of actual children.

125 Lists of RC-rated material can be generated at <http://www.classification.gov.au/www/cob/find.nsf/Search?OpenForm>.

126 Enex Testlab, above n 87.

127 ABC, 'Access Denied', *Four Corners*, 10 May 2010 (Quentin McDermott).

128 See above nn 83, 89, 90.

129 As stated above, critique of the content regulation system generally is beyond the scope of this article.

130 Andrew D Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish, 2007).

131 Marjorie Heins, *Not in Front of the Children* (Hill and Wang, 2007) 261.

132 As in Singapore: Yee Fen Lim, 'Singapore: Internet Regualtion or Censorship' (1999) 2 *Internet Law Bulletin* 44.

133 See generally Beattie, above n 58.