

CENSORSHIP IN NEW ZEALAND: THE POLICY CHALLENGES OF NEW TECHNOLOGY

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Abstract

Recent advances in technology have created a range of challenges for those involved in the classification and censorship system in New Zealand. The rapid growth in Internet use, the introduction of DVDs and the availability of low-cost digital recording technology have raised policy and operational problems that did not exist when New Zealand's current censorship laws were enacted. This paper examines the effects of some of these changes and makes recommendations to address them.

INTRODUCTION

Censorship in New Zealand is governed by the Films, Videos, and Publications Classification Act 1993 (the Classification Act) and associated regulations. The Act was the result of the 1987 Ministerial Committee of Inquiry into Pornography, which recommended, among other things, the consolidation of a variety of laws governing the classification of films, printed publications and videos into one statute. The Classification Act established a single Office of Film and Literature Classification (the Classification Office), which opened on 1 October 1994 and replaced the Indecent Publications Tribunal, Chief Censor of Films and the Video Recordings Authority.

The Act gives the Classification Office power to examine and classify a wide range of "publications", including films, videos, computer games, books, magazines, T-shirts and computer files. Television is excluded from the ambit of the Classification Act and is governed by the Broadcasting Act 1989. The Classification Act also sets out the criteria used to determine the classification of publications. The central issue that must be decided in classifying a publication is whether or not it is objectionable. Publications may be classified as objectionable, restricted or unrestricted. The term "objectionable" is defined in the Act, and centres on the question of whether the availability of a publication is likely to be injurious to the public good. Certain publications are automatically objectionable, in accordance with section 3(2) of the Act. A publication is deemed to be objectionable if it promotes or supports, or tends to promote or support:

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- the exploitation of children or young persons for sexual purposes;
- the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct;
- sexual conduct with the body of a dead person;
- the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct;
- bestiality; or
- acts of torture or the infliction of extreme violence or extreme cruelty.

Material of this sort is the focus of censorship enforcement activity. The New Zealand Customs Service deals with the importation of objectionable material, which is a prohibited import under the Customs and Excise Act 1996. The Department of Internal Affairs Censorship Compliance Unit investigates offences under the Classification Act, including the trade in and possession of objectionable publications. The Police may also exercise the enforcement powers in the Classification Act but generally refer matters involving objectionable material to Internal Affairs.

Those agencies involved in the classification and enforcement aspects of the Classification Act have faced increasing challenges in recent years as a result of developments in technology. The primary development has been the growth in the availability and use of the Internet. It is the challenges posed by the Internet and other new technology that are the focus of this article.

AVAILABILITY OF OBJECTIONABLE MATERIAL

The Internet has made it easy for people to access a huge range of information from all over the world from their personal computers. While this has had undoubted benefits, it has also made objectionable material more readily available in New Zealand than ever before. Child pornography is freely available to anyone with a PC, modem and rudimentary computer skills. Previously, this type of material was not widely available because of New Zealand's geographic remoteness and the vigilance of Customs officers in intercepting it. However, such limiting factors are easily circumvented by Internet users (Department of Internal Affairs 1999).

The Department of Internal Affairs carries out on-line investigations of people trading in objectionable material, primarily child pornography. It has prosecuted people who have possessed as many as 190,000 images. In web chat rooms, many people can be found, at any one time, openly discussing and exchanging objectionable material. Peer-to-peer file sharing, which was primarily used to provide free access to music on the web, enables people to download objectionable material from computers anywhere around the world without ever

meeting or knowing the persons they trade with. Peer-to-peer technology does not require an Internet service provider (ISP) or web host to store objectionable material on their servers because the images can be transferred directly from one person's computer to another.

The increasing availability of digital cameras and web cameras has made it relatively easy for a person to produce pornographic images, legal and otherwise. Some of the child pornography circulating on the Internet consists of scanned images of magazine photographs produced legally in countries that had not outlawed child pornography in the 1970s. However, it is relatively easy to create new images, and these images may be circulated to thousands of anonymous viewers and collectors. Furthermore, digital images do not deteriorate as they are copied (unlike photographs and video tapes) and can be easily distributed around the world through the Internet. This suits collectors of objectionable material, who often focus on collecting complete sets of images (Taylor et al. 2001). In a recent New Zealand case a man had three networked computers searching the Internet for child pornography, which he then copied on to compact discs. He had amassed tens of thousands of images (*New Zealand Herald* 2002).

In 1998 New Zealand researchers wrote that:

There is a definite air of "moral panic" about media headlines that claim that pornography is rife on the Internet. Certainly it is there and in its full range from soft-core erotica to that defined by New Zealand legislation as "objectionable"... but it isn't easy to access; an effort must be made to get through a complex maze of connections... The objectionable material comprises only a small proportion of the total. (Watson and Shuker 1998)

In the experience of the Department of Internal Affairs, it is relatively easy for people to find objectionable material through the use of an Internet search engine. Such a search leads to many links to mainly pay sites offering child pornography and other objectionable material. In order to exchange material with others, it is usually necessary to seek it out in Internet chat rooms. Research by the Australian Office of Film and Literature Classification also found that objectionable material is available on the Internet but that the chance of involuntary exposure to it is low (Australian Broadcasting Authority 1998). However, it is difficult to be certain about the amount of objectionable material available on the Internet. An American study of more than 1,000 randomly selected websites found that a small proportion (3.8%) of them carried graphic sexual or violent content. While the majority of websites do not carry such content, those sites that are available are relatively easy to find and to access (Zimmer and Hunter 2000).

It is not clear what effect the Internet has had on the demand for objectionable material. It makes such material easy to disseminate and desktop computers, floppy discs, zip drives and

compact discs make the storage of images and text straightforward (Fisher and Barak 2001). However, there is no way of readily discovering how many people possess objectionable material or whether modern technology has fuelled demand for it. The Department of Internal Affairs has prosecuted people who were members of organised paedophile groups that share images via e-mail, peer-to-peer file sharing and even through circulation of hard drives or compact discs. However, the majority of offenders detected have been individuals exchanging material in Internet chat rooms (Department of Internal Affairs 1998). While it is possible to profile those who have been detected committing offences involving objectionable material, it is not possible to determine how many people may be committing similar offences, undetected.

In response to the growing availability of objectionable material on the Internet, the Government has recently amended the law in relation to the importation of such material. The Customs and Excise Act 1996 was amended to define the downloading of objectionable material from an overseas website as importation of the material. This is an obvious departure from traditional notions of importation, which involve physically transporting an object across a border. A person who downloads objectionable material may now be guilty of trading, possessing and importing the material as a result of the same action. The amendment is also interesting as an example of attempted regulation of the Internet and of efforts to apply traditional border control laws to an international communication medium.

A recent example of the effect of the Internet on censorship has been a side issue in the controversy surrounding the French film *Baise-Moi*. The film, with its graphic depictions of sex and violence, was classified as R18 in New Zealand. That classification was appealed to the High Court and an injunction placed on its exhibition while the Court heard the appeal. However, people who disagreed with this restriction on exhibition downloaded the film and copied it to compact discs. They are believed to have distributed copies of the film around Wellington (*Evening Post* 2002). While the injunction did not prohibit the possession or distribution of the film, the case is a good example of the ways in which the Internet can circumvent censorship law. The film has since been remitted for reconsideration and re-classification. Even if the film is subsequently classified as objectionable, which would make its possession illegal, anyone who wished to see it could do so using the Internet, though they would be committing an offence.

INTERNATIONAL NATURE OF THE INTERNET

The Internet has changed the way that governments should think about their borders. The Internet belongs to no one country. It is possible for a company in Los Angeles to operate a server from Jamaica that contains images or information accessible to people in almost any country in the world. Furthermore, material that may be perfectly legal in the country in

which it was created, or from which the server storing it operates, may be prohibited elsewhere. In the United Kingdom, for example, it is not illegal to possess indecent material while in New Zealand the possession of objectionable material is an offence that carries a fine of up to \$2,000. This is an offence of strict liability so ignorance of the fact that the material is objectionable is no defence, provided the offender has voluntary possession and control of the material.²

While this situation may lead to the unwitting commission of an offence, it also makes it very difficult to deal with the commercial suppliers of objectionable material. In New Zealand one adult website operator stated that he hosts his site from the United States to avoid “the vagaries of New Zealand censorship laws” – a prime example of the difficulties created by the international nature of the Internet (Mayo 2001). For this reason, most enforcement action focuses on demand-side enforcement, prosecuting those who exchange material rather than those who create it. This may be an appropriate response in New Zealand, where the amount of locally produced objectionable material is likely to be small, but such an approach will not significantly reduce the amount of objectionable material in circulation (Jenkins 2001).

LIABILITY OF ISPS

Internet service providers (ISPs) are in an uncertain legal position regarding liability for the Internet content to which they provide access. The Classification Act is silent regarding the position of ISPs and it is possible that they could be liable for their part in supplying, distributing or displaying an objectionable publication, even if they did no more than provide access to it. Enforcement activity has focused on those who download and trade objectionable material. ISPs have co-operated with the Department of Internal Affairs, when required to do so by a search warrant, in providing information to assist with investigations of censorship offenders.

The Law Commission (1999) considered that the position of ISPs should be clarified through legislation. It also considered that an ISP should have no criminal or civil liability for content unless it has knowledge of the content and fails to remove it promptly. It should be noted that there is no obligation on ISPs to monitor content, and given the vast amount of material available on the Internet it would be difficult to do so accurately.

Currently most New Zealand ISPs subscribe to a voluntary code of conduct. The code aims to protect rights of access and free speech, protect minors from objectionable material, and educate Internet users on how to protect themselves and others from inappropriate or objectionable material. The code also proposes that all Internet content in New Zealand be subject to the Classification Act (The Internet Society of New Zealand 1999).

² See *Department of Internal Affairs v Merry* (2000) DCR 733.

ANONYMITY ON THE INTERNET

One of the great attractions of the Internet for many users is the apparent anonymity it provides. Users may be part of an online community of interest and exchange information with strangers. This arrangement suits very well those who wish to collect or trade objectionable material (Forde and Patterson 1998).

Users of the Internet are seldom required to identify themselves. Indeed, commercial organisations exist to preserve online anonymity. For example, Anonymizer.com states on its website:

Anonymizer.com has been the leader in stemming the tide of online privacy invasion since 1996... The Anonymizer provides services which allow the anonymous use of Internet resources such as email, usenet, and the web. Because our business is privacy and anonymity, we do not require that users provide any personally identifiable information to use our services.

The right to privacy is an important one, not easily set aside. In New Zealand the Privacy Act 1993 provides that “wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation”.³ Internet privacy has considerable benefits in terms of protecting users from unwanted attention from other users. It also makes enforcement of censorship laws more difficult.

Child pornography networks sometimes go to extraordinary lengths to protect the identities of their members. New members are cautioned not to reveal their true identities or nationalities. They are even instructed, if possible, not to use their native language in communications for fear of disclosing their identities (Jenkins 2001). They protect their location through the use of “proxy servers”, which sit between the user and the server they are using. The user makes all of his or her requests from the proxy server, which then makes requests from the real server and passes the result back to the user. This makes it difficult to track the location of the user.

Internet use enables those with an interest in child pornography to socialise through a virtual community with thousands of members. Some researchers suggest that this can help normalise deviant behaviour and encourages the avoidance of individual responsibility by providing behavioural reinforcement and anonymity (Taylor et al. 2001, Lanning 1992, Quayle et al. 2000, Shelley 1998, O’Connell 2001).

³ Information Privacy Principle 8, Privacy Act 1991.

APPLICABILITY OF EXISTING LEGAL DEFINITIONS

An issue causing great consternation in the United States at present is the existence of so-called “morphed” images. These pictures, usually child pornography, are computer-generated and do not depict actual sexual activity. They may involve altering innocent pictures into pornographic ones or the digital alteration of pictures of adult sexual activity into pictures of child sex. The 1996 Child Pornography Prevention Act banned sexually explicit images of anyone who “appears to be a minor”, regardless of his or her actual age or whether the image depicted real people. The law was recently struck down by the Supreme Court on the basis that it “turned upside down” the Constitution’s First Amendment guarantee of free speech. The Court also stated that virtual child pornography records no crime and creates no victims by its production (Alcorn 2002, Stout 2002b). Law enforcement agencies in the United States, as a result, must prove that people appearing in apparent child pornography are real and are under-age. An FBI database of images known to be of real children is being created to assist with prosecutions. In addition, a law with a substantially narrowed prohibition on virtual child pornography is to be introduced (Department of Justice 2002, Stout 2002a).

The issue of virtual images does not raise the same sort of problems in New Zealand. That is because the Films, Videos and Publications Act 1993 deems a publication that “promotes or supports” the sexual exploitation of children or young persons to be objectionable, regardless of whether it actually depicts children or young persons. Thus, an image of an 18-year-old depicted as someone several years younger could be deemed objectionable. So could virtual child pornography or a work of fiction, despite the fact that no real child was directly harmed in creating the publication. The Office of Film and Literature Classification must still determine whether a publication promotes or supports an activity but it does not have to know the actual age or identity of the person depicted. The fundamental difference between child pornography laws in the United States (and many other countries) and New Zealand is that the former focus on child protection whereas New Zealand law focuses on censorship matters such as the effect of a publication.

The difference is also reflected in penalty levels. Under the recently struck-down US law, a distributor of child pornography could have received a 30-year prison sentence. In New Zealand, he or she could be sentenced to a maximum of one year’s imprisonment. The flexibility of the New Zealand law with regard to virtual images is a fortuitous coincidence. The law was enacted in 1993, well before such images appeared and before the Internet was widely used by the general public. Indeed, the 1988 Committee of Inquiry on which the Act was based did not even mention the Internet in its report.

The Internet also gives rise to new ways of viewing objectionable material that may not fit current definitions of “film” or “publication”. Live Internet broadcasts can be viewed around the world but have more in common with television than film, in that they cannot be saved

or reproduced. Similarly, “streaming video” provides a link to a server that plays a film, but that film cannot be copied or reproduced by the viewer. While it can be viewed repeatedly, it would be difficult to argue that the viewer possessed the images.

NEW TECHNOLOGY AND CLASSIFICATION PROBLEMS

The entry of DVDs (digital video discs) into the home entertainment market has created problems for the classification of films. Although DVDs contain the same features as the video and film versions, they also contain additional trailers, interviews and film footage. Many DVDs also allow the viewer to change camera angle, zoom in and out and play parts of a film in a different sequence. This means that DVDs are substantially different from the version classified on film or video and must be classified separately (Office of Film and Literature Classification 1999). This not only occupies the time of the Classification Office but it also costs distributors \$1,100 to have the DVD classified. While the Classification Office may charge a reduced fee in certain circumstances, the requirement creates a risk that film distributors will simply ignore the Act and not seek classification. Furthermore, the Classification Office is required to consider the possibility of making excisions to any film it classifies. While a film or videotape can be edited after production, it is technically impossible to excise material from a DVD.

Similar issues exist in relation to computer games, which are also considered to be films under the Classification Act. The Act requires that they be examined in their entirety in order to be classified. Modern computer games are incredibly complex and may require hundreds of hours of play to complete. The Classification Office has worked with the computer games industry to obtain “cheat” codes to speed up completion of games. It has also employed a specialist staff member with gaming expertise. Despite these initiatives, the 1993 Act appears to have placed a heavy burden on the Classification Office in its requirements for the classification of computer games. This is, in part, due to the fact it was enacted before the advent of complex CD-ROM-based games.

ATTEMPTS TO AMEND THE CLASSIFICATION ACT

During debate on the Films, Videos and Publications Classification Bill in 1993, the government noted that “the Bill cannot resolve all the problems that are posed by new technologies”.⁴ Two MPs have introduced members’ bills to amend the Classification Act, in attempts to keep pace with changing technology. In 1994 Trevor Rogers introduced his Technology and Crimes Reform Bill. The bill created new offences for misuse of telephone lines to transmit

⁴ NZPD 1993:17053.

objectionable material and prohibited communication with foreign telecommunication services that host objectionable images. The offences were to be punished by disconnection of the offender's telephone for up to five years. The bill also required ISPs to cut off links to foreign websites on the order of the Classification Office.

The select committee that considered the bill was advised that the bill would require the Classification Office to take on a huge additional workload in order to classify foreign broadcasts and Internet content and undertake enforcement. The committee considered that the disconnection of telephone services would disproportionately penalise parties other than the offender and could be easily circumvented by access to another telephone line. Submissions to the committee also argued that ISPs should not be held responsible for the material customers access through their service, which ISPs could neither control nor monitor. The committee concluded that ISPs should undertake voluntary self-regulation and that the government should seek support for an international code of practice (Commerce Committee 1997). The committee recommended that the bill not be passed, and it was defeated in the House.

In 2000 Anne Tolley introduced her Films, Videos, and Publications Classification (Prohibition of Child Pornography) Bill. The bill was drafted in response to a decision of the Court of Appeal which directed the Film and Literature Board of Review to reconsider a decision it had made in respect of the classification of photographs depicting children in sexualised poses.⁵ The Court's decision was based on a point of law, not on the Board's substantive classification decision. Nevertheless, in a climate of great concern about child pornography, the bill was introduced. The bill amended the definition of "objectionable" in the Classification Act to include any publication that "describes, depicts or otherwise deals with sexual conduct with or by children, or young persons, or both". This broadening of the definition could have encompassed a wide range of mainstream film and literature that had previously been deemed acceptable, albeit often with age restrictions. Whereas the Classification Act bans the promotion or support of sex with children, the bill would have banned any publication dealing with this topic. This could have included publications with academic, literary, scientific, artistic, educational or medical merit that address the sexual abuse of children without promoting or supporting it. It may have extended to banning social worker reports on child abuse.

The select committee that considered the bill accepted submissions that the bill, while well intentioned, would have unintended results. The Attorney-General informed the House that the bill was inconsistent with the Bill of Rights Act because the results of the bill were not rationally and proportionately connected to the objective of the bill (Government

⁵ *Moonen v Film and Literature Board of Review*.

Administration Committee 2001). The bill was voted down in the House and the select committee agreed to undertake a wider inquiry into the Classification Act. The inquiry was commenced in 2001 but was not completed before the early general election was called in 2002. The select committee appointed after the election has determined that it will continue the inquiry.

OVERSEAS REGULATION OF THE INTERNET

Other countries have faced the same censorship issues raised by the Internet and other new technology and a range of solutions have been implemented. In Myanmar access to the Internet is banned and prison terms of up to 15 years can be imposed for unauthorised use of a modem. China practises state censorship of the Internet and recently introduced rules that require Internet companies to be licensed, and that hold them responsible for illegal content carried on their websites (*The Economist* 2001). While such approaches to regulation may seem unacceptable to citizens of democratic countries, the United States and Australia have also attempted to control the Internet by restrictive legislation. The American law has recently been struck down, as mentioned earlier, and in New South Wales a parliamentary committee concluded that legislation aimed at classifying Internet content and banning objectionable content would be “likely to restrict law-abiding content providers while doing little to deter those with malicious motives” (Standing Committee on Social Issues 2002).

SOLUTIONS

There have been particular concerns expressed about the prevalence and availability of child pornography in recent times. It is in this area that the Department of Internal Affairs focuses most of its enforcement action. Certainly, child pornography and other types of objectionable material have become more accessible with the widespread use of the Internet. In order to more rigorously detect censorship offending, it is likely that wider or more intrusive investigative powers will be required.

At present the Department of Internal Affairs investigates and prosecutes those who trade in objectionable material. The Department cannot obtain a search warrant to investigate possession offences, nor can it intercept private communications. Furthermore, New Zealand’s penalties for censorship offences are low by world standards. This is, in part, because offences related to objectionable material are the same regardless of the type of material in question. In some other countries, offences involving child pornography are treated more severely than those involving other types of illegal material. The level of the penalty has received public criticism in recent times (*Waikato Times* 2002, *Dominion Post* 2002) and there is particular concern about the availability of restricted or objectionable material to children and young persons.

Legislation governing censorship was passed prior to significant changes in technology, such as private access to the Internet and the advent of DVDs. The challenges offered by new technology could not have been foreseen in the early 1990s. A number of censorship policy issues require consideration, including:

- whether the law requires amendment in light of changes in technology;
- whether the penalties for censorship offences are adequate;
- whether the current offence regime reflects the nature of censorship offending, given the widespread use of the Internet;
- whether child pornography should be treated differently from other types of objectionable material;
- whether depictions of rape or torture should be treated differently from other types of objectionable material;
- whether additional investigative powers (such as the wider application of search warrants or interception powers) are required to detect censorship offending;
- whether an extension of investigative powers would be desirable and proportionate to the problem;
- whether ISPs have any liability for content to which they provide access; and
- the status of new types of material, such as live web broadcasts and streaming video.

CONCLUSIONS

New Zealand's Classification Act, with its flexible and uniform approach to censorship, has dealt relatively well with advances in new technology. The Act has been able to address unforeseen changes such as "morphed" images and still and moving images from the Internet. However, new technology has created challenges for those charged with classifying publications and carrying out censorship enforcement. The widespread use of the Internet has greatly increased the availability of objectionable material and the anonymity of those who seek such material. While the Internet has assisted in the detection of some offenders, it has increased the scale and ease of offending. The advent of CD-ROM computer games and DVDs has placed a new burden on the Classification Office.

Technology has advanced to the point that many nations, including New Zealand, must now consider whether current censorship processes and laws are capable of dealing with modern censorship issues.

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