

Content Regulation

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What is content regulation?

- “Internet content regulation refers to any type of legislation by governments or regulatory authorities directed at:
 - Censoring information and communication on the internet based on its subject matter, and,
 - Controlling, or attempting to control, access to internet sites based on subject matter”

Policy Statement: The impact of internet content regulation

International Chamber of Commerce

What kind of content is regulated?

- Age-restricted material
- Obscene material
- Political material
- Material which impacts upon 'national security'
- Defamatory material
- Advertising
- Some types of transactions

The Challenge of Technology

- Applying traditional legal concepts to the internet can present difficulties, e.g.:
 - Child sexual abuse images generally illegal, BUT:
 - Computer-generated images?
 - Differential age limits
 - Pseudo-photographs, tracings
 - Online gambling
 - Approval of premises?
 - Games used

Other online challenges

- Flexibility of internet content
- Ease of publication online
 - Social media & email as distribution channels
- ‘Freedom of expression’
 - Balancing with need to prevent crime, etc.
- Is the user an adult or a child?
- Can be difficult to locate / identify source of unlawful content
 - Use of pseudonyms, encryption, proxy servers & web-based remailing services to preserve anonymity

The Role of Intermediaries

- To what extent should an ISP be liable for content provided by a third party?
- Models for ISP liability
 - ISP as information carrier
 - ISP as information distributor
 - ISP as information controller
- Developing international consensus that ISP should not be strictly liable
 - degree of liability varies

Examples of ISP Liability Provisions

- European Union
 - Electronic Commerce Directive 2000
 - ‘mere conduit’, ‘caching’ & ‘hosting’
 - Copyright in the Information Society Directive 2001
- USA
 - Communications Decency Act 1996
 - Civil liability only
 - Digital Millennium Copyright Act 1998
- Barbados
 - Electronic Transactions Act 2001, Part VII
- Trinidad & Tobago
 - Electronic Transactions Act 2011, Part IV

Methods of content regulation

- Regulation by contract
 - Between user and intermediary
 - Acceptable Use Policies
- Court or administrative orders and injunctions
 - Take-down & block access
 - e.g. *Paramount Home Entertainment International v British Sky Broadcasting Ltd.* (2013)
- Notice and take-down
 - USA: Digital Millennium Copyright Act 1998
 - Specified procedures, including 'put-back'

Technological methods

- Blocking and filtering software
 - blocking by URL, keyword or image
 - P.I.C.S. (Platform for Internet Content Selection)
 - age-verification Tools
- Options for use
 - voluntary use – there for those who want it
 - obligatory in some contexts
 - e.g. schools & public libraries
 - government controlled filtering at the ISP level

Cross-border Content Regulation

- The international nature of the internet
 - Geographical boundaries do not apply online
 - Content put online in one country is visible online in all countries
- Cross-border regulatory problems
 - Advertising
 - e.g. banking & financial services
 - Sale of restricted products
 - e.g. Viagra

Cross-border Content Regulation

- Cross-border regulatory problems
- Obscene & indecent material
 - Differing national standards
 - UK: “tendency to deprave and corrupt”
 - USA: “sexual depictions appealing to the prurient interest”
 - Some consensus on child pornography, BUT:
 - how old is a child?
 - adults appearing to be children

Cross-border Content Regulation

- Defamation
 - Who is the publisher / otherwise responsible?
 - Liability standards vary widely
 - Where does publication take place:
 - Place of uploading...
 - ...or the place where it is downloaded?
 - *Gutnick v Dow Jones* [2001]

Cross-border Content Regulation

- Nature of the Internet
- Many overlapping jurisdictions competing to control information online
- Who has the right to regulate?
- The rules of Public International Law
 - The effects doctrine
 - eCommerce has effects everywhere...
 - ...so every state has jurisdiction?

Enforcement issues

- Intergovernmental disputes & economic sanctions
 - e.g. *Antigua v USA* (2007): suspend \$21m in annual payments of IPR licence fees
- Attempts to enforce against company assets in a third country
- For criminal offences and possible arrest of travelling company officers
 - e.g. Google in Italy
- Deliberate lawbreaking

Content Regulation Options

- ‘Country of receipt’
 - E.g. *Gutnick v Dow Jones*
- ‘Country of Origin’
 - E.g. WTO GATS
 - Article XIV derogations
 - Mutual recognition
 - e.g. electronic signatures and certification authorities
- ‘Directed’ or ‘targeting’
 - E.g. IOSCO policy on investment advertisements

'Country of Origin' Regulation

- For:
 - Easier to identify appropriate law
 - Commercial advantages of 'country of origin' rule, backed by international legal convergence
- Against:
 - Danger of downwards regulatory competition
 - Cultural barriers to international standards
 - e.g. obscenity standards vary
 - e.g. *LICRA v Yahoo! Inc.*
 - e.g. different political cultures and criticism of the state

Concluding Remarks

- Difficulty of Internet Content Regulation
 - Biggest problem: cross-border nature of the internet
 - differing laws in differing jurisdictions
- Most effective means of regulation?
 - Harmonisation/convergence of national laws
 - Directed or targeting intervention **criteria**