

## **Submission to the National Classification Scheme Review**

*15 July 2011*

### **Introduction**

Electronic Frontiers Australia welcomes the ALRC's review of the national classification scheme. EFA was created to participate in the public debate in areas where the digital world and public policy collide, and nowhere is this collision more dramatic or problematic than in the area of censorship. Instant access to a world of information is a boon to Australia and the world that is almost unprecedented in its magnitude, and it's now hard to imagine how we ever got by in a world of snail mail and out-of-date news magazines. The ease and rapidity with which we can access information online, however, carries with it the corollary that there are far fewer mechanisms by which that flow of information can be easily regulated.

In this submission we conclude that the continued application of classification to online content must be viewed with great scepticism. As almost all content will eventually move online, this calls the practicality of classification as a concept into question.

### **About Electronic Frontiers Australia**

Electronic Frontiers Australia Inc. ("EFA") is a non-profit national organisation representing Internet users concerned with on-line rights and freedoms. EFA was established in January 1994 and incorporated under the Associations Incorporation Act (S.A.) in May 1994.

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

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

EFA policy formulation, decision making and oversight of organisational activities are the responsibility of the EFA Board of Management. The elected Board Members act in a voluntary capacity; they are not remunerated for time spent on EFA activities.

EFA has presented written and oral testimony to State and Federal Parliamentary Committee and government agency inquiries into regulation of the Internet and online issues.

### **The Purposes of Classification**

Any consideration of the future of classification in Australia must begin by examining the fundamental purpose of the scheme. What do Australian citizens receive for the money and effort

invested in the system as it was envisioned and as it currently functions? We think there are two purposes that would generally be agreed upon:

**1. Providing information to consumers to guide their content choices.**

The ratings applied to content such as movies and TV shows divide content by age range to signify its suitability for children at various stages of development. As younger children may be less equipped to deal with violent, sexual or morally ambiguous imagery, parents have a duty to filter the programs and movies their children watch to save them from upset or other harms that age-inappropriate content might cause. The ratings provide at-a-glance guidance, indicating that a particular piece of content will be harmless, inappropriate or borderline.

Ratings can serve adults as well. The knowledge that a film is rated R-18+ because of graphic violence is useful to somebody who finds such content distasteful, but might enjoy a film with the same rating because of profanity or sexual content.

**2. Protect Australians from content that is disturbing or represents a moral hazard.**

Not all content can be legally imported or sold in Australia. Some, most notably child abuse material, is a criminal offence to produce or possess, which reflects the harm inflicted on an innocent person in its production. Between the criminal and the everyday, however, lies a large and diverse body of material that would be refused classification by the censors and (at least in the offline world) thereby effectively banned.

Why do we ban material, where the production of such material does not impinge on the rights of others? The wording in the classification code would indicate that it is to protect people from material they might come across that would offend or disgust them, or might encourage them to do something illegal that they may otherwise not have been willing or able to do.

Therefore, something that might “promote, incite or instruct in matters of crime or violence”, or depicts “revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults” are not classified (and thus banned) in order to protect Australians who might be harmed by seeing such content.

This is the rationale behind the current system. When considering the future of classification, the question to ask is: Are these two goals still relevant, and if so, how can they be most efficiently and effectively achieved?

## **Operation of the classification system**

Very broadly, in order to fulfil the goals stated above, the classification system currently operates as follows.

### **1. Different types of media classified differently**

Periodicals, movies, computer games and internet content are all subject to differing classification schemes, and TV programming is handled using a different system.

### **2. Content vetted by a central authority**

Most pieces of content, especially movies and games, are submitted to the Classification Board.

### **3. Content viewed by the authority**

Government employees much watch submitted content in order to compare it to the ratings guidelines set out in the classification code.

### **4. Ratings applied by the authority**

The Classification Board decides which rating is most appropriate for the content. This rating decision is subject to appeal to the Classification Review Board.

### **5. Ratings are enforced at point of importation and sale**

The decisions of the classification board affect who may purchase and consume content and under what circumstances. These rules are enforced where content is imported, displayed or sold. Material rated R-18+ (or Category 1/2 for printed matter) may not be sold to minors. Material rated X-18+ may not be sold in most parts of Australia. Material refused classification may not be imported or sold.

Each of the above facets of how the system operates become problematic as the way Australians consume entertainment content changes in the 21st century.

## **Classification and digital convergence**

Already, a large proportion of the information content that we consume is accessed via a digital medium. If we're not actually viewing it on the internet, we're probably using another form of digital distribution, such as a DVD, CD or digital broadcast. It can be taken as read that the proportion of this content delivered via the Internet will continue to increase and will eventually reach almost one hundred percent; as bandwidth becomes cheaper and omnipresent, IPTV, video on demand, and online games will be the norm. They are hardly unusual today. Even the books we read will be delivered via the internet and accessed digitally, as the success of Amazon's Kindle and Apple's iPad have demonstrated beyond doubt.

In contrast, the classification system as it now stands was designed at a time when most content was distributed as physical objects. It could therefore be regulated in the same way that the sale of tobacco or alcohol are – by placing the onus on retailers and distributors to comply with the law and to back that up with the threat of criminal sanction.

It is a great boon to our ability to access information that these middlemen - the importers, distributors and storefronts - have been replaced with cheap, easy and instant delivery from source

to consumer. Even national boundaries are essentially meaningless online. Without them, however, the existing classification model lacks a context that is critical to its operation.

There are other challenges for classification. The line between the different types of content is now increasingly blurry. Is an interactive book of the kind popularised by the iPad mixes text, animation and full-motion video seamlessly. Movies can be interactive and games can contain lengthy sequences of video with or without player interaction. The distinction between broadcast TV and film no longer applies.

There's also a question of scale. Access to the Internet gives every user access to a vast and ever-changing library of content orders of magnitude larger than anything we could have imagined a few decades ago.

Can the current system be adapted to the digital environment?

### **1. Different types of media classified differently**

When all content is accessed via a URL or a different and changing array of technologies, devices and protocols, distinctions drawn between content types will become increasingly arbitrary and rapidly obsolete.

### **2. Content vetted by a central authority**

The Internet is borderless. Most content produced will be made outside Australia's borders. No matter what laws the Australian Parliament passes, Australia's censors are unlikely to be consulted about the vast majority of content.

### **3. Content viewed by the authority**

There are well over one trillion web pages and (for instance) more than 35 hours of video are uploaded to YouTube each minute. That's the equivalent of 150,000+ full-length movies in cinemas each week. No authority can view more than an insignificant fraction of available material.

### **4. Ratings applied by the authority**

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

### **5. Ratings are enforced at point of importation and sale**

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

We now face the situation where Classification Board reviewers, at considerable taxpayer expense, spend their days watching pornographic videos looking for acts or events that would push the movie from the R-18+ to X-18+ category or from X-rated to RC. Meanwhile, the same material is available, instantly, in endless variety and completely uncensored, online.

This is not a productive use of public resources, and it clearly does not satisfy the goals outlined at the start of this submission. The classification system as it is currently conceived simply cannot be sensibly applied in a digital world.

Further complicating the operation of classification is the fact that among the many revolutionary effects of widespread Internet adoption is the vast expansion in the number of people who are able to produce material for public consumption. Traditionally it was the domain of movie producers, magazine publishers and television executives; now almost anybody can write an article or make a short piece of video and put it online for the world to see. Were we to classify all this content, it would not just be media professionals who had to navigate the classification system, but every member of the Internet-using public.

## **Managing Online Content**

One of the issues to be explored by the present inquiry is how to effectively regulate, or block, access to online content.

We note the virtual impossibility of effectively censoring Internet content itself. Although various regimes around the world do attempt to block undesirable Internet content, and several schemes have been mooted even in Australia to limit access to certain types of web content, no system exists that is at once highly effective and compatible with the freedom of speech we take for granted in a democratic country. The current scheme by which the Australian Communications and Media Authority is obliged to investigate offensive Internet content does not have a material impact on the availability of such content to Australian Internet users.

As noted elsewhere, it is manifestly nonsensical to consider a model whereby online content is pre-vetted by a government authority before it can be viewed by consumers. Instead, it has been suggested that a complaints-based mechanism, similar to what is already in place, could be used to flag offensive content, and that this content, once reviewed, could be blocked by technical means. We do not consider such a model to be practical. The amount of content reviewed would be small and haphazardly selected, and the resulting blocking would be easily circumvented even if the content remained at its original location once the block was put in place. We cannot easily imagine a scenario where the resources expended in vetting and blocking material would be profitably offset against the harm actually caused by an Australian accidentally viewing the material.

Furthermore, the operation of such a scheme would likely lack transparency, as the address of the content under review could not be published. The risks to freedom of speech are therefore not insignificant and must also be weighed up against the perceived benefits of such a system.

Discussions around censorship, particularly in the context of online content, often focus on the protection of children. No classification or censorship scheme will ever be sufficient to protect children alone, and this is truer still when it comes to online content. Although it is beyond the scope of this submission to address cyber-safety issues in detail, we note that parental supervision, home-

or school-based filters, and education about risks remain the best method of safeguarding the interests of children online.

## **Options for the future**

Given the very significant challenges outlined above, we must revisit the goals of our classification system and ask how they might be achieved in a way that will be relevant into our digital future.

### **Providing information to consumers**

It is clear that the Classification Board, or its successor, will not be able to inspect most of the material viewed by the Australian public. However, for certain types of content ratings guidance will still have value to many Australian consumers. To this end, I believe there is a greater role for the content industry to self-assess their material as it is produced. This model has been successfully employed, for instance, in the United States where the Motion Picture Association of America is responsible for movie ratings and the industry-created Entertainment Software Rating Board rates computer games. Currently, television programs are rated by industry in Australia under the Commercial Television Industry Code of Practice, and this model has not been shown to be inferior to inspection by government censors.

Certainly, any attempt to rely on industry self-regulation must be greeted with skepticism if the commercial interests of industry are imperfectly aligned with the interests of the public. In the case of TV, movies and computer games, it is not clear that industry would have any financial incentive in misclassifying their content and thereby disappointing or alienating consumers.

For instance, the Apple iTunes store contains tens of thousands of games that are available to Australians. These games are unrated by the Classification Board even though they are available for sale to Australian consumers. Because Apple's policies on what may be sold in the iTunes store are very strict - nudity, for example, is not allowed - this poses no problem to even the most conservative Australian consumer.

### **Protect Australians from disturbing or immoral content**

This second goal of classification is as problematic as it is debatable. In the 21st century, do we still expect our government to protect us from moral harm by vetting the material we wish to watch? There would be no shortage of people willing to argue either side of this question. We don't offer an opinion on the desirability of such protection, but instead note that regardless of how we feel about this question, we must acknowledge that it is no longer practical. There are not sufficient resources or scope for the Australian government to place itself between the producer and consumer of potentially offensive content on the Internet. That is, unless we wish to attempt a fundamental change in the way in which the Internet is accessed (such as a Chinese style "great firewall" or national Intranet of approved content), but this would mean eschewing the many benefits the Internet brings. These must surely be more significant than the moral hazard posed by unfettered access to the World Wide Web.

Acknowledging this does not mean an "anything goes" approach to content. The most abhorrent material (i.e. that depicting child abuse) can and should be made illegal to produce or possess. The definitions of criminal child pornography, and the subsequent investigation and prosecution of related crimes, are made without reference to classification.

## Conclusion

In a digital world, centralised classification can no longer keep pace with the content available to Australian consumers, and thus cannot function as a useful source of information for consumers or as a barrier to the availability of unacceptable content. While the law can play a role in shielding the public from the most horrendous content, it is no longer realistic to expect the Australian government to vet each piece of content viewed by the Australian public.

### **We therefore recommend:**

- Abolishing the system of classification for internet content (shared by ACMA and the OFLC)
- The phasing out of the Classification Board entirely
- Encouraging the media industries to develop their own rating systems to inform consumers, similar to the way TV programs are rated now
- Review laws regarding illegal content (such as child abuse material) and adequately resource the enforcement of these laws

This submission, which essentially argues that government censorship has outlived its usefulness, could be represented as an argument for a “wild west” attitude to online content. This would be a mischaracterisation of EFA’s position. Clearly, there are some types of content that society cannot tolerate, most particularly abuse. It is fitting that production and possession of such material is a serious criminal matter; and we acknowledge that there may be other types of content that society agrees should fall into this category. For all other material, the fact remains that – whether we should wish it or not – there is no effective way for an Australian bureaucracy to manage the entire world’s books, essays, photographs and movies. If one wonders what an Australia without the classification board would be like, then one has simply to go online and experience it today.

*David Cake*

*Chair*

*On behalf of the EFA Board of Management*