MILLENNIUM MULTIPLEX: ART, THE INTERNET, AND CENSORSHIP

KATE GILCHRIST*

Australia risks turning the Internet into the ultimate multiplex:[1] bland, sterile, consumer oriented, corporatised, privatised with a few flashy ads and a little bit of genius. Amongst the sites for plastic piping and swimming pools, will be designated black holes of cyberspace, left vacuous in the wake of the new Australian online censorship laws.[2] Websurfers will come across: "The content of this site has been removed following a take down notice by the Australian Broadcasting Authority" or "Warning: the following website contains material which has been classified R. It contains violence, nudity and coarse language. You may only proceed if you are over 18 years of age. Please enter your password and date of birth now".

Potentially the most universal of all art galleries, the Internet is still a largely unexplored vessel where art is both practised and placed. However, the excitement may be cut short for artists and their audiences. Regardless of whether or not its main targets are pornography and bombmaking recipes, the *Online Services Act* will have far reaching censorship consequences for artistic expression in Australia.

I. CURRENT POSITION

There is no express right to free speech in Australia as there is in the USA, where legislation[3] similar to the *Online Services Act* was held unconstitutional

* Supervising Legal Officer, Arts Law Centre of Australia. The opinions and comments are the author's own and do not necessarily reflect the opinions of the Arts Law Centre of Australia. The author would like to thank Sally McCausland, Jonathan Morrow, Brendan Scott, and Julian Burnside QC for their comments.

1 Large entertainment complex.

2 *Broadcasting Services (Online Services) Amendment Act* 1999 (Cth), hereafter "*Online Services Act*".

3 *Communications Decency Act* 1996 (USA).

on the ground that it restricted the constitutional right to free speech.[4] At most, Australia has a limited implied constitutional guarantee of political discussion.[5]

Our "privilege"[6] of free artistic expression is constrained by defamation and trade practices laws but also, and particularly referable to the *Online Services Act*, various State and Territory obscenity laws. In NSW, for instance, these include the *Indecent Articles and Classified Publications Act* 1975 (NSW), the *Crimes Act* 1900 (NSW), the common law offences of obscene libel[7] and possibly blasphemous libel,[8] and conspiracy to corrupt public morals and outrage public decency.[9] Justice Windeyer settled the test for obscenity in Australia in *Crowe v Graham:*[10] "Does the publication... transgress the generally accepted bounds of decency?"[11] where "[c]ontemporary standards are those currently accepted by the Australian community... And community standards are those which ordinary decent-minded people accept."[12] It is well established that this community standards test will be applied to sexual, violent, criminal and certain religious matters. These are the very concepts often explored in art.

In particular cases relating to visual art and obscenity, the question of whether an artwork is obscene has been a question for the courts: whether the artwork offends contemporary community standards in Australia. In answering, the court takes the following factors into account: the circumstances of the artwork's publication (including any evidence of its limited circulation); the target group of the publication (including whether the target audience was narrowed physically or by appropriate warning signs about the content of the artwork); and whether or not the artwork has artistic merit (taking into account any expert evidence on this point). There is not, however, any absolute or partial defence of artistic merit. Take, for example, the *Piss Christ case.*[13] The Judge did not rule as to whether the photographic work of American artist Andres Serrano, showing a crucifix immersed in urine, was blasphemous, indecent or obscene under Victorian law.[14] However, the judgment indicates that, in applying a community standards test, the Court would have taken account of the following: the artist's intended meaning of the work;[15] the fact that the artwork is reproduced in art

4 *Reno v American Civil Liberties Union* 117 S Ct 2329 (1997). See T Francis, "Victorian Internet Censorship Legislation: Is it Constitutionally Valid?" (1997) 16(2) *Communications Law Bulletin* 7.

5 *Lange v ABC* (1997) 189 CLR 520. See T Francis, note 4 *supra*.

6 J Robb, "Censor and be Damned" (1998) 18(3) *Artlink* 15 at 15.

7 *R v Close* [1948] VLR 445.

8 *Whitehouse v Lemon* [1979] AC 617; but see *The Most Reverend Dr George Pell, Archbishop of Melbourne v The Council of Trustees of the National Gallery of Victoria* (unreported, Supreme Court of Victoria, Harper J, 9 October 1997), hereafter "*Piss Christ case*". Note s 49(2) of the *Defamation Act* 1974 (NSW) incorporates the notion of blasphemous libel.

9 *Shaw v Director of Public Prosecutions* [1962] AC 220.

10 (1968) 121 CLR 375.

11 *Ibid* at 395.

12 *Ibid* at 399.

13 Note 8 *supra*.

14 Common law blasphemous libel and s 17(1)(b) of the *Summary Offences Act* 1966 (Vic). See K Gilchrist, "Does Blasphemy Exist?" (1997) 106 *Art Monthly Australia* 7 at 7-8.

15 See *Piss Christ case*, note 8 *supra* at 2.

books by eminent art scholars;[16] and the fact that the gallery where the work was to be shown, the National Gallery of Victoria, was an institution of a very high standard.[17]

II. HOW THE *ONLINE SERVICES ACT* WILL AFFECT ART ON THE INTERNET

The *Online Services Act* will radically change the above position to an active, interventionist approach by proposing both to constrain material that is "likely to cause offence to a reasonable adult"[18] and "to protect children from exposure to Internet content that is unsuitable for children".[19] This two tiered prohibition rests on the categorisation of content into "prohibited content",[20] "potential prohibited content",[21] content to which a "restricted access system applies"[22] and, by implication, all other content. Essentially, the *Online Services Act* is a prescription for homogenised[23] content in so far as all unrestricted, freely available material must be suitable for children (under 18 years of age). This situation will have an absurd effect on Internet content, reducing it to the most base, infantile level. Is this what contemporary Australians want on the Internet? A saccharine G-rated commercial? The community standards obscenity test applying to art in physical spaces does not require, as a first limb of that test, that all material must be suitable for children, although like other factors, it is a relevant consideration. Galleries do respect child audience members and use warnings or cordon off particular space as self-imposed restrictions. However, unlike film, literature and computer game products, art has not previously been subjected to the jurisdiction of the Classification Board[24] – according to obscenity laws, artwork has either been on the walls or off it. The censorship effect of restricting access to artistic content on the Internet by order of the Australian Broadcasting Association ("ABA") unjustifiably exceeds the physical paradigm. Further, for the first time, the Classification Board will have jurisdiction over art, albeit indirectly over its online form.

Under the *Online Services Act*, the ABA is given wide, active powers of investigation and censorship over the Internet. The onus of the *Online Services*

16 *Ibid* at 3.

17 *Ibid.*

18 *Broadcasting Services Act* 1992 (Cth), Schedule 5, s 2 (as amended by the *Online Services Act*).

19 *Ibid.*

20 Internet content which has been classified 'RC' (Restricted classification) or 'X' by the Classification Board; or, in the case of content hosted in Australia, Internet content that has been classified 'R' (18+ Restricted) by the Classification Board and access to the R content is not subject to a restricted access system. *Ibid*, s 10.

21 For material not classified by the Classification Board but if it were, "there is a substantial likelihood that the Internet content would be prohibited content". *Ibid*, s 11.

22 With the object of protecting children from exposure to content that is unsuitable for children. *Ibid*, s 4. See B Scott, "The Dawn of a New Dark Age" (1999) 2 *Internet Law Bulletin* 2 at 32.

23 See T Francis, note 4 *supra*.

24 Established under the National Classification Code, *Classification (Publications, Films and Computer Games) Act* 1995 (Cth).

Act is borne by Internet content hosts ("ICHs"), who are responsible for the content of material hosted by Australian websites,[25] and Internet service providers ("ISPs"), who are responsible for material hosted by overseas sites.[26] However, the Act will, of course, directly affect the artist.

A. Content Hosted in Australia

To demonstrate the absurdity of the *Online Services Act*, imagine an example of *Piss Christ* proportions. Imagine that the exhibition *Sensation: Young British Artists from the Saatchi Collection* ("*Sensation*"), recently the cause of considerable scandal both in the USA[27] and in Australia (following the cancellation of its exhibition by the National Gallery of Australia),[28] was now hosted by a website in Australia. How would the *Online Services Act* deal with this? Some would say, as in fact the mayor of New York has, that artworks containing explicit examination of genitalia, Christian iconic images covered in elephant dung and portraits of convicted child murderers, is material unsuitable for children. Does the *Online Services Act* mean that this content must therefore be filtered or removed from the website altogether?

Given the political (rather than the social or legal) conservatism in Australia today, there would be a high risk of receiving an interim take-down notice from the ABA and the possibility that the ABA would require removal or restricted access to the material. Yet, with the *Piss Christ case* as a recent precedent, *Sensation* would probably have survived legal scrutiny if it had been exhibited at the National Gallery of Australia. Therefore, one of the strongest democratic arguments against the *Online Services Act* has to be the fact that it constitutes active, broad sweeping censorship by government and its bureaucracy.

B. Content Hosted Outside Australia

Let us now look at the position where *Sensation* is hosted online by a website outside Australia, as it currently is at www.davidbowie.com.[29] The ABA could notify ISPs through recently registered codes of practice[30] that the content is potentially prohibited content and ISPs would then, as soon as practicable, have to offer users an appropriate filter.[31] Users can still access that content, as there is no requirement on the user to use the filter. The result: there is less risk of censorship if all controversial Australian and international art, accessible in Australia, is hosted overseas.[32]

---

25 Note 18 *supra*, s 30.

26 *Ibid*, s 40.

27 M Ellison, "Show this and I'll cut your funding: Brit pack art 'sick' says NY mayor" *Sydney Morning Herald*, 28 September 1999.

28 B James, "About Face Shows NGA's Timid Side" *Sydney Morning Herald*, 29 November 1999, p 17.

29 As of 7 January 2000.

30 Three codes of practice were registered with the ABA under the *Online Services Act* on 16 December 1999.

31 Content Code 2, cll 6.1 and 6.2.

32 Unless a legal interpretation of the legislation can be used to argue that an ISP hosts overseas hosted content in Australia and an ISP is therefore an ICH hosting content in Australia.

III. RECOMMENDATIONS

The Australian legal system has attempted to apply a working definition of art that is inadequate due to its restrained approach and narrow focus on notions of high art.[33] However, 'art' probably extends beyond its current legal definition to encompass anything that a creator or an audience member perceives to be art.[34] Among its functions is "the provocation of new moral insight by the presentation of new artistic visions of the world".[35] Moreover, "[a]rt, by its nature, calls into question any set definitions and will always violate standards set...".[36] By virtue of this, censorship will never sit well with art. Censorship is based on "current standards of moral decency which prevail in Australia",[37] with moral standards fixed at a point in time rather than being flexible and willing to be tested, challenged and provoked by an artist. As gallery walls crash down and art embraces the Internet, it is important for Australians to be challenged and provoked, especially given the promises provided by the digital age.

Active patrol and regulation by government of online content is at the extreme end of a continuum of legal options to constrain democratic free speech. Would it not be preferable to apply the general principles of obscenity law, developed over time, which recognise, at least to some extent, the intrinsic value and subtleties of art?

A court looking at an Australian website hosting *Sensation* could ask: what type of website is hosting the exhibition? For example, is it the National Gallery of Australia's website, or that of the Australian Network for Art and Technology? What are the artistic reputations of Jake and Dinos Chapman, Jenny Saville, Chris Ofili and Marcus Harvey, and so on, and do Robert Hughes et al mention them in any of the seminal texts on art? Did the ICH consider providing a warning which might remove the risk of children viewing the content without informed guardian consent. I do not suggest that this is adequate, but it is preferable to government agencies ruling on whether art is obscene and issuing take-down notices.

If art is something that pushes the limits of accepted community standards of decency, the *Online Services Act* severely restrains the notion of art in Australia in the digital age. Not only do the new laws fail to take account of art and how it may be positioned or created on the Internet, they fly in the face of years of case law. To censor legitimate artistic material on the Internet is to severely limit Australians' access to ideas and artistic and political expression. Why should

---

33 See, for example, the *Copyright Act* 1968 (Cth), ss 10 and 31; *Attorney-General v Trustees of the National Art Gallery of NSW* (1944) 62 WN (NSW) 212; the *Piss Christ case*, note 8 *supra*; and *Murray v Commissioner of Taxation* 90 ATC 418.

34 For example, Marcel Duchamp's *La Fontaine*: a urinal inscribed with signed R Mutt, exhibited at the Exhibition of the Society of Independent Artists in New York, 1917. See C Finch, *Pop Art Object and Image*, Studio Vista (1968) pp 8-9.

35 P Kearns, *The Legal Concept of Art*, Hart Publishing (1998) p 38.

36 *Ibid.*

37 *Crowe v Graham* (1968) 121 CLR 375.

Australian art audiences languish intellectually, culturally and socially and have artists forced offshore while the rest of the world prospers? To avoid the debasement of Internet content in Australia, the onus should (as it has been with content hosted overseas) be repositioned back onto the Internet user on the principle that adults should be able to read, hear and see what they want.[38] While children should be protected from harmful material, parents and guardians should be responsible for supervising their children who are accessing the Internet by applying their own filtering service. It is then a matter of choice. Failing a repeal of the *Online Services Act*, the legislation should at least provide an express defence of artistic merit.

Recent cases on art, such as the *Piss Christ case*,[39] demonstrate that Australia is a tolerant, pluralistic society. The *Online Services Act*, however, fails to respect the notion of an intellectually vigorous Australian society in which issues can be debated freely. It means that Australian website hosts, perhaps someone such as Timothy Potts, former director of the National Gallery of Victoria, or Andres Serrano (as opposed to commercially driven ISPs), will bear the brunt of a scandalous campaign to justify their artwork. They will do so at great legal risk,[40] in a game of political point scoring and "gesturing".[41] Given that it took over three years to resolve a recent obscenity matter,[42] veracity and vigour will be required of Australian artists who challenge the boundaries in order to reestablish an online moral equilibrium.

38 See the National Classification Code under *Classification (Publications, Films and Computer Games) Act* 1995 (Cth).

39 Note 8 *supra*.

40 Fines of $27 500 per day for corporations, $5 500 per day for individuals.

41 D Marr, "Fighting for Our Souls at the Flicks" *Sydney Morning Herald*, 13 June 1999, p 13.

42 The Rabelais case involved student editors at La Trobe University being charged with criminal offences under the *Classification of Films and Publications Act* 1900 (Vic) for publishing an article on shoplifting. Following a series of appeals, the charges against the editors were eventually dropped. See *Brown v Members of the Classification Board of the Office of Film and Literature Classification* (1998) 154 ALR 67; M Clayton and T Borgeest, "Free Speech and Censorship after the Rabelais case" (1998) 3(4) *Media and Arts Law Review* 194.