

SOCIAL MEDIA AND CONCEPTS OF CONTENT AND COMMUNICATIONS REGULATION

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The indicators are that key regulatory elements are being conceptually stretched and pulled, drawing into question the sustainability of current regulations ...¹

Australian Communications and Media Authority (March 2008)

Introduction

Social media involves the communication of content (whether professional or user generated) amongst users of a service. The term covers a range of online experiences. The most prominent examples of social media are the social networking sites (*MySpace*, *Facebook*), but virtual worlds (*World of Warcraft*, *Second Life*), blogs, wikis and file sharing sites and software (*YouTube*, *Flickr*, *Limewire*) are also caught in this category of online interaction. For our purposes, the importance of social media is that it simultaneously functions as a **communications platform** and as a **distribution mechanism** for all forms of media content. In combining these functions, social media represents an attack on the dividing line between broadcasting and personal communications.

The main aim of this paper is to discuss the regulatory implications of this attack.

Point-to-point versus point-to-multipoint

The distinction between point-to-point and point-to-multipoint communications was once very important.² Point-to-point communications were personal and service providers were regulated by telecommunications laws concerned with infrastructure and access. In terms of content, personal communications were largely left alone by regulators.³ Point-to-multipoint communications, by way of contrast, were sent through airwaves by licensed broadcasters subject to highly prescriptive rules regarding the content of their transmissions.

Traditional territorial lines

The *Broadcasting Services Act 1992* (Cth) (**BSA**) set the foundations of the current content regulation regime for electronic media in the early nineties, when media systems were much less complicated. The definition of 'broadcasting service' remains critical to the scope and application of the BSA. Where a service can be characterised as a broadcasting service it will

¹ Australian Communications and Media Authority (**ACMA**) Top Six Trends in Communications and Media Technologies, Applications and Services – Possible Implications (March 2008) at 3.

² Point-to-point and point-to-multipoint are not defined in the Broadcasting Services Act 1992 (Cth). However, the Explanatory Memorandum to the original Broadcasting Services Bill 1992 says that services which provide programs according to timetabling determined by the service provider would not be considered point-to-point services, in contrast to services which deliver content on demand (which are point-to-point). See: Explanatory Memorandum to the Broadcasting Services Bill 1992 at 16. The Telecommunications Act 1997 (Cth) defines **point-to-multipoint service** as 'a carriage service which allows a person to transmit a communication to more than one end-user simultaneously'.

³ Although note provisions introduced into the Criminal Code regarding the use of a carriage service in a menacing, harassing or offensive manner: Criminal Code Act 1995 (Cth) Criminal Code s 474.17; specific offences exist for the access, transmission and making available of child pornography and child abuse material: Criminal Code Act 1995 (Cth) Criminal Code ss 474.19 and 474.20.

feel the full effect of the BSA's provisions on licensing, programming and advertising, as well as content rules under attendant industry codes of practice.

Services that provide programming on a point-to-point basis are **not** 'broadcasting services' under the BSA.⁴ The specific exclusion of point-to-point services reflects the view that personal communications are an area where content regulation should fear to tread. It also highlights that the 'one-to-one' versus 'one-to-many' understanding of communications was historically useful as a method of determining which communications needed to be conditioned by the 'appropriate community safeguards' codified in broadcasting laws.⁵

Another way of framing the matter might be to say that point-to-multipoint communications were equated with public communications that should properly be subject to some kind of community standard of decency and assessment of risk. Point-to-point communications, being private, could be governed by the subjective sensitivities of the participants, that is, they could be subject to a personal standard (with the qualification that socially harmful material is always censored).⁶

Online content and content services

The advent of online content marked the beginning of the end for the point-to-point/point-to-multipoint distinction. All online content is delivered as a point-to-point communication from a technical perspective. However, across the internet there is clearly a full spectrum of experiences that are variously public and private and variously analogous to traditional media services or not. In short, the technical structure of a communication is no longer an effective way of determining how it should be regulated.

The BSA took its first tentative steps across the point-to-point divide when Schedule 5 was added by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth). The addition of Schedule 7 and the content services regime in 2007 continued the steady march of content regulation online and across new media.⁷ However, personal communications are generally exempt from the operation of Schedule 7 and as such, the conceptual division between point-to-point/point-to-multipoint or rather, public and private communications, is maintained.⁸

⁴ Broadcasting Services Act 1992 (Cth) s 6(1) definition of **broadcasting service**. The legislative intention that the BSA would be technologically neutral has been undermined by the point-to-point/point-to-multipoint distinction. See: Senator Collins, Broadcasting Services Bill 1992 (Second Reading Speech) Senate Hansard (4 June 1992) at 3599; and Niloufer Selvadurai 'Regulating for the Future – Accommodating the Effects of Convergence' (2005) 13 TPLJ 20 at 24.

⁵ Under the co-regulatory regime set out in the Broadcasting Services Act 1992 (Cth), the ACMA only has to register industry codes of practice where it is satisfied that the code contains 'appropriate community safeguards': Broadcasting Services Act 1992 (Cth) s 123(4). The ACMA may determine its own standard if there is evidence that an existing code is not operating to provide appropriate community safeguards: Broadcasting Services Act 1992 (Cth) s 125(1).

⁶ The concepts of community standards as opposed to a 'household' standard is referred to in Adam Thierer 'Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age' (2006–2007) 15 *CommLaw Conspectus* 431 at 480.

⁷ Including, notably, across mobile content. See: Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definition of **mobile premium service**.

⁸ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definitions of **content service** and **exempt content service** and 4. Note that there are qualifications to these exclusions, in particular for adult chat services, or services that specialise in prohibited or potential prohibited content.

Challenges (for regulators)

The experiences offered through social media stretch across a continuum of public to private. *MySpace* and *YouTube* act a lot like traditional broadcasters where they commission programming and ‘air’ it exclusively online. However, the experience of social media does not look or feel much like traditional broadcasting where users take such material and share it amongst themselves. It looks even less like broadcasting where users take content, *modify it*, then send it on.

As a consequence, social media sincerely challenges concepts of content regulation. It is not possible to say that content should or should not be regulated based on whether its communication is initiated by a user or a service provider.

Why regulate?

The risks associated with social media are not directly analogous with the concerns that inform traditional media regulation.

In the report *Internet Filtering and Other Measures for Promoting Online Safety*, the ACMA commented that:

Online risks have shifted from content risks associated with the use of static content to include communication risks associated with interactions with other users.⁹

The categories of **content risks** and **communications risks** provide a useful framework for understanding the types of issues that arise in social media.¹⁰ Content risks are well understood. The term refers to the risk of audiences being exposed to material that is offensive, illegal or inappropriate for certain age groups. In this respect social media is not so far removed from traditional media – that is, the content risks are broadly consistent (although the context in which content is consumed differs across platforms and this can be relevant). Communications risks cover new problems such as cyber-bullying and inappropriate contact between children and adult users.

Content risks

Content risks on social media include the obvious risk of pornography and other extreme content, however, problems have also been identified with material that promotes harmful activities such as smoking, drinking, drug abuse, imitating stunts and other anti-social behaviour.¹¹ The *Sydney Morning Herald* has reported that thousands of videos of ‘sexy smoking teens’ have appeared on *YouTube*.¹² The videos typically involve models doing nothing more than looking glamorous and smoking, and the report speculated that this could be a form of covert tobacco marketing. Another concern indirectly related to content

⁹ ACMA Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (February 2008) at 1.

¹⁰ The ACMA identify a third category, e-security risks, which are also relevant to social media, but are not discussed in this paper. E-security risks refer to viruses, online fraud and spam. ACMA Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (February 2008) at 12. Spam on MySpace has been a problem and the subject of prominent litigation in the United States see: *MySpace Inc. v Wallace* No. 07-1929 (CD Cal. 2007).

¹¹ Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 16.

¹² Julian Lee ‘Whiff of Tobacco Firms on the Net’ *Sydney Morning Herald* (18–19 November 2006).

circulated on social media is the fashionably anti-social practice of ‘happy slapping’.¹³ Happy slapping involves a surprise attack (slap) that is recorded on a mobile phone or digital camera with the footage then being shared (often through social media).¹⁴ Happy slapping is a content issue but is also discussed in the context of cyber-bullying.

Child protection

Child protection has been the main focus of commentary on social media. The revelation that some 29,000 convicted child-sex offenders had profiles on *MySpace* added to a ‘predator panic’ in the United States (and to a lesser extent in Australia) in 2007.¹⁵ This panic was responsible for the introduction of a number of Bills in a number of US legislatures,¹⁶ and contributed to the development of specific agreements on child safety between social networking sites and State US Attorneys-General, which are discussed below. In Australia, the Coalition Government announced the formation of the *Social Networking Sites and Online Grooming Consultative Working Group*,¹⁷ which appears not to have survived a change of government.¹⁸

As child protection issues are so emotive, it is difficult to know whether or not they are being exaggerated. However, a level of ‘predator panic’ is probably justified.¹⁹ The Home Office (UK) has noted a number of cases where adults have used social networking services as a means of contacting and grooming children and young people for sexual exploitation.²⁰ They also cite research conducted in Holland, involving 10,900 participants between the ages of 13 and 19, which found that 47% of girls said they had received unwanted requests to do something sexual in front of a webcam – and that 2% actually did so.²¹

Cyber-bullying

Where social media is involved, cyber-bullying can have a wide audience (see happy slapping).²² In this manner, and in others, bullying and harassment are old themes that have

¹³ Mark Honigsbaum ‘Concern Over Rise of ‘Happy Slapping’ Craze: Fad of Filming Violent Attacks on Mobile Phones Spreads’ *The Guardian* (26 April 2005).

¹⁴ ACMA Media and Communications in Australian Families 2007: Review of Research Literature (December 2007) at 295; Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 16.

¹⁵ Dan Glaister ‘MySpace Bars Thousands of Sex Offenders Found Among Members’ *The Guardian* (26 July 2007). Also see: Susan Duncan, ‘MySpace is Also Their Space: Ideas for Keeping Children Safe From Sexual Predators on Social Networking Sites’ (2008) 96 *Kentucky Law Journal* 527.

¹⁶ See: Keeping the Internet Devoid of Sexual Predators Act (KIDS Act) HR 719 and S 431; Deleting Online Predators Act (DOPA) HR 1120 (as introduced 16 Feb 2007); Internet Stopping Adults Facilitating the Exploitation of Today’s Youth Act (SAFETY) HR 837.

¹⁷ Sen David Johnston and Sen Helen Coonan, (Joint Press Release) Net Alert – Working Group Convened to Prevent Predation through Social Networking Sites. DJ049-07 (13 September 2007).

¹⁸ Although Senator Conroy has announced a Consultative Working Group to improve Cyber-Safety with many of the same members. Sen Stephen Conroy Consultative Working Group to Improve Cyber-Safety Media Release (15 May 2008).

¹⁹ Also see: Safer Children in a Digital World: The Report of the Byron Review (March 2008) at 53.

²⁰ Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 18.

²¹ <http://mjinkindonline.web-log.nl/minjkindonline/2007/03index.html> (report is not available in English) as cited in Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 19.

²² Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 17.

been changed by new technology.²³ Some forms of cyber-bullying involve impersonating another user (sometimes teachers), either by setting up a fake profile or by hacking into their account. Simpler forms include posting embarrassing material, directly intimidating comments/communications, or even just exclusion from a group or friends list.²⁴

Public policy

A further, broader issue that should be kept in mind is the public policy objectives that colour the regulation of traditional media. For instance, public service obligations relating to children's television and local production are imposed on certain categories of Australian broadcasting.²⁵ It is not yet clear how these objectives will translate into new media (including social media) as such services continue to become a more important part of the overall media landscape. Without the Australian nexus offered by access to finite radiocommunications spectrum, future parliaments may not have an opportunity to apply national, public interest content requirements to mass-media. The flipside of this point is that the rationale supporting legacy broadcasting regulation will also need to be revisited in light of the continuing evolution of media systems.²⁶

Formal responses – extending broadcasting legislation

Although they have taken quite different approaches, both the European Commission and the Australian Federal Parliament have sought to adapt concepts of content regulation to new media in a manner informed by traditional broadcasting frameworks. They have both (quite effectively) extended principles of content regulation developed in response to mass-media to online services. These laws are, accordingly, particularly effective in dealing with content risks where online services resemble traditional media.

Australia – content services

The Australian content services scheme was implemented by the *Communications Legislation Amendment (Content Services) Act 2007* (Cth) in response to a scandal.²⁷ In the 2006 season

²³ The Byron Report notes: 'the nature of bullying changes when online, making it anonymous and potentially more damaging' see: *Safer Children in a Digital World: The Report of the Byron Review* (March 2008) at 55. Alastair Nicholson, a former Chief Judge of the Family Court, has also publicly raised concerns about current legal responses to cyber-bullying. See: Bridie Smith 'Law "Lags Behind" Cyber Bullying' *The Age* (17 May 2007).

²⁴ *Safer Children in a Digital World: The Report of the Byron Review* (March 2008) at 55. ACMA *Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety* (February 2008) at 23.

²⁵ *Children's Television Standards 2005*; *Australian Content Standard 2005*; *Television Program Standard for Australian Content in Advertising (TPS 23)*; Local drama expenditure requirements are imposed on subscription television licensees under Part 7 Division 2A of the *Broadcasting Services Act 1992* (Cth). The AVMS Directive, discussed below, also includes provisions on the promotion of European works.

²⁶ The impact of new media on US broadcasting laws and philosophy is reviewed in Adam Thierer 'Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age' (2006–2007) 15 *CommLaw Conspectus* 431.

²⁷ Bronwen Jagers and Mary Anne Nielsen 'Communication Legislation Amendment (Content Services) Bill' *Parliament of Australia, Department of Parliamentary Services: Bills Digest*, No. 158 (23 May 2007). Also see: Explanatory Memorandum to the *Communications Legislation Amendment (Content Services) Bill 2007* at 9. While Big Brother was responsible for speeding the passage of the content services legislation into law, the Department of Communications, Information Technology and the Arts (**DCITA**) (now the Department of Broadband, Communications and the Digital Economy) had been considering issues relating to the online content scheme (including the issue of live content) and how the scheme might be updated for some time. See: *DCITA Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992: Issues Paper*

of reality television program *Big Brother*; two housemates were alleged to have sexually assaulted another contestant and were ejected from the Big Brother house.²⁸ The incident itself was never broadcast on television, but was transmitted through a live stream accessible online and the clip was quickly uploaded to *YouTube* and forwarded around the Internet.²⁹ The incident highlighted a gap in the regulation of online content. The scheme effected by Schedule 5 to the BSA did not cover ephemeral content (such as a live stream) and as a result the ACMA had no mechanism to respond to such material.³⁰ In short, the episode underlined the point that broadcasting regulation stopped at the internet and that this was a problem.

Theory

In a report that preceded the content services legislation, the Department of Communications, Information Technology and the Arts proposed:

A new framework for convergent content

Regulation based on the level of control exercised by service providers rather than the communications delivery platform is likely to be more robust and adaptable in the face of new and innovative content services. At the same time, an objective should be to harmonise the regulation of communications content and to reduce the complexity encountered by consumers, industry and regulators.³¹

This approach came to be adopted in Schedule 7 to the BSA, which establishes a complaints driven take-down/service cessation scheme for ‘content services’ (as defined) that have an Australian connection.³²

What are content services

A **content service** is any combination of text, data, speech, music, sounds or visual images (animated or otherwise) delivered through a ‘carriage service’ (which means a

(September 2002); DCITA Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992: Report (May 2004); DCITA Review of the Regulation of Content Delivered over Convergent Devices (April 2006).

²⁸ The ‘turkey slap’ incident. Police concluded that there was insufficient evidence for a criminal investigation. Darren Cartwright ‘Big Brother Turkey-Slap Baby’ Daily Telegraph (27 April 2007).

²⁹ The incident caused quite a controversy and a series of swift and ineffective responses from the Federal Government. Then Prime Minister, John Howard, called for Big Brother to be cancelled. See: ‘Get this Stupid Program Off’ Sydney Morning Herald (3 July 2006). The Minister for Communications directed the ACMA to investigate ‘whether the Commercial Television Industry Code of Practice was providing adequate community safeguards’. Which was, of course, somewhat beside the point as the incident had never been televised. See: ACMA ‘Review of Commercial Television Code for Reality Programming’ Media Release MR 133/2006 (7 November 2006); Sen Helen Coonan, ‘Reality Television Review’ Media Release 116/07 (24 August 2007). The report from the ACMA concluded that regulatory arrangements for reality television programming were generally appropriate. See: ACMA Reality Television Review: Final Report (30 March 2007) at 88.

³⁰ This is because the definition of ‘Internet Content’ in Schedule 5 to the BSA referred only to ‘stored’ content and live content is not necessarily stored. Furthermore, in 2000, then Minister for Communications Senator Alston determined under paragraph (c) of the definition of **broadcasting service** in section 6(1) of the BSA, that: ‘a service that makes available television programs or radio programs using the internet’ was not within the definition. Therefore, a live stream could not be regulated as either internet content or as a broadcasting service.

³¹ DCITA Review of the Regulation of Content Delivered over Convergent Devices (April 2006) at iv.

³² Broadcasting Services Act 1992 (Cth) Schedule 7 cl 3, 47(1)(b), 56(1)(b) and 62(1)(c). An ‘Australian connection’ will be established where content is hosted on servers physically located within Australia; or in the case of live content, the service originates in Australia. See: Broadcasting Services Act 1992 (Cth) Schedule 7 cl 3; Lexis-Nexis Communications Law and Policy in Australia (2007) at [16,060].

communications network in plain language).³³ The content services legislation delineates three different types of content service:

1. **Hosting Services** – which are services that host stored content, and where hosted content is provided to the public (for a fee or otherwise);³⁴
2. **Live Content Services** – which are services that provide content which is *not* stored to the public (for a fee or otherwise);³⁵ and
3. **Links Services** – which are services that provide links to content and are provided to the public (for a fee or otherwise).³⁶

Where any of these content services are both operated for profit and provided for a fee to the public they are considered a commercial content service and are more highly regulated.³⁷ Mobile premium services, which were previously dealt with under a separate scheme, are now regulated as a subcategory of commercial content service.³⁸

Exemptions and exclusions

The Explanatory Memorandum to the content services legislation notes ‘*the content of users’ personal communications*’ was to be excluded from the scope of the new regulatory framework.³⁹ As a consequence, specific exemptions exist for Instant Messaging (**IM**), Email, SMS/MMS, voice and video calls.⁴⁰ The other important limitation is that the definitions for all types of content service require that the service be provided to *the public*.⁴¹

Content services and social media

It is worth applying these exclusions to the types of service offered in social media. IM applications are a common part of many social media sites,⁴² so are public and private

³³ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definitions of **content** and **content service**. The definition of **carriage service** is set out in section 7 of the Telecommunications Act 1997 (Cth) and means ‘a service for carrying communications by means of guided and/or unguided electromagnetic energy’.

³⁴ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definition of **stored content** and 4.

³⁵ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definitions of **live content** and **live content service**.

³⁶ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definition of **links service**.

³⁷ For instance, the definitions of **prohibited content** and **potential prohibited content** are affected by whether the content service is provided on a commercial basis or not. Furthermore, additional obligations are placed on commercial content services under the Internet Industry Association Content Services Code (June 2008), which includes, inter alia, an obligation that commercial content services providers engage trained content assessors. See: Content Services Code (June 2008) cl 8; Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definition of **commercial content service**, 20, 21, 81 and 82.

³⁸ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definition of **mobile premium service** and 20. The previous scheme for mobile premium services was set out in the Telecommunications Service Provider (Mobile Premium Services Determination 2005 (No.1), the Mobile Premium Services Industry Scheme (August 2006) and the ACMA Mobile Premium Services Default Scheme (September 2006) which still have a limited effect in areas that are not covered by Schedule 7. See: Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1) Amendment 2007 (No.1) and Explanatory Memorandum to the Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No.1) Amendment 2007 (No.1).

³⁹ Explanatory Memorandum to the Communications Legislation Amendment (Content Services) Bill 2007 at 1.

⁴⁰ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definitions of **content service** and **exempt content service** and 4. Note, however, that there are qualifications to these exclusions, in particular for adult chat services, or services that specialise in prohibited or potential prohibited content.

⁴¹ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 2 definitions of **commercial content service**, **links service** and **live service**, 4 and 7.

⁴² IM is central to both MySpace and Facebook. Even file-sharing software Limewire includes a chat feature.

comments, private email and public chat forums.⁴³ Audiovisual material may be posted by users or posted and actively promoted by the service provider;⁴⁴ such content may be ‘shared’ at a click, either by posting the material on the user’s profile, or by highlighting the content through social book-marking sites (another type of social media).⁴⁵ Alternatively a link to that content may be quickly circulated via an uncountable number of communications platforms, such as email or MMS.

In short (and ignoring for a moment the Australian connection test), certain communications and experiences occurring on and through social media would theoretically be regulated under the content services regime while certain others would not. As such, the dividing line between regulated and unregulated communications is both easily and arbitrarily crossed. These issues will be revisited following our review of the content service scheme.

Prohibited content

The content services scheme revolves around the concept of **prohibited content**.⁴⁶ Whether content is prohibited can depend on whether it is provided by a commercial or non-commercial content service.⁴⁷ It may also depend on whether the content is subject to an appropriate age verification mechanism, which is referred to as a **restricted access system (RAS)** in the legislation.⁴⁸ Content that is classified (or classifiable) as MA15+ is not unrestricted where it is provided by a non-commercial content service. If such content is provided as part of a commercial content service, it is prohibited unless access is conditioned by a RAS.⁴⁹

⁴³ As a specific example, the MySpaceIM software allows users to send text instant messages to each other, but also enables voice communications in partnership with Skype. MySpaceIM available at www.myspace.com/myspaceim/. Also see for instance: YouTube, Interacting with Other Users Help Page available at: <http://help.youtube.com/support/youtube/>.

⁴⁴ For instance, MySpaceTV has channels of audiovisual material from, amongst other content providers, the BBC and the ABC. MySpace TV available at www.myspace.com/myspacetv/. See: Chloe Lake ‘MySpace Signs Deal to Screen BBC Shows’ News.com.au (24 January 2008) MySpace Australia has recently come to an arrangement with Fremantle Media for the production of site specific programming. Simon Canning ‘Neighbours Firm Fremantle Media Links with MySpace’ The Australian (24 July 2008).

⁴⁵ Including, Digg, Google Bookmarks, Reddit, Del.icio.us.

⁴⁶ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 20. Due to the dynamic nature of online content, Schedule 7 adopts a concept of **potential prohibited content**, being content which is not yet classified, but which is substantially likely to be prohibited. Broadcasting Services Act 1992 (Cth) Schedule 7 cl 21. See: DCITA Review of the Regulation of Content Delivered over Convergent Devices (April 2006) at 49.

⁴⁷ Broadcasting Services Act 1992 (Cth) Schedule 7 cll 20(1)(c) and (d).

⁴⁸ Broadcasting Services Act 1992 (Cth) Schedule 7 cll 20(1)(b)(i), (c)(ii) and (d)(ii). Details of what will constitute an acceptable restricted access system are set out in the Restricted Access System Declaration 2008 and in the Content Services Code (June 2008). Also see: Matt Vitins and Chris Dalton ‘ACMA Develops New Restricted Access Systems Declaration’ Allens Arthur Robinson Focus: Communications, Media and Technology (February 2008); Ian McGill and Valeska Bloch ‘ACMA Registers Content Services Code 2008’ Allens Arthur Robinson Focus: Communication, Media and Technology (September 2008).

⁴⁹ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 20(1)(c).

The following table provides a summary:

Prohibited Content ⁵⁰	RC // X18+	R18+	MA15+
Content Service	Prohibited	RAS	Not Prohibited
Commercial Content Service	Prohibited	RAS	RAS

Take-down and service cessation

Where, following a complaint and investigation process, the ACMA establishes that prohibited content is being provided through a content service it will issue a take-down notice (for hosting services), service-cessation notice (for live services) or a link-deletion notice (for links services) as applicable.⁵¹ For RC and X18+ content, each of these notices requires that the content service provider disable access to the material.⁵² For the lower classification categories, the service provider may be able to respond to the notice by implementing a restricted access system.⁵³

Penalties and remedies

A graduated range of enforcement measures are available to the ACMA under the content services legislation. Failure to comply with any type of take-down notice, service-cessation notice, or links-deletion notice will incur both criminal and civil liability with a separate offence committed in respect of each day the infringer remains in contravention.⁵⁴

Europe – audiovisual media services

The European Union first set minimum standards on broadcasting for member states through the *Television without Frontiers Directive*, which was adopted by the European Council in 1989.⁵⁵ The directive was updated in 1997 and again in late 2007.⁵⁶ The most recent

⁵⁰ Note that classification categories for printed publications are also extended to online content under the content services legislation. An electronic version of a printed publication is referred to as an ‘eligible electronic publication’ in the content services legislation, and publications will be considered prohibited content if they have been Refused Classification, or classified as Category 1 Restricted or Category 2 Restricted. Broadcasting Services Act 1992 (Cth) Schedule 7 cl 11 and 20(2).

⁵¹ The ACMA may issue final or interim notices depending on whether the content in question has been classified. Broadcasting Services Act 1992 (Cth) Schedule 7 cl 47 (action to be taken in relation to hosting services), 56 (action to be taken in relation to live content services) and 62 (action to be taken in relation to links services). Complaint and investigation provisions are set out in clauses 37–46 of Schedule 7 to the Broadcasting Services Act 1992 (Cth).

⁵² This is referred to as a ‘Type A Remedial Situation’. Broadcasting Services Act 1992 (Cth) Schedule 7 cl 47(1)(c),(e) and 47(6) (hosting services), 56(1)(c) and 56(6) (live content services), 62(1)(d),(f) and 62(6) (links services).

⁵³ This is referred to as a ‘Type B Remedial Situation’. Broadcasting Services Act 1992 (Cth) Schedule 7 cl 47(1)(d) and 47(7) (hosting services), 56(1)(d) and 56(7) (live content services), 62(1)(e) and 62(7) (links services).

⁵⁴ A person must not contravene a **designated content/hosting service provider rule**: Broadcasting Services Act 1992 (Cth) Schedule 7 cl 106 and 107. Compliance with all forms of take-down notice are specified as designated content/hosting service provider rules for hosting service providers under Broadcasting Services Act 1992 (Cth) Schedule 7 cl 53(6). Compliance with all forms of service-cessation notice are specified as designated content/hosting service provider rules for live content services under Broadcasting Services Act 1992 (Cth) Schedule 7 cl 60(4). Compliance with all forms of link-deletion notice are specified as designated content/hosting service provider rules for links services providers under Broadcasting Services Act 1992 (Cth) Schedule 7 cl 68(6).

⁵⁵ Directive 89/552/EEC of 3 October 1989 (Television without Frontiers Directive).

amendments changed the name of the *Television without Frontiers Directive* to the *Audiovisual Media Services Directive* as part of a deliberate extension of television broadcasting rules to new media services that ‘look like’ traditional television.⁵⁷ The genesis of the 2007 amendments can be traced to resolutions of the European Parliament which called for the adaptation of the original *Television without Frontiers Directive* to reflect structural changes and technological developments, while fully respecting its underlying principles.⁵⁸

The *Audiovisual Media Services (Amending Directive)* entered into force on 19 December 2007, and EU member states have until the December 2009 to implement its provisions into national law.⁵⁹

Audiovisual media services

The *Audiovisual Media Services Directive* (the *AVMS Directive*) adopts a technologically neutral definition of **audiovisual media service** that applies across all audiovisual mass media, including television, the internet and mobile devices, and whether scheduled or on demand. An audiovisual media service is defined as a service under the editorial responsibility of a media service provider, the principle purpose of which is the provision of programmes in order to inform, entertain or educate the general public, by means of an electronic communications network.⁶⁰

Importantly, the AVMS Directive sets out further definitions which have the effect of limiting its scope, including the concept of providing a **programme**.⁶¹ In addition, the AVMS Directive is not intended to apply to any purely non-economic activities or ‘any form of private correspondence’.⁶²

Linear and non-linear

The AVMS Directive establishes a distinction between ‘linear’ and ‘non-linear’ audiovisual media services.

Linear services are scheduled. The media service provider determines the moment in time that a specific programme will be transmitted, for simultaneous viewing by the audience.⁶³ This type of service covers television broadcasts and similar services such as IPTV and mobile TV.

⁵⁶ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (amending Council Directive 89/552/EEC); Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC).

⁵⁷ See: Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recitals (11),(16),(18) and (20). In particular, note the definition of ‘programmes’ in the AVMS Directive, which is set out in note 61 below.

⁵⁸ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recital (11).

⁵⁹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC). Also see: European Commission ‘The Television Without Frontiers Directive :: Regulatory Framework’ available at: http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm.

⁶⁰ Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 1(a); Also see: Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recitals (16),(17), and (18).

⁶¹ **Programme** means:

a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting.

Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 1(b).

⁶² Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recitals (16) and (18).

⁶³ Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 1(e). Also note Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending

Non-linear services are provided on demand. This category of service applies where viewing occurs at a moment selected by the user, at his or her individual request.⁶⁴

The minimum tier and additional requirements

Different standards apply to linear and non-linear audiovisual media services.

The recitals to the amending directive note:

On-demand audiovisual media services are different from television broadcasting (linear services) with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services...⁶⁵

Accordingly, the AVMS Directive establishes a minimum tier of basic obligations that apply to both types of service, before continuing to outline additional obligations that are specific to each.⁶⁶

The minimum tier includes requirements relating to the incitement of hatred based on race, sex, religion or nationality, and certain requirements relating to sponsored programmes and commercial communications.⁶⁷ In respect of advertising, the minimum tier states that commercial communications need to be recognisable as such, and limits cigarette and alcohol advertising in particular.⁶⁸

Further provisions that apply only to on-demand (non-linear) services are designed to promote European works and to ensure such services do not seriously impair the physical, mental and moral development of minors.⁶⁹

Linear services are subject to stricter requirements that continue the traditional regulation of television broadcasters. For example, the AVMS Directive sets out rules applicable to linear

Council Directive 89/552/EEC) recital (24), which says that quasi simultaneous broadcasting, where variations are due to technical processes, would be considered simultaneous viewing.

⁶⁴ Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 1(g).

⁶⁵ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recital (42).

⁶⁶ Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) chapters IIa (provisions applicable to all audiovisual media services), chapter IIb (provisions applicable only to on-demand audiovisual media services), chapters IIc, III, V and VI are specific to television broadcasters (i.e. linear services).

⁶⁷ See Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) articles 3a–3g. For instance, Member states shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality: Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 3b; Member states shall ensure that audiovisual commercial communications shall be readily recognised as such and surreptitious audiovisual commercial communication shall be prohibited: Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 3e(1)(a); audiovisual commercial communications shall not cause physical or moral detriment to minors: Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 3e(1)(g).

⁶⁸ Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) articles 3e(1)(a), 3e(1)(d) and 3e(1)(e).

⁶⁹ For example, by implementing access codes or some other means of effectively preventing minors from accessing adult content. Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) article 3h. Also see: European Commission AVMSD – What is it? available at: http://ec.europa.eu/avpolicy/reg/avms/index_en.htm.

services on European programming, advertising levels and the protection of minors from pornography and gratuitous violence.⁷⁰

AVMS and social media

The AVMS Directive is not as ambitious in its scope as the Australian content services legislation and it is not designed to apply to social media. The recitals to the amending directive explain that the definition of audiovisual media service:

should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope... should not cover activities which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.⁷¹

As noted, the AVMS Directive does not affect personal communications.⁷²

Where social media sites start to behave like traditional broadcasters, however, then the AVMS Directive could be relevant. As noted above, *MySpace TV* provides channels of programming and structures its service around broadcasting metaphors. In August, MySpace Australia launched its online television channel by transmitting a live performance by *Death Cab for Cutie*.⁷³ Depending on the ultimate form of the national laws that implement the AVMS Directive, such a service could become regulated. Again, as with the content services legislation, the result is that some social media services could be within the scope of the AVMS Directive and others not.

Shortfalls in formal regulation

The Australian content services legislation and the AVMS Directive are adapted to circumstances where new media looks and behaves like traditional media. These instruments do not attempt to bridge the conceptual divide between content and communications. This is not intended as a criticism. The formal responses outlined above attempt to carry principles of content regulation informed by broadcasting into new media and manage to do so with great theoretical elegance. The point is that they only partially address the content issues in social media and do not seek to address other types of risk.

Content – public and private communications

The primary shortfall in the formal regulation of content in social media is that it does not contemplate the distribution of content through private communications. There are, of course, important differences between publicly and privately distributed content that affect content regulation. As noted, a genuine ‘push’ broadcast and analogous services, need to be conditioned by a **community standard** to avoid causing offence. The nature of a community standard is such that it will change depending on the nature of the audience. For instance, commercial television licensees in Australia can only broadcast material that is classified MA

⁷⁰ Directive 89/552/EEC of 3 October 1989 (Audiovisual Media Services Directive) articles 4 and 5 (European programming); article 18 (advertising limits); article 22 (protection of minors).

⁷¹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recital (16).

⁷² Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recitals (16) and (18).

⁷³ ‘MySpace TV Goes Live as Death Cab Rocks’ News.com.au (20 August 2008).

15+ at certain times of night, or during the day when children are assumed to be at school, because the audience is deemed to be different at those times.⁷⁴

Context is also critical. As explained by the Department of Communications Information Technology and the Arts:

Users come to various communications platforms and devices with different expectations... families sometimes allow children to watch free-to-air television for extended periods during particular time zones because of their confidence in the content requirements placed on broadcasters under the BSA. By comparison, consumers are encouraged to treat the Internet more warily, particularly in terms of allowing children to view internet content in unsupervised situations.⁷⁵

On this basis, the apparent paradox that a cross-referenced library of pornography may be accessed online with little difficulty, while the ACMA continues to impose fines for showing nudity on network television has come to be happily accepted.⁷⁶

In summary, community standards are flexible. They nonetheless contrast with the **personal standards** relevant to content communicated in a private communication. A person who counts a recipient as a 'friend' knows (or should know) what will cause offence to their friend and will adjust their communications accordingly. A broadcaster performs no such individual analysis of audience members or what might upset them. Content distributed by users has built-in safeguards in the form of social convention and notions of good taste. This is probably more effective and is certainly more personalised than, for instance, the *Commercial Television Code of Practice*. This is not to say that all content filtered through personal communications is unproblematic. There are limits where socially harmful material is circulated. In such circumstances society is not concerned with whether the recipient is offended as much as whether the material should be restricted or censored for some other reason. In short, principles of content regulation designed for broadcast media do not directly translate into social media.

Communications risks

Criminal provisions available to deal with communications risks are heavy handed and only appropriate for seriously damaging behaviour.⁷⁷ Such measures ignore the possibility of using very simple and efficient technical solutions for managing communications risks. The manner in which social media fits with existing telecommunications is beyond the scope of this paper. It is worth noting, however, that social media may or may not be caught by infrastructure focussed legacy definitions in the *Telecommunications Act 1997* (Cth) presenting a new set of issues.⁷⁸

⁷⁴ Broadcasting Services Act 1992 (Cth) ss 123(3A) and (3C); Commercial Television Industry Code of Practice (July 2004) cll 2.8–2.12.

⁷⁵ DCITA Review of the Regulation of Content Delivered over Convergent Devices (April 2006) at 94.

⁷⁶ ACMA, ACMA Finds Further Episode of Big Brother Uncut Breached TV Code Media Release MR28/2006 (21 March 2006).

⁷⁷ For instance, the Criminal Code contains offences relating to the misuse of a carriage service in a manner which a reasonable person would regard as menacing, harassing or offensive: Criminal Code Act 1995 (Cth) Criminal Code s 474.17; Provisions in the Criminal Code added by the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004 (Cth) are generally discussed in DCITA Review of the Regulation of Content Delivered over Convergent Devices (April 2006) at 69–70.

⁷⁸ Consider, for instance, social media's position under the Telecommunications (Interception and Access) Act 1979 (Cth).

Informal responses – new risks and regulatory principles

Indirect methods of dealing with online risks, such as education initiatives and user-level filtering,⁷⁹ have always been a central part of the Australian Government's response to online content.⁷⁹ These approaches recognise that users have a level of responsibility for their own online safety.

However, service providers are increasingly being enlisted in informal regulatory arrangements. Since taking over as Minister for Communications, one of Senator Conroy's main policy items has been to press a scheme for ISP level filtering.⁸⁰ The current preference for filtering online content demonstrates that technical solutions can be a highly effective way of managing both user behaviour and the material that is distributed online.⁸¹

The past year has also seen social media service providers and regulators taking highly co-operative steps to respond to the new types of risk existing on social media platforms. In Australia, the United States and the United Kingdom, various principles and codes of conduct have been developed by key industry players and regulatory authorities. *MySpace* and *Facebook* have both signed agreements with Attorneys-General in the United States dealing with online safety measures. In the UK, the Home Office has recently released the *Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008*, which was developed in consultation with a number of major social media service providers and the ACMA, amongst others.⁸²

The *MySpace* agreement

On 14 January 2008, Fox Interactive Media, the parent company of *MySpace*, and the Attorneys-General of 49 US States agreed a *Joint Statement on Key Principles of Social Networking Sites Safety* (the *MySpace Agreement*).⁸³

The focus of the *MySpace Agreement* is on child protection but it also includes more general provisions. The *MySpace Agreement* sets out design changes to the *MySpace* site that work to protect children from inappropriate adult contact and content.⁸⁴ For example, a number of technical measures agreed work to segregate underage and adult users. Users who are over 18 cannot browse for users who are under 18, users who are under 16 years old are automatically assigned a private profile and so forth.⁸⁵

⁷⁹ Richard Alston, 'The Government's Regulatory Framework for Internet Content' [2000] UNSW LJ 1. To see the Australian Government's online safety initiatives in action see: NetAlert available at www.netalert.gov.au.

⁸⁰ See: Sen Stephen Conroy Budget Provides Policing for Internet Safety Media Release (28 July 2008); ACMA Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (February 2008); ACMA Closed Environment Testing of ISP-Level Internet Content Filtering (June 2008).

⁸¹ This relates to the position argued most prominently by Lawrence Lessig in his book *Code* (1999) (and updated in *Code 2.0* (2006) i.e. the way to manage internet content is to manage surrounding 'architectures' or code. The 'soft law' agreements discussed below all suggest architectural changes to the social media services involved as a way of managing user behaviour.

⁸² Although chat services are not specifically discussed in this paper, it is worth noting that the Internet Industry Associations Content Services Code, which forms part of the content services scheme effected through Schedule 7, contains a recommendation that commercial content service providers that provide **chat services** should consider implementing procedures to minimise the risk of and potential for illegal contact between adults and children. Unlike other elements of the Content Services Code this is a recommendation rather than a mandatory clause. See: Content Services Code (June 2008) cl 23.

⁸³ The Texas Attorney General was a notable detractor (and not a signatory). 'Texas AG: MySpace Agreement offers 'false sense of security' Dallas News (15 January 2008).

⁸⁴ Joint Statement on Key Principles of Social Networking Sites Safety (14 January 2008) principle II.

⁸⁵ Joint Statement on Key Principles of Social Networking Sites Safety (14 January 2008) appendix A at 1.

In terms of content regulation, the MySpace Agreement includes extensive provisions identifying and removing inappropriate content.⁸⁶ It also includes requirements that certain areas of the site – for instance the ‘Romance and Relationships Forum’ – are to be restricted. Echoing the European Union’s concerns on tobacco and advertising, users who are under 18 and 21 respectively are not allowed to set the smoking/drinking preferences or access tobacco/alcohol advertising.⁸⁷

The Facebook agreement

A similar agreement was reached between the US Attorneys-General and Facebook on 8 May 2008 (the *Facebook Agreement*).⁸⁸ The operative parts of the Facebook Agreement are very similar to the MySpace Agreement, although worded slightly differently and adapted to the particular characteristics of the site. Facebook is required to aggressively remove inappropriate images and content, underage user profiles are restricted in various ways, and tobacco and alcohol advertising is to be restricted.⁸⁹

Home Office Guidance

In April 2008, the Home Office Task Force on Child Protection on the Internet (UK) published *Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008* (the *Home Office Guidance*). Contributors to the Home Office Guidance included the ACMA, social networking sites, *Facebook*, *MySpace* and *Bebo*, and other new media businesses such as *Yahoo!*, *AOL* and *Google*.

The Home Office Guidance contains recommendations for good practice. The principles that are set out are expressed to apply to social networking and interactive services across both fixed and mobile platforms.⁹⁰ Although more general in nature, the principles are like the MySpace Agreement and the Facebook Agreement in terms of content, and in that they are quite prescriptive. For instance, according to the Home Office Guidance, service providers should ensure that profiles of users under 18 are private by default;⁹¹ even public profiles should not be searchable on all criteria;⁹² content aimed at adults (e.g. sexual content, dating and flirting) should not be available to users registered as under 18; and advertising should be age appropriate.⁹³ The Home Office Guidance also recommends that complaints procedures be developed for cyber-bullying, inappropriate content and suspicious behaviour towards children.⁹⁴

⁸⁶ Technical methods of identifying inappropriate image uploads are to be implemented and users who have uploaded pornographic material repeatedly or flagrantly will have their accounts deleted: Joint Statement on Key Principles of Social Networking Sites Safety (14 January 2008) appendix A at 1 and 2.

⁸⁷ Joint Statement on Key Principles of Social Networking Sites Safety (14 January 2008) appendix A at 2 and 3.

⁸⁸ The Texas Attorney-General did not participate in the Facebook Agreement either.

⁸⁹ Joint Statement on Key Principles of Social Networking Sites Safety (8 May 2008) appendix A at 1–4.

⁹⁰ Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 24 (1.1).

⁹¹ Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 26 (4.9).

⁹² Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 28 (6.2).

⁹³ Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 25 (3.3).

⁹⁴ Home Office Task Force on Child Protection on the Internet (UK) Good Practice Guidance for the Providers of Social Networking and other User Interactive Services 2008 (3 April 2008) at 31 (10.1).

Commentary on ‘soft law’ approaches

These forms of ‘soft law’ allow for a quick response to new media. The MySpace Agreement and Facebook Agreement in particular involve some highly tailored design changes to the sites concerned that would be very difficult to effect through generally applicable law. There is definitely a place for this type of self-regulation.⁹⁵ It is flexible and is likely to be very effective in addressing inappropriate content and anti-social behaviour. The trade-off for this flexibility, however, is that regulatory inconsistencies and uncertainty emerge. Self-regulation suffers from a basic lack of credibility, transparency and accountability.⁹⁶ In a paper of self- and co-regulatory models in communications, Lievens et. al. have also commented that:

Another recurring concern, applicable to alternative regulatory mechanisms, is that their growing use may lead to a steady decrease in the democratic quality of regulation.⁹⁷

The democratic issues with US Attorneys-General privately agreeing to regulatory principles with certain social media services, and not others, are obvious. Concerns regarding sovereignty and equality before the law are raised by this approach.

Conclusions

Social media incorporates communications and media experiences that are variously public and private, commercial and non-economic. The diversity of these experiences means that social media is very hard to keep within regulatory fences that build on such distinctions.

While legislation is always an option, many of the specific design changes implemented by the major social networking sites would be very difficult to capture in generally applicable laws. Further, social media is relatively immature and developing in a number of directions. The nature of social media is not yet clear enough for an appropriate regulatory response to be codified in legislation. In summary, this is an area where either a co-regulatory regime, or the existing style of ‘assisted self-regulation’ displayed in the Home Office Guidance, would appear to be appropriate.

Co-regulation

The ACMA has the power, under Schedule 7, to request codes of practice from an industry body representing a particular section of the content industry.⁹⁸ Alternatively, if an industry body does not exist, or is otherwise unable to produce a satisfactory code, the ACMA may determine a standard in order to provide appropriate community safeguards.⁹⁹ It is important

⁹⁵ Note: Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (amending Council Directive 89/552/EEC) recital (36), which states that co- and self-regulation instruments can play an important role in delivering a high level of consumer protection.

⁹⁶ In discussing guidance documents published by the Home Office Task Force, the Byron Review (UK) comments ‘although the documents are detailed and specific in what they require from industry, concerns have been raised over their transparency, The existence of the documents is not well publicised, they are too lengthy and technically complex for the public to understand and, crucially, performance against these standards is not monitored, so the public has no way of knowing which companies are adopting good practice’. Safer Children in a Digital World: The Report of the Byron Review (March 2008) at 67–68. Also see: Eva Lievens, Jos Dumortier and Patrick S Ryan ‘The Co-Protection of Minors in New Media: A European Approach to Co-Regulation’ (2006) 10(1) UC Davis Journal of Juvenile Law & Policy 98 at 146.

⁹⁷ Eva Lievens, Jos Dumortier and Patrick S Ryan ‘The Co-Protection of Minors in New Media: A European Approach to Co-Regulation’ (2006) 10(1) UC Davis Journal of Juvenile Law & Policy 98 at 147.

⁹⁸ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 86. Industry codes may be registered by the ACMA under clause 85 of Schedule 7 to the Broadcasting Services Act 1992 (Cth).

⁹⁹ Broadcasting Services Act 1992 (Cth) Schedule 7 cl 91.

to note that such a code or standard has to relate to the **content activities** of participants in that particular section of the content industry.¹⁰⁰ However, in our view, this need not limit the scope or effectiveness of such codes/standards in dealing with the risks identified. Our central thesis is that content activities are practically inseparable from personal communications in social media.

Self-regulation

The urge to regulate should be resisted unless there are clear reasons for doing so.¹⁰¹ At the height of the ‘predator panic’ in mid-2007, Chris Kelly, Chief Privacy Officer for *Facebook* was quoted as saying:

There is no city in existence, let alone one that has 33 million citizens, that doesn’t have occasional crime... the question is: does the site make it easier or harder to commit crimes and what does it do to address them?¹⁰²

Social media generates new types of risk and extends old ones. However, social media service providers need to be given the opportunity to self regulate. All signs indicate that social media sites are taking both content and communications risks very seriously and are working to address these issues.

The case for further (external) regulation of social media has not yet been established.

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¹⁰⁰ See: Broadcasting Services Act 1992 (Cth) Schedule 7 cl 85(1)(b), 86(1)(a) and 91(1)(a)(ii).

¹⁰¹ The Office of Communications (UK) quite sensibly adopts the regulatory principle that it will ‘operate with a bias against intervention’. Office of Communications (UK)(**Ofcom**) Annual Plan 2008/2009 (April 2008).

Also see: Section 3(4)(c) of the Communications Act 2003 (UK) which states Ofcom must have regard to: ‘the desirability of promoting and facilitating the development and use of effective forms of self-regulation’.

¹⁰² ‘Alarm over Facebook Predators’ Sydney Morning Herald (31 July 2007).