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*Te Whare Wananga
o te Upoko o te Ika a Maui*



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This paper examines the logistics and consequences of a possible government initiative to "dabble where Angels [or at very least, Law Commissions] fear to tread" and tinker with the innovative and rapidly growing e-market. General policy objectives for improving Internet access and usage across the population provides an important mechanism for raising the economic performance of the nation and the social participation of citizens. However, any decision to intervene in the market may have far reaching consequences and be hard to predict, especially given the tendency of the free market to iron out information asymmetries in the long run.

The government has put the social problem of Internet access into the "too hard" basket. After all, in the absence of intervention the needs of the information poor in New Zealand society could be better met by letting the Internet service providers and commercial organisations go about their innovative efficiencies.

Despite this "laissez-faire" reaction, encouraging disadvantaged groups to obtain and disseminate information via electronic means is essential in a social free-market democracy. It would be appropriate for government to intervene to improve access to some disadvantaged groups. Some equitable concerns should be addressed for the sake of consistency with government education policy. It would also be appropriate to strengthen consumer protection legislation as a means of setting the ground rules for the market.

On the issue of Internet usage the government has additional problems. Intervention that takes the form of censorship has failed in other countries. Many countries have attempted to discourage Internet Service Providers from providing information to the public detriment, regulating charging, censorship, security, and liability. Competition and innovation within these growing industries could be affected by higher compliance costs. Despite this, there may be scope for international initiatives to redress these concerns. Certainly this is not a problem that will disappear in a hurry and the present flouting of intellectual property rights over the Internet is a mere symbol of things to come. If the government is able to send signals to the market then this may encourage an efficient solution rather than a regulatory one. This depends on whether the government can apply the principles and concerns raised by the recent telecommunications enquiry to the regulation of the Internet.

The text of this paper (excluding contents page, footnotes, and annexes) comprises approximately 14300 words.

I INTRODUCTION

The New Zealand legal system is grappling with difficult issues relating to new technologies. The most controversial of these concerns Internet access and usage. The widespread dissemination of information through the medium of the Internet has social and economic advantages, and should be encouraged by government. On the other hand, government regulation could potentially minimise the misuse of this medium.

Previously the focus was on whether businesses could successfully transact within this new medium. Now the focus should go towards consumers wanting to access information and services, who are often at a disadvantage. Disadvantaged groups of individuals classified as "information poor" illustrate the extreme example of these information asymmetries. This paper demonstrates that these groups must be provided with the opportunity to access and use the Internet. An analogy between literacy and the ability to navigate information sources on a computer illustrates the special significance of Internet access in society today.

The Law Commission suggests there is a need for a more *lassiez-faire* approach to e-commerce issues. However, the government has recently demonstrated within the closely related telecommunications industry that it will examine tailor-made solutions to instances of market failure.¹ In relation to the Internet the government owes some obligation to disadvantaged groups to provide them with access to this exciting new market. This paper argues that government should set the ground rules within this new market, and in the process offer consumers additional protection as a whole. Those areas handled well by the market should be left alone, as there is no substitute for market efficiency.

A regulatory approach which will bring about a fairer regime for users of the Internet relies on some degree of regional or international co-operation to be effective. This returns to an ongoing debate about whether the innovative e-market, left to its own devices within the lightly regulated New Zealand economy, can encourage consumer participation more effectively. While industry self-regulation and commercial negotiation should be the preferred approach to industry control, history has demonstrated that this has been ineffective in some areas.²

This paper will first examine possible means of government intervention to promote increased access of the Internet to disadvantaged groups but also the population as a whole. The second part of the paper will then examine how the government could prevent misuse of the Internet. To ensure that the government is encouraging the right sort of usage is the key. A broad policy

¹ This is despite a generally light-handed approach to regulation of the telecommunications industry: see Michael Trebilcock, Michal Gal, *Deregulation of Public Utilities — Experience of the Ontario Natural Gas and Electricity Industries*.

² *Draft Report of the Ministerial Inquiry into Telecommunications [Telecommunications Inquiry]* Submission 51 — The Consumer's Institute, p 1.

goal encouraging dissemination of information could fail if a substantial proportion of new users operate the medium primarily to examine lewd content, write defamatory material, or pursue illegal goals.

II ACCESS TO ELECTRONIC INFORMATION

The Internet creates a new means of accessing information. First, this section considers the benefits to society from information dissemination. Secondly, the unique characteristics of the Internet will be discussed.

A "The Medium is the Message" — Marshall McLuhan

"Unseen treasure and hidden wisdom, of what use is either?" —
Anonymous 14th century librarian³

The shifting media within the twentieth century demonstrates McLuhan's aphorism. This transition, from the power of the printed word, to the increasing impact of first the wireless, then broadcasting, and more recently, the Internet, creates the need for a transition in terms of regulatory focus. The more traditional means of obtaining information in New Zealand was twofold, via education and via media. The New Zealand government following similar western nations, enacted policies in law to maintain the free flow of information in this regard. This is particularly evident in three areas: freedom of speech and expression, education policy, and access to official information. It is also becoming increasingly important in the telecommunication industry, which has strategic importance for users of the Internet.

B "Information is the Currency of Democracy" — Thomas Jefferson

New media can therefore enhance the currency of democracy if one accepts that the ability to use this media has become a "new literacy".⁴ The Law Commission took a very narrow viewpoint in *Electronic Commerce Part One- A Guide for the Legal and Business Community*. This report concentrates upon the electronic implications of business and does not focus upon equity or consumer issues. Education is a necessary element of any successful democracy, and should keep pace with the needs of the society.

C "Information Wants to be Free" — Stewart Brand (infoanarchist)

The present overall legal policy from an intellectual property perspective and considering censorship standards prevents the uninhibited free flow of

³ Roger K Summit, Knowledge Online: Current Implications and Future Trends, in *Information Science: Still an Emerging Discipline* 101, 102 (James G Williams & Toni Carbo eds, 1997).

⁴ Paul Kelso and Guy Adams "As one in four homes go online in the UK, the country's digital divide widens", *The Guardian*, Tuesday July 11, 2000. Malcolm Forbes runs Lambeth Online, a community project based in Brixton, South London. "If the low paid are excluded from the Internet and the new competencies associated with it, then they will be excluded from the tools that will allow them to compete in the global knowledge economy. They will be in the same position as the person who couldn't read in the 'old' economy," he said.

information.⁵ However, there are many aspects that benefit a society with respect to the free flow of information.⁶ Now that many Internet Service Providers [ISP's] offer free dialling (although some charge a setup fee or for an 0900 line for help) one component of the cost of access is falling. Traditional Internet companies say they have been unaffected by tens of thousands of consumers signing up with a raft of new free service providers, suggesting that lower socio-economic groups are signing up.⁷ This paper demonstrates that the costs of access are only one existing impediment to the free flow of information via the Internet, along with infrastructure and education.

D Unique Characteristics of the Internet

Internet communications occur within cyberspace. Cyberspace has characteristics that distinguish it from real space, so it is more difficult to develop a coherent approach to how the law should regulate usage. Any method of regulation must take this into account.

Cyberspace is the non-physical place where electronic communications happen and digital data is located.⁸ Cyberspace (the interconnection of computer networks) makes obsolete physical space and time. Business dealings and banking transactions become simpler, and tangible money becomes rarer. Bill Gates declared that, "information has become increasingly important to us, and indeed we're at the beginning of an information revolution ... the central ingredient of an emerging world economy."⁹ A prerequisite to a successful modern society is access for most of the population to information.¹⁰ This is because electronic information is dynamic, and only made static when frozen in hard copy. Its existence has no meaning

⁵ Even as the traditional record industry is shutting down Napster and other MP3 services, so organisations such as Freenet and Contentville.com are beginning to offer novels and articles in contravention of copyright. Intellectual Property Issues aside, this demonstrates the value to a proficient user of the technology — a wealth transfer from the author / publisher to the technologically literate user.

⁶ Examples of free NZ ISPs - www.14free.co.nz, www.freenet.co.nz, www.zfree.co.nz, surf4nix.com. Many of these providers recoup their investment by other means. Users should beware of free lunches unless they are prepared to compromise their privacy or accept a large degree of advertising.

⁷ As with traditional forms of information retrieval, a local community newspaper or television channel can be free whereas a national newspaper or Sky digital television attract a charge. There are clear policy grounds for encouraging the reading of a national newspaper, whereas something that is purely for entertainment purposes such as Sky digital is a discretionary luxury item which is well outside the scope of traditional government intervention.

⁸ Anne Fulton, "Comment, Cyberspace and the Internet: Who will be the privacy police?" Quoted in Michael Adler, "Cyberspace, General Searches and Digital Contraband: The Fourth Amendment and the Net-wide Search" *Yale Law Journal* (1996) Vol 105, p1093.

⁹ Mark Gordon and Diana McKenzie "A Lawyer's Roadmap of the Information Superhighway" *Journal of Computer and Information Law* (1995), 180.

¹⁰ Michael Connors, *The Race to the Intelligent State* (1997), 11 [*Intelligent State*].

unless it is transferred. The development of this information infrastructure is fundamental to the success of New Zealand in the modern world. Having infrastructures available for electronically transferring and accessing information is critical for economic and social reasons and also can confer competitive advantages.¹¹ For example, the majority of service workers nowadays create, process and distribute information.¹² Many governments have understood the relationship between the strength of information infrastructure and wealth, and are developing the infrastructures to accelerate development. Information therefore becomes the most valuable asset for a nation to have, and prosperity will depend upon the level of its information infrastructure.¹³ As Bill Gates stated, "the Internet is the precursor of the ultimate global network. There is little doubt that when the global interactive network has finally evolved into the highway, it will still be called the Internet". Cables with limited bandwidth, used for voice or text transmissions, are narrowband circuits. Cables with a greater capacity which carry image and limited animation, have 'midband capacity' and those which have a high bandwidth, which can carry multiple video and audio signals, have 'broadband capacity'. A widespread access to broadband obviously promotes the dissemination of information in a number of media.

The Internet permits rapid dissemination of information to large audiences. The Internet works so well partially because there are no leaders, and no single organisation pays the cost. Eventually this unregulated information superhighway could connect every home, office, news medium, library, data bank, business, government agency and computer to every person who uses a communication device, such as a telephone, television or personal computers. Despite all the glamour surrounding the Internet, "content remains king" The content embodies the knowledge, not the mass of information or the search technique. As Hoffman states, "that is what separates a library from a billboard covered in graffiti".¹⁴ The government must focus carefully on where it can promote internet access and usage, and where it is usurping the role of a marketplace for a service. The theoretical boundary will now be addressed.

III THE DIGITAL DIVIDE — AN ECONOMIC ANALYSIS

The Law Commission has succinctly represented the New Zealand government's approach to e-commerce. The policy approach is:¹⁵

"... one of minimal intervention and encouragement of self-regulation, consistent with the Government's overall policy framework. *Government*

¹¹ World Telecommunications Development Report 1995 available at <<http://www.itu.ch/WTDR95/ov.htm>>.

¹² *Intelligent State* above n 10, 15.

¹³ Korean Minister for Information and Communications Policy, Proceedings of the International Council for Computer Communication Conference, 21-24 August 1995.

¹⁴ John Hoffman, *Technology Law Forum* (2000) TLF 16, 17.

¹⁵ "Electronic Commerce Part Two: A basic legal framework" NZLC R 58, para 11.

intervention will only be considered if it is necessary to address clearly identified market failures, or in order to maintain certainty for business and protection for consumers. Any intervention should consist of simple, predictable regulation that is technology-neutral ... and able to respond to the pace of change in the electronic environment." (Emphasis added)

The problem becomes one of identifying market failures. Economic theory dictates that the free market economic system will achieve an allocatively efficient result under perfectly competitive conditions. This is because usually the free market will generate a more efficient allocation of resources than politicians are able to through government intervention. The fact that efficient allocations are achieved in most circumstances without government intervention, control or direction is remarkable. It is a key reason why competition is so highly prized and why there has been a significant movement away from both government intervention and anti-competitive practices in a number of countries. Since the mid-1980s New Zealand has engaged in a major programme of deregulation, with the move towards greater competition being one of the key reasons behind the reforms.

There are however a number of crucial areas where the free market fails to deliver a socially optimal allocation of resources, in addition to the problem of externalities. The economic concept of market failure does not mean that the market economy has collapsed, but rather that the market has not achieved allocative efficiency. The following areas of market failure or socially suboptimal outcomes are particularly relevant.

A *Unfair or Inequitable Allocation*

Although the free market economic system will generate an efficient allocation of resources, it seldom leads to an allocation that people would regard as fair or equitable. Most free market economies generate wide differences between rich and poor and as a consequence have some degree of government intervention to reduce income inequality. This occurs through progressive taxation on higher income earners (at present up to 39%) and the payment of benefits to those who are disadvantaged (for example by income support, disability allowances).

The trade-off between allocative efficiency and equitable concerns must be considered when government decides to intervene in a market. The market will clear with an efficient population level having access to the Internet given the available resources. If the market involves monopoly aspects (for example imperfect competition) these can be curbed to some degree by competition legislation. However to make the same argument in the market for education would result in many consumers opting to "consume" less education given the price per unit of education. The government subsidise education from a social perspective, but it is also important to remember the long-term economic benefits of an educated population via increased productivity and innovation.

The efficiency equity trade-off is a fundamental concern of any decision on whether or not the government should intervene in any market.¹⁶ The uncontroversial factors involved in government intervention to redress equity concerns are:

- 1 Taxation to fund subsidies / intervention introduces a deadweight loss and does not achieve allocative efficiency. The market is therefore producing within the efficient production possibility frontier and efficiency gains are possible by reducing intervention.
- 2 The process of redistributing introduces incentive problems that can result in a misallocation of resources.
- 3 The bureaucracy / administrative cost of the intervention involves resources being taken away from alternative valuable productive uses.
- 4 Compliance costs for an industry impose a drain on private sector resources.
- 5 Providing a subsidy or benefit on private individuals may create a disincentive for those individuals to seek to end this dependency.

Essentially the welfare benefits of intervention must exceed the costs of a less efficient economy. Quantification of this benefit is highly subjective and is usually determined by political decision makers. From a public choice perspective the decision to intervene can be a by-product of strong interest group pressure and the desire of politicians to be re-elected.¹⁷ This paper seeks to give a more independent evaluation of the social benefits of intervention as compared to the efficiency concerns.

In this evaluation, an allocation of resources is deemed to be pareto optimal if no change can make anyone better off without putting someone in a worse position. Once a pareto optimum is achieved no change from it can expect unanimous support because (by definition) any change must disadvantage somebody. This is unless society is willing to transfer wealth voluntarily for example, from rich to poor which is a movement along the pareto frontier.¹⁸

The limits of the utility-maximisation assumption as a view of individual behaviour is frequently debated. There has been a resurgence of interest in a

¹⁶ For example the Lorenz curve analysis is often used as a justification for income support. This analysis plots deciles of household income against the proportion of total household income. New Zealand Lorenz curves based on the last thirty years show the trend over time for the fulfilling of the age-old adage "the rich get richer...". This efficiency-equity debate often take place within the Neo-Monetarist long-run "trickle down" theories as directly conflicting with the Keynesian 'sticky-wages' adage: "in the long run we are all dead".

¹⁷ Politicians quickly move off the radar of political analysis if their principles prevent an electoral victory. See Dmitri Hubbard "Trans-Tasman Tantrums: Genteel Games or Yawning Chasms?" in *The Best: Critical Review*, Issue 4, February 2000, 7.

¹⁸ James M Buchanan "Politics without Romance: A sketch of Positive Public Choice Theory and its normative implications" [Politics without Romance] in *Theory of Public Choice II*, (University of Michigan Press, Michigan, 1984) 12.

variety of non-paretan and non-utilitarian ethics and their relationship to economics.¹⁹ This paper therefore also draws upon the experience of nations which have already attempted to solve the problem of the digital divide.

B Public Goods

Public goods are provided by the state since the free market will not supply them in socially desirable quantities. As these goods are non-rival in consumption and non-excludable in supply, one person's consumption does not prevent another person from consuming. Public goods are critical to the efficient functioning of society in areas like defence and roading. Public goods cannot be profitably produced by the private sector. It is unclear to what extent education and access be termed a public good. It is easier to justify government subsidising of these areas with reference to the unfair or inequitable allocation arguments made with regard to education.

C The Theoretical Framework for Government Intervention

		Socially Desirable?	
		Yes	No
Economically profitable?	Yes	A	B (usage issues)
	No	D (access issues)	C

Box A represents the majority of items produced in the New Zealand economy. No government intervention is necessary and Adam Smith's "invisible hand" everywhere guides the market to equilibrium. Box C represents inefficient socially undesirable goods, which will not be produced in a standard economic system.

1 Justification for subsidising access

Box D raises the Internet access issues which are discussed in this part (Part 1) of this paper. The free market will not produce optimum quantities of goods and services which are not economically profitable although socially desirable. It is not economically profitable for ISPs and commercial firms to produce universal Internet infrastructure, education, and access. The big difficulty occurs when the parts of the access question are broken down — some aspects of Internet access should be left to the market to determine. Unless a free market solution can be categorically proven to be inferior then economic problems should be addressed through the application of the free market.

¹⁹ Politics without Romance above n18, 10.

2 *Justification for regulating usage*

Box B raises the Internet usage issues which are discussed in Part 2 of this paper. The free market produces products which are economically profitable but socially undesirable.²⁰ Judgements about social desirability are represented by individuals and by politicians as influenced by interest group pressure.²¹ Some goods and services produced on the Internet, for example illegal services, pornographic and paedophilic materials, defamatory materials, or pirating of intellectual property rights involve the government making activities illegal or regulating their production. The rent-seeking behaviour of the free market often leads to black markets for the supply of these goods in the presence of government intervention.

3 *Practical problems caused by regulation*

As demonstrated the areas of access and usage within the market for Internet services are potential candidates for some form of government intervention. A useful predictor of producer and consumer behaviour is the desire to maximise benefits and minimise costs. Milton Friedman stated that pool players shoot shots as if they followed the laws of velocity, momentum, and angles from classical physics. However many pool players would be unable to explain these physical principles.²² In a similar vein, the popular profit maximisation models proved that if firms behave as if they are maximising profits, this can be deemed to be their intention. It can be very easy to send a wrong signals to a profit maximising firm if government intervention has the effect of eschewing the operation of Adam Smith's "invisible hand". This coupled with the assumption that when analysed, the political pressure that interest groups apply to politicians are an attempt to spend other people's money on a project of interest to a particular group. Therefore pressure groups are also seeking to maximise benefits while minimising costs. When in the position of spending other peoples money politicians are not subject to the same incentives and disciplines that encourage cost minimisation and benefit maximisation as when it is their own money being spent. In addition to these motivational difficulties, the ability of regulation to distort market signals should not be underestimated.

²⁰ Andrew Callander *Understanding the Economic Environment* (1998, Butterworths, New Zealand), 223. The author quips "Most would agree that contract killing, child prostitution, snuff movies, gun running, traffic in narcotics and so on are not the sorts of goods and services that should be encouraged although they can be very profitable. Other examples may include trade in body parts, traffic in endangered species, excessive production of gambling products and slavery." Many of these categories of activity are currently taking place within the world wide web and many international efforts to suppress these activities are ineffective on a global scale.

²¹ For a simple model of interest group theory see Dmitri Hubbard "Conflicts Of Interest In The Trans-Tasman Trade Relationship: A Public Choice Analysis" LLM Research Paper, Victoria University of Wellington (1999), 21. An interest group is classically defined as "a body that seeks to influence government in the allocation of resources without itself seeking to assume responsibility for government".

²² M Friedman *Essays in Positive Economics* (University of Chicago Press, Chicago, 1953) Ch 1.

D Present Government Approach

The acting Information Technology Minister Trevor Mallard highlighted that the Electronic Transactions Bill will provide confidence to businesses and government organisations wanting to work electronically. Mallard suggested there is a sense of urgency about having the legislation in place to enable e-commerce to succeed. The legislation will become "overarching" modifying existing legal requirements to use paper based communications and record keeping. The discussion paper states that:

"The government recognises the *economic and social importance* of electronic technology as part of New Zealand's push towards an information economy." (Emphasis added)

A short term plan of approach is also presented:

"In the next three years, e-commerce and e-government are likely to play an increasingly important role in achieving the Government's goal of building an *inclusive, innovative economy* for the benefit of all New Zealanders." (Emphasis added)

Despite mentioning "social importance" and "inclusive... economy", the rights of the consumer seems to have been scarcely considered.²³ The Draft Report for the Telecommunications Inquiry alludes to the risk that those with lower incomes or living in more remote areas will access a lower quality of telecommunications services than available to others, as a result making them incapable of participating in the information economy.²⁴ Paragraph 13 of the Law Commission's report identifies a broader goal:

"Wider issues

"... the use of electronic technology to enable citizens to *gain access to legal services and to government agencies generally...*" (Emphasis added).

There is no coherent structure at present for how this goal can be fulfilled. If it is not fulfilled to the extent that those groups who are 'information poor' can access this information, the question becomes, is this an example of market failure?²⁵ In New Zealand, the Department of Labour has responsibility for the

²³ The Consumer Guarantees Act 1993, Part II sets out the consumer's rights of redress against a supplier who fails to comply with guarantees listed in the Act. However the practical difficulties associated with getting repairs, replacement, or a refund from an offshore supplier have been consistently acknowledged.

²⁴ *Telecommunications Enquiry* above n 2, 62 (Appx I).

²⁵ In the United Kingdom 6.5m households (25%) are connected to the Internet. Percentages of households online are as follows: London 25% (highest proportion); Southeast England 24%; Eastern England 22%; Scotland / Northeast 14%; Northern Ireland 11% (lowest proportion). In the lowest income groups Internet access varies from 4 to 6%. Access levels increase rapidly with income, reaching 48% in the highest group. Access is highest in two-parent households; 35% of households with two or more children, 31% with one child are online. 7% of single parent homes with one child and 11% of those with two children have access. 16% of adults living alone have Internet access. The figure drops to 1% after retirement. 26% of couples without children have access. These figures give some ideas of the geographic and socio-economic factors at work in determining access.

governments "digital divide" policy and the State Services Commission has responsibility for e-government initiatives. Neither has to date done anything of substance, whereas the work of the Ministry of Consumer Affairs provides a more useful starting point.

As the Internet increasingly becomes a tool for accessing up-to-date relevant and reliable information, so the ability to access this information is becoming the new literacy. The direct correlation between the literacy and economic performance of a nation makes a convincing economic argument in favor of increasing the quality of, and access to, information.

E Social issues — The Information Poor

An information literate citizenry is fundamental to a participative democracy.²⁶ Access to and comfort with telecommunications based information underpins the information economy.²⁷ Claire Shearman, co-chairwoman of the United Kingdom Communities Online, which works to increase Internet access among the poor and ethnic minorities, the gap is growing despite government initiatives.²⁸ She stated there is a growing belief that dot.coms are the future of the economy. "Without access to the skills and the knowledge to thrive in that economy because of where you live, or how much money you earn, you won't be included," she said. The Internet is a very important form of expression and can provide the poor and those from ethnic minorities, who are traditionally excluded, with an empowering sense of identity. Many of the UK government's programmes — putting computers into all schools and libraries — are fine in principle, but you have to provide people with the skills to do more than just consume information.

People who might miss out on the benefits which electronic commerce will provide are people without employment involving regular use of computers, without the means of buying the equipment needed to get onto the Internet at home, or who are currently unable or unwilling to use computers whether for physical or geographical reasons.²⁹ Often the groups involved are the same groups who were concerned about telephone line access, who made submission to the telecommunications enquiry:

1 Deaf

Issues of access result for deaf people who find the telephone currently inaccessible. It is estimated that there are over 400,000 people in New Zealand with a hearing impediment. Of those 35,000 have severe or profound hearing

²⁶ Submission 16, Auckland City Libraries, 24 July 2000, 1.

²⁷ In a recent survey one in four people refuse to use the Internet because they think it is expensive and irrelevant to their needs; another quarter admit they do not know what the web is used for.

²⁸ Paul Kelso and Guy Adams "As one in four homes go online in the UK, the country's digital divide widens", *The Guardian*, 11 July 2000.

²⁹ *Shaw v Toshiba America Information Sys* (2000) 91 F Supp 2d 942, 984-985.

losses, and about 7000 of those have been deaf from birth. Deaf people are an isolated group who are generally in low socio-economic brackets.³⁰

2 *Blind*

There are 12500 blind, deafblind and sight impaired and sight impaired New Zealanders. These services include the provision of adaptive technology and communicative instruction. The RNZFB view accessibility to telecommunications as creating a flexible environment in which all disabled people can actively participate. The RNZFB was concerned that the enquiry did not address the right to access to telecommunications by all socio-economic groups. The RNZFB believed that telecommunications removed the isolating factors of its members.³¹

3 *Other disabled*

People with disabilities constitute a social minority group with a lower socio-economic status. In the Submission from the Disabled Persons Assembly of New Zealand Inc the objective of the Telecommunications Enquiry was picked up on:³²

"is to ensure that the regulatory environment delivers cost efficient, timely, and innovative telecommunications services on an ongoing, fair and equitable basis to all existing and potential users" (Emphasis added).

The Disabled Persons Assembly touch on an important theme of this paper. There is a difference between providing a service which reaches a large proportion of people (as the Internet will at present growth rates) and a service which has the potential to reach everyone. A market clearing mechanism will never provide for those people for whom additional costs must be incurred, therefore moving provision for those people out of the free market paradigm. The "Kiwishare" agreement represents the attempt to incorporate these factors into the New Zealand telecommunications market.

4 *Geographical location — Rural:*

The Minister for Rural Affairs, Rural Women of New Zealand, and Federated Farmers New Zealand Inc³³ all touched on the theme of geographic isolation and access to broadband phone lines. In addition, Tony Reilly³⁴ stated that Internet use in rural areas remains severely restricted. "The copper wire local loop simply does not have enough bandwidth to carry phone, fax and Internet traffic. There has been no investment in this infrastructure." On 29 September 2000 Telstra-Saturn announced it will install a broadband network in Auckland in a move tipped to open up the regional telecommunications

³⁰ Submission 12, Deaf Association of New Zealand Inc, 21 July 2000.

³¹ Submission 46, Royal New Zealand Foundation for the Blind, 21 July 2000.

³² Submission 47, June 2000.

³³ Submissions 13, 30 and 41 respectively.

³⁴ Submission 2, Chairman, Tasman Milk Products Ltd, July 2000.

market to increased competition.³⁵ These developments indicate the market failure to achieve an optimum level of broadband capacity to rural areas.

5 Lower socio-economic groups

The English government has as one of its aims to prevent the formation of a class of "information have-nots", those people excluded from key aspects of the economy by their inability to use the Internet. Alex Allan, the government's "e-envoy" in charge of widening Internet access, stated that the programme would see 700 special access centres open in deprived areas. He said UK Online was on target to meet a pledge to offer 80% discounts on basic IT courses and help 100,000 low income families to lease or buy cheap computers.³⁶

6 Possible means of redress

Auckland City Libraries submitted to the Telecommunications enquiry:³⁷

1. That the public libraries of New Zealand be contracted to provide education in the use of electronic communications services across the country.
2. That public libraries be contracted to facilitate community access to services.
3. That subsidised access to broadband service be provided via public libraries (as is the case in the United States of America)."

Public libraries, funded and provided by Local Authorities throughout New Zealand, offer an existing network of institutions. These are well located within their communities are open for extended hours, and have staff who are committed to customer service. Most public libraries are automated, and many now offer Internet access to their customers. Obviously all Internet services should be provided free of charge. As with other areas (phone connections, television access) the public do not have an automatic right to all information on the Internet, just as there is no automatic right to cable or satellite television.

The Tenth Report of the House of Commons Select Committee on Trade and Industry 1998 stated that a number of their witnesses raised issues relating to the *cost* of using the Internet and the availability of telecommunications *infrastructure* by which the Internet can be accessed. This suggests that in both respects, United Kingdom users are worse off than their foreign (especially United States), counterparts. Whereas the English government aimed to become the best environment for electronic trading by 2002, the report was concerned that electronic users will avoid the Internet if it is perceived as

³⁵ "Major investment in Auckland telecommunications" *The Evening Post*, 29 September 2000.

³⁶ Paul Kelso and Guy Adams "As one in four homes go online in the UK, the country's digital divide widens", *The Guardian*, Tuesday July 11, 2000.

³⁷ Submission 16, Auckland City Libraries, 24 July 2000, 2.

slow, costly to use and prone to breakdown.³⁸ Most United Kingdom residential customers and small businesses believe local telephone charges are the marginal cost of going on-line, therefore telephone charges are a key influence over the extent to which these groups engage in electronic commerce. With the "kiwishare" agreement in New Zealand hourly residential charges are less of an issue. That is consistent with the United Kingdom report's finding: that compared to the United States where consumers can generally choose unmetered calls, this is more conducive to online shopping and e-commerce. The average duration of an Internet session in the United States is 55 minutes, whereas it is only 16 minutes in the United Kingdom. The possibility of receiving a substantial telephone bill as a result of regular use of the Internet, and the widespread perception that this occurs, have been a disincentive to using the Internet in the United Kingdom. In addition, 7% of United Kingdom households do not have a telephone connection.

The concept of universal service obligations does not presently apply to electronic commerce services. The House of Commons³⁹ Select Committee believed universal service obligations should exist to prevent "a new division in society between those with access to knowledge, and the ability to make use of it, and those without such access or ability ...".

The utility sectors have traditionally applied two elements to the concept of universal service.

- 1 Certain services, such as a supply of electricity, are available to all consumers, on demand. It is illegal for suppliers to discriminate against consumers in the supply of such services on groups such as the difficulty of supplying the service, or the income level of the consumer. Arrangements must be put in place to deal with consumers who have problems with paying for the service.
- 2 The obligations to supply such services are placed on a defined group of businesses. Historically, these businesses have tended to be publicly-owned monopoly suppliers.

These factors are irrelevant to any universal service obligations which might be considered in relation to electronic commerce. First, it would be difficult to define which services should be the subject of these obligations. The government could mandate that all consumers are offered connection, or must be connected to local networks. But with the emergence of digital and so on this might not in the long-term solve the problem. Interactive TV or on-line access by mobile and satellite might eventually make this redundant.

Unlike with electricity, gas or telephone connections in the past, firms and individuals are likely to participate in electronic commerce by numerous methods and means of connection in future. Neither is this market

³⁸ House of Commons — Trade and Industry — Tenth report, para 40 [*Tenth Report*].

³⁹ *Tenth report* above n 38, para 79.

environment in relation to these technologies conducive to the introduction of universal service obligations. A multitude of competing operators, rather than a handful of monopoly suppliers, are seeking to offer on-line services.

The United Kingdom government has sought to achieve universal service goals in electronic commerce by improving access to information and communications technologies in several ways, including:

- by setting up 800 IT Community Learning Centres in England
- a scheme for personal computers to be loaned to low income families
- a scheme for subsidised loans for the purchase for the purchase of the purchase of personal computers for home use by school teachers
- making available computers in public places such as libraries
- negotiating reduced telephone tariff packages for Internet access from schools (the National Grid for Learning) and, more recently, from other public institutions, such as libraries, Citizens advice bureaux and further education colleges

The qualifying remark that the report espoused was "the welcome commitment made by Government to consider how the universal service concept can be adapted to cover electronic commerce." This issue was also being considered at EU level during 1999 as part as part of the review of universal service in telecommunications.⁴⁰

The final definitive remark made by the Report is that:⁴¹

"Personal computers, the Internet and electronic commerce should not be seen as exclusively playthings of the middle classes. We want to see everyone in society — rich or poor, young or old — able to take part in and benefit from electronic commerce. It will be a measure of the Government's success if, in five years time, the profile of the average Internet user more closely resembles the population as a whole rather than being skewed towards young, university-minded men. *Aside from considerations of social justice and equity, widespread take-up of electronic commerce could provide immense benefits to British industry as well as cost savings for Government.* We are of the impression that the Government shares our objective, but we think some more vocal advocacy and more dynamic policies, particularly in relation to socially disadvantaged groups, are called for. We recommend that Ministers, and the e-Envoy once appointed, give a lead in democratising and demystifying electronic commerce." (Emphasis added)

The European Union in order to broaden the group of people benefiting from the Internet, particularly in the field of education, has organised special 'Netdays' to encourage the use of the Internet in schools by bringing together

⁴⁰ Tenth report above n 38, para 80.

⁴¹ Tenth report above n 38, para 75.

the educational authorities and local industry.⁴² These recommendations have worked well overseas and have the advantage of being independent from the actual price setting mechanisms or intervening in the decision-making of firms.

7 *Is this problem solved by the education curriculum?*

The aim of technology education is to enable students to achieve technological literacy through the development of:⁴³

- technological knowledge and understanding
- technological capacity;
- understanding and awareness of the relationship between technology and society

Technology education according to this report involves becoming confident in using a variety of means to address needs and opportunities and solve practical problems within society. It focuses on know-how as well as knowledge itself, gathering information from diverse sources. It encourages risk taking, lateral and divergent thinking, the development of multiple solutions to problems, trial and error, teamwork, and the management of resources effectively and efficiently:⁴⁴

"Information Skills

As technology involves the integration of information from a wide range of sources, information skills are of special importance in technology. Technological activities provide students with opportunities to develop and apply all of the essential information skills:

- devising questions, and using a range of inquiry techniques;
- identifying, locating, gathering, storing, retrieving, and processing information;
- organising, analysing, synthesising, evaluating, and using information;
- presenting information clearly, logically, concisely, and accurately;
- identifying, describing, and interpreting different points of view;
- using a range of information-retrieval and information processing technologies confidently and competently.

This statement was the first national curriculum statement to be developed for the learning area of technology, identified as one of the essential learning areas in *The New Zealand Curriculum Framework*. This final version takes into account many comments from the skills and experience of school trials and pilot teacher development programmes. All students have the right, and

⁴² Celex No 997E2938, European Union Parliamentary Questions, Subject: Commission initiatives for the development of Internet, Official Journal C 117, 16/04/1998, 106.

⁴³ Technology in the New Zealand Curriculum, Ministry of Education, Wellington 1995.

⁴⁴ Technology in the New Zealand Curriculum (above), 18.

therefore should have the opportunity, to achieve in technology. Technology programmes should "recognise, respect, and respond to the educational needs, experiences, interests, and values of all students: both female and male students; students of all ethnic groups; students with different abilities and disability; and students of different social and religious backgrounds."⁴⁵

IV REGULATION MUST CONSIDER THE UNIQUE NATURE OF CYBERSPACE

Computer literacy and Internet access will be major elements of future success for New Zealand society.⁴⁶ First, informed consumers stimulate competition and improve our economy. Secondly, a democratic society requires active, informed citizens. Third, the Internet is making the world a smaller place where people base their opinions on current, independent information. Bill Clinton said in 1997 that:

"as the Internet becomes our new town square, a computer in every home, a teacher of all subjects, a connection to all cultures, this will no longer be a dream but a necessity. And over the next decade, this must be our goal".⁴⁷

Although the view propounded by the New Zealand government's 1999 *Electronic Commerce: The Freezership of the 21st Century* Report states:

"The private sector should continue to lead the development of electronic commerce ... Government[s] role [is] *ensuring a legislative and regulatory environment* where electronic commerce can flourish."

While mindful of the broad focus of this statement, this general approach to electronic commerce will not achieve the equitable values behind increased computer literacy. As proposed by the Ministry of Consumer Affairs, no single solution will achieve consumer confidence in e-commerce.⁴⁸

"Because e-commerce is a global initiative, it requires governments, consumer groups, and businesses to work together as never before, both domestically and internationally, to *develop confidence in e-commerce, and also to ensure that the interests of consumers are being met.*"

The goal of free Internet access can be achieved through using demand aggregation, price subsidisation and tax incentives to encourage ISPs and Internet services to set affordable prices. In addition, a few large providers

⁴⁵ The New Zealand Curriculum Framework, 7.

⁴⁶ Ironically it seems New Zealand professionals are all too aware of the potential of the Internet, and often use it to scope out overseas opportunities. "NZ Faces Legal Brain Drain" NZ Lawyer, Thursday 28 September 2000, 1, THC Press. To say that this represents an argument against electronic education is a fallacy: many of these workers return with "added value" to work in New Zealand.

⁴⁷ "The Internet Changes Everything: Revolutionising Public Participation and Access to Government Information Through the Internet, 50 Admin L Rev 277, (Spring 1998), at 2, from State of the Union Address, 33 Wkly Comp Pres Doc 136, 140 (Feb 4, 1997).

⁴⁸ Electronic Commerce and the New Zealand Consumer: A Status Report and a Proposed New Zealand Model Code for Consumer Protection in Electronic Commerce (March 2000), 18.

could be compelled to offer affordable pricing and universal access. Also the government itself could provide some access in areas that would otherwise not be maintained. The free ISP model is far from proven, even in the United States, where operating costs are far lower and online advertising per use is around ten times greater than New Zealand. In Australia no free ISPs are profitable and some have already changed their models.⁴⁹ The idea that free ISPs are "battlers" for the public interest is false, as their behaviour is consistent with that of rent seeking profit maximisers.

While Internet charge rates at present are as low as they have ever been, the cost of buying a personal computer is still high. The fairly high initial entry cost is a large inhibition to people of modest income who want to access the Internet.

In addition, very recently the recruitment industry has faced a transition large share up as online job sites experience rapid growth.⁵⁰ People without computer literacy will be "out of the loop" as online agencies move to form alliances with established agencies and large corporate employers. The arrival of these sites has put pressure on print media. For the meantime most people still rely on newspaper. Applicants are at present more successful through paper adverts (60%) than over online (less than 1%), but this will change.

Internet usage has increased rapidly.⁵¹ Telecommunications infrastructure costs and the ability to circumvent them affect the ultimate level of ISP costs. ISPs are members of the telecommunications service industry since they provide access to the Internet via the telecommunications infrastructure (which includes telephone service, leased-line services, data communication, and billing).⁵²

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorise precisely. All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute "cyberspace" — located in no particular geographical location but available to anyone, anywhere in

⁴⁹ Russell Brown, NZ Listener, 22 April 2000, 56.

⁵⁰ nzjobs.co.nz (market leader attracted 140,00 unique users last month, monster.co.nz attracted 33,000 in the same period but site traffic had grown 230% in the last 10 weeks. "A Monster Shake Up for job industry" Sunday Star Times, 30 July 2000.

⁵¹ The Internet Service Provider Markets of Australia and New Zealand by Daved Boled de Boer, Christina Enright and Lewis Evans. NZ Institute for the Study of Competition and Regulation. The comparison suggests that Internet service provision in NZ was cheaper in 1999 than in Australia and that penetration and usage in NZ was at least that of Australia.

⁵² David Goddard "Security of Contract: Why it Matters and What That Means" (2000) 6 NZBLQ 82, the government provides in many ways a basic framework which can accommodate free market transactions, see Goddard's examples from Bangladesh (at 84-85) emphasising what can occur if a framework for has weak legal support for security of contract.

the world, with access to the Internet.⁵³ From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.⁵⁴ Any person or organisation with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organisation controls any membership in the Web, nor is there any single centralised point from which individual Web sites or services can be blocked from the Web."⁵⁵

Judge Dalzell's review of "the special attributes of Internet communication" disclosed by the evidence convinced him that the First Amendment denies Congress the power to regulate the content of protected speech on the Internet. He construed cases as requiring a "medium-specific" approach to the analysis of the regulation of mass communication, and concluded that the Internet — as "the most participatory form of mass speech yet developed," — is entitled to "the highest protection from governmental intrusion."

Material posted on the Web is accessible by all Internet users worldwide because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user. At present, due to technological limitations, there may be no means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.⁵⁶ Further, the Court explained that, as applied to the Internet, a community standards criterion would effectively mean that because all Internet communication is made available to a worldwide audience, the content of the conveyed message will be judged by the standards of the community most likely to be offended by the content.

The District Court first rendered findings concerning the physical medium known as the Internet, which it recognised consisted of many different methods of communication, only one of which is the World Wide Web.... It found that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographical community." (p 170)

The Supreme Court has recognised that each medium of expression may permit special justifications for regulation. For example, broadcast media, due to the history of extensive government regulation, its "invasive" nature, and

⁵³ *Reno v American Civil Liberties Union* (1997) 117 S Ct 2329 US Pa June 26, 1997, 851.

⁵⁴ *Reno* above n50, 852.

⁵⁵ *Reno* above n50, 853.

⁵⁶ *American Civil Liberties Union v Reno* (2000) 217 F 3d 162 CA 3 (Pa). Opinion filed June 22, 2000, 162.

the scarcity of available frequencies at its inception justified heightened regulation. However, the Supreme Court has also recognised that these same elements, which justified heightened regulation of the broadcast medium, do not exist in cyberspace.

V THE ECONOMIC CASE AGAINST — THE METHODS IN PRACTICE

A problem with current Internet regulation overseas is that it is based on an "inside out" approach. In the United States, the new technologies are focused upon, rather than the consumer effects of those technologies. The US Senator Conrad Burn put forth a new set of Congressional Bills aimed at regulating a wide area of technologies, such as encryption, satellites, e-mail spamming, and so on. With so many different technical issues covered, all of which are experiencing rapid development and change, it is not reasonable to expect that any government can hope to bring together all these loose ends in one policy.

In New Zealand with the emergence of free ISPs, as has occurred in several other jurisdictions, telecommunications providers in a competitive environment are misusing interconnection agreements and sending distorted signals to the market. A consumer connected to one of these free ISPs does not take into account the actual costs of connection, and so has no motivation to disconnect when the Internet session is finished. What occurs is one ISP cross-subsidising the service of another, an inefficient means of providing the service. However, it is unclear how regulation could prevent this.

Another problem in practice is that the Internet subverts a system of regulation based on borders between physical spaces, at least with respect to the claim that cyberspace should naturally be governed by territorially defined rules.⁵⁷ The Internet as a global computer network is (in the words of Johnson and Post)

"destroying the link between geographical location and (1) the power of local governments to assert control over online behaviour; (2) the effects of online behaviour on individuals or things; (3) the legitimacy of the efforts of the local sovereign to enforce rules applicable to global phenomena; and (4) the ability of physical location to give notice of which set of rules apply."

The economic justification for regulating to facilitate access to a network which is uneconomic to duplicate is to correct the market failure that may otherwise arise as a consequence of the network owner exercising market power to restrict competition in upstream or downstream markets. Regulation is designed to be a surrogate for competition, to constrain the dominant firm where the normal constraints of competition are absent.

⁵⁷ David R Johnson, David G Post *Law and Borders - The Rise of Law in Cyberspace* 1996, 2 at <http://www.cli.org/X0025_LBFIN.html>.

VI COORDINATION MECHANISMS FOR REDRESSING THE DIGITAL DIVIDE

Should then regulation be avoided due to the multitude of problems which arise? There are four possible models which can be applied to the Internet:⁵⁸

- A National Approach — Countries apply their own laws to new technology, which worked well for communications technology, such as radio and television, as the broadcast had a narrower range than the Internet.
- B Multi-National Approach — agreements between countries similar to the old GATT agreements, or the reciprocal visa agreements. Co-ordination difficulties arise.
- C International Organisation Approach — an organisation governing the conduct of member states directly. Administrative difficulties arise.
- D De facto approach — little or no government involvement, an approach signaled by the New Zealand Law Commission.

Proponents of the de facto approach argue that the cyberspace participants are much better positioned than national regulators to design comprehensive legal rules. De facto forms of regulation have worked well in the past for developing improved technologies. However it is not well suited for providing uniformity. Without a central power driving uniformity, individuals can have widely-varying results. Therefore where a strong governmental objective such as Internet access exists, strong central uniform regulation is required. Where issues do not have a strong governmental interest, for example, due to lack of fairness issues, there is no strong reason for uniformity.

VII EFFECTIVE MEANS FOR GOVERNMENT ENHANCED ACCESS

As seen from the imperfect nature of the four models explored above, regulating Internet usage must use a combination of methods. The government should first use incentives to encourage affordable prices, and second should compel affordable prices in some situations. The government should itself provide some access in public places such as libraries. The position is that although free markets are effective at providing affordable access through competition, they cannot alone provide universal access.

A *How can government encourage the free market?*

Free markets strive to maximise profit by producing up to the point where marginal revenue of another unit equates to the marginal cost of producing that unit. In order to encourage the reduction of consumer prices, financial incentives must be offered to offset reductions in price. One method is through aggregating demand, that is, the government uses its position as the

⁵⁸ Mark Maier "Affordable Internet Access for Americans" 6 Rich J L & Tech 8 (Fall 1999), ft 78.

representative of disadvantaged groups to negotiate the best rates from ISPs. By this method the government has an indirect effect upon market forces.

Price reimbursement could be used in the alternative to reduce the price of Internet access. A less cumbersome method of getting the same result is through tax incentives, the ISP could be granted.

In the alternative such mechanisms as the Kiwishare agreement (a general fairness provision in relation to phone lines) could be extended to Internet access costs. The government could compel Telecom and other large ISPs to give a certain amount of free access per month.

B Ideological concerns — indirect regulation

Possible mechanisms to assist the regulating of free access include: special regulation of telecommunications (market failure because of the local loop), computers in schools, government responsibility, or terminal equipment quality of lines.

However, the "nature" of cyberspace can be regulated much more easily by a code than by pure law.⁵⁹ As Greenleaf examines, the earliest literature about cyberspace was very libertarian. James Boyle⁶⁰ described this approach as:

"For a long time, the Internet's enthusiasts have believed that it would be largely immune from state regulation. It was not so much that nation states would not want to regulate the Net, it was that they would be unable to do so; forestalled by the *technology of the medium*, the *geographical distribution of its users* and the *nature of its content*. This tripartite immunity came to be a kind of Internet Holy Trinity, faith in it was a condition of acceptance into the community. Indeed the ideas I am about to discuss are so well known on the Net, that they have actually acquired the highest status that a culture can confer; they have become clichés."

James Boyle leaves the door open to other forms of coercion:

"On the one hand, the studies indicate that the assumption that the state will not be able to regulate cyberspace is definitionally blind to some of the most important ways that some states could, in fact, exert power."

In this conclusion Boyle is borrowing heavily from Michael Foucault, the nineteenth century French philosopher who argued that, rather than the public and formal triangle of sovereign, citizen and right, we should focus on a series of subtler, private, informal and material forms of coercion organised around the concepts of "discipline" and "surveillance."

Digital libertarianism is apparent where Dalziel J struck down the USA's Communications Decency Act as unconstitutional: "As the most participatory

⁵⁹ Graham Greenleaf "Regulating Cyberspace: Code vs Law?" in Commerce on the Internet — The legal implications of the Internet, November 1998, Butterworths, at 23.

⁶⁰ James Boyle "Foucault in Cyberspace: Surveillance, Sovereignty and Hard-Wired Censors" <<http://www.wcl.american.edu/pub/faculty/boyle/foucault.htm>> (23 July 2000).

form of mass speech yet developed, the Internet deserves the highest protection from government intrusion."⁶¹

Law can regulate individual behaviour either directly or indirectly.

C *The Approach of the Law Commission — minimal regulation*

As Paul Heath has said, the Law Commission report should be seen as no more than a starting point.⁶² In the preface to *Electronic Commerce Part Two: A basic legal framework*⁶³ the Law Commission "make recommendations for enactment of a basic legal framework in New Zealand which will remove core problems arising from the use of electronically generated information and identify further issues on which submissions are sought."

The focus is very much on the removal of barriers to commerce as opposed to the strengthening of consumer rights:

E1: "Unless there are good reasons to the contrary, it seems clear that legal impediments to electronic commerce should be removed."

At the same time, the Commission determine common principles for enacting legislation:

E2 "In determining whether it is necessary to enact legislation to remove barriers to electronic commerce we have applied the four guiding principles ...

- The right to choose whether to do business through the use of paper documentation or by electronic means without avoidable uncertainty arising out of the use of electronic means of communication (the *choice* principle).
- Ensuring that the fundamental principle underlying the law of contract and tort remain untouched save to the extent that adaptation is required to meet the needs of electronic commerce (the *adaptation* principle).
- Expression of any laws enacted to adapt the law of contract or the law of torts to the use of electronic commerce in a technologically neutral manner (the *technological neutrality* principle).
- Compatibility between principles of domestic and private international law as applied in New Zealand and those applied by our major trading partners (the *compatibility* principle).

However the Commission recommended ultimately that the private sector should lead development in this area and that the Government's role should be confined to the removal of barriers to electronic commerce and the general facilitation of trade which is carried on through electronic means. The

⁶¹ *ACLU v Reno* 1996

⁶² Paul Heath QC, Law Commission, "The Law Commission Project: Developing a New Zealand Legal Infrastructure".

⁶³ NZLC R 58.

Commission recommended enactment of an Electronic Transactions Act along similar lines to the Electronic Transactions Bill currently before the Federal Parliament in Australia as a basic legal framework to facilitate trade and to remove barriers to trade being carried on electronically." Perhaps the Australian language should have been borrowed:

- ensuring certainty as to the application of the law to electronic commerce and enhancing business and consumer trust and confidence" (para 9)

D Proposed Changes to the Commerce Act 1986

Part 2 of the Commerce Act 1986 deals with restrictive trade practices. Under section 36 no person who has a dominant position in a market may use that position for the purpose of restricting market entry, preventing or deterring competitive conduct or eliminating competitors. The rationale is that firms within a dominant position arguably possess the ability to influence the structure of the market. Section 36 imposes restrictions upon these firms. These firms cannot engage in conduct for the purpose of restricting, deterring, preventing or eliminating competition.

Any regulatory regime must incorporate sunset and review procedures, so that the continued relevance of any regulatory regime is continually tested and if necessary, adjusted. The litmus test of any regulatory regime must be the end effect on consumers, not competitors.

The Telecommunications submission by the Wellington Regional Chamber of Commerce was in this vein:

"In our assessment, the Inquiry's proposed structure bears many similarities to the Australia regime. We note Telstra-Saturn's comments in its first submission that:

...the Australian model is an example of over-regulation which leads to micro-management, even of competitive areas. The Australian regime is straining in critical areas, and is under critical review."

E Intervention via the telecommunications industry

The year 1984 marked a shift in approach to economic regulation in New Zealand, a shift away from the 'market failure' paradigm where direct controls were exhibited through regulation, to a re-thinking of the core functions of government bought about by public choice arguments and efficiency arguments.⁶⁴ Today there is a mitigating trend apparent back toward forms of intervention. These light handed thresholds which are apparent within the Commerce Act 1986 tread a balance between encouraging competition and smothering it. Conventionally heavy handed forms of regulation were rejected in favour of a new approach, with the government seeing competition as the best regulator of telecommunications markets.⁶⁵

⁶⁴ Dr Alan Bollard Dr Michael Pickford, *Utility Regulation in New Zealand*, Institute of Economic Affairs Lectures on Regulation London, 1996, 10 [*Utility Regulation in New Zealand*].

⁶⁵ *Utility Regulation in New Zealand*, above n 63, 28.

Under New Zealand's light handed policy, owners of natural monopoly networks are likely to be in a dominant position in a market, Telecom in the case of the ISP industry. Telecom is subject to s 36 of the Commerce Act 1986.

The present light handed regulation does create an incentive for Telecom to supply line and network services in a discriminatory manner, as with the 0867 agreement, so as to advantage its own operations in downstream markets. What is needed at present in this regard is bottleneck legislation which focuses on the role of the network owner as gatekeeper, and is concerned with removing impediments to the development of competition in the markets on either side of the bottleneck.⁶⁶

Access rather than price control should therefore become the key regulatory issue. The New Zealand regulation of ISPs relies on Telecom as the owner of the bottleneck to act in good faith terms. The present scheme presents no mechanisms to facilitate interconnection if negotiations fail.⁶⁷

The "light handed" regulation could soon be slightly mitigated as the present Labour government completes a sweeping review of the telecommunications industry as promised by the Labour Manifesto at the 1999 general election.⁶⁸ On 9 March, Hugh Fletcher announced that:⁶⁹

"The Inquiry was established to assess the regulatory regime for telecommunications, and recommend any changes. It has been asked to investigate and include particular comment on a range of issues, including:

- the environment for telecommunications network access and interconnection, including Telecom's 0867 initiative;
- the development of an information economy;
- the Kiwi Share obligations..."

1 *Core principles of the report*

The draft report was published in June 2000⁷⁰. One permeating theme is that principles are needed to govern matters such as interconnection wholesale of telecommunications services, and allocation of telephone numbers must be established:

⁶⁶ Ross Patterson (1998) *Competition & Consumer Law Journal* "Light Handed Regulation in New Zealand Ten Years on", 149.

⁶⁷ Patterson (above), 150.

⁶⁸ The enquiry was launched in February 2000, the inquiry team members being Hugh Fletcher (chairman), Allan Asher, and Cathie Harrison see <www.teleinquiry.govt.nz>.

⁶⁹ At that time the Commission decided on the Friday 29 September 2000 for the final report to Minister of Communications. As this paper goes to print (2 October 2000) this report has not been released.

⁷⁰ Ministerial Inquiry into Telecommunications, Draft Report, <<http://www.teleinquiry.govt.nz/reports/draft/draft.pdf>> ISBN 0-478-23493-7.

"... if New Zealand is to move swiftly to, and extract the full benefits of, an information economy, it can no longer afford inefficient procedures for resolving technical issues and settling disputes over access and other similar matters. An improved regulatory framework is needed to encourage and facilitate rapid innovation, high levels of investment and vigorous competition."

The Draft report also recognised a tension between two diverging objectives, which can be summarised:

- 1 **Generic competition law:** the established approach of relying on general competition law and voluntary industry self-management.
- 2 **Industry specific regulation:** in telecommunications, the mere "threat" of industry specific regulation has not been effective enough in encouraging industry self-management.

Government officials during the previous National government asserted that the natural monopoly aspect to telecommunications is much weaker than in the electricity industry. This is because of the development of cellular, fixed wireless, and cable based technologies, combined with lower prices and increased competition. However the Draft Report [p 1] "favours industry self management with a regulatory underpinning". The Draft Report would balance these objectives through two governmental bodies with clearly defined statutory powers:

2 *Electronic Communications Industry Forum*

"[p 1] a Forum should be established to self-manage a wide range of industry issues, including the development of standards and codes of practice. Membership would be compulsory for registered telecommunications and broadcasting networks operators. The Forum's working parties on specific issues would be open to other interested organisations. The Forum would operate under general guidelines that encourage competition and entry into the industry and have regard to the long-term interests of end users of electronic communications services."

3 *Electronic Communications Commissioner*

"[p 2] The Commissioner would

- make recommendations to the Minister of Communications that specific electronic communications services ("designated services) become subject to regulation, and recommend the pricing principles to apply to them;
- encourage industry participants to negotiate their own commercial arrangements in respect of designated services, and only intervene at the request of a party to such negotiations or where any agreement is not consistent with the designation criteria;
- in such circumstances, deliver an interim determination and pursue a public consultation process before issuing a final determination (if necessary); and

— be responsible for developing, together with the Forum, information requirements, standards and codes of practice that would apply to designated services.”

The opinion was stated in submission 001⁷¹ that this is a straight copy of the Australian model, and it is believed the country has “missed an opportunity to leaf-frog into the new electronic economy rather than simply trying to address the problems that arose under the old model.”

4 *Does the regulatory environment facilitate the ongoing delivery of Internet access and other telecommunications services critical to the development of an information economy?*

The current regulatory environment does not facilitate the ongoing delivery of Internet access and other telecommunications services. The Telecom Users Association of New Zealand Inc [TUANZ]⁷² asked itself this question in its “Submission to the Ministerial Inquiry into Telecommunications”:

Philosophically, TUANZ supports the principle of light-handed regulation. However, the application of this principle over recent years has been taken to excess. New Zealand has been left with a vacuum where other similar countries have adopted rules and conventions specific to the telecommunications sector, especially those aspects which relate to the complexities of a network with a high degree of interdependency among the various carriers.

In many industries there are ground rules set by Government which establish conventions under which the industry can efficiently function, and protect the “public interest.” The industry is then left to get on with its business within that framework. Examples abound in sectors such as financial services, transport, food production and service, aviation, construction and others.

New Zealand has failed to provide the necessary regulatory ground rules for its telecommunications network. Reliance has been placed solely on generic competition legislation. This is not designed to resolve complex network issues or establish basic conventions for network operations. It has left a vacuum where other legislatures have explicit regulations.... Issues which other industries might have treated as “industry housekeeping” matters outside the competitive arena, have consequently become competitive and divisive, to the detriment of consumers.”

⁷¹ Telecommunications Report, Submission 1, Paul Budde, Paul Budde Communication Pty Ltd (Australia), <<http://www.budde.com.au>>.

⁷² TUANZ is a non-profit organisation including most of New Zealand’s major users - banks and financial institutions, universities, major retail chains, Government agencies and other enterprises sharing a common interest in a telecommunications service which adds value to their business activities.

The complexity in resolving the dispute over Internet service provider i4free shows that New Zealand's regulatory environment is poorly prepared for the Internet age.⁷³ "The huge success of the Internet over the past decade has come about through its openness and freedom of access," TUANZ chief executive Ernie Newman said. "The Internet is nobody's property; it is the collective asset of the global community. Yet in New Zealand the public's right to access it through whatever reasonable means they choose is being hampered by our legislative vacuum."

Carriers and service providers who make access possible have no options other than court action to settle their differences. This may keep new providers off-line. The process of claim, injunction, and counterclaim, is focussed on alleged rights and wrongs among the service providers. Users get sidelined. It seems that whether New Zealand like other countries gets free Internet services will be determined as a by-product of the "courtroom fracas", rather than from any commercially workable competitive framework. Newman states "in almost any other country, such an issue could not arise. Telecommunications regulation, and consumer protection law, would keep user interests to the forefront."

regulators could move sufficiently fast to regulate these personal services. In this environment, competition and flexibility will allow and drive rapid innovation.

Ian Clarke created Proenet as which information travels from PC to PC anonymously. It is impossible to tell who posts a document or who downloads it. This could be equally a boon to die-hards in totalitarian states, but also unfortunately to child pornographers." Clarke says "an attempt to control information should be just as disturbing as an attempt to control the air we breathe". However, more orthodox views suggest that a lack of confidence by consumers in taking part in the electronic environment will be more damaging than well developed interventions that provide for consumers' legitimate rights and interests to be met." In New Zealand consumer policy and protection activities are developed with rigorous attention to cost and benefit issues. For example, the Proposed New Zealand Model Code for Consumer Protection in Electronic Commerce includes as a guide:

⁷² NZLC R 58, para 742.

⁷³ Case No. 9961301, European Union Parliamentary Question Subject: Paedophiles' ring on the Internet, Official Journal C 91, 20/04/1997, p. 86. In answer "... normal uses of the Internet far outweigh atypical uses related to paedophilia and that the Internet is not the only or indeed the main way criminals indulge in activities such as paedophilia."

⁷⁴ The Informationist, Time June 26, 2000, 70, Miles Cohen

⁷⁵ The Informationist, Time June 26, 2000, 70, Miles Cohen

⁷³ "Rules lag behind Net - users" *The Press* 18 April 2000, 13.

Part 2 — Regulation of Usage

VIII USAGE OF THE INTERNET

"We are of the view that there is not, as yet, a demonstrable need for legislative intervention to provide greater protection against the misuse of information. However, as there may be a demonstrable need in the near future for added protection, we seek further submissions on:

- are the existing statutory, common law and equitable actions sufficient to meet the needs of those involved in electronic commerce?
- if not should information be redefined as property ...⁷⁴

The mass global deployment of mobile communication is changing the telecommunications paradigm, including telecommunications regulation. Communications, computing and content are rapidly converging. Regulation is becoming more complex because of the need to consider broadcasting, communication content, provision and ownership, and the Internet. Mobile service will eventually enter the Internet market. It is unlikely that any regulator could move sufficiently fast to regulate these personal services. In this environment, competition and flexibility will allow and drive rapid innovation.

Ian Clarke created Freenet on which information travels from PC to PC anonymously. It is impossible to tell who posts a document or who downloads it. This could be equally a boon to dissidents in totalitarian states, but also unfortunately to child pornographers.⁷⁵ Clarke says "an attempt to control information should be just as disturbing as an attempt to control the air we breathe".⁷⁶ However, more orthodox views suggest that a lack of confidence by consumers in taking part in the electronic environment will be more damaging than well developed interventions that provide for consumers' legitimate rights and interests to be met.⁷⁷ In New Zealand consumer policy and protection activities are developed with rigorous attention to cost and benefit issues. For example, the Proposed New Zealand Model Code for Consumer Protection in Electronic Commerce includes as a guide:

⁷⁴ NZLC R 58, para 342.

⁷⁵ Celex No. 996E3041, European Union Parliamentary Questions Subject: Paedophiles' ring on the Internet, Official Journal C 91, 20/03/1997 p. 64. In answer "... normal uses of the Internet far outweigh atypical uses related to paedophilia and that the Internet is not the only or indeed the main way criminals indulge in activities such as paedophilia."

⁷⁶ The Infoanarchist, Time June 26, 2000, 30, Adam Cohen

⁷⁷ Important considering New Zealanders spent NZ\$2.42 million on Internet shopping in the past year: Figures from IDC NZ as reported in *The Dominion* 11 January 2000. By 2004 that figure is predicted to rise to NZ\$6.14 billion.

“Information — Identification of the business

19. Businesses should provide consumers with accurate, clear and easily accessible information that is sufficient to enable:

- a) identification of the business involved in a particular transaction
- b) prompt, easy and effective communication with the business regarding such a transaction
- c) service of legal documents”

However the goal alluded to in Part 1 of increasing access to the internet is very reliant on the content of the internet meeting the lofty information needs to which the paper alluded. However in recent times the content on the internet has become dissipated. To get the flavour of the academic comment:⁷⁸

“What was once an ivory tower of data networking ... is morphing into Internet Inc... The problem is not just about researchers bedevilled by slow connections... its about the growing mass of PC users whose embrace of the Internet is bringing the giant network of networks to its knees. What commercial users once called “surfing the Web” is now generally known as wading through mud ... As more and more users employ it as a low-cost conduit for ... e-mail and electronic commerce ... service providers [at a minimum] will have to install more bandwidth.”

The Consumer Guarantees Act could be amended so that the definition of “services” used in s 2 of the Act expressly include the provision of line and cellular network services.⁷⁹ The Consumers institute argued that this would ensure that domestic consumers (the Act only applies to goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption) — are able to seek appropriate compensation in the event that they suffer a loss resulting from a negligent failure on the part of a network service provider. There appears to be no distinguishing feature between a network service provider and an Internet service provider in this regard. As the Act is currently worded, it is not clear that this will be the case should the High Court be asked to rule on a dispute between a domestic consumer and an Internet service provider.

However the Business Roundtable (NZBR) in their submission believed that the powers and privileges of the regulation in the Telecommunications draft report would invite abuse, undermine the rule of law and facilitate the creation of entry barriers.⁸⁰ The NZBR believed that the need for regulation of telecommunications appears to be based on an unexamined view that the profit motive is not enough to ensure that new technologies are introduced to New Zealand in a timely manner.

⁷⁸ David A Gottardo “Commercialism and the Downfall of Internet Self Governance: An Application of Antitrust Law” 16 J Marshall J Computer & Info L 125, 128.

⁷⁹ Submission No 51 on the Draft Report of the Ministerial Inquiry into Telecommunications — The Consumer’s Institute, 24 July 2000, 5.

⁸⁰ Submission No 31 on the Draft Report of the Ministerial Inquiry into Telecommunications — New Zealand Business Roundtable, July 2000, 1.

Mandating supply even in the absence of any evidence of wrongdoing by a dominant incumbent is seriously concerning from the point of view of dynamic efficiency.

IX THE CONTROL OF ILLEGAL / UNDESIRABLE INFORMATION

As said in the Law Commission's Second Report, the liability of ISPs as secondary actors operate on a radically different basis to traditional carriers of communications:⁸¹

"Technology allows operational malleability and providers can play more than one role or fit (or semi-fit) several functional metaphors from one moment in time to another. (... for example a systems operator could be functioning as a common carrier, broadcaster, or publisher simultaneously, or in quick succession, and a university could function as an Internet access provider as well as a cable service programme provider."

At present an ISP faces a diffuse range of potential liabilities: liability can arise from caching; uploading or downloading of information conducted by ISPs subscribers, linking, framing, or hosing a website on which a defamatory message is published; and publishing. Obviously on this issue the ultimate aim is to provide incentives for the ISPs to avoid this content, but to what extent can we expect ISPs to monitor content? At what level of monitoring does a real transaction cost result?

ISPs have questioned the practicality of defamation provisions in the Government's Electronic Transactions Bill. It proposes that an ISP knows about defamatory information on websites it hosts or in discussion it carries, it will be obliged to remove that material or face possible prosecution: "suddenly we become judge and jury and have to adopt the role of censor" was the reaction of the Asia online New Zealand General Manager Hugh McKellar.⁸² Tim Wood, Director of Ihug, said "I don't think ISPs should be forced into making moral judgements. It comes down to resources - there could be quite a cost involved in taking legal advice and constantly having to remove material."

One effect of the proposed law would be the tightening up of ISPs hosting contracts. In some cases, the removal of material from websites might adversely affect the authors and deprive them of revenue. In such a case the ISP might find itself being sued for breach of contract. ISPs will not however normally be held liable for defamation or breaches of intellectual property right by their subscribers under the proposed Electronic Transactions Bill. The Defamation Act 1992 will be amended so an ISP can invoke the defence of "innocent dissemination".

A European Internet provider Xs4All has decided to ban from its Internet services any material containing child pornography. It technically and legally

⁸¹ At para 240.

⁸² E-Bill Impact Worries ISPs, *Evening Post*, 13 June 2000, 16.

is feasible to get all providers on the Internet to take such action. The industry can help reduce circulation of illegal content through properly-functioning systems of self-regulation (such as codes of conduct, establishment of hot-lines) in compliance with and supported by the legal system.⁸³

At the same time many European nations are concerned with the ability of young people to make bombs and synthetic drugs from Internet instructions.⁸⁴

A *An Interesting Case Study: The Chinese Experience:*

The Peoples' Republic of China fears the uncontrolled exchange of information between China and the rest of the world, and so enacted restrictive regulation controlling Internet usage.⁸⁵ China enacted the Interim Internet Management Rules to restrict the freedom of the Internet.⁸⁶ China is working with private technology companies to physically limit its citizens' access to the Internet by various means such as filtering, blocking, and establishing proprietary Chinese Internet [p 362]. If China is unable to prevent effectively its people from full access to information available on the Internet then it is doubtful other countries will have much success either.

By 2010 China's goal is to have established over 420 million Internet lines. Since 1997 \$60 B (US) has been committed to this goal. This commitment is attracting over 30 B (US) foreign investment per year. China is also making a strong commitment to infrastructure in education.⁸⁷

China illustrates the issues involved where a nation attempts to encourage growth in Internet usage without allowing access to certain information or information exchange. The Tianimen democracy movement in 1989 made considerable usage of the limited Internet connectors available in local universities.⁸⁸ More recently the Chinese government has been alarmed at the student's effective use of the Internet to organise a political protest.⁸⁹

The Chinese Regulations attempted to control freedom of expression over the Internet

- 1 Outlawing unregistered and content-restricted use of the Internet.
- 2 Developing "safe" connections in the form of limited physical Internet access.

⁸³ Celex No 997E2582, European Union Parliamentary Questions, Subject: Internet, Official Journal C 102, 03/04/1998, 63.

⁸⁴ Celex No 997E2024, European Union Parliamentary Questions, Subject: Use of the Internet to disseminate illegal and damaging information, Official Journal C 60, 25/02/1998, 80.

⁸⁵ Pacific Rim Law and Policy Journal, March 1997, Scott E Feir, 361 .

⁸⁶ Text of Interim Internet Management Rules available from Xinhua New Agency, February 2, 1996, translated by FBIS available in World News Connection <<http://wnc.fedworld.gov>>.

⁸⁷ Craig S Smith "Chinese Universities will Join Internet" *Asian Wall St J*, Jan 30 1995.

⁸⁸ Peter Constantini "Communication Technology Wrestling with Elusive Internet" Inter Press serv, Apr 23 1996.

⁸⁹ <<http://ecs.school.net.hk/Ebswong/prottext.html>>

The regs identify several layers of governmental jurisdiction over Internet control (arts 5-7). The enacting government organ for the regs is the state council (art 7). The regulations mandate administrative control of international connections to the Ministry of Posts and Telecommunications (art 6). The regs also mandate the local police to enforce penalties against those users failing to register Internet accounts (art 14).

The general command and control structure of these regulations is the antithesis of the Law Commission's approach. Blocking access to non-government news sources is characteristic of China's totalitarian control, forcing conformity of speech and action of its people.

For the most part, attempts to physically limit Internet access are merely a nuisance for determined users.⁹⁰ For those Chinese who want freedom of expression and operate underground publishing despite penalties, Internet users continue to seek and provide restricted sources of information. Benjamin Barber the political scientist believed China is "using nineteenth century modes of repression for twenty-first century ideology and it's not very successful".

However, Art 19 of the Universal Declaration of Human Rights declares that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, receive and impart information and ideas through any media and regardless of frontiers.

B *The American Courts and the First Amendment*

In *Andaclu v Reno*⁹¹ the Court made several findings of fact about the Internet in relation to the first amendment of the American Constitution.

(1) The Court found that the content of the Internet is both commercial and non-commercial speech and is as "diverse as human thought"⁹²

(2) "The Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially millions."⁹³

(3) "Importantly it is an interactive form of communication allowing users to be both speaker and audience."⁹⁴

(4) "The Internet is therefore a unique and wholly new medium of worldwide communication"⁹⁵

⁹⁰ Johnathan Manthorpe "Internet Poses Challenge for Censors" *Ottawa Citizen*, Sept 20 1996.

⁹¹ ACLU 929 F Supp no 2 at 827.

⁹² *Andaclu* above n 91, 842.

⁹³ *Andaclu* above n 91, 843.

⁹⁴ *Andaclu* above n 91, 843.

⁹⁵ *Andaclu* above n 91, 844.

(5) The Court found that the level of communication on and message sophistication on the Internet varied greatly.⁹⁶

(6) Significantly, the Court found that the World Wide Web is a "distributed system with no centralised control... from which individual websites or services can be blocked by the web."⁹⁷

(7) However the Court did find that a process is under way to allow increased screening / filtering.

(8) Commercial screening devices exist that provide software blocking services to assist in preventing subs access to certain topics.

The Judges of the Supreme Court ultimately concluded that the Internet is a decentralised, open access form for discussion and exchange of ideas. Most speakers are individuals or non-commercial entities and have limited financial resources so that regulation would most likely drive speakers from the forum. Even if technology existed (which it does not) for screening individual's identities prior to participation in a particular Internet setting, the labour-intensive and intrusive aspects of such a screening system might force speaker to abandon their websites.

Judge Dalzell in that case said "this medium specific approach to mass communication examines the underlying technology of the communication to find the proper fit between first amendment values and competing interests."⁹⁸ An analogy can be made to the case of *Turner Broadcasting v FCC* which was relied on by Judge Dalzell. Broadcast and cable television are identical, it is pervasive, intrusive into the home, and easily accessed by children. However *Turner* for first amendment purposes said that cable television should be treated differently because of the large number of cable channels. Judge Dalzell applied this theory towards the "democratising" effect of the Internet on speech. Judge Dalzell pointed out that certain basic elements distinguished the Internet from other means of mass communication for first amendment purposes:

- (1) Internet presents low barriers to entry.
- (2) These barriers are the same for speakers and listeners.
- (3) As a result of these low barriers astoundingly diverse content is available on the Internet.
- (4) The Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers. (at 877)

Other means of mass-communication such as newspapers, radio and television, require enormous increments of capital, labour and time. Internet speech is available to all those who have computer access and acts as a filter

⁹⁶ *Andaclu* above n 91, 836-837.

⁹⁷ *Andaclu* above n 91, 838.

⁹⁸ *ACLU* 929 F Supp at 873

of the other means of mass-communication thereby allowing for more diversity of thought.

C The differing approaches of the European Union and the United States

On January 25, 1994, in his first State of the Union Address, President Clinton declared:

“Instant access to information will increase productivity, help educate our children, and provide better medical care and create jobs ...”

At the forefront of this is the conflict between the United States' view and the European Union's view regarding privacy and the extent of legal protection afforded personal information. Internet sites are promulgating privacy policies in the deliberate hope that both federal as well as state regulation can be avoided. In contrast, governments of European Union countries regulate privacy protection for their citizens, ensuring that personal data is protected well beyond national borders.⁹⁹

Two problems stand in the way of an international solution to Internet regulation: (1) each country upholds a different standard of tolerance to shocking information and therefore, regulation is improbable, and (2) the nature of the Internet does not lend itself to identifying or applying conventional methods of jurisdiction upon a violator. While each country has a right when regulating the Internet to uphold its national values and customs, ISPs must work with each country's government to provide a level of service commensurate with the ideals of the society.

A multinational approach to Internet regulation must do two things. First, it must facilitate a flexible regulatory structure allowing nations the freedom to employ a desired degree of regulation. Second, the Multinational Approach focuses on ISPs and a Government's control over them. All countries connected to the Internet will ultimately need to form an international committee to implement a flexible regulatory system which allows nations to exercise varying degrees of regulation over the Internet while maintaining sovereignty.¹⁰⁰

⁹⁹ David Bender and Danice M Kowalczyk "Avoiding Intellectual Trespass in the Global Marketplace: Encryption & Privacy in E-Commerce" 5 Va J L & Tech 2, 3.

¹⁰⁰ Celex No 497Y0306(01), Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 17 February 1997 on illegal and harmful content on the Internet, Official Journal C 70, 6 March 1997, 1. Art 4 states "... INVITE the Member States to start with the following measures: encourage and facilitate self-regulatory systems including representative bodies for Internet service providers and users, effective codes of conduct and possibly hot-line reporting mechanisms available to the public encourage the provision to users of filtering mechanisms and the setting up of rating systems for example the PICS (platform for Internet content selection) standard launched by the international World-Wide-Web consortium with Community support should be promoted participate actively in the International Ministerial Conference to be hosted by Germany and encourage attendance by representatives of the actors concerned".

X ISP LIABILITY FOR "PUBLISHING UNDESIRABLE INFORMATION"

The Law Commission has confirmed that legislation should clarify that ISPs have no liability unless they have *actual knowledge* of the existence of information on the website which would be actionable at civil law. The legislation should also go further and provide an obligation to remove promptly any information drawn to an ISP's attention.

However, this will not limit the availability of socially undesirable information to the consumer, as the consumer has a similar ability (albeit more limited) to find this socially undesirable material as the ISP does.

The Ministry of Consumer Affairs advises the Government on matters that affect consumers when they buy goods and services. Its objectives are:

- examine how laws and practices affect consumers
- promote good business practice
- provide input from a consumer's perspective into relevant programmes of other government departments
- recommend legislative changes to the Government, when necessary, to achieve a fair and informed marketplace."

The OECD agreed in December 1999 to a set of guidelines to help protect consumers in the electronic marketplace.¹⁰¹ The culmination of 18 months work, by the representatives of the 29 member countries' government, business and consumer organisations. Again very significantly, these consumer rights are not set in law. They do provide guidance for businesses who want to sell over the Internet and for consumers who are increasingly searching the net for goods and services. The General Manager for the Ministry of Consumer Affairs, Keith Manch,¹⁰² said at the time that "[t]hey reflect current legal protections and are aimed at encouraging business to provide appropriate consumer protection. They also underline the need for co-operation between government, business and consumers internationally.

These guidelines provide a set of principles dealing with:

- fair business, advertising and marketing practices
- clear information about an online business's identity, the goods and services it offers and the terms and conditions of any transaction
- a transparent process for confirming transactions
- ways of paying securely
- fair, timely and affordable disputes resolution processes
- protection of privacy

¹⁰¹ Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce <<http://www.ftc.gov/opa/1999/9912/oecdguide.htm>> (last modified 26 September 2000).

¹⁰² Ministry of Consumer Affairs Media Release, 12 December 1999.

Keith Manch also commented that the significance of the guidelines is that they are an international stake in the ground on what should be expected of businesses who want to deal with consumers electronically.

"Disparate national policies may impede the growth of electronic commerce, and as such, these consumer protection issues may be addressed most effectively through international consultation and co-operation. OECD Member governments have recognised that internationally co-ordinated approaches may be needed to exchange information and establish a general understanding about how to address these issues."

PART TWO

GENERAL PRINCIPLES

Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce. Governments, businesses, consumers, and their representatives should work together to achieve such protection and determine what changes may be necessary to address the special circumstances of electronic commerce."

The Internet does not readily conform to traditional notions of jurisdiction and a state's ability to impose sanctions on violators of the law is dependent on the need for physical control. However, the burden of holding ISPs liable for content distributed to users is not a realistic solution due to each country's differing standards of intolerable information. In addition, if the ISPs were held accountable for information content, the efforts required to censor the immense amount of material travelling across the Internet would overwhelm ISPs.

XI COMPARATIVE REGULATORY APPROACHES

The primary means of finding information on the Internet is via search engines. In compiling their databases, search engines rely on those who publish Web pages -- webmasters¹⁰³ -- to supply indexing information. Because an increase in visits, or "hits," means more exposure or revenue, webmasters are strongly motivated to do anything to increase their chances of getting hits.¹⁰⁴ Many therefore "spam" search engines in hopes of appearing in as many searches, and as highly ranked in those searches, as possible.

¹⁰³ Strictly speaking, a webmaster is one who designs or maintains a Web page. In the spamdexing context, the implementation of irrelevant or deceptive indexing terms may be done by an actual webmaster, or by a webmaster acting as an agent on behalf of his principal. For simplicity, "webmaster" will refer to any party who provides content on the World Wide Web, either personally or via a webmaster-agent.

¹⁰⁴ [A] high ranking can make all the difference. Consider that a search for the words 'tennis racket' on AltaVista yields more than 850 pages. The user is much more likely to glance through the first 20 sites listed than the last 20. See "Net Interest: Web-Search-2: It's Up to You to Stand Out", Dow Jones News Serv, 9 October 1997.

The American development of the law in relation to cyberspace suggests the need for legislative intervention. Congressional intervention is needed because the law in cyberspace is vague and ambiguous. Two cases that illustrate this uncertainty in the area of liability are *Cubby Inc v CompuServe*¹⁰⁵ and *Stratton Oakmont Inc v Prodigy Services Co.*¹⁰⁶

A *Cubby v CompuServe*

CompuServe, a large commercial on-line service, contracted with a company called Cameron Communications Inc (CCI) to manage and control the Journalism Forum, a CompuServe forum, in accordance with CompuServe's editorial policies. CCI, in turn, contracted with Don Fitzpatrick Associates (DFA) to publish Rumorville USA, a publication carried on the Journalism Forum. The plaintiff in this case, Cubby, alleged that DFA published false and defamatory statements about Cubby and its developer, Robert Blanchard, in Rumorville USA. The court deciding this case held that since CompuServe did not have the power to review the contents of the information that was uploaded to the Journalism Forum, CompuServe was held to be a distributor of information rather than a publisher and thus was not found to be liable.

B *Stratton Oakmont Inc v Prodigy Services Co*

In Stratton, Prodigy, another large commercial on-line service, maintained a bulletin board called Money Talk. Prodigy contracted with individuals to act as leaders of the bulletin board. An unidentified bulletin board user posted a disparaging message on Money Talk about the plaintiff, Stratton Oakmont. Plaintiff sued the unidentified user and Prodigy for libel. Since Prodigy represented to the public that it controlled the content of its bulletin boards, the court in this case held that Prodigy exercised editorial control. As a result, the court concluded that Prodigy was a publisher rather than a distributor and Prodigy was held liable for its actions.

Although Stratton Oakmont is distinguishable, the factual differences between Cubby and Stratton Oakmont are minute. Taken together, these two cases suggest that in order to avoid liability, on-line services should not: 1) represent to the public that they exercise control over the content of the information being placed on the Internet by their members; and 2) actually exercise such editorial control. However, irrespective of the decision in each of these cases, Cubby and Stratton Oakmont illustrate the uncertainty of the developing Internet law.

C *Does Cyberspace Need a New Regulatory Model?*

One commentator has said that "[i]n this age of cyberspace and global connectivity, reliance on statutes and stare decisis simply cannot keep up with a rapidly evolving technological environment."¹⁰⁷ As a result, rules regulating

¹⁰⁵ (1991) 776 F Supp 135 (SDNY).

¹⁰⁶ 23 Media L Rep 1794 (NY Sup Ct 1995).

¹⁰⁷ Matthew R Burnstein, "Conflicts on the Net: Choice of Law in Transnational Cyberspace" (1996) 29 Vand J Transnat'l L 75, 81.

cyberspace may always be obsolete. Another commentator has said that a "[l]aw cyberspace' co-existing with existing laws would be an eminently practical and efficient way of handling commerce in the networked world."¹⁰⁸

David Johnson and David Post argue that cyberspace "requires a system of rules quite distinct from the laws that regulate physical, geographically-defined territories."¹⁰⁹ However, although cyberspace represents a new dimension in communication, it does not necessarily require a completely new jurisprudence. Some of the legal problems of cyberspace are indistinguishable from those that arise in real space. Plus we have seen the difficulties where a set of rules attempts to regulate a unique aspect. In the past we have always relied on the common law to impose a solution.

The European Union had a parliamentary question come up on this point. Mr Bangemann on behalf of the European Commission (7 July 1995) stated the Commission felt that censorship would not be feasible because the World Wide Web sites outside the Community could not be controlled unless there were an international agreement. "As regards service providers within the Community, the legislation in force in some Member States makes it possible for the operators of telematic information services to be held responsible for the content of the information, images or programmes which they make available to the public."¹¹⁰

XII THE ECONOMIC CASE AGAINST — COSTS OF ADMINISTRATION

In the Australian telecommunications industry the regulator has been swamped with appeals to resolve disputes which has created a bottleneck. If the parties use the government funded body to set the terms and conditions of contracts which would normally be determined in the private sector. This has limited the scope of the regulatory regime and prevented the development of speedy dispute resolution processes.¹¹¹

In particular this has come up in relation to designation of services in the Australian telecommunications industry, thereby creating a property right. In the same way the New Zealand government could regulate ISPs granting them property rights and responsibility over areas.

In practice therefore the transaction costs of regulation may be detrimental to the very cost-cutting factors that allowed the internet to thrive originally.

¹⁰⁸ Trotter Hardy, *The Proper Legal Regime for "Cyberspace"* (1994) 55 U Pitt L Rev 993, 1054 (concluding that any "top down" form of regulation would be inappropriate for the Internet).

¹⁰⁹ David R Johnson & David Post "Law and Borders — The Rise of Law in Cyberspace" (1996) 48 Stan L Rev 1367, 1388.

¹¹⁰ European Union Parliamentary Questions, Celex No 995E1131, Official Journal C 230, 04/09/1995, 26.

¹¹¹ *Telecommunications Inquiry* above n 2, Submission 28, Frontier Economics, Dr Graeme Woodbridge.

Part 3 — Concluding remarks

XIII OF FREEZER SHIPS AND PITFALLS

If New Zealand is to make the most of the "Freezer ship" of the Twenty First century it must have a plan of action. It is not merely enough to put in place a regime for consumer protection and subsidise disadvantaged groups. The government needs a coherent plan that addresses usage issues as well as access issues. The regulation of usage through regulating content is a difficult method and doomed to fail on the domestic front. Instead there must be some international coordination which recognises the theoretical boundary between market operations and social goals. Otherwise the risk is run that governments will sacrifice any social control over internet content. There is more at stake here than the mere efficiency of internet service providers.

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