

*An unruly new realm of personal
information distribution:*

Social media and the law - developments

David Vaile
Executive Director
Cyberspace Law and Policy Centre
Faculty of Law, University of NSW
<http://cyberlawcentre.org/>

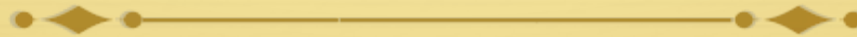
Outline



Regulation

- ✦ Lessig and Code
 - ✦ Online and Social media impacts
 - ✦ Technological changes
 - ✦ Legal disconnects
 - ✦ Struggle for regulators to keep up
 - ✦ Infinitely Long and Short
 - ✦ Australian v International material
 - ✦ IT security: Perimeter must fail
 - ✦ Four horsemen of the personal info security apocalypse
 - ✦ Challenges for regulation
 - ✦ Recent Prosecutions
 - ✦ Where are we left?
- Special Features of the online social environment
- ✦ A 'wicked problem'?

Lawrence Lessig's *Code*



- ✦ Lessig identifies possible sources of regulation (*Code and other laws of cyberspace – 2.0*)

<http://codev2.cc/>

- ✦ **Law** (black letter, *cf.* actually enforced? Privacy?)
- ✦ **Technology** itself, a.k.a. '*Code*' (functions/limits)
- ✦ **Social norms** (netiquette, social practices?)
- ✦ **Business practice** (new social host business models, where the user is product, not customer?)

Online and social media impacts



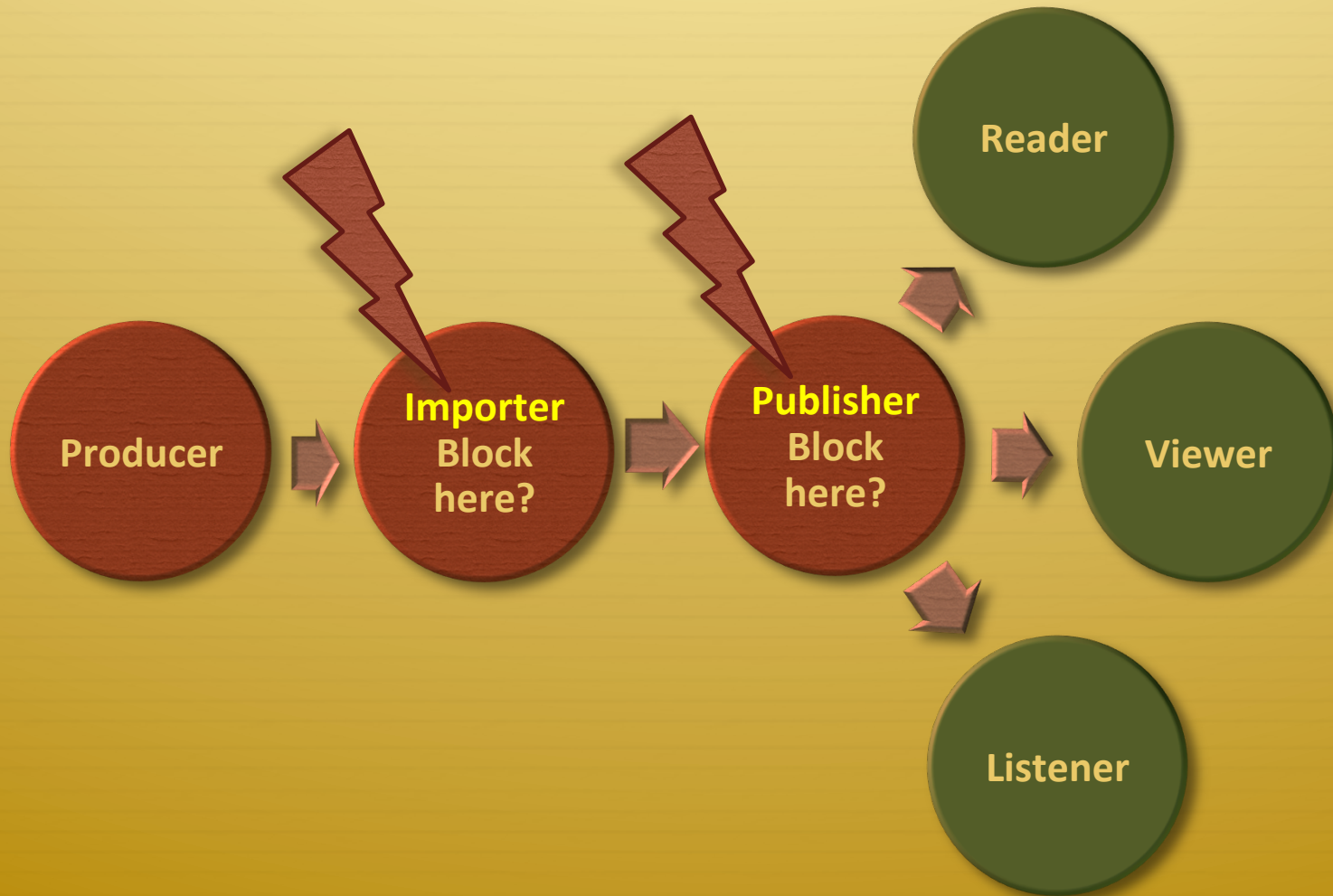
Tech changes
Cultural changes
Legal changes

Technological changes underlying

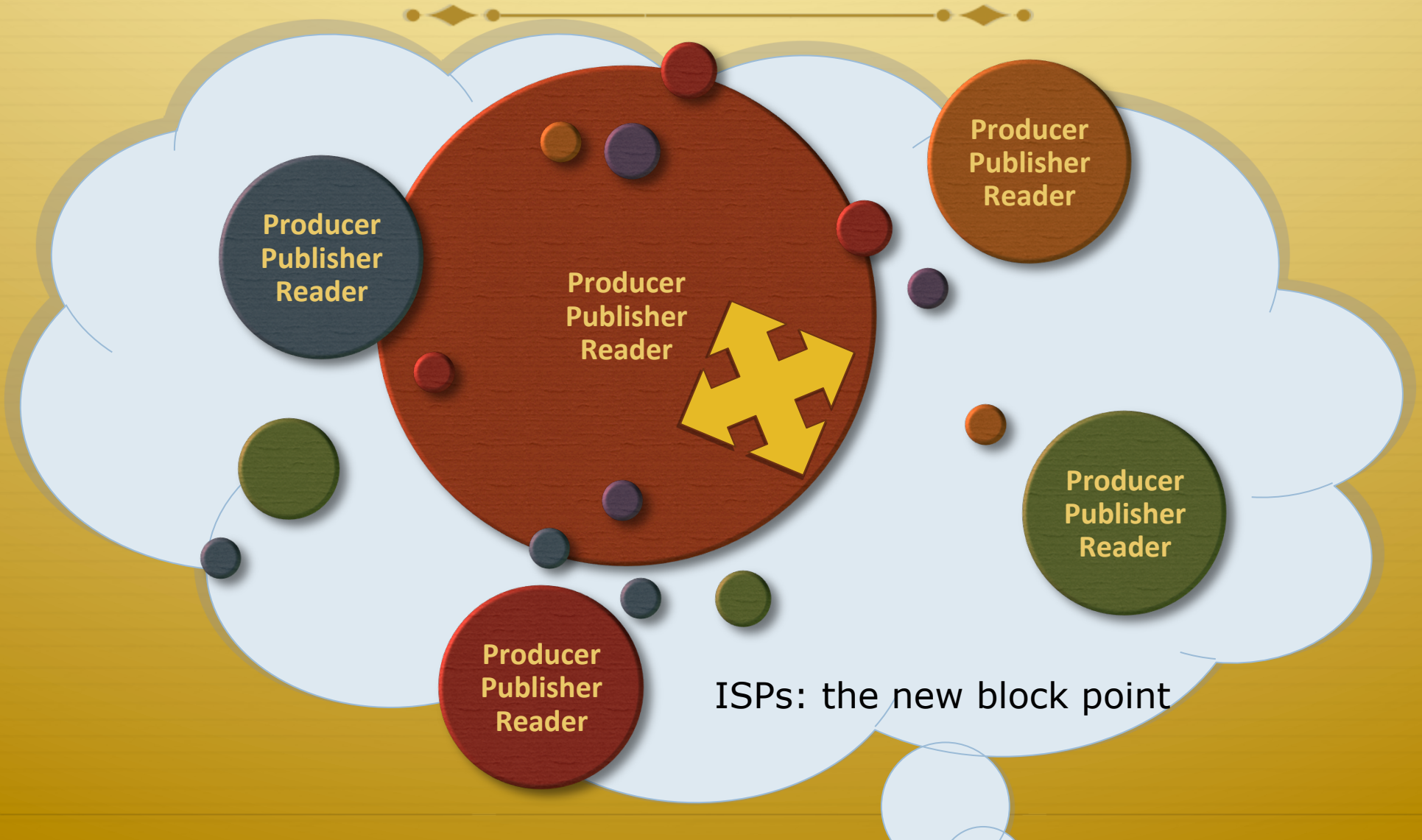


- ✦ Offline world was nice and simple, for regulators and courts
- ✦ Web 1.0: global publication, old media publish models: AustLII
- ✦ Web 2.0: social networking, user generated content: Facebook 1
 - ✦ Convergence of producer and consumer, + distributor
- ✦ Web 3.0?: mass personalisation, semantic web, wearable tech.
 - ✦ It's not just your friends who know you and what you mean
- ✦ Attack of the killer toddlers – we are so old!
 - ✦ Hackers retire at 15, kids turning tech. tables on parents, 'slash'
 - ✦ Facebook does not enforce own entry test of 'at least 13 yrs old'

Ye Olde Worlde (–2006)



New fangled (SNS/UGC)



And then there was '2.0': Features



- ✦ Social networking, user generated content, degenerate narcissism
- ✦ Blurs boundary: Publishing *cf.* Personal Communications
- ✦ From centralised one-to-many topology to distributed network
- ✦ Everyone is both consumer and producer ('prosumer')
- ✦ Everyone is a permanent global publisher; can be intermediary
- ✦ Every device is an endless movie source: deluge of data
- ✦ No editorial brain involved (both users and ISPs)? No selection?
- ✦ ISP replaces Publisher as key point – very significant? *iiNet*

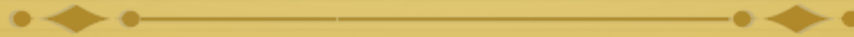
Legal disconnects: 'Info just wants to be free'?

- ✧ Cyberlibertarian fantasies still delude and excite (*Decl. of Indep.* '96)
- ✧ Reality: Jurisdiction out of control, hyper liability (for you)
 - ✧ Intensification, not escape, from jurisdiction (revenge of the States)
- ✧ Or: no care, and no responsibility? (for the Cloud)
 - ✧ Your data and business go offshore, but not legal protection?
- ✧ The rise of the sub-human: minors at the frontier
 - ✧ Deficit in 'consequences' cognitive development: paternalism?
 - ✧ 'Under the age of 18 or appears to be under 18': kids make porn?
- ✧ The fall of the 'common carrier': ISPs reluctantly change masters?
 - ✧ Agents of a foreign power, or a hostile litigant interest? CoE CC
 - ✧ Enforced discipline of their customers, on pain of sharing liability?

The struggle for regulators to keep up

- ✦ Offline: centralised distribution, choke points: edit/publish
- ✦ Web 1.0: more distributors, easier importation
- ✦ Web 2.0: everyone is a creator, (re)-publisher, exporter
- ✦ Web 3.0: the Cloud knows what you like, and makes it?
- ✦ Encryption and roll-your-own protocols already in use
- ✦ The long cyber-war: endless arms race between the straiteners and those seeking to avoid the blocks? Enlivened by real armies.
- ✦ When is publication not publication?
- ✦ Confused discussion: Surely it *is* censorship? No *First Amdt.*
- ✦ Chinese solution: you never know: the Panopticon:
(no-one home, but you self censor)

Special Features of the Online Social Environment



Lifespan
Cultural changes
Legal changes

Why online media control might be a 'wicked problem'

- ✧ Rapid constant evolution of technology, cultures and practices
- ✧ Scope is unmanageable? A billion FB users, a trillion items
- ✧ Classification model unviable? Urge to 'filter' - terminology
- ✧ Design philosophy of the net – under attack? Or net resists all?
- ✧ Supposed beneficiaries of protection also main perpetrators?
- ✧ Moral panic: 'The Panic Button' as solution? Overcriminalised?
- ✧ Real targets are parents? Wishful thinking? Or real victims?
- ✧ Temptations of 'policy-based evidence'? Filter, safety, retention...

Infinitely long and short lifespans

‘The Document that Never Dies’

- ✦ Google Cache: days [*next*]
- ✦ Internet Archive/
Wayback Machine: years
<http://archive.org/> [*next*]
- ✦ Pandora (NLA)
<http://pandora.nla.gov.au/>
- ✦ Legitimate personal copies
- ✦ Illicit personal copies
- ✦ Facebook’s ‘inactive’ accounts:
creature from the black lagoon?

‘Document that Hardly Ever Lived’

- ✦ Instant messaging, text:
Arab Spring 2.0 demonstrates they are not
really transient, but used as if... ?
- ✦ **Snapshot**: www.snapchat.com
A smartphone app shares photos and videos that
self-destruct after viewed once for up to 10 seconds;
warns if recipients attempt to capture screen? [*Next*]
- ✦ **Tor**: encrypted onion router/VPN
- ✦ **Fast Flux injection**: malware staple
- ✦ Roll your own protocols and tools!
- ✦ DFAT, former ASIO, chief declines
to commit to writing (*Zygier* case)

Cache

This is Google's cache of <http://www.vic.gov.au/contactsandservices/directory/?ea01fz149120.&organizationalUnit&bc526326-53a4-406f-8307-ce946e58b664>. It is a snapshot of the page as it appeared on 25 Feb 2013 10:39:25 GMT. The [current page](#) could have changed in the meantime. [Learn more](#)
Tip: To quickly find your search term on this page, press **Ctrl+F** or **⌘-F** (Mac) and use the find bar.

[Skip to navigation](#) [Skip to content](#) These search terms are highlighted: **judicial college victoria**

[Text-only version](#)

victoriaonline

The fastest way to find local, state and federal government information and services

Vict



CONTACTS & SERVICES DIRECTORY

Search

Directory Home

Governor of **Victoria**

Departments and
Other Bodies

Parliament of **Victoria**

Courts and Tribun

You are here: [Directory Home](#) » [Departments and Other Bodies](#) » [Department of Justice](#) » [Courts and Tribunal Service](#) » **Judicial Co**

[skip to this pages content](#) | [skip to site navigation](#)



Judicial
College of
Victoria

- [Forward page to a friend](#)
- [Sitemap](#)

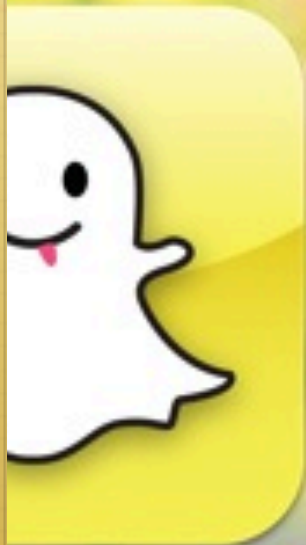
Search this site:

Search

Welcome to the website of the
Judicial College of Victoria

We ensure judicial officers are provided
with opportunities to enhance their skills,
knowledge and abilities

SnapChat



snapchat



Download on the
App Store

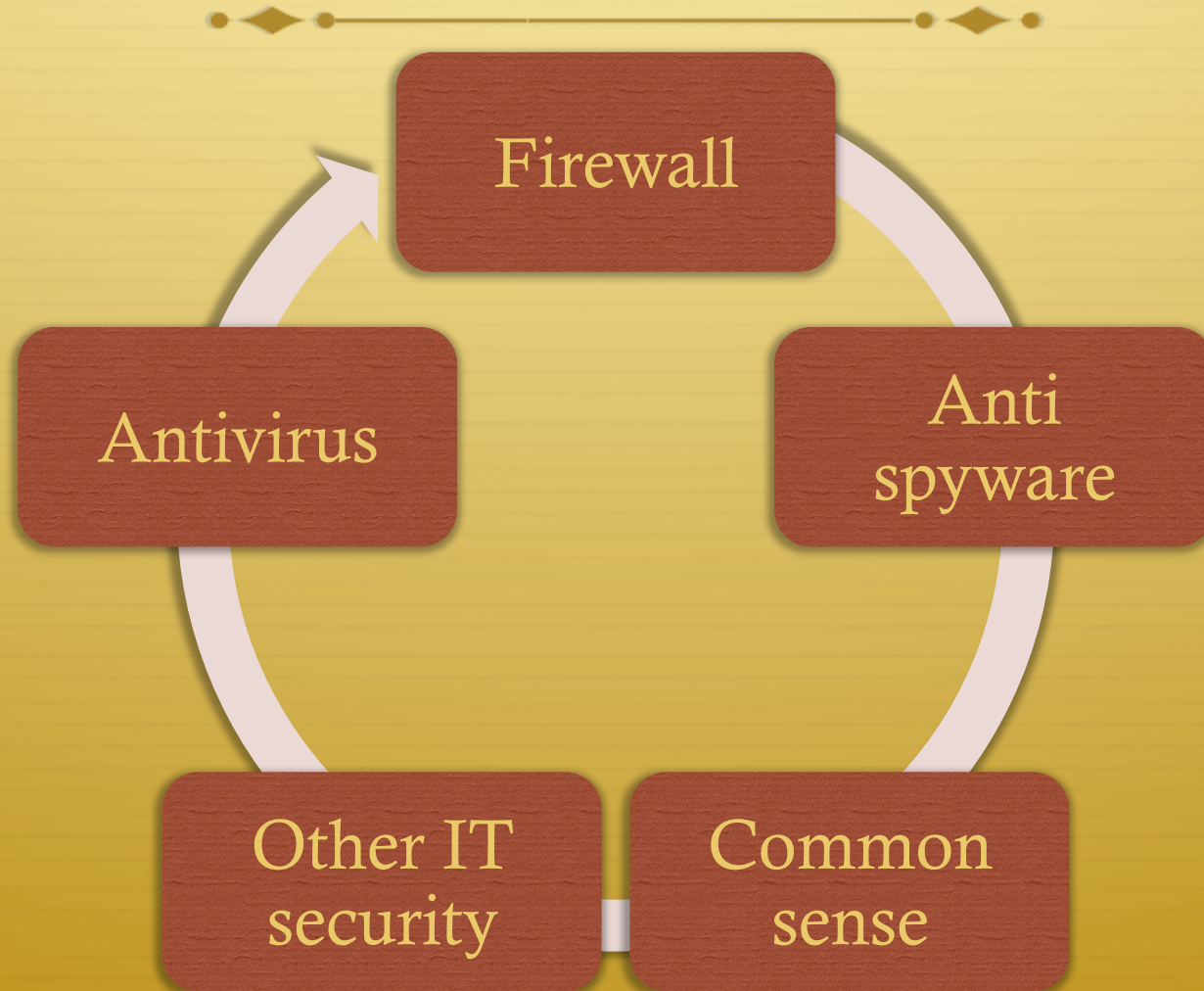


GET IT ON
Google Play

Australian cf. international material

- ✧ Extraterritoriality, foreign jurisdiction limits, 'data sovereignty'
- ✧ Difficulties for censorship, suppression, takedown, prosecution
- ✧ Onshore: Notices (Content Takedown, Link deletion, Stream cessation) for items hosted in Australia from ACMA, Courts
 - ✧ Directed not at author or owner, but ICH, intermediary
 - ✧ No motive to resist? Or seek actual classification, review?
 - ✧ No obligation online to classify, check, edit (cf film, game, publ.)
 - ✧ 'Prohibited' or 'Potentially prohibited': RC, X18+, some R18+, MA15+
- ✧ Offshore: ACMA blacklist based on complaint, Interpol C.P. blacklist in 'voluntary' ISP 'filters'. Otherwise? Most untouched.
- ✧ Potential to use Council of Europe Cybercrime Convention by, and in, USA and EU to streamline criminal prosecution: 1/3/13!

Perimeter security: FAIL



Why IT perimeter security must fail



- ✧ Needs to be 100% effective
- ✧ For a connected device, 99.9% means that 0.1% loophole will be found, in seconds or weeks.
- ✧ No IT security tools is even 99.9% effective.
- ✧ The other side are in a constant arms race with the IT security providers and other vendors trying to keep them out.
- ✧ They only need the tiniest crack – easy to achieve eventually
- ✧ Constant innovation by some of the smartest IT people on the planet, and legions of ‘script kiddies’ using auto-mutating tools

Is IT security broken?



- ✧ Unix IT security model (WinNT, Mac, *nix) doomed
 - ✧ Assumes informed user. But complicated, we're all bozos.
- ✧ Perimeter defence model is doomed: 0.01% v 99.99%
 - ✧ Hacktivists and crims can get into anything
 - ✧ Minutes/hours before any honeypot compromised?
- ✧ No basis for user decision to agree, click; false alarms.
- ✧ Zombies & malware industrialise rapidly, mass customise
- ✧ Implications: we definitely can't keep them out, or info in.

Four Horsemen of the [online privacy/security] Apocalypse



Why do these 'Four Horsemen' matter?



- ✦ Presumption by many that government and industry are 'here to help', rather than 'part of the problem'.
- ✦ Much cyber-safety and cyber-security education material is distorted by this assumption
- ✦ Good players in all four sectors, but serious risks from all too.
- ✦ Failing to see this may blind users to the worst risks for them in a given situation. Courts may look in the wrong place.
- ✦ Also conveniently avoids focusing attention on governance and public policy failures which create such institutional risks!

Challenges for regulation



- ✧ Impossible to treat online content same as offline mass media
 - ✧ Human classification, processing, review: orders too expensive
 - ✧ Machine classification, automation: intrinsically ineffective
 - ✧ Transparency and accountability (old) v. secrecy (new)?
- ✧ No ambition/hope to classify/control all – but what to say to parents, victims, or litigants?
- ✧ Complaints/reporting as a visible response... Then what?
- ✧ Problem of the social network giants: too big to care, too big to afford to deal with individuals? ‘Customers’ *cf.* ‘Products’?
- ✧ Potential of exemplary prosecutions? Shock of consequences?

Recent prosecutions

- ✦ NSW Dist Ct.: *Police v Ravshan USMANOV* [2011] NSWLC 40
- ✦ Publish Indecent Article, s578C of *Crimes Act* 1900 (NSW)
 - ✦ Non-internet offence, old offence!
 - ✦ Former partner, pictures posted, created during the relationship
 - ✦ Intent to cause distress, a means of 'getting back' at former GF.
 - ✦ Plea of guilty, failed bid to minimise sentence, 6 mo. suspended
 - ✦ Poor legal advice, Dep CM unimpressed with 'it was nothing'.
 - ✦ No precedents, magistrate picks middle of range to start.
 - ✦ Discount for plea (25%), then adds 25% for lack of contrition
 - ✦ Dist Ct. approved 6 months result, agreed shd be suspended

Recent prosecutions (*cont.*)

- ✧ Vic Bendigo Mag. Ct: Henderson 2011, breach intervention order
 - ✧ Full admissions, said it was only harmless fun. No relationship.
 - ✧ “couldn’t understand how she had proof he posted the comment”
 - ✧ Illustrates lack of appreciation of both the harm and the evidence gathering capacity of online systems. Importance of data forensics!
- ✧ McCrory and Turner, Aug 2012, same town! Revived 2013!
 - ✧ ‘Root Raters’ – FaceBook’s original purpose?
 - ✧ ‘Use carriage service to offend’: Criminal Code (Cth) s474.17?
 - ✧ ‘publishing objectionable material online’: ??
 - ✧ Jail terms reduced to Community Corrections Orders on appeal

Where does this leave us?



- ✦ Ignorance of consequences a key driver
- ✦ Will prosecutions make any difference?
- ✦ The politics of gesture? Or just the shock needed?
- ✦ Will we ever have a proper discussion of needs of young pp?
- ✦ Failure of local and US regulators to hold giants to account creates culture of impunity – rewards ‘see if you can get away with it’ not compliance. Absence of auditing and protection for individuals’s data?
- ✦ Uncertainties in user requesting or court ordering takedowns.

Questions?



David Vaile

Cyberspace Law and Policy Centre

Faculty of Law, University of NSW

<http://www.cyberlawcentre.org/>

d.vaile@unsw.edu.au

0414 731 249