BUDDLEFINDLAY

Online platforms - has the regulatory tide turned?

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If 10 human years is around 60 dog years, how many 'internet years' is that?

It's now been more than a decade since the term 'Web 2.0' became popular, describing the shift from people just viewing pages on the world wide web, to interacting and collaborating via different online platforms that host and link to user generated content.

We think that, after the huge changes in the internet over this time, a big shift has started in internet regulation including here in New Zealand.

Ten years ago, the Copyright (New Technologies) Amendment Act 2008 had just come into force, introducing safe harbours for ISPs, which gave protection against liability for copyright infringement by their users (so long as the ISP took down infringing content once being notified of it). The law didn't just cover ISPs in the traditional sense – pretty much anyone that hosted user generated content had the same protection.

The rationale was that the internet was a social good, and it was impossible for platforms to monitor the activities of all of their users. There was a strong sense that Web 2.0 offered vast potential, but it needed space to develop, and any steps to control it would limit freedom of expression, stifle innovation, and hurt the economy.

Fast forward a decade, and Facebook's value has grown to over US$500b. Google is worth over US$700b (but paid no NZ tax in 2017). It's been a while since we've 'asked Jeeves' anything, and most of us access news via social media. Cambridge Analytica and other privacy scandals have highlighted the sophisticated tools that platforms use to influence and monetise what we see online. The events in Christchurch showed the speed that harmful content can spread, and how hard it is to remove.

In response to this (and with some overlap) overseas governments have begun flocking to introduce new regulation on online platforms. For example:

- The new EU Copyright Directive holds platform providers liable for infringing content uploaded by its users
- The UK has introduced a white paper on online harms, recommending a 'duty of care' to make online platforms responsible for the safety of their users
- Germany has proposed rules requiring video content providers and intermediaries to disclose the selection criteria that determines sorting and presentation of content
- The Australian Consumer and Competition Commission's Digital Platforms Enquiry made far-reaching recommendations, from addressing Google and Facebook's market power, to assisting in removal of copyright infringing material, to strengthening Australian privacy legislation.

Here in New Zealand, early signs suggest that the regulatory pendulum is swinging in the same direction. Right now there are three legislative reviews underway that would directly affect 'big tech':

- Consultation on MBIE's issues paper on the Copyright Act 1994 has just closed. ISP liability and particularly the breadth of the definition of "ISP" in the Act (which determines the breadth of the safe harbours) is one area under review
- Submissions have also just closed on the DIA's proposals to standardise classification of video-on-demand content. Although user generated content is not likely to come within the review, overseas-based OTT-content providers like Netflix, Google TV and Amazon Prime are likely to be affected
- Consultation has opened on a new 'digital services tax' on gross turnover of social media platforms, intermediation platforms, content sharing sites and search engines.

More reviews are likely to follow in the coming months, as officials and platforms work through how to implement the commitments made at the Christchurch Call.

One prime candidate for review is 'algorithmic transparency'. This is one of the commitments in the Christchurch Call,

although it stops short of requiring the platforms to report on their algorithms (ie the formulae that help platforms determine what users are interested in, and thereby generate advertising revenue). It's clear that there is a tension between the platforms' commercial interest in keeping algorithms secret, and users' interest in understanding how data is being used to influence their behaviour.

We will need to decide whether to follow the EU and legislate in this area, or whether self-imposed initiatives, like Facebook's new feature that explains why certain posts are showing up in your newsfeed, are enough.

We'll leave you with a quote from a recent blog post from Jordan Carter, Chief Executive of InternetNZ (an industry group supporting "an open and uncapturable internet for New Zealand").

"For some people, an open Internet is a Wild West of unlimited control, anything-goes content. Respect for law is absent. Limits to free expression are always bad. Copyright is always wrong. Blocking or censorship is always a short step away from an overmighty state and an attack on human freedom and wellbeing.

That is not what openness means for us. It is not the Internet we need in 2019".

We don't think that, 10 years ago, we'd have read this from InternetNZ, and it gives us confidence in saying that the regulatory tide has turned.

This article was written by Philip Wood and Keri Johansson for the NBR (June 2019).

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