



Internet Licensing and Prior Restraint

1. ARTICLES

1.1 C. Penfold, *Nazis, Porn and Politics: Asserting Control over Internet Content* (*Journal of Information Law and Technology*, no. 2, 2001)

This article compares Australia's regime of internet content regulation, the Broadcasting Services Amendment (Online Services) Act 1999, with that of France, which sought to apply the general law in the decision of *LICRA et UEJF v. Yahoo! Inc and Yahoo France* (order of 20 November 2000 by the Superior Court of Paris). The author argues that neither regime has any practical control over internet content: the Australian Act only sets strict requirements on Australian hosts and content providers, with take-down notices for other content, while jurisdictional and technological issues plague the practicability of the French decision. However, both are symbolic, in that they reflect the effort of nations to regulate the Internet, despite obvious difficulties.

1.2 E. J. Wallack, *Executive Powers of Prior Restraint over Publication of National Security Information: The UK and USA Compared* (*The International and Comparative Law Quarterly*, vol. 32, no. 2, p. 424, 1983)

In this article, the author undertakes a comparative analysis of the emergence of the doctrine of prior restraint as used by the executive in the USA and the UK. While there is a misconception that the USA does not allow for prior restraints entirely, in reality, it has been imposed several times although the balance of powers has acted as a limit on its extent. The UK is, however, home to

several instances of prior restraint and the justification to restrict this may have to come from the European Convention on Human Rights.

1.3 I. Wu, *Canada, South Korea, the Netherlands and Sweden: Regulatory Implications of the Convergence of Telecommunications, Broadcasting and Internet Services* (Telecommunication Policy, vol.28, p.79, 2004)

Wu evaluates media regulatory regimes in the four countries according to their proffered aim of effectiveness in encouraging competition in the telephony, video and Internet markets. She argues that in light of this short-term aim, a majority of issues such as content regulation, scope and extent of the powers of regulatory bodies, network access and content policy have been sacrificed.

1.4 J. Zhu, *Roadblock and Roadmap: Circumventing Press Censorship in China in the New Dimension* (University of La Verne Law Review, vol. 30, no. 2, p. 404, 2009)

Zhu discusses the impact of ‘new media’ – primarily the Internet, which broadens the channels of access and dissemination of information – on the government-monopolised channels of information in China. He argues that the regulation of press freedom assists in the perpetuation of non-democratic governments; this is upset by the advent of new media, which allows reader participation and thus stimulates a grassroots democracy.

1.5 J. A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations* (William and Mary Law Review, vol. 28, p. 439, 1986-87)

Is the doctrine of prior restraint a riddle wrapped in a mystery inside an enigma? In this article, the author seeks to unpack a prior restraint by studying the evolution of it in case law and determining the original intent. Perhaps the best manner of regulating prior restraints is to abolish any and all forms of it, a stance which is similar to the original intent in formulating this doctrine which is today a confused concept. This concern is analysed from the perspective of protecting journalistic freedom from government control.

1.6 J. C. Jeffries Jr., *Rethinking Prior Restraint* (Yale Law Journal, vol. 92, no. 3, p. 409, 1983)

In this article, the author studies the doctrine of prior restraint by juxtaposing it with national security. The concern of protecting speech is a valid one, but the fear of national security is gaining more strength with time and this has forced us into relooking the jurisprudence surrounding the doctrine. The only case in which the US courts have had to determine the balance between these two competing concerns was in the case of *New York Times v. United States*, which according to the author was decided in haste. Upon considering the history of the doctrine, the author has analysed the various methods by which a prior restraint may be imposed – official permits, injunctions, legislative restraints and finally the residuary category consisting of indirect prior restraints. The author concludes that prior restraints have been misunderstood and misused over time and do not deserve to be treated as a different category of First Amendment analysis.

1.7 M. I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers* (*Indiana Law Review*, vol. 34, no. 2, p. 295, 2001)

The author makes a case for defending the doctrine of prior restraint and giving it a more precise legal definition. This, he says, is necessary in light of the recent criticism against the doctrine which is aimed at writing an obituary for the doctrine. The author traces the legal history of the doctrine and outlines the need for the same in present times as a necessary protection against excessive censorship.

1.8 T. Lee, *Internet Control and Auto-regulation in Singapore* (*Surveillance & Society*, vol. 3, no. 1, p. 74 2005)

Lee argues that Singapore, with its well-defined content-regulatory regimes, is an example of an illiberal democracy. Laws on content regulation restrict the availability and access to a diversity of user content on the Internet. Penal provisions enforce and engender not only this, but also create a chilling effect that acts as self-regulation. Such measures result in overbroad restrictions that are not in conformity with international standards.

1.9 T. R. Litvack, *The Doctrine of Prior Restraint* (*Harvard Civil Rights-Civil Liberties Law Review*, vol. 12, p. 557, 1977)

The article aims to determine a definition of prior restraints. The author also outlines exceptions to the rule of presumption of unconstitutionality of prior restraints viz., obscenity, national security and new instances that have been judicially evolving with time. The analysis leads to the conclusion that prior restraints must be a carefully carved out exception to the First Amendment right least it leads to abuse by the government.

1.10 Memorandum on the Draft Changes to the Law on Communications and the Post relating to Licensing in the Republic of Georgia (Article 19, 20 April 2001)

This comment to a proposed legislative amendment in the Republic of Georgia analyses the proposal according to Georgia's obligations under the ECHR, and offers recommendations on better meeting the same. It identifies the following as problematic: the requirement of 50% *local* content as opposed to the European Content for Transfrontier Television requirement of 50% European content, the possibility of a chilling effect on broadcasters by a double-statement of the law, and the lack of independence of the Regulatory Commission and its power to suspend licences.

1.11 Memorandum on the 1995 Press Law of the Palestinian National Authority (Article 19, 15 June 1999)

This memorandum, endorsed by the Palestinian National Authority, evaluates and recommends changes to provisions of Palestinian law placing restrictions on the free flow of information in a manner violative of international obligations. It discusses the following: licensing of newspapers prior to publication, restrictive qualifications for the posts of editor-in-chief and directors, broad and vague content-restrictions and weak provisions for source-protections and confidentiality. Existence of penal provisions creates a further chilling effect on the free flow of information.

1.12 Note on Kazakhstan's Regulation for the Allocation of Domain Space (Article 19, 15 October 2005)

The Regulations prescribe a set of requirements to be complied with by anyone wishing to register a site under the .kz domain of the Internet. The applicant must register his contact and other details with the appropriate agency, and the application must granted/denied within 10 days. Grounds for denial are exhaustively laid out, and are not content-based. This law is analysed in light of the ECHR standard for restrictions, *viz.*, a law, legitimate aims and necessity in a democratic society. The report

concludes that, for those seeking a .kz domain name, no justification exists for the requirement of web-server location in Kazakhstan, nor for the site suspension notice period (which is very less). Further, administration of the same by a government, and not independent, agency heightens fears of draconian laws.

1.13 Promoting Internet Policy and Regulatory Reform in Vietnam: Status of Telecommunications Development in Vietnam (The European Union's Asia IT&C Programme, 2004)

The report examines the efforts of the Vietnamese government to open up and make easily accessible the media in Vietnam. It states that Vietnam's greatest impediment lies in the centralized planning structure it abides by, and the consequent failure to permit market involvement. In addition to government monopolies and over-regulation of internet content, lack of infrastructure and popularity of the Internet are setbacks. As such, e-commerce and e-governance directives are nonexistent.

1.14 The Legal Framework for Freedom of Expression in Ethiopia (Article 19, 1 March 2003)

As the title suggests, this is a sweeping overview of the legal regime concerning media regulation in Ethiopia, covering the press, broadcasting, and other media. The report identifies key issues in media control, ranging across registration, licences, penal laws and supervision by regulatory bodies, and evaluates the extent and permissibility of their restrictions. Further, it makes recommendations for the better balance of content regulation and freedom of expression.

2. CASES

2.1 European Court of Human Rights (ECtHR)

2.1.1 Autronic AG v. Switzerland [22 May 1990, Series A no. 178 (ECtHR)]: The Applicant is a Swiss company engaged in the business of selling dish aerials for televisions. These aerials could receive signals from a telecommunication satellite of the Soviet Union. However, the law in Switzerland required earth stations to obtain a license before receiving telecommunication signals. In the absence

of the Soviet Union granting the right to receive uncoded signals from its satellite, the Applicant was not granted a license by Swiss authorities either. The Applicant sought protection under Article 10 of the European Convention on Human Rights. The Applicant argued that – (a) Article 10 protects not only content but also the form in which expression is made; (b) Article 10 also protects the right to receive information and further that (c) merely because it is a business enterprise it is not precluded from enjoying protection under the Convention. The response from the Swiss Post and Telecommunication Authority was that (a) Article 10 could not be invoked as the demand of the Applicant was of commercial nature and as such, the Convention does not protect economic rights; (b) even if Article 10 is invoked, the Article itself permits States to impose licenses on telecommunication and that (c) the need to protect secrecy of information and prevention of public disorder were legitimate concerns permitting such a State action. Even as the Court recognised the margin of appreciation granted to States to determine laws appropriate to their needs, it was not convinced of the necessity of the interference and further held that any law requiring a license must undergo strict scrutiny because of the right in question.

2.1.2 Gaweda v. Poland [No. 26229/95, ECHR 2002-II (ECtHR)]: In Poland, a publication had to be registered upon giving information about the name of the publication, address of the editor and publishing house and the periodicity. Printing in contravention of this law was a punishable offence. There were two journals that were not granted registration as their names did not fit the content. Did the refusal to register these journals amount to a prior restraint on the freedom of speech? The government argued that the requirement for registration did not tantamount to a license and that there was no censorship. All that was required in the instant case was a change in the title of the publication as it was misleading, which was a mere technical formality. The ground for refusal was however uncertain to the Applicants. The Court held that the law mandating registration was vague and did not provide sufficient safeguards from misuse by the State. Although there may be a prior restraint on speech, it must be carefully scrutinised to ensure that Article 10 is not violated and in the instant case, the overbroad law did not pass the test of a lawful restraint on speech.

2.1.3 Groppera Radio AG v. Switzerland [28 March 1990, Series A no. 173 (ECtHR)]: An Italian private company had built a radio station on a mountain peak such that it could transmit signals to Switzerland. The Applicant in the instant case was a Swiss company engaged in producing radio

programmes using this radio station in order to circumvent the State monopoly on broadcasting in Switzerland. However, when the monopoly ended, private radio stations were allowed to function after obtaining a license. The Applicant was affected by the requirement of a license and hence alleged that Article 10 had been violated. The State argued that the license did not amount to censorship of content, but was in fact a mechanism necessary to protect international telecommunication order and also to accommodate technical limitations posed by limited cable capacity. The Court recognised the State's margin of appreciation in deciding such matters and upheld the legality of the licensing regime.

2.1.4 Hins and Hugenboltz against the Netherlands [No. 25987/94, ECHR 1996 (EComHR)]: The Applicants were citizens of the Netherlands who had applied for a license to retransmit programmes from foreign broadcast stations, but were denied the same by the concerned Minister. Applicants approached the Commission on the ground that their right under Article 10 had been violated. The State argued that since there was limited cable capacity available, regional public broadcasting organisations would get priority in allocation of broadcasting resources over those that retransmit shows relayed by foreign stations. The Commission opined that paragraph 1 of Article 10 must be interpreted in light of paragraph 2, which results in the conclusion that the State was only ensuring efficient use of airwaves and in the process deny a license for legitimate grounds.

2.1.5 The Observer and The Guardian v. United Kingdom [26 November 1991, Series A no. 216, (ECHR)] and The Sunday Times v. United Kingdom (no. 2) [26 November 1991, Series A no. 217 (ECHR)]: These are famously called the Spycatcher cases and are regularly cited to show that prior restraint is permissible but that it must pass the three part test of legality, legitimacy and necessity. In the instant cases the respective Applicants papers wanted to serialise Spycatcher, the autobiography of an MI5 agent called Peter Wright. They were however precluded from doing so through a prior restraint against this in the form of a court injunction. However, since the same had already been published in the USA, continuing the ban would amount to a violation of the freedom of speech since the threat to national security had come to pass.

2.2 Inter-American Court of Human Rights (Int-Am Ct)

2.2.1 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism [Advisory Opinion 5/85 (1985) (Inter-Am Ct)]: Under Law no. 4420 of Costa Rica, journalists had to mandatorily obtain a license before engaging in their profession; the contravention of this law would lead to penal sanctions. This Court was asked for its advisory opinion on the legality of imposing such a license on journalists in general and of Law no. 4420 in specific. The Court explored the scope of Article 13 of the American Convention on Human Rights which protects the Freedom of Thought and Expression. The language of Article 13 is more liberal than that in any other human right convention, in fact, this provision does not allow for prior restraint on speech. The imposition of a license was thus held to be impermissible as it acts as an instrument of prior restraint that not only violates the right of journalists to report but also the right of Costa Ricans to receive information and hence Law no. 4420 was held to be a violation of Article 13.

2.3 African Court of Human and Peoples' Rights (ACHPR)

2.3.1 Media Rights v. Nigeria [(2000) AHRLR 200 (ACHPR 1998)]: Subsequent to the annulment of the election in Nigeria, two magazines and ten newspapers were proscribed from publishing. Further, the government promulgated a decree to the effect that the publication of a newspaper without first getting it registered would be an offence punishable with fine, imprisonment, or both. Apart from a rather high registration deposit that had to be paid by publishers, the bigger concern was the absolute discretion that the government had in permitting registration which effectively amounted to censorship of the press. This affects not only the right of the press to report but also the right of Nigerians to receive information. The Commission considered this decree to amount to a prior restraint which violates the right to expression under Article 9 of the African Charter of Human and Peoples' Rights. Further, the government was directed to bring the domestic law in conformity with the Charter as the touchstone on which the legality of a restriction is tested is not that of national laws but that of international standards.

2.4 Cases from the Supreme Court of the United States of America (US Sup. Ct.)

2.4.1 Near v. Minnesota [283 U.S. 697 (1931) (US Sup. Ct.)]: A Minnesota law equated production, publication, circulation, possession, sale or giving away of (a) obscene, lewd and lascivious or (b) a malicious, scandalous and defamatory newspapers, magazines or other periodicals with nuisance and

all persons guilty of such nuisance could be enjoined. There was a complaint against the Defendants since they had published ‘malicious, scandalous and defamatory’ matter that alleged that Jews were responsible for bootlegging activities and that the State agencies were not doing anything about this. The veracity of the statements that have been published is not known as no finding upon the same was made. There was a court order against further publication of the matter. This court order was held to be censorship violative of the freedom of speech. Prior restraints are only allowed in certain exceptional circumstances such as when the country is at war or when statements have the potential to disturb peace or overthrow an orderly government. But since this was not the case in the instant case, the law was held to be unconstitutional.

2.4.2 *Nebraska Press Association v. Stuart* [1 Media L. Rep. 1064 (US Sup. Ct.)]: In anticipation of the trial of a case of multiple murders, the press was prevented from publishing information such as confessions and statements of other parties. The court held however that the heavy presumption against the constitutionality of a prior restraint had not been satisfied. If the possibility of liability of publishing chills speech, a prior restraint freezes it. Since the restriction here was too broad and had no basis to stand on, it was not permitted.

2.4.3 *New York Times Co. v. United States* [403 U.S. 713 (1971) (US Sup. Ct.)]: Also famously called the Pentagon Papers Case, this was a case in which the United States sought to enjoin newspapers from publishing contents of classified historical study on Vietnam policy. The Supreme Court held that the Government had not met its burden of showing a justification for the imposition of restraint on publication of the contents of the study. It was held that by revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

2.4.4 *United States v. Progressive* [467 F. Supp. 990 (1979)]: An article that purported to reveal the secrets of the making of an atomic bomb was not allowed to be published through a prior restraint in the form of a preliminary injunction. The court opined that in order to grant a preliminary injunction, it must be shown that if the injunction is not granted, there would be an irreparable harm caused to the Plaintiff or that there would be public harm. In the instant case since such information was sensitive, the preliminary injunction was granted as direct, immediate and irreparable injury was

foreseeable. The charges were however dropped as being moot after there were other reports of the same kind already in circulation.

3. Legal Norms

3.1 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (U.N. Doc. E/CN.4/1996/39, 1995)

The Jo'burg Principles, comprise a set of internationalized standards for the protection of human rights (primarily freedom of expression), drawn from growing state practice and general principles of law recognized by nations. They recognize and delineate an upper limit on restrictions that may validly be placed on human rights. For this, they invoke the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR and the Paris Minimum Standards of Human Rights Norms in a State of Emergency. While yet not judicially accepted, the Jo'burg Principles are compelling and persuasive.

3.2 The Joint Declaration by the UN Special Rapporteur for Freedom of Expression, the OSCE Representative on the Freedom of the Media and the OAS Special Rapporteur for Freedom of Expression (2005)

This declaration sets down guidelines for the regulation of the Internet, and specially recognizes anti-terrorism measures. These guidelines include abolishing of licenses, if any exist. While a joint declaration of this nature is not legally binding, it is of great persuasive value.

3.3 Broadcasting (Class Licence) Notification under the Broadcasting Act (1996) [Singapore]

The notification subjects to licences the following: audiotext, videotext and teletext services, and broadcast data, VAN computer online and ICP/ISP online services (section 3). The conditions for obtaining a licence are set out in the Schedule: ISPs, ICPs who are determined to be political parties registered in Singapore, newspapers, etc. must all register with the regulatory authority. As licensees, they must 'remove, or prohibit the broadcast of' content that is against, inter alia, 'public interest, public order or national harmony'.

3.4 Internet Code of Practice issued by the Media Development Authority under s. 6 of the Broadcasting Act (1997) [Singapore]

An Internet Access Service Provider or Reseller (both of which are defined under the Act) are required to deny access to prohibited material (enumerated under clause 4 of the Code). The definition of ‘prohibited material’ is extremely broad: “objectionable on the grounds of public interest, public morality, public order, public security, national harmony, or is otherwise prohibited by applicable Singapore laws”. Further guidelines on assessing the prohibited nature of content are provided under the same clause.

3.5. Management, Provision and Use of Internet Services (Decree No. 55/2001/ND-CP of 23 August 2001)

[Vietnam]

The Decree brings Internet content within the purview of press, publication and state secret laws. In addition to providing for infrastructural development and regulating encryption, it calls for privacy and confidentiality of communications and prohibits phishing, hacking and other related activities. It also regulates the equipment used in the provision of Internet services.