

Freedom of Speech & Risk Management

The following article was written a couple of years ago with the Australian context in mind but can equally be applied (with suitable changes) to the situations facing many Western democracies today.

It tackles the challenges in balancing free speech with possible damage to society and in particular vulnerable individuals and sensitive ethnic groups. It is being republished now with two recent events in mind:

- *The Janet Jackson incident at the Superbowl half-time show.*
- *The concern of the Jewish Anti-Defamation League that Mel Gibson's "The Passion" will incite hatred of Jews.*

The entire original paper follows, after which I shall apply its principles to the two cases above.

Introduction

The introduction of modern communications technology and the decision that "free speech" was implied in the Constitution have created a crisis of governance in which:

1. The concept of "publisher" has changed. Publishers are no longer just large firms with legal counsel and a deep understanding of libel laws. Any individual who can put up a web page can publish material that is libelous, defamatory or even dangerous and this material can cross state and national borders.
2. Communication is no longer mainly within a single state. Even a single email can be sent to thousands of people across the country. Libel laws differ in each state. In one state the email would be defamatory in another it would be legal. Some uniformity in libel laws is desperately needed.
3. Australia is now so multi-cultural that what is "offensive" can no longer be defined in terms of the message alone but only by putting the message in its context. For instance "you must all eat pork chops" would not be offensive to most Australians. However if someone stood up in a mosque during Ramadan and said that it would be a deliberately offensive act. Thus a Film Review Board sitting in a room cannot determine what will be offensive or not be offensive, only the community offended can determine that.
4. Those communities that are aggrieved by an act of speech should have simple, fair and uniform ways of having that grievance addressed. The current plethora of self-regulatory industry boards such as ARIA, ASB etc are not, simple, fair or uniform. In fact they are complex, unjust, arbitrary and skewed in favor of the industry and against plaintiffs.
5. Laws regarding defamation, libel, public acts of speech, offensive material, racist and inflammatory speech, film, music, advertising and media standards and enshrining the freedom of speech need to be drafted at national level, and administered by a single main body in a sensible, rational and scientific way.

Core Concepts

1. Total freedom of speech and opinion in private.
2. Total freedom of the use of encryption to protect personal privacy.
3. The concept of risk management as central to evaluating the appropriateness of an act of public speech. Material that is likely to lead to criminal actions, is hazardous or which may cause psychological trauma or deep offense to a significant number of people would be deemed inappropriate. In risk management risk is divided into probability levels (from zero probability to unlikely to moderate probability to high probability to

certainty) and in degrees of harm if the action occurred (from no harm, to trivial, to significant, to major to catastrophic). Thus even a low risk of a totally catastrophic event needs to be managed. A decision needs to be made about what levels of risk we will find acceptable. Furthermore the probability of the risk is increased by its extent – that is how often the situation occurs. To broadcast a bomb recipe and terrorist techniques, in public, to millions would be an irresponsible act of speech, whereas sharing it within an SAS training session would not.

4. Risk management should be determined on accurate scientific grounds and take into account the material on the psychological impact of various forms of speech and media and studies into the effects violence and pornography. Public policy should be built on the facts of science not the unsubstantiated opinions of libertarians on one hand or censorious individuals on the other.
5. That a message is neither offensive nor inoffensive in itself but only as it is spoken in its cultural context. Society is not uniform in what offends and what does not offend but consists of many different groups with varying tastes and standards. Thus we have a choice between “no standards”, the standard of one predominant group, or a context-based standard that allows the group offended to an appropriate amount of redress. We have, by the complexity and confusion fallen into what amounts to a lawless “no standards” policy by default. Attempting to re-impose a single community standard will not work. A more multi-cultural, yet clear approach is needed. This needs to revolve around three key concepts a) that no act of speech is offensive or inoffensive in itself. b) That the audience determines the appropriateness of the message c) That the communicator is obliged to be aware of the audience that he or she is communicating to.
6. That communication that is clearly targeted to one group, which is not offensive to that group, and which does not go beyond that group, will be deemed not to be offensive no matter how offended others may be by it.
7. Once communication goes significantly beyond the bounds of its target audience then it must take into account the other “listeners”. Thus a Arab commentator in a mosque or on an Arab radio station speaking in Arabic is fine in talking about jihad and controversial matters and even in having anti-Jewish sentiments. However if he puts these sentiments in a full-page advertisement in the Australian, in English, then the Jewish community has every right to take offense.
8. Communication that has no control over who views it, such as prime time TV or a roadside billboard must have a high probability of being inoffensive to all.
9. That society does not consist entirely of mature adults but also of vulnerable groups such as children and the emotionally disturbed. Public speech must take note of the most vulnerable group of significant size that is likely to be exposed to that act of speech. Showing a pornographic film in a kindergarten would be seen as poor risk management and highly inappropriate and irresponsible. Similarly we need to work out how many young children are likely to be still watching late night TV. The myth that there are no children watching TV after 8:30 cannot determine public policy. Public policy needs to be built around accurate scientific assessment of the actual situation, not on myths. Similarly books and music marketed to emotionally disturbed and angry teenagers needs to be assessed for its ability to incite violence/suicide.
10. Blasphemy can be not only a Christian concept but Jewish, Islamic and other religion concept that can be deeply meaningful to those involved in that faith. Blasphemy is set to become a contentious issue in a society with many differing religious standards and

its definition and recognition by the justice system has to be very carefully worked through.

11. There needs to be a complete redefinition of who is a "publisher" and what an "act of publication" is. How responsible are they to take account of the Internet and even of say opinions aired on a talk-back show? How responsible is the ISP, the site owner, the person who posts, the radio station etc.? This I think gets bogged down very quickly. I think that libel laws should apply primarily to the "author" / person who originates the speech and to those who knowingly and deliberately multiply its effect.
12. There needs to be a national level tribunal, easily accessible to complainants, with clear, scientific and independent risk management standards and an understanding of defamation and free speech appropriate to the 21st century. This needs to be demonstrably just and not weighted in favor of the rich and powerful as current laws on libel are. It should also decide advertising, radio, music, internet, film and TV standards and issues of blasphemy and cultural and religious offense and act as an independent and impartial arbiter when a person or group is offended by an act of speech.

Conclusion

The objective is to recognize the need for and complexity of free speech in a modern, multi-cultural democracy. The current complexity has not led to good governance but to lawlessness in practice and utter confusion in understanding and conceptualization. The aim of the Free Speech Act would be to enshrine both freedom and responsibility and to bring scientific clarity in place of a confusion of competing values. The cultural values of various segments of society would still be affirmed and respected but no one value system would be entirely dominant as the arbiter of what was, or was not offensive. There also obviously needs to be some reference to intellectual property issues such as copyright as they intersect with acts of speech and the two acts would need to be in a significant degree of harmony. However I think intellectual property issues should be encoded in separate legislation and arbitrated separately.

Application To Particular Cases

The ABC airs a documentary that profoundly offends an Aboriginal community by revealing sacred material that the producer did not know was sacred. The offense was unintentional. Here the religious standards of a particular segment of society are profoundly but unintentionally violated through the understandable lack of awareness of a major broadcaster.

- Do we say "tough" and apply a "no standards" policy?
- Do we judge the offence by the standards of white society and dismiss it?
- Do we make the standards of the Aboriginal community prescriptive for the entire nation?
- Is the ABC or the Aboriginal community forced into expensive legal action?

I think the above options are all non-optimal. There needs to be recognition that a minority group can be offended, and also recognition that the values of the minority are just that – values of a minority and are not prescriptive for the entire nation. There needs to be a non-litigious means of settling such offences which are grave to the people offended but not criminal offences. One level of the proposed tribunal could contain community mediators that resolve these unintentional cultural offences and work out a resolution acceptable to both parties without legal action.

An angry divorced husband who is a computer programmer sends an email that contains an explicit photograph of his ex-wife and has insulting remarks attached. The email is entitled "photos of my ex-wife". He attaches the email to a computer virus that sends the defamatory email to everyone in the user's address book if they click on it. Soon the email travels around the world and eventually reaches the awareness of the ex-wife who hears about it on a computer show on TV..

Here we have a malicious act of defamation being committed by someone who would hardly fit into the normal categories of an author or a publisher and where the jurisdiction it is committed in and the parties involved are unclear.

- Which state or jurisdiction was the offense committed in? Was the computer it originated on in Toowoomba or the Telstra server in Melbourne the place where the defamation began?
- Did the people who clicked on an email saying "photos of my ex-wife" knowingly participate in a defamatory act?
- Can they be held responsible to some extent for the emails sent out from their address book? Are they liable for not having a virus checker on their email?
- To what extent can a computer virus be classified as a "broadcast mechanism"?
- Was the TV station being responsible in warning of the virus or was it further defaming the woman? What part did it have in her mental anguish?
- What sort of redress is appropriate? Under some States current laws unless the communication caused financial damage then it would technically not be "defamation". This is patently inadequate in this case.
- Could the average person afford a defamation trial under current laws?
- Is "truth" be a fair defense here? Can something that is true still be malicious?
- Is it also a pornographic act?
- Is there any fair and simple means of redress that is as simple and affordable as the defamatory act of publishing was?
- Are complainants in defamation suits always going to be at a huge disadvantage in seeking justice?

This simple, and quite probable, case would tie current Australian defamation laws into knots. While the case could possibly be tried under current laws it could not be done without great cost and angst, and justice would effectively be denied to the ex-wife unless she was very wealthy. The proposed Free Speech tribunal could have a clear set of criteria for dealing with defamation that takes account of issues such as malicious intent, destruction of character as well as finances, the contribution of others, which takes account of modern technology and which can try a case that is both defamatory and pornographic in the one case at the same time. In this case it would be a proper court not just the community negotiators mentioned above.

A deliberately provocative advertising campaign containing adult themes is launched to gain attention and knows, from the start, that they will can the campaign if instructed. The advertiser relies on the slow pace of the complaint mechanism to keep the campaign running for two months

Here the offense is intentional and is calculated to garner maximum publicity and to exploit the slow process of resolution by the Advertising Standards Board. It also calculates on them siding with the advertiser which they do 95% of the time. The proponents know that by the time the complaint is processed their campaign will be over and they will withdraw it when "instructed" by the Advertising Standards Board. They are allowed to time the start of their campaign so it commences just after an ASB meeting time. Being in the industry, they are told ASB meeting times, complainants however are not told this information of given any

help with submitting a complaint. Such one-sided industry self-regulation is unfortunately commonplace under the current regime and mocks any attempt to have reasonable community standards. Advertising needs to be controlled by an independent, national level body that can act rapidly when standards are obviously being flaunted and which is fair to both complainants and advertisers.

Highly pornographic videos produced in the ACT and NT are illegal in other states but these States cannot prevent their entry because of freedom of trade laws.

Because of a lack of clear national standards about highly violent music and pornography we are reduced to the standards of the lowest common denominator. This is ineffective social policy.

- Is there a scientific way of measuring the impact of highly violent and explicit music and videos?
- What is the audience of such videos? Will they be shown in the home where young children could be a part of the audience?
- Does the fact that some of the worst pornography is now computer-generated and does not involve women/children in the making make it less harmful?
- How can lyrics and images be evaluated by their potential to degrade women, cause psychological harm and to encourage violence?
- Is there scientific literature on this that could inform good social policy without undue moralizing or the unfair dominance of a particular philosophy of value system?
- How can free speech be balanced by responsible speech?
- How can social policy decide on what sort of a nation we want to build and how are acts of communication may affect this?
- Is Australia as a society in some way degraded by the extensive distribution of extreme hard-core pornography.
- Are we going to let the lowest common denominator in any one State influence the nation?

Obviously some clear, objective and scientific guidelines need to be established at a national level and a national level body be given power to enforce them. These standards need to be integrated into our social policy and vision for the nation as a whole. The proposed Free Speech Tribunal could be a major step in that direction.

A rogue claims tries to exploit the Free Speech Tribunal for financial gain by claiming that his "personal religion has been violated". It is strongly suspected the personal religion is a fiction.

Here we have to ascertain what is involved in holding a personal value and how we find evidence that indeed the value is strongly held and is as claimed. If the value is obviously part of the person's life and actions and is regularly promulgated to others then that would be a starting point. Whether the offending party could reasonable be aware of such a value needs to enter into the equation as well. If there was no evidence of the supposed religion, no writings, place of worship, actions or promulgated beliefs and if it was so esoteric and individual that the person concerned had no awareness of it then the case could be dismissed or at most resolved by negotiation not litigation.

The Janet Jackson Incident

Janet Jackson bared her right breast in front of 90 million viewers during the half-time show at the Superbowl – which is considered "family time". This was clearly inappropriate and

had a high probability of offending a large number of people – which it did. On the other hand the risk of actual moral damage to minors from such a brief exposure was minimal. The matter would be referred to the Free Speech Tribunal to see whether it was an act of free speech or came in the same category as in appropriate public nudity or even as a sexual crime as “flashing” to a single individual say in a supermarket is considered. A fine for indecency should certainly be levied and a sincere public apology required. The indecency fine, if it was set at \$5 per viewer, would total \$450 million and would certainly discourage future risqué performances.

The Passion

Jewish groups claim that the Passion will raise anti-Semitic sentiments and result in danger to Jews. However this is unsupported by the scientific facts – movies about Jesus have been screened around the globe – with Campus Crusades “Jesus Film” claiming to be the world’s most viewed film having been viewed by over one billion people – but no-one claims that these films have resulted in a rise in anti-Semitic sentiments. Despite numerous pre-screenings, involving tens of thousands of people, no hate crimes against Jews have been committed as a result of the Passion. The producer is simply accurately chronicling the final hours of Jesus’ life with no overt anti-Semitic agenda. There may be a role in the Free Speech tribunal mediating the concerns between the parties – and also requiring some scientific or statistical proof of the allegations of the Anti-Defamation League (perhaps on the basis of the effects of other similar productions).

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