

# What would President Obama think about the Chief Censor prosecuting CallPlus for Global Mode?

November 2014

## Speed read

The censorship prosecution authorities don't have grounds to prosecute for Global Mode, the service that enables access from NZ to sites such as Netflix.

And they shouldn't prosecute. There are wider civil liberty issues at play, as illustrated by President Obama's statement this month on net neutrality. Anyway, stopping Global Mode is just a finger in the dike.

This article first appeared in [National Business Review](#)<sup>2</sup> on 21 November 2014.



## The Detail

Internal Affairs and the Censor's office have valuable roles in relation to pornography particularly as to children. The Internet makes their job challenging. But that doesn't mean that ISPs either can or should be prosecuted under censorship legislation. The cost to political freedom for one thing may be too great.

Stuff reported on [7 November](#)<sup>2</sup> that the Chief Censor is considering bringing charges against CallPlus in relation to its Global Mode service. (In fact it may be Internal Affairs that would look at doing this). Global Mode is a service that might be used by CallPlus' customers to access Netflix and other overseas sites, enabling unclassified content to come into NZ.

Using Netflix as an example, CallPlus doesn't connect the customer to Netflix: the customer does that by taking out an account and downloading content.

The censorship legislation recognises the conduit role of ISPs, couriers, NZ Post etc. and that such conduits should not be liable as distributors of content. For example, excluded from liability are telecommunications network operators and internet access service providers "providing only a network or facility through which the contents of the publication are transmitted".

CallPlus with its Global Mode service is doing no more than providing that "network or facility". All it is doing is providing another pathway to the wider international network, which is what all ISPs do, typically using components bought from upstream providers. Access to the international internet is the ubiquitous and defining feature of the internet and internet access. Any suggestion that "network" doesn't encompass Global Mode is put to bed by the necessarily wider reference to "facility". Global Mode is a "facility".

ISP customers also access Netflix via other ISP services too. That highlights an important point. Stopping Global Mode is not going to stop internet access to Netflix, in our example. One way or another, NZ consumers can get access.

It's ironic that the media reports a possible prosecution in the week that President Obama announces his strong position in favour of net neutrality. The focus of net neutrality is the hijacking of the internet by strong commercial interests, such as Telcos charging more money to speed up certain content, thereby eroding other services for commercial gain, against the ultimate interests of consumers. But what is really striking is that the President opens his statement supporting net neutrality by referring to civil liberties and democracy instead of referring to those commercial interests. He [said](#):<sup>3</sup>

What would President Obama think about the Chief Censor prosecuting CallPlus for Global Mode?

*"An open Internet is essential to the American economy, and increasingly to our very way of life. By lowering the cost of launching a new idea, igniting new political movements, and bringing communities closer together, it has been one of the most significant democratizing influences the world has ever known.*

*"Net neutrality" has been built into the fabric of the Internet since its creation — but it is also a principle that we cannot take for granted."*

Think Arab Spring and Twitter. Think how freedom has been enhanced by variations on Global Mode getting around state political interference including political control of the internet. We take for granted that we have largely unfettered internet access here in New Zealand. Global Mode is a natural part of this principle that information should not be unnecessarily encumbered in its transmission. That is what the internet is meant to be very good at.

Yes, protection in relation to content, especially as to children, is an important objective, and that is challenging to manage over the internet. But action that shuts down internet access, whether Global Mode or some other internet access service, can have the chilling effect against these vital freedom interests. By dealing with one mischief, a content prosecutor may create worse unintended consequences.

But in terms of content, this is finger-in-the-dyke territory. Internet history has shown that, time and time again, blocks and restrictions are navigated around and quickly rendered useless.

Even if there was a breach, all prosecutors have a discretion as to whether or not to prosecute taking into account factors such as the public interest. (A well-known example is the Police discretion not to prosecute speeding below 109 kph). While the Chief Censor and Internal Affairs have important objectives, chilling the internet in this way comes at considerable cost. Is the public interest better met by not prosecuting?

Is there some other way this can be managed? ISPs don't want child porn and the like flowing over their facilities. Maybe it's time for the Chief Censor, Internet Affairs and ISPs to engage constructively to see if there are other solutions, even though a perfect solution is not possible.

But the officials should have their weather eye out for how competing commercial interests drive how various parties approach this. No doubt the Chief Censor wouldn't want to be a porn in a commercial debate between ISPs and content providers, with content providers relying on a back door solution to promoting their commercial objectives.

*Disclosure: Michael Wigley acts for CallPlus*

1. <http://www.nbr.co.nz/article/can-censor-prosecute-callplus-global-mode-165644>

2. <http://www.stuff.co.nz/technology/digital-living/63000645/censor-eyes-callplus-over-globalmode.html>

3. <http://www.whitehouse.gov/net-neutrality#section-read-the-presidents-statement>

Wigley+Company

PO Box 10842

Level 6/23 Waring Taylor Street, Wellington

T +64(4) 472 3023 E [info@wigleylaw.com](mailto:info@wigleylaw.com)

and in Auckland

T +64(9) 307 5957

[www.wigleylaw.com](http://www.wigleylaw.com)

*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*