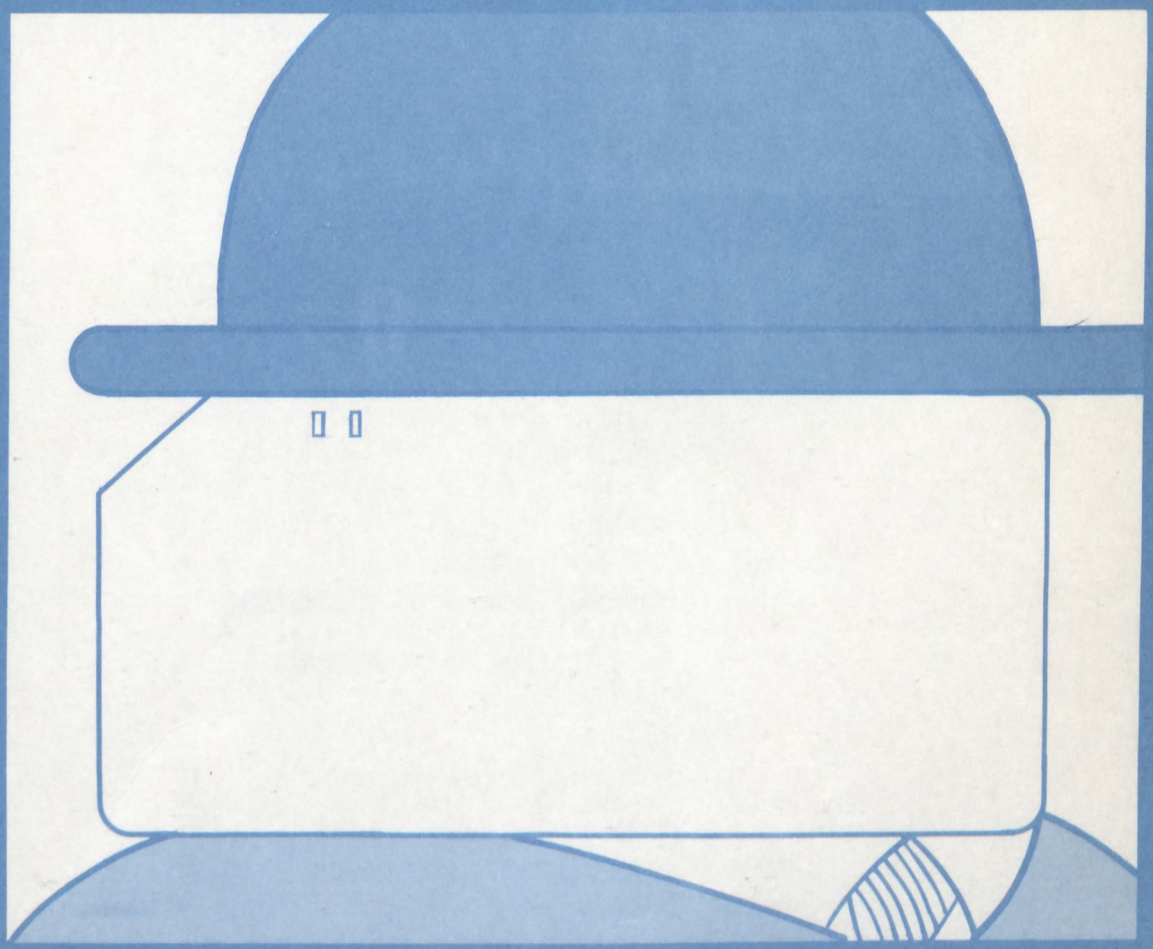
THE THEORY AND PRACTICE OF SELF-REGULATION

S.J. USPRICH



7

A study by the Privacy and Computer Task Force

new

THE THEORY AND PRACTICE OF SELF-REGULATION

A STUDY FOR THE

PRIVACY AND COMPUTERS TASK FORCE

DEPARTMENT OF COMMUNICATIONS

DEPARTMENT OF JUSTICE

S.J. Usprich

This report was prepared for the Privacy and Computers Task Force, an inquiry sponsored by the Departments of Communications and Justice, and should not be construed as representing the views of any department or of the Federal Government. The views expressed herein are exclusively those of the authors, and no inference of any commitment for future action by any department or by the Federal Government should be taken from any recommendations contained herein.

This report is to be considered as a background working paper and no effort has been made to edit it for uniformity of terminology with other studies.

TABLE OF CONTENTS

Introduction

In the following pages I sketch in rather broad strokes the theoretical implications of self-regulation and the conclusions they lead to concerning its applicability as a means of controlling the abuse of confidential information in the computer industry. Many of the subtleties involved with self-regulation have not been dealt with; I have felt it preferable to attempt to grapple with the larger theoretical issues involved because my research has convinced me that, on this basis alone, self-regulation is not suitable for achieving the goals with which the Task Force is concerned.

Whether or not a problem actually or potentially exists that is in need of some form of control has not been considered nor has the wisdom of regulating the industry at all been examined. Though both these matters are obviously crucial in reaching any conclusion to the broad inquiry of the Task Force, they are beyond the scope of this particular Study.

Pursuant to the terms of reference agreed on for this Study, I have proceeded on the assumption that the problem exists and is to be controlled by regulation and have then focused on the single issue of whether self-regulation is the best form that such regulation should take.

PART I - SELF-REGULATION IN PERSPECTIVE

A. Forms of Occupational Control

The means by which the practices, policy and members of various occupational groups[1] are controlled may be roughly divided into three broad categories. These are (1) control by the state, (2) control by the occupational group itself, and (3) a mixed form in which control is vested in the groups under the authority of the state.

This tri-partite characterization of the means of control should not be regarded as establishing hermetically-sealed or mutually-exclusive compartments; it represents rather the theoretical distinctions in the philosophy behind the three broad approaches to occupational control. Quite often a combination of two forms of control (usually (1) and (2)) may be found to exist for a given occupation. For example, the state may wish to assert its control over only one particular narrow aspect of the occupation; this would then leave the members of that occupation free to control the various remaining aspects themselves.

Despite this and other forms of overlap, it is of some value to appreciate the basic distinctions among the three forms of control as a prelude to the more thorough examination of one of them. To this end, these differeing basic approaches will be briefly described and distinguished below.

---

1. The term "occupational groups" is employed for the sake of convenience and brevity. It is to be understood as encompassing professions, trades and industries.

(1) State Control

This form of control may be exercised on one of three different levels. At the lowest level, it embodies a minimal amount of control in a requirement that those engaging in a certain form of activity must have their names listed in an official register. There are no particular qualifications[2] demanded as prerequisites for registration, so that the occupation is thus open to anyone who wishes to engage in it.

An example of this form of control in Ontario is the requirement that itinerant sellers of goods or services be registered.[3] Though entry into this calling is relatively unrestricted, the state can control the methods used by these tradesmen by withholding or cancelling registration should undesirable practices be resorted to and/or by requiring certain practices to be used as a condition of the registration.

A second level of control would be certification whereby the state certifies that an individual has attained a certain level of skill in an occupation, but does not prohibit those less skilled (or even unskilled) from engaging in the occupation.[4] Control over occupational

---

2. In connection with the example used below, the only ground for refusing registration to an itinerant seller is basically if "his financial responsibility or record of past conduct is such that it would not be in the public interest for the registration or renewal to be granted". See s.5(1) of the Act cited in n. 3, infra.

3. See The Consumer Protection Act, R.S.O. 1970, c.82, s.4.

4. An example can be seen in The Nurses Act, R.S.O. 1970, c.301, which prohibits (s.8) an individual merely from falsely holding himself out as a registered (i.e., under the Act, see s. 9) nurse, rather than requiring all nurses to be registered.

activities is thus exerted by the state's requirement for certain standards to be met for certification, enforced (ideally) by the preference of the public to employ state-certified practititioners rather than risk using those less skilled. It can be seen at once that the effectiveness of this form of control will vary according to traditional market forces such as the price differential involved in the remuneration of certified and uncertified practitioners, or the degree of risk perceived by the public in employing uncertified practitioners.

The third level of control, which in effect involves a combination of the first two, is that of licensing. It is at this level that control is most pervasive. The state not only requires that an individual acquire a licence in order to engage in the occupation (similar to the low level registration described above), but requires that a certain standard of skill be attained before a licence will be issued (as in the second level, certification).[5]

The effect then is to restrict entry into the occupation according to the stringency of the standard of competence required, rather than strictly according to the interplay of individual preferences and the economics of supply and demand which dictate the number engaged in a calling over which the first two methods of control are used.

---

5. For an example in perhaps its simplest form, see The Highway Traffic Act, R.S.O. 1970, c.202, s.16, which requires a licence for anyone who operates a vehicle as a chauffeur (i.e., for compensation, see s.1(1)2) and provides for the examination of such persons.

When utilizing this third level of control, the state has -- in theory at least -- created a state-run monopoly out of the controlled occupation since it controls entry to the occupation by retaining the power both to issue licences according to criteria it stipulates and to prohibit unlicensed personnel from engaging in the occupation.[6] Further controls can be exerted by attaching various conditions to the licence requiring the holder to engage in (or refrain from engaging in) certain practices on pain of withdrawal of the licence.

In summary, these three levels of control represent the basic approaches among which the state may select the degree of direct intervention it wishes to employ in the state regulation of an occupation. The level chosen will to a great extent depend on the type and magnitude of the factors it wishes to control in the regulated industry. Any discussion of the relative merits of these forms of state regulation, and any further analysis of their operation and general utility is beyond the scope of this Study; only the obvious point need be made that the various rules and requirements made pursuant to this form of regulation will be effective[7] since they will have the full force of public law and the state apparatus behind them.

---

6. In practice, the distinction between registration and licensing may often seem ephemeral (for example, see the report of the Ontario Royal Commission Inquiry into Civil Rights (hereafter cited as the McRuer Report), vol. 3, s.2, "Licensing", in which examples of both are discussed indiscriminately), but the monopoly-creating capability of the latter represents an important theoretical distinction, as will appear below. See also, Friedman, Capitalism and Freedom, c.9.

7. Of course, how effective the rules etc. are in actually achieving the desired results within the regulated occupation is a totally different question. The coercive power of the state, if used efficiently, can only insure that the rules are obeyed because of the effectiveness of the sanctions if they are not; it cannot, however, coerce the desired social, economic, professional, etc. results that flow from such obedience.

(2) Occupational Self-Control

Simply put, this type of control is, as the name implies, a control exerted by the members of the occupational group over themselves. This may be done in several ways, ranging in its crudest form from a simple informal collective disapproval of certain modes of behaviour in a formless unorganized occupational group to a sophisticated system of hierarchical control in a structured, well-organized occupation. It is at this latter end of the scale that control will be relatively most effective and predictable in its operation.

Since we are here dealing with the pure form of occupational self-control (that is, one in which there is no degree of state involvement),[8] the structural framework will typically be that of a collection of individuals who voluntarily band together to form some sort of occupational association.

This association will usually reserve on to itself the right to determine qualifications for membership, promulgate a code of ethics and standards to be followed by members, and exercise the power to discipline members for infractions of this code. The major weakness of this form of organizational control is that the sanctions available to the association for disciplining its members can, in the ultimate analysis, be ignored by the erring member. By definition, it is not a legal necessity to belong to the association in order to engage in the occupation;

---

8. The mixed form in which the state is involved will be discussed in section 3 below.

thus even the ultimate weapon in the association's arsenal -- expulsion from membership -- can be risked with relative impunity if the stakes are high enough. The degree of control that can thus be exerted over the occupational group depends almost entirely on the willingness with which the individuals involved are prepared to submit themselves to it.

It may be deduced from the above that this form of self-control will be most effective when the members perceive adherence to the prescribed standards and ethics as being in their own self-interest, and, as a corollary to this proposition, least effective when a member sees his own interests being best served by a departure from the standards that are sought to be imposed. The question of what will best serve the public interest is, generally speaking, one that does not arise, except insofar as some benefit may coincidentally accrue to the public as a result of the pursuit of the association's own objectives.

These generalizations hold true, I believe, whether the voluntary, self-controlling association is composed of true individuals or corporate individuals. The correctness of the analysis is borne out by an examination of the factors that lead to the creation of these associations and a consideration of some examples of this form of control.

Very often, the impetus for forming a voluntary self-controlling association will stem from a fear that if certain abuses or improprieties within an occupational group are not self-corrected, state control over the occupation in some form will result. The formation in 1922, for example, of the Motion Picture Producers and Distributors Association

of America Inc. and its self-censorship code can be attributed directly to the producers' fear that various states were on the verge of enacting censorship legislation against them.[9] Again, in more recent times, we have the example in Britain of a Royal Commission recommending establishment of a press council: "If there was any enthusiasm (among newspaper proprietors) for the idea, it was well concealed. But three years later, after a private member's bill to establish a press council by legislation had reached second reading in the House of Commons, the industry finally agreed on a draft constitution."[10]

Other motives which often lead to the formation of voluntary occupational associations are desires:

(i) to enhance professional status of the occupational group;

(ii) to better achieve good public relations;

(iii) to act as a more effective pressure group in securing legislation favourable to the occupation;

(iv) to create the necessary internal structure for a later transformation to self-regulation under statutory authority (to be discussed further below).

---

9. See the account given in Hunnings, Film Censors and the Law, pp. 151-164 and Schumach, The Face on the Cutting Room Floor, c.2.

10. Report of the Special Senate Committee on Mass Media, vol. 1, p. 114, emphasis in original.

In an extensive search of the literature relating to the formation of many such occupational associations, I have failed to discover even one case where it can be said that the formation of such a group was prompted by a desire to better serve or protect the public. In some cases, this may follow as an ancillary result but, regardless of the capital that may then be made of it, it never provides the primary motive.

Nor is this surprising. If individuals are to relinquish voluntarily some degree at least of their formal autonomy it is unrealistic to expect them to do so other than on grounds of self-interest.

In summary then, this form of control is a relatively poor one because it has little coercive control over its members. Membership being voluntary, the association's control will depend on its persuasive powers rather than any real teeth in the sanctions it is capable of bringing to bear on a recalcitrant member. Particularly in moments of crisis or when a conflict develops between the member's self-interest and the public interest, these controls will be largely ineffectual.

(3) Hybrid Control

This form of control combines some of the features of both of the above methods and should be seen as a hybrid form that developed naturally from the two broad alternatives discussed above. At the outset, it should be stressed that this form of control is not completely an alternative to state control; it is more properly characterized as a species of it.

As in the pure form of state control, legislation is enacted requiring those wishing to engage in a given occupation to be certified or, more usually, licensed.[11] The term "licensed" will not always be used, particularly for the higher-prestige professions. Instead, they will be required to take up membership in an association, such as the Law Society, in order to practice. However, whether the requirement is to obtain a "membership" or a "licence", the practical effect can be seen to be the same.

The state then delegates its rule-making and administrative powers over the regulated occupation to the occupational body itself. As in the self-control model, the occupational association itself controls the activity group and determines qualifications for membership, devises standards of behaviour and may discipline those who do not adhere to the standards. The essential difference between the present model and the voluntary self-control one is that under the former the occupational association is elevated into an organ of the state. Its rulings now have the full power of state enforcement behind them, as well as, most typically, the power deriving from monopolistic control of the occupation as a further coercive device.

To put it another way, the voluntary association discussed in Section (2) above has been transformed by statutory recognition into a mandatory association. As an American judge succinctly defined it:

---

11. It is rare (I know of no instance) for this third form of control to be used in connection with bare registration (in the sense defined above, p.2). There would be no particular advantage to the occupational group to have delegated to it the control over an essentially mechanical function.

> "Without the aid of the statute these groups would be mere ... voluntary associations; with it they become state agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved ... and in aid of this the power of the State is heavily involved by way of prosecution ... of those who are unable to secure a license to engage in the occupation."12

For various reasons that will be discussed in B below, pressure from the occupational group is almost always in the direction of achieving the power inherent in this type of control, which is known as self-regulation. This often has the effect of rendering other theoretically-differing control models into practical resemblances of this model. For example, if licensing control is vested in a state board, the regulated occupation may gain control of the board[13] and so transform the regulatory model into a de facto imitation of self-regulation.[14] Conversely, it may sometimes be possible for an occupation to utilize economic power, rather than state power, to turn a de jure voluntary association into a de facto mandatory one in those situations where the association is capable of maintaining monopolistic control of the occupational activity. The analysis of

---

12. State v. Harris, (1940) 6 S.E. 2d 854

13. Members of the regulated occupation will often be appointed to such boards. Even in the absence of an absolute majority on the board, these occupational members may have effective control, particularly in technical matters, since -- because of their expertise -- they will be deferred to by lay board members.

14. Control by state boards is much more common in the U.S. than it is here. For a discussion of some examples where it has evolved into de facto self-regulation, see Gellhorn, Individual Freedom and Governmental Restraints, pp. 115-116.

self-regulation in Part III below will of course apply equally to these forms of control that resemble it. There is also the additional factor, which will not be considered in this Study, of the wisdom of the state allowing "self-regulation" by a monopolistic power in the absence of ultimate state control over the monopoly.

B. Genesis of Self-Regulation

An understanding of the genesis of self-regulation is instructive. There are various advantages that the occupational group sees for itself in this form of control, but these factors may represent the disadvantages of self-regulation from the public point of view.[15]

Historically, the impetus for self-regulation has come from the groups themselves, "always, of course expressing concern for the public good."[16] Pressure is put on the legislature by those already in the professional group to delegate licensing powers to the professional body so that the public may be protected against incompetents. This is generally the basis on which the legislation is then enacted.[17]

---

15. I refer primarily to the utilization of the self-regulatory power in the occupational group's own interest. This will be discussed further in Part III.

16. Report of the Committee on the Healing Arts, vol. 3, p.29.

17. See, e.g., the preamble to the Act to Licence Practitioners in Physic and Surgery Throughout this Province, (1815) 55 Geo. III, c.9 (Upper Canada): "Whereas many inconveniences have arisen to His Majesty's subjects in this Province, from unskillful persons practising Physic and Surgery therein ...."

As a first step towards achieving self-regulation most occupational groups will, as a rule, first form a voluntary association.[18] This will give them the higher status necessary to be entrusted with the self-regulatory powers and also establish a structure through which this power can be exercised.

The evolution of the self-regulatory powers can be validly compared to the experience of the guilds:

> "The medieval guilds, whether of merchants or of craftsmen, seem originally to have been concerned with the reputations of their members. Artisans and tradesmen knew that observance of commonly accepted standards would enhance the reputation of all. At the outset the guilds readily accepted new members, seeking only to insure that all would measure up to the prescribed norms of reliability. Before the middle of the 14th century, however, there were thinly disguised evidences of an aim to restrict competition by restricting membership. And a century later the disguises were frankly discarded."[19]

Just as the guilds were concerned with the protection of their own members, so it can be seen[20] are the self-regulatory bodies. The difference today is that in a modern economy the occupational group can usually only achieve comparable power through the intervention of state power.

---

18. See, e.g. Reader, Professional Men, p. 28:

> "In or before 1739, ... (attorneys) took a step which has since been followed by most occupational groups seeking to raise themselves to professional status. They founded a voluntary professional association ... and one of its principal objects was to clean up attorneys' practice. It was also designed to further attorneys' interests, particularly in their relations with the Bar and other branches of the legal industry; to check unqualified practice; and to promote professional education."

19. Gellhorn, Individual Freedom and Governmental Restraints, p.113.

20. See Part III below.

As noted, the required intervention is rationalized on the basis of its being for the protection of the public. Quite often, there will indeed be an element of this involved. The fact that this is so provides part of the motivation for the occupational group to press for state intervention. Because of existing abuses it seems quite likely that there is bound to be state intervention at some point; rather than having direct state control the group would quite clearly prefer to have the power vested in its own hands. In addition, there are added advantages that flow from the utilization of this power.

An occupation that has been granted the power of self-regulation acquires a special sort of identity in the public eye. The state's having entrusted them with this power acts as a form of approval and thus elevates the status of the given occupation. Self-government is in fact the height of achievement for any occupation, particularly so as the historically self-regulating occupations have been those accorded a high status such as law and medicine. So with this form of regulation the occupation may acquire for itself maximum economic returns[21] and also a better vehicle for applying organized pressure to government to acquire further legislation in its favour.

The interplay between this legislatively-created body and further legislation passed by the state is often an interesting one. The initial power that has been acquired helps to beget more power.

---

21. With higher status often come higher prices. Consider also the effect of the monopoly power on economic gains (see "Restrictive Practices" below).

Since self-regulation is a symbol of the legitimacy of the occupational group and of the trust accorded it by the state, legislators are likely to listen with more respect to the group's view on future legislation. As well, since the original legislation has created an official body for the profession -- as opposed to a fragmentary voluntary association that may represent only part of the profession -- its views will be given more attention. Such an official body's advice would also more likely be sought and given added weight in reference to technical legislation concerning the profession for which the legislature would not have the required expertise.

It is clear then why any occupational group would want to seek self-regulation for itself as the preferred method of control; what is not nearly so clear is why it should in fact be allowed this power. In Part II, this Study will be exploring the most common grounds on which this public trust is given over to the self-regulatory bodies, and, in Part III, adverting to some of the potential abuses that may arise from the inherent weaknesses in the model. This will enable us to extrapolate from this to two possible models of self-regulation for the computer industry and assess the efficacy of this form of control in reference to the particular abuses of confidentiality to which our efforts are directed.

PART II - THE RATIONALE OF SELF-REGULATION

A. Professionalism

It may be instructive to begin by examining those groups for which the privilege of self-regulation has traditionally been reserved. It is to the professional occupational groups that this power is said to be given, with the archetypes being the professions of law and medicine.

However, though spoken of as being reserved for the professions, it is sometimes difficult to discern which occupational groups are in fact professions. One can look, for example, at the 22 more or less self-regulating "professions" in Ontario at present[22] and very well question whether all of them can in fact be termed professional in the traditional sense. Many of the groups which have achieved this power have done so through claiming real or fancied resemblances to the archetypal professions.

To characterize definitively which occupational groups do or do not constitute professions is an impossible task.[23] The definition has been a shifting one and, as has been pointed out, "In the literature there are as many definitions as definers -- probably more."[24]

---

22. See Appendix I for a list based on that compiled by the McRuer Report.

23. The McRuer Report for example begins its discussion of the professions by stating "Those callings which are customarily thought of as professions cannot be precisely defined." (p. 1161).

24. Lees, "Economic Consequences of the Professions", p. 2, n.5.

The term profession with its connotation of higher prestige seems to be a designation aimed at by most, if not all, occupational groups. As a result, over the years the traditional professions have been supplemented by others: "by a range of newer professions, by some premature professions, by some pseudo-professions, and by some lowly occupations eager to lift themselves to the status of profession."[25] As even a cursory historical survey will show, the walls between the professions and non-professions have been broken down, so that very often today there is merely a difference in degree between them:

> "In the United States, the word profession denotes almost all occupations which require more training than those activities vaguely designated as unskilled or semi-skilled. For general purposes, there is no apparent advantage in distinguishing between a business, a trade, a vocation, and a profession, such a distinction inevitably becomes invidious and is often made without logical basis."[26]

To a great extent then, the definition of what constitutes a profession is unimportant. Those occupational groups desiring self-regulation will not be deterred by a mere semantic exercise, which in any event is incapable of satisfactory resolution. Conversely, no right of self-regulation should automatically flow merely because the term "profession" has been attached to a given occupation.[27]

---

25. Hall, "The Place of the Professions in the Urban Community", p. 100.

26. Donald Young, "Universities and Co-operation among Metropolitan Professions" in The Metropolis in Modern Life (Fisher, ed.) at p. 290, quoted in Gellhorn, op. cit., p. 108, n.13.

27. This last point is also made by the McRuer Report, p.1162.

Despite what has been said about the impossibility of precise definition, there are four broad characteristics common to most professions that can be singled out as probably having played some role -- if not always as a logical rationale at least a psychological one -- in the granting of self-regulatory powers.

(1) Specialized Knowledge

A professional will usually undergo specialized training over a period of time and be engaged in an occupation that is based upon the theoretical study of a department of learning. Of course, the variety of things taught at our modern universities make it difficult to characterize one group as learned and others as not. Nor is a recognized program of academic study as such a necessity. Lawyers, for example, for centuries acquired their skills by an apprenticeship system and it is only relatively recently in this century that university law degrees have been made a prerequisite for practice.

Nevertheless, the specialized knowledge, however acquired, has made it difficult for laymen -- be they members of the public or the legislature -- to judge standards of competence within the profession. This leads to the "expertise rationale" whereby the professionals themselves are best granted the power to determine the standards of competence and those of behaviour, since they are the only ones with the necessary knowledge for determining these.

(2) Service Orientation

All groups characterized as professions provide services, rather than goods or products. This is of course equally true for dry-cleaners, postmen, and a host of other occupational groups, which are generally conceded not to be professions. The idea has arisen, however, that, with professionals, service to the public is a primary motive -- which can be seen as a duty flowing from their specialized knowledge -- and the fact that they are generally paid for providing these services is merely incidental thereto.

This tradition of personal gain being of secondary importance can be seen very strongly in the early formative years of the historical professions. For example, in describing the early practices of barristers and physicians, Reader has found: "The whole subject of payment, however, seems to have caused professional men acute embarrassment, making them take refuge in elaborate concealment, fiction and artifice."[28]

Even in more recent times, it has been categorically stated that:

> "The profession is not a money-getting business. It has no element of commercialism in it. True, the professional man seeks to live by what he earns, but his main purpose and desire is to be of service to those who seek his aid and to the community of which he is a necessary part."29

---

28. Reader, op. cit., p.37.

29. State ex rel. Steiner v. Yelle (1933) 25 P. 2d 91. Quare whether the fact that the judge was himself, of course, a professional may have coloured his view.

Regardless of the accuracy of this sentiment, it can be seen as fostering a climate wherein such a "selfless" group could be rewarded with this self-regulatory power and -- trained as they were to subject personal interests to the public good -- be entrusted to exercise the power properly, as well as being of further service to the public by thus regulating themselves.[30]

(3) Trust Element

Unlike the attitude of caveat emptor and attendant public judgement which prevailed in the business world, there was a theoretical responsibility on the professional to do what was best for his client. This flowed partly from the service tradition discussed above but was largely a function of the specialized knowledge possessed by the professional. Because the lay client was not in a position to assess competence or detect any but the most gross errors, the relationship between the professional and his client of necessity had to be one of trust. As well, in the archetypal professions of law and medicine -- as well as occasionally in others, -- the practitioner had to be entrusted with intimate or confidential details of the client or patient's life in order to carry out his function for him. So again, this element of trust can be seen as a necessary appurtenance to the professional relationship.

---

30. How valid these assumptions are will be examined below.

In a sense then, it is merely an extension of this tradition of the trust relationship for the state to entrust self-regulatory powers to a professional group. As opposed to other occupational groups, professionals tended to be seen as a more fit group to serve as a repository of the collective public trust since a relationship of confidence and trust characterized their dealings with the individual public.

(4) Independence

Most commonly, a professional provides his service as an independent contractor, rather than as an employee of his client. The prevailing lack of understanding of the technical aspects of the services provided also made the professional less subject to the control of those for whom he provided the services. Thus, both in his relationship to the client and in the manner in which he carried out his services, the professional was largely independent.

It would be felt, I think, to be largely an extension of this sort of independence to allow the professionals a high measure of independence in the manner in which they were to be regulated. In a sense, it might have seemed almost an impropriety to subject the profession to total state control; it would certainly not have been in keeping with either their position in society or in the economy.

B. Additional Factors

Earlier some of the general factors that make self-regulation the most advantageous model of control from the point of view of the controlled occupation itself were considered. This was followed, above, by a discussion of the factors that would predispose the state to grant this form of power to those groups which it deemed to fall within some sort of definition of a profession. To continue this analysis of what prompts selection of the self-regulation model when choosing a means of control, some additional factors that may at times be seen as advantages of self-regulation should be mentioned.

(a) By means of the disciplinary board (which in some form will always constitute part of the self-regulatory machinery), redress for an aggrieved member of the public can be gained more simply and cheaply through the board than through, for example, a judicial remedy. If there is a small amount of money involved, the judicial remedy may in fact be illusory. This advantage would of course be shared by any form of administrative control, e.g., state licensing, and is not peculiar to self-regulation.

(b) Self-regulation minimizes, prima facie at least, the more overt forms of political patronage and partisanship that may occur if direct state control is employed. However, with the expert professionals themselves now in control (another possible advantage), they may still make decisions on political grounds without bearing the political responsibility for these decisions which would at least otherwise be true.

(c) With the occupational group itself providing the administrative machinery and so forth, self-regulation may seem to be a cheaper form of control than that capable of being provided by the state out of public funds. Of course, there are ways in which this advantage could be offset: the state could, for example, charge license fees which could then support the necessary administrative costs; in order to have the occupation's views represented, members of the occupation would also most likely provide their services, expert evidence, or advice to the state machinery without compensation.

(d) In some circumstances, it may be harmful to the profession as a whole to depreciate the status it would otherwise enjoy by subjecting the profession to state control. As a consequence, the profession may no longer be able to recruit on as high a level as formerly and this may have the effect of lowering the standard of service and competence available to the public. Conversely, the granting of self-regulation would tend to enhance the status of the profession with a possible consequent elevation of standards and competence.

(e) Lastly, rigid adherents to a free enterprise system may view self-regulation as a less philosophically repugnant form of control. It may not be the complete laissez faire environment that some might wish, but it does represent a lesser degree of governmental interference.

PART III - SELF-REGULATION AND SELF-INTEREST

A. Self-Interest Generally

I will now turn to an examination of some of the assumptions made concerning the professions which relate to the rationale of granting them self-regulation. As we have seen, the underlying basis of the delegation of state power to a self-regulating body is the assumption that this is the best way in which the public interest can be served. The advancement of the profession itself (a legitimate goal for a voluntary association) is not the business of self-regulation. This has been forcefully put by the McRuer Report:

> "The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safe-guard to the public interest. The power is not conferred to give or reinforce a professional or occupational status."[31]

There is always a risk, however, that the power will be exercised in the interests of the profession rather than that of the public. We have seen earlier in the description of the genesis of self-regulation how it was in the interests of the profession itself to initially seek this form of control. The burden of this section will be to demonstrate how in the exercise of the power so gained as well it is generally self-interest that prompts the manner in which the power is utilized.

---

31. P. 1162.

This is not a startling proposition -- professionals are, after all, men as well as doctors, lawyers, etc. and it is in the nature of men to act in their own self-interest -- nor is it necessarily evil in all cases. As will be seen, the pursuit of the profession's own enlightened self-interest will very often prompt decisions that will accrue to the benefit of the public as well. The point is though that the priorities can be demonstrated to have been turned about.

My own view is verified by another recent study that dealt, in part, with self-regulatory bodies. In their report, the Committee on the Healing Arts stated:

> "Our investigations have made it clear to us that the primacy of the licensing or regulating body's duty to the public has not always been understood by the body and its practitioners or, if understood, not always acted upon."32

> "Our study of the professions has led us to the conclusion that, if left to their own devices the profession or occupational group tends to seek legislation, make regulations, and adopt rules and practices which are concerned with their self-protection as a guild or which are in their economic interests."33

Even when measures are adopted that on the face of things appear solely to be for the public benefit, further analysis often shows that there is an underlying self-serving basis for them. For example, the legal profession now has a compensation fund which was

---

32. Report of the Committee on the Healing Arts (cited as Health Report hereafter), vol. 3, p. 44.

33. Ibid., p. 49.

established to reimburse members of the public against damages which they suffered at the hands of erring lawyers. This measure was in fact enacted to forestall similar or more onerous legislation from being forced upon them.[34] In Ontario, the Treasurer of the Law Society frankly admitted when discussing the proposed fund that without such a fund run by themselves, the members would be subjected to some external regulation.[35]

That pursuit of the profession's self-interest is not the paramount purpose of self-regulation has often been lost sight of even on occasion by our courts. It is instructive, for example, to note the emphasis in the following extract:

> "One must not lose sight of the purpose of the legislation. It is twofold. It is to protect members of the legal profession who have been admitted, enrolled and duly qualified as solicitors against wrongful infringement by others of the right to practice their profession. It is also for the protection of the public...."[36]

An appeal Court judge is of course at the pinnacle of his profession and yet even he is subject to this confusion of priorities.

---

34. There had been some talk, for example, of compulsory bonding for lawyers -- a device associated with lower status level occupations: see Giffen, "Social Control and Professional Self-Government", pp. 125-6, where this and similar motivation behind the adoption of legal aid schemes are discussed.

35. See S. Arthurs, "Discipline in the Legal Profession in Ontario," (1970) 7 Osgoode Hall L.J. 235 at 264. The same rationale was voiced by the governing body of solicitors in England when they instituted a compensation fund, which was further characterized as "Basically it is a public relations measure". Ibid., n.61.

36. Laidlaw, J.A. in R. ex rel. Smith v. Mitchell, (1952) 104 C.C.C. 247, a prosecution for a violation of the Solicitor's Act.

If we look to other senior members of the profession, such as those elected to positions of prestige and authority in the governing body or disciplinary committee of the profession, it is not unnatural for them to feel that their primary responsibility is to their constituents and to the profession which has given them so much.

Although it is conceded that there are undoubted advantages[37] in having members of the profession with their acknowledged expertise adjudicate disciplinary matters, there are problems that may stem from their possibly divided allegiances.

A similar system of having those with expertise adjudicate the proceedings was once the case for jury trials of criminal prosecutions:

> "Juries proceeded upon common repute, or upon their personal knowledge, men who knew the circumstances of the crime being often put on as additional ... jurors."[38]

---

37. See the views expressed, for example, by Schroeder, J.A.:

> "On a charge imputing misconduct to a medical practitioner in the pursuit of his profession the members of the (Medical) Council are the best possible judges of the issues involved."

and Laskin, J.A. (as he then was):

> "I do not doubt the advisability of having allegations of professional misconduct initially passed upon by the professional body statutorily authorized to enforce ethical standards upon licensed members."

in the case of Re Glassman (1966) 2 O.R. 81 at 100 and 101, respectively.

38. Kenny's Outlines of Criminal Law, (18th ed., 1962), p.593.

However, almost 500 years ago the inherent injustice of this system was recognized and it was altered so that those with personal knowledge now testified before the jury, which was selected so as to be as impartial as possible.

The problem is that there will always be the feeling that the professional body is looking after its own, that the members of the profession "stick together".[39] The executive of the professional association are responsible for the daily administration of the profession and are therefore concerned with the public image, the efficiency, the morale, and the legal liability of the profession. As a result there is an inevitable conflict of interest: they must attempt to reconcile the interest of the public with the obligation they feel to protect the interests of the profession. No matter how fairly the disciplinary committee may perform in a particular case, they will often not be perceived as impartial.

It should be added as well that although the members of the profession will have the expertise in that profession, this in no way ensures that they will have the necessary expertise to regulate that profession efficiently. This will be particularly so in disciplinary matters where the problem will be compounded by the

---

39. This feeling, unfortunately, is sometimes supported by the facts: see, for example, the case of the dentist disciplined for having criticized other members of the profession, Health Report, pp.30-31. Note also the well-known difficulty of getting doctors to testify against their colleagues in malpractice actions.

potential conflict of interest outlined above.[40] In many ways, a more efficient job may be done by someone whose expertise lies in the field of regulation per se rather than in that of the profession regulated. It may be easier for him to call on the professional expertise when it is required, as a judge does when hearing expert witnesses, than to make a good and impartial administrator out of the professional.

B. Restrictive Practices

As it will be recalled, the foundation of the effective power of self-regulation is the fact that the self-regulatory body is generally given a monopoly power over the regulated occupation. There are a few exceptions[41] to this but these are rare. They need not concern us here.

The ultimate aim of this study is the assessment of the likely effect of the self-regulatory model in a particular industry; since the effectiveness of the control will vary directly as the strength of the monopolistic power, we need not concern ourselves with the granting of lesser powers. The proposition is a simple one: either self-regulation will be ineffective because of a lack of effective sanctions or it will create a monopoly power.

---

40. See for example the McRuer Report at p. 1185:

> "Notwithstanding that the Ontario College of Physicians and Surgeons heard seven separate charges of unethical conduct against members of the College in the six months (during which this case occurred) ... grave procedural errors were found by the Court of Appeal to have been made in Re Glassman. The errors were not mere technical or formal lapses. In Mehr v. Law Society of Upper Canada, the Supreme Court of Canada found that the demands of fundamental fairness and natural justice were not met by the disciplinary committee of the Law Society."

41. See, for example, the two principal exceptions in Ontario noted in Appendix I.

It is this granting of a legislatively created and maintained monopoly to a private occupational group that has attracted probably more criticism than any other aspect of self-regulation. Once having been invested with this monopolistic power, there is a tendency[42] for the self-regulatory professions to endeavour to restrict competition both from outside and within the profession by some or all of the following restrictive practices:

1. limiting substitutes available;[43]
2. setting fees;[44]

---

42. See, e.g., Lees, op. cit., p.8, "...neither the economist nor anyone else has reason a priori to suppose that professional men are made of some different clay than the rest of mankind concerned with making a living. Though the professions may plead that fees are a secondary consideration, their incomes ... do not suggest that monetary reward is of little importance."

43. See, e.g., the various sections listed in Appendix I that limit other people from doing what could be called, e.g., solicitor's work, engineer's work, and so forth as the case may be. As well, there is often a constant pressure to widen the definition of what is the occupational group's exclusive practice. For example, see the account of lawyers' efforts to do this in Giffen, op. cit., pp. 123-4, 127-8. And see Health Report, p.34, where a suggested definition of exclusive medical practice urged by the Ontario College of Physicians and Surgeons was commented on as follows:

> "The precise definition which we were asked to recommend will be cited below, but for the moment it will suffice to say that it is so broad that it would effectively prevent anyone but a person licensed by the College to engage in a healing art."

44. See, e.g., the Law Society of Upper Canada's Ruling 31 (4):

> "That holding himself out or allowing himself to be held out as prepared to do professional business at fees less than the appropriate scale prevailing in the area in which he practises, is unprofessional conduct on the part of a solicitor (or barrister)."

3. prohibiting advertising, etc. (traditional forms of competition);[45]

4. limiting numbers in the profession;[46]

5. curtailing competition between members of the profession.[47]

This elimination of competition raises an important question of the public interest. Like all monopolies, it may serve to maintain prices at artifically high levels. As well, there is a tendency for it to lead to inefficiency, since competition encourages innovation.[48]

---

45. See, e.g., the Canadian Bar Association's Canon of Legal Ethics, 5(3), adopted by Ruling 1 of the Law Society of Upper Canada, and see also the latter's Rulings 3 and 16.

46. This was done for example in England in the late 1950's with regard to the medical profession, see Lees, op. cit., p.8.

47. In the legal profession in Ontario, for example, though there is no direct prohibition aimed explicitly at intra-professional competition, the cumulative effect of the directives referred to in footnotes 44 and 45 would be such as to remove the means of competition (e.g., cannot hold out lower fees, cannot advertise, cannot solicit business, cannot publicize self or specialization (Rulings 30 and 24)).

48. See, for example, the account of Abel-Smith and Stevens, In Search of Justice, pp. 45-6, of the English solicitors' successful opposition for decades to the introduction of a system for registering land titles, which would have greatly reduced conveyancing charges. And see the A.M.A.'s opposition to the introduction of group practise and its prohibition against doctors engaging in such practice until it was forced to give in as a result of a successful government anti-trust suit: A.M.A. v. U.S., (1943) 63 S. Ct. 326.

The rationale for the granting of this monopoly power is that it reduces uncertainty for the public. The potential client need not worry whether the professional man he wishes to engage is properly qualified or not, since the self-regulatory body has seen to it that only qualified personnel will be allowed to practise the profession. As well, the point is made that the various restrictive practises lead to the maintenance of high standards. Unrestricted competition it is claimed can lead to lower quality and so create a greater temptation to resort to unethical practises. As well, it is clearly tougher to survive in a competitive market and again this may result in the weaker sisters of the profession resorting to unethical practises in order to survive.[49]

---

49. In this regard note a 20-year study by S. Arthurs, op.cit., p. 245, which indicates that 84% of disbarred lawyers were in the lower level echelons of the profession.

PART IV - SELF-REGULATION AND THE COMPUTER INDUSTRY

The intention in the foregoing has been to demonstrate that the weaknesses and potential abuses of self-regulation stem from the theoretical flaws in the model itself. Various examples have been used to illustrate some of these weaknesses, but this is merely by way of emphasizing the analysis. Much more can be written on the general thoery of self-regulation, and there is no shortage of literature questioning the wisdom of having extended this power to some of the existing "professions" that possess it -- or in fact to any profession. Examples could easily be multiplied of the abuses that have taken place of this power by the two senior professions alone.

However, it is not so much surprising that abuses have taken place -- an understanding of the inherent weaknesses in the technique would lead one to expect that -- but rather that self-regulation has, in fact, generally worked as well as it has. The explanation for this can be found in certain checks and balances that are built into the system as a function of the nature of the present self-regulatory professions.

In this section, which will deal with the possible application of self-regulation to the computer industry, several of the checks and balances that exist where regulation works best will

be dealt with. Some tentative suggestions will be put forward as to whether the computer industry differs in certain basic respects from the existing self-regulatory professions. These can then be measured against the more detailed profile of the computer industry being undertaken by other of the Task Force studies.

The characteristics of the computer industry and of the particular nature of the problem that is to be regulated will both be of concern. Several differences in both these dimensions will be suggested and the conclusion put forward that, because of them, self-regulation is a less advisable means of control.

These differences will be examined in relation to a self-regulating association of computer operators as well as a second self-regulatory model consisting of corporate individuals, i.e., data bank operators, computer service bureaus, etc. Some of the differing considerations that will apply to this second model will be pointed out.

A. Computer Operators as a Self-Regulating Profession

Using the term "computer operators" in its broadest possible sense to cover all technical personnel involved directly in computer operations, this section will briefly survey how such a hypothetical self-regulating profession would compare to the archetypal professions.

Professionalism

The present lack of any precise and rigid program of study necessary for entrance into the occupation is not in itself fatal.[50] Of greater importance would seem to be the lack of any strongly developed self-image of professionalism. This would present a minor problem in that there would be no pre-existing reasonably wide-spread formal association to transform by legislation from a voluntary to a mandatory regulatory body. Aside from any other difficulty then, it may simply be too early a point in time for the industry to be granted self-regulation.

Let us suppose, however, that this process of development could be hastened by legislation that would in effect "thrust professionalism upon them". Such legislation would end the present fragmented nature of the "profession" and at a stroke bring to successful fruition the industry's current efforts to create various professional type associations. A more serious difficulty that could not be so easily legislatively-cured is that the usual strong identification of the individual as being part of a professional brotherhood would not be created by the mere formal legal requirement of association. In the existing professions, this functions to create a loyalty to the image of the profession. As a consequence, there is a tendency for the profession both as individuals and as a group to deprecate certain forms of behaviour as simply not being in keeping with the

---

50. Note, for example, as mentioned earlier the apprenticeship system that long prevailed for lawyers.

professional image they see for themselves.[51] With any premature artificially created profession, loyalties are likely to be more in the direction of the corporation that employs the personnel, rather than to any larger ideals.[52]

Earlier, the characteristics of the professions that have been influential in the granting them of self-regulatory powers were examined. The operation of these factors with regard to computer personnel will now be looked at.

Specialized Knowledge

This factor is probably the single most crucial one in the granting of self-regulation to an occupational group. The services given by the professional are relatively crucial (consider doctors and lawyers for example) to their clients, but it is difficult for lay clients to assess the competency of practitioners. There is also often a certain element of urgency involved in that the

---

51. See, e.g., Law Society Ruling 29 forbidding the use of "and Company" in a firm name "on the ground that such use has a commercial connotation not in keeping with the nature of the profession."

52. It is the existence of and tradition of loyalty to such ideals coupled with the sanction of the disfavour of one's fellow professionals should the traditions be broken that serves to create an influential atmosphere of ethical behaviour amongst the professions. For example, the Canadian Bar Association in frowning on indirect advertising by inspiring self-laudatory newspaper comment condemns such practices which "defy the traditions and lower the tone of the laywer's high calling" (Canon 5(3)) and further admonishes every lawyer to "bear in mind that he can only maintain the high traditions of his profession by being in fact as well as in name a gentleman" (Canon 5(7)). As long as such notions are generally accepted in the profession as flowing from the very idea of the profession, they will be of some effect on behaviour.

professional is resorted to infrequently and on the basis of a more or less immediate need. This provides certain obstacles to an informed selection as well.

A situation exists then where it is more than normally important for the public to be protected from incompetent practitioners and only the professional body itself possesses the requisite knowledge to insure that some minimal level of competence is maintained.

While this primary obligation of the regulatory body may not always be lived up to,[53] this basic rationale for self-regulation does not even exist with reference to the computer industry. Computer personnel work for large knowledgeable technical firms which are quite capable of judging for themselves. In this situation, where there is no overriding public interest in insuring levels of competence, the delegation of state power to a body that in this regard would serve merely as an adjunct to the personnel office of the hiring companies can hardly be justified.

Keeping in mind the particular potential abuses that the Task Force is concerned with, competency can be seen as being largely irrelevant to them. If anything, competency could be said to exacerbate the problem.

---

53. Health Report, p. 32: "It is anomalous that, although the target of licensing was said to be incompetence, one of the weakest threads in the fabric of those who prove competent enough to get admitted to practice has been the inability to eliminate adequately incompetency appearing after the point of admission to the profession."

> "There is very little that can be done from the technical point of view that computer operational people if they choose, cannot undo. ... (I)f people understand the system and decide to misuse it, very little can be done to stop them."54

Though the problem is not one of competence then, it may perhaps be seen as one of ethical standards. This however does not provide the same basis for self-regulation as the special-knowledge-to-insure-competence argument. The technical knowledge that the profession would have does not give them any special expertise in evaluating ethical quotients. At any rate, there is unfortunately no reliable method of determining such matters.

If "good moral character" is made a requirement for entrance into the profession, it cannot be said that the profession itself has any more expertise in determining this matter than any one else would have. Thus the very basis for granting self-regulation would not be present. Such judgements would be subjective, if not highly speculative, ones and tend to result in more inequities than anything else. For example, in the study which examined all lawyers disbarred over a 20-year period, it was found that all of them had favourable character references in their files.[55]

---

54. Kutt, Mers, "Role of Professional Societies in Establishing Ethical Guidelines", p. 2.

55. S. Arthurs, op. cit., p. 250.

Independence

This was seen earlier to be one of the characteristics of the self-regulating profession that provided much of its rationale. This factor would again not be present for computer personnel, who normally would be in a dependent position working as a salaried employee in a company.

As well as negating this particular basis for the delegation of power, this lack of independence also operates in another sphere that would tend to render any controls aimed at the individual less effective. Since the individual does not have sole control over his own operating procedures, pressure to operate in, say, an unethical manner could be more easily brought to bear on him by his employer. Most professionals if put in a similar situation by a client would be faced by the loss of only that client in refusing to carry out his request: it is not the loss of their day-to-day livelihood that is involved.

A related factor is the fragmented nature of the duties involved in the occupation. There is not the same large measure of individual responsibility for over-all operations that is generally borne by doctors, lawyers and other professionals. This factor seems so relevant to the nature of a profession that engineers, for example, who are overwhelmingly salaried employees[56] are required[57] to affix their own individual seal to completed projects for which

---

56. As many as 99% in Ontario, it has been estimated. See Hall, op. cit., p. 107.

57. See The Professional Engineers Act, R.S.O. 1970, c. 366, s. 19.

they will then bear individual responsibility. With computer and data bank operations, so many people will have an involvement in so many aspects of the project that it will be difficult to assign responsibility to any one individual technician. This may make the temptation to yield to the type of pressure outlined previously that much greater. As well, it makes self-regulation seem less appropriate for such a group: without control on even the individual level of operations, any insistence for control on the occupational level seems ostentatious.

Other Factors

The elements of trust and tradition of service, which were earlier argued as being two important qualities attributed to the professions that seemed to lead to self-regulation, can also be seen not to be present for computer personnel. As well as making self-regulation seem therefore less appropriate, this may also have an effect on the way the self-regulatory power would in fact be exercised.

B. Corporations as a Self-Regulating Association

If the self-regulatory association is viewed as being made up of corporate individuals rather than the technical personnel considered above, slightly different considerations will apply.

Initially, such a self-regulatory model might seem attractive in that the major decisions affecting the confidentiality of information processed or stored will be made on the corporate level. Consequently, vesting the regulatory power at this level would seem to lend greater efficacy to the rules adopted for the control and use of this information. Certainly the problems discussed above under the heading of Independence could largely not be raised as objections to self-regulation on this level.

However, several other difficulties present themselves. To begin with, the fundamental basis for the granting of the self-regulatory power, the protection of the public against incompetence, would still not be present. The computer firms which would make up such an association are not employed by inexperienced individual members of the public who need a body with some expertise to decide the question for them, but rather other companies which have the time, skill and facilities to determine the matter for themselves.

Additionally, aside from the practical problem of forming an association of such a diverse range of firms (the only common factor amongst them will often be the fact that they use some form of electronic data processing), the other objections raised earlier concerning the lack of traditions of trust, service, and professionalism would seem to be equally valid in relation to the corporate self-regulatory model. We are here dealing with commercial entities for which the profit motive -- quite properly -- constitutes the raison d'être and primary operational goal.

This last point requires, I think, a further reiteration of the problems of the monopoly power that the grant of self-regulation usually carries. For obvious reasons, a monopoly controlled by an association of corporations is particularly dangerous and open to abuse.

As mentioned earlier, one of the gravest problems with self-regulation generally is the restrictive practices it can and usually does lead to. There has been much criticism of the professions' involvement in such practices[58] and even those who ultimately uphold the monopoly powers of the professions question[59] the "preservation of standards" rationale on which the monopoly power is usually justified.

This rationale, whether it is valid or invalid for the professions generally, has of course no place in the computer industry since our concern is not one of protecting the public with regard to the competence and standards of the profession. There is therefore even less justification than might usually be the case for the granting of monopoly powers.

---

58. See, e.g., Zander's book and Lees' paper cited in Bibliography.

59. See, e.g., Monopolies Commission Report, paras. 279-302 particularly, and Economic Council of Canada, Interim Report, 1969, pp. 148-153.

C. Internal Checks and Balances

It was argued earlier that even though self-regulation was designed solely to be a more effective means of protecting the public interest, it tended in fact to be largely used in pursuing the professions' own self-interest. In maintaining this position, I do not intend to depict the self-regulating profession as nakedly striving for every possible self-advantage with a concomitant "public be damned" attitude. While this sometimes may in fact be true, I do not mean to imply that it is generally the case.

The point is rather that even with the best of intentions, the professional (or anyone) in a conflict-of-interest situation tends to perceive the situation and the various factors involved in it from his own point of view. Even the "objective" facts involved take on a different colouring dependent on the observer's values (e.g., contrast an ardent anti-abortionist and a pro-abortionist viewing an abortion: one "sees" a murder, the other a surgical procedure.

At any rate, both this biased viewpoint and occasional attempts at gaining advantages combine to produce a situation in which the profession's self-interest seems to be of paramount importance. Several factors exist, however, to keep this tendency in check. If the power delegated to the professional association is flagrantly abused, there is always the possibility that the legislature, either on its own initiative or in response to public pressure,

will act to curtail or withdraw the power. This control on the use made of the power will be present for any self-regulating body, be it "professional" or otherwise.

Such control however is a relatively diffuse one and would operate most usually in only the relatively extreme situations. A far more important factor that is present in the professions and has resulted in a generally reasonable use being made of the self-regulatory power is the coincidence of the profession's self-interest and the public interest.

Since these professional groups depend directly on the public for their livelihood, the public wields sanctions as clients, or potential clients. Good public relations for these professions does not just produce a warm glow of approval; it is necessary to some extent to keep business going. Thus the profession's own economic interest and the general public interest in seeing that standards of ethics and competence are observed exact a force in the same direction. These forces therefore serve to reinforce each other and thus make the task of the self-regulatory body easier and relatively more effective.

It is the coincidence of the profession's self-interest and the public interest that make self-regulation reasonably effective and this is the crucial factor that I believe either self-regulatory model for the computer industry would lack.

Looking at the interplay of these two forces from a slightly different aspect may make the point clearer. Essentially, in proposing the sort of controls that may be required to protect confidentiality, we may be asking the computer corporations to do things that are costly and time consuming for them and for which they get no benefit except the vague comfort that they have helped the public interest, whatever that may be.[60]

Compare this to the professions. They are not asked to operate in a more expensive way, just to eschew a perhaps profitable though unethical way of behaving. It does not require a psychologist to predict that it is easier to get someone to behave in that fashion, as opposed to controlling behaviour in the computer example where the two forces are out of phase.

It is interesting and perhaps instructive to apply this two-force theory to one of the recommendations of the McRuer Commission that would seem to militate against self-regulation for the computer industry and see how far it provides a rationale for the recommendation. In discussing the possibility of forming an independent tribunal to adjudicate disciplinary matters for all the professions, the Commission concedes some of the advantages of such a system but ultimately recommends against it.[61] It was felt that there was an advantage for the disciplinary committee to have "that knowledge of the practice and standards of the particular profession or occupation which is the main justification for the present system.[62]

---

60. By way of comparison, consider for example the likelihood of Canadian content regulations being adopted by the TV industry had they been regulated by a self-governing association of TV stations rather than the CRTC.

61. McRuer Report, pp. 1185-6.

62. Ibid., p. 1186.

Thus, the Commission concludes that with the addition of further safeguards,[63] "the public interest will be better served by the present system as applied to truly professional bodies."[64] On the other hand, these "truly professional bodies" are contrasted with the position in which "it is not so clear that the public interest demands that the monopolistic powers of self-government ... be conferred on bodies whose members are trained technicians engaged largely in quasi-commercial activities."[65]

The reason for this distinction is not stated, but I suggest that the two-force theory may provide at least part of the rationale if the following analysis is adopted. As argued previously, the "true" (traditional) professions are very dependent on maintaining a favourable public image since it is from members of the public that they draw their clientele and since the high prestige image is necessary in order to justify the high fees charged. McRuer adverts to the ease with which "a disgruntled member of the public may do serious damage to the reputation of the profession as a whole."[66] Consequently, the tendency of the disciplinary body to "look after its own" will be mitigated. In the non-"professional" situation the dynamics involved are different and the occupation's self-interest would pull in an opposing direction to the public interest.

---

63. See, e.g., Recommendations 2, 6, 7, etc., ibid., pp. 1209 ff.

64. Ibid., p. 1186.

65. Ibid.

66. Ibid.

D. Summary

Beginning with the assumption (based on the nature of the power) that self-regulation should be granted only when it is the best means of protecting the public interest, an analysis was undertaken of the factors that led to its being granted to the traditional professions. Not only do these factors not seem to be present for either of the two posited methods of self-regulation in the computer industry, but equally important the type of internal dynamics that tend to make self-regulation effective despite the pursuit of self-interest seem to be lacking as well. Accordingly, I have reached the conclusion that self-regulation would not constitute the best means of control in relation to the infringement of privacy by the computer industry.

This may be the most opportune point at which to advert to the possibility of a third self-regulatory model consisting of firms which maintain data banks consisting of their own information files.[67] Briefly, it seems to me that such a self-regulatory model would suffer from essentially the same weaknesses that are posited for the corporate model in the study.

---

67. Professor C.C. Gotlieb has suggested the example of Bell Telephone. I do not really see the position of such private data-bank operators as differeing from the data-bank-for-hire operations in terms of the objections raised against self-regulation for the latter (the corporate model).

The main point is that while in some instances it may be in the firm's own interest to safe-guard the confidentiality of the information in its data bank, the assumption that a potential abuse of this information (and hence a need for control) exists presupposes that there will be occasions when the firm's self-interests point in a different direction. As well, there is the basic weakness that the public interest in ensuring confidentiality may require more extensive safeguards than the firm feels necessary to achieve the degree of protection it requires for its own purposes; secondly, the types of information (and therefore the dimensions along which the safeguards will operate) that individuals would want kept confidential and that the firms for their own purposes would want kept confidential may very well differ.

PART V - CONCLUSION

In recommending against self-regulation as the best means of control of the potential problem which the Task Force is examining, I do not intend to deprecate the possible value that voluntary professional associations might have for the industry. Certainly such associations have a helpful role to play in improving standards generally in the industry and in some ways making, say, state regulation that much easier a task.

However, I have proceeded on the assumption that the other Task Force studies will conclude that the abuse of confidential information is in fact a serious potential problem. If it is not, then it does not matter much which form of control, if any, is chosen; but if it is, then quite clearly an effective method of control has to be adopted and I have attempted to show why neither voluntary regulation nor self-regulation would fit this need.

What makes self-regulation so inappropriate as a means of control for our purposes is that the issues involved here are entirely different. The issue is not one of professionalism or competence at all, but rather of controlling a technical product that has certain potential dangers. It would be self-evident I think that a self-regulating association of automobile manufacturers would not be the best means of bringing about greater automobile safety.

In general, far from extending the self-governing power to new "professions", the current trend seems to be a greater questioning of the wisdom of many (or in some cases, any) of the present self-regulating professions enjoying this privilege and as well a movement toward curtailing the degree of independence these professions hitherto enjoyed in exercising this power. The prevailing atmosphere and my own conclusions can be summed up in one of the recommendations made by McRuer:

> "The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it and that the public interest could not be adequately self-guarded by other means."[68]

It is my contention that self-regulation for the computer industry does not fulfil these criteria.

---

68. McRuer Report, p. 1209, Recommendation 3.

APPENDIX I

Statutes conferring self-regulatory powers in Ontario (the indicated section in each case prohibits unlicensed, unregistered, etc., - as the case may be - individuals from engaging in the profession):

The Architects Act, R.S.O. 1970, c.27, s.16.

The Chiropody Act, R.S.O. 1970, c.70, s.5.

The Dentistry Act, R.S.O. 1970, c.108, s.21.

The Dental Technicians Act, R.S.O. 1970, c.107, s.9.

The Drugless Practitioners Act, R.S.O. 1970, c.137, s.8.

The Embalmers and Funeral Directors Act, R.S.O. 1970, c.144, s.10.

The Law Society Act, R.S.O. 1970, c.238, s.50.

The Medical Act, R.S.O. 1970, c.268, s.56.

* The Nurses Act, R.S.O. 1970, c.301, s.8.

The Ophthalmic Dispensers Act, R.S.O. 1970, c.334, s.12.

The Optometry Act, R.S.O. 1970, c.335, s.9.

The Pharmacy Act, R.S.O. 1970, c.348, s.43.

The Professional Engineers Act, R.S.O. 1970, c.366, s.27.

The Psychologists Registration Act, R.S.O. 1970, c.372, s.11.

The Public Accountancy Act, R.S.O. 1970, c.373, s.24.

** The Radiological Technicians Act, R.S.O. 1970, c.399, s.9.

The Surveyors Act, R.S.O. 1970, c.452, s.29.

The Veterinarians Act, R.S.O. 1970, c.480, s.11.

---

* Prohibits only a false holding out of being a Registered Nurse, not nursing as such.

** Prohibits only the unauthorized use of the title "Registered Radiological Technician".

SELECTED BIBLIOGRAPHY

Books

Abel-Smith, Brian, and Stevens, Robert, In Search of Justice, London, 1968.

Blishen, Bernard R., Doctors and Doctrines, Toronto, 1969.

Carr-Saunders, A.M., and Wilson, P.A., The Professions, London, 1933 (2nd impression, 1964).

Davis, K.C., Discretionary Justice, Baton Rouge, 1969.

Friedman, Milton, Capitalism and Freedom, Chicago, 1962 (Phoenix ed., 1963).

Gellhorn, Walter, Individual Freedom and Governmental Restraints, New York, 1956 (Greenwood ed., 1968).

Gilb, C.L., Hidden Hierarchies, New York, 1966.

Gross, Martin L., The Doctors, New York, 1966.

Kett, Joseph L., The Formation of the American Medical Profession, New Haven, 1968.

Rayock, Elton, Professional Power and American Medicine, Cleveland, 1967.

Reader, W.J., Professional Men, London, 1966.

Riddell, W.R., The Legal Profession in Upper Canada in its Early Periods, Toronto, 1916.

_____, The Bar and the Courts of Upper Canada, Toronto, 1928.

Shryock, R.H., Medical Licensing in America, 1650-1965, Baltimore, 1967.

Westin, A.F., Privacy and Freedom, New York, 1968.

Zander, Michael, Lawyers and the Public Interest, London, 1968.

Reports

Economic Council of Canada, Interim Report on Competition Policy, 1969.

Report of the Special Senate Committee on Mass Media, 1970 (Davey Report), vol. 1, c. III, s.4, "Press Council".

Royal Commission Inquiry into Civil Rights (Ont., 1968) (McRuer Report), vol. 3, ss.2, 4.

Report of the Committee on the Healing Arts (Ont., 1970), vol. 3 c.25.

Report of Committee Appointed to Assist Legislative Committee on Professional Societies (Man., 1970?), (O'Sullivan Report).

Monopolies Commission, Report on Restrictive Practices in Professional Services (U.K., 1970), Cmnd. 4463.

Articles and Papers

Arthurs, H.W., "Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession", (1971) 49 Can. B. Rev. 1.

Arthurs, S., "Discipline in the Legal Profession in Ontario", (197) 7 Osgoode Hall L.J. 235.

Bard, M. and Barnford, B.A. "The Bar: Professional Association or Medieval Guild?" (1970) 19 Catholic U.L. Rev. 393.

Friedman, L.M., "Freedom of Contract and Occupational Licensing", (1965) 53 Cal. L. Rev. 487.

Grenier, Jr., E.J., "Computers and Privacy: A Proposal for Self-Regulation", (1970) Duke L.J. 495.

Giffen, P.J., "Social Control and Professional Self-Government" in Urbanism and the Changing Canadian Society, (Clark, S.D., ed.), Toronto, 1961.

Hall, O., "The Place of the Professions in the Urban Community", ibid.

Keck, W.C., "Occupational Licensing", (1968) 44 Notre Dame Lawyer 104.

Kerrigan, W.M. & Abrahams, J.R., "The Information Processing Profession in Canada - A Plan for Action", May, 1971, CIPS Magazine, p.9.

Kessel, R.A., "Price Discrimination in Medicine", (1958) 1 J. of Law & Ec. 20.

Kutt, Mers, "Role of Professional Societies in Establishing Ethical Guidelines", paper delivered at Conference on Computers: Privacy and Freedom of Information, Queen's University, May 21-24, 1970.

Lees, D.S., "Economic Consequences of the Profession", Inst. of Ec. Affairs monograph, London, 1966.

Mills, D.L. & Rootman, I., "Law and Professional Behaviour: The Case of the Canadian Chiropractor", (1968) 18 U. of Toronto L.J. 170.

Note, "The State Courts and Delegation of Public Authority to Private Groups", (1954) 67 Harv. L. Rev. 1398.

Russell, J.M.,"Professional and Technical Means of Reaching Objectives", paper delivered at Queen's Conference (see Kutt reference).

Sharp, J.M., "Computers - Some Proposals for Legislation", ibid.

STUDIES COMMISSIONED BY THE TASK FORCE

The Nature of Privacy - D.N. Weisstub and C.C. Gotlieb.

Personal Records: Procedures, Practices, and Problems - J.M. Carroll and J. Baudot, Carol Kirsh, J.I. Williams.

Electronic Banking Systems and Their Effects on Privacy - H.S. Gellman.

Technological Review of Computer/Communications.[1]

Systems Capacity for Data Security - C.C. Gotlieb and J.N.P. Hume.

Statistical Data Banks and Their Effects on Privacy - H.S. Gellman.

Legal Protection of Privacy - J.S. Williams.

Vie Privée et Ordinateur Dans le Droit de la Province du Québec - J. Boucher.

Regulation of Federal Data Banks - K. Katz.

Regulatory Models - J.M. Sharp.

Ordinateur et Vie Privée: Techniques et Contrôle - C. Fabien.

The Theory and Practice of Self-Regulation - S.J. Usprich.

Privacy, Computer Data Banks, Communications and the Constitution - F.J.E. Jordan.

International Factors - C. Dalfen.

[1] A joint Study by the Privacy and Computers Task Force and the Canadian Computer/Communications Task Force, to be published by the latter.