QUEEN
HC
120
.I55
S3
1995
c.2

ILLEGAL AND OFFENSIVE CONTENT

ON

THE INFORMATION HIGHWAY

A Background Paper

Gareth Sansom
Long Range Planning & Analysis (DPP)
Spectrum, Information Technologies and Telecommunications Sector (SITT)
Industry Canada

June 19, 1995

HC120
.I55
S3e
1995
JOUR

QUEEN
HC
120
.I55
S3e
1995
c.2

Industry Canada
Library - Jrl Tower S

AUG 22 1995
AOU

Industrie Canada
Bibliothèque - édifice Jrl S

HC120
.I55
S3e
1995
JOUR

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

An earlier draft of this paper was distributed to experts within the federal government, many of whom provided extensive comments which were incorporated into the present version:

Justice Canada:

Criminal Law Policy Sector:
Elissa Lieff
Paul Saint-Denis

Human Rights Law Section:
Annemieke Holthuis
Michael Peirce
Isabelle Plante

Research & Statistics Sector:
George Kiefl

Heritage Canada:

Nathalie Bradbury (*Broadcasting Policy*)
Normand Duern (*Human Rights*)
Elizabeth Ide (*Legal Counsel*)
Marie-Josee Levesque (*Arts Policy*)
Mark O'Neill (*Race Relations*)
Dhiru Patel (*Corporate Policy & Research*)

Industry Canada:

Heather Black (*Legal Counsel*)
Jacques Drouin (*Telecommunications Policy*)
Peter Ferguson (*Consumer Policy*)
Luc Fournier (*Communication Development Directorate*)
Bill Graham (*International Cooperation and Trade Directorate*)
Andrew Siman (*Communication Development Directorate*)

I would not have had the benefit of many books, articles and legal documents without the efforts of Industry Canada's research librarians at Journal Tower South, among whom Estelle Lacroix merits special recognition.

My colleagues in the Technology Impact Assessment directorate have shared their time, advice and knowledge. Winnie Pietrykowski deserves my thanks for her invaluable editorial contribution. The division's Director, Helen McDonald, guided this project from the beginning -- it could not have been completed without her insight, conviction and counsel.

The penultimate draft was read by an additional two dozen individuals from across the country -- active on-line luminaries, university professors, lawyers, law enforcement officers and concerned citizens. I am grateful for their time and for the wisdom they offered. Whatever errors remain are mine.

INTRODUCTION

WHAT IS OFFENSIVE COMMUNICATION?

The boundaries of offensive communication are a contested terrain. When we negotiate the parameters of offensive communication we are not only threading our way through a maze of competing interests — we are weaving the very pattern of our social fabric. If we are obliged periodically to weigh our communication practices against the lofty standards of freedom of speech and responsibility it is because these practices are not merely the unleashing of words or pictures, but the planting of markers which define the limits of what is private and what is public.

The boundary between private and public is one threshold where acts of communication can become not only offensive but illegal. As David Price argues "conduct becomes prohibited when the threshold is crossed and private choice encroaches upon public domain" (Price 1979: 301). For example, inherent in our legal construction of defamation is the notion of publication. A privately held belief or opinion can become hate propaganda when it is publicly expressed. In the same manner, a person can legitimately look at a Playboy centrefold in the privacy of their home but to post the same pin-up on the wall at the office could count as sexual harassment.

Artists and writers in our society often grapple with the fact their works can be viewed as offensive and subjected to legal sanctions. D. H. Lawrence's book *Lady Chatterley's Lover* was subjected to extensive trials in Canada and abroad thirty years after its initial publication; more recent examples include obscenity charges against British Columbian punk band Dayglo Abortions, and the trial of Eli Langer whose paintings are said to contravene the child pornography statute. Obscenity charges, of course, are not simply levelled at art and high-brow literature: men's magazines, X-rated movies and gay sex manuals have also been targets.

COMMUNICATION IN A DEMOCRATIC SOCIETY

One of the most delicate balancing acts in a democratic society is to safeguard freedom of expression while minimizing the very real risks posed by communication which harms or threatens to harm. Even if the condition of harm serves to tip the scales from communication which is permissible to that which is illicit, there remains a turbulent domain of contested content. What one group or individual might regard as offensive communication might be considered by other groups or individuals to be an article of faith, a philosophical conviction, a political opinion, or even an innocuous form of entertainment. When controversies erupt, there are two fundamental judicial structures which determine the outcome: the *Canadian Charter of Rights and Freedoms* and the *Criminal Code*.

Section one of the *Canadian Charter of Rights & Freedoms* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 2(b) guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

The freedoms specified in Section 2(b) of the *Charter* are not unlimited: certain acts of communication are regarded as illegal in Canada. This is because Section 1 guarantees rights "subject only to such reasonable limits prescribed by law as can be **demonstrably justified** in a free and democratic society" (emphasis added). To the extent that courts hold Criminal Code provisions to be reasonable limits, the government may restrict freedom of expression in certain well-defined areas. In particular, the *Criminal Code* details under what circumstances communicative practices or their products can be subject to

criminal prosecution including: obscenity (Section 163), child pornography (Section 163.1), hate propaganda (Sections 318-320) and defamatory libel (s.297-317).

PURPOSE OF DOCUMENT

In the twentieth century, the debate over offensive communications has been conducted with respect to paintings, books, sound recordings and movies. With increasing urgency, it is being framed in terms of the role played by computers, networks, and electronic media. The purpose of this document is to assess to what extent the new communications technologies are altering the parameters of what we define as offensive communications, and how well our existing legal and societal responses to offensive content work in a digital environment. The intent is to take stock of what we know, identify areas for further research, and to provide a useful starting point for debate on what Canadian public policy should be with respect to offensive content on the information highway.

This paper focuses on offensive communication that enters the realm of illegality, in particular, the following four areas:

(1) obscenity and child pornography;

(2) sexual harassment (including obscene e-mail, "net-stalking", and display of pornographic material in a public place);

(3) hate propaganda; and

(4) defamation and libel.

COMPUTER-BASED MEDIA

One of the main reasons for revisiting the question of illegal communications is that a variety of new media are becoming embroiled in controversy. It is thus necessary to understand the nature of these new technologies and the communication practices that have emerged with them.

Offensive material in the form of texts, programs, images, or sound files can be: (1) stored on floppy disks, hard disks, or CD-ROM disks (an acronym for *Compact Disk: Read Only Memory*) for use in individual computers, and/or (2) communicated through such computer networks as the Internet, USENET and computer bulletin board systems (BBS). The rest of this section explains how these differ in ownership, administration and control.

COMPUTER BULLETIN BOARD SYSTEMS (BBS)

Anyone with a computer and a modem connected to the public telephone system can access a computer bulletin board system (BBS) in Canada or anywhere in the world. But perhaps more significantly, *using widely available software anyone with a computer and a modem can establish their own BBS.* BBS software is available commercially at a moderate price. More importantly, on many of the thousands of computer bulletin boards in North America, BBS software can be freely and legally obtained. Some BBS software is "freeware" meaning that one can use it at no charge. Other BBS software is "shareware" meaning that one can test the software for a trial period, following which one should purchase a user's license from the owner of the copyright.

There are a wide range of computer bulletin boards in operation, differing in size, purpose, and user base. A small percentage are clearly commercial activities with subscriptions and other user fees. A number of large companies, particularly in the computer software field, have set up free bulletin boards as a means of keeping in touch with their customers. Other companies establish private bulletin boards to permit the exchange of information among employees. But the vast majority of bulletin boards are launched by hobbyists. Generally they are free or if they charge a subscription fee it is minimal (for example $30 per year). Most of these BBSs have a few hundred subscribers, often less.[1] They provide a "place" where people can communicate on topics of common interest or exchange programs and text files. Some have likened the communication which transpires on a bulletin board to conversations taking place in a pub or a private club, and compare file exchanges to transactions in a public library, a bookstore, or at a garage sale.

The number of computer bulletin boards is growing steadily. One indication of the vitality of this grassroots movement is the FidoNet. In June 1984, FidoNet consisted of two bulletin boards; by August 1984 it had grown to almost 30; eight years later it was a world-wide self-regulating amateur network comprising some 15,649 bulletin boards. But FidoNet is merely one fraction of the BBS community -- estimates suggest FidoNet accounts for only 27% of the public dial-up bulletin boards in the United

---

[1] The majority of boards only have one phone line, permitting only one person to access the board at a time. Line counts are growing, however, and multi-line bulletin boards are becoming more common, particularly in the 4-line to 12-line range. Probably the largest BBS in Canada (and one of the biggest in the world) is Canada Remote Systems located in Mississauga. It has 201 lines and has over 9,000 paid subscribers.

States. In July 1992 there were over 40,000 bulletin boards in the U.S. and 66,000 worldwide (Boardwatch October 1992: 61).

Bulletin boards are very easy to set up and virtually impossible to control: any phone line connects a BBS to the rest of the world. This is their greatest strength as a democratizing form of communication but also the heart of the problem when something begins to go wrong. If recent media concerns are any indication, a handful of bulletin boards are not as socially responsible as their counterparts.

INTERNET

The Internet started as a U.S. military computer network designed to connect researchers scattered across the continent. As it evolved, however, the Internet began to connect thousands and thousands of networks. Soon it was no longer researchers under military contract but researchers in every academic field and not just military contractors but all sorts of companies. Now, the Internet has commercial offshoots and publicly accessible sites (FreeNets and other community-based networks).

The word "Internet" covers a bewildering variety of services, technologies, and administrative arrangements. Among the distinct services available on the Internet, the most familiar is probably e-mail. In addition, one can access programs available on a distant computer and interact with these programs (give them commands and read their output) by using ***telnet***. One can also send files to or retrieve files from a remote host by using *ftp* (i.e., "file transfer protocol"; some host sites permit this to be done "anonymously"). There are also a variety of automated tools for browsing and searching directories (e.g., archie, gopher, WAIS). World-Wide Web sites provide access to hypertext documents, allowing you to follow a link — a word, concept or image — from one place in the file to another point either in that file or some other document that could be stored on the same computer or on a machine halfway around the world. At the cutting edge of Internet services, one can experiment with video-conferencing using Cornell University's free *CU-SeeMe* program for Windows and Macintosh platforms. One of the most widely used services, available on millions of Internet host computers, is *USENET*: a valuable source of information where some people exchange technical data and others engage in scientific, religious or political debate. USENET is a heady mix of news, gossip, humour and passionate opinions.

The Internet grew through the co-operative efforts of government, academia and large corporations. The infrastructure expanded: the number of sites increased, and the speed or capacity of the lines connecting the sites making up the backbone grew. By November 1992 over a billion packets of digital bits were being exchanged each day on the Internet and traffic was growing at the rate of 11 per cent per month (Gilster 1993: 16). This means that millions of people are communicating via e-mail and transmitting electronic files to each other.

Today, school children are being connected to this immense computer network. What is sometimes forgotten is that it was never imagined that the Internet would become a place where children would learn and play. For 25 years the Internet had developed a culture based on those who used it: soldiers and other military personnel, computer scientists, aerospace engineers, and a variety of university researchers. This was a world which was uncompromisingly adult, highly educated, and almost exclusively male. It is perhaps not surprising that a culture clash is now taking place — or more accurately, a series of distinct cultural clashes. It is not just school children who are being connected to the Net but diverse social groups — small businesses seeking new entrepreneurial opportunities, not-for-profit and philanthropic organizations and community groups seeking broader access to information resources.

If we are to comprehend and mediate these clashes, we must understand that the Internet has never been a single, monolithic entity but a patchwork of administrative bodies with unique sources of ownership, different organizational controls and distinctive mandates. The Internet began as a military research community and became a plurality of research communities with different agendas. It is now undergoing another transformation as various other occupational and organizational groups become connected, many under the broad rubric of "commercial users".

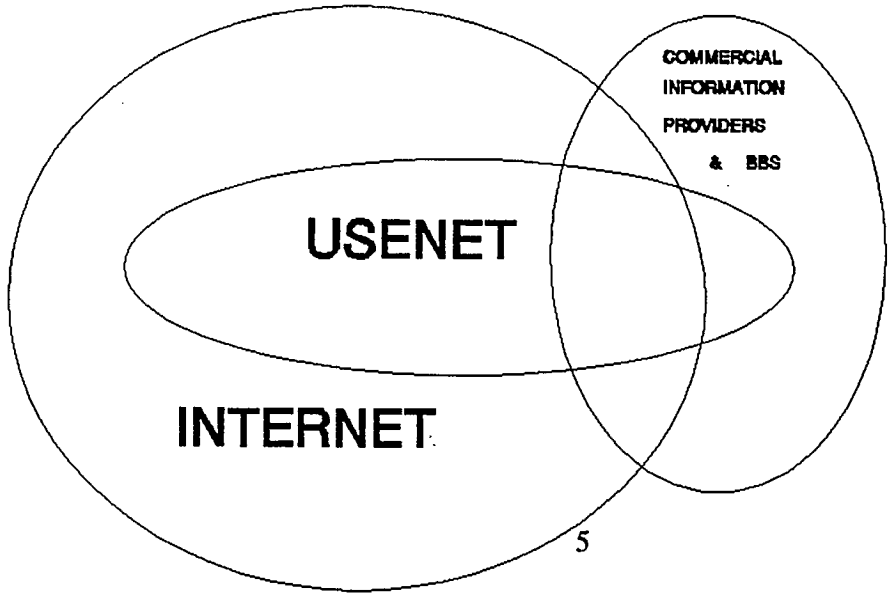
USENET

USENET is a cooperative e-mail network which permits millions of people to communicate with each other on thousands of topics (each topic called a "newsgroup"). One observer has described it as "a bunch of bits, lots of bits, millions of bits each day full of nonsense, argument, reasonable technical discussion, scholarly analysis, and naughty pictures" (Vielmetti 1991/1994).

It persists because people like to read and/or write "articles" on various topics. It is made possible by a set of protocols for disseminating, storing and reading news and a suite of computer programs (newsreaders and newsservers) that implement the protocols. The computers on which these programs run are owned by a wide range of entities: universities and other institutions, government departments, companies both multinational and minuscule, as well as thousands of private citizens in dozens of countries.

One should be cautious in making assumptions about the status, behaviour, or control mechanisms of any USENET host-site — it may belong to an individual or a private, public or non-profit organization, and the community standards in that host-site's particular corner of the globe may vary dramatically from our own. Nor is there a distinct administrative body with authority to determine who gets what information or who can post articles (Salzenberg, Spafford & Moraes 1994). Rather, USENET is a set of communication practices that has evolved over the last decade or so within a community of computer users (really a multiplicity of communities) with access to distributed resources.

FIGURE 1: USENET IS CARRIED BY INTERNET HOSTS, COMMERCIAL INFORMATION PROVIDERS, & COMPUTER BULLETIN BOARD SYSTEMS



USENET is not the same as the Internet. The Internet carries many different kinds of traffic and supports many different kinds of services: only one of these is USENET. Conversely, USENET traffic is disseminated through a number of other networks which do not belong to the Internet proper. USENET is a feed-forward network in which a host-site receives articles from its neighbour and may subsequently re-transmit those articles to another neighbour further "downstream". It is not uncommon to get one set of newsgroups from one newsserver and get a different set from a second newsserver. The fact that a newsserver gets its news from another newsserver does not imply a formal centralized structure: often it is nothing more than bilateral arrangements between the system operators (sysops) of the respective machines. An increasing number of adaptations are also beginning to emerge. Some transmissions are based on cost-recovery schemes and a variety of for-profit transactions are available. For example, a bulletin board system does not need to receive incoming USENET feed via telephone lines connected to a distant computer on the Internet. The "newsdump" is now being offered as a satellite service which can be received on a small satellite dish for a monthly subscription. Although not a centralized structure, there are a variety of checks and balances in place. USENET experience suggests that with the high amount of two-way communicating going on, there is bound to be a certain degree of disorganization, repetition, off-topic chatter and even occasional rudeness resulting from completely unregulated postings. Originally, all USENET newsgroups simply contained whatever postings netdwellers hammered out on their keyboards. But in 1984, the first moderated group appeared, initially to isolate administrative announcements from opinion and gossip. This not only gave rise to the first glimpse of hierarchy within USENET (the creation of newsgroups with the prefix *net* or *mod*) but established a tradition which continues to this day.

When a newsgroup is moderated it generally means that someone reads all the articles posted to the newsgroup and then decides which ones should be distributed to other people. Some may regard this as being equivalent to an editor at a newspaper or periodical; others might think of it as the Speaker of the House; other metaphors are possible. Whatever one may think of the benefits and drawbacks of moderated newsgroups, the very existence of the two broad classes — moderated and unmoderated — requires policy developers and legislators to weigh different sets of considerations regarding responsibility and liability when making decisions which have an impact on USENET.

In 1986, seven official hierarchies were created to bring some order to the proliferation of newsgroups:[2]

comp	Topics of interest to computer professionals and hobbyists, including computer science and information on hardware and software systems.
sci	Discussions marked by special and usually practical knowledge, relating to research in or application of the established sciences.
news	Groups concerned with the news network and software themselves.

[2] The "Great Renaming" (which provoked heated exchanges between Netdenizens) began in July 1986 and was completed in March 1987. "One reason for the renaming was the increasing number of groups made such a reorganization of the highest level domains advantageous for organizational reasons. Another reason was to put controversial groups in the "talk" domain which was added towards the end of the Renaming, so that it would be easier for administrators who wished to remove such groups from their newsfeed to do so. This was considered more desirable and practical than attempting to eliminate controversial newsgroups." [Truscott, 1993] (in Hardy 1993)

misc Groups addressing themes not easily classified under any of the other headings or which incorporate themes from multiple categories.

soc Groups primarily addressing social issues and socializing.

talk Groups largely debate-oriented and tending to feature long discussions without resolution and without appreciable amounts of generally useful information.

rec Groups oriented towards the arts, hobbies and recreational activities. [Spafford 1993]

The newsgroups in the seven official hierarchies are created on the basis of voting by USENET readers. This people's press is predicated on participatory democracy. There are three main phases in the creation of a USENET group belonging to the seven official hierarchies: (a) the discussion; (b) the vote; and (c) the result. There is also a responsibility for host sites to carry newsgroups in the principal hierarchies (*soc* and *talk* groups are discretionary).

There is, however, another classification which has emerged that is carried on a completely voluntary basis: the *alt* hierarchy. The *alt* hierarchy arose as a response to the official hierarchy of newsgroups. Anyone can create an *alt* group — no voting is required — and any host can carry or refuse to carry any *alt* group. There are more than a thousand *alt* newsgroups: some are devoted to serious discussion, some are very technical, some are humorous, and a few are outrageous.

The structure of hierarchies can be regarded as analogous in some respects to the tiered system of basic, extended basic and pay-TV in the cable television market -- with the crucial exception, of course, that there is no central agency such as the CRTC regulating what channels belong to what tiers on local systems ... and instead of a few dozen channels there are a few thousand. Those who use the medium, rather than some central agency, decide whether a newsgroup will belong to the official hierarchy (for example, a newsgroup could start life as an *alt* group and become one of the official *comp* groups as was the case with *comp.society.cu-digest*). Within these parameters, those who provide the infrastructure for the medium (i.e., those who provide the host machines) choose what they will carry.

PORNOGRAPHY

THE CURRENT SITUATION: THE AVAILABILITY OF SEXUALLY EXPLICIT MATERIAL

The definition of pornography is notoriously difficult, even though most people in our society have some sense of what the word means for them. For purposes of discussion (but not the law), Canada's Special Committee on Pornography and Prostitution (the Fraser Committee) proposed that: "... a work is pornographic if it combines the two features of explicit sexual representations (content) and an apparent or purported intention to arouse its audience sexually" (Government of Canada, 1985: 53-54). Canadian criminal law does not define pornography but is concerned instead with *obscenity* and *child pornography*. Section 163 of the *Criminal Code* states that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene". Section 163.1, proclaimed August 1, 1993, pertains to representations of "a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity". With respect to obscenity, distribution is an offence but not possession. With regard to child pornography, production, distribution and possession are all indictable offences.

There are many sexually explicit materials which most people would not regard as pornographic — medical documents such as sex therapy manuals, psychiatric case studies, gynaecology text books and so on. Many other sexually explicit materials, perhaps the largest portion, are legal -- even though they are referred to as "pornography" in everyday speech. Pornographic material becomes illegal only when it falls under the provisions for obscenity or child pornography. In line with the widely accepted sense of "pornography" the legal notion of "obscenity" pertains to sexually explicit works. However, for a book, magazine, or video to be obscene the exploitation of sex in that work must not only be a dominant characteristic but such exploitation must be "undue". With the decision in the 1992 case of *R. v. Butler*, the Canadian Supreme Court clarified this notion of the "undue exploitation of sex":

> ... the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.
>
> If material is not obscene under this framework, it does not become so by reason of the person to whom it is or may be shown or exposed nor by reason of the place or manner in which it is shown. ([1992] 1 S.C.R., 485)

The determination that "Explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex" indicates that much of what could be called pornography is perfectly legal in Canada.

Sexually explicit material is available in a number of formats. The so-called adult entertainment industry includes live entertainment ("exotic dancers") and adult theatres which concentrate exclusively on sexually-explicit feature films (often called X-rated pornographic movies). One of the most widely available forms of legal pornography are adult books and magazines. Magazines with the most extensive circulation — such as Penthouse, Playboy, Playgirl, and Hustler — are obtainable not only in magazine stores and newsstands but also in thousands of neighbourhood convenience stores.

To provide a context for the exploration of computer-based pornography, this next section explores the availability of the following:

(1) Adult magazines and books
(2) Adult videos
(3) Pay-TV and satellite delivery of adult movies
(4) 976 telephone sex

Adult Magazines & Books

A large number of bookstores, including the major chains such as Coles and W. H. Smith, carry at least a small selection of adult books. Often these appear in the fiction racks under "Anonymous" and range from Victorian erotica such as My Secret Life and Man With a Maid to contemporary novels devoted to sexual exploits. A curious eye scanning the shelves in a bookstore's literature section could easily discover publications which could be regarded as legally available pornography — the works of the Marquis de Sade come to mind as an obvious example. Certain titles in the "true crime" genre, particularly those recounting the violent acts of sexual sadists, contain chapters that are sometimes more lurid than such controversial novels as American Psycho.

"Sex shops" can be found in cities across the country which, in addition to "marital aids", often sell a wide range of magazines, as well as paperback books of erotic fiction. Unlike the mass market magazines such as Penthouse or Playboy, the magazines in sex shops have little commercial advertising; this, in addition to their smaller circulation, contributes to their higher prices. The magazines tend to be devoted to particular sexual practices or particular body types and it is probable that the majority of these are imported from the United States.

Prior to the Committee on Sexual Offences Against Children and Youths (Badgley Committee) which submitted its report to the federal government in 1984, there was very little comprehensive knowledge of the distribution of pornographic magazines in Canada. The Badgley Committee reported that in 1980, the 5,981,400 copies of Penthouse sold in Canada garnered revenues of $16,448,850. In the same year, Playboy's Canadian revenues equalled $9,554,050 for 3,474,200 copies in circulation (Badgley Committee 1984: 1252). These two magazines accounted for 62.8% of the $41,389,264 in revenue registered by the *Audit Bureau of Circulation*'s 1980 figures for total sales of audited U.S. adult magazines in circulation in Canada. The *Audit Bureau of Circulation* only reports magazine and newspaper data from its members. Consequently, these figures do not represent the total Canadian domestic consumption of magazine-based pornography.[3] Based on the National Accessibility Survey, the Badgley Committee stated that in 1982-83, 540 different titles of pornographic magazines were reported to be in distribution in Canada (Badgley Committee 1984: 1245-1249). There is a very high probability that the 12 titles included in the *Audit Bureau of Circulation*'s 1980 figures actually represent the largest share of domestic revenues for pornographic magazines. Very few of the titles would have

[3] Many adult magazines which do carry advertising are not members of A.B.C. and, of course, adult magazines which do not have any advertising (except for their own products) would have no incentive to be A.B.C. members.

12 issues per year (many exist for only one issue) and very few if any of these 500 publications would reach the annual copy sales of the smallest of the twelve audited magazines.[4]

What is rather striking is that a decade later the Canadian circulation of glossy mainstream adult magazines, such as Penthouse and Playboy, had declined substantially. Penthouse saw the most dramatic decrease, plummeting from almost six million copies in 1980 down to 976,752 in 1992 and an estimated 930,384 copies in 1993. Playboy fell from an annual circulation of almost three and a half million to 1,544,688 in 1992 and an estimated 1,463,844 copies in 1993. Comparison with the U.S. circulation of these two magazines indicates that between 1988 and 1992, Playboy's paid circulation fluctuated year to year but was relatively stable. On the other hand, Penthouse experienced rapid declines: the magazine's circulation having been almost cut in half between 1988 and 1992.

This preliminary evidence contradicts the popular conception that the amount of pornography in our society continues to increase. A variety of hypotheses could be investigated to assess what is actually happening. For instance, it could be that Penthouse and Playboy have lost market share to other mainstream adult magazines such as Hustler; that is, magazines which do not rely on traditional advertisers (clothing, liquor, cigarettes, etc.) but are supported by advertisers in the adult entertainment industry (phone sex, X-rated videos, etc.). As such, these magazines have no reason to belong to the Audit Bureau of Circulation. Another hypothesis is that Penthouse and Playboy have lost market share to the adult magazines sold in sex shops. This would indicate a significant shift in consumer purchase patterns. Or it could be the case that adult magazine purchases as a whole have genuinely declined over the past decade. To some extent this could be due to changing attitudes. Alternatively, and what might be the most plausible explanation, is that this is a clear case of media substitution. Substantial portions of the market that were previously served by adult magazines have shifted to adult video.

Adult Video: Sale and Rental

In 1983, only 6% of Canadian households had a videocassette recorder; by 1993, 77% of Canadian homes had at least one VCR and 64% had two. It is this level of consumer preference that makes video sales and rental such a significant component in today's film distribution schemes.

Adult videos are available for sale or rental in virtually every town and city in Canada in one of three sites: (a) adult video stores where the primary business is adult video rental; (b) sex shops that sell adult videos in addition to a wide range of "marital aids" and other commodities; and (c) "mainstream" video stores where only one portion of their stock is adult-oriented X-rated videos. A number of

---

[4] The Committee states:

> Many of the more explicit or fetish-oriented titles appear only for a single issue. "Volume One, Number 2" is never produced, but in its stead, the same publisher will introduce "Volume One, Number One" of a closely related magazine, one often having a very similar title. This practice is intended to protect the publisher from law enforcement activity.... Since the National Accessibility Survey was conducted over a period of several months, it is certain that the 540 titles listed include many that have since disappeared, and have been succeeded by other titles ... If a single series of such titles is regarded as representing *de facto*, only a single publication, the total of 540 different magazines may in fact be considerably inflated. (Badgley Committee 1984: 1249).

municipalities have recently introduced municipal by-laws to control the number of adult video stores or restrict their location (Jorgensen 1994; Prentice 1994; Sharpe 1994).

While it is likely that the majority of these outlets are independent stores, there are a number of chains. The largest Canadian chain is thought to be *Adults Only Video*. Started in 1986 in Saskatoon, Saskatchewan, the chain now has approximately 500 employees, annual revenues approaching $25 million, and about 80 stores (Jenish 1993: 52-56). Although the chain has outlets in Saskatchewan, Alberta, British Columbia and Manitoba, the majority of the stores (60 of them) are located in Ontario (the first was established in late 1990).

There is purportedly very little adult video production based in Canada:

> Distributors, retailers and police insist that there is no professional adult-film production in Canada, and that most of the videos come from the United States or Europe. According to some estimates, the American industry, which is composed of about 70 companies, churns out as many as 100 pornographic movies a week. (Jenish 1993: 53)

The claim that no adult videos are professionally produced in Canada is perhaps overstated but domestic production does appear to be minimal.

It is difficult to determine how many adult video titles are currently in circulation in Canada. The 1986 revised and updated edition of Robert H. Rimmer's The X-Rated Video Guide, focusing on X-rated films produced between 1970 and 1985, rates over 1,300 films on videotape and provides a supplemental list of 2,840 more. The Ontario Film Review Board reported (personal communication) that between April 1, 1993 and March 31, 1994 it classified 2,846 videotapes; of these 1,892 (66.5%) were adult sex films. The fact that 1,892 adult sex films were rated in one year suggests that there must be a fairly strong consumer demand.

Pay-TV and Satellite Delivery of Adult Movies

Although video cassette rental is probably the primary consumer source for adult movies, cable television and satellite TV are also delivery mechanisms. Although initially many of the adult films shown on pay-per-view cable channels could be classed as "softcore" pornography,[5] there now appears to be little difference between what is on cable and the material available in adult video stores.

In 1968, only 13% of Canadian homes subscribed to cable television; by 1992, 72% of Canadian homes subscribed to the basic tier of cable television services and about a third of these were willing to pay extra for the discretionary services. Although films featuring "nudity and sexual situations" are sometimes shown on late night movie channels (e.g., on Québec's Quatre Saisons), softcore and hardcore adult material delivered via cable has two main sources. First, in an occasional or sporadic fashion, softcore material surfaces on discretionary services (e.g., The Movie Network appears to schedule one or two softcore films per month). Second, both softcore and hardcore movies appear on

---

[5] In "softcore" adult movies, sexual intercourse is (a) simulated or (b) filmed and edited to avoid close-ups of the genitalia. Unlike so-called "hardcore" pornography, erect penises, fellatio, penetration, and ejaculation are not shown. "Hardcore" as it is being used here does *not* mean illegal (i.e., obscene according to the *Criminal Code*) but instead refers to the style which has typified the adult film industry for more than two decades (since roughly 1972-73).

pay-per-view where there is a regular slate of four or five adult movies per month. Pay-per-view is available on certain cable systems, providing the subscriber has rented the sort of decoding unit which is also used for descrambling other discretionary services. The pay-per-view transaction is made over the telephone; some cable companies ask for a credit card number for a first-time order.

The Ottawa-based company XTC-COM operates *Exxxtasy TV*, a hard-core pornographic video transmission delivered via satellite. XTC-COM initially intended to offer two kinds of service: (1) a scrambled service to bars, clubs and similar public establishments in Canada; and (2) a Direct-To-Home (DTH) scrambled satellite service. However, they were advised in November 1993 by the CRTC that a license was required for a Canadian DTH service. An article in The Ottawa Citizen states:

> From its suburban offices not far from the Herongate Mall, it [XTC-COM] serves 18,000 subscribers across the U.S. Clients pay as much as $220 U.S. per year for eight hours a day of triple-X-rated videos... Exxxtasy TV has also been sold to nine strip clubs across Canada, says its general manager, Richard Latham, but "99.9 per cent of our business is in the U.S." (Atherton; January 31, 1994)

Currently there appears to be no hard-core pornographic video service using satellite to target the Canadian residential market.

976 Telephone Sex

Anyone who watches television after the eleven o'clock news has probably seen the advertisements for *976 telephone sex services*; others may have seen advertising in newspapers and certain magazines. Reliable data on the size of this market, however, are not readily available. In CRTC Telecom Decision 94-4 (Revision to 900 Service) it was stated that Bell Canada (or any common carrier) cannot deprive these information services of bandwidth even if they disapprove of the content. A common carrier, however, may refrain from providing them with automatic accounting services (thereby ensuring that companies must bill their customers via credit cards).

The pervasiveness of sexually explicit products and practices in Canada indicates that a diverse range of pornographic material is already being tolerated in our society. Given that pornographic books and magazines have been available for at least two centuries and that pornographic films and videos have been available for a number of decades, it is not surprising that we already have various laws, procedures, and practices for handling such products and activities. Legal pornography is a fairly large market; computer porn is simply the latest incarnation and currently represents only a small fraction of the pornography market.

COMPUTER-BASED PORNOGRAPHY

"Computer porn" includes pornographic stories or text files, sexually explicit images, and "adult" chat lines. Instances of the first two categories can be found on computer bulletin boards, USENET and CD-ROMs. Adult chat lines, where individuals can see each other's responses typed in real time, are a service offered by certain adult bulletin boards. Although there is an Internet chat system called Internet Relay Chat (IRC) it is not exclusively devoted to sexual conversations. Some of the Internet accessible

MUDs (Multi-User Dungeons, Domains or Dimensions)[6] also have a strong sexual fantasy component (Bartle 1990; Dibble 1993).

The bulk of the sexually-explicit material on bulletin boards or on USENET is not illegal — it is not obscene under Canadian law. Much of this material is similar to what is found in adult magazines available at the local corner store or "Triple-X" videos in adult video outlets. It is not surprising that there is very little original "computer porn" — most of it is digitally scanned from traditional media.[7] However, some image files on some BBSs could be classified as obscene according to the *Criminal Code*. The difficulty is in determining which BBSs have material which is obscene and not simply sexually-explicit.

USENET and the alt.sex Hierarchy

With its roots in the academic research community, USENET has disseminated information on every conceivable topic for almost a decade. USENET communications were assumed to be conducted by and for adults. The only challenge to this assumption occurred so periodically that it had assumed an almost ritualized cadence: each fall, with the influx of first year college and university students there was a noticeable escalation in the frequency of both posting and flaming (composing and posting provocative or insulting messages). As cycles go, by each spring, the new age cohort had learned the explicit and implicit rules of conduct, curbing the most flagrant acts of irresponsibility. But, as the history of the creation of the *alt* hierarchy indicates, even among adults there are serious disagreements over the propriety of certain communications — especially when the topics are sex, drugs, and rock'n'roll.[8] Not

---

[6] MUDs (or as they are called in the UK *Multi User Adventures* MUAs) are a cross between a text-based adventure game and a multi-user real-time chat system (cf. Bartle 1990). For an introduction to MUDs which include sexual bantering see Julian Dibble (1993) or Josh Quittner (1994).

[7] Based on a random sample from sexually explicit *alt.* newsgroups, Mehta and Plaza's analysis reveals:

> Of the 150 pornographic images analyzed, 65% are distributed non-commercially by anonymous network users, 81% are colour, 92% are digitized [i.e., scanned], and 49% were coded as "high quality". These findings suggest that a significant proportion of computer pornography is taken directly from magazines and videos, presumably without copyright permission or royalty payment. (Mehta & Plaza 1994: 9)

[8] As Zombie Lambaddah posted on a BBS called *Flesh Pit Droids*:

> This is not some new obsession by keyboard-diddling computer punks any more than it is a recent eruption in such-and-such "youth subculture" or "sexual underground". Instead, it is a line in our artistic, musical, and cultural experience which stretches back for decades. We all know the icons. Some of us have even read William Burroughs' cut-ups of needles and six-shooters, taken a ride down Kerouac's road, or howled out Ginsburg's ode to Cassidy, "the cocksman of Adonis". If the Beats weren't your scene, maybe you dug the psychedelic Sixties of Ken Kesey and the Merry Pranksters ... or possibly like Zappa and the Mothers you thought this was just a load of Kosmik debris. Too West Coast? Did you prefer to walk on the wild side, sliding into the urban ice and transvestite smack of Andy Warhol's Factory, slurring along with the Velvet Underground? Or perchance you slipped in on the tail end of the 'Boomers, when stagflation and unemployment reduced fashion to safety pins and

surprisingly, the most controversial of all USENET groups, outside of the cold fusion debates, are those devoted to sex.

Of the 4,937 newsgroups available as of April 18, 1994, only 17 carry sexually explicit material (Mehta & Plaza 1994). The *alt.sex* hierarchy contains a wide range of topics with names including alt.sex, alt.sex.bestiality, alt.sex.erotica, alt.sex.fetish, alt.sex.stories, alt.sex.motss ("motss" is the acronym for "members of the same sex") and alt.sex.pictures. Newsgroups range from the tongue-in-cheek alt.sexy.bald.captains (started by fans of the Jean-Luc Picard character in *Star Trek: The Next Generation*) to such serious support groups as alt.sexual.abuse.recovery. Depending on the community constituting a newsgroup, the e-mail messages exchanged can be heart-rending personal experiences, advice drawn from medical texts or sex therapy manuals, erotic fiction, or fantasies both commonplace and bizarre. With regard to the newsgroups which centre on sex as a recreational pursuit or creative writing outlet, the vast majority of the messages are of the sort that could be found at the neighbourhood magazine rack in periodicals such as Penthouse Forum. Contributors to some of these newsgroups occasionally post images but, generally speaking, digitized photographs, drawings, and cartoons are relegated to groups such as *alt.binaries.pictures.erotica* where pictures, not words, are the focus of attention.

The exchange of pornographic photographs and sexually explicit images is apparently more contentious than literary renditions of the most scandalous sexual escapades. The famous example that prompted considerable outrage -- after it was cited in almost every Canadian newspaper article on USENET pornography in early July 1992 -- was described by the Vancouver Province as a picture of "a naked woman hanging by her neck from a rope. Her mouth is gaping as if she's screaming" (July 3, 1992, A46).[9] There were very few journalistic accounts which sought to dispel the troubling suggestion of misogyny. The Globe and Mail, however, did print an article suggesting that rather than an act of

---

garbage bags, when Malcolm McLaren's great rock'n'roll swindle put the Sex Pistols into perspective and Siouxsie and the Banshees made you forget Nico's sultry anthems. Nor will it ever end, what with the industrial occultism of Genesis P-Orridge and the Temple ov Psychick Youth or the American nightmare of G.G. Allin and the Murder Junkies ... I know, it's only shock'n'roll, but they like it ... And don't dismiss this as some post-nuclear aberration — some look back fondly on Dada and the Cabaret Voltaire over sixty years gone ... or peer longingly into the last century seeking out Baudelaire and the *fin-de-siecle* decadents — all shining examples of the *excess* and the *heterogeneity* so dear to the philosopher-writer, Georges Bataille.

[9] The description is intended to incite the view that this is an act of violence (evident from the editorial intrusion: "as if she is screaming") perpetrated by a man against a woman. Of course, we really do not know the partner's gender. If, for example, this image had been posted on *alt.sex.motss* (i.e., members of the same sex) one might suspect that the unseen partner was female.

violence against women, the depictions presented in alt.sex.bondage are shared among an often misunderstood sexual minority.[10]

Another misconception conveyed by many of the newspaper accounts was that digital images distributed over USENET just "popped up" in plain view on computer screens.[11] This is not possible. USENET transmits e-mail in ASCII format (the standard alpha-numeric character set) and many of the computers through which the e-mail is posted and routed impose limits on the size of e-mail messages (an upper limit of 64 kilobytes is common). Digital images conflict with both of these characteristics. They are binary files and not ASCII text files, and even if the data are compressed the file sizes often exceed the maximum size limit. Consequently, images posted to USENET groups use a program such as *uuencode* that converts the binary file into a text file. Thus the e-mail message which appears on screen when one accesses the newsgroup looks like a string of seemingly random alphanumeric characters. Moreover, given the e-mail size restriction, the image is almost always broken up into multiple parts. The individual postings must be recombined into a single, correctly ordered file and then transformed into a binary file using the program *uudecode*. But even then the photograph or drawing will not pop up on the screen automatically. The user must employ a suitable image viewer — a software program that is able to decode that particular graphic format.

In a similar vein, USENET readers are rarely taken by surprise by sexually explicit images. The variety of such images has led to the creation of a plethora of special interests, and thus in *alt.binaries.pictures.erotica.female* one would not encounter photographs depicting male homosexuals. The label of the newsgroup *alt.binaries.pictures.tasteless* is an explicit warning that the content is probably going to be offensive according to some criteria or other. The decoded image is as likely to be open heart surgery, a Vietnam combat photograph, a picture of a couple engaged in bizarre sexual activity, or a series of images featuring two blue fuzzy stuffed toys posed in ludicrous positions -- the subject listing or one-line description may even inform you ahead of time which of these depictions one will encounter. If you choose to ignore the labelling, you are knowingly setting out to be shocked.

The majority of the images transmitted over USENET are of nudes (male or female) and of couples (heterosexual or homosexual) engaged in "explicit sex that is not violent and neither degrading nor dehumanizing" (to borrow the Supreme Court's phrase). A recent content analysis of pornographic images available on USENET suggests that between 10% and 15% of a randomly selected sample may contravene obscenity provisions (Mehta & Plaza 1994: 10). Although research findings are still

---

[10] Apologists would claim that such images of bondage, sadism, or masochism are examples of consensual (often primarily theatrical) practices engaged in by consenting adults. Bondage magazines almost always carry a disclaimer such as: "The depictions of casual bondage in this ... magazine convey the satisfactions that men and women experience together when they practice bondage within the context of mutual trust and consent. We strongly discourage readers from imitating these depictions by themselves outside the boundaries of a loving relationship, without an alert partner." Proponents claim such images are not about the degradation of women *per se* but the exploration of S/M fantasias. On a week by week basis, the preponderance of images in the newsgroup alt.sex.bondage are not pictures of men dominating women -- there are depictions of dominants and submissives of both genders in various combinations. In addition, as The Globe and Mail reported, among the contributors to alt.sex.bondage are women, some of whom identify themselves as libertarians others as feminists (Moon: July 20, 1992).

[11] A rare exception to this confusion was The Edmonton Journal's article on July 11, 1992.

preliminary, it appears that the bulk of the traffic in the newsgroups devoted to the exchange of digital images in the *alt.sex* hierarchy and the various *alt.binaries.pictures.erotica* newsgroups is perfectly legal according to the obscenity provisions in the *Criminal Code*.

On the other hand, it is quite probable that some of the occasional postings of pictures depicting bondage, sadomasochism, or bestiality would be regarded as obscene under Canadian law. The matter, however, is not entirely straightforward. Madonna's recent book of photographs, Sex, included a number of sadomasochistic images -- and was available in Canada. Images of sex and violence more extreme than many in alt.sex.bondage appear in a number of mainstream Hollywood movies, particularly the horror movies fashionable in the early 1980s and the "erotic thriller" which became popular in the early 1990s. When a potentially obscene image is posted, determining the most appropriate course of action can be difficult, particularly for those who have something to lose (i.e., those who are providing the host machines).

Periodically, individuals who are regular participants in USENET discussions express their concerns about censorship or offensive material (for example David Mason's open letter to the online community, Nov. 23, 1993 in *can.general* and *alt.censorship*). Now and then, institutions which operate USENET host machines also respond to the incessant flow of newsgroup postings in the more controversial newsgroups -- some decide, for one reason or another, to refrain from carrying certain newsgroups. On rare occasions, one gets the impression of a chain reaction in which several institutions all make decisions about USENET at the same time. In Canada, the spring and summer of 1992 was one of those rare occurrences. Alerted to the alt.sex newsgroups, a dozen universities across the country took action and came under the media spotlight.

The diversity of responses within the Canadian academic community indicates the bewildering range of issues which erupt when access to the flow of messages in these USENET groups is curtailed:

(1) some universities prevented access to certain alt.sex USENET groups or refrained from receiving the newsfeed from those groups;

(2) some universities refused to cut the newsfeed and resisted preventing access, despite pressure from local media and some women's groups;

(3) some universities shut off certain newsgroups deemed to be offensive but, after following some organizational process, restored them within a few months.

The *alt.sex* issue raises a profusion of problems including the undetermined liability of USENET host sites, the multi-faceted jurisdictional quandary of cross-border e-mail flows, the apparent pendulum swing on tolerance vis-à-vis freedom of expression in the academic environment, and the relation between pornographic newsgroups and sexual harassment. In the rush to tackle these monumental questions attention is perhaps too easily distracted from the most conspicuous and banal observation: *the very divergence in the range of responses.*

Surveying the newspaper articles, USENET discussions, and scholarly papers reveals there has been surprisingly little effort spent to determine what happened and whether or not there are lessons to be learned in how it happened at different places. If details are provided they almost always refer to the local case and assumptions are generalized to other incidents in the rest of the country. Was this a unitary phenomenon that erupted spontaneously in different locations or was this a chain reaction? Is what transpired at different universities the result of unique circumstances or are there structural similarities? Why does it appear inflammatory to suggest that this was a manufactured moral panic?

The penchant to jump to prescriptive rulings following the events of 1992 may serve to replicate the conditions that aggravated the situation in the first place. Haste clouds crucial components in the delicate balance between conflicting rights and responsibilities. In the case of the alt.sex hierarchy the processes giving rise to the predicaments were obscured. More importantly, little attention was paid to conflict-resolution mechanisms, which institutionalize the process of negotiating resolutions within the limits of a tolerant, democratic society. This is unfortunate -- if anything seems inevitable, it is that this problem will resurface again.

One of the institutions that initially banned newsgroups in the summer of 1992 was the University of British Columbia. This initial response, however, was balanced by a review process when the university created a Task Force to assess the situation. Among the "Fundamental Principles" contained in its final report were the following:

> 5. The *Criminal Code* of Canada, the Civil Rights Protection Act, the B.C. Human Rights Act, and the UBC Sexual Harassment Policy all apply to the use of information technology at the University, as they do to other aspects of life here, to limit completely free communication in order that the best possible environment be preserved.
>
> 7. The University should not ban the electronic communication between willing participants of messages and images which others might find offensive, since no such ban applies to other forms of communication.
>
> 8. Those associated with the University should be educated about the laws and policies applicable to this area, as well as about the need for everyone at UBC to treat one another with respect. ("Background Material: History". Report of the Task Force.... December 1992. University of British Columbia.)

The thinking behind these principles and the procedures implementing them may prove beneficial to other institutions that must also grapple with the problems of offensive communication over computer networks. The UBC Task Force acknowledges that a broad range of legal measures and local policies are already in place to ensure that public communication is democratic and equitable. They also affirm that existing laws and policies can be applied to computer-mediated communication in order to ensure that the latter is accorded the same level of freedom and responsibility as traditional forms of communication. The Task Force stressed the importance of educating users and administrators alike about the relevant laws and policies so that computer-mediated communication could be conducted responsibly.

A number of "Specific Recommendations" put forward by the Task Force also warrant attention, including the following:

> 2. The University should provide access to all newsgroups and, more broadly, the Internet as a whole, for all members of the University community. Other institutions, such as schools, which access the Internet through UBC accounts, should be informed of the possible existence of material that is inappropriate for their users. Such institutions should make their own policies regulating access to such material.
>
> 3. The University should make it clear that the user bears the primary responsibility for the material he or she chooses to access, send, or display on the network and other computing

systems. ("Background Material: History". Report of the Task Force.... University of British Columbia. December 1992)[12]

The recommendations about where responsibility should reside are significant and merit careful assessment by policy makers and legal counsel.

The situation with respect to USENET newsgroups continues to change, even within the same institution. For example, in 1988, following a controversy over offensive jokes posted to *rec.humor.funny*, the University of Waterloo struck a committee to assess the situation. On May 30, 1991, the report of the Advisory Committee on Network News restored all banned newsgroups and designated a liaison person to deal with complaints arising from e-mail and news postings. In February 5, 1994 the Globe and Mail reported that the University of Waterloo, following recommendations from an ethics committee, had just banned five newsgroups (for a discussion see Rosenberg 1994: 5-7).

A number of universities re-assessed their USENET status following Judge Francis Kovacs' publication ban regarding the trial of Karla Homolka. A newsgroup *alt.fan.karla-homolka* was created on July 14, 1993. The newsgroup was primarily filled with rumours, gossip and hearsay although a handful of newspaper articles were re-typed and posted (such as one from The Washington Post which was itself a reprint of an article in The Buffalo News and The Detroit Free Press). On November 1993, under order of McGill Vice-President for Planning and Resources, Francois Tavenas, McGill University became the first university to suspend the *alt.fan.karla-homolka* newsgroup. Within a month 15 Canadian universities, the National Capital FreeNet, and one American university discontinued the newsgroup (Rosenberg 1994: 8-13; Shade 1994). What is particularly deserving of further study with respect to these incidents is the relation between the administrative responses to the USENET newsgroup and the legal opinions on the obligations of university libraries with respect to prohibited newspaper articles (whether in paper form or microfilm).

The wide range of responses to the alt.sex newsgroups suggests, among other things, an uncertainty with respect to Canadian law concerning obscenity. One of the clear tasks this study must address if policies are to be formulated for dealing with obscenity is not only the letter of the law in the *Criminal Code* but, perhaps more importantly, how the law is interpreted in practice (the rulings in actual cases and the

---

[12] In his overview "Free Speech, Pornography, Sexual Harassment, and Electronic Networks" (1993), Richard Rosenberg proposed the following principles for dealing with offensive material on the Internet:

Administrative Principles

(1) Do not treat electronic media differently than print media, or traditional bulletin boards, merely because they can be more easily controlled.
(2) Do not censor potentially offensive material on networks: Encourage the use of sexual harassment procedures, if appropriate.
(3) Be aware of your responsibility with respect to the uses and misuses of your facilities. However, do not use cost of services as an excuse to censor and limit access.
(4) Trust, and educate, people to be responsible.

Social Principles

(1) Issues will proliferate beyond the ability of organizations to control them by rigid policies.
(2) Occasional offensive postings do not detract from the benefits of electronic networks. (Rosenberg 1993: 287)

juridical rationale for specific decisions). A preliminary attempt to meet this need will be undertaken in this paper in the section *Dealing with Obscenity*.

File Archives and chat lines: the computer bulletin board system (BBS)

It is difficult to ascertain how many bulletin boards have pornographic material available on-line. One indicator can be found in a recent survey in Boardwatch magazine which garnered 11,512 responses (86% male) to a poll on favourite bulletin boards. If one scans the resulting list of the "Top 100" bulletin boards, about 25% fall into the category of having sexually-oriented material (adult chat lines, text files, images, games or interactive programs).

Digitized images are probably the most pervasive form of pornography on bulletin boards. There are four principal means by which bulletin boards acquire images:

(1) the BBS sysop (systems operator) can purchase commercial collections on CD-ROM (a single CD-ROM disk can hold thousands of photographs);
(2) BBS members can upload files to the BBS (sometimes in exchange for such privileges as longer access time, increased download ratio, etc.);
(3) the sysop can download images from other bulletin boards and post them on his or her own board (sometimes regarded as "raiding" the competition, other times thought to aid members by bearing the cost of long-distance charges);
(4) the sysop produces the images himself or herself by scanning already published magazine images or "frame-grabbing" from X-rated videos (both sources of copyright violation) or by scanning amateur or professional photography to which the rights have been acquired.

While the vast majority of the images are no different than what is available commercially at sex shops or adult video stores, any of these sources could provide material which is obscene under Canadian law. Being able to exclude obscene material — or, if obscene material surfaces, determining the responsibility for the source — is difficult. The bulletin board system operator may only have practical control over materials he or she personally downloads or produces. Given that a commercially purchased CD-ROM has thousands of images, it is conceivable that even if the sysop is knowledgeable enough to hazard a guess as to what is and is not obscene, not every image will be previewed before going on-line. For example, a package of three CD-ROMS retailing for $US 69 is advertised as containing 1,892 Megabytes with over 16,180 files. It could be that all of the images are perfectly legal or that a few dozen are questionable and a handful are clearly illegal. Prior to purchase, the sysop has no way of knowing. Moreover, the CD-ROM could have been made in Europe, America, or Japan where standards of permissable sexual material may be different. One may contend that it is the sysop's responsibility to determine the nature of the material prior to putting the collection on-line, but the sheer volume of material that this storage medium permits may push the limits of practicality.

Another source of vulnerability is member uploads. The issue is not where the members are calling from (out of province or out of the country) but the sheer volume of traffic that a popular bulletin board can sustain. This is illustrated by a recent American case. Located in Boardman, Ohio and operated out of their home by Russell and Edwinia Hardenburgh, *Rusty & Edie's BBS* is a well known board which specializes in adult material. On January 30, 1993 the house was raided by the FBI using a warrant which alleged that the BBS was illegally distributing copyrighted software programs without

permission. An article in the Computer Underground Digest (#5.17, Feb. 28 1993)[13] summarized a newspaper account which stated that at the time of the raid the BBS had 124 phone lines serving more than 14,000 subscribers and had logged approximately 3.4 million calls since 1984, with more than 4,000 new calls daily. The FBI raid set off a storm of controversy within the on-line community (including a biting editorial by John C. Dvorak in the May 11, 1993 issue of PC Magazine). Ken Smiley, in a post to the BBSLAW Fidonet conference attempted to put the matter in perspective:

> First off, R&E was receiving about 40-50 MEGS of new files daily at the time their system was raided. I think you will agree that it is hard for someone to check out all 40-50 megs of these files to determine if they were commercial or not. In fact, many files were uploaded, commented, and downloaded before the sysops had a chance to inspect them. This may not be the "safest" way to run a BBS, in other words some sysops don't allow users to D/L a file until the sysop has checked it out first. I would have to agree that I couldn't check 40-50 Megs of files per day, nor would I want to unless someone was paying me a lot of $$$ and even then I don't know if I could.
>
> R&E was carrying tens of thousands of files online. When the warrant was issued (and the warrant is on public record so I can talk about it) the authorities included a nearly 200 page list of files with the warrant. Among that 200 pages were 2 files underlined that were of commercial nature and that the authorities felt were enough to go after the system. (Smiley reposted in Computer Underground Digest, #5.42; June 24, 1993)

Over the course of ten years, the Hardenburghs had turned their hobby into one of the largest bulletin boards in North America. But theirs is still a small business. It would be necessary to have employees whose sole function every day was inspecting every image on the latest CD-ROM acquisition and screening every image or message uploaded to a file area or conferences. A small business running a BBS cannot be expected to hire additional staff to perform these monitoring functions. The Hardenburghs restrict access to adults by requiring credit cards for subscriptions, but do not monitor every transaction the members conduct. Controlling the flow of information is like trying to police the conversations in a restaurant or a bar. This provides some indication of the sort of problems a BBS can face — whether that one file in 10,000 is copyrighted or obscene.

Chat-lines are another form of computer-based pornography. It could be argued that the "sex on-line" realm of BBS message areas and real-time chat lines are an adult fantasy game which lacks bodily contact -— safe sex pushed to an extreme. Picture suburban rec-rooms or at-home offices where adults exercise their imaginations with a curious blend of verbal dexterity and typing skill, somewhat like a cross between a 976 phone sex service and a 19th century epistolary contest. Jack Rickard, well-respected editor of Boardwatch Magazine, put it this way, in a less-than-politically-correct column:

---

[13] Computer Underground Digest is an on-line electronic journal or newsletter (available through USENET as *comp.society.cu-digest* as well as through CompuServe, GEnie, and America Online). It was originally started by a group of sociologists and political scientists as a means of sharing information on law enforcement responses to bulletin boards during the "hacker-crackdown" of 1990 (search warrants were made available, trial proceedings presented, newspaper reports summarized, etc.). It currently provides a forum for academics, computer professionals, hackers, and journalists to monitor and debate issues of mutual concern.

> Systems advertised to be a real hot spot, are often frequented by pretty normal people discussing pretty mundane things. ... The online world of sexual discussion is largely a world of fantasy — where the middle-aged insurance salesman, balding and sporting a houseful of kids and mortgage payments, can for a few hours assume the persona of Don Juan, Don Quixote, or Don Drysdale. It is interesting to note that many of the svelte, ravishing young femme fatales online are actually sixty-ish, widowed, and perhaps physically handicapped. Their lives in the real world are largely as non-participants, shut into smallish homes with no money or mobility to go anywhere. The modem and these fantasy worlds online allow them to be as young or as old, as rich or as poor, as pretty or not as they claim to be. There is little chance of being called on the little white lie. It is a form of group, interactive escapism that is almost entirely harmless -- and often therapeutic. The relative anonymity and safety of typing keys in the quiet dark of your own den leads to a false sense of intimacy. These people share not just their innermost feelings, but often fantasies they would not dream of living out in the real world, or even of revealing to their close friends and relatives. (Rickard 1992: 6)

Like 976 telephone sex services, BBS adult chat-lines are fantasy dialogues. The most important difference, however, is not that the 976 service is aural and the BBS is typewritten, but rather that the 976 service features a paid employee at one end of the line and a customer at the other. In the adult BBS chat-line, both parties are private individuals who have consented to communicate with each other. Their BBS membership or subscription does not pay for the service's employee to whisper sultry suggestions but rather provides access to a space where like-minded adults have chosen to congregate so as to converse with each other.

DEALING WITH OBSCENITY

To understand how law enforcement and the judicial systems deal with obscenity, we must start with the legal framework at the federal, provincial, and municipal levels of government. This section also describes a sample of recent police actions and discusses the problems of enforcement with respect to obscenity in traditional media and with regard to the distinctive challenges posed by computer-based pornography.

Legal Framework

In Canada, the legislative response to obscenity can be divided into three main phases which correspond to the following boundaries:

(1) the 1897 *Criminal Code* and the *Hicklin test*;
(2) the 1959 *Criminal Code* and the Supreme Court cases of *Brodie, Dansky and Rubin v. R* (1962) and *Dominion News and Gifts Ltd v. R.* (1963);
(3) the proclamation of the *Canadian Charter of Rights & Freedoms* in 1982 and the 1992 Supreme Court decision in *R v. Butler.*

According to W. H. Charles, "The first Canadian statutory provisions relating to obscene publications appeared in section 179 of the *Criminal Code* of 1892" (Charles 1966: 244) which provided that the public sale or exposure for sale of any obscene book or printed matter would constitute an indictable offence. The 1892 *Criminal Code* did not, however, contain a definition of the term "obscene".

Lacking any statutory definition of obscenity (until the *Criminal Code* was revised by statute in 1959), the Canadian courts relied almost entirely on the definition put forward in an 1868 British case, *Regina v. Hicklin*. At that time, Lord Chief Justice Cockburn wrote:

> ... I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (LR 3 QB 360 (1868) in Copp & Wendell 1983: 326)

Although instrumental in British, Canadian, Australian, and American jurisprudence for many decades, the *Hicklin* test was criticized regularly by legal scholars, lawyers and judges. One of the most damaging criticisms is that "the test requires a subjective, speculative evaluation by the judge of the corrupting and depraving tendencies of the material (whatever this may mean), upon a group of unknown readers" (Charles 1966: 245).[14] In addition, there have been a number of objections raised with respect to demarcating the boundary of obscenity based on purported vulnerability of a peculiar class of victims, namely, "those whose minds are open to such immoral influences." This establishes a very restrictive standard by which, for example, works of literature could be prohibited because they are not suited to children or emotionally unstable persons.[15] In American law, the *Hicklin* rule was curbed in the

---

[14] These difficulties associated with the *Hicklin* test were exposed by Laidlaw J.A. in his Ontario Court of Appeal judgement in *R. v. American News Co. Ltd.* (1957), 118 Can C.C. 152:

> The words "deprave" and "corrupt" as contained in the test of obscenity are *indefinite* and *uncertain* in meaning. It is not sufficient in law that a matter charged as obscenity should merely be disgusting or repulsive. Conversely, it is not necessary that the matter be salacious or unsavoury to be obscene. Indeed, for instance, a book may be inoffensive in its content, but *if* it is calculated to deprave and corrupt it *might* fall within the test of obscenity in law. I observe, too, that the effect of the tendency may vary in character. The tendency *might* be to "suggest thoughts of a most impure and libidinous character"; as pointed out by Cockburn C.J. in the Hicklin case; or it *might* be to influence certain persons to do impure acts; or it *might* be to imperil the prevailing standards of public morals ... [T]he test of obscenity is stated explicitly to be applicable to persons "whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". Thus the test embraces both adults and youth ... "normal" as well as ... "abnormal". In each case the finding depends upon a consideration of the effect of the matter in question on persons into whose hands it may fall and whose minds are open to influences of a corruptive kind. The person into whose hands any matter charged as obscenity might fall is again *uncertain* in both theory and practice... The question as to whose minds are open to corruptive influences is, again, a question to which there is *no certain or definite answer*. A tribunal called upon to consider that question must *imagine* a class of persons who in the particular circumstances of the case *may* be susceptive to immoral influences... The Court can only *conjecture* in a judicial manner as to the class of persons who might fall within the description. (Laidlaw footnote 2, pp.157-158; in Mackay 1958: 12)

[15] As early as 1913, in *United States v. Kennerley*, Judge Learned Hand found the *Hicklin* test wanting:

> ... it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few ... To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the

landmark obscenity case concerning James Joyce's Ulysses (*United States v. One Book Called "Ulysses"* (1933), 5 Fed. Supp. 182). This case also pinpointed another failing of the Hicklin test — that it could be applied in such a way that isolated passages in a book are taken out of context and, on the basis of those passages, the entire publication declared obscene (Charles 1966: 245-246). The focus on textual fragments would ignore the work as a whole and any redeeming social, artistic, or scientific value.[16] Canadian law would have to wait until the early 1960s before these deficiencies in the *Hicklin* rule were explicitly remedied. The circumstances which led to this change began with the 1952-1953 Senate Hearings of the Special Committee on Sale and Distribution of Salacious and Indecent Literature (Charles 1966: 250-260). One of the individuals who testified before the Committee was Mr. D. E. Fulton, who for the next four years, as a member of the Opposition in the House of Commons, continued to push for a clearer definition of obscenity. It was not until the election in 1957, which granted a victory to the Conservative Party, that Mr. Fulton, now the newly appointed Minister of Justice, could pursue his campaign.

The first statutory definition of obscenity was provided when Bill C-58 redefined the *Criminal Code* provisions in 1959. The amendment to the *Criminal Code* introduced a definition based on the "undue exploitation of sex". At that time designated Section 150 (now 163), the statutory formula states that

---

lowest and the least capable seems a fatal policy. (in Mackay 1958: 20, footnote 33)

[16] Mackay states:

> First, it is the *dominant* nature of the book taken as a *whole* which is considered in *Ulysses*, whereas the *Hicklin* test has been applied so as to permit a book to be condemned as obscene solely because of isolated words or passages ripped out of context. One abstracted sensuality may be sufficient.
>
> Secondly, because the *Ulysses* test considers a book to be obscene only if its objectionable features dominate the whole effect of the book, or if they are introduced purely as "dirt for dirt's sake", it is necessary to make a highly complex evaluation of the book in terms of its overall values, scientific, educational and literary, and in terms of the relevancy of the objectionable portions. Hence expert critical opinion is not only admissible but is persuasive evidence on the first score, and the purpose and sincerity of the author is clearly material to the issue of relevancy and "literary necessity" on the second, in order to judge the author's need to use whatever words and passages will produce the effect intended. The *Ulysses* test, unlike the *Hicklin* test, calls for a close appreciation of the nature and function of literature and although obscenity is still a question of fact the considerations involved require the application of special skills. Hence, under the *Ulysses* test, opinion evidenced is not irrelevant or superfluous on the ground the judge or jury has the same knowledge or ability any witness could have.
>
> On the other hand, because a book is obscene under the *Hicklin* rule if any passages therein may have an unfortunate tendency towards genital commotion in some adolescent reader the only questions are, in effect, is a given passage smutty? and might it adversely affect some unknown degenerate who might read it and think that portrayal requires emulation? Obviously a juryman is just as capable and incapable respectively of answering these questions as anyone else and therefore the opinion of anyone else, including the author, is irrelevant and inadmissible. Neither, under the *Hicklin* rule, is the sincerity or purpose of the author the least bit material. The *Hicklin* rule escorts literature to the scaffold without a fair trial, by Star Chamber inquisition, and on the basis of very doubtful, and in any event, unproved, premises. (Mackay 1958: 19-20)

"any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene."

It was not long before a crucial decision with respect to obscenity was reached by the Supreme Court. In the case of *Brodie, Dansky and Rubin v. R.*, the Supreme Court determined that D. H. Lawrence's novel, Lady Chatterley's Lover, was not obscene. C.S. Barnett commented:

> Although it has not been regarded as binding in other aspects because it does not represent a majority opinion of the Supreme Court of Canada, Justice Judson's judgements in *Brodie* has definitely established certain propositions which have not been subsequently challenged or contradicted, namely: (1) The undue exploitation need not be *the most, or only,* dominant characteristic of the work so long as it is *a* dominant characteristic of the *whole* work and not merely a dominant characteristic of particular parts or aspects of the work regarded in isolation or out of context. (2) The *author's purpose* and the actual *artistic merit* of the work are both relevant to both "dominant characteristic" and "undue exploitation". Furthermore, prevailing *community standards* are relevant to "undueness". (Barnett 1969/70: 12)

A similar conclusion was reached two years later with respect to what in the Sixties were called "girlie magazines" (the case centred on two magazines, one called Escapade and the other called Dude). The Supreme Court overturned the majority decision by the Manitoba Court of Appeal in *Dominion News and Gifts, (1962) Ltd. v. R. (1963)* and sided instead with the dissenting Judge Freedman.

The third and most recent phase in the judicial handling of obscenity was inaugurated on April 17, 1982, when the *Charter of Rights and Freedoms* was proclaimed in force. Of particular relevance to obscenity are the fundamental freedoms guaranteed by section 2.b of the *Charter*: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The *Charter* soon had a number of impacts on obscenity related matters. For example, on March 31, 1983, the Ontario Divisional Court ruled that the power of the Ontario Censor Board (now called the Ontario Film Review Board) to order deletions from movies or to ban certain motion pictures entirely was an unreasonable limitation on the freedom of expression guaranteed under the *Charter*. The Ontario Court of Appeal subsequently upheld this decision. Another *Charter* case arose with respect to the *Customs Tariff* which was still explicitly using a Hicklin test:

> Under the *Customs Tariff*, customs officials were, until 1985, empowered to forbid entry into Canada of material of an "immoral or indecent" character, as determined by reference to community standards; the scope of those words was wider than that of "obscenity". Thus a broader range of materials could be kept out of the country by administrative action than by criminal prosecution. On 14 March 1985, however, the Federal Court of Appeal found that this provision was too vague to be compatible with the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms* and, therefore, was of no force or effect. The *Customs Tariff* was subsequently amended to change the reference in the schedule to materials "deemed to be obscene" under subsection 163(8) of the Code, or found to be hate propaganda under section 320(8). (Robertson 1994: 6)

The most significant recent finding, however, was the February 27, 1992, Supreme Court of Canada decision in *R. v. Butler*. At issue was the constitutionality of the obscenity provisions in the *Criminal Code*. The Court concluded that although Section 163(8) infringes on Section 2(b) of the *Charter*, it can

be demonstrably justified under Section 1 of the *Charter* which "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Judge Sopinka's decision contains an assessment of the judicial interpretation of Section 163(8) of the *Criminal Code*. If a work is obscene, "the exploitation of sex in a work must not only be its dominant characteristic, but such exploitation must be 'undue'" ([1992] 1 S.C.R., p.475). The most important test for whether the exploitation of sex is "undue" is the community standard of tolerance test.[17] This test "is concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate **other** Canadians being exposed to" ([1992] 1 S.C.R., p.475).[18]

The 1992 Supreme Court decision specifies how the community tolerance test relates to the *Criminal Code*:

> The courts must determine as best they can what the community would tolerate being exposed to on the basis of the harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner.... Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its functioning.... The stronger the inference of a risk of harm, the lesser the likelihood of tolerance....
>
> ... the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.
>
> If material is not obscene under this framework, it does not become so by reason of the person to whom it is or may be shown or exposed nor by reason of the place or manner in which it is shown. The availability of sexually explicit materials in theatres or other public

---

[17] Sopinka affirmed that the *community standard* to be applied is a national one. ([1992] 1 S.C.R., p.476). Price elaborated:

The standard is not one of a small segment of the community such as a university community: *R. v. Goldberg and Reitman* (1971), 4 C.C.C. (2d) 187, [1971] 3 O.R. 323 (Ont. C.A.).

The standard is not that of one city: *R. v. Kivergo* (1973), 11 C.C.C. (2d) 463 (Ont. C.A.).

The standard is that of Canadians in general, urban and rural, from coast to coast: *R. v. MacMillan Company of Canada Ltd* (1976), 31 C.C.C. (2d) 286, at p. 322 (York, Ont. Cty Ct). (Price 1979: 306, n. 24).

[18] Judge Sopinka was here affirming Dickson C.J.'s statement (in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R., at pp.508-509): " The cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it."

> places is subject to regulation by competent provincial legislation. Typically such legislation imposes restrictions on the material available to children. ([1992] 1 S.C.R., 485)

This last clause suggests that if computer bulletin boards had sexually explicit material which "is not violent and neither degrading nor dehumanizing" then it would not be regarded as obscene even if teenagers could access the material. Material does not become obscene "by reason of the person to whom it is or may be shown." Nor can it be viewed in isolation; sexually explicit material may be exempt according to the "internal necessities" test:

> The portrayal of sex must then be viewed in context to determine whether undue exploitation of sex is the main object of the work or whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Any doubt in this regard must be resolved in favour of freedom of expression. ([1992] 1 S.C.R., 454-455)

Through case law, the boundaries of obscenity and the relation between both purviews and levels of responsibility continue to be defined:

> In October 1993, the Ontario Court of Appeal ruled that the definition of obscenity is limited in order to capture only material that creates a substantial risk of harm. Moreover, the fact that films or videos have been approved by a provincial agency such as the Ontario Film Review Board, while relevant in terms of community standards, does not amount to a lawful justification or excuse for their content, or a bar to prosecution. (*R. v. Hawkins* (1993), 15 O.R. (3d) 549). The Supreme Court of Canada agreed in April 1994 to hear an appeal of this case. (Robertson 1994: 14)

As this brief review indicates, it is important to acknowledge that the Canadian legislative and judicial response to obscenity has been steadily evolving and responding to social change for more than a century. There is now a substantial body of case law which provides the parameters for conducting both the prosecution and defence of books, magazines, and videos deemed to be obscene. Although this body of knowledge and the legal processes which enact it have been explicitly developed for traditional mass media, they can nonetheless guide us in dealing with computer-based or on-line manifestations of obscenity.

Police Actions

There are a variety of mechanisms which enforce the laws pertaining to obscenity. The RCMP, various provincial police forces (some with special task forces such as Project P set up by the Ontario Provincial Police) and municipal police investigate cases of obscenity. The number of cases is actually fairly low and the number of convictions even lower.[19] Some of the complications which arise in law enforcement activities regarding obscene material are evident from the following two cases:

---

[19] The criminal enforcement of obscenity does not appear to be a particularly large enterprise of control. The most recent comprehensive study is, unfortunately, more than ten years old. At that time, less than 300 Canadians were charged each year with the offence; those convicted were invariably fined for their conduct [instead of being sentenced to imprisonment]. (Boyd 1984: 67)

> In April, 1991, police forces in 14 municipalities, acting on instructions from the Ontario Provincial Police antipornography unit, raided 22 Adults Only stores across the province and seized 10 tapes from each. Despite the film board's approval of the videos, Jorgensen was convicted on charges of distributing obscene material in Hamilton and Scarborough. He has appealed both decisions. Courts in some other municipalities acquitted him, some police forces dropped the charges, and a few cities are awaiting the outcomes of the appeal before deciding whether to proceed. Jorgensen is also facing a charge in Winnipeg based on a police seizure of nine tapes in June, 1992. (Jenish 1993: 55)

> In September 1991, Toronto police seized sexually explicit videotape as being obscene. Two people were charged with various criminal counts of owning and distributing obscene material, notwithstanding the fact that the tapes had been viewed and cleared by Ontario's Film Review Board. This incident highlights the differences between the federal and provincial laws. It also illustrates the problems of enforcement of the obscenity provisions when some provinces adopt a more lenient attitude than others and the difficulties and unpredictability inherent in the "community standards" test. (Robertson 1994: 13)

There are two significant police actions pertaining to the use of computer bulletin boards to distribute pornography. On May 20, 1993, the Winnipeg Police raided eight computer bulletin boards located in the homes of six adult males and two male juveniles. Another operation was undertaken in the fall of 1993, when the Metro Toronto Police raided 10 homes in a crackdown of pornography on computer bulletin boards. Research is under way to ascertain the details of these incidents, whether they went to trial and, if so, the outcome of the trials.

We have seen a fairly unstable picture emerge with respect to a medium such as videotape, which has had more than a decade (plus a long motion picture history) to establish rules, procedures and mechanisms for dealing with obscenity. The situation is even more inchoate if we turn to the problem of obscene material on computer bulletin boards.

Problems of Enforcement

With respect to controlling violations which arise from traditional pornography, there are two main obstacles. First, various bodies at the federal, provincial, and municipal levels have jurisdiction which can lead to confusion among law enforcement and public alike. Secondly, there are indicators that the arrest rate for obscenity charges is low compared to other vice crimes. The conviction rate is even lower. Boyd, in one of the few long term empirical studies, summarizes:

> The criminal enforcement of obscenity does not appear to be a particularly large enterprise of control. Less than 300 Canadians are charged each year with the offence; those convicted are invariably fined for their conduct [instead of being sentenced to imprisonment]. (Boyd 1984: 67)

We must bear in mind that these figures pertain to obscenity charges in all media (film, video, books, magazines, live performance, and paraphernalia).

As long as one is dealing with *tangible media* (such as pornographic CD-ROMs), the problems arising from computer-based pornography are similar to those regarding books, magazines or videos. A completely new set of difficulties, however, arises with material distributed over computer networks. The *problem of detection*, for instance, cannot be overcome technically without massive social surveillance -- an untenable option because it would violate the privacy of individuals on a scale

intolerable in Canada. Bulletin boards are easy to set up and difficult to track down, particularly if the BBS is operating covertly rather than publicly. A private BBS with adequate login security could engage in illicit activity which no one would know about except the users.

The maxim "*bits know no boundaries*" highlights both the problems of detection and *problems of prosecution*. Transborder flows of information in the form of satellite transmission and telecommunications traffic are virtually impossible to monitor and even more laborious to obstruct. Satellite transmissions have already created questions of whether a law is being transgressed in one country but not in another (e.g., a pornographic television channel intended to serve one European country could also be received in another).

International computer networking leads to similar enforcement difficulties. Assume that a Canadian operates an Internet server or a BBS located in another country. Except for any physical on-site problems (for which local arrangements could be made), it would be quite feasible to maintain the site over a telephone line or a computer network even though it was thousands of miles away. Canadian laws regarding obscenity could be flouted. Consider another, probably more common, example. Messages could be posted to a newsgroup by an individual in another country and distributed to a Usenet host in Canada. An identical dilemma occurs with respect to the uploading of files to an online ftp archive. Assuming that the culprit could be identified -- a not inconsequential problem -- it may be difficult to actually prosecute the individual. Serious challenges to law enforcement are posed by both the *jurisdictional difficulties* (provincial, inter-provincial, international) and the *co-ordination of law enforcement agencies* such as the RCMP, provincial police, and municipal police.[20]

Controlling Access to On-line Pornography

USENET already provides a number of means of restricting local user access. If they wish, the operators of publicly accessible USENET hosts could refrain from carrying certain adult-oriented newsgroups or, like Prodigy Services Co., only grant Internet access to children if they have received parental consent. Individuals can also exercise control simply through their choice of newsgroup subscription. These safeguards could be enhanced further by using technological controls. Nearly every newsreader comes with a "kill-file" option that allows users to set the software to automatically delete messages based on (i) origin, (ii) subject line, or (iii) words contained in the message. Unfortunately, many people are unaware of these capabilities. Some members of the community may be aware but share the common problem of having difficulty programming a VCR -- for them, customizing a newsreader can be a daunting task. A range of options should be available to meet the expanded Internet community.

Newsreader programs could be equipped with password controls and the like so that unsupervised children could not subscribe to additional newsgroups. Only a parent or teacher with the correct password could add any additional newsgroups. Measures of this sort are becoming more common. For example, "Jostens Inc. recently released software for schools that allows teachers to block electronic bulletin boards that contain pornographic pictures" (Sandberg 1995: B2).

---

[20] There are also ancillary problems. Suppose the culprit cannot be tracked down or that if located, cannot be prosecuted. In such a circumstance, even though one might argue that the liability of the owner of the Canadian host computer should be minimal, the public pressure that "something must be done" may make the host computer an unwarranted target.

"Gopher" servers used for browsing by special audiences such as school children, could be customized with built-in constraints to restrict searches. Such controls would curb neophyte extravagance; although an enterprising explorer, by connecting from one gopher to another, could eventually gain access to material that was screened out at the local site. Even this sort of activity is not unmanageable if one judges by Surfwatch Software Inc.'s solution recently described in the Wall Street Journal:

> Surfwatch's [vice-president of marketing] Mr. Friedland said that the software contains the Internet addresses of computers storing sexually explicit material, blocking a user's attempt to access those computers. But such porno-troves often are a moving target: once users find out about them, those computers tend to get overwhelmed by traffic, shut down and move elsewhere on the network and take a new address.
>
> To counter that problem, Surfwatch will charge users a subscription fee for software updates that include new offending Internet addresses. The company is using a database to search the Internet for words such as "pornography" and "pedophilia" and make a list of Internet sites, which won't be visible to users. That's no easy feat, said Mr. Friedland, because "pedophilia is spelled like four different ways." He added, "People often ask us if we'll sell that list. We're not going to." (Sandberg 1995: B2)

One of the most promising areas for introducing control mechanisms are **adaptive filters**, sometimes called "know-bots" or artificial agents. The idea of filtering the many megabytes of daily USENET feed crossed the line from daydream to reality when Stanford University's Department of Computer Science made accessible a *Netnews Filtering Server* (netnews@db.stanford.edu). As their February 1994 announcement states:

> A user sends his profiles to the service, and will receive news articles relevant to his interests periodically. Communication to and from the service is via e-mail messages.
>
> A user's profile is, in the style of WAIS ... queries, just a plain piece of English text; e.g., "object oriented programming," or "nba golden state warriors basketball." Based on the statistical distributions of the words in the articles, scores are given to evaluate how relevant they are to a profile. The highest possible score given to an article document is 100. The user can specify the minimum score for an article to be delivered. (tyan@cs.stanford.edu, February 1994)

This approach is interesting for two reasons. First and foremost is its main function: to filter through USENET looking for articles that match a profile defined by a specific individual. Second, is the fact that the filter is adaptive: an individual can send the server feedback. This type of feedback helps the program to fine-tune its profile search, making it more efficient at fulfilling personalized requests.

Although the *Netnews Filtering Server* is currently used to **search for** articles, there is no reason in principle why it could not be modified to **screen out** offensive or inappropriate messages. If an individual does not wish to receive USENET articles on particular topics or dealing with certain kinds of subject matter not subscribing to a newsgroup is obviously the first line of defense. A software filter would provide an added layer of protection by intercepting messages from self-styled propagandists or miscreants who cross-post messages outside designated newsgroups (for example, a message intended for the consensual sexual discourse of *alt.sex.incest* could be maliciously cross-posted to *alt.abuse-recovery*).

Just as Stanford's adaptive filter can handle hundreds of individual profiles, a similar filter at a USENET host-site could operate with hundreds and eventually thousands of user profiles. Those who chose to receive adult-oriented material could provide proof of age and have their profile adjusted accordingly. The adaptive filter, however, could selectively screen out posted messages so that children for whom such material would be inappropriate or adults who find such material objectionable would not be exposed to offensive content.[21]

It is also be feasible for individuals to install newsfilters and similar software monitoring programs on their home PCs rather than having to rely on the facilities of an information provider. A Vancouver software developer is currently marketing a product called *Net Nanny* which is an alphanumeric input-output scanner with password protection and other features:

> The program works along side operating systems but without the knowledge of those one may wish to protect. First a parent selects and inputs information into *Net Nanny*'s dictionary, like adult-content bulletin board service's (BBS) access numbers, explicit words or phrases and personal information such as children's names, addresses, phone numbers or any other information to be kept private. If any of these are typed on the PC's keyboard, or received during a data conversation a "hit" is registered, logged and if desired, the keyboard locks-up and the system automatically shuts down. The system cannot be disengaged without utilizing the *Net Nanny* administration program. A variety of security functions are also provided. (fax from Net Nanny Inc.)

These technological approaches support individual freedom and responsibility. Arguing that the government should shut down adult-oriented bulletin boards just because an eight-year old can use a computer is analogous to saying that the sale of alcohol should be banned because children know how to use bottle-openers. Those who choose to have a liquor cabinet at home or keep beer in the refrigerator will exercise parental responsibility. Similarly, the responsible use of computers begins in the home. Given the decentralized structure of the Internet, bits and bytes are virtually impossible to control completely whether by technological or legislative means. In their pamphlet on "Child Safety on the Information Highway", the National Centre for Missing and Exploited Children states:

> The best way to assure that your children are having positive online experiences is to stay in touch with what they are doing. One way to do this is to spend time with your children while they're online. Have them show you what they do and ask them to teach you how to access the services.
>
> While children and teenagers need a certain amount of privacy, they also need parental involvement and supervision in their daily lives. The same general parenting skills that apply to the "real world" also apply while online.

---

[21] Text filters are not a panacea, there are trade-offs which should be kept in mind. Although they may offer assistance to individuals or guardians, simple pattern-matching is a far cry from natural language comprehension or any pragmatic understanding. One of the most troubling examples which comes to mind affects hate propaganda rather than sexually explicit messages. Although, for example, it would be a simple matter to block out hateful messages which employed derogatory terms, a message from one of the more sophisticated Holocaust deniers would probably slip through. Any attempt to screen out every message containing Holocaust denial would probably have the side effect of blocking all messages pertaining to the Holocaust -- including refutations of Holocaust deniers and virtually all legitimate historical discussion as well. Paradoxically, such a consequence would achieve the ends of the Holocaust deniers. This example highlights that on its own a quick technical fix is insufficient.

> If you have cause for concern about your children's online activities, talk to them. Also seek out the advice and counsel of other computer users in your area and become familiar with literature on these systems. Open communication with your children, utilization of such computer resources, and getting online yourself will help you obtain the full benefits of these systems and alert you to any potential problem that may occur with their use. (NMEC 1994)

Just as we street-proof our children so that they can play outside safely, we must also teach our children some basic rules so they can be safeguarded when exploring the information highway.

CHILD PORNOGRAPHY: EXTENT OF THE PROBLEM

One of the first comprehensive investigations of child pornography in Canada was conducted by the Committee on Sexual Offences against Children and Youths (the Badgley Committee). Its August 1984 report concurred with a recent investigation by the Department of Justice which concludes that "child pornography is neither professionally made nor commercially produced in Canada ... it is 'homemade' by paedophiles who have communication networks and exchange clubs." The amount of child pornography entering Canada appears to be quite small. Revenue Canada (Customs and Excise) data on seizures and detentions of prohibited materials from January 1986 to November 1990 indicates that only 1.3% of almost 39,000 enforcement actions involved child pornography.

While society at large adopts a zero-tolerance attitude toward child pornography, there are very small pockets of support for paedophilia. NAMBLA (North American Man-Boy Love Association) is a U.S. organization headquartered in New York that advocates consensual sex between male adults and male minors. The organization distributes a publication called the NAMBLA Bulletin. In the June 1990 issue of Rites it was reported that NAMBLA had approximately 500 members and the Bulletin had a readership of about 1100, some of which were reported to live in Canada.

Although many countries make the production and distribution of child pornography illegal, the possession of such material is not universally prohibited. In Denmark, Finland, and Sweden for example, possession of child pornography is legal.[22] Amendments to criminalize possession have recently been introduced in Canada, Germany, Norway, the United States and the United Kingdom. The international dimension has been highlighted by The Ottawa Citizen:

> In March 1993, an international porn bulletin board ring was silenced with simultaneous raids in the U.S. and Denmark.
>
> Earlier this month, an FBI hacker discovered a child pornography archive at Birmingham University in England. It was accessible via bulletin boards in 160 countries when police closed it down and arrested a university researcher. (Abraham 1994)

In the United States, child pornography does not receive First Amendment protection (Federal statute: 18 USC 2252). Whereas the body of case law regarding child pornography has been developing for many years (for example, *New York v. Ferber*, 458 U.S. 747 [1982]), law enforcement and the courts have only recently begun to turn toward computer-mediated instances. A number of computer bulletin boards, for example, were raided for child pornography in December 1993: charges were laid against the sysop of a BBS in North Carolina (CU Digest, #5.94) and in a separate incident against another in Medford, Massachusetts (CU Digest, #6.02).

The following testimony of police detective Norren Wolff, before a House of Commons committee on crime prevention, illustrates some of the Canadian enforcement problems related to child pornography prior to 1993 *Criminal Code* amendments. While executing a warrant on a suspected sexual offender,

---

[22] Alexia Lewnes reports:
A major child pornography ring, involving more than 100 people, was discovered in Sweden in 1992. Of those, only three were charged, since possession is legal.
"In Sweden, you are allowed to distribute child pornography to a close circle of friends," says Helena Karlen, Project Leader for Radda Barnen [Swedish Save the Children]. "It only becomes illegal when it is distributed to the public for commercial purposes, which is extremely difficult to prove." (Lewnes 1994)

Wolff retrieved copies of NAMBLA's Bulletin, a Dutch paedophile magazine, Paedika, and publications from the U.S.-based Rene Guyon society. When charges were not laid, the publications were returned to the individual. According to Wolff: "the photographs in the NAMBLA magazine are not in themselves pornographic and there's really nothing (in the *Criminal Code*) covering the written word, so I think we would have trouble getting a conviction" ("Ban on pedophilic publications demanded". Vancouver Sun. January 21, 1993, A3).

On August 1, 1993, the *Criminal Code* was amended to include provisions making child pornography an offense. It defines child pornography as:

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> > (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
> > (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
>
> (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act. (Section 163.1)

The new amendments to the *Criminal Code* not only prohibit the production, distribution and sale of child pornography but in addition make possession of such material a criminal offence.

Although Canadian owners of computer bulletin boards have been charged under obscenity provisions, preliminary research indicates that only a few Canadian systems operators have been charged under the child pornography provisions of Section 163.1 of the *Criminal Code*. One of the more controversial cases involves a March 1995 search warrant sanctioning law enforcement action against a couple of hobby bulletin boards in Vancouver (a court date has been set for May 31, 1995).[23] The media have reported a number of other recent cases, for example the May 22, 1995 Maclean's relates:

---

[23] Many in the British Columbia BBS community were outraged by the raid (see the log of BBS discussions at gopher://insight.mcmaster.ca). The owner of one of the raided bulletin boards, for example, had corresponded with the B.C. Attorney General in May 1994, explaining that he operated an adult bulletin board. He outlined how he validated everyone who accessed the BBS to ensure that they were adults (using call-back procedures and requiring a hardcopy proof of age). In his letter to the Attorney General he stated: "It is my desire to operate this BBS within the law. What I would appreciate knowing is firstly, are we doing everything we are obliged to do to prevent access by minors? Secondly, what are the laws regarding what an "adult" BBS may or may not carry online?" The Attorney General responded in July 1994:

> I appreciate your concerns on operating such a service: however, I regret that I cannot provide a legal opinion based only on the points raised in your letter. I have taken the liberty of sending you a copy of the section in the Criminal Code pertaining to obscenity (section 163) and the amendments on child pornography, for your information. You may wish to consult a lawyer for advice on your responsibilities regarding computer bulletin boards, obscenity, and safeguarding adult materials from minors.

Observers of the case remarked that it was curious that the search warrant indicates that police action began shortly afterward specifically referring to activity "Between the dates of September 21, 1994 and February 20, 1995..."

> In Calgary last month, police say they discovered a trove of kiddie porn in the home of a man who had already been charged with sexual assault and sexual contact with a child. "We seized several dozen videotapes, written communication and computer disks, and it all depicted child pornography," says Staff Sgt. Fred Bohnet, who is in charge of the child abuse unit of the Calgary Police Department. The evidence, he adds, indicates a national and international child pornography ring operating from computers in Canada, the United States and Europe. Alan Norton, 52, has pleaded not guilty to 51 charges of possession of child pornography, in addition to the sexual assault and contact charges. (Chidley 1995: 58)

Given that the new child pornography provisions have only been in effect for less than two years, it is evident that it is still too early to assess their impact on the online world.

HARASSMENT

Harassment covers many forms of offensive behaviour including -- but not limited to -- unwelcome communication.[24] Harassment has been defined as an abusive attempt to assert power over another person. It can be committed on the basis of race, marital status, age and national or ethnic origin. Some people are harassed because of their political or religious beliefs, others because they have physical or mental disabilities. In a society characterized by sex-stratified divisions of power, probably the most pervasive form of harassment is the sexual harassment of women.

As was discussed earlier with regard to obscenity and new media, the problems of our face-to-face interpersonal world are being carried over into cyberspace. Preliminary investigations have shown that there are a number of different forms of online and computer-based harassment including various forms of offensive e-mail, "net-stalking" and computer-mediated harassment in public places (such as displaying pornographic images on computer monitors in classrooms or offices). If we are to understand the nature of computer-based harassment and potential solutions for controlling it, we must have a solid foundation in the existing laws and instruments already in place.

Over the past twenty years, extensive mechanisms for legal recourse have been established at the federal, provincial and local levels of government. The *Canadian Human Rights Act* is an anti-discrimination law which was adopted in 1977 and took effect in March 1978. Section 3 of the *Act* declares the prohibited grounds of discrimination to be: "race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted." Harassment is made illegal under Section 14 of the *Act*:

> (14) (1) It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
>
> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.
>
> (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

The act applies to all federal government departments and agencies, Crown corporations, and businesses and agencies under federal jurisdiction. Provincial human rights laws provide protection in those areas which are not under federal jurisdiction.

---

[24] For example:
Harassment is any unwelcome physical, visual or verbal conduct. It may include verbal or practical jokes, insults, threats, personal comments or innuendo. It may take the form of posters, pictures, or graffiti. It may involve touching, stroking, pinching or any unwelcome physical contact, including physical assault. Unwelcome sexual acts, comments or propositions are harassment. (Canadian Human Rights Commission 1991: 1)

If harassment takes place at work, victims can file complaints with their employer or their union. Under many circumstances, victims can also register complaints with the Canadian Human Rights Commission. The Commission received 208 harassment complaints in 1992; "approximately 63 percent or 128 actual cases were for sexual harassment" (Falardeau-Ramsay in Geller-Schwartz 1994: 46).

There have been a number of significant Canadian Supreme Court cases pertaining to harassment. For example, *Robichaud v Canada (Treasury Board)* established the responsibility of an employer for an employee's unauthorized discriminatory acts in the workplace.[25] In his 1987 decision, Judge La Forest explained that:

> ... the Act... is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected. ([1987] 40 D.L.R. (4th), 581)
>
> ... I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. ([1987] 40 D.L.R. (4th), 584)

The decision in *Robichaud* also indicated that if an employer is held liable, the degree of redress would be balanced by such factors as whether there was an explicit company policy regarding sexual harassment, whether there were procedures in place to handle complaints, and so on.[26]

Another important Canadian Supreme Court decision pertaining to sexual harassment was reached in *Janzen v. Platy Enterprises Ltd.* (1989). The issue before the Court was whether sexual harassment in the workplace constituted discrimination on the basis of sex. The original case had been tried in Manitoba where the province's *Human Rights Act* dealt explicitly with discrimination on the basis of sex

---

[25] This is under the condition that an employer is subject to the *Canadian Human Rights Act* (ie., the employer is a federal government department or is under federal jurisdiction). Arjun P. Aggarwal has contended "that the impact of the Supreme Court decision is not confined to employers under federal jurisdiction; employers in all jurisdictions are affected..." (Aggarwal in Geller-Schwartz 1994: 65). This should not be taken to suggest that the jurisdictional scope of the *Canadian Human Rights Act* was expanded by the *Robichaud* decision. Employers in "all jurisidictions" are only affected in so far as courts will consider the *Robichaud* decision when interpreting the provincial rights codes which apply to those employers. Aggarwal's analysis indicates the Supreme Court decision will have a broad impact because of its clarification of the principles inherent in human rights legislation.

[26] Judge La Forest stated:
I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may none the less have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability. (D.L.R. 585)

but not with sexual harassment.[27] A board of adjudication found that the appellants, Janzen and Godreau, had been victims of sex discrimination. On appeal, the Manitoba Court of Queen's Bench upheld the adjudicator's decision. Platy Enterprises appealed the decision to the Manitoba Court of Appeal ([1986] Dominion Law Reports, 33 D.L.R. (4th), 32-71). Agreeing with the employer, Huband J.A. decided that "Sexual harassment is not discrimination on the basis of sex under the terms of the *Human Rights Act*" ([1986] 33 D.L.R. (4th), 33). Similarly, Twaddle J.A. concluded, "There is no legal duty on an employer to provide a workplace free of sexual harassment" ([1986] 33 D.L.R. (4th), 34). The Supreme Court of Canada, however, set aside the judgement of the Court of Appeal of Manitoba and restored the judgement of the Manitoba Court of Queen's Bench. In his decision, Chief Justice Dickson formulated an important definition:

> ... sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas* ..., and as has been widely excepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. ([1989] 1 S.C.R., 1284)

Although reservations have been expressed as to whether this definition of sexual harassment is broad enough to capture all gender-based harassment, the Supreme Court's decision does have the effect of prohibiting sexual harassment as defined in all jurisdictions in Canada. With this background, we can now turn to computer-mediated forms of harassment.

COMPUTER-MEDIATED HARASSMENT

The Canadian university crackdown on USENET's *alt.sex* in the spring and summer of 1992 has often been cast in terms of freedom of expression versus censorship. The response by the University of British Columbia Task Force, however, indicated that the problem could be repositioned. Among the most frequently reported incidents said to have kindled the crackdown were those that would appear to

---

[27]The Manitoba *Human Rights Act* was repealed in 1987 and replaced with *The Human Rights Code* which expressly prohibits sexual discrimination in the workplace and defines harassment as "a series of objectionable and unwelcome sexual solicitations or advances".

be less the dissemination of obscenity than flagrant instances of sexual harassment.[28] To quote a Globe & Mail article, a University of Manitoba women's-centre worker named Danishka Esterhazy:

> ... said a female student could walk into a computer laboratory and find a picture of a woman being raped on the computer screen next to her, hear male students laughing as they read about a woman being tortured, or be forced to wait at a computer printer while a male student got a printout of an obscene photograph of a woman. (Moon 1992)

These are quite likely instances of harassment as can be gathered by referring to the Introduction to the Canadian Human Rights Act, which explicitly includes among its examples of harassment the "displaying of pornographic, racist or other offensive or derogatory pictures" (Canadian Human Rights Commission 1985: 23). It does not matter whether the offensive image is indelibly inked on glossy magazine paper or projected on a computer monitor: displaying pornographic images in public places[29] is potentially a violation of the *Canadian Human Rights Act*.[30]

There is also an important distinction to be emphasized between attempts to control the problem using obscenity laws rather than human rights codes. There is no reason to ban a USENET newsgroup that contains sexually explicit material which is not obscene under the *Criminal Code*. Someone who

---

[28] Note that the 1988 University of Waterloo decision to discontinue certain newsgroups was not framed in terms of harassment, nor was it explicitly formulated in terms of obscenity. Waterloo's most recent January 1994 decision to drop five newsgroups (thereby reversing decisions made in their 1991 policy) was also not formulated with respect to harassment; however, this time it was explicitly framed in terms of obscenity. According to the President of the University: "under the Criminal Code it is an offence for anyone to publish or distribute obscene material, and the University is running a risk of prosecution if it knowingly receives and distributes obscene material. In these circumstances I felt the University had to protect itself." (Kadie 1994)

[29] This does not cover all public places. It is evident that movie theatres with restricted admittance, adult video stores, and strip clubs are a certain sort of public place and yet routinely display pornographic images. There have been attempts to define where the line is drawn:

> Anti-pornography activists are attempting to move their fight into the realm of human rights law, and seek to build on previous cases in which depictions of naked women in the workplace have been found to be harassment of female employees. The Ontario Human Rights Commission recently argued before a board of inquiry that the presence of men's sex magazines in corner stores is a form of discrimination against women. The case targets "soft-core" materials, such as Penthouse and Playboy, which are generally considered to meet the community standard of tolerance outlined by the Supreme Court of Canada in *Butler*. In a 2-1 decision, the case was dismissed on a preliminary motion on the basis that the Commission had not complied with its statutory obligation to endeavour to effect a settlement before proceeding to a board of inquiry (*Findlay and McKay v. Four Star Variety*, 22 October 1993). (Robertson 1994: 9)

The Québec Court of Appeal recently struck down City of Montréal by-law #8887 "qui interdisait aux propriétaires de commerces érotiques (bars de danseuses, peep shows, clubs vidéos, etc.) d'utiliser dans leur affichage «la représentation du corps humain»" (Boisvert 1994).

[30] Under the proviso that this is done "in the provision of goods, services, facilities or accommodation ... and in matters related to employment".

persists, however, in displaying pornographic images on a computer monitor located in a public place such as an office, factory, university computer centre or library is engaged in a discriminatory practice.

One of the other forms of electronic harassment is offensive e-mail which, in certain respects, overlaps with the broad field of privacy. Although the term "offensive e-mail" could designate many things, the most serious corresponds less to the postal analogy of junk mail and more to a disturbing telephone parallel -- obscene calls. Telephone harassment is covered in part by the *Canadian Human Rights Act* (for example, S.13 prohibits hate messages) as well as by S.372(3) of the *Criminal Code* which states:

> Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction.

In addition to legal avenues, there are a variety of technical solutions available to anyone who desires to block out e-mail being sent to them by particular individuals. For example, those on Unix systems using the elm mail program have a filter option. There are also mail filtering programs such as procmail (available on many ftp sites).

Just as the most perilous form of sexual harassment is sexual assault, perhaps the most dangerous form of electronic harassment is "net stalking". Given the public's justifiable concern about "sexual predators", it is not surprising that any case of computer networks being used to stalk victims attracts media attention. One of the rare cases of "net stalking" was reported in papers across the continent, including The Ottawa Citizen which wrote:

> Police in Cupertino, California charged a 27-year-old engineer last month for an attack on a 14-year-old boy. The accused, who called himself HeadShaver on the America Online computer network, had several online chats with the boy before luring him to meet in person.
>
> Police allege HeadShaver tortured and raped the boy, then ordered him to write about the experience online. The boy's father discovered the electronic account and went to police, who have since been overwhelmed with phone calls about other "HeadShavers" on the Net. (Abraham 1994)[31]

The immediacy of response, relative anonymity, and illusion of intimacy which sometimes characterizes communication via computer bulletin boards and chat lines occasionally induces many of us to lower our guard. If those of us who perceive some of the risks still miscalculate, surely it is incumbent on us to empathize with those who are even more vulnerable.

Just as we "streetproof" our children, we should also teach them how to be safe on the information highway. Howard Rheingold's reflections are worth repeating:

---

[31] Rosenberg quoted an April 6, 1994 newsgroup posting which provided the outcome of the trial: "A Santa Clara prosecutor says a Cupertino man [Deatherage] pleaded no contest to charges he used a computer bulletin board to contact a 14-year-old boy with whom he later engaged in sadomasochistic sex..." (in Rosenberg 1994: 23). Based on a recent television news report, the no contest plea (rather than a guilty verdict) may have been accepted because the juvenile apparently represented himself as being 16 (the age of consent in California).

I bought an Internet account for my daughter when she was eight years old, so we could exchange email when I was on the road. But I didn't turn her loose until I filled her in on some facts of online life. "Just because someone sends you mail, you don't have to answer them," I instructed her. "And if anybody asks if you are home alone, or says something to you that makes you feel funny about answering, then just don't answer until you speak to me."...

Teach your children to be politely but firmly skeptical about anything they see or hear on the Net.... Teach them that people are not always who they represent themselves to be in email, and that predators exist. Teach them to keep personal information private. Teach them to trust you enough to confide in you if something doesn't seem right. (Rheingold 1994: 95)

HATE PROPAGANDA

Canada has enjoyed a well-deserved reputation as a tolerant society. Yet racism and anti-Semitism, with roots more ancient than our nation's birth, continue to exist within Canadian society. Organized racist groups, often associated with extreme right-wing politics, are perhaps the most visible manifestation of racism and anti-Semitism. There are a number of such groups in Canada, although membership is not large (Barrett documented 586 persons in the early 1980s with estimates running into the low thousands). Among the main organizations are the following:

(i) Events in the 1970s (a revival of the Ku Klux Klan in the U.S. and the re-emergence of fascist groups, particularly around Toronto) contributed to the formation of the Canadian Knights of the Ku Klux Klan in 1980, spear-headed by James Alexander McQuirter. In Canada, the Klan had virtually disappeared since the 1930s. Its peak had been reached in the late 1920s when it had thousands of members across the country and a particularly high concentration in Saskatchewan (1927 provincial estimates range between 10,000 and 40,000 members).

(ii) The white-supremacist Western Guard, which emerged out of the Edmund Burke Society in Toronto in 1972, has been under the leadership of John Ross Taylor since 1976.

(iii) Donald Clarke Andrews, forbidden by court order to associate with the Western Guard (which he led from 1972-76) created the National Citizens Alliance, soon renamed the Nationalist Party.

(iv) Among the most recent groups to emerge is the Heritage Front which went public in November 1989, headed by Wolfgang Droege, who had been McQuirter's lieutenant in the Canadian KKK.

(v) There are a variety of other groups including the Canadian National Socialist Party, Concerned Parents of German Descent (its most prominent member being Ernst Zundel) and the Aryan Nations (founded in the US by Richard Butler, its Canadian branch is headed by Terry Long in Alberta).

The first wave of post-World War Two hate propaganda in Canada occurred in the early 1960s and prompted the government to constitute the Cohen Committee. The Report of the Special Committee on Hate Propaganda in Canada (1966; aka the Cohen Report) remains one of the most extensive analyses of the organized dissemination of hate in Canada. The report focused on the spread of pamphlets and magazines:

> The current hate campaign dates from early 1963, when it began in the Toronto area. Since then it has extended to several other centres in Ontario, and to at least seven other provinces... From 1963 on there was and continues to be a steady dissemination of hate propaganda, mainly anti-Jewish, anti-Negro and neo-Nazi in nature.... The printed, mimeographed and other written materials seem to be obtained in large measure, although not exclusively, from American sources. In many instances it is mailed directly from Arlington, Virginia, the headquarters of the American Nazi party and the World Union of National Socialists, and from Birmingham, Alabama, the headquarters of the National States Rights Party and its organ, "Thunderbolt"... (Canada. Special Committee on Hate Propaganda, 1966: 12-13)

The Cohen Committee recommendations formed the basis of some of the key hate propaganda provisions, s.318-320 of the *Criminal Code*, which were adopted by Parliament in 1970.

A second wave of anti-Semitic and racist activity erupted in the mid-1970s. Some of these racist and anti-Semitic themes became enmeshed with various strains of Christian fundamentalism.[32] Not all forms of prejudice, however, wrapped themselves in the garb of theology. For example, certain manifestations of historical revisionism (particularly "Holocaust denial" literature) and psychometric theories of racial superiority sought respectability by adopting scholarly trappings. Canadian youth espousing white supremacist and neo-nazi ideologies began to appear in the 1980s among various factions of the skinhead subculture. Rosen states:

> This second wave of hate propaganda and racist group activity gave rise to a flurry of reaction and a wide-ranging debate. Proposals for legislative change came from a 1982 Vancouver Symposium on Race Relations and the Law, the 1984 Report of the Special House of Commons Committee on Visible Minorities (*Equality Now!*), the 1984 Report of the Canadian Bar Association's Special Committee on Racial and Religious Hatred, the 1985 Report of the Special Committee on Pornography and Prostitution (Fraser Committee) and the Law Reform Commission of Canada's 1988 *Report on the Recodification of the Criminal Law*. (Rosen 1994: 2)

The bulk of the hate propaganda in Canada continues to be disseminated in the print medium: pamphlets, magazines, and books. Examples of other media, such as video cassettes and audio cassettes, appear with less frequency.

The primary electronic form of disseminating hate propaganda in Canada has been telephone answering machines. For example, in 1979, John Ross Taylor and the Western Guard Party were found to be in violation of section 13 of the *Canadian Human Rights Act* which prohibits the telephonic transmission of hate messages based on race or religion. Between 1977 and 1979, Taylor had operated a hate line using a telephone answering machine. In 1979 the Canadian Human Rights Commission issued a cease and desist order which was made an order of the Court in August of that year. The appellants did not cease and desist. In 1980, Mr. Justice Dubé found the appellants guilty of contempt of court, fining the Party and imposing a one year suspended sentence on Taylor. Between June 1982 and April 1983, Taylor ran another hate line through his telephone answering machine and once again the Human Rights Commission sought a Court ruling. Taylor countered that under the *Canadian Charter of Rights and Freedoms*, which came into force on April 17, 1982, his freedom of expression was being violated. The case reached the Federal Court of Appeal and a decision was rendered on April 22, 1987 -- Taylor's appeal was dismissed.

---

[32] Stanley Barrett argues that the motives of the individuals who comprise the extreme right in Canada have a religious component, and this is not restricted to overtly religious groups such as Christian Identity, Church of the Creator, or the Church of Jesus Christ Christian:

> The view is reflected specifically in the belief of extreme racists that religion -- the Christian religion -- condemns blacks and other coloured peoples to an inferior, subhuman level, and identifies Jews as the children of the Devil... White supremacists see intrinsic links between Western civilization, Christianity, and the white 'race'. Civilization, they believe, is the special prerogative of white people, for only they have been blessed by God with the moral and creative capacity to attain it. Their call to the battle lines is based on the assumption there exists today a massive, insidious, and relentless campaign by Jews and non-whites to attack the very foundation of Western Christian civilization. The contention of white supremacists is that if they lose the battle all mankind will suffer, for without the white man's leadership the world will descend into barbarism. (Barrett 1987: 5)

Taylor's use of telephone answering machines to promote hate is not an isolated case. On July 25, 1989, a Canadian Human Rights Tribunal upheld a complaint against Terry Long, Randy Johnston and the Church of Jesus Christ Christian-Aryan Nations for setting up a hate line which had been operating in 1987 and 1988. Similarly, in 1992, the Canadian Human Rights Commission sought court orders for two white supremacist hotlines set up by the Heritage Front in Toronto. The persistence of some of these groups is clearly illustrated by the recent activities of the Canadian Liberty Net. In January 1992, the Canadian Human Rights Commission announced a tribunal would be formed to adjudicate the case of a Vancouver hate line established by the Canadian Liberty Net (Kinsella 1994: 56-59). On March 3, 1992, a Federal Court injunction ordered the Canadian Liberty Net to stop transmitting telephone hate messages. Tony McAlcer, who launched the Vancouver hate line, then set up a hate line in neighbouring Washington state. The Canadian Human Rights Commission sought a contempt of court ruling. On July 12, 1992, the Federal Court found the Canadian Liberty Net in contempt of court for failing to obey the earlier injunction; fines and a prison sentence were subsequently imposed. The Canadian Liberty Net continued to pursue activities. On September 5, 1993, a Canadian Human Rights Tribunal ordered the Vancouver-based organization to stop their telephone hate messages. This was followed on January 27, 1994 by a Canadian Human Rights Tribunal ordering the Canadian Liberty Net to stop transmitting telephone hate messages directed against homosexuals.

COMPUTER-MEDIATED HATE PROPAGANDA

There are very few documented cases of racist groups using computer bulletin boards in Canada. The primary function of the white supremacist bulletin boards that have existed for almost a decade in the United States appears to be the exchange of information among individuals who *already* belong to racist organizations. Bulletin boards operated by the KKK or the Aryan Nations are not established to prospect for new converts, as is the aim with pamphleteering.

Although white supremacist bulletin boards tend to be covert, racist or anti-Semitic messages are fairly widely accessible in USENET newsgroups such as alt.revisionism and alt.skinheads. The most widely known of the revisionists on USENET are probably Dan Gannon, an American who posts anti-holocaust messages, and Serdar Argic who is preoccupied with Turkish-Armenian historical revisionism. Among skinheads, one of the most prolific posters is a Canadian from the National Capital Region who, in addition to regularly expressing his opinions on everything from fashion to fascism, uploaded a 'zine called SledgeHammer to alt.revisionism and alt.skinheads. Billing itself as "The Voice of the White Nations", the June 1994 issue included articles from German and American contributors (such as Christian Identity Pastor Pete Peters). The electronic magazine purports to be a monthly publication produced by the Gatineau chapter of the Northern Hammer Skinheads.[33] As with similar postings, this was soundly criticized by other net citizens (including anti-racist skinheads) who quickly flood the group with messages advocating tolerance or voicing their condemnation of racism and anti-Semitism.

---

[33] This skinhead organization is comprised of divisions which include the Confederate Hammer Skins (eight addresses in southern United States), the Eastern Hammer Skins (four addresses in eastern United States), a half a dozen addresses in Europe, and a couple in Australia. The Northern Hammer Skins have nine chapters in the U.S. (eg., Detroit and the mid-West) and six in Canada (three addresses listed for Québec (Lachine, Levis, and Gatineau); one in Toronto, Ontario; one in Winnipeg, Manitoba; and one in Surrey, British Columbia).

Ken McVay, a British Columbia resident, has gained respect among regular users of the Net for having devoted much of his spare time to combatting hate mongers. McVay and a number of American USENET enthusiasts such as Danny Keren and Jamie McCarthy scour newsgroups for racist and anti-Semitic postings. Rather than simply denouncing or insulting the hate propagandists, people like McVay, post evidence and historical arguments which refute the claims of Holocaust deniers and neo-Nazis. McVay also operates a listserver which provides access to thousands of documents on the Holocaust, as well as hundreds of articles documenting contemporary neo-Nazi and white supremacist activities. McVay has explicitly argued against censoring newsgroups such as alt.revisionism:

> "Dealing with these guys on a daily basis for over two years. Seeing how easy it is to shoot them down. And it is. The most intellectual among them are stupid and completely inept when it comes to historical research. And, of course, they are liars. That being the case, why on Earth would anyone want to shut them up or force them underground? I want to know who I'm dealing with. I want to know where they are. And I want to know how their minds work...
>
> "These online discussions are not aimed at getting Gannon and his pals to change their minds," McVay says. "That ain't gonna happen. It's to reach the rest - - such as the new users that pop up every September in universities and stumble on this stuff. Many don't know how Nazis operate. Most racists don't go around with a little patch on their shoulder proclaiming: 'I hate Jews, or blacks, or natives.' But it's there. We work to bring it out in the open." (Campbell 1994)

McVay's argument highlights a crucial difference between hate-promoting pamphlets or telephone answering machines with hate messages and USENET newsgroups. If a white supremacist group leaves pamphlets on car windshields or on benches in a public place, an unsuspecting individual who reads the pamphlet is presented with a one-sided diatribe. In USENET groups such as alt.revisionism or alt.skinhead, every time an anti-Semitic or racist message is posted, people like McVay, Keren or McCarthy post rational and well-researched counter-arguments. The presentation of multiple viewpoints ensures that a discussion group can never degenerate into a hotbed of hate propaganda.

If an entire newsgroup were to be censored, it would stifle the marshalling of opinions, evidence and arguments which counter inflammatory material. Messages from people such as Keren, McVay and McCarthy may sway some individuals from racist beliefs. More importantly, their public availability in newsgroups such as alt.skinhead provides others with the tools to fight prejudice. The very appearance of such postings clearly demonstrates that we are living in a tolerant, democratic society and thereby repudiates the lies of bigotry.

In the United States, many state and local governments have enacted "hate crime" statutes, although both types of statutes have been subjected to constitutional challenges on First Amendment grounds. Perhaps the higher threshold for political and religious speech partly explains why American white supremacists have been quicker to exploit more high-tech methods of spreading their message than the Canadian far right. In the mid-1980s, Tom Metzger of the White Aryan Resistance, used public access community channel cable television to spread the white-supremacist message on his own weekly TV talk-show. Metzger started the first computer bulletin board dedicated to hate in 1984, calling it the W.A.R. Board

(which, as expected, stands for "White Aryan Resistance").[34] Some time later, Lewis Beam, former Grand Dragon of the White Camellia Knights of the KKK founded the Liberty Computer Network, a small network of racist bulletin boards. There are also a number of neo-nazi skinhead bulletin boards in the United States. In the United States, the National Telecommunications and Information Administration (NTIA) was directed to prepare a report "on the role of telecommunications in crimes of hate and violence, acts against ethnic, religious, and racial minorities" (March 1993: 16340).

Large commercial systems in the U.S., particularly Prodigy, have in the past gained negative media coverage when anti-Semitic and anti-gay messages were circulated on certain discussion groups. The management of Prodigy currently responds to such occurrences more quickly by shutting down the offending discussion group.

In Canada, there are a small number of examples of hate messages being delivered over bulletin boards. In January 1992, a member of the Canadian National Party[35] disseminated anti-Semitic and racist messages on a number of Montreal computer bulletin boards. There are very few cases of white supremacist groups in Canada establishing computer bulletin boards,[36] although in the past few months, a pair of computer bulletin boards have emerged in Toronto. The *Politically Incorrect BBS* is advertised on U.S. sites as the "First Canadian White Nationalist board, sponsored by the Euro-Canadian Alliance"; it was joined a few months later by a companion bulletin board named the *Digital Freedom BBS*.

In the United States material championing far right politics, white supremacism, and Christian Identity is available on a number of file archives accessible by anonymous ftp as well as a handful of World Wide Web sites. For example, an information provider in Florida is the host for the "*Stormfront White Nationalist Resource Page*". Among the menu selections offered on this WWW page was a current online edition of *Up Front* (produced by The Heritage Front) billed as "Canada's premier White Nationalist magazine". Another U.S. Web site provides a link to Ernst Zundel's "*Voice of Freedom*"

---

[34] Chip Berlet downloaded material from four U.S. white supremacist bulletin boards (including the Aryan Nations and the KKK) during the period January-June 1985. The material was presented in the appendix to a conference paper on Telecommunications and Privacy which Berlet delivered in 1985. An electronic version is available from listserv@oneb.almanac.bc.ca (the filename is racist.bbs).

[35] This is a new name for an old Montreal Nazi group called the National Socialist Christian Party, active in the 1930s and 1940s.

[36] In early 1990, an eighteen year-old neo-Nazi named Bill Harcus organized a Manitoba chapter of the Knights of the Ku Klux Klan. For the next three years the Winnipeg-based KKK disseminated hate propaganda using leaflets, pamphlets and a telephone hate line out of Harcus's apartment. "According to evidence later presented in court, Harcus was attempting to set up a computerized white power 'bulletin board' in Manitoba with the assistance of Louis Beam, Jr., the former Texas Grand Dragon" (Kinsella 1994: 42) but the BBS was never operational.

banner. It offers an extensive bibliography of Canadian newspaper articles about Zundel as well as reviews of some of Zundel's publications.[37]

LEGAL FRAMEWORK

There are a number of federal statutes that have been used to successfully prosecute hate propaganda. The two main legal instruments are Sections 318-320 of the *Criminal Code* and the *Canadian Human Rights Act*.

Section 318 of the *Criminal Code* states: "Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."[38] Whereas section 318 is specifically concerned with the promotion of genocide, section 319 pertains to dissemination of hatred in two specific respects. First:

> (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
>
> (a) an indictment offence and is liable to imprisonment for a term not exceeding two years;
>
> or
>
> (b) an offence punishable on summary conviction.

One should note that a crime is committed only if the statements are communicated in a *public place*; which section 319(7) defines as "any place to which the public has access as of right or by invitation, express or implied." The necessity to draw a distinction between public and private occurs again in the second case covered by section 319:

> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

---

[37] The front end proclaims:

> Welcome to the Ernst Zundel / Voice of Freedom / Samisdat Publishers temporary World Wide Web site. This site is dedicated to providing truthful and honest information about Germany and Germans, past and present. All materials posted here are the personal opinion of the author!
> We believe that we are protected by the following laws and statutes: In Canada, Section 2b of the Charter of Rights and Freedoms; in the United States, by the First Amendment to the Constitution; and worldwide by Article 19 of the United Nations Convention on Human Rights.

[38] Of particular relevance are the subsections of 318:

> (2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
>
> (a) killing members of the group; or
>
> (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
>
> (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin...

(a) an indictment offence and is liable to imprisonment for a term not exceeding two years;

or

(b) an offence punishable on summary conviction.

Although section 319(7) defines a "public place" it does not define a "private conversation". Although personal e-mail between two members of a white supremacist organization may constitute a private conversation, it is unclear whether the caveat "other than in private conversation" could exempt communication conducted on *private* computer bulletin boards (for example, a BBS run by the Aryan Nations which *restricted* BBS admission to members of the Church of Jesus Christ Christian). It does appear, however, that computer-mediated communication such as takes place in the *alt.revisionism* USENET newsgroup is public rather than private and is subject to section 319.[39] According to the logic of how section 319(2) has been applied to existing media, one would suspect that liability rests with *the individual* who communicates statements promoting hatred against an identifiable group rather than with any USENET host that might carry *alt.revisionism* or a similar newsgroup.[40] Without further clarification, however, one cannot totally exclude the possibility that a USENET host might be held liable. The last component in the equation are the newsgroups themselves, specifically the **unmoderated** newsgroups wherein much of this communication currently takes place. Given that individuals who combat hate propaganda (such as McVay, Keren or McCarthy) are regular contributors to *alt.revisionism* and similar newsgroups, it would be difficult to argue that the newsgroup *per se* is the source of hate propaganda.

The final section of the *Criminal Code* which warrants attention is section 320 which states:

(1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

---

[39] Section 319(7) defines "communicating" to include communicating by telephone, broadcasting, or other audible or visible means; and defines "statements" to include words spoken or written or recorded electronically, electromagnetically or otherwise (as well as gestures, signs or other representations).

[40] For those charged under s.319(2), there are four special defences outlined in s.319(3) which will permit an individual to avoid conviction:

(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public's benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

For the purpose of this section, "hate propaganda" is defined as "any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319(2)." This provision evidently targets items such as films, books, magazines, pamphlets and posters used to disseminate hate propaganda. It is possible that by referencing section 319(2) this provision could also include electromagnetic media such as audio- or video-cassettes inasmuch as these would be covered by the "statements" definition of s.319(7). If such were the case, CD-ROM or computer disks containing hate propaganda and intended for "sale or distribution" could also be confiscated. It may also be possible that a computer hard drive containing hate propaganda could be confiscated *if* that computer was used to distribute hate propaganda and was physically located in premises within a Canadian jurisdiction (for example, a white supremacist listserver, ftp archive site, or BBS). These seizure and confiscation provisions require the consent of the provincial Attorney General.

As mentioned earlier, section 13 of the *Canadian Human Rights Act* prohibits the communication of hatred via telephone lines:[41]

> (13)(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that those person or persons are identifiable on the basis of a prohibited ground of discrimination.

With respect to racist telephone messages, section 13 has been successfully used to prosecute John Ross Taylor and the Western Guard Party in 1979, as well as the Church of Jesus Christ-Aryan Nations in 1988. Although this provision was clearly intended to combat hate lines that utilize telephone answering machines, the clause "to communicate telephonically or to cause to be so communicated" captures any traffic (not just voice) that is transmitted over the telephone lines of a licensed common carrier. On this interpretation, section 13 would cover e-mail messages that are "likely to expose a person or persons to hatred or contempt by reason of the fact that those person or persons are identifiable on the basis of a prohibited ground of discrimination."

In addition to *Criminal Code* provisions pertaining to hate propaganda and section 13 of the *Canadian Human Rights Act*, there are a number of other measures that could be brought into effect. Canada Post under the authority of the *Canada Post Corporation Act* (s.43) is permitted to issue an interim prohibitory order disallowing delivery of mail addressed to or posted by a person involved in criminal activities via the mail. This has been used successfully against John Ross Taylor since the mid-Sixties. Ernst Zundel succeeded in having an interim prohibitory order revoked. Canada Customs, under the authority of section 114 of the *Customs Tariff Act* is authorized to prohibit the importation into Canada "Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that constitute hate propaganda within the meaning of s.320(8) of the *Criminal Code*." Finally:

> *Broadcasting Act* regulations are broader than *Criminal Code* sanctions (illegal to subject an identifiable group to hatred) but penalties are less severe...

---

[41] With respect to section 13, Rosen notes: "Unlike the *Criminal Code* hate propaganda provisions, it is not necessary to prove specific intent to succeed in showing the discriminatory practice and there are no special defences available to a respondent to such a complaint. (Library of Parliament 1994: 7)

> Canadian Radio-Television and Telecommunications Act regulations prohibit abusive expression which exposes identifiable groups to hatred or contempt....
>
> Immigration Canada, can and will refuse permission to enter Canada to foreigners under the authority of the *Immigration Act, 1976* if it is reasonably to be expected they will commit an offence. This was done on January 22 of this year [1993] to Denis Mahon, a leader of the KKK, as well as David Irving, a British Holocaust denier (November 2, 1992). Tom and John Metzger, leaders of the White Aryan Resistance (July 1992), were deported after spreading their message. (Solicitor General Canada (Ontario Regional Office) 1993: 12)

This overview provides examples of a number of legal instruments that have been used successfully in dealing with hate propaganda disseminated through traditional media. There are indications that these same instruments could be applied to computer-mediated hate messages.

One outstanding difficulty that these provisions do not cover is that "bits know no boundaries." Canadian options are limited when the person who posts hate messages resides in another jurisdiction or e-mails messages through an anonymous remailer located in another jurisdiction. Although anonymous remailers can provide legitimate services (for example, for victims of sexual abuse who participate in self-help discussion groups) there are clearly misuses of applications affording anonymity. There are significant technical and jurisdictional difficulties in prosecuting an individual posting through an extra-territorial anonymous remailer. Jurisdictional problems also arise when Canadian hatemongers sidestep our laws by placing material on file archives or World Wide Web pages located in the United States or other countries. It may be possible in this regard, however, to explore bilateral or multilateral arrangements with other nations in order to deal with jurisdictional problems in the control of illegal communication on global networks.

DEFAMATION ON THE INFORMATION HIGHWAY

With the millions of e-mail messages being posted daily to bulletin boards (commercial and amateur), USENET groups, listservers, and the like, it is not surprising that some of the messages cross the line from being constructively critical to being sarcastic, insulting, and even defamatory. "Flaming", or composing and posting provocative or insulting messages, is a common occurrence on all but the most tightly moderated groups or conferences. With respect to computer-mediated communication, there are two basic questions which we need to ask:

(a) Can an individual who posts a message with defamatory content on a computer bulletin board, USENET newsgroup, or a listserv be subject to sanctions in a criminal or civil court?

(b) Can an organization, business, or institution be held responsible and made liable simply because it provided the bulletin board service on which a message was posted, or provided the computer which acted as the originating USENET host, or merely stored and forwarded a newsgroup, e-mail conference or FIDONET echo containing a defamatory message?

To address these questions we must first come to terms with what constitutes defamation. Not surprisingly there are jurisdictional differences, especially when dealing with global networks. We can, however, begin by citing the Handbook Exploring the Legal Context for Information Policy in Canada, which states:

> The dissemination of misinformation is proscribed to a certain extent by criminal law which falls within the exclusive jurisdiction of the federal government. The provincial governments have also legislated in this area, specifically in the areas of libel and slander. Finally, there are a variety of common law actions which are concerned with the dissemination of misinformation. (Cleaver et al. 1992: 68)

> Defamatory libel is defined as a matter published without lawful justification that will likely injure the reputation of a person by exposing the person to hatred, contempt, ridicule or insult. In addition, the defamatory libel need not be in the form of words and it may be expressed directly, by insinuation or by irony. (Cleaver et al. 1992: 70)

A variety of defences are available under the *Criminal Code*:

> A person who publishes defamatory libel will not be liable for the offence if he believed, on reasonable grounds, that the content of the published matter is true, relevant to a topic of public interest and that it would be in the public interest to discuss it; the matter is a fair comment about the public conduct of a person who participates in public affairs, or fair comment about a work of art; the matter is true and the manner and time of publication are for the public benefit; the matter was in response to an invitation or challenge, or necessary to refute a defamatory libel about himself, as long as he believes the libel is true, relevant for the purposes stated and does not exceed what is reasonably sufficient in the circumstances; the matter is published, in good faith or without ill-will, in response to inquiries by a person concerned about the truth or who reasonably believes it to be true, relevant and not excessive in the circumstances; the matter is published in good faith to redress a private or public wrong or grievance from a person whom he reasonably believes has an obligation to provide a remedy and he believes the matter to be true; or the matter was contained in a paper published under the authority of the Senate or House of Commons. (Cleaver et al. 1992: 70-71)

In addition to *Criminal Code* provisions, libel and slander can find redress under common law:

> Libel and slander are based on the common law recognition of an individual's right to protect his reputation from injury through false statements or words. Therefore, this tort is concerned with the protection of an individual's reputation from the dissemination of misinformation about himself. Protection is only afforded to the reputation that the individual actually enjoys and not what he may deserve. (Cleaver et al. 1992: 77)

An individual may suffer defamation through libel and/or slander. These are two separate torts. At common law, the following three elements must be proved for both actions:

(1) the statements or words must be defamatory;
(2) the statements or words must be published; and
(3) the plaintiff himself must be defamed.

The distinction between libel and slander is based on two factors:

(1) Permanence of the medium used to disseminate the misinformation:
> Libel occurs when misinformation is communicated in a permanent form such as in print, by photograph, etc. Slander occurs when misinformation is imparted in a transitory fashion, e.g. by gesture, look, word, etc.

(2) Proof of damage:
> Damage is presumed in libel when the plaintiff establishes that the defendant has disseminated defamatory material about him. However, special damages must be pleaded and proved by the plaintiff for slander. This difference has been obliterated by statute in some jurisdictions so that damage is presumed for both libel and slander. (Cleaver et al. 1992: 78)

Everyone is responsible for the accuracy of their statements, notwithstanding their intentions (inasmuch as libel and slander are strictly liability torts, an individual will be held liable even if that individual is unaware that the statement has detrimentally affected the plaintiff).[42] If the statement can be shown to be true, in most cases one can successfully defend a charge of libel or slander (Cleaver et al. 1992: 79).

To put these issues in context, consider the following sample of international disputes: (1) the Rindos-Hardwick suit; (2) Cubby Inc. v. CompuServe; and (3) Godfrey v. Hallam-Baker. One of the rare

---

[42] Of course, it is not just individuals who can sue:

> Corporations may also sue for libel and slander. It is important to note, however, that the reputation of a corporation is distinct from the reputation of the individuals associated with it. Other entities such as professional associations may also sue in defamation, as long as there has been some impairment to their ability in carrying out their objects. (Cleaver et al. 1992: 79)

Internet-related libel cases to go to court and have a verdict rendered was launched by David Rindos.[43] The episode was triggered when the University of Western Australia terminated Dr. Rindos's employment, apparently on the grounds of insufficient productivity. Protests by colleagues at universities around the world began to circulate on the Internet spurred, in part, by postings on June 23-25, 1993 to *sci.anthropology* (and the *Anthro-L* list) by American anthropologist Hugh Jarvis. A few days later, a message was posted in response by Derby anthropologist Gilbert Hardwick. Rindos sued Hardwick for defamation. Following the court's decision, The West Australian reported:

> Justice David Ipp said it [Hardwick's message] contained the imputation that Dr Rindos's professional career and reputation had not been based on appropriate academic research "but on his ability to berate and bully all and sundry."
>
> He said that the message also suggested that Dr Rindos had engaged in sexual misconduct with a local boy. The inference was that these matters had some bearing on his dismissal from the university.
>
> "I accept that the defamation caused serious harm to Dr Rindos's personal and professional reputation," Justice Ipp said. "I am satisfied that the publication of these remarks will make it more difficult for him to obtain appropriate employment.
>
> "He suffered a great deal of personal hurt. The damages award must compensate him for all these matters and vindicate his reputation to the public."
>
> Mr Hardwick did not defend his action. He wrote to Dr Rindos's lawyer: "Let this matter be expedited and done with ... I can do nothing to prevent it, lacking any resources whatsoever to defend myself." (Lang 1994)

Dr. Rindos was awarded $40,000 (Australian). It has been suggested that the extent to which this decision will be binding on future Internet-related litigation in Australia is unclear but it is certain that the Internet can no longer ignore the law. Of course, this case does not have any direct bearing on Canadian court rulings. For our purposes, however, the Rindos-Hardwick case indicates that *it is possible for individuals to be held responsible for defamatory statements which they post to USENET, listservs, or similar electronic discussion groups*.

The second libel case to be considered is Cubby, Inc. v. CompuServe Inc. (776 F. Supp. 135, 1991) which was decided in the Southern District of New York. CompuServe is a large American information provider which, through the CompuServe Information Service, offers online news, information databases, and discussion groups. CompuServe was taken to court for libel, business disparagement, and unfair competition based on allegedly defamatory statements which appeared in a daily newsletter, Rumorville USA, to which CompuServe subscribers have access. CompuServe moved for a summary judgment and its motion was granted by District Judge Peter Leisure. One of the crucial facts in the

---

[43] There appear to be few online cases of defamation and even fewer actually reach a point where a decision is rendered. For example, one of the most publicized recent defamation cases was settled out of court. Suarez Corporation Industries (a direct-mail company) filed a defamation lawsuit (in Cuyahoga County, Ohio) against Brock Meeks who posted a message on the Internet (in his electronic newsletter, "Cyberwire Dispatch") calling one of the company's mail-order offer a scam (cf. Wall Street Journal; April 22, 1994).

decision is that Rumorville USA was a newsletter made available in the Journalism Forum. Cameron Communications, Inc. (CCI), a company independent of CompuServe had been contracted by CompuServe to "manage, review, delete, edit and otherwise control the contents" of the Journalism Forum. Moreover, Rumorville USA was published by Don Fitzpatrick Associates of San Francisco (DFA). DFA provides Rumorville to the Journalism Forum under contract with CCI. In his decision, District Judge Leisure writes:

> CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.
>
> With respect to the Rumorville publication, the undisputed facts are that DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to approved CIS subscribers instantaneously. CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognized as protecting distributors of publications.... Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment." Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir.1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985); see also Daniel v. Dow Jones & Co., 137 Misc.2d 94, 102, 520 N.Y.S.2d 334, 340 (N.Y.Civ.Ct.1987) (computerized database service "is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news" and "is entitled to the same protection as more established means of news distribution"). (*Cubby, Inc. v. CompuServe Inc.* 776 F. Supp. 135, 1991)

The Judge's rationale is significant: *CompuServe is less like a publisher and more like a library or book store*. It is not feasible for CompuServe "to examine every publication it carries for potentially defamatory statements."[44] Admittedly, the decision is a district court case and is not binding on other

---

[44]District Court Judge Leisure's rationale was based on a Supreme Court obscenity case (Smith v. California, 361 U.S. 147, 152-53, 80 S.Ct. 215, 218-19, 4 L.Ed.2d 205 (1959)):

> In Smith, the Court struck down an ordinance that imposed liability on a bookseller for possession of an obscene book, regardless of whether the bookseller had knowledge of the book's contents. The Court reasoned that "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. (*Cubby, Inc. v. CompuServe Inc.* 776 F. Supp. 135, 1991)

jurisdictions but it goes a certain distance in defining where liability ends. Given that there is no Canadian jurisprudence on this point it is only possible to speculate that Canadian courts might make a similar distinction between "publishers" and "distributors".

If we shift now from civil law to criminal law, we find that the Canadian *Criminal Code* dealing with defamatory libel has certain similar, though not as extensive, provisions (cf. Sections 303-304) distinguishing newspaper proprietors from vendors:

> There are special provisions for newspaper and book vendors who sell material that contains defamatory matter. A proprietor of a newspaper will be deemed to have published defamatory material if he cannot prove that the material was inserted without his knowledge and without negligence on his part. A vendor is protected from liability unless he knows that defamatory material is present or the newspaper or book habitually carries defamatory material. Whether a printed publication constitutes a newspaper depends upon the frequency of the publication and the type of material that is contained within it. (Cleaver et al. 1992: 71-72)

Mike Godwin has pointed to the emphasis Judge Leisure accords the contractual relationship between CompuServe and Cameron Communications, Inc., noting that "This particular legal relationship is one that tends to limit the liability of the principal party for most tortious activity (such as libel)" (Godwin 1993). However, Godwin suggests that this is offset by the Judge's reliance on Smith v. California, given that the latter "does not depend on whether the publisher/distributor is party to a subcontract" (Godwin 1993). Judge Leisure states:

> Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements. (*Cubby, Inc. v. CompuServe Inc.* 776 F. Supp. 135, 1991)

Godwin suggests that Judge Leisure's "recognition of the immediacy, the high volume, and the uncensored nature of CompuServe" is a rationale which could equally apply to service providers or organizations who carry USENET newsgroups or mailing lists.

The two cases just considered lead one to speculate that (1) an individual can be held responsible for writing and posting defamatory statements but (2) an information provider which simply carries an electronic newsgroup (and does not exercise editorial control) may be more like a library, bookstore or vendor and not be held responsible. Matters, however, are not quite so simple. This has been indicated by a 1994 case at Carleton University (Godfrey v. Hallam-Baker) in which a Carleton employee posted messages to a newsgroup that were regarded as defamatory by an academic in the United Kingdom. The British academic sued Carleton University. It is purported that the university's insurance company settled out of court. There clearly remains a great deal of uncertainty coupled with a high level of caution on the part of organizations.

CONCLUSION

Digitization and microelectronics have transformed the way we capture, store, transmit and reproduce information. Books, magazines, newsletters, pamphlets, videos, and sound recordings are no longer confined or restricted to their traditional formats. Of course, traditional media will continue to exist; however, the new electronic environment of computer-mediated communications opens up fresh avenues for how information is exchanged and transmitted. Floppy disks, CD-ROMs, and computer networks such as the Internet, USENET and computer bulletin board systems (BBS) are changing some of the ways we communicate with each other.

Computer networks and distributed information resources are evolving as fundamental tools essential to the realms of commerce, industry and academia. Our social world is also beginning to find intrinsic value in the electronic infrastructure as attested by the popularity of electronic mail, electronic bulletin boards, news and discussion groups, as well as the Internet itself. With this proliferation of new pathways for communication, however, has also arisen the age-old problem of controlling offensive content.

As a democratic society, Canada encourages freedom of expression and advocates tolerance. Now and then, some of this expression -- words, images or motion pictures -- is regarded by different individuals or by different communities as offensive. The material could be sexually explicit; contain representations of violence; or contain political, religious, or cultural content that others find unacceptable or intolerable. Sometimes law enforcement intervenes and the judicial system makes a determination whether a particular instance of offensive communication is actually illegal.

Even in a democratic society, freedom of expression is never absolute. Our political and judicial systems prohibit certain forms of communication if there is a reasonable expectation of harm and, in many circumstances, bring into play a variety of contextual factors such as whether the practice is private or public. Freedom of expression, then, is guaranteed by the Canadian *Charter of Rights and Freedoms* but it is qualified or subject to "reasonable limits" proscribed by law. The *Criminal Code* has provisions for dealing with obscenity, child pornography, hate propaganda, and defamatory libel. Harassment is handled, in part, through the Canadian *Human Rights Act*. There are also a variety of remedies in civil law for defamation; for example, libel and slander are strict liability torts.

When the state prohibits certain types of expression, it clearly infringes on section 2(b) of the *Charter of Rights and Freedoms*. This infringement, however, can be justified according to section 1 of the *Charter* if the legislation complies with the threshold test and the proportionality requirement delineated by Chief Justice Dickson. The threshold test requires that the legislative objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (such as the pressing and substantial objective of avoiding harm to particular vulnerable groups in society and consequently to society as a whole). The proportionality requirement requires that: (a) there must be a rational connection between the means (the legislative measures) and the ends (the legislative objective); (b) the measure should impair the constitutionally protected freedom as little as possible (to use the Hon. John Sopinka's illustration, if the objective was to prevent harassing phone calls, banning everyone's use of telephones would be too excessive an infringement); and (c) there must be a proper balance between the effects of the limiting measures and the legislative objective (i.e., the infringement on freedom of expression must be containable and must not abrogate what that freedom essentially contributes to our democracy). The Supreme Court of Canada has provided a number of guidelines in this regard; for example, with respect to obscenity (*R. v. Butler*; 1992) and hate propaganda (*R. v. Keegstra*; 1990).

In general, the law can be applied to any form of expression, regardless of the medium. Often, however, individuals and organizations act as if electronic media do not have the same protections as traditional media. Are existing safeguards to control offensive content adequate in an electronic environment or are there features inherent in network-distributed media that require amendments to laws and regulations governing traditional media?

Although the law applies to all media, it recognizes that under different circumstances blame can be allocated differently. Telephone companies, for example, are common carriers and are not liable for the content transmitted through their facilities.[45] In contrast, the provisions in the *Criminal Code* for defamatory libel specifically distinguish between newspaper proprietors on the one hand and newspaper and book vendors on the other (Sections 303-304). In a recent American case involving defamation, a judge decided that the information provider (CompuServe) was less like a publisher and more like a library or book store. The information provider was not responsible for potentially defamatory statements because it could not be reasonably expected to examine the specifics of every publication it carried. This decision, however, was not binding on other jurisdictions within the United States nor has there been any Canadian jurisprudence on this point.

Although Canadian law distinguishes between different sorts of entities with respect to media law, as new media emerge new issues arise. A USENET host site or a BBS operated by a sysop is not any of the entities that existed in the first half of this century. They are not a common carrier, a bookstore, or a newspaper proprietor. What can be done to clarify the liability of different information providers such as privately-owned not-for-profit bulletin boards, for-profit database companies, individuals who run hobby BBSs, organizations like universities that own Internet or USENET host computers? These are not the same entities, they do not offer the same services, and they exercise different degrees of control over the content that they carry. Waiting for some organization with enough financial resources to pursue a lengthy legal battle may not be the optimal solution to this problem.

In a digital environment where "*bits know no boundaries*", new problems arise in enforcement. Tangible media such as books, magazines, or videocassettes have a higher probability of seizure than an invisible bit-stream transmitted in electro-magnetic waves via satellite or flowing as laser pulses and electrical currents through telephone wires. There have already been cases where one nation finds itself in the "footprint" of pornographic transmissions from an orbiting satellite that is owned by a company based in another country. Globally interconnected computer networks are implicated in similar jurisdictional problems. Material that is legal in another country but illegal in Canada could be posted to a USENET newsgroup and automatically forwarded to a Canadian host computer. Similarly, material that is illegal in our country can reside on a server in another country yet be easily accessible from Canada.
In an environment where information flows through porous boundaries, how are jurisdictional difficulties — provincial, inter-provincial, and international — to be resolved? Are bilateral or multilateral arrangements between provinces and countries a feasible option for controlling cross-border flows of offensive content? What impediments hinder law enforcement agencies when it comes to enforcement on the information highway?

---

[45] For example, Bell Canada's Terms of Service (Item 10 of the General Tariff) approved by the Canadian Radio-television and Telecommunications Commission (CRTC) states in Article 16 that "Bell Canada is not liable for ... defamation or copyright infringement arising from material transmitted or received over Bell Canada's facilities". BBS operators and universities which operate USENET hosts have been brought to court on both defamation and copyright infringement not because of their own actions but because of activities undertaken by users of their systems.

Adherence to basic democratic principles demands that any action to prevent prohibited content not impinge unduly on permissible expression. It appears, however, that electronic communication is not eliciting the same range of measured responses that are currently applied to traditional media. Consider for example, a monthly magazine with sexually explicit images that is stopped at the border by Customs. The first response might be to require a single image or set of images to be blacked out or inked over by the publisher; then, entry of that month's issue would be permitted. If no changes were made, however, officials would decide to prohibit entry of that month's issue of the publication. Finally, if every month's issue contained material prohibited by law, a decision might be made to prohibit the importation of each and every month's issue. This graduated approach demonstrates that with traditional media transgressions are dealt with on a case-by-case basis.

By contrast, access to certain newsgroups such as those containing sexually explicit material has been curtailed by some universities. At issue is not their right to refrain from receiving electronic messages, but the rationale justifying these actions. To assert that newsgroups are not being carried because certain images in the newsgroups are obscene is mistaken in two respects. First, there is a degree of presumption[46] as Supreme Court Judge Sopinka recently remarked:

> Difficult issues also arise in the context of universities which take action to ban certain communications found to be offensive and undesirable. First, one must ask whether it is not preferable to permit the expression and allow the criminal or civil law to deal with the individual who publishes obscene, defamatory or hateful messages rather than prevent speech before it can be expressed. Otherwise, individuals may be putting themselves in the positions of courts to determine what is obscene and what is acceptable. (Sopinka 1994)

Second, is the idea that cutting off access to a newsgroup is equivalent to the most extreme measure of banning every page of a publication in perpetuity. In effect, the action that stops the flow of hundreds of completely legal messages to eliminate a small number of others may constitute unwarranted censure.

In a parallel concern, the "store and forward" architecture underlying USENET has been cited in relation to the Homolka publication ban. This raises the question of whether the very structure of USENET automatically constitutes "publishing" or "distribution" and thereby has the potential to make hosts (or more precisely, the owners of hosts) susceptible to incrimination. Are there features inherent in network distributed media which make it difficult to apply the legal instruments which have been and are being applied to traditional media?

Another issue that deserves consideration arises from the fact that *Criminal Code* definitions of obscenity, hate propaganda and defamation all hinge on the difference between private use or private conversation on the one hand and dissemination, publication or inciting the public on the other. E-mail communication could be a private conversation much like a telephone conversation and may not contravene the *Criminal Code*. It is unclear at what point discussion groups -- particularly those on a private BBS as opposed to a USENET newsgroup -- cease to be private conversations. Defining that

---

[46] Consider also the Supreme Court decision *Re Nova Scotia Board of Censors et al. and McNeil* (84 D.L.R. (3d) 1-29). It acknowledged the legitimacy of Nova Scotia's *Theaters and Amusements Act* to regulate, supervise, and control the film business within their provincial jurisdiction. However, Regulation 32 of the provincial *Act* was regarded as being indistinguishable from the *Criminal Code* provision and was regarded as an invasion of the criminal law field reserved for the federal government.

point is becoming increasingly imperative as more and more of our social discourse takes place in cyberspace.

Let us turn now to the issue of controlling offensive content that is not illegal under the *Criminal Code*. In Canada, different levels of government have different responsibilities regarding content. Aside from the *Criminal Code* and the *Charter of Rights and Freedoms*, the role of the federal government in matters related to expression is partially defined by the Telecommunications Act, the Broadcasting Act, and the Canadian Human Rights Act. Provincial governments have film and video review boards that enforce local regulations, including the prohibition of certain content and the enforcement of age restrictions. Municipal governments have also introduced by-laws concerning the licensing and zoning of "adult entertainment".

We must bear in mind, that outside the *Criminal Code* different media **are** treated differently. For example, the control exercised by the Canadian Radio-television and Telecommunications Commission (CRTC) over certain aspects of **programming** content in broadcasting[47] does not have a parallel in the print medium; there is not a national regulatory body which controls the content of books or magazines. Software and computer databases have been treated more like print media for the past 20 years due to a variety of factors including the contractual underpinnings of private purchases. VANs (Value Added Networks), for example, are currently not regulated. Recently, isolated cases of alarming material have prompted suggestions to license amateur bulletin boards. The only analogy would appear to be with ham radio but the justification for licensing amateur radio operators was linked to spectrum management, **not** the control of individual behaviour or expression. Should additional controls such as regulations or licensing requirements be introduced for computer-mediated content or should we rely, as we have in the past, on a combination of existing legal and voluntary codes or measures, community initiative and individual responsibility?

Different organizations such as business enterprises, libraries, universities, school boards, and high schools have different requirements and different rationales with respect to what content they regard as appropriate and what content they wish to control. There are a number of ways of achieving this objective. *Community action is a viable alternative to government intervention.*

Universities and large organizations have found that having the appropriate procedures and mechanisms in place -- such as sexual harassment codes -- have enabled them to deal with some of the problems of offensive content effectively. Having procedures in place has proven to be more effective than ad hoc emergency responses.

Commercial information providers such as data base services and computer bulletin boards have certain responsibilities when providing services. But they should also be able to pursue their business as long at it does not contravene the *Criminal Code* or local regulations. Some organizations have already introduced certain controls such as asking for proof of age or a credit card before adult-oriented material is accessed. Similarly, Freenets and other community-based networks already use newsservers that

[47] Not everything on cable television is programming -- if it is just alpha-numeric characters, still images and sound -- eg., real estate channels and scrolling text news services -- it does not constitute programming. Home shopping channels are handled differently (cf. *Exemption order respecting tele-shopping programming service undertakings CRTC 1995-14*).

prevent direct access to discussion groups deemed unsuitable for a general audience.[48] But are other measures necessary? Should information providers be encouraged to adopt voluntary codes of conduct as opposed to licensing or regulation? What would voluntary codes of conduct entail?

Turning from the supply to the demand side, it is clear that individuals have access to information services from the home. Individuals should have the right and the **ability** to control the information flows coming into their home. In doing so, however, they must not infringe on the rights of others to express themselves. Some online information services provide various control measures for home-based consumers such as password protection associated with different discussion groups. What else can be done to help individuals, parents, and families deal with offensive content accessible from the home?

Adaptive filters which permit multiple user profiles already exist. If they can seek and find, it is only a minor modification to seek and screen. By permitting hundreds or thousands of unique individual profiles, the "knowbots" or software search engines can provide personalized information controls. What can be done to encourage research and development of technical solutions for offensive content? What should be the focus of R & D in controlling offensive content available via on-line services?

Parents, of course, have some responsibility for teaching their children the basic rules of the info-highway in the same way that they now "street-proof" their kids. In the digital environment, what are the responsibilities of parents to protect their children and to supervise their children's on-line behaviour? Given the flurry of issues that are emerging with computer-mediated communication, there appears to be a certain degree of confusion on the part of the public and many information providers regarding what is and is not permissable. Do service providers understand their obligations and liability under the various laws pertaining to offensive communication? What is the federal government's obligation with respect to providing education about the rules of the information highway to information providers and the public?

These and other questions related to controlling offensive content on the information highway demand some serious consideration. The following recommendations have been developed to introduce a framework for further discussion.

(1) Principles applied to traditional media should be applied to computer-mediated communications. The *Criminal Code* and a substantial body of media case law can guide our way in these new circumstances.

(2) The federal government should examine legislative measures, specifically, with regard to clarifying the question of liability of owners, operators, and users of bulletin boards, Internet and Usenet sites.

(3) The federal government should explore bilateral and multilateral arrangements at the international level in order to deal with jurisdictional problems in the control of harmful or illegal communication on global networks.

(4) Service providers and the user community should be educated in what is and is not permissable.

---

[48] Some high schools, rather than receiving Usenet feed directly from a university newsserver, receive their news feed from a separate newsserver which provides only a subset of the newsgroups (acknowledging that different communities and age groups have different requirements).

(5) The federal government should explore whether bulletin boards and other service providers are amenable to a voluntary code of conduct.

(6) To facilitate arriving at community standards, complaint resolution procedures should be put in place prior to any incident. Ad hoc crisis management rarely upholds the delicate balance between freedom of expression and communicative injury. Guidebooks outlining such procedures could be developed in cooperation with interested parties so that if an incident does arise in a given context, a reasonable response can be delivered in a timely fashion.

(7) Technical solutions should be pursued which ensure that individuals, parents, businesses, community-based organizations or public institutions (such as schools or libraries) have the ability to select easily the content they want and block out the rest. (For example, passwords help ensure restricted access; user validation and certain payment mechanisms uphold age restrictions; adaptive filters on home personal computers will screen out inappropriate violent or sexual content.)

BIBLIOGRAPHY

Anderson, Bart, Bryan Costales & Harry Henderson. The Waite Group's UNIX Communications. Second Edition. Carmel: SAMS, 1991.

Barnett, C. S. "Obscenity and s.150 (8) of the Criminal Code". The Criminal Law Quarterly. Vol. 12, 10-29.

Barret, Stanley R. Is God A Racist? The Right Wing in Canada. Toronto: University of Toronto Press, 1987.

Borovoy, A. Alan. When Freedoms Collide: The Case For Our Civil Liberties. Toronto: Lester & Orpen Dennys, 1988.

Boyd, N. Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity. Working Papers on Pornography and Prostitution. Report # 16. Department of Justice, Canada, July 1984.

Canada. Committee on Sexual Offences Against Children and Youths. Sexual Offences Against Children. Two Volumes. Ottawa: Ministry of Supply and Services, 1984.

Canada. Special Committee on Hate Propaganda. Report of the Special Committee on Hate Propaganda in Canada. Ottawa: Queen's Printer, 1966.

Canada. Special Committee on Pornography and Prostitution. Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution. Vol.1. Ottawa: Supply and Services, 1985.

Carroll, Jim & Rick Broadhead. Canadian Internet Handbook: 1994 Edition. Scarborough: Prentice-Hall, 1994.

Canadian Human Rights Commisssion. Introduction to the Canadian Human Rights Act: Reference Maual. Ottawa, September 1985.

Charles, W. H. "Obscene Literature and the Legal Process in Canada". Canadian Bar Review, Vol.44, 1966, 243-292.

City of Ottawa. "Licenses -- Adult Video Stores". Department of Engineering and Works. Final Notice (EW-182-26). September 21, 1994.

Cleaver, Barry, Margaret Ann Wilkinson, Gailina Liew, Janet Campbell, Graeme Sperryn. Handbook Exploring the Legal Context for Information Policy in Canada. Faxon/SMS Canada. National Summit on Information Policy, December 1992.

Coats, James. Armed and Dangerous: The Rise of the Survivalist Right. New York: Noonday Press, 1987.

Copp, David and Susan Wendell (Eds.). Pornography and Censorship. Buffalo (N.Y.): Prometheus Books, 1983.

Dean, Malcolm. Censored Only in Canada. Toronto: Virago Press, 1981.

Dibble, Julian. "A Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database into a Society". The Village Voice. Vol 38, No. 51 (December 21, 1993), 36-42.

Donnerstein, Edward, Daniel Liz & Steven Penrod. The Question of Pornography: Research Findings and Policy Implications. New York: The Free Press, 1987.

El Komos, M. Canadian Newspaper Coverage of Pornography and Prostitution: 1978-1983. Working Papers on Pornography and Prostitution. Report # 5. Department of Justice, Canada, July 1984.

Geller-Schwarz, Linda (Ed.). From Awareness to Action: Strategies to Stop Sexual Harassment in the Workplace. Ottawa: Women's Bureau, Human Resource Development Canada, 1994.

Gibbs, Mark & Richard Smith. Navigating the Internet. Indianapolis: Sams Publishing, 1993.

Gilster, Paul. The Internet Navigator New York: John Wiley & Sons, 1993.

Hawkins, Gordon & Franklin E. Zimring. Pornography in a Free Society. Cambridge: Cambridge University Press, 1991.

Kendrik, Walter. The Secret Museum: Pornography in Modern Culture. New York: Penguin Books, 1988.

Kinsella. Web of Hate: Inside Canada's Far Right Network. Toronto: Harper Collins, 1994.

Krol, Ed. The Whole Internet: User's Guide & Catalog. Sebastopol: O'Reilly & Associates, Inc., 1992.

Law Reform Commission of Canada. Hate Propaganda. Working Paper 50, 1986.

Mackay, R.S. "Recent Developments in the Law on Obscenity". Canadian Bar Review, Vol.32, 1954, 1010-1018.

Mackay, R.S. "The Hicklin Rule and Judicial Censorship". Canadian Bar Review, Vol.36, 1958, 1-24.

McKay, H.B. & D.J. Dolff. The Impact of Pornography: A Decade of Literature. Report Prepared for the Department of Justice Canada. 1984.

Mehta, Michael D. and Dwaine E. Plaza. "A Content Analysis of Pornographic Images on the Internet". Paper presented at the Symposium on Free Speech and Privacy in the Information Age. University of Waterloo. November 26, 1994.

New Zealand. Ministerial Committee of Inquiry into Pornography. Pornography: Report of the Ministerial Committee of Inquiry into Pornography. Wellington: The Committee, 1988.

Prentice, Maja (MCO Chairperson). Mississauga Committee on Obscenity: An Ad Hoc Volunteer Committee in Review of the Impact of Explicit Pornography on the Community. June 1993.

Price, David. "The Role of Choice in a Definition of Obscenity". Canadian Bar Review, Vol.57, 1979, 301-324.

Quarterman, John. The Matrix: Computer Networks and Conferencing Systems Worldwide. Digital Press, 1990.

Quittner, Josh. "Johnny Manhattan Meets the FurryMuckers". Wired. Vol. 2, No. 3 (March 1994), 92-97, 138.

Rheingold, Howard. "Cyberspace". Whole Earth Review Winter 1994: 95.

Robertson, James R. Pornography -- Current Issue Review 84-3E. Ottawa: Library of Parliament, Research Branch. February 15, 1984. Revised May 16, 1994.

Rosen, Philip. Hate Propaganda -- Current Issue Review 85-6E. Ottawa: Library of Parliament, Research Branch. January 28, 1985. Revised May 16, 1994.

Rosenberg, Richard. "Free Speech, Pornography, Sexual Harrassment, and Electronic Networks". The Information Society. Oct-Dec. 1993, 9(4): 285-331.

Rosenberg, Richard. "Free Speech, Pornography, Sexual Harrassment, and Electronic Networks: An Update and Extension". Paper delivered at Autoroutes Electroniques conference. Montréal, Québec. May 13 1994, 1-30.

Shade, Leslie Regan. "Ethical Issues in Electronic Networks: The Case of Usenet's alt.sex hierarchy and the Canadian University Community". Technoculture and Feminism Panel. NEMLA, April 8-9, 1994.

Shade, Leslie Regan. "Desperately Seeking Karla: the Case of alt.fan.karla.homolka". Paper delivered at Canadian Association of Information Science. May 25-27, 1994. McGill University.

Sher, Julian. White Hoods: Canada's Ku Klux Klan. Vancouver: New Star Books, 1983.

United States. Attorney General's Commission on Pornography. Final Report. Vol.1. Washington, D.C.: U.S. Dept. of Justice, 1986.

Selected Case Law

Obscenity:

Brodie, Dansky and Rubin v. Regina [1962] S.C.R. (Supreme Court Reports), 681-711.

Dominion News and Gifts Ltd v. Regina [1964]. S.C.R. (Supreme Court Reports), 251-252.

Re Nova Scotia Board of Censors et al. and McNeil. 84 D.L.R. (Dominion Law Reports)(3d), 1-29.

Regina v. 294555 Ontario Limited et al., 39 C.C.C. (2d), 352-355.

Regina v. Butler [1992]. 1 S.C.R. (Supreme Court Reports), 452-526.

Regina v. Goldberg and Reitman, 4 C.C.C. (2d), 187-191.

Regina v. Harrison, 12 C.C.C. (2d), 26-29.

Regina v. Prairie Schooner News Ltd. and Powers, 1 C.C.C. (2d), 251-272.

Regina v. The MacMillan Company of Canada Ltd., 31 C.C.C. (2d), 286-322.

Regina v. Red Hot Video Ltd. [1985], 45 C.R. 295.

Regina v. Rioux [1969] S.C.R. 599, [1970] 3 C.C.C. 149.

Towne Cinema Theatres v. The Queen [1985] 1 S.C.R.(Supreme Court Reports), 494.

Hate Propaganda:

Ernst Zundel v. Regina. [1992].

Regina v. Andrews et al.. Ontario Reports [1988] 65 (O.R. (2d)), 161-196.

Regina v. Keegstra. Western Weekly Reports [1988] 5 (W.W.R.), 211-240.

Regina v. Keegstra. [1990]. 3 S.C.R. (Supreme Court Reports), 697-869.

Harassment:

Robichaud v Canada (Treasury Board) [1987], 8 C.H.H.R. D/4326 (S.C.C.).

Janzen and Govreau v. Platy Enterprises [1989] 1 S.C.R. 1252; (1989), 10 C.H.H.R. D/6205.

Selected Newspaper and Magazine Articles

Abraham, Carolyn. "Crime in Cyberspace". The Ottawa Citizen. April 23, 1994.

"Authorities Say Bulletin Boards Hard To Control". Vancouver Sun. May 19, 1992.

"Bits and bytes of pornography have universities in quandry" The Ottawa Citizen. July 3, 1992, A4.

Boisvert, Yves. "La Cour d'appel préserve l'«affichage érotique»". La Presse. August 25 1994, A1-A2.

Bulkely, William M. "Censorship Fight Heats Up on Academic Networks". Wall Street Journal, May 24, 1993, B1.

Chapman, Paul. "Varsities grappling with porn in network". The Province (Vancouver). July 7, 1992.

Chow, Wyng. "Transmission of pornography disturbs universities". Vancouver Sun. July 3, 1992, A9.

"Computer network porno prompts mixed reaction" Calgary Herald. July 3, 1992.

"Computer Cleaned Up" The Toronto Sun. May 28, 1992.

D'Amato, Luisa. "UW computers carry 'obscene' material". Kitchener-Waterloo Record. July 2, 1992, A1.

Elmer-Dewitt, Philip. "Battle for the Soul of the Internet". Time, July 25, 1994 <?>, 40-xx.

Gooderham, Mary. "Homolka facts speed across data highway". Globe & Mail, December 2, 1993, A4.

Hum, Peter. "'The pictures and whatever were just geting too disgusting': Carleton censors computer porn, U of O doesn't". The Ottawa Citizen. July 4, 1992.

Jeffs, Allyson. "High-tech information 'smuggling' re-ignites debate over media ban". Ottawa Citizen, December 4, 1993, B4.

Jenish, D'Arcy. "The King of Porn". Maclean's. October 11, 1993, 52-56.

Jorgensen, Randy. "Don't moralize under guise of regulating". The Ottawa Citizen. September 18, 1994, A11.

Kavanaugh, Cindy. "Computer Porn Hits University Campus". Windsor Star. July 9, 1992, A5.

Monteiro, Liz. "Police won't probe UW porn". Kitchener-Waterloo Record. July 3, 1992, B1.

Moon, Peter. "Computers graphic when it comes to porn". The Globe and Mail. July 20, 1992, A1.

Moon, Peter. "Computer porn prompts outcry". The Globe and Mail. July 20, 1992, A5.

Moon, Peter. "Network lets users 'say what they think'". The Globe and Mail. July 20, 1992, A5.

Paul, Alexandra. "U of M taking byte out of offensive software". Winnipeg Free Press. Saturday May 9, 1992.

Prentice, Maja. "Regulation of porn must reflect local community standards". The Ottawa Citizen. September 18, 1994, A11.

Sandberg, Jared. "New Software Filters Sexual, Racist Fare Circulated on Internet". The Wall Street Journal. May 15, 1995, B2.

Sharpe, Geoffrey. "Restrict location, numbers of outlets". The Ottawa Citizen. September 18, 1994, A11.

Simone, Rose. "UW official can't evade porn issue". Kitchener-Waterloo Record. July 10, 1992, C1.

Smith, Michael. "Grisly details available on computer networks". Toronto Star December 1, 1993, A4.

"Universities' reactions differ over computer bondage scenes". The Hamilton-Burlington Spectator. July 3, 1992, B5.

Unland, Karen. "Pornography in university computer system will stay, official says". The Edmonton Journal. July 11, 1992, B1.

Unland, Karen. "Women's group wants review of computer network porn". The Edmonton Journal. August 8, 1992, C2.

"Violent porn boots up: network sending offensive transmissions to universities". The Province (Vancouver). July 3, 1992.

"Women urged to oppose obscene transmissions". Kitchener-Waterloo Record. July 2, 1992, A2.

Selected Documents Available via the Internet

Bartle, Richard. Interactive Multi-User Computer Games. Report Prepared for British Telecom. December 1990. Available by anonymous ftp from parcftp.xerox.com: /pub/MOO/papers/mudreport.*.

Berlet, Chip. "Christian Identity, Survivalism & the Posse Comitatus". Posted to alt.activism September 30, 1992. Available on listerv@oneb.almanac.bc.ca as CHR-IDEN.01.

Boyce, Jim. July 14, 1992 article from The Cord. (posted to: alt.comp.acad-freedom.talk, alt.censorship; 13 Aug 1992) Available by anonymous ftp from ftp.eff.org as wlu.ca

Buhr, Kevin Andrew. "FP Article Confirms Billionth Monkey Hypothesis". Message-ID: <1992May10.093635.27536@ccu.umanitoba.ca>. Sun, 10 May 1992 09:36:35 GMT; Posted to local.unix.general, wpg.general, alt.comp.acad-freedom.talk; Available from cafv02n21.

Campbell, K.K. ".SIG HEIL: Holocaust revisionism goes up in flame wars". Posted to: eye WEEKLY <eye@interlog.com>, November 10, 1994.

Godwin, Mike. "Internet Liability: Is the Provider Responsible". from Internet World. Nov./Dec 1993. Available by anonymous ftp from ftp.eff.org.

Hardy, Henry Edward. The History of the Net. Master's Thesis. "Unpublished" draft. v 8.5, September 28, 1993.

Kahn, John R. "Defamation Liability of Computerized Bulletin Board Operators and Problems of Proof". CHTLJ Comment. February 1989.

Kamens, Jonathan. "How to Become a USENET Site". Editor and Poster: Chris Lewis <clewis@ferret.ocunix.on.ca>. Feb. 16 1994. Posted periodically to: news.admin.misc, news.announce.newusers, news.answers

Lang, Margot. "Computer Libel Wins Academic $40,000". The West Australian. April 2, 1994. Posted by Inge Lauw <ilauw@cleo.murdoch.edu.au> to dispute-res@listserv.law.cornell.edu, April 6, 1994.

Lewnes, Alexia. "Cracking down on child pornography". (April/June 1994).

MacKinnon, Richard Clark. Searching for the Leviathan in Usenet. Masters Thesis. San Jose State University. December 1992.

Mahoney, Bob. "What Files are Legal for Distribution on a BBS?". Exec-PC Multi-user BBS, 1989.

NMEC (National Center for Missing and Exploited Children). "Child Safety on the Information Highway". 1994. Available from the Electronic Frontier Canada gopher (insight.mcmaster.ca/11/org/efc).

Rafaeli, Sheizaf and Robert J. LaRose. "Electronic Bulletin Boards and "Public Goods" Explanations of Collaborative Mass Media"

Reid, Elizabeth M. Electropolis: Communication and Community on Internet Relay Chat. Honours Thesis. University Of Melbourne, 1991.

Riddle, Michael H. "The Electronic Pamphlet -- Computer Bulletin Boards and the Law".

Salzenberg, Chip, Gene Spafford & Mark Moraes. "what-is-usenet/part1". periodically posted to news.announce.newusers, October 28, 1994.

University of British Columbia. Report of the Task Force on the Appropriate Use of Information Technology. Vancouver, B.C., December 1992. [Available via anonymous ftp from ftp.ucs.ubc.ca in /pub/info/reports]

Vielmetti, Edward. "What Is Usenet? A Second Opinion". Periodically posted to news.announce.newusers. Originally posted Dec. 26, 1991.

Woods, Greg. "Guidelines for USENET Group Creation". Enhanced & edited until 5/93 by spaf@cs.purdue.edu (Gene Spafford); Last-change: 30 Nov 1993 by tale@uunet.uu.net Posted to news.announce.newusers, news.groups, news.admin.misc, news.announce.newgroups, news.answers

CACC / CCAC
29819

QUEEN HC 120 .I55 S3 1995 c. 2
Sansom, Gareth
Illegal and offensive conten