

# Child Pornogra Cyber

**I**t is unclear how much child pornography there is on the internet, but there are a number of factors that make cyberspace a uniquely suitable place for child pornographers to deal in their wares. It might be expected that the challenges posed by modern information distribution would inspire law makers to develop a coherent, planned approach to it.

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Unfortunately, a clear policy direction has not emerged. Despite this lack of leadership, the law enforcement community is beginning to respond by using existing laws to address the problem. Particular difficulties associated with policing the internet may account for the limited success of these enforcement efforts. However, undue emphasis placed on the uniqueness of the internet as a medium for child pornography distracts from the classic problems of policing child pornography: a denial of the harm inherent in the practice, and the conflicting goal of protecting some kinds of speech.

### Availability of child pornography

If you want to break the law and get your hands on child pornography, a quick trip around the internet is all it takes. Due to the illicit nature of child pornography, it is difficult to get statistics on its prevalence. However, if you assume that a certain percentage of the pornography on the internet involves children, statistics on pornography generally can be revealing.

A *Time* magazine article, based on a study by Martin Rimm,<sup>1</sup> asserted that [t]here's an awful lot of porn

online.<sup>2</sup> According to the article, [o]n those [u]senet news groups where digitized images are stored, 83.5% of the pictures were pornographic. The article also points out, however, that pornographic image files, despite their popularity, represent only about three percent of all usenet groups, which represent only 11.5% of traffic on the internet. These figures indicate that pornography is only found on one half of one percent of the internet, in sharp contrast to the figure of 83.5% used sensationally at the beginning of the article. Overall these numbers are controversial, and the methodology used in the Rimm Study has been criticized.<sup>3</sup> Mike Godwin, a lawyer and journalist, accused the study of generalizing from adult bulletin board servers and usenet news groups to the information superhighway as a whole, drawing the analogy of, generalizing from a Times Square adult bookstore to the print medium.<sup>4</sup>

These critics do acknowledge, however, that there is pornography on the internet. What they question is the characterization of the internet as seething with obscenity, rather than as generally free of obscene material. The statistics may be controversial, but the fact remains that there is child pornography available to the public on the internet every day. Even if the majority of cyberspace is free of pornography, the areas that contain illegal and dangerous materials cannot simply be ignored, and neither can they be justified by the relative cleanliness

of the rest of the internet. The US Federal Bureau of Investigations has observed that, [t]he utilization of online services or bulletin board systems is rapidly becoming one of the most prevalent techniques for individuals to share pornographic pictures of minors, as well as to identify and recruit children into sexually illicit relationships.<sup>5</sup>

## The Internet: A uniquely suitable place for child pornographers

### 1. Access

More and more people own the tools necessary to access the internet, and even those who do not can gain access through many schools, universities, offices, and even coffee houses and bars. This access means that child pornography is now easily available to a much larger number of people than ever before. The wide availability of access to the internet is the first of several factors that have implications for child pornography.

### 2. Ease of use and distribution

The second factor that contributes to the unique quality of child pornography on the internet is ease of use and distribution. Nothing is lost by sending pornography via the internet rather than by regular mail. Messages may include or be composed of pictures that appear on a computer screen with comparable clarity and colour to a magazine. No direct contact is required between a source/distributor and the consumer,

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1 Martin Rimm was an undergraduate in engineering at Carnegie Mellon University when he published his study, entitled "Marketing Pornography on the Information Superhighway: A Survey of 917, 410 Images, Descriptions, Short Stories and Animations Downloaded 8.5 million times by Consumers in over 2000 cities, in 40 countries, provinces, and territories": see <http://TRFN.pgh.pa.us./quest/mrstudy.html>.

2 Philip Elmer-Dewitt, "On a Screen Near You: Cyberporn" (3 July 1995) 146:1 *Time* 32 at 34. Also located at <http://pathfinder.com/@i2EgWIFEdgEAQMp4/time/magazine/domestic/1995/950703/950703.cover.html> on 8 January 1996.

3 See Donna Hoffman and Thomas Novak, "A Detailed Critique of the Time Article 'On a screen near you: Cyberporn'" (1 July 1995), located at <http://www2000.ogsm.vanderbilt.edu/dewitt.cgi> on 8 January 1996; and David Post, "A Preliminary Discussion of Methodological Peculiarities in the Rimm Study of Pornography on the 'Information Superhighway'" (28 June 1995), located at <http://www.interlog.com/~bxi/post.html> on 8 January 1996.

4 Mike Godwin, "Journoporn - Dissection of the Time Scandal," located at <http://www.hotwired.com/special/pornscare/godwin.html> on 8 January 1996.

5 "Use of Computer Networks for child sex sets off raids" (13 September 1995) (c) 1995 New York Times News Service, located at [http://www2.nando.net/newsroom/ntn/nation/newsroom331\\_4.html](http://www2.nando.net/newsroom/ntn/nation/newsroom331_4.html) on 8 January 1996.

so a person is spared the trip to the provider of illegal child pornography. And once a pornographic photo is downloaded, it can be stored indefinitely on a computer hard-drive, available for viewing at any time.

Additionally, many advantages over regular mail are gained by using the internet. For example, a person can easily remain anonymous in cyberspace. There is less hassle involved in sending the actual message, as a person does not even have to leave the house. With the computer equipment widely available these days, speed is increased: sending or receiving a message may take only a matter of minutes. Difficulties with storage are also reduced, as files on a hard drive take up less space and are less conspicuous than paper copies of the same material.

### 3. Legitimizing function

Usenet groups and bulletin boards allow people to discuss child pornography in an environment that normalizes it. Related to discussions of child pornography are discussions about child sexual abuse. Such acts, however, are not often characterized as abuse. On the contrary, sexual relationships with children often are portrayed as positive interactions for everyone involved. For example, a writer of a usenet newsgroup message indicated that while he had previously had some doubts and hesitation about initiating sexual relations with his very young niece, he had been convinced

by many messages in the newsgroup that sexual contact with her was perfectly natural, and would even be *beneficial* to her development.<sup>6</sup>

The internet offers new arenas for these discussions where before, either none existed, or at least they existed in fewer numbers and were available to

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fewer people. The general tenor of these discussions can have the effect of legitimizing child pornography and child sexual abuse. Some may argue that these discussions should not be regulated or monitored because to do so would restrict freedom of expression. However, as the above example shows, the value of free expression is not the only one at play. The potential for harm to children that results from normalizing child pornography and sexual abuse must not automatically become an issue secondary to freedom of expression.

### 4. Difficulty of monitoring and tracking

It is extremely difficult to monitor and to track internet communications and transactions. Millions of

<sup>6</sup> This message appeared in one of the alt.sex.usenet newsgroup in January 1996. While the writer of the message may not have meant what he said, he also may have been deadly serious. It is unlikely that he is alone in having been convinced by a barrage of this type of material that it is appropriate to consider children as sexual objects.

people around the world use the internet; communications often occur across national boundaries; and the number of messages are so numerous as to make regulation of all the individual messages impractical. It has been estimated that 20 million words are posted to usenet newsgroups every day, and that the equivalent of 300 paperback pages pass across the network per second.<sup>7</sup> The ability to send messages over phone lines at amazing speeds removes the risks associated with large shipments of illegal goods, which often must pass through customs.

Any attempt to exercise control over the internet is complicated by its cross-jurisdictional nature. There is no central organization which controls or monitors the internet. As such, policing occurs on an ad hoc basis between countries and is subject to myriad legal regimes representing disparate philosophies on the problems of pornography. These difficulties in policing the internet translate into an advantage for those who use it for illegal purposes, because of the decreased likelihood they will be detected, apprehended, or prosecuted.

This problem of policing is complicated further by the greater incidence of the point of sale being in a separate jurisdiction from the point of purchase. If certain pornographic images are legal in the source country, law enforcement officers in a receiving country where they are illegal may be forced into focusing on individual consumers, rather than the producers. This inability to stop

material at its source presents a major obstacle to law enforcement officers. Cases that may at first appear to be successes in the fight against child pornography actually may be of limited importance.

For example, in January of this year, a national precedent was set when Newfoundland police charged a man with the importation and possession of child pornography that had been downloaded from the internet.<sup>8</sup> However, his arrest did not affect the distribution ring. Locating and charging only one recipient with possession is unlikely to make even a dent in the actual volume of material being exchanged. This deficiency in enforcement is aggravated by the fact that the police have indicated they will act only after receiving a complaint.<sup>9</sup> If there is to be at least some enforcement of child pornography laws in cyberspace, police must not passively wait for complaints to be brought to them; they must aggressively conduct their own investigations.

### 5. Incentive to make, sell and trade

It is likely that the internet will encourage greater production of child pornography. Because nothing more is required to put a pornographic image online than to scan a photograph into a computer and send it with the click of a button, the production requirements of earlier times no longer exist. Gone is the need to bind the material into magazines, or to arrange for the distribution of bulky materials. The securi-

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7 Warren Caragata, "Crime in Cybercity" (22 May 1995) *Maclean's* 50 at 52; and Joe Chidley, "Red Light District" (22 May 1995) *Maclean's* 54 at 58.

8 Tom McDougall, "Possessing Internet porn illegal, but random computer raids unlikely" (18 January 1996) *National General News* (Quicklaw - Canadian Press); and "Internet child porn case scheduled for April" (13 February 1996) *Atlantic Regional News* (Quicklaw - Canadian Press).

9 McDougall, see note 8.

ty risks and expenses associated with that type of undertaking become negligible.

Amateur child pornography can flourish on the internet, and its production is encouraged by its potential to offer a new way to profit.

Payment may come in the form of money, or in barter of pornography between interested individuals who often locate one another via the internet. With the spread of amateur child pornographers, it may be that an even greater number of children are at risk of becoming exploited as models.

### **What is being done?**

Given the wide range of issues raised by the internet as a new medium for child pornography, one would expect serious efforts to be taken to develop an appropriate response. In Canada, however, such comprehensive efforts have not materialized. Despite this vacuum of policy direction, a range of initiatives are being undertaken by law enforcement agencies. Regular law enforcement options do not, however, seem entirely adequate to address the problem. This failure may be due to a lack of guidance from government, and the difficulties (discussed above) of regulating the internet. It also may be due to a general lack of commitment to taking the harms of child pornography seriously.

The only official Canadian organization assigned to study the internet is the Information Highway Advisory Council, which is responsible to Industry Canada. None of the main policy objectives identified in their Final Report, which was

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released in September 1995, related directly to use of the internet for illegal purposes.<sup>10</sup> Of the 15 issues addressed, only one touches on pornography and what controls, if any, should be put on information. Overall, the report dedicated only about ten paragraphs to a discussion of illegal or obscene material. Given this lack of attention, it was unlikely that creative solutions would be suggested, and in fact, the recommendations support the status quo.

The Final Report, while making several specific recommendations, generally advocated three approaches

<sup>10</sup> Located at <http://www.ic.gc.ca/info-highway/final.report/eng/> on 8 January 1995.

to deal with obscene or illegal material. First, it recommended that existing laws should be fine-tuned to make them more applicable and enforceable in the changing world of global networks. Second, it promoted self-censorship and suggested that internet service providers be encouraged to adopt voluntary codes of ethics to govern their behaviour. Finally, it stressed that the public

pictures and send mail to one another with just a few keystrokes, child pornography slips easily across borders.<sup>11</sup> To apply existing laws more effectively, the Final Report identified a need for bilateral and multilateral arrangements at the international level. However, nothing more specific was offered.

Law enforcement agencies appear to be trying to develop such agreements. To that end, the Royal Canadian Mounted Police have sent a representative to the United Nations to take part in a task force examining crime on the global network of computer systems.<sup>12</sup> According to Commissioner Philip Murray, the RCMP are concerned about the increase in hate literature and child pornography on the internet. In an interview with the press, he admitted that developing a coordinated response may take some time. The challenge of dealing with such material is exacerbated because many countries with substantially different

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values are involved.<sup>13</sup> Since the extent of our jurisdiction is unclear with respect to messages originating outside this country, or with respect to messages sent from here to abroad, Canadians may have to wait for results from this slow process.

### Global Regulation

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11 Jim Bronskill, "RCMP working with UN to halt Internet crime" (4 April 1995) National General News (Quicklaw - Canadian Press).

12 Bronskill, see note 11.

13 For example, in the US a "community standards" test is used to judge whether material is "obscene." But when sexually explicit material available on a computer bulletin board in one state is accessed and viewed by someone in another state, which state's "community standards" should be used? For a discussion of this question, see Paul R. Joseph, "As Our World Connects, Issues Arise" (Spring 1996) 23:2 human rights 17 at 17. For a further discussion of these issues, see Dennis Chiu, "Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway" (1995) 36 Santa Clara Law Review 185; Pamela Huelster, "Cybersex and Community Standards" (May 1995) 75 Boston University Law Review 865; and John Zanghi, "Community Standards' in 'Cyberspace'" (Fall 1995) 21 University of Dayton Law Review 95. Similar conflicts of laws will also occur between countries.

14 "Internet subscriber shut off for spreading child pornography" (30 December 1995) Foreign General News (Quicklaw - Canadian Press); and "Prosecutors consider incitement charges against internet-access providers" (24 January 1996) Foreign General News (Quicklaw - Canadian Press).

15 John McKay, "Canadians unfazed by latest Internet chill" (3 January 1996) National General News (Quicklaw - Canadian Press).

16 Located at <http://www.eff.org/PUB/EFF/about.eff> on 1 March 1996. Begun in the United States, there are now EFF organizations in Canada, Ireland, Norway, and Australia.

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17 "Germany probes online services to nab cyber-Nazi" (25 January 1996) Foreign General News (Quicklaw - Canadian Press). Five days after the signing of the US Communications Decency Act, (see note 39 and accompanying text), CompuServe reinstated access to all but five of the suspended internet newsgroups. It also said that it would offer a parental control program to allow users both at home and abroad to restrict access to questionable newsgroups: see "CompuServe reinstates newsgroup access" (13 February 1996) Business (Quicklaw - Canadian Press).

18 Dewitt, see note 2 at 39.

19 "Child pornography library found" (15 April 1994) Foreign General News (Quicklaw - Canadian Press).

20 McDougall, see note 8.

21 This approach will be discussed further below; see the section entitled "Rule of Law in Cyberspace."

22 The New York state court decision of *Stratton Oakmount Inc. & Porush v. Prodigy*, 23 Media Law Reporter 1794 (New York Supreme Court 1995) held that any carrier that held itself out as attempting to exercise some editorial or censorial function would become responsible for matter that was available through its server, but that was described as unacceptable in its guidelines. Essentially, this approach characterizes network servers as distributors. The decision has been appealed, and it is unclear what effect the new US Communication Decency Act may have on it. This is not the law in Canada, and the Final Report indicates that it should not become the law. The main arguments raised against imposing liability on network servers are: first, that they more closely resemble common carriers (such as telephone companies, which have no liability for the content of telephone conversations) than distributors (such as book stores); and second, that network servers would not be able to afford such liability, and so would severely restrict use, which would result in undue restrictions on freedom of expression.

authorities. The Ohio-based network server agreed to block access to sex-oriented areas of the internet because of pressure from German prosecutors.<sup>14</sup> However, due to technical problems, CompuServe could only accomplish this task by blocking access to all of its four million subscribers worldwide, not just to those in Germany.<sup>15</sup>

These actions sparked fierce protest from civil liberties groups like the Electronic Frontier Foundation, founded in the United States in 1990 to ensure that civil liberties such as privacy and freedom of expression were protected as new communications technologies emerge.<sup>16</sup> The EFF accused Germany of trying to control what the rest of the world could see and read on the internet.<sup>17</sup>

Despite the complexity of these problems, regular law enforcement and international cooperation have produced some results. There are examples of coordinated international efforts in cross-jurisdictional cases. A man accused of distributing pornography from Mexico was successfully extradited to the United States for prosecution.<sup>18</sup> British police, after a tip from the FBI, seized child pornography stored in a London university computer that could be linked to 160 countries.<sup>19</sup> And the previously mentioned case in which a Newfoundland man was arrested and charged with possession of child pornography occurred after the Newfoundland police received a tip from the RCMP, who in turn had been given information by US customs.<sup>20</sup>

However, it appears that the majority of crime control activity is carried out by national law enforcement agencies working alone. Undercover operations, busts, arrests and prosecutions are occurring within the framework of regular obscenity and pornography laws.<sup>21</sup>

### Voluntary Codes and Self-Censorship

The second general recommendation in the Information Highway Advisory Council Final Report relates to information providers and network servers. It was suggested that the development and adoption of voluntary codes of ethics and practices be encouraged. Nowhere was it suggested, however, that network servers be held responsible for the content of the messages they carry.<sup>22</sup> The decision not to make servers responsible for monitoring messages effectively leaves such censorship in the hands of individuals, and possibly corporations. Parents and guardians can use technology to program their computers and screen out material to which they do not want their children to have access. This approach differs from more interventionist or regulatory approaches in its assessment of the amount of pornography available on the internet. It takes the view that cyberspace is generally a safe place, and that pockets of obscenity can be side-stepped when necessary.

It must be recognized that this approach is extremely problematic in that it characterizes the issue as one of children being exposed to pornog-



raphy. Proponents of this approach, therefore, suggest that leaving it to parents to censor is solution enough. They advocate child-proofing the internet. Unfortunately, putting an end to childrens access to such material does nothing to address the problem of adults who satisfy their own demands for pornography through the internet. Most importantly, it does nothing to address *adult* consumption of child pornography. The self-censorship solution, supported by appealing to the principle of freedom of expression by confusing the issue of child pornography with that of children viewing pornography superficially appears reasonable and effective, while allowing adults continued ease in the location, viewing and possession of clearly illegal materials.

### Rule of Law in Cyberspace

Does criminal prosecution offer a better strategy to address these harms? The last proposal of the Information Highway Advisory Council was that the public should be educated that the rule of law has application in cyberspace. There is a difference, however, between a law having application in a given situation, and that same law being enforced. While local and national law enforcement agencies do appear to be making some attempt to enforce child pornography laws on the internet, the ultimate results are disappointing.

The RCMP state that they can deal with pornography on a computer in the same way they deal with it

on paper, that the laws have been around for years, and that the electronic medium doesnt really present [their] investigators with much difficulty.<sup>23</sup> Neither the US Department of Justice nor the RCMP have asked for new legislation to deal with pornography on the internet.<sup>24</sup> However, the fact that child pornography remains constantly available suggests that the electronic medium does present investigators with difficulties. Even if a new law is not needed, something clearly has to change. The RCMP recognize this need, and have established trained computer investigators and a section for dealing with crimes on the internet, including pornography.<sup>25</sup> They have also sent a representative to the UN task force on crime on the global computer network.<sup>26</sup>

The Criminal Code provision governing child pornography<sup>27</sup> has been put to use in cases involving the internet, most recently in the Newfoundland case mentioned earlier. The accused in that case was charged only with the least serious offence of possession of child pornography; interestingly, this might have been the case even if the police had suspected that he was involved in distribution activities. Possession is far easier to prove than is distribution when the internet is involved, because of the problems inherent in monitoring and tracking internet communications. Therefore, the offence of mere possession may be essential to those prosecutions in which it is too difficult to prove distribution.

23 McDougall, see note 8.

24 In the US, for example, the distribution of obscene material across state lines is already illegal. Several years ago, 40 people from 14 states were arrested for exchanging child pornography online: see Dewitt, note 2 at 39. As well, recently a three year sentence was handed down to a man for transmitting obscene messages by computer: see Wendy Cole, "The Marquis de Cyberspace" (3 July 1995) 146:1 *Time* 37 at 37, also located at <http://pathfinder.com/@iZEgWIFEdgEAQMp4/time/magazine/domestic/1995/950703/950703.cover.marquis.html> on 8 January 1996. And in the same year, the US Justice Department made a dozen arrests following a two year FBI investigation into the use of America On-line, the country's largest computer network, to distribute child pornography and lure minors into sex:

see "Use of Computer Networks for child sex sets off raids," note 5.

25 "Porn flows freely along information highway" (6 November 1994) National General News (Quicklaw - Canadian Press).

26 Bronskill, see note 11.

27 Section 163.1 creates three offences in relation to child pornography: production, distribution, and possession. Unlike section 163, which governs obscenity generally, section 163.1 includes the additional offence of possession, which carries a maximum penalty of 5 years.

For example, in April 1995, after searching his home and finding videotapes and computer disks depicting child pornography, police in Calgary charged a man with 51 counts of possession of child pornography. The police believe that the evidence indicates a national and international child pornography ring that operates by computer, but again, charges of distribution were not brought against anyone.<sup>28</sup>

The Criminal Code provision prohibiting distribution of child pornography has also been applied directly to the internet. In *R. v. Pecciarich*<sup>29</sup> it was found that the accused, using an alias, uploaded child pornography onto a bulletin board server and acted as the systems operator of that server. In that case, the court decided that evidence of uploading files onto bulletin board servers, which the public can access through an application process, is clear evidence of distribution. This case leaves no doubt that the rule of law applies to computer-mediated communications, as stressed by the Information Highway Advisory Council.

From the sentencing in *Pecciarich*, it is clear that the court was concerned about the harm that could arise from the consumption of child pornography. The fact that the material was capable of inciting other pedophiles to act-out was

considered an aggravating factor.<sup>30</sup> This concern reflects the assertion in *R. v. Butler*, the leading Canadian case on pornography and the Charter, that pornography can cause harm, which includes predisposing a person to act in an anti-social manner.<sup>31</sup> An appreciation of this type of harm is evident in the child

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pornography law itself. For example, the Criminal Code defines some material as child pornography even when the subject of the visual representations is not actually under eighteen years of age,<sup>32</sup> indicating that the law is concerned not only with the children who are harmed in the production of child pornography.

28 Chidley, see note 7 at 58.

29 *R. v. Pecciarich* (1995), 22 Ontario Reports (3rd) 748 (Provincial Division).

30 *R. v. Pecciarich*, [1995] Ontario Judgements No. 2238 (Quicklaw) (Provincial Division).

31 *R. v. Butler*, [1992] 1 Supreme Court Reports 452 at 478-480.

Similarly, Mr. Pecciarich was found guilty despite the fact that the images involved were computer generated and did not require the exploitation of children for their production.<sup>33</sup>

In the end, however, the accused in *Pecciarich* received only a suspended sentence, due to the mitigating

was given a conditional discharge due to the mitigating factor of youth. These results seem at odds with the strong penalty of up to ten years imprisonment that is found in the Criminal Code.<sup>36</sup> It is to be hoped that such lenient sentences will not become indicative of the treatment of child pornographers youthful or otherwise who operate in cyberspace.

Unfortunately, there are other signs that leniency will become commonplace when judges deal with child pornography. In British Columbia, a man who was charged with possession of child pornography, and who had pled guilty, is reported to have received a letter from the judge on the case. Provincial Court Judge Saunderson wrote a letter to Vernon Logan's lawyer saying that he should not plead guilty, and that the law banning child pornography ought to be constitutionally challenged. In the letter, the judge apparently said that Logan should enlist the BC Civil Liberties Association or a large legal firm to argue the case. The defendant maintained his plea of guilty, and

the judge discharged him absolutely. The newspaper account of the absolute discharge indicated that Judge Saunderson said Logan was of good character and without previous conviction, and that the law was an infringement of one's freedom of

fact that he was a youthful first offender.<sup>34</sup> This decision followed on two previous cases,<sup>35</sup> both of which involved the distribution of obscene adult materials as well as child pornography on bulletin board servers. In each case, the accused

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<sup>32</sup> Section 163.1 (1) defines "child pornography" to include visual representations "that show 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." (emphasis added)

<sup>33</sup> The children depicted had originally appeared in photographs in clothing catalogues. These photographs had been scanned into a computer, and the computer image had then been enhanced, for example, by removing clothes and adding genitalia. The judge simply assumed that computer-generated images were covered under Canadian child pornography laws.

<sup>34</sup> *Pecciarich*, see note 30.

<sup>35</sup> *Pecciarich*, see note 30.

<sup>36</sup> For example, these penalties can be contrasted with the general provision on obscenity in section 163 of the Criminal Code, where the maximum penalty for both production and distribution is only 2 years.

thought, belief, or opinion...on the theory that unfettered access to reading material is necessary to the exercise of those freedoms.<sup>37</sup>

In the written decision of *R. v. Logan*,<sup>38</sup> the court emphasized that there was no suggestion that the defendant had been sexually involved with children, and further stated that there was no evidence or argument of a causal relationship between reading child pornography and committing sexual offences against children: [t]here has been, and continues to be, considerable debate about whether viewing pornography causes individuals to commit sexual offences.

The court found that a conviction would not be necessary to deter or rehabilitate the accused who had already been forced to resign a position with an international organization, and had lost the company of his female companion of seventeen years. In granting the discharge, the court noted that, ...the defendant is not accused of committing any *overt act* detrimental to the public. *His crime is entirely passive*. He had prohibited material in his possession and, *presumably, read it. That is the extent of his culpability*. (emphasis added)

Therefore, the main obstacle to preventing child pornography on the internet may be not the internet itself, but rather attitudes to child pornography that fail either to take the offence seriously, or to punish it with adequate severity. In neither *Pecciarich* nor *Logan* did the convicted accused serve time for his offence.

In *Pecciarich*, any rhetorical concern for the harm involved in child pornography was not evident in the ultimate outcome of the case. And in *Logan*, the harm itself was denied, while freedom of expression was valued more highly.

## Where to go from here?

A new US law has been passed recently that, on the surface, seems to take these issues more seriously. It is useful to examine this law to determine if it could offer any solutions for Canada. On 8 February 1996, President Bill Clinton signed the *Communications Decency Act* into law as part of a landmark legislative package that threw the US market open for cable television and telephone services.<sup>39</sup> Importantly, the new law makes it a crime, punishable by up to \$250,000 and two years imprisonment, to send indecent material that could be viewed by a minor over a computer network.<sup>40</sup> Proponents of the law, including its chief sponsor, Senator James Exon of Nebraska, say that the law is intended to protect children from hard-core pornography on the internet.<sup>41</sup>

For two days following the signing of the bill, much of the World Wide Web was blacked out and decorated with symbolic blue ribbons as part of a civil liberties protest.<sup>42</sup> Civil liberty advocates argue that these provisions amount to unconstitutional censorship. The American Civil Liberties Union immediately filed suit against the US government challenging the constitutionality of

37 "Accused says judge was right to grant discharge" (4 February 1996) National General News (Quicklaw - Canadian Press).

38 *R. v. Logan*, [1996] British Columbia Judgements No. 352 (Provincial Court).

39 *Telecommunications Act of 1996*, 110 Stat. 56.

40 "Clinton signs landmark telecommunications bill" (8 February 1996) Foreign General News (Quicklaw - Canadian Press); and "US telecommunications bill at a glance" (8 February 1996) Foreign General News (Quicklaw - Canadian Press).

41 "Internet blacked out in protest over censorship" (10 February 1996) Foreign General News (Quicklaw - Canadian Press).

42 "Internet blacked out in protest," see note 41.

these provisions.<sup>43</sup> In response to this lawsuit, a US District Court judge issued a temporary restraining order preventing the government from enforcing its new law. The order will remain in effect at least until the judge hears the arguments.<sup>44</sup>

Civil liberties groups argue that the law will violate privacy rights and strangle free speech, and they have a point. The *Communications Decency Act* defines indecency as any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.<sup>45</sup> This extremely broad definition of indecency could encompass any number of legitimate and important subjects. For example, when CompuServe forbade its customers access to roughly 200 sites, two of the restricted sites were gay-net.coming-out, and alt.sex.weight-gain.<sup>46</sup> Also, because of the way the CompuServe network was set up, the company could not selectively shut out only its German clients.<sup>47</sup> Such overly-broad restrictions on communication raise legitimate concerns about interference with freedom of expression.<sup>48</sup>

Many opponents of the new US law object to it on libertarian grounds: they believe that parents, not government, should control what their children see and hear, and that the value of freedom of expression should be paramount. It seems that Canadas Information Highway Advisory Council would agree. The

Final Report recognizes that pornographic /obscene /hate materials were widely accessible and easy to obtain, and that the internet is difficult to police and monitor. However, it states that in approaching this difficult issue, Canadians must strike a balance between maintaining freedom of expression and promoting tolerance, and imposing controls to deter harm to society and to individuals. With no new laws suggested to remedy the inadequacies of existing options, the balance ultimately struck is in effect one that leans heavily in favour of freedom of expression.

## Conclusion

The new US law contains an extremely broad definition of indecency that is too restrictive on freedom of expression. In addition, it does not focus specifically on child pornography. The irony is that, because of its breadth, it does go some way to accomplishing the goal of enforcing child pornography laws. By including in its scope a ban on indecent material in all cyber-places to which any member of the public might have access (essentially, anywhere a child can go), it directly restricts childrens access to pornography. And, since the laws definition of indecent material would include child pornography, the law also indirectly restricts adults access to child pornography, at least in public cyber-places. It could be argued that having similar provisions in Canada would help bring home the point, made in

43 "Clinton signs," see note 40.

44 "US judge blocks computer decency law" (15 February 1996) Foreign General News (Quicklaw - Canadian Press).

45 "US judge blocks," see note 44.

46 See also Ann Beeson in "Top Ten Threats To Civil Liberties in Cyberspace" (Spring 1996) 23:2 human rights 10 at 13, where she notes that America Online banned the word "breast" until several days of online protests by irate breast cancer patients caused them to reverse their policy. She also notes (at 10) that many of the groups represented by the American Civil Liberties Union in *ACLU v. Reno* (E.D.Pa. No. 96-0963), the case challenging the Communication Decency Act, (see note 42 and related text) are challenging the CDA because it "bans a wide range of socially valuable and constitutionally protected speech about sexuality, reproduction, human rights, and civil liberties." Groups represented by the ACLU include Critical Path AIDS Project, AIDS Education Global Information Service, Planned Parenthood, and the Safer Sex Web Page.

47 McKay, see note 15.

48 Also, the restrictions may tend to impact most harshly on vulnerable or isolated groups. This effect must be kept in mind when suggesting that regulations be increased; see especially *Little Sisters Book & Art Emporium v. Canada*, [1996] British Columbia Judgements No. 71 (Quicklaw) (Supreme Court). However, increased regulation of child pornography leaves less room for discretion — and therefore less room for bias — than does regulation of adult pornography (since all child pornography is illegal by virtue of s.163.1 of the Criminal Code, and it was decided in *R. v. Butler* that no child pornography would receive constitutional protection under the right to freedom of expression).

both the Information Highway Advisory Committee's Final Report and *Pecciarich*, that current child pornography laws apply equally in cyberspace.

However, a replication of the new US law would be too extreme and unnecessarily broad, and is not advisable. It would be enough to amend the Criminal Code to include an offence regarding child pornography on the internet specifically, carrying with it even stricter penalties than exist under the current provisions. But stricter penalties alone will not solve the problem.

Despite the relatively strong penalties that exist already in relation to child pornography, offenders are being granted suspended sentences and discharges. The harm that results from child pornography is being ignored or denied. Stricter penalties must be combined with a renewed conviction on the part of the police, the courts, and the public, that child pornography offences are indeed harmful and must be dealt with as such.

Most importantly, the harms associated with child pornography must not be obscured by the rhetoric of freedom of expression. This danger arises in particular when child pornography is found on the internet. Claims that civil liberties will always be trampled when the government attempts to regulate the internet are simply not true.

Careful regulations crafted to address specific problems need not be overly broad or oppressive. While cyberspace may be a unique and

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novel place, this distinctiveness is no reason in itself that it should not be regulated in the same manner as is non-cyberspace. Further, claims that cyberspace is the last bastion of free communication must not convince us to forego enforcement of our laws there. With a calm and reasoned approach, socially valuable and constitutionally protected speech need not be sacrificed in the struggle against child pornography. ■