

Governing Pornography & Child Pornography on the Internet: The UK Approach

By Yaman Akdeniz,^{*}
<<http://www.cyber-rights.org/yamancv.htm>>

CyberLaw Research Unit,
Faculty of Law,
University of Leeds,
Leeds LS2 9JT.
United Kingdom
E-mail: lawya@cyber-rights.org
Copyright © 2001, Yaman Akdeniz

Full Citation: Akdeniz, Y., "Governing pornography and child pornography on the Internet: The UK Approach," in *Cyber-Rights, Protection, and Markets: A Symposium*, (2001) *University of West Los Angeles Law Review*, 247-275.

Table of Contents

GOVERNING PORNOGRAPHY & CHILD PORNOGRAPHY ON THE INTERNET: THE UK APPROACH -----	1
Introduction -----	3
The availability of pornographic content on the Internet -----	3
The governance of the Internet -----	4
Overview of UK pornography laws -----	5
Obscene Publications Act 1959 and 1964 -----	5
Child pornography -----	6
UK child pornography laws -----	6
Protection of Children Act 1978 -----	6
Section 160 of the Criminal Justice Act 1988 -----	8
Child Pornography Operations -----	8
Possession offences -----	8
Distribution offences -----	9
Fellows and Arnold: The Birmingham University Case -----	9
US attempts to regulate the Internet - the Communications Decency Act 1996 -----	10
Legal challenges to the CDA -----	10

^{*} An earlier version of this article was published as Akdeniz, Y., "Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach," in eds Edwards, L., and Waelde, C., *Law and the Internet: Regulating Cyberspace*, Hart Publishing, 1997. See also Akdeniz, Y., *Sex on the Net? The Dilemma of Policing Cyberspace*, Reading: South Street Press, July 1999, and Akdeniz, Y., & Strossen, N., "Sexually Oriented Expression," in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, pp 207-231.

Developments within the European Union -----	12
Responsibility of Internet Service Providers -----	14
UK police censorship of Internet newsgroups -----	17
Self- regulation by ISPs - the Internet Watch Foundation -----	17
Technical solutions and rating systems-----	19
Parental control software -----	20
Conclusion -----	22

Introduction

How pornography should be regulated is one of the most controversial topics to have arisen in relation to the Internet in recent years. The widespread availability of pornography on the Internet has stirred up a “moral panic”¹ shared by the government, law enforcement bodies such as the police, prosecutors and judges along with the media in general.²

There have been many attempts to limit the availability of pornographic content on the Internet by governments and law enforcement bodies all around the world. While the US Government tried to regulate the Internet through the Communications Decency Act 1996 (“CDA”), and later with the Child Online Protection Act 1998 (“COPA”), the UK police attempted to censor Usenet discussion groups allegedly carrying child pornography in the summer of 1996. Both attempts were criticised and the US Supreme Court struck down the CDA in June 1997, while the COPA is challenged by civil liberties organisations in the USA.

There is no settled definition of pornography, either in the United Kingdom itself, or in the multi-national environment of the Internet, where cultural, moral and legal variations all around the world make it difficult to define “pornographic content” in a way acceptable to all. What is considered simply sexually explicit but not obscene in England may well be obscene in many other countries; conversely what is considered lawful but not pornographic in Sweden may well be obscene under the current UK legislation.

This article will discuss two different issues: the regulation of potentially harmful content such as pornography on the Internet; and regulation of invariably illegal content such as child pornography. These issues are different in nature and should not be confused. It is the submission of this paper that any regulatory action intended to protect a certain group of people, such as children, should not take the form of an unconditional prohibition of using the Internet to distribute certain content where that is freely available to adults in other media.

Before explaining the possibilities of how to govern the availability of “pornographic content” on the global Internet, the author will briefly discuss how and in what form these materials are available on the Internet.

The availability of pornographic content on the Internet

Pornography on the Internet is available in different formats. These range from pictures and short animated movies, to sound files and stories. Most of this kind of pornographic content is available through World Wide Web (“WWW”) pages; but sometimes they are also distributed through an older communication process, Usenet newsgroups. The Internet also makes it possible to discuss sex, see live sex acts, and arrange sexual activities³ from computer screens.

¹ See S Cohen, *Folk Devils and Moral Panics: Creation of Mods and Rockers* (Blackwell, 1987).

² It all started with a controversial Time Magazine article in the summer of 1995. See P Elmer-Dewitt “On a screen near you: Cyberporn,” *Time*, 1995, July 3, 34-41. See for a critique Wallace, J., and Mangan, M., *Sex, Laws, and Cyberspace: Freedom and Censorship on the Frontiers of the Online Revolution*, Henry Holt & Company, 1996.

³ But see section 2 of the Sexual Offences (Conspiracy and Incitement) Act 1996 which makes it an offence to incite another person to commit certain sexual acts against children abroad. The scope of incitement for the purposes of section 2 extends to the use of Internet and any incitement will be deemed to take place in the UK if the message is received in the UK. However, no prosecution has been achieved under this law within

There are also sex related discussions on the Internet Relay Chat ("IRC") channels where users in small groups or in private channels exchange messages and files. But as with the Web and the Usenet, only a small fraction of the IRC channels are dedicated to sex. There are more than 40,000 Usenet discussion groups all around the world but only around 200 groups are sex related, some of these relating to socially valuable and legitimate discussions, concerning, e.g., homosexuality or sexual abuse.

The governance of the Internet

If illegal and harmful content on the Internet needs to be regulated then the question is: how should this be achieved? Despite the popular perception, the Internet is not a "lawless place."⁴ Rather the Internet "poses a fundamental challenge for effective leadership and governance."⁵ Walker states that:

"In the current stage of modern, or post-modern society, one can expect a trend towards 'governance' rather than the 'government', in which the role of the nation state is not exclusive but may need further sustenance by the activation of more varied levels of power at second hand."⁶

According to Reidenberg, laws, regulations, and standards will affect the development of the Internet and this is also true for self-regulatory solutions introduced for the availability of pornographic content on the Internet. Reidenberg states that:

"Rules and rule-making do exist. However, the identities of the rule makers and the instruments used to establish rules will not conform to classic patterns of regulation."⁷

The Internet is a complex, anarchic, and multi-national environment where old concepts of regulation, reliant as they are upon tangibility in time and space, may not be easily applicable or enforceable. This is why the wider concept of governance may be more suitable. According to Walker, "social regulation within modern society has developed within physical bounds of time and space, but the development of cyberspace distanciates its inhabitants from local controls and the physical confines of nationality, sovereignty and governmentality leading to new possibilities in relationships and interaction."⁸ The idea of "governance without government" may be the best approach for the development of the Internet. But "if such mechanisms of international governance and re-regulation are to be initiated then the role of nation states is pivotal."⁹

the UK since its enactment. See Burrell, I., "Child- sex tourists escape UK law," *The Independent*, July 13, 1998. See also the Sex Offenders Act 1997 s.7 which deals with sexual offences committed outside the UK.

⁴ See Reidenberg, J.R., "Governing Networks and Cyberspace Rule-Making" (1996) *Emory Law Journal* (45) 911 (Summer).

⁵ *Ibid.*

⁶ See Walker, C., "Cyber-Contempt: Fair Trials and the Internet" (1997) *Yearbook of Media and Entertainment Law*.

⁷ See Reidenberg, *supra* note 4.

⁸ See Walker, *supra* note 6.

⁹ Hirst, P., and Thompson, G., "Globalization and the Future of the Nation State," (1995) 24 *Economy and Society* 408 at 430.

There appears to be no single solution to the regulation of illegal and harmful content on the Internet because, for example, the exact definition of offences such as child pornography varies from one country to another and also what is considered harmful will depend upon cultural differences. A European Commission Communication Paper stated that “each country may reach its own conclusion in defining the borderline between what is permissible and not permissible.”¹⁰ The multi-layered governance system should be a mixture of national and international legislation, and self-imposed regulation by the ISPs and on-line users. The self regulatory approach should include the creation of codes of conduct by the ISPs, awareness programmes to provide advice and education to parents and those who are in care of children on Internet related matters, and hotlines and special organisations to report illegal content on the Internet.

Governance theorists are beginning to recognise that “objects of governance are only known through attempts to govern them”¹¹ and “governance is not a choice between centralisation and decentralisation. It is about regulating relationships in complex systems,”¹² and the global Internet does provide a great challenge for governance. The following headings will try to address the issues arising from the multi-layered approach to the governance of “sexually explicit content” on the Internet.

Overview of UK pornography laws

This section concentrates mainly on those aspects of UK law relating to obscenity which have particular reference to the Internet. UK obscenity legislation has recently been amended by the Criminal Justice and Public Order Act 1994 (“CJPOA 1994”) to deal with the specific problem of Internet pornography.¹³ The following will show, however, that there are difficulties with the application of existing national laws to a medium such as the global Internet which does not have any borders.

Obscene Publications Act 1959 and 1964

These two statutes constitute the major legislation to combat pornographic material of any kind in the UK. Section 1(1) of the 1959 Act provides that “an article shall be deemed to be obscene if its effect or the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”¹⁴

Under Section 2(1) of the Obscene Publications Act (“OPA”), it is an offence to publish an obscene article or to have an obscene article for publication for gain. Section 1(3) of the 1959 Act makes it clear that the ‘articles’ contemplated were such items as computer disks; however

¹⁰ European Commission Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions: Illegal and Harmful Content on the Internet, Com (96) 487, Brussels, 16 October 1996.

¹¹ Hunt, A., and Wickham, G., *Foucault and Law: Towards a Sociology of Law as Governance* (1994, Pluto Press) at p 78.

¹² Rhodes, R.A.W., “The Hollowing Out of the State: The Changing Nature of the Public Services in Britain,” (1994) *Political Quarterly* 138 at p 151.

¹³ House of Commons, Home Affairs Committee: First report on Computer Pornography, (HMSO, 1994).

¹⁴ This legal definition of obscene is narrower than the ordinary meaning of obscene which is filthy, lewd or disgusting. See *R v Anderson and others* [1971] 3 All ER 1152.

most of the pornography on the Internet is now transferred electronically from one computer to another using telephone lines and modems rather than via any tangible medium such as discs. This left a possible lacuna in section 1(3), OPA 1959, but this has now been plugged by CJPOA 1994, which amended the meaning of “publication” in that section, so that electronic transmission of pornographic material is now clearly covered by the 1994 Act. When A sends B pornographic pictures attached to an e-mail, this electronic transmission will be a publication covered by the Act.¹⁵

Section 1(2) of OPA 1964 makes it an offence to have an obscene article in ownership, possession or control with a view to publishing it for gain. Following the amendments made by CJPOA 1994, this would even apply when A simply makes the data available to be transferred or downloaded electronically, by providing a password to B, so that B can access the materials and copy them.¹⁶

Child pornography

The main concern of legislators and parents in relation to Internet content is child pornography, rather than other forms of sexually explicit content. This has been the case ever since paedophiles started to use the Internet for circulating pornographic materials related to children.¹⁷ Paedophilia can be seen as a minority sexual group, with its own form of expression explicitly involving fantasies and imaginings about sex with children. But while it is often argued that pornography should not be proscribed on the basis of freedom of speech arguments, there is a general consensus that the line should be drawn with child pornography. In most cases, child pornography is a permanent record of the sexual abuse of an actual child (except in the case of pseudo-photographs, which are discussed below). An understanding of the special way in which child pornography is child abuse, is crucial to an understanding of the whole problem of child pornography.

UK child pornography laws

Protection of Children Act 1978

The 1978 Act was passed in response to the growing problem of child pornography. Its main purpose was to close some potential gaps in the measures available to police and prosecutors.¹⁸

¹⁵ See further Akdeniz, Y., “Computer Pornography: A Comparative Study of the US and UK Obscenity Laws and Child Pornography Laws in Relation to the Internet”, [1996] 10 *International Review of Law, Computers & Technology* 235, and Akdeniz, Y., & Strossen, N., “Sexually Oriented Expression,” in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, pp 207-231.

¹⁶ See *R v Arnolds; R v Fellows*, (1996) *The Times*, 27 September; *R v Arnolds; R v Fellows*, [1997] 1 Cr.App.R. 244. See also section 43 of the Telecommunications Act 1984 which makes it an offence to send ‘by means of a public telecommunications system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character’ and is an imprisonable offence with a maximum term of six months. In addition to dealing with indecent, obscene or offensive telephone calls, the Act also covers the transmission of obscene materials through the telephone systems by electronic means.

¹⁷ The Meese Commission Report, in 1986, provides evidence that paedophile offenders and child pornographers had begun to use personal computers and computer networks for communication and distribution of materials. See Attorney General’s Commission on Pornography: Final Report, 2 vols. Washington, DC: U.S. Government Printing Office, July 1986, page 629.

¹⁸ Gibbons, T., “Computer Generated Pornography,” [1995] 9 *International Yearbook of Law Computers and Technology*, pp 83-95, page 87.

The definition of “photograph” given in section 7(4) of the 1978 Act was extended to include photographs in electronic data format following the amendments made by section 84 (4) of the Criminal Justice and Public Order Act 1994 (“CJPOA 1994”).

The CJPOA 1994 introduced the concept of “pseudo-photographs” of children. Pseudo-photographs are technically photographs, but they are created by computer software manipulating one or more pre-existing pictures. For example, a child’s face can be superimposed on an adult body, or to another child’s body, with the characteristics of the body altered to create pornographic computer generated images without the involvement of a real child. It is now an offence “for a person to take, or permit to be taken or to make, any indecent photographs or pseudo-photographs of a child; (or) to distribute or show such indecent photographs or pseudo-photographs” under section 1 of the 1978 Act.

The UK police believe that the creators or possessors of pseudo-photographs will end up abusing children, so the purpose of the new legislation may be seen as to criminalise acts preparatory to abuse,¹⁹ and also to close possible future loopholes in the prosecution of such cases, as it may be very difficult to separate a pseudo-photograph from a real photograph.²⁰

Although pseudo-photographs can be created without the involvement of real children, there is a justifiable fear that harm to children is associated with all child pornography. The Williams Committee stated:

“Few people would be prepared to take the risk where children are concerned and just as the law recognises that children should be protected against sexual behaviour which they are too young to properly consent to, it is almost universally agreed that this should apply to participation in pornography.”²¹

On the other hand, there are arguments that pseudo-photographs are not harmful. The children involved in child pornography may suffer physical or mental injury, but with pseudo-photographs, the situation is quite different. These photographs are created only by the use of computers. There is no involvement of children in production and there is no direct harm to children in their use. However there is substantial evidence that photographs of children

¹⁹ In March 1996 the author had an interview with Detective Inspector David Davis, head of West Midlands police commercial vice unit which deals with child pornography. He clearly stated that the UK police believe that if somebody creates or possesses indecent pseudo-photographs of children, he is a potential child abuser and will abuse children in the future. See further Davis, D., *The Internet Detective - An Investigator's Guide*, Appendix D, Police Research Group, Home Office, 1998. See also Explosive Substances Act 1883 as an example for preparatory acts being criminalised.

²⁰ See the Canadian case of *R v. Pecchiarich* [1995] 22 O.R. (3d) 748-766, in which Pecchiarich, 19, was convicted and sentenced to two year probation, and 150 hours of community service for distributing ‘pseudo-photographs’ of children over the Internet under section 163 (1) of the Canadian Criminal Code. Although Pecchiarich created these materials and they prove his paedophilic tendencies and fantasies, he did not commit any offence towards children. Compare the case of Jake Baker, who had fantasies about torturing, raping and murdering a female student at the University of Michigan. He also sent his story to alt.sex.stories giving the name of a classmate. His case was dismissed by a US District Court Judge ruling that he was protected by the First Amendment. Baker’s case was tackled as a speech issue and although he had sick fantasies they did not involve immediate danger or any criminal activity. See *U.S. v. Baker*, 890 F. Supp. 1375 (1995).

²¹ Williams Committee Report (1979) Obscenity and Film Censorship, Cmnd 7772, (London: HMSO), page 90, para 6.68. See further Bill Thompson, *Soft Core: Moral Crusades Against Pornography in Britain and America*, London: Cassell, 1994.

engaged in sexual activity are used as tools for the further molestation of other children,²² and photographs or pseudo-photographs will be used interchangeably for this purpose.²³

Section 160 of the Criminal Justice Act 1988

Under section 160 of the 1988 Act as amended by section 84(4) of the CJPOA 1994, it is an offence for a person to have an indecent photograph or pseudo-photograph of a child in his possession. This offence is now a serious arrestable offence with a maximum imprisonment term not exceeding six months. It has been successfully used in its new form in recent cases involving possession of child pornography.

Child Pornography Operations

In July 1995, the British police were involved in *Operation Starburst*, an international investigation of a paedophile ring who used the Internet to distribute graphic pictures of child pornography. Nine British men were arrested as a result of the operation which involved other arrests in Europe, America, South Africa and the Far East. The operation identified 37 men world wide.²⁴ The UK Police also conducted the *Operation Cathedral* in September 1998 in which more than 100 people in 12 countries were arrested. According to the Police, 11 people were arrested in Britain across the country and those cases will come to trial during 1999.

Possession offences

As a result of Operation Starburst, many cases of simple possession offences were brought to court. *Christopher Sharp* was fined £9000 and was the first person to be prosecuted in a case involving pornography and the Internet in the UK. Sharp admitted two charges of possessing indecent photographs of children under the age of 16 contrary to section 160 of the Criminal Justice Act 1988. In early 1996, *Martin Crumpton*, a former computer consultant, was sentenced to three months' imprisonment in a Birmingham magistrates' court. He also admitted possession of indecent pictures of children and was the first person to be jailed in the UK in an offence concerning pornography and the Internet.²⁵

²² Attorney General's Commission [The Meese Commission] Final Report on Pornography, 2 vols. (Washington, D.C.: U.S. Government Printing Office) July 1986, page 411.

²³ See also the US legislation, Child Pornography Prevention Act 1996 which sets mandatory prison sentences of 15 years for production of child pornography, five years for possession of child pornography, and life imprisonment for repeat offenders convicted of sexual abuse of a minor. The 1996 Act also covers the computer generated images of children as in Canada and the UK. This law has been challenged as violating the First Amendment by, in effect, creating a "thought crime," outlawing sexual fantasies about minors. The lower court held that the law was constitutional, but the appellate court disagreed: *Free Speech Coalition v Reno* (25 Media L. Rep. 2305, USDC N.D. Cal., 1997) and (198 F.3d 1083, 1999).

²⁴ See further Akdeniz, Y., "The Regulation of Pornography and Child Pornography on the Internet," 1997 (1) *The Journal of Information, Law and Technology*, at <http://elj.warwick.ac.uk/jilt/internet/97_1akdz/default.htm>; Akdeniz, Y., "Child Pornography," in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, 231-249.

²⁵ Note also, *Dr John Payne*, 48, a GP in Warminster, Wiltshire, who admitted a string of computer child pornography charges in November 1996 and was sentenced to 120 hours' community service in December 1996, by the Trowbridge Magistrates. He had four images of children in indecent poses stored on his home computer. See Cyber-Rights & Cyber-Liberties (UK) for further information on all UK child pornography cases involving the Internet at <<http://www.cyber-rights.org/reports/child.htm>>.

Distribution offences

Fellows and Arnold: The Birmingham University Case

Fellows and Arnold were charged with a total of 18 charges, under the Protection of Children Act 1978, Obscene Publications Act 1959, and the CJPOA 1994, which widened the definition of “publication” to include computer transmission. West Midlands Police Commercial Vice Squad was contacted by US Customs saying they had identified a site in the UK. Vice Squad officers then swooped on the Department of Metallurgy at Birmingham University and discovered thousands of pictures stored in the computer system of youngsters engaged in obscene acts. The material could be accessed through the Internet across the world. Fellows had built up an extensive library of explicit pornography called “The Archive,” featuring children as young as three, on a computer at Birmingham University where he worked.

The judge ruled that the computerised images could be legally regarded as photographs, setting a legal precedent that a pornographic computer image was, in law, the same as a photograph. After the ruling of the trial judge, Fellows admitted four charges of possessing indecent photographs of children with a view to distributing them, and one of possessing obscene photographs of adults for publication. Arnold also admitted distributing indecent photographs of children. Fellows was jailed for three years, and Arnold for six months for providing Fellows with up to 30 pornographic pictures of children.

Owen J. stated:

“The pictures could fuel the fantasies of those with perverted attitudes towards the young and they might incite sexual abuse on innocent children.”

This decision, and Crumpton’s imprisonment in 1996, both show the current judicial attitude towards traffickers of child pornography and paedophiles in general.

On appeal, Evans L.J., upheld the ruling of the trial judge that images stored on computer disc constitute photographs.²⁶ His Lordship reviewed the terms of the Protection of Children Act and decided that although the computer disk was not a photograph, it was “a copy of an indecent photograph.”²⁷

The cases described in this article have involved offenders located within the UK. Given the global nature of the Internet paedophile networks or disseminators of child pornography may be scattered around the world and there may be instances where the legal system may not be so

²⁶ See *R v. Fellows, R v. Arnold*, CA, *The Times* October 3, 1996; *R v Arnolds; R v Fellows*, [1997] 1 Cr.App.R. 244.

²⁷ See also the case of Father Adrian McLeish, a Roman Catholic priest at St Joseph’s church in Gilesgate, Durham, who held the largest known collection of child pornography yet gathered electronically. He had amassed a vast store of obscene pictures and drawings in his presbytery and exchanged thousands of explicit e-mail messages with other paedophiles. McLeish was sentenced to six years imprisonment by Newcastle upon Tyne Crown Court in November 1996. His activities were exposed a year ago during ‘Operation Starburst.’ See *Cyber-Rights & Cyber-Liberties (UK)* supra for further information and for other cases involving child pornography and the Internet.

effective. However, problems that may be encountered by the law enforcement agencies will not be discussed within this article.²⁸

US attempts to regulate the Internet - the Communications Decency Act 1996

The US Telecommunications Act 1996, including the provisions of the CDA 1996, attempted to restrict access by minors to “patently offensive depictions of sexual or excretory activities,” a provision clearly intended to cover the pornographic images and materials which are widely available on-line over the Internet. In particular the CDA specified that it covered content available via an “interactive computer service.” This obviously included materials available on the Internet. In the US, speech which is not considered “obscene” but is indecent enjoys First Amendment protection, though it can still be regulated where there is a sufficient governmental interest. The fact that the CDA was intended to prohibit “indecent speech” would have had an unprecedented effect on the Internet. Information regarding protection from AIDS, birth control or prison rape, is sexually explicit and may be considered “indecent” or “patently offensive” in some communities, and this kind of speech would have been affected by the provisions of the CDA, particularly as it had no definition of the word “indecent”.

Legal challenges to the CDA

The American Civil Liberties Union (“ACLU”) and other civil liberties groups filed a lawsuit challenging the CDA as an unconstitutional restraint on free speech on the Internet. In *ACLU v. Janet Reno*, ACLU claimed that the CDA was ill defined and did not sufficiently delineate what speech or other actions would be subject to prosecution. ACLU and the other plaintiffs argued that:

“Not only does this ban unconstitutionally restrict the First Amendment rights of minors and those who communicate with them about important issues, but, because of the nature of the online medium, it essentially bans ‘indecent’ or ‘patently offensive’ speech entirely, thus impermissibly reducing the adult population to ‘only what is fit for children’.”

ACLU did not challenge the statute to the extent that it covered already proscribed obscenity or child pornography, merely opposing the extension of liability for speech introduced by the CDA.²⁹

Following an initial temporary restraint order obtained by the ACLU, in June 1996 the Federal District Court of Philadelphia held that ACLU had established a reasonable probability of eventual success in the litigation by demonstrating that sections 223(a)(1)(B) and 223(a)(2) of the CDA were unconstitutional on their face to the extent that they covered “indecenty”. Accordingly, a preliminary injunction was granted. Dalzell J stated:

“As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from government intrusion. Just as the strength of the Internet is

²⁸ See Wall, D., “Policing and the Regulation of the Internet,” [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, pp 79-90.

²⁹ See 18 U.S.C. 1464-65 and 2251-52. See also *New York v. Ferber*, 458 U.S. 747 (1982), and *Miller v. California*, 413 U.S. 15 (1973), and *U.S. v. Thomas* 74 F.3d 701 (1996).

chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.”³⁰

The final appeal in the *ACLU* case, to the Supreme Court, resulted in a historic ruling on June 26, 1997 in which by a 7-2 vote, the online censorship provisions of the CDA were struck down. The Supreme Court affirmed the Philadelphia Court’s ruling that the CDA was unconstitutional, declaring that “[t]he CDA’s ‘indecent transmission’ and ‘patently offensive display’ provisions abridge the freedom of speech protected by the First Amendment.”³¹ They went on to add:

“As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”

One of the principal issues addressed in the judgement was whether Internet content was more akin to content in print media or in broadcast media such as television. Because of its mass appeal and easy access by children, a higher level of scrutiny in broadcasting than in print media is justified. If part of a broadcasting program on radio or on television is patently offensive, vulgar or shocking than it may be considered indecent and banned at certain times of the day. The Supreme Court explained that the factors that are present in broadcasting are not present in cyberspace. “Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.” The Internet was not as invasive a medium as radio or television, since communications over the Internet did not invade an individual’s home, or appear on one’s computer screen unbidden. Users seldom encountered offensive content by accident. Proscribing offensive content on the Internet for all users just to protect children would be “burn[ing] the house to roast the pig.”³²

In his opinion for the Court, Justice Stevens wrote that “[t]he CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.” The CDA went too far in reducing all material accessible on the global Internet to a level suitable only for children.

However, the battle for free speech does not seem to be over as a new legislation already dubbed as the “CDAIL” was introduced within the US Senate in 1998. The Child Online Protection Act (“COPA”), enacted by the US Congress as part of an omnibus appropriations bill, would punish “commercial” online distributors of material deemed “harmful to minors” with up to six months in jail and a \$50,000 fine. Following the enactment of this legislation, civil liberties organisations including the ACLU, EPIC and EFF filed a court challenge in October 1998.

David Sobel, EPIC’s Legal Counsel, said that making children the excuse for ill-conceived censorship schemes is poor public policy. Moreover, Mr Sobel called for finding ways to

³⁰ *ACLU, et al v. Janet Reno*, 929 F Supp 824 (1996), and *ACLU v Reno*, 117 S. Ct. 2329 (1997).

³¹ See the Supreme Court decision of *ACLU v Reno*, 117 S. Ct. 2329 (1997).

³² Quoted from *Sable Communications v FCC* 492 US 115 (1989).

protect both kids and the First Amendment on the day the challenge was filed. Furthermore, in a statement issued on October 21, 1998, the Global Internet Liberty Campaign (“GILC”) criticised the US attempts to introduce censorious legislation and stated that “the COPA will not be effective in keeping from minors material that might be inappropriate for them. No criminal provision will be more effective than efforts to educate parents and minors about Internet safety and how to properly use online resources. Moreover, we note again that the Internet is a global medium. Despite all the enforcement efforts that might be made, a national censorship law cannot protect children from online content they will always be able to access from sources outside of the United States.”³³

In November 19, 1998, Judge Lowell A. Reed, Jr. stated that the plaintiffs have shown “a likelihood of success on the merits of at least some of their claims” that the COPA violates the First Amendment rights of adults. Significantly, the judge emphasised that the temporary restraining order, applies to all Internet users, and not just the plaintiffs in the case.³⁴ In February 1999, Judge Reed, blocked COPA by saying that it would restrict free speech in the “marketplace of ideas.” In granting a preliminary injunction against COPA, the Judge held that the plaintiffs are likely to succeed on their claim that the law “imposes a burden on speech that is protected for adults.”³⁵

Developments within the European Union

The European Commission launched a Communication Paper on Illegal and Harmful Content together with a Green Paper on the Protection of Minors and Human Dignity in Audio-visual and Information Services in October 1996.³⁶ The Communication Paper was the result of calls for the regulation of the Internet within the European Union dating from early 1996.

The European Commission documents followed a resolution adopted by the Telecommunications Council of Ministers in September 1996, concerning the dissemination of illegal content on the Internet, especially child pornography. While the Communication gives policy options for immediate action to fight against harmful and illegal content on the Internet, the Green Paper sets out to examine the challenges that society faces in ensuring that these issues of over-riding public interest are adequately taken into account in the rapidly evolving world of audio-visual and information services.³⁷ All these initiatives at the European level were adopted in a Resolution at the Telecommunications Council in November 1996.

The European Parliament adopted a resolution following a report about the European Commission Communication in April 1997.³⁸ Following the resolution, the European Commissioner Martin Bangemann, stated in his view that “it is difficult to pass legislation at

³³ See Akdeniz, Y., and Sobel, D., “Global Internet Liberty Campaign Member Statement: The US Child Online Protection Act Criticised,” October 1998, at <<http://www.cyber-rights.org/gilc/gilc-cda.htm>>.

³⁴ See <http://www.epic.org/free_speech/copa/> for further information.

³⁵ See the February 1999 decision of Judge Reed at <http://www.aclu.org/court/acluvrenoII_pi_order.html>.

³⁶ See European Commission Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services, Brussels, 16 October 1996.

³⁷ See also the European Commission Working Party Report (1996) “Illegal and Harmful Content on the Internet” at <<http://www2.echo.lu/legal/en/internet/content/wpen.html>>

³⁸ Report on the Commission Communication on illegal and harmful content on the Internet (COM(96)0487 - C4-0592/96) Committee on Civil Liberties and Internal Affairs, Rapporteur: Mr Pierre PRADIER - 20 March 1997.

international level on harmful content on the Internet, but there is no cultural difference in what is illegal, and the response must be global.”³⁹ Therefore solutions may not be limited to the EU level and a future involvement of other fora such as the OECD or G7 is likely in future.

These issues were discussed at the “Global Information Networks, Ministerial Conference,” in Bonn, in July 1997.⁴⁰ The resultant “Bonn Declaration”⁴¹ underlined the importance of clearly defining the relevant legal rules on responsibility for content of the various actors in the chain between creation and use. The Ministers recognised the need to make a clear distinction between the responsibility of those who produce and place content in circulation and that of intermediaries such as the Internet Service Providers, thus beginning to accept that it is producers and users who must exercise normative choice and discernment and that carriers are not in a position to act as content guardians in this medium. Despite these calls and initiatives, the manager of CompuServe Germany, Felix Somm was successfully prosecuted in May 1998 for the dissemination of child pornography to its customers in Germany.⁴²

The Bonn Declaration was followed in September 1997 by Martin Bangemann’s call for an Internet charter, which would focus on issues to do with technical standards, illegal content, licenses, encryption and data privacy.⁴³

“The current situation may lead to the adoption of isolated global rules with different countries signing up to different rules agreed under the auspices of different international organisations. An international charter would provide a suitable answer.”

The idea was given further substance when Martin Bangemann and fellow-Commissioner, Sir Leon Brittan, launched a proposed framework for international policy cooperation and sought to start a process which could lead to the adoption of an International Communications Charter for the Internet in February 1998.⁴⁴

In November 1997, the European Commission adopted a new proposal for an Action Plan, promoting the safe use of the Internet, which would cover a three year period between 1998 to 2001.⁴⁵ The new Action Plan recognised that the Internet does not exist in a “legal vacuum”.

³⁹ Agence Europe, “MEPs want voluntary code of good conduct to guarantee freedom of expression, while protecting children,” April 26, 1997.

⁴⁰ See the “Global Information Networks, Ministerial Conference,” Bonn 6-8 July, 1997, <<http://www2.echo.lu/bonn/conference.html>>.

⁴¹ See <<http://www2.echo.lu/bonn/final.html>>.

⁴² See the Criminal case of Somm, Felix Bruno, File No: 8340 Ds 465 JS 173158/95, Local Court (Amtsgericht) Munich. An English version of the case is available at <<http://www.cyber-rights.org/isps/somm-dec.htm>>. The conviction was reversed on appeal in November 1999. (CompuServe Ex-Official’s Porn-Case Conviction Reversed, *Associated Press*, 17 November, 1999).

⁴³ See “A New World Order for Global Communications,” a speech by Martin Bangemann to Telecom Inter@ctive ’97, ITU Geneva 8 September 1997 at: <<http://www.ispo.cec.be/infosoc/promo/speech/geneva.html>>.

⁴⁴ See the European Commission, *Communication on International Charter: The need for strengthened international co-ordination - Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions* (COM (98) 50, Brussels-Luxembourg, at <<http://www.ispo.cec.be/eif/policy/com9850en.html>>). See also Tucker, E., “Internet: EU tries to forge system of rules,” *Financial Times*, 5 February 1998.

⁴⁵ See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Action Plan on promoting safe use of the Internet* (Brussels-Luxembourg, November 1997).

However, because of the global nature of the Internet, the EU prefers self-regulatory solutions for the regulation of illegal and harmful content. The Action Plan, therefore, encourages the creation of a European network of hot lines to report illegal content such as child pornography by online users, the development of self regulatory and content-monitoring schemes by access providers, and content providers for combating illegal content. It also seeks the development of internationally compatible and interoperable rating and filtering schemes to protect users (especially children at risk from harmful content), and measures to increase awareness of the possibilities available among parents, teachers, children and other consumers to help these groups to use the networks whilst choosing the appropriate content and exercising a reasonable amount of parental control. The Commission's Action Plan was adopted by a decision of the Council and the European Parliament in September 1998.⁴⁶

Finally, following over a year of discussions within the institutions of the European Union, in December 1998, the Council of the European Union approved the Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks.⁴⁷ The name of the Action Plan was changed slightly from "safe use of the Internet," into "safer use of the Internet". Members of the European Parliament thought that the use of the words "safer use" would be more appropriate since the EU legislation did not cover criminal law, it would not be an easy task to promote "safe" Internet use. Furthermore, according to the MEPs, it was illusory to believe that this action plan alone could stop illegal and harmful content on the Internet. However, during the discussions of the adoption of the Action Plan, the MEPs thought that the Action Plan was a step in the right direction.

The Action plan, therefore, encourages the creation of a European network of hotlines to report illegal content such as child pornography by online users, the development of self regulatory and content-monitoring schemes by access providers, and content providers, the development of internationally compatible and interoperable rating and filtering schemes to protect users, and measures to increase awareness of the possibilities available among parents, teachers, children and other consumers to help these groups to use the networks whilst choosing the appropriate content and exercising a reasonable amount of parental control. These initiatives will take place between 1999 and 2002.⁴⁸

Responsibility of Internet Service Providers

It is not possible to access the Internet without the services of an ISP, and thus the role of ISPs in content regulation of the Internet is crucial. As a result they are obvious targets for enforcement authorities. ISPs have recently been charged with criminal offences of providing child pornography in both Germany and France. Access to "hate speech" on the Internet is of particular concern to the German government, and again the ISPs have been the "usual

⁴⁶ European Parliament and Council, *Decision No 10182/98/EC adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks*, (Brussels- Luxembourg, 16 September.

⁴⁷ Decision No /98/EC of the European Parliament and of the Council of adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, December 1998.

⁴⁸ For a critique of the European Union initiatives, see Walker, C., & Akdeniz, Y., "The governance of the Internet in Europe with special reference to illegal and harmful content," [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, pp 5-19.

suspects” in investigations of provision of such material on the Internet.⁴⁹ A rather sad example of persecuting ISPs resulted with the prosecution of Felix Somm, the ex general manager for CompuServe in Germany. Somm was found guilty of having assisted in the dissemination of pornographic writings in thirteen legally-coinciding cases. Somm received a two-year suspended sentence and a fine of DM100,000 from the Munich district court in May 1998.⁵⁰

On the other hand, the UK Government’s preferred option in relation to ISPs, like that of the European Union, is one of self-regulation rather than control by legislation. ISPs have been encouraged to produce codes of practice to control access to illegal and unsuitable material.⁵¹ The Home Office stated that:

“it is important to distinguish between illegal material and material which is legal but which some would find offensive. Self-regulation is an appropriate tool to address the latter. Dealing with illegal material is a matter for the courts and the law enforcement agencies.”⁵²

Walker comments that:

“Self-regulation in this field has a number of advantages. Rules devised by the media are more likely to be internalised and accepted. In addition, it may avoid heavy-handed legal intervention which carries with it the spectre of government censorship.”⁵³

Chris Smith, the Secretary of State for Culture, Media and Sport stated that:

“It is vital...in considering how best to address [the problem of illegal and harmful content on the Internet], that we bear in mind that only a small fraction of the material available to the public poses a threat to the protection of minors or human dignity. It will be important, therefore, not to impose hasty regulation upon these new services and thereby constrain their development and the educational, commercial and social opportunities and other benefits they can engender.”⁵⁴

⁴⁹ Deutsche Telekom (DT), the national telephone company, in January 1996, blocked users of its T-Online computer network from accessing Internet sites used to spread anti-Semitic propaganda, which is a crime in Germany. The company was responding to demands by Mannheim prosecutors who were investigating Ernst Zundel, a German-born neo-Nazi living in Toronto. See “German Service Cuts Net Access” *San Jose Mercury News*, January 27, 1996.

⁵⁰ See the Criminal case of Somm, Felix Bruno, File No: 8340 Ds 465 JS 173158/95, Local Court (Amtsgericht) Munich. An English version of the case is available at <<http://www.cyber-rights.org/isps/somm-dec.htm>>. The conviction was reversed on appeal in November 1999. (CompuServe Ex-Official’s Porn-Case Conviction Reversed, *Associated Press*, 17 November, 1999).

⁵¹ See for example the JANET Acceptable Use Policy, at <<http://www.ja.net/documents/use.html>>.

⁵² See House of Lords, Select Committee on Science and Technology, “Information Society: Agenda for Action in the UK”, Session 1995-96, 5th Report, London: HMSO, 23 July 1996, available at <<http://www.parliament.the-stationery-office.co.uk/pa/ld199596/ldselect/inforsoc/inforsoc.htm>>, para 4.63. See further House of Commons Select Committee on Culture, “The Multi-Media Revolution - Volume I,” (1997-98 HC 520-I) para.108. See also the Government Response to “The Multimedia Revolution,” (HC520-1), July 1998.

⁵³ Walker, C., “Fundamental Rights, Fair Trials and the New Audio-Visual Sector” [1996] *MLR* 59, 4, 517-539, pages 537, 538.

⁵⁴ See House of Commons Select Committee on European Legislation, Second Report (1997-98 HC 155-ii). See particularly “The Information Society and Protection of Human Dignity” at para.60.

It should not however be forgotten that the prime responsibility for content lies with authors and primary content providers. Blocking access at the level of access providers was criticised in the EU communication paper discussed above on the ground that access is restricted to far more material than the limited category of illegal communications. Such a restrictive regime severely interferes with the freedom of the individual and the political traditions of Europe. There is a real need for the legal position of the ISPs to be clarified, so that they need not, as at present, steer a path between accusations of censorship by users, and exposure to liability for the content they carry.

In November 1998 the European Commission adopted a Proposal for a Directive on certain legal aspects of electronic commerce and this draft Directive referred to the issue of liability of ISPs. Therefore, "to eliminate the existing legal uncertainty and to bring coherence to the different approaches that are emerging at Member State level, the proposal [will] establish a 'mere conduit' exemption and limits service provider's liability for other 'intermediary' activities."⁵⁵ But the recently finalised European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market⁵⁶ offer only limited protection to ISPs with the introduction of an "actual knowledge" test for removal of third party content from ISP servers.⁵⁷ Therefore, the practice known as "notice and takedown" will be common practice for the removal of Internet content through the ISP servers. Such notices can be given either by hotlines like the Internet Watch Foundation for the removal of allegedly illegal content or by private companies or individuals for the removal of other forms of content including content deemed to be defamatory⁵⁸ or content that infringe copyright and trademark laws. The "notice and takedown" provisions of the 1996 Defamation Act (section 1) were criticised by Cyber-Rights & Cyber-Liberties (UK):

"It is totally unacceptable that an offended party should simply notify an Internet Service Provider claiming the information to be legally defamatory. The current state of the UK laws forces the ISPs to be the defendant, judge, and the jury at the same time. Notice should not be enough in such cases."⁵⁹

⁵⁵ European Commission, "Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market," COM(1998) 586 final, 98/0325 (COD), Brussels, 18.11.1998.

⁵⁶ European Commission, "Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market," COM(1998) 586 final, 98/0325 (COD), Brussels, 18.11.1998; European Commission, Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty), COM(1999)427 final, 98/0325 (COD). (Official Journal of the European Communities) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") vol 43, OJ L 178 17 July 2000 p.1.

⁵⁷ See articles 13 and 14 of the Directive.

⁵⁸ This is already possible under section 1 of the Defamation Act, and "notice and takedown" is common practice for the removal of content alleged to be defamatory. See for example Akdeniz, Y., Case Analysis: Laurence Godfrey v. Demon Internet Limited, *Journal of Civil Liberties*, July 1999; Cyber-Rights & Cyber-Liberties (UK), *Hulbert's Case, the Lord Chancellor and Censorship of the Internet*, 11 November, 1999; and Akdeniz, Y., & Rogers, W.R.H., "Defamation on the Internet," in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, pp 294-317.

⁵⁹ Cyber-Rights & Cyber-Liberties (UK) Press Release, "UK ISP found liable for defamation," 26 March, 1999, at <<http://www.cyber-rights.org/press>>. See also; Uhlig, R., "Libel setback for Demon," *The Daily Telegraph*, Connected Section, April 1, 1999; and Akdeniz, Y., "The case for free speech," *The Guardian*, (Online Section), 27 April, 2000.

UK police censorship of Internet newsgroups

Although the UK Government supports self-regulation with respect to the Internet, the UK police appears to wish to take a more pro-active regulatory role. In mid August 1996, the Clubs & Vice Unit of the Metropolitan Police sent a letter to the UK ISPs supplying them with a list of Usenet discussion groups that they believe to contain pornographic material. The list mainly covered newsgroups which carried child pornography such as “alt.binaries.pictures.lolita.fucking, alt.binaries.pictures.boys,” but it also included such newsgroups as “alt.sex.fetish.tickling, alt.sex.fetish.wrestling, alt.homosexual,” which might or might not include pornographic content. As many people post the same material to multiple newsgroups, it is possible to find child pornography in newsgroups not intentionally devoted to the topic but attracting a similar readership such as “alt.sex.fetish.tickling”.

The action taken by the UK police appears to have been ill-considered at the time and did not do much to reduce the availability of sexually explicit content on the Internet. Furthermore, the list of newsgroups provided by the UK police includes much material that is not illegal, such as legitimate discussion groups for homosexuals, and discussion groups which do not contain any pictures, but contain text, sexual fantasies and stories. These would almost certainly not infringe UK obscenity laws. The action of the UK police also amounted to censorship of material without public debate in Parliament or elsewhere. Political action by the UK government would be preferable to random censorship by law enforcement authorities.⁶⁰

Self- regulation by ISPs - the Internet Watch Foundation

The Internet Watch Foundation (“IWF”), was announced in September 1996 initially as a hotline with the support of the UK government and this was an initiative in reaction to the police pressures described above. It follows a similar initiative in Holland although there are differences between the two hotline systems and the IWF remains predominantly industry based.⁶¹ The IWF has an e-mail, telephone and fax hot-line so that users can report materials related to child pornography and other obscene materials.⁶²

The activities of the IWF mainly concentrated on the Usenet discussion groups in its first year of activity.⁶³ According to the IWF annual report which was published in March 1998 (and covers the period between December 1996 and November 1997), there have been 781 reports to the Foundation from online users and in 248 of them action was taken (206 involved child pornography, 16 adult pornography, 12 financial scams and 9 other). These reports resulted in the review of 4324 items, and the Foundation has taken action in 2215 of them (2183 referred

⁶⁰ See further Akdeniz, Y., “Child Pornography on the Internet,” [1998] *New Law Journal* 148 (6833), 451-452; and Akdeniz, Y., “UK Government and the Control of Internet Content,” ,” *The Computer Law and Security Report*, 2001.

⁶¹ The Dutch hotline was established by the Dutch Foundation for Internet Providers (“NLIP”), Dutch Internet users, the National Criminal Intelligence Service (“CRI”), National Bureau against Racial Discrimination and a psychologist.

⁶² See <<http://www.internetwatch.org.uk/hotline/>>.

⁶³ See further the Review of the Internet Watch Foundation: A report for the DTI and Home Office by KPMG and Denton Hall, February 1999, at <<http://www.dti.gov.uk/public/frame2.html>>. But note the Cyber-Rights & Cyber-Liberties (UK) submission to the House of Lords Select Committee on the European Union by Sub-Committee B (Energy, Industry and Transport) on e-Commerce: Policy Development and Co-ordination in the European Union, May 2000, at <<http://www.cyber-rights.org/reports/crcl-hl.htm>> in relation to the activities of the Internet Watch Foundation.

to the Police and 2000 to ISPs). 1394 of these originated from the US while only 125 of the items originated from the UK. Once the IWF had located the “undesirable content”, mainly child pornography, IWF informed all British ISPs and the police.⁶⁴ According to IWF’s second report (January - December 1998 statistics), the number of reports reached 2407 and in 447 action was taken (430 of the actions reports contained child pornography).⁶⁵ These involved 14,580 items in which the IWF took action on 10,548. 9176 of these were referred to NCIS, 541 to the UK police, and 9498 to the UK ISPs. 11,79% of these illegal content originated from the UK, while 49,05% originated from the USA. Furthermore, according to the third year statistics of the hotline (covering the period January - December 1999), there were 4809 reports involving 19710 items. However, only 4% of the 11487 items on which the IWF took an action originated from the UK which is an improvement respect to the 1998 statistics and shows that the problem of child pornography is not a growing problem in the UK and remains as an international problem. Despite the efforts of the UK organisation, only a handful of individuals have been charged with offences related to child pornography.

Furthermore, these figures tell us little as the actual amount of child pornography on the Internet is unknown. It is, therefore, difficult to judge how successful the UK hotline has been. Another downside is that the efforts of the organisation are concentrated on the newsgroups carried by the UK ISPs. This means that while illegal material is removed from the UK ISPs servers, the same material will continue to be available on the Internet carried by the foreign ISPs in their own servers. The expensive monitoring of the Internet at a national level is of limited value as the few problems created by the Internet remain global ones and thus require global solutions. At the same time, it is encouraging that only six per cent of the reported illegal material originates from the UK and that there are only a few criminal charges. This also suggests that the problems are located mainly elsewhere (in fact, especially within the USA). While the UK government should involve with finding solutions to global problems with its international partners, the global problems do not justify expensive monitoring of the Internet at a national level by industry based organisations.⁶⁶

Although the IWF proposals state that UK ISPs should bear responsibility for their services, and take reasonable measures to hinder the use of the Internet for illegal purposes, it is wrong to assume that ISPs should be held solely responsible for content provided by third parties on the Internet. The real problem will remain elsewhere; in the real rather than virtual world, where illegal content such as child pornography are originally created. As long as such material is produced, there can never be a total solution to its availability via the Internet. The Internet is just another convenient tool for paedophiles who wish to traffic in these kind of materials. A better approach would have been a free confidential telephone hot-line not run by the industry itself, akin to that run by the Metropolitan Police in London to combat terrorism. Furthermore, removing materials containing child pornography from the Internet at a UK level only is near

⁶⁴ See Safety-Net proposal, “Rating, Reporting, Responsibility, For Child Pornography & Illegal Material on the Internet” adopted and recommended by the Executive Committee of ISPA - Internet Services Providers Association, LINX - London Internet Exchange and The Safety-Net Foundation at <http://dtiinfo1.dti.gov.uk/safety-net/r3.htm>.

⁶⁵ “Action taken” counts those reports which IWF has judged to contain potentially illegal material.

⁶⁶ See further Akdeniz, Y., “Cyber-Rights & Cyber-Liberties (UK) Report Who Watches the Watchmen: Internet Content Rating Systems, and Privatised Censorship,” November 1997, at <http://www.cyber-rights.org/watchmen.htm>, and Akdeniz, Y., “Cyber-Rights & Cyber-Liberties (UK) Report Who Watches the Watchmen: Part II - Accountability & Effective Self-Regulation in the Information Age,” September 1998 at <http://www.cyber-rights.org/watchmen-ii.htm>.

futile as material can always be accessed by UK residents from computers located abroad. There are further problems. Users of the IWF hotline will probably report material unacceptable according to their taste and moral views, but it should be remembered that what is obscene or illegal is a matter for the courts.

On the other hand, the formation of the IWF as a policy making body (especially in relation to the development of filtering and rating systems) may set up a dangerous precedent for privatised censorship on the Internet.⁶⁷ In February 1998, the Internet Watch Foundation, announced its consultation paper for the development of rating systems at a national level. According to an IWF press release, rating systems would “meet parents’ concerns about Internet content that is unsuitable for children.” A critique of the IWF’s involvement with the development of rating and filtering systems is provided within the *Who Watches the Watchmen: Part II - Accountability & Effective Self-Regulation in the Information Age*⁶⁸ report which concluded that the development of rating and filtering systems may not be the real answers and solutions for the existence problems and “government inspired and enforced pre-censorship is no more different than government-imposed censorship. Such restrictions and complex regulations would make Britain, like any other jurisdiction that goes too far, a very hostile place for network development.”

Technical solutions and rating systems

Platform for Internet Content Selections (“PICS”)⁶⁹ is a rating system for the Internet similar to the “V-chip” technology used to filter out violence or pornography on the television systems. PICS is widely supported by various governments and industry based organisations such as the Internet Watch Foundation in the UK. PICS works by embedding electronic labels in the text or image documents to vet their content before the computer displays them or passes them on to another computer.⁷⁰ The vetting system can be applied to political, religious, advertising or commercial topics. PICS tags can be added by the publisher of the material, by the company providing access to the Internet, or by an independent vetting body. The most common scheme for screening material is that developed in the United States by the Recreational Software Advisory Council on the Internet (“RSACi”). This was originally a scheme for rating computer games.⁷¹ It rates material according to the degree of sex, violence, nudity, and bad language depicted. It is usually this PICS/RSACi screening combination that people have in mind when they refer to PICS.

⁶⁷ David Kerr, head of the IWF had been reported to state that “there is also a whole category of dangerous subjects that demand ratings” such as discussions advocating suicide, information about dangerous sports like bungee-jumping, and more common areas of concern such as drugs, cigarette advertising, sex, and violence. See “Europe Readies Net Content Ratings,” *Wired News*, 7 July, 1997, at <<http://www.wired.com/news/news/politics/story/5002.html>>.

⁶⁸ Akdeniz, Y., “Cyber-Rights & Cyber-Liberties (UK) Report Who Watches the Watchmen: Part II - Accountability & Effective Self-Regulation in the Information Age,” September 1998.

⁶⁹ PICS has been developed by the World Wide Web Consortium at <<http://www.w3.org/pub/WWW/PICS/>>, a non-profit making association of academics, public interest groups and computer companies that looks at the social consequences of technology. It has the backing of 39 global computer and communications companies. The WWW Consortium expects the vetting system to be in widespread use by the end of this year and 80 per cent of information on the Internet to be coded by the end of 1997.

⁷⁰ See R Whittle’s web site “Internet censorship, access control and content regulation” at <<http://www.ozemail.com.au/~firstpr/contreg/>> for an explanation of the PICS system and how it works.

⁷¹ See <<http://www.rsac.org/>>.

However, rating systems can be used and they are seen by many civil liberties organisations as the perfect tool for cyber-censorship. In August 1997, the American Civil Liberties Union was alarmed because of the failure to examine the longer term implications for the Internet of rating and blocking schemes. The ACLU published a white paper in August 1997 entitled *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet*.⁷² The paper warned that government-coerced, industry efforts to rate content on the Internet could torch free speech online. The ACLU paper stated that “in the physical world, people censor the printed word by burning books. But in the virtual world, you can just as easily censor controversial speech by banishing it to the farthest corners of cyberspace with blocking and rating schemes.” According to the ACLU, third-party ratings systems pose free speech problems and with few third-party rating products currently available, the potential for arbitrary censorship increases.

Therefore, there will be many rating authorities, and different communities may consider the same web pages to be in different PICS/RSACi categories. Some rating authorities may e.g. judge a certain site as an offensive, even though it has a public purpose, such as Web sites dealing with sexual abuse and AIDS. There will be no opportunity for free speech arguments to be made if ratings have been applied by private bodies as the government itself will not be involved directly in censorship.

Parental control software

Filtering software products⁷³ are available which are intended to allow parents to implement their preferences as to content when making decisions for their own children. The vast majority of the material available on the Internet is related to everyday topics, such as politics, news, sports, and shopping, but just as in the real world, there are areas of cyberspace which may contain materials that are not appropriate for children. It is argued that blocking and filtering technologies are far more effective and far more flexible than any law. However, most of the currently available filtering software are defective and these can also be used as perfect tools for censorship.

Sometimes this kind of software is over-inclusive and limits access to or censors inconvenient web sites, or filters potentially educational materials regarding AIDS and drug abuse prevention.⁷⁴ Again, the companies creating this kind of software provide no appeal system to content providers who are “banned” by parents, thereby “subverting the self-regulating exchange of information that has been a hallmark of the Internet community.”⁷⁵ As one opponent of such systems put it:

“A close look at CYBERSitter reveals an agenda that infringes on the rights of children, parents and teachers wherever the program is used. Despite the hype over ‘parental

⁷² See (<<http://www.aclu.org/issues/cyber/burning.html>>).

⁷³ See Netparents.org which provides resources for Internet parents at <<http://www.netparents.org>>.

⁷⁴ It has been reported in December 1996 that CYBERSitter completely or partially blocks access to sites such as the National Organization of Women (<<http://www.now.org>>), and the Yahoo search engine (<http://www.yahoo.com>).

⁷⁵ From a letter sent to Solid Oak (CYBERSitter) by The Cyber-Rights working group of Computer Professionals for Social Responsibility, a group of computer and network users concerned about the preservation of free and open expression on computer networks in the USA, dated 18 December 1996. See Cyber-Rights at <<http://www.cpsr.org/cpsr/nii/cyber-rights/>>.

control' as an alternative to government censorship, it is Solid Oak Software that takes control when CYBERSitter is running on your computer.”⁷⁶

CYBERSitter, it should be remembered, relies upon an initial form of labelling outside the home, which can amount to unchallengeable censorship. It is better for such control to be placed wholly in the hands of parents who can set standards for the welfare of individual children.

In December 1997, the Electronic Privacy Information Center (“EPIC”) released “*Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet*,”⁷⁷ to determine the impact of software filters on the open exchange of information on the Internet. EPIC conducted 100 searches using a traditional search engine (AltaVista search engine at <<http://altavista.digital.com>>) and then conducted the same 100 searches using a new search engine that is advertised as the “world’s first family-friendly Internet search site” (Net Shepherd Family Search at <<http://family.netshepherd.com>>). In every case in EPIC’s sample searches, EPIC found that the family-friendly search engine prevented them from obtaining access to almost 90 percent of the materials on the Internet containing the relevant search terms. For example, a search term including National Association for the Advancement of Coloured People resulted with 4076 hits with the AltaVista search engine while the same search term resulted with 15 hits with the Net Shepherd Family Search which means that 99.6 per cent of the materials were filtered out. The EPIC study shows that the would be family friendly technologies can be very hostile and result with censorship of socially acceptable and legal content.

On the other hand, the creation of awareness programmes and brochures can help concerned parents and users. For example, the National Center for Missing and Exploited Children produces a brochure called “Child Safety on the Information Highway.”⁷⁸ After explaining the benefits of the Internet, it also explains the risks of the Internet for children:

- (a) Exposure to inappropriate material,
- (b) Physical molestation,
- (c) Harassment.

The brochure strongly emphasises the importance of parents and their responsibility for their children’s use of on-line services. Similar brochures are also produced in the UK and such educational schemes should be encouraged for better use of the Internet.⁷⁹

So, the technology discussed in this section does not necessarily provide the ideal solutions for the relatively small problems created by Internet content. Relying on such technologies only provides a false sense of security for concerned users, parents and those in their care. One

⁷⁶ See ‘Don’t Buy Cybersitter’ at The Ethical Spectacle Web page, <http://www.spectacle.org> and Peacefire web pages at <<http://www.peacefire.org>>.

⁷⁷ See <<http://www2.epic.org/reports/filter-report.html>>

⁷⁸ NCMEC and Interactive Services Association “Child Safety on the Information Highway” 1994, available at <<http://www.isa.net/isa>>.

⁷⁹ See British Computer Society, “Combating Computer Pornography: Guidance Notes for the BCS Members” BCS, April 1995, National Council for Educational Technology, “NCET Information Sheet for Schools: Computer Pornography” NCET, February 1995 and Norfolk IT Team, “Organising IT in Schools: Computer Pornography” Norfolk Educational Press, 1994.

suggestion to parents would be to educate your children rather than placing your trust in technology or in an industry that believes it can do a better job of protecting children than parents. The message is to be responsible parents not censors and traditional forms of parenting and talking to your children should be preferred as a solution to problems that may be encountered with Internet usage.

Conclusion

By providing quick and cheap access to any kind of information, the Internet is the first truly interactive “mass” medium. It should not be surprising that governments around the globe are anxious to control this new medium,⁸⁰ and the Internet seems to be following a pattern common to the regulation of new media.⁸¹ In reality, while the Internet tends to produce extreme versions of problems, it rarely produces genuinely new ones.

There is a real problem of availability of child pornography on the Internet (and elsewhere), as well as that of the availability of sexually explicit material to unsuitable audiences, such as children. But any regulatory action intended to protect children from being abused in the production of pornography, or from accessing unsuitable content, should not take the form of an unconditional prohibition on using the Internet to distribute content where that content is freely available to adults in other media.

At the moment bans or pre-censorship acts in relation to Internet pornography or sexual content would in any case be unworkable because of the diversity of pornographic sources. Following the introduction of the CDA 1996 in the USA, many WWW pages containing sexually explicit material introduced password protection schemes which required credit card numbers. For example, Adultcheck⁸² is one of the main US based companies regulating WWW pages carrying sexually explicit content on the Internet. Its system requires that both the willing adults and the providers are registered by paying fees to obtain user name and passwords. By means such as this, the pornography industry will regulate itself anyway. To do so is in their best interest, since they will wish to safeguard the substantial amount of profits made from the pornography industry each year.⁸³

The prime responsibility for assuring an appropriate moral environment for children does not rest with Internet content suppliers or access providers. Instead parents and teachers should be responsible for protecting children from accessing sexual or other material which may be harmful to their development. Standards that are overly broad or too loosely defined will result if the job of rating is handed over to rating bodies with different cultural backgrounds, the

⁸⁰ See Human Rights Watch Report, “Silencing The Net: The Threat to Freedom of Expression On-line” [1996] *Monitors: A Journal of Human Rights and Technology* 8 (2), at <http://www.epic.org/free_speech/intl/hrw_report_5_96.html>, Human Rights Watch, “Freedom Of Expression On The Internet,” World Report 1999, at <<http://www.hrw.org/hrw/worldreport99/special/internet.html>>, and the Global Internet Liberty Campaign Report, “Regardless Of Frontiers: Protecting The Human Right to Freedom of Expression on the Global Internet,” Washington: Center for Democracy and Technology, September 1998, at <<http://www.gilc.org/speech/report/>>.

⁸¹ See e.g. the Cinemas Act 1909, Broadcasting Act 1952.

⁸² See Adultcheck at <<http://www.adultcheck.com>>.

⁸³ It has been estimated that pornography, including child pornography, is an \$8 to \$10 billion a year business, and it is also said to be organised crime’s third biggest money maker, after drugs and gambling. See US Senate Report 104-358, Child Pornography Prevention Act 1996.

software industry, or even the producers of pornography. It is not unreasonable to demand that parents take personal responsibility, when the computer industry is already supplying software which parents can use to regulate access to the Internet.

Child pornography is another matter. Its availability and distribution should be regulated, whether on the Internet or elsewhere. But the main concern of enforcement authorities should remain the prevention of child abuse - the involvement of children in the making of pornography, or its use to groom them to become involved in abusive acts - rather than victimless discussion and fantasy by adults. Child pornography not only consists of "crime scene photographs" of child sexual abuse and exploitation, but is also a possible tool for future criminal abuse and exploitation of other children. It is considered 'illegal' in many countries, so there is no need to single it out in a special way because it is found on the Internet. The police should make no distinction whether the offence is committed in Oxford Street or on the Internet. Hotlines and monitoring of Internet content should however be encouraged, and police forces should take action if a content provider refuses to remove the illegal materials. Existing UK legislation is capable of fighting child pornography on the Internet and elsewhere, but many of the paedophiles act in international rings, and the targeted group should be the distributors rather than the possessors of child pornography⁸⁴ and tougher sentences for the production of child pornography may be needed. Although the UK police succeeded with "Operation Starburst" and with the most recent "Operation Cathedral" in identifying international paedophile rings, substantial collaboration at an international level is needed between various national police forces. Therefore, all nations have an important part to play in the fight against child pornography. This can be achieved, as suggested by the European Commission, initially at the EU level.⁸⁵

The Internet is too widespread to be easily dominated by any single government and with technologies that increasingly destroy distance, the challenge of seizing the opportunities of the new age is not merely national, but global in nature. Different governments will continue to take different attitudes towards the availability of sexually explicit content over the Internet and the pornography debate will continue in the 21st Century. Cultural, moral, and political differences and backgrounds of individual nation-states will reflect upon their Internet policies but it will be more and more futile to rely upon the legal system exclusively to provide the desired solutions. As this article tried to show, the current solutions offered by the regulators in different foras are not necessarily the right ones and therefore, new ways of governing complex systems will continue to flourish in the Information Age.

⁸⁴ The recent cases shown that many cases involved simple possession offences in the UK. See Cyber-Rights & Cyber-Liberties UK through <<http://www.cyber-rights.org/reports/child.htm>> for a list of child pornography prosecutions in the UK. See further Akdeniz, Y., "Child Pornography," in Akdeniz, Y., & Walker, C., & Wall, D., (eds), *The Internet, Law and Society*, Addison Wesley Longman, 2000, 231-249.

⁸⁵ See also the European Committee on Crime Problems (CDPC), Committee of Experts on Crime in Cyberspace (PC-CY), Draft Convention on Cyber-crime Declassified – Public version, PC-CY (2000) Draft N° 19, Prepared by the Secretariat Directorate General I (Legal Affairs), Strasbourg, 25 April 2000. The text of the draft Convention can be found at: <<http://conventions.coe.int/treaty/en/projects/cybercrime.htm>>. The CoE draft cyber-crime convention does include a specific section on child pornography.