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REGULATING THE INTERNET PORNOGRAPHY
INDUSTRY: AN ENFORCEMENT PERSPECTIVE

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REGULATING THE INTERNET PORNOGRAPHY INDUSTRY: AN ENFORCEMENT PERSPECTIVE

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ABSTRACT: There have been many warnings about the danger of pornography on the Internet. On the other hand, pornography is not new and it is arguable that the Internet is simply the latest means of disseminating it. Are the fears real or is it a case of moral panic? This article argues that the fears are real and examines whether the steps taken in New Zealand with the Films, Videos, and Publications Classification Amendment Act 2005 and other associated Acts are sufficient to combat pornography in comparison with other jurisdictions. The challenges presented by Internet technology require a multifaceted solution of international legal harmonisation, quicker adoption of technological developments and a coordinated approach by Enforcement Agencies and Internet Service Providers.

INTRODUCTION

Prior to the Internet, pornography's predominantly tangible form of publication acted as a natural impediment to easy dissemination. An individual risked personal identification and invited potential censure in the process of obtaining and possessing pornographic material. From such an isolating experience, in contrast, access to the Internet provides interaction across social and geographical boundaries in perceived anonymity where moral and legal restraints are diminished and a virtual community provides "support, justification, information and self help."¹

The Internet has introduced a multi-dimensionality of form and function incorporating characteristics of print, broadcast and postal media. Information can be displayed on the World Wide Web in text, image, sound and video composition. As a mass medium, it is capable of being used for one-to-one or one-to-many interactive communication. Unlike previous broadcast mediums where the select few spoke, all participants may publish, comment and interact with one or all in an easy and inexpensive manner.² It is a powerful multimedia experience where mood can be manipulated desensitising users to less stimulating modalities.³

* This article was written for a Masters level course in Communications and IT Law at Auckland taught by Associate Professor Louise Longdin and Alex Sims. The author is a graduate of the University of Auckland School of Law and is employed by the NZ Customs Service as a Prosecutions Officer.

¹ Angela Carr "Internet Traders of Child Pornography and other Censorship Offenders in New Zealand" The Department of Internal Affairs (April 2004), Part 1, Introduction, 9.

² *Internet Censorship Report, The Challenges for Free Expression On-Line* The Canadian Committee to Protect Journalists, Chapter 2: Regulation of the Internet < <http://www.cjfe.org/specials/internet/ch2.html> > (at 28 September 2005).

³ *Edited Transcript from a chat with Dr. Dave Greenfield on ABCNEWS* (29 March 1999) 2. <http://www.virtual-addiction.com/a_abcnew_chat.htm> (at 6 October 2005).

With the potential to control and alter perception, to express and experience emotional and sexual feelings without inhibitory social conventions and the associated risk of interpersonal contact, the 'virtual world' must affect the interpretation of and behaviour within the 'real world'. Accordingly, Part I of this paper will argue that the fears about the danger of pornography on the Internet are real; they are not simply a case of moral panic. Part II will examine whether the steps taken in New Zealand with the Films, Videos, and Publications Classifications Amendment Act 2005 are sufficient to combat pornography and finally, Part III will look at how other jurisdictions have tackled this problem.

PART I: THE INTERNET: A DOORWAY TO THE 'DARK SIDE'?

The Internet can be entertaining, educational and social, but as the creator of wOnderland⁴ described, the Internet can also be the "doorway...to the dark side."⁵ While Internet use *per se* is not a problem, there appears to be a connection between a combination of factors such as heavy usage to the point of addiction, social isolation and depression.⁶

An important element in the addictive nature of the Internet is the availability of pornographic material.⁷ There is evidence to suggest that many people access the Internet to avoid emotions such as boredom, anxiety, stress or depression. Online, pornographic images can be downloaded and used as an aid to fantasy and masturbation, negating the aforementioned emotional states by sexual arousal and facilitating a vicious cycle where the next time the person feels bad they will repeat the act, forming and reinforcing addictive or compulsive behaviour patterns.⁸

As part of the Combating Paedophile Information Networks in Europe ("COPINE") Project⁹, a series of semi-structured interviews were conducted with people, identified

⁴ 'wOnderland' was a worldwide private network of individuals who traded texts and images on Internet Relay Chat (IRC). IRC is a vast multi-user discussion forum, which allows users to communicate through text, but in real time. Users in IRC can exchange files directly using a Client-to-Client feature and can distribute images through Fservices. This allows the user to access a certain part of another user's hard drive to upload and download files. A user can be invited to 'visit' somebody else's collection and take what material they want.

⁵ Max Taylor, Ethel Quayle & Gemma Holland "Child Pornography, the Internet and offending" Volume 2 No 2, Summer 2001, ISSN 1492-0611, 7. < http://www.isuma.net/v02n02/taylor/taylor_e.shtml > (at 30 September 2005).

⁶ Greenfield, above n 3, 2.

⁷ Ibid. In 1999, it was recorded that sixty-two percent of Internet addicts access pornographic sites; approximately twenty percent described themselves as sex addicts; forty-six percent of non-addicts logged onto pornographic sites. The survey group was 18,000, of which two thirds were men. If similar statistics were measured today, it would be interesting to see what impact the increased availability of the Internet, broadband and other technological improvements would have statistics.

⁸ *The Role of the Internet* < http://www.innovationlaw.org/pages/child_docs/Quayle.ppt > (at 4 October 2005).

⁹ The COPINE Project at the Department of Applied Psychology, University College Cork, Ireland, has been in existence since 1997. The project seeks to address children's vulnerability in relation

largely through the judicial system, as having a sexual interest in children. The emerging themes from the interviews illustrated that:¹⁰

[P]eople who use the Internet to download pornography move through a series of stages in their offending behaviour which is directly influenced by their level of engagement with the Internet. Initial contact with the Internet was often accompanied by accessing adult pornographic sites before a search for child pornography.

Evidence of the insatiable desire to seek out new material is shown by a quotation from a paedophile bulletin board, “With this hobby we get bored after a while with the usual and we risk a bit to get new stuff or actual experience. It’s a natural progression. Like stealing. You start small. Get bored. Go for bigger stuff...”¹¹ The progression is comparable for those who are alternatively attracted to images of violence, dehumanising and degrading behaviour, and other extreme forms of pornography.

Accessing such material facilitates engagement with a virtual community, further normalizing the collection of material, as well as promoting further engagement with the Internet and its corresponding technology. For all people interviewed, this was followed by a steady increase in on-line behaviour and a reduction in other outside social engagement. Increasingly, large quantities of material are rapidly collected, and what emerges are different forms of collecting behaviour, with time spent sorting and cataloguing images. Such categories might be quite rudimentary, for example organized around age or sex of the children photographed, or more sophisticated with a focus on content of activities. For those who download and go on to engage in social contacts on the Internet, the process of sustaining that engagement requires credibility. Such credibility is often achieved through the exchange or trade of material such as pictures, text, or fantasy stories.

The process of collecting appears to be an important psychological process in itself. The rapid acquisition of images largely goes hand-in-hand with the acquisition of technical skills... With increasing mastery of the Internet comes also a sense of power and control, and this is also evidenced in some of the preferred fantasy material about “teaching” children about love and sex. Where downloaders also communicate with each other, this becomes a powerful justification for their activity, and there is constant reference to the importance of on-line relationships over material. For downloaders who trade images, the notion of photographs as currency is important. They are currency in terms of trading for new images, but they are also currency in maintaining existing on-line relationships and giving credibility.¹²

These themes demonstrate the complex psychological factors compounded by online addiction. The ability to adopt multiple personae alters states of consciousness and facilitates levels of engagement that would otherwise be seen as inappropriate.¹³ Despite this, or perhaps because of it, users gain social confidence while on-line and report, “they

to new technologies, and in particular issues related to child pornography and the Internet.

The project has been funded by grants from the EU and private sources. An important feature of the project has been its links with the law enforcement community in Ireland, the UK, Belgium, the Netherlands and the United States.

¹⁰ Taylor, Quayle & Holland, above n 5, 6.

¹¹ Carr, above n 1, 11.

¹² Taylor, Quayle & Holland, above n 5, 6.

¹³ The Role of the Internet, above n 8.

find it easier to make friends, using the metaphor of the Internet as the Prozac of social communication.”¹⁴

Internet users largely engage without a governing body restricting interaction, consequently, traditionally marginalised people are empowered as they participate in a decentralised network in which power is spread among all participants.¹⁵ With conventional structures broken down, those who are unable to function at an optimal level in the real world have an opportunity to do so in the virtual world.¹⁶ However, ‘virtual’ experiences impact reality; the most significant of which is the growing ‘market’ for new material subjecting ‘models’ to sexual abuse, degradation and violence. The technological ease by which passive viewers can become producers has reduced the degree of separation between those who access, download, create and act out the images.¹⁷ An example of this in the extreme was the online abuse of children by a group of paedophiles in the United States (“US”), Europe and Australia, called the Orchid Club. Using a digital camera, one of the group members transmitted real-time images of a child being sexually assaulted and responded to requests from members of the club in directing the abuse.¹⁸

New technology has increased the clandestine private production of pornographic material reducing the quantum of relatively expensive commercial material that is more easily controlled by government regulation. Ever more images, videos and film clips are set in the lounges, bathrooms and bedrooms of poor countries such as Russia, Eastern Europe and South America, proving difficult to establish origin and identify subjects. These images are made available on pay-to-view websites, representing a growing commercial market for more extreme and explicit material.

The thousands of subscribers that view and download such images rationalise that they have not participated ‘in reality’ and distinguish themselves from the relatively small number of individuals involved in production and distribution. Yet their actions support and abet a market that abuse children, woman, and even men in violent and degrading ways, assigning the victims as mere objects to be used and controlled in order to satisfy sexual appetites and to escape negative emotional states.¹⁹ While some of the subjects may have consented to participation for financial reward, others, particularly children, have no choice.

¹⁴ Taylor, Quayle & Holland, above n 5, 7.

¹⁵ Ibid, 8.

¹⁶ Ibid.

¹⁷ Carr, above n 1, 10.

¹⁸ Taylor, Quayle & Holland, above n 5, 5.

¹⁹ Carr, above n 1, 16.

Society has yet to accurately determine and measure the impact of the Internet. So many variables exist that it is questionable if such a study is even possible. Although the 'moral danger' debate has been inflamed by media reports of violence, on-line pornographic pop-up advertisements and sexual predators, it is important to maintain a balanced perspective as such 'moral effect' claims were similarly made upon the development of other modern means of communication and entertainment. Morality and law are conceptualised as different spheres of human activity; thus, it is only when Internet pornography can clearly and objectively be shown to cause harm that the law will intervene into the area of private morality.²⁰ It cannot yet be established that the Internet is the 'cause' of inexplicable acts of violence and sexual violation, although it is of note that on-line addictive behaviour is commonly found to accompany such acts.²¹

PART II: COMBATING PORNOGRAPHY IN NEW ZEALAND

In New Zealand, not all pornographic publications are illegal. The Films, Videos, and Publications Classification Act 1993 ("FVPC Act") governs a censorship regime wherein it is an offence to produce, possess, advertise, display or trade "objectionable" publications.²²

A publication is deemed to be objectionable for the purposes of the FVPC Act if the publication promotes or supports, or tends to promote or support:²³

- (a) the exploitation of children, or young person, or both, for sexual purposes; or
- (b) the use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
- (c) sexual conduct with or upon the body of a dead person; or
- (d) the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct ; or
- (e) bestiality; or
- (f) acts of torture or the infliction of extreme violence or extreme cruelty.

The Censorship Compliance Unit ("CCU") of the Department of Internal Affairs ("DIA"),²⁴ the New Zealand Customs Service and the New Zealand Police ("Enforcement Agencies") enforce the provisions of the FVPC Act. A proactive role is taken by the Enforcement Agencies in identifying and prosecuting offenders who import and possess

²⁰ H. L. A. Hart *The Concept of Law: Second Edition* (Clarendon Press, Oxford 1994) 202.

²¹ In the wake of the Littleton, Colorado, US massacre, the news media uncovered the fact that he shooters frequently used the Internet to access Neo-Nazi and bomb making web sites.

²² FVPC Act ss123 & 131.

²³ Ibid, s3(2)(a)-(f).

²⁴ The CCU was established in July 1996.

objectionable material.²⁵ Due to the nature of the Internet, it has become necessary for Enforcement Agencies to work closely, in cooperation with overseas agencies such as Interpol, the US Immigration & Customs Enforcement ("ICE") and the British Police.

An example of international agency action was 'Operation Raven' initiated by the US in 2003. ICE set up an undercover operation to penetrate a US based business, used as a clearinghouse for credit card payments to access Internet child pornography. The child pornography identified by the US authorities was channelled through servers in Europe to about 50 different websites. As a result of the operation, US authorities obtained records that included credit card transactions, email addresses and log-ons to websites for thousands of customers around the world. The details of the New Zealand customers located during Operation Raven were provided to the Enforcement Agencies.²⁶ The Enforcement Agencies executed warrants; seized and forensically examined computer hard drives and removable media; and determined what charges would be laid. Twenty individuals have been convicted and sentenced pursuant to this Operation, with more prosecutions at various stages of the judicial process.²⁷

The CCU monitors IRC channels and investigates New Zealand Internet websites and newsgroups.²⁸ The DIA has developed software applications for Internet tracking which have been made available to overseas jurisdictions. Within some European countries it is illegal for inspectors to undertake covert investigations on the Internet, therefore, by undertaking the investigation in New Zealand and providing the evidence through Interpol, the DIA inspectors are able to thwart the attempts of offenders to avoid prosecution by trading in different jurisdictions.²⁹

Interestingly, in a recent defended hearing,³⁰ the argument was advanced that the New Zealand Court lacked jurisdiction where the defendant operated a largely adult website from

²⁵ The Department of Internal Affairs is primarily responsible for enforcing the provisions of the FVPC Act focusing on possession and distribution of objectionable material within NZ (ss123, 124 & 131 FVPC Act); the Customs Service protects New Zealand's physical and "conceptual" border, prosecuting for offences pursuant to s209(1A) and s209(1)(a) of the Customs & Excise Act 1996. The offences are for importation of objectionable material (as defined in the FVPC Act); the former offence requires knowledge of importation and content of publications, the latter being a strict liability offence.

²⁶ The New Zealand operation was called 'Operation Tercel'.

²⁷ The first conviction and sentence was imposed on 21 March 2005.

²⁸ Carr, above n 1, 12.

²⁹ Ministry of Justice *Protecting our Innocence: New Zealand's National Plan of Action Against the Commercial Sexual Exploitation of Children* (2002) 2.

<<http://www.courts.govt.nz/pubs/reports/2002/protect-innocence/chapter-2.html>>
(at 27 September 2005).

³⁰ *Department of Internal Affairs v Philip Carlton Batty* as reported in the New Zealand Herald, 16 August 2005, with further information provided by the Crown Solicitors.

a US server. Charges were laid by the DIA when a picture of a schoolgirl and a sponsor's link to a web site dealing with excrement were posted. Judge Everitt stated that, "It is contrary to commonsense and the intention of Parliament that a person such as Mr Batty can escape the Court's jurisdiction merely by using a server in an overseas country. The *actus reus* of the majority of actions taken by the defendant, as I said earlier, took place in New Zealand". This confirms the proposition that the *actus reus* is committed in front of the computer rather than at some indeterminate location in cyberspace.

The speed at which technology is changing has the potential to leave legislation redundant and outdated. It is essential that legislation and law enforcement strategies be reviewed regularly to ensure continued appropriateness and relevance. Concerns were raised by interested organisations regarding the adequacy of the FVPC Act to address Internet technology, the development of which could not have been contemplated when the Act was passed in 1993.³¹ Accordingly, in 2002, the Government Administration Select Committee commenced an inquiry into the operation of the FVPC Act. The Committee focused on the capacity of the Act to deal with new technology, in particular, the transmission of live performances via the Internet.³²

The Ministry of Justice also undertook a review of the perceived light penalties imposed by the FVPC Act. The most severe penalty under the Act was one year's imprisonment for trading in objectionable material and a fine of \$2,000 for possession in the case of an individual or \$5,000 in the case of a body corporate.³³ The Act was only recently amended with the FVPC Amendment Act 2005, which came into force on 22 February 2005.

The Films, Videos, and Publications Classification Amendment Act 2005 ("Amendment Act")

The Amendment Act introduced a number of changes to the provisions of the FVPC Act.

The definition of publications was extended to include:³⁴

- (d) a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words

³¹ The SAFE network, ECPAT NZ, Auckland Rape Crisis, the Internet Company of New Zealand, the Peace Foundation and other organisations formed an Internet Safety Group in 1998. The Group has developed an Internet Safety Kit and lobby for effective legislation.

³² Ministry of Justice, above n 29, 3.

³³ Ibid.

³⁴ Section 2 Amendment Act.

The penalty provisions have been significantly strengthened for individuals and bodies corporate. A person who knowingly trades, distributes or makes objectionable publications is now liable to a maximum term of imprisonment of 10 years. The penalty for knowingly being in possession of objectionable publications has increased to either a term of imprisonment not exceeding five years or a fine of up to \$50,000.³⁵ Associated amendments were made to the offence and penalty provisions provided in s209 Customs & Excise Act 1996.

The powers of search and seizure under the Amendment Act have been extended; Inspectors of Publications may obtain search warrants where they have evidence that a suspect is in possession of objectionable material.³⁶ Similarly, pursuant to s167(1) of the Customs & Excise Act 1996, a search warrant may be obtained by Customs officers when there are reasonable grounds to suspect that there is, in or on any place or thing, evidence of the unlawful importation of goods.³⁷ Even with these powers, it is increasingly difficult for Inspectors, Customs and Police officers to locate removable USB hard drives and credit card sized discs that are used to store collections of objectionable material and are easily disguised appearing as innocuous objects such as key rings and CDs.

When an Enforcement Agency Informant lays charges,³⁸ the defendant may seek, or the Court require, classification of an allegedly objectionable publication pursuant to section 29(1) of the FVPC Act. At times, this provision is used by defence counsel as a mechanism for delay. A common argument made when submitting material for classification is that the publications' depictions of objectionable material are not real and that the images are simply acted, or in the case of child pornography, that the models are actors 'dressed down' to appear young. However, such submissions are relevant to sentencing and not the classification process. A defendant may accept that an image is "objectionable" and enter a guilty plea without classification.

The analysis undertaken by the Classification Office follows a standard process whereby the publications are described and then scrutinised according to the following legal methodology.

³⁵ Refer ss123(2), 124(2), 131(2), 131A Amendment Act 2005.

³⁶ Refer ss109, 109A, 109B, 109C Amendment Act 2005.

³⁷ Electronic publications are treated as if they were goods in accordance with s54(1A) Customs & Excise Act 1996.

³⁸ The High Court decision in *Goodin v Department of Internal Affairs* (AP 11/01) confirmed the Enforcement Agencies' practice of laying a charge for each individual image file.

Section 3(1) of the FVPC Act sets out the meaning of “objectionable”, a publication is objectionable if it:

describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

The Court of Appeal interpreted the words "matters such as sex, horror, crime, cruelty or violence" in *Living Word Distributors v Human Rights Action Group (Wellington)*.³⁹

[27] The words "matters such as" in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression "such as" is narrower than "includes", which was the term used in defining "indecent" in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, "such as" was a deliberate departure from the unrestricting "includes".

[28] The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words "sex, horror, crime, cruelty or violence", as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

[29] That, in our view, is the scope of the subject matter gateway.

Accordingly, the content of publications must be brought within the "subject matter gateway". In classifying publications, the Classification Office must determine whether the matters are dealt with in such a way that is likely to be injurious to the public good.

Included as a "matter such as sex" is any publication that in terms of s3(1A):

- (a) ...is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and
- (b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.

When the Classification Office considers whether a single publication taken from a website deals with matters of sex, it does not assume a viewer is bringing knowledge or familiarity of the website to the image viewed, or of the website's intention in publishing such images. This is consistent with the High Court's decision in *Renk v Attorney General*, where Gendal J stated:⁴⁰

³⁹ *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570, paras 27-29.

⁴⁰ AP 318/98, High Court, Wellington Registry, 17 June 1999, 12.

The test is objective and relates solely to whether the publication itself, irrespective of any motive of its creator, was exploitative. The legislation is not directed to consider motives or purposes or intentions because such may vary enormously across an infinite variety of human behaviour. The legislation is directed to publications and the manner in which they portray certain images or events and whether such may be injurious to the public good. To superimpose any condition upon the Classification Office or Board that it must be satisfied as to the wrongful intent, motive or purpose of the publisher is outside, and contrary to the legislative provisions.

It is interesting to note that even though it is acknowledged that a logo and website address placed in the corner of an image has some potential to influence a viewer's interpretation, the words of a logo are to be taken at face value. In the Classification Office decision for Publications 015[1].jpg and 1c-008-19[1].jpg,⁴¹ website logos "Little Cuties" and "Young Cuties" were placed in the corner of each image. Both websites contain images of partially nude prepubescent and pubescent girls posed in provocative adult-like poses. However, the words were considered benign and without sexual connotation as "most reasonable" members of the public would not have a prior knowledge of the websites. An obvious sexual reference in a website address or logo would have an influence, however, in this particular decision, the words were thought to merely encourage the reader to view the models as being young or youthful. By removing the context of an image, it is harder to deem objectionable.

If the content of a publication does not bring it within the "subject matter gateway" of s3(1), the FVPC Act requires the Classification Office to consider the publications under s3B, s3(4) and s3(a). Section 3B provides that a publication may be classified as restricted to persons who have attained a specified age, if it is likely to be injurious to the public good for the reasons specified in subsection (4). Under s3(4) additional matters are considered, such as the dominant effect of the publication, the impact of the medium and the character of the publication. The digitised form of a computer image file allows viewing at will with size adjustment, easy dissemination, storage, and a print option; having far more impact than a paper printed image.

Under s3(2) of the FVPC Act, a publication is deemed to be objectionable if it promotes or supports, or tends to promote or support, the activities previously specified. In *Moonen v Film and Literature Board of Review (Moonen I)*⁴², the Court of Appeal stated that the words "promotes or supports" must be given "such available meaning as impinges as little as possible on the freedom of expression" in order to be consistent with s14 of the New Zealand Bill of Rights Act 1990 ("NZBR Act").⁴³ The Court elaborated:⁴⁴

⁴¹ Classification Office, OFLC No. 501303, 501304 & 501305 (1 September 2005), 4.

⁴² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 27.

⁴³ Section 14 states that everyone has "the right to freedom of expression, including the freedom to

Description and depiction...of a prohibited activity do not of themselves necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting the activity.

The Classification Office defines "promote" to mean the advancement or encouragement of that activity; it interprets the word "support" to mean the upholding and strengthening of something so that it is more likely to endure. Thus, it is not sufficient for a publication to merely depict, describe or deal with one of the matters listed in s3(2) to be deemed to be objectionable.

Section 3(2)(a) deems objectionable the exploitation of children, or young persons, or both, for sexual purposes. In *Moonen v Film and Literature Board of Review (Moonen II)* the Court of Appeal stated that "young persons" and "children" were deliberately not defined.⁴⁵

The legislation is concerned with the vulnerability of young people and with the corrosive injury to the public good of depicting persons perceived to be children or young people as subjects for exploitation.... The inquiry under s3 does not require the ascertainment of the precise age of the person photographed.

In practice, however, the Classification Office considers that children and young persons are those under the age of 18 years, despite the definitions contained in the Children, Young Persons and Their Families Act 1989 providing that a "child" is a boy or girl under the age of 14 years and a "young person" is over the age of 14 but under 17 years, but does not include any person who is or has been married.⁴⁶ The difficulty presented by the issue of age was raised in a commentary of the ruling in the UK case, *R v Owen (1989)*, Sir John Smith suggested that if there were two photographs, exactly similar in all material respects, one of an 18 year old girl and one of a well-developed 14 year old, a jury might on being informed of the 14 year olds age, properly consider the latter photograph to be indecent even though they would not so regard the former. Change the scenario to a 17 and a 14 year old, would society consider both to be indecent?⁴⁷

seek, receive, and impart information and opinions of any kind in any form". Under s5 of the NZBR Act, this freedom is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 6 of the NZBR Act states that "Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

⁴⁴ Above n 42 at para 29.

⁴⁵ *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 at para 40.

⁴⁶ The age provision is also inconsistent with the age of consent in New Zealand, being 16 years of age.

⁴⁷ Dr. Alisdair Gillespie "Challenges to the Legal System: UK Experience" Paper presented to the

Pursuant to s23(2) of the FVPC Act, the Classification Office must determine whether the publication is to be classified as unrestricted, objectionable, or objectionable except in particular circumstances. Section 23(3) permits the Classification Office to restrict a publication that would otherwise be classified as objectionable, so that it can be made available to particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes.

Sentencing: Sufficient to Deter?

For defendants convicted of offences pursuant to the FVPC Act or the Customs & Excise Act (“the Acts”), the majority of sentences have seen fines imposed, well below the maximum provided for by law. It is disappointing that more defendants are not required to undergo assessment and therapy to identify and address the criminogenic needs that have contributed to their offending. In some of the more extreme cases, defendants have been referred to attend a STOP programme.⁴⁸

By amendment to the Acts, Parliament has signalled its requirement for increased penalties to provide a stronger deterrent factor. Since February 2005, (when the amendments took effect) in sentencing, Judges have commented that had the charges been laid under the new provisions, the defendant would be facing a custodial sentence. It will be interesting to observe the extent to which the legislative guidance given by Parliament, will impact Judges in sentencing, particularly the willingness to impose terms of imprisonment and increase the level of fines.

An indication that the matter will be taken very seriously was the sentencing of 44-year-old defendant, David Malcolm Walker.⁴⁹ On 13 October 2005 he was sentenced to three and a half years imprisonment in the first test case of the Amendment Act provisions brought by the DIA.⁵⁰ Albeit a custodial sentence, it is significantly less than the maximum term of ten years.⁵¹ Hamilton District Court Judge Phillip Cooper commented at sentencing that the images were “vile and degrading... utterly repulsive and abhorrent in any society” and the

Fifth COPINE Conference “Future Directions in Psychological and Legal Issues of Internet Abuse Images”, University of Cork, Ireland, 24 May 2004.

⁴⁸ The STOP programme operates nationally and works with adolescent and adult offenders who present with sexually deviant behaviour.

⁴⁹ Walker was convicted on 40 charges of possession and seven charges of distribution of objectionable images pursuant to s3(2)(a) FVPC Act (child pornography).

⁵⁰ No charges have yet been heard under the new offence and penalty provisions of the Customs & Excise Act 1996. A number of matters are set down for First Call in the Manukau District Court in November 2005.

⁵¹ The Judge referred to cases from the United Kingdom in passing sentence.

Crown Prosecutor stated that the DIA investigator described the images as the worst the department had seen; which leaves one querying just what factors contributed to the reduction in term⁵², or alternatively, what circumstances would attract a longer term of imprisonment.

A number of 'Operation Tercel' defendants have sought permanent name suppression. To date, two applications have been successful.⁵³ The nature of the offending is such that it has been considered in the public interest for offenders' names to be disclosed. Publication appears to be a significant deterrent for offenders, to such an extent that a small number of offenders have committed suicide or left New Zealand prior to the prosecution process. For those that leave the country, warrants for their arrest remain outstanding.⁵⁴

Sentences in New Zealand appear to have lagged behind those imposed in countries such as Australia, Canada, the United Kingdom and the United States.⁵⁵ This is possibly due to New Zealand's censorship regime as opposed to other countries that deal with illegal pornography under criminal or child protection law enforced by general law enforcement agencies such as the Police.⁵⁶ The effect may be seen in two related outcomes: firstly, due to resource constraints, a lower priority is given to the investigation of such offences as opposed to "more serious" crime;⁵⁷ and secondly, when a prosecution does proceed it is for a more serious case of its kind, which then attracts a more significant sentence.

In dedicating a specialist unit, by way of the DIA's CCU, New Zealand has sought to develop an agency with skills in detecting, investigating and gathering intelligence regarding the nature of these offences. Such intelligence enables insight into offender behaviour contributing to more efficient and effective investigations, successful prosecutions, and providing a valuable empirical base on which to develop policy.⁵⁸ However, it is suggested that the censorship regime is effective in New Zealand because the problem is primarily associated with the possession and distribution of imported pornography rather than the

⁵² The Judge gave an 18-month reduction in prison term for the early guilty plea and favourable pre-sentence report, which said that Walker was a low risk re-offender.

⁵³ An application for permanent name suppression was made in the North Shore District Court by defence counsel, Gary Gotlieb, on the basis of a psychologist's report that indicated, among other factors, that his client was a suicide risk. In a decision released 12 October 2005, Judge Barbara Morris granted name suppression for six months to allow time for therapy, before the man "has to endure the extra burden of publicity". In the decision Judge Morris reiterated the public interest in disclosing the names of people "with a predilection for the viewing of this type of material".

⁵⁴ Carr, above n 1, 12.

⁵⁵ Keith Manch and David Wilson *Objectional Material on the Internet: Developments in Enforcement* The Department of Internal Affairs (2003), 3. (Google search result at 27 September 2005).

⁵⁶ Carr, above n 1, 12.

⁵⁷ Ibid.

⁵⁸ Ibid.

production of objectionable material.⁵⁹ The enforcement focus of the Censorship regime is upon 'capturing' offenders in the initial stages of offending rather than allowing the problem to escalate (as behaviour profiling suggests is likely), requiring sanction by criminal law.

PART III: HOW OTHER JURISDICTIONS TACKLE THE PROBLEM

A well-established body of law has regulated the content of print and broadcast media preventing the publication, distribution or possession of indecent, obscene or objectionable material in most jurisdictions. A major shift is not necessary to include Internet technology; the difficulty is the rapid development in technology, which has outpaced the "speed" of government legislative review together with the global nature of the Internet, making enforcement difficult.

The problem of Internet pornography necessitates a coordinated international response, not just in enforcement but also in legislative standards, criminal sanctions and rehabilitation. While different cultural interpretations make it difficult to define "illegal pornography", there is a general consensus in most jurisdictions that child pornography is unacceptable. This must be an important starting point and will be used as a basis for comparison. The following summaries provide a brief overview of how the problem of child pornography is tackled in Australia, the United Kingdom, the US, South Korea and a 'safe haven' jurisdiction.⁶⁰

Australia

The classification scheme is similar to New Zealand. Films, videotapes and publications are dealt with under the National Classification Code, set out in the Schedule to the Commonwealth Classification (Publications, Films and Computer Games) Act 1995. The code defines child pornography as:

[publications, films or videotapes] that...describe, or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not).

⁵⁹ Ministry of Justice, above n 29, 1.

⁶⁰ Inhope – The Association of Internet Hotline Providers *Facts by Countries: Australia – Overview, United Kingdom – Overview, US – Overview, South Korea – Overview* <
<http://www.inhope.org/content/details.php?lang=en&countryid=1> > (at 6 October 2005).

Such material is classified 'Refused Classification' (RC), although the boundaries between the definitions of pornography, free speech and art can be somewhat blurred.⁶¹ Classification enforcement legislation in each State and Territory make it an offence for such material to be sold, hired or shown publicly. In addition, some State criminal laws make it an offence to possess child pornography, the penalties varying from a maximum of one year to a maximum of ten years.

Of some interest is the Australian High Tech Crime Centre's continuing research into issues such as bridging the gap between clinical understanding and offence definition, hidden offences, the likelihood of contact offences being committed and rehabilitation.⁶²

The United Kingdom

The Internet Watch Foundation was set up in 1996 to restrict the availability of harmful or criminal material available on the Internet. The objectives are achieved by the operation of a hotline for reporting criminal content, supporting software filter development, and educating users about the potential dangers of the Internet.

The legislative framework is complicated, child pornography being covered by five statutes: the Telecommunications Act 1984; the Protection of Children Act 1978 (as amended); the Obscene Publications Act 1959 (as amended); the Criminal Justice Act 1988; and the Sexual Offences Act 2003. It has been suggested that the law relating to child pornography has been "tinkered with" more than any other crime, the recent "tinkering" appearing to be political opportunism rather than a concerted effort to help.⁶³

After some high profile cases, the Government established a forum in May 2001, the Task Force on Child Protection on the Internet. The purpose was to develop good practice guidelines and to maintain a close working relationship between the Internet industry, government, and law enforcement agencies. In March 2005, the Home Office announced the set up of a new Centre for Child Protection on the Internet to support the police and child protection agencies. While child protection will remain the responsibility of local police forces, the new Centre will work closely with them, providing support and focusing efforts on high- risk offenders.⁶⁴

⁶¹ Dr. Tony Krone "Regulating Child Abuse Images on the Internet in Australia" Power point presentation to the Fifth COPINE Conference "Future Directions in Psychological and Legal Issues of Internet Abuse Images", University of Cork, Ireland, 24 May 2004.

⁶² Ibid.

⁶³ Gillespie, above n 47.

⁶⁴ Internet Watch Foundation *National Centre for Child Protection on the Net is Approved* (31

In sentencing, courts are increasingly recognising the impact on victims, however, some commentators still believe that there is a lack of understanding on the usefulness of custodial sentences. Some Courts have used s5A of the Sex Offenders Act 1997 to impose restraining orders, banning people convicted under s1 from having a computer or accessing the Internet.⁶⁵

The US

A variety of federal and state laws address the problem of child pornography.⁶⁶ In 1977 the Sexual Exploitation of Children Act (18 U.S.C. 2251-2253) was enacted. It prohibits the use of a minor in the making of pornography and the transportation of a child across state lines for the purpose of producing such material. The transportation, importation, shipment and receipt of child pornography by any interstate means, including mail or computer, is also prohibited.

The Child Protection Act 1984 (18 U.S.C. 2251-2255) defines anyone younger than the age of 18 as a child. In November 1986, the US Congress enacted the Child Sexual Abuse and Pornography Act (18 U.S.C.2251-2256) that included a provision for civil remedies for personal injury suffered by a minor who is a victim. It also raised the minimum sentence for repeat offenders from imprisonment of not less than two years to imprisonment of not less than five years. Two years later, the Child Protection and Obscenity Enforcement Act (18 U.S.C. 2251-2256) made it unlawful to use a computer to transmit advertisements or visual depictions of child pornography; the buying, selling, or otherwise obtaining temporary custody for the purpose of producing child pornography.

The Child Pornography Prevention Act 1996 amended the definition of child pornography to include that which actually depicts the sexual conduct of real minor children and that which appears to be a depiction of a minor engaging in sexual conduct. This was to enable the prosecution of those that create and alter images to appear as children.

March 2005) < <http://www.iwf.org.uk/media/news.archive-2005.119.htm> > (at 13 October 2005).

⁶⁵ Gillespie, above n 47.

⁶⁶ The Child Exploitation and Obscenity Section of the US Department of Justice has recorded a steadily increasing number of child sexual exploitation reports from approximately 4,000 in 1998 to approximately 78,000 in 2003. Statistics noted in Andrew G. Oosterbaan, Chief, Child Exploitation and Obscenity Section, US Department of Justice, Statistics presented in a power point presentation to the Fifth COPINE Conference "Future Directions in Psychological and Legal Issues of Internet Abuse Images", University of Cork, Ireland, 24 May 2004.

Every State has enacted statutes that specifically impose criminal liability on producers and distributors, however, not all have established laws prohibiting the possession of child pornography.

South Korea

The Harmful Information Report Centre was established in 1992 and renamed 'Internet 119' in 2002. Anyone encountering illegal or harmful material on the Internet may report it to Internet 119, a hotline part of the Information Communication Ethics Committee ("ICEC") operating within the Telecommunications Business Act (Article 53) of South Korea.⁶⁷ The ICEC is an independent legal institution, vested with power to deliberate reported complaints and require correction in accordance with the provisions of the Telecommunications Act.

Other ICEC functions are to demonstrate general ethical principles for a safe cyber world, to propose policy for the prevention of illegal activities via the Internet, and finally to promote activities for "nurturing a virtuous cyber culture". ICEC also operates a counselling centre, the Cyber Defamation and Sexual Violence Counselling Centre.

As an Asian country at the cutting edge of Internet technology, it is interesting to note that the Koreans approach the problem quite differently from the previous western jurisdictions. The problem seems to be dealt with in a similar way to New Zealand's treatment of privacy concerns by referral to the Privacy Commission. It would seem to be an effective way to deal with the problem in view of the findings made in a study of US child pornography cases; 91% of the cases came to light from citizen reports compared with 9% from law enforcement activities.⁶⁸

Russia: A 'Safe-Haven' Jurisdiction?

Under Russian law the age of consent is 14 years, and possession of pornography is not a crime. The production and distribution of pornography is illegal, but the law does not distinguish between child and adult pornography. Both are treated as lesser crimes

⁶⁷ Internet 119 deals with Internet content from lewdness, child pornography, cyber defamation, brutality, violence; any illegal act on a bulletin board, chatroom, or website.

⁶⁸ Janis Wolak and Professor David Finkelhor "Child Pornography Production: Findings and Implications from a national study of US criminal cases" Power point presentation to the Fifth COPINE Conference "Future Directions in Psychological and Legal Issues of Internet Abuse Images", University of Cork, Ireland, 24 May 2004.

punishable by a maximum of two years imprisonment, the same punishment for petty theft or shoplifting.⁶⁹ Russian Police have lamented that the law is not strict enough; however, it appears that a lack of resources and legal chaos leaves them powerless to enforce the law.⁷⁰ The increasing production of child pornography and the international distribution networks run from Russia illustrate how the problem is being driven to jurisdictions in lower socio-economic areas where the value of human life is not respected.⁷¹

Due to the lack of an international standard, the US has sought to prosecute individuals located outside of its national borders. US prosecutors brought the first indictments against five alleged Internet traders of child pornography in April 2000. A federal grand jury charged three men in Indonesia and Russia together with a husband and wife from Texas, for selling pictures of children having sex through websites with names like "Child Rape" and "Lolita Hardcore". The couple were involved as "gatekeepers", processing credit card payments and distributing passwords to customers who bought access to the sites for US\$29.95 a month. Approximately US\$1.1 million a year was collected; one-third was kept with the remaining two-thirds divided between the Indonesian and Russian web-site operators.

The couple were convicted on 87 counts of an indictment that charged them with sexual exploitation of minors, distribution of child pornography, criminal conspiracy, and other related charges. On 6 August 2001, the US Department of Justice announced that Thomas Reedy was sentenced to life imprisonment; Janice Reedy to 14 years imprisonment; the Reedy's company, Landslide Inc was also convicted on 89 counts and sentenced to pay a fine of US\$6,950,970.28; warrants were issued and extradition was sought for the arrest of the foreign web-site operators.⁷²

A more cunning and ingenious approach was taken during "Operation Falcon" when US law enforcement agencies lured the lead defendants of a large commercial organisation of child pornographers based in Belarus, to Paris where it was possible to arrest them.⁷³

An indication of the size of the problem is the large sums of money involved. It is difficult for poorer countries to be impelled to set and enforce stronger provisions when the political and enforcement structures required to effect such provisions are unstable and susceptible to

⁶⁹ Alexander Shytov "Indecency on the Internet and International Law" IJL & IT 2005.13(260), 2.

⁷⁰ Ibid, 3.

⁷¹ Inhope – The Association of Internet Hotline Providers <
<http://www.inhope.org/en/problem/sites.html> > (at 13 October 2005).

⁷² US Department of Justice *Reedy (Landslide) Press Release* (Dallas Texas, 6 August 2001) <
http://www.usdoj.gov/usao/txn/PressRe101/reedy_sent_pr.htm > (at 13 October 2005).

⁷³ Oosterbaan, above n 66.

corruption. Furthermore, in combating the problem the political will may be weak, as fragile economies would be deprived of an essential source of income. Nevertheless, as long as ‘safe-haven’ jurisdictions exist, the stringent standards set by other jurisdictions are impaired.

CONCLUSION

In future all jurisdictions will struggle to meet the challenges presented by Internet technology. It will become harder to detect offending and gather computer forensic evidence with the increasing use of encryption, file-shredding software and proxy servers that endeavour to conceal a user's identity. Other approaches, not favoured at present, may need to be adopted.

As a complex problem, Internet pornography demands a multifaceted solution. In response, jurisdictions have adopted a variety of measures including legislation, censorship laws and non-legal measures including self-regulatory ‘codes of conduct’, ‘good practice guidelines’ and forums for complaint and education. Most of these measures focus primarily on the first level of responsibility, the producer who creates the material, the person who downloads and possesses the material, together with web site operators and ‘gate-keepers’. As it becomes more difficult to detect offenders at this level, technology may provide some solutions to controlling Internet content. Such technological solutions may make it possible to achieve the goal of international legal harmonisation.⁷⁴

Technically, the network infrastructure is differentiated according to function and control, the network provider, the access provider and the Internet service providers (“ISP”) through which data is not only transmitted but also stored. From a technical perspective and for policy reasons,⁷⁵ it is impossible to comprehensively monitor the flow of data by network and access providers. Any effective ‘filtering’ at this level would require a complete control mechanism and an encryption ban, something that democratic societies would not accept and that is being unsuccessfully attempted in the People’s Republic of China.⁷⁶

A more practical solution and one which many countries (particularly member states of the European Union) have been developing, is preventing illegal material at the ISP level to be stored. Where an ISP has knowledge of such material, it could be obliged to delete or block

⁷⁴ Ulrich Sieber “Responsibility of Internet Providers” in E. Lederman and R. Shapira Law (eds) *Information and Information Technology* (Kluwer Law International, The Netherlands, 2001) 234.

⁷⁵ The legal framework conditions play a central role in investment decisions. The Internet has become an important economic factor; any legal uncertainty could detrimentally affect the development of new forms of Internet media.

⁷⁶ Sieber, above n 63, 235.

it. There are problems associated with finding an ISP criminally liable, primarily the lack of intent required with respect to the illegal content together with the possibility and reasonableness of the deletion of data.⁷⁷ This raises some concerns for western legal systems where the penal provisions of statutes generally require a positive act rather than mere omission. A compromise could be achieved by providing a strict liability offence where an ISP is liable only if it has knowledge of the content and where deletion or blocking of the content is technically feasible and can reasonably be expected.

In France, after amendment to provisions in the Law on the Freedom of Communications, considered unconstitutional, an ISP is liable when it fails to act expeditiously to prevent access to illegal content, having been required to do so by a judicial authority.⁷⁸ It is not liable for the content that they host, as long as the ISP has not contributed to the creation or production of the material. Article 43-9 further provides that access and ISPs are required to retain and store data permitting the identification of content providers and Article 43-10 obliges all Internet users to provide identification details before publishing on the Internet. This is intended to target website operators, but it could equally apply to individual users in chat-rooms, bulletin boards and other discussion groups.

Similar provisions exist in other member states of the European Union. Despite the weight accorded to the principle of freedom of speech and expression in constitutional argument, the US Supreme Court did not find unconstitutional 47 U. S. C. section 223(e) of the Communications Decency Act, which provides that no liability arises for the ISP unless, pursuant to s223(e)(2)(3), the ISP works with the originator of the illegal content and knowingly advertises the availability.⁷⁹

It is conceivable that by global consensus a base standard of objectionable content could be imposed at the ISP level, regulating the blocking of illegal publications and imposing duties on ISPs such as retaining and storing data allowing identification of offenders, the installation of filtering software and obliging the adoption of any new technological developments that may assist in combating the problem.⁸⁰ This would effectively extend the reach of enforcement agencies and address some of the resourcing concerns that will inevitably impact the extent to which agencies can pursue offenders. It is reasonable that the Internet infrastructure should bear part of the cost and responsibility of the problems associated with its network.

⁷⁷ Ibid, 238.

⁷⁸ Ibid, 247.

⁷⁹ Ibid, 254. The libel case of *Zeran v America Online Inc.* 29 F.3d 327 (4th Cir. 1997) affirmed that s 230(c) granted ISPs immunity from liability.

⁸⁰ Ibid, 243.