Strategic Alliances:

THE INTER-RELATED ROLES OF CITIZENS, INDUSTRY AND GOVERNMENT IN COMBATING INTERNET HATE

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INTRODUCTION

Descriptors like "Information Society" and "Civil Society" (with or without capital letters) receive significant play these days, especially in association with the Internet. Deciding who is in and who is out is certainly not an uncontroversial matter. "Civil society" is frequently delineated by whom it excludes – for-profit organizations operating in the market economy and the state itself.[1] In contrast, for those involved in the debates surrounding Internet governance, the "Information Society" has been defined broadly to include not only non-profit organizations such as NGOs, but governments and industry as well.[2] Admittedly, the latter approach is not without its dangers – in particular, the risk that broader public interests will be eclipsed by the profit-maximizing objectives of industry or the potentially self-interested (and culturally specific) politics of elected officials.[3] While recognizing a need for caution, this article approaches the term "civil society" broadly in the context of Internet hate propaganda for both practical and philosophical reasons.

On a practical level, many approaches to Internet hate require interaction among individual citizens, Internet and technology-based businesses, NGOs and governments. Individual citizens and citizen collectives have been and will continue to be essential not only in terms of their own actions against Internet hate, but in mobilizing action by key industry and governmental stakeholders. Taking a broader approach is equally important at a philosophical level. Canada and many other countries around the world recognize hate speech as an offence against the public good in their criminal and human rights law.[4] The recognition and disapprobation of the harmful personal and social effects of hate speech[5] through public enforcement mechanisms is essential to fostering the equality and liberty of all. While dedicated citizens, citizen coalitions and private industry can and should continue to work toward solutions, private initiatives should not be considered substitutes for government regulation of this important matter of public policy.

Strong public expressions of disapprobation of hate propaganda through legal regulation and proceedings, as well as publicly accountable private action are essential components in a robust strategy to address both the immediate individual and the long-term broader social harms of Internet hate. The next six sections analyse some of the options for members of civil society in addressing Internet hate speech – including triggering legal action, implementing filtering technologies, educating Internet users, reporting to hotlines and Internet Service Provider ("ISP") self-regulation.

I. CIVIL SOCIETY'S ROLE IN TRIGGERING LEGAL ACTION

The law is one potential element in a civil society strategy against Internet hate propagation. As discussed in other articles in this issue, available legal avenues include initiating criminal investigations,[6] and human rights complaints,[7] as well as

lobbying for adoption of international initiatives against Internet hate propagation.[8] Less often discussed is the role that contract and labour law might play in restricting Internet hate propagation and its effects.

Contract claims have come into play in the context of acceptable use policies (AUPs) that frequently form part of a subscriber's contract for services with his or her ISP. AUPs often include language indicating that ISPs will take action in relation to offensive and illegal content by, for example, terminating the service of offending subscribers. ISPs that have undertaken such a responsibility but allegedly failed to make reasonable efforts to minimize or eliminate discriminatory content have been subject to actions for breach of contract.[9] However, AUPs tend to be drafted to reserve maximum flexibility for ISPs in terms of deciding whether to take any action at all. As a result, attempts to use contract claims relating to AUPs have generally proven to be relatively weak options in responding to Internet hate propaganda.[10] Nevertheless, the presence of anti-discrimination language in AUPs may well play an important role in convincing an ISP to remove content from its servers without having to resort to legal action, an issue discussed in further detail below in Part IV.

Civil actions aimed at addressing hate propaganda through intellectual property infringement claims,[11] damage to property claims where spam is involved,[12] and libel actions[13] present different but similarly perplexing problems in relation to confronting Internet hate propaganda. Further, these kinds of strategies tend to require focus on the individual harms of hate propaganda and impose considerable burdens on private individuals to address a very public and systemic problem.

A potentially more collective, yet private, legal approach might be fashioned on the model of grievances filed by unions of library employees relating to Internet pornography. The unions alleged that patron viewing of Internet pornography on library computers poisoned their work atmosphere contrary to anti-discrimination provisions in their respective collective agreements.[14] In the case of the Ottawa Public Library, the resulting settlement of the grievance led to review and modifications of the Library's Public Internet Access Policy that arguably stand to benefit not only library employees but also other members of the public using library services.[15]

II. PRIVATE IMPLEMENTATION OF TECHNOLOGICAL SOLUTIONS

Technological "solutions" such as filtering and zoning could be employed by members of civil society in order to address online hate. Filtering involves the use of computer software that prevents certain content from appearing on the computer screen of the individual user.[16] Zoning is a technique that could be used to accumulate certain types of Internet content in cyberspace "locations," only to be accessed by persons with the appropriate password.[17] However, both filtering and zoning suffer from practical problems that undermine their viability as total (or perhaps even partial) responses to online hate.[18] Further, their implementation may be philosophically contested in that each mechanism suggests that there is a legitimate place for hate propaganda and places the burden of avoiding those spaces on those likely to be "harmed" or "offended." Canadian law recognizes that the problem with hate speech goes beyond its "offensive" nature, harming the individual members of target groups who come into contact with it as well as threatening the public interest in building an equality-respecting society.[19] While individual implementation of filters, such as the "Hate Filter" designed by the Anti-Defamation League (ADL),[20] may well assist members of target groups in avoiding the harms associated with coming into contact with hate speech, additional measures are needed to address the broader social harms associated with those who continue to distribute, access and receive such content.

III. CIVIL SOCIETY AS EDUCATOR

Civil society can play an important role in educating the public with respect to online hate, using the technology itself to further collective goals of empowerment. Some of the key functions that members of civil society can play include identifying hate speech online, collecting statistics and reporting on the nature and scope of the problem.[21] Civil society groups such as the Simon Wiesenthal Center,[22] the Anti-Defamation League[23] and the Southern Poverty Law Center[24] have set up websites to serve a number of these purposes simultaneously. In addition, they and other civil society organizations, such as Media Awareness,[25] have dedicated themselves to public education – to combating the misinformation that characterizes much hate speech with accurate information. Empowering current and future generations with information

and critical-thinking skills comprises an essential component in a strategy for promoting the public interest in developing an equality-respecting society.

IV. HATE SPEECH HOTLINES AND OTHER COOPERATIVE VENTURES

Hotlines could also play a key role in the struggle to educate the public about online hate, as well as assisting law enforcement. Hotlines allow members of the public to report incidents of illegal and offensive content, which members of the hotline organization investigate and can report to the relevant authorities.[6]

To date, however, Canada's national hotline, cybertip.ca, addresses only child sexual exploitation online, and not hate speech per se.[27] Some national hotlines, such as those provided by the Freiwillige Selbskontrolle Multimedia-Diensteanbeiter (FSM) in Germany,[28] the Internet Watch Foundation in the United Kingdom,[29] the Australian Communications and Media Authority,[30] and the Complaints Bureau for Discrimination on the Internet in the Netherlands,[31] are specifically set up to receive reports on racist, hateful and other forms of discriminatory content, in addition to sexually exploitative material. International efforts such as INHOPE[32] and the International Network Against Cyber Hate (INACH)[33] make possible the sharing of information and reporting across borders, and so partially address some of the challenges presented by the medium's multi-jurisdictional nature.

IV. ISP SELF-REGULATORY INITIATIVES

ISPs and ISP associations, sometimes in concert with the efforts of other members of civil society, have taken steps to address ISPs' roles with respect to hateful content housed on their servers.[34] ISP associations such as the Canadian Association of Internet Providers (CAIP) and the German FSM have drafted codes of conduct for use by their members that include procedural and substantive mechanisms for dealing with online hate.[35] In the case of the FSM, association members can be sanctioned publicly for failing to adequately address complaints relating to online hate speech.[36] Unfortunately, in many other cases, codes of conduct and self-regulatory initiatives of ISPs are treated merely as guidelines, with little or no mechanism for enforcement.[37]

Nonetheless, there are a number of examples of ISPs removing content, modifying their services and/or discontinuing service to those engaged in publishing online hate in response to individual complaints. Private initiatives of this sort have proven to be a useful tool in terms of flexibility and prompt response times. However, it may be risky for our anti-hate propaganda strategy to rely too heavily on the largely unscrutinized choices of private ISPs on an issue like hate propaganda, which so directly engages public interests in equality and multiculturalism, and the mutual respect for diversity essential to them.

CONCLUSION

Numerous options are open to members of civil society seeking to address the problem of Internet hate propaganda. While no single option offers a solution on its own, broad-based efforts involving strategic alliances among citizens, citizen coalitions, industry and government provide a strong foundation from which to engage in visible, publicly accountable action against this individually

Endnotes

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1 London School of Economics, "What is civil society?" (1 March 2004) <http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm>.

2 World Summit on the Information Society, "List of Participants" (5 December 2005), online: http://www.itu.int/wsis/docs2/tunis/final-list-participants.pdf.

3 Both of these concerns have been raised more generally in the context of Internet governance, often focusing on the control held by the United States and the involvement of the for-profit sector in the operation of basic Internet functions. For a discussion at the compromise arrived at in Tunis in 2005, see Michael Geist, "The WSIS Deal" (15 November 2005), online: http://www.michaelgeist.ca/ index.php?option=com_content&task=view&id=1010&Itemid=85 .

4 For a summary of some key legislative provisions in Europe, see: International Network Against Cyber Hate (INACH) "Legislation" (2002), online: http://www.inach.net/index.php3?link=legislation.

5 The Supreme Court of Canada identified two harms flowing from hate speech: individual injuries occasioned by exposure of target group members to hateful content and the broader social harm that hate propaganda may cause by undermining tolerance and equality: *R. v. Keegstra*, [1990] 3 S.C.R. 697 at para. 60-63 [*Keegstra*].

6 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 318, 319, 320, as am.

7 See e.g. *Citron and Toronto Mayor's Committee v. Zundel*, (18 January 2002), C.H.R.T. Decision T.D. 1/02, online: CHRT <http://www.chrt-tcdp.gc.ca/ search/view_html.asp?doid=252&lg=_e&isruling=0> [*Citron*], and *Warman v. Fred Kyburz* (9 May 2003), C.H.R.T. 2003 CHRT 18, online: < http://www.chrt-tcdp.gc.ca/search/view_html.asp?

doid=453&lg=_e&isruling=0> [*Warman*]; *Schnell v. Machiavelli and Associates Emprize Inc.* (20 August 2002) , C.H.R.T. T.D. 11/02, online: <http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=285&lg=_e&isruling=0> [*Schnell*].

[8] For example, Canada recently ratified the Council of Europe Additional Protocol to the Convention on cyber-crime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Eur. T.S. No. 189 (Strasbourg: 28 January 2003), online: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>; and Cybercrime Convention (Eur. T.S. No. 185) (November 23, 2001), Art. 9, online: Council of Europe <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

[9] For an analysis of AOL's AUP, see Jane Bailey "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda" (2004) 49 McGill L.J. 59 at 87 [Bailey Private Regulation].

[10] For an example of how ISP discretion is reserved in AUPs in a way that undermines identification of a legally enforceable contractual obligation on an ISP to take action to ensure a discrimination-free online environment in the chatrooms that it hosts, see *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003).

[11] See, for example, Leslie Brooks Suzukamo, "Judge orders halt of web addresses," *Pioneer Press* (7 January 2004), online: Twin Cities <http://www.twincities.com/mld/pioneerpress/news/local/7648539.htm>.

[12] See Jane Bailey, "What Litigators Should Know About E-mail: A Survey of E-mail-Related Litigation Issues" (22 January 2002), online: Centre for Innovation Law and Policy <http://www.innovationlaw.org/lawforum/pages/Bailey_What_Litigators.doc>.

[13] See Robert Goldschmid, "Promoting Equality in the Information Age – Dealing with Internet Hate" (31 December 2000) at 125-164, online: <http://www.cjc.ca/template.php? action_region&Region=9>.

[14] See e.g. Tanya Miller, "Workers want ban on library porno sites," *CBC News* (10 March 2003), online: CBC http://ottawa.cbc.ca/regional/servlet/View?filename=pornolibrary20030310. See also *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (D. Va. 1998).

[15] *Ottawa Public Library v. Canadian Union of Public Employees, Local 503 (Ottawa-Carleton Public Employees Union)* (Sexual Harassment Grievance) [2003] O.L.A.A. No. 410 at para. 3(r) and 8.

[16] For a helpful discussion relating to filtering, see U.S., Commission on Online Child Protection, Final Report of the COPA Commission (20 October 2000), online: Commission on Online Child Protection <http://www.copacommission.org/report>.

[17] *Ibid*.

[18] Bailey, Private Regulation, *supra* note 9 at 81-84.

[19] *Keegstra, supra* note 5.

[20] Anti-Defamation League, "Hate Filter," online: http://www.adl.org/hatefilter/default.asp.

[21] Southern Poverty Law Center, "Hatewatch," online: http://www.splcenter.org/ intel/hatewatch/hatewatch.jsp.

[22] Simon Wiesenthal Center website, online: http://www.wiesenthal.com.

[23] Anti-Defamation League website, online: http://www.adl.com.

[24] Southern Poverty Law Center website, online: http://www.splcenter.org.

[25] Media Awareness Network website, online: http://www.media-awareness.com.

[26] Cybertip.ca describes itself as "Canada's National Tipline for reporting the online sexual exploitation of children. It is a centralized web portal for receiving and addressing reports from the public regarding child pornography, luring, child sex tourism, and children who are exploited through prostitution. Cybertip.ca also provides the public with information, referrals and other resources to help Canadians keep their children safe while on the Internet," Online: http://www.cybertip.ca/en/cybertip/.

[27] While much obscenity and child pornography could correctly be categorized as hate speech against women and children (Catharine MacKinnon, "Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace" (1995) 83 Geo. L.J. 1959), many hotlines (undoubtedly reflecting the legal position in their countries of origin) focus on the pornographic rather than hateful nature of that content.

[28] Freiwillige Selbskontrolle Multimedia-Diensteanbeiter, "Code of Conduct" (9 July 1997), online: FSM <http://www.fsm.de/sprachen/en/verh.pdf>.

[29] Internet Watch Foundation, "Internet Watch Foundation Annual Review 2002," online: Internet Watch Foundation http://www.iwf.org.uk.

[30] Australian Communications and Media Authority, online: http://www.acma.gov.au/ACMAINTER.65668:LANDING:892024233:pc=INTERNET,tlp=INTERNET.

[31] Complaints Bureau for Discrimination on the Internet (MDI), *Annual Report 2004* (Amsterdam: Magenta Foundation, 2005).

[32] Association of Internet Hotline Providers (INHOPE), online: http://www.inhope.org/en/index.html.

[33] International Network Against Cyberhate, online: http://www.inach.net.

[34] See e.g. Lisa Guernsey, "Yahoo to try harder to rid postings of hateful material," *The New York Times* (3 January 2001), online: The New York Times <http://www.nytimes.com/2001/01/03/technology/03YAHO.html>; and Adrian Humphreys, "U.S. Internet giant pulls Zundel's web site: Canadian rights panel warned firm of hate literature," *National Post* (13 May 2003) A11.

[35] Bailey, Private Regulation, *supra* note 9 at note 180.

[36] Freiwillige Selbskontrolle Multimedia-Diensteanbeiter, "Complaints Rules" (4 May 2004) para. 10-12, online: http://www.fsm.de/ en/Complaint_Rules.

[37] Bailey, Private Regulation, *supra* note 9 at 88-90.

[38] *Ibid*. at 91-93.