Online Liberty: Freedom of Expression in the Information Age

Robert Dawkins

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ONLINE LIBERTY: FREEDOM OF EXPRESSION
IN THE INFORMATION AGE

ROBERT DAWKINS†

ABSTRACT

Cyberspace is generally conceived as a highly participatory environment that facilitates broad-based participation in the free marketplace of ideas. This paper considers the impact of the new media context upon the constitutional validity of laws regulating expressive content. Canadian jurisprudence regarding freedom of expression rights pursuant to the Canadian Charter of Rights and Freedoms are reviewed and contrasted with the American medium specific approach. It is argued that current Canadian jurisprudence indicates that the new media context should not alter the level of scrutiny in the Section 1 analysis. While the democratizing influence of cyberspace is laudable, new media must be considered in the context of Canadian society and Charter values. The constitutional validity of laws regulating the content of online expression must not be determined by technology at the expense of general social and constitutional principles.

INTRODUCTION

Cyberspace is generally conceived of as a highly participatory environment that facilitates broad-based participation in the free marketplace of ideas. The accessibility of the Internet has significantly increased the ability of individual persons to access information and to express their opinions to the community at large. As a result, the content of cyberspace has been said to be “as diverse as human thought.”

† Robert Dawkins graduated with a B.A. (Honours) from the University of Toronto and Dalhousie Law School with an LL.B. He would like to thank Professor Teresa Scassa and Professor Wayne Mackay for their suggestions and constructive criticism in writing this paper. He would also like to thank Patricia Elliot, Tina Piper, Sandi Smith, Fred Dawkins and Dana for their editorial comments.

Although increased access to media is generally perceived as positive, broad-based participation does not come without a price. Cyberspace facilitates the expression of ideas without discrimination. While it facilitates the dissemination of educational and political speech, it also assists in the distribution of potentially harmful content such as hate propaganda and pornography. The Internet does not effectively identify or distinguish sources and users allowing virtually anyone to access any type of material. Such freedom of access is troubling to many as it allows minors easy access to material restricted in real space. As a result, there has been increasing pressure on governments to regulate the content of cyberspace.

Canadian lawmakers have, thus far, taken a hands-off approach to cyberspace content regulation. Instead of directly engaging online expression, they have chosen to rely upon existing laws that restrict offensive expression and set community standards of decency. As many of these laws are drafted in medium neutral language, it has been argued that they may be applied to the Internet with equal force. The problem with this position is that it has been adopted without adequate consideration of how this new context will affect the constitutional scrutiny of Charter violations previously upheld by Canadian Courts. The high level of interactivity, user control and broad participation online may arguably alter the balance of interests between individual rights to “freedom of” expression and the rights of others to “freedom from” the effects of harmful expression.

In this paper, the impact of new media upon the constitutional validity of laws regulating the content of expression is considered. Canadian principles of freedom of expression rights pursuant to the Canadian Charter of Rights and Freedoms will be reviewed and contrasted with the American medium specific approach. It will be argued

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2 At the time of writing there were no Canadian laws aimed directly at the regulation of online content.

3 See generally, Canada, The Cyberspace is not a “no law land”: a study of the issues of liability for content circulating on the Internet, (Ottawa: Industry Canada, 1997), (by M. Racicot et al).

4 s. 2(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the Charter]. Section 2 (b) guarantees to “everyone” “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. 
that Canadian jurisprudence indicates that the new media context should not alter the level of scrutiny in the Section 1 analysis. While the democratizing influence of cyberspace is laudable, new media must be considered in the context of Canadian society and Charter values generally. Although a consideration of the nature and operation of the medium of expression is an essential part of a full contextual analysis, it must be remembered that cyberspace does not exist separately from the society of users that operate it. Accordingly, the constitutional validity of laws regulating the content of online expression must be determined according to general social and constitutional principles rather than a narrow focus on the technological nature of the medium of expression.

Part I of this paper will review the meaning of freedom of expression as defined in Canadian jurisprudence to set the framework for how cyberspace will be approached by Canadian courts. Consideration will be given to key principles including: the principle of content neutrality; the rationale for protecting freedom of expression; the general principles relied upon by Canadian courts in the Section 1 analysis of Section 2(b) violations; and, the impact that the medium of expression has had upon such Section 1 jurisprudence in the past. It will be argued that these factors indicate that the medium of expression should not determine the constitutional validity of a law. Rather, the medium is only one consideration in a full contextual analysis.

In Part II, some of the special challenges raised by new media are considered. Firstly, the democratizing impact of the Internet is evaluated. Specifically, the implications of low barriers to access, user control and anonymity are considered. The impact of pragmatic limitations on enforceability, such as territorial jurisdiction and the technological nature of cyberspace are also reviewed. Finally, this section discusses the problems inherent in attempting to apply existing laws to the context of the new media.

Part III considers the American approach to First Amendment violations in cyberspace. The basic principles of First Amendment

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5 Ibid. s. 1. Section 1 states that: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

6 The First Amendment of the Constitution of the United States asserts that "Congress shall make no law...abridging the freedom of speech, or of the press."
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jurisprudence and the medium-specific approach adopted by American Courts are reviewed. Particular consideration will be given to the United States Supreme Court decision in ACLU v. Reno⁷, which adopted a strict scrutiny standard in regard to First Amendment violations in cyberspace.

In Part IV it will be argued that Canadian Courts should not adopt the American medium-specific approach in regard to Internet expression. The medium-specific approach is flawed as it resolves the level of judicial deference based upon broad characterizations of the medium rather than through a thorough examination of constitutional principles. The medium-specific approach is inconsistent with the contextual and principled approach generally adopted by Canadian Courts in Section 1 jurisprudence. Cyberspace has not transformed the fundamental principles of Canadian democracy and, as a result, it does not warrant special constitutional scrutiny in all cases.

I. THE MEANING OF FREEDOM OF EXPRESSION IN CANADA

Before considering the special challenges created by new media, it is important to outline the general principles behind right to freedom of expression in Canada. In this part, I argue that Canadian courts have, thus far, rejected medium-specific standards of scrutiny in regard to Section 2(b) violations. In support of this position I will first consider the principle of content neutrality and the rationales adopted by the court in support of this principle. I argue that there is a strong connection between the concept of content neutrality and a medium neutral standard. Second, this part discusses the general approach to the Section 1 analysis of purposeful content regulation. The principles traditionally used to justify judicial deference to Parliament will be reviewed. Thirdly, this section considers the role of the medium in the Section 1 jurisprudence prior to the emergence of the Internet. I will demonstrate that while the medium of communication is a critical element of the factual context, it is not, and should not, be the determinative factor in setting the level of scrutiny to be applied to the Section 1 analysis.

⁷ 521 U.S. 844; 117 S.Ct. 2329, online: WL (SCT).
1. **Content Neutrality, Medium-Neutrality and the Freedom of Expression Rationales**

Long before it was constitutionally enshrined, the right to freedom of expression was legally recognized in Canada.\(^8\) Since the adoption of the *Charter*, freedom of expression has received full constitutional protection\(^9\) except where such limitations are prescribed by law and may be "demonstrably justified in a free and democratic society."\(^{10}\) The Supreme Court’s interpretation of freedom of expression rights in Section 2(b) of the *Charter* has cast a very broad net in defining protected expression. Freedom of expression is essential to the proper functioning of a democratic society and any attempt by government to outlaw or restrict particular viewpoints requires justification under Section 1.\(^{11}\)

*Irwin Toy v. Quebec*\(^{12}\) developed the analytical framework for freedom of expression cases\(^{13}\) and adopted the principle of content neutrality. Pursuant to this approach, constitutional protection is extended to

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\(^{8}\) Section 2 (b) of the *Charter*, supra note 4, guarantees to "everyone" "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

\(^{9}\) Section 1 allows for limitations on individual rights where government can demonstrate that such a limitation is in the public interest. See above, *supra* note 5.

\(^{10}\) While time, place and manner restrictions have been approached in a more deferential manner than purposeful restrictions, they may be found to amount to an unreasonable restriction on freedom of expression where the law affects more than the physical consequences of particular conduct. See for example *Ramsden v. Peterborough*, [1993] 2 S.C.R. 1084. I intend to focus on purposeful content restrictions for the purposes of this paper. For a discussion of time, place and manner restrictions on expression see Hogg, *supra* note 8, at 860 to 861.


\(^{12}\) Ibid. If an impugned law constitutes a purposeful restriction on the content of expression or of form tied to content, the Court proceeds directly to the Section 1 analysis and requires the government actor to meet the burden of justification. If the content regulation is merely an incidental effect of apparently content-neutral regulation, then there is a further burden on the challenging party to demonstrate that the particular expression in question is consistent with the rationale of freedom of expression guarantees.
any activity that attempts to convey meaning.\textsuperscript{14} While it may be argued that expression inconsistent with rationales underlying freedom of expression should be excluded from constitutional protection, the majority of the Supreme Court has explicitly rejected this approach to defining Charter rights.\textsuperscript{15} The preferred approach is to define essential rights broadly and require justification of their infringement. Similarly, the Court has refused to limit the scope of section 2(b) by excluding content that conflicts with other Charter rights and values.\textsuperscript{16} Thus, among other things, the Charter initially provides equal protection to political speech, commercial speech,\textsuperscript{17} hate speech,\textsuperscript{18} obscenity,\textsuperscript{19} the expression of deliberate falsehoods,\textsuperscript{20} and sexual solicitation.\textsuperscript{21} The broad inclusive approach embodied in the principle of content neutrality and the fact that Section 2(b) protects “freedom of the press and other media of communication”, indicate that the medium of expression is irrelevant in defining the scope of constitutionally protected speech. Virtually all content is protected no matter where it is expressed.\textsuperscript{22}

In \textit{Irwin Toy} the Supreme Court clearly states the rationales for protecting freedom of expression in Canada. These may be summarized as follows:

(1) seeking and attaining the truth is an inherently good activity;

(2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for

\textsuperscript{14} \textit{Irwin Toy, supra} note 12 at 968.
\textsuperscript{16} \textit{Ibid.} In \textit{Keegstra}, the majority of the Court, per Dickson C.J, refused to exclude hate speech from constitutional protection due to its conflict with the right to equality in Section 15 and the recognition of multiculturalism in s. 27. Instead, these factors became relevant during the Section 1 analysis as discussed below.
\textsuperscript{22} Only expression in a violent form is excluded from constitutional protection. See e.g. \textit{Keegstra, supra} note 15.
the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.  

The truth-seeking rationale adopts Oliver Wendell Holmes’ concept of the free marketplace of ideas, which asserts that:

[the best test of truth is the power of the thought to get itself accepted in the competition of the market... Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.]

The crux of this free market model is that only through unrestricted and open debate can we ensure the development of knowledge. Accordingly, free and unfettered expression should be aggressively defended in order to facilitate human and social development.

The main thrust of the democratic participation rationale is aptly captured by Alan Borovoy in his article, *New Threats to Political Rights*, when he states:

[of all the rights we enjoy in our democratic society, freedom of expression may be the most crucial. Although admittedly not an absolute, this freedom is the lifeblood of the democratic system. It enables us to influence the conditions under which we live. It provides us with a vehicle by which we can recruit and mobilize public support for the redress of our various grievances...freedom of expression is a strategic freedom - a freedom on which our other freedoms depend. A wise old trade unionist once called it the “grievance procedure” of the democratic system.]

This rationale recognizes the essential nature of freedom of expression to the proper functioning of parliamentary democracy. In order to have responsible democratic government we must ensure people are free to openly criticize government policy, to vote in a particular manner, and to support a particular ideology, without fear of government sanction.

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23 *Supra* note 12 at 976.
24 *Abrams v. United States*, 250 U.S. 616 at 630 to 631 (1919) (Dissenting).
The self-fulfillment rationale is perhaps the broadest of the three. It recognizes an intrinsic value in allowing people the freedom to pursue their own interests and develop their sense of self. While constitutional protection is limited to “expressive activity”, this rationale affords protection to a broad range of activities such as “art, music and dance.”

Current jurisprudence clearly suggests that expression in new media would receive full constitutional protection pursuant to the content and medium neutral approach, so long as it attempts to convey meaning and is not found to be in a violent form. This being said, not all content contributes equally to the rationales underlying freedom of expression and it is constitutionally permissible to restrict the content of expression if such a limitation may be demonstrably justified in a free and democratic society pursuant to Section 1 of the Charter.

2. The Balancing of Interests: Justifying Charter Violations Under Section 1

Once a challenging party has demonstrated that government action has resulted in a limitation of freedom of expression rights the onus is on the government to demonstrate that such a limitation may be justified “in a free and democratic society” pursuant to Section 1 of the Charter. The Section 1 analysis requires a highly contextual balancing of public and individual interests. Thus the medium of expression may be relevant at this stage of analysis.

For a limitation on expression to be “prescribed by law” it must not be vague: it must provide an “intelligible standard”. Furthermore, the limitation must be generally consistent with democratic principles. In R. v. Oakes Dickson C.J. suggested that democratic principles would include factors such as:

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27 As jurisprudence in regard to cyberspace develops it is possible that new forms of cyber-violence will be conceived of that could be excluded from Section 2(b). For example, is it possible for a cyber-rape to occur in an online chat room? A full analysis of this issue is beyond the scope of this paper but the Supreme Court has, thus far, been unwilling to exclude expression from section 2(b) protection that may argued to be akin to violence (see Keegstra, *supra* note 15). This suggests that violence or harm caused solely by expressive means will not be excluded from the scope of section 2(b). Accordingly, I believe that all cyber-expression will receive constitutional protection at the first stage of analysis.
28 Irwin Toy, *supra* note 12 at 983.
It is apparent that these factors may conflict with one another. For example, in the context of hate speech there may be conflict between "accommodation of a wide variety of beliefs" and "respect for cultural and group identity," "the respect for inherent dignity of the human person" and "commitment to social justice". Accordingly, these factors must be balanced in the context of the challenged government action, paying careful consideration to competing interests and constitutional values.

In order to ensure a balancing of interests, the government is obligated to meet the requirements of the Oakes Test\(^\text{31}\). First, this test requires the government to demonstrate that it has a pressing and substantial objective that justifies limitation of a constitutionally guaranteed right. Second, the action must be proportional to the objective. To meet this second element of the test a limitation must be rationally connected to the objective, must impair the right only so much as is necessary to achieve a valid objective, and the benefits of the limitation must outweigh the damage caused by restricting individual freedom.

Although the Oakes Test establishes a rigid framework for the Section 1 analysis, the Supreme Court of Canada has adopted a deferential approach to governmental infringement in some circumstances. Where the government has made a reasonable effort to strike a balance between competing interest groups, for example, where there is conflicting scientific or social science evidence, in the allocation of scarce resources, or where limitations aim to protect vulnerable groups, the courts will often defer to parliamentary expertise\(^\text{32}\). In the context of freedom of expression cases, the court will also consider the relationship between the restricted content and the freedom of expression rationales. Where the content of the expression contributes little to the pursuit of truth, democratic participation, or self-fulfillment, it will be easier to

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\(^{30}\) Ibid at 136.

\(^{31}\) Oakes, supra note 29 at 138 to 139.

\(^{32}\) Irwin Toy, supra note 12 at 993.
justify an infringement of freedom of expression rights. This is also the case where the content of expression is in tension with international obligations or other Charter rights. While the focus of the Charter is on the protection of individual rights, Section 1 jurisprudence demonstrates that where the interests of society as a whole outweigh the interests of the individual, Charter rights may be permanently restricted.

In his address at the Symposium on Free Speech and Privacy in the Information Age, former Supreme Court Justice John Sopinka suggested that in regulating the Internet the context of the medium must be taken into account. Despite this fact, he also asserted that freedom of expression is no more absolute in cyberspace than it is in real space. This raises a significant question: if cyberspace is relevant to the constitutional analysis of freedom or expression rights, how should it be taken into account?

3. Justifying Limitations and the Medium of Expression

While Canada has not adopted medium specific standards of scrutiny, the Supreme Court's decisions in Ramsden v. Peterborough (City) and Canada (Human Rights Commission) v. Taylor clearly demonstrate that the medium of communication may be relevant in assessing the constitutional enforceability of laws which infringe freedom of expression rights. In this part, I argue that these cases demonstrate that the medium of expression is only significant as part of the factual context of the case. It should not be viewed in isolation as determinative of the level of scrutiny to be applied to government action.

In Ramsden, the Supreme Court considered the constitutionality of a municipal by-law, which banned all posting on public property. The

33 Keegstra, supra note 15; Taylor, supra note 18. In these cases, the majority of the Supreme Court held that the fact that hate speech contributes little to the freedom of expression rationales made it easier to justify limitations on that form of expression. In Butler, supra note 19 obscenity, was given similar treatment.
34 See e.g. Keegstra, supra note 15.
37 Supra note 18.
accused was engaging in commercial expression, placing advertisements for musical performances on public hydro poles and when charged, challenged the by-law under Section 2(b) of the Charter. The City of Peterborough argued that the purpose of the law was to limit the physical consequences of postering, “litter, aesthetic blight and associated hazards”, and was not a violation of the Charter as it limited the location rather than the content of expression. The court rejected this argument as the ban was absolute and had the effect of limiting the expression of important political, cultural and artistic messages. In striking down the law, the Court asserted that although there was a pressing and substantial concern to limit the physical consequences of postering, an absolute ban did not meet the minimal impairment requirement of the Oakes Test, as there were reasonable alternatives. Furthermore, an absolute ban in this case was a disproportionate measure outweighed by the individual interest in freedom of expression.

A central factor in Ramsden is that postering has historically been the primary means of promoting views that are unable to gain access to the popular media. Speaking for the court, Iacobucci J. adopted the position that:

[p]osters are an economic way of spreading a message. Utility poles have become the preferred postering place since the inception of the telephone system. ...Posters have always been a medium of communication of revolutionary and unpopular ideas. They have been called “the circulating libraries of the poor”. They have been not only a political weapon but also a means of communicating artistic, cultural and commercial messages. Their modern day use for effectively and economically conveying a message testifies to their venerability through the ages.38 [emphasis in original]  

The Court’s conclusions demonstrate that the medium of communication may be significant to the constitutionality of a law where its very nature ties it strongly to the freedom of expression rationales. In Ramsden, the desire to control litter was not an important enough objective to justify a complete ban on expression in a cheap and highly accessible forum.

The medium of expression was also considered in Taylor, which involved a freedom of expression challenge to Section 13 (1) of the

38 Ramsden, supra note 36 at 1102
Canadian Human Rights Act. Section 13(1) restricts particular expressive content, hate-speech, in a particular medium - “telephonic communications”. The law mandates that using the telephone to promote hatred against vulnerable groups violates human rights. As the law refers specifically to the telephonic medium, the nature and use of the telephone was significant in the Section 1 analysis.

Writing for the majority, Dickson C.J. (as he then was) considered the relationship between promoting hatred and the “telephonic” medium. One of the arguments presented in Taylor was that the limitation could not be justified because it restricted private, “one-to-one” communications. Chief Justice Dickson rejected this position, taking note of the fact that Section 13 (1) only addresses repeated telephonic communications. He held that although generally telephonic communications that occur on a one-to-one basis would be private, “the overall effect of phone campaigns is undeniably public, and the reasonable assumption to make is that these campaigns can have an effect upon the public’s beliefs and attitudes.” Chief Justice Dickson’s majority decision exemplifies a full contextual approach, indicating that determinations regarding the public/private divide must be considered in the context of the case as a whole and not merely by reference to the technological nature of the medium. This interpretation illustrates the preference in Canadian jurisprudence for contextual analysis that looks behind the technology and individual communications to the overall purpose of the communicator.

Dickson also considered the accessibility of the medium and its ability to enhance the credibility of the speaker in the specific context of hate propaganda. He agreed with the Canadian Human Rights Tribunal that the use of the telephonic medium gives “the listener the impression of direct, personal, almost private, contact by the speaker, provides no

39 R.S.C. 1985, c. H-6. Section 13 (1) states that:
It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunications undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

40 Taylor, supra note 18 at 937.
realistic means of questioning the information or views presented, and is
subject to no counter-argument within that particular communications
context.\textsuperscript{41} Thus, despite the fact that the telephone generally facilitates
highly interactive communications, in the context of telephone hate
campaigns, this aspect of the medium is diminished. The telephone, like
posterings, provides a cheap and accessible method of promoting diverse
viewpoints but this factor must be viewed in the context of the particular
law challenged. While low barriers to access would clearly make it
difficult to justify broad over-inclusive limitations like that in \textit{Ramsden},
for some types of content it may strengthen the arguments for restriction.
In circumstances where the medium facilitates the effective promotion
of viewpoints and enhances the credibility of the speaker, the arguments
for limitation may be strengthened by increased potential for harm.

In upholding Section 13 (1), Dickson considered the medium of
expression in the context of the case as a whole. Chief Justice Dickson
was highly influenced by the fact that hate speech contributes little to the
truth seeking, democratic participation or the self-fulfillment rationales
of freedom of expression rights. He was also influenced by the fact that
the promotion of hatred was in direct tension with the principle of
equality in Section 15 of the \textit{Charter} and the commitment to fostering
multiculturalism in Section 27. While he considered the medium to be
relevant to his analysis under the Oakes Test, he did not make broad
generalizations about the telephonic medium. Rather, he specifically
considered the connection between the government objective and the
medium of communication as part of a complete factual context. He held
that ease of access, lack of interactivity, and the exclusion of broad
public scrutiny assisted in the promotion of hatred. Accordingly he
found that limitations of this sort of expression could be justified in a
democratic society that places high value on equality and
multiculturalism.

In her dissenting opinion, McLachlin J. (as she then was), asserted
that Section 13 is overly broad and therefore fails the proportionality
aspect of the Oakes Test. Justice McLachlin expressed concern that
Section 13(1) catches a significant amount of expression that is not
intended to promote hate groups, speech that is constitutionally pro-

\textsuperscript{41} Taylor, \textit{supra} note 18 at 937.
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tected and irrelevant to the legislative purpose of Section 13 (1). She asserted that such overbreadth might have a "chilling effect" on important forms of expression and result in self-censorship, thereby increasing the impact of this limitation on a fundamental right. Like the analysis in *Ramsden*, she considered the nature of the telephonic medium broadly:

The telephone is perhaps the least expensive mode by which less advantaged groups or individuals can communicate their ideas and beliefs. Native groups, religious minorities and others who identify themselves by their colour, religion, or ethnic origin may find themselves inhibited by overbroad prohibitions on telephonic communication from using the telephone to express legitimate grievances against the perceived inequities imposed by the majority culture. If the aim of the Charter is to secure to all persons, regardless of economic means, a justifiable measure of free expression, then particular care should be taken in drafting legislation suppressing telephonic communication.\footnote{Taylor, supra note 18 at 967.}

The dissent in *Taylor* clearly suggests that where a medium contributes significantly to the democratic participation rationale, there may be increased scrutiny in regard to the overbreadth analysis. Accordingly, in a highly accessible medium, Section 2(b) limitations must be carefully tailored to ensure a minimal incidental impact on the expression of legal content.

The Supreme Court decisions in *Ramsden* and *Taylor* clearly show that the medium is relevant to the analysis of freedom of expression limitations, but only as one factor in the factual context of the case. In Canada, the medium has not been accepted as the determining factor in constitutional jurisprudence; there is not a separate standard for broadcasting, telephone, and print media. While there has been no clear statement as to the relevance of the medium in the Section 1 analysis, the broad contextual approach taken by Dickson C.J. in *Taylor* is most consistent with Canadian constitutional principles. The medium should only be relevant so far as it inherently contributes to or detracts from the freedom of expression rationales or directly affects the rational connection, minimal impairment, or the proportionality between the benefits of regulation and the limitation of the right. The question to be answered then is how does the Internet relate to the freedom of expression rationales as a medium of communication?
The scope of what human beings can know and do is expanding exponentially due to technological advance. Not only do new, previously unimagined activities and relationships make it difficult to apply law developed in another context, but sometimes those new situations throw into doubt the simpler foundations on which cherished principles were first developed...Searching for the right metaphors which relate cyberspace to conventional law is a huge challenge precisely because there are no precise analogies to cyberspace in the real world. Moreover, many questions are implicated by the nature of cyberspace which have never been previously raised and which pose insoluble problems for legal doctrine as currently constituted. 43

In order to understand how the Internet may affect the balancing of interests under Section 1, it is necessary to consider aspects of cyberspace that contribute to or detract from the freedom of expression rationales or affect the proportionality branch of the Oakes analysis. This section will review key aspects of online communications that would implicate these factors but does not aim to provide an exhaustive analysis of all relevant factors – such an analysis is beyond the scope of this paper. 44 Rather, this section outlines some of the key issues raised by cyberspace communications that may impact on the balancing of interests under the Section 1 analysis.


44 For example, I have not addressed privacy issues on the Internet. Speaking for the majority in Taylor, supra note 18, Dickson C.J. (as he then was) recognized that privacy rights must be considered in assessing Section 2(b) claims:

The connection between s. 2(b) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting.

Privacy aspects of section 2(b) were also central in Supreme Court of Canada decision in R. v. Sharpe (2001), 194 D.L.R. (4th) 1, upholding the prohibition on possession of child pornography in section 163.1(4) of the Criminal Code R.S.C. 1993, c. 46. The majority limited the application of s. 163.1 to protect truly private expression while upholding the general ban on
1. Democratizing the Marketplace of Ideas: Participation, User Control and Anonymity

One of the most significant limitations on the meaningful exercise of freedom of expression rights is scarce resources. Traditional media of communication tend to be controlled by the few people who own them or have the means to purchase access. Furthermore, expression in traditional media is generally subject to the editorial control of its owners and is often motivated by corporate interests. Accordingly, traditional media have not allowed the general public a level of access necessary for meaningful participation in the "marketplace of ideas."

It may be argued that in this respect, the Internet is vastly different from traditional media. It allows for a significantly higher proportion of people to participate in the exchange of ideas, both to express their views and access information. The exact number of people participating in online communications is difficult to assess but a study by IntelliQuest Research estimated that over 100 million adults would be accessing the Internet in the United States in the year 2000. The study


46 The problem of limited access was recognized by the Supreme Court in Ramsden, supra note 36, as a relevant consideration and was central in the Court's refusal to uphold an absolute ban on posterig on public property.

47 See e.g. Lee, supra note 45.

48 IntelliQuest Internet Study Shows 100 Million Adults Online in 2000, online: <http://www.intelliquest.com/press/release72.asp> (date accessed: 19 March 2000). The IntelliQuest study uses the "Worldwide Internet/Online Tracking service" which generates profiles of users and online demographics and estimates a sampling reliability of +/- 1/5%.
also suggested that the average level of education of users is decreasing. The percentage of Internet users with a bachelor’s degree or greater fell from 46% to 36%. Furthermore, users with an annual household income of less than $50,000 US increased from 40% to 45%. In Canada it is estimated that approximately 13.28 million adults were online as of December 1999, 42.8% of the Canadian population. This figure represents a marked increase from 1997 when only 4.6 million Canadian adults were online.49 The level of access to the Internet clearly supports the claim that the Internet has allowed for unprecedented levels of participation and suggests that the marketplace of ideas is no longer the exclusive domain of an educated and wealthy elite.

Broad participation on the Internet has resulted in a diversity of views. By facilitating the promotion of traditionally marginalized political and social interests, the Net may be similar in importance to posterizing as discussed in Ramsden. Participation demographics suggest that the mass of information online is truly representative of the free market place of ideas as it invites people of all social classes, education, culture or gender to participate without being subject to editorial control. Jeffery Shallot of Electronic Frontier Canada suggests that it is just this fact that has led to calls for content regulation.50 Shallot argues that speech is segregated into two classes. First-class speech is said to include traditional media of expression such as books, newspapers and television. First-class speech is “clean, organized, controlled, licensed.”51 It is directed from the elite to the masses, “they speak and we listen”52. Conversely, second-class speech is the speech of the masses. It is:

49 A summary of Canadian usage statistics is available from Nua Internet Surveys, online: <http://www.nua.ie/surveys/how_many_online_americ.html> (date accessed: 31 March 2000). The results posted on the Nua site were generated by sampling surveys conducted by ComQuest Research, Angeis Reid and AC Nielson. While sampling accuracy for ComQuest and Angeis Reid study were not available the results are consistent with the AC Neilson results which estimate accuracy of +/- 1% with a 95% level of confidence, online: <http://www.acnielsen.ca/sect_intemet/index_inter.htm#3> (date accessed: 31 March 2000).


51 Ibid.

52 Shallot, supra note 50.
...the right-wing extremism of talk radio, the pornographer’s blue movies, the communists’ handbills that implore us to “Smash the State”. It’s citizen’s band radio, the evangelists’ pleas for more money, and TV shows like “Oprah” and “Geraldo”. In second-class speech, respected pundits don’t necessarily rule the day. Second-class speech is dirty, unorganized, uncontrolled, and unlicensed. Second-class speech is global. Second-class speech makes us blush. Second-class speech is disturbing and uncomfortable, because there are, from time to time, some four-letter words, and some name-calling...Second-class speech is the speech of democracy at work.53

The tension articulated by Mr. Shallot is that while second-class speech is what Section 2(b) is designed to protect, it is most often the kind of speech subject to regulation. Mass participation in the marketplace of ideas, democratic participation of the majority, and the ability to pursue one’s interests are the crux of freedom of expression rights. Accordingly, as the Internet is an ideal medium for facilitating broad distribution of second-class speech, should it not be accorded special constitutional protection?

Despite increased participation, I argue that the democratizing influence of the Internet should not be overemphasized. Access to the Net still requires a computer with a modem and the payment of connectivity charges. Participation requires some level of technical expertise. For example, posting a webpage on the World Wide Web requires knowledge of HTML programming or the financial capacity to purchase software that assists in web page design. While barriers to access are low, they continue to exist and those who are denied access due to financial inability are likely to be the most vulnerable in real space. Cyberspace does not exist in a vacuum; it does not invariably lead to a brave new world where everyone is equal and free from oppression. Cyberspace is not a separate entity, it overlays the real world and its participants are real people. Accordingly, the social cleavages and inequalities in the real world continue to exist.

A further potential limitation on the democratizing impact of new media is that cyberspace is increasingly becoming a place of commerce. The increasing significance of e-commerce is clearly demonstrated by the presence of million dollar television advertisements during the NFL

53 Shallot, supra note 50.
2000 Superbowl for “dot Com” companies. Furthermore, access to information is increasingly coming at a price, as user fees become the norm for online databases. As the potential for profit increases, it is likely that corporate presence will become dominant and the participation of individual users will be relegated to the margins.\textsuperscript{54} For example, Internet search engines like Realnames.com, which assign certain keywords to particular paying customers, may become the norm. This would mean that while virtually anyone could publish on the Internet, only those who pay would be easily found. If this were to occur, then the participatory nature of the Internet would be little more than an ideological placebo. Although access to the Internet will likely continue to be less restricted than access to traditional media of expression, it is by no means exempt from the social forces that marginalized the individual speaker in the past. In short, accessibility and low barriers to access alone are not enough to ensure meaningful participation in the market place of ideas.

Two further factors used to support a high level of scrutiny for online content regulation are interactivity and enhanced user control over the flow of information. Unlike radio and television broadcasting, which transmit messages to be heard and seen by those tuning in, new media allows for interactive participatory broadcasting. Individual users can receive and broadcast, listen and respond. Receiving information on the Internet generally requires affirmative steps on the part of user by pointing and clicking on links or typing in web addresses. Furthermore, filtering software such as Cyber Patrol and Net Nanny or Internet ratings services allow users to filter out web content that they may find offensive or to limit access by young users. It may be argued that increased user control may shift the balance of interests between the right of “freedom of” and “freedom from” expression in favour of the speaker.\textsuperscript{55}

There are a variety of methods of self-regulating Internet content, including ratings software, search-term blocking, and image recognition software. Ratings software requires either self-rating of web material or

\textsuperscript{54} For a discussion of how corporate presence on the Internet and corporate control of the infrastructure of cyberspace has detracted from online democratic participation see D. Gutstein, \textit{E.con: How the Internet Undermines Democracy} (Toronto: Stoddart Publishing, 1999).

third party rating. Both of these approaches provide imperfect solutions. Self-rating is problematic, as it requires individuals to judge the nature and quality of their own publications and is likely to yield inconsistent results. Third party rating leaves decisions of appropriateness to the moral judgements of others, whose beliefs may or may not accord with those of individual users. Search term blocking allows users to block access to websites that contain particular words like “sex” or “nudity”. This type of blocking mechanism, while perhaps more effective, has the effect of blocking access to a significant amount of political, educational and artistic Internet content which may be desirable or have significant social utility for young users. Also, seemingly innocuous searches for words like “teen” could lead to pornographic material. Image recognition software is in its developing stages and as yet does not provide an effective means of restricting web access. Thus blocking technology currently yields imperfect results and has a limited impact on user control.

The level of interactivity of Internet content varies depending upon the form of the communications and the decisions of the publisher. It is entirely possible for Internet content, like webpages, to take the form of one-way communications. Although enhanced, both user control and interactivity are dependent upon the particular circumstances of the case. Furthermore, the affirmative steps argument was found to be unpersuasive by the majority of the Supreme Court in Taylor in regard to telephone hate messages. Accordingly, user control and interactivity should not be overemphasized and do not justify strict scrutiny of constitutional violations independent of other considerations.

One further aspect of Internet communications that may be relevant to the balancing of interests under Section 1 is the relative anonymity of Internet users. Anonymity has historically been recognized as facilitating freedom of expression in the face of intimidation – the secret ballot was believed to be essential to ensuring meaningful democratic participation. The Internet allows users to hide behind pseudonyms, to distance themselves from communications using free on-line email services and

free web-publishing space. Accordingly, it may be argued that the anonymity provided by the Internet allows those who are the subject of hateful or obscene material to stand up and oppose belittling expressive content without the same fear of backlash that would be felt in real space. It could also be argued that self-defense in the marketplace of ideas, matching words with words, may be a better way of promoting self-worth and dignity than paternalistic government intervention. The problem with this position is that it would place the burden on vulnerable groups to defend themselves against attack and this would not be consistent with Canada’s constitutional commitment to fostering multiculturalism and equality. Furthermore, anonymity allows people to communicate offensive and illegal material without taking responsibility for their actions.

Canadian Courts have clearly recognized the need to protect unpopular or even offensive content.58 Jeffery Shallot’s “second class” speech has been legally recognized as being at the core of freedom of expression rights. The question for constitutional interpreters in considering criminal and regulated content online is: Do the low barriers to access, viewpoint diversity, anonymity and user control shift the balance of interests in favour of the speaker and support a higher level of scrutiny for on-line content regulation?

2. Limits on Enforceability: The Technological Nature of the Internet and Jurisdiction

One of the primary challenges to effective Internet regulation is the structure of the Internet itself. Information is not transferred in a systematic linear manner as the “information superhighway” analogy suggests. The Internet does not have a central control center that may be regulated but consists of a nexus of sub-nets. The technology was designed in order to resist censorship rerouting information should blockages occur. As a result, the Internet naturally resists any attempt to restrict the transfer of information inhibiting the technological enforceability of laws aimed at content regulation.59

58 See for example R. v. Zundel, supra note 20.
This problem is intensified by the difficulty in distinguishing the content of information being transferred over the Internet. The same lines of communication are used in the transmission of political messages, to engage in e-commerce, and for educational purposes as are used for the promotion of hatred and the distribution of child pornography. All of this information is broken down into bytes of code and sent piece by piece from sender to user. While it is possible for system operators to block particular newsgroups or use firewall technology to block access to particular servers, this sort of content restriction is rather easily avoided. In order to ensure the continued flow of information, users may merely start up newsgroups under different names, which are then carried by system operators, or may post “mirrorsites” on other Internet servers so that the flow of information continues.\(^60\) Furthermore, a technological blocking mechanism would have a severe chilling effect, restricting access to a significant amount of non-offensive expression due to its imprecision. Thus, the nature of Internet communications makes it extremely difficult to effectively restrict access to illegal and offensive materials. On the other hand, the nature of cybercommunications is not fixed. Some have suggested that it may be possible to increase the effectiveness of content regulation by regulating the code which is the backbone of cyberspace.\(^61\)

Jurisdictional limitations also restrict the effectiveness of online regulation. The Internet is international in nature and enforceability of

\(^{60}\) The difficulty of blocking the flow of information on the net was demonstrated by the failure of such actions to stop the flow of information in compliance with the media ban on the Paul Bernardo, Karla Holmolka Case. In order to ensure continued discussion of the events of the trial, newsgroups that were dropped merely restarted under different names which were once again carried by system operators. For a discussion of the effect of the Internet on the Bernardo/Holmolka media ban see D. Wisbrod, “Controlling the Uncontrollable: Regulating the Internet” (1995) 4 M.C.L.R. 331, online: <www.catalaw.com/dov/docs/dw-inet.htm> (date accessed: 10 February, 2000). A similar problem occurred when the German government attempted to block access to Ernst Zundel’s anti-Semitic web site located on a U.S. server (The Zundelsite). In blocking access to the Zundelsite, German authorities had to restrict access to the entire Webcom server that carried his page. Censoring the site led to a backlash and the proliferation of mirrorsites which meant that the content could still be accessed by people in Germany from other servers. See Electronic Frontier Canada, Press Release, “Net Censorship Backfires” (1 February 1996), online: <gopher://insight.mcmaster.ca:70/00/org/efc/pr/efc-pr.01feb96>.

individual government regulation is generally limited by physical territory. Jurisdictional issues in cyberspace have not been resolved and many questions remain. For example, is jurisdiction to be determined by the location of the speaker, the server, or the person receiving the information? Is it enough for a Canadian to relocate a web page to a foreign server to avoid the sanctions imposed by Canadian law? How would extradition treaties apply to online activities where content posted in one’s home country is accessed in a foreign jurisdiction? I do not aim here to answer the many questions raised by jurisdictional limitations in cyberspace; such an analysis is well beyond the scope of this paper.\(^6\) It is enough for my purposes to recognize that the difficulty in asserting jurisdiction over foreign web pages or communicators and the ability of Canadians to post material to foreign servers makes it difficult for Canadian laws aimed at content regulation to effectively achieve their stated objectives. This difficulty stems from the fact that in the absence of international agreement, many Internet users committing offences under Canadian laws will be beyond the reach of Canadian law enforcement agencies. Jurisdictional limitations mean that even if Canadian laws deter those within its jurisdiction from engaging in the expression of illegal or regulated content, they are unlikely to be effective in stopping the flow of illegal content to and from foreign jurisdictions.

The limits of territorial jurisdiction, in combination with the Internet’s natural resistance to censorship, severely restrict the effectiveness of any content-based criminal or regulatory law. Limitations on offensive content that would be justified under Section 1 in real space could be said to be valueless on the Internet because they simply cannot efficiently achieve their goals. This dilemma calls into question the rational connection aspect of the Oakes Test and may shift the balance of interests between the limitation of the individual right and the benefits of government action. If effective enforcement is not possible, should cyber-expression be restricted at all? At the very least, should the limited effectiveness of such government action be subject to stringent review and a high burden of justification?

3. Transposing Old Laws to New Technology: Manufacturing Legislative Intent

Context is extremely important in ascribing meaning to statutory language or general legal principles. Accordingly, the new media context may impact the interpretation of new laws or be incompatible with previous definitions. The Supreme Court decision in *R. v. Butler* suggests that the medium of expression will not be relevant in defining broad value-laden terminology like “obscenity” but there are certain laws that will require translation in order to properly apply to the Internet. Transposing old laws to new technological contexts could give rise to unique constitutional challenges. In application to new media, it may be difficult to justify deference to legislative intent and expertise when this context was not considered in drafting the law. Central to this analysis is the problem of unintended consequences and “overbreadth”.

As a full consideration of content-based criminal and regulatory laws is beyond the scope of this paper, I will consider the example of Section 13(1) of the *Canadian Human Rights Act* upheld by the

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63 [1992] l S.C.R. 4. In *Butler* the court ruled that *Criminal Code*, R.S.C., 1985, c. C-46, s. 159 (now s. 163 was not an unpermissible limitation on freedom of expression rights and was not void for vagueness. Section 163 (8) states that “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of . . . crime, horror, cruelty and violence, shall be deemed to be obscene”. Employing the community standards test the majority held that the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial and explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production. The dissent, per L’Heureux-Dubé and Gonthier J.J., suggested that the context of expression should influence the application of the community standards test. Pursuant to this approach communications that are permissible in some circumstances may be criminally obscene in others and the medium of expression could influence this analysis. This position was rejected by the majority which focused on the content of expression in relation to national community standards in determining what is criminally obscene. *Butler* suggests that the medium of expression will not influence the meaning of normative terminology such as “obscene.”

64 For a further discussion of the application of existing laws to the Internet see *The Cyberspace is not a “no law land”: a study of the issues of liability for content circulating on the Internet*, supra note 3.

65 R.S.C. 1985, c. H-6 [hereinafter the Act]. Section 13(1) of the Act states that:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any
Supreme Court of Canada in *Taylor*. This section makes it a discriminatory practice to “communicate telephonically or to cause to be so communicated, repeatedly,” anything likely to expose a person or persons to hatred or contempt due the fact that they are identifiable on the basis of a prohibited ground of discrimination. Section 13 excludes from liability any matter communicated in whole or in part by means of a broadcasting undertaking and owners and operators of telecommunications undertakings.

As the Supreme Court indicated in *Taylor*, there is no intent requirement in Section 13. The majority of the Court did not believe this was problematic because the purpose of the Act is to promote human rights and not merely to prevent intentional wrongdoing. In cyberspace, the lack of an intent requirement may become more problematic. For example, if websites devoted to combating hatred contain links to so-called “hatesites”, could they be prosecuted under the Act? It would appear that such a situation would be covered by Section 13, despite the fact that it was clearly the intention of the website administrator to combat the promotion of hatred. Each time a person clicked on the link matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

66 This is an interesting case study as the Commission is currently trying to prosecute Ernst Zundel for his anti-Semitic website. The “Zundelsite” case has not been resolved at the time of writing but could lead to a consideration of the implications of the Internet on the interpretation of constitutional rights. Zundel raised this issue in Federal Court but the Court held that it was premature to decide the issue as the Human Rights Tribunal had not yet decided the matter. See Zundel v. Canada (Attorney General), [2000] F.C.J. No. 2057 (online: QL).

67 While there are interesting issues as to whether communications in cyberspace would be interpreted as “telephonic communications,” such a discussion is not central to a Section 2(b) argument and is beyond the scope of this analysis. For a discussion of the application of Canada’s hate and obscenity laws to cyberspace generally see *The Cyberspace is not a “no law land”: a study of the issues of liability for content circulating on the Internet*, supra note 3.

68 Canadian Human Rights Act, supra note 64, s. 13(2).

69 Canadian Human Rights Act, supra note 64, s. 13(3).

70 See for example, online: <http://www.hatewatch.org>, a website devoted to combating hatred on the Internet which has links to many hate websites around the world. Similarly, online: <http://www.nizkor.org>, a website devoted to holocaust education contains writings of famous holocaust deniers like Ernst Zundel.

71 See for example the decision of the Copyright Board in *Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication, in Canada, of Musical or Dramatico-Musical Works*, [1999] C.B.D. No. 5 (online: QL). This decision dealt with Tariff 22 which outlined a royalty structure for online music transmissions and asserted...
to the hatesite it could be argued that the administrator of the anti-discrimination site caused hateful messages to be communicated. This would be so despite the fact that the purpose of the site as a whole was to combat discrimination. This sort of linkage was not possible in the context of telephone answering machines and therefore was not considered when the law was drafted. Such an application would seem to strengthen the concerns of Justice McLachlin’s dissent in *Taylor* regarding the overbreadth of Section 13 as discussed in Part 1. Links may also be viewed as weakening Chief Justice Dickson’s position in regard to the offending material itself as it places the offensive expression in the context of a debate. Such debate is central to the truth seeking rationale of freedom of expression rights.

Another problem with the application of Section 13 of the Act to the Internet is that it could result in different treatment for Internet communications via a broadcasting undertaking and those communicated via a telecommunications undertaking. This distinction seems odd, as the Internet Service Provider rather than the content of the communications would determine the application of the Act, insulating some users and exposing others to liability. This sort of problem would have been unlikely to occur in the past because the general public would not have been able to communicate via a broadcasting undertaking. Furthermore, broadcasting was subject to content regulation imposed by the Canadian Radio-television and Telecommunications Commission, which has refused to assert control over cyberspace. Such an unprincipled distinction is problematic, as it could sever the rational connection between the law and the government objective.

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The problems raised by the nature of Internet communications clearly demonstrate that existing law may not be well tailored to deal with the issues raised by new media. Furthermore, it may be more difficult to justify a deferential approach to government action, as it is impossible for the legislature to have conceived of, let alone intend particular consequences of Section 13 in application to online communications. While it may be possible to interpret old laws in ways that are consistent with their application to the Internet, Canadian courts must not overstep their role as interpreters of the law and become lawmakers. Hence, where application to new media leads to ludicrous results or increases concerns regarding chilling effect and overbreadth, it may be difficult to justify a deferential standard to a non-existent legislative intent.

IV. FREEDOM OF SPEECH: FIRST AMENDMENT AND THE AMERICAN RESPONSE TO THE INTERNET

As demonstrated in Part II, the impact of the Internet on both society and the law remains unclear. The democratizing effect of cyberspace is uncertain, jurisdictional problems have not been resolved, the nature of the Internet defies technological censorship, and existing laws were not designed to address these challenges. While there are currently no Canadian Court decisions considering the impact of cyberspace on freedom of expression rights, the issue has already been considered by the United States Supreme Court. Although American jurisprudence does not bind Canadian Courts it may be influential, especially in emerging areas where there is no Canadian precedent. Thus, it is important to consider American jurisprudence regarding online expression.

The First Amendment of the Constitution of the United States asserts that “Congress shall make no law...abridging the freedom of speech, or of the press.” Unlike the Charter, the American constitution does not contain a limitation clause similar to Section 1. Accordingly,

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73 This issue was raised in Zundel v. Canada (Attorney General) et. al, supra note 65. That case deals with the application of the Human Rights act s. 13 to Ernst Zundel’s website. The Federal Court of Appeal did not decide the issue holding it was premature as the Human Rights Tribunal had not yet ruled on the matter.
the First Amendment on its face extends complete protection to individual expression. Because the American constitution does not include a limitation clause, U.S. courts have had a difficult time justifying First Amendment violations even where the objectives are compelling. In order to avoid this analytical dilemma, American Courts have excluded “low value” speech from constitutional protection at the definition stage, asserting that some content is not speech at all. Furthermore, limitations have been allowed where there is a pressing objective but the restriction must employ the least drastic means. This test is strictly applied, as content-based limitations on speech are presumptively invalid.

Despite the rigid framework for freedom of speech analysis in American jurisprudence, U.S. courts have justified more significant intrusions in some forums of communication by adopting medium-specific standards of scrutiny.

This “medium-specific” approach to the regulation of mass communications considers each medium separately and applies a balancing approach of competing government interests to each form in a slightly different manner. The Court therefore examines the underlying technology and unique characteristics of each new form of communication before determining whether there is a governmental interest which might outweigh the First Amendment interest in unrestrained speech over that particular medium.

The main considerations in allowing for a lower standard of review are the pervasiveness of the medium and scarcity concerns that limit participation. American jurisprudence affords a high level of protection to print media, which was central in the minds of the Fathers of Confederation. However, lower levels of scrutiny have been adopted in regard to new technologies to justify government limitations in the public interest.

The lowest level of scrutiny adopted by U.S. Courts applies to radio and television broadcasting and was adopted in FCC v. Pacifica Foun-

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74 Expressive actions are also protected as symbolic speech under the First Amendment.

75 P.W. Hogg, Constitutional Law of Canada, supra note 8 at 851.

76 For example obscenity has been excluded from the definition of “speech” in American jurisprudence. See for example, Roth v. United States, 354 U.S. 476 (1957).

In *Pacifica* the Court considered a Federal Communications Commission regulation that restricted the broadcast of indecent material, some of which was protected by the First Amendment. The Court held that it was constitutionally permissible to punish a broadcaster for broadcasting material which is offensive but not constitutionally obscene if aired at a time when children may be in the audience. A lower standard of review was imposed, as the broadcast medium is highly pervasive and accessible. Broadcast content is pervasive in that it invades the home and is easily accessible by turning on the radio or television and selecting a channel. Furthermore, it is difficult for parents or users to restrict access to television and radio content. Another justification for limiting First Amendment rights in broadcast media is viewpoint scarcity. This scarcity occurs because there are a limited number of broadcasters that can be accommodated by the limited capacity of the electromagnetic spectrum.

After *Pacifica*, American Courts have continued to rely upon the medium specific approach in assessing challenges to freedom of speech violations in telephone communications and cable television. In *Sable Communications of California, Inc. v. FCC*\(^{81}\), the Court considered an FCC ban on indecent telephone messages and held that telephone communications were uniquely different from broadcasting and warranted a higher degree of constitutional protection. The Court held that use of the telephone required affirmative steps in order to access information. Accordingly, it was found to be less accessible to children than broadcast media. The fact that a captive audience is not bombarded by unwanted content was also found to be compelling. Similarly, in Turner Broadcasting Systems v. FCC\(^{82}\), the court held that cable broadcasting deserved a higher level of protection than traditional broadcasting. Cable broadcasting differs from traditional television and radio broadcasting since the user purchases the service and selects a package of

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\(^{78}\) 438 U.S. 726 (1978), online: WL (SCT) [hereinafter *Pacifica*].

\(^{79}\) Since *Pacifica* was decided, channel blocking technology has been developed for televisions. Despite this fact, the same level of scrutiny appears to apply to television broadcasting. This technological development demonstrates the problems of adopting medium specific levels of scrutiny in the face of ever changing technology.


\(^{81}\) 492 U.S. 115 (1989), online: WL (SCT) [hereinafter *Sable*].

\(^{82}\) 512 U.S. 622 (1994) [hereinafter *Turner*], online: WL (SCT).
programming for a monthly fee. Thus, there is a greater degree of user control over the content received. 83

As a whole, the medium-specific approach allows for a spectrum of standards of review to be determined by the technological characteristics of the medium, specifically pervasiveness and scarcity concerns. In ACLU v. Reno84, the United States Supreme Court applied the medium-specific approach to the Internet for the first time. The challenge in ACLU dealt with a number of sections of the Communications Decency Act 1996,85 which criminalized the distribution of obscene or indecent matter on the Internet86. In finding these sections to be unconstitutional, the Court affirmed the medium-specific approach and found that strict scrutiny should be applied to content regulations of online expression.

To justify a strict scrutiny standard, the Court distinguished the Internet from traditional broadcast media. The Court agreed with the District Court87 that Internet content does not invade the user’s home in the same manner as radio or television.88 Like telephone communications in Sable, the reception of Internet content requires a series of affirmative steps by the user. Further, the Court acknowledged that much of the indecent communications on the Internet are preceded by warnings89 and are rarely encountered by accident.

84 521 U.S. 844; 117 S.Ct.2329, online: WL (SCT) [cited to U.S.] [hereinafter ACLU].
86 Specifically, the challenge considered § 223 (a) and §223 (d) of the CDA. Section 223(a)(1)(B) provides that any person who, “by means of a telecommunications device,” “knowingly ... makes, creates, or solicits” and “initiates the transmission” of “any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age,” “shall be criminally fined or imprisoned.” Section 223(d)(1) makes it a crime to use an “interactive computer service” to “send” or “display in a manner available” to a person under age 18, “any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.” Sections 223 (a)(2) and (d)(2) imposed sanctions on those who permit telecommunications facilities under their control to be used in a manner proscribed in §§ 223 (a)(1) and (d)(1).
88 ACLU, supra note 81 at 869. Justice O’Connor’s dissent did not challenge the finding of strict scrutiny for First Amendment violations in cyberspace.
89 ACLU, supra note 80 at 869.
The Court also rejected the scarcity rationale in application to the Internet, having been heavily influenced by viewpoint diversity and the democratizing impact of cyberspace. The majority stated that the Internet:

...provides relatively unlimited, low-cost capacity for communication of all kinds... This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F.Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.90

Having found that strict scrutiny applies to online communications, the Court held that the CDA was unconstitutionally vague and overly broad as it prohibited many adults from accessing constitutionally protected speech and included a significant amount of non-commercial and non-pornographic artistic and educational material91. The Court also held that the limitation did not minimally impair the right. In deciding this point, the Court was influenced by the existence of blocking software, which constituted a reasonable alternative to government action.92 The relevant sections of the CDA were not saved by the affirmative defences, which applied where a transmitter has effectively limited access through means such as credit card verification93. Considering the importance of the Internet to the exercise of freedom of speech, the Court felt that the significant economic burdens involved in setting up such verification procedures placed too high a burden on online participants.94 Thus, overall, the Courts adopted the rationales discussed in Part II to justify strict scrutiny review for online expression.

The arguments against restricting online expression are numerous and compelling. While the issue has not, thus far, been pronounced upon

90 ACLU, supra note 80 at 870.
91 ACLU, supra note 80 at 879.
92 ACLU, supra note 80 at 877.
93 CDA, supra note 81, § 223 (e) (5).
94 ACLU, supra note 80 at 882.
in Canadian Courts, such a challenge is likely to arise in the near future. The question for interpreters of the Charter will be whether or not they will adopt a strict scrutiny standard for online content regulation in the Section 1 analysis. More generally, the difficulty will be in how to consider the balancing of interests of online speakers?

V. THE INTERNET AND FREEDOM OF EXPRESSION IN CANADA – IS THE MEDIUM THE MESSAGE?

In R. v. Rahey,95 La Forest J. asserted that:

[w]hile it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances, particularly given the substantive implications of both s. 1 and s. 24(1) of the Charter. Canadian legal thought has at many points in the past deferred to that of the British; the Charter will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master.96 [emphasis added]

The principled approach to constitutional analysis, based upon a consideration of broad constitutional and social values is central to Canadian Charter jurisprudence. When viewed in isolation, new media would appear to strongly support the freedom of expression rationales. However, to consider the medium of expression in this manner would be inconsistent with the Canadian constitutional interpretive tradition. The medium-specific approach is unprincipled and often based upon a flimsy understanding of modern technology at a single moment in time; commonly when technology is in its nascent stages of development.97 Accordingly, many American critics have called for a rejection

96 Ibid, at 639.
of the medium specific approach, in favour of what I believe is the current Canadian approach adopted in decisions like *Taylor* and *Ramsden*.

Technological characteristics...should not be the crucial factor in determining the protection a message receives under the First Amendment. A political editorial is still a political editorial whether it is printed in a newspaper, broadcast as a teletext on a television screen, downloaded from a computer network, or faxed over a phone line. To the extent that technology is relevant at all, the Court should focus not on the medium of transmission, but on the relationship between technological characteristics of the medium and the underlying First Amendment values at issue. Rather than resting upon ever-changing technologies to justify government regulation of the electronic media, First Amendment analysis should strip away the technological characteristics of the media. The Court should ground its analysis in essential First Amendment interests and draw upon salient technological characteristics only as the factual background against which the real First Amendment concerns must be applied.\(^98\)

A consideration of all factors indicates that a medium-specific strict scrutiny test for Internet communications would not be appropriate in the Canadian context: it would be inconsistent with Canadian precedent in *Ramsden* and *Taylor* and would ignore the importance of full contextual analysis. The relevant technological and social implications of the medium of communication should not be determinative in the constitutional review of Section 2(b) violations. Rather, it should be considered as one aspect of the contextual analysis under Section 1.

As I pointed out in my discussion of the democratizing aspects of cyberspace, the positive effects of low barriers to access, user control and anonymity are far from certain truth. While these aspects of cyberspace do allow for a more meaningful exercise of freedom of

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expression rights, an increased corporate presence on the Web may dilute this effect. Furthermore, low barriers to access facilitate increased circulation of offensive hate propaganda and obscenity, thereby increasing the damage these types of expression may cause to the social fabric. 99 In enabling users to frame these ideas in slick webpages and by facilitating access in the privacy of one’s home, the Internet may allow transmitters of hate speech and obscenity to create a veneer of credibility increasing the damage caused. 100 Accordingly, many of the arguments supporting a high level of scrutiny of government content regulation may be turned on their head to justify government action.

In discussing how the nature of the Internet and territorial jurisdiction place significant limitations on the enforceability of online content regulation, I made reference to the fact that technological regulation may be possible by first regulating the code which is the backbone of the Internet. 101 A full discussion of this issue is beyond the scope of this paper, but it serves as an important reminder. Although technology, when it is broadly accepted, seems to take on a life of its own, we must not allow it to define social values and the meaning of important constitutional rights. The Internet is a technology created, controlled and designed by human users. Accordingly, it is possible to alter that technology. In either case, technological development does not fundamen-

99 This position was supported by the minority decision in R. v. Sharpe, (2001) 194 D.L.R. (4th) 1. Citing the Criminal Intelligence Service Canada’s Annual Report on Organized Crime in Canada (2000), at p. 13 the minority adopted the position that: “The distribution of child pornography is growing proportionately with the continuing expansion of Internet use. Chat rooms available throughout the Internet global community further facilitate and compound this problem. The use of the Internet has helped pornographers to present and promote their point of view.” Criminalizing the possession of child pornography may reduce the market for child pornography and decrease the exploitative use of children in its production.

100 In Taylor, supra note 18 at 937, Chief Justice Dickson was concerned that “authors of hate messages are able through subtle manipulation and juxtaposition of material to give a veneer of credibility to the content of the messages.” The Internet if anything magnifies this concern as a result of anonymity and the ability to create credible presentation.

tally alter the values of democratic society and should not be allowed to independently determine what sort of government action is allowed in the protection of vulnerable groups.

Although territorial jurisdiction is problematic on the Internet and could damage the rational connection and balancing of interests under the Oakes analysis, imposing restrictions on hate propaganda and obscenity online continues to have value. No national law can be expected to cure all of society’s ills, but if its objective is rationally connected to the limitation of rights, jurisdictional limitations should not be relied upon to strike down the law. Although many of those who violate Canadian laws will be beyond their reach, the principles embodied in applying criminal and regulatory sanction to hate speech and obscenity continue to have value. For example, holding those within jurisdiction accountable for their actions in violating Canadian hate and obscenity laws demonstrates a continued commitment to the principles of equality and multiculturalism embodied in the Charter. 102 The fact that laws are not a perfect solution is not enough to completely destroy the rational connection between Charter violations and the objective of fostering a tolerant multicultural society. The fact remains that these types of expression do not significantly promote the freedom of expression

102 See for example, Little Sisters Book and Art Emporium v. Canada (Minister of Justice), (2000) 193 D.L.R. (4th) 193 (online: QL). Speaking for the majority Binnie J. notes at [17]: The administrative burden of identifying prohibited goods in such a vast inflow of material is enormous. In an era of increased volumes of cross-border material, and reduced government resources, the difficulty of performing the Parliamentary mandate cannot be underestimated. The task of properly reviewing a single CD-Rom, featuring the usual array of photographs, film and text, would require far more time than Customs officials are realistically able to devote to the task. Moreover, with the exponential growth of pornographic sites on the Internet, the barrier to the passage across the border of hard copy material may some day be seen as of marginal importance to the enforcement of anti-obscenity laws. Nevertheless, if the Parliamentary mandate is to be carried out with regard not only to the larger public interest served by the Criminal Code but also to the rights of individuals who claim to be engaged in entirely lawful activities, adequate procedures and resources must be put in place to operate the border scheme in a manner that respects Charter rights. [emphasis added]

In adopting this position Binnie J. recognizes that imperfection of a law and difficulty of enforcement may not independently invalidate a law aimed at protecting a public good if important values are at stake.
rationales, their content is in tension with competing Charter values of equality and multiculturalism and increased accessibility and transmission may magnify the damage these sorts of expression cause to the Canadian social fabric.

The final issue that I addressed in Part II is the difficulty of transposing old laws onto new media. In discussing this problem, I indicated that in applying existing law to the Internet, concerns in regard to overbreadth and vagueness may be magnified and deference would be difficult to justify as the context of the Internet was not considered at the time of drafting. Although the nature of Internet communications must be considered as part of the contextual Section 1 analysis, I do not think that the problem of translation will definitively lead to a finding that application to the Net is unconstitutional or legislative in nature. Considering the example of the anti-hate website with links to hate propaganda, a full understanding of the nature of Net communications would likely lead to a finding that there was no violation in this case. While focusing on links to offensive material would suggest that a website operator would be causing hateful material to be communicated, viewing the link in the context of the site as a whole would lead to a different result. If the general content of the site aims at combating hatred, the inclusion of links to hate propaganda would not be determinative. The meaning of the content viewed holistically would lead to the opposite conclusion and such a finding would be consistent with a thorough contextual and purposive analysis. Accordingly, while it may be difficult to rely on legislative intent, a contextual purposive analysis, informed by the technological workings of cyberspace, in combination with a broad understanding of legislative purpose may allow laws to be transposed onto cyberspace without violating constitutional principles. Such an analysis would not involve the court in the lawmaking process, but rather allow the court to fulfill Parliament’s purpose in a changing society.103 Laws are often broadly defined just to allow this sort of flexibility.

103 This is consistent with the majority approach in R. v. Sharpe, supra note 94A, which clearly asserted that laws should be interpreted in a manner consistent with the Charter if such an interpretation is possible and consistent with legislative intention. In that case the court read down the law in order to allow it to achieve its objectives in a constitutionally permissible manner.
The Internet undoubtedly raises a number of challenges to legislative interpretation, some of which could give rise to constitutional challenges. One particular problem I have not addressed is the challenge of defining public and private spaces online. In *Taylor*, Dickson C.J. recognized that privacy rights must be considered in assessing Section 2(b):

> The connection between s. 2(b) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting.  

Despite this fact, Dickson’s analysis of telephone communications, their purpose and the context sets an excellent example of how these problems may be resolved online. Returning to the Court’s decision in *Taylor*, we may ask if a different result would have been reached if the Act were to directly address new media. Leaving aside the issue as to whether Internet communications are “telephonic” in nature, I do not believe that it would. The fact remains that hate speech does not contribute to the freedom of expression rationales, there is a rational connection between the purpose of facilitating an inclusive and tolerant multicultural society and the restriction of online hate speech. Furthermore, application of the Act to online expression would not alter the minimal impairment analysis and concerns about the chilling effect of the legislation would be no more significant than in considering telephone communications. Like the telephone, the Internet is an effective tool for those wishing to promote hatred. It allows access to a broad audience, maintains a more private personal contact, and the ability to hide behind apparently credible websites and anonymity. Accordingly,

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104 *Taylor*, supra note 18 at 936 to 937. Privacy aspects of section 2(b) were also central in the British Columbia appeal decision in *R. v. Sharpe*, [1999] B.C.J. No. 1555; overruled (2001) 194 D.L.R. (4th) 1 (SCC), declaring the prohibition on possession of child pornography in section 163.1(4) of the Criminal Code R.S.C. 1993, c. 46 to be an unjustifiable restriction of Section 2(b) rights. Although the decision in *Sharpe* was overturned on appeal, the majority acknowledged the privacy aspects of expression and limited the application of the Criminal Code to protect truly private expression.
the regulation of hatred online would likely be a justifiable restriction of freedom of expression rights in the Canadian context. Although the form of online communication could alter the analysis, like telephone communications, the requirement of repeated communication would be significant in considering the public or private nature of the expression.

The Internet clearly raises interpretative challenges which may affect the constitutionality of existing laws and the definition of future content-based restrictions, but viewed as a whole, the problems raised by new media do not justify a more stringent standard of review for online communications.

VI. CONCLUSIONS

Canada aspires to be an inclusive and egalitarian society predicated upon:

- respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.105

In order to achieve this goal it is essential to place a high value on both individual and group rights and to find an appropriate balance where there are tensions between these interests. The right to freedom of expression is essential to the proper exercise of democracy but it is not absolute and Section 2 (b) rights are no more absolute in cyberspace than they are in real space.106 The Internet’s ability to facilitate broad-based participation in the marketplace of ideas is laudable but it does not transform the basic principles that may justify the limitation of individual rights in a free and democratic society.

In assessing the level of deference to accord to government action, Canadian Courts generally consider the stakeholders, the allocation of scarce resources, the freedom of expression rationales, and the presence of competing Charter rights. Most significant to the debate regarding

105 Oakes, supra note 29 at136.
106 Sopinka, J., “Freedom of Speech and Privacy in the Information Age”, supra note 33.
online hate mongering and obscenity is that the Court is willing to defer to government intervention where a law aims to protect vulnerable groups. Vulnerability is not eliminated by cyberspace and should continue to be central in the Court’s Section 1 analysis. Broad participation, interactivity, and anonymity afforded online may in some circumstances require a law be declared unconstitutional but such a decision must be based upon a full analysis of the issues at stake in the case rather than a broad idealistic generalization of online communications.

In his classical liberal text, *On Liberty*, John Stuart Mill promoted an absolutist approach to the individual freedom of expression rights. Mill asserted that:

> [i]f all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power would be justified in silencing mankind.\(^{107}\)

But Mill’s own harm principle recognizes that individual liberty may be limited where an individual’s actions causes harm to others. As Irwin Cotler asserts in regard to hate propaganda:

> protecting visible, vulnerable minorities from being vilified and victimized by the promotion of hate propaganda may be the basis of freedom of expression and freedom to debate in both principle and reality. We know that speech can hurt. We have learned that words can maim. We have felt the pain.\(^{108}\)

Cyberspace does not alter the nature of expression, which causes harm. It does not operate in isolation from society or magically eliminate the inequalities and social cleavages experienced in real space. Accordingly, it does not require a higher level of constitutional scrutiny in the absence of other factual circumstances.
