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WEB CONTROL

Attempts to rid the Internet of pornographic material are beginning to have a wider impact on freedom of expression online, says **Julian Petley**

This summer, a trial will be held that has grave implications both for the way in which the Obscene Publications Act is enforced in future and for freedom of expression on the Internet.

Last February, Darryn Walker, a 35-year-old civil servant, was arrested by officers from Scotland Yard's Obscene Publications Unit. His alleged crime was to have posted a 12-page fantasy, entitled *Girls (Scream) Aloud*, on the Internet. The story, which is told entirely in prose and contains no pictures, describes the kidnap, rape, mutilation and murder of the members of the pop group Girls Aloud and concludes with the sale on eBay of various parts of their bodies. That model of taste and decency, the *Daily Star*, claimed on 3 October 2008 to have brought the story to the attention of the Internet Watch Foundation (IWF). They in turn reported it to the police.

Up until now, it had long been generally assumed that prosecutions of the written word for obscenity were a thing of the past. *Lady Chatterley's Lover* was acquitted in 1960, and although *Last Exit to Brooklyn* was found guilty in 1966, the Court of Appeal later overturned the verdict. The case

Credit: Owen Humphreys/PA Photos
Darryn Walker: faces prosecution for obscenity

established the right of authors to explore depravity and corruption, so long as they did not encourage it. So why the decision to prosecute the author of a written fantasy? Surely with the works of William Burroughs, Georges Bataille and JG Ballard available in any high street bookshop, and more than 40 years since the *Last Exit to Brooklyn* judgment, we are beyond prosecuting writers for the darkness of their imagination, even a writer whose work may never be judged as great literature? The case raises fundamental questions about the role of the Internet Watch Foundation in regulating the Internet and the authorities' tolerance of freedom of expression online – in particular what appears to be their desire to censor material which they deem not simply illegal, but more generally unacceptable.

As far as the police are concerned, it was clear from a number of their responses to the consultation on 'extreme pornography', which resulted this year in the 'dangerous images' clauses of the Criminal Justice and Immigration Act, that certain officers felt the written word should be firmly brought back within the ambit of the Obscene Publications Act. For example, an officer from the Protection of Adults and Children Team, Kent Police, complained that 'there remains a legislative gap in terms of written fantasy material'. However, it's difficult to know whether such views are widespread within the force.

Far easier to spot are the signs that the government is determined to censor the Internet and, where this proves impossible, to punish those visiting websites of which it disapproves. The Criminal Justice Act is the clearest possible example of the latter tactic. In their written evidence to the Culture, Media and Sport Select Committee's 2008 inquiry into harmful content on the Internet and in video games, the Department for Culture, Media and Sport and the Department for Business, Enterprise and Regulatory Reform stated: 'As a general rule, and with exceptions for material that is illegal, simply unacceptable or can be demonstrated to cause harm, we support the principle that adults should be free to choose what websites they access or what computer games they play.' But notice the extent of the so-called 'exceptions' and in particular the casual slippage from 'illegal' to 'unacceptable' material. And in his oral evidence to the Committee on 14 May, Vernon Coaker, parliamentary under-secretary at the Home Office (and a stalwart defender of the 'dangerous images' provisions), explained that the Prime Minister's Taskforce would be concerned not simply with illegal content on the Internet, but with 'harmful and inappropriate content as well . . . which may not be illegal but which cause all of us concern'.

In September, in the wake of a press outcry over suicide sites, Maria Eagle, parliamentary under-secretary of state at the Ministry of Justice (and another fan of the Criminal Justice Act), stated that 'updating the language of the Suicide Act should help to reassure people that the Internet is not a lawless environment and that we can meet the challenges of the digital world'. Then, in his final lecture as Ofcom chairman, on 15 October, David Currie, noting that there is not one mention of the Internet in the Communications Act 2003, argued that Parliament took the view at the time that 'the Internet was still so new and its implications so uncertain that a period of legislative forbearance was called for'. He then added: 'Ask most legislators today and, where they think about it, they will say that period is coming to an end'.

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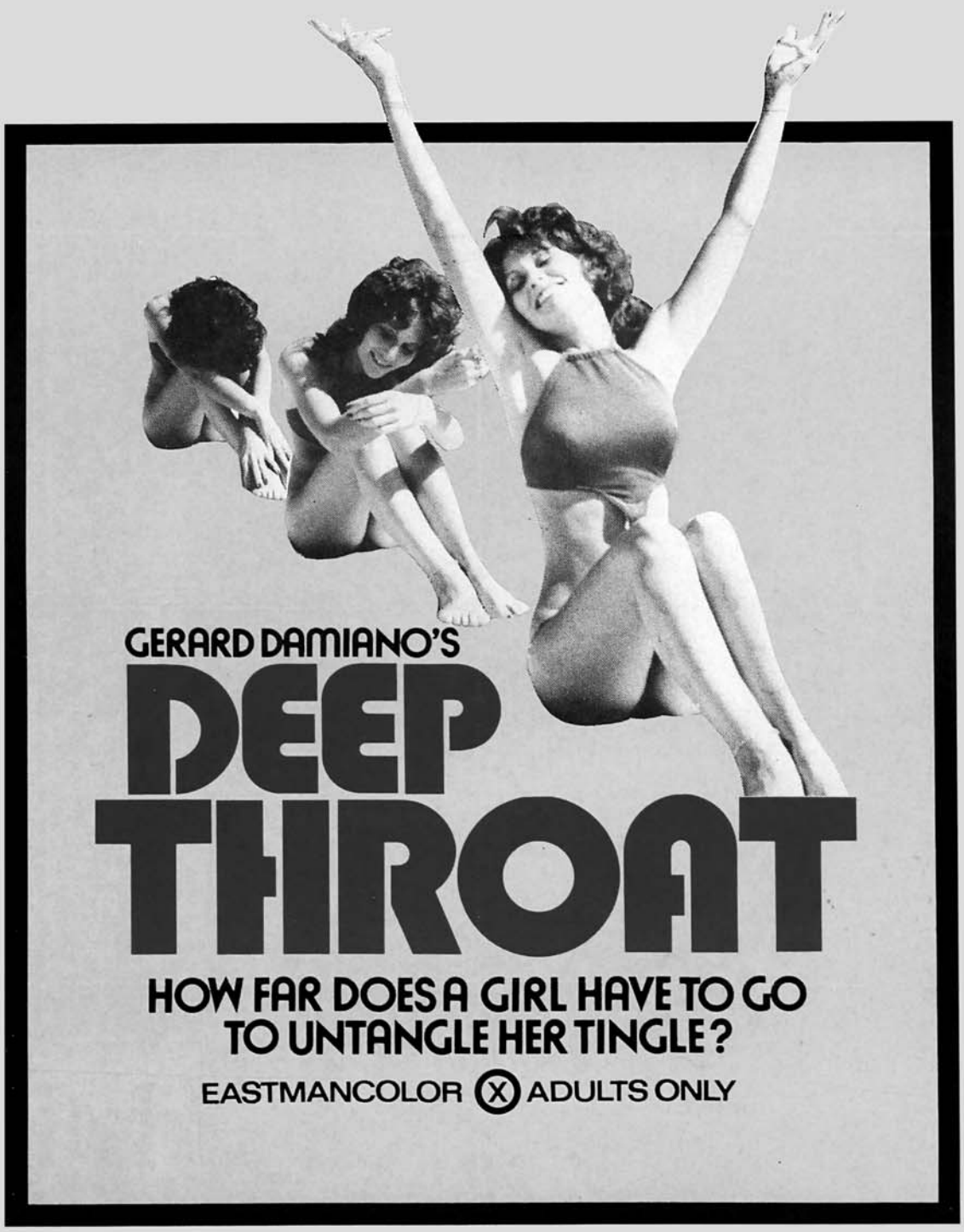

Evidence that this is indeed the case was provided by the launch on 29 September of the UK Council for Child Internet Safety (UKCCIS). This had its origins in the Byron Report *Safer Children in a Digital World*, a sensible document published in March 2008 that basically argued that children, young people and adults needed to be far better informed about the Internet, including its dangers. However, it is abundantly clear from the press release announcing its launch that UKCCIS is going to do to far more than play simply an educational or information role. Thus, for example, it will 'provide specific measures to support vulnerable children and young people, such as taking down illegal Internet sites that promote harmful behaviour' and 'establish voluntary codes of practice for user-generated content sites, making such sites commit to take down inappropriate content within a given time'. ('Voluntary' and 'making' anyone?) Then, on 27 December, in an interview with the *Daily Telegraph*, Culture Secretary Andy Burnham declared: 'If you look back at the people who created the Internet they talked very deliberately about it being a space that governments couldn't reach. I think we are having to revisit that stuff seriously now . . . There is content that should just not be available to be viewed. That is my view. Absolutely categorical.' The article also suggests that Burnham is planning to negotiate with the new US administration 'to draw up new international rules for English language websites' and that another idea being considered is 'giving film-style ratings to individual websites.' However, the idea that it is possible to draw up internationally agreed standards for Internet content is deluded – it is only on the question of child pornography that there is widespread agreement – and the government can no more impose its own standards on a global communications system like the Internet than it can send a gunboat to put down the pesky natives in some far-flung part of the Empire.

In the UK, where the will to censor is deeply ingrained in the culture, and where the unwritten rubric runs that the more popular a form of communication, the more it needs to be controlled, the Internet was always going to be a problem for the censorious and authoritarian. And so, when the Internet first became a truly popular medium in the UK, the authorities determinedly applied pressure to the Internet at its most vulnerable point: the intermediary. In other words, the individual Internet Service Provider (ISP).

In Britain, ISPs were originally regarded as publishers of the material that they carry, and thus as legally responsible for it, even though most of it is provided by third parties. However, since the EU E-Commerce Directive,

Linda Lovelace in Deep Throat*: her biography was acquitted of obscenity in 1976*
Credit: The Advertising Archives

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which came into force in 2000 (although not until 2002 in the UK), ISPs have been recognised as 'mere conduits', carriers of information rather like the postal services. The directive therefore recognises that an ISP is not a publisher, and does not have editorial control over material posted on its servers by third parties. On the other hand, if an ISP obtains 'actual knowledge' of illegal content held on their servers and fails to remove it, then they render themselves liable to prosecution. This does indeed take a certain amount of pressure off ISPs, but it also renders them extremely vulnerable to pressure from corporate interests, law enforcement agencies and self-regulatory bodies such as the Internet Watch Foundation, who have only to allege that material is illegal for ISPs to become understandably nervous about carrying it. And if they then decide to take it down, they effectively become a regulatory agent, thus to a significant extent *privatising* the process of online censorship. (The alarming extent to which this now happens globally is well summarised both by Jack Goldsmith and Tim Wu in their book *Who Controls the Internet?* and by Nart Villeneuve in *Index* 4, 2007.)

In Britain, the initial responsibility for investigating pornography on the Internet fell to the Clubs and Vice Unit at Charing Cross Police Station in London. On 9 August 1996, the Unit's Chief Inspector Stephen French wrote to some 140 ISPs, listing 133 newsgroups that the police wanted them to block on the grounds that 'we believe [they] contain pornographic material'. The letter continued:

> This list is not exhaustive and we are looking to you to monitor your newsgroups identifying and taking necessary action against those others found to contain such material. As you will be aware the publication of obscene articles is an offence. This list is only the starting point and we hope, with the co-operation and assistance of the industry and your trade organisations, to be moving quickly towards the eradication of this type of newsgroup from the Internet . . . We are very anxious that all service providers should be taking positive action now, whether or not they are members of a trade association. We trust that with your co-operation and self regulation it will not be necessary for us to move to an enforcement policy.

However, the list was arranged so that the first half page consisted of unambiguously titled paedophile newsgroups, access to which many people doubtless would want banned. It was only by reading on that it

appeared that the police wanted to restrict access to other kinds of newsgroups as well, if titles such as alt.binaries.pictures.erotica.cheerleaders and alt.binaries.pictures.erotic.centerfolds are anything to go by, which hardly suggest material that would fall foul of the Obscene Publications Act. This was taking place without prior debate in Parliament or elsewhere. However, the police, who appeared to be doing their best to create and not simply to enforce the law, were not acting entirely off their own bat. As Alan Travis, the *Guardian*'s Home Affairs editor, explains in his book *Bound and Gagged*:

> The Conservative Science and Industry Minister at the time, Ian Taylor, underlined the explicit threat to ISPs if they did not close down the newsgroups in question. He warned that the police would act against any company that provided their users with pornographic or violent material. He went on to make it clear that there would be calls for legislation to regulate all aspects of the Internet unless service providers were seen wholeheartedly to embrace responsible self-regulation.

The Internet was always going to be a problem for the censorious

The direct result of what can only be described as a campaign of threats and bullying was that in September 1996 the major ISPs set up the Internet Watch Foundation (initially known as the Safety Net Foundation), a self-regulatory industry body to which members of the public could report Internet content that they deemed illegal, particularly in the area of child pornography. However, after three years, the government decided that the IWF was insufficiently effective and its workings were reviewed for the Department of Trade and Industry (DTI) and the Home Office by the consultants KPMG and Denton Hall. As a result, a number of changes were made to the organisation's role and structure, and it was re-launched in early 2000, endorsed by the government and the DTI, which played a

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'facilitating role in its creation' according to a DTI spokesman. At the time, Patricia Hewitt, then minister for e-commerce, gave it her blessing by stating that 'the Internet Watch Foundation plays a vital role in combating criminal material on the Net'.

Today the IWF describes itself on its website as:

> the UK's Internet 'Hotline' for the public and IT professionals to report potentially illegal online content within our remit. We work in partnership with the online industry, law enforcement, government, the education sector, charities, international partners and the public to minimise the availability of this content, specifically, child sexual abuse content hosted anywhere in the world and criminally obscene and incitement to racial hatred content hosted in the UK.

It defines sexual abuse content by reference to the UK Sentencing Guidelines Council, which established five levels of seriousness for sentencing for offences involving pornographic images of children. In ascending order, these are:

> Level 1 Images depicting erotic posing with no sexual activity
> Level 2 Non-penetrative sexual activity between children, or solo masturbation by a child
> Level 3 Non-penetrative sexual activity between adults and children
> Level 4 Penetrative sexual activity involving a child or children, or both children and adults
> Level 5 Sadism or penetration of, or by, an animal

The IWF also explains that:

> We help Internet service providers and hosting companies to combat abuse of their networks through our national 'notice and take-down' service which alerts them to potentially illegal content within our remit on their systems and we provide unique data to law enforcement partners in the UK and abroad to assist investigations into the distributors of potentially illegal online content.

What this means in practice is that once the IWF has reported to the police the presence of content it deems illegal, the ISP will have no excuse in law that it was unaware of the presence of this material. That this is indeed the

case was spelled out by the Department of Trade and Industry document published in 1998, *Net Benefit: the Electronic Commerce Agenda for the UK*:

> Primary responsibility for illegal material on the Internet would clearly lie with the individual or entity posting it. Under UK law, however, an Internet service provider (ISP) which has been made aware of the illegal material (or activity) and has failed to take reasonable steps to remove the material could also be liable to prosecution as an accessory to a crime.

In the highly unlikely event that an ISP ignores the IWF's service, it will be contacted by the police and told to remove it or face prosecution.

The IWF also compiles and maintains a blacklist of mainly child pornography URLs, which is updated twice daily and circulated to all UK ISPs, who then block access to the offending material. In this area too the IWF depends largely on reports from the public, although before being blacklisted sites will be examined by a team of analysts trained by the police. At any one time, the list contains between 800 and 1200 child pornography URLs, with between 65 and 80 new ones added each week. In 2004, BT introduced its Cleanfeed blocking technology, and by 2006, 90 per cent of British ISPs were using this to block websites on the IWF blacklist, or were preparing to do so. Cleanfeed is essentially a server hosting a filter that checks URLs for websites on the IWF list and returns the message 'website not found' in the case of positive matches. However, in May 2006, Vernon Coaker stated in a written answer:

> We recognise the progress that has been made as a result of the industry's commitment and investment so far. However, 90 per cent of connections is not enough and we are setting a target that by the end of 2007, all ISPs offering broadband Internet connectivity to the UK general public put in place technical measures that prevent their customers accessing websites containing illegal images of child abuse identified by the IWF. For new ISPs or services, we would expect them to put in place measures within nine months of offering the service to the public. If it appears that we are not going to meet our target through co-operation, we will review the options for stopping UK residents accessing websites on the IWF list.

At the time of writing, the figure stands at 95 per cent.

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The IWF dislikes being called a censor, and, strictly speaking, it isn't one. But, on the other hand, there cannot be the slightest doubt that it is involved in a process whose end result is self-censorship by ISPs understandably terrified of being accused of distributing child pornography – and, it might be added, keen to burnish their public image as responsible, family-friendly companies and, thus garlanded, to proceed unhindered with the all-important business of making money. Its existence disguises and obscures the fact that the state is involved in the censorship of the Internet, albeit covertly and at one remove, and its workings make it largely impossible for the authors of online material deemed illegal to defend themselves in court. Furthermore, although it was originally set up and now operates with strong governmental support, its workings have never been the subject of any sustained parliamentary or public scrutiny or debate. But, there again, why should they be? The IWF does not enjoy even the dubious status of a quango, and indeed takes considerable pains to stress that it is a purely private body. The problem, however, is that as such it lacks any kind of democratic legitimacy and authority for its actions. Furthermore, as the addition of 'criminally obscene and incitement to racial hatred content' to the IWF's remit ably testifies, ill-defined bodies such as this are all too prone to mission creep whereby, without any proper public discussion, they quietly expand the range of their activities – usually under pressure from government.

Of course, one of the main problems in the UK is that the stress on combating child pornography on the Internet has actively discouraged critical discussion of both Internet regulation in general and of the role of the IWF in particular. Few, quite understandably, are keen to run the risk of being painted as 'soft' on this matter. It is, of course, perfectly right and proper to use the Internet as a means of tracking down those who actually engage in child abuse (or any other kind of non-consensual sexual activity, for that matter). But whether the online existence of such material, and indeed of other material of which the authorities disapprove (seemingly an ever-growing list), serves as virtually an automatic justification for cracking down on freedom of expression on the Internet, is a topic which deserves far more serious and measured public consideration than it has received. And the need for public debate on this matter becomes more pressing as it becomes obvious that the government intends cracking down on online material other than blatant child abuse images (which very few would wish to defend). However, as the Internet Service Providers Association appears quite rightly to suggest, if this is what the government wants – and in

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particular if it is going to insist on the imposition of any filtering or censorship processes above the consumer level – it should be open about wishing to impose state censorship on the Internet and not covertly pressurise the ISPs into doing its dirty work:

> ISPs are not qualified, sufficiently authorised or resourced to decide on the legality of all the material on the Internet. Whilst ISPs take swift action when they are aware of child pornography on their servers – because it is illegal 'full stop' both in the UK and throughout the world – not all sorts of material are as easily identifiable as illegal such as instances of libel or defamation.

Indeed, in this respect, a major problem with the guidelines of the IWF is that many would question whether images falling into Level 1, above, necessarily constitute child pornography at all. This is particularly the case since the Sexual Offences Act 2003 changed the legal definition of a child from a person under 16 (as defined by the Protection of Children Act 1978) to 18. This means that it is now a crime to take, make, permit to take, distribute, show, possess with intent to distribute, or to advertise indecent photographs or pseudo-photographs of any person below the age of 18. The situation is made even more grave by the fact that under such legislation the offences cover images of young people under 18 that are deemed merely indecent, a concept that the courts have proved worryingly unable to define, except in the broadest terms such as 'offending against recognised standards of propriety' or 'shocking, disgusting and revolting ordinary people'. Seventeen-year-old models on Facebook and YouTube take note.

This might matter less if the police could be relied upon to enforce the legislation sensibly and proportionately. However, the numerous occasions on which they have questioned people for photographing their children at bathtime and harassed galleries showing photos of children taken by artists such as Robert Mapplethorpe, Sally Mann, Tierney Gieron and Nan Goldin, suggests that they cannot be trusted to do any such thing. Fortunately, in most of these cases, the wiser councils of the Director of Public Prosecutions (DPP) have prevailed. The beauty of the IWF takedown notices and blacklist, from the police point of view, is that it simply keeps the DPP and the courts (along with any form of proper public scrutiny) out of the loop altogether.

All of these many problems relating to both the authority of the IWF and the nature of its judgments were thrown into the sharpest relief on 5

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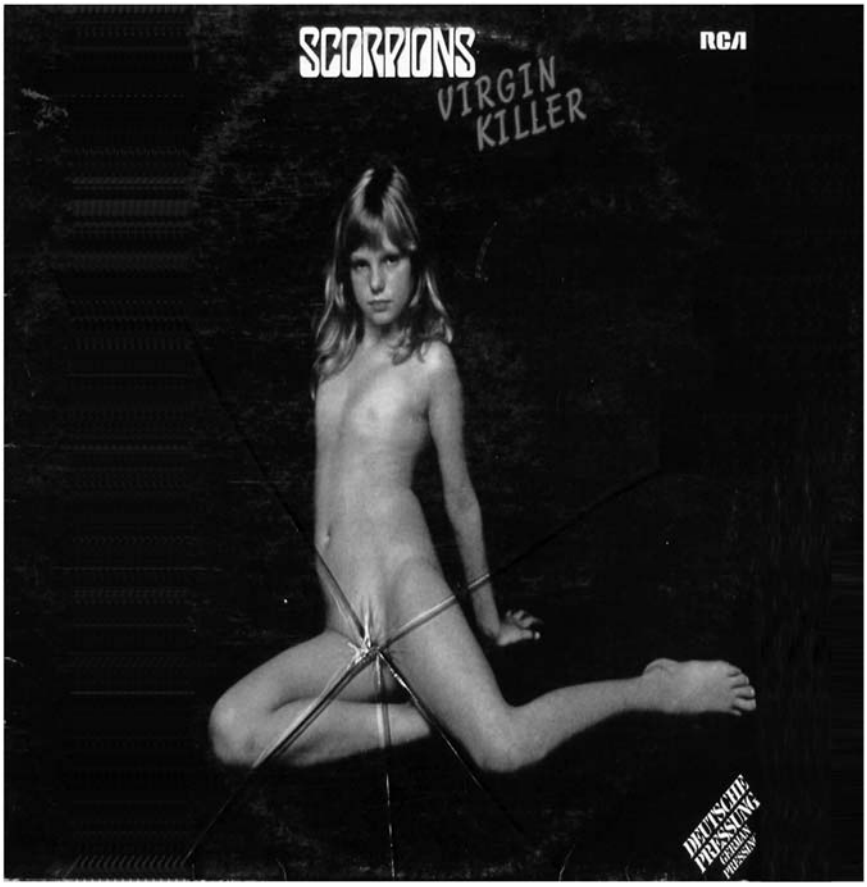

Virgin Killer: blacklisted by the IWF

December 2008 when the IWF decided to take on that bastion of free expression and democratic speech on the Internet, Wikipedia.

Following a single complaint, the IWF blacklisted a Wikipedia article containing an image of the cover of the Scorpions album *Virgin Killer*, which depicts a naked pre-pubescent girl. It regarded the image as coming within the Level 1 (erotic posing) category of images outlined above. The decision was taken in consultation with law enforcement in the shape of the Child Exploitation and Online Protection centre (CEOP). In a dramatic demonstration of the censorship capabilities of the Cleanfeed system, the page almost immediately became unavailable to the vast bulk of British users of the

Internet. Furthermore, for related technical reasons, they found themselves unable to edit other parts of the site, and in some cases access to the whole site slowed to a crawl. Following this, the IWF also received a complaint about the same image being available on the Amazon website. However, rather than blocking the commercial online giant in one of its busiest weeks of the year, following representations from Wikipedia, it reversed its original decision on 10 December 'in the light of the length of time the image has existed and its wide availability'.

This isn't exactly convincing, to put it mildly: either the IWF and CEOP think an image is illegal, or they think it isn't. A rather more likely explanation for the IWF's *volte-face* is that, utterly unused to having its decisions challenged, it simply backed down before the situation spiralled out of its control. In many ways this is a pity, as a real ding-dong with Wikipedia and Amazon, possibly involving court action and certainly galvanising much of the online community both in the UK and abroad, would have helped to flush into the open many of the important issues raised in this article – a situation which, one guesses, would not have been exactly welcomed by the British government. ❐

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