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# Australia's "child abuse material" legislation, internet regulation and the juridification of the imagination

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Australia's 'Child-Abuse Materials' Legislation, Internet Regulation and the  
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*Abstract*

*This paper investigates the implications of Australia's prohibition of 'child-abuse material' (including cartoons, animation, drawings, and text) for Australian fan communities of animation, comics and gaming (ACG) and slash fiction. It is argued that current legislation is out of synch with the new communicative environment brought about by the Internet since a large portion of the fans producing and trading in these images are themselves minors and young people. Habermas's analysis of the conflict between instrumental and communicative rationality is deployed to demonstrate that legislators have misrecognised the nature of the communicative practices that take place within the 'lifeworlds' of fan communities resulting in an unjust 'juridification' of their creative works. Drawing on Japanese research into the female fandom surrounding 'Boys' Love' (BL) manga, it is argued that current Australian legislation not only forecloses the fantasy lives of young Australian fans but also harms them by aligning them with paedophile networks. Finally, drawing upon Jean Cohen's paradigm of 'reflexive law' the paper considers a possible way forward that opens up channels of communication between regulators, fans, domain host administrators and media studies professionals that would encourage a more nuanced approach to legislation as well as a greater awareness of the need for self-regulation among fan communities.*

Keywords: internet, censorship, child pornography, Australia, manga, slash, risk

## *Introduction*

In Australia and increasingly internationally the imagination is under attack in the name of the protection of children. Australia has refined its child pornography legislation, originally intended to prohibit the production, distribution and possession of images of harm and abuse of *real* children, and in recent legislation speaks of ‘child abuse material’. Such material is broadly defined as any kind of representation in any form of any ‘person’ (*fictional* or otherwise) who is, or may only ‘appear to be’, under the age of 18 (or 16 in some jurisdictions) as a victim of violent or sexual behaviour. This legislation, which, as well as depictions of actual children, also covers comics, animation, computer games, text (and in the state of New South Wales ‘any other thing of any kind’) makes illegal a huge range of cultural products – in particular several genres of Japanese animation, comics and gaming (ACG) and popular text-based women’s fandoms such as *Harry Potter* slash fiction.

Much of this material is already illegal in Australia (albeit impossible to police effectively given its popularity and scale) but the Labor government plans to introduce an ISP-level filter that will potentially place websites that host even a single offending image or narrative on a secret government blacklist. If the filter proposal becomes law, it could shut down Australian fans’ engagement with broad and well-established international fan communities. The filter will also make it impossible for Australian academics to study ACG and slash fandoms. This would mean that academic inquiry carried out routinely in the US, Japan and elsewhere would become impossible in Australia. This paper investigates how this situation came about and suggests a possible way forward that can sustain international fan production and the academic study of fan communities into the future.

## *Background to the internet filter proposal*

In its 2007 election manifesto, the Australian Labor Party signalled that if elected it intended to introduce legislation that would require ISPs to offer a ‘clean feed’ internet service to all venues accessible by children, including homes, schools and libraries. The aim of the policy was to protect children from seeking out or inadvertently coming across content prohibited by the Australian Media and Communication Authority

(ACMA) (that is, material that has been or would likely be 'refused classification' for release in Australia). The clean feed would be achieved via the issuing of take-down notices to sites located on Australian servers, and the establishment of a secret ISP-level filter that would block access to a blacklist of overseas sites featuring, among other things, child pornography and extreme violence (Labor's Plan for Cybersafety, 2007).

After Labor's election success in November 2007, Stephen Conroy was appointed Minister for Telecommunications. Despite widespread industry scepticism about the technical viability and efficacy of an ISP-level filtering system, Conroy moved quickly to establish trials. In November 2009, there had still been no report by the Minister on the progress of the filtering trials, leading some commentators to argue that the trials had failed to deliver on the government's ambitious promise to make the internet safer for children. In mid-December 2009, three leading Australian professors of media studies released an extensive report that raised grave concerns about the scope and potential adverse effects of the proposed filtering scheme (Lumby et al., 2009). In March 2010 the government released the results from its call for submissions relating to the *management* of the proposed internet filter (not the desirability of a filtering system *per se*). Responses from internet multinationals such as Google and Yahoo, as well as local Australian service providers, industry lobby groups and academics overwhelmingly emphasised potential problems with the scheme. After a series of press reports noting the critical response of overseas commentators, including US Secretary of State Hilary Clinton, regarding compulsory internet filtering, and the airing of a series of ABC reports that further emphasised the impracticalities of the scheme (ABC 2010), in May 2010 the government decided not to take the proposal to a vote prior to an election scheduled for late 2010. Despite the fact that as a result of the September 2010 General Election, the Labor party was able to hang on to power only in coalition with three independents, at least one of whom has publicly expressed scepticism about the filter proposal, the implementation of a net filtering scheme remains on the government's agenda (McCollister, 2010).

'Protection of children' from sexual content is the oft-stated rationale behind the Labor government's proposal to institute internet filtering and this has been the default rationale reverted to by government commentators questioned about the issue despite the fact that a variety of other 'refused classification' material would also be targeted. This concern about children online is but the latest iteration of a generalized anxiety

about children and public space that a number of theorists have argued characterises late modernity. Ian Hacking, for instance, in his analysis of discourses comprising the ‘risk society’ has argued that ‘the most striking new long-term fear is fear for our children’ (2003: 44). Like other risk theorists Hacking notes that this new prioritization of the safety of children is related to a ‘pollution fear’, namely, that otherwise innocent children might be contaminated by age-inappropriate knowledge. The ease with which information can be accessed on the internet and the difficulty of cordoning off information according to age-appropriate cohorts make the internet an easy target for child-safety campaigners. As Josephine Ho points out ‘a heightened sense of vigilance is now pervasive; as a result, depending on the national context, legislation is either in place or under way to circumscribe all sexual communication and contact on the Internet’ (2008: 458).

From the early days of the internet filter proposal, the blocking of access to ‘child pornography’ has been government spokespersons’ most often repeated policy goal. Yet, absent from the debate over the filtering issue so far, has been the crucial point that in Australia ‘child abuse material’ (a more expansive term than much of the Australian legislation deploys as well as ‘child pornography’) is an extremely broad category that extends even to purely fictional representations of ‘under-age’<sup>1</sup> characters in violent or sexual scenarios – including animation, comics, art work and text. Hence, existing legislation targets not only a small coterie of adult paedophiles dealing in representations of actual children, but extensive communities of animation, comics and gaming (ACG) and ‘slash’ fans whose activities involve the consumption, creation and dissemination of representations of fictional ‘under-age’ characters that would be classified in Australia as ‘child abuse materials’. These communities are overwhelmingly youth oriented and, depending on the genre, include large numbers of girls and young women. Given the youthful nature of the fandoms, and the youthful nature of the characters they engage with, fans are *of course* going to deal in sexualised representations of characters who are or might ‘appear to be’ under 18. Indeed, it would no doubt be cause for even greater concern, were the young fans to be developing fantasies around much older characters.

If Australia’s current zero tolerance legislation on child-abuse material were to be taken seriously, any proposed blacklist would need to contain hundreds of thousands of urls

linking to these fan sites, thus raising serious concerns about the proposed list's manageability. Moreover, if implemented, the filter would bring a heightened public awareness to the range of 'refused classification' material, thus placing these youth communities at even greater risk of surveillance, arrest and prosecution. The point that needs stressing here is that both in Australia and internationally it is *young people themselves* who create, disseminate and consume the majority of *fictional* representations that could be classed as 'child abuse materials' under the Australian definition.<sup>2</sup>

*Australia's 'child abuse materials' legislation and its implications for animation, comics, gaming and slash fans*

In recent years animation and manga as well as related computer games, many of them deriving from Japan, have become immensely popular with young people globally. Unlike in the Anglophone context, where comics have traditionally been understood as a children's medium, in Japan there are manga catering to all demographics and the manga aesthetic has had an enormous impact on Japanese popular culture and on cultures throughout East Asia more generally. The development of the internet has enabled national, regional and global exchanges among animation, comic and games (ACG) fans. Not only are previously obscure titles now easy to obtain from online stores in Japan and the United States, but many pirated editions are shared between fans. Japanese, Korean and Chinese originals are often dubbed or subtitled by fans into English and other languages; referred to as 'scanlations', 'fandubs' and 'fansubs', these texts are then uploaded onto fan sites (Donovan, 2008: 18-20). These global flows of fan culture bypass traditional distribution and sales circuits, making it difficult for nation states to regulate and control access to material that authorities deem unsuitable, especially for children.

Fans also produce their own versions of texts featuring characters from commercial manga and animation. Indeed the creation and circulation of this user-generated content is definitive of the 'Web 2.0' experience' (Jenkins, 2006: 171-205). Some of these fan products are highly popular and are sold at fan conventions in Japan and around the world, whereas others are available via the internet for free (for an outline of this global fandom, see McLelland ed., 2009a). The new ease of access that fans have to Japanese

popular culture has proven problematic for regulators. For instance, animated and cartoon sex and violence are not regulated in Japan to the same degree as in some Western jurisdictions. For example, there is a genre of Japanese comic book romance known as 'Boys' Love' (BL) written for schoolgirls but featuring homosexual love between boys and/or young men (Levi, 2008). Also, it is not unusual to see references to children's precocious sexual interests even in media directed at very young children. Japanese manga artists are cognizant of the greater freedom they have in Japan to represent young people in a range of situations that would be problematic in a Western context, as Kazuhiko Torishima, former editor of Japan's best-selling manga, *Shōnen Jump* (Boys' Jump), has remarked, 'I feel sorry for U.S. kids, who live in an adult-filtered Disney world' (cited in Craig, 2000:13).

Furthermore, the artistic conventions of manga and anime (Japan-style animation) tend to favour youthful looks and many characters, despite their adult status being indicated in the narrative, may 'appear to be' under age 18. Some genres such as the Loli(ta) and BL fandoms discussed below specialise in the sexualisation of their youthful characters but even when characters are not overtly sexual in the original media, they can be sexualised by the fans themselves in their user-generated content. As with the seemingly 'under-age' avatars of adult games players, this becomes a problem for Australian fans when these sexualised fantasy characters are placed in violent or sexual scenarios.

To an extent, the Japanese ACG fandom has merged with the already well established Western slash fandom which takes characters from popular TV and film series and develops new story lines involving same-sex sexual encounters (see Jenkins, 1992 for the classic account of the origins of the slash movement and McLelland, 2006 for the manga/slash crossover). Among the most popular is the *Harry Potter* slash fandom (see Tosenberger, 2008) which generates over 700,000 Google hits, testifying to the ease of access to this material and its currently unfiltered nature. *Harry Potter* slash, which features imagined sexual interactions mainly between Harry and his male schoolmates, like ACG material involving sexual interactions between under-age characters, is in violation of Australia's child-abuse material legislation, which is outlined below.

In Australia child pornography and abuse is legislated at both state and federal level. Federal legislation defines 'child pornography materials' as:

(a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who: (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive (*Criminal Code Act 1995* [Commonwealth] s.473.1).

As can be seen, the federal legislation refers not only to images or texts referring to actual ‘persons’ but also to ‘a representation of a person’ and ‘material that describes a person’ who ‘is, or is implied to be under age 18’. However, most state legislation puts the age at 16 – leading to confusion as to what, exactly, is the legal minimum age for such representations.

Australian state legislatures have outlined the nature of prohibited representations in great detail. In New South Wales, the *Crimes Act 1900* SECT 91FA, states that “‘material’ includes any film, printed matter, electronic data or *any other thing of any kind* (including any computer image or other depiction)’ (italics mine). The reference to ‘any other thing of any kind’ is clearly a response to the ever expanding array of representations now made possible via new computer technologies, and leaves no scope whatsoever for imagination and fantasy outside the law. Given the ubiquity of such representations on both ACG and slash fan sites, it is easy for fans to stumble across material that would put them at the risk of prosecution. As the *Commonwealth Criminal Code Act 1995* makes clear, an individual is guilty of an offense if said individual, among other things, ‘uses a carriage service’ to access child-pornography material, cause the material to be transmitted, distribute, publish or otherwise make the material available (*Commonwealth Criminal Code Act 1995*, 474.19).

That cartoon representations do fall within the definition of a ‘person’ in the NSW Act was clarified by Justice Michael Adams in his reasoning in the case *McEWEN v SIMMONS & ANOR* [2008] NSWSC 1292. The case was an appeal against an earlier conviction for possession of ‘child pornography material’ (in this case user-generated images of the cartoon children from *The Simpsons* TV show engaged in sexual interactions). As stated in the ruling:

On 26 February 2008 the plaintiff was convicted in the Parramatta Local Court of the offences of possessing child pornography contrary to s 91H(3) of the



*Crimes Act 1900* (the Act) and using his computer to access child pornography material contrary to s 474.19(1)(a)(I) of the *Criminal Code Act 1995* (the Code). The alleged pornography comprised a series of cartoons depicting figures modelled on members of the television animated series ‘The Simpsons’. Sexual acts are depicted as being performed, in particular, by the ‘children’ of the family (McEWEN v SIMMONS & ANOR [2008] NSWSC 1292, para 1).

The appeal was launched by the plaintiff on the basis that *The Simpsons* cartoon characters could not reasonably be described as ‘persons’. In his interpretation of the legislation, Justice Adams disagreed, and upheld the judgement of the original magistrate, commenting:

In my view, the Magistrate was correct in determining that, in respect of both the Commonwealth and the New South Wales offences, the word ‘person’ included fictional or imaginary characters and the mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean that such a figure was not a ‘person’ (McEWEN v SIMMONS & ANOR [2008] NSWSC 1292, para 41).

This decision was reviewed and endorsed in January 2010 by the New South Wales Child Pornography Working Party. Citing extensively from a submission by the Public Defender who argued that if the sexual manipulation of fictional child characters were not illegal, then ‘[exploitive] behaviour may be normalised and cognitive distortions reinforced’, the working party concluded that it did ‘not believe the decision has any unintended policy consequences and does not over reach the purpose of the legislation’ (Report, 2010: 42).

This decision is of great importance for Australia-based ACG and slash fans, since it clarifies that in Australia child abuse materials legislation applies equally to ‘fictional or imaginary characters’, even in instances when such characters ‘depart[.] from a realistic representation’. Hence Australian fans of ACG and slash, many of whom are themselves under 18, who routinely access sites that may contain or link to representations of ‘under-age’ characters in sexual or violent scenarios – representations that are legal under Japanese and US legislation – run the risk of prosecution.

Given that there is no demonstrated link between participation in online fan communities dedicated to slash and BL and the commitment of offences against children, it needs to be questioned why the legislation prohibits such a broad range of material. In her work examining legislation prohibiting speech acts encouraging sedition, Sorial calls attention to the ‘permissibility conditions’ that give certain speech acts greater ‘illocutionary force’. In a discussion of incitement to violence on the part of Islamic clerics, Sorial notes that when statements such as ‘it is permissible to kill infidels’ are spoken by clerics in a mosque, this specific situation represents an “enabling” context’ that might ‘impose significant obligations on the part of addressees’ (2009: 300). Hence, since there is a strong possibility that these kinds of statements ‘can cause indirect harms by cultivating certain environments’ (2009: 303), the state has a legitimate case in restricting freedom of expression in this context.

The NSW Working Party on Child Pornography developed a similar line of argument when it upheld the legislation in ‘The Simpsons’ case discussed earlier. The review argued that a prohibition of representations of sexual acts even by cartoon child characters was valid since the manipulation of fictional child characters might create an environment in which ‘[exploitive] behaviour may be normalised and cognitive distortions reinforced’. However it is difficult to see how creative works that involve the manipulation of fantasy child characters have similar ‘illocutionary force’ to incitements to actual child abuse, or how online fan communities dedicated to *Harry Potter* slash might establish ‘enabling contexts’ for actual child abuse. Indeed, popular culture is replete with all kinds of imaginary scenarios, particularly crime scenarios, which are not considered incitements to commit these crimes in real life.

In the remainder of this paper I attempt to develop a sociological explanation that can help us understand how sexualised representations of images and narratives involving purely fictional characters who may only ‘appear to be’ under the age of 18 have come to be legislatively aligned with images of actual child abuse in Australia (and increasingly elsewhere)<sup>3</sup> – despite the fact that the main producers, distributors and consumers of these fantasy materials are *young people themselves*. I argue that there is a serious disconnect between the construction of ‘child abuse materials’ on the part of the legislators and the ‘lifeworld’ understanding of the day-to-day interactions among the largely youth-driven fandoms (which in the case of slash and BL are overwhelmingly female). In conclusion I suggest a way forward to resolve this debacle for both fans and

legislators by applying Jean Cohen's notion of 'reflexive law' to issues of online self-regulation.

### *The Juridification of the Lifeworld*

In his *Theory of Communicative Action* vol 2, Habermas outlines his theory of 'communicative rationality' which he conceives as 'a process of reaching agreement between speaking subjects to harmonize their interpretations of the world' (Deflem, 2006). This communicatively-based interpretation of the world and individuals' perception of their and others' place in it, Habermas refers to as the 'lifeworld'. Habermas notes how the lifeworld comes to be 'colonised' by macro-level discourses of 'instrumental rationality' deriving from the push toward increased 'monetarisatation and bureaucratisation' characteristic of late modernity (Brand, 1990: 57). In particular he mentions how 'central regions of cultural reproduction, social integration and socialisation are ... drawn into the dynamics of economic growth and juridified' (Brand, 1990: 55).

The law is one of the main mechanism through which interactions within the lifeworld are colonised through a process that Habermas refers to as 'juridification'. As Deflem points out 'the concept of juridification generally refers to an increase in formal law in the following ways: the expansion of positive law, i.e. more social relations become legally regulated; and the densification of law, i.e. legal regulations become more detailed' (2006). Habermas gives as his main examples of this process the education system and family life, particularly the latter where he notes that juridification 'implies the opening up of action areas, which were not formally organised, for bureaucratic interference and their subsumption under judicial control' (Brand, 1990: 55).

The internet, too, is increasingly subject to processes of juridification. The internet is of course not one thing but a series of interactive environments characterised by a wide range of 'lifeworld' communities. Kemmis's definition of 'society' describes the online world well, he notes that it 'is not a concrete unity, but instead a fragile network of lifeworlds—an indefinite set of highly differentiated and localised lifeworlds loosely connected through the intersubjective understanding of participants' (1998: 298). These diverse internet communities have increasingly been brought under surveillance and control in the interests of both private business and of government. As Salter has

pointed out commercial concerns, especially the protection of intellectual property, have led to the increased surveillance and regulation of online interaction. In relation to fan activities he notes how, 'Linking webpages and websites traditionally reflected a social relationship between persons sharing an interest, as can be seen in the "web ring" phenomenon'. And yet he points out how,

these simple, 'lifeworld' relations became questioned as e-commerce and copyrighted information developed ... Indeed the use of hyperlinks has been met with legal challenge on numerous occasions and almost always in relation to the protection of commercial interests (Salter 2005: 297).

The intrusion of commercial interests into fan activities has been extensively documented by Henry Jenkins who points out how in the last two decades the idea of 'intellectual property' has been increasingly deployed to place limits on the production and distribution of grassroots fan content (2006: 141). Slash fans, because they introduce culturally challenging 'queer' dynamics into their creations, have been particular targets. As Katyal points out, 'the history of intellectual property law reveals an astonishing number of incidences where the laws of copyright, trademark and patent have been used . . . to silence transgressive depictions of sexuality, sexual identity and gender expression' (2006: 462). In this paper I want to focus on a similarly crucial but less well-recognised aspect of juridification: the impact that the extension of child pornography laws to include purely fictional images and narratives has had on silencing fan communities. Australia's movement away from simply prohibiting 'child pornography' to prohibiting the enormously more encompassing category of 'child abuse material' is a further example of this same process of juridification; that is, a 'densification' of legislation limiting what can be imagined and reproduced. The result is that the interactive lifeworld communication of fan communities is increasingly hemmed in by regulations serving both commercial interests and the ideological biases of government agents.

As argued in earlier articles on the Japanese BL fandom (McLelland, 2005; 2001), fans from the earliest days of the internet have linked their web pages together in circles and web rings, thus emphasising the communal nature of their fan activities. Fans are also characterised by their creative participation in the fandom. Fans thus transgress

Australia's child-abuse materials legislation on multiple levels since they do not simply receive illegal images but also create and redistribute them among their circles.

As has been previously demonstrated, fans whose work deals with sexual issues have always been aware that their interests and motivations might be misunderstood by the chance visitor (McLelland, 2001), but there has been agreement among the fans themselves that the sexualised characters have no relation to actual people or real life. Indeed, as argued by fans themselves, it is precisely the *lack of relationship* between their online fantasy worlds and real life that fans describe as so liberating (McLelland, 2001; McLelland and Yoo, 2007: 98). The kinds of discussion that take place in the context of these fan circles and in online communities such as LiveJournal are good examples of what Habermas conceives as 'communicative rationality' in that communication is 'aimed at mutual understanding, conceived as a process of reaching agreement between speaking subjects to harmonize their interpretations of the world' (Deflem, 2006). This is not to say that interlocutors in these spaces always agree, since 'different validity claims ... are implicitly or explicitly raised in speech-acts' (Deflem, 2006). However there is common understanding as to what participants are doing in these spaces; as Salter points out 'the lifeworld is a background cultural resource which provides a basis for meaning and understanding' (2005: 292).

The conflict between external appraisals of fan activities and fans' own understanding of their behaviour was made apparent in the 'Great LiveJournal StrikeThrough of 2007' (Tushnett, 2008; Castele, 2007). The strikethrough saw the mass deletion of fan fiction blogs containing, among other things, *Harry Potter* slash and 'boys' love' (because of its underage content), and *Supernatural* slash (because of the incest between the two brothers). According to accounts, the take down was prompted by threat of legal action against the site's administrators launched by, among others, a right-wing Christian group, Warriors for Innocence, who accused the site of harbouring material that promoted 'rape, incest and pedophilia'. Acting unilaterally, the administrators suspended a large number of journals based only on key words listed in users' 'interests' profile and without checking for the context. This is a clear conflict between the instrumental rationality of the service provider and the communicative rationality of the fans' own lifeworlds. As Tushnet comments, the administrators' comprehension of the fans 'interests' was out of synch with the fans themselves who had adapted the categories 'to better fit their goals of self-expression and connection to others' (2008:

113). A massive and instantaneous backlash by fans saw the reinstatement of most of the suspended accounts – a response possible in the US where the LiveJournal server is based due to the ‘parody’ of media characters being a protected form of speech. However a similar unilateral takedown of a fan webring linking to similar material and hosted on an Australian server in 2005 saw this material permanently deleted and the female fans panicked and disenfranchised (McLelland, 2005).

Hence the ‘communicative rationality’ underpinning fan understandings of their activities in their shared lifeworld can and does come into conflict with the ‘instrumental rationality’ of the regulators who have very different understandings of the kind of ‘symbolic reproduction’ that takes place in these spaces. ACG and slash fan communities are particularly vulnerable to the intrusion of legislation based upon a generalised instrumental rationality, particularly around copyright and ‘child-abuse publication’ concerns. Fans themselves, since they receive no financial benefit from their user-generated manipulations of copyrighted characters, do not share the ‘infringement of intellectual property rights’ paradigm of the major corporations. Indeed, as work by Jenkins (2006) has shown, fans recognise a common ownership of these characters. Likewise, child-abuse publications legislation which interprets the manipulation of ‘under-age’ characters in sexual scenarios as a paedophile activity, is an interpretation unrecognisable to the fans themselves. The disconnect between what fans think they are doing and how their actions are understood by regulators is an example of how ‘subsystems of economy and bureaucratic state administration are placed in opposition to private and public spheres of life’ (Salter, 2005: 293), further illustrating how ‘instrumental rationality ... achieves dominance’ at the expense of the ‘moral-practical and aesthetic-practical rationality’ expressed by the fans (Salter, 2005: 293).

In the next section I will summarise some of the research that has considered the ‘symbolic’ nature of the communication that takes place around sexualised ‘under-age’ figures in two specific online genres: Loli(ta) and ‘boys’ love’ (BL) manga and animation. This research has stressed that it is precisely the *lack* of fit between the online sexual fantasy spaces and fans’ offline sexual interests that proves so popular and hence suggests that there is no legitimate reason for such representations to be prohibited in Australia.

*Symbolic reproduction in fan communities.*

For decades, much disquiet has been expressed in the Anglophone press about Japanese men's supposed predilection for representations of 'under-age' sex in manga and animation (see McLelland, 2001 for a summary). Despite the fact that there exist highly sexualised manga created by and for both men and women (see Jones, 2005 for a discussion of women's pornographic manga), it is representations in men's manga that have been overwhelmingly critiqued. Known as *rori-kon* (from Lolita Complex) in Japanese, Japanese popular culture is replete with highly figurative sexualised images of schoolgirls and these images and narratives, both commercial and fan-produced, are available internationally in hardcopy via mail order and over the internet. 'Loli' (in English) is one category that falls foul of Australian legislation. However Loli and other manga genres are self-consciously *anti*-realist given the extremely stylised nature of their depictions and the facts that both fans and creators not only 'deliberately reject three-dimensionality' but actually *prefer* the two-dimensionality of the manga and anime representations (Zanghinelli, 2009: 173).

Japanese psychologist Tamaki Saito (2007: 227), one of few professionals to have actually investigated the effects of fans' consumption practices, has also pointed out that it is a mistake to assume that the audience for these kinds of fictional narratives confuses fantasy with reality. Saito's point comes across clearly in his discussion of the 'boys' love' (BL) genre created and consumed by an almost exclusively *female* fandom. *Shōnen'ai* or 'boys' love' manga, which imagine sexual scenarios between 'beautiful boys' and young men, were developed in Japan in the early 1970s by a group of female artists who went on to establish themselves as major figures in Japan's manga industry. By the late 70s many amateur women fans were getting involved in the BL phenomenon by creating and self-publishing homoerotic parodies of established male manga characters. They did this through imagining love affairs between the male characters in much the same way that Western women were simultaneously 'slashing' the male leads of popular TV dramas in their own fan productions. By the early 1980s these parody manga were being termed YAOI, an acronym meaning 'no climax, no point, no meaning', a self-deprecating reference to the fact that the story lines, such that they existed, were only as a pretext to get the male leads into sexual liaisons with each other (McLelland, 2006). The popularity of these fan products, sold and circulated at huge fan conventions, led to an increase in the number of commercial 'boys' love' titles available.

The fandom is now international with its own commercial publications popular throughout Asia (Liu, 2009) and the US (Pagliassotti, 2009). Such is their popularity in the US that San Francisco hosts its own BL convention, Yaoi-Con, now in its tenth year. Given that the majority of the beautiful boys described in this genre are or may 'appear to be' under the age of 18, and the graphic and at times violent nature of the sex depicted, the products of this international female fandom are mostly prohibited in Australia.

For Saito the fact that the beautiful boys of yaoi are entirely 'other' to their female creators (in much the same way that the Loli characters are to the male fandom) is important for understanding women's investment in them. As he points out, 'What is significant ... is the fact that the imaginary sexual lives of the yaoi crowd are totally separate from their everyday sexual lives' (2007: 229). As Saito emphasises, the absence of female characters in these boys' love narratives is crucial for the success of the fantasies, since as one fan expressed to him, 'when women are depicted, it can't help becoming weirdly real' (2007: 231). So, as he concludes, both the Loli characters and the beautiful boys of girls' comics 'lack any correspondent in the real world' (2007: 231). Crucially he notes that many yaoi fans 'lead heterosexual lives, but their fictionally oriented sexuality turns to male homosexual relationships' (2007: 232). They share with male Loli fans the fact that their 'fictional sexual objects are not proxies for the real; instead, the space of fiction has a wholly independent economy of desire' (2007: 232).

In an attempt to explain how this sexual economy might function, Galbraith, in a paper investigating Japanese 'virtual' sexuality, focuses on the term '*moe*' (to have a passion for) that has recently come to be applied in cases where fans develop passionate interests in their favourite 'virtual' ACG fantasy characters. He explains men's and women's differing investments thus:

Men who resist their gender roles imagine romance free from the confines of manhood (defined through work and responsibility), and their *moe* character takes the form of an innocent girl-child who does not demand masculine excellence; likewise, women who resist hetero-normative gender roles imagine romance free from the confines of womanhood (defined through childbirth and responsibility), and their *moe* characters take the form of homosexual boys who do not settle into domestic roles (2009).



Japanese scholarship has, on the whole, argued that in the case of Japanese fans, neither the Loli nor BL fandom represent the interests of paedophiles since *moe* characters are not objectified in the same manner that *actual* images of children can be, rather they express aspects of their creators' or consumers' own identities. As Kinsella points out in relation to Loli fans, 'the infantilized female object of desire ... has crossed over to become an aspect of their own self image and sexuality' (2000: 122), as can be seen in the many cosplay events where male fans come dressed as their female heroines. Indeed, time and again research into Japanese manga fandom suggests that fans' erotic investment in these fictional characters has no direct relationship to their sexual identities in real life. So how has it come about in the Australian context that these virtual characters are aligned in the legislation with representations of actual children? In the next section I suggest that a heightened discourse of risk management is behind the recent 'densification' of child-abuse material legislation in Australia and internationally.

#### *The moralization of 'risk' in late modern society*

In the last two decades a number of theorists have brought attention to the crucial way in which 'risk assessment' has become a structural feature of late modernity. Sociologists such as Beck and Giddens point out how the articulation and consideration of risk factors play important roles in the 'reflexive project of the self'. As Alan Hunt argues, 'In late modernity *not* to engage in risk avoidance constitutes a failure to take care of the self' (2003: 182). Risk management has long been associated with the proper conduct of the self, what might be termed moral management: 'from the outset the concept of risk was used to instil prudence, the moral duty to act today with regard to what might happen in the future' (Ericson and Doyle, 2003: 13). However, the increased invocation of risk across all vectors of human association and identity has been accompanied by what Hunt refers to as 'moralization' and an accompanying 'responsibilization'. In short, through not properly attending to risk discourses, an individual fails in his or her responsibility toward self and society and, as Hunt notes, 'the stakes involved in being responsible have been steadily rising' (2003: 169). The moralization of risk has two aspects, 'a proliferation of ... bureaucratic regulation in the

everyday world' and 'an expansion of the responsibilities that burden citizens in a way that reinforces and even multiplies the regulatory impact' (2003: 165).

There are two key areas in which risk anxiety has heightened exponentially in the last decade: the potentials of terrorism and of child abuse – both key targets of the Australian Labor government's proposed internet filter. In Australia, and elsewhere, anxieties about terrorism and child-abuse have been driving calls for increased internet regulation and authorities have been keen to show voters that they are 'doing something' in relation to these potential threats. As Ericson and Doyle point out, 'risk society is driven by the deployment of more and more resources to preventive security, which simultaneously play on fear and insecurity even as they try to reduce these emotions.' (2003: 18).

Nicholas Rose (1999) points to the expanded role that 'parenting' must now play in the supervision and regulation of children's lives, particularly when it comes to 'the securitization of habitat'. Rose was writing at a time when habitat referred primarily to physical space: the choice of 'good' schools, the 'right' area to live and 'safe' places to play but as Guins (2009) points out 'cyberspace' is increasingly imagined as an unruly and dangerous environment that is unsafe for children and hence in need of parental oversight. Drawing on insights from Rose, Guins points to 'the parental function's investment in and acquisition of measures to safeguard the family' including internet filtering applications via which 'space is reconfigured in the name of security' (2009: 9). As he argues, 'Unlike the term *child* used to mobilize legislation, fear, and insecurity, parent is not a nebulous victim but an enabled solution to police the cultural spaces that most affect children and the family, namely media' (2009: 11). In Guin's view, calls for internet filtering in the name of children or family values are really means to 'extend the protective front door well beyond the domestic sphere ... so that the Internet is an introverted experience – an extension of the domestic and private – rather than opening forth to public space' (2009: 72). Internet filtering is a means to 'disseminate the hegemony of the family and its values of deterrence and security beyond the confines of the home' (2009: 72).

It is in this generalized climate of anxiety, that activities such as fan manipulations of popular culture characters that have been continuing for decades are suddenly recognised by parents, the authorities and the fans themselves as 'risky'. Previous fan

scholarship has pointed out how formerly the main risk faced by fans was prosecution for noncompliance with copyright law (Katyal, 2006: 514-16), but since the mid 1990s when a suite of regulations relating to computer-generated images began to be introduced internationally, the stakes regarding the manipulation of ‘under-age’ characters have been heightened. Fans in Australia now risk prosecution for engaging in sexualised ACG and slash communities that revolve around under-age characters.

Even a summary acquaintance with a *Harry Potter* slash fan site or a BL circle dedicated to *Pokemon* characters Ash and Brock would be sufficient to ascertain that these sites are populated by and reflect the concerns of their constituents: girls and young women. Yet legislation in Australia and elsewhere relegates much of the imagery present to the category of ‘child-abuse material’ and aligns its creators with adult male paedophiles. The manner in which fan groups have been caught up in sweeping, generalized legislation meant to target adult paedophiles is a particularly poignant and disturbing example of juridification; as Hunt notes, ‘the rules and prescriptions for individual conduct devised by alliances of bureaucrats and experts, frequently pressured by one or more social movement organizations, are highly formalized and take little or no account of the practices of the everyday world’ (2003: 19). Here we can see how the generalized form of ‘instrumental’ reasoning deployed by bureaucrats works against the communicative rationality characteristic of specific lifeworlds. Although slash and ACG fan sites have no connection whatsoever with paedophilia or paedophile networks and most fans themselves would be appalled by that insinuation, yet, legislatively speaking, fans are aligned with paedophiles because of an inability of the system to apprehend and engage with their local symbolic meanings.

Hunt specifically points to child pornography debates as an example of how ‘moralizing discourses’ tend to ‘homogenise a wide variety of different issues’:

For example, in recent child pornography debates the moralizing response has insisted that any photograph of a naked child is pornographic, such that parents now make sure that their children are clothed before taking holiday snapshots at the beach. The second step is the act of closure. The assertion that the issue is a ‘moral question’ excludes considerations other than issues of moral judgements. Thus if child pornography is defined as inherently evil there can be no space to consider matters such as artistic merit or speech rights (2003: 182).

And indeed this is precisely the situation that has prevailed in Australia today where a wide variety of fan creations featuring ‘under-age’ characters have been captured by a moralizing discourse that positions these images and narratives as morally repugnant. This leaves no space for the young fans themselves – the very constituency these representations are created by and for – to negotiate their meaning.

Hence, we can see how risk discourse has been one important element in how legislation regulating ‘child-abuse material’ in Australia has taken the form it has. As can be seen in the NSW working party’s review of ‘The Simpsons’ ruling, the possibility that the sexualisation of child cartoon characters *may* result in the reinforcement of ‘cognitive distortions’, requires regulation and management by the authorities. The proposition that the manipulation of cartoon or animated characters (and this is particularly so in games regulation) *may* pose a future risk to actual people is sufficient to regulate even this fantasy space where no actual person is harmed and no real crime is committed.

The regulation of online fan spaces to exclude the inappropriate sexualisation of even fantasy figures resonates with Jean Cohen’s work on the increased juridification of intimate relations in the workplace. Cohen examines the ‘densification’ of work place regulation of sexual expression in relation to sexual harassment legislation. While acknowledging the need to protect vulnerable individuals from the inappropriate deployment of power relations in sexual as well as other arenas, Cohen also notes that ‘juridification ... can pose serious threats to personal privacy, autonomy and freedom of expression’ and that ‘legal regulation of sexual expression in the name of justice seems to undermine the personal autonomy and privacy that is constitutive of intimate relationships’ (2000: 58). Cohen sees the juridification of the sexual sphere as an exercise in normalisation, noting that ‘intrusive juridification threatens the very liberty and happiness it is meant to equalize. It seems to undermine plurality as well by imposing a particular substantive view of correct forms of intimate relationships on everyone’ (2000: 61). In particular she notes that ‘juridification of intimate expression places far too much arbitrary power in the hands of the judiciary or administrators, at the expense of social actors’ (2000: 67). As Cohen notes, over regulation and *arbitrariness* of enforcement is the greatest danger of this kind of ‘ideology based’ legislation – as has been seen in Australia where so far only a few individuals have been

targeted for downloading fictional child-abuse materials that are routinely generated, exchanged and viewed by hundreds of thousands of young people globally on a daily basis.

*Conclusion: Possible ways forward*

Tushnet, with free speech online in mind, argues that ‘we should be thinking carefully about the best regimes that will balance promoting speech with reducing the harm of unlawful speech’ (2008: 130). As Chen points out, filtering software would likely be ‘overbroad, imprecise, potentially chilling speech, or otherwise confusing’ (2007: 527). In cases of questionable content, a filtering system would grant power to a committee of appointed bureaucrats who, deploying ‘instrumental rationality’, would use generalised principles when making designations, designations that might contrast with the communicative understandings current among the lifeworld in which the images and narratives circulated. This kind of national approach based upon instrumental rationality takes no note of local meanings or circumstances. As Chen notes, a nationwide standard for filtering assumes the ‘traditional idea of a uni-dimensional regulatory space’, despite the fact that the internet is home to a variety of local environments with their own lifeworlds, communicative codes and symbolic exchanges. Chen argues that this nationwide requirement to install filtering software is ‘inadequate since it leaves too little room for trial and error and the development of local solutions appropriate to local circumstances’ (2007: 527).

As outlined above, a great deal of youth-driven fan activities that involve the creation, circulation and consumption of ‘virtual’ images of under-age characters in violent or sexual scenarios is already illegal in Australia, caught by blanket ‘child abuse materials’ legislation. The Labor government’s proposed complaints-based internet filter system would make these already stigmatised and vulnerable fan groups further vulnerable to moral vigilantes in attacks similar to the 2007 LiveJournal strikethrough case. Indeed, as Tushnet points out in regard to the LiveJournal incident, commercial media are only too happy to ‘suppress specific troublesome speech once it is brought to the attention of specific owners’, thus emphasising the ‘vulnerability of individual viewpoints to corporate control’ (2008: 102). Because of the ‘fragile, potentially illegal status’ (Katyal,

2006: 498) of their fan creations, fans themselves are thus extremely vulnerable in the face of the disciplinary mechanisms that can be brought against them via the law.

How might this unsatisfactory situation be addressed? How might the rights of young people to explore issues of sexuality in an online fantasy setting be protected in the face of the compelling need to support initiatives that reduce harm to actual children? As Cohen notes, the law does not regulate morally objectionable actions that exist objectively out there in society but is itself responsible for producing and codifying those actions that are defined as morally objectionable. She argues that the law 'can harden into ideology if it closes itself off from the perception of new situations and different interpretations of rights and principles (2000: 68).

Cohen has put forward the notion of 'reflexive law' in situations that require the regulation of intimate communication or expression. She notes that 'Unlike substantive law, reflexive law does not dictate outcomes. The state regulates but indirectly. The idea is to provide legal incentives for self-regulation that will lead actors to comply with general legislative goals and norms' (2000: 70). Cohen argues that laws should be genuinely open to the criticism of civic opinions, the ideal being 'a truly mutual and enabling model of reflexive law' (2007: 516). Cohen's 'regulation of self-regulation' is a potential model for the regulation of online communities which requires 'an attitude of willing participation, communication and learning' on the side of both regulators and fans (2007: 523). It is possible to see this process at work in one positive result of the 'LiveJournal StrikeThrough' discussed above where the administrators agreed to engage in a process of dialogue with fans about providing due process for users whose online speech was considered unacceptable (Tushnet, 2008: 115).

Furthermore, many online communities have already developed self-regulatory sets of practices that include not only codes of civility governing online interactions but also ratings systems for user-created content. Some of the oldest and most successful fan networks such as the BL fan site [aestheticism.com](http://aestheticism.com) have compulsory ratings for all submitted art work and fiction and restrict access to adult materials on their site, access to the latter requiring the provision of proof of age documents. Yaoi-Con, a major San-Francisco fan convention dedicated to Japanese boys' love images and narratives, restricts registration to those over 18. There are multiple examples of how fan communities themselves have negotiated sets of guidelines that assure freedom of

expression while complying with local laws that restrict adult content. The role of regulators would be better served by encouraging this kind of self-reflexive practice rather than seeking to criminalise and filter out potentially offending content altogether while inadvertently making sex criminals of young people themselves.

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Notes

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<sup>1</sup> I use the term ‘under-age’ instead of the term child, and draw attention to the fact with scare quotes, since it is by no means an easy to ask to assign a meaningful age to an imaginary character.

<sup>2</sup> When young people exchange naked pictures of themselves in what has come to be known as ‘sexting’, they may also be liable for prosecution under child abuse materials legislation. However young people’s engagement in the trade in images of *actual* people is outside the scope of this paper.

<sup>3</sup> In Canada the 2001 ruling ‘R v. Sharpe’ clarified that ‘person’ also included imaginary characters. In the UK the 2009 *Coroners and Justice Act*, 383 subsection (8), makes it clear that child pornography also includes ‘references to an imaginary child’.