

16.

**Regina Vs Pecciarich**

[Indexed as: R. v. Pecciarich]

Ontario Court (Provincial Division) Sparrow Prov. Div. J.  
April 6, 1995

**Criminal law** - Pornography - Distribution - Accused sending computer files to computer bulletin board - Files admitted to be child pornography - Accused convicted of distributing child pornography.

**Criminal law** - Evidence - Documents - Hearsay - Circumstantial evidence - Accused charged with distributing child pornography by sending computer files to computer bulletin board - Accused using code name - Identity of accused proven by circumstantial evidence - Documents found in accused's possession and files on accused's computer used as original circumstantial evidence that accused and the code name were linked in meaningful way - Inference that accused and person using code name were same person.

JP was charged with one count of distributing obscene pictures and one count of distributing child pornography by using his personal computer to upload, i.e., to send, computer files to a computer bulletin board where the files could be downloaded, i.e., received by other computer users. The charges arose after an investigation in which KB, a computer expert, download computer bulletin boards. The files bore the identification of having been Zephyr scan "Recent Zephyr", and certain images contained the words "Recent Zephyr scan". Pursuant to a search warrant, a search was made of JP's bedroom and, among other things, documents, catalogue pictures, lewd pictures of children, a manila folder labelled "Recent Zephyr's Software and such", and JP's computer system were seized. The system included a backup tape and a scanner, a device permitting images to be reproduced on a computer where they could be altered. A printout was made of items stored on the backup tape, and the items included various documents identified by references to Recent Zephyr. The printout included a Series of images which appeared to be steps in the creation of one Zephyr. One of these images bore JP's name. It was admitted that the images and text were obscene and pornographic; however, the accused argued that the Crown had not proven that it was he, using the code name Recent Zephyr, who had uploaded the computer files, and the accused argued that uploading computer files did not constitute as defined by law.

**Held**, the accused should be convicted only on the count of distributing child pornography.

There was no admissible evidence to prove uploading of obscene material, and the accused should be acquitted on this count; the other, however, was proven. The evidence established that the accused was Recent Zephyr. The fact that many documents in the accused's computer exhibit

the name Recent Zephyr tended to indicate that the code name was his. Further, the accused knew that he had documents in his computer containing references to child pornography with the name Recent Zephyr on a matching image. This correspondence was a piece of original or real circumstantial evidence that the accused and Recent Zephyr were one. It was logical to assume that someone would not leave his name on illegal material on a backup tape if he were not somehow connected to it or involved in its creation. Given that the accused's possessed a scanner and given that certain similar to drawings and pictures in the accused's possession, it was reasonable to conclude that he created the images placed on the bulletin board which bore the name Recent Zephyr did not violate the hearsay rule; the documents were used as pieces of original circumstantial evidence that the accused and the name Recent Zephyr were so frequently linked in a meaningful way as to create the logical inference that they were same person. Having found that the accused used the name Recent Zephyr, it could be conclude that the documents on his backup tape purportedly authored by him were his creations and were as such admission that he uploaded the files containing child pornography. To suggest that the files were created by an imposter but knowingly stored by him on a backup tape was conjecture without any evidentiary support. Finally, as a matter of law, uploading files onto a computer board where the public has access to them was distribution.

#### **Cases referred to**

R. v. B. (G) (No.1), [1990] 2 S.C.R. 3, 56 C.C.C. (3d) 161, 77 C.R. (3d) 327, 111 N.R. 1;  
R v. Bastien (1968), 20 C.C.C. (2d) 562 (B.C.Co.Ct.);  
R. v. Evans, [1993] 3 S.C.R. 653, 85 C.C.C. (3d) 97, 25 C.R. (4th) 46, 108 D.L.R. (4th) 32;  
R. v. Householders T.V. & Appliances Ltd. (1984), 20 C.C.C. (3d) 561 (Ont. Co. Ct.), affd loc. cit. p.571 (Ont. C.A.);  
R. v. McCrum (1974), 21 C.C.C (2d) 343, 9 N.B.R. (2d) 66 (C.A.);  
R. v. Morrissery (1995), 22 O.R. (3d) 514 (C.A.);  
R. v. Sudbury News Service Ltd. (1978), 18 O.R. (2d) 428, 39 C.C.C. (2d) 1 (C.A.)

#### **Statutes referred to**

Criminal Code, R.S.C. 1985, c. C-46, ss. 601, 786

#### **Authorities referred to**

McWilliams, P.K. Canadian Criminal Evidence, 3rd ed., p. 10310  
Phipson on Evidence, 13th ed. (1982), para. 21-09

TRIAL on charges of distributing obscene pictures and child pornography

Philip Enright, for the Crown.  
John Collins, for accused.

SPARROW PROV. DIV. J.: -- The accused Joseph Pecciarich is charged that (1) between the 20th day of August, 1993 and the 28th day of August 1993 he unlawfully did distribute obscene pictures, to wit a series of files of computer images, and (2) between the 7th day of August 1993 and the 30th day of September 1993 he unlawfully did distribute child pornography, to wit a series of computer images and text files. In short, he is accused of using his personal computer to

send the obscene texts and images to one or more computer distribution centres referred to as bulletin boards, where they can be accessed by or sent to other computer users.

## The Facts

Defence counsel has admitted that the images and texts in question are obscene and pornographic as charged; however, he argues that the Crown has proved neither distribution in fact by his client, nor distribution as defined by law.

The case commenced with a voir dire regarding certain statements made to police by the accused, which were ultimately ruled admissible. They occurred during, and immediately after the execution of a search warrant on October 21, 1993 at his home at 2024 Millway Gate in Mississauga, where he was found lying on the bed in his upstairs bedroom. His computer system, a brown brief case filled with documents, catalogue pictures and sketches, and other items were seized in the bedroom.

The investigation which commenced in mid-July 1993, and lasted through mid-October, was led by Detective Constables Sweeney and Sutherland, and conducted largely by computer specialist Kevin Blumberg. Mr. Blumberg was engaged specifically for the purpose of reviewing materials made available to computer users via computer bulletin boards and locating items which were obscene and/or in the nature of child pornography or hate literature. He did so by using a directory of bulletin boards called "Toronto Computes", contacting those which appeared to provide adult items and identifying images and texts which appeared to fall within the categories described above.

Mr. Blumberg explained that in order to access a bulletin board, he would enter a number, and then fill out an application to use the bulletin board, which would be accepted or declined by the manager, known as the systems operator. Mr. Blumberg would then scrutinize the available files, and "download", or replicate certain files or catalogues of file descriptions which he thought would be of interest to the police. These select items would be stored on the hard drive, or permanent storage area of his computer.

In exchange for receiving the "downloaded" material, Mr. Blumberg, using the alias "Romulus", would provide a file as consideration, usually being one-third or one-quarter of the size of the downloaded file. The file is delivered by a process known as "uploading", or transferring from a personal computer to another computer system such as a bulletin board. He described the programs he provided as "general" in nature. In other relevant testimony he stated that many of the files which he downloaded were identifiable by the terms "GIF" (Graphic Interchange Format) indicating a particular type of format for graphics or pictures, and "ZIP" indicating textual information that is compressed and must be brought back to its original state with a particular program.

After generally describing the way in which computer bulletin boards are accessed, Mr. Blumberg testified as to how on August 16, 1993 he contacted "the Gateway" -- the major site of the obscene and pornographic material allegedly "uploaded" or distributed by the accused. His application was accepted by the systems operator, identified as one Michael Keating, who

verified Mr. Blumberg's identity and age by calling him back personally. Verification of his access thereafter was done by a computer driven system. The bulletin board was identified as containing adult files GIF, the "Cosysop" (co-systems operator) was identified as "The World Famous Recent Zephyr", the alleged code name of the accused. He then examined a catalogue of available files, containing a brief description, date of creation, and date of uploading, and selected seven for downloading and storage to be reviewed by the police.

Regarding the files listed in count 2 of the information, Mr. Blumberg testified that on August 20, 1993, he downloaded YNGFUN 10.ZIP and YNGFUN 11.ZIP, both of which were identified as productions of RECENT ZEPHYR, copyright 1993. He testified that both text files were seen on the Gateway as well as other bulletin boards.

In further evidence addressing the second count, Mr. Blumberg testified that the graphic, or pictorial files Moppet 1.GIF through Moppet 4.GIF were downloaded by him on September 20, 1993, all exhibiting on screen a printed statement that they were uploaded by Recent Zephyr on dates in August and September, 1993. A sample description of MOPPET 01 was "A Gateway original GIF"! Two with girls fully nude and a younger one without panties, and just pulling off the top! He testified that all remaining files specified in count 2 of the information were seen on either the Gateway or another bulletin board such as "Scruples", and all were identified as having been uploaded by Recent Zephyr on August 3, 1993. Only certain ones were downloaded and stored, due to time and space limitations.

Regarding the files of allegedly obscene pictures specified in count 1, Mr. Blumberg testified that they were all described as having been uploaded onto the Gateway by Recent Zephyr on dates in August 1993. Certain files contained a limited amount of graphic text such as "Guy and girl have sex and piss on each other in the series", in file PDRNKRI.GIF. Again, only certain files were downloaded and stored by Mr. Blumberg. Other files purportedly uploaded by Recent Zephyr were seen on many bulletin boards, and sometimes identified as associated with the company names "Yes Software" and "UCP Software".

In other evidence in chief, Mr. Blumberg described how a device called a scanner, seized in the accused's bedroom, can be stroked across an image such as a picture of a child from a catalogue in order to reproduce it on a computer file. Once stored in the computer, other software could be used to make changes such as removing clothing and "drawing in" body parts including genitalia. In cross-examination, Mr. Blumberg acknowledged that even if images were uploaded by a subscriber to the bulletin board, the systems operator could make the alterations described above. In addition, the operator could insert the words "uploaded by Recent Zephyr", without his knowledge. Furthermore, an imposter could upload materials onto the bulletin board in the name of another subscriber, using his telephone number without his knowledge; however, in testimony which was less than crystal clear, Mr. Blumberg explained that a system of call back verification may or may not pick up on the false identity of the uploader.

Following Mr. Blumberg, Detective Constable Sweeney gave testimony concerning all items seized from the bedroom of the accused and the alleged links between those items and the files viewed on the bulletin boards and specified in the information. Defence counsel does not dispute that these items were in his client's possession, but argues that most of them are hearsay in

nature, and therefore cannot be used to link his client to the obscene and pornographic material. I will now describe each item by exhibit number.

Exhibit 1 -- Brown briefcase from closet containing documents.

1(a) -- Catalogue picture of three children in bathing suits. The Crown argues that it is a definite match to ex. 1(c) on argument, the picture labelled "Moppet" 04.GIF, viewed on the Gateway Bulletin Board, except that the girls' clothing has been removed;

1(b) -- catalogue picture of children in a wading pool, which the Crown argues matches ex. 1(b) on argument, except that the boy has been moved on top of the girl and the clothing removed;

1(c) -- a scrapbook of newspaper articles concerning sexual assault trials and pending child pornography legislation;

1(d) -- a piece of paper with catalogue cutouts, a drawing of a naked child and man, and a drawing of a naked girl being held in an obscene pose by a boy. The Crown argues that the latter drawing matches ex. 9(d), a printout of an image which was located on a bulletin board and identified with the markings "Forestwood Kids", "Recent Zephyr", and "RZ" (see testimony of Detective Sweeney referred to below). The same image and a series of images which seem to be stages in the development of Exhibit 9(d) were located on the accused's computer are described below.

1(e) -- a manila folder labelled "Recent Zephyr's Software and Such". The folder contains three printouts of a lewd story entitled "The Forestwood Kids", by Y.E.S. (youth entering sex), referring to child characters such as Jammie, Alison, Adam and Courtney, and a scribbled draft of a lewd story entitled YNGFUN\*.ZIP. The story was also seen by Detective Sweeney on the Gateway;

1(f) -- a hand-drafted directory of names, addresses and phone numbers of children in Mississauga, including L.P, C.H, J. who lives on Forestwood Drive, E. and E.;

1(g) -- an envelope with "Lots of Young Fun" written on the outside, and a draft lewd story inside referring to children's names seen in ex. 1(e) and (f); and with the words "Ultimate Connection BS" at the top of one page;

1(h) -- an envelope with "Lots of Young Fun", "rough outline", "story series" and "Years of fun (YRSFUN\*.ZIP), continued from series one", written on the outside, and draft suggestions for a lewd story inside;

1(i) -- a sheet of scribbles referring to four of the files specified in count 2;

1(j) -- a baby book with photos cut out;

1(k) -- 2 pages of baby photos;

1(l) -- a chart referring to pages and sizes;

2-7 -- Computer, related parts, and scanner

The brown briefcase also contained a variety of other catalogue pictures and sketches of children, some of them nude or in lewd poses, as well as a sheet of paper listing the names of various bulletin boards under the title "A Recent Zephyr Story" and instructions as to how to access files by number.

The other relevant series of exhibits consists of printouts of items located in the storage area of the accused's computer known as the backup tape, all of which defence argues are inadmissible hearsay, Detective Sweeney explained that these materials are moved from the hard drive of the computer to the tape for storage, or use as a "backup". They can be described briefly as follows:

9(a)

Twenty-four pages of notes of conversations concerning the law of pornography and sex between adults and minors, which were also seen by Mr. Blumberg on the Gateway bulletin board. The participants are recorded as REcent Zephyr, Andy Dabydeen and "Magic"; the recorded dates are in September, 1993 and the pages are headed with the words "BBS: the Gateway". Defence counsel argues that this document is hearsay in nature;

9(b)

a two-page document entitled "UCP Code BBS and software presents a Recent Zephyr History Note", a summary of how the writer developed a series of computer text and image files, such as "Forestwood Kids" and "Moppett", using computer upgrading devices such as a scanner. Defence again argues that all materials are hearsay;

9(c)

a document entitled REcent Zephyr's Master File list, a list of all the files referred to in count 2, and a brief description of each;

9(d)

the image of a naked child and man described in 1(d) above, which Detective Sweeney stated was found on the accused's computer and a bulletin board system called "Scruples";

9(e)

as described in 1(d), a series of images which appear to be steps in the creation of 9(d). One image contains the name J. Pecciarch, (c) 1992, in signature form in the lower right-hand corner;

9(f)

a two-page document entitled "Thoughts", marked "written by Recent Zephyr". A brief text details how he developed and uploaded to the BBS some of the files listed in count two, followed by a list, date and brief description of the files;

9(g)

a document entitled "Recent Zephyr Software", inviting users to disperse or download his stories, and describing new files;

9(h)

a document entitled "Recent Zephyr's listings and notes, again a list and description of files including certain ones enumerated in count two, followed by a description of certain characters including Jammie, Eddie, Alison, Melissa and Leanne. The address of some characters is listed as "Forestwood".

During argument, copies of four images from the Moppett files located on the bulletin board were filed with the courts as exs. 1(a)-(d) on argument and compared to items in the accused's home. Each image contained pictures of one or more nude children, a brief accompanying text, the phone number of the "Gateway BBS", the words "recent Zephyr Scan" running across the side or top, and the word "Moppett" with the corresponding file number on the picture. Exhibit 9(d), a scene from the "Forestwood Kids" file which was also viewed on a bulletin board, also exhibits the fill name, the term "Recent Zephyr files", and the letters "RZ" in the corner in the form of a signature.

The other relevant seized evidence was filed as ex. 8, a 38-page document described by Detective Sweeney as a "user list" providing the names, addresses and telephone number of bulletin board users, their assigned security levels, and other information such as numbers of uploads and downloads. He pointed out that both Recent Zephyr and the accused are listed as users, with the same telephone number and the same address of "Mississauga". Recent Zephyr and Michael Keating, whose purported address is Don Mills, Ontario are both listed as having high security ratings. Defence counsel again contends that this document is hearsay.

The other relevant pieces of evidence to be considered are the statements of the accused following arrest. En route to the police station, the following conversation took place between the accused and P.C. Monette:

Q.

Officers have reason to believe you have uploaded some of this material. When a person uploads a program, is a person's name recorded as the sender?

A.

Sometimes.

Q.

Did you leave your name when some programs were uploaded?

A.

Yeah.

At the station, while walking towards an office to complete papers, Officer Monette reviewed a supplementary record of arrest and had the following conversation with the accused:

Q.

Now I know how you got into trouble. It says here that you are the Co Systems Operator on the Gateway bulletin board system - is that true?

A.

Yes.

Q.

How long have you been a Co-Sys-Op there?

A.

2 months.

Q.

Where is Gateway located?

A.

In Don Mills somewhere.

Q.

Have you met the Systems Operator at Gateway?

A.

No.

Q.

What do you get by being the Co-Sys-Op?

A. Nothing. I just lost my computer because of it.

Arguments

The Crown acknowledges that it must prove, as matters of fact (1) that the accused used the computer code name "Recent Zephyr" and (2) that the texts and images specified in the information were "uploaded" onto one or more bulletin boards systems by "Recent Zephyr", namely, the accused. Defence counsel argues that neither fact has been established, given that all documents and computer images, text or catalogues required to make such proof are hearsay.

As a matter of law, the Crown must establish that the uploading of files of texts and images onto bulletin board systems constitutes "distribution" as charged in the information. Defence counsel argues that it is not necessary to consider the issue of distribution, given that there is simply no proof of uploading by his client.

Count Two -- Distribution of Child Pornography

Proof that the Accused is Recent Zephyr

In my view, the fact that many documents in the accused's computer exhibit the name "Recent Zephyr" in a place where one would expect the name of the creator to be tends to indicate that the alias is his. These documents, all described in the "Facts" section above, include:

1. Exhibit 1(e) -- the manila folder containing storied called "Forestwood Kids", with "Recent Zephyr's Software and Such" written in the corner tab created for labelling;

2. Exhibit 1 -- the piece of paper in the briefcase listing the names of various bulletin boards and instructions for accessing files under the title "A Recent Zephyr Story";

3. Exhibits 9(b), (c), and (f)-(g), all narrative documents stored on the backup tape of the accused's computer which feature the name "Recent Zephyr" at the top and which address the creation and distribution of pornographic files by him;

4. Exhibit 9(a), again from the backup tape, being transcripts of conversations marked "From Recent Zephyr" to "Andy Dabydeen" or vice versa; and

5. Exhibit 9(d), from the backup tape, a pornographic image with the initials "RZ" and the words "Recent Zephyr files" in the lower right-hand corner.

Generally, documents found in the possession of the accused are admissible if relevant; they may show acceptance of the truth of the contents, and most likely will at least show knowledge of the contents: see P.K. McWilliams, *Canadian Criminal Evidence*, 3rd ed., at p.6:10310. The law is also summarized in Phipson on Evidence, 13th ed. (1982), para 21-09:

Documents which are, or have been, in the possession of a party will, as we have seen, generally be admissible against him as original (circumstantial) evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as admissions (i.e., exceptions to the hearsay rule) to prove the truth of their contents if he has in any way recognized, adopted or acted upon them.

Defence counsel argues that the documents could have been downloaded to his client's computer, without his knowledge; however, according to Detective Sweeney, the documents on the backup tape could not have arrived there without being directly accepted by the operator of the computer unless a special configuration of software was used, and no such configuration was located when the tape was seized by the police. Therefore, I find as fact that the accused knew he had documents stored in his computer containing reference to child pornography with the name Recent Zephyr in areas normally indicative of authorship or proprietorship, which fact contributes to the inferences to be discussed below.

In determining whether the accused is "Recent Zephyr", it is also necessary to consider the purported signature of the accused on one image which forms part of ex. 9(e), being according to Detective Sweeney a series of steps in the creation of ex. 9(d), a depiction of a man performing oral sex on a child. The image is titled "Forestwood Kids Part 3". As noted above, 9(d), located on both the backup tape and according to Detective Sweeney on the "Scruples" bulletin board, had the name "Recent Zephyr" in the corner; the image in 9(e) has the signature "J.Pecciarich" (sic). Although usage of the signature to strictly indicate authorship would violate the hearsay rule, the fact that it is in the same place as the name "Recent Zephyr" on a matching image allows me to consider it as a piece of original, or real circumstantial evidence that J. Pecciarich and Recent Zephyr are one. Furthermore, like all of the "Exhibit Nine" documents, his possession indicates knowledge -- in this case, knowledge and even complicity in being portrayed as the author of a piece of pornography. It is logical to assume that someone would not leave his purported signature or name on illegal material stored on a backup tape if he were not somehow connected to it, or even involved in its creation.

In determining if the accused is Recent Zephyr it is also necessary to look at evidence establishing that he is the creator of some of the pornographic files enumerated in count 2. Regarding ex. 9(d), the image is located on both the accused's backup tape as well as a bulletin

board, and as stated above its development as a "work in progress" is evidenced by ex. 9(e) from the backup tape. According to Detective Sweeney, ex. 1(e), found in the accused's briefcase, is the original drawing which became the computer image, and examination of it tends to confirm the likeness. Mr. Blumberg explained how images such as this, being a drawing of central body parts attached to the head and legs from a catalogue picture, can be placed on a computer with a device known as a scanner, and further altered with software. Given that the accused was found in possession of a scanner, ex. 6, and given that the drawing matches the images found on the backup tape and the bulletin board, it is reasonable to conclude that he created exs. 9(d) and (e), which, as detailed above, demonstrate the names "Recent Zephyr" and "RZ, as well as "J. Pecciarch". It is also reasonable to conclude that he created the narrative entitled "Forestwood Kids" found in the manila folder, given that it is part of the same file containing the image ex. 9(e) which was viewed by Detective Sweeney on the Gateway.

In my view, original evidence also establishes that the accused created the "Moppett" files enumerated in count 2. Mr. Blumberg testified as to how ex. 1(c) on argument, a computer image of two naked girls, could have been a catalogue picture transported to computer by the scanner, with the clothing removed and genitalia added by computer software. Exhibit 1(a), a catalogue picture of little girls wearing clothes, found in the accused's briefcase was stated to be identical to the pornographic computer image except for the clothing. A cursory viewing confirms Mr. Blumberg's evidence in this regard. The nude image downloaded by him from the Gateway Bulletin Board, has the words "Recent Zephyr Scan" across the top, and the word "Moppett" at the bottom. The logical inference to be drawn is that the accused created this image, and that the name "recent Zephyr" stamped on the computer image is therefore associated with him and with the "Moppett" series.

Mr. Blumberg also reviewed ex. 1(b) on argument, another "Moppett" series photo of a nude boy on top of a little girl in a pool, with the words "Recent Zephyr Scan" beside it. He explained how ex. 1(b), a catalogue photo of children in a pool, found in the briefcase, could have been altered to create the final image. In my view, his evidence and my own observations confirm that the accused created this image which is strongly linked to the name "Recent Zephyr". Exhibits 1(a) and (d), other pornographic images from the Gateway, also feature the words "Moppett" and "Recent Zephyr Scan", indicating a link suggestive of creation by Recent Zephyr. Again, in my view, evidence that the accused created pornographic images featuring the name "Recent Zephyr" is strong evidence that they are one and the same person.

In considering ex. 8, the bulletin board user list, however, I agree with defence counsel that it cannot be used to show that the accused and Recent Zephyr have the same telephone number and city of residence. Such use would clearly be for the truth of the contents, and thus would violate the hearsay rule.

Defence counsel argues that proof of authorship is not possible unless the documents are used in violation of the hearsay rule -- namely to prove the truth of their message that the creator is "Recent Zephyr". However, rather than for truth, I have used the documents as pieced of original circumstantial evidence that the accused and the name "Recent Zephyr" are so frequently linked in a meaningful way as to create the logical inference that they are the same person. A similar exercise was undertaken in *R. v. Bastien* (1968), 20 C.C.C. (2d) 562, a decision of the British

Columbia County Court in which an intercepted parcel (ex. 1) exhibiting the name and return address of the accused was admitted as proof that he lived at the address and sent the parcel containing stolen money. A pad which contained an imprint of the writing on the parcel, ex. E, was also admitted. At pp.565-67 the judge states:

The fact that "F.Cote, 831 Hamilton Street, Vancouver", appears on the outside of ex. I is evidence from which a jury could conclude this to be a return address and the identity of the sender or mailer was Cote, who was in possession of the five \$100 bills contained in ex. I.

The submission concedes the hearsay rule, but although not so expressly stated by Crown counsel, is founded on the proposition that, having regard to evidence adduced and the circumstances of the case, exs. E and I, respectively, are original, circumstantial, evidence, not hearsay, and, therefore, admissible.

... it is my opinion that the registered package or parcel, ex. I, intercepted in mail, constitutes some evidence capable of inference or conclusion that a name and address endorsed thereon is that of Cote and that Cote was the sender or mailer and had possession of Ex. I and its contents.

Admissibility thereof does not infringe upon the hearsay rule since exs. E and I, respectively, are not admitted to prove the truth of the matters stated thereon or therein; that each constitutes original, circumstantial, evidence tending to link, connect or identify Cote with possession of ex. I and, in particular, the five \$100 bills enclosed therein. Each has, therefore, a limited evidentiary use and probative value, as indicated above.

I also rely upon the recent decision of the Supreme Court of Canada in R. v. Evans, [1993] 3 S.C.R. 653, 85 C.C.C. (3d) 97, dealing with a statement made by an alleged robber to the vendors of the getaway car. The vendors testified that the purchase mentioned that he had a pregnant dog and worked in chain link fencing; and it was proven by other evidence that he had a pregnant dog and worked in chain link fencing. The majority of the court held that the statements were admissible merely for the fact that they were even made. At p.662 S.C.R, p.103 C.C.C., Sopinka J. states:

That being said, the statements still have some probative value as non-hearsay. Quite apart from the truth of the contents, the statements have some probative value on the issue of identity. On the issue of identity, the fact that certain representations are made is probative as it narrows the identity of the declarant to the group of people who are in a position to make similar representations. The more unique or unusual the representations, the more probative they will be on the issue of identity. I emphasize that the statements are not being used as truth of their contents at this stage.

In my view, the references to "Recent Zephyr" discussed above are admissible on a similar basis; namely, that, taken in their entirety and their context, they narrow or point stringly to the accused as the person capable of being "Recent Zephyr". Although previously reviewed, the references to the name which point to the accused should be summarized as follows:

(1) Pornographic images from the "Moppett" series, downloaded from the Gateway and referred to in count two, which feature the name Recent Zephyr.

(2) documents containing narrative from the backup tape of his computer which he is deemed to know about, and which feature the name Recent Zephyr in a position usually designating authorship;

(3) a pornographic image on his backup tape, labelled Forestwood Kids 3 which features his purported signature on one copy and the name Recent Zephyr on another copy;

(4) a file folder in the accused's possession, containing lewd stories, labelled in pen "Recent Zephyr Software". The stories bear the same title as the "Recent Zephyr" image referred to in (2) above -- "Forestwood Kids".

Recently, the Ontario Court of Appeal in the decision of R. v. Morrissey (unreported, March 14, 1995) [now reported ante, p.514] summarized the law related to the drawing of inferences as follows [p.530]:

A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonable and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in R. v. White (1994), 89 C.C.C. (3d) 336 at p.351 (Nfld, C.A.):

These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

In applying this principle, I reiterate that substantial documentary evidence in the possession of the accused and on bulletin boards points to him as "Recent Zephyr". This evidence, combined with testimony of Mr. Blumberg that most users of bulletin boards have code names or aliases, and the fact that all of the documents seized from his home, described in the "Facts" section, demonstrates that he is generally a creator of child pornography who therefore would have need of an alias leads to the rational conclusion that the accused and Recent Zephyr are one and the same person.

#### Proof that Recent Zephyr uploaded the Files

Having found that the accused used the name "Recent Zephyr", I also conclude that the documents on his backup tape purportedly authored by him are his creations and are as such admissions that he uploaded the files enumerated in count 2. To suggest, in all the circumstances, which they were created by an imposter, but knowingly stored by him on a backup tape is in my view conjecture. The admissions can be summarized as follows:

(1) Exhibits 9(f) and (c), lists of files created by him which according to the text he intended to deliver to bulletin boards. The files in count 2 were all ultimately located by Mr. Blumberg on bulletin boards, and are found on the lists.

(2) Exhibit 9(g), a statement of Recent Zephyr indicating his intention to have his "software", "files", and "stories" distributed at no cost.

When determining who uploaded the files, these admissions must be considered along with the following additional evidence:

(1) His admission to the police that he left his name when some programs were uploaded, and that he was the "Co-Sys-Op" at the Gateway bulletin board. Although I agree with defence counsel that the admissions are not totally clear, and that the term "Co-Sys-Op" was not well explained, the first statement leads to an inference that he uploaded files, and the second establishes a clear

link to the Gateway where some of his products were proved to be found. In considering the term "Co-Sys-Op" on such a limited basis, I need not deal with defence argument that it should have been defined by an expert, or with the effect of his failure to object until the time of his submissions;

(2) His possession of a Gateway "user list", exhibit 8, which when considered not for its truth but for the fact of possession indicates a strong link to the Gateway;

(3) Evidence that he is the creator of "Moppett" and "Forestwood Kid" files which were found on the Gateway and other bulletin boards, which was reviewed above;

(4) Other exhibits, which lead to an inference that he is a creator of the type of child pornography found with his name on it on bulletin boards. These include 1(f), the catalogue of characters who appear in the Forestwood Kid stories found in the "Recent Zephyr" manila file, and in 9(h) a list of his files; 1(a) and 1(b), story drafts marked with file names including "Young Fun", and the catalogue cutouts and lewd drawings contained in his briefcase; and

(5) Evidence of his fascination with child pornography, as exhibited (a) in his discussion with Andy Dabydeen found on his computer, and at the bulletin board, and (b) the scrapbook of newspaper articles on the subject, as well as articles about sexual assault cases and related legalities.

Defence counsel argues that all the evidence reviewed may well indicate that the accused created child pornography and even some of the files enumerated; however, he contends that uploading is not proved, as despite the evidence referred to above an imposter could have uploaded the material under his name, and/or downloaded materials to his computer. This position, however, is not borne out by the evidence. As stated earlier, Detective Sweeney clarified that such downloading could not occur without his knowledge, unless special software was configured, and no such materials were located. Although Mr. Blumberg admired [sic] that uploading by an imposter was a remote possibility, it is not a suggestion genuinely supported by evidence, given the absence of any indication that the materials created by him were transmitted through a third party. The law in this area is summarized in *R. v. McCrum* (1974), 21, C.C.C. (2d) 343 at pp.349-50, 9 N.B.R (2d) 666 (C.A.):

It is firmly established law that conclusions or references based on facts, established by evidence only, can be considered in applying the rule. Possible explanations based on conjecture or assumption, not supported by the evidence, but advanced as mere possibilities in argument should not be considered by the Court: see *Wild v. The Queen*, ... [1971] S.C.R. 101 at pp.110-1, wherein Martland, J., stated [quoting from the judgement of Smith, C.J.A., in the Appellate Division, [1970] 1 C.C.C. 67 at p.72, 69 W.W.R 138]:

I agree with and consider that the following statement of Evans, J.A., for the Court of Appeal of Ontario in *R. v. Torrie* [[1967] 3 C.C.C. 303, [1967] 2 O.R. 8, 50 C.R 300], at p.306 is applicable to the case at bar. That statement is as follows:

<DL

With the greatest respect, I am of the opinion that the learned trial Judge misapplied the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, as to circumstantial evidence in that he based his finding of reasonable doubt on nonexistent evidence. In *R. v. McIver*, [1965] 1 O.R. 306 at p.309, [1965] 1 C.C.C. 210 at p.215, McRuer, C.J.H.C., said:

The rule (in *Hodge's Case*) makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence and the conclusions alternative to the guilt of the accused

must be rational conclusions based on inferences drawn from proven facts. No conclusions can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.

The statement was approved on appeal to this Court, [1965] 2 O.R. 475, [1965] 4 C.C.C. 182, 45 C.R. 401, and an appeal therefrom to the Supreme Court of Canada was dismissed [1966] S.C.R. 254, [1966] 2 C.C.C. 289, 48 C.R. 4.

I recognized that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negate every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

I do, however, agree with defence counsel that the statements from the bulletin "uploaded by Recent Zephyr", accompanied by a date in August or September 1993, are pure hearsay and therefore not evidence of uploading or of the date specified.

The Crown argued that, given the other admissible evidence of uploading, the statements "uploaded by Recent Zephyr" have probative value and should therefore be admitted for their truth. Although not specifically referred to by him, the second ratio in R. v. Evans, supra, lends some support to this theory, in providing for a two-stage test for admissibility of declarations of the accused. The test is described by Sopinka J. as follows [pp. 668-69 S.C.R., pp.107-08 C.C.C.]:

If there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. While the contents of this statement may only be considered for the limited purpose to which I have referred above in the first stage, in the second stage the contents are evidence of the truth of the assertions contained therein.

Detective Sweeney, however, gave the following testimony concerning the statement "uploaded by Recent Zephyr", as it appeared along with the files on the bulletin board:

"Uploaded by RECENT ZEPHYR" is predominantly put on by the actual computer system itself automatically. So, you have no control over the particular message. It is changeable by the system operator or the co system operator but that would be an automatic product to put that on.

That testimony, in my view, is less than crystal clear and does not permit me to find on a balance of probabilities that the accused produced the alleged admission of uploading. In addition, I question whether the ratio from Evans referred to above is applicable to a case such as this, when the ultimate issue is whether or not the contents of the statement, namely, "Uploaded by Recent Zephyr", are true. In applying Evans, if I decided that the statement was that of the accused on only a balance of probabilities, I would then be permitted to consider whether it was true on a higher standard of beyond a reasonable doubt. Thus the analysis at the second stage would lead to the finding of guilt or innocence, despite the fact that the accused was proved to be the maker of the statement on the basis of non-hearsay evidence weighed only on the balance of probabilities. With all due respect, I question whether Evans was meant to provide for access to a statement for

its truth in this manner when the statement alone could lead to a conviction or acquittal, rather than simply forming part of a greater body of evidence for total consideration as was the situation in Evans.

It is my conclusions, however, that despite the inadmissibility of the phrase "uploaded by Recent Zephyr", the Crown has proved uploading of the files in count 2 by the accused beyond a reasonable doubt on the basis of the evidence summarized above.

#### Law Relating to Distribution

I agree with the Crown that the evidence of the uploading of the files onto bulletin boards, which the public can access through an application process, is clear evidence of distribution. The various cases referred to deal with the distinction between sale and distribution, making it clear that more than retail sale to the public is required for the latter charge: see *R. v. Householders T.V. & Appliances Ltd.* (1984), 20 C.C.C. (3d) 561 (Ont. Co. Ct.), affirmed loc. cit. at p.571 (Ont. C.A.). However, in this case the evidence of uploading by the accused along with his statements in exs. 9(b), (c), (b) and (f) about his intent to have them widely dispersed is clear evidence of intent to distribute.

#### Limitation Period

The Ontario Court of Appeal in *R. v. Sudbury News Service Ltd.* (1978), 18 O.R. (2d) 428 at p.433, 39 C.C.c. (2d) 1 at p.5, stated that distribution is complete upon delivery. By analogy, absent other evidence, distribution of computer files to a bulletin board is complete upon uploading. Given the inadmissibility of the statements proving the dates of uploading as found above, I must consider whether the Crown, having proceeded summarily, has proved by other evidence that the offence in count 2 occurred within six months of the laying of the charge as required by s. 786 of the Criminal Code, R.S.C. 1985, c. C-46.

In my view, ex. 9(c) makes it clear that the "Young Fun", "Kiddyeat", and "Moppett" files were created within six months of November 10, 1993, the date of the laying of the charge; they therefore must have been uploaded within the limitation period. As there is no admissible evidence of the date of uploading of other files, however, their distribution within the requisite time frame is not proved. I am unsure as to whether it is part of the Crown's theory that the accused's role as "Co-Sys-Op" made him a distributor during the relevant time frame; however, given the inadequate definition of this role, I cannot find that being "Co-Sys-Op" for two months prior to arrest helps to show that the uploading of all files was done by him six months before the charge was laid.

Count 2 will therefore be amended to read "between the first day of June, 1993 and the thirtieth day of September, 1993", to conform to the evidence, as allowed by s. 601 of the Code, made applicable to summary matter by s. 795. Such amendment is allowed unless timing is an essential element of the offence, which was not argued by defence and is not in my view the case here: see *R. v. B. (G.)* (No.1), [1990] 2 S.C.R. 3, 56 C.C.C. (3d) 161.

The accused will therefore be convicted on count 2, for the distribution of the Moppett", Young Fun", and "Kiddyeat" files only.

#### Count 1

Regarding count 1, the only evidence given concerning the files specified therein was Mr. Blumberg's evidence that they were viewed on bulletin boards, along with the inadmissible phrase "Uploaded by Recent Zephyr" on a particular date. As such there is no evidence of uploading by him, and therefore no evidence of distribution as charged. The accused is therefore acquitted on this count.