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THE INTERNET AND ITS LEGAL ENVIRONMENT: THE ANALYSIS AND PROSPECT OF CYBERLAW ON SEXUALLY EXPLICIT SPEECH

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ABSTRACT

THE INTERNET AND ITS LEGAL ENVIRONMENT:
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With the current explosive growth of the Internet, more users and the government are for regulation on on-line content, pornography or some undesirable material. Regulating the Internet, however, is not easy because the new medium of communication is creating complex legal challenges to each nation.

This thesis examines what globally permissible policy could be sought in the new future. Several nations already agreed that regulating the Internet respectively is not so effective and that they need some consensus for global policy.

Focusing on sexually explicit expression, I analyze U.S. on-line cases for some future criteria and direction which other nations also would take. Next, examining the developed nations' recent activities, I look for possible solutions to shield undesirable content and to protect the freedom of speech.

I concluded that nations are to head for technological remedies such as blocking software and rating system and that the PICS based rating system is promising because it has already gained support from big nations. A world-wide PICS based rating system might be more successful for this issue.

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I. INTRODUCTION

One technological advancement in communication that is generating unresolved legal problems is the Internet.[1] The Internet is a new form of medium of communication. It contains a wide range of content, ranging from the information of the real-time stock market, cooking recipes, to sexually explicit materials. People can instantly access vast amounts of information and communicate with each other. With the current dramatic rate of increase of Internet users worldwide, it will be social, educational, cultural, and economic influence.

The sudden emergence of the Internet as a means of global communication, combined with its explosive growth, has presented the international community with a dilemma.[2] Since nations are only beginning to understand the Internet in nature, the new medium of communication is creating complex legal challenges to each nation.

Some form of regulation on on-line objectionable content and Internet misuse has been sought to respond to concerns among users and governments. Sexually explicit expression, above all, is where all of today's regulatory efforts are directed.[3] Several nations -- notably United States and Germany -- have already implemented restrictions on sexually explicit content on the Internet. Due to the medium's unique nature, however, they have found difficulties and ineffectiveness in applying laws and general principles to the Internet. Difficulties in applying existing laws to cyberspace result from its non-geographic character. Laws are generally territorial.

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[1] Selin, Sean, Comment: Governing Cyberspace: The Need for an International Solution, 32 *Gonz.L.Rev.* 365, at 366 (1996/1997).

[2] Delacourt, John T., "Recent Development: The International Impact of Internet Regulation," 38 *Harv.Int'l L.J.* 207 (Winter 1997).

[3] Cate, Fred H., "Indecency, Ignorance, and Intolerance: The First Amendment and the Regulations of Electronic Expression," *J. Online L.* art.5, par.9 (1995).

This thesis examines the following questions: First, is the Internet a medium like a print medium or broadcasting? Because differences in the First Amendment standards applied to the media have been justified by the nature of each medium, it is important to answer the question. Second, are the present obscenity laws sufficient to handle crimes on the Internet against the government's anti-obscenity policy? I will examine U.S. on-line cases to find recent legal development and future criteria which enable a nation to prescribe rules for the Internet. Third, beyond U.S. legal and policy analysis, what globally permissible policy could be applied to sexually explicit speech in cyberspace? Most countries agree that some international consensus on regulating on-line communications is necessary to take action on the issue.

Chapter II addresses brief history of obscenity laws and the definition of obscenity in the U.S., and I examines medium-specific regulations on sexually explicit expression.

Chapter III addresses the first question, arguing that the Internet should not be characterized as a medium like broadcasting because it does not share any of the characteristics of broadcasting.

Chapter V addresses the second question. I will examine each judicial element required to find a violation of obscenity laws through on-line cases. I argue the government's effort to find some existing mechanism to punish violators against the anti-obscenity policy. By equating electronic communication with physical movement from one place to another, the government applies existing laws to the Internet.

Chapter V leads the discussion to international arena and addresses the third question. The international community discussed in the chapter, however, is limited. Although the developed countries guarantee freedom of expression and accept some form of pornography, if not obscenity, some countries will not accept

pornography no matter what. China, for example, has an ambitious vision as to the Internet. The Chinese government envisions a system oriented entirely toward business to serve as a tool to spur China's economic development.[4] The restrictions on expression which govern in other contexts continue to apply, especially with regard to the two forms of expression the government finds most odious: pornography and political dissent.[5]

My suggestions for some form of global policy on the Internet in the chapter, therefore, will serve the developed countries or other countries who share similar principles on sexually explicit expression and who look for common policy among the nations.

The conclusion is that governments of the world should back technology instead of regulation to block inappropriate on-line material, mainly by implementing blocking software and rating system. They should work on these systems because those are not technologically perfect as the Internet is rapidly expanding and frequently changing. To respond to concern of the free speech advocates, the government should not use the system for political material.

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[4] Delacourt, *supra* note 2, at 215.
[5] *Id.*

II. MEDIA AND OBSCENITY

While the U.S. constitution dictates that "Congress shall not make law ... abridging the freedom of speech ...",[6] the First Amendment guarantee of free speech does not extend to obscene material. This chapter seeks to examine the historical treatment of obscene material, starting with the definition of obscenity defined by landmark judicial decisions.

Brief History

American government has addressed sexual expression for more than a century. While legitimate government interests in partial prescription include the protection of juveniles, the protection of the privacy rights of unconsenting adults, and the protection of the public from the pandering of sexually explicit materials, the perceived tendency of obscenity to exert a corrupting influence and lead to antisocial conduct nevertheless remains an independent justification for a complete ban.[7]

Obscenity prosecutions in the U.S. at common law date back at least to 1815.[8] States enacted obscenity statutes beginning in 1821, and the federal government followed in 1842.[9] Following the Comstock Act of 1868 in New York,[10] Congress revised the Act to criminalize the use of mails to distribute

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[6] U.S. Const. amend. I, section 1.
[7] Burke, Debra D., "Cybersmut and The First Amendment: A Call for a New Obscenity Standard," 9 *Harv.J.Law & Tec* 87, at 101-02 (Winter 1996).
[8] Stepka, Donald T., Note: Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material, 82 *Cornell L.Rev.* 905, at 913 (May 1997).
[9] *Id.*
[10] 7 New York Stats. 309 (1868).

obscene materials in 1873.[11] By the twentieth century, thirty-one states had enacted statutes regulating obscenity.[12]

America in its early days imported *Hicklin* test[13] for obscenity from England. The *Hicklin* court defined obscenity as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds [that] are open to such immoral influences, and into whose hands a publication of this sort may fall."[14] The *Hickin* test "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons,"[15] and therefore created a very low threshold for finding material to be obscene.[16]

Not until the decision in 1957 in *Roth* case[17] did the United States Supreme Court establish, as a matter of federal constitutional law, a standard of obscenity, applicable in both federal and state courts, which rendered invalid any more stringent standards, whether statutory or judicial.[18] In *Roth*, an individual was convicted under the federal obscenity statute for mailing obscene materials through the U.S. mails.[19]

The Court rejected the *Hicklin* test completely and has ruled that material deemed to be obscene is not entitled to the constitutional protection. The Court

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[11] Ch. 258, 17 Stat. 599 (1873).
[12] Rommel, Sean F., 47 *Ark.L.Rev.* 393, at 396 (1994) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 104-05 (1973)).
[13] *R. v. Hicklin*, L.R.3Q.B. 360 (1868) (The prosecution of a man who sold pamphlets that were critical of the Roman Catholic Church and that the court deemed to be obscene, and therefore illegal).
[14] *Id*, at 371.
[15] E.H. Schopler, Annotation: Modern Concept of Obscenity, 5 *A.L.R.* 3d 1158, at 1163 (1996).
[16] Kabalka, Stephen G., "Constitutional Law - Obscenity - Application of Existing Obscenity Laws to Computer Transmissions," 64 *Tenn.L.Rev.* 215, at 218 (1996).
[17] *Roth v. United States*, 354 U.S. 476 (1957).
[18] E.H. Schopler, Annotation: Supreme Court's Development, Since Roth v. United States, of Standards and Principles Determining Concept of Obscenity, 41 *L.Ed.* 2d 1257, at 2a (1997).
[19] *Roth*, at 480. 18 U.S.C. 1461 (1955): "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

stated that "[t]he *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."[20] The Court adapted the obscenity test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[21] The focus was now on "the average person."

Justice Brennan, writing for the majority in *Roth*, also declared that "obscenity is not within the area of constitutionally protected speech or press." Brennan also distinguished obscenity from other types of sexual expression, which is constitutionally protected. Thus, pornography is protected unless it falls under the umbrella of child pornography or obscenity.[22]

Another Supreme Court decision established a limit on the government's power to proscribe admittedly obscene material.[23] In *Stanley v. Georgia*,[24] the Court held that the private possession of obscene material was not a punishable offense. "[T]he State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."[25]

In the landmark case for obscenity laws, *Miller v. California*,[26] the U.S.

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[20] *Id.* at 489.
[21] *Id.*
[22] *New York v. Ferber*, 458 U.S. 764 (1982). The Court found that child pornography, whether obscene or not, is in a special category, not tested under the *Miller* test, and out of the First Amendment protection.
[23] Goldman, Robert F., Note: Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications, 29 *Ga.L.Rev.* 1075, at 1096 (Summer 1995).
[24] *Stanley v. Georgia*, 394 U.S. 557 (1969).
[25] *Id.* at 567.
[26] *Miller v. California*, 413 U.S. 15 (1973).

Supreme Court established the modern standard for judging obscenity, based primarily on the *Roth* test. The *Miller* definition is the law with respect to what speech can be banned as being obscene and therefore unprotected under the First Amendment.

In short, the Court announced a three-step process to determine whether material is obscene. The fact-finder should determine: "whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest"; "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[27] The term "prurient interest" has been defined as relating to "material having a tendency to excite lustful thoughts."[28]

The Court further stated that when triers of fact are asked to decide whether "the average person, applying contemporary community standards," would consider certain materials "prurient," the community was not national. That is because "[t]o require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility.[29]

The Court has not left the *Miller* test for obscenity undebatable. In *Hamling*,[30] the Court held that the community standards of the *Miller* test are of the community where the jury is selected and that a juror in an obscenity case can draw on his knowledge of the community which he comes.[31] In a 1987 plurality opinion, the Supreme Court used a reasonable person standard, not the community

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[27] *Id*, at 24.
[28] E.H. Schopler, *supra* note 19, at 3a.
[29] *Miller*, at 30.
[30] *Hamling v. United States*, 418 U.S. 87 (1974) (The federal conviction of the mailer of an obscene brochure advertising what was purported to be an illustrated edition of the Lockhart Commission Report, which was itself declared obscene).
[31] *Id*, at 104-05.

standards to determine the serious value of the work.[32] Many lower federal courts have also limited the Supreme Court's holding in *Miller*.[33]

Medium-Specific Regulations on Sexually Explicit Expression

Sexually explicit speech is categorized into "obscene speech" deserving no First Amendment protection, and "indecent speech" which is constitutionally protected speech.

Although indecent speech has constitutional protection, the government may restrict it. The government's compelling interest in protecting minors from harm justifies restriction of such speech. The government, thus, may restrict minors' access to "sex material" that is not obscene to adults.[34] However, since the adult's right is involved, the least restrictive means available must be developed in achieving the interest. The government often found the way by having directed their attention to the nature of media. Decisions also reflect the nature of the media.

Thus, medium-specific regulations exist which restrict sexual material. "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."[35] Attention to difference has resulted in as many First Amendment standards for media as there are identifiable media forms.[36]

I will examine what First Amendment standards apply to each medium when it comes to the government's regulation on sexual speech. A brief examination of regulations in broadcasting, cable television, telephone, and satellite television would be a useful indication to understand the Internet regulation.

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[32] *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (introducing reasonable person standard for determining value component).
[33] Kabalka, *supra* note 16, at 223.
[34] *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).
[35] *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 386 (1969).
[36] Lively, Donald E., "The Information Superhighway: A First Amendment Roadmap," 35 *Boston College L.Rev.* 1067 (September 1994). The print enjoys the most constitutional protection, broadcasting the least, and other media fit somewhere between.

BROADCASTING AND THE FIRST AMENDMENT. The legal framework of broadcasting has been different from that of the print media, though the *Miller* test for obscenity also applies to broadcasting in the same way as the print.[37] The following two theoretical bases have justified the government regulation of the broadcasting media: often called "spectrum scarcity" theory[38] and an official sense of the pervasiveness and unique accessibility of the broadcast medium to children.[39]

The distinct treatment of broadcasting has been justified long with the "scarcity" rationale. This rationale was affirmed in *NBC v. United States* in 1943.[40] The issue was whether the Federal Communications Commission (FCC) would have regulatory powers beyond the engineering and technical aspects of regulation of radio communication.

The Court employed the spectrum scarcity to justify that the commission's task was not limited "as a kind of traffic officer" of the airwaves, but "[the act] puts upon the commission of the burden of determining the composition of that traffic."[41] Justice Frankfurter, writing the opinion of the Court, concluded that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[42]

During the early days of radio, there was not an adequate mechanism

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[37] The key statute used by the FCC to regulate broadcast indecency and obscenity is 18 U.S.C. 1464.

[38] See *Red Lion*, 395 U.S. 388. "[I]t is idle to posit an unbridgeable First Amendment right to broadcast...[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate."

[39] See *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 1281 (1992).

[40] *NBC v. United States, CBS v. United States*, 319 U.S. 190 (1943).

[41] *Id*, at 215-16.

[42] *Id*, at 226.

for allocating that portion of the electromagnetic spectrum suitable for broadcasting.[43] Frankfurter said in *NBC*, "The result was confusion and chaos. With everybody on the air, nobody could be heard."[44] The situation led Congress to enact a comprehensive radio law. The Radio Act of 1927[45] created the Federal Radio Commission, later changed to the Federal Communications Commissions by the 1934 Communications Act, to endow the commission with wide licensing and regulatory power. Understanding of the broadcast spectrum as finite has resulted in regulation marked by basic licensing requirements and public duties.[46]

Modern constitutional review continues to use the scarcity premise to perpetuate broadcasting's subordinate status. The Court reaffirmed that "[t]he justification for our distant approach to broadcast regulation rests upon the unique physical limitations of the broadcasting medium."[47] Justice Kennedy for the opinion of the court said, "Although courts and commentators have criticized the scarcity rationale since its inception, we decline to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here."[48]

It was in 1978 that "indecent speech"[49] deemed to be sanctionable by the FCC, and when the Supreme Court announced the second rationale as a new justification for distinct treatment of broadcasting.[50] The case arose from a New York afternoon radio broadcast of George Carlin's famous satiric monologue entitled "Filthy Words." The FCC found that the repetitive use of certain words

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[43] Watkins, John J., "Lawyer Advertising, the Electronic Media, and the First Amendment," 49 *Ark.L.Rev.* 750 (1997).
[44] *NBC*, at 212.
[45] Its successor was the Communications Act of 1934. The act was amended several times over the years, to be the Telecommunications Act of 1996.
[46] Lively, *supra* note 36, at 1070-71.
[47] *Turner Broadcasting Sys., Inc., v. FCC*, 114 S.Ct. 2445; U.S.Lexis 4831, at 28 (1994).
[48] *Id.* at 30.
[49] The FCC defines indecent speech as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *FCC v. Pacifica Foundation*, 438 U.S. 726, 731-32 (1978) (quoting *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975)).
[50] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)

referring to excretory or sexual activities or organs as "patently offensive," though not necessarily obscene, noting that they were broadcast at times of the day "when there is a reasonable risk that children may be in the audience."[51]

The Court held, expanding the FCC's authority to regulate "indecent" programming as well as obscene programming, that the broadcast media would receive the most limited First Amendment protections with two reasons:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warning cannot completely protect the listener or viewer from unexpected program content.

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although [a] written message might [be] incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. ... The ease with which children may obtain access to broadcast material ... amply justify special treatment of indecent broadcasting.[52]

The Court, however, did not authorize a ban on all indecent transmissions, but merely allowed the government to channel indecent speech, considering such

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[51] 56 F.C.C.2d, at 98.

[52] *Pacifica*, at 748-50.

variables as the time of the broadcast, and the content of the program.[53] Recent congressional regulation is an example of channeling indecent speech at daytime. The D.C. Circuit approved a congressional ban on indecent television programming between six o'clock in the morning and ten o'clock in the evening.[54] The indecent programming is protected in other context, late at night. In addition to the time channeling, Section 551 of the Telecommunications Act of 1996,[55] "Parental Choice in Television Programming," will require a V-Chip on all television sets manufactured after a still-to-be-determined date, no earlier than 1998.[56] This chip, based on a newly created ratings system in development, will all parents to block television programs which they feel are "inappropriate" for their children.

In subsequent cases, the second of theses considerations - protection of children from sexually oriented information - has emerged as the most significant.[57] The following
chapters also see that the potential effect on children by broadcast media as well as new media such as cable and the Internet has been of particular concern.

CABLE TELEVISION. Cable television was originally known as Community Antenna Television ("CATV"). Cable television is essentially a system which delivers programs to consumers through cable or optical fibers which enter the consumer's residence or business and are directly connected to the television.[58] Unlike broadcasting where viewer receives only what the broadcaster chooses to

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[53] *Id*, at 747. "It is a characteristic of sexually explicit speech ... that both its capacity to offend and its 'social value' ... vary with the circumstances. Words that are commonplace in one setting are shocking in another."
[54] *Action for Children's Television*, 58 F.3d 654 (D.C. Cir. 1995) (en banc).
[55] Pub.L. No. 104-105, 551, 110 Stat. 56, 139-42 (1996).
[56] *Id*, 551 (c).
[57] Watkins, *supra* note 43, at 757.
[58] *Turner*, at 627-28.

transmit, cable systems allow subscribers to select from various plans of cable services.[59]

Whereas cable operators once carried only broadcast signals, since the late 1970s and 1980s, several independent cable programmers have been formed.[60] In recent years, cable operators have increased profits by paying for the signals of independent cable programmers.[61]

The ability of cable operators to control program menu has generated legislative and judicial concern with the potential for market abuse that might impair the free flow of information.[62] Its steady increase in subscribers added more concerns. In fact, the number of cable subscribers has been increasing to the point that industry observers confidently predict a 78-percent saturation by the turn of the century.[63] Federal regulation under the FCC was initiated based on the concern.

The FCC began to regulate cable television ownership in the 1970s. Over the years, the cable television industry has grown and encountered increasing government regulation.[64] The FCC and the broadcasting industry argued that cable's impact on broadcasting justifies its regulation. The U.S. Supreme Court supported the argument and ruled that the FCC had authority to regulate cable to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[65]

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[59] *Id*, at 629.
[60] Bhagwat, Ashutosh, "Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture," 74 *N.C.L.Rev.* 141, at 146 (November 1995).
[61] Wu, Angela E., Comment: Spinning a Tighter Web: The First Amendment and Internet Regulation, 17 *N.Ill.U.L.Rev.* 263, at 277 (Spring 1997). The independent programmers are such as MTV, H130, the Discovery Channel, CNN, and C-Span.
[62] *Turner*, 114 S.Ct. 2445, 2466 (1994).
[63] Brown, Rich, "Penetration to Hit 78% by 2000," *Broadcasting*, at 10, June 8, 1992.
[64] Bhagwat, *supra* note 60, at 150-53. Some examples of cable legislation are the Communications Act of 1984 and the 1992 Cable Act. 47 U.S.C. 531-532 (1994).
[65] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

The first major step in cable legislation occurred with the Cable Communications Policy Act of 1984 ("1984 Act").[66] The act established a uniform national policy for broadband telecommunications. Many of the provisions have been amended by the Cable Television Consumer Protection and Competition Act of 1992.

One area of the 1984 cable regulation dealt with obscenity and indecency. Though the federal legislation has not been the object of much litigation, cases arose from state and local statutes or ordinances aimed at restricting obscene or indecent cable programming. Largely reflected in the Supreme Court's *Pacifica* decision,[67] the effort sought to regulate cable "indecency" by transplanting the principles of the regulation of broadcast indecency. In *Cruz v. Ferre*,[68] the Eleventh Circuit Court of Appeals clearly denied the principle of pervasiveness and easy access to children. The Court decided that the broadcast model derived from *Pacifica* did not apply to cable television. The court's reasoning was based on the problems of applying broadcast indecency theories to cable television.

The court said that in *Pacifica*, it must be remembered, focused upon broadcasting's "pervasive presence," ... and the fact that broadcasting "is uniquely accessible to children, even those too young to read." The court introduced the district court's finding[69] that *Pacifica* was inapplicable to the facts above. A cable subscriber must make the affirmative decision to bring Cablevision into his home. By using monthly program guides, the Cablevision subscriber may avoid the unpleasant surprises that sometimes occur in broadcast programming. The ability

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[66] Wu, *supra* note 61, at 277.
[67] *Pacifica*, 438 U.S. 726.
[68] *Cruz v. Ferre*, 755 F.2D 1415 (11th Cir. 1985) (a challenge to the constitutionality of a Miami ordinance regulating the distribution of obscene and indecent material through cable television).
[69] *Cruz v. Ferre*, 571 F.Supp. 125 (S.D.Fla. 1983).

to protect children is provided through the use of a free "lockbox"[70] or "parental key" available from cablevision.[71]

The scarcity rationale also was decided inapplicable to cable television. In *Turner*,[72] a group of cable operators and programmers challenged the constitutionality of the must-carry provisions in the 1992 Cable Act.[73] The Court rejected the FCC's argument that cable television should be analyzed under the same First Amendment standard applicable to broadcasters, though *Turner* dealt primarily with the unrelated issue.

Without mentioning *Pacifica*, Justice Kennedy said in his opinion for the Court that "the justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."[74] Thus, the Court rejected the long-influential "spectrum scarcity" theory of broadcasting to be applied to cable television. Scarcity theory was inapposite "because cable television does not suffer from the inherent limitations that characterize the broadcast medium."[75]

There were indecency-related sections of the 1992 Cable Act[76]challenged in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC.*[77] At issue

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[70] Cable companies can provide "lock boxes" that can prevent children from viewing certain programs, while the recent reform of Telecommunications Act of 1996 mandates the broadcast to provide a similar service.

[71] *Cruz v. Ferre*, 571 F.Supp., at 131.

[72] *Turner*, 114 S.Ct. 2445 (1994). The "must-carry" requirements were upheld on remand. *Turner Broadcasting System v. FCC*, 910 F.Supp. 734 (D.D.C. 1995), prob.juris.noted, 166 S.Ct. 907 (1996).

[73] Pub.L. 102-385, 106 Stat. 1460 (1992 Cable Act or Act).

[74] *Id*, at 2456. Justice Kennedy elaborated this point. "Given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation."

[75] *Id*, at 2457.

[76] Petitioners sought judicial review of sections 10 (a), (b), and (c). The en banc Court of Appeals held that all three sections (as implemented) were consistent with the First Amendment.

in *Denver* case was Section 10 of the act, which sought to regulate the broadcasting of "indecent material" -- broadly defined as "programming that cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by community standards" -- on cable access channels. Two different kinds of access channels were sought to regulate: "leased access" channel and public, educational, and governmental channel ("public access" channel). A "leased access" channel is one which federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties.[78] About 10 to 15 percent of a cable system's channels would typically fall into this category.[79] A public access channel is one which, over the years, local governments require operators to create for public, educational, and governmental programming in turn for permission to install cables under city streets and to use public rights-of-way.[80] Between 1984 and 1992 federal law prohibited cable system operators from exercising any editorial control over the content of any program broadcast over either leased or public access channels.[81]

Congress enacted three sections in an effort to control sexually explicit programming over access channels. The first subsection, Section 10(a), limited leased access channel by permitting cable operators to ban "indecent" programs from leased-access channels.[82] Section 10 (b), applied to only "leased access" channel, further limited leased access by requiring cable operators to segregate

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[77] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374; U.S.Lexis 4261 (1996).

[78] *Id*, at 2381. As a result of the 1984 Act, operators retained their rights to select programming that would be carried on their systems, but commercial programmers unaffiliated with the cable operators were allowed access to the operators' audience through the implementation of leased access channels. Bhagwat, *supra* note 57, at 151.

[79] *Denver*, U.S. Lexis 4261, 14.

[80] *Id*, at 14-15.

[81] *Id*.

[82] See 1992 Act, (a)(2), 106 Stat.1486. "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

indecent programming ("patently offensive" programming) on a single channel. This channel could be unblocked only upon written request of a cable subscriber.[83] Like Section 10 (a), Section 10 (c) permitted operators to ban "indecency" on public access channels, but unlike leased access channel, there was not provision for segregating and blocking such programming.[84]

The Court concluded that the first provision that allowed cable operators to prohibit patently offensive or indecent programming on leased access channels is consistent with the First Amendment. But the second provision, which required cable operators to segregate

indecent programming on a single channel, violated the First Amendment. The third provision, applicable to public access channel, was unconstitutional. The Court found that the "segregate and block" provision was unconstitutional because the provision enabled some operators to regulate the content of their programming.

The plurality's decision relied on the balancing-interests test, saying that the problem was remarkably similar to the problem address by the FCC in *Pacifica*,[85] rather than employed the First Amendment scrutiny test. The Court in *Pacifica* found a governmental ban of a radio broadcast of "indecent" materials constitutionally permissible primarily because "broadcasting is uniquely accessible to children" and children were likely listeners to the problem there at issue -- an afternoon radio broadcast.[86] Likewise, Denver plurality found that "cable television

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[83] See 1992 Act, 10(b)(1). The provision tells the FCC to promulgate regulations that will (a) require "programmers to inform cable operators if the programming would be indecent as defined by Communication regulations"; (b) require "cable operators to place" such material "on a single channel"; and (c) require "cable operators to block such single channel unless the subscriber requests access to such channel in writing."

[84] 1992 Act, 10(c). The provision instructs the FCC to "enable a cable operator of cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

[85] *Pacifica*, 438 U.S. 726 (1978).

[86] *Id*, at 749-50.

broadcasting, including access channel broadcasting, is as 'access to children' as over-the-air broadcasting, if not more so."[87]

The Court found the second provision unconstitutional. The segregate provision and block requirements were restrictive when there was a less restrictive alternative -- the device of the "lockbox," which was used on ordinary channels.

The third provision, similar to the first provision, was unconstitutional on the ground that public access channels are different from leased access channels. Whereas the lessee has total control of programming during the leased time slot on a leased access channel, public access channels are normally subject to complex supervisory systems of various sorts, often with public and private elements.[88] Thus, the Court concluded that "patently offensive" programming would be less likely to appear on public access channels in the light of historical absence of "indecent" programs on public access channels.

The relationship between cable television and the First Amendment will be helpful to understand the new technologies including the Internet. The Internet has no bottle neck problem. The Internet is not controlled by an organization unlike cable television. Still some principles regarding cable television regulations would extend to the Internet. To be sure, the holding by the Court in *Turner* that cable television is freer from speech limitations than broadcasters was the key in the context of the Internet because the point in the past cases had to do with scarcity. The Internet is free from scarcity limitations.

TELEPHONY. The controversy involving the scope of first amendment protection for sexual explicit material has come in the form of "Dial-a-porn." While dial-a-

[87] *Denver*, U.S. Lexis 4261, at 32.
[88] *Id*, at 61-62.

porn services are a creature of the 1980s, the medium in its brief history has been the subject of much litigation and the object of a services of attempts at regulating.[89]

Dial-a-porns are telephone services that offer sexually explicit prerecorded and live messages to anyone with access to a telephone. A dial-a-porn provider operates as an "information access service," defined as "any telecommunications service which permits individuals to access a telephone number, and for which the caller is assessed by virtue of placing or completing the call, a charge that is greater than, or in addition to, the charge for the transmission of the call.[90]

Obscene and indecent telephone communications were originally prohibited by 47 U.S.C. 223 of the Communications Act of 1934. Immediately after dial-a-porn emerged in 1983, the statute was amended by adding subsection (b) to 47 U.S.C. 223 to permit indecent communications to adults but not to minors. The statute criminalized commercial transmission of sexually oriented communications to minors and required to promulgate regulations laying out the means by which dial-a-porn providers could screen out minors.[91] It would be a defense to prosecution that the defendant restricted access to adults only, in accordance with procedures established by the FCC.

The FCC attempted to promulgate regulations to restrict access to minors by modifying Section 223 three times. Initially, the FCC promulgated regulations that restricted hours of operation offering "dial-a-porn" services between 9 p.m. to 8 a.m. eastern time and that required credit card payment before transmission of message.

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[89] 492 U.S. 119.
[90] Woolfall, Brian D., "Implications of A Bond Requirement for 900-Number Dial-A-Porn Providers: Exploring the Need for Tighter Restrictions on Obscenity and Indecency," 30 *Cal.W.L.Rev.* 297 (Spring 1994).
[91] 223 (b)(2).

The time channeling provision was challenged by Carlin Communications Inc., a dial-a-porn service provider.[92] The court set aside the channeling provision, by first noting that the regulation does not warrant the special treatment espoused in some contexts. Since the regulation concerned a telephone service that requires the affirmative act of dialing on the part of the would-be listener, it could be distinguished from regulations directed towards public displays, unsolicited mailings, or other conduct "thrusting" sexual materials upon those who do not want them.[93] The court remanded to the FCC to examine other alternatives, concluding that the operating hours requirement was "both overinclusive and underinclusive" because it denied "access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours."[94]

In 1985, the FCC promulgated new regulations which continued to permit credit card payment and added a defense based on use of access codes or user identification codes instead of time restrictions.[95] The FCC rejected a proposal for "exchange blocking" which would block or screen telephone numbers at the customer's premises or at the telephone company offices. The court set aside the new regulations because of the FCC's failure adequately to consider customer premises blocking.[96]

In 1987, the FCC released a third set of regulations that reestablished access codes and added a scrambler devices as an alternative means by which dial-a-porn services could operate. Under the scrambling approach the service "provider would scramble the message delivered to carrier so that it would be

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[92] *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (1984). (Carlin I)
[93] *Id.* at 120.
[94] *Id.*
[95] It would be a defense to prosecution under 223 (b) if the defendant, before transmission of the message, restricted customer access by requiring either payment by credit card or authorization by access or identification code. 50 Fed. Reg. 42699, 42705 (1985).
[96] *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (CA2 1986) (Carlin II).

unintelligible without the use of a descrambler."[97] The court in *Carlin III*[98] found that the regulation requiring access codes, credit card payments, and scramblers to block minors' access to dial-a-porn was the least restrictive means possible, and accepted the FCC's argument that exchange-blocking devices were ineffective since "they are easily disabled by unplugging, or by reprogramming by the minors."[99]

Thereafter, Congress amended Section 223 (b) to completely prohibit all obscene and indecent interstate telephone communications amended, not only to minors but to adults from using the services. Sable Communications, an affiliate of Carlin Communications, challenged the prohibition.[100]

Upholding the District Court's decision, the Supreme Court affirmed the prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute insofar as it applied to indecent messages. The Court found no constitutional barrier to prohibiting the interstate transmission of obscene communications, but all the justices joined in finding that adults could not be denied access to indecent messages. "[T]he statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages."[101]

The Court rejected the FCC's attempt to rely on *Pacifica*,[102] The Court clarified that *Pacifica* did not involve a total ban on broadcasting indecent material and distinguished radio listeners from telephone callers, reasoning that affirmative

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[97] Murphy, Leah, Comment: The Second Circuit and Dial-A-Porn: An Unsuccessful Balance Between Restricting Minors' Access and Protecting Adults' Rights, *55 Brooklyn L.Rev.* 685, at 702 (1989).

[98] *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, cert.denied, 488 U.S. 924 (1988) (Carlin III).

[99] *Id*, at 554.

[100] *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

[101] *Id*, at 131.

[102] *Pacifica*, 438 U.S. 726 (1978). In *Pacifica*, the Court approved that the FCC has the power to regulate a radio broadcasting that is indecent but not obscene. But the Court in *Pacifica* was careful "to emphasize the narrowness of [its] holding. *Id*, at 750.

steps are required to receive telephone messages, while radio listeners are a "captive audience."

The law governing dial-a-porn has evolved to a point where both the FCC and the service providers seem at least temporarily content -- the regulations adequately protect minors without infringing on the First Amendment rights of adults or providers.[103] But courts have differed on how to treat this medium of communication because of its unique nature. In *Carlin*,[104] the court opined that a phone company resembles a small radio station. Opposing theory is that telephone speech should be treated like cable communication because they share similar characteristics.[105] Cable television requires consumer to consciously pay additional fees to receive certain programs and similarly, telephones require direct actions by the caller and receiver, unlike radio and television broadcasters.[106]

DIRECT BROADCAST SATELLITE. In February, 1990, a Montgomery County, Alabama, grand jury returned an indictment against four companies on charges of obscenity.[107] State charges were brought against Home Dish Only Satellite (HDOS); U.S. Satellite Corporation, Inc. (USSC), which transmitted programs to a DBS satellite; GTE Spacenet, which owned the satellite; and GTE, the parent company of GTE Spacenet.

In November, 1990, the U.S. Attorney's offices in New York and Utah accepted plea agreements stipulating a guilty plea by one of the four companies for a felony charge

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[103] Woolfall, *supra* note 90, at 306.
[104] *Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987).
[105] Wu, *supra* note 61, at 283.
[106] *Id.*
[107] Satellite Film Channel Faces Obscenity Counts, CHI.TRIB., February 18, 1990, at 24.

of distributing obscene material.[108] These charges, targeting obscenity, are among the first filed on the state and federal levels against companies utilizing direct satellite transmission.[109]

The U.S. Attorney's offices in Utah and the Western District of New York filed a felony information against HDOS, for violating the federal statute, 18 U.S.C. 1468, prohibiting the distribution of obscene materials by cable or subscription television.[110] HDOS broadcast the excerpts from a hardcore pornographic film early in the evening on unscrambled signals, to promote the film that were transmitted later in the evening on a scrambled signal. HDOS, its uplink company, and the owner of its common carrier satellite were indicted in New York, the state from which its broadcast originated, and Utah, the location of its uplink facility.

Broadcasters of direct broadcast satellite transmissions can control the distribution of their product by means of a scrambled broadcast signal and filters

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[108] Plea Agreement, *United States v. Home Dish Only Satellite Network, Inc.*, No. 90-00196-S (W.D.N.Y. filed Nov. 28, 1990); Plea Agreement, *United States v. Home Dish Only Satellite Network, Inc.*, No. 90-216-W (D. Utah filed Nov. 28, 1990) (the New York and the Utah Plea Agreement are exact duplicates of one another and were filed on the same day). The subject of both actions was "an obscene movie short entitled 'Hardcore Girlfriends'." Felony Information, *United States v. Home Dish Only Satellite Network, Inc.*, No. 90-000196-S, at 1 (W.D.N.Y. filed Nov. 28, 1990); Felony Information, *United States v. Home Dish Only Satellite Network, Inc.*, No. 90-216-W, at 1 (D. Utah filed Nov. 28, 1990) (the New York and the Utah Felony Information are exact duplicates of one another and were filed on the same day).

[109] Edwards, John V., Note: Obscenity in the age of direct broadcast satellite: A final burial for *Stanley v. Georgia*(?), a national obscenity standard, and other miscellany, 33 *Wm and Mary L.Rev.* 949 (Spring 1992).

[110] 18 U.S.C. 1468 (West Supp. 1991): (a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both; (b) As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for distribution; (c) Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television or subscription services on television.

which screen out non-subscribers.[111] The scrambled and unscrambled direct broadcast satellite signal is distinct from any other form of media.[112] The question was whether the federal and state obscenity law could be applied to direct broadcast satellite because the signal is unintelligible until it reached the home.

DBS raises another question about what types of broadcasts are permissible. Programmers and law enforcement officials have debated whether certain broadcasts fit the legal definition of obscenity.[113] These definitions vary because both state and federal regulations use the community standards test to determine whether material is obscene.[114] In the case in Alabama, HDOS submitted plea agreements that called for payment of a fine and operator's promise not to distribute sexually explicit materials. Thus, while HDOS did not receive an obscenity conviction, the Alabama charges silenced this speech, which was considered permissible in New York.[115]

USSC transmitted both the unscrambled and the scrambled sexual explicit material from an uplink facility in Utah to a GTE Spacenet satellite traveling in a geosynchronous orbit. In a motion to dismiss Alabama indictment, one of USSC claims was that its status as a common carrier protected USSC from the content violations of others because the federal regulation in the broadcast area preempted state law and shielded USSC from state prosecution.[116]

The FCC granted them common carrier status for the particular transpondorer involved in the case above. FCC rules and decisions required common carriers to provide services characterized by two distinctive qualities: (1)

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[111] Article Digest, re Edwards, John V., *supra* note 109, 45 *Fed.Com.L.J.* 344, at 344-45 (April 1993).
[112] Edwards, *supra* note 109, at 949.
[113] Mertz Parnell, Mary C., "Applying Community Standards to International Direct Broadcasting Satellites: Can the United States Know Obscenity Without Seeing It?," 17 *Suffolk Transnat'l L.R.* 473 (Spring 1994).
[114] *Id.*
[115] Mertz Parnell, *supra* note 113.

the carrier must provide the service to others without discrimination and on a first-come, first-served basis and (2) the carrier must provide communication that is the "transmission of intelligence of the user's own design and choosing."[117] Therefore, common carriers cannot exercise any editorial control over the content of the transmission. Most authorities, however, recognize an exception to this general rule which gives common carriers the right to prohibit the use of their facilities for an illegal purpose.[118]

A court examining the satellite or uplink operator's actions must go through two distinct levels of analysis. Initially, the court must discern the common carrier's adherence to the statutory obligation to avoid editorial control. Second, the court must evaluate the common carrier's interest in the transmitted material for determination of any pecuniary interest, regardless of its inability to exercise this editorial control.[119] Once a common carrier passes these evaluations, it will not be liable under federal law even if the broadcast is otherwise illegal.

The 1992 Cable Act now regulates a wireless electronic speech. Public-interest obligations of broadcast regulation even extend to direct broadcast satellite service,[120] a potential competitor of cable television and over-the-air broadcasting which was not even operational in the United States when the 1992 Cable Act was enacted.[121]

Under law, direct broadcast satellites appears to be more like distributors. These satellite service providers do not have editorial control over the programs

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[116] Defendant's Motion to Dismiss Indictment, at 1-3, State v. U.S. Satellite, Inc., No. 90-000971 (Cir. Ct. Montgomery County, Ala. filed June 8, 1990).
[117] Edwards, *supra* note 109, at 958.
[118] Memorandum Opinion, Declaratory Ruling and Order, In the matter of Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 1987 FCC Lexis 3907 (1987).
[119] Edwards, *supra* note 109, at 960.
[120] 47 U.S.C. 335 (Lexis Law Publishing 1997).

themselves.[122] They simply select which programs to provide, much like a bookstore selects which materials to carry.[123]

Public obligations require a provider of direct broadcast satellite service to provide a portion of its channel capacity, equal to not less than four percent nor more than seven percent, for non-commercial programming of an educational or informational nature.[124]

DBS poses similar issues to those that have been debated on the Internet. Technologies such as DBS allow speech from remote sources to travel into private homes, often without government regulation in the receiving community.[125] When it comes to broadcasts of a foreign origin, under international law, jurisdictional issues, the absence of an international agreement on DBS content regulations, and the United States's adherence to a free flow of information policy stop the United States from enforcing obscenity and indecency standards on foreign broadcasts.[126]

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[121] Kellogg, Michael K., John Thorne, and Peter W. Huber, Review Essay: Telecommunications in Jericho, 81 *Calif.L.Rev.* 1209, at 1232 (October 1993).
[122] 47 U.S.C. 335 (b)(4) (Lexis Law Publishing 1997).
[123] Ditthavong, Keth A., "Paving the way for women on the information superhighway: curbing sexism not freedoms," 4 *Am.U.J.Gender&Law* 455, at 503 (Spring 1996).
[124] 47 U.S.C. 335 (b)(1) (Lexis Law Publishing 1997).
[125] Mertz Parnell, *supra* note 110.
[126] *Id.*

III. THE INTERNET AND EXISTING POLICY

What is the Internet?

The twentieth century witnessed new developments in computer communications. As the Internet is becoming a more common mode of communication, Internet regulation has inevitably become a controversy.

In basic terms, the Internet can be thought of as a giant network which connects numerous smaller groups of linked computer networks. These interconnected computers can exchange information in a matter of seconds, enabling people to communicate with individuals, interest groups, or the world in general.[127]

It has only been in recent years that the Internet has experienced such tremendous growth.[128] According to the Findings of Fact the parties stipulated in *Reno*, between 1981 and 1989, the Internet has grown from 300 linked computers to 90,000 computers. In 1993, the number grew to over one million. In January, 1995, host computers numbered approximately 4.9 million in 90 different countries.[129] Today, host computers number over 9.4 million.[130] The number of Internet users amounted to 99.96 million in 1997.[131] By the year 1999, the number of users is predicted to reach 200 million.[132]

Individuals can obtain access to the Internet with a computer, a modem to connect the computer to the telephone. In addition, they need their own direct Internet connections or others including connections from computers or networks

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[127] *ACLU v. Reno*, 929 F.Supp. 824, 831 (E.D.Pa. 1996).
[128] *Id.*
[129] Joint Hearing Before the Subcomm. on Basic Research and the Subcomm. on Tech. of the Comm. on Science, H.R. Rep. No. 104-16, at 10.
[130] *Reno*, 929 F.Supp., at 831.
[131] Internet Industry Almanac. (Online) Available, http://www.imi.ne.jp/mbi/select/text/98012801.htm#1, May 2, 1998.
[132] *Reno*, 929 F.Supp., at 831.

maintained by schools, companies, libraries, service providers, online services and bulletin board systems that are linked to the Internet. Internet service providers are large commercial service providers, such as America Online or many small, local Internet service providers. Although there are many ways to communicate and retrieve information off the Internet, the most common means of communication fit into six categories: one-to-one messaging (such as "e-mail"[133]), one-to-many messaging (such as "listserv"[134]), distributed message databases (such as USENET newsgroups[135]), real time communication (such as "Internet Relay Chat"[136]), real time remote computer utilization (such as "Telnet"[137]), and remote

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[133] E-mail, an increasingly common mode of communication, is electronic mail. Practically, e-mail is similar to sending a first-class letter, but a user can address and transmit a message to more than one individual. *Reno*, 929 F.Supp. 824, 834 (E.D.Pa. 1996). However, e-mail typically reaches its destination more quickly. Unfortunately, e-mail is not as secure and users on intermediate computers between the sender and recipient can access and view the message. *Id.*

[134] A "listserv" is an automatic mailing list service which allows groups interested in particular subjects of interest to communicate with one another. *Id*, at 834. Listservs may be "open" - allowing users to add or remove their names from the mailing list without direct human involvement. *Id.* Listservs may also be "closed" - allowing users to add their names to a mailing list via a human moderator. *Id.*

[135] Distributed message databases are user-sponsored newsgroups which cover almost all possible topics of interest. *Id*, at 834. Newsgroups are simply open forums and exchanges about specific topics. *Id.* Unlike listservs, however, users can access the database at any time and do not need to subscribe to the discussion mailing list. *Id*, at 834-35. Newsgroups may be "moderated" - meaning all messages to the newsgroup are forwarded to one person who screens them for topic relevance or "unmoderated" - meaning messages are automatically forwarded to all adjacent USENET servers. *Id.* Unmoderated newsgroups appear to be the norm. *Id*, at 835.

[136] Real time communication is communication which allows users on the Internet to carry on an impromptu dialogue, in "real time" as opposed to sending a message which the receiver accesses hours or even days later. See *id*, at 835. "Talk" is the form of communication which allows one-to-one communication. *Id.* "Internet Relay Chat" (IRC) is similar to a telephone partyline, using a keyboard instead of a telephone. *Id.* IRC enables two or more users to type messages to each other which appear almost immediately on the other users' computer screens. *Id.*

[137] Real time remote computer utilization is the method of communication where users access and control remote computers in "real time" using "Telnet". *Id*, at 838. Basically, "Telnet" allows users to log onto and use some remote computer to run any program which any off-site user is permitted to run. Dominic Andreano, Cyberspace: How Decent is the Decency Act?, 8 *St. Thomas L.Rev.* 593, at 596 (1996). For instance, by using "Telnet," a researcher at one university can easily use the computing power of a supercomputer at a different university. *Reno*, 929 F.Supp., at 835.

information retrieval[138](such as "ftp," "gopher," and the "World Wide Web.").[139] All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images.[140] Taken together, these tools constitute a unique medium -- known to its users as "cyberspace" -- located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.[141]

Access to and Attack on On-Line Sexual Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core."[142] These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community."[143]

How much rampant is pornographic traffic on the Internet? According to an article in the *Georgetown Law Journal* written by an engineering undergraduate at

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[138] Remote information retrieval is probably the most well-known category of communication on the Internet. *Reno*, 929 F.Supp., at 835. A very common function of the Internet is the search for and retrieval of information on remote computers. See *id.* The three main methods to locate and retrieve information from the Internet are File Transfer Protocol (FTP), "Gopher," and the World Wide Web ("the Web"). *Id*, at 835-36. FTP is the standard which lists computer files available on a remote computer and transfers these files to a user's local computer. *Id*, at 835. Gopher is a program and format which guides a user's search through available resources on a remote computer. *Id*, at 835-36. The Web uses a "hypertext" formatting language called hypertext markup language (HTML) which allows programs using the Web to display graphics, text, sounds and moving video. *Id*, at 836. HTML documents also use "hyperlinks" which allow a user to "click" on the description of the resource using a computer source and be connected to that resource. *Id.*

[139] *Reno*, 929 F.Supp., at 834.

[140] *Reno v. ACLU*, 117 S.Ct. 2329; 1997 U.S. Lexis 4037, 14 (June 26, 1997).

[141] *Id.*

[142] 929 F.Supp., at 844 (finding 82).

[143] *Id* (finding 86).

Carnegie Mellon University,[144] it is difficult to estimate the percentage of traffic on the Internet. The University collected date of "pornography" only from bulletin board systems. Pornography was defined for the study to include the depiction of actual sexual contact, "hard-core," and depiction of mere nudity or lascivious exhibition, "soft-core."[145] The study included commercial "adult" BBS operators.

In a 18-month study, the team surveyed 917,410 sexually explicit pictures, descriptions, short stories and film clips. The study suggested that over 83 percent of the pictures on Usenet groups which stored digitized images were pornographic.[146]

Though pornographic images are evidently popular, they represent only about 3 percent of all the messages on the Usenet newsgroups, while the Usenet itself represents only 11.5 percent of the traffic on the Internet.[147] So sexually explicit material makes up only one-third of one percent of Internet traffic -- a lower percentage than is found in most newsstands and video stores.[148] Other statistics suggest that less than five-percent of the bulletin boards on the net offer cybersmut.[149]

In addition to the fact of the pervasiveness, sexual material on the Internet is a small portion of the Internet and users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself --- and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the

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[144] Rimm, Marty, "Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in over 2000 Cities in Forty Countries, Provinces, and Territories," 83 *Geo.L.J.* 1849 (June 1995). A story on the article was covered by Philip Elmer-De Witt in *Time*. On a Screen Near You: It's Popular, Pervasive and Surprisingly Perverse, according to the First Survey of Online Erotica. And There's no Easy Way to Stamp It Out, *Time*, July 3, 1995, at 38.

[145] *Id*, at 1849. The study excluded any BBS or World Wide Web site which made even a modest attempt to promote itself as "artistic" or "informational" was excluded.

[146] *Id*, at 1868.

[147] *Id*, at 1869.

[148] Cate, *supra* note 3, at para. 3.

document. Almost all sexually explicit images are preceded by warnings as to the content."[150] Moreover, since users need "a series of affirmative steps more deliberate and directed,"[151] children would seldom encounter sexual material unattended.

The government's reaction to the new medium, however, was to hastily enact legislation to deny access to "harmful" content on the Internet for protecting children. Congress's first attempt to regulate Internet content came in the form of the Communications Decency Act of 1996 (CDA).[152]

On February 1, 1995, Sen. James Exon, D-Neb., and co-sponsor Dan Coats, R-Indiana, proposed the bill to prohibit obscene and indecent expression on the Internet through the CDA.[153] It was an amendment to the popular Telecommunications Competition and Deregulation Act of 1995.[154] The amendment extended an existing ban on obscene and indecent telephone calls to the Internet.[155] Sen. Exon's view was to "make that superhighway [the Internet] a safe place for our children and our families to travel on."[156]

The CDA was challenged soon after it was signed into law by the President on February 8, 1996. Chapter V discusses the case.

Protecting Minors

The Supreme Court has long recognized protecting children as an overriding interest for which the government may regulate sexually explicit material. The

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[149] Burke, *supra* note 7, at 94.
[150] 929 F.Supp., at 844-45 (finding 88).
[151] *Id*, at 845.
[152] 47 U.S.C. 223(a), (d)-(h) (1996).
[153] Communications Decency Act of 1995, S.314, 104th Cong., 1st Sess.
[154] 47 U.S.C. 223 (a), (d)-(h) (1996) was corporated to create criminal liability for the creation, transmission and display of obscene, indecent and patently offensive materials to minors over the Internet and commercial online services.
[155] In origin, the law was a dial-a-porn regulation.
[156] 141 Cong. Rec. S8087, 8087 (daily ed. June 9, 1995) (statement of Sen. Exon).

governmental interest became the primary justification in prohibiting indecent material which is given some constitutional protection.[157]

Regulations on indecent material, however, must be by the least restrictive means because the first amendment protects an adult's right to send and receive any communication constituting "speech," regardless of how offensive or sexual explicit it may be.[158] As a result of these conflicting interests, courts must wrestle with the compelling values of allowing adults access to constitutionally protected speech and societal interest in protecting minors from the influence of such speech.[159]

Protecting minors is not only government's interest but used to be basic value and responsibility of American parents. It is a basic recognition in the society that parents rightfully have the authority to raise their children in their own household. Therefore, parents "are entitled to the support of laws designed to aid discharge of that responsibility.[160] "[O]thers, teachers for example, who have this primary responsibility for children's well-being," are entitled to that support as well.[161]

The government has an independent interest in ensuring the well-being of children by "see[ing] that they are 'safeguard[ed] from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"[162]

The government is determined to achieve the interest in protecting the well-being of children with laws to prevent children's access to sexual explicit material and to protect children from sexual exploitation.

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[157] The government needs to have a compelling interest before it can regulate specific instances of indecent speech. *Pacifica*, 438 U.S. 726 (1978).
[158] *Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969).
[159] Murphy, *supra* note 97, at 691.
[160] *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).
[161] *Id*, at 639.
[162] *Id*, at 640 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

FEDERAL STATUTORY PROHIBITIONS ON OBSCENE AND INDECENT SPEECH. Since obscenity does not enjoy constitutional protection, the government can prohibit its dissemination on the Internet as well as on other media. In applying obscenity laws to the Internet, however, the *Miller* obscenity test is not readily applicable to criminal obscenity charges resulting from distribution of pornography on the Internet.[163] The courts apply obscenity laws to each medium differently. Because decisions often reflect the nature of the media, the issue is which medium the Internet is similar to in applying obscenity laws.

The key issue is whether the Internet is more like a print medium, which enjoys strong protection against government interference, or a broadcast medium like television, which may be subject to government's control.

One of the most common avenues for avoiding the First Amendment is to characterize the Internet as a medium like broadcasting or telephony, to which a lower standard of First Amendment scrutiny applies.[164] The Supreme Court acknowledged that technological differences justify different applications of the First Amendment.[165] Those who would regulate expression on the Internet have claimed that the Internet should be regulated like other telecommunications because the Internet has one or more of the unique features of telecommunications. But the Internet does not share any of the characteristics of broadcasting and telephony.

The scarcity of available frequencies and the invasive nature have justified the distinct treatment of broadcasting media. But these elements are not present in cyberspace. The Internet provides relatively unlimited, low-cost capacity for communication of all kinds and can hardly be considered a "scarce" expressive

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[163] Goldman, *supra* note 23, at 1093.
[164] Cate, *supra* note 3, at para. 7.

commodity.[166] Unlike the captive audience by the broadcasting, the Internet users take affirmative actions. The Supreme Court reasoned this distinction in *Sable Communications v. FCC*, in which the Court found that "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[167]

Facing a new form of medium having different characteristics from existing media, the government has prosecuted violators of existing obscenity laws who used the Internet in connection with their crimes.[168] During congressional hearings on the CDA, many legislators voiced the opinion that the existing laws were sufficient to combat any illegal activities committed via the Internet.[169]

Several federal obscenity laws could proscribe sexual material on the Internet. Section 1460 prohibits the possession of obscene material with the intent to distribute, and Section 1462 prohibits importation or transportation of obscene

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[165] See *Red Lion v. FCC*, 395 U.S. 367, 386 (1969) ("differences in the characteristics of new media justify differences in the First Amendment standards applied to them").

[166] *Reno*, 1997 U.S.Lexis 4037, at 46.

[167] *Id*, 45-46. *Sable* involved a constitutional challenge by a "dial-a-porn" company to a 1988 amendment to the Communications Act, which imposed a blanket prohibition on indecent and obscene interstate commercial telephone messages. *Sable Communications v. FCC*, 492 U.S. 115 (1989).

[168] See *United States v. Thomas*, 74 F.3d 701 (6th Cir.) (A couple operating a computer bulletin board service were convicted of violating 18 U.S.C. 1465).

[169] Jacques, Stephen C., Comment: *Reno v. ACLU*: Insulating the Internet, the First Amendment, and the Marketplace of Ideas, 46 *Am.U.L.Rev.* 1945, at 1967 (August 1997) (citing statement of Sen. Leahy, "Our criminal laws already prohibit the sale or distribution over computer networks of obscene or filthy material..." 141 Cong. Rec. S8341 (daily ed. June 14, 1995)).

matters in interstate or foreign commerce through a common carrier.[170] Section 1465 prohibits using a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce,[171] and Section 1466 prohibits being engaged in the business of selling videotape, or photograph or other audio recording, which has been shipped or transported in interstate or

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[170] 18 U.S.C. 1462 (1997) states: Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934), for carriage in interstate or foreign commerce--

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) any matter or thing the carriage or importation of which is herein made unlawful-- Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

[171] Section 1465 (1997): Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both. The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

foreign commerce.[172]

In applying those existing federal obscenity laws, is it true that courts will find little trouble convicting violators of existing obscenity laws who use the Internet in connection with their crimes as some commentators maintain? In the following chapter, I will examine online lawsuits under federal anti-obscenity laws to find whether existing laws are sufficient to convict those violators.

I will also examine another U.S. Supreme Court case, *Reno v. ACLU*[173] because the case dealt with several provisions of the CDA, content regulations on the Internet. The enactment of the CDA was Congress's call for new regulations, reasoning that in light of the dangers on the horizon, existing regulations would be too cumbersome and ineffective.[174]

CHILD PORNOGRAPHY. Government's interests in regulating child pornography are radically different from those in regulating obscenity. The government's primary concern is protecting the child participants from that type of sexual abuse because of the harm that would inflict on these children. The government and courts have a continuing determination to protect children from being involved in its manufacture.

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[172] Section 1466 (1997): Engaging in the business of selling or transferring obscene matter; (a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.; (b) As used in this section, the term "engaged in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is "engaged in the business" as defined in this subsection.

[173] *Reno v. ACLU*, 1997 U.S. Lexis. 4037 (June 26, 1997).

[174] Jacques, *supra* note 169, at 1969.

Concern with the growth of commercial child pornography led Congress to pass the criminal act in 1977.[175] The Protection of Children Against Sexual Exploitation Act[176] was enacted to penalize those directly involved in the production and distribution of visual depictions of minors engaged in sexually explicit conduct.

After finding that child pornography has developed into a highly organized multimillion-dollar industry which operates on a national scale and which exploits thousands of children in a manner that is harmful to the physiological, emotional, and mental health of the individual child and of society, Congress amended the act with the Child Protection Act of 1984.[177]

In 1984, 1986, and most recently 1988, Congress amended to expand the reach of the statute by raising the age of those defined as "minors" from 16 to 18 years of age, by adding a subsection reaching those facilitating the distribution of child pornography by printing or publishing the offending visual depictions, and by sharply increasing the penalties for conviction under the statute.[178]

Under federal law, child pornography is any visual material that depicts a child either engaging in explicit sexual acts when the manufacturer of such material uses an actual child.[179] But prior to *New York v. Ferber* in 1982,[180] it was presumed that child pornography, like other sexual explicit material, had to be judged under the obscenity standards adopted in *Miller*.[181]

In *Ferber*, the U.S. Supreme Court placed "child pornography" in a special category outside the standards for adult obscenity, removing child pornography

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[175] Annotation: Validity, Construction, and Application of 18 USCS @2251, Penalizing Sexual Exploitaion of Children, 99 *A.L.R.Fed.* 643, 2a (1997).
[176] 18 U.S.C.S. 2251 et seq.
[177] Congressional findings. Act May 21, 1984, P.L. 98--292, @2, 98 Stat. 204.
[178] Annotation, *supra* note 172, 2a.
[179] Lawrence, Fred, Symposium: Pornography: Free Speech or Censorship in Cyberspace?, 3 *B.U.J.Sci.&Tech.L.* 3, para.15 (1997) (Comments of Fred Lawrence).
[180] *New York v. Ferber*, 458 U.S. 747 (1982).
[181] *Miller*, 413 U.S. 15 (1973).

from the First Amendment protection.[182] The case involved New York statute to criminalize the sale or distribution of materials depicting children under 16 years of age, engaging in sexually explicit conduct but not to require the proof that the materials were obscene.[183]

The Court adjusted the *Miller* test for obscenity for child pornography as follows: the trier of fact need not find that the material appeals to the prurient interests of the average person; it is not required that the sexual conduct be portrayed in a patently offensive manner; and the material at issue need not be considered as a whole.[184] The Court's conclusion was that the *Miller* standard was not a satisfactory solution to the child pornography when the government's specific and more compelling interest in the well-being of children was took into account. Therefore, it was permissible to consider these materials as without the protection of the First Amendment protection.

Even though *Ferber*'s holding was limited to the commercial production and distribution of child pornography, many states went further than the New York statute and prohibited the possession of child pornography.[185] The challengers argued that there were instances in which unprotected speech should nevertheless be protected when possessed in the privacy of one's home.[186]

Obscenity is protected in context of mere private possession.[187] The Supreme Court in *Stanley* held that even though obscenity is not constitutionally protected speech, the states do not have the power to prohibit the private

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[182] *Ferber*, at 764.

[183] Section 263.15 of the New York Penal Law provides: "A person is guilty of promoting a sexual performance by a child when, knowingly the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." N.Y. penal law 263.15 (McKinney 1989).

[184] Annotation: Validity and Construction of 18 U.S.C.S. 371 and 2252(a) Penalizing Mailing or Receiving, or Conspiring to Mail or Receive, Child Pornography, 86 *A.L.R.Fed.* 359, 2a (1997).

[185] Johnson, David B., Comment: Why the possession of computer-generated child pornography can be constitutionally prohibited, 4 *Alb.L.J.Sci. & Tech.* 311, at 319 (1994).

[186] *Id.*

possession of obscenity in one's home.[188] The Court found that the defendant, Stanley, had two interests at state. First, Stanley had a First Amendment interest in receiving information and ideas.[189] Second, Stanley had a fundamental right to be free from "unwanted government's intrusions."[190]

However, the Supreme Court held that the possession of child pornography can be constitutionally criminalized.[191] In *Osborne*, the Ohio statute at issue prohibited the viewing and possession of any material that depicts a minor in the nude.[192] The defendant, Osborne, argued that the statute infringed on his First Amendment right to receive information in the privacy of one's home.[193] He had been caught in his home with four photographs, each of which depicted a nude male adolescent posted in a sexually explicit position.[194] The Court rejected Osborne's contention.

The Court distinguished *Stanley*,[195] which struck down a Georgia law outlawing the private possession of obscene material on the ground that the State's justifications for the law -- primarily, that obscenity would poison the minds of its viewers -- were inadequate, from *Osborne* case. Ohio's interest in *Osborne* was to protect the victims of child pornography.[196] The Court found that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*."[197]

Ohio advanced three reasons why a ban of the possession of child pornography was necessary to protect children from sexual exploitation. First,

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[187] *Stanley v. Georgia*, 394 U.S. 557 (1968).
[188] *Id*, at 568.
[189] *Id*, at 564.
[190] *Id*.
[191] *Osborne v. Ohio*, 495 U.S. 103 (1990).
[192] *Id*, at 106-107. Ohio enacted Rev. Code Ann. 2907.323 (A)(3) (Supp. 1989).
[193] *Id*, at 108.
[194] *Id*, at 107.
[195] *Stanley*, 394 U.S. 557.
[196] *Osborne*, at 109.
[197] *Id*, at 108.

Ohio found that much of the child pornography has been driven underground. As a result, mere attacking production and distribution is not enough to solve the child pornography problem.[198] Second, the State's ban on possession and viewing encourages the possessors of these materials to destroy them.[199] Third, encouraging the destruction of these materials is desirable to prevent pedophiles from using child pornography to seduce other children into sexual activity.[200]

The Supreme Court in *Osborne* accepted Ohio's arguments and narrowed the right to privacy to such an extent that "some commentators have questioned Stanley's continued validity."[201]

The government has strengthened its determination to combat child pornography in the age of new communication. A recent investigation, which focused on only one of the nation's computer networks and Internet access providers, demonstrates the increasing use of the "information superhighway" for illicit purposes.[202]

On September 13, 1995, the Department of Justice announced twelve arrests in a two-year investigation of the distribution of child pornography on the country's largest online computer service, America Online.[203] The Federal Bureau of Investigation (FBI) collected evidence of pornography involving victims ages two to 13 pictured either nude or in simulated sexual acts. The FBI also discovered that the computer network had been used for identification and recruitment of "children into sexually illicit relationships."[204] Regarding the arrests, U.S.

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[198] *Id*, at 110.
[199] *Id*, at 111.
[200] *Id*..
[201] Johnson, David. B, *supra* note 182, at 324.
[202] Levine, Noah, Note: Establishing Legal Accountability for Anonymous Communication in Cyberspace, 96 *Colum.L.Rev.* 1526, at 1526 (October 1996).
[203] Johnson, David, "Use of Computer Network for Child Sex Sets Off Raids," *New York Times*, September 14, 1995, at A1.
[204] *Id*, at A11 (quoting FBI statement).

Attorney General Janet Reno stated that the government was not going to permit exciting new technology to be misused to exploit and injure children.[205]

Law makers have debated whether to restrict the use of computer networks. Fears about child pornography and child seduction were used to support the CDA.[206] Moreover, Congress recently amended the Child Pornography Protection Act to make it unlawful for pornographers to "morph" pictures, or create images, of children engaging in sex on the Web.

Not only government, but the Internet industry, is determined to combat child pornography. A recent industry summit in Washington produced some results. Four of the largest Internet service communities, representing 95 percent of the online community, agreed to "a zero tolerance policy" for child pornography.[207]

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[205] *Id*, at A1 (quoting Reno's statement).
[206] Lawrence, *supra* note 179, at para.17.
[207] Rhodes, Tom, "Gary Hart 'bimbo' crusades against porn on Internet," *The Times*, December 20, 1997, overseas news. ("A zero tolerance policy" was adopted during the online summit in December 1-3, 1997).

On-Line Cases and Existing Law

Are the present obscenity laws sufficient to handle crimes on the net against the government's anti-obscenity policy?

In applying those laws to alleged violators, the first approach is to find that the material is obscene. As already discussed, the *Miller* test is the current standard for obscenity. The crux of the *Miller* test as it may be applied to the Internet is the "contemporary community standards" portion of the test.[208] In prosecution under the federal obscenity laws, courts are required to find that material in question affronts contemporary community standards. The issue is the standards for the Internet with non-geographic boundaries.

There are some issues other than the community standards in applying the present federal laws to online cases . I will examine each judicial element required to find a violation of obscenity laws through online cases.

"COMMUNITY STANDARDS" TEST. In making determination whether any speech or communication is obscene, the contemporary community standards must be applied to the alleged obscenity. The first two prongs of the *Miller* test use the contemporary community standards to determine whether or not a work as a whole appeals to a prurient interest in sex and describes sexual conduct in a patently offensive way.[209] The obscenity case, *U.S. v. Thomas,*[210] provides a good example of application of community standards in the electronic world.

Robert and Carleen Thomas were convicted for operating the Amateur Action Computer Bulletin Board System (AABBS) from their home in Milpitas,

[208] Goldman, *supra* note 23, at 1091.
[209] Burke, *supra* note 7, at 108.

California. Its features included e-mail, chat lines, public messages, and files that members could access, transfer, and download to their own computers and printers.[211] AABBS members were allowed to access to computer files called Graphic Interchange Format files (GIF files) which contained sexual explicit material such as "images of bestiality, oral sex, incest, sado-masochistic abuse, and sex scenes involving urination."[212] Access to the GIF files was limited to members who had sent a fee and an application to defendant Robert Thomas in exchange for a password.[213]

The defendants were tried in July 1994, found guilty, and sentenced on December 2 of 1994.[214] On appeal the United States Court of Appeals for the Sixth Circuit affirmed the convictions. The court upheld the Thomases' conviction for violating federal obscenity law for knowingly using and causing to be used a facility and means of interstate commerce for the purpose of transporting obscene material.[215]

On appeal, one of the substantive issues was which community's standards are to be applied. The defendants argued that, given the kind of computer

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[210] *U.S. v. Thomas*, 74 F.3d 701, 6th Cir. 1996; cert. denied, 117 S.Ct. 74 (1996). The issue was the interstate transportation of sexual explicit material through a phone line and a modem.
[211] *Id.* at 705.
[212] *Id.* Thomases also sold and delivered sexually-explicit videotapes.
[213] *Id.*
[214] *Id.* at 706.
[215] 18 U.S.C. 1465 (1995): Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, case, phonograph recording, electrical transcription, or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both. The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption is rebuttable. The recently-enacted Communications Decency Act has amended this section of the statute by inserting "or an interactive computer service (as defined in section 230(e)(2) of the Communications Decency Act of 1934) in or affecting such commerce" after "foreign commerce" the first place it appears.

technology involved in this case, a new definition of community is required based on the "broad-ranging connections among people in cyberspace rather than the geographic locations," of the people and computers.[216]

The general principle in a case involving interstate transmission of obscene material is that juries are instructed to apply the community standards of the geographic area where the material is sent.[217] Defendants asserted the principle did not apply to this case for the same reason they claim venue was improper. Defendants' challenge for the propriety of venue was based on the argument that the proper venue under counts of GIF files of indictments was the district from which the transmissions originated, because the defendants did not cause the actual transmission of the data.[218]

The court's treatment of this issue was tied to the issue of venue. Because the GIF files were transferred to Tennessee, the district was proper for venue, and the community standards were those of the district for venue.[219] The court relied on *Peraino*[220] and *Bagnell*[221] as precedent, as well as on *Miller* and *Hamling*. In *Hamling*, the Supreme Court reiterated that the community standards are the standards of the community in which the trial takes place.[222]

As to the defendants' argument for a new definition of community online, the court rejected this argument because it was "not implicated by the facts of this case."[223] Because access to the GIF files was limited to those who got the approval

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[216] *Id*, at 711.
[217] *Id*, at 710-11.
[218] *Id*, at 709.
[219] *Id*, at 711.
[220] *United Sates v. Peraino*, 645 F.2d 548, 551 (6th Cir. 1981).
[221] *United States v. Bagnell*, 679 F.2d 826, 830-31 (11th Cir. 1982), cert.denied, 460 U.S. 1047, 103 S.Ct. 1449, 75 L.Ed.2d 803 (1983).
[222] *Hamling*, 418 U.S. 87, 105-6.
[223] *Thomas*, at 711.

by the defendants, defendants could limit user access in the community where they might face risk of finding the obscenity standards greater than California.[224]

VENUE. As noted in *Thomas*, the issue of venue is tied to the community standards. Defendants in *Thomas* argued that venue was not proper for the same reason for the

community standards.

The court rejected the argument that the proper venue was the district from which the transmissions originated because defendants did not cause the transmissions. The court reasoned that the government only had to prove that the defendants knowingly used a facility of interstate commerce for distributing obscene materials and that the government did not have to prove specific knowledge of each transmission or its destination.[225] The court relied on *Bagnell*[226] and *Peraino*,[227] noting that there was "no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent."[228]

The court made two other points on this issue. First, most of the GIF files themselves were marked "[d]istribute freely," suggesting that distribution was intended and encouraged, and second, memberships and passwords were required to access the AABBS.[229]

The *Thomas* court concluded that GIF files were transmitted with defendants' knowledge and approval to AABBS members in other jurisdictions, or Tennessee, and that the fact convinced the court to conclude that venue was proper in the district in which the computer transmissions are received.

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[224] *Id.* at 711.
[225] *Id.*
[226] *Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983).
[227] *Peraino*, 645 F.2d 548, 551 (6th Cir. 1981).
[228] *Thomas*, at 709.
[229] Kabalka, *supra* note 16, at 229.

WHO IS LIABLE?

One issue that causes concern for online service providers is their degree of liability for the obscene material posted by their users.

The New York District Court in *Cubby, Inc., v. Compuserve, Inc.*,[230] held that system operators who act as mere distributors are not liable, asserting that "[a] computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information."[231]

When system operators behave as distributors of information, they merely provide a means for the users to transmit and receive electronic messages and files.[232] They do not monitor the information on their networks, nor exercise editorial control.

In *Smith v. Californa*,[233] the Court held that a city ordinance violated the First and Fourteenth Amendments when it made the proprietor of a bookstore strictly liable for stocking a book later determined to be obscene.[234] The Court determined that such a statute must require some knowledge of the contents of the materials lest a seller restricts sales to those volumes which have been personally inspected.[235]

The federal statute requires some element of scienter. The Supreme Court has emphasized the importance of this requirement, particularly with respect to the

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[230] 776 F.Supp. 135 (S.D.N.Y. 1991).
[231] *Id*, at 140.
[232] Ditthavong, *supra* note 123, at 491.
[233] *Smith v. California*, 361 U.S. 147 (1959).
[234] *Id*, at 152-53.
[235] *Id*, at 153.

criminalization of obscene speech.[236] But scienter as to exact content of material transported, rather than general knowledge that material is sexually oriented, is not required to uphold conviction.

Generally speaking, system operators are not strictly liable because they cannot be aware of all the content of information on their networks even if they want to. Technically, monitoring all traffic to filter out injurious files is infeasible.[237]

In the case of *Stratton Oakmont Inc. v. Prodigy Services Co.*,[238] Prodigy was held liable for the content of a potentially defamatory electronic message sent by a Prodigy user. Prodigy relied on a prior decision, *Cubby, Inc. v. CompuServe, Inc.*. However, Prodigy did pass all new messages through a filter that screened out those messages that contained certain obscene and derogatory terms.[239] The leaders of the bulletin board discussions also had the prerogative of deleting material that was off-topic, in bad taste, or which otherwise did not meet the Prodigy content guidelines.[240] The court granted plaintiff's motion for partial summary judgment on the ground that Prodigy was a responsible "publisher" of the defamatory statements, having "held itself out to the public and its members as controlling the content of its computer bulletin boards."[241]

Congress, apparently intending to limit the reach of the Prodigy decision, voted early in 1996 to protect commercial computer service providers from liability in certain cases of online wrongdoing.[242] A section titled "Protection for Private Blocking and Screening of Offensive Material" is incorporated in the

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[236] Burke, *supra* note 7, at 114.
[237] Ditthavong, *supra* note 123, at 491.
[238] *Stratton Oakmont Inc., v. Prodigy Services Co.*, 23 Media L.Rep. 1794 (1995).
[239] *Id*, at 1797.
[240] *Id.*
[241] *Id.*
[242] R. Hayes Johnson, Jr., Case Note: Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 *Ark.L.Rev.* 589, at 595 (1996).

Telecommunications Act of 1996, which states that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"[243] except when the provider knowingly permits obscene communications. Depending on the amount of editorial control the system operators exercise, their legal accountability will vary.[244]

The statute already gave such immunity for an online service provider in a defamatory suit. In *Zeran v. America Online*,[245] Zeran claimed that "AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter." The court upheld the judgment of the district court and ruled that 47 U.S.C. 230 "plainly immunizes computer service providers like AOL from liability for information that originates with third parties."

The question of the liability for what is published on line by users may extend to universities. College students often have unlimited access to the Internet from their dormitory rooms, and many use the Internet as an essential information pipeline.[246] The number of legal cases arising from college campuses makes it clear that students are particularly vulnerable to the temptations of misusing computer resources.[247]

The recent federal trial involving a hate crime on the Internet, the first to address the matter, implies that universities are free from liability in the case where a student commits an online-related crime through a university's computer system.

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[243] 47 U.S.C. 230 (c)(1) (1996).
[244] Rose, Lance, "Netlaw: Your Rights in the Online World," at 13 (1995).
[245] 129 F.3d 327 (4th Cir. 1997).
[246] Greenberg, Sally, "Threats, Harassment, and Hate On-line: Recent Developments," 6 *B.U.Pub.Int.L.J.* 673, at 688 (Spring 1997).
[247] *Id.*

Richard Machado, 21, a former University of California student, was convicted of interfering with the civil rights of students attending a public university.[248] Machado sent e-mail messages to 59 Asian students in September 1996 which said in part "I personally will make it may life career to find and kill everyone of you personally."[249] The jury rejected his testimony that the message was a prank and convicted him of one-year imprisonment and a fine of up to $100,000.[250]

The case could be a good legal precedent for a future online case involving the situation in which a university student is charged of posting sexual material through his university computer system. Its suggestion is that university's liability will not be called into question, but that a student will be liable for what he posted.

In addition to the above issue, many universities are debating whether they have the right to censor what students post.[251] There are some cases of university-led censorship on the online publications by students. For example, when a graduate student at the University of Massachusetts used the school's World Wide Web page to post pro-Nazi material questioning whether the Holocaust had occurred, the school ordered him to shut it down.[252] The university argued that this was not a issue of free speech but rather a question of whether a university's computer system is the proper place to promote a political agenda.[253] Since the student did not mount a legal challenge to the university, the issue of whether a public university may block a student's right to publish certain kinds of materials remains an open question.[254]

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[248] Lorek, Cyberways L.A., "Jury's Harsh Message: Don't Send Hate E-mail over Internet," *Sun-Sentinel*, pg. 4F, Februart 15, 1998.
[249] *Id.*
[250] *Id.*.
[251] Greenberg, *supra* note 246, at 689.
[252] Goossens, Anna-Maria, "Umass Closes Internet Site," *The Gazette*, pg.1, February 2, 1996.
[253] *Id.*
[254] *Id.* at 690.

OTHER ISSUES. The federal obscenity laws have raised other issues in the context of cyberspace. One of issues was the tangible/intangible distinction. Defendants in *Thomas* challenged to the convictions on two basic premises. First, Section 1465 does not apply to "intangible" objects like the computer GIF files at issue, which become viewable only after decoded by an AABBS member's computer. The files during transmission was merely computer data, which is simply a string of 1s and 0s. This mode of transmission, where the obscenity is not in a tangible form during its transportation, created an area of uncertainty in the existing obscenity laws.[255] Second, Thomases argued that Congress did not intend to regulate computer transmission such as those involved here because Section 1465 does not expressly prohibit such conduct.

The court rejected two premises. The first premise called into question the sufficiency of the existing obscenity law, including Section 1465. The court relied on *Gilboe* in which the Second Circuit held that the manner in which funds are moved does not change the fact that it is tangible money on each end of transaction.[256] The court said that the manner in which the images moved does not affect their ability to be viewed on a computer screen in Tennessee or their ability to be printed out in hard copy in that distant location.[257] The court applied the rational that defendants' conduct fell within Section 1465 because of "the fact that the transmissions began with computer-generated images in California and ended with the same computer-generated images in Tennessee."[258]

The second argument, that Congress did not intend to regulate transmissions because the statute does not expressly prohibit such conduct was similarly rejected. The court first stated that it had the duty to construe the statute

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[255] Kabalka, *supra* note 16, at 217-18.
[256] *United Sates v. Gilboe*, 684 F.2d 235, at 238 (1982), cert. denied, 459 U.S. 1201 (1983).
[257] *Thomas*, at 707.

"so as to give effect to the intent of Congress."[259] The court, relying on *Alpers*, decided that intent is the most important determination and that statutory language is not to be construed to defeat that intent.[260] In *Alpers*, the Supreme Court stressed that statutory language should not be construed in a manner that defeated the intent of Congress, and that obscene phonograph records fell under the meaning of the obscenity statute even if they were not mentioned.[261] The court decided that Congress intended to stem the transportation of obscene material in interstate commerce regardless of the means used to effect that end.[262]

The Communications Decency Act of 1996 - *Reno v. ACLU*

On February 8, 1996, President Clinton signed the Communications Decency Act (CDA) into law in an attempt to regulate the Internet.[263] On that day, the American Civil Liberties Union filed suit, in a direct challenge to the restrictions of CDA against Attorney General Janet Reno and the U.S. Department of Justice. A separate suit was filed by a coalition including the Center for Democracy and Technology, the American Library Association and a number of software publishers.[264] They moved for a temporary restraining order against enforcement of the provisions of the statute governing "indecency" and "patently offensive"

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[258] *Id.*
[259] *Id*, at 708.
[260] *Id.*
[261] See *Alpers*, 338 U.S. at 708 (1950). The court also cited *United States v. Maxwell*, in which the Air Force Criminal Court of Appeals held that transmitting obscene visual images electronically through an on-line computer service constituted a violation of Section 1465. 42 M.J. 568, at 580 (C.A.A.F. 1995).
[262] *Thomas*, at 707-08.
[263] 47 U.S.C. 223(a), (d)-(h) (1996).
[264] Carney, Dan, "Court to look at government's role in policing 'cyber-indecency,'" *Congressional Quarterly Weekly Report*, March 15, 1997, v.55, n11, 672 (2).

transmissions (47 U.S.C. 223 (a)(1)[265] and 223(d)[266]). One week later, a federal district court in Philadelphia issued a temporary restraining order against the enforcement of 223(a)(1)(B)(ii), as applied to indecent communications.

Combining two suits, a special three-judge federal panel in Philadelphia ruled in June 1996 that the CDA violated both the First Amendment because it was overbroad and the Fifth Amendment because it was vague.[267] The district court enjoined enforcement of 223(a)(1)(B) as related to indecency, but preserved the government's right to investigate and prosecute child pornography and obscenity.[268] The district court also enjoined enforcement of 223(d)(1) and (2). The government appealed that ruling to the Supreme Court.

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[265] 47 U.S.C. 223(a) (1996) states in full: (a) Whoever - (1) in interstate or foreign communications - (A) by means of a telecommunications device knowingly - (I) makes, creates, solicits, and (ii) initiates the transmission of any comment, request, suggestions, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person; (B) by means of a telecommunications device knowingly - (I) makes, creates, solicits, and (ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowingly that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; (C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications; (D) makes or causes the telephone of another repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, United States Code, or imprisoned not more than two years, or both.

[266] 47 U.S.C. 223(d) (Law Co-op, 1995&Supp. 1997) states in full: Whoever - (1) in interstate or foreign communications knowingly - (A) uses an interactive computer service to send a specific person under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, United States Code, or imprisoned not more than two years, or both.

[267] *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (E.D.Pa. 1996).

[268] *Id*, at 824.

The point at issue was the constitutionality of "indecent communication," as established in *Pacifica*.[269] Although the notion of "indecency" has varied slightly depending on the applicable communications medium, the basic premise that indecency constitutes "patently offensive descriptions of sexual and excretory activities has remained constant.[270] Thus, since this "indecency" standard has withstood challenges in the telephone, cable and broadcast radio contexts, history suggests that perhaps it should similarly prevail in a computer-media context.[271]

Section 223(a)(1)(B)(ii) creates criminal penalties for anyone who, by a means of telecommunications device, "initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowingly that the recipient of the communication is under 18 years of age." Section 223(d) provides that it shall be a crime for anyone who knowingly uses an interactive computer service to send or display in a manner available to a person under 18 years of age, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The penalties under the CDA include imprisonment for up to 2 years, and fines of up to $250,000 for each violation.

In addition, defenses were established so that providing access to interactive computers will not automatically incur liability. Those are not liable who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communication,[272] and who restrict such access by

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[269] *Pacifica*, 438 U.S. 726 (1978).
[270] Wu, *supra* note 61, at 286-87.
[271] *Id*, at 287.
[272] 223(e)(5)(A) "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology;"

requiring certain designated forms of age proof, such as a valid credit card or an adult identification number.[273]

On June 26, 1997, the U.S. Supreme Court, 7-2, decided *Reno v. ACLU*,[274] striking down several provisions of the CDA. The Court, in a majority opinion by Justice John Paul Stevens, held that the provisions of the CDA that regulate "indecent transmissions" and "patently offensive displays" violate the First Amendment.

The Court concluded that unlike the familiar media of television and radio, the Internet is a medium that receives full First Amendment protection. The distinction between the Internet and the broadcast media is the central to the Court's analysis in *Reno*.[275] Justice Stevens, writing for the court, concluded that the Internet was different: Indecent material does not surface by chance. Rather, it is almost always preceded by a user-initiated computer search for specific topics and sites.[276] Thus, the majority of opinion affirmed the district court's finding that "[communications] over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident -- - Almost all sexually explicit images are preceded by warnings as to the content."[277] Thus, Internet communications are different from those "pervasive" media described in *Pacifica*.[278]

In addition, the Court noted another Internet's characteristic which differentiates the Internet from the broadcast media. Unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the

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[273] 223(e)(5)(B) "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."
[274] *Reno v. ACLU*, 117 S.Ct. 2329; 1997 U.S. Lexis. 4037 (June 26, 1997).
[275] Raysman, Richard and Peter Brown, "'*Reno v. ACLU*' -- The First Amendment meets the Internet," *New York Law Journal*, July 8, 1997, at 3.
[276] *Reno*, at 40.
[277] *ACLU v. Reno*, 929 F.Supp. 824, 844-45 (finding 88).
[278] *Pacifica*, 438 U.S. 725 (1978).

Internet can hardly be considered a "scarce" expressive commodity.[279] The Internet provides unlimited capacity for communication of all kinds.[280]

The Court also decided whether the CDA was vague in language referring to indecency. Each of the two provisions at issue uses a different linguistic form. Section 223 (a) uses the word "indecent," while Section 223 (d) speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[281] The Court found that the uncertainty about the relation between two standards undermined a conclusion that the CDA is narrowly tailored to protect minors from potentially harmful materials. The vagueness of the language creates concern both because the CDA is a content-based regulation and such vagueness chills free speech.[282]

Defenses were provided for those to take actions to restrict access by minors to the prohibited communications by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number.[283] The Court agreed with the problems confronting age verification for recipients of Internet communications deliberated by the three-judge District Court.

First, at the time of trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers.[284] The problems were not technological, rather its chilling effect on content providers and users. Second, age proof by passwords is not certain because there is no evidence concerning the reliability of those technologies and an adult password requirement would impose significant burdens on non-commercial sites in cost of creating and

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[279] *Reno*, at 45.
[280] *Id.*
[281] *Id*, at 47.
[282] *Id*, at 49.
[283] 47 U.S.C. 223 (e)(5)(B).
[284] *Id*, at 23 (quoting 929 F.Supp.824, at 846 (finding 102)).

maintaining such screening systems and would discourage users from accessing their sites.[285]

Some argue that the majority opinion leaves open the possibility of future regulation of indecency on the Internet.[286] Justice Stevens cited District Court Judge Dalzell's identification of the Internet's distinguishing characteristics. According to Dalzell, the accessibility and diversity of content on the Internet "leads to the conclusion that Congress may not regulate indecency on the Internet at all." Justice Stevens, however, stated that "[because] appellees do not press this argument before this Court, we do not consider it. Appellees also do not dispute that the Government generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech."[287]

Discussion

The impact of *Thomas* on the present state of modern obscenity law is significant. First, by including the intangible computer transmissions found in *Thomas* within the scope of Section 1465, the Sixth Circuit placed an entirely new technology and medium with the reach of the statute.[288] Congress amended Section 1465 to include computer transmissions soon after the case was decided.

The second impact comes from the decision regarding venue, but limited. This issue was decided because the membership requirements of the AABBS for access to the bulletin board could let the operators define each member's community, and the court assumed that the operators could learn the laws of the

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[285] *Id*, at 24 (quoting 929 F.Supp., at 847 (findings 104-106)).
[286] Raysman, *supra* note 275.
[287] *Reno*, at 34.
[288] Kabalka, *supra* note 13, at 231.

district from which every member calls. The court did not concern the larger community of computer and Internet users.[289]

The most significant legal development in this case was that the bulletin board operators in Northern California were convicted in Tennessee for selling pornographic material that was found to be obscene according to Memphis community standards. The material that was found to be obscene in Memphis was presumably not obscene by Milpitas community standards.[290] By rejecting the notion of an on-line "community" and insisting that the term retain its traditional link to geography, the court failed to acknowledge the very interconnectedness that is the essence of on-line communication.[291] The Internet's members are geographically scattered in communities that may have different values. Therefore, as a practical matter, if the *Miller* standard applies to the Internet, each Internet user must govern his speech in accordance with values of the most restrictive community. This fact could deter speech that is constitutionally protected.[292]

After all, in an effort to find some existing mechanism to punish unacceptable conduct, the government attempts to equate electronic communication with physical movement from one location to another.[293] Since private possession of obscene material is not punishable, the federal obscenity laws aim at prohibiting the distribution of such material. Equating cyberspace transactions with the physical passage of a videotape or photograph through a community by mail or

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[289] *Id*, at 232.

[290] Local police confiscated the Thomases' computer two years before the federal indictment, but returned it saying that the material was not obscene. Stepka, *supra* note 9, at 926.

[291] Delacourt, *supra* note 2, at 210-11 (Winter 1997). "Under the facts of this case, there is no need for this court to adopt a new definition of 'community' for use in obscenity prosecutions involving electronic bulletin boards." 74 F.3d, at 712.

[292] Handelman, Eric, Comment: Obscenity and The Internet: Does the current obscenity standard provide individuals with the proper constitutional safeguards?, 59 *Alb. L. Rev.* 709, at 730 (1995).

common carrier, Congress amended the federal obscenity laws by inserting computer transactions[294] to avoid future controversy over language in the online criminal case against anti-obscenity law.

In *Reno*, many of the Internet characteristics were legally identified for the first time. The discussion will provide criteria in the future which enable a nation to prescribe rules for cyberspace, to subject violators of these rules to the process of the court, and to enforce these rules.

International Arena

The debate over what role government should play in controlling the Internet is just beginning overseas. An increasing large and vocal group of users has found reason for concerns as the same as in the U.S. Alarmed by the apparent prevalence of various forms of objectionable online content, as well as by the Internet's enormous potential for misuse, these users have called on their political representatives to institute some form of regulation.[295]

Part of the happy mythology of the network holds that it is a self-regulating entity, controlled by no government - one of the few instances in history of successful anarchy.[296] That is not the case. Ministers in Europe have stressed that the general legal frameworks should be applied online as they are off-line.[297]

There is some common ground. Most industrialized nations guarantee freedom of expression, including Germany, France, Britain and Japan. The

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[293] Byassee, William S., "Jurisdiction of Cyberspace: Application Real World Precedent to the Virtual Community," 30 *Wake Forest L.Rev.* 197, at 203-04 (Spring 1995). See 18 U.S.C. 1465 (1997).

[294] 18 U.S.C. 1462, "Importation or transportation of obscene matters," was amended in 1996 by inserting "or interactive computer service" in the first paragraph and the second paragraph; 18 U.S.C. 1465, prescribing "Transportation of obscene matters for sale or distribution," was amended in 1996 by inserting "or an interactive computer service" in the first paragraph.

[295] Delacourt, *supra* note 2, 207-08.

[296] Wilske, Stephan and Teresa Schiller, "International Jurisdiction in Cyberspace: Which States May Regulate The Internet," 50 *Fed.Com.L.J.* 117, at 121 (December 1997).

countries also have a common interest in regulating sexual material on the Internet and hold a stance that obscenity is beyond protected expression. They have attempted to take action on the issue according to their discretion of the moral and cultural sensibilities of their citizens. Most countries agree that such fundamentally repugnant things as child pornography, fraud, and trafficking in human beings are just as illegal in cyberspace as they are in any other setting and are subject to the same punishment.[298] Nations, however, find the difficulty finding the way of controlling "inappropriate" material on the Internet.

JURISDICTION. Laws are generally territorial, extending no further than the borders of the jurisdiction of the enacting government.[299] When nations attempt to regulate Internet pornography according to the traditional principle, many commentators insist an inevitable problem occurs. For example, defining jurisdiction is a volatile issue because cyberspace has no territorially based boundaries, and the cost and speed of message transmission on the Net is almost entirely independent of physical location.[300]

Under international law, nations are allowed to control activities which happen in their territory even if these activities are not limited to the national territory and even if control might not be effective.[301] Therefore, in the CompuServe case German law was held applicable to bar access for German users to certain news groups. Because of the inability of CompuServe to tailor its services to the laws of each country in which it operates, the consequence was that

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[297] Global Information Networks, Ministerial Conference Bonn 6-8 July 1997, P22. (Online) Available, http://www2.echo.lu/bonn/final.html, December 21, 1997.
[298] *Los Angels Times*, Business, part D, at 1, June 30, 1997.
[299] Burk, Dan. L., "Transferred Intellectual Property Issues on the Electronic Frontier," 6 *Stan.L. & Pol'y Rev.* 9, at 10 (1994).
[300] Johnson, David R. and David Post, "Law and borders - the rise of law in cyberspace," 48 *Stanford L. Rev.* 1367, at 1370 (May 1996); See also Burk, *supra* note 7, at 10.

"German law is dictating what American can read and view."[302] The territoriality principle, however, would not allow extraterritorial application of national law.[303] Therefore, Germany could not order removal of objectionable groups it finds from the Net in general.

Jurisdiction is also grounded in the fact that the injurious effect, although not the act or omission itself, occurred in the territory of the State.[304] Probably the first cyberspace case where the effects principle was invoked was *Thomas* case in the U.S.[305] The defendants, who were operating a computer bulletin board system from their home in California, were convicted in Tennessee on several criminal violations under federal obscenity law. The defendants challenged the venue in Tennessee, claiming that the criminal act did not occur in Tennessee. The Sixth Circuit concluded that "the effects of the defendants' criminal conduct reached the Western District of Tennessee, and that district was suitable for accurate fact-finding."[306]

A case like *Thomas* could happen over the national borders. The question is whether a sender of sexual material files could be indicted where standards concerning obscenity are stricter than in America. *Thomas* case, however, can give a limited precedential value to this question because the defendants knew the jurisdiction in which files were accessed and downloaded with their approval. At least insofar as international jurisdiction is concerned, it is not clear whether the

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[301] Wilske, *supra* note 296, at 129. "Territoriality principle is by far the most common basis for the exercise of jurisdiction to prescribe, and it has been generally free from controversy." See Restatement (Third) of the Foreign Relations Law of the U.S. 402 cmt. c. (1987).

[302] Markoff, John, "German Pornography Law Determine What America Sees," *New York Times*, December 31, 1995, 4, at 2.

[303] Wilske, *supra* note 296, at 130.

[304] Oxman, Jurisdiction of States, in Encyclopedia of Public International Law 280 (Rudolf Bernhardt ed., Instalment 10 1987). The objective territoriality principle, where a state has jurisdiction to prescribe, adjudicate, or enforce rules of conduct for acts that occur outside its territory by which cause effects. Restatement (Third) Foreign Relations Law of the U.S. 402 (1)(c) (1987).

[305] Wilske, *supra* note 296, at 133. *Thomas*, 74 F.3d 701 (6th Cir.), cert.denied, 117 S.Ct. 74 (1996).

downloading of files in a certain country makes the sender's activities based on the random downloading of files that happen to be illegal in certain jurisdictions.[307] The difficulty of finding geographical locations on the random downloading also makes the territorial and injurious principles hard to apply in the context of the cyberspace.

The recent trademark case, *Playboy Enterprises, Inc., v. Chuckleberry Publishing, Inc.*,[308] also dealt with the jurisdictional issue. It is the first published international case addressing multijurisdictional issues in cyberspace. In the case, a publisher offered and distributed sexually explicit photos to customers, including U.S. citizens, from a Web site in Italy. Customers had to subscribe to his service and pay a monthly fee; therefore, the publisher was aware that his material was entering specific jurisdiction.[309]

Judge Scheindlin held that the distribution of the materials in the U.S. is a violation of a fifteen-year-old U.S. court order prohibiting the use of the trademark, "Playmen," in magazines distributed in the U.S. While the court concluded that it has neither the jurisdiction nor the desire to prohibit the creation of Internet sites around the globe, it may prohibit access to those sites in the U.S.[310]

NATION'S RESPONSE. Countries are making their own attempts to regulate Internet pornography. Although the United States is regarded as among those nations placing the fewest restrictions on expression, it was among the first to approve legislation governing the content of on-line communications.[311] One of the on-line content restrictions was the CDA of 1996 which was intended to shield children from obscene and indecent on-line material. As already discussed in the

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[306] *Thomas*, at 710.
[307] Wilske, *supra* note 296, at 134.
[308] *Playboy Enter.*, 939 F.Supp. 1032 (S.D.N.Y. 1996).
[309] *Id*, at 1039.
[310] *Id*, at 1040.
[311] Delacourt, *supra* note 2, at 208. The Communications Decency Act, 47 U.S.C. 223 (a)-(h) (1996).

previous chapter, insofar as several provisions regulating "indecent" and "patently offensive" communications the Supreme Court held them unconstitutional in *Reno v. ACLU.*[312]

The government is now going to give full First Amendment right on the Internet. That means that the government's regulation on the Internet must be carefully tailored in the case of legislation. What some commentator suggested has not happened yet, the majority opinion in *Reno* leaves open the possibility of future regulation on the Internet. Law makers, however, have already introduced several bills that will mandate service providers to offer software blocking objectionable material.[313]

The government's endorsement for software instead of dealing with touchy constitutional problems is also seen in Japan. In Japan, there is no law regulating speech on the Internet. A trade organization, in conjunction with the Ministry of International Trade and Industry, is working to develop filtering software compatible with PICS.[314]

The trade industry, called the Electronic Network Consortium (ENC), was originally established in 1985 as Videotex Promotion Association of Japan, and reorganized with 93 organizations including major online service providers in Japan as the development of telecommunications.[315]

In February 1996, ENC mapped out ethical guidelines, "General Ethical Guideline for Running Online Service," to respond to increasing concerns among teachers and parents about harmful information to children. The Consortium compiled guidelines for both network operators and subscribers.

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[312] *Reno v. ACLU*, 117 S.Ct. 2329 (1997).
[313] Already discussed in detail.
[314] "Operation of the first PICS compliant label service bureau in Japan," Electronic Network Consortium (ENC), Press release, September 16, 1997. (Online) Available, http://www.nmda.or.jp/enc/index-engblish.html, December 21, 1997.
[315] See *Id.*

The guidelines, however, are full of vague notions, calling for respecting the freedom of speech, human rights and public order.[316] Consortium executive Akio Kokubu noted that the use of vague notions reflected how difficult to decide socially acceptable standards on material available on line.[317] Furthermore, the guidelines are not binding because they lack punishments for violators.

The Consortium and the government have recently endorsed development of filtering software. A company launches a Japanese version of CyberPatrol, to filter out indecent material.[318] Meanwhile, the Consortium is researching a system that would rate questionable contents tailored to Japanese society, and based on the Recreational Software Advisory Council's content evaluation criteria (RSACi). The Council used the results of 20-year study by a Stanford researcher into the effect of various media upon minors.[319]

The European Union (EU) has taken similar actions as Japan. It has recently opened a wide-range of debate on the problems associated with the Internet and on the question of how to protect their children and adults from undesirable content on the Internet at EU level.

In October 1996, the European Union Commission of European Communities (Commission) put forth recommendations for combating undesirable content on the Internet, including backing a rating system based on the Platform for

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[316] "General Ethical Guideline for Running Online Services," ENC, Press release, February 16, 1996. (Online) Available, http://www.nmda.or.jp/enc/index-engblish.html, March 18, 1998.
[317] "Ethical guidelines drawn up for on-line net business," *Kyodo News Service*, February 16, 1996; RSACi is a voluntary rating system whose questionnaire asks highly specific questions about the level, nature, and intensity of sex, nudity, violence, and offensive language found within the Web master's site. Once completed, the questionnaire is submitted electronically to the RSAC Web server, which tabulates the results and products the "html" advisory tags that the Web master then places on their Web site. Martin, Dianne C., and Joseph M. Reagle, "An Alternative to Government Regulation and Censorship: Content Advisory Systems for the Internet," 15 *Cardozo Arts & Ent L.J.* 409, at 417 (1997).
[318] ASCII Corp. introduced software in November, 1996. Yoshio Takano, "New software to 'filter' indecency," *The Daily Yomiuri*, December 24, 1996.
[319] *Id.*

Internet Content Selection (PICS) that would allow parents, educators, and others to determine the type of content minors may access on the Internet.[320]

A Commission working document which was submitted to the Council on June 30, 1997, acknowledged that there have been real difficulties in applying laws and general principles to the on-line service sector, and addressed the self-regulation as a supplement to existing legislation, in the form of voluntary action by the parties concerned.[321] At European level, the EU aims at coordinating the development of national self-regulation by promoting common codes of practice and principles to be applied by the member nations, industries and interested parties and EU.[322] The Council unanimously welcomed this.

The European Parliament still finds the difficulty of getting consensus among nations. The Parliament stated in a communication to members, "What is considered to be harmful on the Net depends on cultural differences. Each country may reach its own conclusion in defining the borderline between what is permissible and not permissible."[323]

Although most of industrialized nations withheld enforcing tough regulations on the Internet like Japan, Germany, a member state of EU, is leading the way for online regulations. The recent shut-down of 200 usenet groups by CompuServe in Germany was an important incident from an international perspective.

In November 1995, a Munich prosecutor warned CompuServe's German office about possible violations, and gave the service provider with a list of over

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[320] Staiman, Ari, Note: Shielding Internet Users from Undesirable Content: The Advantages of a PICS Based Rating System, 20 *Fordham Int's L.J.* 866, at 868 (March 1997). See Commission Communication, COM (96) 487, at 18-24 (1996).

[321] "On the follow-up to the Green paper on the protection of minors and human dignity in audiovisual and information services," The European Commission, Commission Communication. (Online) Available, http://europe.eu.int/en/comm.html, March 2, 1998.

[322] *Id.*

[323] "The Cutting Edge; Testing the Boundaries; Countries Face Cyber Contol in Their Own Ways," *Los Angels Times*, home edition, Business; part.D, pg.1, June 30, 1997.

200 online news groups found to be objectionable. As a result, CompuServe, which feared possible prosecution, voluntarily blocked access to the discussion groups not only for its 200,000 German subscribers, but for all of its nearly four million subscribers world wide.[324] This incident indicated that an individual country's decision would be far beyond its national border to the world.

The first significant legal development in the incident is the willingness of the Bavarian Justice Ministry to hold an online service provider, as opposed to an individual user, responsible for material which appears on the Internet.[325] German officials rejected CompuServe's argument that it was merely a "gateway" to the Internet with no control over what users do or say there. Although German officials maintain that CompuServe's decision to cut off access to the sites was not compelled, they claimed that CompuServe would be liable in the event that discussion groups with similar content are found in Germany in the future.[326]

The second major development has been the refusal of the Justice Ministry to accept user-operated screening software as a possible regulatory device.[327] The Justice Ministry condemned CompuServe's effort as an attempt by CompuServe to shift the burden of liability .

FOR INTERNATIONAL CONSENSUS. The three-day summit beginning December 1, 1997, in Washington was the first-ever global conference on protecting children from on-line pornography. Representatives from seven other countries from Britain, Germany, Japan, Italy, Canada, France, and Russia attended the summit.

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[324] Meyer, Michael, "A Bad Dream Comes True in Cyberspace: The Germans Censor an Online Service and the Rest of Us, too," *NEWSWEEK*, January 8, 1996, at 65.
[325] Delacourt, *supra* note 2, at 212.
[326] Miller, Leslie, "CompuServe Offers Parental Controls, Reopens Sites," *USA Today*, February 14, 1996, at 7D.
[327] *Id*, at 213.

The summit was the industry's latest response to President Clinton's request last summer for voluntary measures, in lieu of legislation, after the U.S. Supreme Court struck down provisions of the CDA that would criminalize the distribution of "indecent" communications on the Internet.[328]

At the summit, the industry displayed the centerpiece of the campaign to keep children from wandering into pornographic sites: technology that allows parents to block access to sites based on their content of sex, violence and offensive language.[329]

The primary argument against enacting Internet regulations is that there are alternative means to promoting the government's interest in shielding children from pornography other than regulation. One which received a great deal of attention was technological remedy for controlling the flow of sexually explicit material on the Net. Those remedies that seem to be powerful to block objectionable sites are a software program and a rating system. They also seem to be obtaining more support among nations than regulating content on the Internet.

Technological Remedies - Protecting Children by Technology

SCREENING SOFTWARE. A user-operated software program is a promising regulatory alternative. It is intended to enable parents to protect their children from easy access to sexually explicit sites.

Screening software usually adopts one of two approaches, depending on the level of restriction the user desires: either the software blocks those sites which the user has identified as undesirable, leaving the remainder accessible, or the

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[328] Ota, Alan K., "Congress eyes net regulation," *Journal of Commerce*, December 11, 1997, editorial/opinion; pg.6A.
[329] *Id.*

software permits access only to those sites which the user has identified as desirable, blocking all others.[330] Screening software is also frequently adopted in conjunction with a rating system, creating a hybrid system in which third parties rate the on-line material, but users themselves control the software that determines how these ratings should be interpreted.[331]

All of the major online services, including America Online (AOL), currently offer built-in parental controls for chat rooms, newsgroups, and downloads. For example, AOL provides parents with the option of creating master accounts for themselves and subaccounts for their children and other family members. This allows parents to block access on sub-accounts. Several other software programs are available through online services. These are CyberPatrol, SurfWatch, and CyberSitter. All block access to specified Net sites.[332]

The effectiveness of screening software, like that of rating system, depends on its ability to keep pace with the ever-changing Internet landscape.[333]

RATING SYSTEM. A voluntary rating system is another promising regulatory alternative. Proposals of this system dominate current debate. For example, warning is the simplest form of rating system. Several service providers instituted such warnings at Internet access points to alert users to the fact that the material which lay ahead was unregulated, and therefore potentially objectionable.[334] Other simplest rating content is by inserting "-L18" into an Internet address to indicate that the site is not suitable for individuals under the age of eighteen years old.[335]

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[330] Wilske, *supra* note 296, at 229.
[331] *Id*, at 230.
[332] Tartaglione, Ralph, "Kids Online: What parents can do to protect their children from cyberspace," *SIEUS Report*, v.25, n1, at 10-11 (Oct.-Nov. 1996).
[333] Wilske, *supra* note 296, at 229.
[334] *Id*, at 225.
[335] Staiman, *supra* note 320, at 882.

Another movement called the Platform for Internet Content Selection (PICS) is well under way. PICS has been organized by the World Wide Web Consortium, known as W3C, comprised of 231 corporations, public interest groups and trade associates.[336]

The system advocated by PICS for Internet Content Selection is a far more sophisticated. PICS may establish the Internet "adult zones" that Justice O'Connor and Chief Justice Rehnquist supported in their dissent in *Reno v. ACLU.*[337] It endeavors to rate online material in nice categories -- including sex, violence, and profanity -- on a scale of one through four.[338]

PICS can work with any Internet content exchange technology that has an address based on the uniform resource locator (URL), including FTP and Gopher, but not e-mail.

PICS is a set of technical specifications that help software and rating services to work together. To avoid undesirable sites a user indicates to the PICS compatible software a list of the categories of content the user considers undesirable.[339] When the user tries to access content at a particular site, the user's filtering software will check the ratings of the content against the list of undesirable categories.[340] Depending on what the content labels say, the software may block access to that site.[341]

While PICS relies on content providers to evaluate their own material, these evaluations will be periodically reviewed by the third parties in order to ensure good

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[336] PICS is being developed by the World Wide Web Consortium, a group based at the Massachusetts Institute of Technology. In October 1994, the Consortium was created with MIT Laboratory for Computer Science as its primary host institution.

[337] Weiner, Daniel H. and Jennifer M. Driscoll, "Protecting Speech, and Children, On-Line: Delete Hit on CDA; Software, Rating Systems Possible Solutions," *New York Law Journal*, July 21, 1997, at S5.

[338] Lynch, Stephen, "The Rating Game Online: A high-tech coalition has decided how to clean up the Internet --by having sites rate themselves," *Orange County Reg.*, March 31, 1996, at K9.

[339] Staiman, supra note 320, at 884.

[340] *Id.*

faith reporting.[342] The PICS rating system thus aspires to a level of thoroughness and accuracy unheard of in other fields.

Possible Solutions

Nations are more willing to encourage and develop blocking software combining rating software as one of the most promising alternatives to block inappropriate material on the Internet.

The United States, for example, is leaning more toward new technologies in the wake of the Supreme Court's decision concerning the CDA. In fact, only a few weeks after the ruling in *Reno*, the Clinton administration announced the plan to pursue "a family-friendly Internet" with three components -- new technologies, enforcement of existing laws and more active participation of parents.[343]

The administration has strongly discussed new technologies -- filtering software and rating software -- to gain the backing of the Internet industry and encourage them to take more steps in this direction. Some of the biggest firms in the Internet industry, including America Online, Walt Disney Co. and MCI, recently announced steps to voluntarily restrict access to pornography.[344]

Several legislators have been more willing to head in this direction. On the day when the CDA was struck down by the Supreme Court, Rep. Zoe Lofgren, D-Calif., introduced the bill, "the Internet Freedom and Child Protection Act."[345] The bill seeks to require all Internet service providers to offer "filtering" software as part of their service packages. Lofgren's intent was that the bill "would maintain respect for the First Amendment while helping parents keep unsuitable material

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[341] W3C Frequently Asked Questions. (Online) Available, http://www.w3c.org/PICS, December 27, 1997.
[342] Delacourt, *supra* note 2, at 225.
[343] "Remarks by the President at event on the E-Chip for the Internet," White House Press Release, July 16, 1997. (Online) Available, http://www.whitehouse.gov, January 23, 1998.
[344] Ota, *supra* note 328.
[345] H.R. 3606.

away from children."[346] Another bill, the "Family-Friendly Internet Access Act of 1997," introduced on March 20, 1997, by Rep. Joseph M. McDade, R-Pa., would require Internet access providers to supply screening software for parents to limit children's access to "unsuitable" material on the Internet.[347] Sen. Patty Murray, D-Wash., is considering legislation, similar in part to the Lofgren bill, that would require Internet service providers to offer filtering software.[348]

Two sets of filtering software and rating software might be both technologically and legally the most suitable way for nations to protect minors and unconsented adults from undesirable content on the Internet. In fact, PICS rating system, which helps them to work together, is now gaining more consensus among nations. In Europe, for example, INRIA became the Consortium's second host institution in April 1995.[349] In August 1996, Keio University in Japan joined MIT and INRIA in becoming the third site to host W3C. The three institutions jointly host W3C by providing both local support anda vendor-neutral foundation to perform core development.[350] With more membership, W3C will implement a world-wide PICS based rating system.

Screening software and rating system, however, are not technologically perfect. One frequently cited concern is that the Internet is comprised of a rapidly expanding, and frequently changing, volume of material with which screening software will be unable to keep pace.[351] As a result, filtering software utilizing databases of approved material will block access to any Web site or newsgroups not listed in the database, resulting unduly limited access and under-utilization of the

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[346] News release from Congresswoman Zoe Lofgren, D-CA., June 26, 1997.
[347] H.R. 1180.
[348] Ota, *supra* note 328.
[349] The work in Europe is partly funded by the European Commission as the Webcore project. (Webcore was originally proposed by CERN where the web originated, but at the end of 1994 CERN had to make economies in order to meet the challenges of its Large Hadron Collider project, and passed the initiative to INRIA.)
[350] W3C Frequently Asked Questions, *supra* note 343.
[351] *Id*, at 230.

Internet.[352] Conversely, filtering software utilizing databases of banned material will allow access to all material not listed in the database, resulting in children having inappropriately broad access.[353] A more serious concern is that screening software will be unable to compensate for the infinite number of contexts in which a keyword may appear, leading to frequent over-and under-screening.[354]

Rating systems also are not problem-free. One of the problems relates to the rating body. There is a concern that such a body would itself be overwhelmed.[355] Because the Internet is experiencing rapid growth, small percentage of Web sites such a body can handle with will result in too little blocking or much Internet access.

Although such filtering technology was seen as the best alternative after the *Reno* court ruling, civil liberties groups are condemning the PICS technology as a mechanism for censorship in an increasingly vigorous debate. Tom Berners-Lee, inventor of the World Wide Web and director of the consortium that approved the standard, is defending it as a force for social good.[356]

The primary concern of the free speech advocates is that the government might use the system for political material. At the recent conference in Washington on protecting children from on-line pornography, Floyd Abrams, the First Amendment lawyer, was asked of his view of the problems with software programs that screen out objectionable material. Abrams replied, "The only problem with private filters is to make sure they don't become public filters."[357]

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[352] Kubota, Glenn, Comment: Public School Usage of Internet Filtering Software: Book Banning Reincarnated?," 17 *Loy.L.A.Ent.L.J.* 687, at 698 (1997).
[353] *Id.*
[354] *Id.* at 230.
[355] Delecourt, *supra* note 2, at 226.
[356] Amy Harmon, "Technology to Let Engineers Filter the Web and Judge Content," *New York Times*, January 19, 1998, Business, C1.
[357] Harmon, Amy, "Highway Patrol; The Self-Appointed Cops of the Information Age," *New York Times*, December 7, 1997, late edition - final, section 4; pg. 1.

V. CONCLUSION

Although proponents of cyberspace sovereignty usually present a normative argument -- that nations should respect the rules of cyberspace,[358] it is unrealistic that the government will choose to leave the Internet regulation-free. Analysis of online cases suggests that the government already handled several cases by finding some existing mechanism to punish violators on the net. Under international law, each nation can have its own policy and law on the Internet and regulate activities within the nation's territory.

However, as the chapter discussing international arena indicates, an individual nation's action on the Internet would extend to other nations because many jurisdictions are easily involved in an online related crime. Criminalization of Internet pornography and application of the traditional laws are not possible without international consensus.

It is difficult to have a common legal framework to deal with Internet pornography even among the developed nations who share similar understanding on the freedom of expression. In making determination whether any speech or communication is obscene, not within the area of constitutionally unprotected speech, nations have each standard to determine obscenity. The CompuServe case in Germany was a good case to show that German pornography law banned access to certain news groups and that American users were also barred access.

The developed nations, United States, Germany, Japan, France, EU, agree to the idea that they need some consensus on the issue, acknowledging that it is not easy to regulate the Internet. Therefore, like the support in the Washington online summit in December of 1997, they are heading for technological methods to shield objectionable on-line content rather than for regulation.

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[358] Wu, Timothy S., Note: Cyberspace Sovereignty? -- The Internet and the International System, 10 *Harv.J.Law & Tec* 64, at 648 (Summer 1997).

Technological remedy will be a promising supplement for existing laws because it can avoid the issue of the free speech on the net. The United States is more leaning toward the direction in the wake of the Supreme Court's decision concerning the CDA. It will provide options for users to access to some ojectionable content and for parents to bar some types of information their children access to.

The PICS based rating system seems the best way to shield users from undesirable content because it has gained much support from U.S., Japan, and EU. If a world-wide PICS based rating system is implemented, it will be more effective. However, it will not be so effective unless nations develop uniform systems and continue to work on the systems to keep up with the ever-changing Internet.

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