
Dawn L. Johnson

Follow this and additional works at: https://repository.law.uic.edu/jitpl

Part of the Computer Law Commons, Internet Law Commons, Privacy Law Commons, and the Science and Technology Law Commons

Recommended Citation

https://repository.law.uic.edu/jitpl/vol15/iss1/5

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in The John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.
IT'S 1996: DO YOU KNOW WHERE YOUR CYBERKIDS ARE? CAPTIVE AUDIENCES AND CONTENT REGULATION ON THE INTERNET

I suspect, however, that it may come as a surprise to many people who have not followed the evolution of constitutional law that, by implication at least, the First Amendment provides that Congress shall make no law abridging the freedom of speech unless that law advances a compelling governmental interest. Our cherished freedom of speech does not cover as broad a spectrum as one may have gleaned from a simple reading of the Amendment.1

I. INTRODUCTION

Historically, the advent of a novel communications technology has fostered public apprehension of the harmful effects the medium's content may have on children.2 In the early part of the twentieth century, the release of D.W. Griffith's theatrical film, The Birth of a Nation, literally shocked a nation.3 The viewing public, with the support of both federal and state governments, responded to the film's release with a tirade of attempts to censor content deemed especially harmful for children and


3. Based on Thomas Dixon Jr.'s novel, The Clansman, the film was the first to address the role of African Americans in American history. EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS 3 (1982) (presenting an historical and legal record of movie censorship in the United States by officials and courts for political, religious, moral, and sexual reasons).
immigrants. Griffith, however, believed that this new form of cultural expression should be accorded the same constitutional status as the print media:

Today the censorship of moving pictures through the entire country is seriously harming the growth of art. Had intelligent opposition to censorship been employed when it first made itself manifest it could easily have been overcome. But the pygmy child of that day has grown to be, not merely a man, but a giant, and... he is a giant whose forces of evil are so strong that he threatens the priceless heritage of our nation—freedom of expression.

The debate, which took several decades to resolve, resulted in the film industry's voluntary movie rating system, one of the most effective private efforts at content self-regulation undertaken by industry leaders in a communications medium.

4. Subsequent to the film's release, Dixon persuaded Supreme Court Chief Justice Edward Douglas White, a former Ku Klux Klan member, along with the other Supreme Court Justices and members of Congress, to view the film. De Grazia & Newman, supra note 3, at 4-5. Four days later, the Court handed down a unanimous decision, Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 240 (1915), which held that motion pictures were not protected speech under the First Amendment. De Grazia & Newman, supra note 3, at xix.

The Birth of a Nation was only one of many films challenged over the years in court proceedings and through attempted legislative reform. De Grazia & Newman, supra note 3, at 3-59. Noting that nearly one million children nationwide attended movies daily, Georgia Congressman Dudley M. Hughes, Chairman of the House Education Committee, stated that "if an immoral picture injured a single child, it should be a matter of concern to the federal government." De Grazia & Newman, supra note 3, at 5. Prior to 1927, state legislatures considered, and rejected, more than bills designed to implement statewide film censorship were considered, and rejected, by state legislatures. De Grazia & Newman, supra note 3, at 26.

In 1952, however, the Supreme Court reversed its holding in Mutual, and held that expression by motion picture was subject to First Amendment protection. Burstyn v. Wilson, 343 U.S. 495, 502 (1952).


6. In an effort to avoid federal censorship and regulation of business practices, in 1916, motion picture producers and directors formed the National Association of the Motion Picture Industry ("NAMPI"). De Grazia & Newman, supra note 3, at 22. NAMPI, which announced a self-censorship program to avert the growing governmental censorship movement, also endorsed changes in federal legislation. De Grazia & Newman, supra note 3, at 22 (noting that the federal statutory revisions had the affect of "linking movies with the print media in the context of moral censorship."). See generally 18 U.S.C. § 1462 (1994) (prohibiting transportation of obscene material); 18 U.S.C. § 1494 (1994) (prohibiting sale and distribution of obscene material). In 1922, the Motion Picture Producers and Distributors Association of America ("MPPDA") replaced NAMPI and changed its name to the current industry organization, the Motion Picture Association of America ("MPAA"). De Grazia & Newman, supra note 3, at 25, 64.

In 1968, the Supreme Court decided two cases which would define the current system of industry self-regulation. De Grazia & Newman, supra note 3, at 116. See Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 691 (1968) (striking down a city ordinance which re-
The present proliferation of computer-based communication services appears to be a modern-day counterpart to the mass media explosion of previous decades. In this technological communications world, known as “Cyberspace,”7 users interact by exchanging electronic messages via computers over telephone lines, as well as access on-line services and information.8 The Internet9 is the global network of computers which

7. “Most clearly defined, Cyberspace is where computer-mediated communications take place, such as exchanging messages and information, and accessing on-line services and data.” Donna A. Gallagher, Free Speech on the Line: Modern Technology and the First Amendment, 3 COMM LAW CONSPectus 197, 205 n.2 (1995). For a comprehensive treatment of the history, structure, content, and user profile analysis of the Internet, see ACLU v. Reno, 929 F. Supp. at 830-49 (stipulated findings of fact).

8. Gallagher, supra note 7, at 198. Computer networks provide services such as electronic banking, chatting networks, shopping, television channels, video games, and interactive entertainment. Gallagher, supra note 7, at 205 n.17.

Information on most computer networks is found by accessing a bulletin board system, or “host” computer. Loftus E. Becker, Jr., The Liability of Computer Bulletin Board Operators for Defamation Posted by Others, 22 CONN. L. REV. 203, 207 (1989). A bulletin board operator may control the content of the posted data, or merely allow users to access information and/or communicate with others who have access to the board. Id. at 209. The “Usenet” is an enormous, on-line bulletin board with more than 6,000 different topic groups available daily. Adam C. Engst, Making the Internet Connection, MacUser, May 1995, at 66. The World Wide Web (“Web”) links different servers globally through graphic “pages” of information called “hypertext.” Id.

Electronic mail (“e-mail”) allows any individual with an established e-mail address to post and receive electronically transmitted messages. Becker, supra at 211-12. E-mail is similar to the U.S. Postal Service mail system because generally only those who have access to an e-mail address can send messages, and the user’s password limits who can view the messages. See Becker, supra at 211-12. Cf. ACLU v. Reno, 929 F. Supp. at 834 (noting that simple e-mail, unlike a letter, is not secure and an intermediate computer can access the contents sent between the sender and recipient unless the message is encrypted).
connects its users to the majority of these services. More than one-third of all households in the United States have a personal computer, and many of those have Internet access or subscribe to commercial online services. Increasingly, children seem to be the family "computer experts."

The Internet also offers access to an infinite spectrum of subjects.

Chat lines, a type of bulletin board, allow users a substantially greater degree of interaction, with the number of participants limited only by the technical sophistication of the network. Becker, supra at 212-13.

As the center of the new telecommunications media termed by Vice-President Al Gore as the "Information Superhighway," the Internet functions as a "network of networks," which globally disseminates computer communications, data, text, voice and video. Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619, 1637 n.1 (1995).

The Internet has a variety of users: large, commercial computer communications services such as CompuServe Incorporated, the Microsoft Network, Prodigy Services Company, America Online, Inc., and Netcom On-Line Communications Service, as well as tens of thousands of smaller university, government, and corporate networks. See, e.g., ACLU v. Reno, 929 F. Supp. at 832-36 (stipulated findings of fact discussing individual Internet access avenues).

In turn, these users are linked by a common set of communications procedures known as "protocols." See Mark A. Kassel & Joanne Keane Kassel, Don't Get Caught in the Net: An Intellectual Property Practitioner's Guide to Using the Internet, 13 J. MARSHALL J. COMPUTER & INFO. L. 373, n.2 (1995) (discussing history of the Internet, its resources, and instructions on access).

According to a study released by Texas Internet Consulting, the Internet reaches more than 21.3 million users worldwide, including an additional 27.5 million users with e-mail access. See Karen S. Frank, Potential Liability on the Internet, 437 PLI/PAT 417, at *4 (1996) (noting that the Internet reaches 100 countries and allows e-mail access from 154 countries).

Phillip Elmer-Dewitt, 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 (statement by Republican Senator Dan Coates, co-sponsor of the Communications Decency Act of 1996). The "computer boom" of recent years has concurrently brought new users into the on-line community, and many of them are children. David Landis, Sex, Laws & CyberSpace—Regulating Porn: Does it Compute?, USA TODAY, Aug. 9, 1994, at 1D. See also Hammond, supra note 2, at 270 (noting that an informal survey revealed that "American parents lack sufficient time and technological expertise to monitor and control what their children see on television and cable, hear on their CDs or play and interact with on their computers").

For example, users can access computer bulletin boards through Usenet newsgroups, which provide subject matter on topics ranging from "molecular biology to nude sunbathing." Gallagher, supra note 7, at 205 n.19. Likewise, many services have computer chat rooms, which are described as "the equivalent of an electronic bar in which people talk about everything, including sex." Lorek, supra note 11, at 1B. According to Brian Ek, spokesman for Prodigy, an on-line service provider, "[i]f you go on chat or go onto the Internet, you are leaving your house to a virtual world and will see people from all walks of life." Lorek, supra note 11, at 1B.
Moreover, computer communications provide anonymity, ease of access, and the potential to reach mass audiences. While such features promote the free interchange of expression, they also foster anxiety that this rapidly developing technology allows children access to sexually explicit text, images, and violent content.

14. The explosion of the Internet has brought a concurrent public interest in anonymity. Paul Andrews, *Behind the Mask—Online Users Hide Their Identities for Many Reasons, Legal and Illegal*, The Seattle Times, Nov. 20, 1994, at J1. According to Richard Gingras, worldwide services manager for Apple Computer’s E-World on-line service, “when you’re anonymous you tend to do things of a less responsible nature.” *Id.* Many on-line service providers prohibit true anonymity and keep records of “pseudonymous traffic” in order to locate users who abuse the service. *See also* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 Yale L.J. 1639 (1995) (examining ways in which cultural behavior developing in Cyberspace challenges the First Amendment). However, one of the technological advantages of computer networks is that they allow the use of “anonymous reposters,” which re-route messages through “server” computers, thus disguising its source. Andrews, *supra*.

15. “A user need have only a terminal—a display device and a keyboard—connected to a modem, which in turn is connected to a telephone line, and the information (phone number and sometimes passwords) necessary to access the service.” Becker, *supra* note 8, at 207-08. Moreover, communication between sites on the Internet is facilitated by the use of hypertext markup language (“HTML”), which allows for the creation of “hyperlinks” or “links.” *ACLU v. Reno*, 929 F. Supp. at 843. Simply by clicking on an HTML link, the user moves easily from different files within one Web site, as well as from one Web site to another. *Id.* Similar to that used by WESTLAW or LEXIS users, “search engines”, search available site headers for words or word combinations requested by the user, then allow the user to choose from different sources of content. *See id.*

16. *See Elmer-Dewitt, supra* note 12, at 38 (statement by Civil Libertarian Mike Godwin, staff counsel for the Electronic Frontier Foundation, criticizing indecency portion of Communications Decency Act). *See also* ACLU v. Reno, 929 F. Supp. at 843 (noting that diversity of content on the Internet is feasible because the Internet provides an easy and inexpensive way for a speaker to reach an audience which could potentially number in the millions).

As of November 1994, the estimated number of users of various on-line communications services included: Internet (5 million to 20 million users, Internet access through local providers); CompuServe (2.4 million users); America Online (1.25 million users); Prodigy (2 million-plus users estimated by number of households using system); Delphi (undisclosed, but estimated at 200,000 users). Andrews, *supra* note 14, at J1.

17. As of August 1994, three of the top ten Usenet Newsgroup computer bulletin boards accessible through the Internet involved sex-related topics, (alt.sex.stories, alt.binaries.pictures and alt.sex) with between 200,000 to 400,000 readers each month. Landis, *supra* note 12, at 1D. *See also* Marty Rimm, *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 (1995) (discussing results of 18-month study surveying sexually explicit images and text on computer networks nationwide and finding that of the Usenet newsgroups studied, 83.5% of the pictures were pornographic).

Children may also have access to potentially dangerous or illegal activities. *See* Matthew Kaufman, *West Hartford Man May Get 3-year Term in Bomb Recipe Case*, Hartford Cour. (Connecticut), Oct. 23, 1993, at B7 (discussing the arrest of Connecticut resident
Prior to the February 8, 1996 passage of the Telecommunications Competition and Deregulation Act of 1996 ("Telecommunications Act"), the Internet remained free from formal statutory regulation of the content of material transmitted through its networks. However, subsumed within the language of the Telecommunications Act are the controversial provisions of the Communications Decency Act of 1996 ("CDA"). The CDA attempts to protect children from "obscene" or "indecency" material by imposing criminal liability for violations. The CDA expands section 223 of the Communications Act of 1934, which forbids the transmission of material injurious to children after two boys were injured by homemade bomb they constructed after viewing bulletin board service which contained an instruction guide on how to construct bombs and explosives.

Moreover, Internet sites contain information on alcohol, the drug culture, alternative life-styles, and religious and subversive groups. See generally John Dahlquist, Jr. & Leslie Ann Reis, On-Line Dangers to Children: Will Congress' Rush to Regulate the Internet's Potential for Global Communications? 11-12, 45 n.57 (1995) (unpublished, on file with author) (noting that "[s]eparatist Groups like the Aryan Crusaders and the Ku Klux Klan as well as para-military groups have Internet sites which not only contain information but are used to recruit members," including using interactive games which may entice children). See also David Armstrong, Internet Gin Joint: No ID Required, BosT. GLOBE, June 18, 1995, at M1 (describing the "DeKuyper Bar," an unmonitored site on the Internet, allowing users who connect to the bar to access simulated bar scenes, including exchange with strangers and invitations by the bartender to "click on the bottles and shot glasses"). Other alcoholic beverages companies who offer web sites include: Miller Brewing Co., <http:ll www.zima.com.>; Guinness, <http://www.futurenet.com.uk/guinness/selectpub.html>; importers of Stolichnaya and Absolute Vodkas, <http://www.stoli.com>; and dozens of micro-breweries, numerous wineries, and several retail liquor stores. Armstrong, supra.


19. Prior to the passage of the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") had no power to regulate the content of material transmitted through computer communications services. Andrew Barrett, Reflections on Television Violence and Regulating New Technologies, 4 KAN. J.L. & PUB. POL'Y 105, *2 (1995). See also In the Matter of Amendment of Section 64.702 of the Commissioner's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (final decision) (finding that enhanced services such as computer processing technology are not common carriers subject to FCC regulation).


merely applied only to prohibited uses of the telephone, to include prohibited uses of any "telecommunications device" or "interactive computer service." In effect, the CDA imposes criminal liability on anyone who uses a computer network to transmit not only illegal, obscene material, but constitutionally protected "indecent" or "patently offensive" material to anyone under eighteen years of age—regardless of whether that user initiated the communication.

In response to the CDA's passage, the American Civil Liberties Union ("ACLU") followed by Joe Shea, publisher of an electronic newspaper, successfully challenged the constitutionality of several of the CDA's provisions, and obtained a preliminary injunction against its enforcement. The Department of Justice is cur-

Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions. The Decency Act will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies.


22. The CDA amends section 223 of the Communications Act of 1934, 47 U.S.C. § 223(a)-(h) (1988 & Supp. V 1993). The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). See also Shea v. Reno, 930 F. Supp. 916, 925 (S.D.N.Y. 1996) (noting that "the term encompasses means of making 'content' available to multiple users both on the vast web of linked networks popularly known as 'the Internet' and on other information systems [such as electronic bulletin boards maintained by educational institutions or nonprofit organizations] not physically linked to the Internet").

A "telecommunications device," on the other hand, does not include an "interactive computer service," but is also not clearly defined under the CDA. ACLU v. Reno, 929 F. Supp. at 829 n.5. However, the term likely covers those transmissions of material by modem, and is meant to cover "users who traffic in indecent and patently offensive materials on the Internet through those services." See id. (noting that "[t]he resolution of the tension between the scope of 'telecommunications device' and the scope of 'interactive computer service' as defined in 47 U.S.C. § 230(a)(2) . . . must await another day").


24. See, e.g., ACLU v. Reno, 929 F. Supp. at 828-30; Shea, 930 F. Supp. at 950. The same day President Clinton signed the CDA into law, the ACLU, joined by 19 other plaintiffs (collectively, "ACLU"), filed a complaint in federal court in the Eastern District of Pennsylvania, alleging that CDA sections 223(a) and 223(d) violated their First and Fifth Amendment rights. Id. at 827. The American Library Association, Inc., along with 26 other plaintiffs, subsequently filed a similar action, and the court consolidated the actions. Id.

rently appealing both cases to the Supreme Court. 26

Proponents of regulation of the content of material transmitted over the Internet believe that when individuals use computers to disseminate material inappropriate for minors or to promote behaviors which may endanger their safety, 27 the government has a compelling interest in shielding minors from such expression. 28 On the other hand, free-speech advocates, legislators and other critics of legislative reform argue that to purge the Internet of all material unsuitable for children would deny information to adult users, thus impinging on protected First Amendment rights. 29

26. Linda Greenhouse, High Court Splits on Indecency Law Covering Cable TV, N.Y. Times, June 29, 1996, at 1. On July 1, 1996, the Department of Justice filed its notice of appeal with the Supreme Court, which is expected to hear the case in the Fall of 1996, and to render a decision in Spring, 1997. Citizens Internet Empowerment Coalition, Fight for Free Speech Online Headed to Supreme Court (visited September 16, 1996) <http://www.vtw.org/speech/> (posting Department of Justice' Notice of Appeal). ACLU v. Reno and Shea could likely be consolidated for purposes of Supreme Court consideration. Id.

27. See Gallagher, supra note 7, at 197 (noting increased concern for children's safety when individuals with a dangerous or criminal agenda use on-line computer services as a vehicle to pursue minors who also use these services). See ACLU v. Reno, 929 F. Supp. at 844 (noting that "[t]he accidental retrieval of sexually explicit material is one manifestation of the larger phenomenon of irrelevant search results").

28. ACLU v. Reno, 929 F. Supp. at 852-53 (discussing the Government's argument "that shielding minors from access to indecent material is the compelling interest supporting the CDA"). See also Gallagher, supra note 7, at 204. In support of the Communications Decency Act, Senator James Exon, a co-sponsor of the Act, stated that "children should be protected from the pornography and smut that I fear could turn the Information Superhighway into a red light district." James Coates, "Catch-22" in Cleaning Up Smut in Cyberspace, Chi. Trib., June 4, 1995, at B1.

29. Kara Swisher and Elizabeth Corcoran, Gingrich Condemns On-Line Decency Act; Opposition to Senate Version May Doom Bill, Wash. Post, June 22, 1995, at D8. Prior to enactment of the CDA, House Speaker Newt Gingrich criticized the legislature's attempt at telecommunications reform, noting that "[i]t is clearly a violation of free speech . . . a violation of the rights of adults to communicate with each other." Id.

Mike Godwin, civil libertarian and staff counsel for the Electronic Frontier Foundation, maintained "that the indecency portion of the bill would transform the vast library of the Internet into a children's reading room, where only subjects suitable for kids could be discussed." Elmer-Dewitt, supra note 12, at 38. "It's government censorship," said Marc Rotenberg of the Electronic Privacy Information Center. "The First Amendment shouldn't end where the Internet begins." Elmer-Dewitt, supra note 12, at 38.

Commentators have likewise proposed alternate solutions to intrusive content regulation of the Internet. Laurence Tribe, a Harvard law school professor, has proposed a Constitutional Amendment to protect expression regardless of the medium through which that expression is transmitted. Edward J. Naughton, Is Cyberspace a Public Forum?, 81 Geo. L.J. 408, 411 (1992). Computer industry advocates have also suggested federal legislation to empower parents and protect children by using technological approaches rather than
This Comment argues that the legislature is not the appropriate entity to regulate the content of constitutionally protected speech transmitted by users of this rapidly developing communications medium. Concurrent with this theory, this Comment explores the potential for industry and user self-supervision, rather than intrusive government regulation, to control the content of computer speech. First, this Comment examines the methods through which the traditional communications media have shielded minors from certain offensive speech within the boundaries of the First Amendment. Second, this Comment outlines the current federal regulatory scheme under the CDA which imposes similar restrictions on speech transmitted through computer services. Third, this Comment argues that new legislation, such as the CDA’s indecency provisions, are unnecessary because existing laws and judicial doctrines are capable of assessing liability for harmful material communicated through on-line services. Moreover, the technology exists to provide parents with adequate notice of, and control over, unwanted or offensive material. Fourth, this comment proposes that the CDA’s current regulatory scheme will likely prove impractical—and ineffective—to enforce against the infinite number of potential users of computer services. Finally, this Comment concurs with both the Eastern District of Pennsylvania and the Southern District of New York’s decisions and argues that the CDA, or similar regulation of content, will not withstand a constitutional challenge.

II. BACKGROUND

A. THE LIMITS OF FREE SPEECH GUARANTEED UNDER THE FIRST AMENDMENT

The First Amendment, with clarity and brevity, mandates that “Congress shall make no law . . . abridging the freedom of speech, or of

30. See Gallagher, supra note 7, at 205 (discussing that computer communication should be subjected to same degree of First Amendment protection as print material, and advocating that “[a]n understanding of the capabilities of technical advancements is essential for Congress and the courts to effectively determine if regulation of CyberSpeech is even warranted”). See also Berman & Weitzner, supra note 9, at 1620 (arguing that decentralized open access and user control over content of interactive communications media will best serve First Amendment values and avoid government content regulation).
the press." 31 In accordance with this provision, the United States Supreme Court has traditionally granted great deference to First Amendment values which promote a free exchange of ideas. 32 Several important principles guide a court's analysis of First Amendment issues. The first principle is that speech, whatever its form or message, should be unimpaired by the threat of government censorship. 33 The second principle is based on the long-held value that the public be exposed to diverse and vigorous expression with minimal government regulation. 34 When free of censorship or threat of civil or criminal liability, uninhibited expression furthers the society's through advancement through the development public culture and political debate. 35

However, the First Amendment's guarantee does not extend to all forms of expression. 36 For example, the Supreme Court excluded obscenity from the ambit of First Amendment protection. 37 Although a state


32. See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254-58 (1974). In rejecting a Florida "right to reply" statute as violative of the First Amendment's guarantee of a free press, the Supreme Court noted that "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." Id. at 258.

33. Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 114 S.Ct. 2445, 2456-58 (1994). See also Young v. American Mini-Theaters, Inc., 427 U.S. 50, 76 (1976) (noting that the First Amendment's primary concern is that "there be full opportunity for expression in all its varied forms to convey a desired message").

34. Board of Educ. v. Pico, 457 U.S. 853, 859 (1982) (noting that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom").

35. Roth v. United States, 354 U.S. 476, 484 (1957) (noting that constitutional safeguards for freedom of expression are fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people). See also New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (noting that constitutional protections for speech and press do not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered).

36. See, e.g., Miller v. California, 413 U.S. 15, 24 (1973) (noting that "[t]he First and the Fourteenth Amendments have never been treated as absolutes"). See also N.Y. Times v. Sullivan, 376 U.S. at 269 (stating that "libel can claim no talismanic immunity from constitutional limitations"); Chaplinsky v. New Hampshire, 315 U.S. 476, 484 (1957) (holding that "fighting words" precluded from ambit of First Amendment protection); Schenck v. United States, 249 U.S. 47, 53 (1919) (holding that speech presenting "clear and present danger"—such as yelling "Fire!" in a crowded theater—is subject to restriction).

37. Miller, 413 U.S. at 24. The Supreme Court has made efforts to clearly enunciate a cohesive, yet comprehensive standard by which courts determine what works are obscene and, thus, excluded from the umbrella of constitutional protection; in Miller, the Court established a three-part level of analysis to determine whether allegedly "obscene" content justified regulation. Id. The Court reasoned that because "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New york
cannot, under certain circumstances, criminalize private “possession” of obscene material,\textsuperscript{38} the Constitution clearly does not protect an individual’s right to distribute or transmit obscenity.\textsuperscript{39} Accordingly, child pornography, which is by definition “obscene”, clearly falls outside the bounds of First Amendment protection,\textsuperscript{40} as exhibited by federal and

City," allegedly obscene works should be evaluated under contemporary community standards rather than a uniform national standard. \textit{Id.} at 32. Moreover, the Court discarded its earlier obscenity analysis which required that obscene works be found “utterly without redeeming social value,” and held the appropriate test to be:

(a) whether “the average person, applying contemporary community standards” would find that the work taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

\textit{Id.} at 39. For a development of existing standards of obscenity prior to \textit{Miller}, see \textit{Roth v. United States}, 354 U.S. at 494 (presuming that obscenity lacks "redeming social importance"). \textit{Cf. Memoirs v. Massachusetts}, 383 U.S. 413, 419 (1966) (plurality opinion) (holding that plaintiff has burden of showing that material is “utterly without redeeming social value”).

However, even though protection under the First Amendment does not extend to obscenity, obscene speech is not necessarily illegal. \textit{See, e.g., United States v. Twelve 200-Foot Reels of Super 8mm. Film}, 413 U.S. 123, 129 (1973) (holding that state governments may legalize obscenity, including use by consenting adults). Hence, the Court left to the states the task of determining which works are “obscene” under the \textit{Miller} analysis and held that state statutes “designed to regulate obscene materials must be carefully limited.” \textit{Miller}, 413 U.S. at 24. \textit{See also Hamling v. United States}, 418 U.S. 97, 101 (1974) (affirming obscenity conviction that elaborated on community standards test, and rejecting requirement of a uniform, nationwide standard). \textit{See also Pope v. Illinois}, 481 U.S. 497, 500-01 (1987) (holding that a “community standard” is properly evaluated according to a reasonable person within a given community).

38. \textit{Stanley v. Georgia}, 394 U.S. 557, 568 (1969) (striking down statute on basis that “whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts”). \textit{See also United States v. Orito}, 413 U.S. 139, 143 (1973) (holding that zone of privacy under First Amendment for obscenity does not extend beyond the home).


state statutes addressing such crimes.41

In contrast, the First Amendment protects sexual, vulgar, or crude expression that is found “indecent,” but not “obscene” the presumption that such expression may have some literary, political, or artistic value.42 Nevertheless, where sexually oriented, offensive, or graphic speech may affect children, the Court has determined that a state has a


In contrast, adult pornographic material is not presumed obscene. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62 (1989) (holding that a court must make initial determination of “obscenity” before removing material from circulation).

41. See infra note 103 and accompanying text (discussing federal and state statutes proscribing the transmission of child pornography).

42. See, e.g., Cohen v. California, 403 U.S. 15, 26 (1970) (explaining that “we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process”). Accordingly, as Justice Harlan succinctly explained, “[o]ne man’s vulgarity is another’s lyric.” Id. at 25.

The Supreme Court has vaguely defined “indecent” material, in the context of cable and broadcast media, as “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.” Denver Area Consortium v. Federal Communications Comm’n, 116 S.Ct. 2375, 2389-90 (1996) (plurality opinion) (citing Pacifica, 438 U.S. at 732) (upholding FCC’s definition of indecency, and noting that such material is language which would normally be offensive enough to fall within the definition of “obscene” but for the fact that the material also has serious literary, artistic, political or scientific value or nonprurient purposes). See also Pacifica, 438 U.S. at 741 (holding that George Carlin’s monologue featuring seven four-letter words depicting sexual or excretory activities and organs “indecent” within meaning of FCC’s definition of indecency as it applies to radio broadcast). Cf. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (noting that nudity, without more, is protected expression).

In the context of communications transmitted by computer, however, the definition of “indecent” material is not clear. See, e.g., ACLU v. Reno, 929 F. Supp. at 862-63 (striking down the CDA’s definition of indecency as unconstitutionally vague where the CDA fails to define the term “indecent,” and the FCC has not promulgated regulations defining indecency in the medium of cyberspace as required under Pacifica and its progeny). But see Shea, 930 F. Supp. at 935 (upholding the CDA’s definition of indecency “[i]n light of Supreme Court and other precedent rejecting claims that the language used by the FCC to define indecency is unconstitutionally vague”).

Within the ambit of First Amendment protection, federal and state governments are generally prohibited from constructing regulations directed toward the subject matter, content or viewpoint of protected speech — which includes “indecent” material — absent a compelling government interest. See Turner Broadcasting, 114 S.Ct. at 2458-59. A court initiating an inquiry into the constitutional validity of a government restriction on protected speech will devote “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” Id. at 2459. See also Bolger v. Youngs Drugs Products Corp., 463 U.S. 60, 65 (1983) (citing Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972)) (stating that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).
compelling interest in safeguarding the physical and psychological well-being of a minor.\textsuperscript{43} Therefore, the government may restrict indecent speech only if that regulation serves a compelling interest and is narrowly tailored to achieve that interest.\textsuperscript{44} For example, the restriction oversteps its bounds if its provisions concurrently prevent adults from obtaining protected material.\textsuperscript{45}

Moreover, the Supreme Court has recognized that the mere threat of sanctions may deter some speakers from exercising their right to speak "almost as potently as the actual application of sanctions."\textsuperscript{46} Hence, government may regulate speech protected by the First Amendment "only with narrow specificity."\textsuperscript{47}

A statute or regulation is "overbroad" if it sweeps within its ambit not only speech which may legitimately be restricted, but a substantial amount of protected speech as well.\textsuperscript{48} Due to the fact that such over-

\begin{itemize}
\item \textsuperscript{43} Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).
\item \textsuperscript{44} See Sable, 492 U.S. at 126. As the Supreme Court noted in Sable: [T]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . [B]ut to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interest without unnecessarily interfering with First Amendment freedoms.'
\item \textsuperscript{45} See id. at 131 (striking down blanket prohibition on obscene as well as indecent commercial telephone messages which had the "effect of limiting the content of adult telephone conversations to that which is suitable for children to hear"). See also Butler v. Michigan, 352 U.S. 380, 383 (1957) (striking down statute which denied adults, as well as children, access to books containing obscene language "tending to the corruption of the morals of youth").
\item Minors, like adults, also have First Amendment rights. Cf. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-13 (1975). In Erznoznik, the Court struck down an ordinance which banned drive-in movie theaters from exhibiting all films containing nudity, regardless of context or pervasiveness. \textit{Id.} The Court held that minors are entitled to First Amendment protection, and "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." \textit{Id.} at 212. The Court explained, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." \textit{Id.} at 213-14.
\item \textsuperscript{46} NAACP v. Button, 371 U.S. 415, 433 (1963). See also Erznoznik, 422 U.S. at 217 (noting that where a statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack).
\item \textsuperscript{47} Button, 371 U.S. at 433.
\item \textsuperscript{48} Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). In general terms, the First Amendment overbreadth doctrine "recognizes that an unconstitutional restriction of freedom of expression may deter parties not before the court from engaging in protected speech and thereby escape judicial review." \textit{Shea}, 930 F. Supp. at 938 (citing \textit{Broadrick}, 413 U.S. at 612-13). Hence, under the overbreadth doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also
inclusive regulations may result in a “chilling effect” on speech that may have serious scientific, literary, artistic, or cultural value, the court may strike down the statute as facially invalid if the overbreadth is “substantial.”

A statute or regulation that fails to satisfy the overbreadth test may still be challenged on its face as “unduly vague.” Accordingly, the threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.” Board of Airport Comm’rs v. Jews for Jesus, 482 U.S. 569, 574 (1987) (citing Brockett v. Spokane Arcades, Inc. 472 U.S. 491, 503 (1985) (striking down resolution imposed by board of airport commissioners as substantially overbroad where resolution prohibited all protected expression rather than that which would might create problems with traffic congestion and for airport users); Erznoznik, 422 U.S. at 213 (striking down city ordinance that prohibited nudity in films, in part, because the ordinance treated all nudity as harmful, and noting that regulations which restrict expression may not sweep so broadly as to ban speech that does not have the harmful effects the government sought to remedy).

49. Jews for Jesus, 482 U.S. at 574 (1987) (citing Broadrick, 413 U.S. at 615 (1973)) (noting that requirement that overbreadth be “substantial” exists because overbreadth doctrine is “manifestly, strong medicine” with a realistic danger that statute will significantly compromise recognized First Amendment protection of parties not before the Court). A “facial” challenge means that the law is “invalid in toto—and therefore incapable of any valid application.” Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.5 (1982), reh’g denied, 456 U.S. 950 (1982) (citing Steffel v. Thompson, 415 U.S. 452 (1974)). Moreover, where a federal court is dealing with a federal statute challenged as overbroad, the court should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction. See, e.g., Broadrick, 413 U.S. at 613. See also N.Y v. Ferber, 458 U.S. at 773 n.24 (upholding a New York statute that prohibits persons from knowingly promoting sexual performance by a child under the age of sixteen as not overbroad because the “legitimate reach dwarfs its arguably impermissible applications”).

50. Village of Hoffman Estates, 455 U.S. at 497, 499 (noting that if a law interferes with the “right of free speech . . . a more stringent vagueness test should apply”). The appropriate analysis, the Court has explained, is to first decide whether the statute reaches a substantial amount of constitutionally protected conduct. Id. at 494-95. If it does not, “[t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.” Id. Hence, the plaintiff must establish that no set of circumstances exists under which the statute would be valid. Therefore, “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the law as applied to the conduct of others.” Village of Hoffman Estates, 455 U.S. at 495.

Generally, a vague statute may violate the Due Process Clause of the Fifth Amendment if it fails to provide fair notice as to the actions constituting criminal liability. If that statute attempts to limit freedom of expression, it may also violate the First Amendment if it prevents that individual from exercising that right. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

In Grayned, the Supreme Court outlined the standards for evaluating a vagueness challenge. 408 U.S. at 108-09. First, a vague statute fails to proved an individual “of ordinary intelligence” with notice as to precisely what activity the statute prohibits. Id. There-
Supreme Court has noted that legislation aimed at protecting children, such as legislation enacted with respect to adults, must "be clearly drawn and that the standards adopted be reasonably precise."51 Such standards effectively provide notice to those who must obey them, and they also avoid arbitrary or discriminatory administration in enforcement.52

B. Judicial Review of Regulations Controlling the Content of Protected Speech in the Traditional Mass Media

The Supreme Court in its review of regulations which attempt to curtail the content of protected speech, attempted to balance the compelling interest in protecting minors from offensive content, yet allow adults unrestricted access.53 In order to balance these competing interests within the context of the traditional mass media such as broadcast, cable, and telephone, the Court has examined the technological characteristics of the communications medium. The presence of certain features, such as the number of channels available to all speakers and the pervasive nature of the medium, may justify the appropriate level of restriction over the content of protected speech.54 Historically, the

fore, a vague law may trap an innocent individual by failing to provide a clear guideline as to what speech is actually forbidden. JOHN NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 986 (5th ed., West 1995). Second, a vague statute may encourage arbitrary arrests and convictions, based on a lack of "explicit standards for those who apply them." See, e.g., Grayned, 408 U.S. at 108-09 (noting that "[a] vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). See also Denver Area Consortium, 116 S.Ct. at 2389-90 (holding that a provision in the statute allowing cable operators to prohibit programming that the operator "reasonably believes" may be patently offensive as judged by contemporary community standards not unconstitutionally vague where, inter alia, the term "reasonably" serves to constrain the operator's discretion).


52. Id. at 689-90.

53. See, e.g., Denver Area Consortium, 116 S.Ct. at 2384-85 (noting that throughout the history of the Supreme Court's jurisprudence, the basic First Amendment principles have been restated and refined in order to balance conflicting interests and the "special circumstances of each field of application").

54. In particular circumstances, the Court has determined that "differences in characteristics of new media justify differences in the First Amendment standards applied to them." See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-87 (1969) (holding that television broadcast is subject to First Amendment protection, but "ability of new technology to produce sounds more raucous than those of the human voice" justifies restriction on sound level, hours and places of use, if restrictions are reasonable and applied without discrimination); Pacifica, 438 U.S. at 747 (noting that the constitutional protection ac-
Supreme Court granted the print media virtually unlimited First Amendment protection. The broadcast media, cable service providers, and common carriers receive a lesser quantum of protection under the hierarchy of First Amendment interests.

1. The Broadcast Media

Parents, rather than legislatures, have traditionally been responsible for controlling what their children see and hear. However, where the broadcast media is concerned, the Court recognizes that States have a compelling interest in protecting the well-being of children from exposure to indecent material. Traditionally, the Court has justified the appropriate level of content restriction on the scarcity of channels inherent in broadcast technology. However, the pervasiveness of the recorded to a communication containing "patently offensive sexual and excretory language need not be the same in every context."


56. See, e.g., Pacifica, 438 U.S. at 750-51 (1978) (concerning radio monologue); Turner Broadcasting Sys., 114 S.Ct. at 2469 (concerning cable programmers and operators); Sable, 492 U.S. at 130 (concerning commercial telephone messages).

57. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (holding that "the values of parental direction of the religious upbringing and education of their child in their early and formative years have a high place in our society"); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (holding unconstitutional a federal statute that prohibits mailing of unsolicited advertisements for contraceptives because the statute denies parents truthful information bearing on their ability to discuss birth control and to make informed decisions); Carey v. Population Servs. Int'l, 431 U.S. 678, 708 (1977) (Powell, J., concurring in part and concurring in judgment) (noting that provision prohibiting parents from distributing contraceptives to children amounts to "direct interference" with parental guidance).

58. See, e.g., Pacifica, 438 U.S. at 731. "[O]f all forms of communication, it is broadcasting that received the most limited First Amendment protection." Id. Cf. Federal Communications Comm'n v. League of Women Voters of California, 468 U.S. 364, 376 (1984) (noting that if "a similar ban . . . applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment"). For the purposes of broadcast regulation, a "minor" is anyone under the age of 18. See, e.g., Action for Children's Television v. Federal Communications Comm'n, 58 F.3d 654, 664 (D.C. Cir. 1995) (noting that "[i]n light of Supreme Court precedent and the broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials . . . Government interest extends to minors of all ages").

59. NBC v. United States, 319 U.S. 190, 226 (1943). In NBC, the Supreme Court upheld the FCC's power to enact special regulation over chain broadcasting on the basis of the "public interest, convenience or necessity." Id. The Court found that the scarcity rationale justified the FCC's allocation of frequencies and consideration of program content in formulating licensing decisions. Id. at 215-217. The Court reasoned that "[u]nhke other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why . . . it is subject to governmental regulation." Id. at 226. See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (holding that inherent physical limitation on number of speakers who can broadcast permits limited content restraints on programming, as well as certain affirmative obligations on broadcast licenses); See Children's Television Act of 1990, 47 U.S.C. § 303a (1988 Supp. V 1993) (requiring children's educa-
dium into the home where children may be present, as well as its concurrent accessibility, have been the pivotal factors courts have used to distinguish broadcast from other mass communications media.60

In FCC v. Pacifica Foundation,61 the Supreme Court upheld the Federal Communication Commission's ("FCC")62 power to regulate radio programming that the FCC found to be indecent.63 In order to justify the restrictions on the content of the broadcast, the Court focused on the technological characteristics of the medium.64 The broadcast media, the Court reasoned, possess a uniquely pervasive presence in the homes of the American public, and the programming is easily accessible to children.65

60. Pacifica, 438 U.S. at 748.
61. Id.
63. Pacifica, 438 U.S. at 729. In Pacifica, the Supreme Court was asked to decide whether the FCC had the authority to regulate a radio broadcast that was indecent but not obscene. Id. The FCC claimed that Pacifica station WBAI's radio broadcast of satiric humorist George Carlin's 12-minute monologue, "Filthy Words," violated rules on indecent broadcasting. Id. at 731-32. The FCC based its power to regulate indecent broadcasting on 18 U.S.C. § 1464 (1976), "which forbids the use of any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C. § 303(g), which required the FCC to "encourage the larger and more effective use of radio in the public interest." Id. at 730. Pacifica, in turn, argued that the FCC's ban was unconstitutional censorship, and challenged whether the monologue was "indecent" within the meaning of 18 U.S.C. § 1964. Id.

The Court found that although the Communications Act of 1934 denied the FCC the power to edit broadcasts in advance and to excise material it deemed inappropriate programming, the Act did not limit the FCC in its power to regulate the broadcast of obscene, indecent, or profane language. Pacifica, 438 U.S. at 735-38. The Court also held that the language was "indecent" within the meaning of the statute. Id. The Court noted that although "[p]rurient appeal is an element of the obscene, . . . the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." Id. at 740. Therefore, the Court determined that speech which is not "obscene," but merely "indecent," is entitled to limited protection under the First Amendment. Id. However, constitutional protection afforded such speech "need not be the same in every context." Id. at 747.

The Court then turned to the broader question of "whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content." Pacifica, 438 U.S. at 745.
64. Id. at 747-50.
65. Pacifica, 438 U.S. at 748. The Court noted that "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." Id. Therefore, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in
2. **Cable Television**

The Supreme Court recognized that cable television services, like the broadcast media, exercise editorial control over the content of their programming, and are entitled to First Amendment protection.\(^6\) Similarly, due to the potentially pervasive presence cable has in viewers homes—and its concomitant effect on children—the Court has granted cable operators a similar latitude of protection under the First Amendment as that granted broadcasters where indecent material is concerned.\(^6\)

Generally, cable operators may decline to carry indecent programming on "leased access"\(^6\) or commercial channels, but not with respect to the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." \(^7\) Id. (citing Rowan v. Post Office Dep't, 397 U.S. 728, 737 (1970)). Hence, the government's compelling interest in protecting the "well being of its youth" and in "supporting parents' claim to authority in their own household" justified the FCC's regulation of otherwise protected expression. \(^7\) Id. at 749-51.

Subsequent to the ruling in *Pacifica*, the FCC has found indecent speech objectionable in similar circumstances due to the pervasiveness of the medium and its accessibility to children. \(^8\) See, e.g., *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987) (Reconsideration Order) (holding that explicit references to indecent material in morning and evening broadcasts after 10 p.m., violate federal statute governing broadcast). Although telecommunications legislation for violence currently does not exist, the FCC has implemented "safe harbor rules," which ban certain kinds of programming during hours when minors are most likely to be a significant part of the audience. Barrett, *supra* note 19, at *1. These rules, the FCC has found, are necessary in order to keep childrens' exposure to such material at a minimum. \(^9\) *See Act for Children's Television v. Federal Communications Comm'n*, 58 F.3d 654, 656 (D.C.Cir. 1995) (holding that safe harbor rules from ten p.m. to six a.m. apply to all broadcasters of indecent material).

Federal regulatory measures apply to two different kinds of cable television channels. \(^8\) Federal regulatory measures apply to two different kinds of cable television channels. Greenhouse, *supra* note 26, at 1. The first is "leased access" channels, which federal law requires cable systems operators to make available to independent programmers for a fee. Greenhouse, *supra* note 26, at 1. The second is "public access" channels which the operators provide free of charge for "public, educational, or government use" ("PEG channels"). \(^8\) *Denver Area Consortium*, 116 S.Ct. at 2381. See also Greenhouse, *supra* note 26, at
to community access channels used by local governments and community groups. In *Denver Area Telecommunications Consortium v. FCC*, the Supreme Court's most recent decision concerning the regulation of the content of material transmitted by cable network, the Court, *inter alia*, struck down a provision of the Cable Television Consumer and Competition Act of 1992 ("1992 Act"). The defeated provision required cable systems operators that lease channels to commercial providers of indecent programming to scramble the signals transmitted by the channels. Specifically, in order to obtain access to the indecent material on leased access channels, the 1992 Act required the cable subscriber to request access to the indecent programming, in writing, up to thirty days in advance. The court found that the provisions failed to provide the least restrictive means available to limit children's exposure to indecency and ignored less-intrusive alternatives. In light of new technology

---

1 (noting the provision of free access is a condition to the cable operator's franchise). Moreover, the cable operators are forbidden from exercising editorial control over these PEG channels. *Denver Area Consortium*, 116 S.Ct. at 2397.


72. *Denver Area Consortium*, 116 S.Ct. at 2394. Under the 1992 amendments, cable operators could refuse to carry indecent programming on both leased access and public access channels. *Alliance for Community Media v. Federal Communications Comm'n*, 56 F.3d 105, 111 (D.C. Cir. 1995), rev'd sub nom. *Denver Area Consortium*, 116 S.Ct. 2374 (1996). However, if the cable operator chose to carry indecent programs on the leased access channels, the restrictions required the operator to segregate the material and to block access to the channel until the subscriber affirmatively requested access. *Id.* If the operator decided to carry programming on public access channels, the statute imposed no similar scrambling or access requirements. *Id.* The statute described "indecent" programming as "one that 'describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.'" *Id.* at 113 n.4.

73. *Id.* at 113.

74. *Denver Area Consortium*, 116 S.Ct. at 2394. In the earlier decision, the United States Court of Appeals for the District of Columbia held that the statute, which allowed cable operators to prohibit indecent programs on leased access or public access channels, failed to constitute "state action" that warranted First Amendment review. *Alliance for Community Media*, 56 F.3d at 121. Because statute granted the cable operator, rather than the government, the discretion whether or not to ban indecent program, the statute merely turned the editorial control over to the cable operator. *See id.* (noting that when a cable operator chooses to carry indecent programming on any channel . . . [this decision] does not convert its refusal to carry indecent programming into state action).

In *Denver Area Consortium*, however, the Supreme Court rejected the view that the First Amendment did not apply. 116 S.Ct. 2382. The Court struck down the provision which permitted the operators to decide whether or not to broadcast indecent programming on the public access channels, based on the fact that those channels had historically failed to prevent problems with indecent programming. *Id.* at 2397. However, the provision permitting the operators to ban indecent programming from leased access channels was appro-
available to block programming, the Court could find no reason to enforce a system that requires willing viewers to identify themselves with the subsequent risk of embarrassment by inadvertent exposure, which could likely result if such viewers became "part of the list of those who wish to watch the 'patently offensive' channel."

3. Common Carriers

Telephone services, on the other hand, provide the user with significantly more control over the receipt of content than the television or radio audience has over what it sees or hears. For this reason, Congress subjected common carriers to significantly less regulation than that governing broadcast or cable services. For example, in *Sable Communication Corp. v. FCC*, the Court held that the FCC's regulation of indecent programming was unconstitutional because it imposed an "unlimited burden on commerce," but did not provide viewers with a "sufficient mechanism for control of the content of the transmission." 75

Instead, the hardware presently available on cable boxes, as well as the "v-chip" technology installed on all new television sets, allows viewers to control their own household's access to indecent programming. 76 Moreover, under the Telecommunications Act of 1996, cable operators are required to block, at a subscriber's request, any programs which the viewer declines to subscribe. Denver Area Consortium, 116 S.Ct. at 2392. Moreover, the Telecommunications Act of 1996 requires that cable operators are required to block access to programming on unleased or PEG channels, that are "primarily dedicated to sexually-oriented programming." *Denver Area Consortium*, 116 S.Ct. at 2392. However, like cable television services, the network provider may not always be the information provider. See Hammond, supra note 2, at 274. The telephone network provider can avoid liability by refusing to provide billing services or by obtaining the subscriber's permission to provide the services. *Id.* By following this procedure, the provider is not held liable if it does not know that the information transmitted was indecent. *Id.*

The telephone message provider, on the other hand, will not be held liable for limiting access to its services through use of access codes, credit card verification or various scrambling devices. *Id.* See also 47 C.F.R. 64.201 (1995) (FCC regulations regarding "safe harbor" defenses available to indecent telephone information services under § 223). For a comprehensive analysis of access and indecency regulation of common carriers see Hammond, supra note 2, at 274 (noting that "[s]ubscribing consumers have the option of notifying the network provider that they wish to access such information, thereby taking some
nications of California, Inc. v. FCC, the Supreme Court held as unconstitutionally overbroad a blanket prohibition on obscene, as well as indecent, speech carried through interstate commercial telephone messages. The Court reasoned that the regulation was not sufficiently tailored to serve the compelling interest of prohibiting minors from exposure to the indecent telephone messages because the regulation, in effect, also denied adults access. The technical features of telephonic audiertext services were substantially different from those inherent in broadcast transmission. Because the “dial-it” customer must take affirmative steps to access the service, the individual is not a “captive audience” like the broadcast listener or viewer.

control over its availability and receipt,” thus absolving both the network and information provider of liability).


79. Id. at 130-31. In Sable, providers of sexually-oriented prerecorded telephone messages (“dial-a-porn”) sought declaratory and injunctive relief against a 1988 amendment to § 223(b) of the Communications Act of 1934, which imposed a blanket ban on indecent as well as obscene “dial-a-porn” telephone messages. Id. at 117 (citing 47 U.S.C. § 223(b) (1982) (Supp. V 1988)) (providing criminal penalties for commercial transmission of sexually oriented communications to minors). The Court held that although the statute did not unconstitutionally prohibit obscene expression, the regulation on protected indecent expression violated the First Amendment. Id. at 125-26.

80. Sable, 492 U.S. at 129. In distinguishing the Pacifica Court’s narrow holding, the Court reasoned that technological characteristics which justified restriction on the broadcast of indecent expression did not uniformly apply to the “dial-a-porn” services. Id.

81. Id. at 118.

82. Sable, 492 U.S. at 128. As the Court explained,

The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.

Id. Thus, the legislature can limit access to indecent material, but it must do so with the “least restrictive means to further the articulated interest.” Id. at 126. See also Dial Information Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1541-42 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992) (upholding the constitutionality of § 223 based on the legislature’s determination that a telephone company requirement of age verification prior to using indecent audiertext services is the only means available to prevent children’s access); Information Providers’ Coalition for Defense of the First Amendment v. Federal Communications Comm’n, 928 F.2d 866 (9th Cir. 1991) (holding that “reverse blocking,” which provides telephone access to those who request dial-a-porn service, is narrowly tailored and effective means of limiting minors’ access to service). But see Fabulous Assocs. v. Pennsylvania Public Utility Comm’n, 896 F.2d 780 (3d Cir. 1990) (holding that a state statute which required adults who wanted to listen to sexually explicit telephone messages apply for a nine-digit access code is overbroad, as to burden placed on adults).
C. PROPOSED REGULATION OF SPEECH TRANSMITTED THROUGH COMPUTER

Like other emerging communications media, the proliferation of interactive computer technology has prompted concern regarding children's exposure to illegal or inappropriate material. The ideology behind competing interests of free-speech and protection of children has thrust the issue into the forefront of legislative debate. In response to these concerns, various members of the Senate and House of Representatives introduced during 1995 several, diametrically opposed measures addressing liability for material transmitted through computer communications.83

The Communications Decency Act of 199684 emerged from the de-


84. 47 U.S.CA. § 223(a)-(h) (West 1996) (amending 47 U.S.C. § 223 (1994)). The CDA amends § 223 of the Communications Act of 1934, that previously provided fines of up to $50,000 and/or prison terms of not more than six months for obscene, indecent, or harassing uses of telecommunications facilities (i.e., the telephone). As passed, the CDA amends § 223 by adding two new sections (a) and (d), which apply to prohibited uses of a "telecommunications device" and "interactive computer service." See, e.g., § 223 (a),(d). The CDA's controversial amendments provide in relevant part:

223. Obscene or harassing telephone calls in the District of Columbia or in inter- state or foreign communications
(a) Whoever -
(1) in interstate or foreign communications —
(A) by means of a telecommunications device knowingly—
(i) makes, creates, or solicits, and
(ii) initiates the transmission of, any comment, request, sugges- tion, proposal, image, or other communication which is ob- scene, 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, or solicits, and
(ii) initiates the transmission of, any comment, request, sugges- tion, proposal, image, or other communication which is ob- scene or indecent, knowing that the recipient of the communication is under 18 years of ages, regardless of
whether the maker of such communication placed the call or initiate the communication;
(C) makes a telephone call or utilized 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 or continuously to ring, with intent to harass any person at the called number; or
(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communications ensues, solely to harass any person at the called number or who receives the communications; 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, or imprisoned not more than two years, or both.

(d) Sending or displaying offensive material to persons under 18
Whoever—
(1) in interstate or foreign communications knowingly —
(A) uses an interactive computer service to send to a specific person or 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 depict 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 services 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, or imprisoned not more than two years, or both.


As passed, the CDA makes several substantive changes to § 223. First, the CDA amends § 223(a) to include prohibited uses of a "telecommunications device" and "interactive computer services" within its ambit. § 223(a),(d). See also § 230(e)(2) (defining "interactive computer services"); § 223(h)(1) (defining "telecommunications device"). As for federal criminal liability, the CDA increases fines to $100,000 and the prison term from six months to not more than two years. § 223(a),(d).

In effect, a user is prohibited from using a computer or computer network to transmit in interstate or foreign commerce obscene or indecent material to anyone that the user knows is under eighteen years of age. § 223(a). Although subsection 223(d) uses the term "patently offensive" to describe the prohibited material, the terms "indecent" and "patently offensive" have been used interchangeably. See, e.g., ACLU v. Reno, 929 F. Supp. at 850; Shea, 930 F. Supp. at 935 n.19. In addition, the CDA creates liability for anyone to "knowingly" permit any "telecommunications facility" to be used to transmit prohibited material to anyone under eighteen years of age, and the user must have "intent" that it be used for such activity. § 223(a)(2), (d)(2).

According to Senator Exon, the CDA's sponsor, those who function as common carriers by simply providing access to another network—and are likewise not responsible for the content of the material—and then subsequently transmit indecent material to minors without knowledge of the content of the message, will not be held liable. Kenneth D. Salomon
bate as the Internet’s governing statute when President Clinton signed the bill into law on February 8, 1996. The CDA expands the FCC’s jurisdiction to encompass all advancements in all communications technology, including computers.85 Although some service providers may be exempt from its provisions,86 the CDA clearly aims to stop not only un-

---

85. See, e.g., § 230(e)(1) (defining “Internet”); § 230(E)(3) (defining “Information content provider”); § 223(h)(3) (defining “access software”); § 230(e)(4) (defining “Access software provider”). See also § 223(h)(1) defining “telecommunications device,” to extent that it does not include an “interactive computer service”). Under the CDA’s provisions, the statute would not only cover telephones, but would include all “telecommunications devices” such as computers, modems, data servers and conferencing systems used by Internet sites and by commercial Internet access providers such as America Online, CompuServe, and Prodigy. Electronic Frontier Foundation, Constitutional Problems with the Communications Decency Amendment: A Legislative Analysis by the Electronic Foundation, EFFECTOR ONLINE, Vol. 8, No.10 (June 16, 1995) <http://www.eff.org/Alerts/> (copy on file with author) (analyzing the CDA as passed by the Senate in June, 1995).

86. See, e.g., § 223(e)(5)(A) (providing an affirmative defense if the user has taken “in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors” to indecent or patently offensive material, “which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology”); § 223(5)(B) (exempting from liability any individual who has restrict minor’s access to “indecent” or “patently offensive” communication through use of credit card verification, debit account, adult access code, or adult personal identification number); and § 223(d)(4) (exempting an employer from liability for acts outside an employee’s scope of conduct). See also Salomon, supra note 84, at 1051 (explaining in detail the defenses to liability under the CDA).

In effect, the court in Shea noted that “for the vast majority of applications and services available on the Internet, a user has no way of communicating or making available patently offensive content with certainty that the content will not reach a person under eighteen years of age.” Shea, 930 F. Supp. at 941. As that court explained,

For example, an individual sending a message that will be retransmitted by a mail exploder program has no way of knowing the identity of other subscribers (even if he knows the e-mail address of each subscriber). A content provider has no way of knowing who will have access to an article posted to a Usenet newsgroup. Individual participants in an Internet Relay Chat discussion know other participants only by the names they choose upon entering the discussion; users can participate anonymously by using a pseudonym. A content provider who makes files available on an anonymous FTP or on a gopher or Web server has no way of knowing the identity of other participants who will have access to those servers.

Id.

For example, the credit card verification defense described in section 223(5)(B) is not a plausible solution to liability because the provider of the message has no way of identifying the recipients of the message, it would be impossible to obtain credit card or access verification of a recipient’s age. Id. (finding that the credit card defense may be adequate for certain commercial providers, but that all content providers might not be able to absorb the
protected obscenity, but protected expression as well.87

The same day the CDA was enacted, the American Civil Liberties Union ("ACLU") filed a complaint in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of the provisions that ban "indecent" and "patently offensive" speech transmitted on-line.88 On February 15, 1996, Judge Ronald L. Buckwalter issued a temporary restraining order against enforcement of the CDA provision relating to "indecent" speech, finding it unconstitutionally vague.89 On June 11, 1996, a three-judge panel, in three separate opinions, issued a preliminary injunction against enforcement of those sections of the CDA that prohibit the transmission of "indecent" and "pa-

87. According to Senator Exon, "[c]hildren should be protected from the pornography and smut that I fear could turn the Information Superhighway into a red light district." Coates, supra note 28, at B1. Several vocal opponents, such as House Speaker Newt Gingrich, claim that the legislation "is clearly a violation of free speech and ... a violation of the rights of adults to communicate with each other." Swisher & Corcoran, supra note 29, at D8.


90. ACLU v. Reno, 929 F. Supp. at 883-84. Pursuant to section 561 of the CDA providing for expedited review in any civil action challenging the constitutionality of the CDA's provisions, Delores K. Sloviter, Chief Judge of the United States Court of Appeals for the Third Circuit, convened a three-judge court, which included Judge Buckwalter and Judge Stewart Dalzell, to begin disposition of motions. Id. The case was consolidated with a similar action filed by the American Library Association, Inc. ("ALA"). See id. at 827 n.2 (listing plaintiffs comprising ACLU); n.3 (listing plaintiffs comprising ALA); and at 849 (noting that the plaintiffs in the action are businesses, libraries, non-commercial and not-for-profit organizations, and educational societies and consortia).
tently offensive” material through a computer or a computer network, finding the challenged provisions facially invalid under both the First and Fifth Amendments.

Subjecting the CDA to the strict scrutiny analysis applied to “dial-a-porn” telephone service regulation in Sable, the court found that the CDA’s challenged provisions—regardless of statutory defenses—failed to use the least restrictive means to further the government’s compelling interest in protecting children from indecent material transmitted online. First, the court reasoned, the CDA was a criminal statute which carried the risk of criminal prosecution and penalties, hovering over each content provider “like the proverbial sword of Damocles.” Second, the CDA’s statutory defenses were neither technologically nor economically feasible for most content providers. Last, the court reasoned, the statute’s terms, “indecent” and “patently offensive,” were inherently vague.

91. ACLU v. Reno, 929 F. Supp. at 849, 883-84. The court preliminarily enjoined enforcement of CDA §§ 223(a)(1)(B),(a)(2) finding those sections unconstitutional to the extent that they reach indecency; and finding §§ 223(d)(1),(d)(2) unconstitutional on their face. Id. at 849.
93. See, e.g., ACLU v. Reno, 929 F. Supp. at 851, 855-57 (Sloviter, J.) (citing Sable, 492 U.S. at 126) (reasoning that the CDA, a content-based restriction on speech, “will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest”).

Although the court acknowledged that “there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA,” the CDA reached much farther. Id. at 852-55 (noting, for example, that the Pulitzer Prize-winning Broadway play, Angels in America, depicting homosexuality and AIDS; graphic photographs from National Geographic, and information concerning HIV-related illnesses would all be subject to the CDA’s prohibitions).

Moreover, the court reasoned that the CDA’s scope—which the government argued was intended only to reach commercial pornographers—was not confined to material “that has a prurient interest or appeal, one of the hallmarks of obscenity.” Id. at 854-55. Rather, the court reasoned, the CDA’s legislative history, as well as its failure to define the terms “patently offensive” or “indecent” evidenced an intent to reach beyond obscenity, and to exclude material of serious value. Id. at 855. The court found that because there is “no effective way for many Internet content providers to limit the effective reach of the CDA to adults because there is no realistic way to ascertain the age of those accessing their materials,” a necessary consequence of compliance for Internet providers was silence, rather than prosecution. Id. at 855.

94. 929 F. Supp. at 856. Hence, the court reasoned, no content provider, “whether an individual, non-profit corporation, or even large publicly held corporation, is likely to subject itself to itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. Id.
95. Id. at 856. The government’s hypothetical “tagging” scheme, which is dependant upon third party software providers over which the content providers exercise no control, likewise failed to justify the statute’s “good faith” defense provided under § 223(e)(5)(A). Id. Hence, the court reasoned, a statute is not narrowly tailored “when it subjects to potential criminal penalties those who must depend upon third parties for the effective operation of a statutory defense.” Id.
where the statutory language failed to identify the relevant community by whose standards the material will be judged.\textsuperscript{96}

Several weeks after the Pennsylvania court found the CDA to be an unconstitutional violation of the First Amendment, the District Court for the Southern District of New York granted yet another preliminary injunction against enforcement of the CDA—this time in favor of Joe Shea, publisher of an electronic newspaper, the \textit{American Reporter}.\textsuperscript{97} Although the court failed to find the “indecency” standard in section 223(d)(2) unconstitutionally vague, the court struck down section 223(d) in its entirety as a constitutionally overbroad restriction on adults’ First Amendment rights.\textsuperscript{98} The Department of Justice has appealed both cases to the Supreme Court.\textsuperscript{99}

\textsuperscript{96} \textit{Id}. at 856, 862-63 (citing \textit{Pacifica}, 438 U.S. at 732 (defining “indecent” by reference to terms “patently offensive as measured by contemporary community standards for the broadcast medium”); \textit{Dial Info. Servs.}, 938 F. 2d at 1540 (defining indecency by reference to contemporary community standards for the telephone medium)).

\textsuperscript{97} See, e.g., \textit{Shea}, 930 F. Supp. 950 (striking down CDA § 223(d) as overbroad despite the affirmative defenses stated in § 223(e) where the statute bans constitutionally protected indecent speech in violation of adults’ First Amendment rights).

Shea, owner, publisher and editor of \textit{The American Reporter}, challenged 47 U.S.C. § 223(d) as void for vagueness because the statute failed to provide ordinary citizens with sufficient notice of what conduct will subject them to criminal liability. 930 F. Supp. at 922. In addition, Shea claimed that § 223(d) was substantially overbroad where, 1) the statute restricted speech with “serious literary, artistic, political, or scientific value, and that the government cannot demonstrate any compelling interest in restricting the availability of such material on the Internet,” and 2) § 223(d), along with the affirmative defenses to criminal liability set forth in § 223(e)(5), was not narrowly tailored in that it failed to protect adults’ First Amendment rights to engage in constitutionally protected “patently offensive” speech. 930 F. Supp. at 940. In effect, the statute operated as a blanket ban on indecent communications transmitted through a computer network. \textit{Id}. See § 223(d) (criminalizing the use of an interactive computer service to display to anyone under eighteen, sexually explicit matter that is “patently offensive” according to contemporary community standards). See also supra note 84 and accompanying text (for text of § 223(d)).

\textsuperscript{98} 930 F. Supp. at 935-37. Like the court in \textit{ACLU v. Reno}, the three-judge panel in \textit{Shea} applied a strict scrutiny standard of review to the statute, and found § 223(d) overbroad as violation of adults’ First Amendment rights, despite the statute’s affirmative defenses. \textit{Id}. at 941, 948. Again, as in \textit{ACLU v. Reno}, the court found that in order to avoid criminal liability, content providers would essentially depend upon third parties (i.e., software manufacturers), to provide the technological means necessary for substantial compliance with the statute’s provision. \textit{Id}. at 948.

However, the court failed to find § 223(d)’s term, “patently offensive,” vague. \textit{Id}. at 937. Unlike the court in \textit{ACLU v. Reno}, the Shea court did not read Pacifica and its progeny as requiring statutory reference to a relevant “community standard.” \textit{Id}. at 937-38. Hence, the lack of reference to a relevant community standard did not leave the statute open to arbitrary enforcement as to what content was “patently offensive” where codifications of indecency “have been authoritatively construed for a variety of media in recent years.” \textit{Id}. at 938-39.

\textsuperscript{99} See e.g. note 26 and accompanying text (discussing Supreme Court appeal in both \textit{ACLU v. Reno} and \textit{Shea}). See also CDA, § 561 (providing that any provision of the CDA
III. ANALYSIS

Our technology inevitably expands far faster than our ability to assimilate, legislate, understand or constructively use that technology. Proponents of legislative reform and advocates of self-regulation share a common purpose. Both groups strive to promote free-speech on the Internet, yet they concurrently seek to mitigate the need to shield children from offensive and potentially dangerous expression. However, the government is not the appropriate entity to regulate the content of information transmitted across Cyberspace. This Comment argues that governmental regulation of the content of material transmitted through computer networks, such as that imposed by the Communications Decency Act of 1996, are unnecessary, ineffective and likely unconstitutional.

First, this section demonstrates that new laws are unnecessary to prosecute criminals who use the Internet to target children or to control content on the Internet which may be harmful to them. Moreover, the technology exists for both on-line access providers and users of interactive computer systems to control the content of unwanted speech. Second, broadly worded provisions, such as those set forth in the CDA, will likely prove ineffective to administer to the exponentially-growing number of users of interactive computer systems. Last, the fundamental principles behind the rationale for traditional mass media regulation of content do not yield a similar justification for Internet regulation. Thus, any similar imposition on computer-transmitted speech will likely fail constitutional scrutiny under the First Amendment.

found unconstitutional “shall be reviewable as a matter of right by direct appeal to the Supreme Court”).

100. Barret, supra note 19, at 106. According to Andrew Barrett, FCC Commissioner:
I am unsure that given the typical mindset in this country, many Americans would want the FCC bureaucrats to assume a parental role for their children. Regulators need to be very careful about that; while many people want more regulation in the mass media area, most have the opposite reaction on the telecommunications side. While everybody wants the FCC to come into their households on the mass media side and determine what they ought to see, when they ought to see it, and what ought to be included as a matter of content and programming, people suggest that there ought to be less regulation on the telecommunications side.

Barret, supra note 19, at 106. A survey conducted by Texas-based Intelliquest, a technology research company, revealed the following statistics regarding who they thought would be the appropriate group to regulate the Internet and/or commercial on-line services: An Internet governing body (32%); Users (32%); Private enterprise (16%); No one (15%); U.S. government (6%). See James Kim, Internet Users Favor Self-Regulation, USA TODAY, Oct. 3, 1995 at 1A (noting a margin of error of approximately five percent).
A. **Government Regulation is Unnecessary Because Existing Laws Prohibit Illegal Expression, and the Technology Exists to Control Content Offensive to Children, but Constitutionally Protected Speech as to Adults**

1. **Reliance on Existing Laws to Curb On-line Abuse**

Prosecutors successfully utilize existing laws and judicial doctrines to assess liability for harmful material communicated through on-line services. Regardless of the medium through which it is transmitted, the First Amendment does not protect the transmission or distribution of obscene expression.101 Accordingly, both federal and state governments have implemented statutes that prohibit the transmission and distribution of obscene material through various channels of communication.102


Child pornography, by definition "obscene," has been a target of significant legal regulation long before the Internet offered a medium for transmitting such material. Hence, it is as much a violation of the law to provide obscenity or child pornography to minors on-line as it is to sell children pornography at the local bookstore.

The federal statutory prohibition against the transmission of obscene material has been effectively applied to speech transmitted


Only Vermont and Alaska have no adult obscenity laws. Taylor, supra, at 262 n.39. However, Vermont provides for criminal penalties for the dissemination of indecent materials to minors. 13 V.S.A. §§ 2802, 2804b (West 1994).

103. See, e.g., New York v. Ferber, 458 U.S. 747, 762 (1982) (holding that a state may regulate child pornography within bounds of First Amendment if statute narrowly tailored to achieve compelling objective of protecting minors); Osborne v. Ohio, 495 U.S. 100, 109 (1990) (upholding Ohio Statute which criminalizes possession, production, and dissemination of child pornography as serving compelling state interest in protection minors).


104. See supra notes 102-03 and accompanying text (discussing federal and state statutes regulating the transmission of obscenity and child pornography).
through a computer network.\footnote{105} In \textit{United States v. Thomas},\footnote{106} one of the most infamous Cyperspace cases that involved transmission of pornographic and obscene material on-line, computer bulletin board operators were convicted under federal statute\footnote{107} of ten counts of transmitting sexually obscene pictures through interstate phone lines.\footnote{108} A United States Postal inspector discovered the Thomas' California-based bulletin board service ("BBS"), \textit{Amateur Action}, after he received a complaint from a fellow Tennessee resident about the graphic images.\footnote{109} The defendants were tried before a jury in Memphis, Tennessee, where the images were received, rather than in California where the material originated.\footnote{110} The Thomases were acquitted of the child pornography charges. But the Memphis jury, applying existing federal statutes which prohibit the transportation of obscene materials, found the images ob-

\footnote{105} In his May 6, 1995 letter to Rep. Thomas Bliley, the American Family Association's Patrick Trueman, the Section Chief during the Bush and Reagan Administrations of the Child Exploitation and Obscenity Section of the Justice Department, noted that the Federal Criminal Code currently prohibits distribution of both child pornography and obscenity by computer. \textit{Child Pornography on the Internet, 1995: Hearing on S. 892 Before the Committee on the Judiciary of the Senate, 104th Cong., 1st. Sess. (1995)(written testimony of William W. Burrington, Assist. General Counsel, America OnLine and Chairman of the Online Policy Comm. on Interactive Services Assoc., at note 2) [hereinafter \textit{Burrington Written Testimony}].

\footnote{106} \textit{Thomas}, 74 F.3d 701, 704 (6th Cir. 1996).

\footnote{107} The Thomases were convicted of criminal penalties under Title 18 of the United States Code, which prohibits the transportation of obscene material for sale or distribution and provides in relevant part:

\begin{quote}
Whoever knowingly transports in ... interstate or foreign commerce... for the purpose of sale or distribution, ... of any obscene, lewd, lascivious, or filthy book, pamphlet, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, pornographic recording, electrical transcription ... or any other matter of indecent or immoral character, shall be fined under this title or imprisoned ...
\end{quote}

\footnote{108} \textit{Thomas}, 74 F.3d at 706. The defendants, Robert and Carleen Thomas, operated the board "Amateur Action" from their home in Milipitas, California. \textit{Id.} at 705. Only Amateur Action subscribers had direct access to the files. \textit{Id.} In order to subscribe, members were required to fill out a form which included age and a signature, as well as pay the fee. \textit{Id.} The board featured adults engaged in various sexual acts, including images of bestiality, and sexually explicit scenes with children. \textit{Id.} \textit{See also Rimm, supra} note 17, at 1896-1905 (discussing in detail the content of "Amateur Action" computer bulletin board operated by the Thomases).

\footnote{109} \textit{Id.} at 705. Under an assumed name, he obtained access to the board and downloaded the images onto his computer. \textit{Id.}

\footnote{110} \textit{Id.} at 706.
scene based on the Tennessee community's standards.\textsuperscript{111}

On appeal, the Thomases argued, \textit{inter alia}, that section 1465, which prohibits transportation of obscene materials in interstate commerce for the purpose of sale or distribution, did not apply to intangible objects such as computer files.\textsuperscript{112} Moreover, the Thomases argued that Con-

\textsuperscript{111} Henry J. Reske, \textit{Computer Porn a Prosecutorial Challenge}, 80 A.B.A. J. 40 (1994). \textit{See also supra} note 37 and accompanying text (discussing obscenity analysis based on "contemporary community standards" set forth in \textit{Miller} v. \textit{California}, 413 U.S. 15, 24 (1973)). Hence, the prosecutors were accused of forum shopping on the basis that the convictions would have been unlikely in California where similar sexually explicit material could easily be acquired in the streets in neighboring San Francisco. Reske, supra. \textit{See also} Anthony L. Clapes, 13 No. 7. \textit{COMPUTER LAW.} 1, *8-9 (1996) (discussing the application of the federal obscenity statute to on-line communications in \textit{Thomas}, noting that the court "had little trouble concluding that the federal obscenity statute covered on-line services," prior to the passage of the CDA).

Ultimately, Robert Thomas was convicted of eleven counts under 18 U.S.C. § 371 (conspiracy to violate federal obscenity laws); 18 U.S.C. § 1462 (shipping obscene video tapes); 18 U.S.C. § 1465 (knowingly using and causing to be used a facility and means of interstate commerce—computer and telephone lines—to transport obscene, computer-generated materials in interstate commerce); and 18 U.S.C. § 1467 (forfeiture). 74 F.3d at 705-06. Carleen Thomas was convicted of the same offenses except that under 18 U.S.C. § 1467. \textit{Id.}

After \textit{Thomas}, the absence of a uniform standard of obscenity may be a consideration for the bulletin board operator who chooses to distribute sexually explicit material nationwide. Although beyond the scope of this discussion, the application of local community standards to the Cyberspace community has fostered criticism regarding the appropriateness of the current analysis set forth in \textit{Miller} when applied to cases such as this. However, a wholesale revision of the law may not be required, but rather re-evaluation of the existing judicial doctrine. Among the solutions introduced by practitioners:

It is easy to imagine a situation where a user posts something on his bulletin board which might be wholly appropriate in his own community, but is viewed as obscene when downloaded in some distant, unknown (and perhaps unforeseeable) community. The result is that it is no longer sufficient to adhere to the standards of one's own local community. When conversing on-line, the strictest community may provide the ultimate worldwide standard for review.

Samuel Fifer and Michael R. Lufrano, \textit{The Law Grapples With On-line Defamation}, 1995 A.B.A. SEC. SCI. & TECH. 29, n.28. Thus, "[o]nce the material is on the Internet, it is fair game for readers worldwide and legal claims are fair wherever the sender's message happens to be pulled down." Fifer and Lufrano, supra. \textit{See also} Pamela A. Huelster, \textit{Cybersex and Community Standards}, 75 B.U.L. Rev. 865 (1995)(advocating the use of a single national obscenity standard for computer bulletin board services).

Moreover, although the prosecution successfully convicted the Thomases under existing laws, cases such as this have highlighted the Cyberspace community's practical need for "legal alternatives that permit such groups to exclude from their communities offensive text as well as graphical images." Anne Wells Branscomb, \textit{Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society}, 83 Geo. L.J. 1935, 1948 (1995)(discussing implications of the current obscenity test on the Cyberspace community and examining alternative legal and technical tools available to the Cyberspace community to restrict pornographic traffic on-line).

\textsuperscript{112} \textit{Thomas}, 74 F.3d at 706. The Thomases relied on the Tenth Circuit's decision in United States v. Carlin Commun., Inc, 815 F.2d 1367, 1371 (10th Cir. 1987), for the propo-
gress did not intend to regulate computer transmissions, as evidenced by
the absence of express language prohibiting such conduct. The Sixth
Circuit rejected both arguments, concluding that the federal obscenity
statute applied to on-line services such as the Thomas' BBS.

The utility of *Thomas* is the Sixth Circuit's reasoning for broadening
the applicability of section 1465 to encompass material transmitted by
computer. The "manner and form" in which the images were trans-
ferred, the court reasoned, failed to address the fact that the ultimate
result was still a tangible image—the obscene files received on the
screen, then downloaded on the computer in Tennessee. Moreover,
the court found that section 1465 should be liberally construed, because
the prohibited conduct fell within the plain language of the statute, and
Congress clearly intended "to stem the transportation of obscene mate-
rial in interstate commerce regardless of the means used to effect that
end." State prosecutors have likewise utilized existing law to curb illegal
activity targeting minors. In *People v. Poplaski*, a New York court

sition that the sections 1462 and 1465 applied only to tangible objects, not the intangible
string of 0's and 1's of the Thomas' computer files. *Id.* at 706-07. Moreover, the Thomases
argued that they were prosecuted under the wrong statute, and that 47 U.S.C. § 223(b)
(1988 & Supp V 1993), which prohibited the use of telephone facilities to transport obscene
material, would apply to the conduct in question, if at all. *Id.* at 707.

113. *Id.* at 706.
114. *Id.* at 707-09.
115. See *Thomas*, 74 F.3d at 706-09.
116. *Id.* at 707 (reasoning that "[t]he manner in which the images moves 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"). Ironically, the *Thomas* court, which decided the
case only two weeks prior to the enactment of the CDA, likewise found that 47 U.S.C. § 223
applied to only sexually-explicit, commercial telephone services, not to "commercial com-
puter bulletin boards that use telephone facilities for the purpose of transmitting obscene,
computer-generated images to approved members." *Id.*
1995) (holding that "[t]he use of the terms 'distribution,' 'picture,' 'image,' and 'electrical
transcription' leads us to the inescapable conclusion the statute is fully applicable to the
activities engaged in").

118. See *supra* notes 102-03 and accompanying text (discussing state obscenity and
card pornography statutes). Although not dispositive of all cases prosecuted under rele-
vant state statutes, the following provides a sample of successful convictions of illegal
activity focusing on minors: see *Computer Pedophile Link Feared*, NEWSDAY (N.Y.), Oct. 7,
1994, at A05 (discussing the arrest of a New York computer analyst and subsequent charg-
ing of second-degree sexual contact with a minor, initiated through a computer chat-group);
Mary Murphy, *Computer Prowlers Stalk Kids: Nowadays, It Seems Everything is Done by
Computer - Including Child Molestation, A Special Agent Discovers*, THE ORLANDO SENT.,
July 9, 1995, at 1 (discussing Florida Department of Law Enforcement efforts to track down
child molesters who search for victims in Cyberspace); Dennis McCafferty, *Georgian Ac-
3B (discussing charges brought against 48-year-old Georgia resident for attempted child
upheld a state statute criminalizing acts which endangered children.\textsuperscript{120} Poplaski, who used a computer bulletin board to locate and engage young boys in sexually explicit conversation, claimed that the statute violated his First Amendment rights.\textsuperscript{121} Rejecting Poplaski's argument, the court found that the legislature's intent to protect the physical health, morals, and well-being of children a compelling government interest which outweighed Poplaski's right to engage in sexually explicit phone conversations with children.\textsuperscript{122} \textit{Thomas}, the prosecution successfully utilized existing law as a vehicle through which to target computer crime against minors.\textsuperscript{123} Absent sexually explicit conversation, current law likewise prohibits potentially harmful encounters associated with on-line stalking and harassment.\textsuperscript{124} Hence, where illegal conduct affects chil-

\begin{multicols}{2}

---

\textsuperscript{119}. 616 N.Y.S.2d 434 (N.Y. Crim Ct. 1994).

\textsuperscript{120}. \textit{Id.} at 438. Under New York Penal Law § 260.10(1), "a person is guilty of endangering the welfare of a child when he knowing acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than seventeen years old." \textit{Id.}

\textsuperscript{121}. \textit{Id.} at 436. Poplaski allegedly contacted six boys, ages twelve to fifteen, through a computer bulletin board. \textit{Id.} After locating the boys, Poplaski would call them, and attempt to hypnotize and to direct them to masturbate. \textit{Id.} Poplaski claimed that the statute applied only to acts, not speech. \textit{Id.}

\textsuperscript{122}. \textit{Id.} at 436-37.

\textsuperscript{123}. \textit{See supra} notes 106-14 and accompanying text (discussing facts of \textit{Thomas}).

\textsuperscript{124}. \textit{See, e.g.,} Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (noting that the Supreme Court has defined certain classes of speech which the government may regulate, including the obscene, the profane, the libelous and fighting words. Federal law currently provides criminal penalties for the interstate transmission of any communication which threatens or intends to threaten injury to another person. 18 U.S.C. § 875(c) (1994). \textit{See also} 47 U.S.C. § 223(a)(1)(C) (1994) (prohibiting use of the telephone to "annoy, abuse, threaten, or harass any person").

dren, either as the object of the crime or the viewer of illegal material, current laws appear adequate to curb abuse.\textsuperscript{125}

2. \textit{Technology Exists to Identify and Filter Out Objectionable Material}

Second, legislation such as the CDA which prohibits indecent speech, not only seeks to prohibit unprotected expression, but that which is shielded by the First Amendment as well.\textsuperscript{126} Intrusive government restriction controlling the content of protected expression is unnecessary because self-regulation over unwanted content is a viable alternative. The viability of self-regulation embodies two general principles. First, current technology enables users of interactive services to identify unwanted content, and to filter the contents receipt. Second, the Cyberspace community has shown the impetus to implement these controls.

---

\textsuperscript{125} District Court, even though Baker never approached or spoke to the classmate, "his writings were deemed the work of a dangerous, disturbed man who may have the potential to cause harm." Branscomb, \textit{supra} note 14, at 1653 n.48.

"Stalking" focuses on a repeated pattern of pursuit involving a specific victim, rather than focusing on actual physical contact. Eileen S. Ross, \textit{E-Mail Stalking: Is Adequate Legal Protection Available}, 13 J. MARSHALL J. COMPUTER \\& INFO. L. 405, 405 n.2 (1995) (providing a comprehensive list of state statutes that criminalize stalking and proposing that state statutes should be updated to include electronic communication as a type of "unconsented contact"). Approximately 48 states and the District of Columbia enacted anti-stalking statutes and also provide criminal penalties for various forms of threatening communication. See \textit{id.} at 409-10 n.29.

\textsuperscript{126} See, e.g., ACLU v. Reno, 929 F. Supp. at 856-57. In ACLU v. Reno, the court noted that "vigorous enforcement of current obscenity and child pornography laws" should sufficiently address the problem of children's exposure to patently unsuitable material on the Internet." See \textit{id.} (citing 141 Cong.Rec. S8342 (daily ed. June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, U.S. Department of Justice, to Senator Leahy)).

"To the extent that particular gaps may appear in the future, or if any obstacles arise to prosecution of those who make obscenity or indecency available to minors, Congress should examine whether there is a need for additional training or additional resources for enforcement of the current laws." Written Testimony of William Burrington, \textit{supra} note 105 at n.2.

Moreover, according to the Department of Justice, broadly worded legislation appears premature. \textit{Dept. of Justice Letter, supra} note 105. The Department of Justice recommended instead "that a comprehensive review be undertaken of current laws and law enforcement resources for prosecuting online obscenity and child pornography, and the technical means available to parents and users to control the commercial and noncommercial communications they receive over interactive telecommunications systems." \textit{Dept. of Justice Letter, supra} note 105.

\textsuperscript{126} Pacifica, 438 U.S. at 748 (holding that offensive words subject to constitutional protection, and only in certain limited context is regulation permissible); Sable, 492 U.S. at 126 (1989) (holding that sexual expression which is indecent, but not obscene, protected by First Amendment; and the Government can only regulate content in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest).
As the history of mass media reveals, members of professions or trades are often instrumental in developing self-regulatory codes.\textsuperscript{127} Whether through a desire to avoid government regulation, or to improve the public image of the industry, self-regulation has proven effective for such media as the motion picture industry and video retailers.\textsuperscript{128} Likewise, Internet service providers and users have shown potential ability to provide alternative methods of controlling harmful content.\textsuperscript{129}

\textsuperscript{127} JOHN ELLMORE, BROADCASTING LAW AND REGULATION 259 (1982).

\textsuperscript{128} See supra note 6 and accompanying text (discussing the motion picture industry's success at self-regulation of content through MPAA ratings). Accordingly, nationwide polls conducted each year by the Opinion Research Corporation, Princeton, New Jersey, have consistently reveal that the system is successful. See VALENTI, supra note 6, at 8. A recent poll suggests that 74\% of parents with children under the age of 18 found the rating to be "very useful" to "fairly useful."

Likewise, under the threat of impending legislation, the video software industry proposed to develop a rating system for violent or sexually explicit material contained in some video games. See 140 CONG.REC. S788 (daily ed. Jan 25, 1994) (statement of Senator Liebermann). See also Video Game Rating Act of 1994, S. 1823, 103rd Cong., 2d Sess. (1994) (bill providing for establishment of "Interactive Entertainment Rating Commission" as independent agency in connection with video game industry to create a system for providing purchasers with information about graphic violence or sexually explicit material contained in video games).

\textsuperscript{129} For example, prior to enactment of the CDA, the Interactive Services Association ("ISA"), a non-profit association which serves providers of telecommunications interactive services, took the initiative in developing alternatives to legislation. The ISA proposed, in connection with Congress, to develop technical tools for parents to screen out objectionable content. Written Testimony of William Burrington, supra note 105. ISA's Online Operators Policy Committee is comprised of: America Online, Inc.; Apple e-World; CompuServe; Delphi Internet Services Corp.; GEnie; Interchange Network Company; MCI; Microsoft Network; Prodigy Services Company; and Ziff Davis Interactive. Written Testimony of William Burrington, supra note 105, at n.1. See also Internet Access: ITAA Announces Internet Project on Industry Self-Regulation, EDGE, On & About AT&T, July 3, 1995 at 21(1) [hereinafter Internet Access] (noting that the Task Force on Internet Use of the Information Technology Association of America (ITAA), representing over 6700 United States computer software, service, and communications companies, instituted a study of alternatives for industry self-regulation for recommendation to Congress); Patrick McKenna, Microsoft/ Netscape Plan Parental "Lock Out" Ability, NEWSBYTES, June 15, 1995 at NEW06150029 (announcing joint effort by Microsoft, Netscape Communications, and Progressive Networks to "create and implement" an industry-wide standards agreement which allows parents to lock out access to inappropriate material).

At present, the World Wide Web Consortium has instituted the "Platform for Internet Content Selection" ("PICS"), a program to develop "technical standards that would support parents' ability to filter and screen material that their children see on the Web." See, e.g., ACLU v. Reno, 929 F. Supp. at 838-39. The participants include major on-line service providers, commercial internet access providers, hardware and software companies, major internet content providers, and consumer organizations, with membership constantly growing. Id. at 839 (noting that PICS members have agreed to technical standards which would allow the Internet community to begin to offer products and services based on the PICS-standards).
a. Voluntary Ratings of Content

At present, the Cyberspace community has several alternatives with which to shield minors from offensive content. To begin with, commercial on-line services offer monitored discussion forums in order to assure that the content of the discussion is appropriate for children. Accordingly, courts recognize that the market will support services which assume this responsibility.

In addition, independent organizations offer Internet "ratings systems," which identify content of objectionable Internet sites. The

130. Prodigy Services Company, for example, labels itself as a "family oriented computer network," exercising editorial control over the content of messages posted on its bulletin boards. See Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710, *5-6 (N.Y. Sup. Ct. May 24, 1995) (noting that "[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste'... Prodigy is clearly making decisions as to content, and such decisions constitute editorial control"). CompuServe also provides its users with the option of completely blocking Internet access, or merely blocking unwanted content to specific areas. ACLU v. Reno, 929, F. Supp. at 842.

131. Stratton Oakmont, Inc., 1995 WL at *5. See also Berman & Weitzner, supra note 9, at 1637 (noting that the service providers' decision to assume editorial control by screening content is based on desire to attract customers who want such a service, whereas other on-line services offer unmoderated discussion based on similar customer demand).

132. See Internet Access, supra note 129, at 21(1) (noting that a ratings system may identify the many, varied Internet publishers, from "individuals, to religious groups, to universities, to large corporations... as well as to the format selected," such as a World Wide Web page, chat room, or usenet group).

133. For instance, computer communications contain "headers," which could contain information identifying the subject matter of the content. Headers are identification data, designating the "host" computer (which connects individual users to other users) as well as the particular computer attached to the host. JOHN R. LEVINE AND CAROL BAROUDI, THE INTERNET FOR DUMMIES 53-58 (2d ed. 1994). See Berman & Weitzner, supra note 9, at 1633 (describing header as the digital analogue to a bibliographic entry that describes a book or magazine).

"SafeSurf," a private interest group, originally developed one of the most comprehensive systems for blocking content through use of header identification. Ray Soular and Wendy Simpson, SafeSurf Home Page: The SafeSurf Internet Rating Standard, (visited Oct. 1995) <http://www.safesurf.com/ssplan.html> (copy on file with author) [hereinafter SafeSurf Rating]. Under SafeSurf's approach to rating content of objectionable Internet sites, children would access the Internet using individual passwords. ld. Based on the premise that the majority of Internet sites are directed toward adult viewers, children would only be able to access sites labeled "appropriate for children." ld. Conversely, sites failing to contain the mark would not be accessible. ld. Moreover, Internet sites containing adult material, whether voluntarily labeled or not, will be inaccessible to children. ld. Since the system requires Cyberspace users and web site operators to incorporate the identification code into the header file of the document, children would be denied access to files lacking such codes. SafeSurf Rating, supra. Likewise, the SafeSurf Rating Standard utilizes several levels of blocking based on parental approval of content for children of different ages. SafeSurf Rating, supra. For example, the actual ratings system proposes a series of codes from "0," which contains no adult themes, to "9," which designates adult
ratings systems are designed to work in connection with filtering software, which blocks the identified, unwanted material.\textsuperscript{134} The most comprehensive attempt at present is the World Wide Web Consortium, a cross section of commercial, private and non-profit organizations, which developed the "Platform for Internet Content Selection" ("PICS")\textsuperscript{135} in order to rate Internet sites for content.\textsuperscript{136}

However, a uniform rating system, such as that adopted by the motion picture industry, may not be appropriate for providers of such services or desirable for users.\textsuperscript{137} For example, a single rating system would

\textsuperscript{134} See SafeSurf Rating, supra note 133 (noting that the SafeSurf Internet Rating System is designed to work in connection with third party filtering software). Various companies have marketed software which allows parents to limit children’s Internet access, including Cyber Patrol, Cybersitter, The Internet Filter, Net Nanny, Parental Guidance, Surfwatch, Netscape Proxy Server, and WebTrack. \textit{ACLU v. Reno}, 929 F. Supp. at 839. For example, Surfwatch, a software product which allows the user to filter unwanted content on the Internet, is available at retail locations and is compatible with both Apple Macintosh and Microsoft Windows operating systems. \textit{Id.} at 841.

\textsuperscript{135} See, e.g., \textit{supra} note 129 (describing various Internet-related members involved in PICS).

\textsuperscript{136} The World Wide Web Consortium through its PICS organization, according to the \textit{ACLU v. Reno} court, intends to provide “parents with the ability to choose from a variety of rating services, or a combination of services.” \textsuperscript{929} F. Supp. at 838. By using PICS compatible software offered through several commercial software providers such as Microsystems’ “Cyber Patrol,” PICS is current functioning as a “positive” rating system, or a site inclusion list. \textit{Id.} at 839 (noting that “[t]he default configuration for a PICS compatible Internet application will be to block access to all sites which have not been rated by a PICS rating service, while allowing access to sites which have a PICS rating for appropriate content”).

Microsystems’ Cyber Patrol, which was the first parental empowerment application to be compatible with the PICS standard, offered the first PICS ratings server on the Internet in February, 1996. \textit{Id.} at 840. Cyber Patrol is available to CompuServe and Prodigy subscribers free-of-charge, or can be purchased directly from Microsystems or retail outlets. \textit{Id.}

The CyberNOT list contains twelve categories for parents to choose from when blocking access, including material containing the following content: Violence/Profanity; Partial Nudity; Nudity; Sexual Acts; Gross Depictions (graphic or text); Racism/Ethnic Impropriety; Satanic/Cult; Militant/Extremist; Gambling; Questionable/I illegal; Alcohol, Beer & Wine. \textit{See ACLU v. Reno}, 929 F.Supp. at 840 (describing in detail the CyberNOT categories incorporating the PICS rating).

\textsuperscript{137} In reality, computer bulletin boards are easily established, thus rendering a nationwide rating system virtually impossible to monitor. \textit{See, e.g., ACLU v. Reno}, \textsuperscript{929} F. Supp. at 856 (noting that at present, there is no uniform rating system that is technologically nor economically feasible for all Internet content providers). \textit{See also} Becker, \textit{supra} note 8, at 207 (noting that computer bulletin boards range from large commercial services to individual systems which have only a few users, and “[t]he smaller systems go up and down literally on an hourly basis”).
simply replace government censorship over content with a private scheme of censorship. Instead, the variety of existing options for identifying objectionable, but highly subjective, content provides a workable solution for all users. Hence, parents could choose the service provider whom they trust, or personally supervise content, rather than depend on a single entity's judgment as to a uniform system of appropriate content.

b. Filtering Software

Once identified, existing technology enables users to access or exclude offensive Internet sites. Internet service providers and third party organizations provide filtering software which allow the user to block access to graphics as well as specific files and programs.

---

138. See Berman & Weitzner, supra note 9, at 1633.
139. See also Child Pornography on the Internet: Hearings on Cyberporn and Children, the Scope of the Problem, the State of the Technology and the Need for Congressional Action Before the Senate Judiciary Comm., 104th Cong., 1st Sess. (July 24, 1995) (statement of Senator Leahy) [hereinafter Testimony of Sen. Leahy] (noting that "[p]arents know their children better than any government official, and are in the best position to know the sort of on-line material to which their children may be exposed").
140. See Berman & Weitzner, supra note 9, at 1633. (proposing that flexibility provided by interactive technology conducive to more than one rating system). See also Testimony of Sen. Leahy, supra note 135 (noting that interested organizations, such as the Christian Coalition or Mothers Against Drunk Driving, could provide users that implement blocking technology with lists of Internet sites that these groups consider inappropriate for children).
141. See supra notes 133, 142 and accompanying text (listing companies that provide for sale filtering software to users to screen unwanted content). Child Pornography on the Internet: Hearings on Cyberporn and Children, the Scope of the Problem, the State of the Technology and the Need for Congressional Action Before the Senate Judiciary Comm., 104th Cong., 1st Sess. (July 24, 1995) (statement of Jerry Berman, Executive Director of the Center for Democracy and Technology) [hereinafter Berman Statement]. According to Berman, the user can control or "filter" content in two ways: First, one could screen out all messages or programs based on information in the header. If a parent wanted to prevent a child from seeing a particular movie or from participating in a particular on-line discussion group, then the computer or other information appliance used by the child could be set by the parent to screen out the objectionable content. Such features can often be protected with passwords which would be assigned, for example, by the responsible adults in the house. Second, the same systems can be used to enable blocking of content based on third party rating systems.

Id.
142. Several major online services currently provide filtering software, in connection with service access, for use with personal computers. For example, America OnLine ("AOL") provides separate accounts for each household member, but the master account has access to all subsidiary accounts. See Nancy Tamosaitis, Parental Discretion Advised, COMPUTER LIFE, Nov. 1994, at 163 (discussing access controls provided by on-line commercial service providers). Moreover, AOL's Parental Control feature offers instant message blockage which stops other members from contacting children as well as prohibits children
Although the First Amendment generally protects violent content, current technology would enable the user to screen for such material.

B. Legislation Controlling the Content of Speech on the Internet May Be Ineffective to Police and to Administer

Regulation attempting to control the content of speech on the Internet would likely prove ineffective to administer on a global computer network. There are no effective means to police United States laws worldwide. Because the Internet has no central controlling body, but consists of smaller, interconnecting networks through which to hide the origin of a message, the source of the material may be impossible to from sending messages; stops children's access to adult-oriented chat rooms; and blocks access to special interest conference rooms. Prodigy provides filtering software along with individual household accounts. Id. The software screens bulletin board messages and returns obscene or sexually explicit messages to the writer. Id. CompuServe provides no subsidiary accounts, but will block access to certain chat areas on request. Id.

Other organizations that do not provide on-line Internet access have also developed filtering software. See ACLU v. Reno, 929 F. Supp. at 839-42 (describing third party software available to block content).

143. See, e.g., Winters v. New York, 333 U.S. 507, 508-10 (1948) (holding that First Amendment protects pictures and stories of deeds of bloodshed, lust, or crime). Accord Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (D.C. Cir. 1992) (holding unconstitutional a statute prohibiting the sale or rental to minors of videos depicting violence and requiring display videos in separate areas within stores); American Booksellers Assoc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (holding that television violence is protected speech); Sovereign News Co. v. Falke, 448 F. Supp. 306, 394 (N.D. Ohio 1977) (holding that material containing only violence awarded highest degree of First Amendment Protection).

144. See, e.g., ACLU v. Reno, 929 F. Supp. at 840. For example, Microsystems' CyberNOT, which incorporates the PICS rating standards, offers software to screen violent or politically extreme content. Id.

145. See Shawn P. McCarthy, They Rate Movies of "Decency." Why Not Rate the Internet?, GOVERNMENT COMPUTER NEWS, Apr. 17, 1995, at 52. (noting that language of Communications Decency Act does not take into account the ways information can travel internationally). There are border issues as well. See also Elmer-DeWitt, supra note 12, at 38 (noting that other countries on the Internet are probably no more interested in having their messages screened by U.S. censors "than Americans would be in having theirs screened by, say, the government of Saudi Arabia").

146. ACLU v. Reno, 929 F. Supp. at 838. The court in ACLU v. Reno succinctly described the structure of the Internet:

The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point.

Id. See also Richard Morin, Anarchy and Control, UNIX REVIEW, June 1995, at 83 (noting that the Internet's only controlling body is limited to registration of IP addresses and DNS domains).
track.147 Thus, the potential for anonymity sharply reduces the original speaker's personal responsibility for harmful content.148 Moreover, under legislation such as the CDA, liability for failure to screen all messages could revert to the systems operator of the service, rather than the speaker.149 In such a case, the legislation's broadly-worded language would prove impractical for systems operators to administer.150 Thus,

147. "For technical reasons, it is extremely difficult to stamp out anything on the Internet—particularly images stored on the Usenet newsgroups. As Internet pioneer John Gilmore famously put it, 'The Net interprets censorship as damage and routes around it.' Elmer-DeWitt, supra note 12, at 38. See also Dan Farber, Legislative Folly: Rules in Cyberspace, PCWeek, June 19, 1995, at 126 (noting that in many instances, the legal system is incapable of keeping the hordes of clever programmers across the globe from foreign messages or sending them anonymously on the Internet); Paul Merenbloom, Internet Legislation May Add Lan Cop to the Corporate IS Manager's Job Title, Info. World, June 26, 1995, at 63 (explaining that any capable computer hacker can find elusive ways to hide the material's true address—noting that even a "12 year-old with a text editor can easily manipulate the contents of a Simple Network Management Protocol mailer to alter the addressing and/or contents of the mail").

148. See Fifer and Lufrano, supra note 111, at 38 (noting that if the speaker cannot be located, "the aggrieved target, unable to seek redress from the bulletin board operator or others involved in the process, may be left without a remedy"). See also Branscomb, supra note 14, at 1645 (noting that "if one cannot hold the poster of an abusive message responsible, because it is anonymous or the poster is judgment proof, the defendant must be the provider of the electronic space containing the message . . . [p]otential litigants and their legal counsel have not hesitated to seek the source of the deepest pockets").

149. See supra notes 84-96 and accompanying text (discussing general liability under the CDA). Under the current regulatory scheme, even board operators who act as a conduit for other's material with a minimal amount of knowledge that anyone who uses the bulletin board may transmit prohibited language to a minor may be subject to criminal penalties. See, e.g., 47 U.S.C. § 223 (a), (d) (providing criminal penalties under CDA if systems operator allows another whom the operator knows may transmit indecent material to a minor). See Farber, supra note 147, at 126 (explaining that under the CDA, corporations might also be liable if individuals use the corporate network and e-mail system to post messages that contain offensive content that could be read by a minor).

Thus, proposed legislation may conflict with existing legal standards for accountability. See, e.g., Smith v. California, 361 U.S. 147, 152-53 (1959) (holding that bookseller could not reasonably be expected to oversee all material it offered for sale and recognizing that imposition of such strict requirements would violate First Amendment); accord Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135, 139-41 (S.D.N.Y. 1991) (holding that mere distributor of defamatory material not liable for defamation and "has no duty to monitor each issue of every periodical it distributes").

150. See, e.g., ACLU v. Reno, 929 F. Supp. at 865 (finding that "individuals attempting to comply with the [CDA] presently have no clear indication of what actions will ensure that they will be insulated from criminal sanctions"). See also McCarthy, supra note 145, at 53 (noting that the CDA omits description of the obscene, lewd, lascivious, filthy, or indecent content it prohibits, thus computer network operators may be unable to determine what is acceptable); Merenbloom, supra note 147, at 63 (noting that if an individual discovers holes in another's Internet site, and uses it as a posting center for indecent material, then the systems operator will risk liability unless he explicitly documents that he is reviewing the content of the material passing through his host gateway").
under threat of liability, operators would arbitrarily choose to omit legal, as well as illegal, expression.\textsuperscript{151}

Moreover, legislation such as the CDA will likely conflict with existing laws and judicial doctrines.\textsuperscript{152} First, legislation imposing criminal sanctions on the transmission of constitutionally protected speech conflicts with existing judicial doctrines.\textsuperscript{153} Second, the imposition of criminal liability might force a systems operator to monitor not only the content of their bulletin boards and Internet chat areas, but also private e-mail postings in violation of federal law.\textsuperscript{154} Thus, the legislature's attempts to change language in existing statutes may not only prove unconstitutional,\textsuperscript{155} but would contravene current attempts to prosecute

\textsuperscript{151} See, e.g., ACLU v. Reno, 929 F. Supp. at 855 (finding that the CDA reaches speech subject to the full protection of the First Amendment, including a broad range of material from contemporary films, plays, books, and controversial contemporary art). See also Morin, supra note 146, at 83 (noting that prohibition to include on-line access to indecent material would require service providers to purge alleged indecent material from public bulletin boards and discussion groups to avoid accidental viewing by a minor); Joe Abernathy, Feds Target the Internet, PCWorld, May 1995, at 68 (noting that if subjected to criminal liability or regulatory burdens, many businesses might disconnect Internet service).

\textsuperscript{152} Dept. of Justice Letter, supra note 105.

\textsuperscript{153} Dept. of Justice Letter, supra note 105 (citing Sable, 492 U.S. 115 (1989) (holding that restrictions on the content of protected speech in media other than broadcast must serve compelling state interest using the “least restrictive means”). Accordingly, the CDA “fails to take into account less restrictive alternatives utilizing existing and emerging technologies . . . .” Dept. of Justice Letter, supra note 105. Moreover, the CDA would “jeopardize the enforcement of the existing dial-a-porn statute by inviting additional constitutional challenges, with the concomitant diversion of law enforcement resources.” Dept. of Justice Letter, supra, note 105.

\textsuperscript{154} See generally The Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-2702 (1994) (prohibiting illegal eaves dropping). The CDA would provide defenses for individuals who take good faith steps to “restrict or prevent the transmission of, or access to,” a communication that seems unlawful under its provisions. See Dept. of Justice Letter, supra note 105 (citing CDA prior to enactment, S. 652, at § 402(d)(5)). “The defense actually promotes intrusions into private electronic mail by making it ‘safer’ to monitor private communications than to risk liability. At the same time, this defense would defeat efforts by the government to enforce federal privacy protection against illegal eavesdropping.” Dept. of Justice Letter, supra note 105.

\textsuperscript{155} In order to comply with due process standards, a criminal statute must clearly define what conduct it prohibits and without clarity, the statute is void for vagueness. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). See also Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968), where the court explains that

[.] it is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.
obscenity and child pornography.\textsuperscript{156}

C. \textbf{GOVERNMENT REGULATION WHICH RESTRICTS THE CONTENT OF SPEECH TRANSMITTED THROUGH COMPUTER SERVICES WILL NOT SURVIVE CONSTITUTIONAL SCRUTINY}

1. \textit{The Government Does Not Have a Compelling Interest in Regulating Computer Speech.}

Restrictions attempting to control the content of speech disseminated through Cyberspace will not withstand judicial scrutiny. The constitutionality of an Internet system of self-regulation begins with the premise that "\textit{at the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence.}\textsuperscript{157}\textquote{This premise is buttressed by the Supreme Court's current hesitance to allow blanket regulation of protected speech.}\textsuperscript{158}\textquote{An analysis of the technology-based rationale which the Supreme Court has used to justify government regulation of protected speech transmitted by traditional communications media, fails to sustain similar restriction on speech disseminated through computer communications.}

\textit{a. Pervasiveness}

First, the First Amendment does not permit the government to prohibit speech because the speech is intrusive unless the "captive" audience cannot avoid the speech's objectionable content.\textsuperscript{159}\textquote{Interactive and on-line information services do not intrude upon the sanctity of an un-}

\textsuperscript{156} Dept. of Justice Letter, supra note 105. For example, the CDA's definition of "knowingly" would, inter alia, cripple obscenity prosecutions. Dept. of Justice Letter, supra note 105 (citing CDA prior to enactment, S. 652, at § 402(a)). The letter states in relevant part: Under subsection 402(e), only those persons with "actual knowledge" of the "specific content of the communication" could be held criminally liable. This definition would make it difficult, if not impossible, to prove guilt, and the standard is higher than the prevailing knowledge requirements under existing obscenity and child sexual exploitation statutes. Under Miller v. California, 413 U.S. 629 (1973), the government must only prove that a person being prosecuted under an obscenity statute had knowledge of the general nature of the material being distributed. Large-scale distributors of child pornography and other obscene materials . . . do not read or view each obscene item they distribute. Dept. of Justice Letter, supra note 105 (citing S. 652, at § 402(e)).

\textsuperscript{157} Turner Broadcasting, 114 S.Ct. at 2458 (1994).

\textsuperscript{158} Sable, 492 U.S. at 129. As the Court recently noted, the "First amendment, subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." Turner, 114 S.Ct. at 2458.

willing viewer's home. Rather, a user seeking information must affirmatively seek out harmful content by accessing an on-line chat room discussion or bulletin board service. Moreover, computer-based communication services provide the user with alternative methods with which to evade offensive content. Hence, unlike the television, radio, or telephone message service, the Internet is not an uninvited guest. Instead, the virtual world must be invited in.

b. User-control Over the Medium

Second, the First Amendment does not countenance restriction on protected expression unless the medium is uniquely accessible to children. Hence, if the user of the medium has little control over what a child sees or hears, the Supreme Court has maintained that the government has a compelling interest in assisting parents in maintaining authority.

In this respect, interactive computer services are uniquely different from the traditional broadcast media and telephone services. For instance, commercial on-line service providers have monitored discussion
forums. Absent the service provider as intermediary, filtering software assures users virtually unlimited control over what they choose to receive, while allowing access to the Internet. Once on the Internet or World Wide Web, computer screen interfaces, which allow the user to “talk” to the computer, require the user to affirmatively select an “endpoint,” or ultimate destination, with the click of a mouse or a keyboard command. Thus, unlike television or radio, the control over the medium ultimately resides with the user. With the variety of user-control options, legislation which empowers parents, rather than inhibits technological development, would further the compelling interest of supporting parents' claim to authority in the home.

2. Proposed Legislation Is Not the Least Restrictive Means Available to Control Objectionable Content

To withstand constitutional scrutiny, regulations which burden the content of protected speech must be narrowly drawn, without unnecessarily interfering with First Amendment freedoms. Legislation which imposes harsh criminal penalties on service providers and users is not the least restrictive means possible to limit children's access to objectionable content. Rather, the threat of criminal liability would serve to limit adult access to protected speech.

Current laws impose liability for illegal speech. Likewise, existing technology enables users of interactive services to screen un-

165. Stratton Oakmont, Inc. v. Prodigy Services, Co., 1995 WL 323710 at * 5 (noting that Prodigy's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract users seeking a "family-oriented" computer service).

166. See discussion supra Part III.A.2.b. (discussing the variety of providers who offer filtering software).

167. See Berman & Weitzner, supra note 9, at 1624 (explaining that computer interfaces are the format in which that information is presented to the users and the means by which the users interact with data).

168. See Berman Statement, supra note 141 (noting that the vast majority of the content on the Internet is label or identified in some manner, and without such identification, intended users cannot find it). See also, ACLU v. Reno, 929 F. Supp. at 844-45 (noting that "it takes several steps to enter Cyberspace", where even at the most fundamental level, the user must have access to a computer and modem, direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data).

169. See Pacifica, 492 U.S. at 749-50 (noting that a factor in justifying broadcast regulation was childrens' accessibility to broadcast coupled with parents' inability to control that access).

170. Pacifica, 492 U.S. at 748.

171. See discussion supra part III.A.1. (discussing availability of existing laws to prosecute illegal speech on the Internet).
wanted, but protected speech. \(^{172}\)

Legislation, such as the CDA, attempts to impose upon computer services laws designed for television, radio, and telephones. \(^{173}\) The Supreme Court determined that the broadcast media and common carriers possess the inherent technical capacity to control the flow of content of expression disseminated through the channel. \(^{174}\) Most computer network operators and content providers, on the other hand, have no practical means of complying broadly worded content-based restrictions. \(^{175}\) Thus, when faced with assuming the gargantuan editorial and economic responsibility necessary to avoid liability, smaller network operators might be forced out of the market. \(^{176}\) For larger service providers, the legislature has proposed a conflicting regulatory scheme. Legislation such as the CDA not only imposes virtually unlimited criminal penalties on providers who abdicate control over content, but could subject providers who monitor content to liability as well. \(^{177}\)

Taken to a logical conclusion, heavy-handed content-based legislation will will create a chilling effect on speech disseminated through com-

\(^{172}\) See discussion supra part III.A.2. (discussing availability of current technology to screen for objectionable content).

\(^{173}\) Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952) (noting that each medium of expression presents special First Amendment problems). See also ACLU v. Reno, 929 F. Supp. at 874 (criticizing the Government's argument in support of the CDA, which relies on Pacifica, as assuming that "what is good for broadcasting is good for the Internet").

\(^{174}\) Although the broadcast media have no duty to screen, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974), the FCC may impose sanctions for indecent broadcast which ultimately affect the station's license to operate. Pacifica, 438 U.S. at 748. See also Dial Info. Servs. v. Thornburgh, 938 F.2d 1535, 1541-42 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992) (noting that telephone company requirement of age verification prior to using indecent audiotext services only means available to prevent children's access).

\(^{175}\) See discussion supra part III.B. (discussing inability of most computer services to effectively police laws on the Internet); ACLU v. Reno, 929 F. Supp. at 856 (finding that defenses provided under the CDA not technologically nor economically feasible for most providers).

\(^{176}\) See Testimony of Sen. Leahy, supra note 139 (noting that overly restrictive bans against indecency on the Internet will prove not only unconstitutional but will also hamper the growth of this new communications medium). As one commentator stated:

If carriers are to be held responsible for the content of all information and communication on their systems, they will be forced to attempt to screen all content—every e-mail message, text file, word processing document, or image—before it is allowed to enter the system. In many cases this would simply be impossible. But even where it would be possible, such prescreening would severely limit the diversity and free flow of information in the on-line world.

See John Markoff, Here Comes the Fiber-optic Home, N.Y. Times, Nov. 5, 1989, at 1 (noting that the Internet connects and estimated ten million users in over one hundred countries).

\(^{177}\) See ACLU v. Reno, 929 F. Supp. at 864-65. Those Internet content providers, the court found, have no clear guidance from the CDA's language as to what actions will guarantee they will be shielded from liability under the CDA. Id.
computer communications. Hence, such legislation would serve to deny adult access to constitutionally protected speech. Legislation aimed at controlling the content of computer speech through unlimited criminal liability is not the least restrictive means that Congress can use to control protected speech on the Internet. Clearly, this is another case of "burn[ing] the house to roast the pig."  

IV. CONCLUSION

As one member of the Cyberspace community so aptly stated about the legislature's current proposal to regulate the Internet, "It's well intentioned but wrong-headed, applying an old broadcast mentality of regulation to an entirely different technology, like the guns of the French Maginot line on the eve of World War II, pointed in the wrong direction and irrelevant." Clearly, the government is not the right entity to regulate the content of speech transmitted through computer communications.

First, blanket content regulation is unnecessary. Existing federal and state statutes are sufficient to prosecute crime on the Internet, and existing technology allows parents to block access to offensive content. Second, legislation which had dubious application to an unlimited number of users worldwide would likely prove ineffective to administer. Finally, rationale based on pervasiveness, user control and accessibility to children which has justified regulation of traditional mass media is inapplicable to the technology of modern computer communications. Arguably, the State has a compelling interest in protecting children from indecent or harmful content of information transmitted through computer networks. However, current proposals targeted to obstruct the free flow of protected information carried through Cyberspace will likely continue to fail judicial scrutiny. Anything less will reduce the Internet to a playground fit only for children, transforming "the vast library of the Internet into a children's reading room, whereby only subjects suitable

178. See Butler v. Michigan, 352 U.S. 380, 383 (1957) (striking down legislation as insufficiently tailored since it denied adults their free speech rights by limiting them to read only what was acceptable for children). Conversely, as Senator Leahy noted, children may also be denied access:

If on-line providers are liable for any exposure of indecent material to children, people under the age of eighteen will be shut out of this technology or relegated by the government to sanitized "kids only" services that contain only a tiny fraction of the entire Internet. That would be the equivalent of limiting today's student to the childhood section of the library or locking them out completely.

Testimony of Sen. Leahy, supra note 139.


for kids could be discussed."

Dawn L. Johnson

181. See Elmer-Dewitt, supra note 12, at 38 (statement by Civil Libertarian Mike Godwin, staff counsel for the Electronic Frontier Foundation, criticizing indecency portion of Communications Decency Act).