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## The Communications Decency Act, Congress' First Attempt to Censor Speech over the Internet

by Lorraine Mercier

### I. Introduction

In the past several years, the Internet has developed into the fastest growing, and potentially most expansive, form of communication ever known. Unlike any other medium, the Internet's use and access has grown at exponential rates.<sup>1</sup> Some studies estimate that as many as 40 million users log onto the Internet each month.<sup>2</sup> Lawmakers appear simply unable to keep pace with the growth of the medium, and until recently, very little regulation existed to monitor use. The Communications Decency Act ("CDA"),<sup>3</sup> however, changed this.

This Article describes the development of the Communications Decency Act, the legislative history of the CDA, and the potential fate of the CDA upon judicial review. Additionally, this Article describes the constitutional issues raised by those who oppose the CDA, in particular those challenges relating to the First Amendment. These challenges to the CDA, recently argued before the Supreme Court, will result in a decision which is expected to be handed down this summer. Furthermore, this Article addresses how First Amendment issues were ad-

ressed by Congress, and considered by the courts. Finally, this Article suggests that the CDA should not survive the constitutional challenges currently before the high Court, and suggests possible alternatives which are less intrusive upon an individual's freedom of speech.

### II. Background Information on the CDA

On February 8, 1996, President Clinton signed into law the Telecommunications Competition and Deregulation Act of 1996 (the "Telecom Act").<sup>4</sup> The Telecom Act is an amendment to the Communications Act of 1934;<sup>5</sup> it effectively deregulated a vast majority of telecommunications media. In addition, the Telecom Act attempted to provide "universal service" for all residential consumers, by ensuring that people in rural areas have the same access to broadcast media as individuals in metropolitan areas. The Telecom

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Act also attempted to force large telecommunications industries, especially network and cable television companies, to allow for more competition by smaller, local companies. These goals were applauded by many supporters of local and small scale media broadcast.

While other telecommunications media celebrated the loosening of governmental control, the Internet became, for the first time, subject to federal regulation which seeks to censor content on the Internet. Title V of the Telecommunications Act contains the Communications Decency Act of 1996<sup>6</sup> ("CDA"), which, as enacted, restricts the distribution of obscene or indecent materials over the Internet.<sup>7</sup> The CDA was written by then Senator James Exon, a democrat from Nebraska. Condemning the evils of pornography displayed over the Internet, Senator Exon championed the passage of the CDA, this country's first piece of legislation which regulates speech over the Internet.<sup>8</sup>

The CDA's stated purpose is to protect children from access to indecent and obscene materials over the Internet and to "clean up" the Internet.<sup>9</sup> The protection of children from obscenity and indecency is certainly an important goal. However, Congress' action of achieving this aim is not without controversy and negative effects. Congress' means included making the posting of obscene and indecent materials a criminal act. Despite rather vocal opposition to the CDA on the Senate floor, Senator Exon eventually convinced a majority of his colleagues that the CDA was a necessary and appropriate measure for fighting the evils of pornography on the Internet.

Fortunately for Internet Service Providers ("ISPs"), Internet users, and proponents of constitutionally protected rights to free speech and access to information, it appears that this law will

not stand. On June 11, 1996, the United States District Court for the District of Eastern Pennsylvania, in *ACLU v. Reno*, held that the CDA was unconstitutional and issued an injunction against its enforcement.<sup>10</sup> Additionally, on July 29, 1996, the Southern District of New York, in *Shea v. Reno* held that the CDA was unconstitutional as written.<sup>11</sup> The *Shea* court agreed that an injunction was appropriate under the circumstances.<sup>12</sup> On December 7, 1996, on direct appeal from the three judge panel in *ACLU v. Reno*, the issue came to the Supreme Court. Argument was heard on March 19, 1997, and a decision is expected by early July of this year.

The case before the Supreme Court is certain to be a landmark decision which will help define the future development of the Internet as a communication medium in this country. If the reviewing courts' decisions are overturned on appeal, and the CDA is held constitutional, the ripple effect will be far more substantial than the members in Congress who voted in favor of the measure might imagine. The potential chill on the freedom of speech presented by the CDA is too great to allow this law to stand as written.

The CDA's criminalization of speech over the Internet is impractical, inefficient, and ultimately unconstitutional. The law, as written, is overbroad, as it encompasses both constitutionally protected and unprotected forms of expression. Furthermore, the CDA impermissibly infringes upon an individual's constitutionally protected freedom of speech. Finally, there are several less restrictive alternatives which Congress could have considered prior to enacting the law which, on its face, infringes upon an individual's First Amendment rights. The Supreme Court should realize these constitutional infirmities, and uphold the decisions of the courts of first impres-

sion.

### III. Criminal Law and the Internet

The CDA is not the only means by which one can be prosecuted for speech or action over the Internet. Criminal activity perpetrated over the Internet has become a growing interest for both lawmakers and intellectuals alike. Although this article focuses on the CDA and the criminality created thereunder, it is important to recognize and understand that other criminal behaviors are being discovered and prosecuted. These crimes and prosecutions will continue to increase in numbers as society begins to better understand the capabilities available to an individual with a computer, a modem, an Internet server, and a phone line.

#### A. Non-speech related crimes perpetrated over the Internet

A computer literate user enjoys a nearly unlimited resource in the Internet. If this computer know-how is tainted by criminal propensities, the potential for criminal activity is enormous. With a little tenacity, a computer-genius (or "hacker") can use his or her computer knowledge to break into others' computer systems and crack bank codes, access personal information (including credit card or social security numbers), determine where one lives, a person's automobile information, or even how much money someone makes. An experienced hacker has almost unlimited access to information and can intrude upon another's business or personal affairs with virtual ease.

Until recently, these crimes often went unpunished, due to the difficulty in tracing the hacker

or because of limited understanding of the hacker's ability to commit such crimes. Recently, however, prosecutors and legislatures across the country are increasing their awareness of the hacker's criminal objectives. In fact, the behavior of hackers encouraged the development of new terms to describe and prosecute "cybercrimes," such as: "cyberstalking," "computer burglary," and "industrial computer espionage."<sup>13</sup> The offenses range from teenage mischief to serious malfeasance.<sup>14</sup> Often, these cyber-criminals lack any serious criminal intent.<sup>15</sup> Statistics show that young men in their late teens seeking thrills by cracking codes and breaking into others' computers commit the majority of current computer related crimes.<sup>16</sup> However, more serious computer criminals exist, and continue to present problems for law enforcement agencies around the world. As a result, computer crimes are being taken more seriously by prosecutors, and the less threatening offenders are being punished.

#### B. Prosecutions for speech over the Internet

The computer crimes discussed in the above section are not based upon the content of a communication, but rather upon the act committed in conjunction with that communication. Recently, however, courts across the country have begun to prosecute Internet users based upon the content of their communications as well.<sup>17</sup>

One prosecution for speech involved a University of Texas student who was charged with making a terrorist threat against California state Senator Tim Leslie when he posted a message on the Internet exclaiming, "Let's hunt Senator Leslie for sport."<sup>18</sup> Prosecutors viewed this com-

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ment as a direct threat toward the Senator, and charged the student under antiterrorism statutes. Although the charges against the student were ultimately dismissed, the fact that prosecutors filed charges at all indicates the growing trend of intolerance for suspect acts perpetrated over the Internet.<sup>19</sup>

In addition, in November of 1996, a student from the University of Irvine was indicted in federal court under a hate-crime statute for sending an allegedly threatening message by E-mail to approximately 60 other university students, most of whom were Asian-American.<sup>20</sup> Prosecutors alleged that the message contained threats to kill the students if they refused to leave the campus. U.S. Attorney Nora Manella believed that the E-mail message was prompted by "a clear intent to scare and intimidate Asian students, and to discourage them from attending the university to which they were lawfully admitted."<sup>21</sup> Unlike the University of Texas student, this California student's charges are still pending, which provides further evidence that threats and harassment perpetrated over the Internet will not be tolerated.

#### **IV. Communications Decency Act - Legislative History**

As the general public became increasingly aware of the Internet as an important subculture of mainstream society, it became obvious to many members of Congress that legislation was needed to regulate Internet use and content. Political pressure from all sides mounted, but ultimately, those in favor of Internet censorship prevailed. In addition to the opposition within Congress, a number of special interest groups pushed for the passage of broad legislation.<sup>22</sup> One

such group was the Fairfax, Virginia organization Enough-Is-Enough, an anti-pornography group supportive of any legislation designed to eliminate pornography.<sup>23</sup>

#### **A. Three camps emerged in Senate**

When Senator Exon first introduced the CDA, the legislation faced serious opposition from political camps supporting various degrees of Internet regulation.<sup>24</sup> In one camp, some members of the Senate felt the law was too restrictive upon an individual's freedoms of speech and expression. This camp was led by Senator Patrick Leahy, a democrat from Vermont. Senator Leahy proposed a bill calling for a total lack of government intervention in the Internet.<sup>25</sup> In another camp on the other end of the spectrum, however, sat Senator Grassley who believed that Senator Exon's version did too little to protect people from pornographic materials on the Internet.<sup>26</sup> Ultimately, the CDA faced brutal opposition from many members of Congress, and debates erupted about how the Internet should be treated under the law. Under Senator Exon's version, ISPs were afforded a number of affirmative defenses to criminal prosecution.<sup>27</sup> Senator Grassley's camp disagreed with the CDA because it provides various exemptions which protect ISPs under certain circumstances, whereas Senator Leahy's camp opposed any congressional intervention at all.<sup>28</sup>

#### **B. Passage of Senator Exon's version in the Senate**

As the debates continued over whether Congress needed to intervene and regulate the Internet, Senator Exon attempted to inform other

members of Congress about the extent of pornography on the Internet. To prove his point, Senator Exon put together what he dubbed "The Blue Book" – a notebook filled with sexually explicit material allegedly downloaded from the Internet.<sup>29</sup> He then left the Blue Book on his desk for all of his colleagues to peruse.<sup>30</sup> In addition, a study conducted by Marty Rimm of Carnegie Mellon School of Law, which purported to expose the quantity of pornography and pornographic materials available over the Internet, was published at nearly the same time that Senator Exon displayed the Blue Book.<sup>31</sup> Mr. Rimm claimed to have conducted extensive research on the Internet, and ultimately concluded that a vast majority (83.5%) of the images on Usenet newsgroups (electronic bulletin boards)<sup>32</sup> depict either hard or soft core pornography.<sup>33</sup>

Although Mr. Rimm's study is no longer considered accurate,<sup>34</sup> it did create quite a stir when first published. In an attempt to encourage stricter regulation of the Internet, Senator Grassley quickly distributed the Rimm study to members of Congress.<sup>35</sup> Although Senator Grassley was still unable to garner enough support to pass his own, more restrictive bill, the attention generated by the distribution of the Rimm Study, combined with Senator Exon's display of the Blue Book, seemed to have the effect of swaying members who sat on the fence about the issue.<sup>36</sup> Ultimately, members of the Senate passed Senator Exon's middle of the road bill and sent the bill to the House of Representatives for a vote.

### C. The CDA's fate in the House of Representatives

Although the bulk of the debates about the CDA arose in the Senate, the House of Representatives also questioned the Exon bill upon

presentation for a vote. Debates in the House focused primarily on the appropriate standard for regulation of speech.<sup>37</sup> Some members argued that the CDA should regulate only material which is "harmful to minors."<sup>38</sup> Other members believed that the indecency standard agreed upon by the Senate should control the regulation of material.<sup>39</sup> Still others agreed with Senator Grassley's more restrictive bill, which would not allow ISPs the protections offered in the Exon bill.<sup>40</sup> However, the arguments in the House were not nearly as vehement or protracted as those in the Senate. Therefore, after brief debates, the Exon bill was adopted by the House and presented to President Clinton for final enactment, which occurred on February 8, 1996.

### V. The Content of the CDA

The CDA, as adopted, prohibits the knowing distribution of obscene or indecent materials by means of a telecommunications device to anyone under 18 years old.<sup>41</sup> The exact language of the CDA reads:

Whoever in interstate or foreign communications - by means of a telecommunications device *knowingly* - makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestions, proposal, image or other communication which is obscene, lewd, lascivious, filthy, *or indecent*, with intent to annoy, abuse, threaten, or harass another person . . . [or] initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene *or indecent*, knowing that the recipient of the communi-

cation is under 18 years of age . . . [or] uses any interactive computer service to display *in a manner available to a person under 18 years of age*, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms *patently offensive as measured by contemporary community standards*, sexual or excretory activities or organs, *regardless of whether the user of such service placed the call or initiated the communication* . . . [shall be fined or imprisoned under Title 18 of the United States Code]. (emphasis added).<sup>42</sup>

A person convicted of violating the CDA can be sentenced to up to five years in prison and up to \$250,000 in fines.

As stated in the above section, Senator Exon's affirmative defenses for ISPs were included in the bill ultimately signed into law by President Clinton.<sup>43</sup> These escape clauses were drafted to protect ISPs from prosecution under the CDA for material which is not generated by the ISP itself. Congress acknowledged that it would be virtually impossible for an Internet provider to monitor each of the thousands of images which are uploaded each day.<sup>44</sup> Unless the ISP is an active participant in the distribution of pornographic materials, liability under the CDA will not be found.<sup>45</sup>

Specifically, the CDA provides for three affirmative defenses: (1) ISPs which provide "mere access" to a system or network are immune from liability, so long as the connection does not include the creation of the content of the communication;<sup>46</sup> (2) employers are not held liable for

acts of their employees, unless the conduct is ratified or recklessly disregarded;<sup>47</sup> and, (3) the CDA provides a good faith defense for providers who make efforts to comply with the statute.<sup>48</sup> However, these protections are afforded only to ISPs, and are not available to individual users or subscribers.

## VI. Court Set Limits on the Regulation of Speech

The ability of Congress to regulate speech has been addressed by the Supreme Court in deciding First Amendment challenges. It is long established by the Court that obscenity, although indecent, may be regulated, but cannot be banned outright.<sup>49</sup> Congress was well aware of these limitations when it drafted the CDA, and it appears from the language that the CDA was written in an attempt to avoid some of these constitutional challenges.

### A. The definition of obscenity and the *Miller v. California* test

The first case to establish a definition of obscenity under the law was *Roth v. United States*<sup>50</sup> In that case, the Supreme Court held for the first time that obscenity is not a protected form of speech.<sup>51</sup> However, *Roth* authorized only a very limited reading of what constitutes "obscene material."<sup>52</sup> The *Roth* definition required an inquiry into whether "the average person, applying contemporary community standards [would deem the material offensive,] and if the dominant theme of the material taken as a whole appeals to prurient interest."<sup>53</sup> "Prurient interest" was then defined as material having "a tendency to excite lustful thoughts."<sup>54</sup> Although this definition was the rule of law for many years, it provided little

guidance to legislators and the courts in deciding what is obscene. The ambiguous definition has proved difficult to interpret and apply with any degree of certainty.

For many years, lawmakers and judges grappled with the definitions of "obscenity" and "pornography." In fact, the terms are so general that no hard-line rules have really ever been established. In a concurring opinion in *Jacobellis v. Ohio*,<sup>55</sup> Justice Stewart conceded that he could not define pornography in concrete or intelligible terms.<sup>56</sup> Instead, he claimed, instinct prevailed: "I know it when I see it," he stated.<sup>57</sup> The majority opinion in that case held that materials should be examined on a case-

by-case basis, evaluating the material individually and in context.<sup>58</sup> This individual case-by-case approach continues to be the method for determining whether material constitutes pornography.

The modern definition of obscenity was set forth by the Supreme Court in *Miller v. California*.<sup>59</sup> The defendant in that case was a salesman who sent unsolicited advertisements depicting explicit sexual activity to unwilling recipients through the mail.<sup>60</sup> The defendant was convicted of violating antiobscenity and antipornography laws. He appealed his conviction to the Supreme Court, which agreed to hear that matter to deter-

mine what actually constitutes pornographic and obscene material under the law.<sup>61</sup> The Court created a new test to determine whether material is obscene, vacated the defendant's conviction and remanded for application of the new definition of obscenity.<sup>62</sup>

In *Miller*, five Justices agreed to amend *Roth's* definition of obscenity. *Roth's* reasoning provided a basis for the new definition, but the *Miller* Court took the definition even further, to provide a more concrete definition of what is or is not obscene. *Miller* developed a three-part test to determine whether material is obscene.<sup>63</sup> Under this test, each of the three elements must be established to determine that the specific work is obscene.<sup>64</sup> First, the work "taken as a whole, [must appeal] to the prurient interest."<sup>65</sup> Second, the work must "[depict] or describe, in a patently offensive way, sexual conduct specifically defined by the statute."<sup>66</sup> And, finally, the work must "[lack] serious literary, artistic, political, or scientific value."<sup>67</sup> *Miller* rejects many earlier definitions or standards which had been used to determine whether material is obscene.<sup>68</sup> For example, an earlier Supreme Court plurality opinion stated that the material must be "utterly without social value" to be deemed obscene.<sup>69</sup> The *Miller* Court set forth that the material need not be "utterly" valueless, but only "without serious" value. By

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changing this standard, the decision expanded the definition of what is obscene.

In addition, *Miller* sets forth the idea that a national community standard should not be applied to make the determination of what is obscene, but rather the material is to be judged by a local standard. Courts are not to apply “some hypothetical standard of the United States,”<sup>70</sup> but rather the community where the obscene material originated, or for Mr. Miller, the community standards of the state of California. The Court reasoned that “[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 City.”<sup>71</sup> The *Miller* opinion is written in a manner which suggests that a more restrictive community should not be forced to accept the looser morals of a less restricted community. However, presumably the logic works in the reverse as well, and would not allow a more restricted community to guide the morals of a less restricted one.

Finally, the *Miller* decision established strict criteria by which a state could regulate obscene materials. Under *Miller*, a state can only ban materials which constitute “hard core” pornography.<sup>72</sup> Because there are so many postings on the Internet, it would be practically impossible to analyze each individual posting under the *Miller* test. Therefore, Congress attempted to clarify the scope of the regulation of the Internet with the CDA.

### **B. The modern definition of indecency under *FCC v. Pacifica***

Not only have courts struggled to define obscenity and pornography in concrete terms, they

have also struggled to define “offensive material” and “indecency” in some practical manner. In *Pacifica*, the Court addressed the decency of a monologue written by comedian George Carlin entitled “Filthy Words,”<sup>73</sup> which contained several passages of vulgar and offensive language.<sup>74</sup> The matter came before the Court based on a Federal Communications Commission (“FCC”) ruling which deemed the monologue “indecent” and inappropriate for radio broadcast at a time when children might listen. A radio station appealed the decision by the FCC, which was reversed by the Court of Appeals for the District of Columbia Circuit. Subsequently, the FCC petitioned for certiorari and the Supreme Court heard the case for a determination of the issues.

In an opinion written by Justice Stewart, the Court held that while Mr. Carlin’s monologue did not rise to the level of obscenity, the language was considered “indecent.” The Court focused its opinion on whether the FCC had authority to ban the indecent material from radio broadcast, or whether such action violated the First Amendment.<sup>75</sup>

In *Pacifica*, the Court differentiated indecent materials from obscene materials.<sup>76</sup> The Court acknowledged that certain communications, while not necessarily obscene, could be restricted without violating the First Amendment.<sup>77</sup> The language in Carlin’s monologue contained language which described “sexual or excretory activities in a patently offensive manner,”<sup>78</sup> and was therefore deemed indecent. The Court held that the material need not “appeal to prurient interest” to be deemed indecent, but rather that this requirement was reserved for obscene materials.<sup>79</sup> The question then became whether the FCC has authority to

regulate “indecent” material, or whether the authority is limited to “obscene” material. Ultimately, the Court determined that although the material was not “obscene” (and thus could not be banned outright), the FCC’s action was appropriate and justified.<sup>80</sup> Therefore, the Court held that the FCC action did not violate the broadcaster’s First Amendment rights.<sup>81</sup>

This decision is important because the Court set forth the criteria by which the FCC could restrict the broadcast of indecent (rather than obscene) material. The Court identified the unique elements of the medium presented, in this case radio, as well as the “pervasiveness” of the medium.<sup>82</sup> The Court noted that radio is “uniquely pervasive,” and “uniquely accessible to children, even those too young to read.”<sup>83</sup> The Court held that the unique qualities of the telecommunications medium must be considered when analyzing a statute under the First Amendment.<sup>84</sup> Although certain restrictions may be valid with regard to one medium, the same restriction may be impermissible with regard to another.<sup>85</sup> For example, the FCC promulgated stricter regulations for television and radio broadcast than for newsprint.<sup>86</sup> Stricter regulations are justified based upon the pervasive nature of television and radio. In other words, the Court determined that the accessibility of the medium to the general public is an important factor in determining the degree of regulation. Radio and television are considered pervasive in nature, and therefore stricter regulations are warranted.<sup>87</sup>

In *Pacifica*, the Court discussed at length the differences between various forms of communication, the ease of access to those media, and why each must be treated individually.<sup>88</sup> The unique qualities of each medium make it necessary and appropriate for the application of indi-

vidualized standards of decency. This rationale explains why cable television stations may air uncut, R-rated films at certain times, while network broadcasting may not do the same. Cable television is less “pervasive” than network television, because it requires a monthly service fee and additional equipment, such as a cable wire or cable box. Furthermore, a person can limit or expand the channels available to him or her by subscribing to fewer or more stations. Hence, the Court determined that while Mr. Carlin’s monologue was not obscene, it must not be aired on the radio at times when children are likely to be listening.

Unlike other forms of mass communication, the Internet is only accessible to those who subscribe. Although availability is expanding, the present need to subscribe to an online service is analogous to the need to purchase cable television in your home. Both forms of communication require a person to subscribe to a service prior to gaining access. Therefore, it is logical that the Internet, like cable television, is not pervasive in nature, and at this time, cannot be regulated as such.

### C. *Sable Communications of California, Inc. v. FCC*

Another case which bears upon the issues presented by the enactment of the CDA is *Sable Communications of California, Inc. v. FCC*.<sup>89</sup> The plaintiff in *Sable* was a service provider of sexually oriented recorded telephone messages (“dial-a-porn”).<sup>90</sup> The Los Angeles based company contracted with Pacific Bell to have special phone lines to provide the telephone sex lines. Users were charged a special fee for the service which was collected by Pacific Bell and then divided

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between the phone company and the message provider. The messages were available to people outside the Los Angeles area for an additional long distance toll by simply dialing the area code and number.<sup>91</sup> The plaintiff in this case brought suit to enjoin the FCC or the federal government from prosecuting under the 1988 Amendment to the Communications Act,<sup>92</sup> a precursor to the CDA. In addition, *Sable* sought an injunction against enforcement of the 1988 Amendment to the Communications Act, which imposed a “blanket prohibition on indecent as well as obscene” interstate telephone messages.<sup>93</sup> The 1988 statute targeted at dial-a-porn services, just as the 1996 Amendment directly targets Internet Services. *Sable* is of particular interest to this Article, because the arguments raised are essentially the same arguments raised in opposition to the CDA. The Court’s opinion in *Sable* provides some insight into how it may decide the present issues regarding the CDA.

The plaintiff’s argument for an injunction in *Sable* focused on two constitutional challenges. First, the plaintiff argued that the law “creates an impermissible national standard of obscenity” in violation of *Miller’s* “contemporary community standards” rule.<sup>94</sup> Second, the plaintiff argued that the 1988 Amendment was overbroad; in other words, it was not “narrowly drawn to serve [the government’s stated] purpose.”<sup>95</sup> Although the Court rejected the plaintiff’s first argument the law was stricken on plaintiff’s second challenge that it was overbroad.<sup>96</sup> The Court noted that although the FCC maintains the authority to regulate indecent speech, the parameters by which they may do so are quite strict.<sup>97</sup> The Court acknowledged that the FCC can place an outright ban on dial-a-porn messages which are *obscene*, however, this right to regulate does

not apply to messages which are merely *indecent*, and not obscene.<sup>98</sup>

In its opinion, the Court distinguished *Sable* from *Pacifica* by noting that the 1988 statute (in question in *Sable*) imposed a total ban on the indecent phone messages, while *Pacifica* involved only a ban during certain times when children are likely to listen.<sup>99</sup> The CDA imposes the same, *Sable* form outright ban, on indecent communications over the Internet. The reasoning the Court used to determine that the statute in question in *Sable* was unconstitutional should be followed when the court rules on the CDA this summer. The CDA, like the earlier amendment, is overbroad, and fails to satisfy the requirements set forth by the Supreme Court that indecent material may not be completely banned.

#### D. Incorporation of precedent into the CDA

The CDA incorporates the language of both *Miller* and *Pacifica* into its definitions. By including the reference to “contemporary community standards,” Congress attempted to codify the standard set forth in the *Miller* test. Furthermore, the CDA’s prohibition against “indecent” materials, and those which are “patently offensive” or depict “sexual or excretory activities or organs” essentially codifies the indecency standard set forth in *Pacifica*.

Presumably, Congress chose to incorporate the Supreme Court’s definitions and language from *Miller* and *Pacifica* into the CDA to avoid potential, anticipated constitutional challenges. Congress’ utilization of the exact language employed by the Court indicates Congress’ reliance that the application of those standards to the regulation of the Internet would withstand constitu-

tional challenges. It was likely believed that since the Court already visited these issues, and created definitions which were acceptable under other circumstances, these definitions would sustain future challenges as well. While the congressional intent appears proper, constitutional challenges arose nonetheless, and the CDA has been under fire since its enactment in February, 1996.

## VII. Constitutional Challenges to the CDA

The CDA, as adopted, leaves far too many areas unclear and three main constitutional problems with the CDA exist. Namely,

1) the CDA fails to differentiate between the legal definitions of obscenity and indecency, regulating both equally;

2) the CDA fails to recognize the uniqueness of the Internet as a medium of communication; and,

3) the CDA is overbroad in its language and application.

Each of these issues presents a valid constitutional challenge to the CDA, and, in itself, may render the law unconstitutional.

### A. The battle between obscenity and indecency

The first constitutional problem is that the CDA fails to differentiate between obscenity and indecency, and the CDA proscribes the transmission of both. Although all obscene material may be banned,<sup>100</sup> the Supreme Court has held that indecent material may only be regulated, and this regulation must pass a strict scrutiny test.<sup>101</sup> In other words, the law must be narrowly tailored to accomplish a compelling government inter-

est.<sup>102</sup> It is not clear that the CDA was drafted narrowly enough to be considered the "least restrictive means" available to accomplish the government's goals.

Under *Miller*, any Internet posting must be judged according to contemporary community standards to determine whether the material is indecent or obscene.<sup>103</sup> One must determine, however, whose community is in issue when evaluating whether the material may be banned as obscene or whether the material may simply be regulated as indecent. If an allegedly obscene image is uploaded<sup>104</sup> in New York City and subsequently downloaded in Lincoln, Nebraska, the community standards will be different. The application of different community standards mandates a different result under the *Miller* test, as some communities may find material obscene while another community may simply describe the material as indecent.

Furthermore, there is a valid argument that the Internet itself is a community of sorts, and therefore the appropriate community standard is that of Internet users and subscribers across the country. Consider that allegedly 83.5% of Usenet groups contain some form of obscene material.<sup>105</sup> If this is true, and if the Internet itself is the community by which the material is to be judged, clearly the community standards would be quite relaxed in comparison to most communities across the country. Applying this "Internet Community" standard to material being posted on the Internet would allow for less regulation of postings, as a higher volume of material would be deemed indecent as opposed to obscene.

Congress failed to address the different standards which apply to obscene materials and those which apply to indecent material may render the CDA unconstitutional. The CDA effectively bans

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material that is both obscene and indecent, an unconstitutional infringement on the rights provided by the First Amendment's free speech provision.

### **B. The CDA unconstitutionally bans both obscene and indecent language**

To overcome a presumption that banning an indecent communication is unconstitutional, the government must establish a valid governmental interest and the law must be narrowly tailored.<sup>106</sup> The drafters of the CDA were well aware of potential challenges based on the First Amendment.<sup>107</sup> In fact, many efforts were taken to directly combat these challenges. However, despite those efforts, it quickly became apparent that the CDA failed to consider the unique qualities of the Internet. The qualities which should have been considered were that the Internet, unlike other forms of communication, requires substantial efforts on the part of the user, to be accessed. In addition, unlike radio and television, information from the Internet does not simply flow to the user simply by logging onto the Internet. An Internet user must actively search for information to receive it. Congress' failure to address these characteristics may be enough to declare the CDA unconstitutional, as it is not narrowly tailored to advance the government's interest.

Cybercensors rant that any child might browse the Internet and innocently stumble upon cybersmut. However, in reality, that child does not have access to the Internet without a computer, modem, phone line, and a membership-paid Internet subscriber account. The Internet is unique in this sense. The unique characteristics of the Internet must be considered when the Court

evaluates whether a law is narrowly tailored.<sup>108</sup>

Furthermore, unlike television, radio, or even print media, "time, place and manner" restrictions are unavailable to an Internet provider. Television and radio companies can modify their programming based upon the time of day or likely audience. Over the Internet, however, this is impossible. Although certain subjects may be inappropriate for children, once an item has been posted on the Internet, it is accessible at any time. It is therefore impossible to require an ISP to limit indecent communications to certain times of day. The inability to regulate the Internet by using time restrictions results in an outright ban of any indecent material that may be accessible to children. Accordingly, the overreaching result unconstitutionally prohibits the transmission of indecent material designed exclusively for adults.

### **C. Overbreadth of the scope of the CDA**

The third constitutional problem with the CDA is that the law is too all-encompassing. In fact, during the Congressional debates, some members of Congress, spearheaded by Senator Leahy, challenged the law for being overbroad.<sup>109</sup> This point was successfully argued in *Shea v. Reno*.<sup>110</sup> During the Senate debates, Senator Leahy pointed out that a librarian might be in violation of the statute for posting a copy of the *Catcher in the Rye* over the Internet, which uses indecent language in parts, as might a museum curator for posting a photograph of Michelangelo's David, which depicts full male nudity.<sup>111</sup> While supporters of the CDA might argue that these works would be exempted under the serious artistic or literary value exemption, it is unlikely that a librarian or a museum curator cares to be

prosecuted under the CDA to test the theory.

It has even been suggested that the Supreme Court has violated the statute by uploading its opinion in *FCC v. Pacifica*.<sup>112</sup> The opinion quoted large portions of George Carlin's monologue "Filthy Words," and contained many passages which the Court deemed indecent. Ironically, under the CDA, the Court itself may be in violation of the law for posting this opinion. The overbreadth of the CDA indicates that the law is not narrowly tailored, and therefore the CDA should be found unconstitutional.

#### **D. Jurisdictional problems of the CDA**

Although jurisdiction would not render the CDA unconstitutional, the CDA's application is aggravated due to such problems. Although the CDA applies to all communications originating in the United States, it is inapplicable with respect to cyberporn which is uploaded outside of our territories. Some theorize that nearly 75% of the pornographic material available on the Internet is of foreign origination and would not be removed by the terms of the CDA.<sup>113</sup> If the true intent of the statute is to protect children, certainly there must be a more effective way of doing so than ridding the Internet of 25% of the pornographic material. Furthermore, cybersmut-peddlers from the United States can avoid the law by simply setting up their operations outside the country. Without international cooperation, the implementation of cybersensorship becomes rather meaningless.

Various proposals have been offered for international cooperation in cleaning up the Internet. The problem that arises, however, is that each country has its own standards of decency. The laws of some countries, such as the Netherlands,

are substantially more liberal than other areas in the world. Other countries, however, have more rigid standards regarding pornography than the United States does. These differing standards make international cooperation difficult to achieve, and the CDA does nothing to confront this issue.

### **VIII. Legal Challenges to the CDA - The Judiciaries' Opinions**

#### **A. *ACLU v. Reno***

On June 11, 1996, the United States District Court for the Eastern District of Pennsylvania held in *ACLU v. Reno* that the CDA, as adopted, is unconstitutional.<sup>114</sup> In a lengthy opinion, the judges set forth their reasons for finding that the CDA violates the individual's constitutionally protected rights. The judges held that the plaintiffs in the suit demonstrated a reasonable probability of eventual success on the merits, and therefore, an injunction was appropriate.<sup>115</sup> Furthermore, the judges agreed that the law itself is unconstitutional, which also necessitated an injunction against the enforcement of the CDA.<sup>116</sup> However, while the judges concurred in the result, the rationales used to reach their respective decisions were not in congruence.

#### **1. Preliminary matters and factual background**

The plaintiffs in this suit include The American Civil Liberties Union ("ACLU"), Planned Parenthood, various libraries, computer companies, journalists, educators, and health care providers from across the country. Each plaintiff indicated concern about material it had posted on the Internet and sought clarification from the Courts by bringing a motion for preliminary in-

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junction against Janet Reno, the Attorney General of the United States, and the United States Department of Justice ("Government").<sup>117</sup> Planned Parenthood, for example, stated that certain information it posted with regard to abortions, teenage pregnancy, or contraceptives, might be deemed "indecent" and in violation of the CDA.<sup>118</sup> Other plaintiffs expressed similar concerns based on various postings which may contain indecent material. The plaintiffs challenged the statute based on the potential chill over speech on the Internet. Under § 561(c) of the Telecom Act, cases challenging the provisions of the CDA are to be heard by a three-judge panel from a federal district court.<sup>119</sup> The panel is to be designated by the Chief Judge from the federal circuit in which the matter is to be heard. Therefore, this case was heard by a three-judge panel at the United States District Court for the Eastern District of Pennsylvania.

The parties stipulated to a vast majority of the factual bases for the claims.<sup>120</sup> Included in these stipulations were the historical and technological development of the Internet, as well as information relating to the Internet's use and access. The disputed facts, however, surround the ability of an individual to restrict access to unwanted materials over the Internet.<sup>121</sup> The plaintiffs argued that an Internet user can utilize several means of restricting unwanted materials without the CDA, whereas the Government argued that those means are not readily available.

## **2. Flaws in the Government's reasoning**

The court's opinion discusses at length the characteristics of the Internet as a medium of communication. In addition, the opinion addressed a number of the problems raised in this

Article, including the problem of the lack of international enforceability. After a detailed introduction on the qualities and characteristics of the Internet, the court proceeded to attack each of the often cited defenses to the CDA. For example, the Government defended the CDA based upon the possibility of credit card verification for age and identity of Internet users.<sup>122</sup> Credit card verification would require a user to type in his or her credit card number, which would then be verified by the Internet to ensure that the credit card number is valid. The court dismissed this option as technically impossible at this time.<sup>123</sup> Furthermore, the court noted that mere possession of a credit card does not ensure that the user is of the proper age.<sup>124</sup> In addition, credit card verification prohibits the use of Internet services for adults who do not possess credit cards. Finally, the court reasoned, even if credit card verification were possible at this time, it is impractical and unfeasible, as it is costly and would cause delays in the transmission of information.<sup>125</sup> Therefore, the court held that the credit card solution to monitoring who is using the Internet was not sufficient.<sup>126</sup>

The Government also argued that potentially indecent material could be tagged, or rated, by Internet providers.<sup>127</sup> The court found this suggestion to be equally impractical. The court recognized the functional impossibility for a provider to review every item which flows through its system onto the Internet. Furthermore, the court acknowledged that if parents choose to screen the material, the software exists for them to do so privately.<sup>128</sup>

Next, the court addressed the concerns about a user's right to privacy. The court stressed that an individual is entitled to the right to access information relating to sensitive topics, such as AIDS, homosexual issues, or prison rape, with-

out concern for whether his name will later be tied to such a topic. Users have a right to remain anonymous, and the Government's position infringes upon that right.

Finally, the court addressed the issues of indecency and obscenity. The court held that the statute was invalid on its face, as it purports to ban merely indecent material, as well as obscene products.<sup>129</sup> This ban could not be reconciled with the Supreme Court's holding in *Miller* that the United States Constitution prohibits banning indecent material; accordingly, the court struck down the CDA.<sup>130</sup>

Although each of the individual judges published a separate opinion, all reached the same ultimate conclusion: the CDA violates the United States Constitution. Judge Sloviter criticized the CDA's interchangeable use of "indecent" with "patently offensive."<sup>131</sup> He agreed that a regulation of indecent speech is subject to strict scrutiny, and that despite a valid governmental purpose, the law could not withstand such an examination. Judge Buckwalter focused his opinion on the statute's overbreadth and vagueness. Lastly, Judge Dalzell's opinion combines aspects of each of the others, arriving at the same conclusion. For the time being, at least, the CDA is not enforceable law in the Eastern District of Pennsylvania.

### **B. *Shea v. Reno* - The second attack on the CDA**

Since the decision in *ACLU* was issued, a three-judge panel in the Southern District of New York heard arguments in a similar case, *Shea v. Reno*, in July of 1996.<sup>132</sup> In *Shea* (the plaintiff), a publisher of an electronic newspaper, took issue with the CDA's criminalization of the transmis-

sion of indecent materials over the Internet.<sup>133</sup> In this case, the plaintiff argued that the CDA was both vague and overbroad. The Government's position in this case was identical to their position in *ACLU*, and these points were again argued to the panel.

Similar to *ACLU*, many of the factual matters were stipulated by the parties. The *Shea* court, like the *ACLU* court, engaged in a long narrative about the historical development of the Internet and its access. In addition, the *Shea* court set forth a detailed description of its findings with regard to the availability to sexually explicit material over the Internet. Finally, *Shea* also noted several alternatives to the CDA for shielding minors from access to indecent materials over the Internet.

In *Shea*, the court did not strike the CDA as unconstitutionally vague.<sup>134</sup> Additionally, the plaintiff argued that the indecency standard included in the CDA failed to convey to reasonably intelligent people what conduct was prohibited and which was allowed.<sup>135</sup> The court disagreed with the plaintiff on this issue, and pointed out that the CDA's indecency standard was adopted directly from *Pacifica*.<sup>136</sup> Since the *Pacifica* court upheld its indecency standard against a vagueness challenge, the *Shea* court would not consider this argument. In other words, the court deferred to precedent.

However, the court did agree with the plaintiff's argument that the CDA is substantially overbroad.<sup>137</sup> The court agreed that the CDA's prohibition against the transmission of indecent materials between consenting adults could not be justified.<sup>138</sup> This court found that the CDA was "not narrowly tailored, in that it fails to preserve for adults the ability to engage in certain constitutionally protected communications—effec-



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tively acting as a total ban on indecent communications by interactive computer systems.”<sup>139</sup> This ban, the court reasoned, is unwarranted and unconstitutional. Therefore, the court agreed with the plaintiffs (and with the *ACLU* court), that the CDA was unconstitutional. Furthermore, the court agreed that an injunction against its enforcement was appropriate under the circumstances. The court’s opinion, along with the opinion in *ACLU*, will provide a basis for the Supreme Court to make its ruling this summer.

## **IX. Possible Alternatives to the CDA**

In light of the decisions in both *ACLU* and *Shea*, and the strong opposition to the CDA, it seems appropriate to consider which alternatives are available to an Internet user who hopes to screen out indecent materials. If the reviewing courts’ decisions are affirmed, it will be necessary to find other means of monitoring the materials available over the Internet. It is difficult to accept an argument that the CDA is in fact the least restrictive means of accomplishing the government’s goals with regard to speech over the Internet. There are at least two alternatives to address the problem of pornography on the Internet.

### **A. Platform for Internet content selection**

In Congress, opponents of the CDA have suggested a less restrictive alternative, the use of the Platform for Internet Content Selection (“PICS”).<sup>140</sup> This system was developed by the Internet Consortium in an attempt to put forth technical standards by which parents could screen certain material on the Internet from their

children. Essentially, PICS establishes a rating system for Internet sites, in much the same way television programs are currently being rated. The first screen displayed contains a written warning, detailing the potentially unsuitable material contained therein, and its character. No questionable materials are displayed for several screens, all of which contain disclaimers with regard to content.

Currently, many mainstream computer and Internet providers are members of the PICS working group,<sup>141</sup> and membership continues to grow. Registration with PICS is not difficult. ISP’s can either rate their own websites, applying the criteria set forth by PICS, or they can request that the service rate the site. Sites are rated for four categories: nudity, violence, sex, and language. If the site “passes” PICS’s evaluation, the site may display a PICS logo on the screen.<sup>142</sup> However, critics of the PICS system point out that the task of rating each site posted on the Internet would be extremely difficult to accomplish, because there is simply too much information being transmitted from day to day. However, the availability of the PICS system is evidence of less restrictive means of addressing the problem.

### **B. Available software to self-censor the Internet**

Another alternative to the CDA is available through various software packages which screen Internet sites for explicit or offensive materials.<sup>143</sup> The first software program available to parents or others who wished to screen explicit or offensive materials from the Internet was Cyber Patrol, from Microsystems Software, Inc. Another such program is CyberNOT, which screens for

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violence, profanity, partial nudity, nudity, sexual acts, drugs, alcohol, gambling, and a number of other questionable topics. With CyberNOT, parents can choose which, if any, of the categories to screen, and which, if any, to allow. If, for example, the parent of a teenager does not want him to have access to materials on militant extremist groups such as the Michigan Militia, but does not mind if the child has access to information about sex or drugs, those items can be selectively screened out. There are dozens of programs of this type available on the market. Many of these programs are available for around \$50 and can be purchased at any computer store. Furthermore, many of the online service providers offer screening software, often free of charge, with their service.<sup>144</sup> This type of software is another example of an alternative means of monitoring the Internet without infringing upon an individual's freedom.

## IX. Conclusion

As the trial courts recognized in *ACLU* and *Shea*, the CDA is unconstitutional. The CDA is not narrowly drawn to achieve its stated purpose, and therefore cannot survive a strict scrutiny review. Of course, the protection of children from indecent and obscene materials is a compelling goal under the circumstances. However, less restrictive means are available which afford a person the option to privately screen her online ma-

terials, without the government's interference into her personal or private life. These alternatives should be better publicized so that the general population of Internet users is aware of the options available.

Presently, the CDA awaits review by the Supreme Court. If the decisions of the courts of first impression are thoroughly read and properly understood, it seems that the only possible decision which can be reached is to affirm the rulings. The *ACLU* and *Shea* courts took great strides toward understanding all of the nuances which were involved by educating themselves about the medium, the technology, and the alternatives available. The decisions are well informed and correct, and deserve recognition as such. The CDA is a poorly written law, fueled by ignorance and hype. Two courts recognized this and took steps toward remedying this injustice.

What does this mean to a parent who is concerned about her child learning to use the Internet? Does it mean that a child must be watched at all times to ensure that he doesn't access *erotica.net*? Perhaps, but probably not. Parents need to educate themselves first, and then begin to educate their children. Learn what is out there on the seemingly infinite Internet, learn how to screen materials which are inappropriate for children, and then teach these skills to them. This is truly the safest way to travel on the information superhighway. •

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## E N D N O T E S

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- <sup>1</sup> Reid Kanaley, *Number of Online Subscribers Soon May Double*, TIMES-PICAYUNE, Jan. 7, 1996, at A12.
- <sup>2</sup> Peter H. Lewis, *Technology: Demographically, the Internet is still a Frontier Town*, N.Y. TIMES, May 29, 1995 at S1.
- <sup>3</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133-145 (1996) (codified as amended at 47 U.S.C. § 223 (1934)).
- <sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. §151 et seq. (1934)).
- <sup>5</sup> *Id.*
- <sup>6</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133-145 (1996) (codified as amended at 47 U.S.C. § 223 (1934)).
- <sup>7</sup> *Id.*
- <sup>8</sup> In debates on the Senate floor, Senator Exon spoke out in favor of his version of the CDA, decried pornography on the Internet, and expressed concern that the Internet would become a red light district. 141 Cong. Rec. §1953 (daily ed. Feb. 1, 1995).
- <sup>9</sup> 141 Cong. Rec. § 9770 (daily ed. July 12, 1995) (Memorandum of Opinion in Support of the Communications Decency Amendment as Adopted by the U.S. Senate on June 14, 1995, by the National Law Center for Children and Families).
- <sup>10</sup> American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).
- <sup>11</sup> Shea v. Reno, 938 F. Supp. 916 (S.D.N.Y. 1996).
- <sup>12</sup> *Id.*
- <sup>13</sup> Catherine Therese Clarke, *From Criminet to Cyber-perp: Toward an inclusive approach to policing the evolving criminal mens rea on the Internet*. 75 OR. L. REV. 191, 205 (1996).
- <sup>14</sup> See Davis I Cove, COMPUTER CRIME, A CRIME FIGHTER'S HANDBOOK, 21, (1995).
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.*
- <sup>17</sup> Davan Maharaj, *Ex-UC Student Indicted in Cyberspace Hate Crime Case; Bias: U.S. Accuses 19-Year Old of Sending an E-Mail Threat to Kill Asian Americans on Irvine Campus*. LA TIMES, November 14, 1996, at A1.
- <sup>18</sup> *Id.*
- <sup>19</sup> There is a wide range of criminal activity which has been generated through the use of computers and online services. This article, however, will focus on the CDA, the First Amendment concerns which it raises, and criminal liability thereunder.
- <sup>20</sup> See Maharaj, *supra* note 17.
- <sup>21</sup> *Id.*
- <sup>22</sup> David Savage, *Indecency on the Internet Faces High Court Test*, LA TIMES, March 26, 1997 at A1.
- <sup>23</sup> *Id.*
- <sup>24</sup> See, e.g., 141 Cong. Rec. §8334-46 (daily ed. June 14, 1995).
- <sup>25</sup> §714, 104<sup>th</sup> Cong. (1995), reprinted at 141 Cong. Rec. §8389-90 (daily ed. June 14, 1995).
- <sup>26</sup> See, e.g., 141 Cong. Rec. § 7922-23, in which Senator Grassley proposed alternative legislation, The Protection of Children from Computer Pornography Act of 1995, § 892, 104<sup>th</sup> Cong. (1995), which would deny Internet Service Providers any defenses to distribution of pornographic materials.
- <sup>27</sup> Communications Decency Act of 1996, 47 U.S.C. § 223(e) (1996).
- <sup>28</sup> 142 Cong. Rec. § 8088 (daily ed. Feb. 1, 1996) (statement of Senator Leahy).
- <sup>29</sup> 141 Cong. Rec. § 8087 (daily ed. June 9, 1995).
- <sup>30</sup> *Id.*
- <sup>31</sup> 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).
- <sup>32</sup> "Usenet groups" are Internet bulletin boards dedicated to a particular topic or area of interest. There are approximately 5000 Usenet groups currently posted on the Internet.
- <sup>33</sup> See Rimm, *supra* note 31, at 1849-50; see *supra* note 1.
- <sup>34</sup> Time Magazine originally embraced the study and its conclusions. After opponents to Mr. Rimm's data and methodology began to voice their opinions, however, Time published another explaining that they had been wrong about Mr. Rimm's study and its information. In addition, Rimm was originally scheduled to speak at the Congressional hearings on this issue, but was subsequently uninvited. Philip Elmer DeWitt, *Fire Storm on the Computer Nets*, TIME, July 24m 1995, at 57.
- <sup>35</sup> 141 Cong. Rec. § 9017 (daily ed. June 26, 1995).

- <sup>36</sup> *Id.*
- <sup>37</sup> 142 Cong. Rec. § 692 (daily ed. Feb. 1, 1996).
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.*
- <sup>40</sup> 142 Cong. Rec. § E153 (daily ed. Feb. 5, 1996).
- <sup>41</sup> Communications Decency Act of 1996, Pub. L. No. 104-104 § 502, 47 U.S.C. § 223 (a) (amended Feb. 8, 1996).
- <sup>42</sup> *Id.* (emphasis added).
- <sup>43</sup> *Id.*
- <sup>44</sup> *Hearings on S. 894 Before the Senate Judiciary Committee*, 104<sup>th</sup> Cong. 2<sup>nd</sup> Sess. (July 24, 1995).
- <sup>45</sup> Communications Decency Act of 1996, Pub. L. No. 104-104 § 501 et seq. (Feb. 8, 1996), 47 U.S.C. § 223 et seq. (1996).
- <sup>46</sup> *Id.* § 223 (e)(1).
- <sup>47</sup> *Id.* § 223 (e)(4).
- <sup>48</sup> *Id.* § 223 (e)(5).
- <sup>49</sup> *Miller v. California*, 413 U.S. 15, 36 *reh'g denied*, 414 U.S. 881 (1973); *FCC v. Pacifica*, 438 U.S. 726, 745 (1978).
- <sup>50</sup> *Roth v. United States*, 354 U.S. 476 (1957).
- <sup>51</sup> *Id.* at 483-84.
- <sup>52</sup> *Id.* at 487-88.
- <sup>53</sup> *Id.* at 489 (citations omitted).
- <sup>54</sup> *Id.* at 486, 487 (citing in part WEBSTER'S NEW INTERNATIONAL DICTIONARY, Unabridged, 2 ed., (1949)).
- <sup>55</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1969).
- <sup>56</sup> *Id.*, at 197 (Stewart, J., concurring)
- <sup>57</sup> *Id.*
- <sup>58</sup> *Id.* at 188-90 (citations omitted).
- <sup>59</sup> *Miller*, 413 U.S. at 15-16 (citations omitted).
- <sup>60</sup> *Id.* at 16.
- <sup>61</sup> *Id.* at 20.
- <sup>62</sup> *Id.* at 24.
- <sup>63</sup> *Id.*
- <sup>64</sup> *Id.*
- <sup>65</sup> *Id.* (citing *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).
- <sup>66</sup> *Id.*
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.* at 23.
- <sup>69</sup> *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).
- <sup>70</sup> *Miller*, 413 U.S. at 31.
- <sup>71</sup> *Miller*, 413 U.S. at 32 (citations omitted).
- <sup>72</sup> *Id.* at 29.
- <sup>73</sup> *Pacifica*, 438 U.S. at 726.
- <sup>74</sup> *Id.* at 729.
- <sup>75</sup> *Id.* at 734.
- <sup>76</sup> *Id.* at 748-50.
- <sup>77</sup> *Id.* at 748.
- <sup>78</sup> *Id.* at 732.
- <sup>79</sup> *Id.* at 741.
- <sup>80</sup> *Id.* at 750.
- <sup>81</sup> *Id.*
- <sup>82</sup> *Id.* at 749.
- <sup>83</sup> *Id.*
- <sup>84</sup> *Id.* at 750.
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.*
- <sup>87</sup> *Id.*
- <sup>88</sup> *Pacifica*, 438 U.S. at 747-50.
- <sup>89</sup> *Sable Communications of California v. FCC*, 492 U.S. 115 (1989).
- <sup>90</sup> *Id.* at 117.
- <sup>91</sup> *Id.* at 118.
- <sup>92</sup> Communications Decency Act of 1996, Pub. L. No. 104-104 (Feb. 8, 1996), 47 U.S.C. § 223 (b) (1996).
- <sup>93</sup> *Sable Communications of California*, 492 U.S. at 118.
- <sup>94</sup> *Id.* at 124.
- <sup>95</sup> *Id.* at 126.
- <sup>96</sup> *Id.* at 131.
- <sup>97</sup> *Id.*
- <sup>98</sup> *Id.* at 124.
- <sup>99</sup> *Id.* at 127.
- <sup>100</sup> *Sable Communications of California*, 492 U.S. 115; *see also Miller*, 413 U.S. 15; *FCC v. Pacifica*, 438 U.S. 726.
- <sup>101</sup> *Sable Communications of California*, 492 U.S. 115.
- <sup>102</sup> *Id.*
- <sup>103</sup> *Miller*, 413 U.S. 15.
- <sup>104</sup> Uploading is the act of transferring an image or document from an independent computer to the Internet, thereby making the item available to all users.
- <sup>105</sup> This figure is taken from the Rimm study. The use of this figure is not to validate its accuracy, but rather to demonstrate this point. Rimm, *supra* note 31.
- <sup>106</sup> *See Pacifica*, 438 U.S. 726; and *Miller*, 413 U.S. 15.
- <sup>107</sup> *See, e.g.*, 144 Cong. Rec. § 8088 (daily ed. June 9, 1995).
- <sup>108</sup> *Pacifica*, 438 U.S. at 749.

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<sup>109</sup> See, e.g., statement of Senator Leahy, *supra* note 28.  
<sup>110</sup> *Shea*, 938 F. Supp. 916.  
<sup>111</sup> *Id.*  
<sup>112</sup> *Pacifica*, 438 U.S. 726.  
<sup>113</sup> *Internet Providers & Senator Exon*, WASH. POST, Dec. 2, 1995 at A20.  
<sup>114</sup> *ACLU*, 929 F. Supp. 824.  
<sup>115</sup> *Id.* at 849.  
<sup>116</sup> *Id.*  
<sup>117</sup> *Id.* at 827.  
<sup>118</sup> *Id.* at 829.  
<sup>119</sup> Telecommunications Act of 1996, 47 U.S.C. § 561(c) (1996).  
<sup>120</sup> *ACLU*, 929 F. Supp. at 830-838.  
<sup>121</sup> *Id.* at 838.  
<sup>122</sup> *Id.* at 855.  
<sup>123</sup> *Id.*  
<sup>124</sup> *Id.* at 845.  
<sup>125</sup> *Id.*  
<sup>126</sup> *Id.* at 846.  
<sup>127</sup> *Id.* at 856.  
<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 883.  
<sup>130</sup> *Id.* at 869.  
<sup>131</sup> *Id.* at 850.  
<sup>132</sup> *Shea*, 938 F. Supp. at 922.  
<sup>133</sup> *Id.* at 921.  
<sup>134</sup> *Id.* at 935.  
<sup>135</sup> *Id.*  
<sup>136</sup> *Id.*  
<sup>137</sup> *Id.* at 939.  
<sup>138</sup> *Id.*  
<sup>139</sup> *Id.* at 940.  
<sup>140</sup> <<http://www.w3.org/pub/www/pics>>.  
<sup>141</sup> Members of the PICS working group include Apple Computer, America Online, AT&T, IBM, Netscape Communications Corp., and Prodigy Services Company, to name but a few of the many.  
<sup>142</sup> Information regarding registration and rating under PICS is available at <<http://www.w3.org/pub/www/pics>>. This service is free of charge and relatively simple to use.  
<sup>143</sup> A number of screening software packages are currently available to the consumer, including Cyber Patrol, CYBERSitter, Net Nanny, and Surf Watch, to name only a few.  
<sup>144</sup> Currently, America Online, CompuServe, and Prodigy offer such packages.

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