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Internet Regulations and the First Amendment

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BACKGROUND ON THE INTERNET

The Internet: Origins and Growth

The Internet began in 1969 as a project of the Advanced Research Project Agency Network, ARPANET, a branch of the U.S. Department of Defense. The agency set up a computer network via phone lines to enable the government and researchers to communicate over long distances. Computers from universities, corporations, and individuals began to connect to the network and by the late 1980s, it evolved into a giant network of networks. (Doherty, 1999)

The first step in order to use the Internet is to obtain access through a service provider. The user's computer is linked to that of the provider through a modem. Once logged on, users may use various methods of communication such as e-mail, electronic bulletin boards, or the World Wide Web. The World Wide Web is the most popular method of communication because it is easy to use. Pictures, videos, sound, and text can be accessed and transmitted on the Web. Every document on the Web has a unique address, which is referred to as a Uniform Resource Locator (URL). These documents are stored on servers throughout the world. Any user can create Web pages that others can access through Web sites. These Web sites may contain sexually explicit and other harmful material that is just a point and click away. (Doherty, 1999)

Internet growth has been drastic in the last decade. The number of host computers (that store and relay information) has risen from approximately 300 in 1981 to 36,739,000 in 1998. In 1998, 157 million people had access worldwide, according to estimates, and the projected number for the end of 2000 is 327 million. In the United States alone, 70.5

million (34.9%) of approximately 202 million adults currently use the Internet. (Doherty, 1999) The number of indexable Web pages has grown from 1 billion in January 2000 to more than 2 billion in June 2000. (Sieberg, 2000)

This new technology creates a democratic and diverse speech environment by allowing far more speakers—rich and poor, popular and unpopular, banal and avant-garde—to make their work available to others. Thus, it provides an outlet for a cacophony of ideas with virtually no geographic, economic, social, or political restraints. (Kline, 1999)

A serious issue for both Congress and parents is what material is made available via the Internet and how it may affect children. Approximately one-fifth of users of the World Wide Web regularly view at least one of the more than 600 available commercial pornography sites, and the number of these sites increases daily by 39. It is easy to distribute pornography on the Internet as distributors and receivers remain anonymous. Another concern is the simplicity with which pornography can be viewed online by a person of any age. Access to free pornographic images only requires a mouse-click on a button labeled "yes" when a person is asked, "Are you 18 years of age or older?" A recent poll found that indecency on the Internet was a concern of 85 % of Americans. (Doherty, 1999)

BACKGROUND ON PORNOGRAPHY

Pornography in Cyberspace

A research team at Carnegie Mellon University in Pittsburgh, Pennsylvania, conducted an exhaustive study of online porn in 1995 that was published in the *Georgetown Law Journal*. In July 1995, *Time* magazine hit the stands with the

sensationalist scoop of the Carnegie Mellon study, which suggested that the Internet traffics almost entirely in porn. The cover was a pseudo-human child, with a blow-up doll expression. The headline: "On a Screen Near You: Cyberporn."(Kennedy, 1996-97)

According to Marty Rimm, the student who conducted the study, 83.5% of all images passed around on Usenet newsgroups were pornographic. Also, 71% of this pornography comes from commercial BBSs. Hard-core imagery was the most widely available. Paraphilic imagery (consisting of urination, bestiality, breasts, penis, foreign objects, voyeurism) and pedophilic imagery (consisting of nude portraits of young children in pre-pubescence, and hard-core sex acts involving young-looking boys and girls) accounted for approximately half of nearly six million downloads counted on private BBSs. (Kennedy, 1996-97)

The Marty Rimm study said that it is clear that pornography is being vigorously marketed in increasingly sophisticated ways and has found a receptive audience in a wide variety of computer environments. The study pointed out five factors that account for the recent explosion of pornography on computer networks. First, consumers enjoy considerable privacy on computer networks and can avoid the embarrassment of walking into an "adult" store. Second, consumers have the choice of downloading only those images that they find most arousing. Previously, a consumer had to purchase an entire magazine or video to gain access to a few desired images. Third, easy, discreet storage of pornographic images on a computer enables consumers to conceal them from family members, friends, and associates. Fourth, the prevalence and fear of sexually transmitted diseases has helped pornographers to successfully market viable alternatives to the dangers of real sex. Finally, new and highly advanced computer technologies are quickly

being absorbed into the mainstream, allowing an ever-increasing number of people to gain access to online pornography. (Rimm, 1995)

(Note: The Rimm study was largely discredited and its methodology and ethics were questioned. Despite these attacks on the study, Congress used the study as a basis for regulating the Internet.)

Moreover, computers enable consumers of pornography to access large quantities of pornography at minimal cost, much less than in print form. About 98.9 % of online pornography consumers are men. Even though pornographic images represent a small portion of Internet use, parents and policy makers are concerned about the pervasiveness of Internet pornography. (Kennedy, 1996-97)

There are many cases that show the impact on children of easy access and exchange of harmful material. For instance, a 1997 case that involved 42-year-old Francis Kufrovich of Woodland Hills, California. Kufrovich used the Internet to attempt to lure a 13-year-old Connecticut girl into having sex with him. When he first met the girl, Kufrovich pretended to be a teenager. In another incident, a former high school principal, Lewis Powell, pleaded guilty to using the Internet to lure teenage boys into having sexual relations with him. Powell, 56, admitted he used the Internet to talk to minors about "sexual fantasy stuff." (Doherty, 1999)

Booming Business of "Adult" Sites

Even though the Rimm study has been largely discredited, its suggestion that pornography is being vigorously marketed in sophisticated ways to a receptive audience is proved right by the existence of a large number of "adult" sites on the Internet being run

by publicly traded companies. Cyberporn has become a booming business. The following are a few specific examples of this phenomenon:

A) Kreloff's New Frontier Media

Mark Kreloff appears to move effortlessly between two worlds: one where he and his employees work to harness broadband technology and pioneer e-commerce techniques, and another in which "teen hard-core," and "fetish dungeons" are the coin of the realm. Such professional elasticity is a necessity for the president and CEO of New Frontier Media, one of just a few publicly traded companies delivering pornography over the Internet. (Brunker, 2000)

Though still few in number, executives like Kreloff are changing the parameters of cyberporn, which by most estimates already is a $1 billion-plus-a-year industry. By bringing new legitimacy to what already is one of the most profitable sectors of e-commerce, they believe they can quickly blast the virtual flesh trade far beyond its current orbit.

Their willingness to dive into a stigmatized business that is beset by legal and political uncertainties can be attributed in part to the advent of broadband technology, which allows people to download and watch video on computers.

Offering the discreet delivery of high-quality adult video into the homes of millions of new potential viewers, broadband is the Holy Grail of the adult industry, according to Kreloff and others in the broadband race. (Brunker, 2000)

Broadband video allows consumers to avoid the potential embarrassment of "renting an adult video at a record store where your neighbor's teen-age son may be working," said the 38-year-old Kreloff, whose Boulder, Colo., company distributes both hard-core

porn and softer adult content via the Internet and six 24-hour pay-per-view television channels broadcast over satellite and cable.

"Ninety-nine percent of what we are selling as a company is the ability for our consumers to get access to our content discreetly and in the privacy of their own home," he said. (Brunker, 2000)

"When it comes to broadband, all of a sudden we can reach every consumer who wants to buy adult content," said Bill Asher, president of Vivid Entertainment Group, the leading creator of adult videos and a company intent on being a major Internet player. "For that reason, it's going to make a lot of sense for companies like ours ... to invest heavily in this business now."

Kreloff's company, New Frontier Media, sought to secure a position atop the interconnected pyramid of 30,000 to 40,000 adult Web sites by acquiring leading cyberporn player Interactive Gallery in October 1999 in exchange for stock. The company now owns more than 1,300 adult-related Internet domains that funnel traffic to 27 e-commerce sites selling sexually explicit photos and video.

Chief among them is the byzantine structure of the industry: Virtually every adult site — whether operated by a Webmaster with a single home page or a company with thousands of domains — is connected in a vast traffic-sharing vortex. In most cases, the smaller portal sites redirect potential customers to "pay sites" operated by big companies with large libraries of content. Those big players, in turn, pay small operators for any sales that result from the traffic that they directed to them. (Brunker, 2000)

Even the estimated 12 to 20 big players in Internet porn swap traffic through a combination of click-through banner ads or "mouse-trapping" techniques that open additional browser windows featuring the content of their business rivals.

This system is the result of a marketing strategy developed in the early days of cyberporn, said Frederick S. Lane III, a Vermont attorney and author of the newly published book "Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age." (Brunker, 2000)

B) Danni Ashe's Hard Drive

Danni Ashe, creator of Danni's Hard Drive, is a 32-year-old former stripper and nude model from Seattle. She taught herself to code HTML and created Danni's Hard Drive in 1995 for her small fan club— making her one of the first women to operate her own adult Web site. Ashe has demonstrated astute business acumen in taking advantage of her early start, making the soft-core Danni's Hard Drive one of the best-known adult sites on the Web. In mid-2000, she said the site was generating between 8 million and 10 million hits a day, had 27,000 paying subscribers and was earning about $7 million a year. She also has built a new digital broadcast facility, with five studios, to produce streaming video for her site. She also has become an articulate spokeswoman for the industry, having been profiled in the Wall Street Journal, the New York Times, the Boston Globe and Los Angeles Times, among others. (Brunker, 2000)

C) Eric Langen's XXX.Password.com

As president of Rick's Cabaret since March 1999, this 32-year-old resident of Houston has added online porn to the company's brick-and-mortar topless nightclub operation. In addition to creating sites featuring dancers at Rick's seven nightclubs,

Langen has paid top dollar to purchase the domain "XXXPassword.com" from Voice Media Inc., parent company of Cybererotica, and plans to acquire a second domain later in the year. Langen, who has more than a decade's experience managing "adult entertainment businesses," said the company also is developing a pre-paid card called Porndebit.com that will allow purchasers to gain access to adult sites without giving out credit card information. "It's a fairly natural transition," Langen said of the company's move into cyberspace. "We're in the adult business and the Internet is booming." (Brunker, 2000)

Porn-Gate

Even the White House has faced the problem of regulating cyberporn.

In August 2000, it was reported that White House staffers had been downloading porn from the Internet. White House officials acknowledged this after a review of their server logs. (Napoli, 2000)

White House spokesman Jake Siewart said the offending downloads were traced back to "a handful" of employees, and reflected an "uptick" in porn surfing after other incidents that occurred about a year ago.

"We punish people if we can ID them, but it's difficult," he said. Those who were identified were either suspended or reprimanded with warning letters put in their files, he said. One person left the White House after the incident because he was "humiliated," Siewart said.

The White House has a strict "no personal use" policy regarding computers and the Internet, and a number of systems are in place to prevent people from violating that rule, Siewart said. (Napoli, 2000)

When users log on at a White House terminal, they must click through a message that says he or she agrees to not use the computer for personal use.

As with many computers in office environments, a firewall is in place that blocks a number of sites. "If I tried to log on to my personal Hotmail account from the Web, I couldn't," Siewart said.

The White House put in place additional downloading restrictions about a year ago after learning that a number of employees had been downloading porn around that time. Employees must now also adhere to a "strict no photo policy," meaning that sending any photos — even baby pictures — is forbidden. "Our firewalls now delete any attachment," said Siewart.

"We regularly change and modify our security and firewall," Siewart said. "That's just the nature of cybersecurity. As you discover more sites people are using, we essentially block more sites. It's ongoing work." (Napoli, 2000)

First Amendment Protection of Speech

Parental and governmental concerns about pornography lead them to a direct clash with the First Amendment. In the United States, freedom of speech is the cornerstone of liberty and democracy. The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ." In the 1919 case of *Abrams v. United States* (1919), Justice Holmes introduced the doctrine of "marketplace of ideas." He said that the primary goal of the First Amendment was to guarantee such a marketplace where truth and honest debate could emerge. The Supreme Court has continued to subscribe to models based on Justice Holmes' interpretation. The Court maintains that in order to ensure a free interchange of ideas, the judiciary must act

to prevent the government from interfering with the growth of the marketplace of ideas. (Jacques, 1997)

The right to free speech is not absolute, however. The Court acknowledges, for instance, that the First Amendment does not protect obscenity, child pornography, libelous speech, fighting words, fraud, and deceptive commercial speech. In these cases, the right to free speech is outweighed by a substantial government interest. Indecent material, on the other hand, is protected.

Even when the Court allows government regulation of certain types of speech, the Court limits these restrictions by applying the doctrines of overbreadth, vagueness, and strict scrutiny. (A restriction is vague when it fails to provide clear guidelines and causes speakers to be more cautious than required. A restriction is overbroad when it prohibits too much and scoops up protected speech with unprotected. The government must show that the regulation serves a compelling government interest and is narrowly tailored to achieve it. (Jacques, 1997)

Obscenity Law

In 1868, Lord Chief Justice Cockburn established the first obscenity test in the British case of *Regina v. Hicklin*. The test was defined as whether the material in question had a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands material of this sort may fall. (*Regina v. Hicklin* decision)

The Supreme Court adopted a different test in the 1957 case of *Roth v. United States*. In this case, the Court said that obscene material is not constitutionally protected by the First Amendment and defined the obscenity test as "whether to the average person,

applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (*Roth v. United States* decision; p.488-489)

In the 1973 case of *Miller v. California*, the Supreme Court reaffirmed that obscene material is not constitutionally protected and created the current obscenity test. The three-part standard is: a) whether "the average person, applying contemporary community standards" would find that the work, when taken as a whole, appeals to 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. (*Miller v. California*, 1973; p.40)

In *Ginsberg v. New York* (1968), the Court applied obscenity law toward children slightly differently. The Court found that the state has a compelling interest in protecting the welfare of children. However, a regulation designed to achieve this goal must be narrowly drawn. Also, it held that the state could bar the distribution of obscene materials to children, even though it would not qualify as obscene when distributed to adults. (Doherty, 1999)

Indecency Law

Unlike obscene speech, indecent speech is constitutionally protected, but it may be regulated if the content is offensive to a compelling state interest. Indecent material includes offensive sexual expression that is not obscene when distributed to adults, as determined by the *Miller* obscenity test. A significant case in the area of regulation of indecent speech is the 1978 case of *FCC v. Pacifica Foundation*. It involved a radio broadcast of comedian George Carlin's monologue titled "Filthy Words." The FCC

concluded that the language used was indecent as certain words depicted or described excretory and sexual activities in a patently offensive manner, as measured by contemporary community standards. The Supreme Court affirmed this decision. Justice Stevens, writing for the majority, found that statutory terms "obscene," "indecent," and "profane" had independent meanings. (Krattenmaker, 1994)

Medium-Specific Analysis

Newspapers, magazines, radio, television, motion pictures, and now the Internet have all been faced with censorship issues. Serial publications, particularly magazines, are uniquely vulnerable to newsstand or convenience store boycotts. They also suffer boycott of individual articles or issues. Motion pictures, like books, have also been boycotted. Within the broadcast media, the Federal Communications Commission (FCC) has specified what indecent words may not be spoken on air. Television, a notoriously conservative medium, censors itself in the production process, preventing the very creation of controversial material. The Internet, conversely, is the most democratic and participatory of all media and is, therefore, the most difficult to censor. (Foerstel, 1998)

A tiered structure of the First Amendment protection for the media, with the print media receiving the highest level, the broadcast media the lowest, and the Internet carving out a niche of its own, somewhere in between. (Foerstel, 1998) The Court treats different forms of communication differently when applying First Amendment standards because of different characteristics of each medium. The Supreme Court has long held that First Amendment standards must be applied to various media forms based on the characteristics of each form. The Court has established sets of rules, using a medium-by-

medium approach, when determining the level of protection that should be afforded to print, broadcast radio and television, telephone, and cable television. (Jacques, 1997)

For example, in *Pacifica*, the Court applied a reduced level of scrutiny to a radio broadcast due to the following characteristics of the broadcast medium: 1) radio and television are easily accessible by children; 2) broadcasting is pervasive and invades the privacy of people's homes; and 3) the government must regulate the limited supply of frequency space. (Krattenmaker, 1994)

In *Pacifica*, the Court diluted the First Amendment protection given to radio and television partly because of its special ability to reach children. The Court held that the broadcast of indecent material during times when children are presumed to be in the audience is punishable, even if the material is not obscene. In *Pacifica,* the Court reasoned that because radio and television broadcasting has a "uniquely pervasive presence in the lives of all Americans" and because broadcasting is "uniquely accessible to children, even those too young too read," the government may regulate broadcasting in ways that print may not be regulated. (*FCC v. Pacifica Foundation* decision, 1978; p.748-750)

The scarcity of frequencies argument for regulating broadcasting differently than print originally surfaced in the case of *Red Lion Broadcasting v. FCC* (1969). The Court decided that because there are a limited number of broadcasting frequencies, the government should manage them to best serve the public interest. The Court held that it was constitutional to regulate broadcast media more strictly than other media because broadcast channels were a scarce public resource. (Krattenmaker, 1994)

The Court analyzed the telephone as a communication medium in the case of *Sable Communications, Inc. v. FCC* (1989). In this case, the Court struck down a statute designed to prohibit minors from accessing telephone dial-a-porn because the statute was not narrowly tailored to meet the purpose. The Court found that the dial-it medium was less pervasive than the broadcast medium because a caller must take affirmative steps to receive dial-a-porn messages. (Doherty, 1999)

The Court emphasized that unlike broadcast, telephone communications do not bombard a captive audience with unwanted, indecent material. Also, the telephone medium is less accessible, "requiring listeners to take affirmative steps to receive the communication." (*Sable Communications, Inc. v. FCC,* 1989; p.128)

Thus, the Court used the strict scrutiny standard for telephonic communication. In *Sable,* the Court held that the telephone medium required a greater degree of First Amendment protection than given to broadcast. The Court said that while Congress may impose a ban on obscene dial-a-porn messages, it may not regulate indecent dial-a-porn without considering the age of those receiving the messages. (Jacques, 1997)

The Court faced a new form of communication with the coming of cable television. In *Turner Broadcasting System, Inc. v. FCC*, the Court, using medium-specific analysis, said that cable communications deserved a greater level of protection than that afforded to broadcast. (Jacques, 1997) The Court provided a lesser First Amendment protection to cable television than print because, like broadcasts, cable is accessible to children and has a pervasive presence in a viewer's home. However, in *Turner*, the Court found that the *Red Lion* "scarcity of frequency" reasoning did not apply to cable television. The Court affirmed the application of strict scrutiny or something very close to

strict scrutiny for content-based government regulations in the *Turner* case. (Doherty, 1999)

Internet's Place in the Hierarchy of Protection

The Internet is yet another medium of communication. In the early and middle 1990s, the unregulated flow of information on the Internet generated concern among parents and politicians about children's access to pornographic material online. Congress faced difficult challenges mediating between protecting children from the questionable material and the protection of adult Internet users' First Amendment rights. (Brown, 1996)

The Internet is the most dynamic, accessible, and democratic form of mass communication in history. But it is still in its nascent stages, and like print, broadcasting, telephone, and cable before it, it will require First Amendment protection from governmental intrusion in order to thrive. (Jacques, 1997)

The emergence of the Internet signaled a telecommunications revolution that seemed to be free from the traditional forms of information control. The Internet is posing unprecedented information control problems that governments, service providers, educators, and families are finding hard to solve. (Oumarou, 1998) The two characteristics that make the Internet difficult to regulate is its decentralization and openness. It is not bound by geographical barriers and is open to anyone with a computer and a modem. (Doherty, 1999)

What level of protection should the Internet be granted? Should it be regulated more like print or broadcast media? How will these regulations work in the chaotic, decentralized environment of the Net? Should parents get to control Net content that their

children have access to? How do public institutions deal with Internet censorship? These are just some of the questions that the judicial branch is trying to answer. (Foerstel, 1998)

New forms of restraint on Internet communication have emerged, particularly with respect to what are called computer bulletin board systems (BBSs). At the heart of the BBS is a central computer, set up, and operated by the system operator (sysop). Users link their computers to the central computer, allowing them to communicate with other users, access databases, obtain software, or perform a wide variety of other activities. The constitutional protection for these BBSs is still murky because it depends on whether the law regards the sysop as comparable to 1) a newspaper publisher/ editor, 2) a secondary publisher, such as a library or bookstore, 3) the broadcast media, 4) a common carrier, such as the telephone, or 5) a private real property owner. (Foerstel, 1998)

The Communications Decency Act of 1996

Congress passed the Telecommunications Act of 1996 to encourage development of new telecommunications technologies. Title V of the Act included the Communications Decency Act (CDA), which was an amendment proposed by Senator James Exon (D-Neb.) that sought to make the Internet safe for children and families.

The CDA contained, among other things, two statutory provisions that are informally known as the "indecent transmission" provision and the "patently offensive display" provision. The first one prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. The second provision prohibits the knowing sending or displaying of "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." (*Reno v. ACLU* decision, June 1997; p.860)

In February 1996, President Clinton signed the Telecommunications Act into law and, at the same time, various free speech watchdog groups attempted to get a restraining order on the CDA provisions in the federal district court of the Central District of Pennsylvania. A three-judge panel granted the order, finding that the provisions in question were unconstitutional because they were overbroad and vague in the use of terms "indecent" and "patently offensive." (*ACLU v. Reno,* 1996)

In a 7-2 decision issued on June 26, 1997, the U. S. Supreme Court affirmed the lower court decision and held that the CDA violates the First Amendment's guarantee of freedom of speech. (*Reno v. ACLU* Decision, June 1997)

The Court identified three criteria to explain the application of the strict scrutiny standard to the Internet: 1) The Internet has no history of extensive government regulation; 2) has no scarcity of available frequencies; and 3) does not "invade an individual's home.

The Court ruled that the precedents relied on by the government - *Ginsberg v. New York*, *FCC v. Pacifica Foundation*, and *Renton v. Playtime Theaters, Inc.*- raise, rather than relieve, doubts about CDA's constitutionality. The CDA differs from the laws and orders upheld in the above cases. For example, in *Ginsberg*, the New York statute was narrower than the CDA because the prohibition against sales of obscene materials to minors did not bar parents who desire to purchase such material for their children. Second, the New York statute applied only to commercial transactions whereas the CDA contains no such limitations. Third, the New York statute defined material that is harmful

to minors. The CDA, however, fails to provide any definition of "indecent" and omits any requirement that the "patently offensive" material lack serious literary, artistic, political, or scientific values. (*Reno v. ACLU* decision, June 1997; p.865)

Moreover, unlike *Pacifica,* the CDA neither limits its broad prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics, is punitive, and applies to a medium that, unlike radio, receives full First Amendment protection. Also, unlike *Renton*, the CDA cannot be analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech, the Court said. In *Renton,* the Court upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"—such as crime and deteriorating property values—that these theaters fostered (*Reno v. ACLU* Decision, June 1997)

Additionally, in the Court's opinion, the special factors recognized in some cases as justifying the regulation of broadcast media (such as the history of extensive government regulation used in *Red Lion Broadcasting Co. v. FCC,* or the scarcity of available frequencies at its inception as in *Turner Broadcasting System, Inc. v. FCC*, or its invasive nature as recognized in *Sable Communications of Cal., Inc. v. FCC*) are not present in cyberspace.

Contrary to the government's argument, the CDA is not saved from vagueness by the fact that its "patently offensive" standard repeats the second part of the three-prong obscenity test set forth in *Miller v. California*. Just because a definition including three

limitations is not vague, it does not follow that one of these limitations, standing alone, is not vague, the Court reasoned.

The three defenses offered by the government that the Court rejected were: 1) that the CDA is constitutional because it leaves open alternative channels of communication (the Court found that such a defense relies on a "time, place, and manner" analysis, which is inapplicable here); 2) that the plain meaning of the act's "knowledge" and "specific person" requirements significantly restrict its application (the Court argued that the nature of the Internet prevents the knowledge requirement from having any real meaning); and 3) that the CDA's prohibitions are "almost always" limited to material lacking redeeming social value (the Court said that there is no textual support in the act for the argument that material having redeeming social values will necessarily fall outside the scope of CDA's "patently offensive" and "indecent" provisions).

The two statutory defenses that the Court rejected were 1) that under the "good faith, reasonable . . .actions" provision, "tagging" by the sender of information is a valid defense (the Court said that the suggestion assumes that transmitters may encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software; it termed the defense "illusory," since tagging technology is not currently available and even if it becomes available, there is no guarantee that senders will tag materials); and 2) that the verified credit card/ adult identification provision saves the constitutionality of the act (the Court reasoned that such unproven technology is not economically feasible). (*Reno v. ACLU* decision, 1997)

The Court said that although the government has an interest in protecting children from potentially harmful materials, the CDA pursues that interest impermissibly by suppressing a large amount of speech that adults have a constitutional right to receive and send. The government failed to prove that less restrictive alternatives would not be as effective in achieving the Act's legitimate purposes. Therefore, the majority concluded that the CDA "amounted to 'burning the house to roast the pig.'" (*Reno v. ACLU* decision, 1997; p.882)

As in *Sable*, the Court said that the Internet is not as invasive as radio or television because accessing a site on the Net requires several steps to be taken. One either needs to type in a URL or use a search engine, in which case the search engine provides the document's title or a small description rather than the document itself..

Jerry Berman, co-founder and executive director of the Center for Democracy and Technology (CDT), which is a group working to preserve civil liberties on the Internet, and former chief legislative counsel to the ACLU, said that the Internet is most comparable to a newspaper. "I've always called the Internet a kind of electronic Gutenberg. The old argument that anyone could start a newspaper, as opposed to a radio or television station, now applies to the electronic media. You can start a web page and compete with PBS or CDT or AOL. The costs of entry are very low, and web technology makes it very easy to do graphics and display. The Internet's First Amendment can also be best compared with that of newspapers. The Supreme Court saw it that way. We argued in court that the Internet is not a scarce medium like radio or TV, and it's not a one-to-one communications system like the telephone. It is a one-to-many and many-to-many medium." (Foerstel, 1998; p.195)

In a press release the Electronic Frontier Foundation (EFF), which is a civil liberties group working to protect privacy and free expression, stated that the Court decision "marks a major victory in . . . ongoing efforts to ensure that the long-standing American principles of freedom of expression be preserved and extended to the Internet." EFF has long noted that low-cost technical solutions, together with existing anti-obscenity laws, offer a less intrusive and more efficient answer to questions about protecting children in the online world. (EFF, 1997)

The Citizens Internet Empowerment Coalition (CIEC), which is a group of Internet users, businesses, non-profit groups, and civil liberties advocates, who share the common goal of protecting the Internet as a means of free expression, education, and commerce, agreed with the Court's opinion saying that by imposing broadcast-style content regulations on the open, decentralized Internet, the CDA severely restricts First Amendment rights. Also, the CIEC argued that the only effective and constitutional way to control children's access to objectionable material on the Internet is to rely on user control. It also noted that the CDA is not about child pornography or obscenity, which are already illegal, but about "indecent" or "patently offensive" materials that could include texts of classic fiction such as "Catcher in the Rye" and "Ulysses", which, although offensive to some, enjoy full protection under the First Amendment. (CIEC, 1997)

Child Online Protection Act (COPA)

In 1998 the Congress tried again to address the problem of adult material on the Web by passing the Child Online Protection Act (COPA), also known as the "son of CDA" or "CDA II." The Congress thought that it had overcome the Supreme Court's objections to the language in the CDA, as COPA only regulates commercial Web sites.

As soon as it was signed into law in October 1998, it was challenged as unconstitutional by free speech advocates who claimed that it was overbroad and threatened adult access to legitimate, constitutionally protected material. The ACLU and 16 other plaintiffs, who initiated the legal challenge, argue that filtering software, not federal laws, is the answer to protecting children online. (Pember, 2000)

In November 1998, the U.S. District Court for the Eastern District of Pennsylvania granted a motion for a temporary restraining order and halted enforcement of COPA. In February 1999, U.S. District Court Judge Lowell Reed in Philadelphia issued a preliminary injunction blocking enforcement of the law. Reed said that Congress's goal was certainly legitimate but the new law did not represent the least restrictive means to reach this goal. (Pember, 2000)

". . . Indeed, perhaps we do the minors of this country harm if the First Amendment protections, which they will with age inherit fully, are chipped away in the name of protection," Reed wrote.

The main differences between COPA and CDA are that: a) COPA purports to apply only to commercial Web sites, and b) it employs a "harmful to minors" standard rather than the obscenity standard of the CDA. (Doherty, 1999)

On closer examination, however, the first claim is proven false. The act broadly defines "commercial purposes" stating that a person makes a communication for commercial purposes if he "is engaged in the business of making such communications." The act's definition of "engaged in business" states "it is not necessary that the person make a profit . . . [nor] that the making . . . [of] such communications be the person's . . . principal business." (COPA, 2000)

Many content providers on the Net carry material that relates to sex and allow users to access it for free while attempting to make profits by means other than selling these materials. For example, a web publisher could make a profit through advertising. According to the act's definition of "commercial purposes," these content providers would be forced to restrict access by minors, even though their material is non-commercial. Moreover, it also requires content providers to obtain a credit card number from a user. So, if an adult does not have a credit card, he would not be able to access constitutionally protected material. Thus, COPA has the same overbreadth characteristic that the Court struck down in *Reno v. ACLU.* (Doherty, 1999)

Furthermore, COPA's "harmful to minors" standard embodies the community standard established in *Miller*. This means that it is up to the local community to decide what is harmful to minors. The community standard is, however, very difficult to apply to the Internet because the Internet's reach is worldwide. When a person in a country with conservative community standards receives sexually explicit material from a person from a country that permits nudity and so on, it is difficult to determine which community standard to apply. As the Internet is a global medium, COPA's community standard actually creates a national or international standard. (Doherty, 1999)

An illustrative case here is *United States v. Thomas* (1996). The Thomas's ran their adult-only bulletin board system out of their home in Milpitas, California. They were indicted in Memphis, Tennessee, where the U.S. Postal Inspector was sitting at the time he browsed the Thomas's BBS. Ironically, even though the Thomas's were never in Tennessee, they were convicted on pornography charges in Tennessee for violation of Tennessee law by a Tennessee jury applying the Memphis community standard.

Thus, under the community standard, providers would not be able to predict what is deemed harmful to minors and might be hesitant to share material over the Internet for fear of violating the "harmful to minors" standard of a distant community. (Doherty, 1999)

State Regulations: States Follow In Feds' Footsteps

Pornography on the Net has also emerged as an issue at the state level.

In June 1997, in New York, a law similar to the federal Communications Decency Act was struck down on grounds that it violated the Constitution's interstate commerce clause. In the case of *American Library Association v. Pataki*, U.S. District Court Judge Loretta Preska ruled that the law violated the clause because it sought to regulate transactions taking place entirely outside the state's borders. Preska wrote, "Not surprisingly, much of the legal analysis of Internet-related issues has focused on seeking a familiar analogy for the unfamiliar. Commentators...before the Supreme Court...noted that the Justices seemed bent on finding the appropriate analogy which would tie the Internet to some existing line of First Amendment jurisprudence: is the Internet more like a television? a radio? a newspaper? a 900-line?.... Internet is analogous to a highway or railroad. This determination means that the phrase 'information superhighway' is more than a mere buzzword; it has legal significance...." (*ALA v. Pataki*, 1997; p.161)

According to the *ALA v. Pataki* decision, no organization or entity controls the Internet; in fact, the chaotic, random structure of the Internet precludes any exercise of such control. The username and e-mail address are the only indicators of a user's identity; generally speaking, neither datum discloses a party's age or geographic location. Any Internet user anywhere in the world with the proper software can create a web page and

view those posted by others. Therefore, a provider of content on the Net has no way of knowing the location of the recipient of the communication. The Internet is wholly insensitive to geographic distinctions.

The *ALA v. Pataki* decision also said that the borderless world of the Internet raises profound questions concerning the relationship among the several states and the relationship of the federal government to each state. The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.

Thus, it seems logical to conclude that it would be the prerogative of the Congress, and not the states, to pass legislation regarding Internet regulation and control. In fact, the court said in the *Pataki* decision that the Internet represents one of those areas where effective regulation will require national, and more likely global, cooperation.

In Georgia, a federal judge issued a preliminary injunction against a state law that made it illegal to use a name that "falsely identifies" a speaker on the Internet, such as pseudonyms or anonymous email addresses. The 14 plaintiffs, including the ACLU and EFF, argued that the law was a violation of the First Amendment because it was too broad. They said it did not distinguish between a user's intent to deceive or defraud and a wish to remain anonymous to protect privacy or communicate unpopular views. In June 1997, in the case of *ACLU v. Miller* , the ACLU won the challenge to Georgia's Internet censorship law. (Vesley, 1997)

Also, in February 1999, in the case of *Urofsky v. Gilmore*, a federal judge in Virginia stuck down a restrictive Internet law that barred state employees from viewing sexually explicit content online. (Craddock, 1997)

Public Libraries

Some public libraries have removed certain Internet sites from their computers out of concern that they were inappropriate for children. As far as filtering software being the answer, the problem of children accessing these materials through computers in public places persists because the precedents (such as *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*) indicate that installation of filtering software on these computers is a violation of First Amendment rights. (Pember, 2000)

Mainstream Loudoun v. Board of Trustees of the Loudoun County Library (1998)

Virginia's Loudoun County public library system provides patrons with access to the Internet and the World Wide Web. The library's Board of Trustees adopted a "Policy on Internet Sexual Harassment," which provided that "site-blocking software . . . be installed on all [library] computers" that would "a. block child pornography and obscene material; and b. block material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents." (Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 1998; p.556) The library used commercial software known as "X-Stop" to enforce this policy. (Kline, 1999)

In response, the Mainstream Loudon association and its individual members brought suit against the library board. Plaintiffs claimed that they tried to access Internet sites at the library, only to find out that access to these sites had been blocked. Therefore, they alleged, that the library's site-blocking policy infringed on their access to

constitutionally protected speech, that there were no clear criteria for blocking decisions, and the defendants' "unblocking" policy chilled plaintiffs' receipt of constitutionally protected material. The library argued that the First Amendment did not in any way limit the decisions of a public library on whether to provide access to information on the Internet. The question became whether a public library may, without violating the First Amendment, enforce content-based restrictions on access to Internet speech. (Kline, 1999)

Firstly, the court had to decide which level of scrutiny to apply to the library's policy. The court looked at analogous Supreme Court cases involving public high school libraries (*Board of Education v. Pico, 1982),* post office regulations restricting access to speech deemed communist propaganda (*Lamont v. Postmaster General, 1943*), and congressional efforts to regulate speech on the Internet (*Reno v. ACLU, 1997*). From the first two cases, the district court got the principle that once the library acquired access to all the publications immediately available on the Internet, the library's policy of effectively removing Internet publications, by blocking them, implicated the First Amendment. Therefore, the court found that the library's content-driven policy of regulating access to speech on the Internet was subject to unqualified First Amendment scrutiny, that is, the strict scrutiny the Supreme Court applied to Internet regulation in *Reno.* (*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library decision, 1998*)

The district court said that these content-based restrictions on speech must be justified by a compelling government interest and must be narrowly tailored to achieve that end. The plaintiffs alleged that the material the filtering software blocked depended

not on library board policy that the court could examine, but on criteria known only to the corporation that sold the software. Without knowing those criteria, the court found it impossible to determine whether blocking measures were narrowly tailored.

Next, the court held that the library's means of precluding access to material deemed harmful to juveniles was potentially unreasonable. Borrowing from *Reno v. ACLU,* the court concluded that the library policy may have unconstitutionally restricted adults' access to speech on the Internet to that which is fit for children.

Lastly, the court rejected defendants' argument that the library's unblocking policy saved its blocking policy. The unblocking policy required that patrons submit a written request that must include their name, telephone number, and a detailed explanation of why they desire access to the blocked site. The court held that the unblocking procedure constituted an unconstitutional burden on plaintiffs' right to access protected speech. (*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library decision,* 1998; p.569)

Professor Post, in his book *Between Governance and Management: The History and Theory of Public Forum,* has developed a two-part inquiry for determining whether and how the government can regulate subsidized speech. The first inquiry involves characterizing the speech and determining whether it is part of "public discourse" or located in the "managerial domain." The second inquiry focuses on the government regulation involved and distinguishes between "conduct rules for the government of citizens," which can be understood as limits on public discourse, and "decision rules for the internal direction of government officials," which can be understood as a form of state

participation in the marketplace of ideas. The result of each inquiry has different implications for First Amendment analysis. (Kline, 1999)

About public discourse, Post writes, "Ultimately, speech will be assigned to public discourse on the basis of normative and ascriptive judgments as to whether particular speakers in particular contexts should constitutionally be regarded as autonomous participants in the ongoing process of democratic self-governance." The First Amendment safeguards public discourse from state censorship.

In contrast, "within managerial domains, the state organizes its resources so as to achieve specified ends." Content-based regulations of speech within these managerial domains do not violate the First Amendment so long as they are necessary to accomplish legitimate managerial ends, Post writes. (Kline, 1999)

Where does the library's Internet-blocking policy fall under the above analysis? The Internet, as it provides access to discourse as diverse as human thought, could be perceived to be in the social space of public discourse. However, libraries, by making acquisition and removal decisions, do play a managerial role in determining the types of materials to which patrons are exposed. On the surface then, the public discourse/managerial domain question remains unanswered. Only an examination of our shared understandings about the role of public libraries in a democracy helps to answer it.

Looking to the U.S. Supreme Court precedent, the court in Mainstream Loudoun noted that all nine justices in *Pico* seemed to describe public libraries as a place for public discourse, rather than managerial control. Justice Rehnquist distinguished between public school libraries, which must winnow information to serve the school's inculcative

mission, and public libraries and universities, which are designed for "freewheeling inquiry." (Kline, 1999)

The court in Mainstream Loudoun recognized that adult patrons come to public libraries to pursue their personal intellectual interests rather than the curriculum of a high school classroom. Politicians and librarians have similarly recognized the democratic importance of information freely available in public libraries. The nation's poor and wealthy alike can use public libraries to participate in and learn from the ongoing public discourse.

Post's second inquiry involves the conduct/decision rules distinction. Post argues that while courts invoke doctrines such as overbreadth, vagueness, and viewpoint discrimination in subsidized speech cases, the best way to understand these cases is along the conduct/decision rule divide. Post describes conduct rules as regulations that effectively proscribe individual participation in public discourse; decision rules are criteria that guide subsidy decision-making procedures within a preexisting unit of government. Conduct rules are more constitutionally suspect because they directly interfere with public discourse. (Kline, 1999)

Again, where should the Loudoun County library's Internet-blocking policy be placed under the above distinction? On the one hand, libraries can choose whether or not to subsidize Internet access; filtering methods employed after Internet access has been achieved are best understood as an internal decision rule about what to provide patrons On the other hand, the subsidy that pubic libraries provide—access to information—can be understood as so ingrained in the American way of life, that to deny part of the already obtained subsidy would effectively constitute regulating public discourse. The library's

policy seems analogous to a public library unconstitutionally removing indecent books from its collection. Thus, because the library's policy constitutes a conduct rule that affects public discourse, the district court was justified in applying the strict scrutiny standard of review to the library's attempt to block/filter Internet content. (Kline, 1999)

Technologically, the most difficult determination the district court and all legislatures and courts will have to make is whether Internet-blocking software is advanced enough to be narrowly tailored. The district court left this question unresolved.

Opinion is divided as to whether blocking software is sophisticated enough to block only unprotected speech. The Supreme Court in *Reno* seemed to assume that such technology would one day exist. Others argue that blocking software is a crude tool that can sloppily block protected speech and leave unprotected speech untouched. (Kline, 1999)

Some public libraries have recognized these concerns and have adopted filtering policies that better balance First Amendment concerns with the desire to block some content on the Internet. For instance, the Kern County library in California allows its adult and child patrons to choose between filtered and unfiltered terminals. The Austin, Texas, Public Library does the same; however it restricts access to unfiltered terminals to those older than eighteen. These examples show that the Loudoun County Library's blocking policy was not the least restrictive means available to filter content. (Kline, 1999)

In early 1997, Boston Mayor Thomas Menino ordered local public libraries to install filtering software on library terminals, blocking out Internet sites that had sexual content. When library officials protested that the order was a violation of patrons' First

Amendment rights, a compromise was reached that installed filters only on computer terminals used by children. (Kline, 1999)

In June 1999, the U.S. House of Representatives passed the Franks Filtering Amendment that would require schools and libraries to implement filtering/blocking technology. In September 1999, in a joint letter to the Juvenile Justice Conferees on mandatory Internet filtering, the Internet Free Expression Alliance (IFEA), pointed out that this provision is constitutionally suspect.

The letter stated that under the Supreme Court's 1997 decision in *Reno v. ACLU*, the Internet is accorded the highest level of First Amendment protection. Therefore, any attempted regulation of Internet speech is constitutionally suspect. Also, Section 1402 of the Amendment, with its use of the constitutionally vague "harmful to minors" standard, is unlikely to withstand First Amendment scrutiny. The proposed legislation would require schools and libraries either to expend scarce resources to comply with federal law, or forgo participation in the universal service program. Thus, Section 1402 unconstitutionally conditions the receipt of federal funds on the waiver of First Amendment rights, the IFEA said. (IFEA, 1999)

Public Universities

There have been instances on university campuses where sexually oriented electronic bulletin boards or newsgroups were dropped from campus computer systems because administrators feared liability. However, media law is unclear on whether institutional providers are liable for material that they did not author, publish or select. Despite growing concern of campus officials about Internet liability, Professor Fred Cate at the Indiana University School of Law believes that criminal charges would be

unsuccessful. "The University isn't writing these stories or posting these images. A public university, like IU, is bound by the First Amendment and is not permitted to restrict speech...just because they find it distasteful." (Foerstel, 1998; p.45)

Loving v. Boren (1997)

The University of Oklahoma (OU) implemented a policy restricting Internet access for students under the age of eighteen, and for faculty and staff using the Internet for non-academic purposes. In early 1996, an Oklahoma state representative, who was also the director of the Center for a Family Friendly Internet (which is group that promotes non-offensive, family-friendly Internet content), contacted David Boren, the President of OU. The representative told Boren that offensive material was carried on the OU server through interactive newsgroups. Concerned about the potential violation of an Oklahoma law against the distribution of obscene material, Boren ordered a number of sites blocked on the OU server. There was thorough evaluation of the sites prior to blocking to see if they actually contained any obscene material. In January 1997, OU created two separate newsgroup servers—A and B. Server A allowed access to only OU-approved newsgroups, while server B allowed access to all newsgroups provided that those who wished to access it were over eighteen and were using it for academic and research purposes only (Kaniel, 1999).

Loving, a journalism professor at OU, brought suit in an Oklahoma district court against OU, alleging that OU's actions violated his right to free speech. The court found that the university-owned computer facilities and Internet services did not constitute a public forum, which receives heightened First Amendment protection. Thus, the

restrictions placed by the university were deemed constitutional. The U.S. Court of Appeals for the Tenth Circuit upheld the district court's decision on procedural grounds.

In her article, Kaniel argues that the district court overlooked unique characteristics of the Internet in applying the public forum doctrine to it. Analyzing Internet services under traditional categories of the public forum doctrine is an attempt to place the relatively modern Internet into categories best suited for real, and not intellectual, property, Kaniel writes.

The public forum doctrine reflects the right citizens have to use certain forums to disseminate their messages. The Court established three categories of forums in its decision in *Perry Education Association v. Perry Local Educators' Association*. The first category was the traditional public forum, which consists of streets, sidewalks, parks, and so on. The state may not restrict speech based on content in a traditional public forum unless it is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. The second category was the limited public forum, such as an auditorium or meeting facility that the government makes available to the public. A limited public forum, once opened to the public, receives the same treatment as a traditional public forum. Lastly, there was the non-public forum, such as a federal office or a military base. In such a forum, the state may regulate the time, place, and manner of speech. (Kaniel, 1999)

It is difficult to classify the Internet as a traditional public forum, as the courts look to how long a forum has existed in making that determination. Given its relative modernity, the Internet would not belong to this category.

Analysis under the limited public forum category would look to the university's intent in providing Internet service. The court would ask whether, by providing Internet service, the university intended to create a public forum. Such an analysis is circuitous as the very existence of a restriction on access serves as proof that there was no intent to make the forum public. Thus, a university's Internet service probably falls under the non-public forum category. (Kaniel 1999)

It is difficult to determine how the court applied the public forum doctrine in the case of *Loving v. Boren*. The court stated that the university had never opened its services to the public. This would be a mischaracterization as the Internet, by its very nature, requires interaction with the public, and is open to the public. The university Internet service did not restrict users from e-mailing students or faculty, from reading faculty-sponsored web sites, or from posting to university-moderated newsgroups.

Moreover, the court said that the university has the right to reserve the use of its property for its intended purposes, that is, educational purposes. However, educational purpose could include discussions with people of various backgrounds as well as research done for personal enrichment. A narrow interpretation of educational purpose would have the result of restricting Internet use to research of only topics assigned in university classes. (Kaniel, 1999)

Universities are held to be forums for learning and open examination of often controversial issues. Thus, they should be particularly mindful of the chilling effects Internet regulations may have on student and faculty speech.

The district court in *Loving v. Boren* did not expand on its conclusion regarding the university's Internet service. The public forum doctrine that the court used does not

adequately address the complexities of the Internet. If the university is worried about offensive materials in newsgroups, it should either rely on self-regulation imposed by users of newsgroups, or it should simply not provide Internet access to its students, Kaniel writes.

Future Government Regulation

So, what do we make of this controversial debate? Where are we headed? Are we going to see more attempts by the government to regulate the Internet?

"With respect to the Internet, Congress will now be more sophisticated in trying to find an approach that meets constitutional muster. The importance of the Supreme Court's decision on the CDA is that it lays out new law for this new medium. All the prior precedents that applied to radio and television don't apply. So Congress must begin anew with a constitutional skepticism about vague or overbroad indecency rules that are intended to protect children," Berman of CDT said. (Foerstel, 1998; p.199)

The discussion of international cooperation raises the daunting question that resurfaces as the dust of the CDA decision settles: Are technological alternatives to government regulation truly workable, especially on an international level? Dilemmas surrounding subjective standards of decency will continue to frustrate efforts to control Internet content. For now, national legislation, even if carefully tailored, is not the best way to achieve that control. (Brown, 1996)

Alternative to Medium-Specific Analysis

In reviewing CDA's constitutionality, the Supreme Court could have taken two directions: one toward the traditionally used medium-specific approach, and the other

towards a novel path where the court could focus less on the medium and more on the goals of the First Amendment as applied to all forms of communication. The Court applied a medium-specific analysis in *Reno v. ACLU*. In its opinion, the Court recognized that the Internet is a medium ideally suited to accomplish what Supreme Court Justice Holmes termed the "marketplace of ideas." The Court chose the more predictable course in *Reno v. ACLU*, and by doing so the Court let go of an opportunity to dispose of the complicated, awkward analysis.

Harvard Law School Professor Laurence Tribe suggests that the medium-specific analysis focuses narrowly on the technological characteristics of each medium and results in obfuscation of goals and values behind the First Amendment. The other option provides that all forms of speech (other than those denied First Amendment protection) would receive the highest level of protection. It seems logical that the constitutionality of a person's expression should not depend on whether it is communicated by print, broadcast, or the Internet. The holding in *Reno v. ACLU* would have been the same regardless of which analysis the Court applied, according to Stephen Jacques. (Jacques, 1997)

In his book, *Freedom, Technology, and the First Amendment*, Jonathan Emord writes that if we are to avoid the losses in freedom that would be associated with content and structural controls on the new media forms, it will be imperative for the courts to embrace the First Amendment print model standard and apply it to the new forms. Unless the Supreme Court rededicates itself to preserving the core values of the First Amendment and rejects the notion that each new technology should be subject to a

different standard of protection, speech and press will unnecessarily suffer regulatory restraints that will abridge freedom. (Emord, 1991)

Alternatives to Government Regulation

The U.S. Internet Council's "State of the Internet 2000" report said that governments around the world must allow the evolution of the Internet to remain largely unfettered by regulations if its full potential is to be realized (Seiberg, 2000).

The Council was formed in 1996 as an independent, nonpartisan resource for federal and state policy makers. Mark Rhoads, vice president of the council, said since the Internet is becoming so ubiquitous and changing so fast, the same methods used to measure the Internet for this report might not be useful in 2001. (Seiberg, 2000)

The report further said that the characteristics of the Internet do not make the medium receptive to government regulation. Although the report suggests that governments should promote the tools by which people can protect themselves from harmful content online, efforts by one governmental unit will only succeed in driving these activities to more hospitable conditions, away from the less friendly physical jurisdictions. Government should rely on the Internet community to regulate itself where it is possible, the report said. The primary recommendation of the report is to keep government's regulatory involvement to a minimum. (Seiberg, 2000)

Filtering Software

Another alternative to regulation is using filtering software. Filtering software of various kinds is available that screens out questionable Internet material. The advantages of using such software over government regulation are that the software is available from several different companies at little or no cost, it can filter across jurisdictional

boundaries, and it better serves the right to free speech because it is user-based. Filtering software uses the Platform for Internet Content Selection (PICS), a set of standards used by rating services to label Internet content. Some software manufacturers serve as the rating service for their filtering product (Doherty, 1999). For instance, Cyber Patrol, introduced in 1995, rates sites using categories including "violence/profanity," "nudity," and "sexual acts." (Brown, 1996)

CYBERsitter claims to block hundreds of thousands of sites unsuitable for children, such as sites regarding pornography, sexual issues, and racism. Critics claim that the software is too sensitive as it blocks sites with appropriate material. Also, CYBERsitter uses programs that reject certain words in the text while displaying the rest of the text. Thus, "President Clinton opposes homosexual marriage" would read "President Clinton opposes marriage." However, these problems can be solved by improvements in software design. (Doherty, 1999)

Another rating service is the Recreational Software Advisory Council (RSAC), which follows PICS standards. "What we've tried to do is walk a fine line and a balance between being pro- free speech, which we definitely are, but also pro-parental choice," according to the RSAC. This approach is appealing to website operators because it is allows them to rate their own sites. Each Web site operator fills out a questionnaire that is then graded by a computer, which calculates the rating in four categories: nudity, sexual activity, harsh language, and violence. The site operator is then sent a tag containing the rating, and the tag is added to the top of the site's homepage, where it is visible only to browsing or screening software. (Foerstel, 1998; p.45)

Jerry Berman said screening software and associated Internet ratings will not have a chilling effect on the Internet. "First, we're talking about multiple software products and many different rating systems. It's not monolithic, it's not mandatory, and the government is not imposing it . . . If you or I wish to buy software which chooses content for us, that is all right. That's consistent with the First Amendment," he said. (Foerstel, 1998; p.199-200)

In December 1997, several of the largest technology and media companies, fearing federal regulation, embraced a wide-ranging set of voluntary actions to prevent children from accessing adult-oriented material on the Internet. The online industry announced plans to use TV ads and school-based programs to tout screening software and to warn of the danger of allowing children to search the Internet without supervision. Some of the companies, including America Online and Walt Disney Co., said they would release their own tools to screen the Net. (Foerstel, 1998)

A coalition of free speech and privacy rights organization expressed concern that in attempting to protect children from a small amount of allegedly harmful material, the industry proposals would deny them access to the vast majority of useful and educational material. Despite these attempts to enable parental control, demands for federal censorship laws have persisted. (Foerstel, 1998)

Wall of Shame

Another method of reducing access to sexually explicit materials is the application of public pressure. Zeropaid.com, a music Web site, put the IP addresses of people looking for child pornography on the Net, on a "Wall of Shame." The site logged the time of download, IP address and domain name of users who downloaded any such images,

and then posted them on a Web site for all to see. The Wall of Shame was started in April 2000 as a reaction to reports suggesting that file-sharing software Gnutella was being used to trade pornography. (Sullivan, 2000)

"Most people are using Gnutella to download music. Very few people are using it for child porn, and I don't want them on it," said Jorge Gonzalez, founder of Zeropaid.com. The site immediately started receiving complaints from users who felt the Wall of Shame violated their rights. (Sullivan, 2000)

ABA Recommendations

In July 2000, a study of cyberspace related legal issues was released by an American Bar Association committee. It suggested that a multinational commission is needed to set global Internet rules. The study reviewed how regulatory agencies in the United States and abroad must change to adapt to a new world of electronic commerce that is not dependent on physical location. (MSNBC, July 2000)

Thomas Vartanian, chair of the ABA Global Cyberspace Jurisdiction Project, said that the government cannot write and approve laws fast enough to keep up with the changing technology. Vartanian said that the ABA study underscored the limited ability that any one state or nation may have in bringing greater certainty to cyberspace and thus the need for a multinational commission that could work with governments to establish rules. (MSNBC, July 2000)

CONCLUSION

As can be seen, Internet regulation is an area of media law that is still evolving. The next few years will probably witness an even more intense debate between the government and free speech watchdogs over censorship versus First Amendment issues

relating to the Internet. Filtering software technology will become more advanced. Congress might try to tie federal technology funding to schools and libraries with their use of filtering software. This would, however, pit it against civil liberties advocates. The debate promises to be intriguing and controversial, and the outcome could be very far-reaching. The Internet might even become the catalyst in causing the Court to do away with medium-specific analysis. This, however, will take time, as will the development of any kind of global Internet rules.

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