The Communications Decency Act of 1996

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INTRODUCTION

Imagine sitting at your home computer engaged in an Internet session. Perhaps you are downloading erotic images from the Web. Maybe you are sending a graphic e-mail message to a friend about an abortion experience. You could be posting a message on a bulletin board about being raped in prison. Although you may not realize the consequences of your actions, engaging in sexually explicit speech in the privacy of your own home may subject you to criminal prosecution under the Communications Decency Act of 1996 ("Act" or "CDA"). As the Internet has grown in size and popularity, the federal government has become increasingly involved in regulating obscene, indecent and patently offensive materials found in cyberspace. Despite the Constitution’s explicit guarantee of free speech and expression, the federal government has chosen to control what its citizens see and say in the sanctity of their home.

The method by which the government has chosen to limit on-line, sexually explicit materials is the Communications Decency Act of 1996. The CDA is undoubtedly a government-imposed, content-

1. E-mail is shorthand for electronic mail. See discussion infra part IV. A.
2. Stop Prisoner Rape, Inc. posts graphics, texts and statistics regarding the incidence of prison rape.
4. Cyberspace is the term often used to refer to the decentralized, global medium of communications that links individuals, educational institutions, governments and corporations by the Internet. For other obscenity provisions, see sections 1464-1465 and 2251-2252 of Title 18 U.S.C., which were enacted before the adoption of the Communications Decency Act of 1996; see also United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) (affirming the convictions of two computer bulletin board operators who were convicted after posting graphic descriptions and images of bestiality, oral sex, incest, sadomasochistic abuse and sex scenes involving urination on the Internet).
based restriction on speech. As such, the regulation is subject to strict scrutiny and can only be upheld if it furthers a compelling government interest and is narrowly tailored to effectuate that interest.\(^5\) The Government has maintained that the CDA was adopted to keep sexually-explicit Internet content out of the hands of minors.\(^6\) The way in which the government has chosen to promote that interest, however, sweeps far broader than necessary.

This update will begin with an overview of Supreme Court precedent dealing with indecency and obscenity and then provide an introduction to the Internet. After an explanation of the Communications Decency Act, this update will address how the Act is fatally vague on its face and unconstitutionally over-inclusive as applied. This update will also discuss less-restrictive means which exist to more effectively curb the flow of sexually explicit materials to minors. Finally, this update will address the unique nature of the Internet and whether current First Amendment standards for sexually explicit materials can be applied to cyberspace.

I. THE FIRST AMENDMENT GUARANTEE

The First Amendment states that "Congress shall make no law ... abridging the freedom of speech."\(^7\) The language of the Amendment is absolute and plain; there is no clause that forbids sexually explicit materials. However, "[i]t is well understood that the right of free speech is not absolute."\(^8\)

One method by which the Supreme Court has allowed speech to be


6. Although protecting the physical and mental well-being of children is commendable, the author contends that the Communications Decency Act is an attempt by the government to paternalistically protect society as a whole from the "dangers" of sexually explicit material.

7. U.S. CONST. AMEND. I.

regulated is by the categorization approach. The Court has omitted certain types of "low value" speech from constitutional protection simply by categorizing them outside of the First Amendment.\(^9\) A theory of low-value speech was first enunciated in *Chaplinsky v. New Hampshire* where the Supreme Court labeled certain speech, including fighting words, profanity, libel, lewd and obscene words, as unworthy of First Amendment coverage.\(^10\) This blanket categorization still continues.\(^11\) Recent cases have held that obscenity has no constitutional protection and may be banned outright in certain, or all, types of media.\(^12\) Unfortunately, this broad restriction on speech sometimes affects constitutionally-protected communications as well.

The CDA explicitly codifies the definitions of obscene, indecent and patently offensive material from landmark Supreme Court cases.\(^13\) Therefore, in order to better understand those terms, it is important to look to Supreme Court precedent dealing with sexually-related materials.

II. THE SUPREME COURT'S TURBULENT HISTORY WITH OBSCENITY

The American government and the Supreme Court have always tried to protect the community from viewing or hearing certain

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10. *Id.* at 572.
11. It is interesting to note that most of these "low value" speech categories survive only to a limited extent or have been eliminated altogether. Obscenity, however, continues to be broadly categorized outside the coverage of the First Amendment to this day.
13. Perhaps the drafters copied the language verbatim because approval of such language in the Court's decisions has been read to foreclose a vagueness challenge in certain media. *See* *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1339-40 (D.C. Cir. 1988) (stating "If acceptance of the FCC's generic definition of "indecent" as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction"); *see also* *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1540-41 (2d Cir. 1991) (indecent commercial telephone messages); *Alliance*, 56 F.3d 105, 129 (D.C. Cir. 1995) (cable programming).
expression. But in its quest to protect the public, the Court has struggled to define speech that is constitutionally protected and speech that is not. It is therefore important to examine how the Court "has worked hard to define obscenity and concededly has failed."

A. The Commission Report

Throughout the course of its obscenity litigation, the Supreme Court has always maintained that protecting the community was a compelling reason to ban or restrict sexually explicit materials. This governmental interest seemed less compelling when Congress established the U.S. Commission on Obscenity and Pornography in 1967. The Commission’s Report, issued in 1970, concluded that there was no link between sexually explicit material and sex-related crimes. In addition, the Commission recommended repealing laws prohibiting sexual materials for consenting adults.

In the early 1970’s the Court’s numerous plurality opinions in obscenity cases indicated that the standard for sexually-related materials was unsettled. By 1973, many new conservative justices

14. At one time the Court’s focus for suppression was on seditious libel until the twentieth century, when the Courts’ attention turned to sexual symbolism. See MARJORIE HEINS, SEX, SIN AND BLASPHEMY, A GUIDE TO AMERICA’S CENSORSHIP WARS 23 (1993).

15. Because the word “pornography” has no fixed legal meaning, it is often difficult to label it as obscene or indecent. The non-legal definition of pornography, however, stems from the Greek words, “pome,” meaning harlot or prostitute and “graphos,” meaning writing.


17. See, Roth v. United States, 354 U.S. 476 (1957). However, most cases after Roth centered around the definition of obscenity rather than the interest believed to justify its control.


20. Id. But see, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT, at 1037-1213 (stating that obscenity involving sexually violent themes had a causal link to aggressive, antisocial behavior against women and advocated increased enforcement of existing laws for sexually violent materials).

had been appointed by President Richard Nixon to the Court, which was headed by Chief Justice Burger.\textsuperscript{22} These appointments created a conservative swing in the Court which gave it the opportunity to attain a majority on obscenity issues.\textsuperscript{23}

\textbf{B. Miller v. California}

Although the test for obscenity had been constantly defined and redefined,\textsuperscript{24} it was not until 1973 that the Court was “called on to define the standards which must be used to identify obscene material that a State may regulate” in \textit{Miller v. California}.\textsuperscript{25}

Miller conducted an unsolicited mass mailing campaign to advertise the sale of illustrated “adult” material.\textsuperscript{26} The brochures, which advertised four books and a film, contained descriptive printed material as well as pictures and drawings which very explicitly depicted men and women engaging in sexual activity.\textsuperscript{27} After opening the envelope in the presence of his mother, a manager of a restaurant complained to the police about the unsolicited brochures.\textsuperscript{28} Miller was arrested and convicted under a California statute which criminalized the knowing distribution of obscene matter.\textsuperscript{29}

After re-affirming that obscene material is not afforded the protection of the First Amendment, Chief Justice Burger set forth the

\begin{itemize}
\item 22. By 1973 President Nixon had appointed the last two designees to the Court, Justices Lewis Powell and now Chief Justice William Rehnquist.
\item 23. Although given the opportunity to attain a majority, it is questionable as to whether the Court actually did so after numerous plurality opinions.
\item 25. 413 U.S. 15, 19-20 (1973).
\item 26. \textit{Id.} at 16.
\item 27. \textit{Id.} at 18.
\item 28. \textit{Id.} at 18.
\item 29. \textit{Id.} at 15, 18-19. Miller was convicted of violating § 311.2(a) of the California Penal Code which reads, in relevant part: “Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.” \textit{Id.} at 18.
\end{itemize}
test for obscenity. 30 The current legal standard for obscenity is: 1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; 31 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; 32 and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 33 This standard, formulated over 25 years ago, is still being used to classify obscene materials.

III. THE SUPREME COURT DELVES INTO THE WORLD OF INDECENCY

Aside from obscenity, the Court has also had to deal with the issue of indecent speech. Indecency has been an equally confusing issue for the Court, as it has failed to distinguish what makes sexually-related materials obscene in one instance and indecent in another. 34 This distinction is crucial, however, because if material is obscene, it has no public value and thus no constitutional protection. If the material is merely indecent (or offensive), adults have a First Amendment right to engage in such constitutionally protected speech. 35 It is important to note that the definition of indecency has

30. Id. at 15, 23; Roth, 354 U.S. at 476.
31. Miller v. California, 413 U.S. at 24; Roth, 354 U.S. at 489. Miller was the first case to change from a national to a community standard of review.
32. Miller, 413 U.S. at 24. The Court gave examples of what was patently offensive under subsection (2) as: (a) representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. Id. at 25.
33. Id. at 24.
34. Justice Scalia offered no help by stating that pornography is "normally either indecent or obscene." Sable Communications, Inc. v. FCC, 492 U.S. 115, 132 (1978) (Scalia, J., concurring). Equally unhelpful was Justice Stewart's standard of "I know it when I see it," enunciated in Jacobellis v. Ohio, 378 U.S. 184, 197 (1984) (Stewart, J., concurring).
35. See, Sable, 492 U.S. at 126; FCC v. Pacifica, 438 U.S. 726, 747-48 (1978). Often the courts use circular reasoning to justify their holdings, i.e. indecent speech is constitutionally protected speech because it has public value, therefore it is
its roots in obscenity jurisprudence, often making the line between protected and unprotected speech indistinguishable.

A. FCC v. Pacifica Foundation — Indecent Yet Not Sexually Explicit Speech

In the late 1970's, the Court had to grapple with the question of indecent yet not sexually-related speech in *FCC v. Pacifica Foundation*. At issue was whether the Federal Communications Commission had the power to regulate a radio broadcast that was indecent but not legally obscene.

At approximately two o'clock in the afternoon, a New York radio station owned by Pacific Foundation broadcast a 12-minute monologue entitled "Filthy Words." The monologue, recorded by satirist George Carlin, began by referring to the "words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." Carlin then began listing those words and repeated them in various colloquialisms. A man who heard the broadcast while driving with his young son complained to the Commission.

The FCC responded by regulating the "offensive" language much like the law of nuisance. The Commission did not put an absolute prohibition on the broadcast of indecent language, but rather channeled it to the times of day when children most likely would not be exposed to it.

The Court sustained the FCC's order, claiming that broadcast media had a uniquely pervasive presence which confronted citizens constitutionally protected speech.

36. Unlike the obscenity standard set forth in *Miller*, indecent work need not appeal to the prurient interest or lack serious value to be indecent. See *Denver Area Consortium v. FCC*, ___ U.S. ___, 116 S. Ct. 2374 (1996) (plurality opinion).
38. *Id.* at 734.
39. *Id.* at 729-30.
40. *Id.* at 729.
41. *Id.*
42. *Id.* at 730.
43. *Id.* at 731.
44. *Id.* at 732-33.
not only in public but "also in the privacy of their own home." The Court also held that because broadcasting is uniquely accessible to children, even those too young to read, the FCC had the power to regulate indecent speech over the airwaves. But the Court had not yet decided the FCC's ability to regulate sexually explicit and indecent speech until five years after Pacifica.

B. Sable Communications v. FCC — Indecent And Sexually Explicit Speech

A unanimous Court placed sharp limits on the regulation of speech which was sexually explicit, though not legally obscene, in Sable Communications v. FCC. In 1983, Sable Communications began offering sexually oriented pre-recorded telephone messages, or "dial-a-porn," to adult callers. Congress enacted a statute which criminalized commercial transmissions of sexually-oriented telephone communications to minors and required the FCC to promulgate regulations by which dial-a-porn providers could screen out underage callers. The FCC announced the following regulations which would also act as a defense to prosecution for message providers: (1) requiring payment by credit card before transmitting the dial-a-porn messages; (2) using access or identification codes; and (3) scrambling messages which would be unintelligible without the use of a descrambler, the sale of which would be limited to adults.

Congress responded by amending the Communications Act of 1934 which imposed blanket prohibitions on indecent or obscene interstate

45. Id. at 748.
46. Id.
48. Id. at 117-18.
49. Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214 § 8(a),(b), 97 Stat. 1469, 1470, (codified as amended at 47 U.S.C. § 223(b)(1)(A) (1994)). The provision, which is the predecessor to the amendment at issue in this case, made it a crime to use the telephone to make indecent or obscene interstate telephone calls for commercial purposes to any person under eighteen years of age or to any other person without that person's consent.
50. Sable, 492 U.S. at 120.
51. Id. at 121-22.
commercial telephone messages for adults as well as children.\textsuperscript{52} The government argued that a total ban on indecent telephone communications was justified because nothing less could prevent minors from accessing pornographic messages.\textsuperscript{53}

Justice White, however, struck down the indecency provision of the Act, stating that sexual expression that is indecent could only be proscribed to promote a compelling interest.\textsuperscript{54} Although the Court acknowledged the interest in protecting children, the means by which the government chose far exceeded that which was necessary to protect minors.\textsuperscript{55} The Court concluded that the statute would essentially limit the "content of adult telephone conversations to that which is suitable for children to hear."\textsuperscript{56}

It is with these guidelines that indecent and obscene Internet materials must be judged. But before conceptualizing the on-line materials which the CDA seeks to limit, a basic understanding of the Internet is necessary.

\section*{IV. AN INTRODUCTION TO THE INTERNET}

The Internet is a decentralized communications medium which allows users to globally share information. The Internet is not simply a computer system or program, rather it is a network which interconnects other computer networks. Each computer in any network has the capability to communicate with computers on any other network within the system. These networks are composed of personal users, government agencies, educational institutions and corporations in virtually every country in the world.

\begin{itemize}
  \item \textsuperscript{52} \textit{Id.} at 122-23.
  \item \textsuperscript{53} \textit{Id.} at 128.
  \item \textsuperscript{54} \textit{Id.} at 131.
  \item \textsuperscript{55} \textit{Id.} at 116, 126. Evidence supported that the regulations promulgated by the FCC - credit card verification, identification codes and scrambling - were feasible and effective ways to promote the compelling interest of protecting minors. \textit{Id.} at 122.
  \item \textsuperscript{56} \textit{Id.} at 131.
\end{itemize}
A. Ways To Access Cyberspace

To better understand the Communications Decency Act, it is useful to understand how pornographic material is disseminated by computer.\textsuperscript{57} There are many ways users may access the system, and once accessed, there are various methods by which communications can be exchanged.

Electronic mail or e-mail is perhaps the most commonly known computer-communications service. E-mail allows people to send messages to each other via computer and to be stored in the recipient's computer account until they are read. E-mail can be distributed one-to-one or it can be sent to numerous people by mass mailing.

Internet relay chat, or "IRC," creates "chat rooms" where people can type their message and have it instantaneously viewed by anyone in the same chat room.\textsuperscript{58} Generally, users may access IRC simply by signing onto a channel. Individuals engaged in real-time chat can also be "invited" into a private room by another participant to communicate or trade pictures.\textsuperscript{59}

Usenet News, or newsgroups, allow like-minded people to relay information in an area of special interest.\textsuperscript{60} Newsgroups permit free and open exchange of ideas by participants who have the ability to post messages or pictures, read or view messages, converse with other users or respond to posted materials.\textsuperscript{61} Any person can create a newsgroup at any time.

The World Wide Web ("WWW") is a series of inter-connecting documents that are stored world-wide in different computers on the network. When people refer to "surfing the 'Net," they are referring to jumping from link to link, document to document. Users may

\textsuperscript{57}. Interview with David S. Zaret, Information Technology, Internet Group for Swiss Bank Corporation (Oct. 16, 1996).
\textsuperscript{58}. ADAM GAFFIN, EFF'S GUIDE TO THE INTERNET (Formerly Big Dummy’s Guide to the Internet) 123 (1994).
\textsuperscript{59}. Id. at 123-26.
\textsuperscript{60}. For example, alt.drinks.snapple is a Usenet newsgroup which is devoted to discussion and suggestions surrounding the popular beverage. There are currently thousands of newsgroups and the number is growing faster than it can be reported.
access these documents by typing in a “URL,” or Universal Resource Locator, or by searching for content by key word. By accessing the Web, people can quickly and flexibly view information in the form of text, images, sound and even animated video.

People can access e-mail, IRC, newsgroups and the Web by joining a commercial or private Internet Service Provider (“ISP”), which acts as a pipeline to the Internet. After registering with an ISP, the user must also employ software which provides them with an interface to the on-line materials.

B. Pornography On The Internet

The Internet is used by people world-wide to trade information on a variety of topics. There is no doubt that some of the information available in cyberspace is sexually explicit material, including hard core pornography and child pornography. However, there is no evidence to show that pornography constitutes a significant portion of available Internet content. Users may access pornographic pictures or text in the same way they would encounter non-sexual materials. It is the sexually-related material, however, that the CDA seeks to limit to the point of exclusion.

V. THE COMMUNICATIONS DECENCY ACT OF 1996

The Communications Decency Act of 1996, which makes up Title V of the Telecommunications Reform Act, was approved by the Senate in an 84-16 vote in the summer of 1995. The CDA was


63. This term is to be distinguished from “content provider,” which refers to anyone who “posts” or distributes materials on-line. Examples of commercial Internet Service Providers are America Online, CompuServe, Prodigy and Microsoft Network.

64. An example of this software is a Web browser such as Netscape.

65. Codified, as amended, at 47 U.S.C. § 223(a) to (h) (1996). Also referred to as the Exon amendment after its proposal by Senator Jim Exon, a Democrat from Nebraska.

66. WILLIAM J. COOK, INTERNET & WEB LAW 1996 60 (1996); see also, Elizabeth Corcoran, Legislation to Curb Smut On-Line is Introduced, WASHINGTON.
signed into law by President Clinton on February 8, 1996. The Act restricts certain communications over computer networks by subjecting violators to criminal penalties and fines.

One provision of the CDA prohibits the transmission of obscene communications via a telecommunications device, such as a computer connected to the Internet. There is no dispute that obscene materials and child pornography, in the eyes of the Supreme Court, are low value speech not afforded First Amendment protection. To date, nobody has brought suit challenging the obscenity provisions of the Act.

A. Indecency Under The Communications Decency Act

The same provision that prohibits obscene materials also limits the transmission of indecent material on-line. Generally, section 223(a) subjects to prosecution anyone who, by means of a telecommunications device makes, creates, or solicits and transmits any comment, suggestion, proposal, request, image, or other communication which is indecent when the transmission is

Post, July 1, 1995, at F2.


68. Each intentional act of posting unlawful content is considered a separate violation of the Act and carries with it a fine of up to $50,000, a prison term of up to two years, or both. See, 47 U.S.C. section 223(b), (d) (1996).


70. Since child pornography regulations arise from different policy considerations and statutory regulations than does adult obscenity legislation, they are beyond the scope of this paper.


72. The author, believing that people should have the right to engage in communications of their choice while in their home, argues that current obscenity statutes should be repealed. See, Stanley v. Georgia, 394 U.S. 557, 565 (1969) (stating that if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch).
knowingly made to a minor.\footnote{In pertinent part Section 223(a) of the CDA subjects persons to criminal penalties who: (1) in interstate or foreign communications . . . (A) by means of a telecommunications device knowingly . . . (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communications which is \textit{obscene or indecent}, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity. 47 U.S.C. § 223(a)(1)(B), (a)(2) (1996) (emphasis added).}

\section*{B. Patently Offensive Materials Under The Act}

There is a separate provision governing "patently offensive" materials on-line. Section 223(d) of the CDA targets people who, by the use of an interactive computer service, display sexually explicit material that is "patently offensive" by contemporary community standards to persons under the age of eighteen.\footnote{Section 223(d) subjects anyone to criminal penalties who: (1) in interstate or foreign communications knowingly . . . (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the use of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity. 47 U.S.C. § 223(a)(1)(B), (d)(1), (d)(2) (1996).} The CDA specifically mentions the depiction or description of sexual or
excretory organs as "patently offensive." 75

C. Safe Harbor "Defenses" Under The CDA

The CDA provides some defenses for potential violators. 76 If providers believe their materials fall within the scope of the Act, they may post their materials on the Internet with a tag identifying the adult-oriented content of the message. The two other defenses require the content provider 77 to demand user verification through an adult identification number or a credit card before the user can view the provider's materials.

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75. The language of § 223(d) parallels the definition of "indecency" in Pacifica.
76. Subsection (e) lists defenses to posting impermissible content
In addition to any other defenses available by law:
(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.
(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communication that violate this section, or who knowingly advertises the availability of such communications.
(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.
(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.
77. Information content provider is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."
1. Tagging

A provider may limit his liability by identifying indecent or patently offensive material by appending a tag onto the URL or on the content page. Such a tag could take the form of “XXX” or “Over18.” The same protocol would be followed for posting objectionable material on a newsgroup or inter-relay chat channel. For e-mail, the provider would have to tag his message in the subject line in order to warn the reader of explicit content. In theory, server or client software would then detect the tag and either make the materials available to the user or deny access.

2. Adult Identification System

A provider may also operate with an age verification or identification system to deny access to minors. Typically, a user would sign onto the system and provide personal information - name, password, e-mail address, age - in order to register. Once registered, the user receives an identification number which he must submit before he may view adult-oriented materials. Many, but not all of the systems currently in existence for this purpose, charge users for this service.

3. Credit Card Verification

A third possible safe harbor available under the CDA is credit card verification. Under this method, a user interested in accessing “adult only” materials would first have to submit his credit card number to the content provider. The credit card would then be manually submitted by the content provider to ensure the validity of the credit card before access would be given to the user.

D. Good Faith Efforts “Awarded”

The Act also provides a defense to liability for providers who take reasonable, effective and appropriate actions under the circumstances to prevent minors’ access to communications falling within the scope
of the Act. These efforts include any steps "feasible under available technology." 79

VI. THE INHERENT FLAWS OF THE COMMUNICATIONS DEGENCY ACT

In its quest to keep Internet users from accessing sexually-explicit materials, Congress has drafted an unconstitutionally overbroad statute as construed because it bans constitutionally protected speech between adults. Furthermore, the statute is fatally vague on its face as many terms, vital to imposing liability, are never defined by the lawmakers. There are other less-intrusive means by which to curb sexually-related materials to minors, including placing responsibility on parents to monitor or prohibit their child’s access to the Internet as well as self-regulation. Finally, there are other considerations, such as the unique nature of cyberspace, which must be explored before current obscenity and indecency laws can be applied to Internet materials.

A. The Communications Decency Act Is Unconstitutionally Overbroad As Construed

The CDA is unconstitutionally over-broad as construed because it bans constitutionally-protected speech. It is important to note that

78. The good faith exception reads as follows:
(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section,
or under subsection (a)(2) of this section with respect to the use of a facility for an
activity under subsection (a)(1)(B) -
(A) has taken, in good faith, reasonable, effective, and appropriate
actions under the circumstances to restrict or prevent access by
minors to a communications specified in such subsections, which
may involve any appropriate measures to restrict minors from such
communications, including any method which is feasible under
available technology; or
(B) has restricted access to such communication by requiring use of a
verified credit card, debit account, adult access code, or adult
personal identification number.
79. Id. at (e)(5)(A).
only 12-15% of the total population of the United States is on-line. Just as there is only a small percentage of the population on the Internet, only a small percentage of the material found in cyberspace is pornographic. Furthermore, almost half of all pornographic material found on-line comes from outside the United States - and outside of the reach of prosecution by U.S. officials.  

The CDA, however, reaches further than the small number of users dabbling in pornography. As applied, the "safe harbor" defenses amount to no defense at all for violators of the Act. For tagging to work, a provider must first decipher which material is subject to CDA regulations and which material is not. There is no universal tag which can be recognized by the current software. The software manufacturers, unlike the content providers, do not have to comply with the Act by supplying blocking software to detect a particular tag. It is incomprehensible to subject an individual to criminal penalties for actions which rely on the compliance of an unwilling third party.

The problems inherent in the adult verification defense are also numerous. On a technical level, it would be difficult, if not impossible, to register every user of sexually explicit materials. Even if registration could be accomplished, there is no way that a provider could ensure that someone would not register under a false name or age - thus frustrating the very purpose of the CDA.

Registration also implicates the First Amendment free speech rights of Internet users as well. 'Netizens, 81 be they adults or minors, rely on the anonymity of the Internet to foster an open environment. If users were required to register, then many people would be discouraged from visiting certain Internet sites for fear of being "exposed." 82 Another problem is that some verification systems require payment by the user to help reduce the costs of providing the adult identification numbers; many users who could not afford the fee would be precluded from free speech solely on the basis of inability to pay.

81. A contraction of the words Internet and citizens.
82. For example, newsgroups for victims of prison rape, AIDS sufferers, homosexuals, people who have had abortions, etc. would probably forfeit their right to engage in free speech for fear that they might be identified.
The credit card "defense" is also unworkable as a practical matter. Most small-run providers do not have the capabilities or machinery to process credit cards in their home. Assuming that all content providers do have credit card machines at their disposal, the fees that providers must pay to process the credit card orders would prohibit many providers from posting their materials altogether. Although many commercial content providers may be able to afford this "defense," most content providers are non-profit entities unable to pay for these services. Charging users would also be contrary to the spirit of the Internet as well as the First Amendment. Finally, the time it takes to manually validate credit cards would diminish the benefit of having information immediately at your fingertips.

The credit card defense would also chill the free speech rights of users. Unfortunately, many people who would like to access sexually explicit materials on the 'Net do not have credit cards. In reality, it is not reasonable to request a credit card before engaging in objectionable speech because this safeguard cannot be applied to "non-static" communications.84

Even if an individual could require a credit card from other participants on IRC, protection under the credit card defense is questionable.85 Because the distinction between "listener" and "speaker" is often unclear, an individual can be participating in both listening and speaking at the same time. The speaker/listener who provides the credit card can still be held criminally liable for his communication, and because he did not request a credit card from the initiating speaker/listener, he would have no defense for prosecution.86

Even the good faith exception is, concededly, unavailable to content providers facing prosecution. The problem with the good faith exception is that it requires providers to "use all feasible and

84. Non-static communications are those such as e-mail and IRC, where the content can be changed at any time.
85. Supplying a credit card on a public channel would preclude many users from participation for fear of credit card fraud.
86. The CDA criminalizes the transmission of objectionable materials, comments, suggestions or proposals regardless of who initiates the contact.
reasonable efforts under technology" to keep pornographic materials from minors. Unfortunately, there are currently no means available to ensure that minors are not able to access the covered communications.87 Thus, if there is no feasible and reasonable way for a provider to restrict minors' access, then he could still be liable under the Act.

Finally, if the CDA were used to prosecute indecent or patently offensive materials, even life-saving information would be subject to criminal penalties. Some sexually explicit materials on the Internet serve a purpose other than to arouse the "prurient interests" of users. People are learning of the human rights abuses against women in Africa from graphic descriptions of genital mutilation. Women in traditionally closed societies, such as the Middle East, are now privy to information regarding abortions, female sexuality and reproductive health care. Furthermore, people world-wide are provided with life-saving, albeit descriptive, information on safer sex and the transmission of HIV by visiting any of the thousands of AIDS Web sites.

Contemporary art could also fall victim to censorship.88 For example, an Internet posting regarding Angels in America, a play about homosexuality and AIDS, uses coarse, descriptive terms which could violate the Act.89 However this play has won numerous awards, including two Tony awards and a Pulitzer Prize. Even educational materials such as National Geographic articles, could fall victim to the Act. Cultural materials including images of the Kama Sutra or nude ancient Greek statues could be prohibited. Museum Web pages advertising a Robert Mapplethorpe exhibit could also be banned if

87. Even the government conceded during oral arguments for the ACLU case that no current technology could assure a speaker that only adults were receiving the distributed materials. See, ACLU v. Reno, 929 F. Supp. at 856.

88. Counsel for the government in ACLU was unable to define "indecency" with specificity or to distinguish whether certain examples offered by the panel (and listed in the same paragraph in which this footnote is referenced) would be "indecent" and subject to prosecution.

89. The language is often vulgar and shocking and portray lewd depictions of excretion, ejaculation, masturbation and sodomy.
samples of the artist's sexually-explicit work were posted.  

**B. The Act Is Fatally Vague Because It Chills Protected Speech**

The problem of vagueness in the language of the Act deters individuals from freely disseminating their ideas on the Internet. Because of the unclear language, the line between constitutionally protected and unprotected speech is often blurred, thus opening the door to subjective judgments of what is obscene, indecent or patently offensive.

In order to protect the constitutionally guaranteed rights of Internet providers, terms such as indecent, obscene and patently offensive must be defined in the CDA, which seeks to limit the right to free speech. If no definitions exist for indecent, obscene and patently offensive, then how can we assume that content providers would be able to accurately distinguish between protected and unprotected speech?

A similar problem exists in that the CDA criminalizes the display of certain images that, "in context," are patently offensive. At no time, however, does the Act clarify what is meant by the phrase "in context." Furthermore, the phrase "under his control" is never defined to mean actual, physical control or whether it is implied through mere ownership. A distributor may not know if he or she can be held liable for lending his/her computer and modem to an individual who uses it to distribute pornography on-line. A similar problem occurs by virtue that although the statute contains a

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90. Mapplethorpe is famous for his works depicting homosexual sex and objects inserted into bodily orifices.

91. The dissent in *Miller* criticized the Court's failure to define obscenity and opined that obscenity law is based on "vague and highly subjective aesthetic, psychological and moral tests which do not provide meaningful guidance for . . . juries or courts." *Miller*, 413 U.S. at 39-40, n.5 (Douglas, J., dissenting)(quoting from U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970).

92. In *Pacifica*, the Court enunciated that "context" includes the particular medium from which the communication originates and the community that receives it. FCC v. *Pacifica*, 438 U.S. 726, 746 (1978). This explanation, however, is not helpful to explain Internet material.
“knowing” standard of intent, the government has not explicitly stated what behavior will satisfy this standard. Because of the unique nature of computer communications, providers have no way of knowing for sure whether the receivers of information are over eighteen. Finally, the fact that nowhere in the “good faith” exception are there specific steps by which a provider may avoid prosecution or be given sufficient notice is another issue left unanswered by the Act.

Similarly, nowhere in the Act did the legislature explain what was meant by the phrase “as measured by contemporary community standards.” As evident by Supreme Court precedent, there is no national consensus on what is patently offensive or indecent. There are added problems for defining the Internet community, which is a virtual community not bound by geography or national borders.

A prime example of how problematic a community standard is on the Internet is illustrated by United States v. Thomas. The Thomases, a husband and wife, were in business selling access to an adult-oriented bulletin board entitled “Amateur Action BBS,” which provided users with, among other items, pornographic images. A Postal Inspector who was working undercover in Memphis, Tennessee, signed onto the Thomas’ California-based bulletin board and downloaded sexually-explicit materials. The Inspector tipped off federal authorities, who searched the Thomas’ house and charged them with violating anti-obscenity laws. The government fought to bring the trial to Tennessee to take advantage of the local community standards, which it thought were more conservative than the liberal

93. Even the government conceded in oral arguments for Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), that section 223(d), standing alone is not constitutionally defensible because there is no way that a user can be certain that his content will not reach a minor. Id. at 941.

94. Indeed even attaining a majority of the nine member Court has been difficult on issues regarding sexually-related material.

95. 74 F.3d 701 (6th Cir. 1996), cert. denied, 117 S.Ct. 74 (1996).

96. Id. at 705.

97. Id. These images depicted images of bestiality, oral sex, incest, sadomasochistic abuse, and sex scenes involving urination. See also Joshua Quittner, Computers in the 90’s; Life in Cyberspace, the Issue of Porn on Computers, NEWSDAY, Aug. 16, 1994, at B28.

98. Thomas, 74 F.3d at 705-06.
Despite pleas from the defense, the District Court judge ruled that the trial would be held in Memphis, as it was the Memphis community that was affected by the pornographic materials. The jury, relying on the community standards of Memphis, convicted the couple of interstate distribution of obscene materials. Robert And Carleen Thomas were sentenced to two and a half years and thirty-seven months in prison, respectively. The convictions were upheld on appeal.

The vagueness of the Act's terms could mean that some constitutionally-protected communication is being restricted without justification. If providers cannot distinguish between material which is prohibited under the statute and material which is not, then they simply might refuse to post their material on the Internet, thereby chilling their constitutionally protected right to free speech. Furthermore, the unpredictable and subjective nature of these terms in the CDA impose criminal liability onto violators without providing notice.

C. Narrower Means To Keep Pornography From Children

The means chosen by the CDA sweep far broader than necessary,

99. COOK, supra note 66, at 2.
100. Thomas, 74 F.3d at 710, 711. See also William S. Byassee, Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community, 30 WAKE FOREST L. REV. 197, 207 (1995).
101. Thomas, 74 F.3d at 706; see also, James Crawley, Memphis Porn Decision is Far Reaching: Ruling Raises Concerns About Rights of Online Computer Users, SAN DIEGO UNION-TRIBUNE, Aug. 16, 1994, at 9.
102. Thomas, 74 F. 3d at 706.
103. Id. at 716.
104. Although Fifth Amendment issues are beyond the scope of this update, the problem of vagueness raises the question of notice and Due Process concerns especially in light of Supreme Court holdings that a law which imposes imprisonment for exercising protected speech must clearly define the prohibited speech not only for a potential offender but for a potential enforcer as well. See, Kolender v. Lawson, 461 U.S. 352 (1983); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Smith v. Goguen, 415 U.S. 566 (1974).
thereby chilling the expression of adults and over-stepping onto the rights protected by the First Amendment. Currently there are two non-legislative solutions to curb the flow of sexually explicit material to children. Several computer software manufacturers and commercial on-line services have offered relatively inexpensive programs that allow parents and schools to control what children can access on-line. These methods allow great flexibility in custom-designing what children view and keeps the government from censoring on-line materials.

Prodigy, American Online and Microsoft Network offer parental control options free of charge to their subscribers. America Online even allows parents to establish a separate account for their children, which is limited to the company’s own propriety content. Parents are given the opportunity to decide what types or categories of information they want shielded from their children and then block it from the child’s account. The other, more “child-friendly” material will then be the only information the child can access through it’s account.

Cyber Patrol and SurfWatch are software programs that allow children to reap the benefits of the Internet without being exposed to objectionable material. These screening tools maintain lists of sites known to contain sex-related materials, and attempts to access these materials are blocked. In addition, these programs have the ability to block access to sites which contain certain words such as “sex,” and block any searches including those words. The SurfWatch program also empowers parents to exercise individual choice by blocking access to all Internet sites except those which the parents choose to make available for their children.

In addition, the World Wide Web Consortium has launched PICS, the Platform for Internet Content Selection, which develops technical standards so that electronic ratings can be attached to Internet addresses. Parents can purchase PICS-compatible software and

105. These programs range from free to approximately $49.95.
106. CyberNOT enables parents to selectively block access to any or all of the following twelve categories: Violence/Profanity; Partial Nudity; Nudity; Sexual Acts; Gross Depictions; Racism/Ethnic Impropriety; Satanic/Cult; Drugs/Drug culture; Militant/Extremist; Gambling; Questionable/Illegal; Alcohol, Beer & Wine. The system receives automatic updates every seven days.

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configure it so that it detects specific PICS tags. These PICS tags, designed to suit the parents' needs or values, can block objectionable material once detected.

There is also a second solution to control materials distributed online. Self-regulation is a simple and costless option. Self-regulation places the responsibility on users to be cautious about what information they distribute and where the materials are disseminated. Self-regulation, however, is not without its problems -- many people who prey on children (and for whom the legislation was drafted) will not practice self-regulation of sexually-explicit ideas and materials.

D. The Unique Nature Of Cyberspace - A Test Of First Amendment Principles

The Internet presents unique problems in applying current obscenity and indecency standards. The Supreme Court has recognized that each medium of expression is capable of presenting unique problems for First Amendment jurisprudence. Unlike other media, where the written or spoken word is clearly broadcast from a defined source, the distinction between speaker and listener is unclear for Internet communications. The entrance barriers for listeners and speakers are virtually identical. The users and providers are active participants in speech. They are not merely passive listeners taking part in public discourse. Because of the problems of defining speaker and listener on the Internet, the traditional notions of constitutionally-protected "speech" must be re-worked to encompass this inter-active medium. The legal standards that govern the Internet must also change to reflect that progress. Specifically, the special qualities of this global forum demand the broadest protection afforded by the courts.

107. Even Vice-President Gore prefers voluntary self-regulation to accessing and posting obscenity on the Internet. Thomas Brazaitis, Computer Network Creates Thorny Ethics Problem, PLAIN DEALER, July 31, 1994, at 10A.

VII. RECENT CHALLENGES TO THE COMMUNICATIONS DECENCY ACT

There have been two cases that have challenged the constitutionality of the Act on overbreadth and vagueness grounds. Both facial challenges were heard by a three-judge panel comprised of District Court judges, as required by statute. \textsuperscript{109}

\textit{A. American Civil Liberties Union v. Reno}

The first case to challenge the Act, \textit{American Civil Liberties Union v. Reno}, \textsuperscript{110} was filed on the day the Act was signed. \textsuperscript{111} Two weeks

\textsuperscript{109} The two provisions governing the three-judge panel requirement, section 561 of Pub. L. 104-104 and 28 U.S.C. § 2284, are as follows:

\textbf{§ 561 EXPEDITED REVIEW.} (a) THREE JUDGE DISTRICT COURT HEARING - Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

\textsuperscript{108} Pub. L. 104-104, Title V, § 561(a), 110 Stat. 133.

\textbf{§ 2284. Three-judge court; when required; composition; procedure}

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows ... 

(3) A single judge may conduct all proceedings except the trial . . . He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction[.]


\textsuperscript{111} COOK, \textit{supra} note 66, at 20. Plaintiffs filed their action in the United States District Court for the Eastern District of Pennsylvania. \textit{See}, Complaint, Civil Action No. 96-963 (E.D. Penn. 1996). Plaintiffs moved to enjoin the enforcement of the indecent and patently offensive provisions of the CDA. \textit{Id.} After an
later, the ACLU legal challenge was supported by a similar action brought by the American Library Association, the Center for Democracy and Technology, several civil rights groups, on-line services and software corporations. After the consolidation of the two cases, the plaintiff class was composed of businesses, libraries, non-commercial and non-profit organizations, educational societies and consortia.

The matter was brought before a three-judge panel on plaintiff's motion for a preliminary injunction of the indecency and patently offensive provisions of the CDA. The plaintiffs disputed the provisions of the Act on grounds of both vagueness and overbreadth, claiming that the law limited ideas on the Internet to the least tolerant community.

The three-judge panel of the District Court held that the provisions at issue violated the First Amendment right to free speech and expression. All three panel judges found that the statute could not withstand constitutional scrutiny because it was substantially overbroad. Furthermore, two of the judges found § 223(d), the patently offensive provision, to be unconstitutionally vague. On June 11, 1996, the court granted the ACLU's motion for a preliminary injunction preventing the U.S. Department of Justice from enforcing the patently offensive and indecent provisions of the law.

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113. Id. at 824. After the consolidation, the cases were collectively referred to as "the Philadelphia litigation."
114. Id. at 827-28.
115. COOK, supra note 66, at 20.
116. ACLU, 929 F. Supp. at 824.
117. Id. at 853-55 (Sloviter, C.J.); Id. at 857 (Buckwalter, J.); Id. at 869 (Dalzell, J.).
118. Id. at 856 (Sloviter, C.J.); Id. at 861 (Buckwalter, J.).
119. However, U.S. Attorney General Janet Reno has stated that if the Supreme Court holds that the CDA is constitutional, the Department of Justice retains the right to prosecute violations which occurred between the enactment of the CDA and the Court's decision. Id. at 827.
B. Shea v. Reno

A follow-up case to the Philadelphia litigation also reviewed the validity of the CDA. In Shea v. Reno,\(^{120}\) the editor-in-chief, publisher and part-owner of an electronic newspaper published an editorial criticizing the Act on the day that it was signed into law.\(^{121}\) Some of the material in the editorial could have arguably fallen within the provision criminalizing the display of patently offensive materials.\(^{122}\) Plaintiff Joe Shea filed suit on behalf of his company, the American Reporter, seeking a declaration that the Act was unconstitutionally vague and overbroad in that it banned protected communications between adults.\(^{123}\) A little more than a week later, plaintiff also sought a preliminary injunction to bar the enforcement of section 223(d).\(^{124}\)

After review, the three-judge panel held that: (1) the Act's incorporation of the FCC's indecency standard did not make the section unconstitutionally vague; (2) the provision would have to survive a strict scrutiny analysis to survive an overbreadth challenge; (3) the statute was overbroad as it totally banned constitutionally protected, indecent speech between adults; and (4) the affirmative defenses for violators of the Act do not save the statute from being over-inclusive.\(^{125}\)

The Supreme Court granted *certiorari* for the two cases, which were consolidated, to resolve the constitutional issues surrounding the CDA. Oral arguments were heard in mid-March, 1997.\(^{126}\) In making its ruling, it is hoped that the Court will not only question the

\(^{120}\) 930 F. Supp. 916 (S.D.N.Y. 1996).

\(^{121}\) *Id.* at 922, 923.

\(^{122}\) *Id.* at 923-24.

\(^{123}\) *Id.* at 924.

\(^{124}\) *Id.* at 922.

\(^{125}\) *Id.* at 950.

\(^{126}\) Reno v. ACLU, 117 S. Ct. 554 (1996); *See also,* Michael Kirkland, *U.S. Files Internet 'Indecency' Appeal,* WASHINGTON NEWS, Oct. 1, 1996. President Clinton has since appealed to the Supreme Court to save the federal ban on indecency on the Internet. *Id.* Vice-President Al Gore, however, is a leading proponent of the Internet and was reluctant to support governmental regulation of Internet content. Thomas Brazaitis, *Computer Network Creates Thorny Ethics Problem,* PLAIN DEALER, July 31, 1994, at 10A.
constitutionality of the Act, but will also announce a broad First Amendment standard for Internet speech.

CONCLUSION

Protecting the well-being of children is indeed a valid reason for enacting the Communications Decency Act of 1996. However, in the government's quest to control the content of the Internet, it has essentially banned adults from engaging in constitutionally-protected speech.

The policy rationale for prohibiting the distribution of obscene materials is not applicable to the dissemination of information on the Internet. With the exception of electronic mail, sexually-explicit content does not appear on a user's screen without the user having first taken some affirmative steps. Although there is a potential for occasional, accidental viewing of sex-related content, the user must still put forth the initial effort of accessing the system. Moreover, most sexually-explicit materials on-line are proceeded by explicit warnings, and many require express confirmation from the user before displaying the pornography. Even if a user is confronted with sex-related materials, the user can simply "click" off the objectionable material in seconds. The danger of a very small child "accidentally" viewing pornography on-line is almost negligible because a child would require both a certain sophistication to operate the computer as well as the ability to read.

The steps to find pornography, or any materials on-line, are much more labor-intensive then simply turning the dial of a television or flipping the on switch of a radio. The Internet presents no danger of offending unwilling participants as was the case in Pacifica, nor is the material unsolicited as in Miller. Virtually no Internet participant is taken by surprise by content and there is no problem of a captive audience. The Internet is even less intrusive than the sexual speech in Sable. Where access to "dial-a-porn" requires only the use of a telephone, which is found in virtually every home, the Internet requires the use of a telephone line, modem and computer. Unlike community newsstands, bookstores or movie theaters, the Internet
carries little or no risk for obscene material to be in the public eye because Internet users generally access these materials in the privacy of their homes.

The most effective way to keep children from viewing sexually explicit material is not by prosecuting content providers for sharing their ideas, but rather by placing the burden on concerned parents to monitor their own computer. It is the parents and others responsible for minors that undertake the primary obligation to prevent the children’s exposure to sexually explicit materials.

Because of the nature of this new communication medium, the Internet presents unique problems in First Amendment jurisprudence. As such, the Internet must be considered separately from all other media and afforded the broadest freedom guaranteed by the Constitution and bestowed by the courts.

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