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The Communications Decency Act of 1996

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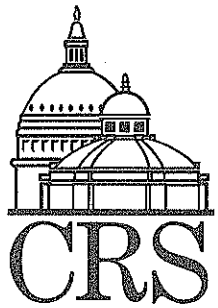

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THE COMMUNICATIONS DECENCY ACT OF 1996

SUMMARY

The Communications Decency Act of 1996 (CDA) is Title V of the Telecommunications Act of 1996, Public Law 104-104. Subtitle A of the CDA (§§ 501-509) makes it a crime, in interstate or foreign communications, to make obscene material available by computer to anyone, or to make indecent material available by computer to minors. It also expands the laws that prohibit transmitting obscene or indecent material by means of telecommunications devices, and restricts sexually-oriented programming on cable television. Several lawsuits have been filed challenging the constitutionality of various provisions of the CDA, and several bills were introduced in the 104th and 105th Congresses to repeal or amend various provisions of the CDA.

Subtitle B of the CDA (§ 551) attempts to enable parents to make informed decisions about television programming viewed by their children. To this end, it encourages the development of voluntary industry standards for rating television programs, and requires television sets manufactured or imported into the United States to be equipped with technology to enable viewers to block violent programming. This report does not further examine Subtitle B.

Subtitle C of the CDA (§ 561) provides that any civil action challenging the constitutionality, on its face, of any provision of the CDA shall be heard by a 3-judge federal district court pursuant to 28 U.S.C. § 2284, and that any order of a three-judge court holding a provision of the CDA unconstitutional "shall be reviewable as a matter of right by direct appeal to the Supreme Court." On June 11, 1996, a three-judge court held two provisions of the CDA unconstitutional, and, on July 29, 1996, another three-judge court held a provision of the CDA unconstitutional. The provisions that were struck down would restrict communications by telephone, fax, and computer. The June 11 decision is scheduled to be argued in the Supreme Court on March 19, 1997. On November 8, 1996, a three-judge court upheld the constitutionality of the provisions of the CDA that regulate cable television, but stayed enforcement pending Supreme Court review.

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CHILD PORNOGRAPHY, OBSCENITY, AND INDECENCY: DEFINITIONS AND APPLICABILITY OF THE FIRST AMENDMENT

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] In general, the First Amendment

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[1] Despite its literal words, the First Amendment applies not just to Congress, but equally to all branches of the federal government and to state and local governments. Gitlow v. New York, 268 U.S. 652 (1925).

protects pornography, with this term being used to mean any erotic material. The Supreme Court, however, has held that the First Amendment does not protect two types of pornography: child pornography and obscenity. Consequently, they may be banned on the basis of their content, and Congress, in various statutes, has prohibited their importation, transportation, distribution, or receipt in interstate commerce.[2]

Child pornography is material that *visually* depicts sexual conduct by children.[3] Obscenity is defined by the Supreme Court's three-part *Miller* test, and may be solely verbal. The *Miller* test asks:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[4]

Under this test, most pornography is not legally obscene; to be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct."[5]

"Indecent," the Supreme Court wrote, "merely refers to nonconformance with accepted standards of morality."[6] The Federal Communications Commission has defined "indecent" in the contexts of dial-a-porn and radio and television broadcasting to mean the description or depiction of "sexual or

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[2] *See, e.g.*, 18 U.S.C. §§ 1460-1469, 2251-2259. For additional information, see *Obscenity: Constitutional Principles and Federal Statutes* (CRS Rep. No. 95-804 A), and *Child Pornography: Constitutional Principles and Federal Statutes* (CRS Rep. No. 95-406 A).

[3] New York v. Ferber, 458 U.S. 747, 764 (1982). It is unprotected by the First Amendment even when it is not legally obscene; *i.e.*, child pornography need not meet the *Miller* test to be banned.

[4] Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). In Pope v. Illinois, the Supreme Court clarified that "the first and second prongs of the *Miller* test -- appeal to prurient interest and patent offensiveness -- are issues of fact for the jury to determine applying contemporary community standards." 481 U.S. 497, 500 (1987). However, as for the third prong, "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Id.* at 500-501.

[5] *Id.* at 27.

[6] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 740 (1978).

excretory activities or organs" in a "patently offensive" manner "as measured by contemporary community standards.[7] The CDA, quoted below, uses this definition as well. Note that, unlike obscenity, material may be deemed indecent even if it does not appeal to the prurient interest, and even if it has serious literary, artistic, political, or scientific value.

The First Amendment applies to indecent material that falls short of constituting obscenity or child pornography. This means that such material may not be banned, but may be restricted in order to keep it from children or for other reasons. Thus, the courts have upheld the zoning and licensing of "adult" theaters, as well as restrictions on indecent dial-a-porn and indecent radio and television programming. In 1978, the Supreme Court upheld the FCC's prohibition, on the ground of indecency, of the broadcast of George Carlin's "Filthy Words" monologue during hours when children would most likely be in the audience.[8] Federal statutes currently prohibit indecency on broadcast radio and television from 6 a.m. to 10 p.m., and prohibit making indecent dial-a-porn available to minors.[9] Federal appeals courts have upheld both these statutes as constitutional.[10]

DETERMINING THE CONSTITUTIONALITY OF GOVERNMENTAL RESTRICTIONS ON PROTECTED SPEECH

Speech that is fully protected by the First Amendment, including indecent material, may generally be restricted only if the restriction is necessary "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[11] When a court examines a restriction to determine whether it meets these standards, it is said to be applying "strict scrutiny." In applying strict scrutiny, the courts tend to be more deferential to the government in finding that an asserted governmental interest is "compelling" than in finding that the government has used the least restrictive means available.

Thus, with respect to the "compelling interest" test, the D.C. Circuit, in June 1995, upholding the ban on indecent broadcasts from 6 a.m. to 10 p.m.,

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[7] *Id.* at 732; 47 C.F.R. § 73.4165 (broadcasting); Dial Information Services Corp. v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992) (dial-a-porn).

[8] *Pacifica*, *supra* note 6.

[9] 47 U.S.C. § 303 note (broadcasting); 47 U.S.C. § 223(b) (dial-a-porn).

[10] Action for Children's Television v. Federal Communications Commission (ACT III), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996) (broadcasting); Dial Information Services, *supra* note 7 (dial-a-porn).

[11] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

found "that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves," and "that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts."[12] However, with respect to the "least restrictive means" test, the Supreme Court, in *Sable Communications of California, Inc. v. Federal Communications Commission*, overturned a statute that banned indecent dial-a-porn, to adults as well as children, on the ground that "credit card, access code, and scrambling rules . . . [would have] represented a 'feasible and effective' way to serve the Government's compelling interest in protecting children."[13] Citing *Sable*, the D.C. Circuit overturned a statute that banned indecent broadcasts 24 hours a day, on the ground that there were less restrictive means by which the government could accomplish its ends.[14]

With respect to governmental regulation of broadcast radio and television, however, the Supreme Court has applied something less than strict scrutiny. It first held that the broadcast media enjoy less than full First Amendment protection when, in *Red Lion Broadcasting Co. v. Federal Communications Commission*, it upheld the constitutionality of the FCC's fairness doctrine, writing:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[15]

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[12] *ACT III*, *supra* note 10, at 661, 663. The court rejected a claim by the dissent that these two interests are contradictory, in that "my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned . . . ." *Id.* at 670 (Edwards, C.J., dissenting). The court also rejected a claim that "no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors," and quoted the Supreme Court case to the effect that it does not demand of legislatures scientifically certain criteria, but rather only that legislation have a rational relation to the objective of safeguarding minors. *Id.* at 661, 662 (quoting Ginsberg v. New York, 390 U.S. 629, 642-643 (1968)).

[13] *Sable*, *supra* note 11, at 128. Enactment of the law, cited in note 9, *supra*, which limits the ban on indecent dial-a-porn to minors, followed this decision.

[14] Action for Children's Television v. Federal Communications Commission (ACT II), 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992). This decision prompted Congress to enact the current 6 a.m. to 10 p.m. restriction that the D.C. Circuit upheld in June 1995.

[15] 395 U.S. 367, 388 (1969). The fairness doctrine required broadcast media licensees to provide coverage of controversial issues of interest to the community and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. The FCC abolished the fairness doctrine in 1987.

In *Federal Communications Commission v. Pacifica Foundation*, the FCC had taken action against a radio station for broadcasting a recording of George Carlin's "Filthy Words" monologue at 2 p.m., and the station had claimed First Amendment protection.[16] The Supreme Court upheld the power of the FCC "to regulate a radio broadcast that is indecent but not obscene."[17] The Court cited two distinctions between broadcasting and other media: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans . . . confront[ing] the citizen, not only in public, but also in the privacy of the home . . . ," and "Second, broadcasting is uniquely accessible to children . . . ."[18] As Justice Brennan noted in his dissent in *Pacifica*, the Court's opinion did not, as in *Red Lion*, rely on the notion of "spectrum scarcity" to support its result.[19]

The courts, however, have not specified precisely what degree of scrutiny is appropriate for the broadcast media. The D.C. Circuit, in its June 1995 decision upholding the statute that prohibits indecent broadcasts from 6 a.m. to 10 p.m., wrote:

> While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast media.[20]

Chief Judge Edwards, dissenting, wrote:

> The majority appears to recognize that section 16(a) could not withstand constitutional scrutiny if applied against *cable* television operators. . . . This is the heart of the case, plain and simple.[21]

This is because, the Supreme Court, in 1994, in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, which did not involve obscenity or indecency, held that cable television is entitled to full First

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[16] *Pacifica*, *supra* note 6.

[17] *Id.*, 438 U.S. at 729.

[18] *Id.* at 748-749.

[19] *Id.* at 770, n.4 (Brennan, J., dissenting). Justice Brennan added: "As Chief Judge Bazelon noted below, 'although scarcity has justified *increasing* the diversity of speakers and speech [by serving as the basis for upholding the fairness doctrine], it has never been held to justify censorship.'" (*Id.*, citing 556 F.2d, at 29, emphasis supplied by C.J. Bazelon).

[20] *ACT III*, *supra* note 10, at 660.

[21] *Id.* at 671.

Amendment protection.[22] In 1996, however, in *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, a plurality of the Justices retreated from the Court's position in *Turner*. They wrote: "The Court's distinction in *Turner*, . . . between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable. . . . While that distinction was relevant in *Turner* to the justification for structural regulations at issue there (the 'must carry' rules), it has little to do with a case that involves the effects of television viewing on children."[23]

In Part II of the *Denver Consortium* opinion, a plurality (four Justices) upheld § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532(h), which permits cable operators to prohibit indecent material on leased access channels.[24] In upholding § 10(a), the Court, citing *Pacifica*, noted that cable television "is as 'accessible to children' as over-the-air broadcasting," has also "established a uniquely pervasive presence in the lives of all Americans," and can also "'confron[t] the citizen' in 'the privacy of the home,' . . . with little or no prior warning."[25] Applying something less than strict scrutiny, the Court concluded "that § 10(a) is a sufficiently tailored response to an extraordinarily important problem."[26] It also found that "the statute is not impermissibly vague."[27]

In Part III of *Denver Consortium*, a majority (six Justices) struck down § 10(b) of the 1992 Act, 47 U.S.C. § 532(j), which required cable operators, if they do not prohibit such programming on leased access channels, to segregate and block it. In this part of the opinion, the Court appeared to apply strict scrutiny, finding "that protection of children is a 'compelling interest,'" but "that, not only is it not a 'least restrictive alternative,' and is not 'narrowly

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[22] 114 S. Ct. 2445, 2457 (1994) ("In light of these fundamental technological differences between broadcast and cable transmission [spectrum scarcity applies only to the former], application of the more relaxed standard of scrutiny, adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation.").

[23] 116 S. Ct. 2374, 2388 (1996).

[24] The Cable Communications Policy Act of 1984, Public Law 98-549, had required cable operators to provide leased access and public access channels free of operator editorial control. 47 U.S.C. §§ 531(e), 532(c)(2). These two provisions were amended in 1996 by § 506 of the Communications Decency Act to permit cable operators to refuse to transmit "obscenity, indecency, or nudity."

[25] *Denver Consortium*, *supra* note 23, at 2386.

[26] *Id.* at 2385-2386.

[27] *Id.* at 2390.

tailored' to meet its legitimate objective, it also seems considerably 'more extensive than necessary.'"[28]

In Part IV, which only three Justices joined, the Court struck down § 10(c), 42 U.S.C. § 531 note, which permitted cable operators to prohibit indecent material on public access channels. Without specifying the level of scrutiny they were applying, the Justices concluded "that the Government cannot sustain its burden of showing that §10(c) is necessary to protect children or that it is appropriately tailored to secure that end."[29] We discuss below the possible significance of *Denver Consortium* for the CDA provisions concerning both the Internet and cable television.

THE COMMUNICATIONS DECENCY ACT: INTERACTIVE COMPUTER SERVICES AND TELECOMMUNICATIONS DEVICES

Section 507 of the CDA amended two sections of federal law, 18 U.S.C. §§ 1462 and 1465, which prohibit the importation or transportation of obscenity, to make them applicable to obscenity on any "interactive computer service."[30] Although both §§ 1462 and 1465 speak not only of obscenity, but of "lewd, lascivious, or filthy" material, the courts do not apply these laws to material that is not obscene, as such material is protected by the First Amendment.[31]

Section 1462 of Title 18 also prohibits interstate or foreign commerce in "any drug, medicine, article, or thing designed, adapted, or intended for producing abortion," or in any written matter giving information as to obtaining any such thing. This language, however, predates Supreme Court cases that established the constitutional right to abortion and to publish advertisements offering to procure abortions.[32] On February 7 and 8, 1996, lawsuits were filed challenging the constitutionality of § 1462, and Attorney General Janet Reno issued a statement "that the Department of Justice will not defend the

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[28] *Id.* at 2391.

[29] *Id.* at 2397.

[30] Section 509 of the CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2).

[31] *See, e.g.*, United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (§ 1462); United States v. Alexander, 498 F.2d 934, 935-936 (2d Cir. 1974) (§ 1465).

[32] Roe v. Wade, 410 U.S. 113 (1973); Bigelow v. Virginia, 421 U.S. 809 (1975).

constitutionality of the abortion-related speech provision of 1462" because it violates the First Amendment.[33]

Section 502 of the CDA amended 47 U.S.C. § 223(a)(1)(A) to make it a crime, in interstate or foreign communications, by means of a telecommunications device, knowingly to transmit a communication that is "obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person."[34] Section 502 of the CDA also amended 47 U.S.C. § 223(a)(1)(B) to make it a crime, in interstate or foreign communications, by means of a telecommunications device, knowingly to transmit a communication that is "obscene or indecent, knowing that the recipient of the communication is under 18 years of age . . . ."

Although the CDA defines "telecommunications,"[35] it does not define "telecommunications device." However, § 502 provides that the term "does not include the use of an interactive computer service."[36] Thus, it appears that § 223(a)(1)(A) and (B) are intended to apply to communications, by telephone, fax machine, or computer, that are sent to particular individuals, not those that can be accessed by multiple users.[37]

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[33] Letter dated February 9, 1996, to "Honorable Albert Gore, Jr., President of the Senate."

[34] On January 30, 1997, in ApolloMedia Corp. v. Reno (N.D. Cal.), a San Francisco-based multimedia company, challenged § 223(a)(1)(A), writing: "The CDA criminalizes any 'indecent' computer communications 'intended to annoy' another person. Abuse, threaten or harass another person -- understandable. Those actions should be prohibited and are prohibited. *But annoy?*" (italics in original). *Legal Times*, Feb. 10, 1997, p. 9. The *Legal Times* article reports: "[P]laintiffs lawyers maintain that laws against telephone harassment [§ 223(a), before the CDA] are distinguishable from a law governing Internet communications. Specifically, the suit argues that the telephone laws regulated conduct, not speech. 'A ringing telephone intrudes into private space and carries the ability to harass or threaten even if no content is communicated, especially when the calls are repeated in the middle of the night,' court papers state. 'But computer communications are silent, and, most importantly, they are read only if the recipient chooses to read them.'" The Complaint for Declaratory and Injunctive Relief and a Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction appear at www.annoy.com/case.html.

[35] Section 3 of Public Law 104-104 added to 47 U.S.C. § 153 the following definition of "telecommunications": "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the format or content of the information as sent and received." The conference report adds that this information includes "voice, data, image, graphics, and video."

[36] 47 U.S.C. § 223(h)(1)(B). *See*, n.30, *supra*, for the definition of "interactive computer service."

[37] Section 223(a)(1)(B), on its face, would apply even to a personal conversation between, for example, two consenting 17-year olds who use indecent language. Prior to

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In addition, however, § 502 of the CDA created § 223(d), which makes it a crime, in interstate or foreign communications, knowingly to use "an interactive computer service to send to a specific person or persons under 18 years of age, or . . . to display in a manner available to a person under 18 years of age, any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ." Note that, whereas § 223(a)(1)(B), which bans indecency to minors on telecommunications devices, uses the term "indecent," § 223(d), which bans indecency to minors on interactive computer services, uses the definition of "indecent," quoted above, that the FCC uses in the dial-a-porn and in the broadcasting context.[38]

As added by § 502 of the CDA, 47 U.S.C. § 223(e) provides that, with exceptions, "[n]o person shall be held to have violated subsections (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control," and who does not create the content of the communication. Section 223(e)(5) provides that it is a defense under subsection (a)(1)(B) or (d) that a person -- "(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors . . .[39] 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."

As added by § 502 of the CDA, 47 U.S.C. § 223(f) provides, in part: "No state or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section." This prohibition on state and local governments contains a proviso: state and local governments could enforce "complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services."

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[37](...continued)
the CDA, federal law prohibited making indecent telephone calls available to consenting minors only "for commercial purposes"; that is, it applied only to dial-a-porn. 47 U.S.C. § 223(b).

[38] *See*, text accompanying note 7, *supra*.

[39] It appears that the word "effective" should not be read literally, because to do so would seem to require that the defendant succeed in restricting or preventing the transmission of, or access to, a prohibited communication, which would mean that he would not have committed a proscribed act in the first place. Presumably, "effective" should be construed to mean something like "effective as possible under the circumstances." In addition, the word "appropriate" and the phrase "in good faith" do not seem to add anything to the word "reasonable" (could one take a "reasonable" action that was inappropriate or in bad faith?).

Immediately after the CDA became law, the ACLU and other plaintiffs asked a federal court to issue a temporary restraining order (TRO) against enforcement of both § 223(a)(1)(B) and § 223(d). The court issued a TRO against the former provision but not against the latter.[40] The court found "that the plaintiffs have raised serious, substantial, difficult and doubtful questions . . . in their argument that the CDA is unconstitutionally vague in the use of the undefined term, 'indecent.'" Therefore, the court enjoined the government from enforcing the provisions of § 223(a)(1)(B), "insofar as they extend to 'indecent', but not 'obscene'." The order "shall remain in force only until the hearing and determination by the district court of three judges of the application for a preliminary injunction."

The judge declined to issue a TRO with respect to § 223(d), because, he said, "I do not believe that the patently offensive provision of Section 223(d) . . . is unconstitutionally vague . . . ."

On June 11, 1996, the three-judge panel unanimously granted a preliminary injunction as to both § 223(a)(1)(B) and § 223(d).[41] As the panel found these two provisions of the CDA unconstitutional, its decision, under § 561 of the CDA, is "reviewable as a matter of right by direct appeal to the Supreme Court." Although the panel issued a single introduction, findings of fact, and conclusions of law, each judge wrote his or her own opinion setting forth grounds for the decision.

Chief Judge Dolores K. Sloviter noted that "[t]he government asserts that shielding minors from access to indecent materials is in the compelling interest supporting the CDA,"[42] yet "the government has made no showing that it has a compelling interest in preventing a seventeen-year-old minor from accessing" images such as "[p]hotographs appearing in National Geographic or a travel magazine of the sculptures of India of couples copulating in numerous positions, a written description of a brutal prison rape, or Francesco Clemente's painting 'Labirinth,' . . . all [of which] might be considered to 'depict or describe, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'"[43] Chief Judge Sloviter found further "that it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access."[44]

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[40] American Civil Liberties Union v. Reno, Civil Action No. 96-963, 1996 U.S. Dist. LEXIS 1617 (E.D. Pa., Feb. 15, 1996).

[41] American Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *prob. juris. noted,* 117 S. Ct. 554 (1996).

[42] *Id.* at 852.

[43] *Id.* at 853.

[44] *Id.* at 854.

She noted that "[t]he government attempts "to circumvent this problem by seeking to limit the scope of the statute to content providers who are commercial pornographers, and urges that we do likewise in our obligation to save a congressional enactment from facial unconstitutionality wherever possible. But in light of its plain language and its legislative history, the CDA cannot reasonably be read as limited to commercial pornographers."[45]

Judge Ronald L. Buckwalter, who had issued the TRO, wrote: "I continue to believe that the word 'indecent' is unconstitutionally vague, and I find that the terms 'in context' and 'patently offensive' are also so vague as to violate the First and Fifth Amendments."[46] Judge Stewart Dalzell did not believe that the CDA is unconstitutionally vague, but found that *Pacifica*'s authorization of governmental regulation of indecent speech over broadcast media must be read as limited to that media. He added that "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography of the Internet." This is because "[n]early half of Internet communications originate outside the United States . . . ."[47] Judge Dalzell concluded "that the Internet deserves the broadest possible protection from government-imposed, content-based regulation."[48]

The Supreme Court's decision in *Denver Consortium*, discussed at page 6, which was issued two weeks after the three-judge panel's decision, arguably supports the position that the challenged Internet provisions of the CDA are unconstitutional. For one thing, the Supreme Court upheld only the part of the cable statute that gave *permission* to cable operators to prohibit indecency; it struck down the part that, like the CDA, banned indecency. For another, in upholding the part of the statute that gave permission to cable operators to prohibit indecency, the plurality, citing *Pacifica*, noted that, on cable as well as broadcast television, "'[p]atently offensive' material . . . can 'confron[t] the citizen' in the privacy of the home,' . . . with little or no prior warning."[49] This arguably is not the case on the Internet, where, as another court wrote, "with the exception of e-mail, no content appears on a user's screen without the user

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[45] *Id.* Judge Dalzell added: "Perversely, commercial pornographers would remain relatively unaffected by the Act, since we learned that most of them already use credit card or adult verification anyway. . . . The CDA will force these businesses to remove the teasers (or cover the most salacious content with cgi scripts), but the core, commercial product of these businesses will remain in place." *Id.* at 879.

[46] *Id.* at 858.

[47] *Id.* at 882.

[48] *Id.* at 881.

[49] *See*, note 25, *supra*. The plurality's citing *Pacifica* in connection with cable television suggests that Judge Dalzell was incorrect in writing that the case applies only to the broadcast media, but this does not necessarily mean that it applies to the internet. In addition, the plurality found that the definition of "indecency" is not unconstitutionally vague. *See*, note 27, *supra*.

having first taken some affirmative step."[50] This court added that, "there is potential for occasional accidental viewing of sexually explicit material, . . . but there is no basis in the record for concluding that a user not seeking out sexually explicit material on the Internet will encounter it with any particular frequency."[51]

On July 29, 1996, another three-judge federal panel, this time in a single opinion, unanimously held § 223(d) unconstitutional.[52] The panel found that, although the plaintiff did not demonstrate "a likelihood of success on his claim that § 223(d) is unconstitutionally vague" (the panel cited *Denver Consortium* in this regard), he did demonstrate "a likelihood of success on his claim that §223(d) is unconstitutionally overbroad in that it bans protected indecent communication between adults."[53] "The Government concedes," the panel wrote, "that strict scrutiny is appropriately applied to this claim and that § 223(d) would, on its own, act as an unconstitutional total ban on indecent communication, protected and unprotected alike, but argues that the two affirmative defenses set out in § 223(e)(5) serve to shield adults engaged in constitutionally protected indecent communication from criminal liability."[54] The panel found, however, that "[c]urrent technology provides no feasible means for most content provides to avail themselves of the two affirmative defenses to § 223(d) set out in § 223(e)(5)."[55]

THE COMMUNICATIONS DECENCY ACT: CABLE TELEVISION

Section 504 of the CDA added to the Communications Act of 1934 a new § 640, which provides:

> Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

This section includes no restriction on the type of material that a subscriber may request to have blocked.

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[50] Shea v. Reno, *infra* note 50, 930 F. Supp. 916, 930 (S.D.N.Y. 1996).

[51] *Id.* at 931.

[52] Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996).

[53] *Id.* at 922.

[54] *Id.* at 923.

[55] *Id.* at 950.

Section 505 of the CDA added § 641, which provides:

> (a) In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber does not receive it.
>
> (b) Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to be viewing it.

On March 7, 1996, a federal district court issued a temporary restraining order prohibiting the enforcement of § 505 of the CDA pending a preliminary hearing before a three-judge court,[56] but, on November 8, 1996, the three-judge court denied the plaintiffs' petitions for a preliminary injunction.[57] The three-judge court noted that the purpose of the scrambling required by § 505(a) is to eliminate "signal bleed," which "is the partial reception of video images and/or audio sounds on a scrambled channel." The court wrote:

> Section 505 differs, however, from the statute at issue in *Denver Consortium* and from most statutes that are directed at speech or at the regulations of speech in that the target of § 505 is not the speech itself, *i.e.*, sexually explicit adult programming. The target is signal bleed, a secondary effect of the transmission of that speech. . . .
>
> Even though § 505 is aimed at the content-neutral objective of preventing signal bleed, the section applies only when signal bleed occurs during the transmission of "sexually explicit adult programming or other programming that is indecent." It does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel. Thus, Congress targeted signal bleed based on its sexually explicit content, rendering § 505 a "content-based" restriction. We will therefore apply content-based analysis.

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[56] Playboy Entertainment Group, Inc. v. United States, 918 F. Supp. 813 (D. Del. 1996).

[57] Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772 (D. Del. 1996), *petitions for cert. filed*, Dec. 29, 1996, and Jan. 10, 1997). On December 5, 1996, the three-judge panel entered an order staying enforcement of § 505, pending Supreme Court review. *See*, BNA, *Daily Report for Executives* (Dec. 10, 1996) at A-21.

We must, however, also consider content in context. We cannot ignore the fact that the households that receive signal bleed have not subscribed to the adult channel which transmits the unwanted images and sounds. Nor can we ignore the fact that cable television is a means of communication which is pervasive and to which children are easily exposed. . . .

As a result, we conclude that § 505 clearly addresses a recognized "compelling interest," and it remains only for us to determine whether the provision is carefully tailored to serve that end. . . .

There is undoubtedly a substantial expense involved in complying with subsection (a). However, . . . [b]y including the time-channeling compliance option in § 505, Congress provided MSOs [multisystem operators] with decision-making flexibility and an economically less restrictive alternative. . . . It follows therefore that if the time-channeling alternative provides a constitutional means of compliance with § 505, then § 505 is constitutional. . . .

Because the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*, we believe that time-channeling also survives constitutional scrutiny here. . . .

The plaintiffs contend, nevertheless, that § 504 is a less restrictive option which is available to provide protection from signal bleed. They urge, therefore, that we declare § 505 invalid. However, the cost to MSOs of creating an adequate shield from a widespread intrusion of signal bleed by supplying Converter/lockboxes to households that don't subscribe to adult channels, would be close to the expense of providing converter/lockboxes to non-subscribing households under § 505(a). The main difference is that under § 504 the household has to request the box, while under § 505 the MSO must provide the box. We have no evidence in the present record that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockbox or other blocking devices upon demand. Likewise, there is no evidence that parents are otherwise aware of the § 504 means of achieving complete blocking of undesired channels. Upon this record, the government has demonstrated an expectation that § 504 will not be a viable alternative.

Moreover, in view of the fact that children watch television in the homes of their friends as well as in their own homes,

> we do not find Congress to have been unreasonable in wishing to extend protection from signal bleed beyond a child's own home.

The three-judge court also considered and rejected two other challenges to § 505: (1) that it violates equal protection because it restricts the speech only of channels "primarily dedicated to sexually-oriented programming," and not of adult-oriented programming on other channels; and (2) that the term "indecent" is unconstitutionally vague.

Section 505(a)'s scrambling requirement with respect to channels that are primarily sexually-oriented resembles the blocking requirement of § 10(b) of the 1992 Act that the Supreme Court struck down in *Denver Consortium*. In *Denver Consortium*, however, the Court struck down § 10(b) in part because there were less restrictive alternatives available to protect minors from indecent material, and one that the Court cited was that used by § 505(a), because it requires blocking only of "programming on any (unleased) channel *primarily dedicated* to sexually-oriented programming."[58]

To the extent that it is not technologically feasible for distributors to comply with § 505(a) immediately, they are required to comply with § 505(b)'s limitation on the hours during which indecent material may be transmitted. The en banc D.C. Circuit upheld a limitation on the hours that indecency may be broadcast on radio and television, and compared broadcast and cable television:

> Unlike cable subscribers, who are offered such options as "pay-per-view" channels, broadcast audiences have no choice but to "subscribe" to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material.[59]

Because § 505(b) would limit the hours during which a distributor may allow specified material to be shown only if the distributor, under section 505(a), does not fully block the material to non-subscribers, § 505(b) appears aimed at protecting non-subscribing cable viewers who now receive such material less than fully blocked and who therefore are in the same position as broadcast viewers who "are confronted without warning with offensive material." Consequently, the D.C. Circuit's reasoning would apparently support the constitutionality of § 505(b).[60]

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[58] *Denver Consortium*, *supra* note 23, at 2392 (emphasis supplied by the Court).

[59] *ACT III*, *supra* note 10, 58 F.3d at 660.

[60] Referring to §§ 504 and 505 in Part III of its *Denver Consortium* opinion, *supra* note 23, the Supreme Court wrote: "Although we cannot, and do not, decide whether the new provisions are themselves lawful [*i.e.*, constitutional] (a matter not before us), we

(continued...)

Finally, § 506 of the Communications Decency Act amended 47 U.S.C. §§ 531(e) and 532(c)(2) to permit cable operators to refuse to transmit "obscenity, indecency, or nudity" on public access and leased access channels.[61]

COMPUTER INDECENCY: SELECTED CONSTITUTIONAL ISSUES

The concept of "community." The Supreme Court has never defined "community" for purposes of either the *Miller* test or the FCC's definition of "indecency." In *Hamling v. United States*, the Court noted that a "community" is not any "precise geographic area," and suggested that it might be less than an entire state.[62] In *Jenkins v. Georgia*, the Court approved a "trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.'"[63] A recent court of appeals case raised the issue of the application of community standards to computer transmissions. In 1994, in Memphis, Tennessee, Robert and Carleen Thomas, a husband and wife from Milpitas, California, were convicted and sentenced to prison under 18 U.S.C. § 1465 for transmitting obscenity, from California, over interstate phone lines through their members-only computer bulletin board. The Sixth Circuit affirmed, holding that 18 U.S.C. § 1465 applied to computer transmissions.[64]

The Thomases also raised a First Amendment issue, arguing that they "cannot select who gets the materials they make available on their bulletin boards. Therefore, they contend, BBS [bulletin board service] operators like Defendants will be forced to censor their materials so as not to run afoul of the standards of the community with the most restrictive standards."[65] The court did not decide the issue because it found that, in this case, the defendants had transmitted only to members whose addresses they knew, so "[i]f Defendants did

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[60](...continued)
note that they are significantly less restrictive than the provision here at issue [§ 10(b) of the 1992 Act, 47 U.S.C. § 532(j)]." 116 S. Ct. at 2392.

[61] Justice Kennedy, in the only footnote to his concurring and dissenting opinion in *Denver Consortium*, wrote that the constitutionality of the amendments made by § 506, "to the extent they differ from the provisions here [§§ 10(a) and 10(c) of the 1992 Act], is not before us." 116 S. Ct. at 2404.

[62] 418 U.S. 87, 105 (1974).

[63] 418 U.S. 153, 157 (1974).

[64] United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996). The court cited another conviction under 18 U.S.C. § 1465 for computer pornography -- this one by an Air Force court. United States v. Maxwell, 42 M.J. 568 (A.F.Ct.Crim. App. 1995). Subsequent to the affirmance of the Thomases' convictions, the CDA, as noted above, amended § 1465 to make it explicitly applicable to any "interactive computer service."

[65] *Id.* at 711.

not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability."[66] However, if a future defendant is not in a position to select who has access to his or her materials, then the argument the Thomases raised may cause the Supreme Court to revisit the concept of community standards.[67]

The knowledge requirement. As noted above, new § 223(a)(1)(B) makes it a crime, by means of a telecommunications device, knowingly to transmit a communication that is "obscene or indecent, *knowing* [emphasis added] that the recipient of the communication is under 18 years of age . . . ." As also noted above, new § 223(d) makes it a crime knowingly to use "an interactive computer service to send to a specific person or persons under 18 years of age, or . . . to display in a manner available to a person under 18 years of age, any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ." Note that § 223(d), unlike § 223(a)(1)(B), on its face does not require that the defendant know that the person to whom he makes the indecent material available is under 18. This lack of a knowledge requirement arguably makes § 223(d) an unconstitutional denial of due process.

However, in *United States v. X-Citement Video, Inc.*, the Supreme Court construed a comparable statute, and, rather than declaring it unconstitutional, chose to read a knowledge requirement into it.[68] The statute was 18 U.S.C. § 2252, which makes it a crime "knowingly" to "transport[ ] or ship[ ] in interstate or foreign commerce" any "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct." The most natural grammatical reading of this statute would have "knowingly" apply only to "transports or ships," but the Court held that the statute must be read to require that the defendant knew that the material depicted sexually explicit conduct and that at least one of the performers was a minor. The Court read the statute this way in part "because of the respective presumptions that some form of scienter [knowledge] is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[69]

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[66] *Id.*

[67] In Shea v. Reno, *supra* note 52, which struck down a provision of the CDA, the court also declined to address the argument that, in the case of the Internet, "even assuming a content provider can discern the appropriate community standards, the provider has no choice but to gear his message toward the least tolerant community." 930 F. Supp. at 937. (Indecency, like obscenity, is defined in terms of community standards.)

[68] 115 S. Ct. 464 (1994).

[69] *Id.* at 467.

In light of *United States v. X-Citement Video, Inc.*, the courts may construe § 223(d) to require that a person who sends an indecent communication to a specific person or persons under 18 years of age, or who displays an indecent communication in a manner available to a person under 18 years of age, know that a person accessing it is in fact under 18. If courts construe § 223(d) this way, then it would not apply to communications where the individual who posts them has no control over who has access to them.

Least restrictive means. Suppose, however, that the courts do not construe § 223(d) to require a defendant to know that a person accessing the material is under 18, but to require merely that a defendant make the material available to all with access to the Internet, not excluding minors. Would § 223(d), as so construed, be constitutional?

To answer this question, a court would likely apply strict scrutiny, which means that it would determine whether § 223(d) is necessary "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[70] As noted above, the D.C. Circuit has found "that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves," and "that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts."[71]

If this precedent is followed on the issue of "compelling interest," the next question would be whether § 223(d) constitutes the least restrictive means to further that interest. In its decision that Congress had used the least restrictive means available to protect children from dial-a-porn, the court of appeals disagreed with the district court's determination that "New York's current voluntary blocking system is adequately protective of children and is less restrictive than either a pre-subscription requirement or an independent billing mechanism."[72] The court of appeals wrote:

> The error of the district court lies in focusing on means, when the focus should be on goals as well as means. The means must be effective in achieving the goal. Even if voluntary blocking is assumed to be the least restrictive

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[70] *Sable, supra* note 11.

[71] *ACT III, supra* note 10, at 661, 663. In *Denver Area, supra* note 23, 116 S. Ct. at 2386, the Court noted "that this Court has often found . . . the need to protect children from exposure to patently offensive sex-related material" to be compelling.

[72] *Dial Information Services Corp., supra* note 7, 938 F.2d at 1541, quoting 742 F. Supp. at 1264.

> means of accomplishing the congressional purpose, it clearly is not an effective means."[73]

It is apparent from this case, that, in deciding a case that challenged the constitutionality of § 223(d), a court would weigh any admissible evidence the litigants introduce as to the restrictiveness and the effectiveness of the limitations on speech that § 223(d) imposes as against the restrictiveness and the effectiveness of other means, if any, that might accomplish the goal of protecting children from indecent computer postings, and of supporting parental supervision of their children. A question that would seem likely to arise would be the extent to which it is possible, under presently available technology, for a person who posts a message on an interactive computer service to know and to control whether those with access to the message are under 18. To the extent that this is not possible, one might argue that § 223(d) would effectively prohibit *all* indecent communications by means of an interactive computer service, which would unconstitutionally "'reduce the adult population . . . to . . . only what is fit for children."[74] On the other hand, one might argue that, to the extent that it is not possible to know or control whether recipients are under 18, then prohibiting all indecent communications by means of an interactive computer service *would* be the least restrictive means to accomplish a compelling governmental interest. It seems doubtful, however, that a court would find this to justify a statute that reduced the adult population to reading only what is fit for children.

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[73] *Id.* The court of appeals explained:

> Under voluntary blocking . . . , any subscriber can have sexually explicit telephone communications centrally blocked by contacting the telephone company and requesting such a service, which is free of charge. . . . A parent who receives a bill from the telephone company for dial-a-porn messages thereby receives notice that calls are being made by a child in the household and may request central blocking.
>
> It seems to us that voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company as would the presubscription requirement of the Helms Amendment. Blocking has been available for over two years in the New York area, but only four percent of the 4.6 million residential telephone lines in the area having access to [blocking] have been blocked. . . . [H]alf of the residential households in New York are not aware of either the availability of dial-a-porn or of blocking. . . . Moreover . . . , a child may have suffered serious psychological damage from contact with dial-a-porn before the child's parents become aware from a monthly telephone bill that there has been access to an indecent message. . . .

Id. at 1541-1542.

[74] *Sable, supra* note 11, 492 U.S. at 128.

To the extent that it *is* possible to know and control whether recipients of indecent communications by means of an interactive computer service are under 18, under subsection (e), quoted above, it would be a defense to a prosecution under subsection (d) if the defendant "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" . . . to indecent communications. This defense apparently would make it more likely that subsection (d) would be constitutional, as, if the possibility of knowing and controlling the age of those with access to indecent communications is limited, then a defendant who, in good faith, takes "reasonable, effective, and appropriate actions" would not be responsible for failing to prevent a minor from receiving the communication.[75]

Banning all indecency to all minors. Another argument that the CDA's restriction on indecent material on the Internet is not the least restrictive means to further a governmental interest is that prohibiting all indecent material, to all minors, is overbroad. Is it permissible for a statute to mandate the application of community standards that place the same ban on teenagers' viewing four-letter words as they place on young children's viewing hard core (but not necessarily obscene) pornography? The three-judge panel in *ACT III*, which was overruled by the en banc court that upheld the 6 a.m. to 10 p.m. ban on indecent broadcasting, wrote:

> The Court was particularly concerned that "broadcasting is uniquely accessible to children, *even those too young to read*," *Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040 (emphasis added), and strongly implied that the Commission would *not regulate* material that "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected" by its content. . . .
>
> While a child's ability to make decisions is presumed to be inferior to an adult's, the capacity for choice does not remain dormant throughout childhood until appearing *ex nihilo* upon the arrival of a person's 18th birthday. . . . Accordingly, we conclude that the confident abrogation of a minor's First Amendment rights by a protective government must proceed by a less rigid line than the legal age of majority.[76]

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[75] *See*, note 39, *supra*.

[76] Action for Children's Television v. Federal Communications Commission, 11 F.3d 170, 179, 180 (D.C. Cir. 1993). The panel cited a case in which the Supreme Court struck down a "ban on films containing nudity as not justified by [the governmental] interest in [the] protection of minors, noting, *inter alia*, that [the] prohibition would extend to films containing depictions of 'the nude body of a war victim, or scenes from a culture in which nudity is indigenous.'" *Id.*, citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975). Such nudity apparently could be deemed indecent under the

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The en banc court found "persuasive" three reasons that the FCC offered in support of its definition of "children" to include "children ages 17 and under":

> Other federal statutes designed to protect children from indecent speech use the same standards (citing 47 U.S.C.A. § 223(b)(3) . . . (forbidding indecent telephone communications to persons under 18)); most States have laws penalizing persons who disseminate sexually explicit materials to children ages 17 and under; and several Supreme Court decisions have sustained the constitutionality of statutes protecting children ages 17 and under (citing *Sable*, *Ginsburg*, and *Bethel School District*).[77]

What sort of medium is the Internet? In *Red Lion*, the Supreme Court held that, because of spectrum scarcity, broadcast media are not entitled to full First Amendment protection. In *Turner Broadcasting*, it held that cable television is entitled to full First Amendment protection, but in *Denver Consortium*, it found that not the case in "a case that involves the effects of television viewing on children."[78] In *Pacifica*, the Court upheld indecency restrictions on broadcast media without relying on spectrum scarcity, but relying instead upon factors, namely broadcast media's pervasiveness in the home and accessibility to children, that the Supreme Court cited in *Denver Consortium* in upholding the indecency restrictions on cable television in § 10(a) of the 1992 Act.

The plurality in *Denver Consortium*, as noted, cited *Pacifica* in finding that, on cable as well as broadcast television, "'[p]atently offensive' material . . . can 'confron[t] the citizen' in the privacy of the home,' . . . with little or no prior warning."[79] As noted above, this arguably is not the case on the Internet, where the user must choose to visit any particular site.

In *Bolger v. Youngs Drug Products Corp.*, the Supreme Court "recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of

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[76](...continued)
CDA, as some community standards might consider some instances of it to constitute a patently offensive display of sexual or excretory organs.

[77] *Act III*, *supra* note 10, at 664. For *Sable*, see text accompanying note 13, *supra*. *Ginsberg* is Ginsberg v. New York, 390 U.S. 629 (1968), which upheld a state statute that prohibited the sale of certain magazines to minors but not to adults. *Bethel* is Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), which upheld the power of a public school to discipline "a high school student for giving a lewd speech at a school assembly."

[78] *Denver Area*, *supra*, note 23.

[79] *See*, notes 25, 49, *supra*.

other means of communication."[80] In *Bolger*, the Court emphasized the word "uniquely" in quoting from a passage from *Pacifica* from which we quoted above:

> In *FCC v. Pacifica Foundation* . . . , the majority "emphasize[d] the narrowness of our holding," . . . explaining that broadcasting is "*uniquely* pervasive" and that it is "*uniquely* accessible to children, even those too young to read."[81]

In *Denver Consortium*, a plurality applied *Pacifica* to cable television, thereby implying that broadcasting is no longer unique.

In *Bolger*, the Court declared unconstitutional a federal statute that prohibited mailing unsolicited advertisements for contraceptives, holding that "[b]ecause the proscribed information 'may bear on one of the most important decisions' parents have a right to make, the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest."[82]

The government's interest, which the court said "is undoubtedly substantial,"[83] was "to aid parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control."[84] The Court held, however, that, "[a]s a means of effectuating this interest," the statute "fails to withstand scrutiny."[85] The Court explained:

> We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailboxes. Under 39 U.S.C. § 3008, parents can also exercise control over information that flows into their mailboxes.[86] And parents must already cope with the

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[80] 463 U.S. 63, 74 (1983), quoted with approval in 1994 in *Turner Broadcasting*, *supra* note 22, at 2457.

[81] *Id.* at 74 (emphasis supplied by the Court). *See*, text accompanying note 18, *supra*.

[82] *Id.* at 75.

[83] *Id.* at 73. Because the speech at issue in the case was commercial speech, which receives less than full First Amendment protection, the Court, to uphold the restriction, had to find the governmental interest the restriction furthered to be "substantial," but was not obliged to find it "compelling."

[84] *Id.* at 71.

[85] *Id.* at 73.

[86] Section 3008 provides that a person who receives in the mail "any pandering advertisement which offers for sale matter which the addressee in his sole discretion

(continued...)

> multitude of external stimuli that color their children's perception of sensitive subjects.[87] Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such stimuli.
>
> This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children."[88]

We have quoted from *Bolger* at length because its reasoning obviously could be cited in support of an argument that the Internet provisions of the CDA are unconstitutional. Such an argument would seek to demonstrate that the factual situation with respect to the Internet is closer to the situation in *Bolger* than the situations in *Pacifica* and *Denver Consortium*. Do parents, as in *Bolger*, already "exercise substantial control" over their home computers? Is material accessible by children on home computers already available to them through a "multitude of external stimuli"?[89] Or is the Internet so pervasive in the home and so accessible to children as to make broadcasting and cable no longer "unique"?

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[86](...continued)
believes to be erotically arousing or sexually provocative" may request the Postal Service to issue an order directing the sender to refrain from further mailings to the addressee, and the Postal Service must do so. If the Postal Service believes that a sender has violated such an order, it may request the Attorney General to apply to a federal court for an order directing compliance. The language of § 3008 is broad enough to apply to any unwanted advertisement, regardless of content, as the Supreme Court indicated in upholding the constitutionality of the statute. Rowan v. Post Office Department, 397 U.S. 728 (1970).

[87] "For example, many magazines contain advertisements for contraceptives. . . . Similarly, drugstores commonly display contraceptives. And minors taking a course in sex education will undoubtedly be exposed to the subject of contraception." (This is footnote 26 of the Court's opinion.)

[88] *Bolger*, 463 U.S., at 73.

[89] This may depend upon which material one has in mind; compare, for example, the seven dirty words broadcast in *Pacifica*, which children may hear regularly on the street (or when their parents are behind the wheel), with images of (at-least-partially) nude people, which children may regularly view on magazine covers in convenience-store newsracks, with images of hard core sexual acts, which are less frequently available to children.

104th and 105th CONGRESS LEGISLATION TO AMEND THE COMMUNICATIONS DECENCY ACT

Comstock Clean-up Act of 1996 (S. 1592, H.R. 3057, 104th Congress). This bill would have repealed the restrictions on abortion-related material discussed on page 7 of this report. Specifically, it would have repealed 18 U.S.C. § 1462(c), as well as the second through fifth paragraphs of 18 U.S.C. § 1461, which concern the mailing of abortion-related material, and which were not amended by the CDA.

S. 1567, 104th Congress (which had no formal title). This bill would have simply repealed, retroactively to the enactment of the CDA, the amendments made by § 502 of the CDA to 47 U.S.C. § 223. These constitute all the obscenity and indecency restrictions on computer transmissions -- both by telecommunications devices and interactive computer services.

Online Parental Control Act of 1996 (H.R. 3089, 104th Congress). Section 2 of this bill would have substituted "harmful to minors" for "indecent" in 47 U.S.C. §§ 223(a)(1)(B) and 223(d); these are the provisions that restrict indecent communications to minors by telecommunications devices and interactive computer services. It would not, however, have required that prohibited material actually be harmful to minors. This is because its definition of "harmful to minors" was equivalent to the *Miller* obscenity test, altered to be especially applicable to minors, and the *Miller* test does not require that material be harmful to be obscene.

Section 2(c) of the bill would have defined "harmful to minors" to mean --

> sexually explicit matter which meets all of the following criteria:
>
> > (A) Considered as a whole, the matter appeals to the prurient interest of minors.
> >
> > (B) The matter is patently offensive as determined by contemporary local community standards in terms of what is suitable for minors.
> >
> > (C) Considered as a whole, the matter lacks serious literary, artistic, political, educational, or scientific value for minors.

This definition thus would not include some material that could be deemed indecent under the CDA, namely material that, although depicting or displaying in a patently offensive manner sexual or excretory activities or organs, does not appeal to the prurient interest or *does* have serious literary, artistic, political, educational, or scientific value to minors. In other words, such material might be indecent under the CDA but not "harmful to minors" under H.R. 3089.

Section 3 of the bill would have added to § 223(e) new defenses to prosecutions under §§ 223(a)(1)(B) and (d) (existing defenses are discussed on pages 8-9, above). It would have made it a defense that the defendant "has, in good faith -- (i) labeled a communication as inappropriate for minors, (ii) placed the communication in a segregated access site identified as inappropriate for minors, or (iii) otherwise established a mechanism," and that the labeling, segregation, or other mechanism enables the communication to be automatically blocked or screened.

Section 3 of the bill also provided that the defenses available under § 223(e), as amended, would serve as defenses to civil and criminally liability under state law as well as under the CDA.

None of the above bills was enacted.

S. 213, 105th Congress (which has no formal title). This bill would repeal 47 U.S.C. § 223(a) and (d) through (h), which are the CDA provisions restricting obscene and indecent material on telecommunications devices and interactive computer services. It would also restore the provisions on obscene and harassing phone calls that were in effect before the CDA.