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# PRODIGY: IT MAY BE MANY THINGS TO MANY PEOPLE, BUT, IT IS NOT A PUBLISHER FOR PURPOSES OF LIBEL, AND OTHER OPINIONS

MARC JACOBSON\*†

Growing up, my parents always told me that I should be a responsible adult. When I became an executive in an on-line company, I became enormously responsible. Not only was I responsible for my family, a mortgage, children, future college expenses, and future law school expenses, but I am now responsible for keeping everyone else's children away from indecent content and maintaining content that meets the standards of thousands of communities from New York to Salt Lake City.<sup>1</sup> I am responsible for keeping all potentially libelous comments from reaching the public's eyes and ears and for keeping infringing material off my service, as well as the worldwide WEB.<sup>2</sup> I am responsible for preventing consumers from falling for on-line stock scams, and for

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† I would like to acknowledge the assistance of Brian Ek, the former Vice President of Government Relations at Prodigy Services Company.

<sup>1</sup> See *Miller v. California*, 413 U.S. 15, 24-25 (1973) (establishing guidelines for trier of fact to determine whether work is "obscene" in applying contemporary community standards); see also *People v. Calbud*, 49 N.Y.2d 398, 393 (1980) (holding that contemporary standards of communities throughout New York State were proper measure of what was "obscene" within meaning of New York Penal Law).

<sup>2</sup> But see 17 U.S.C. § 111 (1995) (extending general exemption from actions for copyright infringement to secondary transmitters that act solely as passive carriers that have no control over content or selection of transmissions); but see also *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1362, 1369, 1372 (N.D. Cal. 1995) (reasoning that Internet service provider's were analogous to owner of publicly used copy machine and noting that billions of bits of data were impossible to police for infringement).

making sure no-one intrudes on a consumer's cyberspace privacy.<sup>3</sup> You might say I am so busy that I am lucky to be here.

It seems today that when you are an on-line service provider, a small town bulletin board operator, or even the owner of a personal WEB page, you are your brother's keeper.<sup>4</sup> You are his parent, his child's parent, his financial advisor, his copyright lawyer, and his personal policeman.<sup>5</sup> This is the expectation of people in this country for the people who are involved with the worldwide WEB.

In today's society, responsibility equals liability. Failing to do those things that I just mentioned, could result in a 200 million dollar lawsuit like *Stratton Oakmont*,<sup>6</sup> or two years in prison under the Communications Decency Act.<sup>7</sup>

The important question for on-line service providers today is who is liable and for what; we at Prodigy do not know. The landscape is a mess, and the trail signs are pointing in many different directions.<sup>8</sup> Today, I will offer you some opinions, but in reality, that is all they are—my opinions.

<sup>3</sup> See 18 U.S.C. § 2510 (1995) (prohibiting interception or disclosure of contents of oral, wire, and electronic communications by service providers, government, and public at large); cf. 42 U.S.C. § 2000aa (1995) (prohibiting law enforcement from executing search warrants against those involved in dissemination of information to public without first using less intrusive means).

<sup>4</sup> Cf. *Smith v. United States*, 431 U.S. 291, 315-16 (1977) (Stevens, J., dissenting) (reasoning that ascertainment of obscenity standards is too subjective to identify criminal conduct or delineate boundary of First Amendment).

<sup>5</sup> See, e.g., J.E. Faucette, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1182 (1995) (noting that Electronic Communications Privacy Act of 1986 will leave gaping hole in attempts to censor sexually explicit material because user e-mail may not be accessed without consent).

<sup>6</sup> *Stratton Oakmont v. Prodigy*, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995). Plaintiff, an investment firm, brought a defamation suit against Prodigy for publishing allegedly defamatory statements on its "Money Talk" computer bulletin board in October 1994. *Id.* at \*1. The Court decided that Prodigy was a publisher for the purposes of plaintiff's libel claim. *Id.*

<sup>7</sup> Communications Decency Act of 1996, 104 Pub. L. No. 104, § 502, 110 Stat. 56. Section 502 of the Act provides that any person who knowingly uses any interactive service to display to persons under the age of 18 anything that in context depicts or describes in terms patently offensive by community standards sexual or excretory organs shall be fined or imprisoned not more than two years. *Id.* See generally 104 Pub. L. No. 104, §§ 501-602, 110 Stat. 56 and scattered other sections within *The Telecommunications Act of 1996* (enacting sweeping federal telecommunications regulation).

<sup>8</sup> See, e.g., S.A. Schiff, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 732 (1996) (noting that as 21st Century approaches courts face formidable task of rethinking outmoded free speech and obscenity doctrines to comport with ever-evolving cyberspace/Internet technology).

Part of the confusion stems from what the on-line services are and are not, and because what the on-line services are is rapidly changing, what they are today will not be what they are this afternoon.<sup>9</sup> We are publishers: we create our own content, similar to Time-Warner, and we put it on commercial services and on the WEB.<sup>10</sup> We are the Post Office: we deliver millions of messages by E-mail every day, and I do mean millions.<sup>11</sup> We are the telephone company: we link people in real time chat, with instant messaging and with real time voice coming on strong as well, much to the chagrin of the telephone companies.<sup>12</sup> We are the town square: we allow people to voice their opinions in free flowing bulletin boards.<sup>13</sup> We are the library: we assemble interesting Internet content by subject, connecting that content through hyper links, which can be called the Internet's Dewey Decimal System, or a speed dial connection or any one of a number of a things.<sup>14</sup> Finally, we are straight pipe: we link people directly to the Internet where they go out into cyberspace and they perform a variety of different tasks.<sup>15</sup>

<sup>9</sup> See, e.g., *id.* at 732-34. Internet's information superhighway is widely viewed as the communications medium of the future. *Id.* Estimates indicate that the number of users will reach 100 million by 1998 and about one billion by early next century. *Id.*

<sup>10</sup> See, e.g., Faucette, *supra* note 5, at 1172 (asserting that computer bulletin boards have attributes associated with publishers, secondary publishers, and common carriers).

<sup>11</sup> See F.C. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 36 (1995) (estimating that on-line user volume is growing by 750,000 per month); see also R.F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obsecenity Laws to On-line Communications*, 29 GA. L. REV. 1075, 1102-03 (1995) (suggesting that commercial access providers such as Prodigy may be treated as common carriers).

<sup>12</sup> See, e.g., D.K. McGraw, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 RUTGERS COMPUTER & TECH. L.J. 491, 504 (1995) (asserting that network service providers are analogous to telephone companies which are not liable for content of communications they carry).

<sup>13</sup> See, e.g., E.C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 250 (1987) (citing policy reasons why courts afford more protection to common carriers including that they protect public's right to continuous communication service and operate as conduit for access for everyone).

<sup>14</sup> See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (comparing Internet providers to traditional news vendors such as public library, book stores, and newsstands); see also D. Gallagher, *Free Speech on the Line: Modern Technology and the First Amendment*, 3 COMM.LAW CONSPICUOUS 197, 198 (1995) (equating on-line services with libraries and bookstores).

<sup>15</sup> See C. Meyer, *Reclaiming Sex From the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 2008 n.108 (1995) (noting that Internet's original *raison d'être* was to ensure that severed link in connection could easily be circumvented by rerouting to prevent outages due to nuclear or terrorist attacks); see also Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1063, 1063 n.3 (1994) (noting that term "information superhighway" was first popularized by then Senator Al Gore).

The problems occur when legislators, people, and courts do not understand the whole spectrum of roles that we play as on-line service providers, and they assign the wrong role to a particular function of our business.<sup>16</sup> Alternately, they decide on their own definition, as did our friend Stewart Ain<sup>17</sup> in Nassau County, and as we saw with the Telecom legislation<sup>18</sup> and its insistence on brandishing a broadcast model on the Internet.

One of the clearest examples of mistaken identity, we feel, is *Stratton Oakmont*.<sup>19</sup> This is a case where an investment firm sued Prodigy for 200 million dollars for allegedly libelous comments posted on the Prodigy Money Talk bulletin board.<sup>20</sup> The plaintiff claimed that we were a publisher and should be responsible for the communication of third parties.<sup>21</sup> The Judge agreed in the first round,<sup>22</sup> finding that we actually screened the postings on our bulletin boards. In fact, at that time, we did not.<sup>23</sup> Nevertheless, the Court found that we did, and therefore, we were found liable.<sup>24</sup>

<sup>16</sup> See *Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995); cf. 17 U.S.C. § 111 (1995). This section of the Copyright Act provides an exemption from liability from copyright infringement for cable operators who transmit images created by others. *Id.* It is posited that courts are beginning to recognize that Internet operators should be similarly protected.

<sup>17</sup> See *Stratton Oakmont, Inc., v. Prodigy, Inc.*, 1995 WL 323710, \*1, \*1 (N.Y. Sup. Ct. May 24, 1995). Justice Stewart Ain presided over the *Stratton Oakmont* case in the Supreme Court in Nassau County. *Id.* Justice Ain reasoned that Prodigy made a conscious choice to assume editorial control and mandated that Prodigy be viewed as a publisher as opposed to a carrier. *Id.* at \*5.

<sup>18</sup> The Telecommunications Act of 1996, 104 Pub. L. 104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). The language of the Telecommunications Act has come under attack as being overbroad and not narrowly tailored to achieve the government's compelling interest of protecting children. See generally D. Andreano, *Cyberspace: How Decent is the Decency Act?*, 8 ST. THOMAS L. REV. 593, 594 (1996).

<sup>19</sup> *Stratton Oakmont*, 1995 WL 323710, at \*1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*2.

<sup>22</sup> *Stratton Oakmont, Inc. v. Prodigy*, 1995 WL 323710, \*1, \*4-\*5 (N.Y. Sup. Ct. May 24, 1995). The Court held that Prodigy was a publisher for two reasons: first, Prodigy conveyed to members and the public that it controlled the content of its computer bulletin boards. *Id.* Second, Prodigy maintained control by means of an automatic software screening program in accordance with company guidelines, which guidelines required "board leaders," whom were held to be Prodigy's agents, to enforce them. *Id.* at \*1, \*4-\*5, \*7. The Court distinguished another leading Internet case decided in federal court, *Cubby v. CompuServe*, noting that the key difference between CompuServe's computerized database and Prodigy's on-line service was that, unlike Prodigy, CompuServe had no opportunity to police information that was posted. *Id.* at \*4 (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991)).

<sup>23</sup> See *Stratton Oakmont*, 1995 WL 323710, at \*4. Prodigy was said to have actively engaged in the deleting of notes from its bulletin boards on the basis of "offensiveness" and "bad taste." *Id.*

<sup>24</sup> *Id.* at \*5.

We made a motion for renewal and re-argument, a unique motion in New York jurisprudence, requesting the Court to reconsider and reverse its prior decision.<sup>25</sup> The Judge refused.<sup>26</sup> Although he did indicate in his decision that the facts presented on the second round were "drastically different" than the facts which formed the basis of his first decision,<sup>27</sup> he let the first decision stand.<sup>28</sup>

In reality, Prodigy does not screen material on the bulletin boards. We have what we call the "George Carlin screener" that screens for the seven dirty words<sup>29</sup> and their translation into most of the major languages. We block the postings which contain one of those words by the technology explained to you this morning.<sup>30</sup> There are words that, interestingly, are not screened. For example, you can call someone a piece of a Shitake mushroom, and we will let it go through because it is a separate word.

The case is still pending in part in the Appellate Division, but the case was settled in part when we decided to take a more aggressive stance, and suggested that perhaps truth was a defense to the allegedly libelous posting. Stratton Oakmont was under investigation by the Securities and Exchange Commission at the time for allegedly operating boiler room tactics and for all kinds of other acts which the Commission does not look upon too kindly.<sup>31</sup>

<sup>25</sup> *Id.* at \*1. The Court construed Prodigy's motion as only a motion for renewal because it determined that Prodigy wished to admit new evidence to the Court rather than re-argue evidence admitted prior to the Court's first decision. *Id.* at \*2.

<sup>26</sup> *Id.* at \*3.

<sup>27</sup> See *Stratton Oakmont, Inc. v. Prodigy, Inc.*, 1995 WL 323710, at \*1, \*1 (N.Y. Sup. Ct. May 24, 1995) (noting that there is lack of guidance concerning Internet prior to its decision and finding that it is developing area in which law has not kept pace with technology).

<sup>28</sup> See *id.* The Court denied Prodigy's motion for renewal because Prodigy failed to submit an acceptable excuse for its failure to include newly submitted evidence in the original motion papers. *Id.* at \*2-\*3. The Court felt that the new facts were well known to Prodigy at the time of its original application. *Id.*

<sup>29</sup> See *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 729 (1978). In this case, commonly known as the "seven dirty words" case, the United States Supreme Court held that the F.C.C. could censure a radio station's broadcast of comedian George Carlin's "Filthy Words" act in the afternoon. *Id.* This case struggled with the government's ability to define indecent speech as that which does not conform to accepted standards of morality. *Id.* at 740. The Court ultimately held for the government but it was noted that indecency is largely a function of the context in which it is presented. *Id.* at 744.

<sup>30</sup> See M. Rimm, Survey, *Marketing Pornography on the Information Superhighway*, 83 GEO. L.J. 1860, 1861 (1995) (stating that research labs are developing software that might assist network operators in scanning for images that indicate nudity and other sexually explicit content).

<sup>31</sup> See Diana B. Henriques, *S.E.C. Wins Big Round Against Stratton Oakmont Firm*, N.Y. TIMES, Jan. 12, 1995, at D2 (discussing Stratton Oakmont's defense of suit by Securities and Exchange Commission ("SEC") and mentioning libel suit against Prodigy for com-

The posting on the bulletin board which was allegedly libelous stated that Stratton Oakmont committed fraud in connection with the sale of stock.<sup>32</sup> As a result of this stance, we have, by and large, settled the case except with respect to our reservation of the right to appeal the decision. We will pursue the appeal because its outcome will affect other cases pending against us.<sup>33</sup>

The next area where there is mistaken identity or liability is the Communications Decency Act,<sup>34</sup> which is part of the telecommunications legislation that was passed earlier this year. Congress bought an image, promulgated very much, in our view, by the Christian Coalition, that on-line operators and Internet operators were the same as TV networks with full control over what was transmitted through the service.<sup>35</sup> They must have looked at a computer and saw that it had a screen, and then they looked at a television and saw that it had a screen as well, and concluded that the computer requires the same kind of legislative regulation.

The problem is that even with this legislation we still do not know what "indecent"<sup>36</sup> or "patently offensive" means,<sup>37</sup> and we do

ments posted accusing firm of violating securities laws); see also Diana B. Henriques, *Market Place: Stratton Oakmont Still Disputes SEC Settlement's Terms*, N. Y. TIMES, Dec. 16, 1994, at D6 (discussing SEC action against Stratton Oakmont); *SEC Wins TRO Against Stratton Oakmont For Failure to Comply With Undertakings*, 27.1 SEC. REG. & L. REP., Jan. 6, 1995, at 16 (same); *SEC Wins Injunction in Case Charging Stratton Oakmont With Non-Compliance*, 27.3 SEC. REG. & L. REP., Jan. 20, 1995, at 127 (same).

<sup>32</sup> *Stratton Oakmont, Inc. v. Prodigy, Inc.* 1995 WL 323710, at \*1, \*1 (N.Y. Sup. Ct. May 24, 1995) (noting that allegedly libelous material included allegations that Stratton Oakmont and Daniel Porush, Stratton's President "committed criminal and fraudulent acts in connection with initial public offering of stock on Solomon-Page Ltd").

<sup>33</sup> *But see* Telecommunications Act of 1996, Pub. L. No. 104, § 509, 110 Stat. 56 (1996). This issue appears to have become moot because § 509 of the Telecom legislation provides that no provider or user of an interactive computer service will be treated as a publisher of content provided by others. *Id.*; *but see also* 17 U.S.C. § 230(c) (1995). Similarly, this statute prohibits liability for actions to restrict access to what is considered objectionable material whether or not such material is constitutionally protected. *Id.*

<sup>34</sup> Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56, §§ 501-602 (and various other scattered sections of the Act) (1996). The Communications Decency Act was enacted as part of the Telecommunications Act of 1996. *Id.*

<sup>35</sup> See 141 CONG. REC. S8337 (daily ed., June 14, 1995) (statement of Sen. Exon) (producing letter from Christian Coalition and urging passage of CDA because children's access to pornography on Internet necessitates congressional action); see also L.J. McKay, *The Communications Decency Act: Protecting Children From On-Line Indecency*, 20 SETON HALL LEGIS. J. 463, 485 (1995) (arguing that current regulations in combating problem of children accessing pornography on Internet are ineffective and advocating necessity of Christian Coalition backed Communications Decency Act).

<sup>36</sup> See *Denver Area Educ. Telecomm. Consortium v. F.C.C.*, 116 S. Ct. 2374, 2381 (1996) (upholding government's latest efforts at banning indecency from cable television and noting that government's definition of indecency is not overbroad); see also *F.C.C. v. Denver Area Educ. Telecomm. Consortium, Inc.*, 56 F.3d 105 (D.C. Cir. 1995) (publishing lower court decision in case above); *Dunlop v. U.S.*, 165 U.S. 486, 488 (1897) (discussing inde-

not know whether the good faith efforts we have taken to install access controls will constitute a good faith defense. For example, we have installed access controls to chat rooms and bulletin boards and controls on access to the worldwide WEB. Later this year, we will install Cyber Patrol which will block access to certain URLs and limit it to certain pre-selected sites.

Recently, the person who is in charge of content at my company asked me to explain which areas were indecent and which were patently offensive. I cannot and do not want to do that. What I have agreed to do is give him a synopsis of the law, "This is what the law says is indecent,<sup>38</sup> this is what the law says is patently offensive,<sup>39</sup> now you can try to figure it out, because we just cannot tell what constitutes what." The potential for liability is enormous.

The same scenario is playing out in the copyright area as well. The on-line and Internet operators are seen as publishers with the ability and responsibility to police the bulletin boards, to police the net, and to screen content containing infringing material.<sup>40</sup> Some publishers go so far as to contend that every on-line provider, or every WEB page creator, including the 50,000 people

agency in the context of publications); BLACK'S LAW DICTIONARY 768-69 (6th ed.) (defining traditional concepts of indecency as public displays of naked persons, exhibition of obscene books and prints and other actions which contravene social mores); Paul M. Barret, *Cable Ruling May Portend Internet Curbs*, WALL ST. J., July 1, 1996, at B1, B5. (discussing Supreme Court's decision in *Denver Area Educ.*).

<sup>37</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that States may use community standards to determine what material is obscene in that if average person applying contemporary community standards would find that work, taken as whole, is prurient, patently offensive, and lacks serious literary, artistic, political, or scientific value, it is obscene).

<sup>38</sup> See *ACLU v. Reno*, 929 F. Supp. 824, 856-58 (E.D. Pa. 1996) (reasoning that term "indecent," as used in Communications Decency Act, is vague, and that Due Process requires more than one vague word in defining criminal conduct).

<sup>39</sup> See *Miller*, 413 U.S. at 42-25 (holding that whether work is "obscene" can be determined by, *inter alia*, applying community standards to find that work depicts or describes in "patently offensive" way sexual conduct specifically defined by applicable state law).

<sup>40</sup> See *Stratton Oakmont, Inc. v. Prodigy, Inc.* 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995). A New York state court in *Stratton Oakmont* reasoned that Prodigy chose to assume editorial control over the content of what its users posted on bulletin boards and that this mandated that Prodigy be viewed as a publisher as opposed to a distributor. *Id.* at \*5. *But see* Telecommunications Act of 1996, Pub. L. No. 104, § 509, 110 Stat. 56 (1996). At the time the Author spoke at St. John's Law School, Congress had not yet enacted the Telecom legislation. Section 509 of the Telecom legislation provides that no provider or user of an interactive computer service will be treated as a publisher of content provided by others. *Id.*; *but see also* *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991). In *Cubby*, a federal court concluded that CompuServe was a distributor, not a publisher, because it found that it would be impossible for it to monitor every publication for potentially libelous material. *Id.*



that have created personal WEB pages on Prodigy, should be required to check out the copyright status of every item on every single page before linking to it, or face the consequences.<sup>41</sup>

The issues of privacy have also been addressed here today. Prodigy, as has been mentioned before, is truly a leader in the privacy area. We are the only provider which does not sell our member lists. We do use information that we collate from our members using our service, but we do not sell our lists or information to anyone else.

In general, I believe that the liability landscape will work out as follows: The Communications Decency Act will fix, or effectively fix, the libel and defamation issue as has been discussed.<sup>42</sup> As a result, *Stratton Oakmont* type liability will probably not occur again. I believe that the lawsuit in Philadelphia mentioned in this morning's session that challenges the Communications Decency Act as unconstitutional in violation of the First Amendment<sup>43</sup> will be successful to some degree and will force the law back to Congress.<sup>44</sup> From there, we will see two things. One is the statute will narrow the standard regarding indecency on the Internet.<sup>45</sup> We need to differentiate what is harmful to minors as opposed to what

<sup>41</sup> See Karen S. Frank, *Potential Liability on the Internet*, in CABLE TELEVISION LAW 1996, at 417, 445 (PLI Pat., Copyrights, Trademarks, & Prop. Course Handbook Series No. G4-3962, 1996) (positing that Internet providers should take steps to insure that they will not be found to have knowledge of what is posted on their services, except, at most, final decision rights). *But see* Dworkin v. Hustler Magazine, 611 F. Supp. 782, 786 (D. Wyo. 1985) (holding that unless distributor has express notice, it is under no duty to examine publications it offers for sale for potential defamation).

<sup>42</sup> See 18 U.S.C. § 2510 (1995) (prohibiting interception or disclosure of contents of oral, wire, and electronic communications by service providers, government, and public at large); see also 42 U.S.C. § 2000aa *et seq.* (1995) (prohibiting law enforcement from executing search warrants against those involved in dissemination of information to public without first using less intrusive means).

<sup>43</sup> See The Telecommunications Act of 1996, 104 Pub. L. No. 104, § 509, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). At the time of this writing, the Author's prediction turned out to be correct. *Id.*

<sup>44</sup> U.S. CONST. amend I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . . . *Id.*"

<sup>45</sup> *ACLU v. Reno*, 929 F. Supp. 824, 835-55 (E.D. Pa. 1996). A three judge panel of the District Court of Eastern Pennsylvania held that provisions in the Communications Decency Act of 1996 were unconstitutional because they violated the First Amendment protection of free speech. *Id.*; see also *Shea v. Reno*, 930 F. Supp. 916, 942 (E.D.N.Y. 1996). In *Shea*, a panel of judges also held that the Communications Decency Act of 1996 was unconstitutionally overbroad due to its complete ban on constitutionally protected speech between adults. *Id.*

<sup>46</sup> See, e.g., Frank, *supra* note 41, at 464 (stating that civil libertarians have attacked CDA provisions, that criminalize distribution of indecent (instead of obscene) materials, for being overbroad and thereby chilling protected speech).

is indecent or patently offensive.<sup>47</sup> In addition, there will be a PICS type defense. PICS is an acronym for "Platform for Internet Content Selection" which is a technology base that allows a third party rating service to be overlaid on top of it.<sup>48</sup> The Rating can come from RSAC, which is the video game association, or Good Housekeeping, or the Motion Picture Association, or the Church, or the Christian Coalition, and the user will be able to plug that rating system onto PICS and be able to select their content.<sup>49</sup> We have selected Cyber Patrol for Prodigy users to do something similar.<sup>50</sup> Site owners with adult content will have to self rate. They will have to indicate that the area contains adult content which may not be proper for children.<sup>51</sup>

To me, however, copyright is the real wild card in this entire area. I personally believe that unless significant changes are made to the copyright law, the on-line service companies, the Pathfinders, the large Internet based WEB sites, can virtually be put out of business.<sup>52</sup>

Extending copyright protection to the transmission of digitized content raises a lot of concerns, but eventually there will be a process by which copyright owners can report infringing material to on-line service providers and WEB site owners, and we will be required to remove content or links promptly. In this regard, however, there is a fundamental issue in that copyright owners, not

<sup>47</sup> Cf. *Butler v. Michigan*, 352 U.S. 380, 382-83 (1957) (holding that Michigan statute which criminalized publishing materials that had deleterious effect on children was unconstitutional overbroad because it reduced population of Michigan to reading only that which was fit for children).

<sup>48</sup> See, e.g., Paone, *News Brief*, 7 INTERNETWORK no.7, at \*1 (July 1, 1996) (noting that PICS is "a formalized checklist that establishes the extent of conformance to standards displayed by the vendor").

<sup>49</sup> See Paone, *supra* note 48, at \*1. PICS was developed by MIT's World Wide Web Consortium and it is being adopted by vendors including America On-line, AT&T, CompuServe, Microsoft, Netscape and of course, Prodigy. *Id.* PICS allows parents of children using the Internet, or corporations or other interest groups to develop ratings systems for Internet content. *Id.*

<sup>50</sup> See *M2 Presswire, Prodigy Licenses Cyber Patrol to Enhance Parental Controls for Internet Chat*, M2 COMMUNICATIONS, Feb. 26, 1996 (describing Cyber Patrol and noting that it regularly posts names of sites inappropriate for children, allows parents to block children's access to those sites and UseNet groups, and was developed on premise that individual users have content control).

<sup>51</sup> *But see* H. Wolinsky, *Parents Have Options to Block On-line Porn*, CHI. SUN TIMES, June 16, 1996, at 16 (arguing that burden of policing Internet content for material intended to exploit children should not rest solely on parents).

<sup>52</sup> See, e.g., C.J. Moorehead, Symposium, *Protecting Copyright Will Make the Internet User Friendly to Authors and Consumers Alike*, INSIGHT MAGAZINE 25, Jan. 15, 1996 (discussing technical evolution of Internet and arguing that copyright laws must also evolve to protect valuable works of authors on Internet).

Time-Warner, are taking a position that hyperlinking itself constitutes an infringement.<sup>53</sup> For instance, if I link to a page, and that page has unauthorized content on it, the argument continues that the mere fact that I have put that link in blue on my page creates liability on me for copyright infringement.<sup>54</sup> If you consider the impact of *Playboy v. Frena*,<sup>55</sup> it starts looking grim.<sup>56</sup>

Last night I heard that the National Music Publishers Association does not believe that copyright legislation will be presented this year. This is probably correct, however, there will be other activities in the copyright arena.

There is a lot happening here and it is happening quickly. I am hopeful that Congress, business, and the public will become more familiar with the Internet, how it works, and the spectrum of services that are offered by an on-line service provider. Hopefully, we will see attitudes and laws that reflect the reality of the business.

Thank you.

<sup>53</sup> See, e.g., G. Borzo, *Follow the Blue Brick Road*, 39 AM. MED. NEWS 69, n.26 (July 8, 1996) (noting that hyperlink is mechanism from darting from site to site on World Wide Web and gives user ability to narrow or broaden search for related material).

<sup>54</sup> See *Bensusan Restaurant Corp. v. King*, 1996 WL 509716 (S.D.N.Y.). In *Bensusan*, a New York court dismissed a trademark suit brought by the Blue Note jazzclub in New York against a blues club of the same name in Missouri on jurisdictional grounds. *Id.* at \*6. The Court held that creating a web site was like placing a product in the stream of commerce, however this fact alone did not give the site any impact in New York that was greater than in any other state. *Id.* at \*5. Counsel for plaintiffs argued that jurisdiction was proper because the Missouri club's web site provided hyperlinks to the New York "Blue Note" web site. *Id.*; see also Borzo, *supra* note 53, at 69.

<sup>55</sup> *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (1993) (holding computer bulletin board operator liable for copyright infringement).

<sup>56</sup> See *id.* In this case, the defendant, an operator of a computer bulletin board, was held to have infringed Playboy's copyright to certain photographs that appeared in Playboy when some of the defendant's customers uploaded the photographs onto the bulletin board and others downloaded them on to their personal computers. *Id.* at 1554-59. This was the decision although the defendant claimed that he did not take part in, authorize, nor witness the uploading or downloading of Playboy's photographs. *Id.*; see also Telecommunications Act of 1996, Pub. L. No. 104, § 509, 110 Stat. 56.