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Accidents On the Information Superhighway: On-Line Liability And Regulation

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I. Introduction

A. Evolution of the Internet

B. Constitutional Issues

II. Case Law: Liability for On-Line Access Providers

A. *Cubby, Inc. v. CompuServe Inc.*

B. *Stratton Oakmont, Inc. v. Prodigy Servs.*

C. What Are the Implications of *Cubby* and *Prodigy*?

III. Attempts to Legislate and Regulate the On-Line Universe

A. Internet Legislation

B. Setting the Stage: History of Communications Regulation

C. Congressional Actions to Regulate the Internet

1. The Original Communications Decency Act

2. The Revised and Adopted Communications Decency Act

3. The Cox-Wyden Bill

D. State Actions to Regulate the Internet

1. Virginia's Ban On Internet Child Pornography

IV. Is Our Existing Framework of Laws Sufficient?

A. Collisions in Cyberspace

B. Potential Conflicts

C. An International Perspective on Internet Challenges

D. The Future of Internet Regulation?

V. Conclusion

I. Introduction

{1} In one way or another, the Internet has affected or will affect our lives in a profound fashion.[1] The Internet has fundamentally changed the way society works and plays by providing an inexpensive medium to obtain information and communicate with others. The current generation of children will be educated through computer communication, rather than from the confines of a dusty library with outdated books. However, the benefits of rapid Internet development have also opened a Pandora's box of legal issues and concerns which merit careful consideration.

{2} With roots in over 160 countries, and without a centralized authority, many now consider the Internet the last free marketplace of ideas. Civil libertarians and on-line activists are currently fighting a Sisyphean battle to keep the Internet free of all constraints. Such regulation threatens to curtail the expansion of the Internet by imposing formidable civil and criminal liabilities for negligent or allegedly illegal on-line activities.

{3} This comment examines recent efforts by legislators, regulators and the judiciary to tame the seemingly untamable on-line universe. First, it considers the prominent legal cases concerning the liability of on-line access providers for electronic transmissions. Second, it examines congressional and state legislative efforts aimed at regulating on-line activities. Finally, it will analyze whether the Internet is a proper candidate for regulation, and to what extent our existing framework of laws can be adequately used to prosecute illegal on-line activities.

A. Evolution of the Internet

{4} The Internet began innocently in the late 1960's as a government funded computer networking experiment.[2] First named ARPANET,[3] the Department of Defense created a system of linked computer networks impervious to any massive disturbance, even nuclear attack.[4] In essence, the Pentagon enlisted computer scientists to build a system that would allow an unlimited number of computers to communicate without any single computer serving as the proverbial "traffic cop." [5] Because the Department of Defense was concerned that a centrally managed computer network would be too vulnerable to nuclear attack, a decentralized system was necessary.[6]

{5} Ultimately, the Department of Defense succeeded in creating a computer system which could exchange data from remote locations.[7] Although ARPANET started with just a handful of locations, it was quickly

recognized as a powerful research and communications tool, and was expanded to include universities and corporations.[8] As ARPANET grew, it was refined, improved and later became known as the Internet.

{6} Today, over twenty-five years after the inception of ARPANET, the Internet stands tall with 45,000 networks wired and accessing more than three million computers.[9] It provides users with the visual advantages of television and the interactive benefits of a telephone system. It is this perfect blend of sight, substance, and access which makes the Internet so appealing to its users and the private sector.

{7} The Internet can be distinguished from commercial on-line access providers, such as CompuServe, Prodigy and America Online,[10] which are isolated services that typically offer limited Internet access.[11] The Internet is comprised of networks, each of which "represents a group of computers already hooked together." [12] The individual computers which form a network include government agencies, colleges, corporations and private individuals.[13]

{8} This short history would be incomplete without briefly observing that until recently, the vast expanse of information available on the Internet was difficult for novices to explore and obtain. This once arcane system was simplified by the development of the World Wide Web[14] and a browser program called Mosaic. These advances quickly created a user-friendly and graphically oriented way to flesh out information on the Internet.[15] It is from these simple beginnings that the following legal issues have arisen.

B. Constitutional Issues

{9} To what extent does regulation of the Internet infringe upon on-line users' constitutional rights? Clearly, Internet users must be afforded their First Amendment rights to free speech coupled with a Fourth Amendment right to some freedom from government intrusion. However, the rapid growth of the Internet has left our current system of laws lagging behind, allowing abuses to occur.[16] Some of these abuses are the result of Internet "con artists," while others have been perpetrated by overzealous legislators and law enforcement officials trouncing upon individual's constitutional rights.

{10} In 1969, the Supreme Court of the United States held that speech could not be punished unless it was "an incitement to imminent lawless action." [17] This same standard must be applied to Internet transmissions. "Words sent over the Internet may inspire or incite, but the nexus between the words and subsequent action is far more attenuated than any case in which the [Supreme] Court has approved criminal sanction" [18] For example, falsely shouting 'fire' in a crowded movie theater is probably far more threatening than posting it on the Internet.[19] Arguably, many types of speech, some of which may be provocative in the physical world, may be far less threatening when appearing on the Internet and thus, less deserving of censure.[20]

{11} One particular area of recent concern is Internet access to bomb-making instructions.[21] At issue is whether these recipes for destruction are merely for informative purposes, or are designed to incite others to imminent lawless action. If the government cannot ban books on bomb-making, it seems reasonable that it should not be able to outlaw similar publications appearing on the Internet. Nevertheless, many legislators such as Senator Dianne Feinstein (D-Calif.), remain opposed to such on-line publications, arguing that such material is "incendiary, not academic." [22]

{12} Also exemplary of these privacy issues is the plight of Arnaldo Lerma.[23] Lerma, a Virginia resident, posted numerous court documents on the Internet concerning the California based Church of Scientology. In response, the church filed a copyright infringement suit against Lerma and his Internet access provider. Ultimately, federal marshals and church lawyers obtained warrants, entered his home, and removed all

equipment which could be used to post information on the Internet.[24]

{13} Ostensibly, the Lerma case raises difficult privacy issues. First, if a court document is a public record, why can't Lerma post it on the Internet? Second, were Lerma's freedom of speech rights violated by terminating his Internet access? Third, was the seizure of Lerma's computer equipment an illegal search and seizure in violation of the Fourth Amendment?

{14} Jerry Berman and Daniel Weitzner[25] recently discussed the First Amendment in Cyberspace in the following terms:

In order for interactive media to develop with the diversity-enhancing characteristics of a medium such as print - and to win strong First Amendment protections from regulation like those accorded to print - their architecture must have two key characteristics. First, the architecture must be open and decentralized, promoting a true abundance of information and communication opportunities. Second, there must be sufficient user control to enable users to choose what they want to receive, and what they want to keep out, thus eliminating the rationale for government to step in and protect various parts of society with intrusive content regulations.[26]

{15} Privacy is mentioned at this juncture only to note the issue. As Internet legislation is promulgated and Internet litigation increases, privacy will undoubtedly be an issue of paramount importance. However, there are many other challenges to Internet expansion and regulation.

II. Case Law: Liability for On-line Access Providers

{16} An issue of tremendous importance concerns the extent to which on-line access providers can be held liable for transmissions facilitated through their services. As the massive growth of on-line access services continues, this issue will undoubtedly be encountered with greater frequency. On-line access providers are in essence the "deep pockets" of cyberspace[27] and they will obviously be the focal point of future litigation. In the realm of "libel"[28] there have already been two prominent lawsuits against on-line access providers which may serve to forecast how the judiciary will interpret future on-line issues.

A. *Cubby, Inc. v. CompuServe Inc.* [29]

{17} In *Cubby*, the defendant CompuServe was an on-line service providing subscribers with access to a variety of special interest databases and forums.[30] One of the forums focused on the journalism industry and provided more specific information concerning broadcast journalism.[31] Ultimately, one of the publications available on the "Journalism Forum" carried false and defamatory statements about the plaintiffs, developers of an electronic news and gossip magazine entitled "Skuttlebut." [32]

{18} Interestingly, CompuServe did not dispute that the statements concerning the plaintiff were defamatory. Rather, CompuServe argued that it "acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements." [33] CompuServe had no opportunity to review the contents of publications before they were uploaded into the company's computer data banks. Conversely, the plaintiffs argued that CompuServe was a "publisher" of the false statements and should be held to the higher standard of liability accompanying such designation.[34]

{19} At issue was the standard of liability which should be imposed upon CompuServe. If CompuServe could be likened to an electronic library or bookstore, then it would be considered a distributor of published material. In *Smith v. California*,^[35] the United States Supreme Court held that a distributor must have knowledge of the contents of a publication before imposing liability for its distribution. In *Smith*, the Court struck down an ordinance which imposed liability on a bookseller for possession of an obscene book irrespective of whether the bookseller actually had knowledge of the book's contents.^[36] The Court observed that "[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."^[37] Thus, a distributor is a passive receptacle for information and will not be held liable in absence of actual knowledge.

{20} If CompuServe was found to have "published" the defamatory statement, it would have been liable as a culpable party because a publisher who republishes or repeats a defamatory statement is subject to the same liability as if it had originally published the statement.^[38] Whether or not a party will be characterized as a publisher is largely dependent upon how much editorial control is exercised over a publication. For example, a newspaper exercises a high degree of control over its final product with respect to editorial judgments and ultimate content. In *Miami Herald Publishing Co. v. Tornillo*,^[39] the United States Supreme Court held that the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper and treatment of public officials . . . constitute the exercise of editorial control and judgment."^[40] Thus, newspapers are considered publishers within the legal context of libel and defamatory statements.

{21} In *Cubby*, the court characterized CompuServe's product as an "electronic, for-profit library" which provides a variety of publications and collects subscriber fees in return for access.^[41] More importantly, the court found that "CompuServe has no more control over such a publication than does a public library, bookstore, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."^[42] Therefore, the court granted summary judgment in favor of CompuServe.^[43]

{22} By labelling CompuServe as a distributor rather than a publisher, the court issued the first prominent legal decision concerning the culpability of on-line access providers. The decision encouraged growth within the Internet community by reducing the threat of liability to on-line access providers. This has been evidenced by the massive growth of companies such as America Online, CompuServe, Prodigy, and smaller companies providing basic Internet access.^[44] *Cubby* allows such companies to exist in a worry free environment with respect to liability for information appearing as a result of their electronic transmissions.

B. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*^[45]

{23} On May 24, 1995, the Supreme Court of New York granted partial summary judgment against Prodigy Services Company, finding that it had exercised sufficient editorial control over its computer bulletin boards to incur liability as a publisher.^[46] Prodigy was founded in 1990 and was described by the court as a "computer network" with no less than two million subscribers.^[47] Prodigy subscribers are able to communicate with one another through various bulletin boards. "Money Talk" was a widely read financial bulletin board, where members could post statements concerning stocks, bonds, investments, and related financial matters.^[48]

{24} Plaintiffs, Stratton Oakmont, Inc., a securities investment banking firm, and its president, Daniel Porush, brought an action for per se libel for statements posted^[49] about them on Prodigy's Money Talk computer bulletin board in 1994.^[50] The posting reflected that Porush was "soon to be proven criminal" and

that Stratton Oakmont, Inc., was a "cult of brokers who either lie for a living or get fired." [51]

{25} The plaintiffs contended that Prodigy had held itself out as an on-line service which was family oriented. [52] In an effort to provide a family environment, Prodigy edited the content of messages posted on its bulletin boards. Prodigy made "no apology for pursuing a value system that reflects the culture of the millions of American families . . . [and] no responsible newspaper does less when it chooses the type of advertising it publishes." [53] Plaintiffs further argued that statements such as the prior remark by a Prodigy official were tantamount to an admission, which proved that Prodigy was akin to a newspaper. As such, Prodigy should incur liability for defamatory statements posted on its bulletin boards as a publisher. [54]

{26} At issue was whether or not Prodigy had exercised enough editorial control over its bulletin boards to render it a publisher with the same liabilities as a newspaper. In support of their claim that Prodigy was a publisher, the plaintiffs introduced evidence that Prodigy promulgated content guidelines, [55] used a software screening program, [56] utilized Board Leaders, [57] and had an emergency delete function. [58] Prodigy countered these assertions by observing that although Board Leaders may remove messages which violate its guidelines, this was not the equivalent of serving as an "editor." [59] For legal authority Prodigy argued that they were most akin to a distributor, much like CompuServe's position in the *Cubby* decision.

{27} Unfortunately for Prodigy, the court distinguished *Cubby* on two scores when granting summary judgment in favor of the plaintiffs. First, Prodigy held itself out to the public as a service which controlled the content of its bulletin board postings. [60] Second, it had implemented this control through its software screening program, and utilized Board Leaders to enforce its policies and guidelines. [61] "Prodigy has uniquely arrogated itself the role of determining what is proper for its members to post and read on its bulletin boards." [62] Thus, the court concluded that Prodigy was a publisher and should incur the normal level of liability associated with such a status. [63]

C. What are the Implications of *Cubby* and *Prodigy*?

{28} In writing the *Prodigy* opinion, Justice Ain observed "that Prodigy's current system . . . may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what Prodigy wants, but for the legal liability that attaches to such censorship." [64] Justice Ain was not attempting to promote this "chilling effect" by deciding against an access provider. However, *Prodigy* may now serve as a vehicle to curtail or discourage the development of the Internet by causing access providers to fret about potential legal culpability. [65] Worse yet, access providers may turn a blind eye to any and all communications disseminated through their services in an effort to reduce their potential liability as a "publisher." This may result in an increase in Internet activity involving precisely the kind of material, such as pornography and bomb-making manuals, currently generating paranoia among the general public.

{29} *Cubby* was clearly a blessing for access providers since it severely reduced their level of culpability. *Prodigy* agreed that access providers "should generally be regarded in the same context as bookstores, libraries, and network affiliates." [66] However, the *Prodigy* court found that it was Prodigy's own conscious decisions which altered its liability and resulted in it being labelled a publisher. [67] "Prodigy's conscious choice to gain the benefits of editorial control has opened it up to greater liability than CompuServe and other networks that make no such choice." [68]

{30} Nevertheless, the *Prodigy* decision is a signal that access providers must be wary. Since access providers are the "deep pockets" of the Internet, cases like *Cubby* and *Prodigy* merely foreshadow the onslaught of litigation which will ultimately plague the industry. As previously noted, the growth within the industry has been tremendous and revenue has been generated at a remarkable pace. Many feel that access

providers are the best entities to assume culpability.

{31} For example, in P.C. Computing magazine's letters to the editor the following comment entitled "Punish the Providers" appeared:

There is a need for some sort of Internet regulation. It's nearly a lawless environment in which nasty people can and do harass innocent participants with impunity. E-mail and online communications are no more worthy of free speech protection than harassment by telephone. *Making providers liable may well be the only practical means of control.*^[69]

{32} However, one should examine the true implications of making computer access providers liable. First, the cost of monthly and hourly fees paid to access providers will likely increase. While many observers speculate that access costs will decline as the Internet expands and the cost of high-speed connections comes down,^[70] this may be offset by increased expenses for litigation, lobbying, and insurance.

{33} As access providers become entangled in webs of litigation, they will be required to retain counsel and incur legal expenses to fight courthouse battles.^[71] Similarly, state and federal legislative efforts concerning on-line transmissions will necessitate even more lobbying by the access provider industry. As a last resort measure, access providers will have to obtain comprehensive insurance policies to protect their businesses from potential "runaway jury verdicts."^[72] All of these costs will naturally be passed on to consumers in the form of increased subscriber fees and hourly rates.

{34} Second, an increase in the likelihood of liability will discourage the growth of the access provider industry and thus stunt the expansion of the Internet. This will be a tremendous loss for society, given the Internet's benefits of access to information and commercial business. Moreover, a slow down in Internet expansion could equate to economic losses for many private investors^[73] and companies.

{35} It appears that lines of demarcation with respect to liability will ultimately be drawn by Congress. The court in *Prodigy* observed that the issues it considered may "be preempted by federal law if the Communications Decency Act of 1995 . . . is enacted."^[74] Thus, state and federal legislators appear willing to take these issues into their own hands.

III. Attempts to Legislate and Regulate the On-Line Universe

A. Internet Legislation

{36} Federal and local governments have responded to the *Prodigy* decision and other well-publicized problems, such as on-line pornography, by promulgating legislation. At issue is who should bear the brunt of on-line liability: the individual or the access provider of the improper material. It appears logical that a party who creates prohibited material should be legally culpable. For example, the creator of child pornography is guilty of a crime irrespective of whether the material is distributed through the Internet or in printed form. But how can these matters be policed when such material may be transmitted either anonymously^[75] or pseudonymously?

{37} Many legislators want to target the access provider of improper material because the distributor is better situated to prevent or control an initial transmission. Some lawmakers contend that an access provider which knowingly transmits a libelous statement posted by a subscriber should bear some level of legal liability. Ostensibly, there are numerous enforcement and deterrent advantages to regulating on-line access providers.

However, is liability better suited to fall on the creator of improper material?

{38} Federal and state lawmakers have been struggling to reach agreement on what regulatory approach is best suited to handle the evolving issues surrounding this medium. Some legislative attempts have been premature, while others are complex and sophisticated. Regardless of whether or not these bills have become or will remain law, they are indicative of future legislative efforts to regulate on-line activities.

B. Setting the Stage: History of Communications Regulation

{39} To understand how recent Internet legislation fits within the current regulatory scheme, it is useful to examine the history of telecommunications technology.[76] Radio and wireless telegraph were the first modern communications media in this country. Congress passed the Radio Act of 1927,[77] which founded several of the fundamental communications regulatory policies. The Radio Act required federal licensing for broadcasters[78] and granted all enforcement powers to a single agency, the Federal Radio Commission (F.R.C.).[79] The Radio Act protected broadcasters' material from government censorship, yet imposed a prohibition on "obscene, indecent, or profane language by means of radio communication." [80] This regulation was viewed by both radio broadcasters and politicians as beneficial to the economy because it provided the structure necessary for the fledgling communications industry.[81]

{40} Soon after the Radio Act was passed, television and telephone were introduced into mainstream America. Because the Radio Act did not regulate these communication systems, Congress passed a comprehensive law to include regulatory authority over evolving technologies. This law was called the Communications Act of 1934, and in its amended form remains the primary legislation for communication technologies and wireless systems as we know them today.[82]

{41} The Communications Act of 1934 transferred federal enforcement authority over communications from the F.R.C. to the newly authorized Federal Communications Commission (F.C.C.).[83] The Communications Act of 1934 maintained the separation between print media and other radio and wire communications, but it created a division between regulated broadcast media[84] and common carriers.[85]

{42} Although the F.C.C. was granted broad jurisdiction to regulate the entire common carrier communication industry, the F.C.C. refused to regulate the computer technology industry. Computer technologies were considered "data processing" rather than communications. They were therefore not subject to regulation because the F.C.C. believed that regulating data processing together with communications could adversely affect competition in the sale of the data processing services.[86] It was not until 1976 that the F.C.C. determined that the data processing industry and the communications industry were inextricably linked, and reasserted its authority to regulate comprehensively.[87]

C. Congressional Actions to Regulate the Internet

{43} In June 1995, the United States Senate approved amendments to the Communications Act of 1934.[88] Senator James J. Exon (D-Neb.) and Senator Daniel Coats (R-Ind.) sponsored the Communications Decency Act (CDA), which restructured the original act to incorporate computer communications under the statute and utilize F.C.C. regulation over the telecommunications industry.[89] Although this bill was modified and adopted as part of the monstrous Telecommunications Act of 1996,[90] an examination of its original form is reflective of the problems inherent in a highly regulatory approach to the Internet.

1. The Original Communications Decency Act^[91]

{44} Because they are not currently within the confines of F.C.C. regulation, users and operators of the Internet have had virtually free reign to post or send uncensored messages and images to other on-line subscribers. The Senate wanted to limit user and operator autonomy by giving regulatory control to the F.C.C.^[92]

{45} The original version of the CDA would have placed increased civil and criminal liability on on-line access providers for transmitting "obscene" or "indecent" messages with the intent to annoy or harass.^[93] Violators would be punished with fines of up to \$100,000 and up to two years in prison.^[94] In a nutshell, the bill treated the Internet like a radio broadcast by imposing restrictions on freedom of expression. Under these principles, according to the United States Supreme Court's ruling in *F.C.C. v. Pacifica Foundation*,^[95] the Internet would be provided the most limited First Amendment protection. In *Pacifica*, the Court held that the F.C.C. could prohibit from public radio broadcast comedian George Carlin's seven "Filthy Words."^[96] Although these words were admittedly not "obscene," the F.C.C. was allowed to regulate "indecent" material on the radio to the extent that radio broadcasts intrude into the private lives of adults and particularly children.^[97]

{46} *Pacifica's* approach to the regulation of indecent material is based on a nuisance rationale as proposed by the F.C.C.^[98] The Court sanctioned the F.C.C.'s approach by examining two unique characteristics of broadcast media:^[99] (1) broadcast media has a "uniquely pervasive presence" in our lives,^[100] and (2) it is uniquely accessible to children.^[101] The court recognized how easily decent and indecent material could be thrust into the homes of private individuals by merely turning on a radio or television.^[102] This pervasive presence, coupled with its random and widespread accessibility to children, persuaded the court that F.C.C. regulation of indecent material under a nuisance rationale was both necessary and appropriate.

{47} Internet services, however, are not invasive in this same manner. Individuals take affirmative actions when they seek out information on the Internet. Children are not inundated with indecent or pornographic material; instead, they must ferret out such information through an interactive medium.^[103] Despite these distinctions, the original Senate-approved version of the CDA attempted to equate the Internet to radio stations.

{48} There were three key problem areas with the CDA legislation.^[104] First, the CDA prohibited material on the Internet that was *not* prohibited in print.^[105] The bill did not distinguish between material that may be "indecent" and hard-core pornography. A failure to distinguish between these terms raises serious constitutional questions. Second, the bill recognized no difference between minors and consenting adults with regard to restricted access to indecent materials.^[106] Finally, there was concern that the bill would be ineffective in catching the "real criminals" because it imposed criminal liability on access providers rather than individuals.^[107]

{49} Ultimately, this bill would have had far reaching effects and, if passed as written, would likely have been challenged on constitutional grounds.^[108] The United States Supreme Court has held that while obscenity is not protected under the First Amendment, adults do have a right to view or listen to materials that fall below the level of what is considered "obscene."^[109] Obscenity, as defined in the landmark case of *Miller v. California*, is material that offends the average person of the community, or when taken as a whole, lacks "serious literary, artistic, political, or scientific value."^[110] This standard may be difficult to apply to on-line services: the Internet "community" may be broadly construed as to include the whole nation or planet.

{50} Internet access providers were understandably concerned about the prospective legislation, since the CDA imposed criminal liability on access providers who allowed the prohibited material to be carried on or through their systems.^[111] However, according to the bill's sponsors, liability was subject to a general

knowledge standard.[112] Proponents of the original bill argued that it was simply an extension of the Dial-A-Porn law[113] passed in the late 1980's. This law was a congressional response to public outcry over children's easy access to the booming 'phone sex' industry.

{51} The original Dial-A-Porn law amended section 223(b) of the Communications Act of 1934 to completely prohibit "dial-a-porn" services.[114] The law was struck down in *Sable Communications of California v. F.C.C.*[115] which held that section 223(b)'s ban on "dial-a-porn" services did not implement the least restrictive means to serve the government's compelling interest of shielding minors from pornographic telephone messages.[116] Indecent material, when readily accessible to children, is provided limited First Amendment protection; however, it is offered full constitutional protection for adults.[117] A complete prohibition on "dial-a-porn" services denies access to constitutionally protected material. The Court indicated, however, that the use of screening devices for children, such as providing a credit card number, might be a constitutionally permissible alternative to the flat prohibition on "dial-a-porn." [118]

{52} Congress responded by passing another amendment to the Communication Act of 1934, adopting the Court's suggested constitutional alternative.[119] It required telephone companies to block all indecent "dial-a-porn" unless the subscriber made an affirmative request for access.[120] The F.C.C. has interpreted this to mean that dial-a-porn services must restrict access by requiring: (1) credit card payment, (2) use of an access code, or (3) message scrambling.[121] If a provider utilizes one of the restrictive measures, a presumption arises that the user is an adult and this presumption serves as a defense to liability.

2. The Revised and Adopted Communications Decency Act

{53} The adopted version of the CDA contains many of the same provisions as the Senate-approved version, with the noted exception of F.C.C. jurisdiction. While the original version granted jurisdiction over the Internet to the F.C.C., the most current version grants the F.C.C. only a consultative role to "describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications." [122] The F.C.C. is granted no enforcement authority over such measures.[123]

{54} The current text of the CDA also includes a provision similar to the "dial-a-porn" restrictive measures defense. A person is not liable under this Act so long as he "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." [124]

{55} Although this bill was accepted by both the House and Senate by a wide margin,[125] access providers and civil libertarians continue their opposition to the indecency standard incorporated into the adopted version of the CDA. This anti-indecency provision raises the same constitutional questions as in the Senate-passed version, and will likely be challenged by free speech interest groups in the near future.[126]

3. The Cox-Wyden Bill[127]

{56} The United States House of Representatives passed the Internet Freedom and Family Empowerment Act on August 4, 1995 as a direct response to the *Prodigy* decision and the original version of the CDA. This act was sponsored by Representatives Chris Cox (R-Cal.) and Ron Wyden (D-Or.) and was passed in the House by a remarkable vote of 420 to 4.[128] The bill specifically prohibited the F.C.C. from regulating material on the Internet.[129] Rather, it released access providers from liability if they exercised editorial control over their transmissions. The bill ensured that access providers could actively screen out obscene

material without incurring liability for every message transmitted, so long as they made a "good faith" effort to screen their services and provided screening devices for parents.[\[130\]](#)

{57} By prohibiting F.C.C. intervention, the Cox-Wyden bill virtually eliminated the prospect of federal content-based regulation of the Internet. It focused on screening indecent material from children, instead of regulating or eliminating the material from the Internet altogether. The bill attempted to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material" [\[131\]](#) Naturally, this bill was favored by on-line users and access providers. The latter were shielded from liability, while the former continued to enjoy a decentralized and uncensored Internet.

{58} However, the Cox-Wyden bill failed to directly address the concerns of parents and teachers regarding children's continued Internet access to indecent and obscene materials. The bill's focus on screening devices carried a less powerful punch than its proponents would have liked to admit. The bill's language merely provided that as a general "policy," the government should "remove disincentives" for the development of screening and blocking devices.[\[132\]](#) This language is suggestive, but vague. It did not mandate any behavior or specific actions by access providers to further this policy. For those who feel that F.C.C. jurisdiction may be appropriate, the Cox-Wyden bill failed to grant proper control over the medium.

{59} The House-approved Cox-Wyden bill would have preserved the status quo that many Internet users and civil libertarians so desperately desire.[\[133\]](#) It would have imposed no additional culpability on access providers, and would shift the burden of responsibility to the individual user. One advantage of the bill is that it eradicated the constitutional and enforcement problems inherent in the original version of the CDA and other legislative efforts. With the Cox-Wyden bill, free speech reigned supreme and enforcement was left to watchful parents and our existing framework of laws. The majority of the Cox-Wyden bill was collapsed into the adopted version of the CDA, with the notable exception of Cox-Wyden's prohibition on F.C.C. jurisdiction. In lieu of the Cox-Wyden approach to F.C.C. jurisdiction, the CDA grants the F.C.C. a consultative role in helping determine appropriate standards for indecent material available on-line. Nevertheless, the F.C.C., under the adopted CDA, is prohibited from enforcing those standards.[\[134\]](#)

D. State Actions to Regulate the Internet

{60} Although federal efforts to regulate the Internet appear frequently in the news, state lawmakers have also been aggressively targeting on-line material. For example, Georgia recently enacted a statute prohibiting the computer transmission of bomb-making instructions.[\[135\]](#) The Commonwealth of Virginia enacted into law Senate Bill No. 1067[\[136\]](#) on May 5, 1995. The bill was sponsored by Senator Bob L. Calhoun, in an effort to restrict child pornography on the Internet. Governor George F. Allen signed the bill despite concern from the telecommunications industry that it would be held criminally liable for the conduct of their customers.[\[137\]](#) This law may be of particular interest to some of the large access providers, such as America Online, which are located in Virginia. And while Virginia law is by no means exhaustive, this statute does provide an excellent example of issues confronting state legislative efforts at regulating the Internet.

1. Virginia's Ban on Internet Child Pornography

{61} In essence, this law seeks to expand the definition of "sexually explicit visual material" to include child pornography distributed through the Internet. Sexually explicit materials are now defined to include "digital"

images of child pornography.[138] This law also makes it unlawful to knowingly take part in a "computer-generated reproduction" which utilizes or has as a subject a person under eighteen years of age.[139] Most significant, however, is a provision that imports criminal liability on a person who "electronically transmits" sexually explicit material involving a person under eighteen years of age.[140] On its face this provision appears to punish anyone who transmits pornography, irrespective of whether the material was transmitted with knowledge.

{62} The Attorney General for the Commonwealth of Virginia, James S. Gilmore, issued a formal opinion regarding this controversial provision.[141] The opinion, dated April 21, 1995, was sent to Senator Calhoun less than two weeks prior to Governor Allen signing the bill into law. The opinion recognizes that section 18.2-374.1(B)(4) of the Virginia Code fails to use the word "knowingly." However, the opinion affirmatively states:

[A]n electronic or on-line network that transmits material nevertheless would be culpable only if it knew of the contents of that material. Indeed, the Supreme Court of Virginia has read a scienter requirement into similar provisions of [section] 18.2-374.1, even when that requirement was not expressly stated therein.[142]

Therefore, the scienter requirement is inherent in the Virginia statute, regardless of whether the explicit "knowledge" language appears. Without such an interpretation, this law would impinge on First Amendment rights.[143]

{63} When this statute is read in conjunction with the Attorney General's Opinion, it is apparent that access providers will be afforded a safe haven from criminal liability when improper material is transmitted without knowledge.[144] Interestingly, this bill may have been somewhat redundant given that the original statute would have likely encompassed Internet child pornography.[145] However, Senator Calhoun proposed the bill in an effort to inform state residents that pornography transmitted through the Internet is being addressed by the state legislature.

{64} As a final note, this law, as well as other state legislation targeting on-line activity, may be short-lived. These state laws may be preempted by federal legislation, such as that previously discussed.[146] However, it is possible that federal legislation may give the states some autonomy to regulate their on-line transmissions.

IV. Is Our Existing Framework of Laws Sufficient?

{65} Is our existing framework of laws capable of regulating Internet legal issues? As the rash of federal and state regulations reflect, many legislators feel that our current system of laws will be unable to handle the dynamic Internet and digital transmissions. However, access providers, software companies, and Internet users contend that the Internet can regulate itself and that our existing laws can handle situations which emerge. In areas analogous to real world problems, our existing laws effectively encompass Internet legal issues. In some other cases, the issues presented by the Internet are simply too unique to be managed by our current framework of laws, and demand legislation if they are to be regulated. To determine if our current system of laws is adequate to encompass Internet "Cybercrimes" and other improper activity it may be useful to review some recent examples of how our current system has dealt with these new issues.

A. Collisions in Cyberspace

{66} Bryan Sisson, a forty-five year old unemployed truck driver, travelled to Wisconsin to visit a young girl whom he met through the Internet.^[147] However, this is not a romantic story about two lost souls who met through the Internet and lived happily ever after. Sisson responded to a message from "Jessica," who wrote that she was fourteen years old and that "older guys treat you grown-up."^[148] Sisson communicated with "Jessica" for approximately nine months, discussing her sexual experiences and even sending her sexually explicit pictures of himself.^[149]

{67} When Sisson arrived in Milwaukee to obtain a motel room for a meeting with "Jessica", he was arrested by FBI agents and charged with traveling across state lines for the purpose of engaging in a sexual act with a minor. "Jessica" was a fictitious persona developed by a female private investigator who was disturbed by the amount of sexually explicit material available on the Internet. Bryan Sisson pleaded guilty to the charges, and he is free on bond with the condition that he not use the Internet.^[150] Sisson's criminal history reflected that he had previously been convicted as a pedophile.^[151]

{68} To some extent, this example demonstrates the ability of our existing framework of laws to punish criminal activity on the Internet. The fact that Sisson used the Internet to perpetrate his crime did not affect the FBI's ability to bring charges against him. However, Sisson was not arrested until he actually travelled to Wisconsin for the purpose of engaging a minor in sexual activity. What if Sisson had never done anything more than talk dirty to "Jessica" and send explicit pictures of himself - would he have been criminally prosecuted? The answer is less clear.

{69} The sting which caught Sisson was unique because it was initiated by a private individual instead of law enforcement officials. "Jessica" was not the fourteen year old girl she purported to be, but rather a sophisticated woman who baited Sisson with a young girl's image in an effort to solicit information she would ordinarily find offensive. Supporters of a decentralized Internet would likely contend that "Jessica's" behavior runs contrary to the spirit of the Internet. That is, if you seek out a certain type of material available on the Internet, it is presumed you want to receive it; likewise, if you find material offensive, you have the power to abstain. This is the so-called beauty of interactive media when compared to mass media.

{70} Nevertheless, other Americans maintain that it is irrelevant how purveyors are caught. A Florida newspaper recently posed a question to its community involving a problem similar to the Sisson case:

Question 1: A Florida Department of Law Enforcement agent recently charged a man with meeting young boys through computer services. Should officers be patrolling the Internet for pedophiles and purveyors of pornography?

...

Eileen Constanza, Wildwood: "I don't think these perverts should use our computer systems or any other systems to recruit our babies for their pleasure. They must be stopped. I also think any rapist of any kind should be 'Bobbitted.'"^[152]

{71} Obscenity on the Internet is another issue challenging our legal system. Perhaps the first conviction on the Internet for obscenity was the well-publicized case of Robert and Carleen Thomas. This California couple distributed obscene images through the "Amateur Action Bulletin Board System" which they ran via the Internet.^[153] The couple was tried in Memphis after a Tennessee resident downloaded obscene material from Thomas' private computer bulletin board. On July 28, 1995 they were found guilty under an existing federal criminal statute which prohibited the distribution of obscene images.^[154]

{72} Once again, this appears to be an example of how the existing framework of laws is capable of dealing with these problems. Mr. and Mrs. Thomas were prosecuted under federal laws established for the

distribution of obscene images. However, as litigators become more sophisticated at distinguishing new interactive media from the more traditional mass media, it will be difficult for such laws to remain applicable. How will our society deal with obscene material distributed by citizens from other nations utilizing the Internet? Is obscene material appearing in a digital fashion applicable to the same standards as printed material of the same nature? Moreover, the person who received the obscene material from the Thomas' bulletin board sought it out and *downloaded it* for safe keeping. Shouldn't individuals assume the risk of the material they seek out?

{73} Another interesting case involved a University of Michigan student, Jake Baker. Baker posted a story on the Internet in December 1994 in which he described torturing, mutilating, and sodomizing a woman while she was tied to a chair. The short story ends with Baker lighting a match, as if to burn down the woman's apartment, and bidding her farewell. Most disturbing was that the woman depicted in Baker's vignette shared the same name as a fellow student from the University of Michigan.[\[155\]](#)

{74} Baker's story was discovered by a University of Michigan alumnus who was "surfing" the Internet in Moscow.[\[156\]](#) In February 1995, Baker was "charged with five counts of sending threats to injure and kidnap across state lines via the Internet . . . [and] face[d] up to five years in prison if convicted."[\[157\]](#) Baker was jailed for twenty-nine days because his actions indicated he was potentially dangerous.[\[158\]](#)

{75} United States District Court Judge Avern Cohn dismissed Baker's case by ruling that the electronic message did not rise to the level of an illegal threat.[\[159\]](#) The prosecution had to prove that Baker intended to carry out the threats on the student named in his story.[\[160\]](#) Judge Cohn called Baker's jailing "disturbing" and "inexplicable,"[\[161\]](#) and said that the student's discussion of his desires did not represent an intent to carry out such acts.[\[162\]](#)

{76} The Baker case presents one instance where the law was unable to accommodate an Internet confrontation. Baker's vignette never rose to the level of an illegal threat against his fellow student because the message was not sent directly to her. However, statutorily prohibiting Baker from posting his fictional story runs a serious risk of violating the First Amendment's guarantee of Free Speech. While most Internet users may not condone the content of Baker's writings, many believe there is a place for them on the Internet.

{77} Our legal system seems to warrant mixed reviews regarding its ability to handle the issues of obscenity, solicitation and threats on the Internet. The Sisson and Thomas cases are successful examples of the law punishing undesirable Internet behavior. Conversely, the Baker case represents one situation where current law simply failed to anticipate Internet conduct which may be viewed as undesirable.

B. Potential Conflicts

{78} One developing conflict between current law and Internet activity concerns on-line gambling. On-line "bookies" and "casinos" exist on the Internet and allow people to place bets on a variety of events. Obviously gambling in the United States is illegal, except for a few select places such as Las Vegas or Atlantic City. However, citizens from any state may get on-line and place a bet with an Internet site that is located in a place where gambling is legal. At issue is whether or not these actions are criminal and the extent to which there are laws available to prosecute offenders.

{79} I. Nelson Rose, a law professor at the Whittier Law School in Los Angeles and an expert on gambling law, describes the future of on-line gambling as follows:

The technology for a virtual reality casino already exists. Put on a helmet that surrounds you

with sights and sounds, tie it to a computer that shifts the scene in response to your movement and you can be anywhere you want, including a casino in a foreign country, while your body never leaves home.[\[163\]](#)

{80} A formidable barrier to on-line gambling is the Interstate Wire Act (IWA).[\[164\]](#) In essence, the IWA makes it a crime for someone in the business of gambling to transmit a bet using a telephone line which crosses a state or national boundary.[\[165\]](#) The law, however, only makes it a crime for a business to receive a bet, rather than a player to place a bet.[\[166\]](#)

{81} So how can the Global Casino[\[167\]](#) site on the World Wide Web legally exist on the Internet? The operation is described as "an international leisure and entertainment organization offering world-wide wagering on sporting events utilizing toll-free telephone communication, world-wide wagering on the Internet through the use of home computers . . ."[\[168\]](#) Sports International, Ltd. and Intracorp., Inc. entered into a joint venture to create the Global Casino, which is located in Antigua.[\[169\]](#) Gambling is legal in Antigua, a constitutional monarchy under the British Commonwealth.[\[170\]](#)

{82} Does the IWA allow the Global Casino in Antigua to accept bets from the United States? According to Rose, a foreign national located in a foreign country will not have to worry about laws affecting his American customers, since the sovereignty of nations doctrine will apply.[\[171\]](#) Moreover, it is doubtful that the United States government would want to send FBI agents to raid foreign countries.[\[172\]](#)

{83} Additionally, state laws may criminalize on-line gambling. Some states make it a crime to place a bet outside of licensed outlets.[\[173\]](#) Clearly, this makes it a crime for every individual of that state to place a bet on the Internet. However, the Internet casino might also be liable as an "aider and abettor" to the bettor's crime.[\[174\]](#) The problem is that state criminal statutes are presumed not to have an extra-jurisdictional reach and thus would not apply to foreign countries.[\[175\]](#)

{84} As it stands, the states have taken a "patchwork approach" to on-line gambling. In *Minnesota v. Granite Gate Resorts, Inc.*, a recent case filed by the Minnesota Attorney General, the State charged the resort with deceptive trade practices, false advertising, and consumer fraud for running a sports handicapping service.[\[176\]](#) According to the information acquired by the Attorney General, this group was ready to market a new service called Wagernet, where individuals could place bets on-line by simply using a credit card. The Minnesota Attorney General has promised to prosecute anyone running a gambling operation in Minnesota in which its citizens may have access.[\[177\]](#)

{85} Florida has taken a different approach to on-line gambling. A formal opinion issued by the Attorney General's office notes that "[e]volving technology appears to be far outstripping the ability of government to regulate gambling activities on the Internet and of law enforcement to enforce such regulation."[\[178\]](#) In response to this problem, the state of Florida has taken the position that on-line gambling is a problem of national and international concern which cannot be resolved by the varying approaches of a handful of states.

{86} Internet gambling is just one of the many legal issues that will be confronted in the near future. Whether or not it will be addressed through existing laws, new laws, or deregulation is still unclear.

C. An International Perspective to Internet Challenges

{87} Because the Internet connects no less than 160 countries, other nations are surely struggling with the same issues as our own system. But many of these nations fail to embrace the democratic principles and constitutional rights that our country prides itself on. For example, Vietnam has benefitted immensely from

the Internet since it is an isolated nation trying to build ties with the outside world. The Internet's instant access to information from other countries has been invaluable to Vietnam. In an effort to foster continued access, Vietnam has decided to make available *uncensored information*. This move could undermine Vietnam's current political control.^[179] This decision seems somewhat odd considering that the Communist party retains tight political control over Vietnam and even runs the country's press.^[180] However, the Vietnamese government must believe that any political disadvantages from the free exchange of information will be outweighed by the prospect of economic gains.

{88} As one might expect, China has restricted access to the Internet. The Chinese government prohibits using the Internet for anything but academic purposes.^[181] The continued growth and access of China's Internet has led authorities to seek measures which will block access to objectionable material.^[182] Similarly, Singapore attempted to search individual accounts of users who posted objectionable information on the Internet; however, it later decided not to curtail anti-government discussions and the like.^[183]

{89} A little closer to home, Canada has created a federal task force which is planning to provide a list of recommendations for Internet regulation. At present, Canada does not regulate the Internet. However, some expect that the Canadian government will announce its intention to regulate in the coming months.^[184] This expectation is based on a preliminary report from the government commission examining the Internet which suggests that some form of regulation is necessary.^[185]

{90} The Canadian Radio-Television and Telecommunications Commission (C.R.T.C.) does not have the authority to regulate the Internet. However, the Simon Wiesenthal Center submitted a brief^[186] to several prominent government agencies, such as the Department of Justice and Solicitor General's Office, suggesting that the term "broadcasting" should include all forms of Internet communication, with the exception of person-to-person communication.^[187] Expanding the definition of broadcasting would permit the C.R.T.C. to regulate the Internet.

{91} The Simon Wiesenthal Center believes that the Internet is not as "ubiquitous as it appears."^[188] There are only ten provincial networks in Canada, collectively known as "Cannet."^[189] The Simon Wiesenthal Center suggests that improper material be screened or edited out as it passes through Cannet. However, Cannet supports self-regulation and is considering using subscriber contracts stipulating that users shall not post pornography or violate copyright laws through the Internet.^[190] If subscribers were to breach the contract, their access would be terminated by Cannet.^[191]

{92} According to the Canadian Director of the Simon Wiesenthal Center, Canada's version of the First Amendment is fashioned so that actions to regulate content on the Internet might take place without violating freedom of speech.^[192] To the extent that obscene or improper material might still infiltrate Canada from other countries, the Simon Wiesenthal Centre hopes that it can reach international agreements to control such material.^[193]

D. The Future of Internet Regulation?

{93} In some instances, our current framework of laws appears to sufficiently address certain legal issues arising on the Internet. However, these issues are analogous to events already occurring in the real world. The law is able to provide a remedy for these issues because they are not really "new," or because the law is able to adapt to the Internet medium.

{94} The problem is that there are many additional and developing Internet issues which our existing framework is ill-equipped to address. Our current laws either did not contemplate the existence of these novel

issues or are simply too narrowly defined to adapt to the complexities of this new medium of communication.

{95} Political pressure exists to pass regulatory measures which would severely inhibit the development and growth of the Internet. Legislation aimed at restricting the Internet will be challenged on First Amendment grounds and potentially held unconstitutional. It is difficult to imagine, even if such legislation were passed, how it could be applied to individuals from other nations who distribute material to the United States. Within our own country, it is unclear how "community standards" can be applied to Internet transmissions available to every city, county, and state in America.

{96} The Cox-Wyden bill recognizes the inherent flaws within the Communications Decency Act, as well as the potential benefits (primarily economic) to be gained from the Internet. Thus, the Cox-Wyden bill appeases Internet users, software companies, on-line access providers and civil libertarians by taking a "hands-off" approach to the Internet. The bill plays upon fears of First Amendment violations and diminished Internet growth. It attempts to control improper material appearing on the Internet by encouraging the internal development of screening devices. By way of example, the Cox-Wyden bill would surely applaud the development of software programs such as "Net Nanny." This software prevents children from being able to access certain information through a personal computer. Net Nanny advertises itself as the "Best Way to Protect Your Children and Free Speech on the Internet."[\[194\]](#)

{97} The only real benefit from the Cox-Wyden bill is that it would ensure that the Internet remains deregulated. It is doubtful whether such legislation would actually encourage Internet screening devices. However, screening devices are certainly one way to address the back alleys of the Internet. As Jerry Berman and Daniel Weitzner note:

The choice of an interactive architecture, with header information, makes effective screening by the recipient possible. No longer will controversial material intrude into users' homes in the manner that, in Congress' view, required steps to aid parents in protecting children. Rather, users will *request* that particular information be delivered. These requests can be screened or controlled by parents if necessary to limit their children's access to certain kinds of information.
[\[195\]](#)

The utility of the Cox-Wyden Bill would be magnified if it could ensure that Internet screening would be a certain by-product. Screening and blocking devices may prove to be the most narrowly tailored alternative to denying access to users altogether. However, without a regulatory body to oversee the implementation of screening devices, the bill's effectiveness is undermined.

{98} In an ironic twist, the threat of regulatory legislation such as the CDA may result in the creation and utilization of a screening mechanism for parents and users alike. A group of high-tech companies is joining forces to develop a system to cope with indecent materials in Cyberspace.[\[196\]](#) This group will be comprised of approximately two dozen corporations including Microsoft Corp., Apple Computer Co., AT&T Corp., Time Warner, Inc., and Spyglass, Inc.[\[197\]](#) It intends to develop a selection or rating system for material entitled the "Platform for Internet Content Selection" (P.I.C.S.).[\[198\]](#) The group is led by the World Wide Web Consortium at the Massachusetts Institute of Technology.[\[199\]](#)

{99} P.I.C.S. intends to develop industry-wide standards for the Internet in an effort to obviate draconian legislative measures.[\[200\]](#) It hopes to create software which will enable companies and organizations to label information on the Internet.[\[201\]](#) Additionally, it would allow parents and teachers to prevent children from accessing certain types of material such as pornography.[\[202\]](#) P.I.C.S. anticipates that its developmental software will be available for implementation in the near future.[\[203\]](#) The success of a "hands off" approach to Internet regulation is largely dependent on the success of these endeavors.

V. Conclusion

{100} Internet legal issues are largely in a formative state, making broad conclusions about the ability of our current law to handle issues arising from Internet activity. While some legislative reform is inevitable, it is unclear the extent to which measures will be taken to implement government regulation or whether users will be allowed to screen out certain types of information. When the government attempts to regulate the Internet, it will have to circumvent constitutional challenges. However, if the Internet remains substantially unregulated, some type of industry-wide screening system will be necessary to allow users to selectively restrict certain types of material.

{101} Litigation concerning on-line matters will occur with greater frequency as the industry continues to expand. Judicial resolutions may be the only avenue for companies and individuals to clear the Internet's murky waters. In civil matters, increased litigation will equate to greater litigation costs and an increase in potential liability for Internet access providers, the deep pockets of Cyberspace. Cases such as *Prodigy* illustrate the vulnerabilities of access providers. Therefore, any legislation passed by Congress must include a "knowledge" element to import liability upon access providers. It remains unclear whether the judiciary will interpret this knowledge requirement broadly or narrowly.

{102} On an international level, it is clear that other countries are struggling to fashion an appropriate response to Internet growth. Examining international issues is useful on two scores. First, the methods employed and policy rationale of other nations permit the United States to consider how regulatory and open-access approaches will function. Second, when Congress enacts legislation governing the Internet, international agreements will be necessary to ensure the compliance of other countries. In either case, the scope of Internet regulation must truly be considered on the larger global scale.

{103} Criminal Internet litigation poses a different problem. Because the courts generally interpret civil statutes more broadly, criminal statutes need to be broadened by legislative actions in order to apply to the Internet. Amending Virginia's child pornography laws to apply to digital transmissions is illustrative of this movement. As on-line criminal activity increases, enforcement of existing laws by federal and state officials will be critical. The interpretation of these laws, in either a broad or narrow fashion, will ultimately determine how effectively our existing legal framework applies to the Internet.

{{END}}

Footnotes

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[]NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Marc L. Caden & Stephanie E. Lucas, Comment, *Accidents On the Information Superhighway: On-Line Liability And Regulation*, 2 RICH. J.L. & TECH. 3 (1996), at http://www.richmond.edu/jolt/v2i1/caden_lucas.html.

[1] By way of example, it was recently noted that:

"Federal Express delivery truck service offers downloadable shipping and tracking software, a query form to track a particular shipment, and a searchable data base of areas of service (at Internet address <http://www.fedex.com/>).

Reebok, the athletic shoe maker, provides "Planet Reebok," for conversations with sports figures, a bulletin board for users to post their views about the company and its products, and other material attractive to Reebok's consumer base (at <http://planetreebok.com/>).

Bookport, a bookseller, offers reviews, book lists, online ordering and customer service (at <http://www.bookport.com/>).

Faucet Outlet, a plumbing retailer, provides its catalog, and selection and installation advice, with full ordering information (at <http://www.faucet.com/>).

Peter W. Martin, *Prospecting the Internet*, A.B.A. J., Sept. 1995, at 53.

[2] Phillip E. Courtney, *Untangling the Internet*, ENT. SYS. J., March 1995, at 16.

[3] The acronym A.R.P.A. stands for Advanced Research Projects Agency.

[4] Brian Livingston, *The Mother of All Networks; Internet*, P.C. COMPUTING, Apr. 1994, at 180. The Internet's military origins were premised on "packet-switching" technology. Thus, if data was sent to a network which had been destroyed or was immobilized, the data packet would be re-routed and simply travel to another intact network. *Id.* "To this day, packet switching fundamentally characterizes the Internet." Abe Dane, *Understanding and Exploring the Internet*, POPULAR MECHANICS, Apr. 1995, at 66.

[5] John W. Verity & Robert D. Hof, *The Internet: How it Will Change the Way you do Business*, BUS. WK., Nov. 14, 1994, at 80.

[6] Livingston, *supra* [note 4](#).

[7] Courtney, *supra* [note 2](#).

[8] Verity & Hof, *supra* [note 5](#).

[9] Alison Schneider, *Cruising Cyberspace*, WASHINGTONIAN MAG., Dec. 1994, at 145. In 1982, there were approximately 100 computers on ARPANET. *Internet Security, 1994: Hearings Before the Subcomm. on Science of the House Comm. on Science, Space and Technology*, 103d Cong., 2d Sess. (1994) (statement of Dr. Vinton G. Cerf, President, Internet Society). The Internet is doubling in users, networks, and hosts on an

annual basis. *Id.*

[10] "America Online is like a private pool, and Internet, like the ocean across the street At the pool, lifeguards can be stationed and control established, but once the public crosses the street to the 'vast sea of information' on the other side, there is no more control." Debra G. Hernandez, *Mayhem Online*, ED. & PUBLISHER, June 24, 1995, at 34 (quoting William W. Burrington, Assistant General Counsel and Director of Government Affairs, America Online, Inc.).

[11] Schneider, *supra* [note 9](#).

[12] *Id.*

[13] *Id.*

[14] The World Wide Web allows individuals or businesses to search for information through "sites" which can be linked to include other documents on the Internet. Wallys W. Conhaim, *The Internet: Accessing the Network*, LINK-UP, Jan. 1995, at 5. Documents can be placed on the Web that have paragraphs, lists, or pictures which include imbedded links to allow one to delve more deeply into the depicted topics. *Id.* These links appear as highlighted words or icons, which "jump" the user to other resources located at other sites, which, in themselves have more imbedded links. *Id.*

The World Wide Web is a playground of the mind, a place where anyone with the time and inclination can travel the globe, grabbing a portrait of the First Cat during a tour of the virtual White House, listening to digitized songs from cool, obscure bands, or skimming guides to cities and countries the world over. It's also a way for businesses -- from newspapers and record houses to high-tech vendors like Microsoft and Sun -- to reach out to customers. It doesn't exist in any physical sphere

Rick Ayre & Kevin Reichard, *Web Browsers: The Web Untangled*, PC MAG., Feb. 7, 1995, at 173.

[15] Schneider, *supra* [note 9](#).

[16] Anne M. Fulton, *Cyberspace and the Internet: Who Will Be the Privacy Police?*, 3 COMM. LAW CONSPPECTUS 63, 64 (1995).

[17] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[18] Hernandez, *supra* [note 10](#) (quoting Jerry Berman, Executive Director, Center for Democracy and Technology).

[19] *Id.*

[20] *Id.*

[21] Much of the recent concern about bomb-making manuals is attributable to the well-publicized bombing of the Oklahoma City federal building on April 19, 1995. *See* Sue Anne Pressley, *Bomb Kills Dozens in Oklahoma Federal Building; More than 200 Missing; Children at Day Care Among Victims of Apparent Terrorist Attack*, WASH. POST, Apr. 20, 1995, at A1.

[22] Hernandez, *supra* [note 10](#) (quoting Sen. Dianne Feinstein (D-Calif.)). *See also* Louis S. Hansen & Kristin Holmes, *Injured Montco Boys Got Bomb Information from the Internet. One Was Released from the Hospital. The Other Had Surgery. Instructions for Making Bombs are Easy to Find, Friends from School*

Say., PHILA. INQUIRER, Feb. 1, 1996, at B1.

[23] See Lan Nguyen, *Va. Man's Computer Seized in Internet Lawsuit*, WASH. POST, Aug. 13, 1995, at B6.

[24] *Id.* The federal marshals seized over 400 computer disks, four hard drives, a computer and a scanner. *Id.* The case against Lerma was subsequently dismissed and all seized materials were ordered returned to Lerma. [Religious Technology Center v. Lerma, et. al](#), (11-29-1995 E.D. Va. 95-1107-A).

[25] Jerry Berman and Daniel J. Weitzner are the Executive Director and Deputy Director of the Center for Democracy & Technology, a public interest organization designed to protect civil liberties and democratic values in the new digital media.

[26] Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1621 (1995).

[27] See Kara Swisher, *Getting Rich on the Back of the Internet*, WASH. POST, July 24, 1995 at A1.

[28] "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." CAL. CIV. CODE § 45 (West 1982).

[29] 776 F. Supp. 135 (S.D.N.Y. 1991).

[30] *Id.* at 137. Subscribers paid CompuServe a membership fee along with additional fees for on-line time usage. *Id.*

[31] *Id.*

[32] *Id.* at 138.

[33] *Id.* It is worth noting that CompuServe had contracted with a company called Cameron Communications, Inc. to "'manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum 'in accordance with editorial and technical standards and conventions of style as established by CompuServe.'" *Id.* at 137 (quoting Affidavit of Jim Cameron).

[34] *Id.* at 139.

[35] 361 U.S. 147 (1959).

[36] *Id.* at 155.

[37] *Id.* at 153 (quoting *The King v. Ewart*, 25 N.Z.L.R. 709, 729 (C.A. 1905)).

[38] See *Hoover v. Peerless Publications*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978) (noting that one who republishes libel is subject to the same liability as if he had originally published such a statement, even if the republisher attributes the libelous statement to the original publisher); RESTATEMENT (SECOND) OF TORTS § 578 (1976) ("one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

[39] 418 U.S. 241 (1974).

[40] *Id.* at 258.

[41] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

[42] *Id.*

[43] *Id.* at 141.

[44] The revenue from the Internet access provider business was approximated at \$180 million in 1994, but is estimated to grow to more than \$1 billion by 1997. Swisher, *supra* [note 27](#). One access provider, UUNET in Fairfax, Virginia, created twenty-four new millionaire employees by having an early summer 1995 stock offering. *Id.*

[45] 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. May 25, 1995).

[46] *Id.* at 1795.

[47] *Id.*

[48] *Id.*

[49] The statements were made by an unidentified bulletin board user. *Id.*

[50] The second amended complaint alleged ten causes of action. *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* (quoting Exhibit J).

[54] *Id.* at 1795-96.

[55] These content guidelines advised subscribers that "notes to harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed" *Id.* at 1796.

[56] The software screening program automatically pre-screened bulletin board postings for offensive language. *Id.*

[57] Board Leaders monitored on-line postings and enforced Prodigy's guidelines. *Id.* At the time of the alleged posting, Charles Epstein was the Board Leader for Money Talk. The second part of the court's opinion focuses on the rationale for holding Epstein in an agency relationship with Prodigy for purposes of the acts and omissions alleged in the complaint. *Id.* at 1798-99.

[58] A Board Leader could use the emergency delete function to remove a note and provide a previously prepared message explaining why the note was removed. *Id.* at 1796.

[59] *Id.*

[60] *Id.* at 1797.

[61] *Id.*

[62] *Id.*

[63] *Id.* In spite of Justice Ain's decision, Stratton Oakmont agreed to drop its lawsuit against Prodigy in return for an apology from Prodigy. Peter H. Lewis, *After Apology From Prodigy, Firm Drops Suit*, N.Y. TIMES, Oct. 25, 1995, at D1.

[64] 23 Media L. Rep. (BNA) at 1798.

[65] *Id.*

[66] *Id.* See also Edward V. DiLello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199, 210-11 (1993).

[67] *Prodigy*, 23 Media L. Rep. (BNA) at 1798.

[68] *Id.*

[69] *Mail. Letter to the Editor*, P.C. COMPUTING, June 1995, at 27 (emphasis added).

[70] See, e.g., Michael J. Miller, *The Ubiquitous Network. Growth of the Internet as a Platform*, P.C. MAG., June 27, 1995, at 75 (predicting that the cost of Internet access will fall dramatically).

[71] Many in the legal field speculate that Internet litigation will be a new and expanding field of practice for lawyers. *Shrinking the Bar; Downsizing Hits the Legal Profession*, HARTFORD COURANT, July 31, 1995, at 8.

[72] *Id.*

[73] See Michelle Quinn, *Investors in Frenzy as Hot Software Firm Goes Public*, SAN. FRAN. CHRON., Aug. 8, 1995, at A1 (discussing the investment into Netscape Communications Corp., a producer of software for navigating the Internet).

[74] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) 1794, 1798 (N.Y. Sup. Ct. May 25, 1995).

[75] Professor Trotter Hardy notes that while we have the ability to send anonymous computer messages, we also have the capability to make telephone calls and letters without identifying the sender. I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993 (1994).

[76] See generally A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., 1989) (compiling text of Communications Act of 1934, congressional hearings and debates, House and Senate Committee Reports, and articles on the political aspects of the Act).

[77] Radio Act of 1927, ch. 169, § 41, 44 Stat. 1162, 1174 (1927) (repealed 1934).

[78] *Id.* § 1. The Radio Act of 1927 is "intended to regulate all forms of . . . radio transmissions and communications . . . for limited periods of time, under licenses granted by Federal authority" *Id.*

[79] *Id.* § 3. The F.R.C. was charged with assigning frequencies to radio stations, preventing interference between stations, requiring record keeping procedures and establishing area service zones. *Id.* § 4.

[80] *Id.* § 29. This provision set the stage for the majority of constitutional challenges to broadcast regulation. See generally Cindy L. Petersen, Note, *The Congressional Response to the Supreme Court's Treatment of*

[81] Although he did not generally endorse heavy government regulation, President Coolidge supported the Radio Act as a necessary step to foster the communications industry. *See* President Coolidge's Message to Congress, H.R. Doc. No. 483, 69th Cong., 2d Sess. (1926), *reprinted in* DOCUMENT OF AMERICAN BROADCASTING 28 (Frank J. Kahn ed., 3d ed. 1978).

[82] Communications Act of 1934, ch. 652, § 609, 48 Stat. 1064, 1105 (1934) (current version at 47 U.S.C. §§ [151-613](#) (1988)).

[83] *Id.* § 151. The Communications Act of 1934 states:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . there is created a commission to be known as the "Federal Communications Commission."

Id.

[84] *Id.* §§ 301-329. Subchapter III of the Communications Act of 1934 is entitled Special Provisions Relating to Radio. This subsection regulates broadcast media, including all radio communications intended to be received by the public. *Id.*

[85] Subchapter II regulates common carriers. *Id.* §§ 201-204. A "common carrier" is defined under the Act as "any person . . . for hire, in interstate or foreign communication by wire or radio . . . but a person engaged in radio broadcasting shall not . . . be deemed a common carrier." *Id.* § 153(h). Examples of common carriers include citizens band (C.B.) and mobile radios.

[86] *See In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 267, 268-69, 285-86 (1971). The F.C.C. asserted its authority to separate the data processing industry from the communications industry. Surprisingly, however, it also recognized that the data processing industry is dependent upon the communications services for development.

[87] *See In re* Amendment of Section 64-702 of the Commission's Rules and Regulations, 61 F.C.C.2d 103, 110 (1976). "Since the release of our *Final Decision*, we have witnessed technological advances, in hardware and software, which are tending to cause a blurring of the distinctions between data processing and communications which we had then established." *Id.* at 105.

[88] The Communications Decency Act was passed by the U.S. Senate on June 14, 1995. 141 CONG. REC. S8346-47 (daily ed. June 14, 1995).

[89] *See* S. 314, 104th Cong., 1st Sess. (1995).

[90] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (signed by President Clinton on February 8, 1996).

[91] S. 314.

[92] S. 314 § 2.

[93] S. 314 § 2. The Senate-approved bill expanded the language of 47 U.S.C. § [223](#) to include

"telecommunications devices" such as modems and commercial data servers. The CDA, as passed, uses the following language to import liability:

(a) Whoever--

...

(A) by means of telecommunications device knowingly--

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

Communications Decency Act § 502.

[94] S. 314 § 2(b).

[95] 438 U.S. 726 (1978).

[96] *Id.* at 729.

[97] *Id.* at 738-40.

[98] *Id.* at 750.

[99] The Court did not limit its analysis or its resulting test to only radio broadcasts, but included all broadcast media (e.g., radio, television, and closed circuit transmissions). *Id.*

[100] *Id.* at 748.

[101] *Id.* at 749-50.

[102] *Id.* at 748-49.

[103] The distinction between the traditional mass media and the new interactive media provided by the Internet can be summed up as follows:

A proper understanding of the interactive media leads to the conclusion that heavy-handed content control by any level of government is inappropriate and violates the basic First Amendment guarantee of freedom of speech. Whatever one might conclude about the wisdom of content regulation in today's mass media, such regulations would be inappropriate for developing interactive media. Interactive media differ from mass media in that they offer users a great degree of control over the content that users and their children receive. Therefore, individual users, not the government, should be entrusted with the task of controlling the content to which they and their families are exposed.

Berman & Weitzner, *supra* [note 26](#), at 1629.

[104] There were actually a multitude of criticisms of the original CDA. They have been consolidated into three primary categories for clarity and brevity.

[105] *CDT Analysis of Senate passed Communications Decency Act*, Center for Democracy & Technology, available online at <http://www.cdt.org/policy/freespeech/exon-coats_analysis.html> §A, ¶4 (1995).

[106] *See Modern Anxiety: What to do When Smut Rides the Internet?*, L.A. TIMES, June 16, 1995, at B6.

[107] Letter from Kent Markus, Acting Assistant Att'y General, to Patrick J. Leahy, U.S. Sen. (May 3, 1995) in Center for Democracy & Technology, <http://www.cdt.org/policy/freespeech/doj_050395.ltr.html> ¶3 (1995) ("[The Communications Decency Act] would significantly thwart enforcement of existing laws regarding obscenity and child pornography, [and] create several ways for distributors and packagers of obscenity and child pornography to avoid criminal liability").

[108] *See Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 112-13 (D.C. Cir. 1995) (indicating through dicta that a ban on indecency would be struck down as unconstitutional).

[109] *Miller v. California*, 413 U.S. 15 (1973).

[110] *Id.* at 24.

[111] S. 314 § 2(a)(4)(A).

[112] Telephone interview with David Crane, Legislative Assistant to Sen. Daniel Coats (R-Ind.) (Aug. 28, 1995).

[113] *Id.*

[114] Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424 (1988).

[115] 492 U.S. 115 (1989).

[116] *Id.* at 116.

[117] *See id.*

[118] *Id.* at 129-30, & n.10.

[119] *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-166, § 521, 103 Stat. 1159 (1989) (codified as amended at 47 U.S.C. § [223\(b\)](#) (Supp. V 1993)).

[120] *Id.* *See also* *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992). The Second Circuit upheld F.C.C. regulations requiring payment by credit card as the least restrictive means to protect children from indecent materials. *Id.*

[121] *See In re Regulations Concerning Indecent Communications by Telephone*, 5 F.C.C.R. 4926 (1990).

[122] Communications Decency Act § 502 (2)(e)(6).

[123] Communications Decency Act § 502 (2)(e)(6).

[124] Communications Decency Act § 167; 502(2)(e)(5)(B).

[125] The Senate passed the bill with a vote of 91-5, while the House passed it with a vote of 414-16. *See*

Michael L. Rozansky, *Complete Overhaul of Communications: The House and Senate Approved a Bill that Lets TV and Telephone Companies Into Each Other's Backyards. It Also Tries to Erase Smut From the Internet*, PHILA. INQUIRER, Feb. 2, 1996, at A1.

[126] A spokesperson for the American Civil Liberties Union stated that they would be challenging the provision "very shortly." See Jeanne D. Cooper & Susan Benkelman, *It's Revolutionary: Congress OKs Communications Deregulation*, NEWSDAY, Feb. 2, 1996, at A3.

[127] H.R. 1978, 104th Cong., 1st Sess. (1995).

[128] 141 CONG. REC. H8478-79 (daily ed. Aug. 4, 1995).

[129] H.R. 1978 § 230(d) ("Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services.").

[130] *Id.* § 230(c) ("No provider . . . shall be held liable on account of -- (1) any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected").

[131] *Id.* § 230(b)(4).

[132] *Id.*

[133] See, e.g., John P. Barlow, *The Economy of Ideas, A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property is Wrong)*, WIRED, Mar. 1994, at <<http://www.hotwired.com/wired/2.03/features/economy.ideas.html>> (comparing the Internet to the frontier west where the people made their own laws).

[134] Communications Decency Act § 502.

[135] 1995 Ga. Laws 322. This law was enacted on April 12, 1995 and expands the definition of "communication facilities" to include a computer or computer network.

[136] 1995 Va. Acts 839.

[137] Peter Baker, *Allen Vetoes 'Motor Voter' Measures; Virginia Also Sues U.S. Over Demand to Make Registration Easier*, WASH. POST, May 6, 1995, at B5.

[138] VA. CODE ANN. § 18.2-374.1(A) (Michie Repl. Vol. 1995). "'Sexually explicit visual material' means a picture, photograph, drawing, sculpture, motion picture film, digital image or similar visual representation" *Id.*

[139] "A person shall be guilty of a Class 5 felony who: . . . knowingly takes part in . . . computer-generated reproduction, which utilizes or has as a subject a person less than eighteen years of age" *Id.*

[140] *Id.* § 18.2-374.1(B)(4). A person is criminally liable if he "electronically transmits . . . sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age." *Id.*

[141] Op. Att'y Gen. (1995), 1995 WL 290495.

[142] *Id.* at *2-3.

[143] *Id.* at *4.

[144] Telephone interview with Bob L. Calhoun, Member, Virginia State Senate (Sept. 7, 1995). Senator Calhoun alleges that access providers are no longer fearful of their legal culpability under this statute in light of the Attorney General's opinion. *Id.*

[145] Senator Calhoun contends that the Supreme Court of Virginia is generally conservative when construing criminal statutes, and might not imply the Internet medium within the statute's purview unless expressly stated. *Id.*

[146] *See infra* [Part III](#).

[147] Rogers Worthington, *Internet Sting Nabs User Seeking a Minor for Sex*, WASH. POST, July 9, 1995, at A19.

[148] *Id.*

[149] *Id.*

[150] *Id.* *See also* Kara Swisher, *On-line Child Pornography Charged as 12 are Arrested*, WASH. POST, Sept. 14, 1995, at A1; Jared Sandberg, *U.S. Cracks Down on On-line Child Pornography*, WALL ST. J., Sept. 14, 1995, at A3 (detailing the FBI's arrest of twelve suspected pedophiles found distributing child pornography through the America Online Inc. computer network). America Online cooperated in the multi-year FBI investigation which included raids on 125 homes and offices nationwide. Tony Munroe, *America Online on the Spot Over Porn*, WASH. TIMES, Sept. 15, 1995, at B7. The FBI operation commenced in 1993 after the abduction of George Stanley Burdyski, Jr., a ten year-old boy who may have been the target of on-line pedophiles. *Id.*

[151] Worthington, *supra* [note 147](#).

[152] Sam Fenton, *Readers: Patrol to Control Cyberporn*, THE ORLANDO SENTINEL, July 19, 1995, at 4.

[153] *First Conviction for Obscenity on the Internet*, THE COMPUTER LAWYER, Sept. 1994, at 29.

[154] *Id.*

[155] Maryanne George, *U-M Ousts Student Over Rape Fantasy Internet Story Raises Free Speech Question*, DET. FREE PRESS, Feb. 4, 1995, at A1.

[156] *Id.* The story was discovered in a file containing sex stories and fantasies. *Id.*

[157] Joel Thurtell, *Dismissal is Sought in Internet Porn Case*, DET. FREE PRESS, Apr. 27, 1995, at B2.

[158] *Id.*

[159] [United States v. Baker](#), 890 F. Supp. 1375, 1388 (E.D. Mich. 1995).

[160] *Id.* at 1380, 1388-89.

[161] *Id.* at 1379 n.5.

[162] *Id.* at 1388.

[163] I. Nelson Rose, *Gambling & the Law*, REPLAY MAG., July 1995, at 47.

[164] See generally I. Nelson Rose, *Interstate Betting: A Lot of Laws, Some Little Loopholes*, CASINO EXEC., June 1995, at 22 (discussing the impact of the IWA on online gambling).

[165] *Id.*

[166] *Id.*

[167] If you want to experience the thrill of on-line gambling, try the Global Casino at <<http://www.netaxs.com/people/sportbet/casino.htm>>.

[168] E-mail Letter from Sports International Ltd., to Marc L. Caden (Sept. 12, 1995) (on file with the *Richmond Journal of Law & Technology*). Sports International Ltd.'s letter further observed:

We have been public and trading on the NASDAQ Bulletin Board since October 20th, 1994. Our trading range has been from .75c to \$5.00. The offering price as of August 1, 1995 was \$2.25.

Operationally, we handled over \$48,000,000.00 (Forty Eight Million Dollars) in our first full year of operations holding 10%, netting over \$200,000.00 (Two Hundred Thousand Dollars).

Id.

[169] *Id.*

[170] I. Nelson Rose, *Wire Cops: The A.G.s Take On Internet Gambling*, CASINO EXEC., Aug. 1995, at 4.

[171] Rose, *supra* [note 163](#).

[172] *Id.*

[173] Rose, *supra* [note 170](#), at 3.

[174] *Id.*

[175] *Id.* at 2.

[176] *Minnesota v. Granite Gate Resorts, Inc.*, available on-line at <<http://www.state.mn.us/ebranch/ag/ggcom.txt>>.

[177] See <<http://www.state.mn.us/ebranch/ag/memo.txt>>.

[178] Op. Att'y Gen. (1995), 1995 WL 698073, available on-line at <<http://legal.firm.edu/units/opinion/95-70.html>>.

[179] See Terry Atlas, *On-line Dilemma for Vietnam; Leaders Both Fear and Want Internet*, CHI. TRIB., Aug. 23, 1995, § 3, at 1. See also *America Online Added to German Investigation*, RICH. TIMES-DISPATCH, Feb. 4, 1996, at A4 ("Prosecutors trying to keep Germans from reading neo-Nazi propaganda on the Internet have notified America Online Inc. that it may be charged with inciting racial hatred.").

[180] Atlas, *supra* [note 179](#).

[181] *Id.* at 2.

[182] *Id.*

[183] *Id.*

[184] Telephone Interview with Sol Littman, Canadian Director, Simon Wiesenthal Center (Sept. 12, 1995). *See also* Sol Littman, *Lawlessness on the Internet*, THE GAZETTE, Aug. 5 1995, at B6 (discussing the current state of the Internet in Canada).

[185] CANADIAN INFORMATION HIGHWAY ADVISORY COUNCIL, FINAL REPORT OF THE COPYRIGHT SUBCOMM., COPYRIGHT AND THE INFORMATION HIGHWAY (1995).

[186] The Simon Wiesenthal Center, *The Need for Regulation on the Information Highway* (1995) ("All forms of Internet with the exception of individual, person-to-person communications, should be defined as broadcasting, thereby bringing it under CRTC regulation.").

[187] Telephone Interview with Sol Littman, *supra* [note 184](#).

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.* Mr. Littman observed that international agreements have been reached in other analogous areas, such as air privacy and airline arrangements. *Id.*

[194] This information appears on the front of the Net Nanny software package.

[195] Berman & Weitzner, *supra* [note 26](#), at 1634 (emphasis added).

[196] Jared Sandberg, *Cleaning the Web: Companies to Seek Pornography Blocker*, WALL ST. J., Sept. 8, 1995, at A3.

[197] *Id.*; *Internet Consortium Aims to Create Rating System*, WALL ST. J., Sept. 11, 1995, at B8.

[198] *Internet Consortium Aims to Create Rating System*, *supra* [note 197](#).

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] Sandberg, *supra* [note 196](#).

[203] *Internet Consortium Aims to Create Ratings System*, *supra* [note 197](#).

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