

Setting Rules in Cyberspace: Congress's Lost Opportunities to Avoid the Vagueness and Overbreadth of the Communications Decency Act

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I. INTRODUCTION

On February 1, 1996 Congress passed the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.¹ The CDA amended section 223 of the Communications Act of 1934,² which regulates obscene and harassing telephone calls, by adding a new subsection (d).³ Under the amended section, it would be illegal to use an "interactive computer service" to send or display any communication available to a person under eighteen years of age that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."⁴

1. Communications Decency Act of 1996, Pub. L. No. 104-104, tit. 5, § 502, 110 Stat. 136 (1996) (codified as amended at 47 U.S.C.A. § 223(d) (West, Supp. 1997)) [hereinafter "CDA"].

2. Communications Act of 1934, 47 U.S.C. § 223 (1994).

3. CDA, *supra* note 1, at § 223(d).

4. *Id.* at § 223(d)(A)-(B).

A broad array of charges were made about the parade of horrors that would result from the liability created under the CDA. Many felt that the CDA would have a chilling effect on free speech that would, in turn, threaten the new form of "community" developing in "cyberspace."⁵ Others questioned the necessity and/or appropriateness of government's usurping the responsibility for children's well-being—believing it is better left to parents.⁶ Still others feared the return of what they believe to be the overly-moralizing, self-righteous attitudes associated with the Comstock Laws of the late nineteenth century.⁷

This Article does not address the larger social issues raised by those claims except to conclude that Congress's misunderstanding of, or disregard for, the relevant issues threatens the growth and well-being of online communities. Many have made legitimate and convincing arguments against the stated and perhaps less forthright goals of the CDA. However, the CDA is also problematic on a more fundamental level: it is filled with ambiguities and inconsistencies of language.

The problems with the language of the CDA are the result of careless drafting and reflect an awkward and hurried attempt at compromise among congresspersons. The stated intentions of the CDA expose a general lack of understanding of the mechanisms and environment Congress sought to regulate. In addition, Congress revealed a remarkable insensitivity to the First Amendment. Specifically, Congress misread (or disregarded) the rationale permitting the abridgement of certain otherwise free speech in the broadcast medium and attempted to

5. See generally WILLIAM GIBSON, *NEUROMANCER* (1984); see also *Glossary*, PUB. RELATIONS J., May 1995, at 34 (describing the term "cyberspace" as: "the virtual computer world and the society that gathers around it").

6. See Thomas E. Weber, *Keep Out! Software Will Help Parents Screen Potentially Offensive Sites*, WALL ST. J., Mar. 28, 1996, at R14; Amy Dunkin (ed.), *Cybersmut: How to Lock Out the Kids*, BUS. WK., Feb. 12, 1996, at 98. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the First Amendment protects the right of Amish parents to refuse to send their children to high school).

7. See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992); David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of the Free Speech in American History*, 45 STAN. L. REV. 47 (1992); Wade Rowland, *The Communications Decency Act, Censorship and the Net* (visited Jan. 29, 1998) <<http://www.blue-cat.com/bcat/article5.html>>.

foist it wholesale onto a new and different medium. The result was a statute that was unconstitutionally vague and overbroad.⁸

Notwithstanding the CDA's shortcomings, it will be important to identify the most problematic features of the CDA and attempt to comprehend their meaning. On June 11, 1996, a federal court in Philadelphia ruled that the CDA unconstitutionally abridged rights protected by the First and Fifth Amendments.⁹ The Justice Department appealed that ruling and the Supreme Court heard oral arguments on March 19, 1997. On June 26, 1997, the Court struck down the CDA, finding that in its attempt to shield minors from indecent material on the Internet, Congress had unconstitutionally abridged the First Amendment rights of adults.¹⁰

Although the CDA is now dead, many in Congress remain adamant in their conviction that some form of regulation of cyberspace is necessary to protect the well-being of the nation's children.¹¹ In fact, efforts to draft some sort of "CDA II" are already underway.¹²

II. PROBLEMS WITH CDA TERMINOLOGY

The wording of the CDA made it difficult to determine who would be liable under the law. Specifically, terms not clearly defined by the Act ("telecommunications device") or terms not defined at all ("telecommunications facility") left a wide range of participants in the telecommunications industry unsure of their potential liability under the CDA. In addition, contradictory language associated with "interactive computer services" left providers of those services, including content creators and telecommunications equipment and service providers, unsure of their status under the law.

A step-by-step walk through the CDA from the beginning reveals several problems and provokes as many questions. Some problems appear at first more compelling and far-reaching; however, even the

8. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

9. *ACLU v. Reno*, No. CIV.A. 96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996).

10. *Reno v. ACLU*, 117 S. Ct. at 2334.

11. See generally Telecommunications Competition and Deregulation Act of 1995, Mar. 30, 1995 S. Rep. No. 104-23 (1995); 141 CONG. REC. S8310 (1995); Andrew Kantor ed., *CDA Overturned, but Other Legislation Looms*, INTERNET WORLD, Sept. 1996, at 16.

12. See Jane Black, *New CDA Legislation Expected* (visited Oct. 1, 1997) <<http://www.news.com/News/Item/0,4,119380,00.html>>; see also *Washington Wire*, WALL ST. J., Nov. 14, 1997, at A1 (reporting that Sen. Dan Coats (R-Ind.) recently introduced a bill to Congress dubbed "son of CDA" which would replace the CDA's indecency standard with a "harmful to minors" standard); see also discussion of "harmful to minors" standard, *infra* Part V.C.

wording with the most seemingly innocuous ambiguities posed serious problems for those trying to assess their exposure to the severe criminal penalties imposed by the CDA.

A. Undefined Terms

1. Reach Over Foreign Persons or Entities

The first sentence of the CDA, amended section (a)(1)(A) of the Communications Act of 1934, refers to activities "in interstate or foreign communications."¹³ It is not defined here or elsewhere in the CDA what Congress intended by including the word "foreign" or its expectations of whom the CDA might reach by its inclusion. The Commerce Clause of the United States Constitution¹⁴ grants Congress the power to create and enforce laws with respect to both domestic and foreign commercial activity.¹⁵ The legislative history of the Communications Act of 1934 notes that "the general purposes of the Act make clear that the Congress intended to exercise its full authority under the commerce clause."¹⁶ Indeed, the word "foreign" is included in the original section 223 of the Communications Act of 1934.¹⁷ However, that section referred only to communications by telephone, and therefore may have been limited to persons or entities affirmatively calling into the United States, purposefully employing the United States telephone infrastructure. While Congress in 1934 may have been exercising its "full authority" under the Commerce Clause pursuant to the *Zeitgeist* of the times,¹⁸

13. CDA, *supra* note 1, at § 502(a)(1)(A).

14. U.S. CONST. art. I, § 8, cl. 3.

15. See Douglas B. McFadden, *Antitrust and Communications: Changes After the Telecommunications Act of 1996*, 49 FED. COMM. L.J. 457, 469 (1997).

16. See H.R. Rep. No. 90-1109 (1968), reprinted in 1968 U.S.C.C.A.N. 1915, 1919.

17. 47 U.S.C. § 151-610 (1982), amended by 47 U.S.C. § 223(d) (1996).

18. In the years just prior to the passage of the Communications Act of 1934, the Supreme Court struck down a number of laws supported by President Franklin Roosevelt on the grounds that they exceeded the scope of the Commerce Clause. Many believe that President Franklin Roosevelt's proposed plan in the 1930s to "pack" the Supreme Court by increasing the number of Justices sitting on the court prompted the then sitting Justices to later defer to the Executive and Legislative branches on the matter of the scope of the Commerce Clause. See Henry J. Abraham, *Reflections on the Contemporary Status of Our Civil Rights and Liberties and the Bill of Rights*, 13 J.L. & POL. 7, 20 (1997).

there are at least two reasons why it cannot be assumed that Congress meant to subject any communication with an international aspect to the CDA.

First, as discussed more fully below, the transparent methods by which pack-switched networks such as the Internet arbitrarily and inconsistently employ a foreign telecommunications infrastructure, even when the sender and receiver of a communication are next door to each other, is fundamentally different from ordinary telephony. This difference between voice communications contemplated by the Communications Act of 1934 and the Telecommunications Act of 1996 on the one hand, and the advanced telecommunications and information services contemplated by the CDA on the other, was not fully discussed in the legislative history of the CDA. Second, "foreign communications" *per se* were not discussed at all in the legislative history of the CDA of the Telecommunications Act of 1996. The phrase, "interstate or foreign communications," was simply grafted from the existing parts of the 1934 law.

Because the amended section replaces the word "telephone" with the term "telecommunications device," the appropriateness of including the word "foreign" may need to be reevaluated. The Internet, for example, employs "packet-switching" technology which breaks communications into parts and employs multiple, often geographically diverse, telecommunications mechanisms to deliver and then reassemble those parts.¹⁹ The path of the message parts, and, therefore, the number and location of telecommunications mechanisms, is volatile and arbitrary from the perspective of the sender and receiver of a communication.²⁰ One who sends a communication using a telecommunications device (depending upon how that term is defined) may in fact be employing a foreign telecommunications infrastructure, and thus be potentially liable under this section of the CDA. This may be the case even where the sender and receiver are within the same jurisdiction.

It may be that Congress is attempting to reach foreign persons or entities who "reach in" to the United States via use of the American telecommunications infrastructure, even if they do so unintentionally (due to non-user-controlled packet-switching, for example). If the sender and receiver of a prohibited communication both reside in foreign

19. See Christopher Libertelli, *Internet Telephony Architecture and Federal Access Change Reform*, 2 B.U. J. SCI. & TECH. L. 13, 13 (1996).

20. Packet-switching technology takes advantage of efficiencies in traffic flow of telecommunications. The route of message parts is determined by available capacity among several alternative routes. See John L. Keller, *GTE Planning to Buy BBN*, *Internet Pioneer*, WALL ST. J., May 6, 1997, at B6.

jurisdictions, however, the violator can hardly be said to be under the proper jurisdiction of Congress. Moreover, the protection of foreign "victims" is not Congress's concern.

In addition, Congress may be seeking to ensure that violators of the CDA are not shielded from liability by the deliberate use of "foreign communications" to send prohibited communications. As explained, however, the route of any communication over the Internet cannot be directed by the sender. Moreover, from the user's perspective, the same lack of control over routing applies to all forms of telecommunications. Neither the user of a telephone, nor a computer with a modem, nor a wireless device is cognizant of, nor has control over, the route of transmission of his or her communication.

Congress's use of the term "foreign communications" may reflect nothing more than its intention to reach prohibited communications initiated in foreign jurisdictions but which ultimately reach the United States. In this sense, the use of the term would seem to parallel the intention of the original Communications Act of 1934 regarding, *inter alia*, obscene or harassing telephone calls. Nevertheless, with the complex nature of modern telecommunications transmission, e.g. packet-switching, and the convergence of distinct forms of communications across the telecommunications infrastructure (voice, data, e-mail, etc.) it may be that extending the CDA to "foreign communications" packs an unintended, over-inclusive punch.

2. "Telecommunications Facility" and Vicarious Liability

Amended section 223(a)(2) extends liability for prohibited activities under amended section 223(a)(1) to anyone who "knowingly permits any telecommunications facility under his control to be used for any [prohibited activity] . . . with the intent that it be used for such activity."²¹ Unfortunately, but not surprisingly, the term "telecommunications facility" is not defined either in the CDA or the larger Telecommunications Act of 1996.

Whatever definition is imputed to the term, at first glance it would seem unlikely that any person or entity controlling a "telecommunications facility" would unwittingly subject itself to liability under this section of the CDA since the wording requires both intent and knowl-

21. CDA, *supra* note 1, at § 502(a)(2).

edge. On the other hand, a precise definition of the term “telecommunications facility” will be important for Internet service providers (IAP),²² so-called “interactive computer services,” and even the “enhanced services”²³ provided by telephone companies and others.

Specifically, the lack of a definition for the term “telecommunications facility” renders it subsumable under telecommunication devices or even interactive computer services. Because sections (a)(1)(A)-(B) of the CDA contemplate communications “by means of a telecommunications device,” telecommunications facilities must be distinct from mere devices in order to be spared under these sections. As discussed below, because telecommunications device is defined only with reference to what is not contemplated by that term, facilities that may be considered “telecommunications facilities” are even more vulnerable. Indeed, the intuitive relationship between telecommunications devices and facilities is obvious: one can easily imagine a telecommunications facility comprised of telecommunications devices. Whatever is to be understood by the two terms, the distinction between them must be made clear.

In addition, telecommunications facilities may be subsumed by interactive computer services. At first glance, the distinction between a computer and an element of telecommunications equipment—“device” or “facility”—may seem clear. The definition of interactive computer service provided by the CDA, however, refers to (1) “information systems,” (2) providing access “by multiple users to a computer server,” and (3) “a system that provides access to the Internet.” As discussed later in this section, telecommunications infrastructure providers such as telephone companies are increasingly and actively engaged in the provision and maintenance of information systems (e.g., frame relay service).

Systems that provide multiple users access to a computer server necessarily use modems and, therefore, necessarily use “telecommunications equipment.” By including in the definition of interactive computer service these systems and systems that provide access to the Internet,

22. Internet service providers provide access to the Internet over dial-up telephone lines. Some Internet service providers house server computers which temporarily store data for individual subscribers to access at will. The service house enhanced telecommunications facilities which provide speedier access to the Internet.

23. Telephone companies, which are normally regulated as common carriers and are not liable for content traveling over their lines, may be liable in their provision of enhanced services if they “create or control the intelligence” of the communication. *See infra* Part II.B.3; *see also*, Anthony L. Clapes, *Proceed With Caution—Information Superhighway Under Construction: Selecting the Proper Intellectual Property Right Paradigm to Apply to Passengers on the Interim-net*, 11 ST. JOHN’S J. LEGAL COMMENT. 621, 624 (1996).

Congress has forced the contemplation of at least some telecommunications equipment and infrastructure within the meaning of interactive computer service.

The first of the two principal provisions of the CDA refers to communications by means of a telecommunications device. The second provision refers to the use of interactive computer services. Because it is arguably contemplated by both of these terms, a telecommunications facility, whatever it is, may be subject to virtually the entire CDA.

Once telecommunications facilities are endowed with a precise definition, assuming that definition wholly distinguishes them from both telecommunications devices and interactive computer services, liability under the CDA as discussed at the beginning of this section appears limited to identical subsections (a)(2) and (d)(2) (addressing telecommunications devices and interactive computer services respectively).

In these subsections, liability is limited to those who "knowingly permit any telecommunications facility under his control [to be used to transmit a prohibited communication] with the intent that it be used for such activity." The wording provides the relatively limited reach to those actors with both knowledge and intent. However, as discussed in detail below, the question of control of telecommunications facilities is problematic.

3. *Online Service Providers, Internet Service Providers, and the CDA's "Control of Facilities" Language*

If the term "telecommunications facility" is to include the computer servers and broadband telecommunications lines used by IAPs,²⁴ and if those facilities are deemed to be controlled by the IAPs, then IAPs may be liable under the CDA notwithstanding other language in the Act which would tend to shield them. Specifically, the defenses included in the CDA, discussed in detail below, arguably include language which would shield from liability all the typical activities of an Internet service provider.

It seems clear that the commercial online service providers, such as CompuServe and America Online ("AOL"), control the systems to which

24. Internet service providers own or lease a high speed, high capacity telecommunications link to the Internet. Subscribers to IAPs dial into the IAP's location via a computer modem and home telephone line.

their customers connect. On the other hand, most of the commercial online service providers also provide their customers with access to the Internet. The Internet and the thousands of computers and telecommunications facilities and devices that it employs are not controlled by any one entity.

The question remains of whether an IAP such as AOL could be liable for material found on its proprietary system but not liable for material accessed on the Internet via AOL. Anyone who has used one of the commercial online services knows that this division in the application of liability would be cumbersome and difficult to apply and enforce. On the America Online service, for example, the distinction between content provided by AOL, its subscribers, or its licensed content providers and content originating from the Internet is becoming increasingly blurred. Because "hyperlinks" appear throughout the service by which one can seamlessly switch back and forth between AOL content and the Internet, all but the most experienced user may be unaware that he has left the confines of AOL's huge computer server in Vienna, Virginia.

Thus, for AOL and the other commercial online services, liability cannot effectively be divided based on the origin of the content available on their services. Moreover, even if AOL and the others could shield themselves from liability based on the fact that some of their content arrives via the Internet, Congress's goal to protect children from obscene or indecent communications would be largely undermined.²⁵ Indeed, because all of the commercial online services are currently considering providing access to their services through Internet World Wide Web pages, AOL and the other services could avoid liability for the prohibited acts of their subscribers and/or licensed content providers simply by changing the way their services are delivered.

B. Unclear Definitions

1. "Telecommunications Device"

The first of the two principal sections of the CDA refers to prohibited communications "by means of a telecommunications device." "Telecommunications device," however, is nowhere defined in either the CDA or the larger Telecommunications Act. The CDA provides that "interactive computer services" are not telecommunications devices, but otherwise

25. In fact, because the commercial online services provide the lion's share of Internet access to private residences, their exclusion from liability under the CDA would render almost ineffective Congress's intention to provide for contributory or vicarious liability.

leaves the term undefined.²⁶ An argument may be made that by subtracting interactive computer services, a term that is defined in the CDA, we are left with a more-or-less identifiable subset of equipment. Specifically, one might conclude that the term "telecommunications device" seeks to update the word "telephone" in the Communications Act of 1934 to include fax machines, cellular phones, pagers, and other voice or signaling-related equipment.

The fact that the CDA attempts to exclude "interactive computer services" from the definition of "telecommunications device" is unhelpful. First, it is unclear whether the Internet as a whole is to be considered an interactive computer service. The definition of an interactive computer service, provided in section 230(f)(2) of the CDA, includes "a service or system that provides access to the Internet." A self-contained computer server with a single connection to the Internet may indeed be owned and controlled by a single person or entity—a distinction that the CDA emphasizes elsewhere in the statute as one determinant of liability. The Internet as a whole, however, is neither owned or controlled by a single entity nor limited to even the most broad definition of "telecommunications device." Indeed, it is hard to imagine a device or service contemplated anywhere in the CDA that does not, or could not, somehow relate to the Internet.

Notwithstanding the undefined term "telecommunications device," and the difficulties that arise when inferring which devices it contemplates, the use of the term "knowingly" effectively limits the devices and activities associated with them that are reached under that section of the Act.²⁷ Telephones, fax machines, cellular phones, and pagers are all examples of point-to-point communications devices.²⁸ Except in the case of a misdialed identifying number, a communicator affirmatively communicates with or to a specific person with those devices. Thus, one who initiates a prohibited communication to a specific person using a point-to-point device does so knowingly. In contrast, the use of devices contemplated under the term "interactive computer service"²⁹ may, by the nature of those systems, result in a prohibited communication being

26. CDA, *supra* note 1, at § 230(f)(2).

27. CDA, *supra* note 1, at § 223(a)(1)(A)-(B).

28. See Moskowitz, Robert, *Nifty New Phone Features at your Fingertips; Enjoy Phones that Follow You and Make Calls Without You*, INVESTORS BUS. DAILY, July 13, 1995, at A1.

29. The meaning of "interactive computer service" is discussed *infra* at Part II.B.2.

received by a person protected under the Act without the knowledge of the sender.

The "intent" requirement of amended section 223(a)(1)(A) also limits the application of the Act to certain devices, the use of which may result in liability under that section. Subsection (a)(1)(A) requires the "intent to annoy, abuse, threaten, or harass another person" to be liable under the CDA. This effectively precludes from the reach of the section the user of a point-to-multipoint³⁰ device whose communication may reach an unintended recipient.

Whereas, the "knowingly" and "intent" requirements may effectively protect users of point-to-multipoint devices such as computer networks, other language in amended sections 223(a)(1)(A)-(B) would seem to sweep in most devices not specifically included within the definition of interactive computer services.³¹ The CDA refers to the transmission of any "comment, request, suggestion, proposal, image, or other communication which is obscene. . . or indecent."³² An "image" is precisely what fax machines and other data-based devices transmit. In addition, the phrase "other communication" would seem to serve as a catch-all for any other communication not specifically associated with an interactive computer service, which is the only "device" the CDA tells us is not a telecommunications device.

Thus, the intent and knowledge requirements of amended section 223(a) together with the exclusion of interactive computer services from the definition of telecommunications device may effectively limit the kinds of devices contemplated under the section. Nevertheless, undefined terms in legislation aimed at the telecommunications industry is unproductive and unfair: rapid development of new technologies and convergence of the telecommunications and computer industries will lead to increased uncertainty in assessing liability under the CDA. Moreover, by employing another problematic term of the CDA (interactive computer services) in an attempt to enlighten the meaning of telecommunications device, Congress has only further confused the matter.

30. An example of a point-to-multipoint device might be a posting from a home computer to an electronic bulletin board residing on a server computer. From this bulletin board, multiple parties may have access. See Kelly Tickle, *The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards*, 80 IOWA L. REV. 391, 392 (1996).

31. Telecommunications Act of 1996, § 230(e)(2) (codified at 47 U.S.C.A. § 230(e)(2) (West Supp. 1997)).

32. CDA, *supra* note 1, at § 223(a)(1)(A)(ii).

2. Scope of "Interactive Computer Service" Under the CDA

The CDA adds a new subsection (d) to section 223 of the Communications Act of 1934.³³ This subsection imposes liability for knowingly using an "interactive computer service" to send to a specific person under the age of eighteen, or "display in a manner available" to a person under the age of eighteen, "patently offensive" material as measured by "contemporary community standards."³⁴

The "display in a manner available" language in this subsection is potentially the most far-reaching part of the CDA. It may reach anyone who posts objectionable material from anywhere in the world to anywhere on the Internet or other computer services. After all, without the use of filtering software³⁵ or other blocking controls, postings to the Internet are available to anyone with access to one of the hundreds of thousands of servers connected to that "network of networks."³⁶

In addition, there is the ambiguity in the requirement of "using" an interactive computer service to be reached by the Act, and the non-requirement of "initiating" the communication. A similar ambiguity exists in subsection (a). With this vague language, Congress has left unanswered the question of what the difference is between using a service and initiating a communication.

It is also important to determine precisely what is to be included within the meaning of "interactive computer service." Section 502(g)(2) of the CDA provides that the term has the meaning provided in new section 230(f)(2). That section defines "interactive computer service" as "any information services, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet"

33. CDA, *supra* note 1, at § 502.

34. *See* Roth v. United States, 354 U.S. 476, 488-89 (1957); *Miller v. California*, 413 U.S. 15, 21 (1973).

35. *See supra* note 6.

36. The Internet is a "network of networks" because it is comprised of thousands of "local area" networks—such as those in the workplace or on college and university campuses. The networks are not directly connected to one another, but, rather, make "contact" using communication protocols and address schemes.

However, subsection (e)(1) of section 502 of the CDA provides that no person will be liable under subsections (a) and (d) for having solely provided access or connection to or from a facility, system, or network not under that provider's control. The question then becomes, "Does a provider 'control' the facility, system, or network to which he is providing access?"

An interactive computer service is the only potential victim of the CDA for which Congress has provided an allegedly complete definition. In its entirety, section 230(f)(2) reads:

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

This definition potentially sweeps in everything from the largest telecommunications service provider (even AT&T provides access to the Internet) to the one-man, one-computer bulletin board operator. In laying a foundation for the CDA's defenses to liability, however, Congress has confused the determination of the reach of the section.

First, Congress explained that one purpose of new section 230 of the Communications Act is to overrule any case law which holds that an online service provider incurs liability for exercising control of the content available on its service.³⁷ The purpose of the section was to pave the way for a defense to liability under the CDA. Section (e)(5) provides a defense to prosecution under the CDA for having taken "reasonable, effective, and appropriate" measures to block access of a prohibited communication to a minor child.

Defense provision (e)(1) makes available a wide escape hatch for anyone "providing access to a facility, system, or network not under his control." Section (e)(3), in what at first seems redundant, clarifies that the defense is not available to a person who provides access to a system, facility, or network that is under such person's control or ownership. The suggestion seems to be that if a service operator owns or controls a facility, system, or network, the operator knows or should know of prohibited communications made by means of its systems.

The result of Congress's patchwork of sweeping liability and broad defenses is a statute that does not know whether it is coming or going. To suggest that ownership or control of a facility, system, or network necessarily means knowledge of illegal actions by system users rises to duplicitous involvement in prohibited communications is unfounded.

37. Explanatory Statement, *infra* note 105, at H1130.

For one thing, as discussed later in this section, it ignores one hundred years of common carrier policy and regulation. Even a cursory review of the sound reasons for exemption from liability for common carriers would have revealed potential problems for the CDA.

In addition, "adjusting" the sweep of section 230 by devising a patchwork of defenses is not responsible legislative drafting. Why not pull back on the broad definition of interactive computer services rather than limit liability through a series of defense provisions?

3. *Distinct Treatment of "Enhanced Services" and the Blurring Lines Between Common and Private Carriage*

Buried at the end of a section not directly relevant to the issue of service provider control of content is the following sentence: "Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."³⁸

The commercial online services both provide access to proprietary systems under their control, and provide access to the Internet, which, of course, they do not control. Internet service providers provide connections to the Internet only. It is unclear, however, whether the ISPs are properly classified as common carriers, and thus not subject to liability for content, or exercise enough control over their system's content to be considered under subsection (d).

Indeed, the CDA's unelaborated use of the term "common carrier" disregards a century of judicial and regulatory struggle over properly distinguishing between common and private carriers. At least as far back as 1889, the Supreme Court has said of the common carrier/private carrier distinction:

A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. . . . A common carrier may become a private carrier . . . when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.³⁹

The Court thus suggested that a given carrier may operate as both a common and private carrier. When it undertakes its regular business activities, previously deemed common carrier services, it is subject to common carrier regulation. When it contracts to perform activities

38. CDA, *supra* note 1, at § 502(e)(6).

39. *Liverpool & G.S. Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 440 (1889).

outside the scope of its regular operations, activities are not deemed common carriage, it is a private carrier for that particular transaction.⁴⁰ More recently, regulators have determined that a carrier may serve as both a common carrier and a private carrier depending upon the characteristics of the telecommunications services provided. Specifically, common carrier provision of "enhanced services" will in most cases subject that carrier to distinct regulation as a noncommon carrier with respect to the enhanced service. Moreover, because the FCC has found that "complex communications technologies . . . blur the line between common and private carriage,"⁴¹ precise line-drawing between and among telecommunications services continues to challenge regulators and their reviewing courts.

In providing that interactive computer services are not common carriers, Congress *presumably* meant to deny those services safe harbor in traditional common carrier regulation. A service provider is a common carrier and is thus not subject to liability for the content of its transmissions when: (1) the carrier holds itself out as an indifferent provider, and (2) the end-user of the service designs and chooses the intelligence to be transmitted.⁴²

In the 1976 *NARUC II* decision, the D.C. Circuit Court found that a requirement that "has particular applicability to the communications field is the . . . prerequisite to common carrier status . . . that the system be such that customers transmit intelligence of their own design and choosing."⁴³ In other words, when the users of communications equipment or facilities control the content of their transmissions, the carrier is deemed neutral and is not subject to any liability arising from the contents of the communications.

Importantly, the *NARUC II* court seemed to adopt a broad view of the behavior required by an end-user to meet the common carrier prerequisite of the "design[ing] and choosing of the intelligence to be transmitted, . . . any two-way use of cable in which the customer explicitly *or implicitly* determines the transmission or content of the return message,

40. *Id.*

41. Independent Data Communications Manufacturers Association Petition for Declaratory Ruling re AT&T's InterSpan Frame Relay Service, 10 FCC Rcd 13717, 13724. In addition, FCC rules impose common carrier status on Local Exchange Carriers (LECs) as a condition of LEC provision of enhanced services over the LEC's own network. Thus, a carrier that would otherwise be free from common carrier regulation in the provision of enhanced services is subject to such regulation if it owns the network over which the enhanced services are provided.

42. See *NARUC v. FCC*, 525 F.2d 630 (1976) ("NARUC I"); *NARUC v. FCC*, 533 F.2d 60, 610 (1976) ("NARUC II").

43. *NARUC*, 533 F.2d at 609.

satisfies [the] second prerequisite to common carrier status.”⁴⁴ The court identified a burglar alarm system, “whereby the customer intends and expects a message to be sent at the occurrence of a particular event, [as] an example of implicit customer control.”⁴⁵ Indeed, the court determined that content control “may arise solely from the determination to transmit or not [to transmit].”⁴⁶ Thus, under the *NARUC* decisions, an Internet service provider would almost certainly be characterized as a common carrier. Indeed, ISP customers create the “intelligence” of their transmissions; the ISPs merely transmit that intelligence unaltered.

It may be that in expressly removing interactive computer services from common carrier status, Congress sought to ensure that the classification would not be used to avoid liability under the CDA. It is inappropriate, however, to remove interactive computer services as a whole without addressing the distinctions between and among members of that classification. Some members of the class may be more characteristic of a common carrier, others may be less so.

C. *Determination of Liability Under the CDA*

The Communications Decency Act modifies the Communications Act of 1934 by amending section 223(a) to include the use of “telecommunications devices” rather than simply telephones. The updated legislation reasonably seeks to prevent an escape from liability to those who intentionally annoy, abuse, threaten, or harass another individual by means of non-telephone telecommunications devices. Such telecommunications devices used to violate the section could include fax machines, pagers, and wireless communications devices. Because telecommunications device is left undefined in the CDA, however, it is difficult to determine the range of devices within reach of the subsection.

The CDA also adds a new subsection (d) to section 223 of the original Communications Act. Subsection (d) extends liability to anyone who uses an interactive computer service to “make available” to a person under the age of eighteen a communication that, in context, is patently offensive. The subsection is distinct from subsection (a) in two ways: (1) it refers to the use of interactive computer services, services that the

44. *Id.* at 610 (emphasis added).

45. *Id.* at n.46.

46. *Id.* at 610.

CDA advises are not telecommunications devices, and (2) knowledge that the recipient of a prohibited message is under eighteen is not required.

The three problems that arise in subsection (d) are: (1) determining who is an interactive computer service, (2) adjudging "context," and (3) applying the "contemporary community standards" to determine patent offensiveness. The first problem is discussed in detail later in this section; the second and third problems are discussed in Part III.

1. Overview of Affected Parties and Conduct Subject to Liability

Amended subsection (a)(1)(A) reaches anyone who uses a telecommunications device to annoy, abuse, threaten, or harass another person ("harasser"). Subsection (a)(1)(B) reaches the harasser who transmits an obscene or indecent communication to another person whom the harasser knows is under eighteen years old ("pedophile harasser"). Subsections (a)(1)(C), (D), and (E) all reach the harasser who uses a telephone or other telecommunications device to harass anonymously, or to cause a telephone to ring repeatedly. Actual communication between the harasser and his intended victim is not necessary (thereby including a "crank caller").

These provisions update existing law by extending liability to the use of telecommunications devices other than telephones. Because both knowledge (of under-aged recipients) and intent to harass are required, the provisions do not appear to reach significantly or unreasonably beyond existing law.

As discussed below, because telecommunications device is not defined in the CDA, point-to-multipoint communications such as e-mail and bulletin board postings may be swept into the subsection. On the other hand, because interactive computer services are expressly excluded from the definition of telecommunications device, most point-to-multipoint communications may be protected from these subsections.

Subsections (d)(1)(A) and (B) reach the computer user who makes available to minor children communications deemed patently offensive as determined by contemporary community standards. A person in violation of these subsections is labeled under the CDA as a "computer offender." Because subsection (d) does not require intent, the provision potentially sweeps in anyone who contributes to a "public forum" in cyberspace any material that may unintentionally find its way to a minor child. Moreover, because "patent offensiveness" is to be determined by "contemporary community standards," indistinct and/or meaningless jurisdictional boundaries within the communities of cyberspace may lead to the application of the most conservative standards to all cybercitizens.

Subsections (a)(2) and (d)(2) reach anyone who permits his telecommunications facility to be used to violate the provisions of the CDA with the intent that the facility be used for such activities ("passive offender"). Because telecommunications facility is not defined in the CDA, the passive offender potentially runs the gamut from the largest telecommunications infrastructure and service provider to a home-based computer used to "host" a small cyber-community. Despite the non-acknowledgment of the distinction for liability purposes between private and common telecommunications carriers, the intent requirement of the subsection may be enough to shield the truly passive transmitter.

2. *Section (a)(1)(A)*

As explained above, this section of the CDA updates the Communications Act of 1934 by replacing the word "telephone" with the term "telecommunications device." The intent of the section, to prohibit the making of an "obscene, lewd, lascivious, filthy, or indecent" communication with intent to "annoy, abuse, threaten, or harass another person," remains the same. Although the CDA does not provide a complete definition of "telecommunications device," except to say that an "interactive computer service" is not one, presumably Congress meant to account for new types of personal communications devices such as fax machines, pagers, and cellular phones that might be used as effectively as a telephone to annoy, abuse, threaten, or harass another person.

Because the subsection prohibits the making and sending of obscene, lewd, lascivious, filthy, or indecent images or other communications, however, the provision may reach significantly farther than it did under the original Communications Act. No longer limited to the spoken voice or other audible sounds, the subsection may reach a whole host of communications including literary and artistic works and the content of e-mail. Although many may decry the perhaps increased subjectivity of determining the lasciviousness or lewdness of an image, the subsection still requires intent to annoy, abuse, threaten, or harass. Because the content of telephone conversations is, and always has been, subjective as well, it may be that the intent requirement effectively limits the potential over inclusiveness of the provision.

The subsection also refers to the "initiat[ion of] the transmission" of a prohibited communication. Given Congress's clear intention elsewhere

in the CDA to provide for vicarious liability for the transmission of prohibited communications, the wording of this section may be of concern for telecommunications service providers such as telephone companies. However, transmission alone is not enough under this subsection. One must make (or create or solicit) *and* transmit the communication to be liable. Moreover, the wording provides that one must knowingly make and transmit the communications. Thus, "passive" transmitters of communications may be effectively excluded from liability under the subsection (a)(1)(A).

3. *Section (a)(1)(B)*

Subsection (a)(1)(B) differs from (a)(1)(A) in two ways: (1) when the person who makes and sends a prohibited communication knows that the intended recipient is under the age of eighteen, it is not necessary that the sender have initiated the communication, and (2) there is no intent requirement. Although the subsection does not provide an example, a reasonable interpretation of the first difference evokes the image of a minor child telephoning or otherwise contacting an individual who then transmits a prohibited communication to the minor child.

4. *Constructing a Definition of "Interactive Computer Service"*

In determining who is liable under the new subsection (d) of the CDA, one must determine what qualifies as an "interactive computer service." Subsection (e)(6) informs that an interactive computer service is *not* to be construed as either a common carrier or telecommunications carrier. Subsection (h)(1) informs that a "telecommunications device" does *not* include an interactive computer service. From this, we know what an interactive computer service is not.

A definition of interactive computer service is provided in new section 230(e)(2):

[A]ny information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Arguably, any information creator or provider discussed herein, other than telecommunications infrastructure common carriers, could fit into this definition.

We now know what interactive computer services are not and what they might be. Section 502(e)(1) provides:

No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

It seems, then, that regardless of what the definition of "interactive computer services" may include, liability under the new law only reaches those who truly have, and exercise, some editorial control over the content to which they provide access.

Congress may or may not know that those providers currently exercising editorial control over their content (e.g., AOL, CompuServe, etc.) have long since implemented controls that would appear to fall easily within the "good faith" defenses outlined in the Act.⁴⁷ Perhaps Congress is really only after individual content *creators*—those who obtain or create "patently offensive" material and upload it to computer servers accessible to minors.

5. *Applications of Electronic Mail Mechanisms*

Amended subsections 223(a)(1)(C), (D), and (E) simply retain the provisions of section 223 of the original Communications Act by prohibiting anonymous or harassing telephone calls or causing another's telephone to ring repeatedly. As with the other subsections of amended section 223, the word "telephone" is replaced with the term "telecommunications device." Thus, one could deduce that the use of a fax machine or pager to harass another would be reached by the Act. Again, however, the undefined term "telecommunications device" leaves precise application of the subsection ambiguous.

Perhaps the most far-reaching application of subsections (C), (D), and (E) would be to persons using electronic mail (e-mail) anonymously or repeatedly with the intention of harassing the receiving party or parties.

47. CompuServe has segregated adult-oriented content on its service to a separate area that can only be accessed by password. Similarly, America Online has "parental control" features that block adult-oriented material unless the subscriber affirmatively alters the control settings. Michelle Healy, *Ecstasy Alert*, USA TODAY, July 30, 1997, at 1D.

Because postings to news groups and electronic bulletin boards (BBS)⁴⁸ employ e-mail mechanisms, the subsections may reach those who post without intending to communicate with any particular person. The potential liability for those who post to "open"⁴⁹ groups or bulletin boards is enormous: an e-mail directed to an unknown party may find its way to the "egg shell plaintiff."⁵⁰

Specifically, one posting a communication to a wide audience on a bulletin board or an Internet newsgroup may find that what was intended to be merely provocative is perceived by some as harassing. In this way, the potential harasser may not be shielded by the intent requirement; after all, he intended to be provocative. Indeed, anyone who participates in online communications understands that the "faceless" nature of discussions can lead to misunderstood intentions that result in awkward or embarrassing (or worse) encounters. On the other hand, the CDA specifically excludes "interactive computer services" from the definition of "telecommunication device." Speaking to this issue, the CDA states that, "[t]he use of the term 'telecommunications device' in this section . . . does not include an interactive computer service."⁵¹ Thus, subsections (C), (D), and (E) may not apply at all to e-mail and the communications made to BBS's and news groups. Without more precise definitions of the terms used throughout the CDA, however, liability for prohibited communications through the use of such mechanisms cannot be determined.

48. See Ferdinand M. DeLeon, *Electronic Bulletin Boards Offer Forums to Share Interests, Friendship*, SEATTLE TIMES, Mar. 12, 1995, at C1.

49. There are several different types of virtual groups whose members communicate using computers. Usenet and Netnews groups, for example, are accessed via the Internet and are available indiscriminately to anyone who has access to the Internet. Groups on the commercial online services, on the other hand, are available only to the subscribers to the particular service. Finally, dial-up bulletin boards reside on a single "host" computer and are accessed by individuals over phone lines by calling into the host computer.

50. See generally Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 LOY. L.A. L. REV. 1327 (1994); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995); Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121 (1993).

51. CDA, *supra* note 1, at § 223(b)(1)(B).

D. Defenses to Liability Included in the CDA

1. First Amendment Challenges to Statutory Defenses

Section 502(e)(5)(A) provides a defense for those providers who, "ha[ve] taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified [in the CDA]. . . ." These measures may include software designed to filter out objectionable material, training for parents and children on "responsible use of computers," or requiring access codes, passwords, or credit card numbers to access certain materials.⁵² It is impossible to determine, however, which blocking mechanisms would qualify under the CDA as "effective," if any. Moreover, because of the rapid growth of online communications, the evolution of the telecommunications technology it employs, and the changing nature of its protocols, blocking mechanisms deemed "effective" under the Act today may be obsolete tomorrow.

Subsection 223(e)(1) provides a defense for service providers who provide access to materials not under their control. A spokesperson for Senator Exon (the chief sponsor of the CDA) recently explained that this defense would protect, for example, commercial online service provider America Online for providing access to the World Wide Web that results in a minor receiving prohibited materials.⁵³ Although it may seem reassuring that a spokesperson for one of the CDA's creators has publicly expressed this view, it is by no means clear from the wording of the Act that Congress intended to so severely limit the reach of the CDA. America Online creates its own content, monitors activity on its

52. Section 230(c)(2)(A) provides:

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of 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.

Many have interpreted this language to contemplate widely-available filtering or screening software to block material from appearing on a user's computer monitor. *What Decision on Internet Decency Means*, ATLANTA J. & ATLANTA CONST., June 13, 1996, at E4.

53. See *Statement of Chris McLean*, FED. COMM. BAR ASS'N NEWSL., Mar. 1996, at 20. .

service, provides access to the Internet, *and* owns much of the telecommunications and computer infrastructure it employs. If a commercial online service provider such as this is immune from liability under the CDA, it is difficult to imagine who Congress seeks to reach in the first place. Indeed, if the intent of the CDA is to reach only the demented pedophile, sitting at home in front of his computer devising ways to offend intended victims, it is difficult to understand the sweeping nature of the legislation.

2. *Limits on Defenses Provided by the CDA*

Subsection (e)(3) of section 502 provides that the defenses to liability under the CDA shall not apply “to a person who provides access or connection to a facility, system, or network engaged in a violation of this section that is owned or controlled by such person.” The wording of this defense provision begs two questions: (1) the persistent and unanswered question of how a “facility” is defined under the CDA, and (2) the problematic determination, addressed above, of what it means to control a “facility, system, or network.”

The limitations on defenses to liability provided in subsection (e)(3) are of limited reach, however, because they apply only to the defenses provided in paragraph (1) of subsection (e)(1). The defense to liability provided in paragraph (5) of subsection (e) of the CDA applies broadly to all liability imposed under amended section 223(a) and new section 223(d).

The CDA also provides that the Federal Communications Commission (FCC) may develop an advisory list to aid content creators and access providers in avoiding liability under the new law.⁵⁴ Nothing in the Act suggests that compliance with the FCC’s suggestions provides a legal defense or “safe harbor”⁵⁵ from liability.

3. *Adequacy of CDA Defenses*

The question of whether service providers control their content is even more problematic for Internet service providers. Many view ISPs as mere “onramps” to the Internet—completely neutral common carriers neither exercising editorial control over the content provided through their facilities nor having knowledge of their potential liability.

54. CDA, *supra* note 1, at § 502(e)(6).

55. See Richard C. Turkington, *Safe Harbors and Stern Warnings: FCC Regulation of Indecent Broadcasting*, 3 VILL. SPORTS & ENT. L.J. 1, 2 (1996).

On the other hand, one might argue that because the servers to which ISPs' customers connect are really something more than a data conduit, the providers should be held to a higher standard than, for example, a telecommunications backbone provider.⁵⁶ Indeed, Internet content is stored in an ISP's server, however temporarily, and there is evidence that the ISP could, if it so chose, filter out certain "locations" on the Internet.⁵⁷

The ambiguities of the "control" issue aside, subsection (e)(1) of section 502 seems to provide a defense for an ISP regardless of how it is conceptualized: "No person shall be held to have violated [the CDA] . . . for providing access . . . including transmission, downloading, intermediate storage, access software, or other related capabilities. . . ." The wording of this defense provision would seem to cover all the activities of even the most attentive ISP. Indeed, even some BBS's and "moderated"⁵⁸ newsgroups may find shelter under this broad defense since most such systems are capable of fully automated operation.

4. *Determination of Liability for Parties Attempting to Control Content*

Section 509 of the Telecommunications Act of 1996, familiarly titled the "Online Family Empowerment Act," reflects Congress's intent to overrule a New York Supreme Court case⁵⁹ characterizing an online service provider as a publisher by virtue of the provider exercising control over the content of its service. The *Stratton* court found that "with . . . editorial control comes increased liability."⁶⁰ Because Prodigy had "held itself out to the public and its members as controlling

56. A "backbone" is a high-speed, high-capacity telecommunications line to which thousands of separate telephone lines are connected. The backbone is capable of transmitting many conversations or data streams simultaneously.

57. See *Religious Technology Ctr. v. Netcom On-line Communication Serv.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995). The Netcom system operators in that case admitted that it was possible for them to take affirmative steps to "screen out" specified Internet content.

58. Many electronic bulletin boards are moderated, often by volunteers. Moderators perform administrative functions of the group, including screening the content of posted messages for materials deemed inappropriate for the subject of the discussion or purpose of the board.

59. *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (N.Y. Sup. 1995) (not approved by Reporter of Decisions for reporting in state reports).

60. *Id.* at *3.

the content of its computer bulletin boards," the service could not now deny liability under a publisher paradigm.⁶¹

Although the *Stratton* case addressed a copyright issue,⁶² it was the court's imposition of liability on the service provider by virtue of its content control that Congress sought to undermine with the inclusion of section 509 of the Act. Because the Telecommunications Act is not meant to address copyright issues, even in the new context of cyberspace, it is reasonable to infer that Congress sought to ensure that online service providers would not be subject to liability under the CDA for exercising, or attempting to exercise, control over information content. Had Congress not overruled *Stratton*, the defenses provided in the CDA would be undermined or, at least, would be ineffectual and difficult to apply.

Yet, in this respect, Congress seems to want to have it both ways. A narrow reading of the CDA would suggest that liability falls only to those content *creators* who proactively offend an intended target (or inadvertently offend a minor). A more broad though equally reasonable reading of the Act, however, suggests that any person or entity who is in *any way involved with the creation, transmission, or delivery of an offending communication* could be liable. In other words, Congress's overruling of *Stratton* implies that the CDA seeks to reach only the creators of offending communications, not passive transmitters; yet, the definition of interactive computer service as provided in section 230(e)(2) of the CDA includes, "information . . . systems . . . including specifically . . . system[s]. . . provid[ing] access to the Internet." This wording suggests that Congress seeks to impose liability not only on content creators but on those who deliver the message as well.⁶³

On the other hand, the Explanatory Statement accompanying the CDA claims that, "the conferees intend that [the defense allowed by overruling *Stratton*] be construed broadly to avoid impairing the growth of online

61. *Id.* at *4.

62. *Id.* at *4-*6 (holding that Prodigy was a publisher of statements concerning plaintiffs on its "Money Talks" computer bulletin board, and that moderator, or "board leader" of "Money Talks" BBS acted as agent of Prodigy).

63. Despite the over inclusive wording of § 230(f), the *Explanatory Statement* accompanying the CDA claims: "Internet operators who provide access to the Internet and other interactive computer services shall not be liable for indecent material accessed by means of their services." Explanatory Statement, *infra* note 105, at H1129. This statement claims that any interactive computer service, from AOL to the Internet service providers, are not liable absent actual knowledge of and subsequent conspiracy to facilitate prohibited communications. If the CDA itself had been this clear, significantly fewer telecommunications and computer service providers would be in fear of the reach of the law.

communications through a regime of vicarious liability.”⁶⁴ The mistake that Congress made—to the detriment of a myriad of telecommunications service providers—was to not express this goal in the wording of the CDA.

III. CONGRESSIONAL, JUDICIAL AND REGULATORY DISTINCTIONS BETWEEN “INDECENCY” AND “OBSCENITY”

In addition to the ambiguities and contradictions with regard to computers, networks, and the instrumentalities of telecommunications, the CDA attempts to create and apply standards for use in determining liability under the Act. While the vague definition of terms such as “telecommunications device” makes precise application of the CDA difficult and confusing, it is the statute’s imposition of ill-conceived and overbroad standards that poses the greatest threat to the already large and fast-growing cyberspace community.

Congress’s proximate use of the terms “obscenity” and “indecency” reflects a disingenuous suggestion that the words are synonymous. In outlawing the dissemination of “obscene or indecent” materials, Congress ignores a century of line-drawing between the terms and an evolution of their perceived meanings. Ironically, Congress has reassembled the essence of a sentence from a nineteenth-century law that regulators and the courts have spent one-hundred years deconstructing.

A. *The Comstock Laws*

Near the end of the Civil War, the U.S. Postmaster General reported that “great numbers” of “dirty” pictures and books were being mailed to troops in the field.⁶⁵ Congress reacted by passing a law making it a crime to send any “obscene book, pamphlet, picture, print, or other publication of vulgar and indecent character” through the U.S. mail.⁶⁶

Within a decade, Anthony Comstock, secretary of the New York Society for the Suppression of Vice, had successfully promoted an

64. Explanatory Statement, *infra* note 105, at H1129.

65. Robert Corn-Revere, *New Age Comstockery: Exon vs. the Internet*, Cato Policy Analysis No. 232, June 28, 1995 (visited Sept. 11, 1997) <<http://www.cato.org/pubs/pas/pa-232.html>>.

66. Post Office Act, chap. 89, sec. 16, 13 Stat. 504, 507 (1865).

expanded version of the Postal Act.⁶⁷ The new law was popularly named the "Comstock Law."⁶⁸ In addition to the prohibition against using the U.S. mails to send obscene, vulgar, or indecent material, the new law made it a crime to distribute lewd or lascivious publications or pictures.⁶⁹

Then, as now, the laws against obscenity, indecency, or other publications potentially offensive to some, centered around the perceived need to protect children. The laws responding to the movement led by Comstock were modeled after an opinion written in a contemporary English case, *Regina v. Hicklin*,⁷⁰ which held that the test for obscenity turned on whether the material tended to corrupt the morals of a young or *immature mind*.⁷¹

The English court was concerned with the young or immature "into whose hands a publication of this sort may fall."⁷² Neither the intended audience nor the "overall artistic merit" of the material in question were important in determining the government's right to regulate distribution.⁷³

Despite the Constitution's First Amendment, literary artists and the particular tastes of mature adults fared little better in the United States during Comstock's crusade. The Victorian age's preoccupation with preserving the "virtue" of young women was only one motivating force behind Comstock's success. He also crusaded against "dime novels" with tales of wild west gunslingers and big-city crime. Comstock and his followers in Congress denounced such materials as "the inspiration for all of the antisocial behavior exhibited by the youth of today."⁷⁴

67. Among Comstock's methods was the setting up in the Vice President's Office of what became known as "The Chamber of Horrors," for the purpose of displaying materials that Comstock believed should not be available to the public. Corn-Revere, *supra* note 65, at 2, 3.

68. An Act for the Suppression of, Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, chap. 258, sec. 2, 17 Stat. 598, 599 (1873).

69. See generally Jonathon Rosenoer, *Indecent Communication* (visited Sept. 9, 1997) <<http://www.cyberlaw.com/cylw1295.html>> (discussing specific examples of "Comstock Law" violations); Daniel L. Appelman, *Policing the 'Net's Red Light District*, NAT'L L.J., Mar. 25, 1996, at C1 (discussing the strict application of the obscenity standards when applying the CDA).

70. *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868).

71. Corn-Revere, *supra* note 65, at 2.

72. See *Regina*, 3 L.R.-Q.B. at 371.

73. *Id.* Some English judges found that literary merit compounded the danger of obscene materials reaching the vulnerable by virtue of their being "disguised" in a generally acceptable publication. Corn-Revere, *supra* note 65, at 2 (discussing the work of EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE* 12 (Random House 1992)).

74. Blanchard, *supra* note 7, at 757. A more modern version of the concern over non-sexually-related materials and their effect on young or immature minds was the 1954 congressional hearings about comic books: a child psychologist named Frederic Wertham

Comstock's activities, and those of John Sumner, who carried on the effort after Comstock's death, resulted in the destruction of hundreds of thousands of publications ranging from the work of early feminists (because references to abortion or birth control were often contained therein)⁷⁵ to D.H. Lawrence⁷⁶ to George Bernard Shaw.⁷⁷

The tide began to turn in 1932 when the newly formed Random House Publishing Company decided to publish James Joyce's banned *Ulysses*. When copies of Joyce's book were seized by customs officials, Random House sued in Federal court. The District Court's ruling and its affirmation on appeal created the standard that such publications must be considered in their whole.⁷⁸ If a publication has artistic or literary merit when taken as a whole, it cannot be banned outright based on such isolated passages as may be offensive to some.

The James Joyce case marked the end of the Rule of *Hicklin* that had been the basis of the Comstock Laws. The yardstick for the measure of obscenity would no longer be the sensitivities of the most vulnerable victim but rather the average person. The ground was now laid for the evolution of a new "indecent" standard as the Supreme Court reviewed government action in the broadcast medium.

B. Speech of "Minimal Value"

As early as 1957, the Supreme Court, in *Roth v. United States*,⁷⁹ found that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties."⁸⁰ Because the Court has consistently held

wrote a book in which he claimed that comic books were a leading cause of juvenile delinquency. As a result of those hearings, comic books were sanitized. Bob Gale, *Fans of Sex and Violence Will Love the V-Chip*, WALL ST. J., Feb. 21, 1996, at A14.

75. See generally Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1006 (1993).

76. All copies of Lawrence's *Women in Love* were recalled and destroyed and the printing plates melted down.

77. Comstock attacked Shaw's play *Mrs. Warren's Profession* because it dealt with prostitution. In response, Shaw coined the term "Comstockery" in his own effort to combat overzealous moralizing.

78. See *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 708 (2d Cir. 1934).

79. 354 U.S. 476 (1957).

80. *Id.* at 484.

that obscene speech is not protected by the First Amendment, any communication adjudged obscene necessarily must be devoid of "even minimal value."

Sixteen years later, in *Miller v. California*,⁸¹ the Court put into words the essence of the James Joyce case decided by a U.S. Court of Appeals in 1934, "[Obscenity] must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which . . . do not have serious literary, artistic, political, or scientific value."⁸² The Court's finding did at least two things: (1) it limited obscene materials or communications to those of a sexual nature, and (2) it provided four broad categories under which the requisite minimal social value may be found to justify the dissemination of otherwise obscene speech.

When the Miller Court returned to the states and local communities the power to evaluate and suppress obscene speech, it may have been as much a matter of practicality as a precise reading of the dictates of the Constitution. In the decade and a half between *Roth* and *Miller*, the Court had become the final arbiter of obscenity determinations thirty-one times. The Justices may have tired of reviewing speech which many of them undoubtedly found personally offensive, and admittedly were beginning to conclude that an opinion from an unreviewable, national court was not serving justice or the people effectively. Indeed, Justice Brennan eventually concluded that the government could not constitutionally prohibit obscene speech at all.⁸³

IV. TWISTING IN THE WIND—THE FCC'S "INDECENCY STANDARD"

The authors of the CDA suggest that the rationale permitting the regulation of obscenity and indecency in the broadcast medium should apply to communications in cyberspace. Indeed, the Explanatory Statement accompanying the CDA cites Supreme Court case law addressing broadcast regulation to support this proposition. In addition, the CDA invites the FCC to develop guidelines for those seeking to avoid liability under the Act. Thus, a review of the FCC's regulation of broadcast obscenity and indecency is important to understanding Congress's intentions with respect to the CDA.

81. 413 U.S. 15 (1973).

82. *Id.* at 24.

83. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting).

A. Development of the Indecency Standard

For the regulation of broadcast indecency and obscenity, the FCC first looks outside of the Act under which it is authorized to regulate the airwaves in the public interest.⁸⁴ Criminal Statute 18 U.S.C. § 1464 reads: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than 2 years, or both."⁸⁵ Although only the Justice Department can bring criminal actions under the statute (and it rarely does so), the FCC may, under its authorizing statute, impose civil penalties on broadcasters who violate section 1464.⁸⁶

In addition, under sections 312 and 503 of the Communications Act of 1934, the FCC may: (1) revoke the station's broadcast license for a section 1464 violation, (2) issue cease and desist orders, and (3) impose fines against violators.⁸⁷ Under sections 307 and 308, the FCC may deny renewal, renew on a temporary basis, or deny a broadcast license application for activities it deems violative of the law. Finally, under section 303(g), the FCC can use the broad power of its mandate to "promote the larger and more effective use of radio in the public interest."⁸⁸

B. Reshaping the Standard After *Miller v. California*

In response to *Miller v. California*,⁸⁹ the FCC released an order purportedly recasting its indecency standard in harmony with the rule of that case. The FCC found that:

the concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or

84. The Communications Act of 1934 authorized the FCC to regulate the airwaves. See Paul J. Feldman, *The FCC and Regulation of Broadcast Indecency: Is There a National Broadcast Standard in the Audience?*, 41 FED. COMM. L.J. 369, 371 (1989).

85. 18 U.S.C. § 1464 (1994).

86. See Feldman, *supra* note 84, at 372.

87. *Id.* at 372.

88. *Id.* at 373; But see *Pacifica v. FCC*, 438 U.S. 726, 778 (Stewart, J., dissenting)(finding that FCC does not have authority to regulate indecency independent of § 1464).

89. 413 U.S. 15 (1973).

excretory activities and organs, at times of the day when there is a reasonable risk that children will be in the audience.⁹⁰

Believing it was justified as the authorized regulator of the airwaves, the FCC reformulated the indecency standard it found in *Miller* to apply to the broadcast medium. The important factors noted by the FCC were:

- (1) unsupervised children have access to radio;
- (2) radio receivers are in the home, where people's privacy interest is entitled to greater deference;
- (3) unconsenting adults may tune into a station without heeding any warning about offensive language; and
- (4) spectrum scarcity justifies greater regulation of broadcasting than other modes of communication.⁹¹

In addition, the FCC excused itself from two of the three prongs of the *Miller* test by making the questionable assertion that, for purposes of section 1464, the term "indecency" is not subsumed by the term "obscene." Thus, the FCC was not limited under the section to the regulation of material that "appealed to prurient interests." The FCC also boldly declared that "when children are in the audience, [words deemed indecent] cannot be redeemed by their literary, artistic, political, or scientific value."⁹²

C. Contemporary Community Standards for the Broadcast Medium

The *Miller* Court also developed the "contemporary community standards" language first introduced in *Roth*. The social values of the locality in which the speech or communication in question is found are to be applied in determining whether such speech or communication is obscene.⁹³ Chief Justice Warren Burger wrote: "[the First Amendment does not require] that the people of Maine and Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."⁹⁴

In reworking its indecency standard after *Miller*, the FCC tagged on the words "in the broadcast medium" to the phrase "contemporary community standards." Thus, the Commission suggested that communi-

90. *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 FCC 2d 418, 425, Feb. 19, 1975 (emphasis added).

91. *Id.*

92. The FCC's order did, however, allow that the artistic, literary, political, or scientific value of indecent speech broadcast during "late hours" would be evaluated in considering sanctions.

93. *Miller v. California*, 413 U.S. at 32.

94. *Id.* See also *Pope v. Illinois*, 481 U.S. 497 (1987) (holding that only obscenity is to be adjudged by local standards; artistic merit, etc., is reviewed under "reasonable man" theory).

ty standards are determined differently with respect to broadcast. Indeed, the implication was that the concept of "community" may be distinct in the broadcast paradigm.

The FCC did not define the "contemporary community standards for the broadcast medium." Thus, the issue of whether the rationale of *Miller* properly applies within a differently conceived form of "community" was left unexplored. Indeed, the community of the broadcast medium may differ in many ways. First, the geographic character of the community may vary dramatically depending upon nothing more than the power (reach) of a broadcast signal. Second, the demographic makeup of the community may include individuals or groups who would normally not be "connected" by the common receipt of broadcast entertainment or information. Finally, the common understanding and experience of a "community" may be entirely inapplicable to the broadcast paradigm. The "community" discussed in *Miller* arguably assumed interaction between and among the members of that community; the nature of broadcast, simultaneous communication from one "speaker" to many listeners, precludes interaction.

D. *Hamling and the Creation of a National Standard*

In 1974, the Supreme Court sought to abridge the use of its "contemporary community standards" test to judge speech on the basis of a decision maker's personal opinion or by its effect on a particularly sensitive person or group.⁹⁵ The Court noted that by referring to the community standard in *Miller*, it did not require the use of any precise geographical area in evaluating obscenity.⁹⁶

In *Hamling v. United States*, the FCC saw an opportunity to justify the national standard that it had alluded to earlier by referring to a community standard for the *broadcast medium*. In deciding that indecency would be determined by the FCC based on the "average listener," the agency was effectively admitting that a uniform standard would be applied. Although it did not preclude the possibility that the average listener would be determined on, for example, a state-by-state basis, no methodology was put in place for such review. Moreover, any argument that five commissioners sitting in Washington, D.C. could fairly apply

95. *Hamling v. United States*, 418 U.S. 87, 107 (1974).

96. *Id.* at 103-10.

differing standards depending upon the locale of the broadcast speech in question was untenable.

E. *The English Rule*

The FCC applied its new indecency standard against the Pacifica Foundation for broadcasting what it deemed to be an indecent comedy monologue.⁹⁷ When the D.C. Circuit court reversed the FCC's decision, the case went to the Supreme Court.⁹⁸ The Court, while not explicitly ruling on the validity of the FCC's indecency standard, reversed the lower court's decision and affirmed and acknowledged the FCC's criteria by which it distinguished broadcast from other media and set it apart for more stringent regulation.⁹⁹

Despite the high Court's sanctioning of the FCC's methods and reasoning, it was several years before the FCC began to impose penalties under its indecency standard. Because the *Pacifica* case had been limited to a review of the particular speech at issue and the FCC's finding it indecent, the agency sought to clarify that it would not be limited to its prohibition of the particular words deemed indecent in that case. In attempting to cast its indecency net as widely as possible, the FCC provided that station licensees who broadcast indecent speech are only protected "when there is not a reasonable risk that children may be present in the broadcast audience."¹⁰⁰

V. THE INDECENCY STANDARD IN THE CDA

A. *Regulation in the Broadcast Medium*

Amended section 223(a) of the Communications Act prohibits the knowing, intentional transmission of "obscene, lewd, lascivious, filthy, or indecent" communications. "Lewd, lascivious, and filthy" are terms neither defined by the CDA nor individually discussed in case law or FCC proceedings.¹⁰¹ "Obscene" and "indecent," on the other hand, are

97. *FCC v. Pacifica*, 556 F.2d 9 (D.C. Cir. 1977); *rev'd*, 438 U.S. 726 (1978).

98. *See FCC v. Pacifica*, 438 U.S. 726 (1978).

99. *Id.* at 734-41, 748-50, 761-62.

100. *See In the Matter of Pacifica Foundation Memorandum and Order*, 2 FCC REC. 2698, 2700 (1987).

101. The Court in *Pacifica* noted that Justice Harlan had limited the phrase, "obscene, lewd, lascivious, indecent, filthy or vile" to cover only that which was obscene. *Pacifica*, 438 U.S. at 740 (citing *In Manual Enter., Inc. v. Day*, 370 U.S. 478, 483 (1962)). The *Pacifica* Court went on to note that Justice Harlan's interpretation resurfaced in *Hamling*, again limiting the application of the statutory language at issue to that which was merely "obscene." *Pacifica*, 438 U.S. at 740.

terms specifically discussed in Supreme Court case law and FCC rulemakings.

A defining theme in the use of these terms by the government as standards in broadcast regulation and the review of that regulation by courts has been the distinction between obscene and indecent.¹⁰² When broadcast over the airwaves, obscene communications may be regulated by the FCC and are accorded no First Amendment protection of free speech. Indecent communications, on the other hand, are accorded some First Amendment protection, but may be regulated in the broadcast medium.

The Supreme Court acknowledged the reasoning of Congress that because the broadcast radio spectrum has long been considered a public resource of limited quantity, the government may regulate its use in the "public interest."¹⁰³ In *Pacifica v. FCC*, the Court verified that the FCC may impose sanctions for the broadcast of material deemed obscene and that "indecent" material may be restricted in ways tailored to prevent it from reaching children and others who may be offended by it.¹⁰⁴

B. *Distinction Between Broadcast and Interactive Networked Communications*

In an explanatory statement accompanying the CDA,¹⁰⁵ the conferees charged with drafting the final version of the Telecommunications Bill reported their intention that the term "indecent" was to have the same meaning as established in the *Pacifica* case.¹⁰⁶ While acknowledging

102. In discussing a statute at issue in the *Pacifica* case, the Court found that "[t]he words 'obscene, indecent, or profane' are written in the disjunctive, implying that each had a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Pacifica*, 438 U.S. at 739-40.

103. The Communications Act of 1934 provided that the Federal Communications Commission was established to regulate the radio spectrum for the good of the public. The Act was preceded by the Radio Act of 1926 which regulated the increasingly crowded radio airwaves at the request of radio station operators who were frustrated with signal interference problems.

104. *Pacifica*, 438 U.S. at 748-50.

105. See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458 (1996), 142 Cong. Rec. H1078-03, H1107 (daily ed. Jan. 31, 1996), for the Telecommunications Competition and Deregulation Act of 1995, Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56 (1996) [hereinafter "Explanatory Statement"].

106. *Id.* at H1129

that “[t]he precise contours of the definition of indecency have varied slightly depending on the communications medium to which it has been applied,” the conferees insist that the essence of the phrase—patently offensive descriptions of sexual or excretory activities—has remained constant.¹⁰⁷

Despite pending challenges to federal indecency standards, the conferees concluded that the question of whether indecency is overly broad is not “seriously at issue.”¹⁰⁸ From there, the conferees confidently conclude that “[t]here is little doubt that indecency can be applied to computer-mediated communications consistent with constitutional strictures”¹⁰⁹ in as much as the standard has “already been applied without rejection in other media contexts, including telephone, cable (television), and broadcast radio.”¹¹⁰

Notwithstanding their false assertion that the *Pacifica* case actually created or sanctioned a so-called “indecency standard,” the conferees’ bigger problem is that they completely ignore the Court’s reliance on the unique characteristics of the broadcast medium. To suggest, as the conferees do, that “there is little doubt” that the prohibition of indecent material can be applied to cyberspace “consistent with constitutional strictures” is to ignore the Court’s own words justifying the government’s regulation of protected indecent speech in addition to unprotected obscene speech over the airwaves:

Of all the forms of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting is the uniquely pervasive presence that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive.¹¹¹

In a one-sentence parenthetical explanation of the *Pacifica* case, the conferees reduce the Court’s accordation of First Amendment rights to indecent expression to a slovenly, inconsequential right the loss of which we needn’t lose sleep over: “describing indecency as low value and marginally protected by the First Amendment.”¹¹² Thus, say the

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* See generally Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 118 (1996) (showing that the regulation of broadcast media content has suffered little resistance from the legislature or the courts).

111. *FCC v Pacifica*, 438 U.S. 726, 727 (1978).

112. Explanatory Statement, *supra* note 105, at H1129

conferees, given the "solid constitutional pedigree"¹¹³ of the indecency standard, its application to cyberspace "poses no significant risk to the free-wheeling and vibrant nature of discourse"¹¹⁴ found on the Internet.

The drafters of the CDA either completely misunderstood the true nature of the Internet and other elements of cyberspace, or are disingenuously attempting to foist the regulatory justifications of a distinct paradigm onto a new medium. It is difficult to decide which is worse. Neither the Internet nor the commercial online services nor any other member of cyberspace is a broadcaster.

Broadcasters cast their net broadly, and indiscriminately, over the "free" public airwaves.¹¹⁵ All within the range of the broadcaster's signal who possess receiving equipment may perceive the signal, and all receive the same information or entertainment content. In addition, unlike "interactive computer services," receivers of broadcast signals are unable to respond or in any way interact with the originator of broadcast programming.

In contrast, connection to the Internet, through an Internet service provider, is more analogous to the perception of a dial tone on a telephone set. The telephone system's dial tone is a neutral conduit facilitating access between a communicator and the listener of information of his choice. All connections to "locations" in cyberspace are proactively initiated by users of networking equipment.

The conferees claim that "prohibiting indecency merely focuses speakers to re-cast their message into less offensive terms."¹¹⁶ This over-simplified observation disregards Supreme Court law that acknowledges that some material which might be deemed indecent by some, may have serious artistic merit or social value in other contexts. The conferees claim that because section 502(d)(1)(B) of the CDA prohibits communications which are, "in context," patently offensive, all otherwise indecent materials are exempt from liability under the CDA if they are

113. *Id.*

114. *Id.*

115. Broadcast television and radio is said to be "free" to the consuming public because it is funded by advertising revenues. See Kathryn Seagle Robbie, *Turner Broadcasting System, Inc. v. FCC: The Supreme Court Establishes a Standard of Review for First Amendment Issues Involving Cable Litigation*, 7 ST. THOMAS L. REV. 375, 380 (1995); Toni Elizabeth Gilbert, *Economic Regulation of the Cable Television Industry: Reigning in a Giant at the Expense of the First Amendment*, 45 CATH. U. L. REV. 615, 651 (1996).

116. Explanatory Statement, *supra* note 105, at H1129.

somehow adjudged valuable in an acceptable context. In adopting the Supreme Court's intention that the meaning of the term "patently offensive" should be determined by "contemporary community standards," however, Congress has once again either revealed its misunderstanding, or, at least, an under-appreciation, for the nature of the growing cyberspace community.

Alternatively, and worse, Congress may intend to create and apply a "national standard" to be applied to all "American"¹¹⁷ cyberspace. As many fear, the standard to be applied could gravitate towards the "lowest common denominator," or most conservative community standard found in the service area of the Internet. Because all wide area computer networks, including the Internet, employ the national telephone infrastructure, there is virtually no physical or geographical limitation on the affected community.

C. *Lost Opportunities to Avoid Vagueness and Overbreadth*

Congress considered and rejected an alternative standard for the CDA. The proponents of the "harmful to minors" standard contended that, by expressly tying the standard to the well-being of children under eighteen, a "built-in" exception for material with serious literary, artistic, political, or scientific value would have inhered in the CDA. The rejected standard would have contemplated the reasoning of the Supreme Court in *Miller* and related cases.

Ironically, in the *Explanatory Statement* accompanying the CDA, the conferees of the final version of the Act assert that the proponents of the harmful to minors standard "misapprehend the indecency standard itself." In fact, it is Congress that completely misapprehends the indecency standard. Indeed, the so-called indecency standard finds support only to the extent that it applies to the broadcast medium.

Congress is well aware, or should be, that what it refers to as the indecency standard was an invention of the FCC to be applied to over-the-air broadcast radio and television. When the Supreme Court upheld

117. The traditional concept of jurisdiction is an issue in cyberspace law and scholarship. Because the new communities forming in cyberspace are said to be "virtual," *i.e.*, they do not exist in geographical time and space, the jurisdiction, or the reach of the law, to which cyber-communities are to be subject is far from clear. At particular issue is domestic vs. international legal jurisdiction. Some have argued that a paradigm such as that used for the law of the sea should be developed. See Timothy S. Wu, *Cyberspace Sovereignty - The Internet and the International System*, 10 HARV. J.L. & TECH. 647, 660 (1997) (discussing a French proposal for a charter for international cooperation on the Internet and the French government's "expressed hope that the initiative would lead to an accord comparable to the international law of the sea").

the FCC's application of its standard in *Pacifica*, the basis of the decision was unequivocal: it was the unique nature of the broadcast medium that justified the limited infringement of otherwise constitutionally protected speech. Congress apparently believes that indecency as a standard is malleable and may be applied to other mediums at will.

D. Defiance to the CDA

On February 7, 1996 the American Civil Liberties Union (ACLU) and other groups announced their intent to file suit to challenge the constitutionality of the CDA.¹¹⁸ The CDA itself provided for an expedited judicial review of the much-anticipated constitutional challenges.¹¹⁹ The first challenge, filed in the United States District Court for the Eastern District of Pennsylvania, resulted in a limited Temporary Restraining Order (TRO) of one part of the CDA.¹²⁰

The voices of reason made three main arguments against the CDA. First, notwithstanding those libertarians of cyberspace who view the First Amendment as an unqualified dictate, the challengers acknowledge that some speech is unprotected. Indeed, obscene speech is already outlawed in cyberspace.¹²¹ Rather, the challengers simply reminded the court that indecent speech is protected by the First Amendment and if it is to be regulated in cyberspace, a justification must be articulated similar to that articulated for broadcast. In order for the CDA to have been upheld, Congress would need to have articulated a new justification for the regulation of indecent speech; the broadcast paradigm simply does not apply. Neither the scarcity of spectrum nor the pervasiveness of over-the-air "free" television and radio applies to cyberspace.

118. See *ACLU v. Reno*, No. CIV.A 96-963, 1996 WL 65464, at *1 (E.D. Pa. Feb. 15, 1996).

119. CDA, *supra* note 1, at § 561.

120. The Temporary Restraining Order issued under *ACLU v. Reno*, stated: "The defendant [the Justice Dept.] . . . [is] hereby enjoined from enforcing against plaintiffs the provisions of 47 U.S.C. § 223 (a)(1)(B)(ii), insofar as [it] extend[s] to 'indecent,' but not 'obscene.'" *ACLU v. Reno*, No. CIV.A 96-963, 1996 WL 65464, at *4.

121. See 142 Cong. Rec. S. 687, 694 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy) ("We already have crimes on the books that apply to the Internet, by banning obscenity, child pornography, and threats from being distributed over computers. In fact, just before Christmas [1995], the President signed a new law we passed last year sharply increasing penalties for child pornography and sexual exploitation crimes.").

Second, the challengers criticized Congress's claim that its misapplied indecency standard was narrowly tailored because suspect communications are to be reviewed "in context" for the depiction or description, in terms patently offensive, of sexual or excretory activities or organs. Supporters of the CDA argued that this "definition" of indecency would limit liability under the Act to communications more-or-less equated with pornography.

What the challengers hoped to show, however, was that Congress's biggest mistake was its wholesale incorporation of the FCC's definition of indecency. It is well known that the FCC has regulated speech under its indecency standard that amounts to no more than the audio broadcast of four-letter words. To impose the restrictions on broadcast imposed by the FCC and upheld by the Supreme Court on cyberspace is to infringe upon free speech to a far greater extent than Congress claimed as its intention.

Third, the challengers suggested that the penalties imposed by the CDA were far too severe to withstand the least restrictive means test of First Amendment review. Restrictions on some speech are justified and desirable in an ordered society. But to face a \$250,000 fine and two years in prison for making a communication that some would find indecent almost implicates another constitutional standard: the prohibition against cruel and unusual punishment.

The efforts of the ACLU and other groups opposed to the CDA were rewarded. On June 26, 1997, the Supreme Court struck down those portions of the CDA that would have exposed Internet and other online service users to criminal and civil liability for "displaying" or "making available to minors" material deemed indecent.¹²²

VI. CONCLUSION

The Communications Decency Act is filled with undefined terms and contradictory statements. Given the robust opposition to the Act and the rush to include it within the larger Telecommunications Act of 1996, it is not surprising that the myriad of last-minute compromises led to poorly drafted legislation. And the muddled wording has led to much confusion and possibly-unwarranted concerns. In order to calm the fears of those who believe the CDA is over-reaching and to aid those who would be charged with implementing it, Congress must make itself clear.

In attempting to incorporate into the Act standards for regulating the content of cyberspace, Congress has disregarded the Supreme Court's

122. *See supra* note 10.

treatment of obscenity and the development of the indecency/obscenity distinction. In addition, Congress has misunderstood the FCC's Indecency Standard and has disingenuously rationalized its application to cyberspace and the new type of community that exists and thrives there. By including the controversial "contemporary community standards" measure, Congress has revealed its misconception of how online communities are formed and the way in which their members interact.

Congress has dismissed the Supreme Court's well-articulated reasons for extending less First Amendment protection to indecency in the broadcast medium. The justifications that inhere in the broadcast paradigm, that the radio spectrum is a limited public resource and that broadcast communications are pervasive, simply do not exist in cyberspace. Congress asserts that the CDA's defense provisions ensure that the law is narrowly tailored and thus is fortified against First Amendment attack. This shows a remarkable misinterpretation of two centuries of First Amendment analysis.

Moreover, even if the defense provisions of the CDA limit its application, Congress has still discounted the non-legislative approaches to addressing its interest in protecting the sensibilities of children. Ironically, in attempting to shield from liability those who make "good faith" efforts to inhibit prohibited communications, the CDA itself mentions the "blocking" software and other mechanisms that could be used to satisfy the goals of the Act. It is as if Congress is saying: "This law seeks to outlaw certain undesirable activity in cyberspace; and, by the way, here's a better way to address the problem."

The CDA has two principal problems. First, its wording and phraseology are so unclear as to be void for vagueness. Second, and more importantly, its standards are overbroad and ill-suited for cyberspace. Many have decried the advent of online communities for their potential for harm—including increased isolationism. Not enough has been said, however, about the opportunities for bringing people together. Indeed, many of the limitations set by geography, resources, and social inhibitions and hierarchies, are non-existent in this new community. The virtues and opportunities of cyber-communities are making their way to the populace; now is not the time to inhibit their evolution.

