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CONGRESS WRESTLES WITH THE INTERNET: ACLU v. RENO AND THE COMMUNICATIONS DECENCY ACT

Claudia Oliver

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On June 26, 1997, the U.S. Supreme Court took its first foray into cyberlaw and overturned the Communications Decency Act (CDA). The act made it a crime to transmit indecent material on the Internet to people under age 18.[1] Justifiably a landmark decision, the Court recognized and articulated the distinct characteristics of the Internet. The justices ruled that, given the Internet's free-flowing nature, it would be impossible to enforce the CDA without trampling adults' First Amendment rights.[2] Members of Congress are still intent on passing cyberlaw, scrambling to develop new legislation that will meet the standards announced by the Court.[3] The following article first examines the Internet and the CDA's impact on cyberspace. Next, the focus shifts to the ACLU's fight against the CDA's broad censorship. Finally, the article studies the Supreme Court's decision in Reno v. ACLU and Congress' next attempts to tackle the Internet.

I. Introduction

As one of the most innovative technologies of our age, the Internet thrills people with its infinite capabilities to interact with others and reach resources a continent away. However, there are some that fear this technology opens a Pandora's box. These critics argue that if the Internet is left unregulated, society's morals and safety are in great danger.[4] How and why could the Internet be so dangerous? It is not physical or tangible, but a giant network which interconnects innumerable smaller groups of linked computer networks.[5] As an intangible and enormous entity, it is very difficult, if not impossible, to determine its size at a given moment.[6]

The Internet began as an experimental project by the Department of Defense's Advanced Research Projects Administration (ARPA).[7] It provided researchers direct access to supercomputers at a few key laboratories, enabling operators to transmit vital communications.[8] ARPA supplied the funds necessary to create this network of computers operated by the military, defense contractors, and universities conducting defense-related research through dedicated phone lines.[9] The network was known as ARPANET.

No company or entity operates or controls the Internet. It is a decentralized operation, where hundreds of thousands of separate users with their own computers independently decide to enter "cyberspace" and exchange communications.[10] The Internet allows users to argue, plead, interact, pontificate, or harvest a wide variety of information.[11] A few clicks away[12] a user intercepts information on the newest computer game, chat rooms, and sex-related materials, such as abortion and reproductive rights.[13] Access to this and other "sexual content" has irked Senator James Exon and his colleagues, influencing members of Congress to introduce and pass[14] a law that

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[1] Pub. L. 104-104 Sec. 502, 110 Stat. 56 (1996).

[2] Reno v. ACLU, 117 S.Ct. 2329, 1997 U.S. LEXIS 4037, at *10.

[3] T.R. Goldman, *Lawmakers take steps to respond after legislation is found unconstitutional*, LEGAL TIMES, July 14, 1997 at 8.

[4] Morality in Media, Inc. Amicus Brief for Janet Reno, ACLU v. Reno, 929 F.Supp. 824 (E.D. Pa. 1996) (No. 96-511).

[5] ACLU v. Reno, 929 F.Supp. 824, 829 (E.D. Pa. 1996).

[6] *Id.* at 831.

[7] Shea v. Reno, 930 F.Supp. 916, 925 (S.D.N.Y. 1996).

[8] *Id.* at 926.

[9] *Id.*

[10] ACLU v. Reno, 929 F.Supp. 824, 832 (E.D. Pa. 1996).

[11] Mike Toner, *Surfing on the Internet*, THE ATLANTA JOURNAL & CONSTITUTION, July 24, 1994, at 1.

[12] *Id.*

[13] Planned Parenthood Home Page, www.igc.apc.org/ppfa/lev2-abo.html.

[14] 141 Cong. Rec. S8087 (daily ed. June 5, 1995). (Statement of Senator Exon).

would protect decent children and families while punishing providers of "indecent content," the Communications Decency Act (CDA)[15] that the Supreme Court found unconstitutional.[16]

Provisions (a) and (d) of the CDA prohibit the transmission and display of "obscene" or "indecent" materials on a "telecommunications device" or an "interactive computer service."[17] Opponents to the CDA argue that discussions on sex education, AIDS prevention, lesbian affairs, rape stories, and other related material would be deemed "indecent," and punishable under these provisions.[18] The head of the National Telecommunications Information Administration (NTIA), Larry Irving, stated that "the government should refrain from regulating the Internet for fear of stifling its potential."[19] Roger Evans, Legal Counsel for Planned Parenthood of America, stated "we fear a small group of religious, political extremists could use this antiquated legislation to cripple the ability of Planned Parenthood and other health care organizations to provide basic reproductive health information through the Internet."[20] What is this "antiquated language" Mr. Evans feared could cripple many content providers' efforts to inform the public?

The CDA's language[21], specifically provisions (a) and (d), may cover health care information that Planned Parenthood and other organizations provide to the public. These provisions, which prohibit the transmission and the display of "indecent" material, encompass a broad area of information on the Internet such as AIDS education, sex and reproductive education, safe sex sites, etc.[22] But what does "indecent" mean? The provisions do not define what material is indecent. The provisions also do not define what "community standards" apply to content providers. Worry and criticism propelled a number of organizations and groups, such as the American Civil Liberties Union, Planned Parenthood, Feminists for Free Expression and the American Reporter to file suits in federal court.[23] The District Courts for the Eastern District of Pennsylvania and the Southern District of New York have held CDA provisions (a) and (d) unconstitutional, and enjoined the government from prosecuting anyone under those provisions.[24] Provision (a) prohibits the transmission of obscene or indecent material while provision (d) prohibits the display of 'patently offensive' material.[25]

In ACLU v. Reno, plaintiffs moved for a temporary restraining order to enjoin enforcement of section 223(a)(1)(B), the transmission provision, and section 223(d)(1), the patently offensive provision.[26] Plaintiffs argued that the provisions are content-based restriction on speech, and warrant strict scrutiny.[27]

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[15] 47 U.S.C. 223

[16] Reno v. ACLU, 117 S.Ct. 2329, 1997 U.S. LEXIS 4037, at *10.

[17] §§ 223(a) and (d).

[18] Bill Pietrucha, *Feminist Group Joins Anti-CDA Fight*, NEWSBYTES, February 25, 1997.

[19] *Government Should Take Care Not to Stifle the Internet, Irving Says*, WASHINGTON TELECOM NEWS, December 16, 1996, Vol. 4, No. 48.

[20] *Planned Parenthood Joins Lawsuit to Prevent Health Information Censorship*, PR NEWSWIRE, February 7, 1997.

[21] 47 U.S.C. 223:
(a) Prohibited general purposes
Whoever--
(1) in interstate or foreign communications--
(A) by means of a telecommunications device knowingly--
(i) makes, creates, or solicits, and
(ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with the intent to annoy, abuse, threaten, or harass another person;
(B) by means of a telecommunications device knowingly--
(i) makes, creates, or solicits, and
(ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
(d) Sending or displaying offensive material to persons under 18
Whoever—
(1) in interstate or foreign communications knowingly--
(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.

[22] 141 Cong. Rec. S19185 (daily ed. December 22, 1995). (Statement of Senator Feingold); Feminists for Free Expression Amicus Brief, *ACLU*, (No. 96-511).

[23] ACLU v. Reno, 929 F.Supp. 824 (E.D. Pa. 1996); Shea v. Reno, 930 F.Supp. 916 (S.D.N.Y. 1996).

[24] *Id.* at 883; at 950.

[25] 47 U.S.C. 223.

[26] ACLU at 825.

[27] *Id.* at 852.

Plaintiffs also argued that the provisions failed this constitutional standard, and that the provisions were unconstitutionally vague.[28] The three-judge panel agreed.[29]

Similarly, in Shea v. Reno, the plaintiff Joe Shea, the editor, publisher, and part owner of the American Reporter, claimed that section 223(d) is unconstitutionally vague because the provision fails to define what is indecent conduct subject to criminal liability. Plaintiff also claimed that section 223 was unconstitutionally overbroad because it targeted a broader area of speech than necessary.[30] The district court concluded that the plaintiff failed to demonstrate that the provision was unconstitutionally vague, but the court did hold that the provision was overbroad.[31]

On March 19, 1997, the US Supreme Court heard oral arguments to the Reno v. ACLU case, and on June 26, 1997, the Court affirmed the district court's judgment, holding that provisions (a) and (d) of the CDA abridged freedom of speech protected by the First Amendment.[32]

II. Internet and Indecency

A. The Internet[33]

As many as forty million individuals have access to the information and tools of the Internet, and that figure is expected to grow to 200 million by the year 1999.[34] Users can access the Internet in a variety of ways. First, a user can use a computer that is directly connected to a network that in turn is directly or indirectly linked to the Internet.[35] Second, a user can access the Internet through a personal computer with a modem that connects over a telephone line to a network connected to the Internet.[36] Also, users can access the Internet through a number of national commercial "online services" such as America Online and Microsoft.[37]

Once you are on the Internet, there are a number of ways to communicate with other users. Methods of communication include one-to-one messaging (e-mail), one-to-many messaging (listserv), distributed message databases (USENET newsgroups), chat rooms, and the World Wide Web.[38] Due to these unregulated methods of communicating on the Internet, the government argued in the Shea v. Reno case that a user can easily encounter sexually explicit material.[39]

To combat the influx of sexual expression into homes, various companies have developed systems to help parents' control such material.[40] The World Wide Web Consortium's Platform For Internet Content Selection (PICS) developed technical standards that help parents' filter and screen material their children see on the Web.[41] Also, some companies have developed software, such as Cyber Patrol and Surf Watch, intended to help parents limit Internet access within their homes.[42] For example, Cyber Patrol works with direct Internet Access providers (ISP) such as Netcom as well as commercial online service providers such as CompuServ and Prodigy.[43] Cyber Patrol developed a Cyber NOT list that included sites containing violence, profanity, obscenity, partial nudity, sex acts and others which parents may selectively block access using the software.[44]

Though parents are frustrated and worried their children may access obscene or indecent material, the Internet's methods of communications are not only used by purveyors

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[28] *Id.* at 858.

[29] *Id.* at 883.

[30] Shea at 922

[31] *Id.* at 923.

[32] Reno v. ACLU, 117 S.Ct. 2329, 1997 U.S. LEXIS 4037 at *10.

[33] The Internet originated as ARPANET in 1969. The programs on the linked computers used a technical scheme known as "packet-switching," where a message from one computer to another would be divided into smaller, separate pieces of data, known as "packets." When these packets arrived at the desired destination, the message would reassemble itself. After the success of ARPANET, universities, research facilities, and commercial entities developed and linked their own networks, implementing ARPANET's programs. Other networks also included were the high-speed "backbone" known as NSFNet, smaller regional networks, and large commercial networks run by Sprint and IBM. By 1990, ARPANET ceased functioning, and the Internet today encompasses these numerous networks. Shea at 926.

[34] *Id.*

[35] ACLU at 832.

[36] *Id.*

[37] *Id.* at 833.

[38] *Id.* at 834.

[39] Shea at 930.

[40] ACLU at 838.

[41] *Id.*

[42] *Id.* at 839.

[43] *Id.* at 840.

[44] *Id.*

of sexual material. Non-profit organizations and commercial companies use the Internet as an easy and cheap means of communicating with the public.[45] For example, Planned Parenthood and the Population Council inform the public on current policy and news on reproductive rights; how to get an abortion; where to go to get an abortion; a woman's sexual rights; how to have safe sex, and so on.[46]

B. Congress' Attempt to Curb Indecency on the Internet

Proponents of the CDA argue that parents alone cannot protect their children from indecent material on the Internet.[47] During a Senate session, Senator James Exon stated "one of the things this Senator feels we should properly address . is the matter of trying to clean up the Internet--to make that superhighway a safe place for our children and our families to travel on. It is not an exaggeration to say that the worst, most vile, most perverse pornography is only a few click-click-clicks away from any child on the Internet. . The fundamental purpose of the CDA is to provide much-needed protection for [our] children."[48] As a result, Congress decided if it did not provide some "basic rules of the road," sexually explicit material will be easily available and accessible on the Internet, which could harm children.[49]

The need to protect a child's normal development was a central theme in the government's amici. Organizations such as Morality in Media and Enough is Enough argued that a child is susceptible to influences which in turn affect their development.[50] The organizations believed that misinformation on sexuality, pornography and the like leaves children confused, changed, and damaged.[51] They feared children soon will desensitize rape, de-emphasize venereal diseases, and objectify women and sex.[52] It is no wonder that Congress would become involved in protecting and maintaining the decent, moral values for children.[53] In their amicus brief to the Supreme Court, Senators Exon, Helms, Coates, and others argued "as a matter of law, Congress has the independent interest in protecting children from exposure to or receipt of patently offensive sexual or excretory depictions, and is not required and should not be compelled to rely on private, voluntary actions of others, such as parents."[54] Similarly, the government argued in its brief to the Supreme Court that it has a strong interest in protecting children from "patently offensive material" on the Internet, and an equally compelling interest to protect the First Amendment interest of all Americans to use an unparalleled, educational resource.[55] On the other hand, CDA opponents stressed that neither Congress nor the government have presented "a shred of evidence" that children are harmed from exposure to indecent material.[56]

Also, could not such a compelling interest infringe on adults' right to free speech? Let us examine the CDA more closely by applying section 223(a) and (d) to Planned Parenthood's website.[57] The site informs the public about abortion services. In addition to facts about abortion, the website discusses issues on breast cancer, fetal viability, birth control, and unwanted pregnancies.[58] Provision (a) prohibits the transmission of "any comment, or other communication which is obscene, . or indecent, with intent to abuse . another person."[59] Planned Parenthood is transmitting information it created over the Internet. The organization certainly falls under this part of the provision. However, is the material "indecent"? Does it abuse an adult surfing the Internet? Section 223(a)(1)(B) applies to a content provider if he knowingly transmits an obscene or indecent

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[45] *Id.* at 842.

[46] Planned Parenthood Home page: www.igc.apc.org/ppfa/lev2-abo.html.

[47] Brief for Janet Reno, Reno v. ACLU, 929 F.Supp. 824 (E.D. Pa. 1996) (No. 96-511).

[48] 141 Cong. Rec. S8087 (daily ed. June 5, 1995) (Statement of Senator Exon).

[49] Brief for Janet Reno, Reno v. ACLU, 929 F.Supp. 824 (E.D. Pa. 1996) (No. 96-511).

[50] Enough is Enough, et al. Amicus Brief, *Reno* (96-511).

[51] *Id.*

[52] *Id.*

[53] 141 Cong. Rec. S8087 (daily June 5, 1995) (Statement of Senator Exon).

[54] Members of Congress Amicus Brief for Janet Reno, *Reno* (No. 96-511).

[55] Appellant's Brief, *Reno* (No. 96-511).

[56] Nadine Strossen, *Children's Rights v. Adult Free Speech: Can They Be Reconciled?* 29 CONN. L. REV. 873 (Winter 1997).

[57] www.igc.apc.org/ppfa/lev2-abo.html.

[58] *Id.*

[59] 47 U.S.C. 223(a)(1)(A).

communication to a minor.[60] Congress stressed that a content provider must "know" he transmits "indecent" material to minors to be criminally liable.[61] But how could a content provider know whether the person on the other line is an adult? How could the provider know whether the person is a consenting adult and whether he is assaulted by such information?[62] Congress argued that the indecency standard is defined in section 223(d)(1)(B): a communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[63] In their Conference Report, Congress argued this standard has the same meaning as the standard established in FCC v. Pacifica.[64] Nonetheless, Senator Exon and his colleagues' amicus brief stressed that the online indecency standard should not be viewed within the same scope as broadcast indecency.[65]

From which legal precedent should this online indecency standard derive? Federal District Judge Dalzell stressed that the Internet's underlying technologies should be taken into account when creating an appropriate constitutional standard.[66] Congress has failed to distinguish between the various technologies involved, the information they each provide, the separate, applicable regulations, and constitutional risks from government intrusion.[67] Robert Corn-Revere argued that the CDA threatens to "lobotomize" the Internet by imposing the same legal standard applied sixty years ago under the Comstock laws.[68]

Even Speaker of the House Newt Gingrich agreed that the CDA "clearly violates" free speech and an adult's right to communicate .. "How do you maintain the right of free speech for adults while also protecting children in a medium which is available to both?"[69] Corn-Revere and Gingrich argued that the CDA protects children from exposure to indecent material but by sacrificing adults' rights to such material. Both men emphasized how difficult it will be to protect children and protect free speech. Corn-Revere argued that the CDA will be overturned.[70]

Some scholars argued that the technology must be closely scrutinized in order to develop an appropriate constitutional standard.[71] "Each medium presents its own peculiar problems, and so, the standards applied to that medium must be well-suited to address that medium's unique characteristics. Simply transferring one set of standards from one medium to another without careful analysis will limit technological progress and infringe on freedom of express."[72] Clearly, Congress should have distinguished between the different technologies, and applied different standards to each as the Supreme Court has done in the past. In order to protect an adult's right to free speech, Congress must assess the technology's capabilities and limitations. For example, does the Internet reach a great number of people? Does a user need to affirmatively act to enter 'cyberspace' or does he access the medium as easily as he switches on the television? By examining these questions, Congress would have known how far it might restrict the Internet to protect children from exposure to indecent material.

Attorney Robert Cannon of the Wireless Telecommunications Bureau of the FCC argued that the Internet is unique.[73] There is no scarcity of spectrum, no central monopolies, no pervasiveness.[74] The Internet user affirmatively seeks online information.[75] The CDA does not distinguish between broadcasting, cable, telephone and online communications. Section 223(a) simply prohibits a "telecommunications device" from transmitting "indecent" material.

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[60] 47 U.S.C. 223(a)(1)(B).

[61] Brief for Janet Reno, *Reno* (No. 96-511).

[62] Morality in Media Amicus Brief, *Reno* (No. 96-511).

[63] 47 U.S.C. 223(d)(1)(B).

[64] H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 113, 188 (1996).

[65] Amicus brief, *Reno* (No. 96-511).

[66] ACLU v. Reno, 929 F.Supp. 824, 877 (E.D. Pa. 1996).

[67] Robert Corn-Revere, *New Age Comstockery*, 4 COMMLAW CONSPECTUS 173, 183 (Summer 1996).

[68] *Id.* at 175.

[69] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COM. L.J. 51, 66 (November 1996).

[70] Corn-Revere, *Comstockery* at 186.

[71] Stacey J. Rappaport, *Rules of the Road: The Constitutional Limits of Restricting Indecent Speech on the Information Superhighway*, 6 FORDHAM I.P., MEDIA & ENT. L.J. 301, 343 (Fall 1995).

[72] *Id.*

[73] *Id.* at 79

[74] *Id.* at 80.

[75] *Id.*

This provision covers all technological mediums. Standing alone, section 223(a) fails to pass constitutional muster under broadcasting, cable, and telephone indecency standards.[76] However, the government argued in ACLU v. Reno,[77] and before the Supreme Court that section 233(a) and (d) are supplemented by defenses to prosecution articulated in section 223(e).[78] That provision states that a person will not be held criminally liable under the statute simply for providing access or connection.[79] Nonetheless, if found liable under section 223(a) or (d), that person may argue he has taken a good faith effort to restrict or prevent access by minors to an "indecent" communication, by any method technologically feasible.[80] In addition, a person may argue that he have restricted access to such communication by requiring a verified credit card number, a debit account, an adult access code or an adult identification number.[81] Such statutory defenses are not available to most non-profit organizations, or such defenses would be too expensive to incorporate on their sites.[82] If the CDA does not provide an exception or feasible defense for organizations unable to effectuate adult certification systems or tagging, then these organizations should worry that the CDA may prohibit sexually explicit information disseminated from their sites. In a different context but similar situation, the FCC and federal courts had to decide whether abortion information broadcast in political ads was indecent.[83]

C. Abortion Photos and Programs: Indecent or not?

On July 19, 1992, then-congressional candidate Daniel Becker's photos of aborted fetuses aired on WAGA.[84] After numerous complaints from viewers, WAGA refused to air Becker's "Abortion in America: Real Story" during 4PM and 5PM.[85] In Gillett Communications of Atlanta, Inc. v. Daniel Becker, the district court held that the program's "graphic depictions and descriptions of female genitalia, the uterus, excreted uterine fluid, dismembered fetal body parts, and aborted fetuses were indecent.[86] The district court applied the FCC indecency standard approved by the Supreme Court in Pacifica. The FCC defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[87] The district court held that such indecent material should be channeled to a time that "sufficiently reduces chances of injury to the psychological well-being of minors."[88] However, the district court held that its ruling would be moot when the FCC published its ruling on the issue. That same day, the FCC ruled that broadcasters who 'reasonably and in good faith' believe a candidate's political ad includes indecent material may banish the commercial to safe harbor hours between midnight and six AM.[89]

The 11th Circuit Court of Appeals vacated and remanded the district court's ruling, and in 1994, the FCC concluded that Becker's Initial advertisement (abortion photographs) was not indecent. The FCC also ruled that there was evidence in the record that indicated children would be psychologically damaged by graphic advertisements, and that channeling would not violate a political candidate's right to broadcast time.[90] The FCC did not express any views on the subsequent abortion program, which concerned the district court.

In 1996, Becker petitioned for review of the 1994 FCC ruling.[91] The D.C. Circuit Court of

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[76] FCC v. Pacifica Foundation, 438 U.S. 726, 751 (1975); Denver Area Educational Telecommunications Consortium, Inc., et al. v. FCC, 116 S.Ct. 2374, 2385 (1996); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989).

[77] 929 F.Supp. 824, 854 (E.D. Pa. 1996).

[78] Brief for Janet Reno, *Reno* (No. 96-511).

[79] 47 U.S.C. 223(e)(1).

[80] § 223(e)(5)(A).

[81] § 223(e)(5)(B).

[82] ACLU v. Reno, 929 F.Supp. 824, 883 (E.D. Pa. 1996).

[83] Daniel Becker, et al. v. FCC, 95 F.3d 75, 76 (D.C. Circuit 1996).

[84] Daniel Becker, et al. v. FCC, 95 F.3d 75, 76 (D.C. Circuit 1996).

[85] *Id.*

[86] 807 F.Supp. 757, 762 (N.D. Ga. 1992).

[87] *Id.*

[88] *Id.* at 764.

[89] *Koppie: FCC ruling "unconstitutional"*, UNITED PRESS INTERNATIONAL, October 30, 1992.

[90] 9 F.C.C.R. 7638, 7649 (1994).

[91] 95 F.3d at 75.

Appeals granted the petition for review and vacated the ruling. It found that channeling interfered with Communications Act of 1934, section 312(a)(7), the 'reasonable access' provision and section 315, the no-censorship provision.[92] The Circuit court did not decide on whether the photographs or the program were indecent. At this time, we still do not have an indecency standard legally applicable to abortion information on any medium.

D. ACLU v. Reno and Shea v. Reno

The American Civil Liberties Union succeeded in enjoining the government from prosecuting any person under the CDA provisions.[93] The plaintiffs argued that section 223(a) and (d) failed the strict scrutiny test by not using the least restrictive means available.[94] In addition, the plaintiffs argued the provisions were unconstitutionally vague.[95]

Chief Circuit Judge Sloviter stated that the government does have a compelling interest to protect children from access to indecent material, but if the means sweep broadly than necessary, such means will chill adult expression, violating First Amendment rights.[96] The three-judge panel found that the statutory defenses were not completely available to a majority of speakers and economically exacting to other speakers.[97] The ACLU argued that there is no technology feasible to verify age on the Internet.[98] For example, tagging the URL does not prevent a child from accessing the site, and tagging depends on the cooperation of third party manufacturers, who need not comply with the CDA.[99] Similarly, section 223(e)(5)(B) failed to be accepted as the least restrictive means because requiring the use of credit card verification or adult identification would be too costly for several non-profit organization, i.e. Planned Parenthood, to conduct.[100]

The plaintiffs also argued that section 223(a) and (d) were unconstitutionally vague. Chief Circuit Judge Sloviter and District Judge Buckwalter agreed.[101] Buckwalter stated that the terms "indecent," "in context," and "patently offensive" were so vague as to violate the First and Fifth Amendments.[102] Buckwalter stresses that the CDA does not define "indecent;" it has not defined what would be "in context;" and content providers would be confused as to what community standards apply to online communications.[103] The FCC has not promulgated regulations defining "indecency" on the Internet.[104]

Though District Judge Dalzell stated that the vagueness challenge did not hold under constitutional precedent,[105] he did hold that the provisions were unconstitutional.[106] Dalzell stressed that four related characteristics will be at risk if the CDA is upheld: (1) the Internet presents very low barriers to entry; (2) these barriers of entry are identical to both speakers and listeners; (3) as a result of these low barriers, diverse content is available on the Internet; (4) the Internet provides significant access to all who wish to speak on the medium.[107] If the CDA continues to restrict the manner in which information is supplied on the Internet, users will decline to communicate on the Internet, literally destroying these unique characteristics.[108]

Shea v. Reno similarly argued that section 223(d) was unconstitutionally vague and overbroad, but the court rested its holding solely on the overbreadth argument.[109] The court stated that the Supreme Court approved the indecent standard the FCC promulgated for the broadcast medium in Pacifica, foreclosing a vagueness challenge to the FCC standard.[110] Also, the court stated that the term "in context" has always been a component in indecency analysis regardless of the medium.[111] Lastly,

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[92] *Id.* at 83.

[93] 929 F.Supp. at 858.

[94] *Id.* at 825.

[95] *Id.*

[96] *Id.* at 853-854.

[97] Brief for ACLU, Reno v. ACLU, 929 F.Supp. 824 (E. D. Pa. 1996) (No. 96-511).

[98] *Id.*

[99] ACLU at 858.

[100] *Id.* at 856.

[101] *Id.*

[102] *Id.* at 858.

[103] *Id.* at 864.

[104] *Id.* at 861.

[105] *Id.* at 871.

[106] *Id.* at 877.

[107] *Id.*

[108] *Id.* at 878.

[109] Shea v. Reno, 930 F.Supp. 916, 949 (S.D.N.Y. 1996).

[110] *Id.* at 935.

[111] *Id.*

content providers would not be less capable of acquiring familiarity with relevant "community standards."[112]

The court emphasized that the provision was overbroad, where "the CDA can be expected to chill the First Amendment rights of adults to engage in the kind of expression that is subject to the CDA's criminal penalties, . . . the government has failed to demonstrate that the CDA does not necessarily interfere with First Amendment freedoms."[113]

Internet users, access and content providers awaited the Supreme Court's decision on Reno v. ACLU. As the highest profile case this term, the Supreme Court finally decided on what relevant constitutional standard applies to indecency on the Internet. In response to the Supreme Court decision, several members of Congress "are forging son-of-CDA bills."[114]

III. Legal Analysis

A. Legal Precedent on the Indecency Standard

Obscenity is constitutionally unprotected speech.[115] As such, obscenity controls have been routinely established and allowed in publishing, broadcasting, cable, and common carriage.[116] However, expression that is sexually explicit or patently offensive, but not obscene, warrants First Amendment protection.[117] "Indecency (unlike obscenity) is constitutionally protected speech that often has substantial social value and lacks prurient interest."[118]

In FCC v. Pacifica Foundation, the Supreme Court held that the government has the power to regulate indecent speech in broadcasting.[119] Yet, the Supreme Court has held only limited protection to indecent expression.[120] The Court was concerned that the broadcasting medium has a "uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children."[121] However, in Sable Communications v. FCC, the Supreme Court limited Pacifica, where a ban on indecent "dial-a-porn" communications was unconstitutional.[122] The Court held that the government could only regulate a medium "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[123] The Court limited the Pacifica rationale once again in Turner Broadcasting System, Inc. v. FCC, where it declined to adopt the broadcast indecency standard to the cable medium.[124] It distinguished cable from broadcasting by emphasizing that cable is not "uniquely pervasive" or "uniquely accessible to children."[125]

District Judge Dalzell stressed that the courts must take into account the underlying technologies and their singular characteristics in order to produce a constitutional standard.[126] Unlike broadcasting, the Internet is not pervasive, and the user must affirmatively act to seek entry on the Internet. A person cannot enter the Internet without a computer or an access network. Even then, the user must pay a monthly fee to access the Internet, whereas broadcasting freely enters a person's home. Unlike cable, the Internet is decentralized and unregulated.[127] A cable company transmits programs to whoever subscribed to its services. No one can know who sends material to the Internet. Understanding the Internet enabled the Court to decide whether government regulation is necessary or to what extent it is necessary.

In Sable, the Supreme Court held that where a statute is a content-based restriction on speech,

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[112] *Id.* at 936.

[113] *Id.* at 941.

[114] *Supreme Court nixes censorship law*, EDUCATION TECHNOLOGY NEWS, July 9 1997.

[115] Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

[116] Donald E. Lively, Blake D. Morant, Allen S. Hammond IV, & Russell L. Weaver, *Communications Law: Media, Entertainment, & Regulation* (forthcoming 1997).

[117] Sable at 126.

[118] *Id.*

[119] 438 U.S. 726, 750-751, 98 S.Ct. 3026, 3040-41(1978).

[120] Pacifica at 748-49.

[121] *Id.*

[122] Sable at 117-18.

[123] *Id.* at 126.

[124] 114 S.Ct. 2445, 2457 129 L.Ed.2d 497 (1994).

[125] *Id.* at 2457.

[126] ACLU at 877.

[127] Fred H. Cate, *Indecency, Ignorance, and Intolerance: First Amendment and the Regulation of Electronic Expression*, 1995 J. ONLINE L., art. 5, para. 109.

such a statute is subject to strict scrutiny.[128] The CDA prohibits the transmission or display of obscene or indecent speech on the Internet; therefore, it is a content-based regulation. The statute would have passed constitutional muster if it was justified by a compelling interest and if it was narrowly tailored to promote that interest.[129] The courts in Shea and ACLU applied strict scrutiny to the CDA, and found that the provisions failed.[130] Though the courts found that the government has a compelling interest to protect children from access to indecent material,[131] the means sweep more broadly than necessary, chilling adult expression.[132] Provisions (a) and (d) criminally hold liable content providers who knowingly transmit or display "indecent" or "patently offensive" material to minors. Access providers also are held liable if they know such material will be transmitted or displayed.[133]

The ACLU and Shea courts found that it was not technologically feasible, whether incorporating tagging or adult verification systems, to conduct age screening.[134] Tagging would require content providers to label all of their "indecent" or "patently offensive" material by alerting the user through a string of characters, such as 'XXX.'[135] Adult verification systems will allow only those users who have registered and paid for the system's services, such as access to pornographic sites.[136] These methods would be costly and burdensome to conduct for many non-profit and commercial organizations.[137] The courts found that these methods are not the least restrictive means available.[138] The government could continue to protect children from access to indecent material by enforcing existing criminal laws for obscenity and child pornography.[139] In addition, parents could use software filters to provide a "clean" Internet for their children as well as actively guide their children when they use the Internet.[140]

B. ACLU v. Reno Oral Arguments

On March 19th, the nation finally discovered the Supreme Court's concerns about the Internet and the CDA. As Seth P. Waxman argued for the government, Justice O'Connor asked the first question. O'Connor wanted to know how content providers will "know" that children would access "indecent" material; whether the computer gateway interface (CGI) appropriately screens or blocks "indecent" material.[141] She also questioned how expensive it would be for non-profit organizations to install screening or blocking devices.

Justice Breyer questioned whether Internet communications are similar to telephone conversations. Would the government prosecute high school students who describe their sexual experiences on the Internet, but not on the telephone? Waxman conceded that the CDA would hold both situations criminal. Similarly, Justice Kennedy questioned whether conversations between two, between a minor and an adult, between two adults on public streets and public places would all be prohibited under the government's analysis of the CDA. Waxman conceded that the statute would prohibit such conversations conducted at a public street corner. It seems that the Supreme Court was concerned about how similar or different the Internet would be to other technologies.

Justice Ginsburg spoke for the Court on the issue of severability. The Court abhors "tinkering" with any law. Cutting and pasting provisions was not an acceptable option.

Also, the oral arguments showed a Court concerned with the Internet as a technology and how analogous to telephone or the other mediums it could be. Not only did the Court question recent technology such as software filters and screening systems, but it also expressed distaste toward reworking the CDA. Therefore, the Court would either overturn the CDA or uphold the law for further findings about prospective technology.

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[128] Sable at 126.

[129] *Id.*

[130] ACLU at 854; Shea at 940.

[131] *Id.* at 852; at 938.

[132] *Id.* at 854; at 941.

[133] 47 U.S.C. 223.

[134] *Id.*

[135] *Id.* at 846.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 855; at 943.

[139] *Id.* at 882.

[140] Rappaport, *Rules of the Road*, supra note 68, at 79-80.

[141] Oral Arguments, *Reno v. ACLU* (No. 96-511).

C. The Supreme Court's decision in Reno v. ACLU

The Supreme Court held the CDA unconstitutional, finding provisions (a) and (d) abridged "the freedom of speech" protected by the First Amendment.[142] The Court applied the strict scrutiny test, and while it recognized the government's interest in protecting minors from "indecent" or "offensive" material, it was not persuaded that the government employed narrowly tailored means to effectuate its interest.[143] The Court began its opinion by rejecting the government's reliance on Ginsburg v. New York and FCC v. Pacifica Foundation as legal precedents for the Internet medium.[144] In Ginsburg, the Court upheld a statute that prohibited selling obscene materials to minors under 17 years of age. The Court distinguished the Ginsburg statute, where a parent was not barred from buying obscene magazines for their children while the CDA applies to any indecent communication, regardless whether a parent consents or participates in the communication. Also, the Ginsburg statute defined material harmful to children as that "utterly without redeeming social importance," while the CDA fails to define what is indecent or what is patently offensive.[145]

The Court also pointed out significant differences between the Pacifica case and the CDA.[146] Pacifica upheld an order that decided when a specific broadcast would air on the radio rather than totally banning the broadcast. Also, the Court stressed that Pacifica dealt with the broadcast medium that had a history of limited First Amendment protection, while the Internet has no comparable history.[147]

The Court observed that the Internet has never been subjected to government supervision and regulation applicable to the broadcast industry. The Court emphasized that the Internet is not as "invasive" as television or radio.[148] Not only does the CDA restrict a medium that is not as invasive as broadcasting, but the CDA's language provokes uncertainty among speakers as to what communication is indecent and what communication is patently offensive.[149] This uncertainty undermines the government's assertion that the CDA is carefully tailored to protect minors from potentially harmful materials.[150]

The Court agreed that the CDA effectively suppressed a large amount of speech that adults have a constitutional right to receive and address to another.[151] The Court found that the CDA's provisions were an unacceptable method of protecting minors from potentially harmful material; less restrictive alternatives would have been as effective to promote Congress' goal in protecting children from potentially harmful materials.[152]

The Court also pointed to the CDA's broad prohibition, which "embraces all nonprofit entities and individuals that post indecent messages or displaying them on their own computers, messages with serious educational or other value."[153] Not only does the CDA burden educational or other valuable communication, but it holds a parent criminally liable for allowing her minor child to obtain information the CDA deems "indecent."[154] Thus, the Court held that the CDA, neither its language nor defenses, was narrowly tailored to promote the governmental interest in protecting children from potentially harmful material. In truth, the CDA impermissibly burdened protected speech and interfered with the free exchange of ideas on the Internet.[155]

Though the Court reached the conclusion that the CDA places a heavy burden on protected speech, criticizing the government's reliance on terms like "indecent" and "patently offensive," the Court did not state or define an indecency standard that applied to the Internet. Importantly, it distinguished the Internet from broadcasting, recognizing the phenomenal growth of the Internet and the "vast democratic

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[142] Reno v. ACLU, 117 S.Ct. 2329, 1997 U.S. LEXIS 4037 at *7.

[143] *Id.* at *62.

[144] *Id.* at *36.

[145] *Id.* at *37.

[146] *Id.* at *39.

[147] *Id.* at *43.

[148] *Id.* at *44.

[149] *Id.* at *48.

[150] *Id.*

[151] *Id.* at *53.

[152] *Id.*

[153] *Id.* at *61.

[154] *Id.*

[155] *Id.* at *73.

fora" encouraging a free exchange of ideas.[156] The justices gave the Internet medium the same kind of First Amendment protection books and newspapers are given.[157]

Notably, the Court agreed with the District Court's finding that currently available user-based software suggests a reasonable method by which parents can prevent their children from accessing sexually explicit and other material parents deem inappropriate for their children.[158] The Court considers empowering the parents, and not Congress, to protect children, which simultaneously protects the First Amendment.[159]

While the Court's strict scrutiny analysis held the CDA provisions (a) and (d) unconstitutional, one questions whether the outcome would have been different if the Court employed the balancing of interests test in the Denver Area Educational Telecommunications Consortium, Inc., et al. v. FCC. There, a plurality consisting of Breyer, Stevens, Souter, and O'Connor applied a new test to determine the constitutionality of sections 10(a), (b), and (c) of the Cable Television Consumer Protection and Competition Act in Denver Area.[160] The Court closely scrutinized section 10(a), the provision that permits a cable operator to decide whether or not to broadcast indecent programming on leased channels,[161] to assure that the provision "addresses an extremely important problem without imposing, in light of relevant interests, an unnecessarily great restriction on speech."[162] The plurality acknowledged that telecommunications law, technology, and industry changes rapidly, and it would be "unwise and unnecessary" to choose one set of terms or one specific standard to apply.[163]

The plurality examined a number of relevant interests, and determined from the balance which interests outweighed the others.[164] For example, the Court acknowledged that the interest to protect children from exposure to patently offensive, sex-related material was important;[165] protecting adults' right to access such material was a counter interest equally important;[166] the nature of the medium (whether it is pervasive and easily accessible to children), and whether the regulation was rigid or flexible as applied were other important interests.[167] The Court held that section 10(a), which permitted a cable operator to decide whether to broadcast indecent programming was constitutional under the balancing test.[168] However, the Court found sections 10(b) and (c) unconstitutional because the "segregate and block" requirements do not properly accommodate the legitimate aim of protecting children without sacrificing the important First Amendment interest.[169] Let us apply the "balancing of interests" test to the CDA, and determine whether the provisions are constitutional, and also which test protects free speech and which test protects children.

The government has an important interest in protecting children from exposure to indecent material. However, an equally important interest concerns adults' rights to free speech. These two interests compete for the upper position as the dominant interest the Court should choose. Yet, the Court would look at the Internet to determine how these interests interrelate with the nature's medium. As District Judge Sloviter stressed, the Internet presented low barriers for a user or provider to access the medium. Online communications are decentralized, unregulated. But the Internet is not pervasive or easily accessible to children. People must have a computer and the computer must be connected to a network able to enter the Internet. A user must affirmatively seek to communicate or research online. No one has ready access unless they have a modem or commercial access providers. The Court certainly examined the Internet's capabilities and technology.

Senator Exon and his colleagues argued that the Court should apply the balancing of interests rather than strict scrutiny.[170] By balancing the

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156 *Id.* at *44.

157 *Supreme Court nixes censorship law*, EDUCATION TECHNOLOGY NEWS, July 9, 1997.

158 *Supra* note 156 at *58.

159 Kurt Wimmer and Victoria Carter, *A Clean Slate*, CONNECTICUT LAW TRIBUNE, August 4, 1997.

160 116 S.Ct. 2374, 2385 (1996).

161 *Id.* at 2381.

162 *Id.* at 2386.

163 *Id.* at 2385

164 *Id.* at 2386.

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* at 2387

169 *Id.* at 2391, 2393

170 Amicus Brief for Janet Reno, *Reno* (No. 96-511).

interests, the government could have succeeded on its appeal.

D. New Proposals

Several members of Congress have proposed bills to amend or repeal the CDA. For example, Representative Anna Eshoo (D-CA) introduced a bill in the House which states Congress needs to be educated on tools available to parents to control consent; to bring the issue of indecency before the whole Congress, and whether the Miller standard should track obscenity on the Internet.[171] Eshoo praised the Supreme Court's decision, emphasizing that parents are legitimately concerned about what their children view on the Internet, and should rely on technological solutions to stop sexually explicit and other material from coming to their homes.[172]

Moreover, Rep. Zoe Lofgren (D-Calif.) has introduced H.R. 774, the Internet Freedom and Protection Act, which would require all Internet providers to offer some version of screening software, such as "Net Nanny, Surfwatch, or CYBERsitter."[173] In addition, the Clinton Administration has changed its position, and suggested that Congress embrace technical solutions to assist in screening information online.[174]

Senator Pat Murray (D-Wash.) addresses another solution -- encouraging Web page creators to rate their own pages for content with standardized codes similar to those applied to movies and television.[175] Likewise, White House Press Secretary Mike McCurry stated on June 27 that a "rating system with respect to some products available on the Internet might be useful."[176]

Nevertheless, the ACLU warned that the recent White House summit on censorship "was clearly a step away from the principle that protection of the electronic word is analogous to protection of the printed word."[177] In its recent 15-page white papers, ACLU's Barry Steinhardt, Ann Beeson, and Chris Hansen said, "the government and industry leaders are now inching toward the dangerous and incorrect position that the Internet is like television, and should be rated and censored accordingly."[178] The authors not only warn that the ratings system would threaten free speech, but also filtering programs, which would block access to valuable information such as safer sex information.[179] Congress and the computer industry have substantial work ahead of them, importantly, protecting the Supreme Court's constitutional standard in Reno v. ACLU.

IV. Conclusion

Section 230 of the Communications Decency Act "promotes the continued development of the Internet and other interactive computer services."[180] The policy aims to preserve the Internet as a "vibrant and free market of competition," and aims to remove the "development and utilization of blocking and filtering technologies."[181] How could Congress promote such a policy yet enforce restrictive provisions in section 223? Though the government has the right to regulate indecent material if children are exposed to such material, the CDA infringed on adult expression and rights. The CDA's language prohibited information about abortion, contraception, safe sex, and the like, infringing on the public's right to acquire such information online.

For example, recall the Gillett case where a district court held that political advertisements featuring abortion photographs and film clips aired during primetime were indecent.[182] Though the D.C. Circuit court held that the neither the broadcasters nor the FCC could regulate political advertisements,[183] sites which disseminate abortion information still should be concerned that the Supreme Court may decide

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[171] Kathleen Doler, *Online Smut Controversy Spawns Alternative Proposal*, INVESTOR'S BUSINESS DAILY, March 26, 1996 at A8.

[172] *Supreme Court nixes censorship law*, EDUCATION TECHNOLOGY NEWS, July 9, 1997.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Bill Pietrucha, *ACLU warns Internet ratings may torch free speech*, NEWSBYTES, August 8, 1997.

[178] *Id.*

[179] *Id.*

[180] 47 U.S.C. 230.

[181] *Id.*

[182] Gillett Communications of Atlanta, Inc. v. Daniel Becker, 807 F.Supp. 757, 762 (N.D. Ga. 1992).

[183] Daniel Becker et al. v. FCC, 95 F.3d 75, 83 (D.C. Circuit 1996).

that sexually explicit material should be prohibited, if not entirely, than to certain hours of the day. As the D.C. Circuit court analyzed how to protect a political candidate's right to free expression as well as protect children from sexually explicit material, the court used a balancing test, similar to the analysis Justice Breyer introduced in Denver Area.[184] The D.C. Circuit court concluded that political free expression superseded a concern to protect children.

The government can protect children from exposure to pornography in other ways. The government should promote further enforcement of obscenity and pornography laws, and enforce them online. It should educate parents on the merits and dangers of the Internet through pamphlets, through funds to the states, and through members of Congress. Congress and the Internet community must work to meet both free speech standards and moral values for online communications. Though the government constitutionally may regulate indecent material in broadcasting and cable, its foray into cyberspace fell short from its mark. Though Congress is turning its attention to a "son-of-CDA," the ultimate responsibility lies with the software companies and access providers on one side, and the parents on the other. The people who use and promote the Internet are more experienced and better able to develop protective measures for both protecting children from "indecent" material and protecting the First Amendment rights of adults.

[184] *Supra* note 76.