January 1996

KEEPING SEX SAFE ON THE INFORMATION SUPERHIGHWAY: COMPUTER PORNOGRAPHY AND THE FIRST AMENDMENT

Meredith Leigh Friedman

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Recommended Citation

This Note is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.
I. INTRODUCTION

"[T]he first automobile accident cases were tried by the standards set down for horse-drawn carriages, and the cutting-edge decisions on protecting computerized databases are all based on precedents established for telephone books . . . ."¹

"[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."²

In 1973, the United States Supreme Court decided Miller v. California,³ which held that "obscenity is to be determined by applying contemporary community standards . . . ."⁴ As we edge closer to the twenty-first century, and our "community is held together by modems and wire,"⁵ it appears that the Supreme Court will have to revisit Miller, a decision now almost a quarter of a century old, and redefine the very notion of "community standards." This new online community created headlines recently when operators of a computer bulletin board system (BBS) were convicted in federal court for trafficking obscenity across state lines.⁶ The case, United States v. Thomas,⁷ turned on the fact that what

² Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)). In Red Lion, the Court upheld the fairness doctrine, which imposed an affirmative obligation upon a broadcaster to present both sides of a public issue with fair coverage. Id. at 395-96. In doing so, the Court noted that the public has a right to receive access to social and political ideas; without the fairness doctrine, only a small minority would have the resources available to access radio and television broadcast. See id. at 390.
⁴ Id. at 37 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972); Roth v. United States, 354 U.S. 476, 489 (1957)).
⁷ 74 F.3d 701 (6th Cir. 1996).
is considered obscene in Tennessee, where the case was tried, is not necessarily considered obscene in California, where the Thomases lived and posted the material onto the BBS.\(^8\) As a result of cases like *Thomas*, many staunch supporters of individual rights, as well as technology connoisseurs, have cried out in alarm at what they perceive as an infringement on the First Amendment rights of computer users.\(^9\)

The core of the problem is trying to fit a new medium of communication into existing law which cannot, as it stands, adequately cope with the technological advances. For instance, the electronic media reduces the time required for accessing, transmitting and publishing information.\(^10\) Electronic data can be transmitted over any amount of distance instantaneously. As such, information can have global impact without ever hitting radio or television, and at the same time can reach a larger audience.\(^11\) Additionally, the unique qualities of electronic communication make it possible for persons to connect with other groups and persons with similar interests, without having to reach large audiences.\(^12\) In the case of computer networks, many argue that if the same material is available nationwide, or even worldwide, the local community standards set by *Miller* may no longer be workable, and that the law in this area must be reexamined in light of these technological advances.\(^13\)

Part II of this note will briefly examine the technological aspects of a BBS, highlighting some of the technical differences that make it difficult for this particular medium to be covered by existing obscenity laws.\(^14\) Part III will focus on past obscenity decisions, including the Thomases' convictions, concentrating mainly on the developing media of telephone and broadcast. Part III will also examine how the Supreme Court has dealt with the issue of obscenity and the First Amendment within these burgeoning media.\(^15\) Because it is likely that the recent convictions of the Thomases will reach the United States Supreme Court, it is important to identify the crucial technological and social issues that may face the

\(^8\) Id. at 705; Landis, *supra* note 6.


\(^12\) Id.

\(^13\) *Pornography in the Global Community*, ST. LOUIS POST-DISPATCH, Aug. 18, 1994, at 6B.

\(^14\) *See infra* notes 19-41 and accompanying text.

\(^15\) *See infra* notes 42-137 and accompanying text.
Court in the very near future. Thus, Part IV of this note will address these issues and examine them in light of past decisions. Part V examines the recent legislation enacted by Congress that seeks to implement a national standard for obscenity, as well as several industry initiatives for self-regulation.

II. WHAT IS A COMPUTER BULLETIN BOARD?

A BBS can be operated easily, with only a computer, modem and a telephone line, along with some software and a nominal amount of money. A BBS is simply a digitalized version of the classic corkboard wall unit. That is, in its simplest form, an operator of a BBS posts messages, consisting of text and/or images, on a host computer from which other computer owners can access the information, often for a fee. To access the BBS, the user dials the host computer using a modem; once connected, the modem translates digital data from the sending computer into analog signals which can be sent over phone lines. Many BBS now offer other services such as e-mail and access to one of the largest and most well-known computer networks, the Internet. The Internet was created in the 1960s by the United States Department of Defense, and soon expanded to include universities and various corporate and government computer systems. Today, the total number of Internet users is estimated to be from twenty million to fifty million in over 135 countries.

17. See infra notes 138-75 and accompanying text.
18. See infra notes 176-241 and accompanying text.
19. See infra notes 138-75 and accompanying text.
21. Id.
23. See Heinke & Rafter, supra note 22, at 2; Internet Was Started as System For Military Leaders, Research, SEATTLE POST-INTELLIGENCER, Dec. 8, 1995, at C5 (describing original purpose of Internet as intending to aid development of weapons by linking researchers and military commanders).
After the Internet was developed, several commercial online services were created which offer a variety of communications applications such as e-mail, Internet Relay Chat, and access to the Internet and the thousands of BBS that exist there. Prodigy, America Online, GEnie, and CompuServe represent the largest of these commercial online service providers, with America Online leading the pack with about 5 million users and CompuServe a close second with about 4.5 million users. Recently several of these commercial online services have begun offering access to the approximately 50,000 BBS accessible to the public on the Internet with about 13.5 million users per year.

Most of the services offered on a BBS can be divided into two categories: interactive and non-interactive. An interactive BBS begins when the operator posts a message; others read the message and add to the conversation. Unlike the television or newspaper, where the operators have substantial contact with the material before it is transmitted, the computer BBS operator technically allows its users to post whatever they wish, and cannot easily limit the subjects of posted messages. It is not possible for an operator to prescreen every BBS message in an interactive BBS because it is virtually impossible to locate the exact source of every transmission, and because the expense of a 24-hour monitoring system would result in most BBS shutting down. Furthermore, this type of screening would also eliminate the live conversation many people consider


27. See Landis, supra note 6; Kate Gerwig, Is The Net Full?, NETGUIDE, May 1, 1996, at 4.


29. Comment, supra note 25, at 229.


32. Heinke & Rafter, supra note 22, at 6; see Kevin O'Brien, Down a Dark Alley, CLEVELAND PLAIN DEALER, May 22, 1994, at 1C, 4C (quoting the vice president for information services at a major university as commenting, "[w]e could never offer [Internet access] for free if we had to do all those checks").
the central part of the success of BBS. These live chat sessions, where computer operators communicate by typing messages that people can read, as well as exchange messages about any and all subject matters, including sexual peccadilloes like bestiality and bondage, provide instantaneous communication whereby an individual can be “talking” to an entire group of people who are connected to the BBS. Thus the difficulty in pre-screening messages on a computer BBS contravenes exactly what consumers find so appealing. In a non-interactive service, the user does not directly affect the content of the BBS. Typically, these non-interactive services are online newspapers, news and financial services, movie reviews, and other informational databases, although some pornography BBS are non-interactive as well.

Three of the top ten BBS are sexually related, and each has between 200,000 and 400,000 users each month. The thousands of sexually

33. See Note, supra note 31, at 222; see also Peter H. Lewis, No More ‘Anything Goes’: Cyberspace Gets Censors, N.Y. TIMES, June 29, 1994, at A1 (describing expanded use of censorship on commercial online services to dismay of subscribers).

34. See Note, supra note 31, at 217.

35. See id. at 217, 221; see also Bill Husted, Cyberspace: Special Gear Needed to Gear on Net, THE ATLANTA J. & CONST., Apr. 28, 1996, at 1.

36. See Note, supra note 31, at 217.

37. See id.

38. Id. A recent study published in the Georgetown Law Journal found that one of the largest recreational uses of computer networks was the distribution and consumption of pornography. See Marty Rimm, Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories, 83 GEO. L.J. 1849, 1861 (1995). The study also found that the majority of pornographic images were available on commercial ‘adult’ BBS, although the three largest BBS, CompuServe, Prodigy and America Online, do not allow posting such images. Id. In addition, unlike the traditional print forms for pornography (print/video), the computer pornography market has a strong demand for pedo/hebephilic and paraphilic imagery. More specifically, in Rimm’s study, conducted on the Carnegie-Mellon campus, pedo/hebephilic and paraphilic imagery comprised 48.4% of all adult BBS downloading. Id. at 1892.

The study also looked at the Thomases’ BBS, Amateur Action, partly because its owners were recently convicted of distributing pornography over a computer BBS, and partly because it is a market leader in ‘adult’ BBS. Id. at 1896. Robert Thomas has often bragged that his BBS is “the nastiest place on earth.” Id. at 1902. Indeed, the study found that after the Thomases’ convictions, demands for bestiality images more than quadrupled. Id. at 1904. As of May, 1995, Amateur Action had 10,687 subscribers and had logged over 1.6 million calls. Id.

The author of the study suggests what this Note also argues: should the traditional, geographically defined community, at the heart of the Miller standard, be discarded in
explicit images that these BBS offer can be transferred to a personal
counter and viewed. Computer pornography does not just consist of
messages: graphics, sound and high-quality pictures are available too. Computer
technology has advanced so far that computers can now be used
to both display and edit photographs and video. Additionally, many of
today's color monitors, which are standard equipment on most computers,
can display resolutions higher than those found on televisions.

III. HISTORY OF THE FIRST AMENDMENT AND OBSCENITY

In 1942, Justice Murphy, writing for the Supreme Court, asserted that "[t]here are certain . . . classes of speech, the prevention and punishment
of which have never been thought to raise any Constitutional problem.
These include the . . . obscene. . . . [S]uch utterances . . . are of such
slight social value as . . . [to be] outweighed by the social interest in . . .
morality."\textsuperscript{42} However, the Court's first direct encounter with obscenity
did not come until fifteen years later in \textit{Roth v. United States.}\textsuperscript{43} Roth,
a New York bookseller, was convicted of mailing obscene circulars and
advertising.\textsuperscript{44} Because the Supreme Court had not addressed the issue
of whether obscenity was protected by the First Amendment they granted
favor of a cyberspace community, not bound by any geographical limits? \textit{See id.} at 1897
n.94. However, if cyberspace is a separate community, and graphic sexual imagery is
allowed, is the geographical community to be forced to allow such imagery to be
downloaded in its residents' homes? On the other hand, if the geographical community
standards proved to be more lenient than that of the cyberspace community (in New York
City, for example) would the government be forced to restrict the imagery to only what
is permissible in the cyberspace community? Lastly, Rimm suggests that "another logical
view is that cyberspace does not constitute a community at all," and thus the "entire
conception of community and community standards" may have to be addressed once
again by the federal courts as computer pornography becomes more prevalent. \textit{Id.}
While the study sparked quite a bit of controversy over its methods and the accuracy of
its findings, it was also hailed by many legal scholars as a "landmark study" and an
"important and original contribution" to the study of sexuality. Peter H. Lewis, \textit{Critics
Troubled by Computer Study on Pornography}, N.Y. \textsc{Times}, July 3, 1995, at 37, 40
(quoteing, respectively, Professor Catharine A. MacKinnon, University of Michigan Law
School, and Professor Carlin Meyer, New York Law School).

39. Brad Patten, \textit{Sex Rides the Fast Lane on Info Superhighway}, \textsc{Phoenix Gazette},
40. \textit{Id.}
41. \textit{Id.}
44. \textit{See id.} at 480.
NOTE: COMPUTER PORNOGRAPHY AND THE FIRST AMENDMENT

In *Roth*, the Court held that obscenity was "not within the area of constitutionally protected speech or press," and defined such material as that which "deals with sex in a manner appealing to prurient interest . . . [i]e., material having a tendency to excite lustful thoughts." The Court was later presented with two cases that were a result of the difficulty in interpreting the *Roth* definition of obscenity.

In *Stanley v. Georgia*, the Court embraced a drastically different approach than that taken in *Roth*, but in the subsequent case of *United States v. Reidel*, it became clear that *Stanley* did not overrule *Roth*. *Stanley* involved a prosecution for the possession of obscenity within a person's home.* Stanley's home was searched by police due to his alleged bookmaking activities there. During the search, police found some films they believed to be obscene and arrested Stanley for having possession of obscene matter. There, the Court indicated that

[In the context of this case—a prosecution for mere possession . . . in the privacy of a person's own home—that right takes on an added dimension. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. . . . *A State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.*

*Reidel* concerned an indictment for mailing obscene materials. The Court emphasized that because *Stanley* dealt with the right to have and read obscene material in the privacy of one's own home, it was distinguishable from *Reidel*, which concerned only the *distribution* of such

---

45. *See id.* at 481.
46. *Id.* at 485.
47. *Id.* at 487 & n.20.
49. *See id.* at 564-65.
50. 402 U.S. 351, 352 (1971) (holding that it is not unconstitutional to prohibit "knowing use of the mails for the delivery of obscene matter").
51. *Id.* at 354.
53. *Id.* at 558.
54. *Id.*
55. *Id.* at 564-65 (emphasis added).
The district court in Reidel had erroneously interpreted Stanley to stand for the proposition that "if a person has the right to receive and possess this material, then someone must have the right to deliver it to him." The Supreme Court, however, determined that the district court had given Stanley "too wide a sweep," and that Stanley only recognized "the right to satisfy [one's] intellectual and emotional needs in the privacy of his own home." The Court also affirmed the holding of Roth and stated that the sale of obscene material was not protected by the First Amendment. However, confusion among circuit courts in applying the Roth definition of obscenity and disparity among the Justices themselves eventually forced the Supreme Court to readdress the obscenity question in Miller v. California.

Miller had conducted a mass mailing of sexually explicit materials in order to promote book sales. The Miller Court expanded the obscenity test and held that the states have a legitimate interest in prohibiting the dissemination of obscene material. Chief Justice Burger began the Court's opinion by noting that Miller was one of several cases being reviewed by the Court in order to examine and clarify the standards involving "the intractable obscenity problem." The Court was undertaking to set concrete standards for the states to use in regulating obscenity without infringing on the First Amendment. The newly articulated standard examines whether:

(a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

57. Id. at 354.
58. Id. at 355.
59. Id. (quoting Stanley, 394 U.S. at 565).
60. See id. at 356.
61. See Miller v. California, 413 U.S. 15, 22 n.3 (1973).
62. See id. at 22-23. In 1968, only a decade after Roth, Justice Harlan wrote, "in the ... 13 obscenity cases ... [since Roth] in which signed opinions were written ... there has been a total of 55 separate opinions among the Justices." Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 705 n.1 (1968) (Harlan, J., concurring in part and dissenting in part).
64. Id. at 16.
65. See id. at 18.
66. Id. at 16 (quoting Interstate Circuit, 390 U.S. at 704 (Harlan, J., concurring in part and dissenting in part)).
67. See id. at 19-20.
(b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.68

Thus, the Miller test became the standard for identifying obscenity and is the test of obscenity still used today.69

Obscenity law as applied to both broadcasting and telephone communications is of particular relevance to the medium of computer BBS because online networks have been labelled by many as the “marriage” of phone and broadcasting.70 While a BBS does use telephone lines to carry the information, the point-to-multipoint transmission of information is very similar to that of broadcasting, especially with a non-interactive BBS like Amateur Action where the images can only be downloaded by the subscriber.71 Thus, to adequately illuminate the issues facing courts today and in the near future, a historical analysis of obscenity law in the context of both broadcasting and telephone communications is necessary.

A. Broadcast

In FCC v. Pacifica Foundation,72 the Supreme Court relied on the “unique” aspect of broadcasting to hold that the FCC has the power to regulate radio broadcasts that are indecent but not obscene.73 Pacifica, the parent company of a radio station, had broadcast during the middle of the afternoon comedian George Carlin’s Seven Dirty Words, a 12-minute

68. Id. at 24.
69. See infra text accompanying note 136.
71. Traditional broadcasting, however, differs from online services in two very important ways. First, with online services there is no concern with scarcity of channels, as there is with broadcast. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969) (holding that fairness doctrine did not violate First Amendment). Second, broadcasting is much more accessible to the general public, and the user does not have to take such affirmative steps to access the speech. See Sable Communications of Cal. v. FCC, 492 U.S. 115, 128 (1989). Nonetheless, in the context of computer online services it is still important to discuss the history of obscenity as it relates to public broadcasting.
73. See id. at 748.
monologue that included language describing sexual and excretory activity." The Court focused on the particular qualities of television broadcast that caused it to receive "the most limited First Amendment protection" and its "uniquely pervasive presence in the lives of all Americans," and based its holding on several specific traits inherent in broadcast media. The Court first noted that the power of broadcasting to reach into the privacy of one's home confronts the right to be let alone. In addition, because broadcasting is "constantly tuning in and out," the Court reasoned that prior warnings are inadequate to protect the listener or viewer from offensive content. The Court also emphasized broadcast's unique accessibility to children, noting that the "ease with which children may obtain access to broadcast material . . . amply justifies a special treatment of indecent broadcasting." Subsequent to Pacifica, the FCC chose not to investigate any alleged indecent broadcasting. The three networks imposed self-regulation in the form of "Standards and Practices," which strictly limited the degree of nudity, violence or type of language exhibited. However, due to the growing aggressiveness of broadcasters, the FCC began issuing warning letters in 1987 to certain licensees. The FCC also issued a Public Notice stating that the standard of indecency set forth in Pacifica, "patently offensive [language] as measured by contemporary community standards for the broadcast medium," would be used in the future.

B. Telephone

Obscenity law as it concerns telephone communication is crucial to the future of computer BBS because phone technologies are so interwoven

74. Id. at 729-30.
75. Id. at 748.
76. See id.
77. See id.
78. Id. at 750.
79. Timothy B. Dyk & Lois Schiffer, The FCC, the Congress and Indecency on the Air, COMM. LAW. (Winter 1990), at 8, 9.
80. FED. COMM. COMM'N, REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL No. 28-11 (1975).
82. FED COMM. COMM’N, PUBLIC NOTICE: NEW INDECENCY ENFORCEMENT STANDARDS TO BE APPLIED TO ALL BROADCAST AND AMATEUR RADIO LICENSEES No. 87-153 (1987).
with computer based telecommunications. Not only do these technologies provide the physical means of information transport, but also because they are the most recent and related technologies to computer BBS. Until the introduction of interactive telephone pornography, the telephone companies had experienced very little regulation over the content of telephone conversations. The introduction of these sexually oriented prerecorded telephone messages ("dial-a-porn") to the American public stirred up the law of obscenity that had long remained dormant.

Carlin Communications began offering dial-a-porn to the New York metropolitan area in 1983 and soon thereafter expanded their business to several cities nationwide. After Congress responded to the growing dial-a-porn industry with anti-pornography legislation in the early 1980s, Carlin brought three suits against the FCC in federal court. Carlin I addressed a challenge to the FCC's Report and Order, which was a direct response to Congress's passage of 47 U.S.C. § 223(b). This amendment to the 1934 Communications Act provided for defenses for dial-a-porn companies such as Carlin, which were to be promulgated in regulations by the FCC. The FCC determined that restricting the messages to the hours between 9:00 p.m. and 8:00 a.m., as well as

83. See Comment, supra note 25, at 228 (noting that a computer BBS is nothing more than "a computer set up to receive calls from other computers and to exchange information. It enables anyone with a modem-equipped personal computer and a phone line to read BBS messages . . . ." (citing Kevin McManus, Board Meetings, WASH. POST, Sept. 10, 1993, at N7 (Weekend))).
84. See id.
85. See Dyk & Schiffer, supra note 79, at 8.
86. See infra notes 87-119 and accompanying text.
90. See Carlin I, 749 F.2d at 117. 47 U.S.C. § 223(b) (1983) prohibited any "(A) . . . communication, by means of telephone, . . . (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age . . . ."
91. See id. at 115-16. Congress was acting in response to the enormous growth of dial-a-porn in the mid-1980s (in May, 1983, 800,000 dial-a-porn calls were made per day). See id. at 114. The FCC was required by Congress to issue regulations in response to § 223(b) no less than 190 days after its enactment, which was December 8, 1983. See id. at 116.
requiring payment by credit card, were sufficient defenses.\textsuperscript{92} When Carlin Communications brought suit to invalidate those restrictions on First Amendment and other grounds, the Second Circuit held that the regulations were not sufficiently narrowly-tailored, and that while the regulations diminished adult access to dial-a-porn messages during daytime hours, they did not prevent minors from calling the service during the evening hours.\textsuperscript{93}

Following Carlin \textit{I}, the FCC adopted a Second Report and Order\textsuperscript{94} rejecting all number blocking which would have blocked access to dial-a-porn service providers at the calling customer's premises, due to economic and technical problems.\textsuperscript{95} The FCC also rejected automatic coding known as scrambling and other time-channel regulations.\textsuperscript{96} The FCC concluded that the most effective means of restricting access to dial-a-porn by minors was to require those message providers to either send messages only to adults who had obtained an access code from the service provider, or, alternatively, to require credit card payment before access could be obtained.\textsuperscript{97} In Carlin \textit{II}, the Second Circuit again struck down the FCC's regulations because the FCC did not "adequately consider the feasibility of shifting the cost of customer premises blocking equipment" to the providers of these messages.\textsuperscript{98} The court found that because the record did not indicate why the burden was not placed on the information providers, the FCC had not presented the most narrowly-tailored means to satisfy the regulatory mandate.\textsuperscript{99}

This failure by the FCC prompted a third series of regulations,\textsuperscript{100} which added yet another defense to § 223(b)'s proscription against indecent phone calls: message scrambling.\textsuperscript{101} This new defense adopted by the FCC reversed its decision in its Second Report and Order, which

\begin{flushleft}
92. \textit{See id.} at 117.
93. \textit{Id.} at 121.
96. \textit{See id.} Scrambling messages consists of mixing a signal's content before transmission, and reconstituting it on receipt. \textit{See id.} at 850.
98. \textit{See Carlin II}, 787 F.2d at 855.
99. \textit{See id.} at 856.
\end{flushleft}
had originally rejected message scrambling.¹⁰² Dial-a-porn providers could now scramble the message which would be unintelligible without the purchase of a descrambler.¹⁰³ This new imposition upon message providers prompted Carlin III,¹⁰⁴ where the Second Circuit found that the scrambling device, coupled with the use of credit card payment and access codes, were feasible and effective enough to protect minors' access to adult telephone messages.¹⁰⁵ However, the court did note that § 223(b), as amended, could not constitutionally be applied to non-obscene speech, and that the FCC should reopen proceedings if a less restrictive technology became available.¹⁰⁶

Later that year, Congress again amended the 1934 Communications Act.¹⁰⁷ The resulting litigation, Sable Communications of California v. FCC,¹⁰⁸ was a response to the government's assertion that nothing less than a total ban on adult telephone messages could prevent children from gaining access.¹⁰⁹ The amended Act imposed a ban on both obscene and indecent interstate telephone messages, but the Supreme Court held that the ban on indecent messages was unconstitutional.¹¹⁰

Sable Communications, a Los Angeles-based affiliate of Carlin Communications, began providing dial-a-porn through the Pacific Bell telephone network.¹¹¹ Not only did Sable use special telephone lines, but those who called the messages were charged a special fee.¹¹² In 1988 Sable brought suit against enforcement of the 1934 Communications Act provision that provided a blanket prohibition on indecent as well as

¹⁰². See Carlin II, 787 F.2d at 852. In fact, the court stated in its opinion that they could not understand why the FCC did not address the matter of transferring the cost of customer blocking to the message providers or telephone companies as a feasible system to comply with the congressional mandate, especially in view of the Commission's decision to impose the cost of access code identification procedures on the providers. Id. at 855. In addition, the court termed the FCC's failure to impose message scrambling "especially troubling" because the existing technology owned by the phone company made access codes extremely difficult to put into place. Id.


¹⁰⁵. Id. at 555.

¹⁰⁶. Id. at 555, 560-61.


¹⁰⁹. See id. at 122-23.

¹¹⁰. Id. at 117.

¹¹¹. See id. at 117-18.

¹¹². See id. at 118.
obscene telephone calls. The Court held that because the First Amendment does not extend to obscene speech, § 223(b) does not unconstitutionally prohibit the adult telephone messages.

In addition, the Court rejected Sable's argument that § 223(b) created a "national standard" of obscenity, contrary to the Miller holding, because it no more established a national standard than did federal statutes outlawing the mailing or broadcasting of obscene messages. The Court went further to state "the fact that 'distributors of . . . obscene materials may be subjected to various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of the application of uniform national standards of obscenity.' The Court mandated that Sable must tailor its messages to the communities it chose to serve, even if that meant incurring extra costs and implementing a screening system.

In a statement that seemed to prophesize the problem faced today, the Court noted that there was "no constitutional barrier under Miller to prohibit communications that may be obscene in some local communities but not in others. Sable bore the burden of complying with different local standards of obscenity and their varying prohibitions on obscene messages.

C. Computers

In July, 1994 Robert and Carleen Thomas, operators of a BBS accessible through the Internet and based in Milpitas, California, were convicted of transmitting sexually obscene pictures through interstate

113. At the time of the suit, the statute stated in pertinent part:
(b)(1) Whoever knowingly—
(a) . . . makes . . . any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call . . . shall be fined not more than $50,000 or imprisoned not more than six months, or both.
114. See Sable Communications, 492 U.S. at 131.
115. Id. at 124.
116. Id. at 125 (quoting Hamling v. United States, 418 U.S. 87, 106 (1974)).
117. Id.
118. Id.
119. Id. at 126.
phone lines to an undercover agent in Memphis, Tennessee.\textsuperscript{120} This is believed to be the first federal obscenity conviction involving material transmitted via computer.\textsuperscript{121} The Thomases' BBS, titled Amateur Action, had about 3500 users nationwide who paid $99 each to gain access to the board.\textsuperscript{122} There were more than 20,000 images—some of which involved animals and incest—for the agent, an undercover U.S. Postal Service inspector, to view.\textsuperscript{123} The Thomases were convicted in federal court in Memphis, Tennessee—a city known for its conservative juries—on a combined total of twenty-one counts of trafficking obscenity through interstate phone lines via their BBS.\textsuperscript{124} In January 1995, a federal judge sentenced Robert Thomas to 37 months and his wife, Carleen, to 30 months in federal prison.\textsuperscript{125}

The Thomases' trial was plagued from the beginning with a series of mishaps. First, the Thomases' lawyer improperly declared the Miller holding "unconstitutional," and based the motion to dismiss the indictment on the North American Free Trade Agreement (NAFTA).\textsuperscript{126} Furthermore, while the prosecution offered several expert witnesses, the defense presented only one who testified about sexual fetishes, rather than the technologies at issue or community standards regarding obscenity in Tennessee.\textsuperscript{127}

\begin{thebibliography}{127}
\bibitem{120} United States v. Thomas, 74 F.3d 701 (6th Cir. 1996); see \textit{Pornography Conviction Alarms Users of Internet}, CHI. TRIB., July 31, 1994, § 1, at 11 [hereinafter \textit{Pornography Conviction}]; see also Landis, supra note 6.

\bibitem{121} \textit{See Pornography Conviction, supra} note 120.

\bibitem{122} \textit{See Quittner, supra} note 5. By May, 1995 however, Amateur Action had 10,687 subscribers and had logged over 1.6 million calls. \textit{See Rimm, supra} note 38, at 1904.

\bibitem{123} \textit{Thomas, 74 F.3d at 705.}

\bibitem{124} \textit{Id. at 705-06. A common charge by many commentators of the Thomas trial was forum shopping by federal authorities for a state with conservative obscenity laws. \textit{See Reske, supra} note 9; \textit{see also Pornography Conviction, supra} note 120. Each count carried up to five years imprisonment and a $250,000 fine.}


\bibitem{126} \textit{Id. In pleadings requesting that the Thomases be kept out of jail pending their appeal, the Thomases' new lawyers argued that the trial has been a "farce" because, among other things, their first lawyer failed to investigate thoroughly, failed to file any pretrial motions, and failed to mount a substantial defense.}

\bibitem{127} \textit{Id. (quoting one of the Thomases' new lawyers, James Causey of Tennessee, as stating that he "[would] have brought [a witness] in from Memphis where they sell these types of things . . . [i]t would have made a hell of a difference").}
The defendants have since fired their former lawyer and hired a more experienced criminal defense lawyer for their appeal. In late December, 1994 the Thomases filed pleadings in the Sixth Circuit, arguing primarily that their defense lawyer was too unprepared, inexperienced and ill-equipped to have properly handled their trial. The district court judge who tried the case in Tennessee felt that it was "unlikely" that the "best lawyer in the world" could have produced a different result because the evidence was "very egregious . . . at the extreme end" of the obscenity scale. The Thomases' former defense attorney felt that the trial was a media circus brought about by the U.S. attorney's office. "Show a Bible Belt jury six hours of fetish adult films and they are going to walk out with frowns on their faces." As a result of the Thomases' trial, many BBS operators and users are running scared: a BBS can be accessed from anywhere and the government could presumably choose to prosecute in whichever community a legal victory is most likely. The Thomases contend that they believed the material transmitted on their BBS was legal because they purchased the materials from stores in San Francisco. The judge, however, stated that "there was no indication of venue shopping" on behalf of the government and did not believe "there are places in this country . . . where this is not likely to be found obscene." The jurors were instructed to apply the Miller holding and use "contemporary community standards" to distinguish between legal pornography and unprotected obscenity. On appeal, the Thomases' convictions were affirmed by the Sixth Circuit.

128. Id.; see also Pornography Conviction, supra note 120.
129. See Howard Mintz, Offensive to Professional Standards, LEGAL TIMES, Jan. 23, 1995, at S35 (Technology Report) (suggesting that appeal "set the stage for a crucial appellate test of community standards" but unfortunately may have more to do with "lousy lawyering" than First Amendment).
130. Id.
131. Id.
132. Id.
134. See Mintz, supra note 125, at 2.
136. Id.
137. United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).
IV. How Existing Obscenity Law Relates to Online Pornography

The way in which we acquire and communicate information has changed drastically over the past ten years due to technological advancements. These changes require corollary adaptions in the law in order to avoid infringing on fundamental First Amendment rights. For example, diverse efforts at regulation have attempted to respond to the different problems presented by computers with regard to defamation and copyright laws. It is arguable that the very nature of computers requires new laws which pay greater attention to the technology’s effect on the issues, and not the issues themselves.

The Court’s conclusion in *Sable Communications* that the differences between wire and broadcast communications have significant constitutional implications may also be applied to computers. This in turn forces yet another conclusion—that differences exist between computers and all other forms of media—raising unique First Amendment concerns. One key difference, the fact that a home computer is located within the private confines of the home, highlights the Court’s holding in *Stanley*, i.e., that the First Amendment prohibits “making mere private possession of obscene material a crime.” Justice Thurgood Marshall stated, “[t]he right to receive information and ideas, regardless of their social worth, is fundamental to our free society.” He also stated that possessing information, regardless of its content, in the privacy of one’s own home implicates the right to be free from “unwanted governmental intrusion into one’s privacy.” Thus, the Court’s holding in *Stanley* can easily be interpreted to mean that the State has no business telling a man, sitting

138. Heinke & Rafter, *supra* note 22, at 6. For example, in *Cubby v. CompuServe*, the court found that CompuServe served only as distributor, and not publisher, of messages posted on one of the many BBS accessible on that particular commercial online service. In doing so, the court noted that “CompuServe has no more editorial control over such a publication than . . . a newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than . . . any other distributor.” *Cubby v. CompuServe*, 776 F.Supp. 135, 140 (S.D.N.Y. 1991).


142. *Id.* at 564.

143. *Id.*
alone in his house, what messages he may read or which images he may view on his computer.

On the other hand, the Court made it clear in Reidel that even if there is a constitutional right to "freedom of mind and thought [in] the privacy of one's home," there is no constitutional right to sell obscene material. In the context of computer BBS, however, it is arguable that there is never any actual dissemination and thus the rationale of Stanley is still applicable. The premise of the non-dissemination argument rests in the nature of the technology in question: publishing information electronically consists only of placing the information in a computer which is linked with other computers. A subscriber has "virtually free reign" to both upload and download any information transmitted, including pictures and videos. Thus, in its "purest form," a computer BBS does not involve any distribution at all and the operator does not send or disseminate a message in the traditional sense of the word.

In their appeal to the Sixth Circuit, the Thomases relied on Stanley and argued that the files containing the offensive pictures never left the privacy of their home, and thus were not sold, disseminated, or shared with anyone outside their home or outside California. Their argument was flatly rejected; the court stated that Stanley had subsequently been clarified to mean only that there was a right to privacy in the home, and even if there was a right to possess obscene materials within the home, there was no correlative right to transport or distribute those materials outside the home.

Another argument justifying different obscenity treatment for computer networks (but was not raised in the Thomases' appeal) is that a BBS user must take affirmative steps to access the information and must

145. See Katsh, supra note 11, at 1473.
146. See id.
147. Heinke & Rafter, supra note 22, at 7.
148. See id.
149. This is true only for interactive systems where the user posts a message, and other users log on, read the messages that have been posted, and in turn post their own. See T.R. Reid, The New Legal Frontier: Laying Down the Law in Cyberspace, WASH. POST, Oct. 24, 1994, at F24.
150. United States v. Thomas, 74 F.3d 701, 710 (6th Cir. 1996).
151. Id. (quoting United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 126 (1973)).
even have technological knowledge of how to use the equipment.\textsuperscript{152} Because computer pornography is the result of each individual's efforts to gain access to such messages, it has even been labelled a "truly victimless crime."\textsuperscript{153} "Never will you be innocently fiddling around . . . on the [Inter]net and suddenly have a montage of naughty parts splashed across your monitor."\textsuperscript{154}

These same ideas had their genesis in \textit{Sable Communications}, where the Supreme Court differentiated between telephone and broadcast.\textsuperscript{155} It noted that while broadcast pervades the home without warning or opportunity to avoid listening, the telephone medium "requires the listener to take affirmative steps to receive the communication."\textsuperscript{156} The telephone does not present the problem of a captive audience because the callers themselves are not likely to be unwilling listeners.\textsuperscript{157} The same rationale is applicable to computer BBS: the user must seek out and most often is required to pay to gain access to the system. Without the appropriate equipment and technological knowledge, the user is at a loss.\textsuperscript{158}

The most compelling argument for treating computers differently, however, rests in what many perceive as the unworkability of the \textit{Miller} standard in the realm of computer technology.\textsuperscript{159} Anyone armed with basic computer equipment and a credit card can access electronic erotica, so the question arises: whose community standards should be used to judge the decency of these materials? Some view the Thomases' convictions as creating the ability for communities like Memphis to set standards for places like New York City and California, where the obscenity laws may be more lenient.\textsuperscript{160} Because of this, some BBS

\begin{itemize}
  \item \textsuperscript{152} See id.
  \item \textsuperscript{153} See id.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} \textit{Sable Communications}, 492 U.S. at 127-28.
  \item \textsuperscript{156} Id. at 128.
  \item \textsuperscript{157} See FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978) (noting that because broadcasting tunes in and out, prior warnings are useless, and once language is aired, the damage has been done); see also Cohen v. California, 403 U.S. 15, 21 (1971) (holding, in part, that profanity printed on back of jacket worn in public place expressing political views could not be proscribed under First Amendment because offended viewers could simply avert their eyes).
  \item \textsuperscript{158} See supra notes 19-41 and accompanying text.
  \item \textsuperscript{159} See infra part IV.
  \item \textsuperscript{160} Quittner, supra note 5 (suggesting that the Thomas decision in Memphis may be setting the legal standard for the rest of the United States).
\end{itemize}
operators feel threatened.161 One operator said he planned to end the bulletin board he produces for a fee because “the [Thomas] conviction makes it the legal equivalent of playing Russian roulette.”162 Another operator has described her peers as “scared” because many of the rules governing BBS operation are ambiguous, and operators “wish [they] knew what the rules are.”163

When the Supreme Court decided in 1973 that local communities should set their own standards of what constitutes obscenity,164 the justices probably never dreamed of the day when computer networks would make it possible for someone in California to connect instantaneously, both verbally and pictorially, with someone in Tennessee. The Miller decision is a prime example of how geography is usually incorporated as an element of the law—a crime must occur within a public place, a house, in a vehicle, or at least in a certain jurisdiction.165 The information superhighway, by contrast, knows no geographic boundaries—it encompasses the entire world.166 The Internet itself is viewed as a “virtual community” where geographic boundaries have little or no importance or value.167 The federal government, however, would like users to accept the view that the Internet is simply a “collection of wires connecting ‘real’ communities.”168

This issue was raised in the Thomases’ appeal where they argued that computer networks required a new definition of “community” based on the connections between people, and not their geographical locations.169 The Thomases argued that without a more flexible definition of community there will be “an impermissible chill on protected speech” because the technology of a BBS does not allow the operator to choose who may receive the materials and who may not.170 Thus, BBS operators will be forced to censor their materials in order to comply with even the strictest community standards.

---

161. See Pornography Conviction, supra note 120; Landis, supra note 6.
162. Pornography Conviction, supra note 120.
163. Landis, supra note 6 (quoting Laura Brito, operator of a Missouri BBS and co-administrator of an adult BBS network).
164. See supra notes 63-69 and accompanying text.
165. Id.
166. Heinke & Rafter, supra note 22, at 2 (stating that the Internet connects about 20 million users in 135 countries).
168. Id.
170. Id. at 711.
The court, however, held that the Thomases' First Amendment arguments were without merit as their BBS required membership applications and thus the Thomases knew exactly where each of their subscribers was located. Indeed, the court stated that if the defendants did not want to "subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability." The court based this aspect of its holding on Sable Communications; however, in the same opinion, the court recognized that "telephonic communication of pre-recorded sexually suggestive comments or proposals is inherently different from the obscene computer-generated materials that were electronically transmitted from California to Tennessee in [Thomas]." The court made this statement as it rejected the defendants' argument that they should have been prosecuted under 47 U.S.C. § 223(b), the portion of the 1934 Communications Act which regulates obscenity, because that statute was enacted solely for the purpose of prosecuting dial-a-porn. Thus, the court conveniently relied upon Sable Communications, a case based on a statute deemed inapplicable to the Thomases' case, to hold that the community standards test for obscenity should apply to Internet technology.

V. REGULATION OF THE INTERNET

A. A National Standard in Cyberspace

One solution to the problems faced by the Thomases in their appeal, as suggested by Marjorie Heins of the American Civil Liberties Union's Arts Censorship project, is a national obscenity standard "analogous to the

171. Id.

172. Id.

173. See id.; Sable Communications, 492 U.S. 115 (1989) (holding that dial-a-porn distributors may be subject to the varying standards of the communities where the material is transmitted, and that those providers should bear the cost burden in developing and implementing the technology needed to tailor its messages in order to conform to the particular locations it serves).

174. Thomas, 74 F.3d at 707. The defendants claimed that the statute they were prosecuted under, 18 U.S.C. § 1465, was not applicable to their case because the computer generated GIF files were intangibles, and thus outside the scope of § 1465. The court, however, held that "the manner in which the images moved does not affect their ability to be viewed on a computer screen in Tennessee or their ability to be printed out in hard copy in that distant location." Id.

175. Id.
FCC indecency standard for TV." But is it feasible for the government to implement a national standard of obscenity, as some have suggested? Most likely not, because electronic BBS can be especially difficult, if not almost impossible, to monitor. At best, the government could require BBS operators to obtain a copy of a driver's license from a user applying to a members-only board. Even that prophylactic measure, however, does not always work. According to some law enforcement officials, teenagers using fake IDs to bypass BBS safeguards is as common an occurrence as using fake IDs to get into bars. Although these BBS operators are acting in a legal manner, the transmission of the information becomes illegal because the receiver is underage. In their attempt to screen out potential users under the age of eighteen, most bulletin boards have required a fee paid by credit card.

Because obscenity judgments are factual, case-by-case decisions, to implement a national community standard would be "an exercise in futility." Residents in the fifty states have such different tastes and attitudes that a national standard would strangle these differences by the "absolutism of imposed uniformity." Furthermore, the Court noted in Miller that it would be unrealistic and not "constitutionally sound to read the First Amendment as requiring that the people of Maine or

176. Landis, supra note 6.
177. Barbara Kantrowitz et al., Sex On the Info Highway, NEWSWEEK, Mar. 14, 1994, at 62, 63 (stating how it would be difficult to police the Internet as it is comprised of nothing more than computers hooked up to phone lines); see also O'Brien, supra note 32, at 1C, 4C (stating how law cannot keep up with Internet and technology).
178. See Patten, supra note 39, at 1C.
179. Susan Kuczka, Kids, Computers and Porn: For Many, Adult Material Just a Keystroke Away, CHI. TRIB., Aug. 6, 1993, at 1N.
180. See id.
181. Pornography Conviction, supra note 120.
182. Miller v. California, 413 U.S. 15, 30 (1973). One author has even suggested that, in the case of dial-a-porn, applying the Miller standard would require prosecutors to sift through the thousands of dial-a-porn messages recorded each year to find those specific messages considered obscene. See Juliet Dee, "To Avoid Charges of Indecency, Please Hang Up Now": An Analysis of Legislation and Litigation Involving Dial-a-Porn, COMM. & THE L., 3, 27 (March 1994). Professor Dee also states that because obscenity cases are usually considered low priority it is likely that dial-a-porn providers will be able to produce messages bordering on obscenity unchecked. See id. In the case of computer pornography, that would in turn require federal prosecutors-turned-obscenity-hunters to spend hundreds of hours sifting through the messages and imagery that are posted daily on the more than 50,000 BBS available on the Internet today.
183. Miller, 413 U.S. at 33.
Mississippi [or Tennessee] accept public depiction of conduct found tolerable in Las Vegas, or New York City [or California]." In fact, that is exactly what the federal government has attempted with The Communications Decency Act of 1996 even though the Supreme Court has intimated that there cannot be uniform national standards as to what is considered obscene.

1. Recent Legislation

The Telecommunications Act of 1996, which amends portions of the 1934 Communications Act, includes a section which criminalizes transmission of material that is "obscene, lewd, lascivious, filthy or indecent" on the nation's telecommunications networks. The law applies to several areas of telecommunications, including television and

184. Id. at 32.

185. Pub. L. No. 104-104, § 502, 110 Stat. 56. The Exon-Coats Communications Decency Act was passed on February 8, 1996 as part of the Telecommunications Deregulation and Reform Bill. This new law, known as the Telecommunications Act of 1996, will allow long distance and cable service companies to compete with local phone companies, which will likely result in lower rates for both local and long distance phone service. Cable deregulation is set to begin in three years when new competition is ready to enter the market. The decency portion of the Act, The Communications Decency Act of 1996, contains provisions which regulate speech transmitted over computer networks.

186. See Miller, 413 U.S. at 30.

187. The Decency Act added a new subsection (d) to § 223 of 47 U.S.C., which reads as follows:

(d) 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; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

Id.

188. 47 U.S.C. § 223 (b).
telephone systems, as well as public and private computer networks, including the Internet. The proposal was drafted by Senator Jim Exon of Nebraska, who stated that his main concern was "mak[ing] the new Internet and information superhighway as safe as possible for kids to travel." Senator Exon also stated that because "the information superhighway . . . will transcend newspapers, radio and television as an information source . . . this is the time to put some restrictions or guidelines on it." One of the biggest problems facing this new legislation is the difficulties the federal government will encounter attempting to police computer networks. There are also liability problems, such as deciding whether an interactive BBS operator should be held liable for its customers who post pornographic images or use proscribed language. Several lobbying groups, such as the Business Software Alliance, have signed a letter expressing their opposition to the bill because it would require them to censor the content of material they were carrying for others.

In essence, Congress has made into law what the Court suggested in <i>Sable Communications</i>: that it is up to the service provider to police their own services, or else risk incurring liability. Nonetheless, despite Congress’ aggressive policymaking regarding where liability and responsibility lie, some prominent actors in the private sector disagree: a spokesperson for Prodigy, a network with about two million users, stated that "Prodigy does not believe that [their] role should be as surrogate parents for anybody." In response, Senator Exon, the bill’s sponsor, has stated that he is "not trying to be a super-censor," and that while no law would put an end to sex on the Internet, Exon was "not about to throw up [his] hands and give up."

---


190. See Lewis, supra note 189, at A34.

191. See id.


193. See id.

194. See id.

195. See Lewis, supra note 189, at A34.

Not only does Senator Exon’s endeavor encounter tremendous difficulties with regard to its constitutional implications, but its very notion contravenes over twenty years of obscenity jurisprudence. Only days after the bill was proposed it was blasted by civil libertarians, telecommunications lobbyists, and computer and communications companies alike. The ACLU joined the fight against the proposal, stating that “millions of computer users should not be deprived of the right to talk dirty electronically.” That organization, among others, believes that the new law will create an “enormous new intrusion on privacy and free speech.” Jerry Berman, head of the Center for Democracy and Technology, a nonprofit group that specializes in civil rights issues and electronic networks, also recognized the bill’s flaws, and quipped, “they’re trying to design a whole city to look like Disney World.”

After the bill was passed, Mr. Berman commented that “[t]he Internet has been given second class speech rights, and we are going to take them to court over it.” Not long after this statement was issued, the ACLU sought and received a temporary restraining order against those portions of the Act that were held to infringe upon First Amendment rights. The ACLU was joined by more than twenty organizations, including the Electronic Frontier Foundation, a national organization which advocates for civil liberties in the online community. In their brief, the ACLU

197. See supra notes 42-119 and accompanying text.
198. See Lewis, supra note 189, at A34; see also Andrews, supra note 189, at D7.
199. ACLU Opposes Bill to Fight Computer Porn, THE SUN, Mar. 30, 1995, at 10A.
201. See id.
203. ACLU v. Reno, No. 96-683 (Feb. 15, 1996) (E.D. Pa. 1996). In his brief opinion, Judge Buckwalter noted that the ACLU had raised “serious, substantial, difficult and doubtful questions” about the legislation’s vagueness. The judge noted that “the Supreme Court has never actually passed on the FCC’s broad definition of ‘indecency’;” however, the judge also noted that the recent opinion in Alliance for Community Media v. FCC, 56 F.3d 105 (D.C.Cir. 1995), casts doubt on the possibility that the question of vagueness would be successful. In Alliance, the court dismissed the plaintiff’s vagueness claim on the basis that the Supreme Court’s implicit acceptance of the FCC’s definition of obscenity in Pacifica “foreclosed the question whether this definition was unconstitutionally vague.” Alliance for Community Media, 56 F.3d at 129.
204. Brief for Petitioners at 2, ACLU v. Reno (No. 96-683).
argued that the sheer impossibility of any one sector of American society judging what is obscene or indecent for another is only one of the many problems with the Act.205 They also underscored the vastness of the Internet, noting that when information is posted to an international network like the Internet, it is not possible for only the residents of a particular country to view or not view that information.206

Many of these civil libertarians are worried that the government will attempt to impose the conservative standards of morality found in, for example, Memphis, Tennessee on their daily lives.207 They fear that small, conservative zones will assume the power to dictate the legal standards for the entire national online community.208 As one attorney phrased it, "[a] few years ago, all the papers were running stories saying, 'Isn't this wonderful? We're all going to be connected.' Now everybody's running stories saying, 'Isn't this horrible? We're all going to be connected.'"209

B. Industry Self-Regulation: How Much is Too Much?

Several attempts to wrestle with the problem of regulating BBS have emerged from within the industry itself.210 An entire industry has evolved seeking to offer consumers the ability to screen out objectionable online material, while allowing other information to flow freely. These tools range from software packages, aptly titled SurfWatch and NetNanny, to a new type of computer barrier known as a firewall.211 A firewall creates a barrier that requires a password in order to enter certain

205. See id. at 20. In its brief, the ACLU stated:
Any one persons' notion of "indecency" will be influenced by such factors as his or her age, occupation, race, level of education, socioeconomic status, geographic location, personal interests and politics. Rock or country music fans are likely to have very different ideas on the subject from conservative ministers; a New York sophisticates notions will contrast dramatically with those of many rural residents; artists, students, intellectuals, and political leaders are also likely to have different definitions.

206. Id. at 11.

207. See Landis, supra note 6; see also Pornography Conviction, supra note 120, at 11; Pornography in the Global Community, supra note 13.

208. See Wittes, supra note 133, at 5.

209. Id.


211. Peter H. Lewis, Limiting a Medium Without Boundaries: How Do You Let the Good Fish Through the Net While Blocking the Bad?, N.Y. TIMES, Jan. 15, 1996, at D1, D4.
The special filtering software programs that are available, such as Surfwatch, can be run on either a personal computer or by the Internet service provider. These software programs compare the user's request for information from a particular site against a list of prohibited sites. Both SurfWatch and NetNanny prohibit access to sex-related imagery and text, and update their lists of prohibited sites periodically using either computer programs which scan the data for certain words, or by employees who search for objectionable material. When the user attempts to access or download data from a prohibited site, the software blocks the access.

At a recent convention of computer experts in Atlanta, one software manufacturer initiated an effort to develop an industry-based rating system for the materials available on BBS. This effort is being considered by the Association of Online Professionals, a recently formed trade and education group within the computer industry. David McClure, the executive director of the Association of Online Professionals, said the attempt to develop a rating system has not stemmed from complaints from the public, but “rather [from] a desire among professionals in the industry to take leadership in self-regulation in the public interest.” This system would include everything from compiling a list of BBS nationwide, monitoring these BBS, and enforcing the regulations imposed. Another ratings software package is being developed by the Platform for Internet Content Selection and would be combined with the browser service (like Surfwatch). Thus, parents could choose a browser service endorsed by the Christian Coalition or the local school board.

212. Richard Raysman & Peter Brown, Policies for Use on the Internet, N.Y. L.J., Nov. 14, 1995, at 3, 10 (discussing how corporate liability for employee misuse of Internet communications, including pornography and e-mail, can be reduced through internal regulation).


214. Lewis, supra note 211, at D4.


216. See id.

217. Id.

218. Id.

219. Id.

220. See Lewis, supra note 211, at D4.

221. Id.
While some BBS operators seem enthusiastic about the rating system, others feel it would be unorganized, "more work than it's worth," and "an attempt to regulate and censor the free flow of information between members of the general population." However, in light of the specter of government-imposed regulation, this alternative may be more and more appealing to industry professionals. Others favoring self-regulation also feel it would bring control back to the family, where it belongs.

Prodigy's system of what they term "George Carlin software" is another possible method of monitoring the content of the information being transmitted. This software finds certain words designated as objectionable and warns those who sent them to erase them, or their messages will be censored. Prodigy spokeswoman Carol Wallace described Prodigy's scanning system as a computer that goes through all of the notes passed over the network. If the computer discovers a word on Prodigy's "list of dirty words . . . [i]t will send the note in its entirety back to the originator, saying, 'Sorry, you did not pass the scanner.' This has led to Prodigy's being dubbed the "family service." And while this type of software may seem like the ideal solution to BBS operators' problems, it does not have the capability to monitor the pictures and graphics that are also transmitted on computer networks. Thus, it fails to cure problems which are of great concern to those desiring to clean up the Internet.

On the other hand, when does self-regulation on the Internet go too far? In December, 1995 many online users learned the answer to that question when CompuServe responded to complaints by German authorities that the material found in certain discussion groups available on CompuServe violated German pornography laws. The result was blocked access to over 200 discussion groups by CompuServe subscribers in the United States and around the world. CompuServe stated that...

222. Id.
224. Heinke & Rafter, supra note 22, at 5.
225. Id.; see Lewis, supra note 189, at A34.
226. Patten, supra note 39, at C1.
227. Id.
228. Matthew Childs, Lust Online: Computer User Groups for Sex, PLAYBOY, Apr., 1994, at 94.
229. See id.; see also Patten, supra note 39; supra notes 29-32 and accompanying text.
it intended to restore access to the discussion groups as soon as it was capable of screening out the German subscribers from accessing the discussion groups.\textsuperscript{231} In the meantime, more than four million subscribers in over 140 countries were blocked from accessing newsgroups such as alt.sexy.bald.captains—the fan club address for bald actor Patrick Stewart.\textsuperscript{232} Also blocked were a support group for disabled people, alt.support.disabled.sexuality, and a parody of a popular children’s television cartoon character, alt.sex.bestiality.barney.\textsuperscript{233} Even more disturbing is the blocked access to news and support groups which provide valuable information to the public on important issues, such as clarinet.news.gays, an online newspaper focused on gay issues, and gay.net.coming-out, a support group for gay men and women dealing with revelation of their sexual orientation.\textsuperscript{234}

Unfortunately, the CompuServe incident was only one of many similar problems. In the fall of 1995, America Online decided to censor the word ‘breast’ from its network because they deemed it vulgar.\textsuperscript{235} Obviously, America Online did not consider the hundreds of women who use computer BBS for their breast cancer support group discussions?\textsuperscript{236} America Online later apologized and restored use of the word where it was deemed appropriate.\textsuperscript{237}

Industry self-regulation, while helpful to subscribers who want censorship control in their own hands, can leave BBS operators exposed to fates similar to that of the Thomases, especially now that the federal government has chosen to restrict online communications using the same standards as for broadcasting. While it is doubtful that the Supreme Court

\begin{itemize}
\item \textsuperscript{231} Compuserve Looks to Restore Internet Sex Groups, N.Y. TIMES, Jan. 5, 1996, at D4.
\item \textsuperscript{233} Rotenberg, supra note 232.
\item \textsuperscript{234} 142 CONG. REC. S687, S694 (daily ed. Feb. 1, 1996) (statement by Sen. Leahy) (discussing his opposition to the Communications Decency Act’s Internet regulation, which he described as “threaten[ing] fundamental Constitutional rights of free speech over the Internet”). \textit{Id.} at S695.
\item \textsuperscript{236} \textit{Id.}; see 142 CONG. REC. at S694 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy) (describing one of his constituents in Vermont whose America Online profile was deleted because she communicated with fellow breast cancer survivors online).
\item \textsuperscript{237} \textit{See} 142 CONG. REC. at S694; \textit{see also} Lewis, supra note 235.
\end{itemize}
will uphold the indecency portion of the Decency Act, if that happens computer BBS operators will not even have the opportunity to use screening devices such as credit card payment or membership applications stating the user’s name and age.

The Supreme Court will likely look to its handling of the facts in *Sable Communications* for guidance. Thus, the government could impose the burden on all BBS operators to impose costly screening procedures and develop the necessary technology in order to tailor their messages to comply with different standards of obscenity. The Court agreed with Sable Communications that the credit card payment, access codes and scrambling rules were satisfactory for the purposes of keeping the adult telephone messages out of the reach of minors. Yet in the case of the Thomases, only paying members who received passwords could obtain the pictures, and they knew what they were receiving. How then is it possible that these operators were subject to prosecution when they implemented procedures similar to those suggested by the Supreme Court in *Sable Communications* for preventing minors’ access to obscenity?

VI. CONCLUSION

The legislation recently approved by our Congress and signed into law by President Clinton seems to contradict what the Court noted in *Miller*, that a national standard would be “an exercise in futility.” The *Carlin* trilogy and *Sable Communications* case demonstrate that the Supreme Court has repeatedly rejected attempts by legislators to restrict telephone message content because the least restrictive means were not utilized. What the government has attempted with the Decency Act is to level a sweeping limitation on the content of discourse between BBS users to a level which is suitable for children. This is clearly unconstitutional. A comprehensive ban placed on computer networks is simply too high a

---

238. *Sable Communications*, 492 U.S. at 115.
239. See id. at 125.
240. Id. at 128.
242. See text accompanying supra notes 63-68.
243. See text accompanying supra notes 93-119.
244. See *Sable Communications*, 492 U.S. at 131. Justice White reasoned that similar to the *Carlin* cases, *Sable* was simply “another case of ‘burn[ing] the house to roast the pig.’” *Id.* (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).
restriction on communication and forces the content of computer transmissions down to a level which is only suitable for elementary school.

If the Thomases’ appeal reaches the Supreme Court, which it most likely will, the Court will be forced to reconsider its *Miller* decision, only this time in light of greatly expanded and more highly developed computer technology. Many hope, and many others fear, that the Court will mechanically follow its holding in *Sable Communications*, where the cries of information providers seemed to fall upon the deaf ears of the Court, and impose the burdens of screening and developing technology on computer BBS operators. However, in the case of computer BBS, the difficulty of developing and implementing computer software that is able to both decipher the pinpoint location of each incoming and outgoing computer transmission, as well as prevent certain images and messages from reaching specific communities is nearly impossible.245 Such a decision by the Court would only be futile: even if such technology is developed, the ease in which computer technology will soon be able to surpass such barriers is already recognized by many in the field.246

Finally, if BBS operators are forced to deny access to potential subscribers based solely on their geographical location, the resulting withering technological exchange and its concomitant dearth of technological development would injure this country’s progress and position as a technological leader.

Many BBS operators users and civil libertarians find the notion of forced compliance with rules originally created for earlier communications methods, such as telephone and broadcast, unworkable and outdated. Unfortunately, until Congress drafts legislation that is created specifically for and narrowly-tailored to computers and the special, often highly

---

245. Lewis, *supra* note 211, at D4 (“[t]rying to keep certain types of information from entering a jurisdiction is as difficult as keeping certain kinds of molecules from entering a country’s air space, or certain kinds of fish from swimming in its waters.”); Bradley Peniston & Austin Bachman, *Intro to Internet: Congress Goofs In Its Attempts To Censor The Internet*, THE CAPITAL, July 16, 1995, at B5 (stating that it is impossible “to trace all of the traffic that flies through the thousands and thousands of computers that make up the Internet”).

246. Lewis, *supra* note 211, at D1 (quoting Brian R. Ek, a spokesman for a group creating a ratings system on the Internet, as stating “no matter what technologies we come up with, somewhere, somehow, someone is going to figure out a way to circumvent them. That’s the nature of programming.”). The article also featured an interview with a Microsoft Network manager (a network which offers Internet access in 50 countries), who commented that subscribers could bypass blocking mechanisms because “[i]f they know the URL [address] of a site . . . they can enter the web directly via [Microsoft’s] Internet Explorer. If we don’t maintain the server, my guess is that we could not control the content.” *Id.*
technical, problems that these computer BBS create, compliance with outdated and unworkable laws and jurisprudence is all that remains. Perhaps, as one commentator has suggested, "when technology begins to render obsolete old legal applications, then the law is set for a revolution."247

Meredith Leigh Friedman

247. O'Brien, supra note 32, at 1C.