The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway[(1)]

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[T]he Barbarians are at the gate!

--Senator James Exon, quoting an article from *HotWired*.[(3)]

What they're trying to do is design a whole city to look like Disney World.

--Jerry Berman, Executive Director of the Center for

Democracy and Technology.[(4)]

I.Introduction

On February 1, 1995, Senator James Exon (D-Neb.) attempted to do what had never been done before--regulate speech on the Internet.[(5)] Introducing the Communications Decency Amendment (CDA), Senator Exon declared a danger to society: Barbarian pornographers are at the gate and they are using the Internet to gain access to the youth of America. Senator Exon proclaimed:

The information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.

Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions. The Decency Act will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies.[(6)]

In a year of deregulation, Senator Exon called for more regulation. In the year when Speaker of the House Newt Gingrich placed the House of Representatives on the Internet, praising it as a landmark for democracy, Senator Exon warned America that the Internet was filled with dark places[(7)] from which we needed government protection. In a year where Internet users were proclaiming the infinite utility of the World Wide Web, Senator Exon, who has apparently no Internet experience,[(8)] declared a danger.

A. The Problem: The Availability Of Pornography

Senator Exon was motivated out of a concern for the proliferation of pornography and indecency on the Internet and the easy access to that material by the youth of America. Not everyone shared his belief that there existed a substantial threat where one can go "click, click, click"[(9)] and have access to pornography.

The greatest salvo in the debate over the availability of pornography on the Internet was Marty Rimm's study *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* (*Rimm Study*), published in the Georgetown University Law Review.[(10)] Rimm purported to have conducted a thorough survey of the availability of pornography on the information superhighway. He concluded that pornography was rampant and freely available. In one of his most notorious statements, he concluded that 83.5 percent of the images available on the Usenet are pornographic.[(11)]

The study became a front page "exclusive" in *Time* magazine.[(12)] The ink was barely dry on the story before Senator Grassley waved a copy in front of the Senate in support of his antipornography legislation.[(13)] The study became the source of endless articles and editorials.[(14)] The opposition was sent scurrying, searching for ways to defend against this weapon of the censorship proponents. On-line discussion groups dedicated endless bandwidth to deliberating the merits of the study. And parents started curtailing surfing privileges of their children.[(15)] When the skirmish died down, the study had been largely discredited and *Time* magazine published a follow-up article which was all but a retraction and apology for being duped into publishing the study.[(16)] Nevertheless, the warning cry that the Internet was the dark home of pornographers after the children of America had been spread across the American psyche.

The problems of the *Rimm Study* were numerous. The *Rimm Study* was apparently not subject to peer review.[(17)] Professors Donna L. Hoffman and Thomas P. Novak criticized the study, concluding that Rimm's work was methodologically flawed.[(18)] The ethics of Mr. Rimm's research procedures were questioned.[(19)] He was accused of plagarism.[(20)] Finally, it was discovered that he was working both sides of this issue; Mr. Rimm was also the author of *The Pornographer's Handbook: How to Exploit Women, Dupe Men, & Make Lots of Money*.[(21)] In the end, even Carnegie Mellon, his graduate school, distanced itself from the *Rimm Study*.[(22)] As a final salvo in the *Rimm Study* skirmish, the United States Senate decided that it no longer needed to hear what Mr. Rimm had to say about pornography and pulled him from the witness list of the July 26, 1995, hearing concerning pornography on the Internet.[(23)]

Rimm proved an easy target for the censorship opponents. But criticism of the *Rimm Study* did not discount the reality of pornography on the Internet.[(24)] While at the local corner store there are at least some barriers which keep thirteen-year-old boys from buying *Playboy*, there are virtually no barriers keeping those boys from surfing through the pages of the *Playboy* World Wide Web site.

The debate over the *Rimm Study* was representative of the power of the Internet in the new democracy.[(25)] In cyberspace, everyone can hear you scream. Information flows rapidly and freely. "Netizens" are ready to examine every aspect of every event. Marty Rimm made a mistake in publishing the *Rimm Study;* he also made a mistake in thinking that he could keep his past and his methods hidden. In the information age the level of debate has been raised; more information is available and it is available faster. Democracy, which thrives on discussion, disagreement, and debate, prospered because the ability to debate and the ability to have access to information relevant to the issues was heightened. The debate over the *Rimm Study* is representative of how this new form of democratic activism can prevent distortion from controlling public policy.

II.The Communications Decency Act

A. The Act as Passed

Senator Exon, believing that God was on his side,[(26)] set forth to battle the pornographers by introducing the most important piece of legislation that the Senator ever believed that he had worked on.[(27)] "The fundamental purpose of the Communications Decency Act is to provide much needed protection for children."[(28)] He proposed to create this protection by amending section 223 of Title 47,[(29)] United States Code, entitled "Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications."

The CDA, as passed, extends the antiharassment, indecency, and antiobscenity restrictions currently placed on telephone calls to "telecommunications devices" and "interactive computer services."[(30)] Pursuant to the CDA, it is illegal to knowingly send to or 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 [(31)]

communication.

Violators are liable for "each intentional act of posting" and not each occasion of downloading or accessing.[32] It is the intent of Congress that the CDA target content providers, not access providers or users.[33]

In addition, owners of telecommunications facilities are liable where they knowingly permit their facilities to be used in a manner that violates the CDA.[34] The penalty for violation was changed from $10,000 to fines pursuant to Title 18 of the United States Code and from a maximum of six months imprisonment to a maximum of two years.[35]

1. The Defenses

The CDA added four defenses to section 223: protection for service providers giving "mere access," protection against *respondeat superior*, recognition of good faith attempts to comply with this statute as compliance with the statute, and protection against criminal and civil liability where an individual makes a good faith effort to restrict access to offending material.[36]

In its original version, the CDA did not incorporate all of these defenses. This resulted in strong objections from the interactive computer service industry. The industry stated that they were subject to an impossible task: monitoring and censoring of millions of bits of information flowing across computers each day.[37] As a result of the criticism received, Senator Exon incorporated the following defenses.[38]

First, section 223(e)(1) provides a defense where an individual solely provides access to material not under the individual's control.[39] The "access provider" defense extends to services and software which download and cache data from other computers as long as that content is not created on the service provider.[40] According to Senator Exon, this defense

explicitly exempts a person who provides access to or connection with a network like Internet that is not under that person's control. Providing access or connection is meant to include transmission, downloading, storage, navigational tools, and related capabilities which are incidental to the transmission of communications. An online service that is providing such services is not aware of the contents of the communications and should not be responsible for its contents. Of course this exemption does not apply where the service provider is owned or controlled by or is in conspiracy with a maker of communications that is determined to be in violation of this statute.[41]

This defense narrows the reach of the CDA. The conferees explicitly stated that it is the purpose of the CDA "to target the criminal penalties of new sections 223(a) and (d) at *content providers* who violate this section and persons who conspire with such content providers, rather than entities that simply offer general access to the internet and other online content."[42] This defense is to be liberally applied.[43]

The second defense is the "good faith" defense. It is a defense to prosecution if an individual takes, in good faith, "reasonable, effective[44] and appropriate" actions[45] to prevent offensive material from being accessed by minors. Offensive material which is transmitted despite an individual's good faith efforts would not result in liability for the individual.[46]

As a corollary to the good faith defense, individuals who make good faith efforts to implement a defense under the CDA shall be protected from other criminal or civil liability.[47] This defense was in response to what Senator Exon felt was an absurd situation. If an Internet Service Provider (ISP) exerted no editorial control over the transmissions on its computers, it was free from liability according to the few cases that had been decided. If, however, an ISP exerts editorial control but is nevertheless unable to prevent all harmful transmissions from passing over its computers, then the ISP could be liable for the resulting harm.

Stratton Oakmont, Inc. v. Prodigy[48] was the war cry of this absurdity. According to the facts of *Stratton*, Prodigy had [49]

represented itself as a family on-line service. The evidence revealed that Prodigy exercised editorial control by promulgating content guidelines which requested that users refrain from certain conduct by using "a software screening program which automatically prescreens all bulletin board postings for offensive language," by employing individuals whose duties include enforcement of the content guidelines, and by use of an "emergency delete function" by which the individuals employed could censor the content of the service.[(50)]

Stratton was a brokerage house in New York. An individual posted a comment on Prodigy which Stratton claimed was libelous to its reputation. Stratton sued Prodigy as a publisher of that information, demanding $200 million in damages.[(51)] The New York court held that Prodigy was in fact liable as a publisher. The court's holding was premised on the finding that Prodigy represented, and in fact, that it exercised editorial control over its service.[(52)] The fact that Prodigy monitored its service only for obscenity and indecency and not defamation was of no consequence. Since Prodigy entered the role of censor, Prodigy became liable in the eyes of the New York court for everything on its service.

Congressmen on both sides of the debate found *Stratton* objectionable.[(53)] Representatives of the on-line industry argued that laws like *Stratton* create a "Hobson's choice" between creating "child safe" areas that expose the ISP to liability as an editor, monitor, or publisher, and doing nothing in order to protect the ISP from liability.[(54)] In order to encourage ISPs to monitor their services and act in the role of censor without fear, Senator Exon provided a defense against such civil or criminal liability.[(55)] In the Conference Report, the conferees specifically stated that they were overturning *Stratton*.[(56)]

2. Preemption and Jurisdiction

The CDA preempts state law as it applies to commercial entities and activities, nonprofit libraries, and institutions of higher learning.[(57)] On the federal level, the CDA provides for virtually no FCC involvement.[(58)] Originally, enforcement of the CDA was to be under the jurisdiction of the FCC. The Conference Committee placed it under the jurisdiction of the Department of Justice (DOJ).[(59)] In addition, the Conference Committee removed language instructing the FCC to report every two years on the effectiveness of the CDA.[(60)] Finally, the Conference Committee retained language from a competing House amendment stating that it is the policy of the federal government "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[(61)]

B. The Legislative History

At first, support for the CDA was uncertain. Then Senator Exon unveiled his infamous "Blue Book."[(62)] At the request of Senator Exon, a friend downloaded from the Internet a collection of pornography.[(63)] This was gathered in a blue folder and made accessible at Senator Exon's desk on the Senate floor so that everyone could observe the "filth" that was accessible to every boy and girl in this country.[(64)] The Blue Book would be repeatedly cited throughout the debate in support of the CDA.[(65)] Its existence is theorized to have helped reluctant senators vote for the CDA.[(66)] No senator wanted to make what could be construed as a pro-pornography vote.

1. The Exon-Coats Revision

In order to ensure passage of his amendment, Senator Exon responded to the criticism and opposition which he received.[(67)] On June 9, 1995, Senator Exon introduced a revised version of the CDA[(68)] that included revisions to the original defenses. Senator Exon was attempting to appease several groups simultaneously. However, DOJ reaffirmed its opposition to the amendment[(69)] and organizations on the conservative right indicated displeasure with new defenses that obstructed, in their opinion, the prosecution of pornographers.[(70)]

2. The Loyal Opposition

The CDA faced strong opposition in the Senate from Senator Leahy.[(71)] Senator Leahy introduced a competing amendment which proposed that the federal government take no additional efforts to regulate the Internet, and, instead, conduct a Department of Justice study to determine what additional forms of legislation would be required over and above current antiobscenity and pornography law, to successfully regulate on-line communications.[(72)]

The Leahy Amendment was, in Senator Exon's opinion, an attempt to punt by conducting a federal study achieving nothing.[(73)] Senator Leahy responded that it was in fact Senator Exon who was proposing the punt, that individuals phobic of on-line pornography wanted to pass the buck of responsibility of protecting our children on to the FCC.[(74)] Senator Leahy argued that it was a punt to pass legislation out of fear without considering whether that legislation would be constitutional or even successful.

Attacks within the Senate came not only from those who believed that regulation premature and imprudent, but also arose from those who believed that the CDA was too liberal, permitting loopholes through which pornographers could slither. The conservative opposition introduced alternative legislation which would censor the Internet without defenses.[(75)]

The reception which the House of Representatives gave to the CDA was frigid. The Speaker of the House, Newt Gingrich, who had only that year proudly launched the House of Representatives into cyberspace with the *Thomas* system,[(76)] rejected Senator Exon's attempt to sterilize electronic space. On June 20, 1995, Speaker Gingrich pronounced that the CDA

is clearly a violation of free speech and it's a violation of the right of adults to communicate with each other. I don't agree with it and I don't think it is a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium which is available to both?[(77)]

He went on to say that the reason why it had passed the Senate was that it was "seen as a good press release back home so people voted for it."[(78)]

When the House voted on its version of the telecommunications bill, the House gave what appeared to be a resounding rejection of the CDA and any attempt to meddle with the Internet. The younger House, having more experience with the Internet, wanted nothing of the CDA and sought to distance itself from the appearance of a regulatory-hungry federal government ready to trample the prized freedoms found in cyberspace.[(79)] In opposition to the CDA, Representatives Cox and Wyden introduced the Family Empowerment Amendment, which proclaimed an Internet free of government interference.[(80)] This amendment was attached to the House's telecommunications bill in a virtually unanimous 420 to 4 vote.[(81)]

The opposition proclaimed that the Cox/Wyden Amendment would block the CDA in conference.[(82)] In truth, the Cox/Wyden Amendment was far from a victory. The Cox/Wyden Amendment specifically and curiously stated that "[n]othing in this section shall be construed to impair the enforcement of section 223 of" Title 47, the very statute that the CDA sought to amend.[(83)] As a result, the House and Senate amendments were described as fitting together "like a hand in a glove."[(84)]

The opposition proclaimed that the Cox/Wyden Amendment forbade FCC regulation of the Internet;[(85)] it did not.[(86)] The opposition claimed that it preempted state regulation of the Internet;[(87)] it did not.[(88)] The only thing that the amendment in fact did was to overrule *Stratton*[(89)] by protecting from liability on-line services that make a good faith effort to restrict access to offensive material.[(90)] This one affirmative act was, in fact, consistent with the provisions of the CDA.[(91)] The Cox/Wyden Amendment was described as a bill without a verb.[(92)] In response to a growing on-line opposition movement, congressmen were able to declare their allegiance to the First Amendment and cyberspace without actually committing themselves to legislation of significance. The victory was hollow.

In the midst of the hoopla over the imaginary victory, something was snuck through the back door of the House version of the telecommunications bill. Representative Bliley, on the day of the vote on the telecommunications bill, introduced the "Manager's Amendment."[(93)] Item 41 of the Manager's Amendment, known also as the Hyde Amendment, extended the federal obscenity laws to cover interactive computer services.[(94)]

The Manager's Amendment as a whole received little press. Representative Bryant stated that the amendment was created in darkness without input from the public or from Congress.[(95)] He argued that the amendment appeared out of nowhere and the House was forced to vote on it without having the opportunity to review its terms.[(96)] He and others argued that the Manager's Amendment, which altered the telecommunications bill from the form that was voted on and passed from the Commerce and Judiciary Committees, was a last minute creation in order to appease the interests of big business.[(97)] Thoughout the debate, however, (concerning the Manager's Amendment on the day of the House vote on the telecommunications bill) the Hyde Amendment, censoring the Internet, was not mentioned or discussed.[(98)]

The Administration, through Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, voiced its opposition to the CDA.[(99)] The Department of Justice issued statements denouncing the amendment and declaring that it, in fact, weakened their ability to prosecute on-line obscenity.[(100)] Reed Hundt, chairman of the FCC, also spoke up in his opposition to the amendment.[(101)]

Cyberspace itself rose up in strong opposition to the CDA. Although public opposition to legislation normally may not get significant coverage in legal analysis or the courtroom, opposition to the CDA is fascinating in the way in which it was the epitome of one of its own strongest arguments.[(102)] The opposition heralded the Internet as a boon for democratic process and responsive representation. With the increased availability of information, ease of organization, and improved ability to contact one's congressional representatives, the opposition saw the Internet as something to be cherished; any attempt to infringe on its unique empowerment of free speech and democratic debate was to be warded off with vigilance. The opposition was the very proof of its own argument. A portion of the community was able to rise up, become quickly and highly educated, and convey its views to the governing body. The governing body, in turn, was able to quickly become aware of the positions of its constituents and respond. Democratic process was heightened. The essence of our democratic society--the free exchange of ideas and the belief that out of the cacophony of views we can reach reasonable and enlightened principles to guide our society--was improved. In his attempt to curtail some voices on the Internet, Senator Exon caused other voices to mature.

Instead of reveling in this revitalization of democracy, Senator Exon saw the on-line movement as a threat. He criticized the on-line movement, characterizing it as a bunch of First Amendment belly-achers.[(103)] Senator Exon complained that the opposition had more concern for protecting pornographers than cooperating with his office.[(104)]

3. Victory in the Senate and the House

On June 14, 1995, Senator Exon saw his attempt to protect the minds of the youth of America meet with victory. The CDA was successfully added to the Senate version of the telecommunications bill of 1995.[(105)] On June 15, 1995, the Senate Telecommunications Competition and Deregulation Act, S. 652, passed the Senate.[(106)] The House would soon thereafter pass its version of the telecommunications bill along with both the Cox/Wyden Amendment and the Manager's Amendment. The battle ground was laid out for a confrontation in the conference committee.

III.Analysis

Criticism of the amendment can be broken down into three general areas: (1) infeasibility; (2) constitutional deficiency; and (3) against public policy.

A. Feasibility of Regulating Speech in Cyberspace

The first area of criticism--that the regulation which Senator Exon proposes is infeasible--starts with the criticism that [(107)]

Senator Exon fundamentally misunderstood the medium which he sought to regulate. At no time did Senator Exon ever profess personal experience on the Internet.[108] His staff indicated that he had no first-hand Internet experience.[109] The material that Senator Exon presented from the Internet to the Senate was always downloaded by someone other than himself.[110] Senator Exon's Washington, D.C., offices had no e-mail address and had no office hook-up to the Internet.[111] This begs the question of how a senator with no technical knowledge of the medium can draft language which regulates it.[112]

One fundamental characteristic which Senator Exon did not account for is the immensity of the medium. The Internet is composed of hundreds of thousands of computers with millions of users growing at a tremendous rate. The Internet spans the globe and transmissions are in hundreds of languages. The volume of transmissions is incomprehensible,[113] beyond the ability for a host to monitor.[114]

The job of an on-line host attempting to comply with the CDA would be immense. Senator Exon sought to protect the providers by giving them the good faith defense.[115] The good faith defense requires that hosts take "reasonable, effective and appropriate" action to prevent access to offensive material by minors.[116] This begs the question of what fraction of an infinite number of transmissions must a host monitor in order to be taking "reasonable" action. How many of an ever growing number of newsgroups with a tremendous volume of traffic must a host examine? How many of a tremendous number of ever-changing World Wide Web pages must the host inspect? Could Senator Exon even give the slightest clue? No, because he had no idea. He had to, as Senator Leahy stated, punt to the executive branch to determine that which cannot be determined.[117] In an environment which is potentially without boundaries and without limits, delineating "reasonable" monitoring conduct is ludicrous.[118]

Further making the job of compliance with the CDA impossible for the service provider is the growth of encryption capabilities. As more aspects of computer communication become secure, the service provider is increasingly unable to monitor these transmissions. If the service provider is unable to monitor transmission, the provider cannot comply with the CDA. Arguably, this would be accounted for in the definition of the reasonable action which the service provider must take. However, since the service provider could take *no* action concerning encrypted material, any significant meaning to the term "reasonable action" as used by the CDA is further eroded.

Another characteristic for which Senator Exon does not account is the unique relationship of on-line communications to jurisdiction.[119] The Internet was designed to route around obstruction. Censorship is merely an obstruction to be routed around. If the CDA were fully enforced in the United States, content providers could move questionable material or activity outside of the United States and outside the reach of the CDA. The final result would be that the material which Senator Exon sought to ban would remain available to users.[120]

B. First Amendment Analysis

One of the largest battlefields was the First Amendment.[121] It was a weakness that the cybercensors were well aware that they had to defend against.[122] Aware of the vulnerability, the conference committee took great strides to restructure the CDA so that it that it could pass constitutional muster.

The problem which the supporters of the CDA faced was the uniqueness of the emerging medium. The Supreme Court held in *Sable Communications of California, Inc. v. FCC*[123] that indecency law and the First Amendment cannot be uniformly applied across the board to all communication media. The unique attributes of each medium must be understood and accounted for.[124] The technical capacity of the medium to achieve the compelling government interest must be considered.[125] Regulations which may be constitutional when applied in one medium may not be constitutional when applied to another.

Originally the CDA lumped all "telecommunication devices" together and made the transmission of offensive material over these media illegal.[126] In order to shore up the constitutionality of the CDA, as it applies to on-line services, the

conference committee made three changes. First, the committee removed "interactive computer services" from the definition of "telecommunication devices," placing "interactive computer service" restrictions in its own subsection.[(127)] This appears to avoid the legal problem of applying the same indecency restrictions to different media. Second, instead of using the word "indecency," which could be vague, the conference committee replaced it with the definition of "indecency" in *Pacifica*.[(128)] The committee theorized that since the Supreme Court had already upheld that definition, the Supreme Court would uphold it as used in the CDA.[(129)] Finally, the conference committee clarified that the CDA targeted content providers.[(130)] This was an attempt to respond to the fear that the CDA would penalize on-line services for the transmission of material of which they did not create nor of which did they have knowledge.

1. Obscenity and Indecency

Senator Exon attempted to make the transmission of both obscenity and indecency illegal.[(131)] The terms are not synonymous. Obscenity is defined as material, when taken as a whole, which the average person, applying contemporary community standards, would find as appealing to the prurient interests and lacking serious educational or artistic value.[(132)] The Supreme Court has determined that obscenity is one of those rare forms of speech which is not protected by the First Amendment.[(133)]

Indecency is defined as "language or material that, in context, depicts or describes, in terms patently offensive[(134)] as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[(135)] Indecent speech is protected by the Constitution.[(136)] Regulation of this form of speech must be by the least restrictive means possible in order to further a compelling government interest.[(137)] The regulation must "do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[(138)] In so regulating indecent speech, "the government may not `reduce the adult population . . . to . . . only what is fit for children.'"[(139)]

2. Consideration of the Medium: *Sable*

Although the protection of children is agreed as a legitimate governmental interest,[(140)] it is not agreed that the recognition of this danger "at our gates" calls for a ban on the offending material. Such a reaction, the opposition argued, fails to account for the nature of the medium as required by *Sable*.[(141)] Old methods of regulation and the rationales that accompanied them are not applicable to the emerging medium of "interactive computer services."

Regulation of indecency has been found by the courts to be appropriate, given the unique characteristics of the medium in question. When considering the printed press, regulation of content has largely not been tolerated by the courts. However, this changed with broadcast. Due to the "pervasive" nature of the broadcast and the possibility that a listener, in his or her car or home, might stumble upon an offensive broadcast as he or she spins down the dial, restrictions on the broadcast of indecency have been upheld by the Supreme Court.[(142)] Again, technology changed with the creation of dial-a-porn and, again, the old law was not permitted to be applied to the new medium. The pervasiveness of the broadcast medium was seen as irrelevant to dial-a-porn. New restrictions appropriate to the new medium had to be promulgated by the FCC.[(143)]

The Internet, the opposition argues, is unique. There is no scarcity of spectrum. There is no central control or monopolies.[(144)] Unlike broadcast, the Internet is not pervasive.[(145)] The user is not likely to stumble upon the offensive.[(146)] The Internet requires that the user seek out the information the user desires. The Internet gives the user a full range of options for blocking out material not acceptable to the user.[(147)] The user can determine and control what data the user will be exposed to. The user does not need a paternalistic government determining what is appropriate to view.[(148)]

Another fundamental characteristic of on-line communication which sets it apart from other forms of communication is

the general inability of the communicator to select its audience. Aware that a message may offend the community standards of a particular jurisdiction, a communicator using traditional forms of communication has been able to choose the community which will be the communicator's audience.(149) This is not true of on-line communications. The communicator generally does not control which jurisdictions receive the communicator's message. Once a message is placed on the Internet, it can be accessed anywhere. The result of the CDA would be that the most easily offended community on the Internet would control what material is openly placed on the Internet. In order to protect against liability, an individual would have to apply the standards of the most conservative and restrictive jurisdiction in the nation. The opposition argued that this would reduce the discourse on the Internet to the level of Disneyland.(150)

"Interactive computer services" is a unique and emerging medium of communication. The opposition argued that the failure of Congress to appreciate this emerging technology led to a constitutionally offensive statute.

3. Least Restrictive Means

In order for the government to act on its compelling interest, the government must use the least restrictive means in order to minimize the detrimental effect on the First Amendment.(151) The opposition argued that, given the nature of the medium, the CDA did not present itself as the least restrictive means possible for protecting children against indecency.(152) The opposition argued that the technological alternatives to government censorship present themselves as far more effective than government censorship, far less obstructive of First Amendment rights, and far more flexible in meeting the standards of a particular community.

The opposition pointed to new, affordable(153) software packages available on the market which include "Surfwatch" and "Net Nannie."(154) This software is written by groups who surf the net hunting for offensive material. Databases are built into the software. When access to an on-line service is activated, this software blocks access to inappropriate sites. These software programs can be installed into computers by parents, so that the parents are empowered and determine what is appropriate for their children to view according to that family's beliefs and values.(155)

The opposition further pointed to actions taken by major access providers and browsers. Providers such as America OnLine, CompuServe and Prodigy are providing software built into their package which permit parents to control what parts of the commercial service and the Internet their children could access.(156)

Towards the end of the debate over the CDA, yet another technological solution was proposed. The opposition pointed to the Platform for Internet Content Selection (PICS),(157) yet another technology that empowers user control over content received. PICS is described as establishing standard protocols for anyone to set up rating services like Surfwatch. Any segment of society can adjust its filters pursuant to the parameters of PICS, creating its own determination of what should be accessed.

These software packages present themselves as potentially more effective than government regulation for a number of reasons. First, the United States government does not have jurisdiction over a significant portion of the Internet; it does not reach computers located outside of the territorial United States. The purveyors of offensive material could provide their product as readily as before by simply moving the data offshore. Government regulation can do nothing to stop this. Software can effectively block sites regardless of location.(158)

Second, the government faces a constitutional task of defining appropriate material. The software, which is not state action, does not face a constitutional challenge. The software company, using its own set of criteria, can judge sites by those sets of values; if the public objects, the public can opt either not to use the software or to use someone else's software and values.

This leads into the next advantage which is that the software can be more flexible and responsible to the values of the community. Databases can be developed based on the values of the most conservative to the most progressive parts of our society. The Christian Coalition, the Mennonites, pacifists, and feminists could all develop their own databases which would block material they deem inappropriate for their communities. The selection can be tailored to fit the

desires of the user. This removes a paternalistic government from such a determination and replaces it with the community and the individual, consistent with the underpinnings of our democracy.

In addition, the CDA is an after-the-fact remedy, whereas the blocking software prevented exposure to offensive from taking place in the first place. The CDA imposes sanctions after individuals either upload or download materials; the event which the amendment seeks to criminalize would have already taken place. The blocking software prevents access to the offensive material from occuring in the first place. Senator Herb Kohl, making this argument, stated that "[e]very parent in America would rest easier knowing that action is being taken to prevent a crime against their children, rather than simply devising a solid penalty after the fact."(159)

In light of the advantages which the technological solutions offer, the opposition argues that government regulation of the content of on-line communications would fail the constitutional scrutiny of the least restrictive means requirement. When technology presents a solution, that solution must be selected against government intrusion.(160) According to the Interactive Working Group Report to Senator Leahy, "The principle that each person should decide for him or herself the `ideas and beliefs deserving of expression, consideration and adherence' lies at the heart of the First Amendment."(161) Instead of punting to the federal government the responsibility for determining what is morally acceptable, the responsibility is on the individual and the citizen.(162) It is the choice of empowerment of the individual over dependency upon the bureaucracy.

4. Overbreadth Doctrine

The opposition argued that the CDA was not narrowly drawn in order to achieve the compelling government interest, and that it was overbroad,(163) censoring and chilling a wide range of speech.(164) Senator Leahy pointed out that there are a number of projects on the net which seek to provide public access to literature. A great deal of this literature, including the works of Charles Dickens, Geoffrey Chaucer, or D. H. Lawrence,(165) could offend the contemporary standards of conservative communities in the United States and therefore violate the CDA.(166) Other areas of speech which would be censored could include "online discussions of safe sex practices, of birth control methods, and of AIDS prevention methods."(167) Since the amendment is vastly overbroad, the opposition argued that it was unconstitutional.

Supporters of the CDA viewed this as an "unjustified hue and cry."(168) They believe that the definition of indecency, taken from *Pacifica*, was sufficiently narrowly drawn to pass constitutional scrutiny. Their answer to the overbreadth argument is that *Pacifica* stands for the proposition that material must be considered in context. The context of *Catcher in the Rye* is that it is literature. The literary value of this book places it outside of the definition of indecency and outside the scope of the CDA.(169) Therefore, the supporters argued, there would be no chilling effect on free speech because these materials are clearly not covered under the CDA.

5. Vagueness Doctrine

Another challenge is that the CDA is vague.(170) In light of the unique nature of the medium, the terms of the CDA and of traditional indecency law become increasingly vague. A determination of what "indecency" means in the context of this medium will be fraught with difficulty.(171) As stated in the Interactive Working Group Report to Senator Leahy,

Neither the Congress nor the Supreme Court have ever established a single definition for what constitutes "indecent" material. The FCC has offered different definitions for indecency depending on the communications medium. Embarking on such a process for interactive media would be fraught with Constitutional disputes and challenges in court. Efforts to ban indecency on dial-a-porn services lead to ten years of constitutional litigation, thus delaying the enforcement of those regulations considerably.(172)

The ability to come to a clear understanding of indecency is aggravated by the vagueness of the term community. The definition of indecency is dependent upon the "community" in which the indecency occurs. But, as Senator Feingold

stated:

It is unclear what would constitute a community standard for indecency? Whose community? That of the initiator or that of the recipient? Will all free speech on the Internet be diminished to what might be considered decent in the most conservative community in the United States?(173)

If a user in San Francisco uploads data to a server in Sweden, which is then downloaded by a user in Tennessee, whose community standard is at issue?(174) Does the user in San Francisco deliver the material to Tennessee? Does the user in Tennessee cause the material to be brought into Tennessee by going to Sweden? Is the community where the information is stored operative? Or is there another community altogether, an on-line community, separate from the physical world, by whose standards the material should be judged? Whatever community is selected will effect the determination of whether the material is decent. If the operative community is the situs of the uploading of the data, the purveyors of indecency will select the most liberal of communities, permitting the "barbarians" to roam free. If the operative community is the situs of the downloading, the opponents of offensive material will select the most conservative of communities to challenge the material, reducing the level of discourse.(175)

In addition, a court would have to struggle with many of the other terms in the CDA, including "good faith"(176) and "annoy."(177) There are so many terms which, given the medium, are vague that the reasonable person will be unable to determine whether that person is in compliance with the law. The only alternative for the individual is to have speech chilled to protect against an unknown liability.

6. Conclusion: A Contest Between Censorship and Democratic Discourse

Senator Exon's attempt to curtail on-line dialogue violates the essence of our democracy. Our democracy is premised on the idea that out of the cacophony of ideas, truth will arise. Without discussion, dissent, and even "flames,"(178) democracy collapses. Free speech is institutionalized revolution, given to us by the Founding Fathers. It is the ability to tear down governments gone astray without bloodshed.

The Internet is the nirvana of the founders of our democracy. It is a "never-ending worldwide conversation."(179) It is the opportunity for all citizens to have a voice. It is the fulfillment of the adage that the solution to bad speech is *more* speech. All views can be spoken and all views can be heard. The value of this invigoration of our democracy far outweighs the danger that offensive some speech may bring to some individuals.

C. Public Policy Issue

In addition to the above legal challenges to the CDA, there were also several public policy arguments.

1. Was New Legislation Required?

The opposition questioned the need for additional legislation, arguing that current law is sufficient to fend off the attack of pornographers.(180) They pointed to several widely publicized arrests made of individuals transmitting offensive material on on-line services as proof of the ability of current law to respond to the need.(181) DOJ stated that current law was sufficient and that the CDA would only interfere and weaken laws currently in place.(182) Many members of Congress agreed with this point of view.(183) Since existing law was sufficient, the CDA was not needed and was not prudent. Why risk trampling on the Constitution, interfering with cyberspace, and increasing government regulation when law enforcement agencies were already successfully making arrests?

2. The CDA as a Threat to Privacy

The CDA also raises concerns with regard to the right to privacy. The CDA makes a server liable for data being transmitted between users. If offensive material is transmitted, and the ISP negligently fails to attempt to prevent that the transmission, the ISP can be liable. The CDA places the ISP in the position of traffic cop (or Big Brother), responsible for watching all transmissions. The opposition argued that this infringes on the right of privacy of users.

A significant portion of Internet traffic is in open forums. WWW pages, USENET groups, public IRC rooms, public listservers, and anonymous ftp sites are all open forums. When an individual places material in an open domain, the individual has no claim to privacy. No privacy rights would be violated in this context.

The other concern is e-mail. E-mail is protected by federal law. No person other than the intended recipient may intercept the e-mail transmission.(184) The CDA does not effect or change the protection of e-mail privacy.(185) ISPs will not be able to intercept e-mail in order to monitor for content under the current law.

The ability of the government and of organizations to gather information on and monitor individuals has dramatically increased in the new information age. The privacy concerns of netizens are real. It is unclear, however, how the CDA itself erodes that right.

3. The CDA as an Impediment to the Development of the Medium

Another argument relates to the development of the medium. The Internet, heretofore, has been permitted to develop at a speed limited only by technological capabilities. Government involvement in the Internet was in the form of support, not regulation. Those individuals developing the medium were technologically sophisticated individuals with an interest in advancing the medium. The opposition's argument is that to punt regulation of the Internet to a government bureaucratic entity having no particular familiarity or expertise in the medium would stifle the development of that medium.(186) The speed of development would be reduced to the lowest common denominator--bureaucratic contemplation--as opposed to the limits of technology. As our society increasingly turns to the Internet as a valued source of communication and information, the suggestion that this resource be limited by the speed of Washington, D.C. was disdained. The Internet is the telecommunications means for the common person; bogging it down while deregulating and freeing the hands of huge telecommunications giants is offensive.

IV.The Final Outcome

The outcome of the CDA in the Telecommunications conference committee was determined in October of 1995 when the conferees were named. Members of the conference committee included Senator Exon and Senator Gorton, co-sponsors of the CDA, and Representative Hyde, sponsor of House censorship language. Absent from the conference committee were Senator Leahy, Representative Cox, and Representative Wyden, the leading opponents to the CDA. Also absent was any Senator who voted against the CDA. The one opportunity for the opposition lay in conference committee member Representative White, a co-sponsor of the Cox/Wyden Amendment.(187)

The opposition movement made a last ditch effort to stop the CDA.(188) Congress was determined, however, to protect the minds of the youth of America.(189) Represenative White(190) proposed a compromise amendment, using a "harmful to minors" standard in place of indecency. This compromise was passed and undone in the blink of an eye.(191) At about that time, Senator Leahy stated his fear that the conferees would take the easy way out and incorporate both the Cox/Wyden Amendment and the CDA into the final version of the Telecommunications Act.(192) That is exactly what happened. With minor adjustments, the Cox/Wyden Amendment was exposed for the nonevent so many had said that it was(193) and Senator Exon stood proud knowing that his fight was near victory.

On February 1, 1996, one year after the CDA was introduced, Congress passed the Telecommunications Act of 1996 including, as recommended by the conference committee, the CDA, the Cox/Wyden Amendment, and the Hyde Amendment.(194) On February 8, 1996, President Clinton signed into law the most comprehensive reform of telecommunications law since 1934, bringing deregulation to most telecommunication media. The most significant changes in the CDA in its final form included: (1) virtually eliminating FCC jurisdiction over the content of on-line computer communications, (2) replacing the word "indecency" in the CDA with the definition of indecency from *Pacifica*, (3) couching the language aimed at the Internet in its own subsection governing "interactive computer services," and (4) specifically targeting the CDA at content providers.

V.Conclusion

With the passage of legislation censoring the Internet, the battle to stop the barbarian at the gate has only just begun. The purveyors of offensive material will continue their quest to make their material available; in all likelihood the CDA will prove to only be a minor inconvenience. The opponents of on-line censorship have moved on to the next battle field, the court room.(195) The only one leaving the field of battle will be Senator Exon, who announced, prior to introducing his CDA, that he would be among the stampede of Democrats retiring from the Senate this year.

The debate of Senator Exon's Communications Decency Amendment was a clash of competing visions of this emerging medium. One saw the Internet as an old barbarian in new clothing. The Internet was merely a new medium threatening to bring the same old patently offensive material through the door of our homes. Uncontrolled, it would harm our society. Left on their own, users would be harmed. Thus, it was necessary for the central government to protect the little people from a harm from which they could not protect themselves.

The other vision was one of opportunity and empowerment. The Internet was seen as a medium unlike any other before. Any application of old rules to this unique forum was bound merely to reveal ignorance. The Internet amplified the exchange of information, improving the quality of our society and democracy and giving the opportunity for anyone, regardless of size, wealth, or opinion, to present and debate his or her views. A part of this vision is the empowerment of the individual, the belief that individual does not need a central government stepping in and determining what values are appropriate. Paternalism is rejected in favor of responsibility; regulation is rejected in favor of decentralization and self-determination; censorship is rejected in favor of democratic discourse.

The passage into law of the Exon Amendment is far from the end of debate. Nevertheless, the debate itself has gone far in steering the course of the Internet. Fear of the CDA has been a significant motivating force in the development of blocking software, PICS, and attempts by on-line services to monitor for offensive material. States have also attempted to regulate the content of the Internet.(196) Internet Service Providers and content providers have taken steps to restrict access to offensive material and protect themselves from liability. Even if the CDA is declared unconstitutional by the U.S. Supreme Court, Senator Exon has succeeded in battling the barbarian at the door.

1. On June 11, 1996, a three-judge panel in the Eastern District of Pennsylvania found that the Communications Decency Act violated the First Amendment of the United States Constitution. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (U.S. Supreme Court appeal filed). *See also* Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996) (also declaring CDA unconstitutional). The U.S. Department of Justice has appealed the decision to the Supreme Court. According to the Telecommunications Act of 1996, the Supreme Court must hear this appeal. *See infra* Telecommunications Act of 1996, Pub. L. No. 104-104, § 561(b), 110 Stat. 56, 143. This article focuses on the legislative history of the Communications Decency Act and not the subsequent litigation.

2. * The author would like to thank Josh Gaffin <http://www.interport.net/~bubble> and Jeremy Cannon for their assistance. Robert Cannon is an attorney with the Wireless Telecommunications Bureau of the Federal Communications Commission. He is also the Webmaster of the Federal Communications Bar Association's World Wide Web site <http://www.fcba.org/>. Robert Cannon's website can be found at <http://www.cais.net/cannon/>.

3. 1. 141 Cong. Rec. S8339 (daily ed. June 14, 1995) (quoting Brock N. Meeks, *Cyberrights Now!*, HotWired (June 1995) <http://www.hotwired.com/wired/3.06 /departments/cyber/rights.html>). *See also infra* note 101.

4. 2. Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 Geo. L.J. 1969, 1992 n.126 (1995) (quoting Jerry Berman).

5. 3. *See* Mike Mills, *Congress Nearing Passage of Rules Curbing On-Line Smut*, Wash. Post, Dec. 7, 1995, at A1. Although it had never been done before, it has been attempted. In the previous Congress, Sen. Exon unsuccessfully introduced S. 1822, which is similar to the Communications Decency Act (CDA). 140 Cong. Rec. S9745 (daily ed. July 26, 1994) (statement of Sen. Exon). *See* 141 Cong. Rec. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon referencing previous year's efforts); James T. Bruce and Richard T. Pfohl, *Analysis: S. 314, The Communications Decency Act of 1995: Introduced by Sen. Jim Exon (D-NE)* (Feb. 7, 1995) (visited July 6, 1995) <http://www.ema.org/html/ at_work/S314.htm> (noting previous effort).

6. 4. 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995).

7. 5. "[The Internet] is a great boon to mankind. But we should not ignore the dark roads of pornography, indecency and obscenity it makes possible." Sen. Exon, *Letter to the Editor*, Wash. Post, Dec. 2, 1995, at A20 [hereinafter *Exon Letter*].

8. 6. *See infra* 105-18 and accompanying text.

9. 7. 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon). *See also The MacNeil/Lehrer News Hour: Sex in Cyberspace?* (PBS television broadcast, June 22, 1995) *available in* LEXIS, News Library, Script File (remarks of Sen. Exon) [hereinafter *MacNeil/Lehrer Transcript*].

10. 8. 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 (1995) [hereinafter *Rimm Study*].

11. 9. *Id.* at 1867, 1914. *See also* 141 Cong. Rec. S9017 (June 26, 1995) (statement of Sen. Grassley, citing study, stating "83.5 percent of all computerized photographs available on the Internet are pornographic."). *See generally* Ned Brainard, *JournoPorn: Dissection of the Time Scandal,* HotWired (1995) <http://www.hotwired.com/special/pornscare /flux.html> (commenting on and criticizing 83.5% figure); Brock Meeks, *JournoPorn Special Report: Muckraker,* HotWired (last modified Oct. 30, 1995) <http://www. hotwired.com/special/pornscare/brock.html> (commenting on and criticizing 83.5% figure); David Post, *A Preliminary Discussion of Methodological Peculiarities in the Rimm Study of Pornography on the "Information Superhighway*" (June 28, 1995) <http://www. 9.12interlog.com/~bxi/post.html> (commenting on and criticizing 83.5% figure); Elizabeth Weise, *Internet Porn Survey, Coverage Stirs Debate on (Where Else) the Net*, Associated Press, July 9, 1995, *available in* 1995 WL 4396129. (stating "83.5 percent of the digitized photos transmitted over a portion of the Internet called Usenet newsgroups were pornographic, the study found.").

12. 10. Philip Elmer-DeWitt, *Cyberporn--On A Screen Near You,* Time, July 3, 1995, at 38 *reprinted in* 141 Cong. Rec. S9019 (daily ed. June 26, 1995). *See also JournoPorn Special Report: HotWired Interviews Elmer-DeWitt,* HotWired (July 2, 1995) <http: //www.hotwired.com/special/pornscare/transcript.html> (giving background on development of *Time* report on *Rimm Study*).

13. 11. 141 Cong. Rec. S9017 (daily ed. June 26, 1995) (statement of Sen. Grassley, referring to *Rimm Study* as "a remarkable study"). *See infra* note 73 and accompanying text (discussing Sen. Grassley's legislation). Other Congressmen cited the study as well. *See, e.g.,* 141 Cong. Rec. S8332 (daily ed. June 14, 1995) (statement of Sen. Coats); 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

14. 12. *See, e.g.,* Steven Levy, *No Place for Kids?: A Parent's Guide to Sex on the Net*, Newsweek, July 3, 1995, at 47, *reprinted in* 141 Cong. Rec. S9021 (daily ed. June 26, 1995); Howard Kurtz, *A Flaming Outrage: A "Cyberporn" Critic Gets A Harsh Lesson in `90s Netiquette*, Wash. Post, July 16, 1995, at C1; Al Kamen, *Would-Be Internet Hearing Star is Flamed*, Wash. Post, July 24, 1995, at A19; *Journoporn Special Report,* HotWired (Oct. 30, 1995) <http://www.hotwired.com/special/pornscare>; Weise, *supra* note 9 (stating that *Rimm Study* was subject of ABC's *Nightline*).

15. 13. *See Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the Senate Committee on the Judiciary* 104th Cong. 169 (1995) [hereinafter *Cyberporn and Children Hearings*] (prepared statement of Sen. Herb Kohl) (commenting on concern which had been raised in minds of parents).

16. 14. Philip Elmer-DeWitt, *Fire Storm on the Computer Nets*, Time, July 24, 1995, at 57. *See* Kurtz, *supra* note 12, at C3 (commenting on *Time's* publication of *Rimm Study*); Meeks, *supra* note 9 (criticizing *Time's* publication of *Rimm Study*); Fred H. Cate, *Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression*, 1995 J. Online L., art. 5, para. 109 (noting Time's publication of *Rimm Study*); Weise, *supra* note 9 (reporting Philip Elmer-Dewitt's regrets in publication of Time article). *See also* Julian Dibbell, *Muzzling the Internet*,

Time, Dec. 18, 1995, at 75 ("Pornography in Cyberspace? Sure, it's out there, although there is not as much of the hard-core stuff as most people seem to think.").

17. 15. *See* Post, *supra* note 9 ("One would have, perhaps, more confidence in the results of the *Rimm Study* had it been subject to more vigorous peer review."). After its publication the *Rimm Study* received rigorous peer review. *See Journoporn Special Report, supra* note 12 (archive of online discussion critiquing *Rimm Study*).

18. 16. Donna L. Hoffman & Thomas P. Novak, *A Detailed Analysis of the Conceptual, Logical, and Methodological Flaws in the Article: "Marketing Pornography on the Information Superhighway"* (version 1.01, July 2, 1995) <http://www2000.ogsm.vanderbilt .edu/rimm.cgi>; *See also* Brian Reid, *Critique of the Rimm Study< /em> <http://www2000.ogsm .vanderbilt.edu/novak/brian.reid.critique.html> ("In summary, I do not consider Rimm's analysis to have enough technical rigor to be worthy of publication in a scholarly journal."); Elizabeth Weise, What a Tangled Web We Weave, Associated Press (Dec. 24, 1995) available in 1995 WL 4420752 (referring to Rimm Study as "discredited"); Andrew Kantor, Laissez-faire, Internet World, Jan. 1996, at 36-37 (referring to Rimm Study as "a very questionable study"); Alan Lewine, Georgetown Law Journal Gives GULC Rimm Job, Geo Law Weekly (1995) available in (last modified Nov. 6, 1995) <http://www.dcez.com /~alewine/NetPornindex.html> ("The article and resultant Time story are `bogus,' a `cyberhoax,' a `gross distortion' of `questionably validity,' `cyberfraud,' and `a scandal' as described in headlines found in the San Francisco Examiner, Media Beat, The Globe and Mail, The Press of Atlantic City, and HotWired respectively.").*

19. 17. Jim Thomas, The Ethics of the "Cyber-Porn" Study, Hard-Copy (Sept. 1995) <http://www.ccs.org/hc/9509/ethics.html>. The fact that the study's researchers were able to gain access to BBSs in order to monitor user activity was seen as suspicious. See Elmer-DeWitt, supra note 10 (stating that Rimm conducted study of BBS use with permission of BBS operators). Normally operators wish to keep the privacy of their users strongly protected. It was argued that Mr. Rimm was able to gain access by misrepresenting his intentions, indicating that he was doing research to aid pornographers. Kamen, supra note 12, at A19; Meeks, supra note 9; Brock N. Meeks, Jacking in from the "Mr. Toad's Wild Ride" Port, CyberWire Dispatch (July 13, 1995) <http:/ /cyberwerks.com:70/0h/cyber wire/cwd/cwd.95.07.13.html>.

20. 18. It was discovered that Mr. Rimm's study had an eerie similarity to an unpublished Canadian study, a study to which Mr. Rimm allegedly requested access several months prior to the publication of his study. Declan McClullagh, The Case of the Two Cybersex Studies (July 24, 1995) <http://www.cinenet.net/~faber/issues_study_comp>; Kamen, supra note 12, at A19.

21. 19. See Books in Print 6101 (1995) [hereinafter Mr. Rimm's book is referred to as Handbook]. See also Meeks, Jacking in from the "Mr. Toad's Wild Ride" Port, supra note 17, (stating that Marty Rimm of Carnegie Mellon Study and Marty Rimm of "Pornographer's Handbook" are same person); Reid Kanaley, Steamy Stuff on the Net? His Findings Raise Tempers, PC Expo (July 27, 1995) <http://www2.phillynews.com/online/cyber/kana727.htm> (stating Handbook was written by Marty Rimm, going into further detail concerning Rimm's past); Jeffrey Rosen, Cheap Speech, The New Yorker, Aug. 7, 1995, at 75 (referring to Marty Rimm as author of Handbook); Jonathan Wallace & Mark Mangan, Sex, Laws, and Cyberspace (1996) (referring to Marty Rimm as author of Handbook); The Pornographer's Handbook--Intro & Letter to Guccione? (visited July 24, 1996) <http://www.cybernothing.org/jdfalk/media-coverage/archive/msg01404.html> (Usenet post containing sections of what is claimed to be Rimm's book, indicating that the two Rimms are the same person).

22. 20. Kurtz, supra note 12, at C3; Cate, supra note 14, para. 109; Meeks, Jacking in from "Mr. Toad's Wild Ride" Port, supra note 17, at 2.

23. 21. Kamen, supra note 12, at A19; Cate, supra note 14, para. 109 (citing 141 Cong. Rec. S9017 (daily ed. June 26, 1995)); Kanaley, supra note 19; Rosen, supra note 19, at 75.

24. 22. See Interactive Working Group Report to Senator Leahy, Parental Empowerment, Child Protection, & Free Speech in Interactive Media (July 24, 1995) <http://www.cdt. org/cda/iwgrept.txt> ("While the vast majority of content on the Internet is intended for legitimate educational, cultural, political, or entertainment value, some material on the Internet, however, may not be appropriate for children.") [hereinafter IWG Report].

25. 23. See Weise, supra note 9 (stating debate over Rimm Study "demonstrates the power of the Internet as a forum for debate").

26. 24. On June 14, 1995, Sen. Exon read into the record a prayer written by the Senate Chaplin which decried the dangers of on-line pornography. 141 Cong. Rec. S8329 (daily ed. June 14, 1995). Sen. Leahy suggested that it was perhaps inappropriate for the Senate Chaplin to be interjecting himself into public policy debates. 141 Cong. Rec. S8331 (daily ed. June 14, 1995).

27. 25. 141 Cong. Rec. S8090 (daily ed. June 9, 1995) (statement of Sen. Exon, remarking "in my 8 years as Governor of Nebraska and my 17 years of having the great opportunity to serve my State in the Senate, there is nothing that I feel more strongly about than this piece of legislation").

28. 26. 141 Cong. Rec. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon).

29. 27. 47 U.S.C § 223 (1994). This section is a part of the Common Carrier subchapter of the Wire and Radio Communications Chapter of title 47. See infra note 110 and accompanying text (discussing appropriateness of placing Internet regulation under common carrier law).

30. 28. Communications Decency Act of 1996, Pub. L. No. 104-104, sec. 502, §§ 223(d)(1)(B), (h)(2), 110 Stat. 133, 134-135 (to be codified at 47 U.S.C. § 223(d)(1)(B), (h)(2)). A "telecommunication device" is specifically defined to not include "interactive telecommunication services." Id. sec. 502, § 223(h)(1), 110 Stat. at 135 (to be codified at 47 U.S.C. § 223 (h)(1)). "The term `interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Id. sec. 509, § 230(e)(2), 110 Stat. at 139 (to be codified at 47 U.S.C. § 230(e)(2)); See id. sec. 502, § 223(h)(2), 110 Stat. at 135 (to be codified at 47 U.S.C. § 223(h)(2)) (referring to definition at sec. 230(e)(2)).

31. 29. Id. sec. 502(2), § 223(d)(1)(B), 110 Stat. at 134. S. 652 originally made it illegal, via a telecommunications device: (1) to create and transmit offensive material with the intent to harass, S. 652, 104th Cong., § 402(a)(2) (1995) (to amend 47 U.S.C. § 223(a)), (originally amending § 223(a)); (2) to make available obscenity, Id. § 402(a)(2); and (3) to make an indecent communication to a minor, Id. § 402(a)(2). The definition of a telecommunication device included interactive computer services.

In attempt to make the CDA constitutional, the conference committee set restrictions on "interactive computer networks" in their own subsection and provided a definition for the offensive material, codifying the definition of indecency from FCC v. Pacifica, 438 U.S. 726, 732 (1978). H.R. Conf. Rep. No. 104-458, at 188 (1996) (discussing reconcilation of CDA). See infra note 133, and accompanying text discussing definition of indecency, instead of using words like "obscenity" and "indecency."

32. 30. H.R. Conf. Rep. No. 104-458, at 189-190 (discussing sec. 502).

33. 31. See 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Coats, remarking "On-line services and access software providers are liable where they are conspirators with, advertise for, are involved in the creation of or knowing distribution of obscene material or indecent material to minors."); 142 Cong. Rec. S714 (daily ed. Feb. 1, 1996) (remarks of Sen. Exon, stating "[i]n general, the legislation is directed at the creators and senders of obscene and indecent information.").

34. 32. Communications Decency Act, sec. 502, § 223(d)(1), 110 Stat. at 133-34 (to be codified at 47 U.S.C. § 223(d)(1)). See also S. 652, 104th Cong. sec. 402(a)(2) (adding 47 U.S.C. § 223(d)-(e)).

35. 33. Communications Decency Act, sec. 502, § 223(d)(1), 110 Stat. at 133-34 (to be codified at 47 U.S.C. § 223(d)(1)). See also S. 652, 104th Cong. sec. 402(a)(2) (originally amending 47 U.S.C. § 223(a) to increase fines from $10,000 to $100,000). The conference compromise placed enforcement of CDA under the jurisdiction of the

Department of Justice.

36. 34. H.R. Conf. Rep. No. 104-458, at 188 (discussing sec. 502, stating "[d]efenses to violations of the new sections assure that attention is focused on bad actors and not those who lack knowledge of a violation or whose actions are equivalent to those of common carriers"). These defenses as submitted to and passed by the Senate were strongly criticized by the Department of Justice. Letter of Kent Markus, Acting Assistant Attorney General, Department of Justice, to Sen. Patrick J. Leahy (May 3, 1995), reprinted in 141 Cong. Rec. S8343 (daily ed. June 14, 1995) [hereinafter Markus].

37. 35. See Cyberporn and Children Hearings, supra note 13, at 72-73 (prepared statement of William W. Burrington, Assistant General Counsel and Director of Government Affairs, America Online, Inc., and Chairman of the Online Policy Committee, Interactive Services Association) (stating "online service providers cannot police and be aware of the specific content of each communication, and yet they are penalized for transmitting certain communications"); Meyer, supra note 2, at 1980, 1983 n.77 (commenting on impossibility of monitoring all transmissions over server's computers, citing Catherine Yang, Flamed with a Lawsuit, Bus. Wk., Feb. 6, 1995, at 70-71 (reporting that CompuServe, Inc. and Prodigy have said they cannot police activities of their thousands of subscribers and, in Prodigy's case, read or edit the 75,000 notes transmitted daily)).

38. 36. 141 Cong. Rec. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon).

39. 37. Communications Decency Act, sec. 502, § 223(e)(1), 110 stat. at 133-34 (to be codified at 47 U.S.C. § 223(e)(1)). See also S. 652, 104th Cong. § 402(a)(2). This defense in its original form was criticized by the Department of Justice as establishing "a system under which distributors of pornographic material by way of computer would be subject to fewer criminal sanctions than distributors of obscene videos, books or magazines." Markus, supra note 34. Mr. Markus went on to state that "[s]uch a defense may significantly harm the goal of ensuring that obscene or pornographic material is not available on the Internet or other computer networks by creating a disincentive for operators of public bulletin board services to control the postings on their boards." Id.

40. 38. Communications Decency Act, sec. 502, § 223(h)(3), 110 Stat. at 135 (to be codified at 47 U.S.C. § 223(h)(3)) (defining "access software"); H.R. Conf. Rep. No. 104-458, at 190. Access providers may be liable where they "own[ ] or control[ ] a facility, system, or network engaged in providing" offensive material. 142 Cong. Rec. S714 (daily ed. Feb. 1, 1996) (statement of Sen. Exon).

41. 39. 141 Cong. Rec. S8345 (daily ed. June 14, 1995). See also 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (statement of Sen. Coats, stating "[I]t is the intent of this legislation that persons who are providing access to or connection with the Internet or other electronic service not under their control are exempted under this legislation"); 142 Cong. Rec. H1158 (daily ed. Feb. 1, 1996) (statement of Rep. Hyde, stating "the conference report expressly provides an absolute legal defense to any on-line access provider, software company, employer, and any other, `solely for providing access or connection to or from a facility, system or network not under that person's control,' so long as that person is not involved in `the creation of the content of the communication'"); 142 Cong. Rec. S714 (daily ed. Feb. 1, 1996) (statement of Sen. Exon, stating "the telephone companies, the computer services such as CompuServe, universities that provide access to sites on Internet which they do not control, are not liable."); id. (Sen. Exon, stating "[t]he legislation generally does not hold liable any entity that acts like a common carrier without knowledge of messages it transmits or hold liable an entity which provides access to another system over which the access provider has no ownership of content. Just like in other pornography statutes, Congress does not hold the mailman liable for the mail that he/she delivers.")

42. 40. H.R. Conf. Rep. 104-458, at 190 (discussing sec. 502, stating "[t]he defense covers provision of related capabilities incidental to providing access, such as server and software functions, that do not involve the creation of content").

43. 41. Id. (discussing sec. 502, stating "[t]he conferees intend that this defense be construed broadly to avoid impairing the growth of online communications through a regime of vicarious liability.").

44. 42. Id. (discussing sec. 502, stating "[t]he word `effective' is given its common meaning and does not require an

absolute 100% restriction of access to be judged effective").

45. 43. Communications Decency Act, sec. 502, § 223(e)(5), 110 Stat. at 134 (adding 47 U.S.C. § 223(e)(5)). See also S. 652, 104th Cong. sec. 402(a)(2) (adding 47 U.S.C. § 223(f)(3)). Originally, the FCC was to promulgate rules explaining what these terms might mean. Until those rules were promulgated, the regulations implementing the dial-a-porn legislation were to be used. Id. The CDA, as passed, states only that the FCC may promulgate rules explaining these terms. See infra note 56 (discussing role of FCC).

46. 44. See also Press Release, Support Exon-Coats Computer Porn Amendment Says National Law Center for Children and Families, reprinted at 141 Cong. Rec. S8338 (daily ed. June 14, 1995) (stating that good faith effort is all we can ask of servers at this point); Cyberspace and Children Hearings, supra note 13, at 71 (prepared statement of William W. Burrington) (stating that such statutory defenses serve as incentive to develop effective blocking and screening devices). Kent Markus of the Department of Justice criticized this defense, stating "this proposed defense would lead to litigation over whether such actions constitute `good faith' steps to avoid prosecution for violating the section 402, and could thwart existing child pornography and obscenity prosecutions." Markus, supra note 34. See infra note 115 and accompanying text (elaborating criticism of good faith defense).

47. 45. Communications Decency Act, sec. 502, § 223(f)(1) & sec. 509, § 230(c)(2), 110 Stat. at 135, 138 (adding §§ 223(f)(1), 230(c)(2)). See also S. 652, 104th Cong. sec. 402(a)(2) (adding § 223(f)(4)) (1995). Kent Markus of the Department of Justice criticized this defense for weakening an individual's right to privacy in e-mail transmissions. Since the service provider is protected from civil or criminal liability, the service provider can conduct illegal eavesdropping in the name of a good faith effort to prevent the transmission of obscenity. Markus, supra note 34.

48. 46. Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995).

*49. 47. Id. at *2.*

*50. 48. Id. at *2-*3.*

51. 49. Mark Walsh, Scientologists, Secrets, and Cyberspace, Legal Times, July 3, 1995, at 2, 8. Ultimately Stratton settled for an apology from Prodigy. Peter H. Lewis, After Apology From Prodigy Firm Drops Suit, New York Times, Oct. 25, 1995, at D1. Reportedly, Stratton itself came to see the Stratton lower court decision as problematic for on-line communications. Id. ("Citing the `best interest[ ] of . . . the on-line and interactive services industries,' Stratton Oakmont, Inc., of Lake Success, L.I., said it would not contest a motion filed by Prodigy asking Justice Stuart L. Ain of the State Supreme Court of Nassau County to dismiss the case."). The New York Times further reported that Prodigy had planned to raise truth as the absolute defense against libel. Id. at D5. See also Prodigy off the hook in on-line libel case, CNN--U.S. News Briefs (Oct. 25, 1995, 1 a.m. EDT) <http://www.cnn.com/US/Newsbriefs/9510/10-24/index.html>.

52. 50. Walsh, supra note 49, at 8.

53. 51. See 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (Sen. Coats, stating "I want to be sure that the intend [sic] of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable . . . the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position. . . . If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Representative Cox, referring to Stratton decision as "backwards"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing Stratton decision).

54. 52. IWG Report, supra note 22 (criticizing Stratton). See also Cyberporn and Children Hearings, supra note 13, at 76, (prepared statement of William Burrington) (citing Stratton as obstacle to wide implementation of measures to block or filter out offensive materials). Justice Stuart Ain, who presided over Stratton Oakmont, Inc. v. Prodigy, anticipated this criticism. In his decision, he stated, "For the record, the fear that this Court's finding of publisher

*status for Prodigy will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure." Stratton, 1995 WL 323710 at *5.*

55. 53. This protection against liability may have, however, an unintended result. Prodigy was found liable in Stratton for what essentially amounted to as an ommission, the failure to monitor for and remove a defamatory remark. However, the CDA gives service pro-viders protection from affirmative acts. If a service provider violates the legal rights of users, the service provider can claim that it was seeking to restrict access to offensive material and claim immunity under the CDA. Injured individuals have potentially lost an important cause of action.

56. 54. H.R. Conf. Rep. No. 104-458, at 191 (1996) (commenting on sec. 509, § 230(c)(1)).

57. 55. Communications Decency Act, Pub. L. No. 104-104, sec. 402, § 223 (f)(2), 110 Stat. at 135 (adding 47 U.S.C. § 223(f)(2)). Originally the CDA preempted state legislation only with regards to commercial entitites. S. 652, sec. 502, 104th Cong. (1995) (adding 47 U.S.C. § 223 (g)). See also 141 Cong. Rec. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon). The conferees responded to the calls for a uniform national standard and a recognition that the Internet is a global medium. H.R. Conf. Rep. No. 104-458, at 191 (discussing sec. 502, stating "[t]he conferees have expanded this section to provide for consistent national and State and local content regulation of both commercial and non-commercial providers"). See generally Cyberporn and Children Hearings, supra note 13, at 76 (prepared statement of William Burrington) (noting that five states in the past year have passed laws aimed at regulating obscenity and harassment on computer networks, and stating that where ISPs are faced with varying regulations from different states, the ISPs "would be forced to meet the content and activity standards of the most restrictive state. In this way, one state legislature, rather than the federal government, would control the content of our country's contribution to the global information superhighway."); Coalition Letter to Telecom Conferees 2 (Nov. 9, 1995) <http://www.cdt.org/policy/freespeech /1109_iwg_ltr.html> (letter of the Internet Working Group, calling for uniform national policy). Excluded from state preemption would be noncommercial content providers.

58. 56. Congress instructed that the FCC "may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d)." Communications Decency Act, sec. 502, § 223(e)(6), 110 Stat. at 134-35 (adding 47 U.S.C. § 223(e)(6)) (emphasis added). See also 142 Cong. Rec. S714 (daily ed. Feb. 1, 1996) (statement of Sen. Exon, commenting on FCC's role). Congress went on to say:

Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures.

Communications Decency Act, sec. 502, § 223(e)(6), 110 Stat. at 134-35 (adding 47 U.S.C. § 223(e)(6)). Further, this grant of authority is to be narrowly construed. H.R. Conf. Rep. No. 104-458, at 190-91 (discussing § 223(e)(6)).

59. 57. Communications Decency Act, Pub. L. No. 104-104, sec. 502, 110 Stat. at 133-34 (amending 47 U.S.C. § 223(a)(2),(d)(2)).

60. 58. See S. 652, 104th Cong. sec. 402(a)(2) (adding 47 U.S.C. § 223(j)).

61. 59. Id. This may be the only way the Cox/Wyden Amendment in the House successfully influenced the CDA. See infra note 78 and accompanying text (discussion of Cox/Wyden Amendment).

62. 60. Elmer-DeWitt, supra note 10 (discussing introduction of Blue Book).

63. 61. Id. The Center for Democracy and Technology criticized the Blue Book, noting that there was no indication of where the images which were a part of the Blue Book were down-loaded from. "[I]f they're down-loaded from Sweden or they're downloaded from Denmark, which looks exactly like any U.S. site, any law that [the U.S. Senate] passes will not reach it." MacNeil/Lehrer Transcript, supra note 7.

64. 62. 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon).

65. 63. See, e.g., 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon); 141 Cong. Rec. S8330, S8339 (daily ed. June 14, 1995) (statement of Sen. Exon); 141 Cong. Rec. S8332 (daily ed. June 14, 1995) (statement of Sen. Coats). See generally Levy, supra note 12.

66. 64. Cyberporn and Children Hearings, supra note 13, at 34 (statement of Sen. Feingold); Levy, supra note 12.

67. 65. 141 Cong. Rec. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon, noting that revisions were "in response to concerns raised by the Justice Department, the profamily and antipornography groups, and the first amendment scholars"). See also 141 Cong. Rec. S8340 (daily ed. June 14, 1995) (statement of Sen. Leahy, noting "[T]he revisions made by Senator Exon reflect a diligent and considered effort by him and his staff to correct serious problems that the Department of Justice, I and others have pointed out with this section of the bill."); 141 Cong. Rec. S8334 (daily ed. June 14, 1995) (statement of Sen. Feingold, noting "[H]is efforts to accommodate his colleagues only underscore his commitment to the welfare of our children.").

68. 66. 141 Cong. Rec. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon). The new version was cosponsored by Senators Coats, Byrd, and Heflin. 141 Cong. Rec. S8386 (daily ed. June 14, 1995).

69. 67. Letter form Kent Markus, Acting Assistant Attorney General, Department of Justice, to Sen. Patrick J. Leahy (undated), reprinted at 141 Cong. Rec. S8343-44 (daily ed. June 14, 1995).

70. 68. Ben Wittes, Internet Obscenity Bill Loses Support, Legal Times, May 22, 1995 at 2, 2; Press Release of Morality in the Media, Morality in Media Calls for Rejection of Senator Exon's `Communications Decency Act' (Mar. 28, 1995) reprinted at <http: //www.cdt.org/freespeech/mim_pr.html>; Letter from Patrick A. Trueman, Director of Governmental Affairs, American Family Association, to Senator James Exon (Apr. 4, 1995) reprinted at <http://www.cdt.org/freespeech/amfam_ex.ltr.html>; Brock N. Meeks, Jacking in from the `Senatorial Battleground' Port: Snapshots from a Dirty Little War, CyberWire Dispatch (June 9, 1995) <http://www.utopia.com/mailings/rre/1st.amendment.in.congress.html>.

71. 69. Other statements of senatorial opposition can be found at 141 Cong. Rec. S8346 (daily ed. June 14, 1995) (statement of Sen. Levin); id. at S8345 (statement of Sen. Biden); id. at S8334 (statement of Sen. Feingold).

72. 70. S. 714, 104th Cong. (1995) reprinted at 141 Cong. Rec. S8389-90 (daily ed. June 14, 1995). In introducing the amendment, Sen. Leahy stated "I am trying to protect the Internet, and make sure that when we finally have something that really works in this country, that we do not step in and screw it up, as sometimes happens with Government regulation." 141 Cong. Rec. S8331 (daily ed. June 14, 1995). See also 141 Cong. Rec. S5548 (daily ed. Apr. 7, 1995) (statement of Sen. Leahy discussing S. 714).

73. 71. 141 Cong. Rec. S8339 (daily ed. June 14, 1995) (statement of Sen. Exon); 141 Cong. Rec. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon, accusing the Clinton administration and the Department of Justice of attempting to punt).

74. 72. 141 Cong. Rec. S8342 (daily ed. June 14, 1995) (statement of Sen. Leahy). The CDA in its original form would have been under the jurisidiction of the FCC. See supra note 56 and accompanying text. Sen. Leahy argued that Sen. Exon

says his amendment takes the same approach as the dial-a-porn statute. . . . On dial-a-porn, it took 10 years of litigation for the FCC to find a way to implement the dial-a-porn statute in a constitutional way. That is why I say his amendment punts to the FCC the task of finding ways to restrict.

See supra note 56 and accompanying text. See also 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, noting that converting the Federal Communications Commission into Federal Computer Commission, as would be required by CDA, is impractical); id. at H8470 (statement of Rep. Wyden, noting "we believe that parents and families are better suited to guard the portals of Cyberspace and protect our children than our Government

bureaucrats."); 171 Cong. Rec. H8287 (daily ed. Aug. 2, 1995) (statement of Rep. Wyden, noting "this idea of a Federal Internet censorship army would make the keystone cops look like Cracker Jack crime fighters").

75. 73. S. 892, 104th Cong. (1995) (introduced by Sen. Grassley). See also 141 Cong. Rec. S8084 (daily ed. June 9, 1995) (statement of Sen. Dole in support of Sen. Grassley's amendment); 141 Cong. Rec. S7922-23 (daily ed. June 7, 1995) (statement of Sen. Grassley, introducing S. 892, indicating cosponsors as Sens. Dole, Coats, McConnel, Shelby, and Nickles).

76. 74. An Electronic Sink of Depravity, Spectator, Feb. 4, 1995, reprinted at 141 Cong. Rec. S9017 (daily ed. June 26, 1995); Ann Reilly Dowd, The Net's Surprising Swing to the RIGHT, Fortune, July 10, 1995, at 113, 114 (commenting on launch of Thomas).

77. 75. Center for Democracy and Technology, Gingrich Says CDA is a "clear violation of free speech rights," <http://www.cdt.org/policy/freespeech/ging_oppose.html> (reprinting comments from June 20, 1995, television show, the Progress Report, carried on National Empowerment Television). See also Gingrich Lambasts Exon Amendment, Press Release From the Progress and Freedom Foundation (June 21, 1995) (repeating Gingrich's conclusion that CDA is unconstitutional). But see 141 Cong. Rec. H12,090 (daily ed. Nov. 10, 1995) (statement of Rep. Miller, accusing telecommunications advisor to Speaker Gingrich of bias on grounds that advisor had financial interest in company producing pornography).

78. 76. MacNeil/Lehrer Transcript, supra note 7 (remarks of Speaker of the House Newt Gingrich).

79. 77. One Congressman after another proceeded on the floor of the House to declare their support of the Cox/Wyden Amendment. See 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statements of Reps. White, Markey, Goodlatte, and Fields); id. (statement of Rep. Lofgren, remarking that Exon Amendment is a misunderstanding of technology); id. at H8470 (statement of Rep. Wyden, arguing that parents are better suited to protect children from on-line obscenity than government bureaucrats and that the Cox/Wyden Amendment stands in sharp contrast to CDA); id. (statement of Rep. Barton, noting that the Cox/Wyden Amendment is a much better approach than CDA); id. (statement of Rep. Danner); id. at H8649 (statement of Rep. Cox).

80. 78. 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995). The Cox/Wyden Amendment was first introduced June 30, 1995. See Center for Democracy and Technology, ALERT: House to Vote This Week on Net-Censorship Bills (Aug. 1, 1995) [hereinafter ALERT].

81. 79. 141 Cong. Rec. H8478-79 (daily ed. Aug. 4, 1995).

82. 80. House Passes Cox/Wyden `Internet Freedom' Amendment Major Victory for Cyberspace--Indecency Statutes Remain a Major Issue (Aug. 4, 1995) <http://www.cdt.org /publications/pp230804.html>; ALERT, s upra note 78.

83. 81. 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995).

84. 82. See Letter from Sen. Leahy to Sen. Pressler and Sen. Hollings (Nov. 8, 1995) (commenting on how the Cox/Wyden Amendment does not apply "to the section of the Communications Act of 1934 that the `Communications Dece ncy Act' seeks to amend"); Comm. Daily Notebook, Comm. Daily, Nov. 13, 1995, at 6, 6 (stating that Sen. Leahy "was concerned conference panel would take `the easy compromise' by combining 2 provisions, which fit `like a hand in a glove.' Leahy noted that Cox-Wyden doesn't apply to sections of Communications Act that Exon-Coats seeks to amend.").

85. 83. See supra note 79.

86. 84. 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995). Although the language of the amendment itself promised that it would prohibit any interference of the Internet by bureaucrats, it did not. The amendment stated that it would be the policy of the federal government to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation." Id. at H8469 (§ 104(b)(2) of the amendment). "Policy" is not the same as law. In addition, a section heading in the amendment was titled "FCC

Regulation of the Internet and Other Interactive Computer Services Prohibited." Id. (§ 104(d) of the amendment). However, the actual language of the section merely directed that "[n]othing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services." Id. See also Norman J. Singer, 2A Sutherland Statutory Construction §§ 47.03, 47.14 (5th ed. 1992) (stating that where language of statute is clear, section heading has no bearing). However, even though the language of the Cox/Wyden Amendment was weak, it did have some influence over the final version of the CDA. See supra note 59 and accompanying text.

87. 85. See supra note 78.

88. 86. 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995). Instead, the amendment proclaimed that states were not prevented from enforcing state law consistent with the amendment. Id. at H8469 (§ 104(e)(3) of the amendment). See Communications Decency Act of 1996, Pub.L. No. 104-104, sec. 509, § 230(d)(3), 110 Stat. 133, 139 (retaining language as 47 U.S.C. § 230(d)(3)).

89. 87. Stratton Oakmont, Inc. v. Prodigy Services Co., available in Westlaw, 1995 WL 323710 (N.Y. Sup. Ct.). See also supra notes 46-54 and accompanying text.

90. 88. 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995) (adding 47 U.S.C. § 230(c)).

91. 89. See supra note 45 and accompanying text.

92. 90. Chris McLean, Address at the Federal Communication Bar Association Seminar (October 18, 1995) (stating that CDA and Cox/Wyden were consistent); H.R. Conf. Rep. 104-458 at 188, 193 (1996) (discussing sec. 502, stating that there was no provision in House related to CDA, and discussing sec. 509, stating that there was no provision in Senate related to Cox/Wyden Amendment).

93. 91. 141 Cong. Rec. H8444-60 (daily ed. Aug. 4, 1995).

94. 92. See Communications Decency Act, Pub. L. No. 104-104, sec. 507, 110 Stat. at 137 (amending 18 U.S.C. §§ 1462, 1465); 141 Cong. Rec. H8450-55 (daily ed. Aug. 4, 1995). The Hyde Amendment received much attention for amending the Comstock Act to prohibit speech concerning abortion on interactive computer services. Id.

95. 93. 141 Cong. Rec. H8456 (daily ed. Aug. 4, 1995).

96. 94. 141 Cong. Rec. H8451-52 (daily ed. Aug. 4, 1995).

97. 95. 141 Cong. Rec. H8452, H8456 (daily ed. Aug. 4, 1995) (statement of Rep. Bryant); id. at H8455 (statement of Rep. Klink).

98. 96. Id. at H8425-507.

99. 97. See Larry Irving, Administrative Concerns Regarding S. 652: the Telecommunications Competition and Deregulation Act of 1995, <http://www.cdt.org/policy/legislation /admin_S652_comnts.hmtl#first.amdt>.

100. 98. See supra notes 34, 37, 44-45, 65.

101. 99. Benjamin Wittes, Interview: Reed Hundt Picks His Battles, Legal Times, Sept. 4, 1995, at 10, 12.

102. 100. Public support for the CDA came from groups including the National Law Center for Children and Families, the "Enough is Enough!" Campaign, and the National Coalition for the Protection of Children and Families. As of the time of writing this article, web pages were not found for these organizations.

103. 101. See Internet Mess: Return to Sender, Wash. Post., Dec. 15, 1995, at A24 (stating that demonizing Congressional opposition as "ACLU types" had become strong part of conferee negotiations). In an attack on the Electronic Frontier Foundation (EFF), Sen. Exon accused the EFF of, on the one hand, advocating parental control of

a child's access to the Internet through software blocks, and, on the other hand, posting on-line pamphlets explaining how to beat those blocks. 141 Cong. Rec. S8344 (daily ed. June 14, 1995). EFF denied Sen. Exon's allegations concerning the pamphlet. E-mail from Mike Godwin, Staff Attorney for EFF, to Robert Cannon (Sept. 5, 1995) [hereinafter Godwin e-mail]. EFF did note, however, that the pamphlet to which Sen. Exon referred was published as footnote 21 of the Rimm Study, repeatedly used in support of the CDA. Id. See supra notes 9-22 and accompanying text (concerning Rimm Study). EFF confessed that "the Martin Rimm/ Georgetown Law Journal `study,' is accessible on our Web page (not the same as posting, but there you go)." See Godwin e-mail.

In another attack, Sen. Exon complained that the on-line opposition movement in "a widely distributed letter" had characterized him as a barbarian. 141 Cong. Rec. S8339 (daily ed. June 14, 1995). Sen. Exon had his facts wrong. The reference came not from an on-line letter but from an article written by Brock Meeks published in HotWired, an on-line version of Wired magazine. See Brock N. Meeks, Cyberrights Now! The Obscenity of Decency, HotWired (June 1995) <http: //www.hotwired.com/wired/3.06/departments/ cyber.rights.html> (placing the quote "the barbarians are at the gate" above the article). According to Mr. Meeks, those words were placed above the article by the editors, not by himself. E-mail from Brock N. Meeks to Robert Cannon (Sept. 6, 1995). Mr. Meeks stated, "Exon is many things, and his bill is out to lunch, but he isn't a `barbarian.'" Id.

Sen. Exon also attacked the Washington Post for its opposition to his amendment. Sen. Exon inferred that the Washington Post was biased, placing profits over all-else on the grounds that the Washington Post had a economic interest in its on-line presence, "Digital Ink." Exon Letter, supra note 5. The marvelous irony of the accusation is that Sen. Exon is in effect accusing the Washington Post of bias by merit of familiarity. Because the Washington Post is sophisticated enough to take advantage of and see the value of on-line communications, Sen. Exon believes the Washington Post biased. Sen. Exon, on the other hand, having no experience on the Internet, is somehow well-positioned to deal with the subject.

104. 102. At one point Sen. Exon complained about the lack of cooperation of the public opposition. He stated:

we found out that basically [the Center for Democracy and Technology] goes back to the old idea that I think is kind of foreign that Thomas Jefferson and all of the good people who wrote the Constitution worked overnight and planned and plotted to make sure that the Constitution protected the most gross pornographers, pedophiles, those who are trying to lure children today.

MacNeil/Lehrer Transcript, supra note 7. Jerry Berman, Executive Director of the CDT responded that he felt quite comfortable being lumped together with the likes of Thomas Jefferson. Id. At another point Sen. Exon accused the CDT of hiding behind the Constitution. Id.

105. 103. 141 Cong. Rec. S8386-87, S8347 (daily ed. June 14, 1995) (amending the Senate telecommunications bill by adding the CDA by a vote of 84 to 16). On November 15, 1995, the author of this article surveyed Senate use of the Internet. On the day of the survey, of senators who voted in favor the CDA, 52% had no Internet connection and 43% had e-mail and either a World Wide Web (WWW) or gopher connection. Of those who opposed the amendment, 81% had e-mail and either a WWW or gopher connection, and 94% had an Internet connection of some type. Of those who had no Internet connection, 98% voted in favor of the CDA. Of those who had e-mail and a WWW or gopher site, 73% voted for the CDA, 27% opposed it. See <http://policy.net/capweb> (providing directory of Congress with Internet addresses). See also Elizabeth A. Marchak, Constituents in Cyberspace, Cleveland Plain Dealer, July 9, 1995, at 1C (noting that at the date of her article 26% of Members of House and 46% of senators had e-mail addresses).

106. 104. 141 Cong. Rec. S8570 (daily ed. June 16, 1995).

107. 105. Jerry Berman, Executive Director of the CDT, stated that with the CDA, Sen. Exon was attempting to overlay an old paradigm on a new paradigm. Jerry Berman, Address at the Federal Communication Bar Association Seminar (Oct. 18, 1995).

108. 106. Sen. Exon's only professed familiarity with the Internet was "[a]s a member of the Senate Armed Services Committee, I have been involved in the development of the Internet from its beginning." Exon Letter, supra note 5.

109. 107. Chris McLean, Sen. Exon's staff person assigned to the CDA, stated that Sen. Exon has no first-hand Internet experience. McLean, supra note 90. He stated that Sen. Exon understood the need to protect children and comprehension of the medium is unnecessary.

110. 108. Sen. Exon raised issue with the comment "the barbarians are really at the gate," see supra note 101, which was not downloaded by Sen. Exon. He raised issue with the Frequently Asked Question pamphlet (FAQ) concerning how one beats blocks to pornography; Sen. Exon did not himself download this FAQ and he misidentified the source. See Cong. Rec. S8344 and Godwin e-mail supra note 101. The infamous Blue Book, was downloaded by someone other than Sen. Exon. See supra note 61 and accompanying text; Elmer-DeWitt, supra note 10. Repeatedly his office was asked to explain from where the images in his famous Blue Book were acquired, suggesting that the servers very easily could be out of the jurisdiction of the United States and his proposed amendment. See MacNeil/Lehrer Transcript, supra note 7 (remarks of Jerry Berman, Executive Director of the CDT). This author never observed Sen. Exon being able to answer that question.

111. 109. McLean, supra note 90. See also Capweb: A Guide to the U.S. Congress <http:/ /policy.net/capweb/States/NE/NE.html> (updated Sept. 5, 1996) (listing Sen. Exon's address without an e-mail address). Mr. McLean explained Sen. Exon's inexperience by stating that Sen. Exon was a 72-year-old man. Another indicator of Sen. Exon's offices lack of comprehension of the medium was the perpetual use of analogies to technologies as a way of explaining and justifying the CDA. McLean, supra note 90 (comparing Internet to Old Wild West; comparing Internet to streets and stating that we need stop signs, yield signs, and speed limits; making analogies to bookstores and movie theaters, access to which is controlled by front door).

112. 110. A final note of curiosity is the way in which Sen. Exon sought to stop the purveyors of indecency. He proposed to amend law which is a part of the common carrier subchapter of the United States Code. See 47 U.S.C. § 223. ISPs are not common carriers. Computer and Comm. Industry Ass'n v. FCC, 693 F.2d 198 (D.C.Cir. 1982), cert. denied sub nom. Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 461 U.S. 983 (1983). See generally Craig A. Johnson, Not A Panacea: Stopping Net Censorship Through "Common Carrier" Protection Has Its Problems, Wired, Dec. 1995, at 80, 80 (discussing application of common carrier status to ISPs). Compare H.R. Conf. Rep. 104-458 at 188 (1996) (discussing reconcilation of CDA, stating "[D]efenses