

## ESSAY

### Pornography Drives Technology: Why *Not* to Censor the Internet

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#### INTRODUCTION

Constitutional issues aside, the basic problem with the Communications Decency Act<sup>(2)</sup> is its assault on free expression. If enforced, it will stifle the free use of what Judge Dalzell, in *ACLU v. Reno*, called "the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen."<sup>(3)</sup>

Some have complained of the Communications Decency Act's overbreadth--that it would cast too wide a net and sweep up not only smut, but also nonprurient discussions of sex, health, AIDS, abortion, and other sex-related public issues.<sup>(4)</sup> This essay, to the contrary, presents head-on the case for smut itself. My contention is that the Communications Decency Act will inhibit the free flow of the very sort of material that has traditionally been a new medium's most popular early use, that is, pornography.

Throughout the history of new media, from vernacular speech to movable type, to photography, to paperback books, to videotape, to cable and pay-TV, to "900" phone lines, to the French Minitel, to the Internet, to CD-ROMs and laser discs, pornography has shown technology the way. "Great art is always flanked by its dark sisters, blasphemy and pornography."<sup>(5)</sup> The same is true of the more mundane arts we call media. Where there is the Gutenberg Bible, there is also Rabelais; where the U.S. mails, dirty postcards; where the three-volume hardback novel, paperback pulp fiction; where HBO, *Midnight Blue*; where CompuServe, the *Plain Brown Wrapper* library.<sup>(6)</sup>

Pornography,<sup>(7)</sup> far from being an evil that the First Amendment must endure, is a positive good that encourages experimentation with new media. The First Amendment thus has not only intellectual, moral, political, and artistic value,<sup>(8)</sup> but practical and economic value as well. It urges consenting adults, uninhibited by censorship, to look for novel ways to use the new media and novel ways to make money out of the new uses. Therefore, while it may be politically impossible and socially unwise to encourage computer pornography, legislators should at least leave it alone and let the medium follow where pornography leads.

#### I. HISTORY

Both English and Italian can trace their emergence as popular tongues partly to pornography. Before the fourteenth century, the gentry of England spoke as much French as English,<sup>(9)</sup> while the Italian language was a hodgepodge of Latin-derived tongues varying from city-state to city-state.<sup>(10)</sup> Geoffrey Chaucer's *Canterbury Tales* (1387) and Giovanni Boccaccio's *Decameron* (1349-51), larded with the sexy and the scatological, passed in manuscript from hand to hand and read aloud to a largely illiterate populace, helped create national languages in both countries.<sup>(11)</sup> By writing long and popular works in London English and in Florentine, Chaucer and Boccaccio transformed local vernaculars into national speech. Pornography helped.

The printing press appeared a half-century after Chaucer's death in 1400 and soon spread throughout Europe. Early printing, though voluminous, was largely devoted to the Bible, to other theological, legal, and scientific works, to texts for scholars like the Greek and Latin classics, to popular sheet music, and to local religious and political broadsides.<sup>(12)</sup> Martin Luther's ninety-five theses, for instance, nailed to the church door in Wittenberg on October 31, 1517, leafleted Germany in two weeks and Europe in two months, thanks to the printing press.<sup>(13)</sup>

But two less noble works did more to popularize print and bring literacy to the masses than the scholarly works. These

were Pietro Aretino's *Postures* (1524)<sup>(14)</sup> and Francois Rabelais' *Gargantua and Pantagruel* (1530-40).<sup>(15)</sup> Of the two, the *Postures* was the more pornographic in the strict sense, a series of engravings of sexual positions, each with a ribald sonnet. Rabelais' work, on the other hand, instantly entered the canon, where it has remained ever since. His tales of the two courtly giants, Gargantua and his son Pantagruel, the vinous monk Friar John and the reprobate scholar Panurge, are classics of satire and adventure, spoofing every vestige of the Middle Ages from feudal war to scholasticism to law to religion, with hearty doses of sex and scatology. Playful governesses introduce Gargantua to sex;<sup>(16)</sup> Gargantua's horse pisses an army away;<sup>(17)</sup> a woman scares the devil away by exposing her vagina;<sup>(18)</sup> Panurge scatters musk on a fine lady who scorned him, exciting the dogs of Paris to rapine and rut.<sup>(19)</sup> Both Aretino's and Rabelais' works were censored,<sup>(20)</sup> but since censure at the time made no distinction between political, religious, and social heresies,<sup>(21)</sup> one cannot be sure they were banned for smut. What is sure is that both were popular, Aretino remaining *the* underground porn classic for centuries,<sup>(22)</sup> Rabelais traveling a somewhat higher road. Rabelais' boast in *Gargantua and Pantagruel* that "more copies of it have been sold by the printers in two months than there will be of the Bible in nine years"<sup>(23)</sup> was first, probably true, and second, prescient advice to new media: sex sells.

Three hundred years after Rabelais, photography became a new medium for porn to exploit. Begun as a staid art, requiring long exposures and great stillness, including a headclamp to immobilize the seated subject,<sup>(24)</sup> photography first lent itself to portraits and landscapes.<sup>(25)</sup> It was not long, however, before the Civil War taught photography two new uses. The first and more famous was the battlefield photography of Mathew Brady.<sup>(26)</sup> The second, the more infamous, was pornography.<sup>(27)</sup> Soldiers demanded more than letters from home, they demanded erotica. So great was the traffic to the front, not only of dirty books, but soon of erotic daguerreotypes and photographs, that Congress passed the first U.S. law proscribing obscenity via the mails.<sup>(28)</sup> Congress, as usual, was late. By the time the bill passed, it was 1865, the war was over, and the boys were home with their pictures in their pockets.

Before the electronic era, the greatest example of pornography showing technology the way was the paperback book. Though paperbacks were in use as early as the French Revolution and continued to circulate throughout the nineteenth century as an alternative to hardback publishing,<sup>(29)</sup> these early paperbacks were more an expansion of pamphleteering than a medium in their own right. The later part of the nineteenth century saw the growth of the "dime" novel, a brassy subculture to the mainstream three-volume hardcover that monopolized legitimate fiction. Printed on cheap paper, and hence called "pulp" fiction, early paperbacks included westerns, mysteries, tall tales, foreign-language stories for the growing immigrant market, and, of course, pornography. Increased literacy kept paperbacks thriving, though somewhat scorned, until World War II. Then, suddenly, the paperback's cheapness became its strength: wartime shortages demanded that books be printed cheaply; books shipped wholesale to readers overseas had to be lightweight.<sup>(30)</sup> Paperbacks filled both bills. A government-financed publishing project, the Armed Services Editions, adopted "pulp" technology wholesale,<sup>(31)</sup> and, after the war, the paperback became the legitimate heir to publishing's crown. Here, then, is a true example of pornography actually developing a new technology that, first, the government (no less) and then the legitimate market adopted whole.<sup>(32)</sup>

By the mid-1980s a new communications revolution was in full swing,<sup>(33)</sup> of which the Telecommunications Act of 1996<sup>(34)</sup> is late acknowledgment. The key term in this revolution is convergence. Telephone, television, computer, and recording technologies are converging upon one another and commingling in so many ways that it will soon be nonsense to speak of media as if they were distinct. More television arrives by wire than by air; more phone calls come through air than through wire; phone lines and computers converge to create cyberspace. Nonetheless, at the edges of the growing web of networks, some strings still dangle that identify the sources of all this convergence. Tug one and up pops porn.

Cable TV started simply, as an antenna attached to a cable that would retransmit broadcast signals to remote areas. The cable revolution began by creating programming specifically for cable and charging money for it. First came individual channels like HBO and Showtime,<sup>(35)</sup> then entire cable networks. One of the first uses of pay-cable was pornography: people would pay to watch X- and R-rated films at home.<sup>(36)</sup> When cable systems began competing to wireup entire communities, one of the things communities demanded was leased- or public-access channels, to keep the cable

operator from entirely dominating local programming.<sup>(37)</sup> What they wanted was worthy alternative programming produced by local civic and educational groups. What they got was porn. *Midnight Blue*, produced by *Screw* magazine, is one of leased access' longest running shows.<sup>(38)</sup> So are the offerings of ecdysiast Robin Byrd and Lou Maletta of the Gay Cable Network.<sup>(39)</sup>

Videotape first emerged as a cheap and efficient alternative to film (later kinescope) for TV production. Its development for home use owes its birth to Sony and Betamax but its maturity to porn. Predicting that the greatest use of home VCRs would be time-shifting, that is, recording TV shows off the air for later viewing, Sony designed Betamax tape with a one hour playing time.<sup>(40)</sup> When the market for videotape proved not to be time shifting, but prerecorded movies instead, longer-playing tape was demanded, and VHS arose to meet the demand. Though Beta eventually went to a four hour format, it was too late. Within years, two-, four-, and six-hour VHS tape became the industry standard.<sup>(41)</sup>

What were people watching on these early videotapes? The early home video rental stores, the outlets that drove Betamax from the market, were almost exclusively pornographic, drawing on the same clientele as early nickelodeons.<sup>(42)</sup> The same was true of home video sales.<sup>(43)</sup> It was not until the mid-1980s that first, local videorental stores, and next, national chains like Blockbuster entered the field with videos for the mass shown the way. Thus, the victory of VHS over Betamax, and the triumph of video rental and purchase over time-shifting, is a rare example of pornography specifically adopting a product and a method of retailing that drove its competitor from the market.

Other participants in the communications revolution that have been helped by pornography include "900" phone numbers,<sup>(44)</sup> CD-ROMs, and laser discs.<sup>(45)</sup> In fact, the French Minitel, which many see as the prototype of the computer-mediated telephone system, owes whatever success it has attained largely to its use for exchanging sexual messages.<sup>(46)</sup>

Some commentators suggest that porn gravitates to new media because new media are more free from restraint than existing ones, whose content authorities have learned to regulate.<sup>(47)</sup> Though this may be partly true, it does not explain the exuberance with which porn revels in new media. Print, after all, is cheap to produce and free of regulation; if all porn sought were freedom from restraint, it would stick to books and pictures. Clearly, something bigger is at work. Porn, like its subject matter, is always eager to experiment. It is also free from ideological and sociological baggage. Its design is, simply, to get to market as quickly and easily as possible. When new media offer new markets, porn spies them quickly and rushes to fill them, like an amoeba extruding a new pseudopod where its skin is thinnest.

## II. THE VALUE OF PORNOGRAPHY

Pornography has several values beyond serving as a test-driver for new media. As suggested above in the Betamax-VHS battle, porn, with little cash to spare and its nose to the ground, is often first to sniff out the practical uses of new media, leading the way for profitable investment by the mainstream.

Furthermore, porn draws curiosity seekers, who stay to see what else the new media can do. There is a convenient dovetailing in the audience for computers and pornography: young, white males dominate both markets. Gadget-playing, girl-crazy young men will stay longer at a terminal that supplies both girls and gadgets.<sup>(48)</sup> Finally, several studies have suggested that, far from creating sexist, violent feelings in young men, pornography has a calming, cathartic effect, easing adolescent cares with a dose of mild erotica.<sup>(49)</sup>

Other values of pornography have been suggested. For one thing, the very fear that pornography arouses in parents may redound to society's advantage. In order to keep indecent messages from reaching their computer-literate children, parents themselves must become computer-literate and learn to use blocking and screening devices. If Congress is allowed to assume the parental role, parents will have less incentive to learn what their children already know.<sup>(50)</sup> Furthermore, far from fearing what computer sex may be teaching, parents can use the computer as an opportunity to

discuss sex in a meaningful way with their children.<sup>(51)</sup>

Finally, sex on the computer is far better for children than another kind of sex that is drawing Congressional fire, that is, sex on television.<sup>(52)</sup> While sex and violence on television shoulder the blame for sex and violence in society, several studies have suggested that something else about television is the real culprit. That is, the passive, solitary nature of television-watching is an anti-social activity, which steals children's time away from more active, engaging kinds of play. Thus, when children erupt in violence after watching television, it is not because they have been watching too much sex or violence but because they have been watching too much television.<sup>(53)</sup> Computers, by contrast, are interactive and socializing, feeding the very skills that TV starves. Therefore, anything, including the risqué, that entices children from the TV to the computer is a good thing.<sup>(54)</sup>

### III.HOW MUCH COMPUTER PORN IS THERE?

For awhile it looked as if a 1994-95 Carnegie-Mellon study would answer this question.<sup>(55)</sup> The CMU study purported to record eighteen months of Internet users' viewing of computer porn. Among the study's findings were that 83.5 percent of the images stored on the Usenet newsgroups are pornographic, that a third of the newsgroups most visited by college students are sexually explicit, that the five largest adult bulletin-board systems have revenues over one million dollars per year, that their customers are nation- and world-wide, that pornography is readily available to minors, and that the predominant images on computer nets are pedophilic, hebephilic, and paraphilic, including bondage, sadomasochism, urination, defecation, and bestiality.

So long awaited and explosive was the CMU study that it was featured on the cover of *Time* and read whole into the Congressional Record.<sup>(56)</sup> Unfortunately, much of it proved untrue. Within a week of the study's publication, the Internet, the very medium purportedly studied, breathed a fire-storm of flame messages, discrediting both the study and its author Marty Rimm. Among the problems with the study were that it conflated findings from adults-only bulletin boards, which require credit cards and proof of age, with those from public networks, which do not; that it failed to report that pornography represents only one-half of one percent of Internet images; and that it counted, not actual downloadings, but only opportunities to download. The problems with Rimm himself went deeper: he was only an undergraduate at Carnegie-Mellon; his own university calls his project improperly supervised; as a high school student he authored a study inflating the incidence of gambling among New Jersey teenagers; and members of his Carnegie-Mellon research team have disclaimed involvement.<sup>(57)</sup> Confronted with the controversy, the Senate disinvited Rimm, their star witness, from its summer 1995 hearings on the Communications Decency Act.<sup>(58)</sup>

Therefore it is impossible to answer the question, "How much computer porn is there?" The answer seems to be: less than the CMU study indicates, but enough to unnerve Congress. The two leading compendia of computer porn<sup>(59)</sup> list a generous double handful of adult bulletin boards, all of which offer materials similar to what is available in print and many of which simply scan pictures from available books and magazines.<sup>(60)</sup> The CMU study confirmed, not the amount of computer porn, but the amount of public nervousness about it. Its value lies in pointing out how susceptible a skittish public is to bogus statistics and how welcome a thorough, unbiased study would be. Unfortunately, the CMU study is so discredited that even if it contains some accuracy, nobody can separate it from the chaff.

### CONCLUSION

Since, therefore, nobody has proven either the extent or the harm of cyberporn, the safest choice is to leave it alone. The Telecommunications Act of 1996 and the Communications Decency Act, in particular, represent an attack on cyberporn which, constitutional or not, will have a chilling effect on some of the new medium's most adventurous pioneers. One of the advantages of reading the history of pornography is to show how instrumental it has been in flexing the muscles of new media, from vernacular speech to print to photography to videotape. Far from viewing cyberpornographers as pariahs, society would do well to view them as mountain men and women in the mold of Jedediah Smith, who discovered and opened the passes of the Rockies for entire families to follow west. These early rogues were scruffy and smelly, perhaps not fit for polite society, but they did good service. Though uncivilized, they showed the roads for civilization to follow. We need not let the cyber-pioneers into every home, but society will

benefit hugely by letting them roam free.

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2. 1. Communications Decency Act of 1996, Pub. L. No. 104-104, secs. 501-561, 110 Stat. 133 (to be codified in scattered sections of 47 U.S.C).

3. 2. *Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

4. 3. *Id.* at 852-853.

5. 4. Camille Paglia, *Sexual Personae* 24-25 (1990).

6. 5. Carlin Meyer, *Reclaiming Sex from the Pornographers*, 83 *Geo. L.J.* 1969, 1970 (1995).

7. 6. Neither the Supreme Court nor I have attempted a definition of pornography. *But cf.* 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 *Georgetown L.J.* 1849, 1849 n.1 (1995) [hereinafter CMU study] (defines hard-core pornography as depictions of sexual acts and soft-core pornography as depictions of nudity). Others define pornography as depictions intended solely to arouse sexual feelings. *See, e.g.*, Nadine Strossen, *Defending Pornography* 17 (1995). The trouble with a definition that involves intention is that it commits the "intentional fallacy," attributing to a work an intention that may not have been in the author's head. W.K. Wimsatt, Jr., and Monroe C. Beardsley, *The Intentional Fallacy*, 54 *Sewanee Rev.* 468-88 (1946). In this Essay I use the word pornography in a loose and commonsensical way, that is, depictions or descriptions of 1) unclothed or scantily-clad people, or 2) sex or excretion, or 3) both.

8. 7. *See Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

9. 8. Donald R. Howard, *Chaucer and the Medieval World* 21-24 (1987).

10. 9. *Italian Language*, in 12 *Encyclopedia Britannica* 712 (1966).

11. 10. M.H. Abrams et al., 1 *The Norton Anthology of English Literature* 97 (1974); Howard, *supra* note 8, at 183.

12. 11. *See generally* Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change* (1979) (*especially* Ch. 6, *Technical Literature Goes to Press*, at 520-74).

13. 12. Walter Kendrick, *The Secret Museum, Pornography in Modern Culture* 96 (1987).

14. 13. *Id.* at 59.

15. 14. *Id.* at 63.

16. 15. Francois Rabelais, *Gargantua and Pantagruel* 63 (J.M. Cohen, trans., Penguin Books 1979).

17. 16. *Id.* at 117.

18. 17. *Id.* at 549.

19. 18. *Id.* at 244.

20. 19. *Id.* at 28-29; Kendrick, *supra* note 12, at 59; Paula Findlen, *Humanism, Politics and Pornography in Renaissance Italy*, in Lynn Hunt, *The Invention of Pornography* 55 (1993).

21. 20. Kendrick, *supra* note 12, at 97.
22. 21. *Id.* at 62.
23. 22. Rabelais, *supra* note 15, at 168.
24. 23. Roy Meredith, Mr. Lincoln's Camera Man: Mathew B. Brady 24 (1974).
25. 24. Ronald P. Lovell et al., Two Centuries of Shadow Catchers: A History of Photography 21 (1996).
26. 25. Meredith, *supra* note 23.
27. 26. Lovell et al., *supra* note 24, at 23.
28. 27. Edward de Grazia, Girls Lean Back Everywhere 4 (1992); David G. Loth, The Erotic in Literature 143 (1961).
29. 28. John William Tebbel, Between Covers: The Rise and Transformation of Book Publishing in America 7 (1987).
30. 29. Thomas L. Bonn, Under Cover: An Illustrated History of American Mass-Market Paperbacks 47-48 (1982) ("Never before had so many books at such a low price found such a large number of avid readers.").
31. 30. *Id.*
32. 31. Tebbel, *supra* note 28, at 161-63, 340; Bonn, *supra* note 29, at 28-30.
33. 32. *See, e.g.*, Susan Faludi, *The Money Shot*, The New Yorker, Oct. 30, 1995, at 64.
34. 33. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).
35. 34. *See* HBO v. FCC, 567 F.2d 9 (1977).
36. 35. The author participated, both as a writer and performer, in one of the early sell-a-thons for HBO (1979). Both implicit and explicit in the advertising skits we developed was the thrill of seeing uncut, explicit films at home.
37. 36. The legislative and constitutional history of leased- and public-access cable stations is traced in *Alliance for Community Media v. FCC*, 56 F.3d 105, 110-112 (1995), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecoms. Consortium v. FCC, 116 S. Ct. 2374 (1996).
38. 37. Linda Greenhouse, *Justices to Rule on Limiting Cable TV's Sexually Explicit Programs*, N.Y. Times, Nov. 14, 1995, at A20.
39. 38. *The Information Revolution* (WNYE-TV (New York City) television broadcast, Mar. 1, 1996) (interview of Robin Byrd and Lou Maletta by James P. Goodale).
40. 39. Janet Wasko, Hollywood in the Information Age 121 (1994).
41. 40. *Id.*
42. 41. *Id.* at 170.
43. 42. James Lardner, Fast Forward: Hollywood, the Japanese and the Onslaught of the VCR 184 (1987).
44. 43. *See, e.g.*, Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
45. 44. Anne Welles Branscomb, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the*

*Information Superhighway Reveal a Threat to the Stability of Society?*, 83 Geo. L.J. 1935, 1936 (1995).

46. 45. John Markoff, *The Latest Technology Fuels the Oldest of Drives*, N.Y. Times, Mar. 22, 1992, at D5.

47. 46. *See, e.g.*, Branscomb, *supra* note 44, at 1937.

48. 47. *Id.* at 1941.

49. 48. Matthew L. Spitzer, *Seven Dirty Words and Six Other Stories* 96 (1986); Society benefits from pornography in unexpected ways. The author remembers the Boy Scout paper drives of his youth, where the enthusiastic turnout was largely due to the chance of recycling our neighbors' old copies of *Gent* and *Swank*.

50. 49. Meyer, *supra* note 5, at 1969.

51. 50. *Id.*

52. 51. *Id.*

53. 52. *See, e.g.*, Tannis MacBeth Williams, *The Impact of Television: A Natural Experiment Involving Three Towns* (1986) (finding increase in violence when TV introduced to a community); B. Centrewall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA 3059 (June 10, 1992) (finding a parallel increase in homicide rates in three countries following the introduction of television).

54. 53. Meyer, *supra* note 5, at 2000 (citing *Only Three More Loves . . . : The Effect of Video Game Playing on Children*, *exe*, Dec. 1993 at 48).

55. 54. CMU Study, *supra* note 6.

56. 55. Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, *Time*, July 3, 1995, at 38.

57. 56. Philip Elmer-DeWitt, *Fire Storm on the Computer Nets*, *Time*, July 24, 1995, at 57.

58. 57. Mike Godwin, *Witness Against Net Prosecution*, *Internet World*, Dec. 1995, at 102.

59. 58. Billy Wildhack, *Erotic Connections* (1994); Philip Robinson & Nancy Tamosaitis, *The Joy of Cybersex* (1993).

60. 59. Elmer-DeWitt, *supra* note 55.