

## NOTES

### THE COMMUNICATIONS DECENCY ACT: PROTECTING CHILDREN FROM ON-LINE INDECENCY

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#### *Table of Contents*

|   |     |
|---|-----|
| I. INTRODUCTION .....   | 464 |
| II. HISTORICAL BACKGROUND .....                                     | 466 |
| A. The Internet: Growth and Characteristics.....                    | 467 |
| 1. Origin and Development.....                                      | 467 |
| 2. Features .....   | 469 |
| B. Pornography on the Internet.....                                 | 470 |
| 1. Availability .....   | 470 |
| 2. Images .....   | 471 |
| 3. Harms.....   | 473 |
| III. LEGISLATIVE HISTORY.....                                       | 475 |
| A. Passage of the CDA .....   | 475 |
| B. Proceedings in the Senate.....                                   | 477 |
| C. Proceedings in the House of Representatives.....                 | 481 |
| IV. ARE CURRENT REGULATIONS INEFFECTIVE? ....                       | 483 |
| V. FIRST AMENDMENT CONSIDERATIONS .....                             | 486 |
| A. Obscene Material and the Community Standard .                    | 486 |
| B. Least Restrictive Means in Regulating Indecent<br>Material ..... | 488 |
| C. Restrictions and the Nature of the Medium .....                  | 489 |
| D. Constitutionality and Protection of Children .....               | 490 |
| E. Challenges that the CDA is Unconstitutionally<br>Vague .....     | 491 |
| VI. ADDITIONAL PROBLEMS FACING THE CDA .....                        | 492 |
| A. Is the CDA Enforceable? .....                                    | 492 |

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|   |     |
|---|-----|
| B. Concern the CDA Will Hamper the Development of Technology and On-Line Services ..... | 493 |
| C. Is the CDA Specific to a Sufficient Degree? .....                                    | 495 |
| D. Alternatives.....  | 496 |
| E. Is Regulation Necessary? .....   | 499 |
| VII. CONCLUSION.....  | 501 |

Almighty God, Lord of all life, we praise You for the advancements in computerized communications that we enjoy in our time. Sadly, however, there are those who are littering this information superhighway with obscene, indecent, and destructive pornography. Virtual but virtuelessness reality is projected in the most twisted, sick, misuse of sexuality. Violent people with sexual pathology are able to stalk and harass the innocent . . .

Oh God, help us care for our children. Give us wisdom to create regulations that will protect the innocent . . . Lord, give us courage to balance our reverence for freedom of speech with responsibility for what is said and depicted.<sup>1</sup>

## I. Introduction

Twelve-year-old Steven was described by his mother as a computer nerd who spent hours at his computer playing on screen adventure games.<sup>2</sup> However, Steven's mother was shocked and dismayed to find that her son was also putting his computer to other uses; Steven was using his computer to retrieve hard-core pornography.<sup>3</sup> In response to the availability of pornography on computer networks<sup>4</sup> the federal government enacted the Communications Decency Act ("CDA").<sup>5</sup>

The CDA, as part of Section 502 of Title V of the Telecommunications Act of 1996,<sup>6</sup> seeks to prohibit the transmission of indecent and obscene materials to minors over computer networks.

<sup>1</sup> 141 CONG. REC. S8127 (daily ed. June 12, 1995) (statement of Senate Chaplain Dr. Lloyd Ogilvie).

<sup>2</sup> Susan Kuczka, *Kids, Computers and Porn; For Many, Adult Material Just a Keystroke Away*, CHI. TRIB., Aug. 6, 1993, at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; see *infra* note 4 and accompanying text discussing computer networks.

<sup>5</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133-145 (codified as amended at 47 U.S.C. § 223 (1934)). See *infra* note 72 for the pertinent text of the CDA.

<sup>6</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 151 et seq. (1934)).

This law resulted from the claims that pornography is too easily accessible in cyberspace.<sup>7</sup> However, the CDA has become a controversial topic centered on two hotly debated issues: the Internet<sup>8</sup> and pornography.<sup>9</sup> Supporters of the CDA argue that pornography has extremely harmful effects on children,<sup>10</sup> while opponents of the CDA are fearful of government control of the Internet and other computer networks.<sup>11</sup>

This note will discuss the arguments of both those who support and oppose the Communications Decency Act as it attempts to regulate computer networks. Section II.A will provide background information on the Internet, including its origin and features.<sup>12</sup> Section II.B will analyze the availability of pornography and

<sup>7</sup> See *infra* notes 44-46 and accompanying text discussing access of pornography via the Internet and note 36 for a definition of "cyberspace."

<sup>8</sup> ELIZABETH LANE LAWLEY & CRAIG SUMMERHILL, *INTERNET PRIMER* 1 (1993). When the word "Internet" is used with a capital "I", it references a world-wide communications system. *Id.* This system is currently existing and links computers operated by private corporations, the United States' government, universities, libraries, and researchers to name only a few. *Id.* Another term used to describe a series of connected computers is "inter-network[ed]." *Id.*

<sup>9</sup> PORNOGRAPHY AND SEXUAL VIOLENCE; EVIDENCE OF THE LINKS 2 (1988). The definitions of pornography vary, but Catherine MacKinnon defines pornography as follows:

[T]he graphic, sexually explicit subordination of women through pictures or words, that also includes women dehumanized as sexual objects, things or commodities, enjoying pain or humiliation or rape, being tied up, cut up, mutilated, bruised or physically hurt, in postures of sexual submission or servility or display, reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

Erotica, defined by distinction as not this, might be sexually explicit materials premised on equality. We also propose that the use of men, children or transsexuals in the place of women is pornography.

*Id.* at 2 (citing Pornography, Civil Rights, and Speech, Francis Biddle Memorial Lecture, Harvard Law School (Apr. 5, 1984)). A more simplified definition of pornography was employed by Marty Rimm when studying pornography on the Information Superhighway: "'pornography' is defined here to include the depiction of actual sexual contact [[ ]hardcore] and depiction of mere nudity or lascivious exhibition [[ ]soft-core]." 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, 1849-50 n.1 (1995).

<sup>10</sup> See *infra* note 52 and accompanying text discussing the harms to children.

<sup>11</sup> See *infra* notes 124, 181-182 and accompanying text for comments on the possible effects of regulation of the Internet.

<sup>12</sup> See *infra* part II.A.

its harms.<sup>13</sup> In Section III, this note will then discuss the Senate and House debates regarding the CDA<sup>14</sup> and also examine why many view current regulations as ineffective in dealing with pornography in Section IV.<sup>15</sup> The next section examines the United States Supreme Court's analysis of First Amendment issues as they may relate to the CDA.<sup>16</sup> This note will also examine specific criticisms of the CDA, including whether it is enforceable,<sup>17</sup> whether the CDA will hamper the development of technology,<sup>18</sup> and whether the use of alternative measures to manage with pornography on computer networks would provide a more effective means of control.<sup>19</sup> The last section will examine the claim that regulation of pornography in this arena is not necessary.<sup>20</sup>

## II. Historical Background

The presence of pornography in cyberspace,<sup>21</sup> otherwise known as the information superhighway<sup>22</sup> represents a convergence of the old and the new mediums.<sup>23</sup> This is primarily because cyberspace has experienced only recent growth<sup>24</sup> when compared to pornography.<sup>25</sup>

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<sup>13</sup> See *infra* part II.B.

<sup>14</sup> See *infra* part III.

<sup>15</sup> See *infra* part IV.

<sup>16</sup> See *infra* part V.

<sup>17</sup> See *infra* part VI.A.

<sup>18</sup> See *infra* part VI.B.

<sup>19</sup> See *infra* part VI.D.

<sup>20</sup> See *infra* part VI.E.

<sup>21</sup> See *infra* note 3 defining cyberspace.

<sup>22</sup> Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062 n.3 (hereinafter *The Message in the Medium*) (citing Al Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, WASH. POST, July 15, 1990, at B3). The term "information superhighway" is a term coined by then Senator Al Gore. *Id.*

<sup>23</sup> I. Trotter Hardy, *The Proper Legal Regime for Cyberspace*, U. PITT. L. REV. 993, 996-98 (1994) (proposing that perhaps no legal questions are new as opposed to the view that cyberspace may warrant legal resolutions tailored to new mediums).

<sup>24</sup> William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 197 (1995). Approximately fifteen years ago the personal computer did not yet enjoy any significant prominence, whereas today computers have changed the everyday existence for many. *Id.* As recently as 1990, the Internet has become available to individuals outside of governmental, educational, or research areas. *Id.* at 197 n.2.

<sup>25</sup> See H. Montgomery Hyde, *A History of Pornography* 30, 40-45 (1964) (describing the many references in the Old Testament to the subject of pornography as well as the prevalence of pornography in ancient Greece).

### A. *The Internet: Growth and Characteristics*

The Internet, commonly referred to as "the world's largest computer network,"<sup>26</sup> is one of the largest areas in cyberspace.<sup>27</sup> This system is not merely a single network, but instead is a conglomeration of smaller networks that inter-operate.<sup>28</sup>

#### 1. Origin and Development

The Internet began as a military project in 1969.<sup>29</sup> Although the military created network eventually disbanded, it allowed for the development of significant knowledge pertaining to computer

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<sup>26</sup> JOHN R. LEVINE & CAROL BAROUDI, *THE INTERNET FOR DUMMIES* 9 (1993). A computer network can be simply defined as a number of computers that are interconnected. *Id.* An analogy can be made to television networks which utilize broadcast networking. *Id.* However, the analogy ends when considering that television networks broadcast messages at the same time, whereas computer networks relay a message to a particular computer and also allow for two way communication. *Id.* While some computer networks allow only certain users the access to a central computer, the Internet allows anyone on the network to communicate with any other user. *Id.* In addition, the Internet is the world's largest computer network, as it is claimed to have millions of users on every continent. *Id.* at 8, 10.

<sup>27</sup> Byassee, *supra* note 24, at 200. The Internet has no central location for information, nor does it possess a central governing authority, but it simply operates by informal agreement among users whose linkage by telephone connections forms the "backbone" of the Internet. *Id.* at 200-01. Secondary users are then allowed to access the so called "backbone." *Id.* at 201.

<sup>28</sup> LAWLEY & SUMMERHILL, *supra* note 8, at 1. These smaller networks exchange information between the computers, sometimes referred to as hosts, on the individual network. *Id.* Many of the networks can be classified as separate entities in the political and technical sense. *Id.* However, most computers on the Internet are able to communicate through a shared set of telecommunications protocols. *Id.* The current technical scheme being used is the Internet Protocol (IP) which allows computers to exchange messages. LEVINE & BAROUDI, *supra* note 26, at 12. A technical scheme, known as Transmission Control Protocol (TCP), may also be used. LAWLEY & SUMMERHILL, *supra* note 8, at 1. When computers utilize these protocols to communicate with one another they are "inter-networking." *Id.* By utilizing the common communication scheme, a "seamless inter-operability" results which allows users to interact with each other. *Id.*

<sup>29</sup> LEVINE & BAROUDI, *supra* note 26, at 11. The development of the Internet began with the United States' Department of Defense network called the Advanced Research Projects Agency Network [hereinafter ARPAnet]. *Id.* The ARPAnet was an experimental network that attempted to link together military contractors such as universities and other researchers participating in military-funded projects. *Id.* One goal of ARPAnet was to develop a network that could survive partial outages, yet still continue to function. ED KROL, *THE WHOLE INTERNET: USER'S GUIDE & CATALOG* 13 (1994). Inherent in this goal as to ensure that individual computers, rather than the network itself, would establish communication. *Id.*

networking.<sup>30</sup> Next, the National Science Foundation ("NSF") began a program to develop supercomputers for research that would link research centers together throughout the United States.<sup>31</sup> Today there are many networks that may or may not be connected to the Internet.<sup>32</sup> Through the use of site addresses,<sup>33</sup> the Internet allows individuals to communicate with site addresses outside of the United States.<sup>34</sup>

The Internet is becoming a popular medium as computers will experience enormous growth as they become the mode through which society will interact.<sup>35</sup> This interaction will occur in

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<sup>30</sup> LAWLEY & SUMMERHILL, *supra* note 8, at 2. The Internet, as it is known today, and other forms of computer networking are based on the research done by ARPAnet. *Id.*

<sup>31</sup> *Id.* at 8. The National Science Foundation created the network named NSFnet and arranged for the connection of many regional networks. *Id.* at 2. Beginning in 1987, this network was re-engineered and expanded under the management of Merit Networking. *Id.* at 3. During this time, NSI entered into a partnership with IBM and MCI to further develop the NSFnet. *Id.* With the network playing a role in a national research network, the NSFnet began to emerge into what is known as today. *Id.*

Originally, the NSF sought to develop a scheme of three national networks, intermediate networks and local networks. *See id.* at 3. However, it has developed into a complex interrelation of networks. *Id.* at 3.

<sup>32</sup> *Id.* at 6. Many networks have emerged as some are connected to the current Internet, while others, which are not directly connected, possess "gateways" which provide them the ability to send and receive electronic mail from other Internet addresses. *Id.* The networks making up the Internet include the Defense Data Network, the Energy Sciences Network, and the NSFnet, which connects the mid-level networks. *Id.* at 6-8.

<sup>33</sup> LEVINE & BAROUDI, *supra* note 26, at 14. These networks are connected to networks in the U.S. *Id.*

<sup>34</sup> *Id.* at 19, 21. Each computer on the net is assigned a number for identification, i.e. 123.45.67.89, or microsoft.com. *Id.* at 17. For a detailed discussion on how the Internet operates, *see* KROL, *supra* note 29, at ch. 3.

The Internet is easily accessible by use of a relatively easy as only a computer, modem, phone line and communications. George P. Long III, Comment, *Who are you?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1180 (1994). Most universities, governmental agencies and many private corporations provide access to the Internet. *Id.*

<sup>35</sup> Byassee, *supra* note 24, at 198. The growth of the Internet is expected to be great. *Id.* at 198 n.4. When the Internet first became available to users in 1990 there were only one million users. *Id.* at n.2. However, the number of users since that time has "grown exponentially." *Id.* By the end of the century, the Internet is expected to reach more than 500 million users. *Id.* (citing Thomas F. Mandel, *Surfing the Wild Internet*, SCAN, *Business Intelligence Program*, SRI International, Menlo Park, No. 2109, Mar. 1993).

It is also predicted that the current methods of communication will converge so that all information is received from the outside world via fiber optic devices. *Id.* at 198 n.4 (citing Note, *The Message in the Medium: The First Amendment on the Information*

the community known as cyberspace.<sup>36</sup>

## 2. Features

The Internet offers a variety of different services, described as different "communities," which allow users to communicate with one another.<sup>37</sup> Examples of these services include on-line services,<sup>38</sup> electronic mail ("e-mail"),<sup>39</sup> bulletin board services ("BBS"),<sup>40</sup> and the World Wide Web ("WWW").<sup>41</sup> Again, similar

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*Superhighway*, 107 HARV. L. REV. 1062, 1062 (1994)). The growth of the Internet and an increase in computer use will occur because computers have the ability to greatly reduce time and distance constraints. *Id.* at 198. This growth is exemplified by the fact that in 1994 thirty million messages were exchanged every day on the internet. Mike Toner, *Surfing on the Internet*, ATLANTA J. & CONST., July 24, 1994, at F1.

<sup>36</sup> Byassee, *supra* note 24, at 198. Cyberspace is the coined term for the non-physical universe in which users are able to communicate. *Id.* Science fiction author William Gibson created the term "cyberspace" in the early 1980's. EDWARD CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 1* (1994). Gibson created cyberspace as a computer generated space where people would enter a network that allowed the user to assume they were in a certain place, but was a place without physical reality. *Id.* As more and more people came to be connected on line, "cyberspace" was used to describe the world occupied by the users of interconnected computers. *Id.*

Furthermore, the evolution of cyberspace has paralleled and allowed the evolution of virtual communities. Byassee, *supra* note 25, at 198 n.5. As a result of communicating on the Internet, social groups have emerged where people can forge relationships. *See id.* at 198 n.6. However, strains on legal principles have resulted because the new relationships differ from normal relationships in the physical world. *Id.* at 199 (discussing how cyberspace creates problems with applying current law to such communities, thus legislation should be enacted to accommodate these differences rather than using judicial application of current laws which would distort existing statutes).

<sup>37</sup> Byassee, *supra* note 24, at 200.

<sup>38</sup> *Id.* Subscribers to the on-line services are able to engage in "conversations." *Id.* at 200 n.12. Most of the national services have specific interest groups that discuss particular topics. *Id.* On-line services, the largest of which include America On-line, Prodigy, and Compuserve, derive some of their popularity from allowing users to provide opinions, answer questions, and offer general support to other users. *Id.*

<sup>39</sup> LEVINE & BAROUDI, *supra* note 26, at 11. E-mail is considered the most widely used service. *Id.* E-mail is one of the most private forms of communication for two reasons: first, e-mail can be secured by a password; second, the messages can be sent directly to another person, rather than allowing all users in the network to have access. John C. Scheller, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 994, (1994) (citing Reuven M. Lerner, *Protecting E-Mail*, TECH. REVIEW, Aug.-Sep. 1992, at 11).

<sup>40</sup> Byassee, *supra* note 24, at 200 n.13. A BBS is a system whereby a computer retrieves messages from other computers and in turn, allows other users to receive these messages. Scheller, *supra* note 41, at 992 (citing JONATHAN D. WALLACE & REES W. MORRISON, *SYSLAW: THE SYSOP'S LEGAL MANUAL 9-19* (1988)). Each BBS is run by a

services can be offered outside of the Internet in other cyberspace entities.<sup>42</sup>

## B. *Pornography on the Internet*

### 1. Availability

It is claimed by many that pornography<sup>43</sup> is rampant on the Internet and in cyberspace.<sup>44</sup> Pornography in cyberspace has increased at a rapid pace due to its unique medium and also the corresponding changes within society.<sup>45</sup> Technology has devel-

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person known as the "sysop" or system operator. Byassee, *supra* note 25, at 993. Bulletin boards can operate within the Internet or apart from it: an example of a service that works within the Internet is USEnet. *Id.* at 201. This system has been described as a computer conferencing system that allows for messages from over 2000 topic groups to be sent via telephone lines. LEVINE & BAROUDI, *supra* note 28, at 11. Topics on the Usenet's newsgroups can include "comp.os.ms-windows.announce," concerning Microsoft Windows' operating systems, to such newsgroups as "alt.binaries.pictures.erotica," which sometimes contain explicitly pornographic pictures that may be received then converted into graphics. Byassee, *supra* note 24, at 201 n.16. While access to Usenet files may be available at no charge, BBS operators charge a subscription fee. Rimm, *supra* note 9, at 1864.

<sup>41</sup> Byassee, *supra* note 24, at 202 n.22. The WWW is described as the Internet's most widely used information tool. *Id.* Its software shows users where documents are located and enables them to obtain graphics in addition to textual material. *Id.*; see also *Click, Click, and Suddenly You're in Pornland*, 27 NAT'L J. 1339 (1995) [hereinafter *Click, Click*].

<sup>42</sup> See KROL, *supra* note 29, at ch. 13.

<sup>43</sup> See PORNOGRAPHY AND SEXUAL VIOLENCE, *supra* note 9 providing Catherine MacKinnon's definition of pornography.

<sup>44</sup> Rimm, *supra* note 9, at 1914. Computer networks are being utilized worldwide by both the pornographers and their customers. *Id.* This is evidenced by reports that pornography is said to be widely available through networks such as Usenet, WWW and BBS as reported in the Carnegie Mellon Study by Marty Rimm entitled *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*, *SUPRA* note 9. According to this study, 71 percent of the pornography in cyberspace comes from Usenet newsgroups, and 83.5 of graphics posted on the Usenet are pornographic. *Id.* at 1914. There is a wide variety of sexually explicit material available on-line. David Hochman, *Getting Off On-Line; Hot Stops on the Information Superhighway*, MEN'S J., Mar. 1996, at 103. For example, many sites dealing with sex can be found simply by scanning the directories on the World Wide Web. *Id.* Also, approximately 8,238 new files daily can be found daily in the alt.sex newsgroup. *Id.* at 104.

<sup>45</sup> Rimm, *supra* note 9, at 1852. The changes within society include the growth of disease as well as the increase in use of computers. *Id.* Both the growth of marketing and access of pornography on computer networks can be explained by four factors. *Id.* First, the computer user is afforded greater privacy when accessing pornography on a home computer as compared to visiting an adult oriented store. *Id.* Second,



oped in recent years which allows vividly realistic images to reach a computer screen and be downloaded.<sup>46</sup> The forms of pornography available in cyberspace include digitized images<sup>47</sup> and animated sequences.<sup>48</sup> Although pornography is available in many forms and occupies a great percentage of total information available in cyberspace, it is still in its early stages.<sup>49</sup> While many groups claim that these images are easily accessed by children, intentionally or inadvertently, others argue that viewing deviant pornographic images is not easily obtainable.<sup>50</sup>

## 2. Images

The so called "problem" associated with pornography on computer networks stems from, first, its availability<sup>51</sup> as previously dis-

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users can not only access these images, but can also download the images for future use which can easily be hidden. *Id.* Third, in the age of AIDS as well as other sexually transmitted diseases, users look to accessing images as a form of "safe sex." *Id.* Lastly, rapidly expanding technology which enables more and more users to gain access to computers and cyberspace. *Id.*

<sup>46</sup> *Id.* at 1864. To download pornography, all that is needed is a modem, computer, and color monitor. *Id.* After accessing the appropriate network, such as an adult BBS, an image can be opened and viewed. *Id.*

<sup>47</sup> CAVAZOS & MORIN, *supra* note 36, at 90. Digitized images are the most popular form of pornographic images available in cyberspace. *Id.* at 90-91. These images are received and posted off of BBS or a Usenet group. The images are placed in a computer network by someone "painting" the image with a "paint program," or by scanning an image. *Id.* at 90. Digitized images are referred to through the file extensions of .gif or .jpg which indicate Graphics Interchange Format and Joint Photographic Experts Group, respectively. Rimm, *supra* note 9, at 1864. The images can then be seen provided the computer has the appropriate viewer software. *Id.*

<sup>48</sup> CAVAZOS & MORIN, *supra* note 36, at 91. Animated sequences include a series of images that give the illusion of movement. *Id.* These arrangements are represented by the file extensions .dl and .gl. *Id.*

<sup>49</sup> Rimm, *supra* note 9, at 1911. The burgeoning industry involved in marketing pornography in cyberspace is considered to be "in its infancy." *Id.*

<sup>50</sup> Click, *Click*, *supra* note 41, at 1339. Some argue that children do not have the technical ability to download pornography. *Id.* On-line activists claim viewing explicit pictures requires an understanding of formats and graphics software. *Id.* This includes the ability to find the pictures as well as the ability to subsequently download and decode the images. *Id.* However, this inability of children to access pornographic images is dispelled by minors themselves who claim to have accessed pornography. See *Children Exposed Southern California Voices/ A Forum Community Issues: Youth Opinion; On-Line Smut Laws: 'A Wrench in the Gears'*, L.A. TIMES, July 15, 1995, at B7 [hereinafter *Youth Opinion*] (where minors describe the ease of access and downloading pornographic files).

<sup>51</sup> See *supra* notes 44-50 and accompanying text discussing the availability of pornography on the Internet.

cussed and second, its supposed harmful effects.<sup>52</sup> In particular, a major concern among many Americans is that children are being exposed to pornography via computer networks.<sup>53</sup> It is reported that students can access pornographic stories, pictures, and video images.<sup>54</sup> A large percentage of the pornography originates from access to Bulletin Board Systems.<sup>55</sup> The problem is not simply that children are able to retrieve pornography, but the images themselves are retrievable.<sup>56</sup> It is contended that children are able to access pornographic images and vividly descriptive text.<sup>57</sup> More-

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<sup>52</sup> Stephen J. Gould, *The Production, Marketing, and Consumption of Sexually Explicit Material in Our Sexually Conflicted Society*, 11 J. OF PUB. POL'Y & MARKETING 135, 140 (1992). Research on the harms of pornography is conflicting. *Id.* One view argues that the harm attributed to pornography is that viewing pornography which depicts violence toward women will cause men to use violence against women. EDWARD DONNERSTEIN, ET AL., *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS* 105 (1987) (examining research that may or may not indicate there is a link between pornography depicting violence towards women and actual aggression towards women). It may be possible that prolonged exposure to sexually explicit and violent materials may lead individuals, especially young people, to be desensitized to violence. *Id.* at 136. As a result, individuals may have a reduced awareness of the harmful effects of violence upon victims. *Id.*

<sup>53</sup> *Youth Opinion*, *supra* note 50. Teenagers in California report that pornographic material, including pictures or stories taken from computer networks, is accessible to children. *Id.* One student, age 17, stated that "[a]ll you have to do is go into Usenet, the way of accessing news groups, and use a search string to look up alt.sex, and you will be confronted with a barrage of pornographic stories and images that you can download and then decode." *Id.*

<sup>54</sup> *Id.* Another teenager, a senior at Santa Monica High School, described that utilizing video capture technology and a camcorder allows video images to be sent through computer networks, known as "CUseeme." *Id.* Thus users are able to "put on shows for minors" by placing their cameras near their computers. *Id.*

<sup>55</sup> *Id.* A seventeen year old student from California reported that he had been accessing pornography for the past five years via bulletin boards. *Id.* He stated that in order to access the relevant files, a list containing most bulletin boards could be downloaded. *Id.* Then, after selecting the appropriate adult section, a minor only has to report that he or she is eighteen and is thereby given access to the files. *Id.*

<sup>56</sup> See 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon). Sen. Exon stated that the "fundamental purpose of the CDA is to provide much-needed protection for children." *Id.* Rimm's Carnegie Mellon study claims that the largest amount of sexual imagery was discovered on Usenet groups. Rimm, *supra* note 10, at 1866. The most popular files included: alt.binaries.pictures.erotica; alt.binaries.pictures.bestiality; and alt.binaries.pictures.tasteless. *Id.* Sexual imagery is available on over 45,000 bulletin boards and presents material that depicts nudity, bondage, and sadomasochism. *Id.* A portion of such materials are free to those who can access the proper network. Henry J. Reske, *Computer Porn a Prosecutorial Challenge*, 80 A.B.A. J. 40 (1994).

<sup>57</sup> See 141 CONG. REC. S9017 (daily ed. June 26, 1995) (statement of Sen. Grassley in support of S. 892 (citing *An Electronic Sink of Depravity*, SPECTATOR, Feb. 4, 1995

over, these images and descriptions may be more deviant than those contained in printed materials.<sup>58</sup>

### 3. Harms

The concerns with regard to pornography on computer networks involve those accessing the information and also those depicted in the images.<sup>59</sup> While the concern pertaining to children's access to pornography is a general consideration, access to child pornography has also drawn attention.<sup>60</sup> The access of child pornography is now widespread, especially on computer networks.<sup>61</sup>

The prevalence of child pornography has occurred despite the fact that the Supreme Court has ruled that the state has a compelling interest in regulating child pornography.<sup>62</sup> This interest stems from the harms that children may be subject to as a result of seeing other children portrayed in such pornographic images.<sup>63</sup> Also,

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(describing the sexually explicit text available in cyberspace, including the description of torture to a six-year old boy who is castrated and then shot)).

<sup>58</sup> Philip Elmer-DeWitt, ET AL., *On a Screen Near You: It's Popular, Pervasive and Surprisingly Perverse, According to the First Survey of On-line Erotica*, TIME, July 3, 1995, at 38. Due to the fact that hard-core pictures are available through other mediums, such as print, the Bulletin Board market seems to cater to those whom prefer images that can not be found on the non-computer marketplace. *Id.* Images available on a bulletin board, which may not be found in adult magazines, include extremely deviant sexual behavior. *Id.*

<sup>59</sup> See *infra* notes 63, 68-69 and accompanying text discussing the harms of pornography.

<sup>60</sup> See Scheller, *supra* note 39, at 996-1001. Child pornography is described as "material that depicts minors in sexually explicit ways." CAVAZOS & MORIN, *supra* note 36, at 99. While "pornography" is a generally understood term, the definition of "child" may vary. GORDON HAWKINS AND FRANKLIN ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY* 182 (1988). "Child" can be defined as (1) a sexually immature subject; (2) a preadolescent or adolescent, a social rather than biological definition; or (3) a person simply below the age of majority. *Id.*

<sup>61</sup> Scheller, *supra* note 39, at 1001. With the use of computers to traffic pornography, the distribution of the material has become even more of an underground activity. *Id.* Thus, it is difficult to attack pornography because of its hidden nature. *Id.* However, there is some question as to whether a large amount of child pornography is actually produced. HAWKINS & ZIMRING, *supra* note 60, at 182. Despite claims to the contrary, there is no real evidence to support assertions that the industry is as large as reported. *Id.* at 181. However, these opinions may have been made prior to the prevalence of computers.

<sup>62</sup> Scheller, *supra* note 39, at 998. A state has a compelling interest in regulating the pornography to protect children from. *New York v. Ferber*, 458 U.S. 747, 756 (1982). See *infra* notes 158-159 and accompanying text discussing *Ferber*.

<sup>63</sup> Scheller, *supra* note 39, at 1001. There is the fear that children are harmed not only by participating in pornography, but also because child pornography is used by

child abuse occurs when children participate in recording sexual activities.<sup>64</sup> Some claim that child abuse is not the result of viewing pornography because many of the images made were not produced using actual minors.<sup>65</sup> However, others argue that actual participants are not children, the harmful effects from child pornography still occur.<sup>66</sup>

The harm resulting from children viewing "regular" pornography is another area of concern.<sup>67</sup> Children, who are exposed to pornographic images of women, may come to believe that women are inferior and treat them as objects.<sup>68</sup> Also, conservative-religious groups fear that sexually explicit material hinders child development and affects the "moral climate" of society.<sup>69</sup> Other groups

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child-abusers to "lure children into sexual activity." *Id.* at 998 (citing ATT'Y GEN. COMM'N ON PORNOGRAPHY, FINAL REPORT at 411). By allowing children to view these images, the children can be persuaded to believe that the activity depicted is acceptable merely because children are involved in the activity. *Id.* at 1001. Furthermore, the computer "increases the destructive effects because pedophiles utilize this technology to transmit and receive child pornography anonymously." *Id.*

<sup>64</sup> *Id.* at 998. First, there is the obvious harm, in that children will be exposed to activities of which they are not aware. HAWKINS & ZIMRING, *supra* note 60, at 183. Secondly, children may not have the judgment required to remove themselves from the situation as they are emotionally and physiologically immature. *Id.*

<sup>65</sup> CAVAZOS & MORIN, *supra* note 36, at 99. In both pornography in print and online, the children depicted may not actually be minors. *Id.* For example, young adult actors may be used to portray children. HAWKINS & ZIMRING, *supra* note 60, at 184. Also, in terms of computer pornography, digital images of adults may be modified to give the appearance that children are involved in sexual acts even though the actual models are not children. CAVAZOS & MORIN, *supra* note 36, at 99. In addition, images of children engaged in non-pornographic activities can be altered to depict minors engaging in sexual conduct. *Id.*

<sup>66</sup> HAWKINS & ZIMRING, *supra* note 60, at 184. The depiction of children in sexually explicit ways may lead to increased popularity of child pornography and also cause damage to children themselves. *Id.* at 184-85. In general, the prevalence of such images may corrupt the moral climate of society. *Id.* at 189.

<sup>67</sup> See DONNERSTEIN, *supra* note 52, at 134-36 (describing studies which may or may not link the viewing of pornography with violence).

<sup>68</sup> Gould, *supra* note 52, at 139. Feminists and other groups believe that pornography not only degrades women, but reinforces their inferior social status. *Id.* Pornography in general is thought to treat women as objects and often depicts women as subjects of violence. *Id.* According to the feminist perspective, pornographic imagery, teaches it viewers it that women do not have the right to control their bodies. *Id.* (citing *Women Against Pornography Handout* (n.d.)).

<sup>69</sup> *Id.* at 139. Pornography disturbs the growth and well being of society as it does not depict the proper representation of sexuality. *Id.* Instead, it fails to properly depict the representation sexuality as connected to love. *Id.* Conservative groups contend that love is not selfish and results from mutual respect, whereas

[p]ornography distorts the goodness and beauty of human love and sexu-

would counter the position of conservative groups, noting the positive aspects to pornography.<sup>70</sup>

### III. Legislative History

#### A. Passage of the CDA

On February 8, 1996, President Clinton signed into law the Telecommunications Competition and Deregulation Act of 1996.<sup>71</sup> Title V of this legislation includes the Communications Decency Act of 1996 ("CDA").<sup>72</sup> The CDA forbids the knowing dissemina-

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ality and undermines those beliefs and views which are essential to the stability of any society. It threatens the innate dignity of every person and erodes the general moral fiber. . . . In short pornography perverts God's high purpose for human sexuality.

*Id.* (citing DAVID HOLBROOK, *THE CASE AGAINST PORNOGRAPHY* 6 (1972)).

<sup>70</sup> Gould, *supra* note 52, at 138. Liberal groups, divided by their views on pornography into naturalists and gnostics, do not expound on the horrors of pornography. *Id.* Instead, naturalists see sexuality as a natural function and believe that repressing such activities is unhealthy. *Id.* This group also notes the dangers in allowing the government to prohibit or regulate pornography and believes that the First Amendment supports pornography. *Id.* Gnostics view pornography as liberating and believe it allows the "unleashing of sexuality" which furthers self-development and knowledge. *Id.*

<sup>71</sup> Mike Mills & John Schwartz, *Judge Blocks On-Line Smut Law Enforcement; Order Sparks Confusion Over Definition*, WASH. POST, Feb. 16, 1996, at B1. The goals of this Act include accelerating the advancement of telecommunications and information technologies through deregulation, "opening all telecommunications markets to competition." 141 CONG. REC. S8570 (daily ed. June 16, 1995). This goal is to be achieved in part by allowing consumers to obtain affordable telecommunication services. *Id.* The Telecommunications Act of 1996 will promote competition in all areas of the communications including broadcast, cable, satellite, wireless, long distance, and local telephone service. 142 CONG. REC. S 687 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings). This Act, in part, modifies the Communications Act of 1934, 47 U.S.C. § 151-et seq. *Id.*

<sup>72</sup> 47 U.S.C. § 223(a)-(h). The relevant section of the CDA, contained in 47 U.S.C. § 223(a)(1)(b), includes the following provision:

(a) Whoever

(1) in interstate or foreign communications-

(A) by means of a telecommunications device knowingly-

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

(B) by means of a telecommunications device knowingly-

(i) makes, creates, or solicits, and

(ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is ob-

tion to children of material deemed to be obscene and indecent through telecommunication devices, including computer networks.<sup>73</sup>

The CDA is an amendment to 47 U.S.C. § 223,<sup>74</sup> originally enacted as part of The Telecommunications Act of 1994.<sup>75</sup> In short, the CDA makes criminal the act of transmitting or allowing obscene or "indecent"<sup>76</sup> information to be sent through computer networks where it can be accessed by minors.<sup>77</sup> Penalties for such

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scene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . .

47 U.S.C. § 223(a)(1)(b).

In addition, § 223(d) states:

(d) Whoever

(1) in interstate or foreign communications knowingly

(A) uses an interactive computer service to send to a specific person or person under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18 United States Code, or imprisoned not more than two years, or both.

47 U.S.C. § 223(d).

<sup>73</sup> 141 CONG. REC. S9770 (daily ed. July 12, 1995) (Memorandum of Opinion in Support of the Communications Decency Amendment as Adopted by the U.S. Senate on June 14, 1995 by the National Law Center for Children and Families).

<sup>74</sup> 47 U.S.C. § 223 (prohibits obscene or harassing telephone calls in interstate or foreign communications).

<sup>75</sup> 141 CONG. REC. S8571 (daily ed. June 16, 1995).

<sup>76</sup> 47 U.S.C. § 223. Although indecency is not defined, the statute forbids "any interactive computer service" from displaying "any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary standards, sexual or excretory activities or organs." *Id.*

<sup>77</sup> *Id.* Peter H. Lewis, 'Darkness' to Meet Communications Bill, N.Y. TIMES, Feb. 8, 1996, at A16. The Telecommunications Act of 1996 also requires television set manufacturers to install a V-chip in new sets which allow parents to block access to certain programs. Edmund L. Andrews, *Communications Bill Signed, And the Battles Begin Anew*, N.Y. TIMES, Feb. 9, 1996, at A1, D16.

action include jail sentences of up to five years and monetary penalties of up to \$250,000.<sup>78</sup>

### B. *Proceedings in the Senate*

The CDA, as part of S. 652, was approved by the Senate on June 15, 1995,<sup>79</sup> and was sponsored by Senator Daniel Coats (R-Indiana) and Senator James Exon (D-Nebraska), thus allowing this amendment to the Telecommunications Act of 1995 to be a bipartisan measure.<sup>80</sup> The stated purpose of this law is the protection of children.<sup>81</sup> Senator Exon described the CDA, prior to its Senate approval, as a deterrent.<sup>82</sup> Senator Exon also views the Act as necessary to "clean up" the information superhighway and to allow laws to catch up with technology.<sup>83</sup>

To garner support for this bill, Senator Exon displayed his "Blue-Book" on the Senate floor.<sup>84</sup> This notebook included information on the pornographic images that Senator Exon was able to retrieve through access from computer networks.<sup>85</sup> It was specu-

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Also included within the definition of "obscene" are the words "drug medicine, article, or thing . . . intended for producing abortion." 142 CONG. REC. E294 (daily ed. Mar. 6, 1996) (statement of Hon. Corrine Brown before the House of Representatives). This section is criticized as reviving an outdated law, known as the Comstock Act, that would result in the prohibition of the discussion of abortion via phone and computer lines. *Id.*

<sup>78</sup> Lewis, *supra* note 77, at A16.

<sup>79</sup> 141 CONG. REC. S8480 (daily ed. June 15, 1995). The Telecommunications Act was approved by a vote of 81-18. *Id.*

<sup>80</sup> 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Coats). S. 652 was originally introduced in to the Senate on March 30, 1995 by Sen. Pressler (R-S.D.). 141 CONG. REC. S4924 (daily ed. Mar. 30, 1995).

<sup>81</sup> See *supra* note 56 discussing Sen. Exon's view on the purpose of the CDA.

<sup>82</sup> Jim Exon, *The Constitution Doesn't Protect Pornographers; Porn on the Internet: Keeping Kids Away*, SAN FRANCISCO EXAMINER, Apr. 19, 1995, at A17. The CDA would work to toughen penalties to those who transmit pornographic and harassing material on the information superhighway. *Id.*

<sup>83</sup> 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon). The information superhighway, according to Sen. Exon, contains dangerous places. 141 CONG. REC. S8088 (daily ed. June 9, 1996). Sen. Exon also notes that his amendment to the Communications Act of 1934 is intended to keep pace with the new technology because old laws are ineffective. *Id.* Current laws protect both adults and children from harassment and obscenity but do not apply to the new technologies. *Id.*

<sup>84</sup> 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon).

<sup>85</sup> *Id.* Sen. Exon reading the list of topics that he found on the bulletin boards, claimed that anyone who reads could easily "click" into the index and then follow instructions to access the following: "[m]ultimedia erotica; erotica fetish; nude celebrities; . . . pictures boys; . . . erotica animal; . . . erotica bestiality, hamster." 141 Cong.

lated that prior to the display of the Blue Book, the CDA's future was uncertain.<sup>86</sup> However, the production of the book in addition to the live television coverage on C-SPAN appears to have contributed to the Senatorial approval.<sup>87</sup>

To further support his position, Senator Exon introduced letters in support of the CDA into the Senate debate.<sup>88</sup> For example, Senator Exon produced a letter to the Senate from the Christian Coalition urging the passage of the CDA.<sup>89</sup> Moreover, Senator Exon produced a copy of a letter he received from the National Coalition for the Protection of Children and Families which noted the need for legislation to protect children.<sup>90</sup> Senator Exon also introduced a memorandum from the National Law Center for Children and Families which argues that the prosecution of pornographers under the CDA is constitutional.<sup>91</sup>

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Rec. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon). Sen. Exon later posited that the material should be labeled "Warning. Do not open until further instructions. Offensive material enclosed. Keep out of reach of children." 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon).

<sup>86</sup> Elmer-DeWitt, *supra* note 58, at 42. Sen. Larry Pressler (S.D.), who is chairperson of the Commerce Committee that has control over Telecommunications Act of 1995, indicated that this bill was not expected to pass prior to Sen. Exon's display of his Blue Book. *Id.* In fact, Sen. Pressler stated that he had considered making a move to table the amendment. *Id.*

<sup>87</sup> *Id.* According to Sen. Pressler, the Blue Book, as displayed on Sen. Exon's desk, had images that were quite shocking in comparison to pornography in newsstand magazines. *Id.* These images contributed to the pressure to pass the CDA as the debate concerning the CDA was broadcasted live on C-SPAN and senators may have been pressured into approving the measure as "few . . . wanted to cast a nationally televised vote that might later be characterized as pro-pornography." *Id.*

<sup>88</sup> 141 CONG. REC. S8337 (daily ed. June 14, 1995); see *infra* notes 89-91 and accompanying text discussing support for the Exon-Coats bill.

<sup>89</sup> 141 CONG. REC. S8337 (daily ed. June 14, 1995) (statement of Sen. Exon). The Coalition attempted to garner support by writing "[p]ornography on the computer superhighway has become so prevalent and accessible to children that it necessitates congressional action" and that "[t]he increasing existence of computer pornography today requires more action, not more study." *Id.* This appeal references Sen. Patrick Leahy's suggestion to refer the issue to the United States Department of Justice. See *infra* note 100 (discussing Sen. Leahy's proposal).

<sup>90</sup> 141 CONG. REC. S8337 (daily ed. June 14, 1995) (statement of Sen. Exon inserting into the record a letter from the National Coalition for the Protection of Children and Families). The letter noted that "[c]urrently, almost any child with access to the Internet can quickly download and view bestiality, torture, rape, mutilation, . . . and other unspeakable acts." *Id.* In addition, "[p]ornographers have no right to hijack Cyberspace, which offers . . . a host of promising technologies which should be available to children." *Id.*

<sup>91</sup> 141 CONG. REC. S9770 (daily ed. July 12, 1995) (statement of Sen. Exon in-



The CDA has been described by both its sponsors, Senator Exon and Senator Coats, as an Act to protect children which would allow laws to keep pace with technology.<sup>92</sup> Sen. Coats indicated that the Act would protect children by forcing providers of pornography to ensure that only adults could receive access.<sup>93</sup> One way the CDA would help to combat the problem of children accessing pornography is by omitting teasers, items that are placed in the computer networks free of charge, luring children.<sup>94</sup> In addition, the CDA's original sponsors sought to protect adults from be-

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serting memorandum from ten National Law Center for Children and Families). The memorandum indicated that the Communications Decency Act fulfills First Amendment requirements. *Id.*

<sup>92</sup> 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon). Sen. Exon stated:

the legislation will . . . give law enforcement new tools to prosecute those who would use the computer to make the equivalent of obscene telephone calls to prosecute electronic stalkers who terrorized their victims, to clamp down on the electronic distributors of obscene materials, and to enhance the chances of prosecution of those who would provide pornography to children via the computer.

This legislation attempts to make the information superhighway a little bit safer for families and children to travel.

*Id.* In addition, Sen. Coats expressed similar views on the need and purpose behind the Act:

What would our amendment do? It would clean up the Internet. We ban obscenity. And we require that indecency be walled off so children cannot have access.

. . . [O]ne of the most urgent questions in any modern society is how we humanize our technology, how we make it serve us instead of corrupt us. America is on the frontier of human knowledge but it is incomplete without applying human values.

One of our most important values is the protection of our children, not only the protection of their bodies from violence, but the protection of their minds and souls from abuse.

141 CONG. REC. S8333 (daily ed. June 14, 1995).

The Act originated after Senator Exon observed his grandchildren's skills on their family computer. Graeme Browning, *Net Effects*, NAT'L J., Vol. 27, No. 22, June 3, 1995. Exon stated that he observed his two granddaughters operating the computer with far greater ease than the adults at a family reunion. *Id.* After returning to Washington, he heard reports concerning the pornography available on the Internet, and soon after introduced his Amendment to the 1934 Communications Act. *Id.*

<sup>93</sup> 141 CONG. REC. S8333 (daily ed. June 14, 1995) (statement of Sen. Coats). Sen. Coats noted that providers of pornography must put barriers in place to ensure that the material does not "get into the hands of children." *Id.*

<sup>94</sup> 141 CONG. REC. S8090 (daily ed. June 9, 1996) (statement of Sen. Exon). Teasers are similar to coming attractions segments show at movie theaters. *Id.* The teaser segments take "the best and most enticing pictures of whatever they want to sell that particular day or that particular week and they enter it over here on the Internet." *Id.*

ing harassed, or electronically stalked.<sup>95</sup>

A survey of the record does not reveal any intent to deal with the portrayal of children in pornography on computer networks.<sup>96</sup> Such concerns were evident in the statements supporting S. 1305, a proposed bill debated in the Senate exactly ten years prior to the CDA.<sup>97</sup> This bill also sought to prevent the distribution of child pornography through the use of computers.<sup>98</sup>

The Exon-Coats bill spawned a number of other bills and proposals which deal with the information superhighway and pornography.<sup>99</sup> Senator Patrick Leahy (D-Vt.) submitted a bill that would refer the problem to the Justice Department and require the Attorney General to study current laws which allow the prosecution of those who place obscenity on computer networks.<sup>100</sup> Sen. Leahy submitted this bill partly because he believed that the Coats-Exon Amendment would interrupt the development of electronic information systems.<sup>101</sup> Senator Charles Grassley (R-Iowa) also submitted a bill to the Senate entitled "The Protection of Children from Computer Pornography Act of 1995" ("S. 892").<sup>102</sup> Senator

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Sen. Exon is concerned about the teasers as they are available free of charge and are accessible to children. *Id.*

<sup>95</sup> 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon).

<sup>96</sup> See 141 CONG. REC. S8310 (daily ed. June 14, 1995); 141 CONG. REC. S8087 (daily ed. June 9, 1995).

<sup>97</sup> 131 CONG. REC. S8937 (daily ed. June 27, 1985) (statement of Sen. Symms).

<sup>98</sup> *Id.*

<sup>99</sup> See *infra* notes 100-103 and accompanying text discussing alternative bills.

<sup>100</sup> 141 CONG. REC. S8331 (daily ed. June 14, 1995) (statement of Sen. Leahy). Sen. Leahy's proposal was submitted as an alternative to the Exon-Coats Amendment. Browning, *supra* note 92, at 1340. The bill instructs the Justice Department and Commerce Department to study not only the available resources for prosecution, but also the free speech and privacy issues relevant in regulating on-line obscenity. *Id.* These departments were to report the results of their study to the Senate within five months. *Id.*

<sup>101</sup> 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Leahy). Sen. Leahy cautioned the Senate not to over-react and "unnecessarily destroy in reaction what has been one of the most remarkable technological advances . . . the Internet." *Id.* Sen. Leahy worried that S. 652 assigned only the FCC to find ways to restrict minor's access to obscenity. 141 CONG. REC. S8342 (daily ed. June 14, 1995). Sen. Leahy had concerns over the materials available on-line and his proposed study would allow the investigation of the software that parents could use to monitor their children's use of these on-line services. 141 CONG. REC. S8331 (daily ed. June 14, 1995) (statement of Sen. Leahy). His study would use the Justice Department's recommendations to draft a statute that does not reach innocent conduct. *Id.* For additional remarks of Sen. Leahy's criticism of CDA, see *infra* notes 187-188.

<sup>102</sup> 141 CONG. REC. S8084 (daily ed. June 9, 1995) (statement of Sen. Grassley).

Grassley's bill would operate by amending the criminal code to prohibit the transmission of pornography to children.<sup>103</sup>

### C. *Proceedings in the House of Representatives*

The House also passed the Communications Decency Act as part of the Telecommunications Act.<sup>104</sup> After the passage of S. 652, the House approved a conference report on S. 652 after many months of negotiation.<sup>105</sup> However, members of the House differed on the adoption of the standard for regulation: some members sought to have a "harmful to minors" standard, while instead, an "indecent" standard was ultimately adopted.<sup>106</sup> Those that re-

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<sup>103</sup> Debra Gersh Hernandez, *Controlling Cyberporn; Numerous First Amendment Questions Arise as the Government Attempts to Regulate Content of On-line Information Services*, EDITOR AND PUBLISHER MAGAZINE, Aug. 26, 1995, at 35. Although there were no hearings concerning the Exon-Coats Amendment, the Judiciary Committee examined the Grassley bill after passing the Exon Amendment. *Id.* Sen. Grassley explained that his bill would prosecute "computer systems operators who knowingly transmit innocent material to a child" as well as "operators who willfully permit children to use their systems as a conduit to indecent material intended for adults." *Id.* This bill, like the Exon-Coats Amendment, was also subject to criticism. *Id.* For example, on-line providers argued that they would be liable for indecent material on the Internet regardless of any affirmative steps they take to limit access. *Id.* This, in turn, would provide disincentives for investing in on-line services. *Id.* In addition, the Grassley bill was criticized as being subject to broad interpretation by the criminal courts. *Id.*

However, Sen. Grassley's bill also received support. See *Child Pornography on the Internet: Hearings on S.892 Before the Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (written statement of Dee Jepsen, President of Enough is Enough). Enough is Enough, a non-profit, non-partisan women's organization which opposes child pornography, supported his bill partly because children are at risk of exposure to pornography on the Internet and are also at risk of being exposed to pedophiles who "lurk on the Information Superhighway." *Id.*

<sup>104</sup> 141 CONG. REC. H10,000 (daily ed. Oct. 12, 1995).

<sup>105</sup> 142 CONG. REC. H1179 (daily ed. Feb. 1, 1996). The committee report on the Telecommunications Act passed by a vote of 414 to 16. *Id.* The Senate also approved the conference report on Feb. 1, 1996 by a vote of 91-5 (3 not voting). 141 CONG. REC. S720 (daily ed. Feb. 1, 1996).

<sup>106</sup> 142 CONG. REC. H1165 (daily ed. Feb. 1, 1996) (statement of Rep. Howard Berman, D-Cal.). Rep. Berman contends that the House first voted to adopt the standard set forth by the United States Supreme Court in *Miller v. California*, which would prohibit material that was "harmful to minors." *Id.*; see *supra* notes 137-139 and accompanying text discussing the *Miller* standard. This standard would criminalize "exposing children to on-line pornography such as Playboy or Penthouse without chilling entirely non-pornographic, but offensive, expression." 142 CONG. REC. H1166 (daily ed. Feb. 1, 1996). However, the House ultimately replaced the "harmful to minors" standard with an undefined "indecent standard" as offered by Rep. Robert Goodlatte (R-Va.). *Id.* Attempts were made to include the "harmful to minors" standard within the indecent standard and also clarify that the indecent standard to

jected the "indecentcy" standard contend that it may be unconstitutional.<sup>107</sup> Although the House approved the CDA, arguments were made that the Act is not stringent enough, because it exempts access providers from liability.<sup>108</sup>

Rep. Christopher Cox (R-Cal.) and Rep. Ron Wyden (D-Or.) introduced the "Internet Freedom and Family Empowerment Act" which was included in a telecommunications bill passed in the House.<sup>109</sup> This bill has been described as an Anti-Exon bill and pro-free speech as it would bar federal regulation of the Internet.<sup>110</sup> Reps. Cox and Wyden have criticized the Senate's CDA for being ineffective, thus they support parental regulation.<sup>111</sup> The S. 652, or

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include material that "taken as whole, lacks serious literary, artistic, political or scientific value for minors.'" *Id.* However, the proposal was rejected. *Id.* Instead, the Goodlatte provision was amended to incorporate the FCC definition of broadcast indecency. *Id.*

<sup>107</sup> 142 CONG. REC. H1166 (daily ed. Feb. 1, 1996). Rep. Berman takes issue with this standard as no hearings on the constitutionality of the indecency standard took place. *Id.* The standard may not meet the least restrictive means test. *Id.*

<sup>108</sup> 142 CONG. REC. E153 (daily ed. Feb. 5, 1996) (statement of Hon. Robert K. Dornan). The Hon. Robert K. Dornan argued before the House of Representatives that the CDA lacks effectiveness and will only provide the nation with a false sense of security as pornography on the Internet will continue to be a problem. *Id.* (citing Patrick A. Trueman, *Porn on the Internet and Abroad*). Patrick Trueman argues that Sen. James Exon and Rep. Rick White (R-Wash.) helped to create the language within the CDA which protects access providers such as Compuserve and American On-Line. *Id.* This provision differs from Sen. Exon's original bill which did not protect access providers. *Id.* It is contended that Rep. Henry Hyde, the Chairman of the House Judiciary Committee, sought to exclude exemptions to access providers. *Id.* Instead he would have these providers be held liable for the knowing and intentional distribution of pornography or allowing pornography to be available to children. *Id.* Trueman contends that the Exon-White exemption provision was endorsed by pro-family groups. *Id.* However, the end result of this provision of the CDA will not result in a lessening of pornography on the Internet because individuals will not be deterred from placing pornography on there. *Id.* at 154 (citing Patrick A. Trueman, *Porn on the Internet and Abroad*).

<sup>109</sup> Gersh Hernandez, *supra* note 103, at 35.

<sup>110</sup> Elmer-Dewitt, *supra* note 58, at 42. The Cox-Wyden measure is seen as a pro-speech piece of legislation as it would prohibit the FCC from regulating the content of on-line networks, thus allowing customers to choose the material they view. Gersh Hernandez, *supra* note 93, at 35.

<sup>111</sup> Gersh Hernandez, *supra* note 103, at 35. Rep. Cox stated that the "language of the Senate bill will result in more, not less, criminal activity" and that the bill passed in the Senate "would simply be creating the illusion that government is protecting people." *Id.* Cox believes that regulation of computer networks would be ineffective in preventing children from viewing pornography as the Internet is a global entity. *Id.* Instead, Reps. Cox and Wyden advocate that parental control should be the method employed to regulate the problem of children receiving pornography through the

the Telecommunications Act, received final approval in the House on February 6, 1996 when the bill was examined and signed.<sup>112</sup> Similarly, S. 652 was signed in the Senate on February 6, 1996.<sup>113</sup>

#### IV. Are Current Regulations Ineffective?

Advocates of the CDA argue that this bill is necessary because current legislation is ineffective in combating the problem of children accessing pornography on computer networks.<sup>114</sup> Supporters of the Exon-Coats Amendment stress that present laws simply have not kept pace with technology in that there are no laws that prohibit providing indecent images to minors through computer modems.<sup>115</sup>

It is urged that current laws dealing with the dissemination of obscenity are inadequate and not applicable to cyberspace.<sup>116</sup> New laws need to be adopted to fit the changing technological advancements as old laws are not adaptable to the unique community created by computers, because the "community standard" test for obscenity is not applicable.<sup>117</sup> In addition, current laws deal with

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computer networks. Doug Abrahams, *Self-filter of On-line Porn Proposed; House Bill Bars Federal Policing*, WASH. TIMES, July 1, 1995, at A4. The Cox-Wyden bill would encourage on-line services to add "content filters" which would allow parents to prevent children from viewing material that parents consider inappropriate. *Id.* This bill proposes to prevent children from viewing pornography by empowering the consumer instead of advocating "big-government-style regulation." *Id.*

<sup>112</sup> 141 CONG. REC. H1231 (daily ed. Feb. 6, 1996).

<sup>113</sup> 141 CONG. REC. S915 (daily ed. Feb. 6, 1996).

<sup>114</sup> See *infra* notes 115-126 discussing current regulations.

<sup>115</sup> 141 CONG. REC. S9771 (daily ed. July 12, 1995) (a Memorandum from the National Law Center for Children and Families which supported the Exon Amendment). Present law prohibits providing indecency to minors over phone lines through commercial dial-a-porn messages or when pornography is broadcast over television or radio transmission. *Id.* In addition, existing laws have been useful to prosecute only commercial sales of obscene materials by computer networks through phone lines, thus such statutes are not useful in preventing transmission of pornography to minors from services that do not charge customers. *Id.* (citing 18 U.S.C. § 1465).

<sup>116</sup> See Byassee, *supra* note 24, at 197 (arguing that current law becomes distorted when it is applied to cyberspace communities; thus legislative action, rather than modification of old laws, is necessary to address the problems that have developed in cyberspace).

<sup>117</sup> *Id.* at 209. Federal anti-pornography statutes work in local communities by prohibiting material that the local community believes is obscene. *Id.* at 208. Thus, if the community believes that certain materials are obscene, then the existence of the material outside the home is unlawful. *Id.* Juries, in assessing criminal liability would therefore apply the local community standard. *Id.* at 208-9. However, in cyberspace,

activity in defined jurisdictions, whereas cyberspace presents the problem of undelimited boundaries.<sup>118</sup> Current legislation also relies on a traditional standards of transportation, unlike the concept of transporting materials in cyberspace.<sup>119</sup> Thus, laws dealing with the dissemination of pornography on computer networks should realize these differences and overcome the problems resulting from applying real world laws to the virtual world of cyberspace.<sup>120</sup>

Current regulation is also ineffective in dealing with child pornography on the internet.<sup>121</sup> For example, the 1988 Amendment to the Protection of Children from Sexual Exploitation Act of 1977, 18 U.S.C. 21 2251-2253 censures only advertisements regarding child pornography.<sup>122</sup> An effective law to combat this problem

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the community is totally unlike the local community in the traditional sense. *Id.* at 209. The virtual community created in cyberspace "is a community for which geographical bounds are irrelevant." *Id.* at 210. Thus the "community standard" used in traditional laws cannot be applied because these laws regulate the way material affects the local community, whereas material sent over telephone lines "affects only the virtual community of cyberspace." *Id.*

A further problem is presented when considering that the community standard is used to take into account different values throughout the country. *Id.* If different users are scattered over a wide geographical area, then a problem is created when "each cyberspace user must govern her speech in accordance with the most restrictive of these communities." This eventually amounts to a chilling of free speech. *Id.* See *infra* note 140 and accompanying text discussing the distortion of the community standard.

<sup>118</sup> Byassee, *supra* note 25, at 199. Problems with jurisdiction exist, according to Byassee because:

[a]ctivity in cyberspace . . . creates new relationships among individuals that differ from their analogues in the more usual, physical existence. . . . The fundamental jurisdictional premise of the common law is physical presence, either actual or constructive, within the jurisdiction attempting to assert authority over an individual . . . the boundaries of the jurisdiction itself are defined in physical, geographical terms.

*Id.* However, cyberspace, in contrast to the "real world," is a new and separate jurisdiction with no real boundaries. *Id.*

<sup>119</sup> Byassee, *supra* note 24, at 211. Some obscenity statutes require a provider to "knowingly transport" an item. *Id.* A problem exists, however, when applying such statutes to cyberspace activities because the provider only places an item into the "stream of commerce" and it is the customer who "reach[es] out and complete[s] the transaction herself." *Id.* Thus, the transportation and transaction standard should be reflected in more contextually appropriate laws as transportation in the cyberspace realm is "entirely self-service." *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See *infra* note 122 and accompanying text discussing current regulation that may be applied to the dissemination of pornography over the Internet.

<sup>122</sup> Scheller, *supra* note 39, at 1009. This statute's amendment regulates only "notices" or "advertisements" for child pornography and therefore does not provide an

would allow interception of the material without requiring probable cause.<sup>123</sup> Additional regulations that have also been deemed ineffective in combating the receipt of pornography by children are 18 U.S.C. § 1465,<sup>124</sup> 18 U.S.C. § 2252,<sup>125</sup> and 18 U.S.C. § 2423(a).<sup>126</sup>

Current regulation has been shown to be both ineffective and effective in light of two recent cases involving individuals prosecuted for transmitting pornography or possibly obscene materials using computer networks or computer modem lines.<sup>127</sup> For example, federal statutes were somewhat effective in prosecuting Robert and Carleen Thomas.<sup>128</sup> The Thomases were found guilty of interstate dissemination of obscene material by computer phone lines in violation of 18 U.S.C. § 1465.<sup>129</sup> Although the defendants were

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effective law for dealing with the actual conveyance of child pornography over computer phone lines. *Id.* 1010. In spite of the current law, an operator can still set up a computer network for the purpose of displaying pornographic images. *Id.* at 1010 (citing *Computer Pornography and Child Exploitation Prevention Act, 1985: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 99th Cong., 1st Sess. 29 (1985) (testimony of Jack D. Smith, General Counsel, FCC)).

<sup>123</sup> *Id.* at 1011. In order to combat child pornography on computer networks, an effective law must also allow law enforcement officials to "intercept electronic communications without probable cause." *Id.* This is necessary in order to remove the cloak of anonymity under which computer networks transmitting pornography operate. *Id.*

<sup>124</sup> 18 U.S.C. § 1465 (prohibits the transportation of obscene materials for sale or distribution). See also *infra* note 129 discussing the prosecution of Robert and Carleen Thomas under 47 U.S.C. § 1465.

<sup>125</sup> 18 U.S.C. § 2252 (prohibits distribution of materials depicting sexual exploitation of minors). Sen. Leahy argues that this legislation is sufficient to prohibit the illegal computer solicitation of children. 142 CONG. REC. S1180 (daily ed. Feb. 9, 1996).

<sup>126</sup> 18 U.S.C. § 2423(a). This statute prohibits the luring of a minor into sexual activity by use of computer conversations. 142 CONG. REC. S1180 (daily ed. Feb. 9, 1996). Sen. Leahy, who opposes the CDA, argues that in fact this legislation as well as those previously listed are adequate to prosecute those that distribute pornography to children. *Id.* In fact, the penalties under these laws were recently increased. *Id.*

<sup>127</sup> See *infra* notes 128-131 and accompanying text discussing existing laws and prosecutions of pornography.

<sup>128</sup> Byassee, *supra* note 25, at 204 (citing *United States v. Thomas*, No. CR-94-20019-G (W.D. Tenn. 1994)).

<sup>129</sup> *Id.* The Thomases had operated a BBS named the "Amateur Action Bulletin Board" since 1991. *Id.* This BBS offered adult oriented material to subscribers by allowing the downloading of certain files. *Id.* In 1993, a postal inspector subscribed to the Thomases' BBS operation and downloaded files that contained explicit adult images, or Graphic Interchange Formats, after receiving a complaint that the service offered photos and videos of nude children. *Id.* at 204, n.34. The inspector then ordered videos from the Thomases that were advertised on the network. *Id.* The Thomases were eventually indicted with six counts of transmitting obscenity through

convicted of transmitting obscene images under this statute, the case raised the more important issue of whose community standard should be applied in prosecuting these cases.<sup>130</sup> However, a recent case involving textual pornographic material was dismissed.<sup>131</sup>

## V. First Amendment Considerations

The CDA is criticized not only for violating constitutional privacy rights,<sup>132</sup> but also for violating First Amendment rights.<sup>133</sup> The issue is whether the CDA comports with the constitutional requirements of the First Amendment. To answer this question, the CDA must be analyzed to see how traditional constitutional law will adapt to the new technological mediums of the computer and cyberspace.<sup>134</sup> Although this issue is too broad to contemplate all implications of constitutional law upon the CDA, it is relevant to consider the following: (1) the Supreme Court's test for obscenity and the "community standard;" (2) whether the statute is the least restrictive means available; (3) pervasiveness of the medium; and (4) the Court's jurisprudence supporting legislation that is aimed at protecting the well being of children.<sup>135</sup>

### A. Obscene Material and the Community Standard

In analyzing expression, the Supreme Court has determined that obscene material is afforded protection under the First

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interstate phone lines. *Id.* at 205. The indictment defined one offense as violating 18 U.S.C. § 1465 because obscene material was transmitted through a Graphic Interchange Format. *Id.*

<sup>130</sup> *Id.* See also Rimm, *supra* note 9, at 1860-61 (questioning whether application of community standard is appropriate).

<sup>131</sup> United States v. Baker, 890 F. Supp. 1375 (E.D. Pa. 1995). Baker was charged with five counts of sending threats via e-mail under 18 U.S.C. § 875 (c). *Id.* at 1375. The defendant argued that applying this statute to e-mail transmissions "push[ed] the boundaries of the statute beyond the limits of the First Amendment." *Id.* at 1380. However, the court dismissed the charges against Baker as the e-mail messages contained no true threat, as the messages only mentioned "a girl" and were not directed towards a specific person. *Id.* at 1388.

<sup>132</sup> See Scheller, *supra* note 39, at 1003-08 (discussing the right of privacy and electronic communications).

<sup>133</sup> See *infra* note 144 and accompanying text discussing why the CDA violates the requirement of the least restrictive means.

<sup>134</sup> Rimm, *supra* note 9, at 1860-61.

<sup>135</sup> See *infra* notes 156-159 and accompanying text discussing instances where the United States Supreme Court has sustained statutes which protect children from pornography.



Amendment.<sup>136</sup> In *Miller v. California*,<sup>137</sup> the Supreme Court held in that laws regulating obscenity must pass a three part test, a statute can only regulate those works that: (a) appeal to "prurient interests in sex" when applying contemporary community standards; (b) demonstrate sexual conduct in a "patently offensive way"; and (c) fail to have "serious literary, artistic, political, or scientific value."<sup>138</sup> The *Miller* test also employs the use of the "community standard" to allow each locale where the pornography is available to determine what level of obscenity it will tolerate.<sup>139</sup>

Critics of the CDA question which communities' standard is appropriate; they argue that utilizing the community standard to enforce restrictions on obscenity on the Internet may be difficult.<sup>140</sup> As cyberspace represents both a dissolution of normal geographic and community lines, as well as a creation of a whole new community, the *Miller* test appears to be inappropriate in analyzing laws that govern cyberspace.<sup>141</sup> Those who are sensitive to new technol-

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<sup>136</sup> *Roth v. United States*, 354 U.S. 476, 485 (1957). The court supported this holding by noting that obscenity is "utterly without redeeming social importance" as it plays no part in providing society with an "exposition of ideas" and any benefit from obscene materials is outweighed by a "social interest in order and morality." *Id.* at 484-85 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

<sup>137</sup> 413 U.S. 15 (1973).

<sup>138</sup> *Id.* at 24-25. The *Miller* Court stated that state statutes must be limited in their attempt to regulate obscenity. *Id.* at 24.

<sup>139</sup> *Id.* at 31-32. The Court stated that there should not be a national standard of obscenity, because the United States is too large and diverse to employ such a requirement. *Id.* at 30. The court opined that it was unrealistic "to read the First Amendment as requiring that the people of Main or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32.

<sup>140</sup> 141 CONG. REC. S8335 (daily ed. June 14, 1995) (statement of Sen. Feingold). The CDA creates problems for a sender of pornographic material because the community standard becomes distorted. *Id.* A sender may not be aware of who is reading his communication and therefore would not be aware of the appropriate community standard. *Id.* A relevant question becomes "[w]hose community? That of the initiator or that of the recipient?" *Id.* In addition, there is the fear that users of the Internet will be forced to modify the materials they place on computer networks to fit the most stringent or restrictive community standards, because they will not know who will be accessing the material. *Id.*

<sup>141</sup> *Rimm*, *supra* note, 9 at 1897 n.94. The *Miller* standard of community relies on the fact that communities can be seen by geographic lines. *Id.* However, if cyberspace is thought to be a new community in itself, a new standard may be appropriate. *Id.* In providing for a new community standard of cyberspace, the *Miller* Court's attempt to allow geographic communities to regulate obscenity would be obsolete. *Id.* See *supra* note 110 for a more detailed discussion of the cyberspace community and how it is distinct from normal conceptions of community; see also Hardy, *supra* note 23, at 1012.

ogy and its implications, argue that an entirely new obscenity doctrine, different than that delineated in *Miller*, is necessary.<sup>142</sup>

B. *Least Restrictive Means in Regulating Indecent Material*

The second consideration is whether the statute employs the least restrictive methods in regulating indecent material, as the Supreme Court required in *Sable Communications v. FCC*.<sup>143</sup> The CDA, in attempting to regulate indecent material, is attacked as violating First Amendment rights because it does not fulfill the standard of using the least restrictive means available for limiting pornography on the Internet.<sup>144</sup> Proponents of the CDA, analogizing to the *Sable* decision, argue that it does employ the least restrictive means.<sup>145</sup> However, *Sable* struck down a law which required a total ban on pornographic phone services because there were less restrictive methods available to prevent children from accessing the messages.<sup>146</sup>

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<sup>142</sup> M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 188 (1989). Legal doctrines on obscenity will not have long term applications, because a new obscenity doctrine will probably be formulated to match the new technologies. *Id.*

<sup>143</sup> 492 U.S. 115, 126 (1989). The Supreme Court in *Sable* stated that indecent material is unlike obscene material in that it is protected and can be regulated using only the least restrictive means. *Id.* The *Sable* Court stated "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.*

<sup>144</sup> 141 CONG. REC. S8336 (June 14, 1995) (statement of Sen. Feingold). The CDA violates the standard requiring the least restrictive means possible. *Id.* First, parents can purchase programs to block and screen certain materials and computer networks from children's access. *Id.* Furthermore, technology is also developing new methods to restrict access to pornography on the computer and on-line services are seeking to provide parents with the option to block access. *Id.* Second, the CDA, in attempting to block access to minors, will also restrict adult's access. *Id.* See also *infra* note 106 and accompanying text discussing Rep. Berman's opposition to the indecency standard as not meeting the least restrictive means test and notes 192-194 and accompanying text, describing alternatives available to block access to pornography.

<sup>145</sup> 141 CONG. REC. S9770 (daily ed. July 12, 1995) (Memo from National Law Center for Children and Families).

<sup>146</sup> *Sable*, 492 U.S. at 131. The Court held that an amendment to the 1934 Communications Act, which outlawed indecent and obscene telephone messages, was not narrowly drawn in attempting to protect children. *Id.* at 126. After examining the congressional record, the Court found that the defendants failed to show that the statute was the least restrictive means available. *Id.* at 129.

### C. *Restrictions and the Nature of the Medium*

The Supreme Court has also considered the nature of user control in deciding whether statutes regulating access are constitutional.<sup>147</sup> For example, in *FCC v. Pacifica Foundation*<sup>148</sup> the Court upheld a FCC prohibition on an indecent monologue broadcast over the radio, based on the pervasive presence of radio.<sup>149</sup> In addition, dial-a-porn restrictions have been upheld because of the intrusive nature of such audio services.<sup>150</sup> The Court also utilized the "pervasiveness" test in *Sable* when the Court struck a statute which attempted to restrict children from being able to access dial-a-porn.<sup>151</sup> In contrast to its decision in *Pacifica*, the Court found that accessing telephone services requires the user to take affirmative steps to hear the indecent material.<sup>152</sup>

Thus, the Court indicated that if an individual is not able to exert control over the message provider, then restrictions on the message may be allowed.<sup>153</sup> Questions then arise as to how messages sent via computer networks should be viewed in terms of pervasiveness.<sup>154</sup> Critics of the CDA argue that cyberspace is unlike the medium of radio considered in *Pacifica*, as users are able to control access to obscene and indecent messages.<sup>155</sup>

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<sup>147</sup> *The Message in the Medium*, *supra* note 22, at 1080.

<sup>148</sup> 438 U.S. 726 (1978), *reh'g denied*, 439 U.S. 883 (1978).

<sup>149</sup> *Id.* at 748. The court stated that the broadcast media has a "uniquely pervasive presence" in the United States. *Id.* One cannot easily avoid indecent material because a warning might not be heard. *Id.* Also, broadcast media provides material that is easily accessible by children. *Id.* at 748-49.

<sup>150</sup> *Child Pornography on the Internet: Hearings on S.892 Before the Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of Jerry Berman, Executive Director of the Center for Democracy and Technology).

<sup>151</sup> *Sable*, 492 U.S. at 127-28, 131 (1989).

<sup>152</sup> *Id.* at 127-28.

<sup>153</sup> *Message in the Medium*, *supra* note 22, at 1080.

<sup>154</sup> *Id.* at 1093-95. Turning on the computer may be considered in the future to be similar to turning on the radio. *Id.* at 1087. However, it may also be said that users who utilize their computers to obtain information have a high level of control over the messages they receive, unless they are receiving information that is unsolicited. *Id.* at 1087. Therefore, the government should be able to provide regulations limiting unsolicited information. *Id.* Additionally, if cyberspace is considered a public arena, then the burden to turn away from such messages may be imposed on those who access computer networks. *Id.* at 1094.

<sup>155</sup> 141 CONG. REC. S8336 (June 14, 1995) (statement of Sen. Feingold). The Supreme Court, in considering the medium and ability of user control, provided greater First Amendment protection to print media than broadcast media because it is more difficult to control. *Id.* However, the interactive communications, on the

#### D. *Constitutionality and Protection of Children*

In spite of the constitutional tests implicated above, the Supreme Court has sustained statutes over alleged First Amendment infringement when the statutes seeks to protect children.<sup>156</sup> For example, in *New York v. Ferber*,<sup>157</sup> the Court upheld a New York statute that prohibited the distribution of child pornography even where the material was not obscene.<sup>158</sup> The Court indicated that child pornography, therefore, is not dependent on the obscenity test, because the state has a compelling interest in protecting children.<sup>159</sup>

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Internet present a different media and allow for greater user control, as users do not stumble across information as on the radio, but retrieve information based on message headings. *Id.* Newsgroups that provide sexually explicitly materials identify such materials, and thus users can choose to avoid these areas. *Id.*

Others argue that the so called "pervasiveness" or "intrusiveness" test utilized by the Court in *Pacifica* is inapplicable to information technologies, because considerable effort is required before computers can be accessed. Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 41, 44 (1995).

<sup>156</sup> See *infra* note 159 and accompanying text discussing *Ferber* and *Pacifica*. The Court has permitted restrictions on broadcasting that sought to protect children. Cate, *supra* note 148, at 35. In *Pacifica*, the Court permitted a restriction on speech that, if heard by a child, would place undesirable words in his or her mouth. *Id.* (citing *Pacifica*, 138 U.S. at 749). The Court has also upheld laws that restrict printed materials from reaching children's hands in an attempt to protect children from the harmful effects of speech. *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968)).

<sup>157</sup> 458 U.S. 747 (1982)

<sup>158</sup> *Id.* at 765.

<sup>159</sup> *Id.* The Court provided five reasons why child pornography could be restricted. *Id.* at 757-63. First, the Court stated that "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757. The Court noted that in *Pacifica* it identified the Government's interest in protecting children from harmful broadcasting programs. *Id.* (citing *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978)). In *Pacifica* the Court upheld an FCC restriction on radio partly because it noted "[t]he ease with which children may obtain access to broadcast material . . . amply justify special treatment of indecent broadcasting." *Pacifica*, 438 U.S. at 750. Thus, the court allowed a restriction on the indecent broadcast because adults could obtain the material through other means. *Id.*

Second, the Court in *Ferber* justified restricting distribution of child pornography, indicating that materials that depict children engaged in sexual activity are similar to acts of child abuse, and third, the restriction is justified because selling of child pornography is illegal. *Ferber*, 458 U.S. at 459, 761. In addition, the Court gave a fourth reason for its holding, stating that there is little value to allowing the production of photographs that depict children engaged in sexual acts. *Id.* at 762. Last, the Court reasoned that previous decisions were in support of the classification of child pornog-

### E. Challenges that the CDA is Unconstitutionally Vague

Almost as soon as the CDA was signed into law, its constitutionality was challenged: the American Civil Liberties Union ("ACLU") along with 19 other groups, including Planned Parenthood Federation of America, Inc., filed suit in the United States District Court.<sup>160</sup> The court granted a temporary restraining order which bars the enforcement of certain aspects of the CDA.<sup>161</sup> The court, agreeing with the ACLU's argument, stated the term "indecent" is vague.<sup>162</sup> However, in granting the temporary restraining order, the court noted that the ACLU faces a difficult challenge in attempting to have the statute declared unconstitutional.<sup>163</sup> In defending the CDA and its constitutionality, the Clinton Administration argued the law only applies to minors and employs the least restrictive means.<sup>164</sup> However, according to the court, the CDA may be enforced as it applies to obscene material.<sup>165</sup> The U.S. Court of Appeals will ultimately rule on the decision, after which an appeal may be made to the United States Supreme Court.<sup>166</sup>

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raphy and found it undeserving of First Amendment protection. *Id.* at 763 (citing *Young v. American Mini Theaters, Inc.* 427 U.S. 50, 60 (1976); *FCC v. Pacifica Foundation*, 438 U.S. 726, 742-48 (1978)).

<sup>160</sup> *American Civil Liberties Union v. Reno*, 1996 U.S. Dist. LEXIS 1617 (E.D. Pa. Feb. 15, 1996).

<sup>161</sup> *Id.* at \*9. Peter H. Lewis, *Judge Blocks Law Intended to Regulate On-Line Smut*, N.Y. TIMES, Feb. 16, 1996, at D1.

<sup>162</sup> *Id.* at \*6. The court stated that the plaintiffs were able to raise serious questions as to whether the CDA was unconstitutionally vague in the use of "indecent" as the term is undefined in § 223(a)(1)(B)(ii). *Id.* The term may be vague as it would cause a reasonable person to be unclear as to what the statute sought to prohibit. *Id.* The court noted that the exact definition of the term is vital as it alone could be the foundation for a violation and prosecution under the CDA. *Id.* In addition, the court stated that the Supreme Court has never ruled on the exact meaning of the term "indecent," nor whether its use by the FCC was unconstitutionally vague. *Id.* at \*7.

The injunction prohibits the enforcement of the CDA where actions are deemed to be innocent. *Id.* at \*10. However, the court held that the statute could be enforced as it applies to obscene material. *Id.* The court also upheld a section of the CDA that prohibits transmission of information on drugs and equipment needed to perform abortions. *It's Almost Indecent How Some Bills are Written; Court Quickly Axes Ill-Conceived Internet Regulation Measure*, L.A. TIMES, Feb. 20, 1996, B6 [hereinafter *It's Almost Indecent*].

<sup>163</sup> *Id.* at \*7.

<sup>164</sup> *Mills & Schwartz*, *supra* note 71, at B1.

<sup>165</sup> See *It's Almost Indecent*, *supra* note 162, at B6.

<sup>166</sup> *Id.*

## VI. Additional Problems Facing the CDA

### A. Is the CDA Enforceable?

Critics of the CDA question whether the Act is enforceable as it applies to indecent material.<sup>167</sup> First, opponents argue that a law restricting obscene on-line material would not rid computer networks of indecent material, because information can easily be sent from other countries.<sup>168</sup> Critics point to how current laws regulating computer technology are easily circumscribed by the very technology that the laws are trying to regulate.<sup>169</sup>

Second, critics question how the Internet can be policed, due to its immense size.<sup>170</sup> At present, an estimated two to three million users utilize and control the services of the Internet.<sup>171</sup> Additionally, there are prohibitive concerns regarding the costs of regulating the Internet.<sup>172</sup>

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<sup>167</sup> See *infra* notes 173-174, 181-188 and accompanying text discussing criticisms of the CDA. See also *supra* note 162 discussing enforcement of the CDA as it applies to obscene material.

<sup>168</sup> Edmund L. Andrews, *Smut Ban Backed for Computer Net*, N.Y. TIMES, Mar. 24, 1995, at A1, D7. Whether proper enforcement of the law can occur is questionable as the global nature of the on-line system allows pornographers to easily evade American law. *Id.* For example, as present international connections are easily established, "a company might set up a computer in Denmark to dispense nude pictures, and people in the United States would be able to tap into that computer as easily as two college students communicate from opposite sides of a campus." *Id.* at D7. In fact, American companies might also take advantage of this arrangement by merely sending this information from an outside source. *Id.* Thus, they could operate without even setting up a large offshore location. *Id.*

<sup>169</sup> *Id.* For example, the Electronic Privacy Information Center currently operates a site on the World Wide Web that is based in the Netherlands. *Id.* This site provides those who access it with information on encryption technology. *Id.* In using such a site, the group avoids the harshness of American laws that restrict the use of encryption technology to code materials that may otherwise be deemed obscene. *Id.*

<sup>170</sup> *Id.* at A1. As proponents cite the abundance of sexually related material on computer networks, critics of the legislation point to the "sprawling and largely anarchistic array of interconnected networks" and question how such a system will be easily governed. *Id.* at A1.

<sup>171</sup> I. Trotter Hardy, *Censorship of Cyberspace: A Personal Choice*, SAN FRANCISCO EXAMINER, June 4, 1995, at B5. The approximately two to three million computers on the Internet are, in turn, accessible to almost thirty million users. *Id.*

<sup>172</sup> Rimm, *supra* note 9, at 1859 n.21. Approximately fifty new WWW sites and twenty new Usenet groups are added each day. *Id.* Restrictions on pornography would require checking new cites on a daily basis. *Id.*

B. *Concern the CDA Will Hamper the Development of Technology and On-Line Services*

Both on-line services and users of on-line services claim that the CDA will hamper on-line industry providers such as Prodigy, Compuserve, or America On-line.<sup>173</sup> There is a fear that the CDA will have a significant chilling impact on speech communicated through the Internet.<sup>174</sup> In fact, on-line users have also used the Internet as the medium for their fight against the CDA.<sup>175</sup>

Supporters of the CDA claim that on-line service providers will not be affected.<sup>176</sup> Responding to concerns regarding good-faith providers, the CDA was amended to allow defenses for on-line services whose networks carry material that would violate the CDA.<sup>177</sup>

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<sup>173</sup> See, *Child Pornography on the Internet: Hearings on S.892 Before the Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of Jerry Berman, Executive Director of the Center for Democracy and Technology); *Child Pornography on the Internet: Hearings on S. 892 Before The Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of William Burrington, Assistant General Counsel, America On-line).

<sup>174</sup> 141 CONG. REC. S19187 (daily ed. Dec. 22, 1995) (statement of Sen. Feingold). There are valid newsgroups and web sites that would be restricted if the CDA were enforced. *Id.* at S19186. For example, newsgroups dealing with pregnancy that discuss adult areas of interest, such as childbirth and breastfeeding, might also be restricted. *Id.* Moreover, a current Web site entitled "Truth or Dare: Sex in the 90's" which deals with safe sex may also be deemed "indecent" under the CDA. *Id.*

In response to a German prosecutor who threatened criminal prosecution of Compuserve if children were able to access pornography through the service, the on-line company blocked access to Usenet groups. Peter H. Lewis, *An On-Line Service Halts Restriction on Sex Material*, N.Y. TIMES, Feb. 14, 1996, D1, at D2. The German prosecutor threatened action under a law that prohibited the distribution of pornography to children and cited a list of Usenet groups that violated this law. *Id.* Despite the fact that Compuserve did not create the objectionable material, it could still be liable for disseminating pornography. *Id.* However, Compuserve restored access to all but five of the Usenet groups. *Id.* at A1. The Usenet files are suspected to have been carrying child pornography. *Id.* The on-line provider was able to remove these restrictions by implementing parental-control devices which would allow subscribers to block offensive material. *Id.*

<sup>175</sup> Browning, *supra* note 92, at 1336. Users of the Internet have utilized this medium to undermine the CDA and voice their criticism. *Id.* For example a student in Oxford, England was able to voice his opposition to the CDA via the Internet. *Id.* G. Scott Aikens downloaded the Act from the Internet and was able to sign a petition against the CDA via his computer. *Id.* There has been a significant use of the Internet as a tool for lobbying against the CDA. *Id.*

<sup>176</sup> See 141 CONG. REC. S8333 (daily ed. June 14, 1995) (statement of Sen. Coats) (stating that the CDA will not cripple the Internet as defenses shield good-faith providers).

<sup>177</sup> Andrews, *supra* note 168, at D7. The CDA was amended after questions were

Proponents of the CDA proffer that the addition of these exceptions for on-line services will not hurt the Act's effectiveness.<sup>178</sup> The CDA does, however, require service providers to participate actively in some form of monitoring.<sup>179</sup> Opponents of the CDA claim that regulation of the Internet will only serve to hamper the development of technology and education.<sup>180</sup> Since the Internet was developed, decentralization of control has fostered advances in technology and communications mediums and opponents claim present attempts to regulate the computer networks would result in stifling the environment that allowed such developments.<sup>181</sup> Ac-

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raised as to whether a service that merely operates a bulletin board should be held liable if only its customers, and not the service itself, are posting the obscene material. *Id.* In light of these concerns, the CDA was amended to allow for exemptions and defenses for on-line service providers. *Id.* First, the CDA exempts those companies that serve only as "transmission services" whose customers are utilizing the service only as an intermediate "storage" network. *Id.* This exemption would apply to such servers as America On-line or Compuserve. *Id.* The CDA also provides defenses to on-line services. *Id.* For example, an on-line service has a potential defense if it can prove a good-faith effort on its part to provide its customers with warnings as to the content of the material they are about to download. *Id.*

<sup>178</sup> 141 CONG. REC. S9772 (daily ed. July 12, 1995) (Memorandum of Opinion in Support of the Communications Decency Amendment as Adopted by the U.S. Senate on June 14, 1995 by the National Law Center for Children and Families). The addition is claimed as a necessity in order to "safeguard[ ] legitimate corporate rights." *Id.* Although some groups have criticized this addition as being too lenient and serve as a defense for pornographers, supporters claim that the addition would not render the CDA ineffective. *Id.* In fact, phone carriers and computer on-line services would be exempt "only to the extent that they provide mere access for users to connect to the services and boards of other companies." *Id.* The law would effectively divert liability to those who deserve the blame. *Id.* However, if an on-line service provided pornography, they would then be liable. *Id.* Thus, the "primary criminal liability [is] on those . . . who make indecency available to minors without taking reasonable steps to limit it to adults." *Id.*

<sup>179</sup> 141 CONG. REC. S9773 (daily ed. July 12, 1995) (Lies That Pornographers Tell- letter to Reps. Cox and Wyden from Bruce Taylor, National Law Center for Children and Families). In this regard, the CDA does not dispense leniency to on-line services. *Id.* It exempts carriers only when they, according to the CDA, "solely" give access to which they have "no control." *Id.* For example, a carrier would be liable for violating the CDA when they "knowingly and intentionally allow users to transmit obscenity or indecency to minors." 141 CONG. REC. S9974 (daily ed. July 12, 1995). The threat of liability will provide incentives to service providers to operate in a manner to restrict and/or prevent the transmission of indecent material. *Id.*

<sup>180</sup> See *supra* note 168 discussing the problems associated with regulating the Internet.

<sup>181</sup> *Child Pornography on the Internet: Hearings on S. 892 Before the Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of Jerry Berman, Executive Director of the Center for Democracy and Technology). Control of communication would only serve to "stifle" the Internet. *Id.* This would yield disastrous circum-



cordingly, opponents contend that such laws would limit educational activities which in turn would damage America's international competitiveness.<sup>182</sup>

### C. *Is the CDA Specific to a Sufficient Degree?*

Opponents have generally criticized the CDA.<sup>183</sup> First, critics claim a result will occur where an individual will be able to purchase sexually explicit photos from a bookstore, but will be unable to download or view such material on the Internet.<sup>184</sup> Supporters respond by arguing that the difference is in the availability of access.<sup>185</sup> In addition, opponents claim that the CDA's terms are

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stances. *Id.* The Internet is based on a system of decentralized control and has flourished as a result. *Id.* For example, since the Internet has been commercialized, users have not only increased, but technological advances have also developed. *Id.* For example, the World Wide Web is one area that has developed in the atmosphere of decentralization. *Id.* In his argument against the passage of S. 892, Jerry Berman, Executive Director of the Center for Democracy and Technology, stated:

Indeed, the innovative, entrepreneurial Internet marketplace has even produced a variety of software and services that help protect children from inappropriate material online. Imposition of content regulations would seriously retard the growth of the Internet marketplace. What's more, content control is unlikely to be effective in protecting children.

*Id.*

<sup>182</sup> *Child Pornography on the Internet: Hearings on S.892 Before The Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of William Burrington, Assistant General Counsel, America On-line). Most of the communication available on the Internet is educational and access to such information allows for significant educational opportunities. *Id.* For example, Americans have large databases easily available to them which provide a vast amount of information. *Id.* However, if the Internet becomes regulated, access to these sources may be terminated because providers fear criminal liability. *Id.* This would deny students information, and, in turn, would lessen their competitive advantage in the world marketplace as well as hinder international competitiveness. *Id.* Sen. Coats, responding to such attacks on the CDA, commented:

Critics may also charge the standards we have set are too high and this will force businesses to deny children access to the Internet entirely, but that is not true. That is a scare tactic, not an argument. Our legislation simply provides the same protections for children that currently exist in every other sector of our society.

141 CONG. REC. S8333 (daily ed. June 14, 1995) (testimony of Sen. Coats).

<sup>183</sup> See *infra* notes 184-187.

<sup>184</sup> Jason Goldman, *Limiting Free Speech on the Internet*, ST. LOUIS POST DISPATCH, Apr. 25, 1995, at B13.

<sup>185</sup> 141 CONG. REC. S8310 (daily ed. June 14, 1995) (statement of Sen. Coats). Support can be provided for the CDA through current restrictions which prohibit pornographic magazines from being purchased by minors; phones may not be used to provide inappropriate messages to minors. *Id.* However supporters of the CDA ar-

too vague to allow the bill to be effective.<sup>186</sup> To that effect, Sen. Leahy criticized the bill's potential application of harsh penalties to unwitting parties who merely send e-mail messages with indecent words.<sup>187</sup> Supporters disclaim that this innocuous result would occur because explicit speech is not covered and cannot be prohibited by the CDA.<sup>188</sup> Two competing legislation resulted from these criticisms: Sen. Leahy's proposal to have the Justice Department perform a study of the problem,<sup>189</sup> and Reps. Cox and Wyden's Internet and Freedom and Family Empowerment Act.<sup>190</sup>

#### D. *Alternatives*

Criticism of the Act has led to the proposal of several alternatives to the CDA that would be effective in dealing with the prob-

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gue, the prohibition on providing such materials to children has not crippled the dial-a-porn or adult magazine industries and therefore regulation should not hurt the Internet. *Id.*

<sup>186</sup> *It's Almost Indecent*, *supra* note 156, at B6. Opponents of the CDA maintain that the vagueness of the law would prohibit discussions on topics of health and disease where information would contain words that would be deemed "racy" under the CDA. *Id.*

<sup>187</sup> 141 CONG. REC. S8331 (daily ed. June 14, 1995) (statement of Sen. Leahy). Sen. Leahy contends that the CDA would allow a felony conviction if one person was to send another an e-mail message with explicit words. *Id.* This may be an odd result as the same person who used a phone to convey such messages would not be subject to a \$100,000 fine. *Id.*

<sup>188</sup> *Id.* Sen. Leahy worries that the CDA is not specific in that it allows for a felony conviction if a person "send[s] or receive[s] over computer networks any obscene material." *Id.* The CDA fails because there is no requirement that the person who is receiving the mail know that it is obscene. *Id.* An example of an unintended result would occur if a person were to download something that they thought was innocent, but instead was obscene. *Id.*

Supporters would respond to the allegations that an additional "odd result" may occur as innocent receivers would not be prosecuted under the CDA as the statute concentrates on the activities of those sending the message, not those receiving it. Sen. Coats contends that the CDA is simply applying an old approach to new technology. 141 CONG. REC. S8333 (daily ed. June 14, 1995) (testimony of Sen. Coats). As the CDA is an amendment to existing communications legislation, the approach of the CDA has been used and upheld in dial-a-porn statutes. *Id.* Therefore, the law "is not new" and takes the standards regulating communications over phone wires and applies them to computer wires. *Id.* "It is just simply a different means of bringing a communication into a home through the computer rather than through the phone. We are taking the same standards." *Id.*

<sup>189</sup> See *supra* note 100 and accompanying text discussing Sen. Leahy's proposal.

<sup>190</sup> See *supra* notes 109-111 and accompanying text discussing Reps. Cox and Wyden's proposal.

lem of children accessing explicit materials.<sup>191</sup> First, opponents of the CDA claim that filtration programs should be utilized by those who wish to block children's access to obscene materials.<sup>192</sup> Filtration programs operate by scanning databases to identify and eliminate objectionable material.<sup>193</sup> One currently available blocking software is Surfwatch.<sup>194</sup>

Proponents of filtration programs also support a method of regulation that involves the use of parental control programs.<sup>195</sup>

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<sup>191</sup> See *infra* notes 192-194, 198-199 and accompanying text discussing possible alternatives to the CDA.

<sup>192</sup> 141 CONG. REC. S19187 (daily ed. Dec. 22, 1995) (statement of Sen. Feingold). Filtration programs such as Net Nanny, which prevents children from viewing certain areas on the Internet, or Cybersitter, which prevents children from downloading material from the Internet should be used. *Id.* Sen. Feingold claims these programs are better suited to protect children from on-line obscenity as the CDA does not satisfy the requirement that the means used be the least restrictive. *Id.* See *supra*, part II.B. discussing the constitutional requirement that the means used to restrict access be the least restrictive.

Filtration programs are currently being used by the major on-line service providers including Compuserve, America On-line, and Prodigy. Lewis, *supra* note 174, at A1. Robert J. Massey, the president and chief executive officer of Compuserve, contends that "[t]he introduction of parental control lets us put power to control and restrict content access where it belongs, with the individual user." *Id.* at D1.

<sup>193</sup> Dwight Silverman, *Cyberspace Porn Debate Tangling Net Up in Knots*, HOUSTON CHRON., July 23, 1995, at 1. Some programs operate by searching for key words such as "sex," "erotic," or "XXX" on computer networks. *Id.* Others actually scan for the known sites on the Internet that contain pornography. *Id.* These programs are compatible with Internet access software. *Id.* In addition, researchers have worked on programs that would function by scanning databases and identify colors, textures, and patterns that may indicate the presence of images containing sexually explicit conduct. Rimm, *supra* note 9, at 1858 n.21 (citing Will Equitz and Wayne Niblack, *Retrieving Images from a Database Using Texture-Algorithms from the QBIC System*, RES. REP., IBM Research Division (1994)). However, such methods are not yet as accurate as the current "linguistic parsing software" described above. *Id.*

<sup>194</sup> Click, click, *supra* note 41, at 1339. Surfwatch was unveiled in May of 1995 and is a program available for parents to purchase and install in order to block sexually explicit material. *Id.* This specific program functions using the list of the 2000 known sites that contain explicit material. Silverman, *supra* note 180, at 1. The program blocks access to such databases. *Id.* However, purchasers must subscribe to receive updates to the list. *Id.* Net Nanny and Cybersitter are other examples of currently available programs. *Id.*

<sup>195</sup> Abrahms, *supra* note 111, at A4. The Cox-Wyden Bill proposed in the House would ban the federal government from regulating the on-line industry. *Id.* Instead, it would encourage the use of technology by families to ensure their children do not view obscene materials. *Id.* Aside from encouraging on-line companies to add "content filters" which parents could use to restrict access to certain files, the Cox-Wyden bill also favors the use of content filters purchased by parents. *Id.* Rep. Cox feels this approach would solve the problem by "remov[ing] the perverse incentives for 'any-

Others contend that a two-pronged approach, federal prosecution of pornographers in addition to education of parents as to the availability of on-line materials, is necessary to effectively prevent children from accessing obscenity.<sup>196</sup> Proponents of the CDA argue use of filters by parents are not trustworthy nor are they entirely effective.<sup>197</sup>

Another method for dealing with the problem of access to obscene material on the Internet is to allow self-regulation by the industry.<sup>198</sup> This approach would allow the on-line services to utilize and offer a number of different blocking devices.<sup>199</sup> Other alternatives to the CDA include the legislation set forth by Sen. Leahy, whereby the Justice Department would offer a solution,<sup>200</sup> Sen.

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thing goes' in cyberspace" while also "solving the problem of child exposure to indecency on the Internet." *Id.* In addition, according to Rep. Wyden, the House bill also "solves the problem not through big-government-style regulation, but by empowering the consumer to control what comes into his or her home." *Id.*

<sup>196</sup> John Zipperer, *The Naked City: 'Cyberporn' Invades the American Home Computer*, CHRISTIANITY TODAY, Sept. 12, 1994, at 42, 48.

<sup>197</sup> *Lawless*, ECONOMIST, July 1, 1995 at S15. One problem with parental regulation or self regulation is that "generic filters are bound to fail." *Id.* This is true because obvious or well-known pornography groups restricted under filtration programs may attempt to "adopt a heavier disguise." *Id.*

<sup>198</sup> *Child Pornography on the Internet: Hearings on S.892 Before The Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of William Burrington, Assistant General Counsel, America On-line). The industry hopes to provide plans for ways in which parents can deal with child access to pornography via computer networks, as the Technology Association of America, consisting of 300 high-tech companies, plans to assemble a task force to confront this problem. Elizabeth Corcoran, *Cybersensitivity? Critics Say the Media Overreacted to a Study on Computer Pornography*, WASH. POST, June 28, 1995, at C1, C8. Assistant General Counsel to America On-line, William Burrington, arguing to the Senate Committee on the Judiciary on S. 892, stated that this bill was not necessary and that "rather than criminalizing the mere transmission of certain materials, Congress should support and encourage the entrepreneurial spirit of the interactive services industry to build parental empowerment tools." *Child Pornography on the Internet: Hearings on S. 892 Before The Senate Judiciary Comm.*, 104th Cong., 2nd Sess. (July 24, 1995) (statement of William Burrington, Assistant General Counsel, America On-line).

<sup>199</sup> *Id.* These devices would include not only the screening tools such as programs that block access to obscene materials, but also other devices. *Id.* For example, the audience can be controlled by requiring a credit card to open an account, a device which America On-line currently employs. *Id.* This operational procedure would be in accord with the dial-a-porn statutes which presume that the user is an adult. *Id.* In addition, another method of audience control, currently used by Prodigy, is the use of a credit card to allow for verification each time a family member logs onto the service. *Id.* America On-line also has a service which allows parents to limit their children's access to designated "kids only" areas. *Id.*

<sup>200</sup> See *supra* note 100 and accompanying text discussing Sen. Leahy's proposal.

Grassley's S. 892,<sup>201</sup> and Rep. Cox and Rep. Wyden's proposal.<sup>202</sup> Others advocate the implementation of increased penalties under existing law.<sup>203</sup> The new method of communicating, coupled with the often debated issue of pornography, fosters the current environment where no consensus is currently available on how or if pornography on the Internet should be regulated.<sup>204</sup>

### E. *Is Regulation Necessary?*

Many contend that regulation, such as the CDA, is not necessary, because children accessing pornography on the Internet is not a significant problem.<sup>205</sup> First, opponents of the regulation contend that problem has received attention far in extent of the actual problem.<sup>206</sup> In fact, much of the concern over the issue of pornography on the Internet occurred after the publishing of the Carnegie Mellon study, *Marketing Pornography on the Information Superhighway*, in the *Georgetown Law Journal*.<sup>207</sup> The article received significant media attention following its release.<sup>208</sup> Opponents

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<sup>201</sup> See *supra* notes 102-103 and accompanying text discussing Sen. Grassley's proposal.

<sup>202</sup> See *supra* notes 109-111 discussing Reps. Cox and Rep. Wyden's proposal.

<sup>203</sup> 141 CONG. REC. S10485 (daily ed. July 21, 1995) (Report of Interactive Working Group on Parental Empowerment, Child Protection, and Free Speech in Interactive Media, statement of Sen. Leahy). On-line pornographers restricted by the use of currently enacted Federal laws. *Id.* For example, the sale of obscene material is prohibited by 18 U.S.C. § 1465, 1466, 2252, and 2425(c). *Id.* In addition, the solicitation of minors for sexual activity is prohibited under 18 U.S.C. § 2452. 141 CONG. REC. S10485-10486 (daily ed. July 21, 1995). By providing law enforcement with the proper training and resources, they will be able to "track down computer criminals, and not create new laws which restrict free speech and are repetitive of new crimes." 141 CONG. REC. S10485 (daily ed. July 21, 1995) (statement of Sen. Leahy placing *Report of Interactive Working Group on Parental Empowerment, Child Protection and Free Speech in Interactive Media* into the record).

<sup>204</sup> Silverman, *supra* note 193, at 1. As Dean Kaplan, vice president of the National Coalition for the Protection of Children and Families, stated, policy makers have no common agreement on how the problem should be addressed. *Id.* Although the Coalition supports the Exon-Coats Amendment, a spokesperson noted that as the Internet is a new medium, it will take time for legislative and enforcement solutions to develop. *Id.*

<sup>205</sup> See *infra* notes 206-213.

<sup>206</sup> Bill Schackner & Dennis B. Roddy, *Internet Brouhaha Entangles Researcher*, PITT. POST-GAZETTE, July 24, 1995, at A1.

<sup>207</sup> Corcoran, *supra* note 198, at C1. Rimm's article has made headlines in magazines, newspapers, the focus of a discussion on ABC's *Nightline* and mentioned in the debates of Congress. Schackner & Roddy *supra* note 206, at A1.

<sup>208</sup> Corcoran, *supra* note 198, at C8; Schackner & Roddy, *supra* note 206, at A4.

claim that this publication, as well as other stories which detailed the problem of pornography on computer networks, have not only sensationalized the issue, but also created a problem that does not exist.<sup>209</sup>

Furthermore, opponents assert that even if the Carnegie Mellon study presents a true reflection of available pornography and the access of these images, pornography on computer networks is not necessarily a large problem that demands forbidding its distribution.<sup>210</sup> First, opponents of the CDA argue that pornography on the Internet is only a passing phase, and will soon be replaced by

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<sup>209</sup> Corcoran, *supra* note 198, at C1. What the media portrayed and what the study actually centered on were not exactly the same issues: the Carnegie Mellon study was not about what children might view, but how often pornographic materials were downloaded from BBS and newsgroups. *Id.*

Donna L. Hoffman, a business professor at Vanderbilt University, noted that the study was misleading, because the study makes broad inferences about consumer taste without providing information concerning consumer behavior. *Id.* at C8. Others contend that the author and researcher of the study, Martin Rimm, was an undergraduate when the article was written. *Id.* His report is under scrutiny by critics. See Schackner & Roddy, *supra* note 206, at A1, A4. These critics claim that the Carnegie Mellon study provided the impression that pornography is widespread on the Internet when, in reality, it represents only one percent of all "computer traffic." *Id.* at A4. In addition, critics assert that it is difficult to access pornography because it is found primarily on BBS or other private computer networks which are outside of the Internet. *Id.*

Rimm, however, defends his study, stating that the accusations exaggerated the amount of pornography available, as his study points out that less than three percent of images on the Usenet are pornographic. *Id.*; Cf. Rimm, *supra* note 9, at 1914 (noting "83.5% of all images posted on the Usenet are pornographic"). Rimm further defends his research, indicating that his study provides valuable information in allowing others to see what people are interested in viewing through their computers. Corcoran, *supra* note 198, at C8. Rimm notes that his study simply found that pornography newsgroups are "accessed way out of proportion to their number." *Id.* In addition, he stated, "[t]here's no question that by availability, pornography accounts for a small percentage of what's out there on the Internet," but it is demand, not supply that is the issue. *Id.*

Using the report's criticism to bolster their arguments, opponents of the provision also claim that the government, in passing the CDA, put far too great a weight on a study whose methods and conclusions may be suspect. Mills & Schwartz, *supra* note 71, at B1. The Justice Department, however, defends its position, stating that the Carnegie Mellon study was used only as a starting point to identify materials that could be accessed through on-line services. *Id.*

<sup>210</sup> Anne Wells 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, 1957 (1995) (concluding that forbidding the distribution of pornography through electronic distribution is not necessary as there are adequate "social, economic, legal, and political means" available to curb the excess and effects of pornography).

other information and materials that come to dominate computer networks.<sup>211</sup> Second, opponents assert that pornography is not easily accessible<sup>212</sup> and that mechanisms may be used to restrict access to pornography.<sup>213</sup>

Nevertheless, staunch supporters of the CDA claim that it is vital to the protection of children, because indecency on computer networks is beyond acceptable standards,<sup>214</sup> as evidenced by his Senator Exon's Blue Book.<sup>215</sup> Groups such as the Christian Coalition argue that the CDA is simply necessary to make the Internet safe for children's access.<sup>216</sup>

## VII. Conclusion

While the protection of children is a legitimate goal, the CDA is not an effective means of achieving this goal. First, while children are able to access pornography, there is no definitive study or evidence to show that children are accessing pornography on a large scale level. Thus, legislation in this area may not be necessary. Second, there has been no evidence that other regulations are in fact ineffective. While some contend that the community standard for obscenity is not applicable in the world of cyberspace, the conviction of the Thomases<sup>217</sup> demonstrates that prosecution of violators is not impossible under laws other than the CDA. Third, the CDA faces difficulties concerning enforcement, especially when considering the size of the Internet and its global nature.

The greatest challenge to the CDA, as enacted, is its possible violations of First Amendment rights. The Supreme Court has allowed laws regulating obscenity, thus the CDA may be applicable to this type of materials on the Internet. However, the Court has held

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<sup>211</sup> *Id.* at 1956. In the future, pornography may simply be one of many types of material available on computers. *Id.* For example, the publications of pornography in the magazine industry, represent only a small portion of the entire market. *Id.*

<sup>212</sup> *Id.* It is difficult to access as well as download the files. *Id.* However, technological advances may allow for greater ease in access. *Id.*

<sup>213</sup> *Id.* at 1957; see *supra* notes 192-194 discussing methods of limiting children's access of pornographic materials including use of filtration programs and parental monitoring.

<sup>214</sup> 141 CONG. REC. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon).

<sup>215</sup> See *supra* notes 84-85 discussing the Blue Book.

<sup>216</sup> Browning, *supra* note 92.

<sup>217</sup> See *supra* notes 128-129 and accompanying text discussing the conviction of the Thomases.

that laws for indecency must be the least restrictive. The CDA's constitutionality is questionable as other means of control, whether technological or parental, are clearly evident. In addition, as a person must take affirmative steps to seek out pornography, the medium the CDA attempts to regulate is not pervasive.

However, balanced against the above considerations is the desire to protect children. The Supreme Court in *New York v. Ferber* held that it would uphold laws seeking to protect children.<sup>218</sup> Thus, the CDA's infringements of the above constitutional standards may be mitigated by the fact that the Supreme Court has upheld statutes that protect minors.

Although the protection of children is certainly a valid purpose, the Communications Decency Act seems to have been approved in response to the public attention given to the issue. Such attention did not however, consider the numerous alternatives to dealing with pornography on the Internet. In considering the Supreme Court's requirement for the least restrictive means available in regulating indecency, there are viable alternatives including parental supervision and computer programs to block access to pornographic material. These alternatives must and should be considered.

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<sup>218</sup> See *supra* notes 157-159.