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Massachusetts Institute of Technology
Fall Semester, 2012

MIT 6.805/STS085: Ethics and Law on the Electronic Frontier (3-0-9)
Evolution of Internet Policy

Class meetings: Thursday 2-5 in room TBA

General information

Class meetings: Thursdays 2-5PM in room TBA

Instructors

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Welcome

In this class, we will consider the interaction between law, policy, and technology as they relate to the the evolving controversies over control of the Internet. This fall, we be doing an in-depth segment on a new approach to privacy on the Web, which replaces the traditional emphasis on secrecy and access control, by policies and technologies to make data use more accountable and transparent.

Topics we will explore include:

- Legal background for regulation of the Internet.
- Fourth Amendment Law and electronic surveillance
- Fundamentals of privacy law.
- Technology and regulatory regimes for transparency and accountability.
- Fundamentals of copyright law, seminal court cases relating to copyright on the Web
- International persepectives on the Internet.

See the course calendar for the complete list of topics.

All information for this course is maintained on the Web via the class web site:

http://mit.edu/6.805

The site contains course information, including pointers to assigned readings and source material, as well as archives of exemplary papers by students in the class.

Prerequisites and enrolling

Course 6 students may use this subject as one of Advanced Undergraduate Subjects (AUS) required for graduation, or as general engineering concentration subjects (EC electives) required for the S.B. or M.Eng. As an alternative, students may use the subject for HASS elective credit.

Students who want to use the subject to satisfy a department requirement (AUS or EC elective), should register for 6.805. Those who want to use it for HASS elective credit should register for STS.085. Graduate credit can be granted through STS (not Course 6), although this will require making special arrangements with Mike Fischer for extra work.

There are no formal prerequisites for this subject, but students should be prepared to do extensive independent research, involving both technology and policy analysis. In selecting participants for the class, we will be looking for people with appropriate backgrounds, such as knowledge of 6.033. Also, due to the importance of class participation, **class attendance is mandatory**.

Syllabus

The course syllabus and weekly assignment can be found on the course calendar web page.

Readings

The class will have many readings, mostly short. Most of these are on the web and will be posted along with the weekly class assignments. There many of the readings will include judicial opinions. Here are some helpful hints on locating judicial opinions.

Grading and required work

Grades will be based on

- **Class participation:** We expect you to participate actively in class discussions, contributing your own ideas and commenting on the ideas of others. The readings assigned each week should be done before class. In class, we will call on you and ask you to answer questions about the readings and to contribute to the discussion. The quality of class participation will be a factor in grades. If you are the type who "does not like to talk in class" you should consider whether you really want to take this class. *Class attendance is mandatory.*
- **Short writing assignments:** There will be weekly short writing assignments. Many assignments will have two parts: (1) writing your own paper; and (2) commenting on other students' papers. All assignments will be posted on the class web site for everyone in the class to read.
- **Term project:** You will be required to work in a team project that will last most of the semester. Much of this work will be done in conjuction with a mentor who is active in the area of Internet policy.
- **Final Exam (not):** There is no final exam.

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6.805 Fall 2012 - Calendar Page

6.805: Foundations of Internet Policy - Fall 2012

Class meetings: Thursday 2-5 in room 36-156. The room may change after the first class.

Click on the individual weeks below to see the overview and the assignments for each class, including the assignment to be completed as preparation before the class.
Dates without links do not have their assignments posted yet.

Week	Topic	Preparation
1: September 6	Introduction to Internet Law	• Read and brief *Mainstream Marketing Services v. Federal Trade Commission* (10th Cir. 2004). • Read: BARACK OBAMA: CONNECTING AND EMPOWERING ALL AMERICANS THROUGH TECHNOLOGY AND INNOVATION and identify policy successes and failures
2: September 13	Internet Freedom of Expression	
3: September 20	Internet Intermediary Liability	
4: September 27	Net Neutrality	
5: October 4	Online Copyright Law - from the Digital Millenium Copyright Act to SOPA	
6: October 11	Basics of the Fourth Amendment	
7: October 18	Electronic Surveillance, the Internet and Linked Data	
8: October 25	Consumer Privacy Law in the United States	
9: November 1	Consumer Privacy Law around the world	
10: November 8	Open data and innovative governments	
11: November 15	Cybersecurity	
12: November 29	Global regulation of the Internet - the United Nations and the new Internet Institutions	

13: December 6	Conclusion	

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Read 8/31

Class 1, Sept. 6, 2012) - Introduction to Internet Law

6.805: Foundations of Internet Policy - Semester Calendar

Please bring a laptop to this class and to every class this semester - and make sure it's charged.

Goals

- Whet your appetite for Internet policy issues
  - How did the current policy environment help the Internet grow?
  - How do we avoid complex failures?
- review US civics 101
- learn to read and brief a judicial opinion
- introduce Agenda 2013 project - developing a policy agenda to avoid breaking the Internet
- asking a simple question: What public policy framework is necessary for the Internet to work? (per David Baltimore: figuring out the right simple/general question is the right way to make scientific progress - swarthmore speech)

Class Preparation

There will be assignments each week that are due for class. Here are the assignments for this first week. These include some things to write. You do not need to turn these in before these first class. But *do* write them up as notes for yourself to refer to in class. Future weeks *will* have written assignments that are due before class.

Briefing Judicial Opinions

In class, we'll be writing *briefs* of the *Mainstream Marketing* case. To prepare for this

- read the Sample Case Brief, which illustrates how to brief the case *Cubby v. Compuserve*, 776 F.Supp 135 (SDNY, 1991), an important decision about liability of ISPs and system operators. You should at least skim *Cubby* and then read the brief, noticing how the brief (a) is short; (b) covers the essential elements of the case.
- read and brief Do Not Call case: *Mainstream Marketing Services v. Federal Trade Commission* (10th Cir. 2004).

? where submit

The Obama administraion's 2008 Internet Agenda

- read Obama 2008 campaign technology policy white paper: BARACK OBAMA: CONNECTING AND EMPOWERING ALL AMERICANS THROUGH TECHNOLOGY AND INNOVATION. In preparation for an in class exercise, identify two policy initiative on which there was progress and two on which there was not. For each initiative, locate primary sources (legislation, regulation, policy papers) or secondary sources (press reports, blogs) to illustrate what was done and evaluate its effect.

In Class Timeline

2:00 - 2:15	Introductions
2:15 - 2:30	Overview of Semester
2:30 - 2:45	US Civics 101
2:45 - 3:45	Briefing Mainstream Marketing Services
3:45 - 4:00	break
4:00 - 4:55	Agenda 2013 Activity
4:55 - 5:00	Preview next week's class

Agenda 2013 Activity

Goal: introduce the Agenda 2013 project thread (developing policy options for new Administration in the White House on January 2013).

- Small groups (5 groups of five students) compare views on successful and unsuccessful policy initiatives outlined in the paper: BARACK OBAMA: CONNECTING AND EMPOWERING ALL AMERICANS THROUGH TECHNOLOGY AND INNOVATION.
    - work in groups of 5
    - discuss policy initiatives identified by each student
    - develop consensus list of 2 top successes and 2 top failures, together with best primary sources and most representative secondary source.
- Each group presents top two successful and unsuccessful initiatives, yielding common list.

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FEB 17 2004

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation;
TMG MARKETING, INC., a Colorado corporation;
AMERICAN TELESERVICES ASSOCIATION,

Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

and

TIMOTHY J. MURIS, Chairman of the Federal Trade Commission;
SHEILA F. ANTHONY, Commissioner, Federal Trade Commission;
MOZELLE W. THOMPSON, Commissioner, Federal Trade Commission;
ORSON SWINDLE, Commissioner, Federal Trade Commission;
THOMAS B. LEARY, Commissioner, Federal Trade Commission;
J. HOWARD BEALES, III, Director, Bureau of Consumer Protection, in their official capacities,

Defendants.

No. 03-1429

freedom of speech has some loopholes

Before SEYMOUR, EBEL and HENRY, Circuit Judges.

EBEL, Circuit Judge.

The four cases consolidated in this appeal involve challenges to the national do-not-call registry, which allows individuals to register their phone numbers on a national "do-not-call list" and prohibits most commercial telemarketers from calling the numbers on that list. The primary issue in this case is whether the First Amendment prevents the government from establishing an opt-in telemarketing regulation that provides a mechanism for consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls. We hold that the do-not-call registry is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech. In other words, there is a reasonable fit between the do-not-call regulations and the government's reasons for enacting them.

does that change things?

As we discuss below in greater detail, four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements. First, the list restricts only core commercial speech i.e., commercial sales calls. Second, the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence. See Frisby v. Schultz, 487 U.S. 474, 484 (1988). Third, the do-not-call registry is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers. Fourth, the do-not-call registry materially furthers the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of the calls that cause these problems. Under these circumstances, we conclude that the requirements of the First Amendment are satisfied.

A number of additional features of the national do-not-call registry, although not dispositive, further demonstrate that the list is consistent with the First Amendment rights of commercial speakers. The challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising. Moreover, they give consumers a number of different options to avoid calls they do not want to receive. Namely, consumers who wish to restrict some but not all commercial sales calls can do so by using company-specific do-not-call lists or by granting some businesses express permission to call. In addition, the government chose to offer consumers broader options to restrict commercial sales calls than charitable and political calls after finding that commercial calls were more intrusive and posed a greater danger of consumer abuse. The government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but it had no comparable evidence with respect to charitable and political fundraising.

So it's good can't block charitable - Or did they lobby more since purely commercial?

The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive. Just as a consumer can avoid door-to-door peddlers by placing a "No Solicitation" sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so. We are convinced that the First Amendment does not prevent the

government from giving consumers this option.

I. BACKGROUND

In 2003, two federal agencies the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) promulgated rules that together created the national do-not-call registry. See 16 C.F.R. . 310.4(b)(1)(iii)(B) (FTC rule); 47 C.F.R. . 64.1200(c)(2) (FCC rule). The national do-not-call registry is a list containing the personal telephone numbers of telephone subscribers who have voluntarily indicated that they do not wish to receive unsolicited calls from commercial telemarketers. Commercial telemarketers are generally prohibited from calling phone numbers that have been placed on the do-not-call registry, and they must pay an annual fee to access the numbers on the registry so that they can delete those numbers from their telephone solicitation lists. So far, consumers have registered more than 50 million phone numbers on the national do-not-call registry.

The national do-not-call registry's restrictions apply only to telemarketing calls made by or on behalf of sellers of goods or services, and not to charitable or political fundraising calls. 16 C.F.R. .. 310.4(b)(1)(iii)(B), 310.6(a); 47 C.F.R. .. 64.1200(c)(2), 64.1200(f)(9). Additionally, a seller may call consumers who have signed up for the national registry if it has an established business relationship with the consumer or if the consumer has given that seller express written permission to call. 16 C.F.R. . 310.4(b)(1)(iii)(B)(i-ii); 47 C.F.R. . 64.1200(f)(9)(i-ii). Telemarketers generally have three months from the date on which a consumer signs up for the registry to remove the consumer's phone number from their call lists. 16 C.F.R. . 310.4(b)(3)(iv); 47 C.F.R. . 64.1200(c)(2)(i)(D). Consumer registrations remain valid for five years, and phone numbers that are disconnected or reassigned will be periodically removed from the registry. 47 C.F.R . 1200(c)(2); Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4640 (Jan. 29, 2003).

The national do-not-call registry is the product of a regulatory effort dating back to 1991 aimed at protecting the privacy rights of consumers and curbing the risk of telemarketing abuse. See generally FTC v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 857-58 (10th Cir. 2003). In the Telephone Consumer Protection Act of 1991 ("TCPA") under which the FCC enacted its do-not-call rules Congress found that for many consumers telemarketing sales calls constitute an intrusive invasion of privacy. See Pub. L. No. 102-243, 105 Stat. 2394 at . 2 (1991). Moreover, the TCPA's legislative history cited statistical data indicating that "most unwanted telephone solicitations are commercial in nature" and that "unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R. Rep. No. 102-317 at 16 (1991). The TCPA therefore authorized the FCC to establish a national database of consumers who object to receiving "telephone solicitations," which the act defined as commercial sales calls. Pub. L. No. 102-243, 105 Stat. 2394 at . 3.

Furthermore, in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 ("Telemarketing Act") under which the FTC enacted its do-not-call rules Congress found that consumers lose an estimated $40 billion each year due to telemarketing fraud. See Pub. L. No. 103-297, 108 Stat. 1545 at . 2 (1994). Therefore, Congress authorized the FTC to prohibit sales calls that a reasonable consumer would consider coercive or abusive of his or her right to privacy. Id. at . 3.

The FCC and FTC initially sought to accomplish the goals of the TCPA and the Telemarketing Act by adopting company-specific do-not-call lists, requiring sellers to maintain lists of consumers who have requested not to be called by that particular solicitor, and requiring telemarketers to honor those requests. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,

Report and Order, 7 FCC Rcd. 8752 at . 23-24 (Sept. 17, 1992); Telemarketing Sales Rule, Statement of Basis and Purpose, 60 Fed. Reg. 43842, 43854-55 (Aug. 23, 1995). Yet in enacting the national do-not-call registry, the agencies concluded that the company-specific lists had failed to achieve Congress' objectives. See Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed Reg. 4580, 4629, 4631 (Jan. 29, 2003); Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44144, 44144-45 (July 25, 2003). Among other shortfalls, the agencies explained that the large number of possible telephone solicitors made it burdensome for consumers to assert their rights under the company-specific rules, and that commercial telemarketers often ignored consumers' requests not to be called. 68 Fed. Reg. at 4629. Accordingly, the agencies decided to keep the company-specific rules as an option available to consumers, but to supplement them with the national do-not-call registry. Id.; 68 Fed. Reg. at 44144.

In this appeal we have consolidated four cases challenging various aspects of the national do-not-call registry. Cases Nos. 03-1429, 03-6258 and 03-9571 involve First Amendment attacks on the do-not-call list and its registry fees. We address these issues in parts III and IV(A) respectively. Case No. 03-9594 involves a challenge to the FCC rule's established business relationship exception on administrative law grounds. We address this issue in part IV(B). Finally, in part IV(C), we address the alternative argument that the FTC lacked statutory authority to enact its do-not-call regulations, an argument that the district court relied upon in case No. 03-6258. We conclude that all of the telemarketers' challenges lack merit and we uphold the do-not-call list in its entirety.

II. STANDARD OF REVIEW

The constitutionality of the national do-not-call registry and its fees under the First Amendment are questions of law we review de novo. See Phelan v. Laramie County Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1246 (10th Cir. 2000). We review whether the FCC's decision to include an established business relationship exception violated the Administrative Procedure Act under the arbitrary and capricious standard. See Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997). Finally, we review de novo a district court's decision that an agency lacked authority under the controlling statute to act, keeping in mind that the courts owe deference to a federal agency's interpretation of a statute it administers. See Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 824 (10th Cir. 2000) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

III. FIRST AMENDMENT ANALYSIS

The national do-not-call registry's telemarketing restrictions apply only to commercial speech. Like most commercial speech regulations, the do-not-call rules draw a line between commercial and non-commercial speech on the basis of content. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n.11 (1981) ("If commercial speech is to be distinguished, it must be distinguished by its content."); Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977) (same). In reviewing commercial speech regulations, we apply the Central Hudson test. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980); see also City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416, 429-30 (1993) (noting that the challenged law drew content-based distinctions between commercial and non-commercial speech and applying more lenient scrutiny under Central Hudson); Florida Bar v. Went For It, Inc., 515 U.S. 618, 634-35 (1995) ("This case ... concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment."); Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1513 (10th Cir. 1994) (content-based regulations disadvantaging commercial speech are reviewed pursuant to the lesser degree of First Amendment protection provided in Central Hudson).

Central Hudson established a three-part test governing First Amendment challenges to regulations restricting non-misleading commercial speech that relates to lawful activity. First, the government must assert a substantial interest to be achieved by the regulation. Central Hudson, 447 U.S. at 564. Second, the regulation must directly advance that governmental interest, meaning that it must do more than provide "only ineffective or remote support for the government's purpose." Id. Third, although the regulation need not be the least restrictive measure available, it must be narrowly tailored not to restrict more speech than necessary. See id.; Board of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989). Together, these final two factors require that there be a reasonable fit between the government's objectives and the means it chooses to accomplish those ends. United States v. Edge Broad. Co., 509 U.S. 418, 427-28 (1993).

The government bears the burden of asserting one or more substantial governmental interests and demonstrating a reasonable fit between those interests and the challenged regulation. Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1069 (10th Cir. 2001). The government is not limited in the evidence it may use to meet its burden. For example, a commercial speech regulation may be justified by anecdotes, history, consensus, or simple common sense. Went For It, 515 U.S. at 628. Yet we may not take it upon ourselves to supplant the interests put forward by the state with our own ideas of what goals the challenged laws might serve. Edenfield v. Fane, 507 U.S. 761, 768 (1993).

A. Governmental Interests

The government asserts that the do-not-call regulations are justified by its interests in 1) protecting the privacy of individuals in their homes, and 2) protecting consumers against the risk of fraudulent and abusive solicitation. See 68 Fed. Reg. 44144; 68 Fed. Reg. at 4635. Both of these justifications are undisputedly substantial governmental interests.

In Rowan v. United States Post Office Dep't, the Supreme Court upheld the right of a homeowner to restrict material that could be mailed to his or her house. 397 U.S. 728 (1970). The Court emphasized the importance of individual privacy, particularly in the context of the home, stating that "the ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." Id. at 737. In Frisby v. Schultz, the Court again stressed the unique nature of the home and recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." 487 U.S. 474, 484 (1988) (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)). As the Court held in Frisby:

One important aspect of residential privacy is protection of the unwilling listener. ... [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. Id. at 484-85 (citations omitted). Likewise, in Hill v. Colorado, the Court called the unwilling listener's interest in avoiding unwanted communication part of the broader right to be let alone that Justice Brandeis described as "the right most valued by civilized men." 530 U.S. 703, 716-17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). The Court added that the right to avoid unwanted speech has special force in the context of the home. Id.; see also FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home ... the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

Additionally, the Supreme Court has recognized that the government has a substantial interest in

preventing abusive and coercive sales practices. Edenfield v. Fane, 507 U.S. 761, 768-69 (1993) ("[T]he First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.") (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976)).

B. Reasonable Fit

A reasonable fit exists between the do-not-call rules and the government's privacy and consumer protection interests if the regulation directly advances those interests and is narrowly tailored. See Central Hudson, 447 U.S. at 564-65. In this context, the "narrowly tailored" standard does not require that the government's response to protect substantial interests be the least restrictive measure available. All that is required is a proportional response. Board of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

In other words, the national do-not-call registry is valid if it is designed to provide effective support for the government's purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked just as well. See Central Hudson, 447 U.S. at 564-65. These criteria are plainly established in this case. The do-not-call registry directly advances the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.

1. Effectiveness

haha

The telemarketers assert that the do-not-call registry is unconstitutionally underinclusive because it does not apply to charitable and political callers. First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context. As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front. United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993). "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." Id. The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further. See Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995); see also Central Hudson, 447 U.S. at 564 ("If a regulation "provides only ineffective or remote support for the government's purpose" it cannot be said to bear a reasonable fit with that purported objective). Cf. City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (underinclusiveness provides a basis for a First Amendment claim when it constitutes an "attempt to give one side of a debatable public question an advantage in expressing its views to the people").

Common Sense ...

In Rubin, for example, the Supreme Court struck down a law prohibiting brewers from putting the alcohol content of their product on beer labels, purportedly in an effort to discourage "strength wars." 514 U.S. at 478. However, the law allowed advertisements disclosing the alcohol content of beers, allowed sellers of wines and spirits to disclose alcohol content on labels (and even required such disclosure for certain wines), and allowed brewers to signal high alcohol content by using the term "malt liquor." Id. at 488-89. Under these circumstances, the Court concluded that there was little chance that the beer label rule would materially deter strength wars in light of the "irrationality of this unique and puzzling regulatory framework." Id. at 489.

Likewise, in City of Cincinnati v. Discovery Network, the Court struck down a law prohibiting commercial newsracks on public property, purportedly in order to promote the safety and attractive

Court can strike down silly rules

appearance of its streets and sidewalks. 507 U.S. 410, 412 (1993). However, the ban applied to only 62 of the 1,500 to 2,000 newsracks in the city, thus addressing only a "minute" and "paltry" share of the problem. Id. at 417-18. Moreover, the challenged ordinance was not enacted in an effort to address problems posed by newsracks, but was actually an "outdated prohibition against the distribution of any commercial handbills on public property ... enacted long before any concern about newsracks developed." Id. For these reasons, the Court held in part II of that opinion that "the city did not establish the reasonable fit we require." Id. at 417-18.

Yet so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal under Central Hudson. For example, in Edge Broadcasting the Supreme Court approved a regulation that prohibited broadcasters in North Carolina (which did not permit lotteries) from broadcasting lottery advertisements on the radio, even as applied to a broadcaster located near the border of Virginia (where lotteries were legal) whose audience consisted of 92.2 percent Virginians. 509 U.S. 418, 423-24, 431-33 (1993). The Court found it determinative that the regulation prevented lottery ads from reaching about 127,000 North Carolina residents (7.8 percent of Edge's listeners):

It could hardly be denied ... that these facts, standing alone, would clearly show that applying the statutory restriction to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy.... [T]his result could hardly be called either "ineffective," "remote," or "conditional." Nor could it be called only "limited incremental support" for the Government interest. Id. at 432 (citations omitted). The Court rejected Edge's argument that the regulations banning lottery advertising by in-state radio failed materially to advance the government's interests because North Carolina residents were already inundated with lottery advertising from other sources, such as Virginia radio and television programs. Id. at 434-35. "[T]he Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated." Id. at 434; see also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981) ("[P]rohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising.").

Who finds all these things at.

As discussed above, the national do-not-call registry is designed to reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation. The registry directly advances those goals. So far, more than 50 million telephone numbers have been registered on the do-not-call list, and the do-not-call regulations protect these households from receiving most unwanted telemarketing calls. According to the telemarketers' own estimate, 2.64 telemarketing calls per week or more than 137 calls annually were directed at an average consumer before the do-not-call list came into effect. Cf. 68 Fed. Reg. at 44152 (discussing the five-fold increase in the total number of telemarketing calls between 1991 and 2003). Accordingly, absent the do-not-call registry, telemarketers would call those consumers who have already signed up for the registry an estimated total of 6.85 billion times each year.

To be sure, the do-not-call list will not block all of these calls. Nevertheless, it will prohibit a substantial number of them, making it difficult to fathom how the registry could be called an "ineffective" means of stopping invasive or abusive calls, or a regulation that "furnish[es] only speculative or marginal support" for the government's interests. See also id. (noting the effectiveness of state do-not-call lists in reducing unwanted telemarketing calls).

Furthermore, the do-not-call list prohibits not only a significant number of commercial sales calls, but also a significant percentage of all calls causing the problems that Congress sought to address (whether commercial, charitable or political). The record demonstrates that a substantial share of all solicitation calls will be governed by the do-not-call rules. See H.R. Rep. No. 102-317, at 16 (1991)

("[M]ost unwanted telephone solicitations are commercial in nature."); 68 Fed. Reg. at 44153-54 (the high volume and unexpected nature of commercial calls subject to the national do-not-call registry makes those calls more problematic than nonprofit calls and solicitations based on established business relationships).

The telemarketers asserted before the FTC that they might have to lay off up to 50 percent of their employees if the national do-not-call registry came into effect. See 68 Fed. Reg. at 4631. It is reasonable to conclude that the telemarketers' planned reduction in force corresponds to a decrease in the amount of calls they will make. Significantly, the percentage of unwanted calls that will be prohibited will be even higher than the percentage of all unsolicited calls blocked by the list. The individuals on the do-not-call list have declared that they do not wish to receive unsolicited commercial telemarketing calls, whereas those who do want to continue receiving such calls will not register. Cf. 68 Fed. Reg. at 4632 (under the national do-not-call regulations, "telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object").

Finally, the type of unsolicited calls that the do-not-call list does prohibit commercial sales calls is the type that Congress, the FTC and the FCC have all determined to be most to blame for the problems the government is seeking to redress. According to the legislative history accompanying the TCPA, "[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R. Rep. No. 102-317, at 16 (1991) (noting that non-commercial calls were less intrusive to consumers' privacy because they are more expected and because there is a lower volume of such calls); see also 68 Fed. Reg. at 44153. Similarly, the FCC determined that calls from solicitors with an established business relationship with the recipient are less problematic than other commercial calls. 68 Fed. Reg. at 44154 ("Consumers are more likely to anticipate contacts from companies with whom they have an existing relationship and the volume of such calls will most likely be lower.").

Additionally, the FTC has found that commercial callers are more likely than non-commercial callers to engage in deceptive and abusive practices. 68 Fed. Reg. at 4637 ("When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter."). Specifically, the FTC concluded that in charitable and political calls, a significant purpose of the call is to sell a cause, not merely to receive a donation, and that non-commercial callers thus have stronger incentives not to alienate the people they call or to engage in abusive and deceptive practices. Id.; cf. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("[B]ecause charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech."). The speech regulated by the do-not-call list is therefore the speech most likely to cause the problems the government sought to alleviate in enacting that list, further demonstrating that the regulation directly advances the government's interests.

In sum, the do-not-call list directly advances the government's interests reducing intrusions upon consumer privacy and the risk of fraud or abuse by restricting a substantial number (and also a substantial percentage) of the calls that cause these problems. Unlike the regulations struck down in Rubin and Discovery Network, the do-not-call list is not so underinclusive that it fails materially to advance the government's goals.

2. Narrow Tailoring

Although the least restrictive means test is not the test to be used in the commercial speech context, commercial speech regulations do at least have to be "narrowly tailored" and provide a "reasonable fit" between the problem and the solution. Whether or not there are "numerous and obvious less-burdensome alternatives" is a relevant consideration in our narrow tailoring analysis. Went For It, 515 U.S. at 632. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). Accordingly, we consider whether there are numerous and obvious alternatives that would restrict less speech and would serve the government's interest as effectively as the challenged law. See Central Hudson, 447 U.S. at 565; Edge Broad., 509 U.S. at 430.

We hold that the national do-not-call registry is narrowly tailored because it does not over-regulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients. Cf. Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("There simply is no right to force speech into the home of an unwilling listener."); Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) ("We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another."). The do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute an invasion of privacy. See Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (the right of privacy includes an unwilling listener's interest in avoiding unwanted communication).

The Supreme Court has repeatedly held that speech restrictions based on private choice (i.e. an opt-in feature) are less restrictive than laws that prohibit speech directly. In Rowan, for example, the Court approved a law under which an individual could require a mailer to stop all future mailings if he or she received advertisements that he or she believed to be erotically arousing or sexually provocative. 397 U.S. at 729-30, 738. Although it was the government that empowered individuals to avoid materials they considered provocative, the Court emphasized that the mailer's right to communicate was circumscribed only by an affirmative act of a householder. Id. at 738. "Congress has erected a wall or more accurately permits a citizen to erect a wall that no advertiser may penetrate without his acquiescence. ... The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." Id.

Likewise, in rejecting direct prohibitions of speech (even fully protected speech), the Supreme Court has often reasoned that an opt-in regulation would have been a less restrictive alternative. In Martin v. City of Struthers, the Court struck down a city ordinance prohibiting door-to-door canvassing, noting that the government's interest could have been achieved in a less restrictive manner by giving householders the choice of whether or not to receive visitors. 319 U.S. 141, 147-49 (1943) ("[T]he decision as to whether distributers of literature may lawfully call at a home ... belongs ... with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant."). More recently, in Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, the Court struck down a permit requirement for door-to-door advocacy, while noting that another section of the ordinance allowing residents to post "No Solicitation" signs provided ample protection for the unwilling listener. 536 U.S. 150, 153, 168-69 (2002); see also Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980) ("[T]he provision permitting homeowners to bar solicitors from their property by posting signs reading 'No Solicitors or Peddlers Invited' suggests the availability of less intrusive and more effective measures to protect privacy.") (citations omitted).

The idea that an opt-in regulation is less restrictive than a direct prohibition of speech applies not

only to traditional door-to-door solicitation, but also to regulations seeking to protect the privacy of the home from unwanted intrusions via telephone, television, or the Internet. See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000) (opt-in targeted blocking of offensive television programming "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners.... Simply put, targeted blocking is less restrictive than banning...."); cf. Reno v. ACLU, 521 U.S. 844, 860, 879 (1997) (striking down an absolute prohibition against making certain sexually explicit material available to minors on the Internet on the grounds that it curtailed the speech of adults, contrasting that regulation with the alternative of facilitating parental control of such material).

Like the do-not-mail regulation approved in Rowan, the national do-not-call registry does not itself prohibit any speech. Instead, it merely "permits a citizen to erect a wall ... that no advertiser may penetrate without his acquiescence." See Rowan, 397 U.S. at 738. Almost by definition, the do-not-call regulations only block calls that would constitute unwanted intrusions into the privacy of consumers who have signed up for the list. Moreover, it allows consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them. Under the circumstances we address in this case, we conclude that the do-not-call registry's opt-in feature renders it a narrowly tailored commercial speech regulation.

The do-not-call registry's narrow tailoring is further demonstrated by the fact that it presents both sellers and consumers with a number of options to make and receive sales offers. From the seller's perspective, the do-not-call registry restricts only one avenue by which solicitors can communicate with consumers who have registered for the list. In particular, the do-not-call regulations do not prevent businesses from corresponding with potential customers by mail or by means of advertising through other media. Cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 633-34 (1995) (holding a 30-day post-accident ban on attorney solicitations narrowly tailored, finding it relevant that ample alternative channels for advertising legal services were available).

From the consumer's perspective, the do-not-call rules provide a number of different options allowing consumers to dictate what telemarketing calls they wish to receive and what calls they wish to avoid. Consumers who would like to receive some commercial sales calls but not others can sign up for the national do-not-call registry but give written permission to call to those businesses from whom they wish to receive offers. See 16 C.F.R. . 310.4(b)(1)(iii)(B)(i); 47 C.F.R. . 64.1200(f)(9)(i). Alternatively, they may decline to sign up on the national registry but make company-specific do-not-call requests with those particular businesses from whom they do not wish to receive calls. See 16 C.F.R. . 310.4(b)(1)(iii)(A); 47 C.F.R. . 64.1200(d)(3). Therefore, under the current regulations, consumers choose between two default rules either that telemarketers may call or that they may not. Then, consumers may make company-specific modifications to either of these default rules as they see fit, either granting particular sellers permission to call or blocking calls from certain sellers.

Finally, none of the telemarketers' proposed alternatives would serve the government's interests as effectively as the national do-not-call list. Primarily, the telemarketers suggest that company-specific rules effectively protected consumers. Yet as the FTC found, "[t]he record in this matter overwhelmingly shows the contrary ... it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer." 68 Fed. Reg. at 4631. Yes

First, the company-specific approach proved to be extremely burdensome to consumers, who had to repeat their do-not-call requests to every solicitor who called. Id. at 4629. In effect, this system gave

solicitors one free chance to call each consumer, although many consumers find even an initial unsolicited sales call abusive and invasive of privacy. Id. at 4629-30; cf. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not ... avoid a harm that has already taken place."). Second, the government's experience under the company-specific rules demonstrated that commercial solicitors often ignored consumers' requests to be placed on their company-specific lists. 68 Fed. Reg. at 4629. Third, consumers have no way to verify whether their numbers have been removed from a solicitor's calling list in response to a company-specific do-not-call request. Id. Finally, company-specific rules are difficult to enforce because they require consumers to bear the evidentiary burden of keeping lists detailing which telemarketers have called them and what do-not-call requests they have made. Id.

The telemarketers' objection that the company-specific approach should have been more vigorously marketed to consumers is unavailing because the flaws the FTC identified are inherent in the company-specific rule. More consumer education simply could not have cured the ineffectiveness of the former system. Similarly, even if we were to agree with the telemarketers' argument that violations of the company-specific list were not adequately enforced, the national do-not-call program improves upon failures of the company-specific approach that were not caused by any lack of enforcement. Unlike the national registry, the company-specific approach gave a vast number of potential solicitors one shot at each unwilling consumer and was significantly more difficult for consumers to use. Moreover, the national do-not-call registry will be easier to enforce than the company-specific rules because there will generally be no dispute as to whether a certain telemarketer is prohibited from calling a particular number.

Finally, the telemarketers argue that it would have been less restrictive to let consumers rely on technological alternatives such as caller ID, call rejection services, and electronic devices designed to block unwanted calls. Each of these alternatives puts the cost of avoiding unwanted telemarketing calls on consumers. Furthermore, as the FCC found, "[a]lthough technology has improved to assist consumers in blocking unwanted calls, it has also evolved in such a way as to assist telemarketers in making greater numbers of calls and even circumventing such blocking technologies." 68 Fed. Reg. at 44147. Forcing consumers to compete in a technological arms race with the telemarketing industry is not an equally effective alternative to the do-not-call registry. lol

In sum, the do-not-call registry is narrowly tailored to restrict only speech that contributes to the problems the government seeks to redress, namely the intrusion into personal privacy and the risk of fraud and abuse caused by telephone calls that consumers do not welcome into their homes. No calls are restricted unless the recipient has affirmatively declared that he or she does not wish to receive them. Moreover, telemarketers still have the ability to contact consumers in other ways, and consumers have a number of different options in determining what telemarketing calls they will receive. Finally, there are not numerous and obvious less-burdensome alternatives that would restrict less speech while accomplishing the government's objectives equally as well.

C. Discovery Network

As should be clear from the foregoing discussion, the telemarketers' reliance on Discovery Network is misplaced. In Discovery Network, the Supreme Court applied Central Hudson to strike down a municipal policy directly prohibiting freestanding commercial newsracks on public property. 507 U.S. at 412, 416. It concluded that the regulation which did not similarly restrict non-commercial newsracks did not bear a reasonable fit to the city's interests in promoting safety and the attractive

appearance of the city's public areas. Id. at 412, 417. In particular, the Court emphasized that 1) the regulation applied to only a "minute" and "paltry" share of the total number of newsracks in the city, id. at 418, and 2) the regulation's distinction between commercial and non-commercial speech bore "no relationship whatsoever to the particular interests that the city has asserted." Id. at 424 (emphasis in original).

The trifling number of newsracks regulated in Discovery Network suggested that the policy did not materially advance the city's interests, and this aspect of the regulation was not justified by evidence demonstrating that despite their small numbers the commercial newsracks disproportionately caused the problems the city sought to remedy. The Court held, in essence, that a regulation that has only a minimal impact on the identified problem cannot be saved simply because it targets only commercial speech, which occupies a lower place in our First Amendment jurisprudence. The Court concluded that the "low value" of commercial speech was "an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks." Id. at 418 (emphasis added). Under a straight-forward application of Central Hudson, the Court struck down the city's newsrack ordinance because it failed directly to advance the city's interests.

Both of the factors the Court emphasized in Discovery Network are absent in our case. First, while the regulation in Discovery Network applied only to a minute and paltry number of newsracks, the do-not-call registry blocks a substantial amount of unwanted telemarketing calls. See supra part III(B)(1). Second, while the distinction between commercial and non-commercial speech in Discovery Network bore no relationship whatsoever to the city's asserted interests, the do-not-call registry's commercial/non-commercial distinction was based on findings that commercial telephone solicitation was significantly more problematic than charitable or political fundraising calls. Id.; see also FTC v. Mainstream Mktg Servs., Inc., 345 F.3d 850, 856-60 (10th Cir. 2003). Additionally, the government had evidence that other alternatives (company-specific restrictions) failed in the commercial context, but had no comparable experience involving the failure of company-specific restrictions with respect to charitable or political callers. See supra part III(B)(2); 68 Fed. Reg. at 4637.

D. Summary

For the reasons discussed above, the government has asserted substantial interests to be served by the do-not-call registry (privacy and consumer protection), the do-not-call registry will directly advance those interests by banning a substantial amount of unwanted telemarketing calls, and the regulation is narrowly tailored because its opt-in feature ensures that it does not restrict any speech directed at a willing listener. In other words, the do-not-call registry bears a reasonable fit with the purposes the government sought to advance. Therefore, it is consistent with the limits the First Amendment imposes on laws restricting commercial speech.

IV. OTHER ISSUES

The telemarketers also challenge various other aspects of the do-not-call registry. In turn, we consider 1) whether the fees telemarketers must pay to access the registry are constitutional, 2) whether it was arbitrary and capricious for the FCC to approve the established business relationship exception, and 3) whether the FTC had statutory authority to enact its do-not-call rules.

A. The Do-Not-Call Registry Fees

To obtain the phone numbers of consumers who have signed up for the national do-not-call registry, telemarketers must pay a modest annual access fee determined by the FTC. Currently, the fee is $25 per area code of data, except that the first five area codes are provided free of charge and the maximum annual fee is capped at $7,375. 16 C.F.R. . 310.8(c). The telemarketers argue that this fee unconstitutionally imposes a revenue tax on protected speech. We disagree.

It is well-established that the First Amendment protects against the imposition of charges, such as a license taxes, for the enjoyment of free speech rights. Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943). Nevertheless, the government is permitted to exact a fee in order to defray the cost of legitimate regulations, even though such a fee incidentally burdens speech. See id. at 114 n.8. In Murdock, for example, the Court struck down an ordinance that required Jehovah's Witnesses to pay licensing fees in order to distribute religious materials door-to-door, explaining that the regulation was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." Id. at 106, 113-14. The Court employed the same reasoning in Cox v. New Hampshire, upholding license fees of up to $300 to take part in a parade or procession because the fee was held "to be not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." 312 U.S. 569, 570-71, 576-77 (1941).

Accordingly, we recently approved the Utah Charitable Solicitations Act which requires charitable fundraisers to register with the state and pay $250 for a permit because that fee offsets increased regulatory costs associated with the act. American Target Adver., Inc. v. Giani, 199 F.3d 1241, 1246, 1248-49 (10th Cir. 2000). We held that "a regulatory fee may be constitutional only if it serves a 'legitimate state interest'" and that defraying the costs of a regulation aimed at protecting citizens from fraud is legitimate. Id. at 1248-49. Such fees may be imposed to defray both administrative expenses (such as processing and licensing costs) and the cost of enforcing the regulations. National Awareness Found. v. Abrams, 50 F.3d 1159, 1166 (2d Cir. 1995) ("[E]nforcement power is necessary to ensure that the purposes of [the regulations] are served.").

The Do-Not-Call Implementation Act authorized the FTC to collect fees for fiscal years 2003 to 2007, requiring that "[s]uch amounts shall be available for expenditure only to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement." Pub. L No. 108-10, 117 Stat. 557 at . 2 (2003). In enacting the fees regulation, the FTC stated it was authorized only "to assess fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR." Telemarketing Sales Rule Fees, 68 Fed. Reg. 45134, 45141 (July 31, 2003). The FTC estimated the costs of implementing and enforcing the national do-not-call registry at $18.1 million for fiscal year 2003. Id.

The record conclusively demonstrates that the do-not-call registry fees are to be used only to pay for expenses incident to the administration of the do-not-call registry, as required by Murdock and Giani. The FTC explained that the costs of the do-not-call registry fall into three major categories. First are the actual costs of developing and operating the national registry, such as the costs of handling consumer registration and complaints, transferring information from state lists to the registry, ensuring telemarketer access to the registry, and managing law enforcement access to appropriate information. Id. Second are the costs of enforcement efforts, such as domestic and international law enforcement initiatives to identify and challenge alleged violators, and consumer and business education efforts. Id. Third are the increased costs of agency infrastructure and administration, including changes in information technology structural support necessary to handle anticipated increases in consumer complaints and requests from law enforcement agencies for access to such

complaints. Id. The FTC decided upon the $25 per area code fee in order to ensure that it would collect the amount necessary to defray these costs.

Therefore, we hold that the registry fees are a permissible regulatory measure designed to offset projected expenses incident to the administration and enforcement of the national do-not-call list, not an unconstitutional revenue tax.

B. The Established Business Relationship Exception

The telemarketers next argue that the FCC's established business relationship exception is arbitrary and capricious in violation of the Administrative Procedure Act. See 5 U.S.C. . 706. In particular, they contend that the FCC failed to give appropriate consideration to the anti-competitive effect that this exception may have on telecommunications markets. We conclude that the FCC did in fact address this concern, and that the FCC's exception for established business relationships is not arbitrary and capricious under the APA.

The arbitrary and capricious standard of review is a narrow one, and we are not empowered to substitute our own judgment for that of the administrative agency. City of Albuquerque v. Browner, 97 F.3d 415, 424 (10th Cir. 1996). "Generally, an agency decision will be considered arbitrary and capricious if 'the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

The Telecommunications Act of 1996, 47 U.S.C. . 251 et. seq., required local telephone monopolies to make their facilities and services available to competitors for negotiated or arbitrated prices, and directed the FCC to establish regulations to advance local competition. The FCC enacted its do-not-call rules under different statutory authority, the TCPA, which specifically authorized the FCC to establish a national database of residential telephone subscribers who object to receiving telephone solicitations. See 47 U.S.C. . 227(c)(3).

When an agency is charged to enforce overlapping and at times inconsistent policies, it cannot act single-mindedly in furtherance of one of those policies while wholly ignoring the other. Southern S.S. Co. v. NLRB, 316 U.S. 31, 46-47 (1942); McLean Trucking Co. v. United States, 321 U.S. 67, 80 (1944).

The FCC rule sufficiently addresses the telemarketers' concerns about the established business relationship exception. In its notice of rulemaking, the FCC asked for comments on the anti-competitive effect this exception might have on the telecommunications industry. See 68 Fed. Reg. at 44159. The FCC received responses indicating that such an exception would favor incumbent telephone service providers who would be able to market new services to their larger customer base. Id. at 44159-60. Also, the FCC noted some respondents' concerns that this anti-competitive effect would be particularly strong because telephone solicitations are currently the primary mechanism for selling telecommunications services. Id. at 44159. The FCC then considered several proposed ways in which such an anti-competitive effect could be mitigated, rejecting each of them.

Yeah...

First, the FCC considered a proposal to narrow the established business relationship exemption so that no telecommunications company could call its customers to advertise different services. Id. at

44160. However, the FCC cited comments in its administrative record emphasizing the importance of "flexibility in communicating with ... customers not only about their current services, but also to discuss available alternative services or products." Id. Accordingly, the FCC concluded that limiting telecommunications companies' ability to market new goods or services to existing customers would not be in the public interest. Id. ? how

Second, the FCC considered a proposal that the Commission revise the definition of established business relationship so that all providers of telecommunications services would be deemed to have such a relationship with all consumers, even if they had not in fact had any preexisting business connections. Id. Third, it considered an alternative proposal that the definition of established business relationship be revised to exclude companies who have historically been dominant or monopoly service providers, at least until such time as the new entrants to the telecommunications industry sufficiently penetrated the market. Id. The FCC concluded that these proposals would not adequately fulfill Congress' mandate to protect residential telephone subscribers' privacy rights to avoid telemarketing calls to which they object: "To permit common carriers to call consumers with whom they have no existing relationships and who have expressed a desire not to be called by registering with the national do-not-call list, would likely confuse consumers and interfere with their ability to manage and monitor the telemarketing calls they receive." Id.

The FCC then explained the factors it believed would limit the established business relationship exception's anti-competitive effect. First, it noted that all providers of telecommunications services incumbent carriers and new competitors alike may contact competitors' customers who have not signed up for the national do-not-call registry. Id. Second, consumers who have signed up for the do-not-call registry still have the ability to place their carrier on a company-specific do-not-call list, thereby overriding the established business relationship exception. Id. Finally, the FCC emphasized that telecommunications providers are still free to use other means of marketing their products to consumers, such as direct mailings. Id. Ok

basically too bad

The FCC's rule demonstrates that the agency did not simply ignore the potential anti-competitive effect of the established business relationship exception or its duties under the Telecommunications Act. Rather, the FCC analyzed the possible effects that this exception may have on the telecommunications industry and explained why it believed its rule would minimize any adverse consequences. When an agency has made a reasoned policy decision, "we are not empowered to substitute our judgment for that of the [agency]" under the arbitrary and capricious standard of review. Browner, 97 F.3d at 424. The FCC did not act in an arbitrary and capricious manner in adopting the established business relationship exception, and we decline the telemarketers' invitation to displace the FCC's policy judgment.

C. The FTC's Statutory Authority

In case No. 03-6258, the district court held that the FTC lacked statutory authority to enact the do-not-call registry. In the Telemarketing Act, Congress authorized the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." Pub. L. 103-297, 108 Stat. 1545 at . 3. More specifically, Congress directed the FTC to include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." Id. The FTC's conclusion that this language authorized it to enact the national do-not-call registry is entitled to deference under the familiar test outlined in Chevron, U.S.A., Inc. v. Natural Resources Defense Council. 467 U.S. 837, 842-43 (1984). In light of this deference, we conclude that the FTC did have statutory authority to promulgate its do-not-call regulations because the agency's

view that the Telemarketing Act authorized it to enact those rules is at least a permissible construction of that statute. it prob exactly authorized them

Moreover, even if some doubt once existed, Congress erased it through subsequent legislation. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."); Schism v. United States, 316 F.3d 1259, 1289 (Fed. Cir. 2002) ("Congress may ratify agency conduct 'giving the force of law to official action unauthorized when taken.'") (citing Swayne & Hoyt v. United States, 300 U.S. 297, 302 (1937)). In the Do-Not-Call Implementation Act, Congress directed the FCC and FTC to maximize consistency between their respective do-not-call rules and authorized the FTC to collect do-not-call registry fees to offset the administrative costs of the regulations. Pub. L. 108-10, 117 Stat. 557 at .. 2-3. Furthermore, in response to the district court's decision in case No. 03-6258, Congress expressly ratified the FTC's do-not-call regulations. An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. 108-82, 117 Stat 1006 (2003). The FTC's statutory authority is now unmistakably clear.

V. CONCLUSION

We hold that 1) the do-not-call list is a valid commercial speech regulation under Central Hudson because it directly advances substantial governmental interests and is narrowly tailored; 2) the registry fees telemarketers must pay to access the list are a permissible measure designed to defray the cost of legitimate government regulation; 3) it was not arbitrary and capricious for the FCC to adopt the established business relationship exception; and 4) the FTC has statutory authority to establish and implement the national do-not-call registry.

The judgments below in cases 03-1429 and 03-6258 are REVERSED with respect to the questions presented in this appeal, and the petitions for review in cases 03-9571 and 03-9594 are DENIED.

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BARACK OBAMA: CONNECTING AND EMPOWERING ALL AMERICANS THROUGH TECHNOLOGY AND INNOVATION

"Let us be the generation that reshapes our economy to compete in the digital age. Let's set high standards for our schools and give them the resources they need to succeed. Let's recruit a new army of teachers, and give them better pay and more support in exchange for more accountability. Let's make college more affordable, and let's invest in scientific research, and let's lay down broadband lines through the heart of inner cities and rural towns all across America."

[Presidential Announcement Speech in Springfield, IL 02/10/07]

ran into $ trouble

BARACK OBAMA ON TECHNOLOGY AND INNOVATION

Barack Obama understands the immense transformative power of technology and innovation and how they can improve the lives of all Americans. He sees that technology offers the tools to create real change in America. Obama's forward-thinking 21st century technology and innovation policy starts by recognizing that we need to connect all citizens with each other to engage them more fully and directly in solving the problems that face us. In tandem with that goal, Barack Obama understands that we must use all available technologies and methods to open up the federal government, creating a new level of transparency to change the way business is conducted in Washington and giving Americans the chance to participate in government deliberations and decision-making in ways that were not possible only a few years ago. To achieve this vision, Barack Obama will encourage the deployment of the most modern communications infrastructure. In turn, that infrastructure can be used by government and business to reduce the costs of health care, help solve our energy crisis, create new jobs, and fuel our economic growth. And an Obama administration will ensure America remains competitive in the global economy.

Barack Obama is already using technology to transform presidential politics and to help unprecedented numbers of citizens take back the political process. Obama's Internet campaign is only the beginning of how Obama would harness the power of the Internet to transform government and politics. On barackobama.com, voters have connected not only with the campaign but with each other; the campaign has used technology to engage those who have not been able to participate in prior presidential campaigns. More than 280,000 people have created accounts on barackobama.com. These users have organically created over 6,500 grassroots volunteer groups and have organized more than 13,000 off-line events using the site. Obama is also opening up the campaign and giving average Americans a chance to offer opinions and information on important policy issues and Americans have responded: over 15,000 policy ideas have been submitted through the web site. Through Obama's leadership, many of the presidential debates are freely available online for mashups, commentary, and other uses by ordinary citizens, bloggers, and others. On the fundraising front, supporters have made more than 370,000 donations online, more than half of which have been under $25. Users who have set up personal fundraising pages online have raised over $1.5 million. The campaign's technology activities demonstrate the important and positive role technology would play in an Obama administration, opening up the closed practices of governance to greater citizen engagement and participation and re-connecting Americans with their democracy in new ways.

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Barack Obama's comprehensive technology and innovation plan will:

- Ensure the full and free exchange of information among Americans through an open Internet and diverse media outlets.
- Create a transparent and connected democracy.
- Encourage the deployment of a modern communications infrastructure.
- Employ technology and innovation to solve our nation's most pressing problems, including reducing the costs of health care, encouraging the development of new clean energy sources, and improving public safety.
- Improve America's competitiveness.

I. Ensure the Full and Free Exchange of Information through an Open Internet and Diverse Media Outlets

Democracy is strongest when its citizens can engage in the full and free exchange of information and ideas, including freely expressing themselves and learning from information offered by others. The Internet and traditional media outlets are critical in facilitating communication by and between Americans and citizens of the world. As president, Barack Obama will ensure that these critical communications pathways remain accessible to all Americans and reflect the diversity of our nation. By doing so, this policy will enable Americans to discuss and debate more actively the key issues that affect our lives and will give citizens greater autonomy to determine where the truth lies.

Protect the Openness of the Internet: A key reason the Internet has been such a success is because it is the most open network in history. It needs to stay that way. Barack Obama strongly supports the principle of network neutrality to preserve the benefits of open competition on the Internet. Users must be free to access content, to use applications, and to attach personal devices. They have a right to receive accurate and honest information about service plans. But these guarantees are not enough to prevent network providers from discriminating in ways that limit the freedom of expression on the Internet. Because most Americans only have a choice of only one or two broadband carriers, carriers are tempted to impose a toll charge on content and services, discriminating against websites that are unwilling to pay for equal treatment. This could create a two-tier Internet in which websites with the best relationships with network providers can get the fastest access to consumers, while all competing websites remain in a slower lane. Such a result would threaten innovation, the open tradition and architecture of the Internet, and competition among content and backbone providers. It would also threaten the equality of speech through which the Internet has begun to transform American political and cultural discourse. Barack Obama supports the basic principle that network providers should not be allowed to charge fees to privilege the content or applications of some web sites and Internet applications over others. This principle will ensure that the new competitors, especially small or non-profit speakers, have the same opportunity as incumbents to innovate on the Internet and to reach large audiences. Obama will protect the

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Internet's traditional openness to innovation and creativity and ensure that it remains a platform for free speech and innovation that will benefit consumers and our democracy.

Encourage Diversity in Media Ownership: Barack Obama believes that the nation's rules ensuring diversity of media ownership are critical to the public interest. Unfortunately, over the past several years, the Federal Communications Commission has promoted the concept of consolidation over diversity. Barack Obama believes that providing opportunities for minority-owned businesses to own radio and television stations is fundamental to creating the diverse media environment that federal law requires and the country deserves and demands. As president, he will encourage diversity in the ownership of broadcast media, promote the development of new media outlets for expression of diverse viewpoints, and clarify the public interest obligations of broadcasters who occupy the nation's spectrum. An Obama presidency will promote greater coverage of local issues and better responsiveness by broadcasters to the communities they serve.

Protect Our Children While Preserving the First Amendment: By making information freely available from untold numbers of sources, the Internet and more traditional media outlets have a huge influence on our children. Barack Obama believes that the openness of the new media world should be seen as an opportunity as much as some see it as a threat. We live in the most information-abundant age in history and the people who develop the skills to utilize its benefits are the people who will succeed in the 21st century. But Barack Obama also recognizes that lurking out there are the darker corners of the media world: from Internet predators to hateful messages to graphic violence and sex. Obama values our First Amendment freedoms and our right to artistic expression and does not view regulation as the answer to these concerns. Instead, an Obama administration will give parents the tools and information they need to control what their children see on television and the Internet in ways fully consistent with the First Amendment.

- An Obama administration will encourage the creation of Public Media 2.0., the next generation of public media that will create the Sesame Street of the Digital Age and other video and interactive programming that educates and informs. Obama will support the transition of existing public broadcasting entities and help renew their founding vision in the digital world. meh if gov should support
- Obama will work to give parents the tools to prevent reception of programming that they find offensive on television and on digital media. Obama will encourage improvements to the existing voluntary rating system, exploiting new technologies like tagging and filtering, so that parents can better understand what content their children will see, and have the tools to respond. Private entities like Common Sense Media are pursuing a "sanity not censorship" approach, which can serve as a model for how to use technology to empower parents without offending the First Amendment. good
- Obama will encourage industry not to show inappropriate adult-oriented commercial advertising during children's programming.
- On the Internet, Obama will require that parents have the option of receiving parental controls software that not only blocks objectionable Internet content but also prevents children from revealing personal information through their home computer. parents can currently buy - should not require ISP to provide
- To further protect children online, Obama supports tough penalties, increased enforcement resources and forensic tools for law enforcement, and collaboration between law enforcement and the private sector to identify and prosecute people who abuse the Internet to try to exploit children.

Safeguard our Right to Privacy: The open information platforms of the 21st century can also tempt institutions to violate the privacy of citizens. Dramatic increases in computing power, decreases in storage costs and huge flows of information that characterize the digital age bring enormous benefits, but also create risk of abuse. We need sensible safeguards that protect privacy in this dynamic new world. As president, Barack Obama will strengthen privacy protections for the digital age and will harness the power of technology to hold government and business accountable for violations of personal privacy. ? nothing specific

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- To ensure that powerful databases containing information on Americans that are necessary tools in the fight against terrorism are not misused for other purposes, Barack Obama supports restrictions on how information may be used and technology safeguards to verify how the information has actually been used.
- Obama supports updating surveillance laws and ensuring that law enforcement investigations and intelligence-gathering relating to U.S. citizens are done only under the rule of law. well...
- Obama will also work to provide robust protection against misuses of particularly sensitive kinds of information, such as e-health records and location data that do not fit comfortably within sector-specific privacy laws.
- Obama will increase the Federal Trade Commission's enforcement budget and will step up international cooperation to track down cyber-criminals so that U.S. law enforcement can better prevent and punish spam, spyware, telemarketing and phishing intrusions into the privacy of American homes and computers.

II. Create a Transparent and Connected Democracy

it never stays that way

Open Up Government to its Citizens: The Bush Administration has been one of the most secretive, closed administrations in American history. Our nation's progress has been stifled by a system corrupted by millions of lobbying dollars contributed to political campaigns, the revolving door between government and industry, and privileged access to inside information—all of which have led to policies that favor the few against the public interest. An Obama presidency will use cutting-edge technologies to reverse this dynamic, creating a new level of transparency, accountability and participation for America's citizens. Technology-enabled citizen participation has already produced ideas driving Obama's campaign and its vision for how technology can help connect government to its citizens and engage citizens in a democracy. Barack Obama will use the most current technological tools available to make government less beholden to special interest groups and lobbyists and promote citizen participation in government decision-making. Obama will integrate citizens into the actual business of government by:

- Making government data available online in universally accessible formats to allow citizens to make use of that data to comment, derive value, and take action in their own communities. Greater access to environmental data, for example, will help citizens learn about pollution in their communities, provide information about local conditions back to government and empower people to protect themselves.
- Establishing pilot programs to open up government decision-making and involve the public in the work of agencies, not simply by soliciting opinions, but by tapping into the vast and distributed expertise of the American citizenry to help government make more informed decisions. this doesn't actually work
- Requiring his appointees who lead Executive Branch departments and rulemaking agencies to conduct the significant business of the agency in public, so that any citizen can watch a live feed on the Internet as the agencies debate and deliberate the issues that affect American society. He will ensure that these proceedings are archived for all Americans to review, discuss and respond. He will require his appointees to employ all the technological tools available to allow citizens not just to observe, but also to participate and be heard in these meetings.
- Restoring the basic principle that government decisions should be based on the best-available, scientifically-valid evidence and not on the ideological predispositions of agency officials.
- Lifting the veil from secret deals in Washington with a web site, a search engine, and other web tools that enable citizens easily to track online federal grants, contracts, earmarks, and lobbyist contacts with government officials. good - but still opaque
- Giving the American public an opportunity to review and comment on the White House website for five days before signing any non-emergency legislation.

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- Bringing democracy and policy deliberations directly to the people by requiring his Cabinet officials to have periodic national online town hall meetings to answer questions and discuss issues before their agencies.
- Employing technologies, including blogs, wikis and social networking tools, to modernize internal, cross-agency, and public communication and information sharing to improve government decision-making.

Bring Government into the 21st Century: Barack Obama will use technology to reform government and improve the exchange of information between the federal government and citizens while ensuring the security of our networks. Obama believes in the American people and in their intelligence, expertise, and ability and willingness to give and to give back to make government work better.

- Obama will appoint the nation's first Chief Technology Officer (CTO) to ensure that our government and all its agencies have the right infrastructure, policies and services for the 21st century. The CTO will ensure the safety of our networks and will lead an interagency effort, working with chief technology and chief information officers of each of the federal agencies, to ensure that they use best-in-class technologies and share best practices. key
- The CTO will have a specific focus on transparency, by ensuring that each arm of the federal government makes its records open and accessible as the E-Government Act requires. The CTO will also focus on using new technologies to solicit and receive information back from citizens to improve the functioning of democratic government.
- The CTO will also ensure technological interoperability of key government functions. For example, the Chief Technology Officer will oversee the development of a national, interoperable wireless network for local, state and federal first responders as the 9/11 commission recommended. This will ensure that fire officials, police officers and EMTs from different jurisdictions have the ability to communicate with each other during a crisis and we do not have a repeat of the failure to deliver critical public services that occurred in the aftermath of Hurricane Katrina.
- In the 21st century, our economic success will depend not only on economic analysis but also on technological sophistication and direct experience in this powerful engine of our economy. In an Obama administration, the government's economic policy-making organizations and councils will include individuals with backgrounds in our technology industry. use general comm

III. Deploy a Modern Communications Infrastructure

To realize Barack Obama's vision of an interconnected democracy, the nation deserves the finest and most modern communications infrastructure in the world. The technology sector has helped keep the United States at the center of innovation and the job growth and wealth creation that has accompanied it. However, while the United States once led the world in Internet deployment, the Bush administration has surrendered that leadership through its indifference to technology and its lack of understanding of the 21st century economy. By rededicating our nation to ensuring that all Americans have access to broadband and the skills to use it effectively, Barack Obama will position our citizens, particularly our young people, to compete and succeed in an increasingly technology-rich, knowledge-based economy.

Deploy Next-Generation Broadband: Barack Obama believes that America should lead the world in broadband penetration and Internet access. As a country, we have ensured that every American has access to telephone service and electricity, regardless of economic status, and Obama will do likewise for broadband Internet access. Full broadband penetration can enrich democratic discourse, enhance competition, provide economic growth, and bring significant consumer benefits. Moreover, improving our infrastructure will foster competitive markets for Internet access and services that ride on that infrastructure. Obama believes we can get

true broadband to every community in America through a combination of reform of the Universal Service Fund, better use of the nation's wireless spectrum, promotion of next-generation facilities, technologies and applications, and new tax and loan incentives. Specifically, Obama proposes the following policies to restore America's world leadership in this arena:

- Redefine "broadband:" The Federal Communications Commission today defines "broadband" as an astonishingly low 200 kbps. This distorts federal policy and hamstrings efforts to broaden broadband access. Obama will define "broadband" for purposes of national policy at speeds demanded by 21st century business and communications.
- Universal Service Reform: Obama will establish a multi-year plan with a date certain to change the Universal Service Fund program from one that supports voice communications to one that supports affordable broadband, with a specific focus on reaching previously un-served communities.
- Unleashing the Wireless Spectrum: Obama will confront the entrenched Washington interests that have kept our public airwaves from being maximized for the public's interest. Obama will demand a review of existing uses of our wireless spectrum. He will create incentives for smarter, more efficient and more imaginative use of government spectrum and new standards for commercial spectrum to bring affordable broadband to rural communities that previously lacked it. He will ensure that we have enough spectrum for police, ambulances and other public safety purposes.
- Bringing Broadband to our Schools, Libraries, Households and Hospitals: Obama will recommit America to ensuring that our schools, libraries, households and hospitals have access to next generation broadband networks. He will also make sure that there are adequate training and other supplementary resources to allow every school, library and hospital to take full advantage of the broadband connectivity.
- Encourage Public/Private Partnerships: Obama will encourage innovation at the local level through federal support of public/private partnerships that deliver real broadband to communities that currently lack it.

IV. Employ Technology and Innovation to Solve Our Nation's Most Pressing Problems

The 21st century tools of technology and telecommunications have unleashed the forces of globalization on a previously unimagined scale. They have "flattened" communications and labor markets and have contributed to a period of unprecedented innovation, making us more productive, connected global citizens. By maximizing the power of technology, we can strengthen the quality and affordability of our health care, advance climate-friendly energy development and deployment, improve education throughout the country, and ensure that America remains the world's leader in technology.

Lower Health Care Costs by Investing in Electronic Information Technology Systems: A key feature of Barack Obama's health care plan is the use of technology to lower the cost of health care. Most medical records are still stored on paper, which makes them difficult to use to coordinate care, measure quality, or reduce medical errors. Processing paper claims also costs twice as much as processing electronic claims. Barack Obama will invest $10 billion a year over the next five years to move the U.S. health care system to broad adoption of standards-based electronic health information systems, including electronic health records. He will also phase in requirements for full implementation of health IT and commit the necessary federal resources to make it happen. Obama will ensure that these systems are developed in coordination with providers and frontline workers, including those in rural and underserved areas. Obama will ensure that patients' privacy is protected. A study by the Rand Corporation found that if most hospitals and doctors offices adopted electronic health records, up to $77 billion of savings would be realized each year through improvements such as reduced hospital stays, avoidance of duplicative and unnecessary testing, more appropriate drug utilization, and other efficiencies. Obama will make the Veterans Health Administration, the nation's largest integrated

Very hard on details

health system, a model in the use of technology to modernize and improve health care delivery. To ensure that veterans get the best care possible, he will improve electronic records interoperability between the Pentagon and VA, expand effectiveness research, promote wellness programs, and use technology to improve the accountability for performance and quality.

Invest in Climate-Friendly Energy Development and Deployment: Barack Obama knows that we need to rely on technology to help solve the critical energy and environmental problems facing this country. As he announced in his energy policy, Barack Obama will invest $150 billion over the next ten years to enable American engineers, scientists and entrepreneurs to advance the next generation of biofuels and fuel infrastructure, accelerate the commercialization of plug-in hybrids, promote development of commercial-scale renewable energy, and begin the transition to a new digital electricity grid. This investment will transform the economy and create millions of new jobs. Obama will:

- Double federal science and research funding for clean energy projects, relying on the resources and ability of our national laboratories, universities and land grant colleges.
- Invest in the development of the next generation of biofuels, including cellulosic ethanol.
- Increase the resources devoted to the commercialization and deployment of low-carbon coal technologies.
- Create a Clean Technologies Deployment Venture Capital Fund, funded by an annual $10 billion investment for five years, to ensure that promising technologies move beyond the lab and are commercialized in the U.S.
- Use innovative measures to dramatically improve the energy efficiency and stability of our economy and improve our national energy intensity 50 percent by 2030.
- Invest in a digital smart energy grid.

"go doing this"

Upgrade Education to Meet the Needs of the 21st Century: Barack Obama will emphasize the importance of technology literacy, ensuring that all public school children are equipped with the necessary science, technology and math skills to succeed in the 21st century economy. Access to computers and broadband connections in public schools must be coupled with qualified teachers, engaging curricula, and a commitment to developing skills in the field of technology. This is central to the competitiveness of our nation's technology sector and of our citizens. Obama also believes that we must strengthen math and science education to help develop a skilled workforce and promote innovation. He will work to increase our number of science and engineering graduates, encourage undergraduates studying math and science to pursue graduate studies, and work to increase the representation of minorities and women in the science and technology pipeline, tapping the diversity of America to meet the increasing demand for a skilled workforce. If we export our best software and engineering jobs to developing countries, it is less likely that America will benefit from the next generation innovations in nanotechnology, electronics, and biotechnology. We must have a skilled workforce so that we can retain and grow jobs requiring 21st century skills rather than forcing employers to find skilled workers abroad.

Create New Jobs: An Obama administration will foster home-grown innovation and ensure that we can retain and grow high-paying jobs in fast-growing sectors in the sciences and technology rather than exporting those jobs to lower cost labor markets abroad. As offshoring becomes more of a long-term workforce management strategy and less of a perceived short-term cost savings, it presents a significant challenge to young people growing up in America's historically low-income and working-class communities. An Obama administration will invest in human capital to ensure that our young people have the skills to fill the growing number of information technology jobs being created globally and will also support pilot programs that provide incentives for businesses to grow their information technology workforce in inner-cities and rural communities.

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Modernize Public Safety Networks: Barack Obama is committed to improving the information and communications technology used to support public safety from the antiquated 1970s and 1980s-based technology currently used by agencies around the country to a modern system that will enable us to respond to emergencies and natural disasters such as Hurricane Katrina. In particular, Obama will:

- Catalyze national leadership to spur the development and deployment of new technologies to promote interoperability, broadband access, and more effective communications among first responders and emergency response systems.

- Use the authority over spectrum licenses to establish an effective public-private partnership that would facilitate the development of a next generation network for use by public safety agencies on a priority basis.

V. Improve America's Competitiveness

Invest in the Sciences: Barack Obama supports doubling federal funding for basic research, changing the posture of our federal government from being one of the most anti-science administrations in American history to one that embraces science and technology. This will foster home-grown innovation, help ensure the competitiveness of US technology-based businesses, and ensure that 21st century jobs can and will grow in America. As a share of the Gross Domestic Product, American federal investment in the physical sciences and engineering research has dropped by half since 1970. Yet, it often has been federally-supported basic research that has generated the innovation to create markets and drive economic growth. For example, one recent report demonstrated how federally supported research in fiber optics and lasers helped spur the telecommunications revolution.

Make the R&D Tax Credit Permanent: Barack Obama wants investments in a skilled research and development workforce and technology infrastructure to be supported here in America so that American workers and communities will benefit. Obama wants to make the Research and Development tax credit permanent so that firms can rely on it when making decisions to invest in domestic R&D over multi-year timeframes.

Reform Immigration: While highly skilled immigrants have contributed in beneficial ways to our domestic technology industry, there are plenty of Americans who could be filling those positions given the proper training. Barack Obama is committed to investing in communities and people who have not had an opportunity to work and participate in the Internet economy as anything other than consumers. Most H-1B new arrivals, for example, have earned a bachelor's degree or its equivalent abroad (42.5%). They are not all PhDs. We can and should produce more Americans with bachelor's degrees that lead to jobs in technology. A report of the National Science Foundation (NSF) reveals that blacks, Hispanics, and Native Americans as a whole comprise more that 25% of the population but earn, as a whole, 16% of the bachelor degrees, 11% of the master's degrees, and 5% of the doctorate degrees in science and engineering. We can do better than that and go a long way toward meeting industry's need for skilled workers with Americans. That being said, we do not want to shut our doors to innovators from overseas, who have traditionally helped make America strong. Barack Obama supports comprehensive immigration reform that includes improvement in our visa programs, including our legal permanent resident visa programs and temporary programs including the H-1B program, to attract some of the world's most talented people to America. We should allow immigrants who earn their degrees in the U.S. to stay, work, and become Americans over time. And we should examine our ability to increase the number of permanent visas we issue to foreign skilled workers. Obama will work to ensure immigrant workers are less dependent on their employers for their right to stay in the country and would hold accountable employers who abuse the system and their workers.

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Promote American Businesses Abroad: Trade can create wealth and drive innovation through competition. Barack Obama supports a trade policy that ensures our goods and services are treated fairly in foreign markets. At the same time, trade policy must stay consistent with our commitment to demand improved labor and environmental practices worldwide. In its first six years, the Bush Administration has filed only 16 cases to enforce its rights under WTO agreements. This compares to 68 cases filed during the first six years of the Clinton Administration. President Bush has failed to address the fact that China has engaged in ongoing currency manipulation that undercuts US exports; that China fails to enforce U.S. copyrights and trademarks and that some of our competitors create regulatory and tax barriers to the delivery and sale of technology goods and services abroad. Barack Obama will fight for fair treatment of our companies abroad.

Ensure Competitive Markets: Barack Obama believes we need a business and regulatory landscape in which entrepreneurs and small businesses can thrive, start-ups can launch, and all enterprises can compete effectively while investors and consumers are protected against bad actors that cross the line. As president, Obama will reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers. Thus, he will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not. An Obama administration will look carefully at key industries to ensure that the benefits of competition are fully realized by consumers. Obama will strengthen the antitrust authorities' competition advocacy programs to ensure that special interests do not use regulation to insulate themselves from the competitive process. Obama will also strengthen competition advocacy in the international community as well as domestically. He will take steps to ensure that antitrust law is not used as a tool to interfere with robust competition or undermine efficiency to the detriment of U.S. consumers and businesses. He will do so by improving the administration of those laws in the U.S. and by working with foreign governments to change unsound competition laws and to avoid needless duplication and conflict in multinational enforcement of those laws. In short, an Obama administration will take seriously its responsibility to enforce the antitrust laws so that all Americans benefit from a growing and healthy competitive free-market economy.

Protect American Intellectual Property Abroad: The Motion Picture Association of America estimates that in 2005, more than nine of every 10 DVDs sold in China were illegal copies. The U.S. Trade Representative said 80 percent of all counterfeit products seized at U.S. borders still come from China. Barack Obama will work to ensure intellectual property is protected in foreign markets, and promote greater cooperation on international standards that allow our technologies to compete everywhere.

Protect Intellectual Property at Home: Intellectual property is to the digital age what physical goods were to the industrial age. Barack Obama believes we need to update and reform our copyright and patent systems to promote civic discourse, innovation and investment while ensuring that intellectual property owners are fairly treated.

Vage

Reform the Patent System: A system that produces timely, high-quality patents is essential for global competitiveness in the 21st century. By improving predictability and clarity in our patent system, we will help foster an environment that encourages innovation. Giving the Patent and Trademark Office (PTO) the resources to improve patent quality and opening up the patent process to citizen review will reduce the uncertainty and wasteful litigation that is currently a significant drag on innovation. With better informational resources, the Patent and Trademark Office could offer patent applicants who know they have significant inventions the option of a rigorous and public peer review that would produce a "gold-plated" patent much less vulnerable to court challenge. Where dubious patents are being asserted, the PTO could conduct low-cost, timely administrative proceedings to determine patent validity. As president, Barack Obama will ensure that our patent laws protect legitimate rights while not stifling innovation and collaboration.

in progress

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Massachusetts Institute of Technology
Fall Semester, 2010

MIT 6.805/STS085: Ethics and Law on the Electronic Frontier

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6.805 - Sample Case Brief

Cubby v. Compuserve, 776 F.Supp 135 (SDNY, 1991)

In common law systems (such as the United States and Great Britain), courts decide cases both in order to determine the just result of a particular dispute and also to provide an evolving articulation of legal rules applicable to classes of controversies. Judges write legal opinions in a manner that explains the dispute before the court and also to serve as a record of how the legal system understands the type of dispute in the case before the court.

Lawyers read judicial opinions to understand the application of the law and to use the arguments presented by judges in earlier cases in order to construct arguments about new cases. When reading cases for this purpose, it is necessary to extract 5 key elements from the opinion. This style or reading and summarizing a judicial opinion is called *briefing a case*. Here's how you do it:

Key elements of a judicial opinion to include in a case brief:

- **Issue**: What is the legal question to be decided?
- **Procedural History**:
  - Who are the Parties to the dispute?
  - Procedural Posture; what has happened in the court system before the case arrived at this court for decision?
- **Facts**: What are the key facts that the court finds as true and relevant to applying the legal rules to the dispute? (Resist the temptation to recite ALL facts. Instead, think about which facts are really important to the holding.)
- **Holding**: What is the result of the case — an answer to question posed by the *Issue* relative to the *Parties*.
- **Reasoning**: Why did the court *hold* as it did?
- **Dissent**: If there is a dissenting opinion (minority of judges who disagree with the result supported by the court), be sure to indicate the reasoning behind the dissent.

C I'm confused by this —

Briefing Cubby

- **Issue**: Can Compuserve (CIS) be held liable for the defamatory statements

— Think heard summary of this before

made in an online forum by an independent entity under contract with CIS?

- **Procedural History**
  - Parties:
    - Plaintiff: Cubby (Skuttlebutt)
    - Defendants: Compuserve, Don Fitzpatrick
  - Procedural Posture: Defendant Compuserve's motion for summary judgment
- **Facts**
  - Journalism Forum:
    - operated by CCI, subcontracted by CCI to DFA
    - CCI contracted to "create, edit, etc. content"
    - CIS gains no revenue for access to CCI as opposed to any other forum
    - CIS has no practical control over content given volume
    - content created by CCI is made available to subscribers 'instantaneously'
    - CIS has no employment relationship with CCI or DFA
  - Skuttlebutt = competing service
- **Holding:** CIS not liable as a publisher -- only responsible for defamatory material which it knew about or had reason to know about.
- **Reasoning**
  1. Legal standard/rule: An online service is responsible only for defamatory content about which it knows or has reason to know
  2. Facts: There is no evidence that CIS knew of defamatory content given instantaneous upload, contract terms, large volume, overall lack of editorial control.
  3. Policy argument: Traditional First Amendment protections for information distributors should apply here. If a heavier burden for policing content is put on online distributors, then the First Amendment rights of online speakers and authors would suffer.

Note

This is a 1991 ruling and reflects the law as of 1991. There have been lots of changes since then.

HOME GENERAL INFORMATION CALENDAR

Send comments about this site to *6.805-staff at mit dot edu*
Last modified: 08/22/2010 12:49:03

Hal Abelson(hal at mit dot edu)
Mike Fischer (mfischer at mit dot edu)
Danny Weitzner (djweitzner at csail dot mit dot edu)
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ELECTRONIC PRIVACY INFORMATION CENTER

For Sample Brief

Offical Decision

Cubby v. CompuServe Inc

No. 90 Civ. 6571

United States District Court, S.D. New York.

Oct. 29, 1991.

Kayser & Jaffe, New York City (Leo Kayser, of counsel), for plaintiffs.

Jones, Day, Reavis & Pogue, New York City (Leslie Mullady, of counsel), for defendants.

LEISURE, District Judge

This is a diversity action for libel, business disparagement, and unfair competition, based on allegedly defamatory statements made in a publication carried on a computerized database. Defendant CompuServe Inc. ("CompuServe") has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated below, CompuServe's motion is granted in its entirety.

Background

CompuServe develops and provides computer-related products and services, including CompuServe Information Service ("CIS"), an on-line general information service or "electronic library" that subscribers may access from a personal computer or terminal. Subscribers to CIS pay a membership fee and online time usage fees, in return for which they have access to the thousands of information sources available on CIS. Subscribers may also obtain access to over 150 special interest "forums," which are comprised of electronic bulletin boards, interactive online conferences, and topical databases.

One forum available is the Journalism Forum, which focuses on the journalism industry. Cameron Communications, Inc. ("CCI"), which is independent of CompuServe, has contracted to "manage, review, create, delete, edit and otherwise control the contents" of the Journalism Forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe." Affidavit of Jim Cameron, sworn to on April 4, 1991 ("Cameron Aff."), Exhibit A.

One publication available as part of the Journalism Forum is Rumorville USA ("Rumorville"), a daily newsletter that provides reports about broadcast journalism and journalists. Rumorville is published by Don Fitzpatrick Associates of San Francisco ("DFA"), which is headed by defendant Don Fitzpatrick. CompuServe has no employment, contractual, or other direct relationship with either DFA or Fitzpatrick; DFA provides Rumorville to the Journalism Forum under a contract with CCI. The contract between CCI and DFA provides that DFA "accepts total responsibility for the contents" of Rumorville. Cameron Aff., Exhibit B. The contract also requires CCI to limit access to Rumorville to those CIS subscribers who have previously made membership arrangements directly with DFA.

CompuServe has no opportunity to review Rumorville's contents before DFA uploads it into CompuServe's computer banks, from which it is immediately available to approved CIS subscribers. CompuServe receives no part of any fees that DFA charges for access to Rumorville, nor does CompuServe compensate DFA for providing Rumorville to the Journalism Forum; the compensation CompuServe receives for making Rumorville available to its subscribers is the standard online time usage and membership fees charged to all CIS subscribers, regardless of the information services they use. CompuServe maintains that, before this action was filed, it had no notice of any complaints about the contents of the Rumorville publication or about DFA.

In 1990, plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard ("Blanchard") (collectively, "plaintiffs") developed Skuttlebut, a computer database designed to publish and distribute electronically news and gossip in the television news and radio industries. Plaintiffs intended to compete with Rumorville; subscribers gained access to Skuttlebut through their personal computers after completing subscription agreements with plaintiffs.

Plaintiffs claim that, on separate occasions in April 1990, Rumorville published false and defamatory statements relating to Skuttlebut and Blanchard, and that CompuServe carried these statements as part of the Journalism Forum. The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville "through some back door"; a statement that Blanchard was "bounced" from his previous employer, WABC; and a description of Skuttlebut as a "new start-up scam." Affidavit of Robert G.

Blanchard, sworn to on July 11, 1991 ("Blanchard Aff."), PP 5-9.

Plaintiffs have asserted claims against CompuServe and Fitzpatrick under New York law for libel of Blanchard, business disparagement of Skuttlebut, and unfair competition as to Skuttlebut, based largely upon the allegedly defamatory statements contained in Rumorville. CompuServe has moved, pursuant to Fed.R.Civ.P. 56, for summary judgment on all claims against it. CompuServe does not dispute, solely for the purposes of this motion, that the statements relating to Skuttlebut and Blanchard were defamatory; rather, it argues that it acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements. Plaintiffs oppose CompuServe's motion for summary judgment, claiming that genuine issues of material fact exist and that little in the way of discovery has been undertaken thus far.

Discussion

I. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). "Summary judgment is appropriate if, 'after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party.' " United States v. All Right, Title & Interest in Real Property, 901 F.2d 288, 290 (2d Cir.1990) (quoting Murray v. National Broadcasting Co., 844 F.2d 988, 992 (2d Cir.), cert. denied, 488 U.S. 955, 109 S.Ct. 391, 102 L.Ed.2d 380 (1988)).

The substantive law governing the case will identify those facts that are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Herbert Construction Co. v. Continental Insurance Co., 931 F.2d 989, 993 (2d Cir.1991). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there does indeed exist a genuine issue for trial." Anderson, 477 U.S. at 249, 106 S.Ct. at 2511; see also R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 107 (2d Cir.), cert. denied, 493 U.S. 815, 110 S.Ct. 64, 107 L.Ed.2d 31 (1989). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and identifying which materials "it believes demonstrate the absence of a genuine issue of material fact." Celotex, supra, 477 U.S. at 323, 106 S.Ct. at 2553; see Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir.1991).

Once a motion for summary judgment is properly made, however, the burden then shifts to the non-moving party, which " 'must set forth specific facts showing that there is a genuine issue for trial.' " Anderson, 477 U.S. at 250, 106 S.Ct. at 2511 (quoting Fed.R.Civ.P. 56(e)). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported

motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48, 106 S.Ct. at 2509-10 (emphasis in original). "Conclusory allegations will not suffice to create a genuine issue. There must be more than a 'scintilla of evidence,' and more than 'some metaphysical doubt as to the material facts.' " Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir.1990) (quoting Anderson, 477 U.S. at 252, 106 S.Ct. at 2512 and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986)); see also Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir.1991). "The non-movant cannot 'escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts,' or defeat the motion through 'mere speculation or conjecture.' " Western World Insurance Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir.1990) (quoting Borthwick v. First Georgetown Securities, Inc., 892 F.2d 178, 181 (2d Cir.1989) and Knight v. U.S. Fire Insurance Co., 804 F.2d 9, 12 (2d Cir.1986), cert. denied, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987)).

II. Libel Claim

A. The Applicable Standard of Liability

Plaintiffs base their libel claim on the allegedly defamatory statements contained in the Rumorville publication that CompuServe carried as part of the Journalism Forum. CompuServe argues that, based on the undisputed facts, it was a distributor of Rumorville, as opposed to a publisher of the Rumorville statements. CompuServe further contends that, as a distributor of Rumorville, it cannot be held liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory statements. Plaintiffs, on the other hand, argue that the Court should conclude that CompuServe is a publisher of the statements and hold it to a higher standard of liability.

Ordinarily, " 'one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.' " Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir.1980) (Friendly, J.) (quoting Restatement (Second) of Torts s 578 (1977)). With respect to entities such as news vendors, book stores, and libraries, however, "New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation." Lerman v. Chuckleberry Publishing, Inc., 521 F.Supp. 228, 235 (S.D.N.Y.1981); accord Macaluso v. Mondadori Publishing Co., 527 F.Supp. 1017, 1019 (E.D.N.Y.1981).

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment. "[T]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the reading materials they carry. Smith v. California, 361 U.S. 147, 152-53, 80 S.Ct. 215, 218-19, 4 L.Ed.2d 205 (1959). In Smith, the Court struck down an ordinance that imposed liability on a bookseller for possession of an obscene book, regardless of whether the bookseller had knowledge of the book's contents. The Court reasoned that

"Every bookseller would be placed under an obligation to make himself aware

of the contents of every book in his shop. It would be altogether unreasonable
to demand so near an approach to omniscience." And the bookseller's burden
would become the public's burden, for by restricting him the public's access to
reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.

Id. at 153, 80 S.Ct. at 219 (citation and footnote omitted). Although Smith involved criminal liability, the First Amendment's guarantees are no less relevant to the instant action: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute." New York Times Co. v. Sullivan, 376 U.S. 254, 277, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964) (citation omitted).

CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.

With respect to the Rumorville publication, the undisputed facts are that DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to approved CIS subscribers instantaneously. [FN1] CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognized as protecting distributors of publications.... Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment." Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir.1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985); see also Daniel v. Dow Jones & Co., 137 Misc.2d 94, 102, 520 N.Y.S.2d 334, 340 (N.Y.Civ.Ct.1987) (computerized database service "is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news" and "is entitled to the same protection as more established means of news distribution").

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow

of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

B. CompuServe's Liability as a Distributor CompuServe contends that it is undisputed that it had neither knowledge nor reason to know of the allegedly defamatory Rumorville statements, especially given the large number of publications it carries and the speed with which DFA uploads Rumorville into its computer banks and makes the publication available to CIS subscribers. Affidavit of Eben L. Kent, sworn to on April 4, 1991 ("Kent Aff."), PP 7-9; Cameron Aff., PP 6-7. The burden is thus shifted to plaintiffs, who " 'must set forth specific facts showing that there is a genuine issue for trial.' " Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (quoting Fed.R.Civ.P. 56(e)). Plaintiffs have not set forth anything other than conclusory allegations as to whether CompuServe knew or had reason to know of the Rumorville statements, and have failed to meet their burden on this issue. Plaintiffs do contend that CompuServe was informed that persons affiliated with Skuttlebut might be "hacking" in order to obtain unauthorized access to Rumorville, but that claim is wholly irrelevant to the issue of whether CompuServe was put on notice that the Rumorville publication contained statements accusing the Skuttlebut principals of engaging in "hacking."

Plaintiffs have not set forth any specific facts showing that there is a genuine issue as to whether CompuServe knew or had reason to know of Rumorville's contents. Because CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory Rumorville statements, summary judgment in favor of CompuServe on the libel claim is granted.

III. Business Disparagement Claim

Plaintiffs base the claim for business disparagement of Skuttlebut on statements published in Rumorville in April 1990. Plaintiffs' contention is that "defendants made statements intentionally designed to discourage its [sic] own subscribers and others in the news business from associating with Skuttlebut, thus disparaging Skuttlebut's business." Complaint, P 20. These statements include, inter alia, the allegedly defamatory remarks suggesting that plaintiffs inappropriately accessed information from Rumorville "through some back door" and describing Skuttlebut as a "new start-up scam." Blanchard Aff., PP 5, 8.

New York courts rarely use the term "business disparagement" and have not articulated the elements of such a claim. New York's highest court, although not using the "business disparagement" label, has recognized a cause of action for tortious conduct similar to that alleged by plaintiffs. See Ruder & Finn Inc. v. Seaboard Surety Co., 52 N.Y.2d 663, 670-71, 422 N.E.2d 518, 522, 439 N.Y.S.2d 858, 862 (1981) ("[w]here a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies"). [FN2] New York courts have applied other labels to similar conduct: "The tort of trade libel or injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment." Waste Distillation Technology, Inc. v. Blasland & Bouck Engineers,

P.C., 136 A.D.2d 633, 633, 523 N.Y.S.2d 875, 876 (2d Dep't 1988).

Regardless of the label used, the substance of plaintiffs' "business disparagement" claim is similar to the action for defamation recognized in Ruder & Finn, as well as the action for trade libel or injurious falsehood recognized in Waste Distillation Technology. Under either formulation, plaintiffs would have to prove that CompuServe had knowledge or reason to know of Rumorville's publication of the allegedly disparaging statements in order to hold CompuServe liable for business disparagement. As discussed with respect to the libel claim, supra, plaintiffs have failed to meet their burden of setting forth specific facts showing that there is a genuine issue as to whether CompuServe had knowledge or reason to know of the April 1990 Rumorville statements. Summary judgment in favor of CompuServe on the business disparagement claim is therefore granted. [FN3]

IV. Unfair Competition Claim

Plaintiffs base the unfair competition claim on the statements concerning Skuttlebut that appeared in Rumorville in April 1990. Plaintiffs' theory is that Rumorville launched a "campaign of disparagement of Skuttlebut" in order to compete with Skuttlebut and retain its subscribers without reducing its fee structure. Complaint, PP 25-26. "In order to state a claim for unfair competition based on disparagement, [the plaintiff] must allege some injurious falsehood intentionally uttered that caused the plaintiff to suffer actual damage." Brignoli v. Balch Hardy & Scheinman, Inc., 645 F.Supp. 1201, 1208 (S.D.N.Y.1986) (citing Diehl & Sons, Inc. v. International Harvester Co., 445 F.Supp. 282, 291-92 (E.D.N.Y.1978) (citing Penn-Ohio Steel Corp. v. Allis-Chalmers Manufacturing Co., 7 A.D.2d 441, 184 N.Y.S.2d 58 (1st Dep't 1959))). "Generally a statement is actionable only where it is made intentionally to a third person and results in direct financial loss to the party whose interest is disparaged." Id. (citing Payrolls & Tabulating, Inc. v. Sperry Rand Corp., 22 A.D.2d 595, 597, 257 N.Y.S.2d 884, 886 (1st Dep't 1965) (citing Restatement of Torts ss 630 et seq.)).

Because the utterance of a disparaging statement must be intentional in order to give rise to an unfair competition claim based on disparagement, CompuServe may not be held liable on plaintiffs' unfair competition claim if it did not know or have reason to know of the Rumorville statements. As discussed with respect to the libel claim, supra, plaintiffs have failed to meet their burden of setting forth specific facts showing that there is a genuine issue as to whether CompuServe had knowledge or reason to know of the April 1990 Rumorville statements. Summary judgment in favor of CompuServe on the unfair competition claim is therefore granted.

V. Vicarious Liability

Plaintiffs also argue that CompuServe may be held vicariously liable for the allegedly defamatory Rumorville statements, based on an agency relationship between CompuServe, CCI, and DFA. CompuServe contends that the undisputed facts demonstrate that, at most, DFA is an independent contractor of CCI and CCI is an independent contractor of CompuServe, so that it may not be held vicariously liable for the statements that appeared in Rumorville.

"An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control."

In re Shulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir.1984). In contrast, an independent contractor is " 'one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work.' " Murray Hill Films, Inc. v. Martinair Holland, N.V., 1987 WL 14918, * 3, 1987 U.S. Dist. LEXIS 6500, * 7-* 8 (S.D.N.Y. July 17, 1987) (quoting Dorkin v. American Express Co., 74 Misc.2d 673, 675, 345 N.Y.S.2d 891, 894 (Sup.Ct.1973), aff'd, 43 A.D.2d 877, 351 N.Y.S.2d 190 (3d Dep't 1974)); accord Spiro v. Pence, 566 N.Y.S.2d 1010, 1012 (City Ct. Albany County 1991). In order for an employer to be held vicariously liable for the tort of an independent contractor, the employer must have directed the act from which the injury resulted or have taken an affirmative, active part in its commission. See Ramos v. State, 34 A.D.2d 1056, 1056, 312 N.Y.S.2d 185, 186 (3d Dep't 1970).

Based on the undisputed facts, the Court concludes that neither CCI nor DFA should be considered an agent of CompuServe. CompuServe, CCI, and DFA are independent of one another. CompuServe has simply contracted with CCI for CCI to manage the Journalism Forum; under the contract, CCI "agrees to manage, review, create, delete, edit and otherwise control the contents of the [Journalism Forum], in accordance with editorial and technical standards and conventions of style as established by CompuServe." Cameron Aff., Exhibit A. CompuServe has thereby delegated control over the assembly of the contents of the Journalism Forum to CCI. CompuServe's ultimate right under the contract to remove text from its system for noncompliance with its standards merely constitutes control over the result of CCI's independent work. This level of control over the Journalism Forum is insufficient to rise to the level of an agency relationship. Similarly, the contractual provisions calling for CompuServe to provide CCI with training necessary to manage the Journalism Forum and to indemnify CCI from claims resulting from information appearing in the Journalism Forum do not give CompuServe sufficient control over CCI and its management of the Journalism Forum to render CCI an agent of CompuServe.

As for DFA, the original publisher of Rumorville, CompuServe has no direct contractual relationship with DFA; DFA provides Rumorville to the Journalism Forum under a contract with CCI. The contract between CCI and DFA provides that "DFA accepts total responsibility for the contents of" Rumorville; that DFA "agrees to maintain the [Rumorville] files in a timely fashion including uploading and merging into availability to the members of [Rumorville]"; and that "DFA maintains total responsibility for communicating with its members, billing them for any membership fees and collecting same." Cameron Aff., Exhibit B. DFA is therefore largely independent of CompuServe in its publication of Rumorville, and the tenuous relationship between DFA and CompuServe is, at most, that of an independent contractor of an independent contractor. The parties cannot be seen as standing in any sort of agency relationship with one another, and CompuServe may not be held liable for any of plaintiffs' claims on a theory of vicarious liability. Cf. McNally v. Yarnall, 764 F.Supp. 838, 852-53 (S.D.N.Y.1991).

VI. Need for Additional Discovery

Plaintiffs also suggest, in their memorandum of law in opposition to CompuServe's summary judgment motion, that additional discovery is needed and should preclude the grant of summary judgment. Fed.R.Civ.P. 56(f) provides that when the party opposing a motion

for summary judgment cannot "present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit ... discovery to be had." In order to persuade the Court to grant a request for additional discovery, plaintiffs would have to "file an affidavit explaining (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 422 (2d Cir.1989) (citing Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 926 (2d Cir.1985)). The Court may reject a request for further discovery pursuant to Rule 56(f) if no affidavit is filed or if the request is based on pure speculation as to what would be discovered. Burlington Coat Factory, 769 F.2d at 926-927.

In the instant action, plaintiffs have failed to fulfill the requirements enumerated by the Second Circuit in Hudson River Sloop Clearwater and Burlington Coat Factory. Plaintiffs have simply asserted, not in an affidavit but in their memorandum of law, that "[l]ittle in the way of discovery has been undertaken" and that "CompuServe has produced documents in response to the plaintiff's First Document Request, but no depositions of the parties have taken place." Memorandum of Law in Opposition to Defendant CompuServe's Motion for Summary Judgment at 2. Plaintiffs have not specified what facts they wish to discover through depositions or other means and how these are to be obtained, how these are reasonably expected to create a genuine issue of material fact, what efforts they have made to obtain these facts, or why they have been unsuccessful in their efforts. Plaintiffs have therefore not made a showing sufficient to persuade the Court to deny CompuServe's motion for summary judgment or to order a continuance to allow further discovery to take place.

Conclusion

For the reasons stated above, CompuServe's motion for summary judgment pursuant to Fed.R.Civ.P. 56 is granted on all claims asserted against it.

SO ORDERED

Footnotes

1. Civil Rule 3(g) of the Local Rules of this District requires that a party moving for summary judgment provide a statement of the material facts as to which it contends there is no genuine issue to be tried. Rule 3(g) further requires that the non-movant file a statement of the material facts as to which it contends there is a genuine issue to be tried, and provides that facts set forth in the movant's 3(g) statement that are uncontroverted by the non-movant's statement are deemed to be admitted. CompuServe's 3(g) statement contends that there is no genuine issue to be tried as to the fact that "CompuServe has no opportunity to review Rumorville's contents before DFA 'uploads' it into CompuServe's computer banks, from which it is instantaneously available to approved CIS subscribers." Plaintiffs do not, in their 3(g) statement or elsewhere, controvert this material fact; therefore, it is deemed admitted pursuant to Rule 3(g). See General Electric Co. v. New York State Department of Labor, 936 F.2d 1448, 1452 (2d Cir.1991); Dusanenko v. Maloney, 726 F.2d 82, 84 (2d Cir.1984).

2. The New York Court of Appeals distinguished this type of defamation in the commercial context from "product disparagement," which involves a false statement that "is confined to denigrating the quality of the business' goods or services" and requires that malice and special damages be proven. Ruder & Finn, 52 N.Y.2d at 670-71, 422 N.E.2d at 521-22, 439 N.Y.S.2d at 861-62.

3. Plaintiffs also contend, as part of the business disparagement claim, that (unspecified) "defendants ... took affirmative action to initiate telephone calls to other data base systems and inform these systems that plaintiffs were 'computer hackers' and ran a scam operation." Complaint, P 19. These alleged telephone calls do not, however, have any bearing on CompuServe's liability for statements contained in the Rumorville publication. Moreover, plaintiffs have not contested CompuServe's denial of any involvement on the part of its agents or employees in the alleged phone calls. See Kent Aff., sworn to on April 4, 1991, P 9. Therefore, even if some person or persons did make the alleged phone calls, that fact does not prevent CompuServe from prevailing on its summary judgment motion.

Cubby, Inc. v. CompuServe Inc.

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Cubby, Inc. v. CompuServe Inc. was a 1991 court decision in the United States District Court for the Southern District of New York which held that Internet service providers were subject to traditional defamation law for their hosted content.[1] The case resolved a claim of libel against CompuServe, an Internet service provider that hosted allegedly defamatory content in one of its forums. The case established a precedent for Internet service provider liability by applying defamation law, originally intended for hard copies of written works, to the Internet medium. The court held that although CompuServe did host defamatory content on its forums, CompuServe was merely a distributor, rather than a publisher, of the content. As a distributor, CompuServe could only be held liable for defamation if it knew, or had reason to know, of the defamatory nature of the content.[2] As CompuServe had made no effort to review the large volume of content on its forums, it could not be held liable for the defamatory content.

The application of traditional defamation law to the Internet context was soon to create controversy in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, in which a service provider was found liable for defamation on the grounds of good-faith attempts to filter objectionable content. In 1996, service providers were granted immunity as publishers and distributors by Section 230 of the Communications Decency Act as an incentive to moderate posted material.

Cubby, Inc. v. CompuServe Inc.

United States District Court for the Southern District of New York

Date decided	Oct. 29, 1991
Citations	776 F. Supp. 135
Judge sitting	Peter K. Leisure

Case holding

CompuServe was merely a distributor, rather than a publisher of content on its forums, and hence could only be liable for defamation if it knew, or had reason to know, of the defamatory nature of the content.

Keywords

Defamation

Contents

Facts

Cubby, Inc. and Robert Blanchard brought suit against CompuServe Inc. in the United States District Court of the Southern District of New York in 1991 for libel, business disparagement, and unfair competition.[1]

CompuServe, an Internet service provider, hosted an online news forum, the contents of which were generated by a contractor. Cameron Communications, Inc. agreed to "manage, review, create, delete, edit, and otherwise control the contents" of certain forums.[1] Cameron Communications then subcontracted the production of Rumorville USA, a daily newsletter.

In April 1990, Rumorville published defamatory content about a competing online newsletter developed by Blanchard and Cubby, Inc. CompuServe did not dispute the defamatory nature of the content. However, no evidence presented during the trial demonstrated that CompuServe knew, or should have known, of the existence of the defamatory content.

Legal Proceedings

Given the established facts, the court determined that a trial was unnecessary and granted summary judgment in favor of CompuServe for all claims.

Libel claim

Cubby alleged that CompuServe was the publisher of the defamatory statements. A "publisher," in the context of defamation law, is one who publishes or otherwise republishes content.[3] According to federal law and in agreement with New York state law, a publisher who repeats or republishes defamatory content has the same liability as the original publisher of the content.[4]

CompuServe maintained that it was merely a distributor of the published statements. Distributors of defamatory content can only be held liable if they knew, or had reason to know, of the defamatory nature of the content.[2] The court held that "CompuServe has no more editorial control over such a publication [as Rumorville] than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so." [1]

Business Disparagement and Unfair Competition claims

Both the business disparagement claim, which was viewed as trade libel, and the unfair competition claim, based on disparaging remarks, required that CompuServe knew or had reason to know of the defamatory remarks.[1] Again, CompuServe was unaware of the nature of the statements and was thus not held liable.

Impact

Cubby v. CompuServe treated internet intermediaries lacking editorial involvement as distributors, rather than publishers, in the context of defamation law. This decision removed any legal incentive for intermediaries to monitor or screen the content published on their domains.

In 1995, *Stratton Oakmont, Inc. v. Prodigy Services Co.* further clarified Internet service providers' liabilities. Because Prodigy filtered and occasionally removed offensive content from bulletin boards that it

hosted, the court held that Prodigy was a publisher of, and therefore liable for, published defamatory content. As these decisions were not appealed to higher level courts, they were not mandatory precedent. However, the incentive was clear: Internet service providers that chose to remain ignorant of their content were immune from liability, while those that edited content, even in good faith, assumed full publisher liability.

which is silly ... So I

In 1996, Section 230 of the Communications Decency Act granted Internet service providers immunity from liability for content provided by others, with certain exceptions.[5] Section 230 distinguishes between interactive computer services, e.g. Internet service providers, and information content providers, e.g. users who post messages in forums. Interactive computer services are not considered publishers of content from information content providers and cannot be held liable on account of "Good Samaritan" attempts to filter objectionable content.

References

1. ^ *a b c d e* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (http://epic.org/free_speech/cubby_v_compuserve.html) (S.D.N.Y. 1991).
2. ^ *a b* Restatement (Second) of Torts § 581
3. ^ Restatement (Second) of Torts § 558
4. ^ Restatement (Second) of Torts § 578
5. ^ 47 U.S.C. § 230 (http://www.law.cornell.edu/uscode/47/230.html)

External links

- Wikipedia obtains immunity from defamation under CDA § 230 (http://www.eff.org/files/filenode/wikimedia/bauerorder.pdf)
- University of Melbourne Publication Series on Internet Law (http://www.law.unimelb.edu.au/cmcl/publications/Defamation10.html)
- Blog on the development of Internet defamation law by Nissenbaum Law Group, LLC. (http://www.internetdefamationlawblog.com/communications_decency_act_immunity/)

Retrieved from "http://en.wikipedia.org/w/index.php?title=Cubby,_Inc._v._CompuServe_Inc.&oldid=486011552"

Categories: United States district court cases | CompuServe | United States Internet case law | United States Free Speech Clause case law | United States defamation case law | 1991 in United States case law

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Mainstream v. FTC Brief

Michael Plasmeier *8/31/2012*

- **Issue**: Is it legal for the FTC and the FCC to implement a do-not-call registry?

- **Procedural History**
  - **Parties**:
    - **Plaintiff**: Telemarketing companies: Mainstream Marketing, TMG Marketing, and American Teleservices Association
    - **Defendants**: FTC and related officers
  - **Procedural Posture**: 4 previous cases on First Amendment issues regarding the overall system and its fees, arbitrary and capricious issues regarding the established business relationship standard, and the FTC's ability to act
- **Facts**:
  - Congress passed the Telephone Consumer Protection Act of 1991
  - Courts have previously found limits on First Amendment speech for commercial purposes
  - Courts have found that consumers have the ability to control what speech they receive inside their homes
  - Courts have found that regulations which make incremental progress towards resolving the situation are not necessarily invalid
  - Courts have found that opt-in is more valid than a blanket ban
- **Holding:** The do-not-call registry stands in its entirety.
- **Reasoning**
  1. **Commercial speech**: Courts can apply some limits to commercial speech without violating the First Amendment. The Government has a reasonable interest, and the regulations are narrowly targeted.
  2. **Privacy of the Home:** Courts have found that consumers have the ability to control what speech they receive inside their homes
  3. **Incremental progress:** Courts have found that regulations which make incremental progress towards resolving the situation are not necessarily invalid
  4. **Opt-in allowed:** Courts have found that opt-in is more valid than a blanket ban
  5. **Reasonable fees allowed:** To cover the cost of enforcing the regulations
  6. **Established business relationships**: Allowing contact from established business relationships is in the public interest, but allowing it from other companies, including upstart telecommunications companies would not be.

Michael E Plasmeier

From: halatmitdotedu@gmail.com on behalf of Hal Abelson <hal@MIT.EDU>
Sent: Wednesday, September 05, 2012 6:01 PM
To: Hal Abelson
Cc: 6.805-staff
Subject: Tomorrow is the first class in 6.805

Follow Up Flag: FollowUp
Flag Status: Flagged

Hi 6.805 class!

Tomorrow is our first class. You already know this (because you've read the web pages) but we're meeting from 2-5 in 36-156. That information, and everything about 6.805 this semester, is linked from the class calendar, which is itself linked from the class web page at mit.edu/6.805.

Make sure you've done the assignment for tomorrow. If you look at the calendar, you can find the assignment by clicking the link marked September 6. Please prepare by reading and taking notes on *Cubby* and the sample case brief, and on *Mainstream Marketing*. And come prepared to discuss the Obama initiatives and your two successes and two failures identified (along with primary and secondary sources), We will be making cold calls in class, and we expect you to be ready to discuss law and policy.

Don't forget to bring a laptop.

See you tomorrow.

==Hal
hal@mit.edu

6.805/STS.805 L1 9/5

6.805/STS.805 - doesn't matter in class

transparency of deciding midterm

this was once a frontier - 1996

└ Should country laws even apply

Policy

Hal Abelson

Danny Weitzner - Fmr Deputy CTO White House Sci + Tech

Alan Davidson - Fmr Google Head of Public Policy Started DC office

Mike Fischer - Fm head STS Cultural aspects of internet

big emphasis on ind projects

└ publishable
Creditable + interesting contribution

(2)

Secure Flight
- a student looked at
- tech - stats + machine learning
- legal

~~people~~
news articles were written

Team Projects
- Serious Policy papers
- Study Group
- Designing new agendas

"Chatham House Rules"
↳ no - not really

Next week → 9-152

~~Above~~ Andrew Crocker - TA
- 3rd ~~Above~~ Year Harvard Law

(3)

3 goals

1. History of Dev about Law of Internet
   - ~1997 starts
   - Net Neutrality
   - Online Copyright
   - Privacy - 4th and
     - Consumer
     - world
   - Cyber security
   - Global Internet Governance
2. Law, Policy, Tech Discourse
   - Thinking like a lawyer
   - Will do in 4 weeks
   - Case briefs
   - Mechanics + Subtilties

(4)

Every week → writing + talking

3. New ~~Ilbbn~~ Internet Policy for new admin
   thaghtful, persuasive, comprehensive
   people need help in making policy decisions
   Agenda 2013 project

Nationwide student writing class
   Workshop in DC Mid Jan 2013

Glayder paper
   know who is gay based on their friends

Alan - 18C, TPP
   6.001

Undocumented bugs

(5)

Civics 101 in 12 min

Most on US - Federal Gov

US Constitution
- First RFC (6)

enumerated power

3 branches

Bicca

Leg
- bi-cameral
- (skipping)

also oversight w/ panels
- fairly important

Cos + exec branch very sensitive to

Exec
- President

6

He was at DNC

15 agences + ind. orgs
5 mil people

FTC + FCC
White House can't talk about certain things w/ them
But ind agencies still get $ from Congress

Congress passes laws
Agencies gets the specifics
Fact Finding + Rule Making progress

Judicial

District - 1
Appeal / Circuit - 3
Supream Court - 9
appointed for life
by pres - w/ advice + consent of Senate

(7)

tremendous power to override

Rest of power in states

Attorney General of states more powerful

Also International

Treaties

Trade Agreements

Mainstream Marketing Services

Brief - this is the unusual case of def.

org thinking

—

think about cases this way

Issue: courts deal w/ cases + controversies

not a source of authority on general policy

"Is abortion good?

legislator answers

8

Well written opinion

1. What is it talking about (issue)

Not: can people be disturbed

But: Does the FTC have the authority to implement the rules

More specifically: First ammendment ~~limits government~~ prevents gov from implementing rules

Focus on core issue - not details

Stare decisis - respect previous court deciding precidence

10th circuit

Started in district course - Constitutional challenge

If challenge ind agency - often start at circuit course

(9)

(I didn't really get the history)

Telemarketing was a big issue
long legislative fight
most trade associations realized it was inevitable
small companies sued
worried that would limit speech rights of telemarketers – which they did

Next week ACLU v Reno
└ Fact guy as guest speaker

What are laws of case
facts

Fact: - fraud problem
- commercial speech ie advertising
- alt avenues for speech

(6)

- opt-in - onus on Consumer
- prior efforts have failed
  - ~~Kasky~~ helps in least restrictive test

Holding Is valid commercial speech reg

Reasoning Courts establish rules / doctrine

Individual

Political speech) different

3 prongs of test -> Central Hudson

Marketers try to argue each one

1. Substantial Gov interest

trying to protect privacy (4th amendment)

Common law: A man's house is his castle

↑ from the courts - will read - 150 years before Constitution

imported from the British

but 4th amend only against the gov

(11)

"creative judicial interpretation"
+ Commerce clause - broad - though health care
2. Directly advance the asserted issue

(Me - do we really need all this reasoning since opt-in
- no requirement to listen
- gov is just coordinating system)

Suppose someone says I don't have to buy newspapers w/ ads
so papers must be prepared w/o ads
- not a good judicial reasoning

They use last assault
- damage already done

3. Narrowly tailored
achieves interest, but no more

(12)

Telemarketers not narrowly tailored

- Should be co-specific instead

least restrictive tougher than narrowly tailored

not perfectly effective - just reasonably effective

No dissent - all 3 agreed

Alito/Roberts has concurrence

- agrees w/ result
- but diff reasoning

dissent - disagreements

4th ammendment should be bright line

- yes only

but can be hard to sort out

(13)

The Home - is easy here

but in internet-era - very different!

bring cell phone into home?

lots of personal papers on them!

do personal papers have effect on your home?

Courts try to be somewhat deferential to legislate

What is people's will

legislative history - created when making a law

courts look to that

in Reno

(break)

(14)

Obama '08 Tech Policy

2 successful + 2 unsuccess 4 reasons/each

Write up analysis

6 people

1 doc from each group

Plaz
Will
E
Catch
North
C
(

all 6-3 pretty much

Consi broadband - didn't happen

USF

- pros

(Other group doesn't have knowledge I do)

(14)

Pros Lot of Clean energy funding

(2) Net Neutrality
Rules were published

article links

(1) Patent System

Cons Create Jobs

Schooling for tech

Modernizing Public Sanity

Immagration

(actually very hard - people disagree)

Diversity in Media Ownership

Does Progress count? Pass rules
Or see effect in co

15

Others see 1 big cause as failure

Don't see small cleg

Next Tue - email in

2pg paper on all 4

4 people on ~~each~~ pros

Cons

2 people edit

- Plaz

Done by Sun morning 1st round

Other Groups

F: Create New Jobs

5-7%

Maintained tax cuts for overseas

F: Transparency

5 day hold

(16)

1/3 Agendas + transparency

S: New CTO

S: Wireless Spectrum

(I like this better)

S: Net Neutrality

S: Open Up gov to citizens

S: Open gov plan

Petitions

Dashboard

F: Broadband Construction

F: Patent Reform

1st to file

Fees

Not: SW patents

Does progress count?

Does 1 event override

(17)

(I still don't agree on ours)

S: Net Neutrality
Stop SOPA

(Obama blamed for a lot!)

F: Transparency
~~F: Affirmative Action~~
F: Improve America's Competitiveness
S: CTO
S: Net Neutrality
F: IP reform
S: Broadband
F: R+D Tax Credit

(This reminds me of how much Obama has done - despite GOP blaming)
(Does regulation hurt?)

(18)

Si Dump $ into broadband + wireless
- measure by $ in

Si Patent Reform

Fi Jobs

Fi IP abroad

Take pic of board - focus group

Campaign Doc

Written by vol. policy committee

15-20 of these

He helped wrote

Collab/iterative process

Only 2 sucesses unequiv

Appoint CTO

Net Neu

fail

R+D tax

Jobs

Media conc

(19)

If involve Congress,
- is it Presidents job to push it through?

Dumping $ sucess

; Don't view sucess

Both Ive Tue

Draft 9/9 3PM

Sunday morning have your paragraphs written, then we can edit and compare.

==========

2 sucess + 2 failures
4 reasons to justify each

Obama's Successes:

1. Net neutrality (Kathy)

-FCC published net neutrality rules (open internet rules): http://www.pcworld.com/article/240505/fcc_publishes_net_neutrality_rules.html
http://www.pcmag.com/article2/0,2817,2406672,00.asp

-Obama pledged to veto a congressional measure to overturn the FCC ruling: :// www.reuters.com/article/2011/11/09/us-usa-internet-obamahttp-idUSTRE7A86SK20111109

Obama has enforced his support of network neutrality and the openness of the internet. Under his administration, the Federal Communications Commission (FCC) published rules that prohibit internet service providers (ISPs) from discriminating based on content. These rules ban ISPs from limiting lawful content, applications, and services, including content of their competitors.[1] The FCC was motivated to act after Comcast blocked peer-to-peer sites. The FCC rules prevent ISPs, such as Comcast, from using fees to determine which websites receive preferential treatment on their networks. Furthermore, the rules give the FCC power to engage in disputes about how ISPs manage their networks, thus providing more transparency. The FCC also has the authority to investigate ISPs suspected of breaking network neutrality rules.[2]
The FCC rules have been highly controversial and contested by communications companies such as Comcast, Verizon, and MetroPCS.[3] Republicans in Congress also protested against the FCC rules and moved to overturn them. However, Obama threatened to veto any bill designed to overturn the FCC rules and the bill was rejected by the Senate.[4]
Despite the ongoing controversy surrounding the FCC rules, the rules still stand. They are an important testament to Obama's commitment to network neutrality.

2. Patent Law (Noor, Yi)

Why good / bad

- First to file
- Fees

http://articles.cnn.com/2011-09-16/politics/obama.patent.reform_1_patent-office-first-to-file-system-patent-reform?_s=PM:POLITICS
http://articles.latimes.com/2011/sep/16/news/la-pn-obama-patent-20110916
http://news.yahoo.com/obama-signs-1st-major-patent-law-change-since-153819335.html
http://minisites.theplaz.com/netneutrality/
http://www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim
http://www.uspto.gov/news/pr/2012/12-40.jsp

Obama has kept his promise to reform the patent system with the passage of the America Invents Act. First, it transitions the country to a "first-to-file" system from an outdated "first-to-invent" system,

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[1] http://www.pcworld.com/article/240505/fcc_publishes_net_neutrality_rules.html
[2] http://www.pcmag.com/article2/0,2817,2406672,00.asp
[3] http://www.reuters.com/article/2011/11/09/us-usa-internet-obama-idUSTRE7A86SK20111109
[4] http://latimesblogs.latimes.com/technology/2011/11/senate-net-neutrality-vote-.html

providing ownership clarity in the patent-granting process. This measure also provides adequate funding by granting the patent office the right to set and keep its own fees. Before this act was passed, the patent office received a set amount of money from Congress regardless the number of applications it receives in a given year.
It streamlines the patent process to reduce patent issuance time from the three-year average and to diminish backlog. It plans to increase the number of patent offices from one to four and recruit technical experts for application processing. This consequently will encourage inventors and investors to develop and introduce the products quicker and thus be competitive in the international market.
Additionally, the bill creates a post-grant review process where inventors and companies to contest the validity of a patent for nine months, therefore reducing the number of legal battles.

Obama's Shortcomings

1. Broadband (Mari)
   - http://stopthecap.com/2012/08/30/finger-pointing-who-failed-rural-broadband-democrats-republicans-or-providers/
   - http://www.forbes.com/sites/larrydownes/2012/08/23/how-the-fcc-sees-broadbands-95-success-as-100-failure/
   - http://mashable.com/2012/08/29/republicans-obama-broadband/

how is that related

Obama has fallen short of his goals regarding next-generation broadband in America. Despite the FCC redefining broadband speeds, the new standard of 768 kbps does meet Obama's claim of fulfilling 21st century demands. This speed leaves the United States 26th in worldwide rankings of broadband service.[5] Even after investments made by the Universal Service Fund, broadband access is available to only 95% of Americans, the same percentage as when Obama took office in 2008.[6] Critics also point out that Obama has failed to auction wireless spectrum as promised. Though Congress approved such an auction in February 2012, the FCC has not yet taken action.[7] Doubts remain that the resulting freedom of 500 MHz of spectrum will not be enough to satisfy American demand.[8] Finally, broadband adoption is stagnant, remaining at around 68%, suggesting a failure of providing "adequate training and other supplementary resources" as Obama promised.[9] The recently minted US Ignite project to make broadband construction faster and cheaper is a promising step, but in order to deploy next-generation broadband, the next President must raise the standards of broadband speed in America, educate citizens on broadband adoption, and work to free enough spectrum for public use.

2. Media ownership diversity (Will)
   - http://www.thewrap.com/tv/column-post/fcc-slammed-media-ownership-diversity-19655
   - http://www.nytimes.com/2011/01/19/business/media/19comcast.html

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[5] http://www.howtogeek.com/95659/internet-speed-by-country-infographic/

[6] http://www.forbes.com/sites/larrydownes/2012/08/23/how-the-fcc-sees-broadbands-95-success-as-100-failure/4/

[7] http://mashable.com/2012/08/29/republicans-obama-broadband/

[8] http://news.cnet.com/8301-1035_3-57488618-94/wireless-spectrum-what-it-is-and-why-you-should-care/

[9] http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/29/whatever-happened-to-obamas-goal-of-universal-broadband/

- http://news.cnet.com/8301-30686_3-20128424-266/president-obama-nominates-new-fcc-commissioners/

In Obama's report to the nation, he also outlined his desire to prevent consolidation of media ownership and promote its diversity, but unfortunately on this issue his administration has not been entirely successful. He sought to use his influence of the office of US President to oversee the FCC and enact this philosophy. However, as the NCAACO (National Coalition of African American Owned Media) reported, the Obama administration failed to stop one of the largest media mergers in US history between Comcast and NBC universal, a $30 billion deal.

Good

The New York Times reported in January of 2011 that the FCC admitted that the deal could impose risks "...to the development of innovative online video distribution services.". The article continued to say that Free Press, a non-profit media reform group, accused Obama of going back on his promise of media ownership diversity. While it is true, Obama did not cast the votes of the FCC commissioning board (at 4 to 1 vote in favor of allowing the merger), as the executive of the executive branch, there is certainly leverage he could have made use of to prevent this action. As the US President, he appoints FCC commissioners - officers that make the decision on allowing such deals to go through or not. However, Obama failed to use this power quickly enough to make a difference.

Later that year, in November 2011, Obama appointed two new commissioners to the board, one Democratic and one Republican. Their stances on similar large mergers is unknown and no doubt they will play an important role in the future on media diversity ownership. However it seems just a little too late to preserve Obama's promise of media ownership diversity as the Comcast / NBC universal merger is large enough to warrant that failure.

4 reasons

"Final" it's a Google Doc 4/10

Obama's Technology and Innovation Policy:

4 Years Later

Michael Plasmeier
Will Devro
Mari Miyachi
Katherine Fang
Noor Al Sharif
Yi Wu

President Obama's first term is drawing to a close. As the end of his term nears, we took a look back at Candidate Obama's 2008 Technology and Innovation Policy.[1] There was some debate among our team about what counted as a success. Putting a policy in place? Spending money? Seeing results? We choose to define success as completing all steps required of one to pass the rule (so not defending the new rules from court battles) and seeing measurable progress on the issue, if applicable.

Obama's Successes:

Net Neutrality

Under the Obama administration, the Federal Communications Commission (FCC) published rules that protected network neutrality and the openness of the internet. These rules ban Internet Service Providers (ISPs) from limiting lawful content, applications, and services, including content of their competitors.[2] The FCC rules (1) prevent ISPs, such as Comcast, from using fees to determine which websites receive preferential treatment on their networks, (2) give the FCC power to engage in disputes about how ISPs manage their networks and thus provide more transparency, and (3) give the FCC the authority to investigate ISPs suspected of breaking network neutrality rules.[3] The FCC rules have been highly controversial and contested by communications companies such as Comcast, Verizon, and MetroPCS.[4] Republicans in Congress also protested against the FCC rules and moved to overturn them. However, Obama threatened to veto any bill designed to overturn the FCC rules and the bill was rejected by the Senate.[5]

Net neutrality is important to protecting innovation in this country. Without it, the ISPs would turn the Internet into an unequal playing field. ISPs would use their market power to provide preferential treatment to their affiliated departments and companies - this monopoly leveraging would not be in consumers' best interests. In addition, ISPs could charge high fees to new entrants, keeping

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[1] http://obama.3cdn.net/780e0e91ccb6cdbf6e_6udymvin7.pdf
[2] http://www.pcworld.com/article/240505/fcc_publishes_net_neutrality_rules.html
[3] http://www.pcmag.com/article2/0,2817,2406672,00.asp
[4] http://www.reuters.com/article/2011/11/09/us-usa-internet-obama-idUSTRE7A86SK20111109
[5] http://latimesblogs.latimes.com/technology/2011/11/senate-net-neutrality-vote-.html

them out of the business and protecting existing large companies. ISPs could also impinge on the freedom of speech with these changes, because certain political actors might not be able to pay for preferential treatment.

Patent Law

Obama has kept his promise to reform the patent system with the passage of the America Invents Act. First, it transitions the country to a "first-to-file" system from an outdated "first-to-invent" system, providing ownership clarity in the patent-granting process. This measure also provides adequate funding by granting the patent office the right to set and keep its own fees. Before this act was passed, the patent office received a set amount of money from Congress regardless the number of applications it receives in a given year[6].

It streamlines the patent process to reduce patent issuance time from the three-year average and to diminish backlog[7]. It plans to increase the number of patent offices from one to four and recruit technical experts for application processing[8]. Processing applications faster will encourage inventors and investors to develop and introduce the products quicker and thus be more competitive in the international market[9].

Additionally, the bill creates a post-grant review process where inventors and companies to contest the validity of a patent for nine months, therefore reducing the number of legal battles. Current legal battles can be very expensive. Going through a patent lawsuit can be disastrous to a company and the threat of a lawsuit often forces smaller companies to give in. A more streamlined process would allow more companies to focus on innovation.

Obama's Shortcomings

On the other hand, there are certain areas where Obama's policies have not yet taken hold, no progress has been made made, or possibly even negative progress has been made.

Broadband

Obama set clear goals regarding next-generation broadband in America, but failed to achieve the majority of them. Despite the FCC redefining broadband speeds, the new standard of 768 kbps does not meet Obama's claim of fulfilling 21st century demands. This speed is far below international leaders like South Korea and Sweden, who boast internet speeds of triple and double this standard, leaving the United States 26th in worldwide rankings of broadband service.[10]

Even after investments made by the Universal Service Fund, broadband access is available to only 95% of Americans, the same percentage as when Obama took office in 2008.[11] Critics also point out that Obama has failed to auction wireless spectrum as promised. Though Congress approved such an auction in February 2012, the FCC has not yet taken action.[12] Doubts remain that the resulting freedom

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[6] http://articles.cnn.com/2011-09-16/politics/obama.patent.reform_1_patent-office-first-to-file-system-patent-reform?_s=PM:POLITICS

[7] http://articles.latimes.com/2011/sep/16/news/la-pn-obama-patent-20110916

[8] http://www.uspto.gov/news/pr/2012/12-40.jsp

[9] http://www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim

[10] http://www.howtogeek.com/95659/internet-speed-by-country-infographic/

[11] http://www.forbes.com/sites/larrydownes/2012/08/23/how-the-fcc-sees-broadbands-95-success-as-100-failure/4/

[12] http://mashable.com/2012/08/29/republicans-obama-broadband/

of 500 MHz of spectrum will not be enough to satisfy American demand.[13]

Finally, broadband adoption is stagnant, remaining at around 68%, suggesting a failure of providing "adequate training and other supplementary resources" as Obama promised.[14] The recently minted US Ignite project to make broadband construction faster and cheaper is a promising step, but in order to deploy next-generation broadband, the next President must raise the standards of broadband speed in America, educate citizens on broadband adoption, and work to free enough spectrum for public use.

Media Ownership Consolidation

In Obama's report to the nation, he also outlined his desire to prevent consolidation of media ownership and promote its diversity, but unfortunately on this issue his administration has not been entirely successful. He sought to use his influence of the office of US President to oversee the FCC and enact this philosophy. However, as the NCAACO (National Coalition of African American Owned Media) reported, the Obama administration failed to stop one of the largest media mergers in US history between Comcast and NBC universal, a $30 billion deal[15].

The FCC admitted that the deal could impose risks "...to the development of innovative online video distribution services."[16]. Free Press, a non-profit media reform group, accused Obama of going back on his promise of media ownership diversity. While it is true, Obama did not cast the votes of the FCC commissioning board (at 4 to 1 vote in favor of allowing the merger)[17], as the executive of the executive branch, there is certainly leverage he could have made use of to prevent this action. As the US President, he appoints FCC commissioners - officers that make the decision on allowing such deals to go through or not. However, Obama failed to use this power quickly enough to make a difference.

Later that year, in November 2011, Obama appointed two new commissioners to the board, one Democratic and one Republican. Their stances on similar large mergers is unknown and no doubt they will play an important role in the future on media diversity ownership. However it seems just a little too late to preserve Obama's promise of media ownership diversity as the Comcast / NBC universal merger is large enough to warrant that failure. While this large event represents failure in our analysis, it is simply the combination of four distinct failures on Obama's part leading to this consequence. These failures include: failure to introduce or promote legislation to empower the FCC to support media ownership diversity, failure to pressure the current FCC commissioners to act accordingly, failure to appoint new FCC commissioners before this large merger, and finally a failure to use the presidential "bully pulpit" to raise press awareness of the issue.

Conclusion

Overall, President Obama has made progress on his Innovation and Technology policies. It is easier to more favorably rate policies where the stated intention was just to spend money or pass a rule. It is much harder to have a visible impact on the nation. In fact, many of these policies have yet to have an identifiable impact on the nation. It might take years before we are able to identify and attribute an

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[13] http://news.cnet.com/8301-1035_3-57488618-94/wireless-spectrum-what-it-is-and-why-you-should-care/

[14] http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/29/whatever-happened-to-obamas-goal-of-universal-broadband/

[15] http://www.thewrap.com/tv/column-post/fcc-slammed-media-ownership-diversity-19655

[16] http://www.nytimes.com/2011/01/19/business/media/19comcast.html

[17] http://news.cnet.com/8301-30686_3-20128424-266/president-obama-nominates-new-fcc-commissioners/

impact on the country as a whole.

In a similar fashion, we found broadband and media ownership diversity to be lacking in Obama's efforts so far. Clearly governance is a complicated issue and the president's role is certainly limited. However, considering his office is the least limited of perhaps any one single person, it is reasonable to point out areas of deficiency in policy, especially those he pledged to fix or improve.

No grade assigned

Obama's Technology and Innovation Policy:

4 Years Later

Michael Plasmeier
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Katherine Fang
Noor Al Sharif
Yi Wu

President Obama's first term is drawing to a close. As the end of his term nears, we ~~took a~~ looked back at Candidate Obama's 2008 Technology and Innovation Policy.[1] There was some debate among our team about what counted as a success. Putting a policy in place? Spending money? Seeing results? We choose to define success as completing all steps required of one to pass the rule (so not defending the new rules from court battles) and seeing measurable progress on the issue, if applicable.

Obama's Successes:

Net Neutrality

Under the Obama administration, the Federal Communications Commission (FCC) published rules that protected network neutrality and the openness of the internet. These rules ban Internet Service Providers (ISPs) from limiting lawful content, applications, and services, including content of their competitors.[2] The FCC rules (1) prevent ISPs, such as Comcast, from using fees to determine which websites receive preferential treatment on their networks, (2) give the FCC power to engage in disputes about how ISPs manage their networks and thus provide more transparency, and (3) give the FCC the authority to investigate ISPs suspected of breaking network neutrality rules.[3] The FCC rules have been highly controversial and contested by communications companies such as Comcast, Verizon, and MetroPCS.[4] Republicans in Congress also protested against the FCC rules and moved to overturn them. However, Obama threatened to veto any bill designed to overturn the FCC rules and the bill was rejected by the Senate.[5]

Comment [LCP1]: What are some of the arguments against Net Neutrality?

[1] http://obama.3cdn.net/780e0e91ccb6cdbf6e_6udymvin7.pdf
[2] http://www.pcworld.com/article/240505/fcc_publishes_net_neutrality_rules.html
[3] http://www.pcmag.com/article2/0,2817,2406672,00.asp
[4] http://www.reuters.com/article/2011/11/09/us-usa-internet-obama-idUSTRE7A86SK20111109
[5] http://latimesblogs.latimes.com/technology/2011/11/senate-net-neutrality-vote-.html

Net neutrality is important to protecting innovation in this country. Without it, the ISPs would turn the Internet into an unequal playing field. ISPs would use their market power to provide preferential treatment to their affiliated departments and companies - this monopoly leveraging would not be in consumers' best interests. In addition, ISPs could charge high fees to new entrants, keeping them out of the business and protecting existing large companies. ISPs could also impinge on the freedom of speech with these changes, because certain political actors might not be able to pay for preferential treatment.

Patent Law

Obama has kept his promise to reform the patent system with the passage of the America Invents Act. First, it transitions the country to a "first-to-file" system from an outdated "first-to-invent" system, providing ownership clarity in the patent-granting process. This measure also provides adequate funding by granting the patent office the right to set and keep its own fees. Before this act was passed, the patent office received a set amount of money from Congress regardless the number of applications it receives in a given year[6].

It streamlines the patent process to reduce patent issuance time from the three-year average and to diminish backlog[7]. It plans to increase the number of patent offices from one to four and recruit technical experts for application processing[8]. Processing applications faster will encourage inventors and investors to develop and introduce the products quicker and thus be more competitive in the international market[9].

Additionally, the bill creates a post-grant review process where inventors and companies to contest the validity of a patent for nine months, therefore reducing the number of legal battles. Current legal battles can be very expensive. Going through a patent lawsuit can be disastrous to a company and the threat of a lawsuit often forces smaller companies to give in. A more streamlined process would allow more companies to focus on innovation.

Obama's Shortcomings

On the other hand, there are certain areas where Obama's policies have not yet taken hold, no progress has been made ~~made~~, or possibly even negative progress has been made.

Broadband

Obama set clear goals regarding next-generation broadband in America, but failed to achieve the majority of them. Despite the FCC redefining broadband speeds, the new standard of 768 kbps does

[6] http://articles.cnn.com/2011-09-16/politics/obama.patent.reform_1_patent-office-first-to-file-system-patent-reform?_s=PM:POLITICS

[7] http://articles.latimes.com/2011/sep/16/news/la-pn-obama-patent-20110916

[8] http://www.uspto.gov/news/pr/2012/12-40.jsp

[9] http://www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim

Comment [LCP2]: You need to be more specific here about what you mean by "departments and companies." One approach would be to give a concrete example of leveraging that would not be in the consumer's interest and another hypothetical example of how it could limit the range of political discourse.

Comment [LCP3]: This term is confusing. I think I know what you mean but it could also be interpreted to refer to people such as Clint Eastwood.

Comment [LCP4]: What does "it" refer to.

Comment [LCP5]: Is this "it" identical to the previous "it"?

Comment [LCP6]: Explain why this statement is true.

Comment [LCP7]: You are not really discussing Obama's Shortcomings but rather the shortcomings of Obama's Internet Policy

Comment [LCP8]: Rather than use the term negative progress why not say "situations became worse"

not meet Obama's claim of fulfilling 21st century demands. This speed is far below international leaders like South Korea and Sweden, who boast internet speeds of triple and double this standard, leaving the United States 26th in worldwide rankings of broadband service.[10]

Even after investments made by the Universal Service Fund, broadband access is available to only 95% of Americans, the same percentage as when Obama took office in 2008.[11] Critics also point out that Obama has failed to auction wireless spectrum as promised. Though Congress approved such an auction in February 2012, the FCC has not yet taken action.[12] Doubts remain that the resulting freedom of 500 MHz of spectrum will not be enough to satisfy American demand.[13]

Finally, broadband adoption is stagnant, remaining at around 68%, suggesting a failure of providing "adequate training and other supplementary resources" as Obama promised.[14] The recently minted US Ignite project to make broadband construction faster and cheaper is a promising step, but in order to deploy next-generation broadband, the next President must raise the standards of broadband speed in America, educate citizens on broadband adoption, and work to free enough spectrum for public use.

Comment [LCP9]: parts of the wireless spectrum?

Comment [LCP10]: Unclear. Do you mean "opening up the 500MHz spectrum will not be enough to satisfy American demand"?

Media Ownership Consolidation

In Obama's report to the nation, he also outlined his desire to prevent consolidation of media ownership and promote its diversity, but unfortunately on this issue his administration has not been entirely successful. He sought to use his influence of the office of US President to oversee the FCC and enact this philosophy. However, as the NCAACO (National Coalition of African American Owned Media) reported, the Obama administration failed to stop one of the largest media mergers in US history between Comcast and NBC universal, a $30 billion deal[15].

The FCC admitted that the deal could impose risks "...to the development of innovative online video distribution services."[16]. Free Press, a non-profit media reform group, accused Obama of going back on his promise of media ownership diversity. While it is true, Obama did not cast the votes of the FCC commissioning board (at 4 to 1 vote in favor of allowing the merger)[17], as the executive of the executive branch, there is certainly leverage he could have made use of to prevent this action. As the US President, he appoints FCC commissioners - officers that make the decision on allowing such deals to go through or not. However, Obama failed to use this power quickly enough to make a difference.

Comment [LCP11]: What leverage could he have used? The President appoints only one commissioner a year, and there cannot be more than three commissioners from one party, meaning that the Democrats appointed by Bush would be fairly conservative, and that Obama would have to appoint some Republicans.

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[10] http://www.howtogeek.com/95659/internet-speed-by-country-infographic/

[11] http://www.forbes.com/sites/larrydownes/2012/08/23/how-the-fcc-sees-broadbands-95-success-as-100-failure/4/

[12] http://mashable.com/2012/08/29/republicans-obama-broadband/

[13] http://news.cnet.com/8301-1035_3-57488618-94/wireless-spectrum-what-it-is-and-why-you-should-care/

[14] http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/29/whatever-happened-to-obamas-goal-of-universal-broadband/

[15] http://www.thewrap.com/tv/column-post/fcc-slammed-media-ownership-diversity-19655

[16] http://www.nytimes.com/2011/01/19/business/media/19comcast.html

[17] http://news.cnet.com/8301-30686_3-20128424-266/president-obama-nominates-new-fcc-commissioners/

Later that year, in November 2011, Obama appointed two new commissioners to the board, one Democratic and one Republican. Their stances on similar large mergers is unknown and no doubt they will play an important role in the future on media diversity ownership. However it seems just a little too late to preserve Obama's promise of media ownership diversity as the Comcast / NBC universal merger is large enough to warrant that failure. While this large event represents failure in our analysis, it is simply the combination of four distinct failures on Obama's part leading to this consequence. These failures include: failure to introduce or promote legislation to empower the FCC to support media ownership diversity, failure to pressure the current FCC commissioners to act accordingly, failure to appoint new FCC commissioners before this large merger, and finally a failure to use the presidential "bully pulpit" to raise press awareness of the issue.

Conclusion

Overall, President Obama has made progress on his Innovation and Technology policies. It is easier to more favorably rate policies where the stated intention was just to spend money or pass a rule. It is much harder to have a visible impact on the nation. In fact, many of these policies have yet to have an identifiable impact on the nation. It might take years before we are able to identify and attribute an impact on the country as a whole.

In a similar fashion, we found broadband and media ownership diversity to be lacking in Obama's efforts so far. Clearly governance is a complicated issue and the president's role is certainly limited. However, considering his office is the least limited of perhaps any one single person, it is reasonable to point out areas of deficiency in policy, especially those he pledged to fix or improve.

Comment [LCP12]: Good conclusion

Overall, you did a great job covering the material. You could have made your report stronger, however, by offering examples and explanations to support some of your assertions. Moreover, there are places where you could have been more exact in selecting the right words. Still, overall, a good first paper.

6.805 Class 2, Sept. 13: Internet Freedom of Expression Law

Class 2 (13 Sept 2012) - Internet Freedom of Expression Law

6.805: Foundations of Internet Policy - Semester Calendar

Read 9/10

Goals

In this class we will explore the Supreme Court's foundational statement on how the First Amendment free speech guarantees in the US Constitution apply to the Internet. This is a landmark case in First Amendment law, and also contains several important directional indicators on how the US legal system in general will approach the Internet going forward.

Our guest for today will be John Morris. John is currently Associate Administrator for Policy at the US National Telecommunications and Information Administration, and he was a lead litigator in the Reno case itself.

Cool

Class Preparation and Writing Assignments

- read *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). You should be able to easily find lots of summaries on the Internet, as well as the opinion itself, for example, from Lexis or at sites such as findlaw.com/casecode. *Make sure to read the actual opinion, not just the summaries.*
- read and brief *Reno v. ACLU,* 521 U.S. 844 (1997). Along with writing your brief, write down at the bottom of your brief two questions for our guest John Morris.
- be sure to read the underlying statute that was challenged in *Reno v. ACLU*, paying special attention to 47 USC 223(a) and 47 USC 230.
- group write up of Agenda 2013 exercise from class 1 (due Sept. 11) done
- read one of the following two policy papers
  - Berkman Center Internet Safety Technical Task Force Enhancing Child Safety and Online Technologies. (Group A students)
  - NTIA Online Safety and Technology Working Group Youth Safety on a Living Internet (Group B students)
- The groups for the above assignment are:
  - Group A: agokhale@mit.edu, mmiyachi@mit.edu, theplaz@mit.edu, drevo@mit.edu, bendorff@mit.edu, xenophon@mit.edu, wuyi@mit.edu, pquimby@mit.edu, denzils@mit.edu, bbaren@mit.edu, ssuen@mit.edu, kfang@mit.edu, gabuhama@wellesley.edu, wpli@mit.edu, rubyt@mit.edu, tvanky@mit.edu, wbstueck@mit.edu
  - Group B: dlaw@mit.edu, crockct@mit.edu, bennettj@mit.edu, mg@mit.edu, wvyar@mit.edu, jesharpe@mit.edu, xingyi@mit.edu, ntsharif@mit.edu, rlau@mit.edu, jhurwitz@mit.edu, jugonz97@mit.edu, christy@mit.edu, tgalvin@mit.edu, annaw@mit.edu, vsun@mit.edu, djronde@mit.edu
  - If you are not listed in either of the above groups, pick either group.

Should really be 2 events

Agenda 2013 Activity - in class

Goal: Develop recommendations for the 2013 Administration on the topic of online child protection and cyberbullying.

future

Group Process: Groups of 6 students work together. Each group includes equal number of 'A' and 'B' students so that each group will have students who have read each of the two policy papers.

Deliverable: Two page briefing memo to the Director of the White House Domestic Policy Council:

- problem statement in one paragraph
- top three policy initiatives the Administration could undertake to address the problem
- constituency analysis: who will support and who will oppose
- launch event plan: how should this initiative be announced to the public

? politics

Groups will develop material in class and have until Sunday 16 September to submit a final group paper. The paper may not exceed 2 pages.

'ours was too long' Oh well

Published by Google Docs – Report Abuse – Updated automatically every 5 minutes

'Cloud balancing'

Federal Communications Commission v. Pacifica Foundation

From Wikipedia, the free encyclopedia

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) is a landmark United States Supreme Court decision that defined the power of the Federal Communications Commission (FCC) over indecent material as applied to broadcasting.

Read 9/10
Opt

Contents

Facts

In 1973, a father complained to the FCC that his son had heard the George Carlin routine "Filthy Words" broadcast one afternoon over WBAI, a Pacifica Foundation FM radio station in New York City. Pacifica received censure from the FCC, in the form of a letter of reprimand, for allegedly violating FCC regulations which prohibited broadcasting indecent material.

Holding

what are these 2 things?

The U.S. Supreme Court upheld the FCC action in 1978, by a vote of 5 to 4, ruling that the routine was "indecent but not obscene". The Court accepted as compelling the government's interests in 1) shielding children from potentially offensive material, and 2) ensuring that unwanted speech does not enter one's home. The Court stated that the FCC had the authority to prohibit such broadcasts during hours when children were likely to be among the audience, and gave the FCC broad leeway to determine what

Federal Communications Commission v. Pacifica Foundation

Supreme Court of the United States

Argued April 18–19, 1978
Decided July 3, 1978

Full case name	*Federal Communications Commission v. Pacifica Foundation, et al.*
Citations	438 U.S. 726 (https://supreme.justia.com/us/438/726/case.html) (*more*) 98 S. Ct. 3026; 57 L. Ed. 2d 1073; 1978 U.S. LEXIS 135; 43 Rad. Reg. 2d (P & F) 493; 3 Media L. Rep. 2553
Prior history	Complain granted, 56 F.C.C.2d 94 (1975); reversed, 181 U.S.App.D.C. 132, 556 F.2d 9 (1977); certiorari granted, 434 U.S. 1008

Holding

Because of the pervasive nature of broadcasting, it has less First Amendment protection than other forms of communication. The F.C.C. was justified in concluding that Carlin's "Filthy Words" broadcast, though not obscene, was indecent, and subject to restriction.

Court membership

Chief Justice
Warren E. Burger

Associate Justices
William J. Brennan, Jr. · Potter Stewart
Byron White · Thurgood Marshall
Harry Blackmun · Lewis F. Powell, Jr.
William Rehnquist · John P. Stevens

constituted indecency in different contexts.

See also

- List of United States Supreme Court cases, volume 438
- Federal Communications Commission v. Fox Television Stations (2009)
- Federal Communications Commission v. Fox Television Stations (2012)

Case opinions	
Majority	Stevens, joined by Burger, Blackmun, Rehnquist, Powell
Concurrence	Powell, joined by Blackmun
Dissent	Brennan, joined by Marshall
Dissent	Stewart, joined by Brennan, White, Marshall
Laws applied	
U.S. Const. amend. I; 18 U.S.C. § 1464 (http://www.law.cornell.edu/uscode/18/1464.html)	

What did each argue?

Further reading

- Tremblay, R. Wilfred (2003). "FCC v. Pacifica Foundation". In Parker, Richard A. (ed.). *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions.* Tuscaloosa, AL: University of Alabama Press. pp. 218–233. ISBN 0-8173-1301-X.

External links

- Text of the decision courtesy of FindLaw (http://laws.findlaw.com/us/438/726.html) .
- Audio of the oral argument and decision (http://www.oyez.org/oyez/resource/case/120/audioresources)
- First Amendment Library entry on *FCC v. Pacifica Foundation* (http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Federal_Communications_Commission_v_Pacifica)

Retrieved from "http://en.wikipedia.org/w/index.php?title=Federal_Communications_Commission_v._Pacifica_Foundation&oldid=507866779"
Categories: Censorship of broadcasting in the United States | Obscenity law | Federal Communications Commission | Pacifica Radio | United States Supreme Court cases | United States communications regulation case law | United States Free Speech Clause case law | 1978 in United States case law | Media case law | History of radio

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kinda history that broadcast laws different

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http://laws.findlaw.com/us/438/726.html

U.S. Supreme Court

FCC v. PACIFICA FOUNDATION, 438 U.S. 726 (1978)

438 U.S. 726
FEDERAL COMMUNICATIONS COMMISSION v. PACIFICA FOUNDATION ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 77-528.

Syllabus

Argued April 18, 19, 1978
Decided July 3, 1978

A radio station of respondent Pacifica Foundation (hereinafter respondent) made an afternoon broadcast of a satiric monologue, entitled "Filthy Words," which listed and repeated a variety of colloquial uses of "words you couldn't say on the public airwaves." A father who heard the broadcast while driving with his young son complained to the Federal Communications Commission (FCC), which, after forwarding the complaint for comment to and receiving a response from respondent, issued a declaratory order granting the complaint. While not imposing formal sanctions, the FCC stated that the order would be "associated with the station's license file, and in the event subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." In its memorandum opinion, the FCC stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent radio broadcasts, and it advanced several reasons for treating that type of speech differently from other forms of expression. The FCC found a power to regulate indecent broadcasting, inter alia, in 18 U.S.C. 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications." The FCC characterized the language of the monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to the law of nuisance where the "law generally speaks to channeling behavior rather than actually prohibiting it." The FCC found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, noted that they were broadcast in the early afternoon "when children are undoubtedly in the audience," and concluded that the language as broadcast was indecent and prohibited by 1464. A three-judge panel of the Court of Appeals reversed, one judge concluding that the FCC's action was invalid either on the ground that the order constituted censorship, which was expressly forbidden by 326 of the Communications Act of

So explicitly illegal

fine matters

1934, or on the ground that the FCC's opinion was the functional equivalent of [438 U.S. 726, 727] a rule, and as such was "overbroad." Another judge, who felt that 326's censorship provision did not apply to broadcasts forbidden by 1464, concluded that 1464, construed narrowly as it has to be, covers only language that is obscene or otherwise unprotected by the First Amendment. The third judge, dissenting, concluded that the FCC had correctly condemned the daytime broadcast as indecent. Respondent contends that the broadcast was not indecent within the meaning of the statute because of the absence of prurient appeal. Held: The judgment is reversed. Pp. 734-741; 748-750; 761-762.

181 U.S. App. D.C. 132, 556 F.2d 9, reversed.

MR. JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I-III and IV-C, finding:

1. The FCC's order was an adjudication under 5 U.S.C. 554 (e) (1976 ed.), the character of which was not changed by the general statements in the memorandum opinion; nor did the FCC's action constitute rulemaking or the promulgation of regulations. Hence, the Court's review must focus on the FCC's determination that the monologue was indecent as broadcast. Pp. 734-735.

2. Section 326 does not limit the FCC's authority to sanction licensees who engage in obscene, indecent, or profane broadcasting. Though the censorship ban precludes editing proposed broadcasts in advance, the ban does not deny the FCC the power to review the content of completed broadcasts. Pp. 735-738.

3. The FCC was warranted in concluding that indecent language within the meaning of 1464 was used in the challenged broadcast. The words "obscene, indecent, or profane" are in the disjunctive, implying that each has a separate meaning. Though prurient appeal is an element of "obscene," it is not an element of "indecent," which merely refers to noncomformance with accepted standards of morality. Contrary to respondent's argument, this Court in Hamling v. United States, 418 U.S. 87 , has not foreclosed a reading of 1464 that authorizes a proscription of "indecent" language that is not obscene, for the statute involved in that case, unlike 1464, focused upon the prurient, and dealt primarily with printed matter in sealed envelopes mailed from one individual to another, whereas 1464 deals with the content of public broadcasts. Pp. 738-741.

4. Of all forms of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting is the uniquely pervasive presence that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid [438 U.S. 726, 728] those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children. Pp. 748-750.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, and MR. JUSTICE REHNQUIST, concluded in Parts IV-A and IV-B:

1. The FCC's authority to proscribe this particular broadcast is not invalidated by the possibility that its construction of the statute may deter certain hypothetically protected broadcasts containing patently offensive references to sexual and excretory activities. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 . Pp. 742-743.

2. The First Amendment does not prohibit all governmental regulation that depends on the content of

speech. Schenck v. United States, 249 U.S. 47, 52 . The content of respondent's broadcast, which was "vulgar," "offensive," and "shocking," is not entitled to absolute constitutional protection in all contexts; it is therefore necessary to evaluate the FCC's action in light of the context of that broadcast. Pp. 744-748.

MR. JUSTICE POWELL, joined by MR. JUSTICE BLACKMUN, concluded that the FCC's holding does not violate the First Amendment, though, being of the view that Members of this Court are not free generally to decide on the basis of its content which speech protected by the First Amendment is most valuable and therefore deserving of First Amendment protection, and which is less "valuable" and hence less deserving of protection, he is unable to join Part IV-B (or IV-A) of the opinion. Pp. 761-762.

STEVENS, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I-III and IV-C, in which BURGER, C. J., and REHNQUIST, J., joined, and in all but Parts IV-A and IV-B of which BLACKMUN and POWELL, JJ., joined, and an opinion as to Parts IV-A and IV-B, in which BURGER, C. J., and REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, post, p. 755. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 762. STEWART, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, post, p. 777.
Joseph A. Marino argued the cause for petitioner. With him on the briefs were Robert R. Bruce and Daniel M. Armstrong.

Harry M. Plotkin argued the cause for respondent Pacifica Foundation. With him on the brief were David Tillotson and Harry F. Cole. Louis F. Claiborne argued the cause for [438 U.S. 726, 729] the United States, a respondent under this Court's Rule 21 (4). With him on the brief were Solicitor General McCree, Assistant Attorney General Civiletti, and Jerome M. Feit. *

[Footnote *] Briefs of amici curiae urging reversal were filed by Anthony H. Atlas for Morality in Media, Inc.; and by George E. Reed and Patrick F. Geary for the United States Catholic Conference.

Briefs of amici curiae urging affirmance were filed by J. Roger Wollenberg, Timothy B. Dyk, James A. McKenna, Jr., Carl R. Ramey, Erwin G. Krasnow, Floyd Abrams, J. Laurent Scharff, Corydon B. Dunham, and Howard Monderer for the American Broadcasting Companies, Inc., et al.; by Henry R. Kaufman, Joel M. Gora, Charles Sims, and Bruce J. Ennis for the American Civil Liberties Union et al.; by Irwin Karp for the Authors League of America, Inc.; by James Bouras, Barbara Scott, and Fritz E. Attaway for the Motion Picture Association of America, Inc.; and by Paul P. Selvin for the Writers Guild of America, West Inc.

Charles M. Firestone filed a brief for the Committee for Open Media as amicus curiae.

MR. JUSTICE STEVENS delivered the opinion of the Court (Parts I, II, III, and IV-C) and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST joined (Parts IV-A and IV-B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He

proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica [438 U.S. 726, 730] Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 F. C. C. 2d 94, 99. The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." 1 [438 U.S. 726, 731]

In its memorandum opinion the Commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Id., at 94. Advancing several reasons for treating broadcast speech differently from other forms of expression, 2 the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications," 3 and 47 U.S.C. 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest." 4

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it. . . . [T]he concept [438 U.S. 726, 732] of `indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 F. C. C. 2d, at 98. 5

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the

audience (i. e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." Id., at 99. In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [] 1464." 6 Ibid.

Skippy

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that [438 U.S. 726, 733] it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F. C. C. 2d 892 (1976). The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition. 7 Id., at 893. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." Ibid.

The United States Court of Appeals for the District of Columbia Circuit reversed, with each of the three judges on the panel writing separately. 181 U.S. App. D.C. 132, 556 F.2d 9. Judge Tamm concluded that the order represented censorship and was expressly prohibited by 326 of the Communications Act. 8 Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was "overbroad." 181 U.S. App. D.C., at 141, 556 F.2d, at 18. Chief Judge Bazelon's concurrence rested on the Constitution. He was persuaded that 326's prohibition against censorship is inapplicable to broadcasts forbidden by 1464. However, he concluded that 1464 [438 U.S. 726, 734] must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. 181 U.S. App. D.C., at 140-153, 556 F.2d, at 24-30. Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language "as broadcast." Id., at 154, 556 F.2d, at 31. Emphasizing the interest in protecting children, not only from exposure to indecent language, but also from exposure to the idea that such language has official approval, id., at 160, and n. 18, 556 F.2d, at 37, and n. 18, he concluded that the Commission had correctly condemned the daytime broadcast as indecent.

Having granted the Commission's petition for certiorari, 434 U.S. 1008 , we must decide: (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by 326; (3) whether the broadcast was indecent within the meaning of 1464; and (4) whether the order violates the First Amendment of the United States Constitution.

I

The general statements in the Commission's memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U.S.C. 554 (e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations. The order "was issued in a specific factual context"; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue "as broadcast."

"This Court . . . reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 . That admonition has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues. Rescue Army v. Municipal Court, 331 U.S. 549, 568 -569. However appropriate [438 U.S. 726, 735] it may be for an

administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions. See Herb v. Pitcairn, 324 U.S. 117, 126 . Accordingly, the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast.

II

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of 47 U.S.C. 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U.S.C. 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

Section 29 of the Radio Act of 1927 provided:

"Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication." 44 Stat. 1172.

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties. 9 [438 U.S. 726, 736] During the period between the original enactment of the provision in 1927 and its re-enactment in the Communications Act of 1934, the courts and the Federal Radio Commission held that the section deprived the Commission of the power to subject "broadcasting matter to scrutiny prior to its release," but they concluded that the Commission's "undoubted right" to take note of past program content when considering a licensee's renewal application "is not censorship." 10 [438 U.S. 726, 737]

Not only did the Federal Radio Commission so construe the statute prior to 1934; its successor, the Federal Communications Commission, has consistently interpreted the provision in the same way ever since. See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964). And, until this case, the Court of Appeals for the District of Columbia Circuit has consistently agreed with this construction. 11 Thus, for example, in his opinion in Anti-Defamation League of B'nai B'rith v. FCC, 131 U.S. App. D.C. 146, 403 F.2d 169 (1968), cert. denied, 394 U.S. 930 , Judge Wright forcefully pointed out that the Commission is not prevented from canceling the license of a broadcaster who persists in a course of improper programming. He explained:

"This would not be prohibited `censorship,' . . . any more than would the Commission's considering on a license renewal application whether a broadcaster allowed `coarse, vulgar, suggestive, double-meaning' programming; programs containing such material are grounds for denial of a license renewal." 131 U.S. App. D.C., at 150-151, n. 3. 403 F.2d, at 173-174, n. 3.

See also Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d

994 (1966).

Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language. A single section of the 1927 Act is the source of both [438 U.S. 726, 738] the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

There is nothing in the legislative history to contradict this conclusion. The provision was discussed only in generalities when it was first enacted. 12 In 1934, the anticensorship provision and the prohibition against indecent broadcasts were re-enacted in the same section, just as in the 1927 Act. In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as 1464 of Title 18. 62 Stat. 769 and 866. That rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the anticensorship provision. H. R. Rep. No. 304, 80th Cong., 1st Sess., A106 (1947). Cf. Tidewater Oil Co. v. United States, 409 U.S. 151, 162 .

We conclude, therefore, that 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" [438 U.S. 726, 739] monologue was indecent within the meaning of 1464. 13 Even that question is narrowly confined by the arguments of the parties.

The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are [438 U.S. 726, 740] written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality. 14

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in Miller v. California, 413 U.S. 15 . Pacifica relies most heavily on the construction this Court gave to 18 U.S.C. 1461 in Hamling v. United States, 418 U.S. 87 . See also United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7 (18 U.S.C. 1462) (dicta). Hamling rejected a vagueness attack on 1461, which forbids the mailing of "obscene, lewd, lascivious, indecent,

filthy or vile" material. In holding that the statute's coverage is limited to obscenity, the Court followed the lead of Mr. Justice Harlan in Manual Enterprises, Inc. v. Day, 370 U.S. 478 . In that case, Mr. Justice Harlan recognized that 1461 contained a variety of words with many shades of meaning. 15 Nonetheless, he thought that the phrase "obscene, lewd, lascivious, indecent, filthy or vile," taken as a whole, was clearly limited to the obscene, a reading well grounded in prior judicial constructions: "[T]he statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." 370 U.S., at 483 . In Hamling the Court agreed with Mr. Justice Harlan that 1461 was meant only to regulate obscenity in the mails; by reading into it the limits set by Miller v. California, supra, the Court adopted a construction which assured the statute's constitutionality. [438 U.S. 726, 741]

The reasons supporting Hamling's construction of 1461 do not apply to 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted 1464 as encompassing more than the obscene. 16 The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means. 17

Because neither our prior decisions nor the language or history of 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast. [438 U.S. 726, 742]

IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F. C. C. 2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context - it cannot be adequately judged in the abstract.

The approach is also consistent with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 . In that case the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program [438 U.S. 726, 743] content. Radio Television News Directors Assn. v. United States, 400 F.2d 1002, 1016 (CA7 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated:

"We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications

conceivable, United States v. Sullivan, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise." 395 U.S., at 396 .

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. 18 While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. Bates v. State Bar of Arizona, 433 U.S. 350, 380 -381. Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 . The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 . We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech. [438 U.S. 726, 744]

B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. 19 For if the government has any such power, this was an appropriate occasion for its exercise.

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Mr. Justice Holmes' statement for the Court in Schenck v. United States, 249 U.S. 47, 52 :

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words [438 U.S. 726, 745] that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Other distinctions based on content have been approved in the years since Schenck. The government may forbid speech calculated to provoke a fight. See Chaplinsky v. New Hampshire, 315 U.S. 568 . It may pay heed to the "`commonsense differences' between commercial speech and other varieties." Bates v. State Bar of Arizona, supra, at 381. It may treat libels against private citizens more severely than libels against public officials. See Gertz v. Robert Welch, Inc., 418 U.S. 323 . Obscenity may be wholly prohibited. Miller v. California, 413 U.S. 15 . And only two Terms ago we refused to hold that a

"statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." Young v. American Mini Theatres, Inc., supra, at 52.
The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. 20 Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. Roth v. United States, 354 U.S. 476 . But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of [438 U.S. 726, 746] ideas. 21 If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content - or even to the fact that it satirized contemporary attitudes about four-letter words 22 - First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. 23 Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S., at 572 .

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, e. g., Hess v. Indiana, 414 U.S. 105 . Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, [438 U.S. 726, 747] the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. 24 It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. Cf. Cohen v. California, 403 U.S. 15, 25 . 25

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its [438 U.S. 726, 748] context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 -503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." 26 Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 , it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 .

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Dept., 397 U.S. 728 . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he [438 U.S. 726, 749] hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place. 27

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U.S. 629 , that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. [438 U.S. 726, 750] Id., at 640 and 639. 28 The case with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, 29 and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard." Euclid v. Ambler Realty Co., 272 U.S. 365, 388 . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise [438 U.S. 726, 751] of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

The following is a verbatim transcript of "Filthy Words" prepared by the Federal Communications Commission.

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [']cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be

in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, [']cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it [438 U.S. 726, 752] doesn't really - it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word - the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty - dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock - three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember - What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, [']cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, [438 U.S. 726, 753] will ya? I don't want to see that shit anymore. I can't cut that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, the shit is going to hit de fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always like that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter)

I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals - Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, today. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. [']Cause in a lot of cases that's the very act that [438 U.S. 726, 754] hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a kuh. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am FUCK. (laughter) FUCK OF THE MOUNTAIN. (laughter) Tune in again next week to FUCK OF THE MOUNTAIN. (laughter) It's an interesting word too, [']cause it's got a double kind of a life - personality - dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) [438 U.S. 726, 755] [']Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your ass. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can

just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)

Footnotes

[Footnote 1] 56 F. C. C. 2d, at 99. The Commission noted:

"Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. [] 312 (a), 312 (b), 503 (b) (1) (E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. [] 307, 308." Id., at 96 n. 3.

[Footnote 2] "Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children." Id., at 97.

[Footnote 3] Title 18 U.S.C. 1464 (1976 ed.) provides:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[Footnote 4] Section 303 (g) of the Communications Act of 1934, 48 Stat. 1082, as amended, as set forth in 47 U.S.C. 303 (g), in relevant part, provides:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall -

. . . . .

"(g) . . . generally encourage the larger and more effective use of radio in the public interest."

[Footnote 5] Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. 56 F. C. C. 2d, at 98.

[Footnote 6] Chairman Wiley concurred in the result without joining the opinion. Commissioners Reid and Quello filed separate statements expressing the opinion that the language was inappropriate for broadcast at any time. Id., at 102-103. Commissioner Robinson, joined by Commissioner Hooks, filed a concurring statement expressing the opinion: "[W]e can regulate offensive speech to the extent it constitutes a public nuisance. . . . The governing idea is that `indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct. . . . If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being `indecent' within the meaning of the statute." Id., at 107-108, and n. 9.

[Footnote 7] The Commission did, however, comment:

"`[I]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 F. C. C. 2d, at 893 n. 1.

[Footnote 8] "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 48 Stat. 1091, 47 U.S.C. 326.

[Footnote 9] Zechariah Chafee, defending the Commission's authority to take into account program service in granting licenses, interpreted the restriction on [438 U.S. 726, 736] "censorship" narrowly: "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England - the deletion of specific items and dictation as to what should go into particular programs." 2 Z. Chafee, Government and Mass Communications 641 (1947).

[Footnote 10] In KFKB Broadcasting Assn. v. Federal Radio Comm'n, 60 App. D.C. 79, 47 F.2d 670 (1931), a doctor who controlled a radio station as well as a pharmaceutical association made frequent broadcasts in which he answered the medical questions of listeners. He often prescribed mixtures prepared by his pharmaceutical association. The Commission determined that renewal of the station's license would not be in the public interest, convenience, or necessity because many of the broadcasts served the doctor's private interests. In response to the claim that this was censorship in violation of 29 of the 1927 Act, the Court held:

"This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship." 60 App. D.C., at 81, 47 F.2d, at 672.

In Trinity Methodist Church, South v. Federal Radio Comm'n, 61 App. D.C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 , the station was controlled by a minister whose broadcasts contained frequent references to "pimps" and "prostitutes" as well as bitter attacks on the Roman Catholic Church. The Commission refused to renew the license, citing the nature of the broadcasts. The Court of Appeals affirmed, concluding the First Amendment concerns did not prevent the Commission from regulating broadcasts that "offend the religious susceptibilities of thousands . . . or offend youth and innocence by the free use of words suggestive of sexual immorality." 61 App. D.C., at 314, 62 F.2d, at 853. The court recognized that the licensee had a right to broadcast this material free of prior [438 U.S. 726, 737] restraint, but "this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it." Id., at 312, 62 F.2d, at 851.

[Footnote 11] See, e. g., Bay State Beacon, Inc. v. FCC, 84 U.S. App. D.C. 216, 171 F.2d 826 (1948); Idaho Microwave, Inc. v. FCC, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965); National Assn. of Theatre Owners v. FCC, 136 U.S. App. D.C. 352, 420 F.2d 194 (1969), cert. denied, 397 U.S. 922 .

[Footnote 12] See, e. g., 67 Cong. Rec. 12615 (1926) (remarks of Sen. Dill); id., at 5480 (remarks of Rep. White); 68 Cong. Rec. 2567 (1927) (remarks of Rep. Scott); Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 121 (1926); Hearings on H. R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., 26 and 40 (1926). See also Hearings on H. R. 8825 before the House Committee on the Merchant Marine and Fisheries, 70th Cong., 1st Sess., passim (1928).

[Footnote 13] In addition to 1464, the Commission also relied on its power to regulate in the public interest under 47 U.S.C. 303 (g). We do not need to consider whether 303 may have independent significance in a case such as this. The statutes authorizing civil penalties incorporate 1464, a criminal statute. See 47 U.S.C. 312 (a) (6), 312 (b) (2), and 503 (b) (1) (E) (1970 ed. and Supp. V). But the validity of the civil sanctions is not linked to the validity of the criminal penalty. The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition. Radio Act of 1927, 14, 29, and 33, 44 Stat. 1168 and 1173; Communications Act of 1934, 312, 326, and 501, 48 Stat. 1086, 1091, and 1100, 47 U.S.C. 312, 326, and 501 (1970 ed. and Supp. V). The 1927 and 1934 Acts indicated in the strongest possible language that any invalid provision was separable from the rest of the Act. Radio Act of 1927, 38, 44 Stat. 1174; Communications Act of 1934, 608, 48 Stat. 1105, 47 U.S.C. 608. Although the 1948 codification of the criminal laws and the addition of new civil penalties changes the statutory structure, no substantive change was apparently intended. Cf. Tidewater Oil Co. v. United States, 409 U.S. 151, 162 . Accordingly, we need not consider any question relating to the possible application of 1464 as a criminal statute.

[Footnote 14] Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . ." Webster's Third New International Dictionary (1966).

[Footnote 15] Indeed, at one point, he used "indecency" as a shorthand term for "patent offensiveness," 370 U.S., at 482 , a usage strikingly similar to the Commission's definition in this case. 56 F. C. C. 2d, at 98.

[Footnote 16] "`[W]hile a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464. . . . Similarly, regardless of whether the "4-letter words" and sexual description, set forth in "lady Chatterly's Lover," (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and section 1464 questions.'" En banc Programing Inquiry, 44 F. C. C. 2303, 2307 (1960). See also In re WUHYFM, 24 F. C. C. 2d 408, 412 (1970); In re Sonderling Broadcasting Corp., 27 R. R. 2d 285, on reconsideration, 41 F. C. C. 2d 777 (1973), aff'd on other grounds sub nom. Illinois Citizens Committee for Broadcasting v. FCC, 169 U.S. App. D.C. 166, 515 F.2d 397 (1974); In re Mile High Stations, Inc., 28 F. C. C. 795 (1960); In re Palmetto Broadcasting Co., 33 F. C. C. 250 (1962), reconsideration denied, 34 F. C. C. 101 (1963), aff'd on other grounds sub nom. Robinson v. FCC, 118 U.S. App. D.C. 144, 334 F.2d 534 (1964), cert. denied, 379 U.S. 843 .

[Footnote 17] This conclusion is reinforced by noting the different constitutional limits on Congress' power to regulate the two different subjects. Use of the postal power to regulate material that is not

fraudulent or obscene [438 U.S. 726, 742] raises "grave constitutional questions." Hannegan v. Esquire, Inc., 327 U.S. 146, 156 . But it is well settled that the First Amendment has a special meaning in the broadcasting context. See, e. g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 ; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 ; Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 . For this reason, the presumption that Congress never intends to exceed constitutional limits, which supported Hamling's narrow reading of 1461, does not support a comparable reading of 1464.

[Footnote 18] A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

[Footnote 19] Pacifica's position would, of course, deprive the Commission of any power to regulate erotic telecasts unless they were obscene under Miller v. California, 413 U.S. 15 . Anything that could be sold at a newsstand for private examination could be publicly displayed on television.

We are assured by Pacifica that the free play of market forces will discourage indecent programming. "Smut may," as Judge Leventhal put it, "drive itself from the market and confound Gresham," 181 U.S. App. D.C., at 158, 556 F.2d, at 35; the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism.

[Footnote 20] Although neither MR. JUSTICE POWELL nor MR. JUSTICE BRENNAN directly confronts this question, both have answered it affirmatively, the latter explicitly, post, at 768 n. 3, and the former implicitly by concurring in a judgment that could not otherwise stand.

[Footnote 21] See, e. g., Madison School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 -176; First National Bank of Boston v. Bellotti, 435 U.S. 765 .

[Footnote 22] The monologue does present a point of view; it attempts to show that the words it uses are "harmless" and that our attitudes toward them are "essentially silly." See supra, at 730. The Commission objects, not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.

[Footnote 23] The Commission stated: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions . . . ." 56 F. C. C. 2d, at 98. Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure.

[Footnote 24] With respect to other types of speech, the Court has tailored its protection to both the abuses and the uses to which it might be put. See, e. g., New York Times Co. v. Sullivan, 376 U.S. 254 (special scienter rules in libel suits brought by public officials); Bates v. State Bar of Arizona, 433 U.S. 350 (government may strictly regulate truthfulness in commercial speech). See also Young v. American Mini Theatres, Inc., 427 U.S. 50, 82 n. 6 (POWELL, J., concurring).

[Footnote 25] The importance of context is illustrated by the Cohen case. That case arose when Paul

Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "Fuck the Draft." After entering the courtroom, he took the jacket off and folded it. 403 U.S., at 19 n. 3. So far as the evidence showed, no one in the courthouse was offended by his jacket. Nonetheless, when he left the courtroom, Cohen was arrested, convicted of disturbing the peace, and sentenced to 30 days in prison.

In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." Id., at 22. In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners. It should be noted that the Commission imposed a far more moderate penalty on Pacifica than the state court imposed on Cohen. Even the strongest civil penalty at the Commission's command does not include criminal prosecution. See n. 1, supra.

[Footnote 26] 47 U.S.C. 309 (a), 312 (a) (2); FCC v. WOKO, Inc., 329 U.S. 223, 229 . Cf. Shuttlesworth v. Birmingham, 394 U.S. 147 ; Staub v. Baxley, 355 U.S. 313 .

[Footnote 27] Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See Erznoznik v. Jacksonville, 422 U.S. 205 . As we noted in Cohen v. California:

"While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . ., we have at the same time consistently stressed that `we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" 403 U.S., at 21 .

The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C. 1692d (1976 ed., Supp. II).

[Footnote 28] The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. Butler v. Michigan, 352 U.S. 380, 383 . Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

[Footnote 29] Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: "And prively he caughte hire by the queynte." The Canterbury Tales, Chaucer's Complete Works (Cambridge ed. 1933), p. 58, l. 3276.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I join Parts I, II, III, and IV-C of MR. JUSTICE STEVENS' opinion. The Court today reviews only the Commission's holding that Carlin's monologue was indecent "as broadcast" [438 U.S. 726, 756] at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion. Ante, at 734-735. In addition to being consistent with our settled practice of not deciding constitutional issues unnecessarily, see ante, at 734; Ashwander v. TVA, 297 U.S. 288, 345 -348 (1936) (Brandeis, J., concurring), this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts. See 181 U.S. App. D.C. 132, 158-160, 556 F.2d 9, 35-37 (1977) (Leventhal, J., dissenting).

I also agree with much that is said in Part IV of MR. JUSTICE STEVENS' opinion, and with its conclusion that the Commission's holding in this case does not violate the First Amendment. Because I do not subscribe to all that is said in Part IV, however, I state my views separately.

I

It is conceded that the monologue at issue here is not obscene in the constitutional sense. See 56 F. C. C. 2d 94, 98 (1975); Brief for Petitioner 18. Nor, in this context, does its language constitute "fighting words" within the meaning of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Some of the words used have been held protected by the First Amendment in other cases and contexts. E. g., Lewis v. New Orleans, 415 U.S. 130 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Papish v. University of Missouri Curators, 410 U.S. 667 (1973); Cohen v. California, 403 U.S. 15 (1971); see also Eaton v. Tulsa, 415 U.S. 697 (1974). I do not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance. See Brown v. Oklahoma, 408 U.S. 914 (1972) (POWELL, J., concurring in result). And I would assume that an adult could not constitutionally be prohibited from purchasing a recording or transcript of the monologue [438 U.S. 726, 757] and playing or reading it in the privacy of his own home. Cf. Stanley v. Georgia, 394 U.S. 557 (1969).

But it also is true that the language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing the narrow category of language used here as "patently offensive" to most people regardless of age.

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F. C. C. 2d, at 98. In my view, this consideration provides strong support for the Commission's holding. 1

The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975); see also, e. g., Miller v. California, 413 U.S. 15, 36 n. 17 (1973); Ginsberg v. New York, 390 U.S. 629, 636 -641 (1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (opinion of BRENNAN, J.). This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, supra, at 649-650 (STEWART, J., concurring in result). Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the

unwilling [438 U.S. 726, 758] through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat:

"[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. `It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, [321 U.S. 158 , 166 (1944)]. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Id., at 639.

The Commission properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts. In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. See id., at 634-635. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching [438 U.S. 726, 759] children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. See Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 -387 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (DC 1971), aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972); see generally Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 -503 (1952). In my view, the Commission was entitled to give substantial weight to this difference in reaching its decision in this case.

A second difference, not without relevance, is that broadcasting - unlike most other forms of communication - comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. Erznoznik v. Jacksonville, supra, at 209; Cohen v. California, 403 U.S., at 21 ; Rowan v. Post Office Dept., 397 U.S. 728 (1970). Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, see, e. g., Erznoznik, supra, at 210-211, but cf. Rosenfeld v. New Jersey, 408 U.S. 901, 903 -909 (1972) (POWELL, J., dissenting), a different order of values obtains in the home. "That we are often `captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." Rowan v. Post Office Dept., supra, at 738. The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case. This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect [438 U.S. 726, 760] unwilling adults from momentary exposure to it in their homes. 2 Making the sensitive judgments required in these cases is not easy.

But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of "reduc[ing] the adult population . . . to [hearing] only what is fit for children." Butler v. Michigan, 352 U.S. 380 ,383 (1957). This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.

The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated [438 U.S. 726, 761] use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

II

As the foregoing demonstrates, my views are generally in accord with what is said in Part IV-C of MR. JUSTICE STEVENS' opinion. See ante, at 748-750. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. Compare ante, at 744-748; Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 -73 (1976) (opinion of STEVENS, J.), with id., at 73 n. 1 (POWELL, J., concurring). 3 In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him. 4 [438 U.S. 726, 762]

The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. Cf. id., at 77-79 (POWELL, J., concurring). These are the grounds upon which I join the judgment of the Court as to Part IV.

[Footnote 1] See generally Judge Leventhal's thoughtful opinion in the Court of Appeals. 181 U.S. App. D.C. 132, 155-158, 556 F.2d 9, 32-35 (1977) (dissenting opinion).

[Footnote 2] It is true that the radio listener quickly may tune out speech that is offensive to him. In addition, broadcasters may preface potentially offensive programs with warnings. But such warnings

do not help the unsuspecting listener who tunes in at the middle of a program. In this respect, too, broadcasting appears to differ from books and records, which may carry warnings on their face, and from motion pictures and live performances, which may carry warnings on their marquees.

[Footnote 3] The Court has, however, created a limited exception to this rule in order to bring commercial speech within the protection of the First Amendment. See Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455 -456 (1978).

[Footnote 4] For much the same reason, I also do not join Part IV-A. I had not thought that the application vel non of overbreadth analysis should depend on the Court's judgment as to the value of the protected speech that might be deterred. Cf. ante, at 743. Except in the context of commercial speech, see Bates v. State Bar of Arizona, 433 U.S. 350, 380 -381 (1977), it has not in the past. See, e. g., Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

As MR. JUSTICE STEVENS points out, however, ante, at 734, the Commission's order was limited to the facts of this case; "it did not [438 U.S. 726, 762] purport to engage in formal rulemaking or in the promulgation of any regulations." In addition, since the Commission may be expected to proceed cautiously, as it has in the past, cf. Brief for Petitioner 42-43, and n. 31, I do not foresee an undue "chilling" effect on broadcasters' exercise of their rights. I agree, therefore, that respondent's overbreadth challenge is meritless.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with MR. JUSTICE STEWART that, under Hamling v. United States, 418 U.S. 87 (1974), and United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973), the word "indecent" in 18 U.S.C. 1464 (1976 ed.) must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

For the second time in two years, see Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First [438 U.S. 726, 763] Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. See opinion of MR. JUSTICE POWELL, ante, at 761-762. Moreover, as do all parties, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), or obscenity, Roth v. United States, 354 U.S. 476 (1957), that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of the words found condemnable here are fully protected by the First Amendment in other contexts. See Eaton v. Tulsa, 415 U.S. 697 (1974); Papish v. University of Missouri Curators, 410 U.S. 667 (1973); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15 (1971). Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is

protected speech, a majority of the Court 1 nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Kovacs v. Cooper, 336 U.S. 77 (1949). Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, [438 U.S. 726, 764] and (2) the presence of children in the listening audience. Dispassionate analysis, removed from individual notions as to what is proper and what is not, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications - if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme - that the Court today permits.

A

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many - including the FCC and this Court - might find offensive.

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." Cohen v. California, supra, at 21 I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within the "substantial privacy interests" to which Mr. Justice Harlan referred in Cohen, and is entitled to the greatest solicitude. Stanley v. Georgia, 394 U.S. 557 (1969). However, I believe that an individual's actions in switching on [438 U.S. 726, 765] and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. See Note, Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity, 61 Va. L. Rev. 579, 618 (1975). Although an individual's decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-a-vis the communication he voluntarily admits into his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in Cohen who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," Cohen v. California, supra, at 21, the very fact that those interests are

threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[t]he radio can be turned off," Lehman v. Shaker Heights, 418 U.S. 298 ,302 (1974) - and with a minimum of effort. As Chief Judge Bazelon aptly observed below, "having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in Cohen and Erznoznik [v. Jacksonville, 422 U.S. 205 (1975)]; he can avert his attention by changing channels or turning off the set." 181 U.S. App. D.C. 132, 149, 556 F.2d 9, 26 (1977). Whatever the minimal discomfort suffered by a [438 U.S. 726, 766] listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly to follow MR. JUSTICE STEVENS' reliance on animal metaphors, ante, at 750-751, "to burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957).

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. Cf. Lehman v. Shaker Heights, supra. Rowan v. Post Office Dept., 397 U.S. 728 (1970), relied on by the FCC and by the opinions of my Brothers POWELL and STEVENS, confirms rather than belies this conclusion. In Rowan, the Court upheld a statute, 39 U.S.C. 4009 (1964 ed., Supp. IV), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not prevented from doing so. Equally important, the determination of offensiveness vel non under the statute involved in Rowan was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernible here. [438 U.S. 726, 767]

B

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to adults," Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106 -107 (1973) (BRENNAN, J., dissenting), the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors. Ginsberg v. New York, 390 U.S. 629 (1968). It is true that the obscenity standard the Ginsberg Court adopted for such materials was based on the then-applicable obscenity standard of Roth v. United States, 354 U.S. 476 (1957), and Memoirs v. Massachusetts, 383 U.S. 413 (1966), and that "[w]e have not had occasion to decide what effect Miller [v. California, 413 U.S. 15 (1973)] will have on the Ginsberg formulation." Erznoznik v. Jacksonville, supra, at 213 n. 10. Nevertheless, we have made it abundantly clear that "under any test of obscenity as to minors . . . to be obscene `such expression must be, in some significant way, erotic.'" 422 U.S., at 213 n. 10, quoting Cohen v. California, 403 U.S.,

at 20 .

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. 2 It thus ignores our recent admonition [438 U.S. 726, 768] that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S., at 213 -214. 3 The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of Butler v. Michigan, supra. Butler involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." 352 U.S., at 381 . Although Roth v. United States, supra, had not yet been decided, it is at least arguable that the material the statute in Butler was designed to suppress could have been constitutionally denied to children. Nevertheless, this Court [438 U.S. 726, 769] found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned:

"The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." 352 U.S., at 383 -384.

Where, as here, the government may not prevent the exposure of minors to the suppressed material, the principle of Butler applies a fortiori. The opinion of my Brother POWELL acknowledges that there lurks in today's decision a potential for "`reduc[ing] the adult population . . . to [hearing] only what is fit for children,'" ante, at 760, but expresses faith that the FCC will vigilantly prevent this potential from ever becoming a reality. I am far less certain than my Brother POWELL that such faith in the Commission is warranted, see Illinois Citizens Committee for Broadcasting v. FCC, 169 U.S. App. D.C. 166, 187-190, 515 F.2d 397, 418-421 (1975) (statement of Bazelon, C. J., as to why he voted to grant rehearing en banc); and even if I shared it, I could not so easily shirk the responsibility assumed by each Member of this Court jealously to guard against encroachments on First Amendment freedoms. In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, ante, at 757-758, and my Brother STEVENS, ante, at 749-750, both stress the time-honored right of a parent to raise his child as he sees fit - a right this Court has consistently been vigilant to protect. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Yet this principle supports a [438 U.S. 726, 770] result directly contrary to that reached by the Court. Yoder and Pierce hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that. 4

C

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS - the intrusive nature of radio and the presence of children in the listening audience - can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public [438 U.S. 726, 771] radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Johnson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible. 5

In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." Brief for Petitioner 45. The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment," opinion of MR. JUSTICE POWELL, ante, at 757, involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the [438 U.S. 726, 772] Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. 6 For my own part, even accepting that this case is limited to its facts, 7 I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

II

The absence of any hesitancy in the opinions of my Brothers POWELL and STEVENS to approve the FCC's censorship of the Carlin monologue on the basis of two demonstrably inadequate grounds is a function of their perception that the decision will result in little, if any, curtailment of communicative exchanges protected by the First Amendment. Although the extent to [438 U.S. 726, 773] which the Court stands ready to countenance FCC censorship of protected speech is unclear from today's decision, I find the reasoning by which my Brethren conclude that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow, ante, at 750, takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," ante, at 743 n. 18, and

finds solace in his conviction that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." Ibid. The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word. Mr. Justice Harlan, speaking for the Court, recognized the truism that a speaker's choice of words cannot surgically be separated from the ideas he desires to express when he warned that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Cohen v. California, 403 U.S., at 26 . Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications. This, too, was apparent to Mr. Justice Harlan and the Court in Cohen.

"[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys [438 U.S. 726, 774] not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." Id., at 25-26.

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words." Ante, at 750 n. 28. My Brother POWELL agrees: "The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion." Ante, at 760. The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases, the medium may well be the message. The Court apparently believes that the FCC's actions here can be analogized to the zoning ordinances upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). For two reasons, it is wrong. First, the zoning ordinances found to pass constitutional muster in Young had valid goals other than the channeling of protected speech. Id., at 71 n. 34 (opinion of STEVENS, J.); id., at 80 (POWELL, J., concurring). No such goals are present here. Second, and crucial to the opinions of my Brothers POWELL and STEVENS in Young - opinions, which, as they do in this case, supply the bare five-person majority of the Court - the ordinances did not restrict the access of distributors or exhibitors to the market or impair [438 U.S. 726, 775] the viewing public's access to the regulated material. Id., at 62, 71 n. 35 (opinion of STEVENS, J.); id., at 77 (POWELL, J., concurring). Again, this is not the situation here. Both those desiring to receive Carlin's message over the radio and those wishing to send it to them are prevented from doing so by the Commission's actions. Although, as my Brethren point out, Carlin's message may be disseminated or received by other means, this is of little consolation to those broadcasters and listeners who, for a host of reasons, not least among them financial, do not have access to, or cannot take advantage of, these other means.

Moreover, it is doubtful that even those frustrated listeners in a position to follow my Brother POWELL'S gratuitous advice and attend one of Carlin's performances or purchase one of his records

would receive precisely the same message Pacifica's radio station sent its audience. The airways are capable not only of carrying a message, but also of transforming it. A satirist's monologue may be most potent when delivered to a live audience; yet the choice whether this will in fact be the manner in which the message is delivered and received is one the First Amendment prohibits the government from making.

III

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain. [438 U.S. 726, 776]

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.). The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research indicates that this is indeed the case. See B. Jackson, "Get Your Ass in the Water and Swim Like Me" (1974); J. Dillard, Black English (1972); W. Labov, Language in the Inner City: Studies in the Black English Vernacular (1972). As one researcher concluded, "[w]ords generally considered obscene like `bullshit' and `fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." C. Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," Language and Linguistics Working Papers No. 5, p. 82 (Georgetown Univ. Press 1972). Cf. Keefe v. Geanakos, 418 F.2d 359, 361 (CA1 1969) (finding the use of the word "motherfucker" commonplace among young radicals and protesters).

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. 8 [438 U.S. 726, 777] In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. See Moore v. East Cleveland, 431 U.S. 494, 506 -511 (1977) (BRENNAN, J., concurring).

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on "`the words you couldn't say on the public . . . airways,'" explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 56 F. C. C. 2d, at 95, 96. In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evinces an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

[Footnote 1] Where I refer without differentiation to the actions of "the Court," my reference is to this majority, which consists of my Brothers POWELL and STEVENS and those Members of the Court joining their separate opinions.

[Footnote 2] Even if the monologue appealed to the prurient interest of minors, [438 U.S. 726, 768] it would not be obscene as to them unless, as to them, "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

[Footnote 3] It may be that a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the "other legitimate proscription[s]" alluded to in Erznoznik. This is so both because of the difficulties inherent in adapting the Miller formulation to communications received by young children, and because such children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649 -650 (1968) (STEWART, J., concurring). I doubt, as my Brother STEVENS suggests, ante, at 745 n. 20, that such a limited regulation amounts to a regulation of speech based on its content, since, by hypothesis, the only persons at whom the regulated communication is directed are incapable of evaluating its content. To the extent that such a regulation is viewed as a regulation based on content, it marks the outermost limits to which content regulation is permissible.

[Footnote 4] The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." 181 U.S. App. D.C., at 152, 556 F.2d, at 29 (emphasis in original). See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

[Footnote 5] See, e. g., I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that pertain to him by the morning light any that pisseth against the wall"; II Kings 18:27 and Isaiah 36:12: "[H]ath he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"; Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."; Ezekiel 23:21: "Thus thou calledst to remembrance the lewdnes of thy youth, in bruising thy teats by the Egyptians for the paps of thy youth." The Holy Bible (King James Version) (Oxford 1897).

[Footnote 6] Although ultimately dependent upon the outcome of review in this Court, the approach taken by my Brother STEVENS would not appear to tolerate the FCC's suppression of any speech, such as political speech, falling within the core area of First Amendment concern. The same, however, cannot be said of the approach taken by my Brother POWELL, which, on its face, permits the Commission to censor even political speech if it is sufficiently offensive to community standards. A result more contrary to rudimentary First Amendment principles is difficult to imagine.

[Footnote 7] Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F. C. C. 2d 94 (1975) and 59 F. C. C. 2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of "language that

describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 F. C. C. 2d, at 98. For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here, or even this "shock treatment" type of offensive broadcast during the late evening.

[Footnote 8] Under the approach taken by my Brother POWELL, the availability of broadcasts about groups whose members constitute such audiences might also be affected. Both news broadcasts about activities involving these groups and public affairs broadcasts about their concerns are apt to contain interviews, statements, or remarks by group leaders and members which may contain offensive language to an extent my Brother POWELL finds unacceptable.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court today recognizes the wise admonition that we should "avoid the unnecessary decision of [constitutional] issues." Ante, at 734. But it disregards one important application of this salutary principle - the need to construe an Act of Congress so as to avoid, if possible, passing upon its constitutionality. 1 It is apparent that the constitutional questions raised by the order of the Commission in this case are substantial. 2 Before deciding them, we should be certain that it is necessary to do so. [438 U.S. 726, 778]

The statute pursuant to which the Commission acted, 18 U.S.C. 1464 (1976 ed.), 3 makes it a federal offense to utter "any obscene, indecent, or profane language by means of radio communication." The Commission held, and the Court today agrees, that "indecent" is a broader concept than "obscene" as the latter term was defined in Miller v. California, 413 U.S. 15 , because language can be "indecent" although it has social, political, or artistic value and lacks prurient appeal. 56 F. C. C. 2d 94, 97-98. 4 But this construction of 1464, while perhaps plausible, is by no means compelled. To the contrary, I think that "indecent" should properly be read as meaning no more than "obscene." Since the Carlin monologue concededly was not "obscene," I believe that the Commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power to prohibit speech that [438 U.S. 726, 779] would be constitutionally protected outside the context of electronic broadcasting.

This Court has recently decided the meaning of the term "indecent" in a closely related statutory context. In Hamling v. United States, 418 U.S. 87 , the petitioner was convicted of violating 18 U.S.C. 1461, which prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article." The Court "construe[d] the generic terms in [1461] to be limited to the sort of `patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California.'" 418 U.S., at 114 , quoting United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7. Thus, the clear holding of Hamling is that "indecent" as used in 1461 has the same meaning as "obscene" as that term was defined in the Miller case. See also Marks v. United States, 430 U.S. 188, 190 (18 U.S.C. 1465).

Nothing requires the conclusion that the word "indecent" has any meaning in 1464 other than that ascribed to the same word in 1461. 5 Indeed, although the legislative history is largely silent, 6 such indications as there are support the view that 1461 and 1464 should be construed similarly. The view

that "indecent" means no more than "obscene" in 1461 and similar statutes long antedated Hamling. See United States v. Bennett, 24 F. Cas. 1093 (No. 14,571) (CC SDNY 1879); Dunlop v. United States, 165 U.S. 486, 500 -501; [438 U.S. 726, 780] Manual Enterprises v. Day, 370 U.S. 478, 482 -484, 487 (opinion of Harlan, J.). 7 And although 1461 and 1464 were originally enacted separately, they were codified together in the Criminal Code of 1948 as part of a chapter entitled "Obscenity." There is nothing in the legislative history to suggest that Congress intended that the same word in two closely related sections should have different meanings. See H. R. Rep. No. 304, 80th Cong., 1st Sess., A104-A106 (1947).

I would hold, therefore, that Congress intended, by using the word "indecent" in 1464, to prohibit nothing more than obscene speech. 8 Under that reading of the statute, the Commission's order in this case was not authorized, and on that basis I would affirm the judgment of the Court of Appeals.

[Footnote 1] See, e. g., Johnson v. Robison, 415 U.S. 361, 366 -367; United States v. Thirty-seven Photographs, 402 U.S. 363, 369 ; Rescue Army v. Municipal Court, 331 U.S. 549, 569 ; Ashwander v. TVA, 297 U.S. 288, 348 (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 .

[Footnote 2] The practice of construing a statute to avoid a constitutional confrontation is followed whenever there is "`a serious doubt'" as to the [438 U.S. 726, 778] statute's constitutionality. E. g., United States v. Rumely, 345 U.S. 41, 45 ; Blodgett v. Holden, 275 U.S. 142, 148 (opinion of Holmes, J.). Thus, the Court has construed a statute to avoid raising a doubt as to its constitutionality even though the Court later in effect held that the statute, otherwise construed, would have been constitutionally valid. Compare General Motors Corp. v. District of Columbia, 380 U.S. 553 , with Moorman Mfg. Co. v. Bair, 437 U.S. 267 .

[Footnote 3] The Court properly gives no weight to the Commission's passing reference in its order to 47 U.S.C. 303 (g). Ante, at 739 n. 13. For one thing, the order clearly rests only upon the Commission's interpretation of the term "indecent" in 1464; the attempt by the Commission in this Court to assert that 303 (g) was an independent basis for its action must fail. Cf. SEC v. Chenery Corp., 318 U.S. 80, 94 -95; SEC v. Sloan, 436 U.S. 103, 117 -118. Moreover, the general language of 303 (g) cannot be used to circumvent the terms of a specific statutory mandate such as that of 1464. "[T]he Commission's power in this respect is limited by the scope of the statute. Unless the [language] involved here [is] illegal under 1464., the Commission cannot employ the statute to make [it] so by agency action." FCC v. American Broadcasting Co., 347 U.S. 284, 290 .

[Footnote 4] The Commission did not rely on 1464's prohibition of "profane" language, and it is thus unnecessary to consider the scope of that term.

[Footnote 5] The only Federal Court of Appeals (apart from this case) to consider the question has held that "`obscene' and `indecent' in 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to the prurient interest." United States v. Simpson, 561 F.2d 53, 60 (CA7).

[Footnote 6] Section 1464 originated as part of 29 of the Radio Act of 1927, 44 Stat. 1172, which was re-enacted as 326 of the Communications Act of 1934, 48 Stat. 1091. Neither the committee reports nor the floor debates contain any discussion of the meaning of "obscene, indecent or profane language."

[Footnote 7] When the Federal Communications Act was amended in 1968 to prohibit "obscene, lewd, lascivious, filthy, or indecent" telephone calls, 82 Stat. 112, 47 U.S.C. 223, the FCC itself indicated that it thought this language covered only "obscene" telephone calls. See H. R. Rep. No. 1109, 90th Cong., 2d Sess., 7-8 (1968).

[Footnote 8] This construction is further supported by the general rule of lenity in construing criminal statutes. See Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 . The Court's statement that it need not consider the meaning 1464 would have in a criminal prosecution, ante, at 739 n. 13, is contrary to settled precedent:

"It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give 1464. the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." FCC v. American Broadcasting Co., supra, at 296. [438 U.S. 726, 781]

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Reno v. American Civil Liberties Union

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Reno v. American Civil Liberties Union, 521 U.S. 844 (https://supreme.justia.com/us/521/844/case.html) (1997), is a United States Supreme Court case in which all nine Justices of the Court voted to strike down anti-indecency provisions of the Communications Decency Act (the CDA), finding they violated the freedom of speech provisions of the First Amendment. Two Justices concurred in part and dissented in part to the decision. This was the first major Supreme Court ruling regarding the regulation of materials distributed via the Internet.

Contents

Background

The Communications Decency Act was an attempt to protect minors from explicit material on the Internet by criminalizing the knowing transmission of "obscene or indecent" messages to any recipient under 18; and also the knowing sending to a person under 18 of anything "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

The government's main defense of the CDA was that similar decency laws had been upheld in three prior Supreme Court decisions: *Ginsberg v. New York* (1968); *F.C.C. v. Pacifica Foundation* (1978); and *Renton v. Playtime Theatres, Inc.* (1986); and that the CDA should be similarly upheld.

Reno v. American Civil Liberties Union

Supreme Court of the United States

Argued March 19, 1997
Decided June 26, 1997

Full case name	*Janet Reno, Attorney General of the United States, et al. v. American Civil Liberties Union, et al.*
Docket nos.	96-511 (http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/96-511.htm)
Citations	521 U.S. 844 (https://supreme.justia.com/us/521/844/case.html) (*more*) 117 S.Ct. 2329, 2334; 138 L.Ed.2d 874
Prior history	*Prelim. injunction granted* (3-judge court, E.D. Penn. 1996); expedited review by S.Ct. per CDA §561

Holding

§223(a)(1)(B), §223(a)(2), §223(d) of the CDA are unconstitutional and unenforceable, except for cases of obscenity or child pornography, because they abridge the freedom of speech protected by the First Amendment and are substantially overbroad. The Internet is entitled to the full protection given to media like the print press; the special factors justifying government regulation of broadcast media do not apply.

Court membership

Chief Justice
William Rehnquist

Associate Justices
John P. Stevens · Sandra Day O'Connor
Antonin Scalia · Anthony Kennedy

In *F.C.C. v. Pacifica Foundation*, the Supreme Court had upheld the possibility of the FCC delivering administrative sanctions to a radio station for broadcasting George Carlin's monologue titled "Filthy Words". In *Reno v. ACLU*, though, the Supreme Court held that this was not case law justifying the CDA, as the FCC's sanctions were not criminal punishments; and TV and radio broadcasts, "as a matter of history, had 'received the most limited First Amendment protection' … in large part because warnings could not adequately protect the listener from unexpected program content", as opposed to Internet users, who must take "a series of affirmative steps" to access explicit material.

David Souter · Clarence Thomas Ruth Bader Ginsburg · Stephen Breyer	
Case opinions	
Majority	Stevens, joined by Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
Concur/dissent	O'Connor, joined by Rehnquist
Laws applied	
U.S. Const. amend. I; 47 U.S.C. § 223 (http://www.law.cornell.edu/uscode/47/223.html)	

Finally, in *Renton v. Playtime Theaters, Inc.*, the Supreme Court had upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The government argued that the CDA was an attempt to institute "a sort of 'cyberzoning' on the Internet". In *Reno v. ACLU*, however, the Court ruled that the "time, place, and manner regulation" that *Renton* had enacted was not similar to the CDA, which was "a content-based blanket restriction on speech".

Opinion of the Court

In a nuanced decision, Justice John Paul Stevens wrote of the differences between Internet communication and previous types of communication that the Court had ruled on. In conclusion, he wrote:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. (...)
>
> It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population ... to ... only what is fit for children." *(footnotes removed)*

The rest of the CDA, including the "safe harbor" provision protecting ISPs from being liable for the words of others, was not affected by this decision and remains law.

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.
>
> —Opinion of the court, 58¶ 5-6, [1]

Concurring opinion

Justice O'Connor, joined by Chief Justice Rehnquist, agreed with the decision "as of 1997", but expressed interest in the idea of creating an "adult zone" on the Internet that was made inaccessible to minors through "gateway technology" that had been investigated by a lower district court. If such technology could be introduced, they wrote, zoning portions of the Internet to prohibit adult content could be as constitutional as such zoning is in the physical world. (See .xxx top-level domain. An alternate proposal promoted by free speech advocates claims that a ".kids" domain would be more feasible and constitutional.)

Oh - same thing I said :)

The two dissented in part, writing they would have invalidated a narrower portion of the two CDA provisions under review.

just for the above

See also

Further reading

- Fraleigh, Douglas (2003). "Reno v. ACLU". In Parker, Richard A. (ed.). *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*. Tuscaloosa, AL: University of Alabama Press. pp. 298–312. ISBN 0-8173-1301-X.
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1. ^ FTP.resource.org (http://ftp.resource.org/courts.gov/c/US/521/521.US.844.96-511.html)

- First Amendment Library entry on *Reno v. ACLU* (http://www.firstamendmentcenter.org/faclibrary/case.aspx?id=1658)

External links

- decision at FindLaw (http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&navby=case&vol=521&invol=844) , with links to decisions citing this one
- Summary at OYEZ (http://www.oyez.org/cases/1990-1999/1996/1996_96_511)
- Netlitigation case summary and review (http://www.netlitigation.com/netlitigation/cases/reno.htm)
- Howard Rheingold's testimony (http://www.ciec.org/transcripts/April_1_Rheingold.html) as an expert witness

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Dissent in *Reno v. ACLU*: Seeds sown for a new generation of regulation?

Joanna Lu

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Paper for MIT 6.805/STS085: Ethics and Law on the Electronic Frontier, Fall 1997

When the Communications Decency Act of 1996 was ruled unconstitutional in *ACLU v. Reno*, and later in *Reno v. ACLU*, there was great rejoicing among the various groups that allied in the effort to move the court toward those decisions. It seemed a ringing affirmation of First and Fifth Amendment rights and a forward step in governmental understanding of the unique technological position the Internet enjoys within the realm of communications media.

However, the June 26, 1997 ruling made in the Supreme Court's *Reno v. ACLU* decision was not the overwhelmingly unanimous ruling voiced in the lower court. Justice O'Connor and Chief Justice Renquist concurred with the rest of the Court only in part with respect to the constitutionality of the CDA. Together, they issued a joint dissenting opinion. It's true that with the Supreme Court decision in *Reno v. ACLU*, one chapter of the Internet Censorship Saga came to a close. The dissenting opinion, however, leaves elements of the larger plot hanging and its characters redrafting their alliances. It leaves open the possibility for future Internet regulation based on the perceived need to protect minors from indecent material. The CDA may have died that day in June, but the seeds of a new generation of regulations may have been sown the very same day.

Let's consider if there were a Son or Daughter of the CDA,

1. ... what Constitutional grounds did the decisions concerning the CDA stand on?
2. ... what rationale supported these grounds?
3. ... what developments in technology support the rationale for regulation?
4. ... apart from constitutional issues, what societal forces exert pressure to regulate the Internet?
5. ... and how do I believe regulation can or should be enacted?

In answer to the first question, the Court deliberated long and hard to root its opinions in firm constitutional ground. To the second, I believe there is a legal rationale to connect Constitutional principles to regulation, but that rationale is still debatable. To the third, there are Internet technologies developing that didn't exist at the time of either *ACLU v. Reno* or *Reno v. ACLU* and they will aid regulation. To the fourth question, there are forces in a democratic society (for better or worse) that come into play other than rulings in the Supreme Court on issues of constitutionality. And to the fifth question,

I do believe there are ways to put up guidelines consistent with the principles of the US Constitution which at the same time answer the concerns of a US population with extraordinarily diverse needs, but I don't believe they need to be regulated through legal statutes.

1. What are the Constitutional grounds for the decision?

First, let's take a look at the sections of the CDA in question and the accompanying issues of

constitutionality. Since it's primarily background to later parts of the paper, I'll try to zoom through the major points of the opinion as quickly as possible.

```
(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 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; ... and
(d) Whoever --
  (1) in interstate or foreign communications knowingly --
     (A) uses an interactive computer service to send to a specific
         person or persons under 18 years of age, or
     (B) uses any interactive computer service to display in a manner
         available to a person under 18 years of age, any comment,
         request suggestion, proposal, image, or other communication
         that, in context, depicts or describes, in terms patently
         offensive as measured by contemporary community standards,
         sexual or excretory activities or organs, regardless of
         whether the user of such service placed the call or initiated
         the communication; or
  (2) knowingly permits any telecommunications facility under such
      person's control to be used for an activity prohibited by
      paragraph (1) with the intent used for such activity ...

Shall be fined under title 18 US code or imprisoned not more than two
years. (1)
```

The above statutory provisions were included in the CDA to protect minors from "indecent" and "patently offensive" communications on the Internet. Even though the Supreme Court was sympathetic to the congressional goal of protecting children from harmful materials, it still agreed with the three-judge District Court ruling that the statute abridged "the freedom of speech" for adults protected by the First Amendment. It used the decisions in *Ginsburg v. New York*, *FCC v. Pacifica Foundation*, and *Renton v. Playtime Theatres, Inc.* to lay doubt on the constitutionality of the CDA. This is how the Court reasoned.

Ginsburg v. New York upheld the right to prohibit selling to minors under 17 years of age material that was considered obscene to them even if it was not obscene to adults. *Reno v. ACLU*, however, rejected its applicability to the CDA on the grounds that the CDA was far broader than the New York statute. They declared the CDA's coverage was wholly unprecedented and that the breadth of the statute demanded that the government explain why a less restrictive provision would not be as effective as what the CDA proposed. (2)

In the *FCC v. Pacifica Foundation* decision, the court upheld the order of the FCC that the "Filthy Words" monologue which included words that referred to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent "as broadcast." *Reno v. ACLU* rejected this decision's applicability to the CDA because the Internet is not comparable to broadcast media in the receiver's risk of accidental encounter of "offensive material." The justices cited the lower court's finding that the risk of encountering indecent material on the Internet by accident is remote because a series of affirmative steps is required to access specific material." (3)

Before looking at the whether these laws can be enacted in the technologically maturing realm of the Internet, let's look at the philosophical basis for attempting to do so. Citing Ginsburg, the Court affirmed the State's independent interest in the well-being of its youth, and also on their "consistent recognition of the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." (8)

Citing *Pacifica*, it also agreed with the government that there is a compelling interest in protecting the physical and psychological well-being of minors "which extended to shielding them from indecent messages that are not obscene by adult standards." (9)

And citing *Miller v. California*, the Supreme Court stated that even though the CDA provisions were vague in their attempts to regulate "indecent," "patently offensive," and "obscene" material, it believed that with a more carefully drafted substitute, the weaknesses of the CDA could be overcome by using the three-pronged Miller obscenity test properly. Let's take a closer look at these three parts. To judge something obscene, one would determine

> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (10)

The Court charged the government with using only one limitation of the Miller test, the "patently offensive" prong stated in (a), and used it synonymously with "indecent." The court also said the government then went on to assume that since Miller outlined this limitation, the CDA cannot be constitutionally vague. But there is a second prong ... and it contained a critical requirement omitted from the CDA: that it be "specifically defined by applicable state law." This is what makes Miller's use of "indecent" and "patently offensive" specific -- that it can be determined by a law defined by a state. The CDA lacked the prong that reduced the inherent vagueness of the term "patently offensive." In other words, if the people who drafted the CDA were more together about applying the principles of indecency and offensiveness outlined by *Miller v. California*, the Act might have withstood the vagueness charge. The justices had no beef with the aim of the CDA. They simply charged the writers of the statute with being sloppy.

Given that the Court understood Congress's compelling reason in drafting the CDA to protect minors from harm ... and given that the Court felt that the CDA was overbroad in its reach because it abridged adult First Amendment rights in a then unzoneable medium ... and given that Justices O'Connor and Renquist saw the Internet moving towards zoneability ... can minors now be segregated from adults according to a set of community standards? What would happen if what was once considered a community of standards in the form of a geographic state is now a cyberspace community of standards with its own set of boundaries? Is it now possible to narrow a statute to the least restrictive means? Has widespread technical feasibility arrived for creating "zones?" Enter PICS.

3. What developments in technology support the rationale for regulation?

Even before the CDA was written by Congress and signed into law by President Clinton, an effort to establish boundaries had already begun. In the summer of 1995, a number of groups joined in an effort to find a way to address the issue of content control without government regulation. Under the auspices of the World Wide Web Consortium, this effort that included the Electronic Frontier Foundation and The Center for Democracy and Technology sought to define a technology platform on

In *Renton v. Playtime Theatres, Inc.*, the Court upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. It was not a content-based issue, but an issue of "secondary effects." In other words, the court was not trying to stop dissemination of offensive speech, but instead, it was trying to control crime and deteriorating property values in the geographic neighborhood of these theatres. With this distinction in mind, the justices evaluated the CDA. They saw it as a "blanket content-based restriction on speech, and, as such cannot be 'properly analysed as a form of time, place, and manner regulation'" in the same way that Renton could. (4) In other words, the effect of proximity is almost impossible to determine on the Internet.

That was the majority opinion. But what did the dissent say? What issues were left to hold ajar the open door for another generation of the Communications Decency Act? At the heart of the dissenting opinion was the concept of "zoning." O'Connor and Renquist saw that the creation of "adult" zones can be constitutionally sound. States have long denied minors access to certain physical establishments frequented by adults. They have also denied minors access to speech deemed "harmful" to them. These prohibitions relied on two concepts that are readily enforceable in the physical world. These are geography and identity. Geography is the place, such as an adult dance show. Identity consists of elements that make up an individual, such as age or gender - aspects of "who someone is" that are hard to conceal in the physical world. A 14-year old would have a difficult time passing through the doors of the Naked I Cabaret on her own. In the electronic world, however, the boundaries of geography and identity are not as easily enforced.

> "The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. " (5)

But things are changing, O'Connor and Renquist went on to say in their dissent. They contended that although the world at the time of their decision may not have been compatible with zoning, now ...

> "Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and consequently, more amenable to zoning laws. This transformation is already underway. Cyberspace is moving ... from a relatively unzoned place to a universe that is extraordinarily well zoned." (6)

Can we carry the concerns we've attempted to legislate in the past into the developing media of communications? Is a law -- enforceable in the "real" world of "adult" theaters with doors and bouncers, the "real" world of magazine stands that sell their wares to adults but not minors -- now also enforceable in a cyberspace that can be "zoned" into adult sectors and children's sectors? As O'Connor stated her position,

> "... the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults." (7)

Therefore, if it were technically feasible to create zones that would "protect" minors from indecent, patently offensive and obscene material without abridging adult First Amendment rights to access that same material, would it be constitutionally possible to legislate statutes delineating the boundaries of those zones while at the same time enforcing who crosses and who remains within those boundaries?

2. What rationale supports these grounds?

which people could write their own labels. It would be a set of protocols for how ratings could be expressed, not a rating system in itself. It came to be known as the Platform for Internet Content Selection, or PICS. (Other options exist which are part of commercial online services or can be purchased as stand-alone software products, but it seems that PICS is developing as the standard that most rating and filtering systems are employing.)

I was thinking HTTP tags

How does it work? PICS is a technical standard for labels. Ratings from any source employing PICS technical standards will work with all PICS-using filtering software. Consider how it would work from two sides of the communication. The label content itself is written by either self-rating publishers or by third-party services that rate other groups' sites. This done, the standard then allows any PICS-enabled tool to find and interpret the label on a Website or Website file.

How does this work for filtering material such as the CDA was concerned with? A browser or stand-alone software filter can be set to check labels for certain content. If a parent, library, or school were concerned with filtering out indecent material, it could set a filter to do just that. When an end-user (minor) asks to see a particular URL, the software filter fetches the document but also makes an inquiry to the label bureau to ask for labels describing that URL. Depending on what the labels say (indecent or decent), the filter may either block access to that URL or let the material through.

As of 1996, PICS conventions have caught on with a number of vendors. These include Microsoft, Netscape, Surfwatch, and CyberPatrol. Networks such as AOL, AT&T Worldnet, CompuServe, and Prodigy provide free blocking software that is PICS-compliant. RASCi (of the Recreational Software Advisory Council) and SafeSurf, both third-party rating services, write using their own labeling vocabulary, but use on-line servers that produce PICS-formatted labels. CompuServe announced it will label all web content it produces using RASCi labels.

Proponents of the system point to its flexibility as a plus. By creating only a platform of technical standards, it leaves the actual labeling and filtering process in the hands of others. In the words of Paul Resnick and James Miller from "PICS: Internet Access Controls. Without Censorship,"

Right

> "Not everyone needs to block reception of the same materials. Parents may not wish to expose their children to sexual or violent images. Businesses may want to prevent their employees from visiting recreational sites during hours of peak network usage. Governments may want to restrict reception of materials that are legal in other countries but not in their own. The "off" button (or disconnecting from the entire Net) is too crude: there should be some way to block only the inappropriate material. Appropriateness, however, is neither an objective nor universal measure. It depends on at least three factors.
>
> 1. The supervisor: parenting styles differ, as do philosophies of management and government.
> 2. The recipient: what's appropriate for one fifteen-year old may not be for an eight-year old or even all fifteen-year olds.
> 3. The context: a game or chat room that is appropriate to access at home may be inappropriate at work or school." (11)

What are the implications for another effort at Internet regulation? It means that even though the CDA was charged with being overbroad in its constitutional reach by making content-based decisions for the entire population, it now has the means to narrow that reach by targeting only minors. By installing blocking protocols on specific systems or stand-alone machines, a supervisor (parent,

employer or government) can block "indecent," "patently offensive" or "obscene" material from a computer in a "children's zone." A filtering system set for an adult user would allow the same materials to enter an "adult zone" or allow an adult access to an "adult zone." There is a possibility of finding a least restrictive means. Minors can be both shielded from inappropriate material getting to them and prevented from accessing "zones" they are not mature enough to enter.

well a not restricted zone

In her dissent, O'Connor identified the "patently offensive display" provision of the CDA as in reality two separate provisions. The first, she says, makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18. The second criminalizes the display of patently offensive messages or images in any manner available to minors. She goes on to reason that since neither of these provisions purports to keep indecent (or patently offensive) material away from adults who have a First Amendment right to obtain this speech, "the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access." (12) Later in her dissent she says,

> "Gateway technology is not ubiquitous in cyberspace, and because without it there is no means of age verification, cyberspace still remains largely unzoned - and unzoneable ... Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today." (13)

Well, today has gone and tomorrow has come. And it has come with PICS. We can filter. We can block. We can zone. Should we as a society actually desire to do that?

we dont need zip from congress except manditory tagging

4. Apart FROM Constitutional issues, what societal forces exert pressure to regulate the Internet?

Many of the groups who rallied together to oppose government regulation of the Internet pointed to the development of blocking, filtering and labeling systems as a preferred alternative. However, here lies an interesting twist. Debate over the implementation of PICS-based labeling has become a battleground itself. Where some point to labeling as a way for empowered parents to take control of their families' online lives, others see it as a way for government and big business to join together in order to exercise an even more insidious control than writers of the CDA ever dreamed of wielding.

Let's look at the proponents' arguments. Many were collected from a statement of the NetParents homepage. It's entitled "Businesses, Public and Private Groups Unite Behind Initiative For Family-Friendly Internet Online World."

> "Companies in the Internet online industry joined today with organizations representing education, children, parents, consumers and law enforcement to support President Clinton's and Congress' call for an Internet online environment that's family-friendly and rewarding and safe for children." (Executive Summary Excerpt)

> "The benefits of this emerging medium to our society, and especially to our children, are extraordinary. We are only just beginning to understand the power of interactive services to educate, inform and entertain our children. At the same time, parents need to get involved with their children online and help them get the most out of their interactive experience. Just like you wouldn't drive without buckling up your kids in seat belts, you shouldn't let them travel in cyberspace without the available and easy to use technology safeguards." (Steven Case, Chairman and CEO of AOL)

> "Today, parents who want to ensure that their children are safe online have many different options, whether they are using one of the big Internet online services or a small ISP. These tools are widely available, effective and mostly free. If you can click a mouse, you can use kid-friendly tools. And across the industry, what you're seeing today is a real commitment to make these tools even more effective, even easier for parents to use and even more widely distributed than they are today." (Laura Jennings, VP, Microsoft Network)
>
> "Parents need to know the difference between good software and not-so-good software. They need to know where they can buy it, how they can use it and what it will do. Government's role in this debate is to provide parents with the tools they need to make wise decisions -- not to introduce ineffective and meddlesome regulations." (Carole Shields, President, People for the American Way)
>
> "Our customers tell us they want their children to have rewarding online experiences. They recognize that the Internet is a vast global frontier, and they want and need help charting their children's course. The industry in general and AT&T in particular are providing them that help today and are both cooperating and competing in finding even better ways to help parents child-proof the Internet." (Tom Evslin, president, AT&T WorldNet Service) (14)

And what stand does the president take? In a paper on the White House home page he pledged that

> "In the wake of the Supreme Court's decision on the Communications Decency Act ... [t]he Administration will continue to enforce laws to protect children on-line. The Supreme Court decision on the Communications Decency Act did not affect US laws against obscenity, child pornography and on-line stalking. The president made clear that the Administration remains committed to the vigorous enforcement of federal prohibitions against the transmission of child pornography and obscenity over the Internet and other media, and the use of the Internet by pedophiles to entice children to engage in sexual activity." (15)

So, the Justice Department's decision notwithstanding, the President will find a way to protect the children of the United States of America by making it "family-friendly and rewarding and safe for children." (16) He is responding to a concerned, vocal and active constituency.

But as we embrace guardian empowerment to protect minors, perhaps we should recognize some caveats. Critics of blocking, filtering and labeling abound. Let's review some of their warnings.

The ACLU white paper "Fahrenheit 451.2: Is Cyberspace Burning?" raises the fear that the White House is moving away from the position Judge Dalzell staked out in *ACLU v. Reno*. Dalzell contended that with its low barriers of entry and wide-reaching exchange of communication, the Internet should be afforded the greatest protection of all media under the First Amendment. The ACLU states

> "The White House meeting was clearly the first step away from the principle that protection of the electronic word is analogous to protection of the printed word. Despite the Supreme Court's strong rejection of a broadcast analogy for the Internet, government and industry leaders alike are now inching toward the dangerous and incorrect position that the Internet is like television, and should be rated and censored accordingly ... in the virtual world, one can ... easily censor controversial speech by banishing it to the farthest

corners of cyberspace using rating and blocking programs." (17)

The ACLU also recounts the following events with the suspicion that government and big business may not need the CDA to lay the infrastructure for Internet censorship since that process is already underway. In a presidential summit with industry leaders, Clinton encouraged Internet users to self-rate themselves and at the same time urged industry leaders to develop and use tools for blocking inappropriate speech. Network industry leaders responded with pledges supporting the White House efforts. Netscape and Microsoft, with 90% of the browser market, have adopted PICS standards. With a grant from IBM and its use by Microsoft and CompuServe, the RASCi rating system has become the "defacto industry standard rating system." Four of the major search engines announced a plan to promote self-regulation on the Internet. Senator Patty Murray (D Wash.) proposed legislation which would impose civil and ultimately criminal penalties on those who misrate a site. (18)

While collaboration between government and industry giants is laudable, control of the information industry is rapidly moving into just a few commercial hands. To borrow from an old economic metaphor describing the "invisible hand" guiding the free market economy ... the not-so-invisible hand of the government may be guiding the not-so-free industry of information exchange.

There is an additional angle to consider. Simson Garfinkel's worry is that access controls on the end-user's machine can be turned off by a user who doesn't wish to be censored. But it's not this step that worries him. His concern is the next step ... that controls are tamper-proof only by implementing them upstream from the end-user's PC, at the ISP or on an organization's firewall. This would allow the network administrator to review all down-loaded documents and identify the person who downloaded it. It would also mean that a user wouldn't even know what documents were blocked or filtered out, but the administrator would. (19) In the ACLU white paper the ultimate result is envisioned. So what if tamper proof

> "The Internet will become bland and homogenized. The major commercial sites will still be readily available. They will have the resources to self-rate, and third-party rating services will be inclined to give them acceptable ratings. People who disseminate quirky and idiosyncratic speech, create individual home pages, or post to controversial news group, will be among the first Internet users blocked by filters and made invisible by the search engines. Controversial speech will still exist, but will only be visible to those with the tools and know-how to penetrate the dense smokescreen of industry "self-regulation." (20)

3rd party optional proxy site

There are other examples of blocking problems that have arisen. And these can't even be attributed to the government and big business censoring free dissemination of information. They are the result (I hope) of glitches in software programming still in the infancy of its development.

Here's one. Some programs tend to block entire directories of Web pages simply because they contain just one "adult" file. This results in perfectly appropriate material being blocked because of proximity to inappropriate material. On some occasions entire domains are blocked. This is an issue of granularity. How fine a filter will be used to sift material? public marketplace

Here's another. It results from string-recognition software. AOL's program, looking for and blocking four-letter words, refused to let users register from the town of Scunthorpe in Great Britain. Using Surfwatch, users at the University of Kansas Medical Center couldn't see the Web page of the Archie Dykes Medical Library, part of their own medical facility.

And one more. The white out feature in CYBERSitter not only blocks selected information, but in so doing will give it new meaning. By "whiting out" the "inappropriate" material and leaving the "acceptable" remainder, a sentence like "President Clinton opposes homosexual marriage" would become "President Clinton opposes marriage." (21)

Other examples highlight issues that go beyond growing pains in software development. These are human judgment calls made by raters. CYBERSitter tends to block anything that has to do with sex, including information on sexual orientation by virtue of the fact that it would have the word sex in its name. CyberPatrol blocks Usenet newsgroups including alt.feminism, soc.feminism, clari.new.women, soc.support.pregnancy.loss, and alt.support.fat-acceptance. It blocked the Electronic Frontier Foundation's censorship archive, the National Organization of Women's web site, and the Penal Lexicon which is an encyclopedic British site concerned with prisons and penal affairs. With these examples in mind ...

Vol comercial

5. Can new regulations be enacted?

Yes. I've already outlined the constitutional support and legal rationale that can be cited to enact future regulatory laws. I've also shown the considerable political and economic support among the people and institutions for Internet regulation. Is regulation already developing? Yes. In fact we've felt some of the growing pains already.

... and should they?

Should some form of regulation exist on the Internet? I believe yes. Why? Because as a society we need protections. Even as we need protections from being accosted on the street or invaded in our homes, regulation on the Internet affords us and our children protection. Who should do it? That's a trickier question. We are a diverse nation. And when we consider the Internet, probably we should say that globally we are a diverse group of nations each made up of a multitude of people. We have different needs, different governments, and operate under different codes of ethics. A single governmental law would create a Procrustean bed of what is acceptable on the Internet. It would either cripple us by chopping off parts of ourselves we value, or deform us by forcing us into areas we don't naturally fit.

I believe the motive behind the Communications Decency Act - to protect minors from indecent, patently offensive, or pornographic material -- stems from good intentions. But because the definition of what constitutes decent material is subject to a community standard, I'm leery of identifying which community standard gets applied. As someone has already said... One man's meat is another man's sex organ.

But we have arrived at a time when we actually have the tools with PICS to define for ourselves what community we choose to belong to. (This doesn't apply only to issues of sex either. It's just that the CDA was consumed by that particular issue. Our standards of taste and tolerance vary with respect to views on religion, violence, animal use/abuse, respect for age, euthanasia, commercial solicitation, privacy, and political affiliations.) Without a doubt, there are problems with labeling, filtering and blocking software. I've mentioned only a few. I could have spent the entire paper throwing stones at rating systems and their potential for mistakes, misuse, and misapplied efforts at censorship.

But I'm an optimist. And I do believe in the vigor of a free market and the eventual wisdom of free choice as long as there are many choices. As the system matures, the sophistication of a rating

vocabulary will evolve with our sophistication in using it, and as more rating services proliferate, we will find the communities we wish to join. We have not only the choice but the responsibility to take charge of our own lives and not simply balk at government attempts to set standards for us.

So what do we do? We accept a technical platform for content labeling. It's like labeling clothing. There's a place we always look to figure out the size ... usually on the neck or waistband. After all, it helps to know what size it is. Then we choose which size we buy because we know how we want our clothes to fit us. Likewise, there's a label for fiber content. Is it cotton, silk, or polyester/spandex? How does it fit with our taste and preferences? Do we like to machine wash only, or will we dry clean? We decide. The label simply gives us information. If it's something we reject, like a material that's not flame-retardant and could endanger the life of our child, that's our choice as well.

How does choice fit in to labeling for network material? If a PICS-enabled browser can find the URL label, a user accepts or rejects the material based on labeling information. What about the anecdotes of CYBERSitter and CyberPatrol blocking perfectly legitimate sites with a whiff of a hint of a rumor of sex? This is where I believe that we should take charge in choosing our community. Blocking should happen as far downstream to the user as possible. The key is to keep control of filtering and choice of rating services in the hands of the end users. We should be reading our own labels and tailoring our filtering to our particular needs of age, maturity, taste, and tolerance. There will eventually be a multitude of rating services. We should not accept the package deal that comes with a browser or ISP. It is the user's responsibility to research how different services rate material and choose the services compatible with her/his values and preferences.

Esther Dyson has envisioned a very near future where this kind of choice can and should take place:

> "This is ideal ground for a proliferation of third-party raters, or trust and reputation services. We expect to see a lively marketplace of competing rating services -- just as in the real world there are restaurant ratings, seals of approval, best picks in magazines, reading lists from high schools, rankings of legislators by political groups, top-10 lists, special college issues and the like ... One can imagine rating systems for almost any characteristic that is specifiable -- or for any group's or individual's judgment. And they can rate locations or places or communities as well as static content. Some rating systems simply look at the words used, but the more sophisticated ones make judgments on a different basis -- more like editorial judgment. This site is filled with mature people with an interest in social action; that one is best-suited for teenage girls who want to talk about boys, models, and make-up; that one is for my teenage girl, with discussions about female pilots, doctors and executives ..." (22)

Garfinkel raises the possibility of a savvy youth altering filter controls with the result that parents move the blocking protocols upstream to the ISP or network administrator so they can't be tampered with. That scenario isn't necessary if a guardian doesn't abdicate responsibility for a child. In the way a family or school makes decisions about what kind of print or broadcast material enters a building, or the way they evaluate what movie to go out and see, that same mechanism should be used to judge what online material enters or is accessed by a computer.

What about the agreements among the large ISP's, the developers of the major browsers, and the White House to make the Internet family friendly? In this case, I worry. I worry that the rights and responsibilities that adults who care for children can be abridged. I worry that the ability for minors to learn how to judge for themselves what are the tolerable boundaries for acceptable language, sexual activity and levels of violence is being abridged as well. I worry that in the rush to cater to the

politically popular cause of "our children above all else," we may be forgetting the substantial percentage of the remaining population which is over 17 years of age. Since any rating system imposes its own set of values on the material being judged, and since the driving concern of the White House and the mainstream Internet industry is family friendliness, this partnership may have its cost. Since much of the population will likely view the Internet through filter-mediated access such as employers, libraries, or state-funded community centers, there is a strong likelihood that material will pass through a politically-defined sieve or be strained through a mesh sized for only bland, wide-spread commercial appeal ... easy to digest, but without much texture.

So should we abandon PICS and its label-enabling technology? ... or should we abandon filter and blocking technology because of the potential for misuse? No. They have value, and the value resides in being able to nurture the future generations in the way families and communities have nurtured their young in the past -- by exposing them to the world with guidance and support appropriate to their maturity and the values of their chosen community. Should we be wary of abuse? Yes. But since we don't reject kitchen knives because of their potential for harm, and we don't rule out buying aspirin because it can be abused if taken in the wrong amount or in the wrong context, we shouldn't wring our hands over the censorship possibilities of rating. It certainly is preferable to abiding by a new version of the Communications Decency Act. If we acknowledge the communities we belong to, actively participate in creating our own rules and standards, encourage a diversity of rating systems, and step forward to take responsibility and control of the technology before us, then we have also taken a step in affirming our place in a technological democracy.

Notes:

1. Communications Decency Act, Title 47 U.S.C.A., 223(a) and (d), 1996.

2. US Supreme Court majority opinion, *Reno v. ACLU*, No. 96-511, 1997.

3. Ibid.

4. Ibid.

5. US Supreme Court dissenting opinion, *Reno v. ACLU.*

6. Ibid.

7. Ibid.

8. US Supreme Court majority opinion, *Reno v. ACLU.*

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10. *Miller v. California*, 413 U.S. 15 (1973)

11. Paul Resnick, James Miller, "PICS: Internet Access Controls Without Censorship," Association for Computing Machinery, Inc., 1996. URL: http://www.w3.org.PICS.iacwcv2.htm 12. US Supreme Court dissenting opinion, *Reno v. ACLU.*

13. Ibid.

14. A statement from public interest and industry groups on White House announcement, "Businesses,

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15. White House Statement, "A Family Friendly Internet," 1997. URL: http://www.whitehouse.gov.WH/New/Ratings/

16. Op. cit., "Businesses, Public and Private Groups Unite Behind Initiative For Family-Friendly Internet Online World."

17. Principal authors Ann Beeson, Chris Hansen, Barry Steinhardt; American Civil Liberties Union White Paper, "Fahrenheit 451.2: Is Cyberspace Burning?" 1997. URL: http://www.aclu.org/issues /cyber/burning.html

18. Ibid. 19. Simson Garfinkel, "Good Clean PICS," HotWired, February, 1997. URL: http://www.hotwired.com/packet/garfinkel/97/05/index2a.htm 20. Op. cit., Beeson, Hansen, Steinhardt, et.al.

21. Jonathan Weinberg, "Rating the Net," 1997 URL: http://www.msen.com/~weinberg/rating/htm 22. Esther Dyson, "Labels and Disclosure," Release 1.0, December, 1996. URL: http://www.edventure.com/release1/1296body.html

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4. Dyson, Esther, "Labels and Disclosure," Release 1.0, December, 1996. URL: http://www.edventure.com/release1/1296body.html

5. Garfinkel, Simson, "Good Clean PICS," HotWired, February, 1997. URL: http://www.hotwired.com /packet/garfinkel/97/05/index2a.htm

6. Harvard Law Review Association, "The Message in the Medium: the Amendment on the Information Superhighway," The Harvard Law 1994.

7. Marshall, Joshua Micah, "The Trouble With PICS," Feed, Inc., 1997. URL: http://www.feedmag.com/html/feedline/97.09marshall/97.09marshall.html

8. Resnick, Paul, "PICS, Censorship, & Intellectual Freedom FAQ," last revised June, 1997.

9. Resnick, Paul and Miller, James, "PICS: Internet Access Controls Without Censorship," Association for Computing Machinery, Inc., 1996. URL: http://www.w3.org.PICS.iacwcv2.htm 10. Shallit, Jeffrey, from a talk given at the Session on "Public Networks and Censorship" at the Ontario Library Association, 1995.

11. Statement from Public Interest and Industry Groups on White House announcement, "Businesses,

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12. Tribe, Laurence, "The Constitution in Cyberspace," Keynote Address at the First Conference on Computer Freedom and Privacy, 1991. 13. US Constitution, Bill of Rights, 1791.

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15. White House Statement, "A Family Friendly Internet," 1997. URL: http://www.whitehouse.gov.WH/New/Ratings/

16. World Wide Web Consortium Homepage, Platform for Internet Content Selection, last updated 18 July 1997. URL: http://www.w3.org.PICS/

This doesn't seem to be an issue anymore....

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER II - COMMON CARRIERS
Part I - Common Carrier Regulation

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

Footnotes

[1] So in original. Probably should be "subparagraph (A)."

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739.)

References in Text

The Electronic Communications Privacy Act of 1986, referred to in subsec. (e)(4), is Pub. L. 99–508, Oct. 21, 1986, 100 Stat. 1848, as amended. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 2510 of Title 18, Crimes and Criminal Procedure, and Tables.

Codification

Section 509 of Pub. L. 104–104, which directed amendment of title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) by adding section 230 at end, was executed by adding the section at end of part I of title II of the Act to reflect the probable intent of Congress and amendments by sections 101(a), (b), and 151(a) of Pub. L. 104–104 designating §§ 201 to 229 as part I and adding parts II (§ 251 et seq.) and III (§ 271 et seq.) to title II of the Act.

Amendments

1998—Subsec. (d). Pub. L. 105–277, § 1404(a)(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (d)(1). Pub. L. 105–277, § 1404(a)(1), inserted "or 231" after "section 223".

Subsecs. (e), (f). Pub. L. 105–277, § 1404(a)(2), redesignated subsecs. (d) and (e) as (e) and (f), respectively.

Effective Date of 1998 Amendment

Amendment by Pub. L. 105–277 effective 30 days after Oct. 21, 1998, see section 1406 of Pub. L. 105–277, set out as a note under section 223 of this title.

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Reno v. American Civil Liberties Union (96-511) 521 U.S. 844 (1997)

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Syllabus

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SUPREME COURT OF THE UNITED STATES

521 U.S. 844

Reno v. American Civil Liberties Union

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

96-511 Argued: March 19, 1997 --- Decided: June 26, 1997

Two provisions of the Communications Decency Act of 1996 (CDA or Act) seek to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world. Title 47 U. S. C. A. § 223(a)(1)(B)(ii) (Supp. 1997) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Section 223(d) prohibits the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Affirmative defenses are provided for those who take "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications, § 223(e)(5)(A), and those who

restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, § 223(e)(5)(B). A number of plaintiffs filed suit challenging the constitutionality of §§ 223(a)(1) and 223(d). After making extensive findings of fact, a three judge District Court convened pursuant to the Act entered a preliminary injunction against enforcement of both challenged provisions. The court's judgment enjoins the Government from enforcing § 223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of § 223(d) is unqualified because that section contains no separate reference to obscenity or child pornography. The Government appealed to this Court under the Act's special review provisions, arguing that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague.

Held: The CDA's "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment. Pp. 17-40.

(a) Although the CDA's vagueness is relevant to the First Amendment overbreadth inquiry, the judgment should be affirmed without reaching the Fifth Amendment issue. P. 17.

(b) A close look at the precedents relied on by the Government--*Ginsberg* v. *New York*, 390 U.S. 629; *FCC* v. *Pacifica Foundation*, 438 U.S. 726; and *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41--raises, rather than relieves, doubts about the CDA's constitutionality. The CDA differs from the various laws and orders upheld in those cases in many ways, including that it does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content based blanket restriction on speech. These precedents, then, do not require the Court to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions. Pp. 17-21.

(c) The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media--the history of extensive government regulation of broadcasting, see, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 399-400; the scarcity of available frequencies at its inception, see, *e.g.*,

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622, 637-638; and its "invasive" nature, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 128--are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet. Pp. 22-24.

(d) Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes. For instance, its use of the undefined terms "indecent" and "patently offensive" will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content based regulation, see, *e.g.*, *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, coupled with its increased deterrent effect as a criminal statute, see, *e.g.*, *Dombrowski* v. *Pfister*, 380 U.S. 479, raise special First Amendment concerns because of its obvious chilling effect on free speech. Contrary to the Government's argument, the CDA is not saved from vagueness by the fact that its "patently offensive" standard repeats the second part of the three prong obscenity test set forth in *Miller* v. *California*, 413 U.S. 15, 24. The second *Miller* prong reduces the inherent vagueness of its own "patently offensive" term by requiring that the proscribed material be "specifically defined by the applicable state law." In addition, the CDA applies only to "sexual conduct," whereas, the CDA prohibition extends also to "excretory activities" and "organs" of both a sexual and excretory nature. Each of *Miller*'s other two prongs also critically limits the uncertain sweep of the obscenity definition. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing alone, is not vague. The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. Pp. 24-28.

(e) The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, *e.g.*, *Ginsberg*, 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, *e.g.*, *Sable*, *supra*, at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See, *e.g.*, *Sable*, 492 U. S., at 126. The Government has not proved otherwise. On the other hand, the District Court found that currently available *user based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available. Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing

some tolerance for parental choice, and regulating some portions of the Internet differently than others. Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored. Pp. 28-33.

(f) The Government's three additional arguments for sustaining the CDA's affirmative prohibitions are rejected. First, the contention that the Act is constitutional because it leaves open ample "alternative channels" of communication is unpersuasive because the CDA regulates speech on the basis of its content, so that a "time, place, and manner" analysis is inapplicable. See, *e.g.*, *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536. Second, the assertion that the CDA's "knowledge" and "specific person" requirements significantly restrict its permissible application to communications to persons the sender knows to be under 18 is untenable, given that most Internet forums are open to all comers and that even the strongest reading of the "specific person" requirement would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech. Finally, there is no textual support for the submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's prohibitions. Pp. 33-35.

(g) The § 223(e)(5) defenses do not constitute the sort of "narrow tailoring" that would save the CDA. The Government's argument that transmitters may take protective "good faith actio[n]" by "tagging" their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software, is illusory, given the requirement that such action be "effective": The proposed screening software does not currently exist, but, even if it did, there would be no way of knowing whether a potential recipient would actually block the encoded material. The Government also failed to prove that § 223(b)(5)'s verification defense would significantly reduce the CDA's heavy burden on adult speech. Although such verification is actually being used by some commercial providers of sexually explicit material, the District Court's findings indicate that it is not economically feasible for most noncommercial speakers. Pp. 35-37.

(h) The Government's argument that this Court should preserve the CDA's constitutionality by honoring its severability clause, § 608, and by construing nonseverable terms narrowly, is acceptable in only one respect. Because obscene speech may be banned totally, see *Miller*, *supra*, at 18, and § 223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court can sever the term "or indecent" from the statute, leaving the rest of § 223(a) standing. Pp. 37-39.

(i) The Government's argument that its "significant" interest in fostering the Internet's growth provides an independent basis for upholding the CDA's

constitutionality is singularly unpersuasive. The dramatic expansion of this new forum contradicts the factual basis underlying this contention: that the unregulated availability of "indecent" and "patently offensive" material is driving people away from the Internet. P. 40.

929 F. Supp. 824, affirmed.

Stevens, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., joined.

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STEVENS, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

521 U.S. 844

Reno v. American Civil Liberties Union

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

96-511 Argued: March 19, 1997 --- Decided: June 26, 1997

Justice Stevens delivered the opinion of the Court.

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment. [n1]

The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. See 929 F. Supp. 824, 830-849 (ED Pa. 1996). [n2] The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the

problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

The Internet

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," [n3] which was designed to enable computers operated by the military, defense contractors, and universities conducting defense related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication." [n4]

The Internet has experienced "extraordinary growth." [n5] The number of "host" computers--those that store information and relay communications--increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for a small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium--known to its users as

"cyberspace"--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

E mail enables an individual to send an electronic message--generally akin to a note or letter--to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e mail group. Subscribers can send messages to a common e mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real time dialogue--in other words, by typing messages to one another that appear almost immediately on the others' computer screens. The District Court found that at any given time "tens of thousands of users are engaging in conversations on a huge range of subjects." [n6] It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought." [n7]

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address--"rather like a telephone number." [n8] Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text--sometimes images.

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the

right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. [n9] Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web." [n10]

Sexually Explicit Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest core." [n11] These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community." [n12] Thus, for example,

"when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing--wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague." [n13]

Some of the communications over the Internet that originate in foreign countries are also sexually explicit. [n14]

Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." [n15] For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. [n16] Unlike communications received by radio or television, "the receipt of information on the Internet

requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." [n17]

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images." [n18] Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available." [n19]

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e mail, mail exploders, newsgroups or chat rooms." [n20] The Government offered no evidence that there was a reliable way to screen recipients and participants in such fora for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent." [n21]

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non commercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers." *Id.*, at 846 (finding 102). Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." [n22]

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are

effective for commercial purveyors of indecent material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach." [n23]

In sum, the District Court found:

"Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Ibid.* (finding 107).

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over the air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V--known as the "Communications Decency Act of 1996" (CDA)--contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. [n24] They are informally described as the "indecent transmission" provision and the "patently offensive display" provision. [n25]

The first, 47 U. S. C. A. § 223(a) (Supp. 1997), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

"(a) Whoever--

"(1) in interstate or foreign communications--

. . . . .

"(B) by means of a telecommunications device knowingly--

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

"any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

. . . . .

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

"shall be fined under Title 18, or imprisoned not more than two years, or both."

The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

"(d) Whoever--

"(1) in interstate or foreign communications knowingly--

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

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

"any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

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

"shall be fined under Title 18, or imprisoned not more than two years, or both."

The breadth of these prohibitions is qualified by two affirmative defenses. See § 223(e)(5).[n26] One covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. § 223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code. § 223(e)(5)(B).

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs[n27] filed suit against the Attorney General of the United States and the

Department of Justice challenging the constitutionality of §§ 223(a)(1) and 223(d). A week later, based on his conclusion that the term "indecent" was too vague to provide the basis for a criminal prosecution, District Judge Buckwalter entered a temporary restraining order against enforcement of § 223(a)(1)(B)(ii) insofar as it applies to indecent communications. A second suit was then filed by 27 additional plaintiffs,[n28] the two cases were consolidated, and a three judge District Court was convened pursuant to § 561 of the Act.[n29] After an evidentiary hearing, that Court entered a preliminary injunction against enforcement of both of the challenged provisions. Each of the three judges wrote a separate opinion, but their judgment was unanimous.

Chief Judge Sloviter doubted the strength of the Government's interest in regulating "the vast range of online material covered or potentially covered by the CDA," but acknowledged that the interest was "compelling" with respect to some of that material. 929 F. Supp., at 853. She concluded, nonetheless, that the statute "sweeps more broadly than necessary and thereby chills the expression of adults" and that the terms "patently offensive" and "indecent" were "inherently vague." *Id.*, at 854. She also determined that the affirmative defenses were not "technologically or economically feasible for most providers," specifically considering and rejecting an argument that providers could avoid liability by "tagging" their material in a manner that would allow potential readers to screen out unwanted transmissions. *Id.*, at 856. Chief Judge Sloviter also rejected the Government's suggestion that the scope of the statute could be narrowed by construing it to apply only to commercial pornographers. *Id.*, at 854-855.

Judge Buckwalter concluded that the word "indecent" in § 223(a)(1)(B) and the terms "patently offensive" and "in context" in § 223(d)(1) were so vague that criminal enforcement of either section would violate the "fundamental constitutional principle" of "simple fairness," *id.*, at 861, and the specific protections of the First and Fifth Amendments, *id.*, at 858. He found no statutory basis for the Government's argument that the challenged provisions would be applied only to "pornographic" materials, noting that, unlike obscenity, "indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value." *Id.*, at 863. Moreover, the Government's claim that the work must be considered patently offensive "in context" was itself vague because the relevant context might "refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings." *Id.*, at 864. He believed that the unique nature of the Internet aggravated the vagueness of the statute. *Id.*, at 865, n. 9.

Judge Dalzell's review of "the special attributes of Internet communication" disclosed by the evidence convinced him that the First Amendment denies Congress the power to regulate the content of protected speech on the Internet.

Id., at 867. His opinion explained at length why he believed the Act would abridge significant protected speech, particularly by noncommercial speakers, while "[p]erversely, commercial pornographers would remain relatively unaffected." *Id.*, at 879. He construed our cases as requiring a "medium specific" approach to the analysis of the regulation of mass communication, *id.*, at 873, and concluded that the Internet--as "the most participatory form of mass speech yet developed," *id.*, at 883--is entitled to "the highest protection from governmental intrusion," *ibid.* [n30]

The judgment of the District Court enjoins the Government from enforcing the prohibitions in § 223(a)(1)(B) insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §§ 223(d)(1) and (2) is unqualified because those provisions contain no separate reference to obscenity or child pornography.

The Government appealed under the Act's special review provisions, § 561, 110 Stat. 142-143, and we noted probable jurisdiction, see 519 U. S. ___ (1996). In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. We begin our analysis by reviewing the principal authorities on which the Government relies. Then, after describing the overbreadth of the CDA, we consider the Government's specific contentions, including its submission that we save portions of the statute either by severance or by fashioning judicial limitations on the scope of its coverage.

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg* v. *New York*, 390 U.S. 629 (1968); (2) *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); and (3) *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). A close look at these cases, however, raises--rather than relieves--doubts concerning the constitutionality of the CDA.

In *Ginsberg*, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant's broad submission that "the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor." 390 U. S., at 636. In rejecting that contention, we relied not only on the State's independent interest in the well being of its youth, but also on our consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their

children is basic in the structure of our society." [n31] In four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. First, we noted in *Ginsberg* that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.*, at 639. Under the CDA, by contrast, neither the parents' consent--nor even their participation--in the communication would avoid the application of the statute. [n32] Second, the New York statute applied only to commercial transactions, *id.*, at 647, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." *Id.*, at 646. The CDA fails to provide us with any definition of the term "indecent" as used in § 223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by § 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

In *Pacifica,* we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled "Filthy Words" that had previously been delivered to a live audience "could have been the subject of administrative sanctions." 438 U. S., at 730 (internal quotations omitted). The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent "as broadcast." *Id.*, at 735. The respondent did not quarrel with the finding that the afternoon broadcast was patently offensive, but contended that it was not "indecent" within the meaning of the relevant statutes because it contained no prurient appeal. After rejecting respondent's statutory arguments, we confronted its two constitutional arguments: (1) that the Commission's construction of its authority to ban indecent speech was so broad that its order had to be set aside even if the broadcast at issue was unprotected; and (2) that since the recording was not obscene, the First Amendment forbade any abridgement of the right to broadcast it on the radio.

In the portion of the lead opinion not joined by Justices Powell and Blackmun, the plurality stated that the First Amendment does not prohibit all governmental regulation that depends on the content of speech. *Id.*, at 742-743. Accordingly, the availability of constitutional protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast. *Id.*, at 744-748. Relying on the premise that "of all forms of communication" broadcasting had received the most limited First Amendment protection, *id.*, at 748-749, the Court concluded that the ease with which children may obtain access to broadcasts, "coupled with the concerns recognized in *Ginsberg*," justified special treatment of

indecent broadcasting. *Id.*, at 749-750.

As with the New York statute at issue in *Ginsberg*, there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when--rather than whether--it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." *Id.*, at 750. Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," *id.*, at 748, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

In *Renton*, we upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"--such as crime and deteriorating property values--that these theaters fostered: " 'It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.' " 475 U. S., at 49 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34 (1976)). According to the Government, the CDA is constitutional because it constitutes a sort of "cyberzoning" on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any "secondary" effect of such speech. Thus, the CDA is a content based blanket restriction on speech, and, as such, cannot be "properly analyzed as a form of time, place, and manner regulation." 475 U. S., at 46. See also *Boos* v. *Barry*, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience" are not properly analyzed under *Renton*); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content neutral basis for regulation").

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

In *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975), we observed that "[e]ach medium of expression . . . may present its own problems." Thus, some of our cases have recognized special justifications for regulation of

the broadcast media that are not applicable to other speakers, see *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). In these cases, the Court relied on the history of extensive government regulation of the broadcast medium, see, *e.g.*, *Red Lion*, 395 U. S., at 399-400; the scarcity of available frequencies at its inception, see, *e.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 637-638 (1994); and its "invasive" nature, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 128 (1989).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.[n33] Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' " 929 F. Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that " 'odds are slim' that a user would come across a sexually explicit sight by accident." *Ibid.*

We distinguished *Pacifica* in *Sable*, 492 U. S., at 128, on just this basis. In *Sable*, a company engaged in the business of offering sexually oriented prerecorded telephone messages (popularly known as "dial a porn") challenged the constitutionality of an amendment to the Communications Act that imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. We held that the statute was constitutional insofar as it applied to obscene messages but invalid as applied to indecent messages. In attempting to justify the complete ban and criminalization of indecent commercial telephone messages, the Government relied on *Pacifica*, arguing that the ban was necessary to prevent children from gaining access to such messages. We agreed that "there is a compelling interest in protecting the physical and psychological well being of minors" which extended to shielding them from indecent messages that are not obscene by adult standards, 492 U. S., at 126, but distinguished our "emphatically narrow holding" in *Pacifica* because it did not involve a complete ban and because it involved a different medium of communication, *id.*, at 127. We explained that "the dial it medium requires the listener to take affirmative steps to receive the communication." *Id.*, at 127-128. "Placing a telephone call," we continued, "is not the same as turning on a radio and being taken by surprise by an indecent message." *Id.*, at 128.

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200

million by 1999." [n34] This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F. Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," 47 U. S. C. A. § 223(a) (Supp. 1997), while the second speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," § 223(d). Given the absence of a definition of either term, [n35] this difference in language will provoke uncertainty among speakers about how the two standards relate to each other [n36] and just what they mean. [n37] Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, *e.g., Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1048-1051 (1991). Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. See, *e.g., Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. ___ (1996).

The Government argues that the statute is no more vague than the obscenity standard this Court established in *Miller* v. *California*, 413 U.S. 15 (1973). But

that is not so. In *Miller,* this Court reviewed a criminal conviction against a commercial vendor who mailed brochures containing pictures of sexually explicit activities to individuals who had not requested such materials. *Id.*, at 18. Having struggled for some time to establish a definition of obscenity, we set forth in *Miller* the test for obscenity that controls to this day:

"(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24 (internal quotation marks and citations omitted).

Because the CDA's "patently offensive" standard (and, we assume *arguendo,* its synonymous "indecent" standard) is one part of the three prong *Miller* test, the Government reasons, it cannot be unconstitutionally vague.

The Government's assertion is incorrect as a matter of fact. The second prong of the *Miller* test--the purportedly analogous standard--contains a critical requirement that is omitted from the CDA: that the proscribed material be "specifically defined by the applicable state law." This requirement reduces the vagueness inherent in the open ended term "patently offensive" as used in the CDA. Moreover, the *Miller* definition is limited to "sexual conduct," whereas the CDA extends also to include (1) "excretory activities" as well as (2) "organs" of both a sexual and excretory nature.

The Government's reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague.[n38] Each of *Miller*'s additional two prongs--(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it "lac[k] serious literary, artistic, political, or scientific value"--critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the "patently offensive" and "prurient interest" criteria, it is not judged by contemporary community standards. See *Pope* v. *Illinois,* 481 U.S. 497, 500 (1987). This "societal value" requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value. The Government's contention that courts will be able to give such legal limitations to the CDA's standards is belied by *Miller*'s own rationale for having juries determine whether material is "patently offensive" according to community standards: that such questions are essentially ones of *fact.*[n39]

In contrast to *Miller* and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope.

Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

In evaluating the free speech rights of adults, we have made it perfectly clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable,* 492 U. S., at 126. See also *Carey* v. *Population Services Int'l,* 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"). Indeed, *Pacifica* itself admonished that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." 438 U. S., at 745.

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. See *Ginsberg,* 390 U. S., at 639; *Pacifica,* 438 U. S., at 749. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children." *Denver,* 518 U. S., at ___ (slip op., at 29) (internal quotation marks omitted) (quoting *Sable,* 492 U. S., at 128).[n40] "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger* v. *Youngs Drug Products Corp.,* 463 U.S. 60, 74-75 (1983).

The District Court was correct to conclude that the CDA effectively resembles the ban on "dial a porn" invalidated in *Sable.* 929 F. Supp., at 854. In *Sable,* 492 U. S., at 129, this Court rejected the argument that we should defer to the congressional judgment that nothing less than a total ban would be effective in preventing enterprising youngsters from gaining access to indecent communications. *Sable* thus made clear that the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity.[n41] As we pointed out last Term, that inquiry embodies an "over arching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on

speech." *Denver,* 518 U. S., at ___ (slip op., at 11).

In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult to adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100 person chat group will be minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults.[n42]

The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a user who is accessing material through e mail, mail exploders, newsgroups, or chat rooms. 929 F. Supp., at 845 (findings 90-94). As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial--as well as some commercial--speakers who have Web sites to verify that their users are adults. *Id.*, at 845-848 (findings 95-116).[n43] These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast, the District Court found that "[d]espite its limitations, currently available *user based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available." *Id.*, at 842 (finding 73) (emphases added).

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value.[n44] Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message.[n45] The regulated subject matter includes any of the seven "dirty words" used in the Pacifica monologue, the use of which the Government's expert acknowledged could constitute a felony. See Olsen Test., Tr. Vol. V, 53:16-54:10. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17 year old--no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17 year old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. See 47 U. S. C. A. § 223(a)(2) (Supp. 1997). Similarly, a parent who sent his 17 year old college freshman information on birth control via e mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

The breadth of this content based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet--such as commercial web sites--differently than others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

In an attempt to curtail the CDA's facial overbreadth, the Government advances three additional arguments for sustaining the Act's affirmative prohibitions: (1) that the CDA is constitutional because it leaves open ample "alternative channels" of communication; (2) that the plain meaning of the Act's "knowledge" and "specific person" requirement significantly restricts its permissible applications; and (3) that the Act's prohibitions are "almost always" limited to material lacking redeeming social value.

The Government first contends that, even though the CDA effectively censors discourse on many of the Internet's modalities--such as chat groups, newsgroups, and mail exploders--it is nonetheless constitutional because it provides a "reasonable opportunity" for speakers to engage in the restricted speech on the World Wide Web. Brief for Appellants 39. This argument is unpersuasive because the CDA regulates speech on the basis of its content. A "time, place, and manner" analysis is therefore inapplicable. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536 (1980). It is thus immaterial whether such speech would be feasible on the Web (which, as the Government's own

expert acknowledged, would cost up to $10,000 if the speaker's interests were not accommodated by an existing Web site, not including costs for database management and age verification). The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets *regardless of* their content--we explained that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State (Town of Irvington)*, 308 U.S. 147, 163 (1939).

The Government also asserts that the "knowledge" requirement of both §§ 223(a) and (d), especially when coupled with the "specific child" element found in § 223(d), saves the CDA from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to "refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18." Brief for Appellants 24. This argument ignores the fact that most Internet fora--including chat rooms, newsgroups, mail exploders, and the Web--are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would be discoursers that his 17 year old child--a "specific person . . . under 18 years of age," 47 U. S. C. A. § 223(d)(1)(A) (Supp. 1997)--would be present.

Finally, we find no textual support for the Government's submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's "patently offensive" and "indecent" prohibitions. See also n. 37, *supra*.

The Government's three remaining arguments focus on the defenses provided in § 223(e)(5).[n46] First, relying on the "good faith, reasonable, effective, and appropriate actions" provision, the Government suggests that "tagging" provides a defense that saves the constitutionality of the Act. The suggestion assumes that transmitters may encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software. It is the requirement that the good faith action must be "effective" that makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material. Without the impossible knowledge that every guardian in America is screening for the "tag," the transmitter could not reasonably rely on its action to be "effective."

For its second and third arguments concerning defenses--which we can consider together--the Government relies on the latter half of § 223(e)(5), which applies when the transmitter has restricted access by requiring use of a verified credit card or adult identification. Such verification is not only technologically available but actually is used by commercial providers of sexually explicit material. These providers, therefore, would be protected by the defense. Under the findings of the District Court, however, it is not economically feasible for most noncommercial speakers to employ such verification. Accordingly, this defense would not significantly narrow the statute's burden on noncommercial speech. Even with respect to the commercial pornographers that would be protected by the defense, the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults. [n47] Given that the risk of criminal sanctions "hovers over each content provider, like the proverbial sword of Damocles," [n48] the District Court correctly refused to rely on unproven future technology to save the statute. The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays.

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision. In *Sable,* 492 U. S., at 127, we remarked that the speech restriction at issue there amounted to " 'burn[ing] the house to roast the pig.' " The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.

At oral argument, the Government relied heavily on its ultimate fall back position: If this Court should conclude that the CDA is insufficiently tailored, it urged, we should save the statute's constitutionality by honoring the severability clause, see 47 U.S.C. § 608 and construing nonseverable terms narrowly. In only one respect is this argument acceptable.

A severability clause requires textual provisions that can be severed. We will follow § 608's guidance by leaving constitutional textual elements of the statute intact in the one place where they are, in fact, severable. The "indecency" provision, 47 U. S. C. A. § 223(a) (Supp. 1997), applies to "any comment, request, suggestion, proposal, image, or other communication which is *obscene or indecent*." (Emphasis added.) Appellees do not challenge the application of the statute to obscene speech, which, they acknowledge, can be banned totally because it enjoys no First Amendment protection. See *Miller,* 413 U. S., at 18. As set forth by the statute, the restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, which we have held unconstitutional. Therefore, we will sever the term "or indecent" from the statute, leaving the rest of § 223(a) standing. In no other respect, however, can

§ 223(a) or § 223(d) be saved by such a textual surgery.

The Government also draws on an additional, less traditional aspect of the CDA's severability clause, 47 U. S. C., § 608, which asks any reviewing court that holds the statute facially unconstitutional not to invalidate the CDA in application to "other persons or circumstances" that might be constitutionally permissible. It further invokes this Court's admonition that, absent "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985). There are two flaws in this argument.

First, the statute that grants our jurisdiction for this expedited review, 47 U. S. C. A. § 561 (Supp. 1997), limits that jurisdictional grant to actions challenging the CDA "on its face." Consistent with § 561, the plaintiffs who brought this suit and the three judge panel that decided it treated it as a facial challenge. We have no authority, in this particular posture, to convert this litigation into an "as applied" challenge. Nor, given the vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute, would it be practicable to limit our holding to a judicially defined set of specific applications.

Second, one of the "countervailing considerations" mentioned in *Brockett* is present here. In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is "readily susceptible" to such a construction. *Virginia* v. American Bookseller's *Assn., Inc.*, 484 U.S. 383, 397 (1988). See also *Erznoznik*, v. *Jacksonville*, 422 U.S. 205, 216 (1975) ("readily subject" to narrowing construction). The open ended character of the CDA provides no guidance whatever for limiting its coverage.

This case is therefore unlike those in which we have construed a statute narrowly because the text or other source of congressional intent identified a clear line that this Court could draw. Cf., *e.g.*, *Brockett*, 472 U. S., at 504-505 (invalidating obscenity statute only to the extent that word "lust" was actually or effectively excised from statute); *United States* v. *Grace*, 461 U.S. 171, 180-183 (1983) (invalidating federal statute banning expressive displays only insofar as it extended to public sidewalks when clear line could be drawn between sidewalks and other grounds that comported with congressional purpose of protecting the building, grounds, and people therein). Rather, our decision in *United States* v. *Treasury Employees*, 513 U.S. 454, 479, n. 26 (1995), is applicable. In that case, we declined to "dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn" because doing so "involves a far more serious invasion of the legislative domain." [n49] This Court "will not rewrite a . . . law to conform it to constitutional requirements." *American Booksellers*, 484 U. S., at 397. [n50]

In this Court, though not in the District Court, the Government asserts that--in addition to its interest in protecting children--its "[e]qually significant" interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA. Brief for Appellants 19. The Government apparently assumes that the unregulated availability of "indecent" and "patently offensive" material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

For the foregoing reasons, the judgment of the district court is affirmed.

It is so ordered.

1. "Congress shall make no law . . . abridging the freedom of speech." U. S. Const., Amdt. 1.

2. The Court made 410 findings, including 356 paragraphs of the parties' stipulation and 54 findings based on evidence received in open court. See 929 F. Supp. at 830, n. 9, 842, n. 15.

3. An acronym for the network developed by the Advanced Research Project Agency.

4. Id., at 844 (finding 81).

5. Id., at 831 (finding 3).

6. Id., at 835 (finding 27).

7. Id., at 842 (finding 74).

8. Id., at 836 (finding 36).

9. "Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web." Id., at 837 (finding

42).

10. Id., at 838 (finding 46).

11. Id., at 844 (finding 82).

12. Ibid. (finding 86).

13. Ibid. (finding 85).

14. Id., at 848 (finding 117).

15. Id., at 844-845 (finding 88).

16. Ibid.

17. Id., at 845 (finding 89).

18. Id., at 842 (finding 72).

19. Ibid. (finding 73).

20. Id., at 845 (finding 90): "An e mail address provides no authoritative information about the addressee, who may use an e mail 'alias' or an anonymous remailer. There is also no universal or reliable listing of e mail addresses and corresponding names or telephone numbers, and any such listing would be or rapidly become incomplete. For these reasons, there is no reliable way in many instances for a sender to know if the e mail recipient is an adult or a minor. The difficulty of e mail age verification is compounded for mail exploders such as listservs, which automatically send information to all e mail addresses on a sender's list. Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list."

21. Ibid. (finding 93).

22. Id., at 846 (finding 102).

23. Id., at 847 (findings 104-106):

> "At least some, if not almost all, non commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge.
>
> . . . . .

> "There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints from its members about HotWired's registration system, which requires only that a member supply a name, e mail address and self created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited."

24. See Exon Amendment No. 1268, 141 Cong. Rec. S8120 (June 9, 1995). See also id., at S8087. This amendment, as revised, became § 502 of the Communications Act of 1996, 110 Stat. 133, 47 U. S. C. A. §§ 223(a)-(e) (Supp. 1997). Some Members of the House of Representatives opposed the Exon Amendment because they thought it "possible for our parents now to child proof the family computer with these products available in the private sector." They also thought the Senate's approach would "involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected." These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled "Online Family Empowerment." See 110 Stat. 137, 47 U. S. C. A. § 230 (Supp. 1997); 141 Cong. Rec. H8468-H8472. No hearings were held on the provisions that became law. See S. Rep. No. 104-23 (1995), p. 9. After the Senate adopted the Exon amendment, however, its Judiciary Committee did conduct a one day hearing on "Cyberporn and Children." In his opening statement at that hearing, Senator Leahy observed:

> "It really struck me in your opening statement when you mentioned, Mr. Chairman, that it is the first ever hearing, and you are absolutely right. And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change--some would say even wreak havoc--on the Internet. The Senate went in willy nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor." Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action, Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 7-8 (1995).

25. Although the Government and the dissent break § 223(d)(1) into two separate "patently offensive" and "display" provisions, we follow the convention of both parties below, as well the District Court's order and opinion, in describing § 223(d)(1) as one provision.

[26.] In full, § 223(e)(5) provides:

> "(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person--
>
> "(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or
>
> "(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

[27.] American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc.

[28.] American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L. L. C.; National Press Photographers Association; Netcom On Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd.

[29.] 110 Stat. 142-143, note following 47 U. S. C. A. § 223 (Supp. 1997).

[30.] See also 929 F. Supp., at 877: "Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. We explain these characteristics in our

Findings of fact above, and I only rehearse them briefly here. First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers." According to Judge Dalzell, these characteristics and the rest of the District Court's findings "lead to the conclusion that Congress may not regulate indecency on the Internet at all." Ibid. Because appellees do not press this argument before this Court, we do not consider it. Appellees also do not dispute that the Government generally has a compelling interest in protecting minors from "indecent" and "patently offensive" speech.

31. 390 U. S., at 639. We quoted from Prince v. Massachusetts, 321 U.S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

32. Given the likelihood that many E mail transmissions from an adult to a minor are conversations between family members, it is therefore incorrect for the dissent to suggest that the provisions of the CDA, even in this narrow area, "are no different from the law we sustained in Ginsberg." Post, at 8.

33. Cf. Pacifica Foundation v. FCC, 556 F. 2d 9, 36 (CADC 1977) (Levanthal, J., dissenting), rev'd, FCC v. Pacifica Foundation, 438 U.S. 726 (1978). When Pacifica was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio, see 556 F. 2d, at 37, n. 18. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

34. Juris. Statement 3 (citing 929 F. Supp., at 831 (finding 3)).

35. "Indecent" does not benefit from any textual embellishment at all. "Patently offensive" is qualified only to the extent that it involves "sexual or excretory activities or organs" taken "in context" and "measured by contemporary community standards."

36. See Gozlon Peretz v. United States, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion") (internal quotation marks omitted).

37. The statute does not indicate whether the "patently offensive" and "indecent" determinations should be made with respect to minors or the population as a whole. The Government asserts that the appropriate standard is "what is suitable material for minors." Reply Brief for Appellants 18, n. 13 (citing Ginsberg v. New York, 390 U.S. 629, 633 (1968)). But the Conferees expressly rejected amendments that would have imposed such a "harmful to minors" standard. See S. Conf. Rep. No. 104-230, p. 189 (1996) (S. Conf. Rep.), 142 Cong. Rec. H1145, H1165-1166 (Feb. 1, 1996). The Conferees also rejected amendments that would have limited the proscribed materials to those lacking redeeming value. See S. Conf. Rep., at 189, 142 Cong. Rec. H1165-1166 (Feb. 1, 1996).

38. Even though the word "trunk," standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, its meaning is clear when it is one prong of a three part description of a species of gray animals.

39. 413 U. S., at 30 (Determinations of "what appeals to the 'prurient interest' or is 'patently offensive'. . . . are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists"). The CDA, which implements the "contemporary community standards" language of Miller, thus conflicts with the Conferees' own assertion that the CDA was intended "to establish a uniform national standard of content regulation." S. Conf. Rep., at 191.

40. Accord, Butler v. Michigan, 352 U.S. 380, 383 (1957) (ban on sale to adults of books deemed harmful to children unconstitutional); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (ban on "dial a porn" messages unconstitutional); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73 (1983) (ban on mailing of unsolicited advertisement for contraceptives unconstitutional).

41. The lack of legislative attention to the statute at issue in Sable suggests another parallel with this case. Compare 492 U. S., at 129-130 ("[A]side from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, . . . the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be. . . . No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial a porn messages") with n. 24, supra.

42. The Government agrees that these provisions are applicable whenever "a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor." Opposition to Motion to

Affirm and Reply to Juris. Statement 4-5, n. 1.

43. The Government asserts that "[t]here is nothing constitutionally suspect about requiring commercial Web site operators . . . to shoulder the modest burdens associated with their use." Brief for Appellants 35. As a matter of fact, however, there is no evidence that a "modest burden" would be effective.

44. Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U.S.C. §§ 1464-1465 (criminalizing obscenity); § 2251 (criminalizing child pornography). In fact, when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography, and child solicitation. See 141 Cong. Rec. S8342 (June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, U. S. Department of Justice, to Sen. Leahy).

45. Citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993), among other cases, appellees offer an additional reason why, in their view, the CDA fails strict scrutiny. Because so much sexually explicit content originates overseas, they argue, the CDA cannot be "effective." Brief for Appellees American Library Association et al. 33-34. This argument raises difficult issues regarding the intended, as well as the permissible scope of, extraterritorial application of the CDA. We find it unnecessary to address those issues to dispose of this case.

46. For the full text of § 223(e)(5), see n. 26, supra.

47. Thus, ironically, this defense may significantly protect commercial purveyors of obscene postings while providing little (or no) benefit for transmitters of indecent messages that have significant social or artistic value.

48. 929 F. Supp., at 855-856.

49. As this Court long ago explained, "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully be detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." United States v. Reese, 92 U.S. 214, 221 (1876). In part because of these separation of powers concerns, we have held that a severability clause is "an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

50. See also Osborne v. Ohio, 495 U.S. 103, 121 (1990) (judicial rewriting of statutes would derogate Congress's "incentive to draft a narrowly tailored law in the first place").

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Reno v. American Civil Liberties Union (96-511) 521 U.S. 844 (1997)

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O'CONNOR, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

521 U.S. 844

Reno v. American Civil Liberties Union

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

96-511 Argued: March 19, 1997 --- Decided: June 26, 1997

Justice O'Connor, with whom The Chief Justice joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster.

Appellees bring a facial challenge to three provisions of the CDA. The first, which the Court describes as the "indecency transmission" provision, makes it a crime to

knowingly transmit an obscene or indecent message or image to a person the sender knows is under 18 years old. 47 U. S. C. A. § 223(a)(1)(B) (May 1996 Supp.). What the Court classifies as a single " 'patently offensive display' " provision, see *ante*, at 11, is in reality two separate provisions. The first of these makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18 ("specific person" provision). § 223(d)(1)(A). The second criminalizes the display of patently offensive messages or images "in a[ny] manner available" to minors ("display" provision). § 223(d)(1)(B). None of these provisions purports to keep indecent (or patently offensive) material away from adults, who have a First Amendment right to obtain this speech. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). Thus, the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access. See S. Conf. Rep. No. 104-230, p. 189 (1996) (CDA imposes "access restrictions . . . to protect minors from exposure to indecent material").

The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. [n1] State shave also denied minors access to speech deemed to be "harmful to minors." [n2] The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecency transmission" and "specific person" provisions fail to adhere to the first of these limiting principles by restricting adults' access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.

Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain--it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The First Amendment does not tolerate such interference. See *id.*, at 383 (striking down a Michigan criminal law banning sale of books--to minors or adults--that contained words or pictures that " 'tende[d] to . . . corrup[t] the morals of youth' "); *Sable Communications*, *supra* (invalidating federal law that made it a crime to transmit indecent, but nonobscene, commercial telephone messages to minors and adults); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (striking down a federal law prohibiting the mailing of unsolicited advertisements for contraceptives). If the law does not unduly restrict adults' access to constitutionally protected speech,

however, it may be valid. In *Ginsberg* v. *New York*, 390 U.S. 629, 634 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.

The Court in *Ginsberg* concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The Court did not question--and therefore necessarily assumed--that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create "adult zones": geography and identity. See Lessig, Reading the Constitution in Cyberspace, 45 Emory L. J. 869, 886 (1996). A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, see Lessig, *supra*, at 901, however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. Lessig, *supra,* at 888-889. *Id.*, at 887 (cyberspace "is moving . . . from a relatively unzoned place to a universe that is extraordinarily well zoned"). Internet speakers (users who post-material on the Internet) have begun to zone cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves--perhaps an adult identification number or a credit card number--before they can access certain areas of cyberspace, 929 F. Supp. 824, 845 (ED Pa. 1996), much like a bouncer checks a person's driver's license before admitting him to a nightclub. Internet users who access information have not attempted to zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user based zoning is accomplished through the use of

screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. *Id.*, at 839-842. The Platform for Internet Content Selection (PICS) project is designed to facilitate user based zoning by encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs. *Id.*, at 838-839. ? is rating tagging illegal ?

Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, *id.*, at 845; *Shea* v. *Reno*, 930 F. Supp. 916, 933-934 (SDNY 1996), it is not available to *all* Web speakers, 929 F. Supp., at 845-846, and is just now becoming technologically feasible for chat rooms and USENET newsgroups, Brief for Federal Parties 37-38. Gateway technology is not ubiquitous in cyberspace, and because without it "there is no means of age verification," cyberspace still remains largely unzoned--and unzoneable. 929 F. Supp., at 846; *Shea, supra,* at 934. User based zoning is also in its infancy. For it to be effective, (i) an agreed upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available--and widely used--by Internet users. At present, none of these conditions is true. Screening software "is not in wide use today" and "only a handful of browsers have screening capabilities." *Shea, supra,* at 945-946. There is, moreover, no agreed upon "tag" for those programs to recognize. 929 F. Supp., at 848; *Shea, supra,* at 945.

Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. *Ante*, at 36. Given the present state of cyberspace, I agree with the Court that the "display" provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. But this forced silence impinges on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, "reduce[s] the adult population [on the Internet] to reading only what is fit for children." *Butler*, 352 U. S., at 383. As a result, the "display" provision cannot withstand scrutiny. Accord, *Sable Communications*, 492 U. S., at 126-131; *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S., at 73-75.

The "indecency transmission" and "specific person" provisions present a closer issue, for they are not unconstitutional in all of their applications. As discussed above, the "indecency transmission" provision makes it a crime to transmit knowingly an indecent message to a person the sender knows is under 18 years of age. 47 U. S. C. A. § 223(a)(1)(B) (May 1996 Supp.). The "specific person"

provision proscribes the same conduct, although it does not as explicitly require the sender to know that the intended recipient of his indecent message is a minor. § 223(d)(1)(A). Appellant urges the Court to construe the provision to impose such a knowledge requirement, see Brief for Federal Parties 25-27, and I would do so. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

So construed, both provisions are constitutional as applied to a conversation involving only an adult and one or more minors--*e.g.*, when an adult speaker sends an e mail knowing the addressee is a minor, or when an adult and minor converse by themselves or with other minors in a chat room. In this context, these provisions are no different from the law we sustained in *Ginsberg*. Restricting what the adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e mails to other adults. The relevant universe contains only one adult, and the adult in that universe has the power to refrain from using indecent speech and consequently to keep all such speech within the room in an "adult" zone.

The analogy to *Ginsberg* breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively requires the adults in the room to stop using indecent speech. If they did not, they could be prosecuted under the "indecency transmission" and "specific person" provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor. Accord, *ante*, at 30. The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store. Even assuming such a law might be constitutional in the physical world as a reasonable alternative to excluding minors completely from the store, the absence of any means of excluding minors from chat rooms in cyberspace restricts the rights of adults to engage in indecent speech in those rooms. The "indecency transmission" and "specific person" provisions share this defect.

But these two provisions do not infringe on adults' speech in *all* situations. And as discussed below, I do not find that the provisions are overbroad in the sense that they restrict minors' access to a substantial amount of speech that minors have the right to read and view. Accordingly, the CDA can be applied constitutionally in some situations. Normally, this fact would require the Court to reject a direct facial challenge. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act [succeeds only if] the challenger . . . establish[es]

that no set of circumstances exists under which the Act would be valid"). Appellees' claim arises under the First Amendment, however, and they argue that the CDA is facially invalid because it is "substantially overbroad"--that is, it "sweeps too broadly . . . [and] penaliz[es] a substantial amount of speech that is constitutionally protected," *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992). See Brief for Appellees American Library Association et al. 48; Brief for Appellees American Civil Liberties Union et al. 39-41. I agree with the Court that the provisions are overbroad in that they cover any and all communications between adults and minors, regardless of how many adults might be part of the audience to the communication.

This conclusion does not end the matter, however. Where, as here, "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish . . . [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). There is no question that Congress intended to prohibit certain communications between one adult and one or more minors. See 47 U. S. C. A. § 223(a)(1)(B) (May 1996 Supp.) (punishing "[w]hoever . . . initiates the transmission of [any indecent communication] knowingly that the recipient of the communication is under 18 years of age"); § 223(d)(1)(A) (punishing "[w]hoever . . . send[s] to a specific person or persons under 18 years of age [a patently offensive message]"). There is also no question that Congress would have enacted a narrower version of these provisions had it known a broader version would be declared unconstitutional. 47 U.S.C. § 608 ("If . . . the application [of any provision of the CDA] to any person or circumstance is held invalid, . . . the application of such provision to other persons or circumstances shall not be affected thereby"). I would therefore sustain the "indecency transmission" and "specific person" provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

Whether the CDA substantially interferes with the First Amendment rights of minors, and thereby runs afoul of the second characteristic of valid zoning laws, presents a closer question. In *Ginsberg*, the New York law we sustained prohibited the sale to minors of magazines that were "harmful to minors." Under that law, a magazine was "harmful to minors" only if it was obscene as to minors. 390 U. S., at 632-633. Noting that obscene speech is not protected by the First Amendment, *Roth* v. *United States*, 354 U.S. 476, 485 (1957), and that New York was constitutionally free to adjust the definition of obscenity for minors, 390 U. S., at 638, the Court concluded that the law did not "invad[e] the area of freedom of expression constitutionally secured to minors." *Id.*, at 637. New York therefore did not infringe upon the First Amendment rights of minors. Cf. *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213 (1975) (striking down city ordinance that banned nudity that was not "obscene even as to minors").

The Court neither "accept[s] nor reject[s]" the argument that the CDA is facially overbroad because it substantially interferes with the First Amendment rights of minors. *Ante,* at 32. I would reject it. *Ginsberg* established that minors may constitutionally be denied access to material that is obscene as to minors. As *Ginsberg* explained, material is obscene as to minors if it (i) is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable . . . for minors"; (ii) appeals to the prurient interest of minors; and (iii) is "utterly without redeeming social importance for minors." 390 U. S., at 633. Because the CDA denies minors the right to obtain material that is "patently offensive"--even if it has some redeeming value for minors and even if it does not appeal to their prurient interests--Congress' rejection of the *Ginsberg* "harmful to minors" standard means that the CDA could ban some speech that is "indecent" (*i.e.*, "patently offensive") but that is not obscene as to minors.

I do not deny this possibility, but to prevail in a facial challenge, it is not enough for a plaintiff to show "some" overbreadth. Our cases require a proof of "real" and "substantial" overbreadth, *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973), and appellees have not carried their burden in this case. In my view, the universe of speech constitutionally protected as to minors but banned by the CDA--*i.e.*, the universe of material that is "patently offensive," but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest--is a very small one. Appellees cite no examples of speech falling within this universe and do not attempt to explain why that universe is substantial "in relation to the statute's plainly legitimate sweep." *Ibid.* That the CDA might deny minors the right to obtain material that has some "value," see *ante,* at 32-33, is largely beside the point. While discussions about prison rape or nude art, see *ibid.*, may have some redeeming education value for *adults,* they do not necessarily have any such value for *minors,* and under *Ginsberg,* minors only have a First Amendment right to obtain patently offensive material that has "redeeming social importance *for minors,*" 390 U. S., at 633 (emphasis added). There is also no evidence in the record to support the contention that "many [e] mail transmissions from an adult to a minor are conversations between family members," *ante,* at 18, n. 32, and no support for the legal proposition that such speech is absolutely immune from regulation. Accordingly, in my view, the CDA does not burden a substantial amount of minors' constitutionally protected speech.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The

Court reaches a contrary conclusion, and from that holding that I respectfully dissent.

1. See, e.g., Alaska Stat. Ann. § 11.66.300 (1996) (no minors in "adult entertainment" places); Ariz. Rev. Stat. Ann. § 13-3556 (1989) (no minors in places where people expose themselves); Ark. Code Ann. §§ 5-27-223, 5-27-224 (1993) (no minors in poolrooms and bars); Colo. Rev. Stat. § 18-7-502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); Del. Code Ann., Tit. 11, § 1365(i)(2) (1995) (same); D. C. Code Ann. § 22-2001(b)(1)(B) (1996) (same); Fla. Stat. § 847.013(2) (1994) (same); Ga. Code Ann. § 16-12-103(b) (1996) (same); Haw. Rev. Stat. § 712-1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); Idaho Code § 18-1515(2) (1987) (no minors in places displaying movies or shows that are "harmful to minors"); La. Rev. Stat. Ann. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minors' prurient interest); Md. Ann. Code, Art. 27, § 416E (1996) (no minors in establishments where certain enumerated acts are performed or portrayed); Mich. Comp. Laws § 750.141 (1991) (no minors without an adult in places where alcohol is sold); Minn. Stat. § 617.294 (1987 and Supp. 1997) (no minors in places displaying movies or shows that are "harmful to minors"); Miss. Code Ann. § 97-5-11 (1994) (no minors in poolrooms, billiard halls, or where alcohol is sold); Mo. Rev. Stat. § 573.507 (1995) (no minors in adult cabarets); Neb. Rev. Stat. § 28-809 (1995) (no minors in places displaying movies or shows that are "harmful to minors"); Nev. Rev. Stat. § 201.265(3) (1997) (same); N. H. Rev. Stat. Ann. § 571-B:2(II) (1986) (same); N. M. Stat. Ann. § 30-37-3 (1989) (same); N. Y. Penal Law § 235.21(2) (McKinney 1989) (same); N. D. Cent. Code § 12.1-27.1-03 (1985 and Supp. 1995) (same); 18 Pa. Cons. Stat. § 5903(a) (Supp. 1997) (same); S. D. Comp. Laws Ann. § 22-24-30 (1988) (same); Tenn. Code Ann. § 39-17-911(b) (1991) (same); Vt. Stat. Ann., Tit. 13, § 2802(b) (1974) (same); Va. Code Ann. § 18.2-391 (1996) (same).

2. See, e.g., Ala. Code § 13A-12-200.5 (1994); Ariz. Rev. Stat. Ann. § 13-3506 (1989); Ark. Code Ann. 5-68-502 (1993); Cal. Penal Code Ann. § 313.1 (West Supp. 1997); Colo. Rev. Stat. § 18-7-502(1) (1986); Conn. Gen. Stat. § 53a-196 (1994); Del. Code Ann., Tit. 11, § 1365(i)(1) (1995); D. C. Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. § 847.012 (1994); Ga. Code Ann. § 16-12-103(a) (1996); Haw. Rev. Stat. § 712-1215(1) (1994); Idaho Code § 18-1515(1) (1987); Ill. Comp. Stat., ch. 720, § 5/11-21 (1993); Ind. Code § 35-49-3-3(1) (Supp. 1996); Iowa Code § 728.2 (1993); Kan. Stat. Ann. § 21-4301c(a)(2) (1988); La. Rev. Stat. Ann. § 14:91.11(B) (West 1986); Md. Ann. Code, Art. 27, § 416B (1996); Mass. Gen. Laws, ch. 272, § 28 (1992); Minn. Stat. § 617.293 (1987 and Supp. 1997); Miss. Code Ann. § 97-5-11 (1994); Mo. Rev. Stat. § 573.040 (1995); Mont. Code Ann. § 45-8-206 (1995); Neb. Rev. Stat. § 28-808 (1995); Nev. Rev. Stat. §§ 201.265(1), (2) (1997); N. H. Rev. Stat. Ann. § 571-B:2(I) (1986); N. M. Stat.

Ann. § 30-37-2 (1989); N. Y. Penal Law § 235.21(1) (McKinney 1989); N. C. Gen. Stat. § 14-190.15(a) (1993); N. D. Cent. Code § 12.1-27.1-03 (1985 and Supp. 1995); Ohio Rev. Code Ann. § 2907.31(A)(1) (Supp. 1997); Okla. Stat., Tit. 21, § 1040.76(2) (Supp. 1997); 18 Pa. Cons. Stat. § 5903(c) (Supp. 1997); R. I. Gen. Laws § 11-31-10(a) (1996); S. C. Code Ann. § 16-15-385(A) (Supp. 1996); S. D. Comp. Laws Ann. § 22-24-28 (1988); Tenn. Code Ann. § 39-17-911(a) (1991); Tex Penal Code Ann. § 43.24(b) (1994); Utah Code Ann. § 76-10-1206(2) (1995); Vt. Stat. Ann., Tit. 13, § 2802(a) (1974); Va. Code Ann. § 18.2-391 (1996); Wash. Rev. Code § 9.68.060 (1988 and Supp. 1997); Wis. Stat. § 948.11(2) (Supp. 1995).

ABOUT LII CONTACT US ADVERTISE HERE HELP TERMS OF USE

Questions

John Marks

9/10

So long ago!

Taught them how the internet works

Do they still know?

Self-regulation → tagging

ACLU v. Reno Brief

9/10

Michael Plasmeier

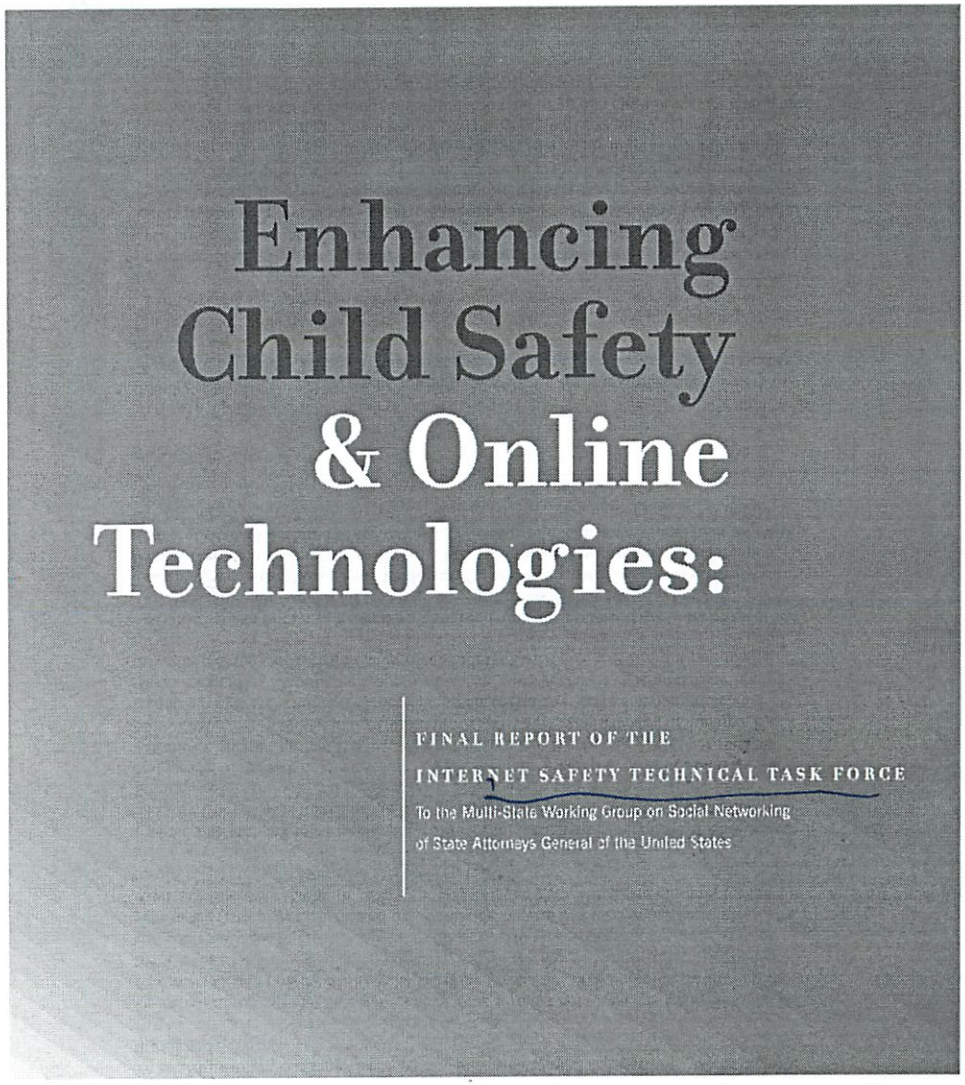
~~9/1/2012~~

- **Issue**: Is it legal for Congress to criminalize the transmission of "obscene or indecent" messages to recipients under 18 through the Communications Decency Act.

- **Procedural History**
  - **Parties**:
    - **Plaintiff**: The American Civil Liberties Union
    - **Defendants**: Janet Reno, Attorney General of the United States
  - **Procedural Posture**: Preliminary injunction granted by three judge District Court that enjoins the government to not enforce against "indecent" content, but allow enforcement against obscene or child pornography.
- **Facts**:
  - Congress passed the Communications Decency Act in 1996
  - The Act prohibited the knowing transmission of "indecent" or "patently offensive" content to those under 18
  - Content could be displayed if age proof (ie credit card number) was provided
- **Holding:** The above provisions of the CDA were overturned
- **Reasoning**
  1. **Rules were not narrowly tailored**. The rules could have been written more narrowly to minimize the impact on adult's First Amendment rights.
  2. **Adults have a legal right to the material.** This ruling would unreasonably block adults from seeing the results. Since the internet is open to all, it would allow the "heckler's veto."
  3. **Blocking technologies were or would be available.** Consumers could install their own filtering software.
  4. **Tagging technology might allow for supervisor choice.**
  5. **The Internet is growing fine without these rules.**

Questions for John Morris:

1. How much closer are lawmakers and judges in understanding how the Internet works now vs. 1997.
2. Are more people aware of technologies such as tagging, which allow for greater self-regulation on the Internet.



DECEMBER 31, 2008

Berkman
The Berkman Center for Internet & Society
at Harvard University

ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES:

FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES

December 31, 2008

Directed by the Berkman Center for Internet & Society at Harvard University
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Institute for Policy Innovation
Linden Lab
Loopt
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MTV Networks/Viacom.
MySpace and Fox Interactive Media
National Center for Missing & Exploited Children
The Progress & Freedom Foundation
Sentinel Tech Holding Corp.
Symantec
Verizon Communications, Inc.
Xanga
Yahoo!, Inc.
Wiredsafety.org

December 31, 2008

To the Multi-State Working Group on Social Networking of State Attorneys General of the United States:

On behalf of the Internet Safety Technical Task Force, I am pleased to transmit to the 52 Attorneys General on the Multi-State Working Group the Task Force's Final Report on the role and the promise of technologies to reduce the risk to minors of harmful contact and content on the Internet. Along with the quarterly reports submitted throughout the year to the Attorneys General and the evaluation criteria included in the Technology Advisory Board's submission, this Report fulfills the Task Force's remit to report the results of its study no later than December 31, 2008.

I would like to thank in particular Attorneys General Richard Blumenthal of Connecticut and Roy Cooper of North Carolina, and their respective staffs, for their support throughout this process and for their leadership – over many years – to help protect children from the risk of harm online. I was especially pleased to have been hosted by Attorney General Martha Coakley, who has been a key figure, along with her staff, in protecting children online in the Commonwealth of Massachusetts and nationally. The leadership of these Attorneys General and their colleagues, on this and many related issues – including identity theft, spam, phishing, and cybersecurity – is an important driver in making the Internet a safer place for all of us.

I would also like to take this opportunity to recognize the outstanding efforts of all of the Task Force members and their respective organizations. I am grateful, too, to the Technology Advisory Board and the Research Advisory Board for their contributions to this process. This Task Force was a collaborative effort, convened over a very short period of time, on an issue of the utmost importance to our society. We all look forward to working on the next steps to help implement the recommendations included in this report.

Sincerely,

John Palfrey
Chair, Internet Safety Technical Task Force
Harvard Law School
1545 Massachusetts Avenue
Cambridge, MA 02138

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Executive Summary

Many youth in the United States have fully integrated the Internet into their daily lives. For them, the Internet is a positive and powerful space for socializing, learning, and engaging in public life. Along with the positive aspects of Internet use come risks to safety, including the dangers of sexual solicitation, online harassment, and bullying, and exposure to problematic and illegal content. The Multi-State Working Group on Social Networking, comprising 50 state Attorneys General, asked this Task Force to determine the extent to which today's technologies could help to address these online safety risks, with a primary focus on social network sites in the United States.

To answer this question, the Task Force brought together leaders from Internet service providers, social network sites, academia, education, child safety and public policy advocacy organizations, and technology development. The Task Force consulted extensively with leading researchers in the field of youth online safety and with technology experts, and sought input from the public. The Task Force has produced three primary documents: (1) a Literature Review of relevant research in the field of youth online safety in the United States, which documents what is known and what remains to be studied about the issue; (2) a report from its Technology Advisory Board, reviewing the 40 technologies submitted to the Task Force; and (3) this Final Report, which summarizes our work together, analyzes the previous documents as well as submissions by eight leading social network sites regarding their efforts to enhance safety for minors, and provides a series of recommendations for how to approach this issue going forward. Due to the nature of the Task Force, this Report is not a consensus document, and should be read in conjunction with the separate Statements from Task Force members included in the appendix.

At the outset, the Task Force recognized that we could not determine how technologies can help promote online safety for minors without first establishing a clear understanding of the actual risks that minors face, based on an examination of the most rigorously conducted research. The Task Force asked a Research Advisory Board comprising leading researchers in the field to conduct a comprehensive review of relevant work in the United States to date. The Literature Review shows that the risks minors face online are complex and multifaceted and are in most cases not significantly different than those they face offline, and that as they get older, minors themselves contribute to some of the problems. In broad terms, the research to date shows:

- Sexual predation on minors by adults, both online and offline, remains a concern. Sexual predation in all its forms, including when it involves statutory rape, is an abhorrent crime. Much of the research based on law-enforcement cases involving Internet-related child exploitation predated the rise of social networks. This research found that cases typically involved post-pubescent youth who were aware that they were meeting an adult male for the purpose of engaging in sexual activity. The Task Force notes that more research specifically needs to be done concerning the activities of sex offenders in social network sites and other online environments, and encourages law enforcement to work with researchers to make more data available for this purpose. Youth report sexual solicitation of minors by minors more frequently, but these incidents, too, are understudied, underreported to law enforcement, and not part of most conversations about online safety.
- Bullying and harassment, most often by peers, are the most frequent threats that minors face, both online and offline.

- The Internet increases the availability of harmful, problematic and illegal content, but does not always increase minors' exposure. Unwanted exposure to pornography does occur online, but those most likely to be exposed are those seeking it out, such as older male minors. Most research focuses on adult pornography and violent content, but there are also concerns about other content, including child pornography and the violent, pornographic, and other problematic content that youth themselves generate.
- The risk profile for the use of different genres of social media depends on the type of risk, common uses by minors, and the psychosocial makeup of minors who use them. Social network sites are not the most common space for solicitation and unwanted exposure to problematic content, but are frequently used in peer-to-peer harassment, most likely because they are broadly adopted by minors and are used primarily to reinforce pre-existing social relations.
- Minors are not equally at risk online. Those who are most at risk often engage in risky behaviors and have difficulties in other parts of their lives. The psychosocial makeup of and family dynamics surrounding particular minors are better predictors of risk than the use of specific media or technologies.
- Although much is known about these issues, many areas still require further research. For example, too little is known about the interplay among risks and the role that minors themselves play in contributing to unsafe environments.

The Task Force asked a Technology Advisory Board (TAB) comprising technology experts from a range of backgrounds to solicit and review submissions from vendors and others offering currently available technologies. The TAB received 40 written submissions representing several categories of technologies, including age verification and identity authentication, filtering and auditing, text analysis, and biometrics. In sum, the TAB's review of the submitted technologies leaves the TAB in a state of cautious optimism, with many submissions showing substantial promise. The youth online safety industry is evolving. Many of the technologies reviewed were point solutions rather than broad attempts to address the safety of minors online as a whole. There is, however, a great deal of innovation in this arena as well as passionate commitment to finding workable, reasonable solutions from companies both large and small. The TAB emerged from its review process encouraged by the creativity and productivity apparent in this field.

The TAB and the Task Force note that almost all technologies submitted present privacy and security issues that should be weighed against any potential benefits. Additionally, because some technologies carry an economic cost and some require involvement by parents and teachers, relying on them may not protect society's most vulnerable minors.

The Task Force also asked all members from social network sites to provide overviews of their efforts to enhance safety for minors on their sites. These submissions reveal that much innovation – including the use of new technologies to promote safety for minors – is occurring at leading social network sites themselves. This innovation is promising and can be traced in no small part to the engagement of Attorneys General in this matter and the activities of the Task Force. As with the technology submissions, the steps being taken by the social network sites are helpful in mitigating some risks to minors online, but none is fail-safe.

The Task Force remains optimistic about the development of technologies to enhance protections for minors online and to support institutions and individuals involved in protecting minors, but cautions against overreliance on technology in isolation or on a single technological approach. Technology can play a helpful role, but there is no one technological solution or specific combination of technological solutions to the problem of online safety for minors. Instead, a combination of technologies, in concert with parental oversight, education, social services, law enforcement, and sound policies by social network sites and service providers may assist in addressing specific problems that minors face online. All stakeholders must continue to work in a cooperative and collaborative manner, sharing information and ideas to achieve the common goal of making the Internet as safe as possible for minors.

The Task Force does not believe that the Attorneys General should endorse any one technology or set of technologies to protect minors online. Instead, the Attorneys General should continue to work collaboratively with all stakeholders in pursuing a multifaceted approach to enhance safety for minors online. The Task Force makes specific recommendations in Part VII to the Internet community and to parents, as well as recommendations regarding the allocation of resources:

- Members of the Internet community should continue to work with child safety experts, technologists, public policy advocates, social services, and law enforcement to: develop and incorporate a range of technologies as part of their strategy to protect minors from harm online; set standards for using technologies and sharing data; identify and promote best practices on implementing technologies as they emerge and as online safety issues evolve; and put structures into place to measure effectiveness. Careful consideration should be given to what the data show about the actual risks to minors' safety online and how best to address them, to constitutional rights, and to privacy and security concerns.

- To complement the use of technology, greater resources should be allocated: to schools, libraries, and other community organizations to assist them in adopting risk management policies and in providing education about online safety issues; to law enforcement for training and developing technology tools, and to enhance community policing efforts around youth online safety; and to social services and mental health professionals who focus on minors and their families, so that they can extend their expertise to online spaces and work with law enforcement and the Internet community to develop a unified approach for identifying at-risk youth and intervening before risky behavior results in danger. Greater resources also should be allocated for ongoing research into the precise nature of online risks to minors, and how these risks shift over time and are (or are not) mitigated by interventions. To allow for more systematic and thorough research, law enforcement should work with researchers to help them gather data on registered sex offenders' use of Internet technologies and technology companies should provide researchers with appropriately anonymized data for studying their practices.

- Parents and caregivers should: educate themselves about the Internet and the ways in which their children use it, as well as about technology in general; explore and evaluate the effectiveness of available technological tools for their particular child and their family context, and adopt those tools as may be appropriate; be engaged and involved in their children's Internet use; be conscious of the common risks youth face to help their children understand and navigate the technologies; be attentive to at-risk minors in their community and in their children's peer group; and recognize when they need to seek help from others.

I. Introduction

Many youth in the United States have fully integrated the Internet into their daily lives. For them, the Internet is a positive and powerful space for socializing, learning, and engaging in public life. Minors use the Internet and other digital technologies to communicate with friends and peers, to connect with religious leaders and mentors, to conduct research for school assignments, to follow the progress of favorite sports teams or political candidates and participate in communities around shared interests, to read the news and find health information, to learn about colleges and the military, and in countless other productive ways. Most minors do not differentiate between their lives off and online, in part because the majority of online social interactions involving minors do not involve people who are not part of their offline lives.

Minors face risks online, just as they do in any other public space in which people congregate. These risks include harassment and bullying, sexual solicitation, and exposure to problematic and illegal content. These risks are not radically different in nature or scope than the risks minors have long faced offline, and minors who are most at risk in the offline world continue to be most at risk online. In the past, however, the risks were primarily local, and ideally addressed by parents, educators, social services, law enforcement and others working together at the local level. In the online context, the risks implicate services from companies and access to audiences from around the world. The technologies involved also make visible risky behaviors and problematic interactions that were less visible offline, while allowing at-risk youth to more publicly and prominently display signs that they need help. Parents and local community members often are unfamiliar with the relevant technologies and do not have direct experience with the way the risks evolve in the context of the Internet and interactive technologies. Addressing risks online therefore carries different challenges and requires broader collaboration to find innovative solutions.

The Internet Safety Technical Task Force was formed to consider, on an accelerated timeline, the extent to which technologies can play a role in enhancing safety for minors in these online spaces. The Task Force was a collaborative effort among leaders from Internet service providers, social network sites, academia, education, child safety and public policy advocacy organizations, and technology development. The Task Force was created in accordance with the Joint Statement on Key Principles of Social Networking Safety announced by the Attorneys General Multi-State Working Group on Social Network Sites and MySpace in January 2008, which is attached in Appendix A.

MySpace, in consultation with the Attorneys General, invited the members to participate in the Task Force. While all members brought different perspectives to the table, all were strongly committed to the common goal of enhancing protection for minors on the Internet. MySpace invited John Palfrey, Dena Sacco, and danah boyd – all from Harvard University's Berkman Center for Internet & Society – to direct the Task Force. The Task Force held an organizational meeting in March 2008 and submitted this Final Report to the Attorneys General on December 31, 2008. The work we did during the intervening nine months is summarized in this Report.

but prob other stuff unchanged

This Report is being released at a time of dynamic change. The political, legislative, and economic context in which the Task Force began its work was markedly different from that at the conclusion. There has been a sea change in the political leadership of the country following the recent election of President-elect Obama. There is considerable speculation about the scope and reach of the proposed position of CTO for the United States, but this appointment and other campaign pledges appear very likely to have an impact on online safety going forward. In addition, a bill introduced by Senator Ted Stevens, the Protecting Children in the 21st Century Act, was incorporated into a larger broadband bill and recently signed into law by President Bush. This law calls upon the Department of Commerce's National Telecommunications and Information Administration (the NTIA) to create a Working Group on a range of online safety issues, upon the FTC to develop national online safety awareness programs, and upon all schools that receive the e-rate to incorporate online safety education in curricula. The recently passed Pryor Bill instructs the FCC to review "advanced blocking technologies" to see whether there are ways to help parents better protect their children from inappropriate content in a converged media world. The FCC currently recently considered content filtering requirements as a condition for obtaining broadband spectrum in the upcoming AWS-3 auction. The Task Force is hopeful that our work will help to guide not only the important work of the Attorneys General with regard to online safety, but also the development and implementation of these and similar programs going forward.

II. Methodology

A. Development of a Project Plan

The Task Force began by reviewing past efforts in the area of youth online safety, including the work of the Child Online Protection Act (COPA) Commission (2000) and "Youth, Pornography, and the Internet" from the Computer Science and Telecommunications Board National Research Council (2002) in the United States, as well as related European efforts, such as the United Kingdom's Byron Review entitled "Safer Children in a Digital World" (2008) and the European Commission's "Background Report on Cross Media Rating and Classification and Age Verification Solutions" (2008).

The Task Force used the findings of these related efforts as starting points to inform our work. As set forth in greater detail in the Project Plan attached in Appendix B, the scope of the Task Force's inquiry was to consider those technologies that industry and end users – including parents – can use to help keep minors safer on the Internet. The Task Force identified the following three key questions:

1. Are there technologies that can limit harmful contact between children and other people?

2. Are there technologies that can limit the ability of children to access and produce inappropriate and/or illegal content online?

3. Are there technologies that can be used to empower parents to have more control over and information about the services their children use online?

Within each of these broad topic areas, the Task Force sought to identify the most pressing aspects of the problem and, in turn, which technologies are most likely to help companies, parents, children, and others in addressing those aspects.

The Task Force was chartered specifically with a focus on identity authentication tools and on social network sites in the United States. Although we focused on harms that occur in social network sites, the Task Force determined that we could not ignore the broader environment of the Internet as a whole, and that we would assess age verification technology in the context of other digital technologies that protect children online. Additionally, we placed emphasis on issues arising in the United States, but undertook to consider the problem of child safety on the Internet in an international context. The Task Force recognized from the outset that given limited time and resources and the dynamic nature of the issues, our work would represent a series of next steps, but not final answers, to these problems. Finally, although the Task Force's focus was on technological solutions, we recognize that technology can work only in tandem with educational and law enforcement efforts.

As a note on terminology: throughout this report, the terms "youth," "minors," and "children" are used more or less interchangeably. There is a lack of uniformity in the use of such terms in public discourse and in the relevant scholarly literature. The Task Force ~~has focused primarily on those young people who are under 18~~ years of age. The Task Force acknowledges that Internet safety issues are different for minors at various ages and developmental stages, and that any strategies should be targeted to subgroups of minors based on these and other factors, as discussed later in this Report.

B. Establishment of Advisory Boards

To assist in our work, the Task Force established two advisory boards: A Research Advisory Board ("RAB") and a Technology Advisory Board ("TAB"). The purpose of these supporting advisory boards was to enable us to accept input from experts on these topics who were not Task Force members (who were selected by MySpace at the outset of the Task Force process in early 2008).

The RAB was composed of leading researchers in the field. It provided information to the Task Force on what is known about the safety of minors online based on current research. It did so through a series of presentations to the Task Force, each of which was video-recorded and made available to the public on the Task Force's website, as well as through a comprehensive Literature Review of relevant research. A summary of the research is incorporated in Part III below, and the full Literature Review is attached in Appendix C. The Task Force intends for the Literature Review to help inform not only its own work, but also similar efforts going forward across the world.

The TAB was composed of technology experts, including academic computer scientists and computer forensics experts. It established a process for companies and individuals to submit to the Task Force information about technologies relevant to the protection of minors online. The TAB then reviewed those written submissions, answers to questions, and public presentations by some of the companies, and submitted a report to the Task Force regarding that review. A summary of the TAB's report is incorporated in Part IV below, and the full report is attached in Appendix D.

In addition, the Task Force asked members representing social network sites to provide information regarding the safety features they have in place to protect minors on their sites. Those submissions are described in Part V below and attached in Appendix E.

C. Task Force Meetings and Discussions

After our organizational meeting in March 2008, the full Task Force met four more times over the course of the year. At those meetings, the Task Force heard from the Research Advisory Board and other experts regarding current issues in youth online safety, heard from the Technology Advisory Board regarding its review of technology submissions, and worked on the contents of the project plan and the reports. Between meetings, the Task Force communicated frequently via email and our website.

In addition, in September 2008, the Task Force held a day-and-a-half public meeting at Harvard Law School in Cambridge, Massachusetts. The meeting was advertised on the Task Force's website, via press release, and by way of direct communication by Task Force members. Attorneys General Richard Blumenthal of Connecticut and Martha Coakley of Massachusetts addressed the public at the beginning of the meeting.

At this public meeting, Attorney General Blumenthal mentioned specifically that "MySpace has taken the initiative in eliminating about 50,000 child predators who have established profiles in their own names." The Task Force has taken note of and discussed this process in carrying out its work this year. This topic is a complex and important one. Figures of this sort do not appear in the research section of this report below because they have not been verified through a peer-reviewed research process. Researchers note that much remains to be asked and learned about this topic, and that it is important to learn more about who these Registered Sex Offenders are and what they do online in order to address concerns about their online activities.

The Task Force and members of the public then heard from some of the technology companies that submitted technologies for review, and learned more about others through a concurrent poster session. MySpace and Facebook addressed their own efforts in enhancing safety on their sites, and WiredSafety's teen Internet Safety experts, the TeenAngels, discussed their perspectives on the scope of the problem.

D. Quarterly and Final Reports

In addition to this Final Report, the Task Force submitted four quarterly reports to the Attorneys General. The Berkman team drafted the quarterly reports and the accompanying meeting minutes. All drafts were provided to the entire Task Force for comment before reports were finalized and shared with the Attorneys General and the public via the Task Force's website.

The Berkman Center team drafted this Final Report, with significant input from the Research and Technology Advisory Boards, each of which submitted their own documents to the Task Force. The draft of the Final Report then went to the entire Task Force. Members provided comments on the draft in two ways: (1) during a day-long discussion at the Task Force meeting on November 19, 2008; and (2) in writing before and after that meeting. The Task Force recognized at the outset that due to the diversity of our membership, we could not achieve unanimity on all of the findings and recommendations in this Report, and no formal vote was taken on its adoption. However, the Berkman Center team sought to incorporate comments whenever possible, and provided a revised draft to the entire Task Force to allow for an additional round of comments before finalizing the Report. In addition, all Task Force members were invited to submit separate Statements, which are attached in Appendix F. We urge all readers to consider these Statements in conjunction with this Report, the TAB's Report, and the Literature Review. Taken together, these documents give a sense of the extent to which the Task Force reached consensus.

E. Policy of Open Access to Information

Throughout the year, the Task Force sought to make our work as transparent as possible to the public. The Berkman Center established a public-facing website for the Task Force, accessible at http://cyber.law.harvard.edu/research/isttf. The Task Force also established a policy with regard to Intellectual Property, which is attached as Exhibit 3 to the TAB Report in Appendix D. Task Force documents were posted on the website, including the Project Plan, quarterly reports, meeting minutes, research from the RAB, the template for submissions to the TAB, and the submissions received by the TAB. The RAB presentations to the Task Force, as well as the entire public meeting in September 2008, were video-recorded, and those recordings were posted on the website. Harvard University will host and archive the website going forward.

III. Summary Report from the Research Advisory Board

A. Background

The Task Force's Research Advisory Board (RAB) was composed of scholars and researchers whose research addresses online safety for minors. The RAB was instructed to help the Task Force develop an understanding of what is currently known about safety issues with respect to minors and the Internet and, more specifically, social network sites.

Researchers and scholars from the United States whose work is relevant to the Task Force were invited to contribute through presentations and consultations. Researchers were invited to present their research to the Task Force based on the informative nature of their work and its relevance to the Task Force. Their presentations and a video of their talks are available on the Task Force's website. The RAB reached out to individuals with a record of ongoing, rigorous, and original research and invited them to directly participate in the creation of the Literature Review attached as Appendix C, by providing citations, critiques of the review, and otherwise expressing feedback. The RAB intended to be as inclusive as possible. Those who contributed to this process who wished to be identified are listed in Appendix C. The RAB also publicized a draft of the Literature Review for public and scholarly feedback and directly elicited responses from non-U.S. scholars working on this topic. Members of the research community who directly contributed to the RAB are:

- **danah boyd (Chair)**, University of California–Berkeley
- **David Finkelhor**, University of New Hampshire Crimes Against Children Research Center
- **Sameer Hinduja**, Florida Atlantic University
- **Amanda Lenhart**, Pew Internet and American Life Project [Presenter]
- **Sam McQuade**, Rochester Institute of Technology [Presenter]
- **Kimberly Mitchell**, University of New Hampshire Crimes Against Children Research Center
- **Justin Patchin**, University of Wisconsin–Eau Claire
- **Larry Rosen**, California State University at Dominguez Hills
- **Janis Wolak**, University of New Hampshire Crimes Against Children Research Center [Presenter]
- **Michele Ybarra**, Internet Solutions for Kids [Presenter]

B. Background to the Literature Review

The Literature Review attached in Appendix C is a review of original, published research addressing online sexual solicitation, online harassment and bullying, and exposure to problematic content. The bulk of this document was written by Andrew Schrock, the Assistant Director of the Annenberg Program in Online Communities at University of Southern California, and danah boyd, the Chair of the RAB and co-director of the Task Force. The purpose of this document is to provide a review of research in this area in order to further discussions about online safety. The RAB believes that to help youth in this new environment, the first step is to understand the actual threats that youth face and what puts them at risk. To do so, it is important to review the data. The RAB believes that the best solutions will be those that look beyond anecdotal reports of dangers and build their approaches around quantifiably understood risks and the forces that put youth at risk. The RAB also believes that solutions that are introduced should be measured as to their effectiveness in addressing the risks that youth actually face instead of measured in terms of adult perception at solving perceived risks.

Included in this review is methodologically sound research, with an emphasis on recent U.S.-focused, national, quantitative studies that addressed social media. Because the number of large-scale studies is limited, the review also includes smaller, regional studies and notes when a specific region is being discussed. Where appropriate, a limited number of older studies, qualitative findings, and studies outside of the United States are referenced for context. Studies commissioned by government agencies also are referenced, even when the sampling techniques are unknown and the findings were not vetted by peer review, because the RAB believed that work from these reputable organizations should be acknowledged. Reports and findings by other institutions were handled more cautiously, especially when the RAB was unable to vet the methodological techniques or when samples reflected problematic biases. The RAB did not exclude any study on the basis of findings, nor did it exclude any peer-reviewed study on the basis of methodology. In choosing what to review, the RAB was attentive to methodological rigor, because it wanted to make sure that the Task Force had the best data available.

The methodology of a study is its most important quality. The size of a sample population matters less than how the population was sampled in relation to the questions being asked. The questions that qualitative studies can address differ from those that can be addressed quantitatively, but both are equally valid and important. For most of the concerns brought forth by the Task Force, the RAB thought it was important to focus on those questions best addressed through quantitative means.

Presenting statistical findings is difficult, because those who are unfamiliar with quantitative methodology may misinterpret the data and read more deeply into the claims than the data supports. For example, correlation is not the same as causation, and when two variables are correlated, the data cannot tell you whether one causes the other or whether an additional mediating variable that affects both is involved. In presenting the findings of different studies, the Literature Review tries also to provide a roadmap for understanding what these studies mean and also includes some background on methodology for those who want a better overview of the topic.

Although numerous studies are currently underway and much research is available to address online safety concerns, very few of the findings enter public or political discourse. This is unfortunate, because the actual threats that youth may face appear to be different than the threats most people imagine. More problematically, media coverage has regularly mischaracterized research in this area, thus contributing to inaccurate perceptions of what risks youth face. This problem was most visible in the public coverage of the Online Victimization studies done at the Crimes Against Children's Research Center (Finkelhor et al. 2000; Wolak et al. 2006). These reports are frequently referenced to highlight that one in five or one in seven minors are sexually solicited online. Without context, this citation implies massive solicitation of minors by older adults. As discussed below, other peers and young adults account for 90%-94% of solicitations in which approximate age is known (Finkelhor et al. 2000; Wolak et al. 2006). Also, many acts of solicitation online are harassing or teasing communications that are not designed to seduce youth into offline sexual encounters; 69% of solicitations

involve no attempt at offline contact (Wolak et al. 2006). Misperception of these findings perpetuates myths that distract the public from solving the actual problems youth face.

This summary highlights some of the major findings from key studies to provide an overview of the full document. The statistics presented here are better read in context, but are used here to offer a sense of scale. It also provides a descriptive overview of what the studies presented in the review mean. This is not a substitute for the data; those who want more depth or who plan to apply the statistics presented should read the full Literature Review and the original research cited therein.

This summary also points out the weaknesses of some of the current studies and the need for more research. This is a dynamic space and it is important that studies are ongoing, tracking changes as the environment changes. It is clear that more research is necessary to understand the behaviors and profile of adult offenders. It is also clear that studies on online harassment suffer from inconsistent definitions and that too little is known about certain types of problematic content. That said, except with respect to the definitions of bullying, the research presented is fairly consistent across studies with different populations, affirming the fundamental question of validity.

Finally, some Task Force members have expressed a concern that because the time involved in collecting data, interpreting results, and publishing studies is often long, the findings presented here are irrelevant to current debates and usage. This view is reasonable, but also inaccurate. The research presented here shows clear trends over time and across different genres of social media and age ranges; also, the research is frequently affirmed by multiple studies. There is also clear indication that psychosocial problems and risky behaviors are the dominant factors correlated with risk across all genres of social media.

To further assuage doubt, the RAB contacted all of the scholars working on national studies and asked them to review the data that they are currently analyzing for any salient shifts. Based on their preliminary analysis of data from upcoming studies, there are no major departures from current trends in the near future.

C. Summary of Literature Review

The rapid rise of social network sites and other genres of social media among youth is driven by the ways in which these tools provide youth with a powerful space for socializing, learning, and participating in public life (boyd 2008; Ito et al. 2008; Palfrey and Gasser 2008). The majority (59%) of parents say the Internet is a "positive influence" in their children's lives (Rideout 2007), but many have grave concerns about the dangers posed by the Internet. Contemporary fears over social network sites resemble those of earlier Internet technologies, but – more notably – they also seem to parallel the fears of unmediated public spaces that emerged in the 1980s that resulted in children losing many rights to roam (Valentine 2004). There is some concern that the mainstream media amplifies these fears, rendering them disproportionate to the risks youth face. This creates a danger that known risks will be obscured, and reduces the likelihood that

society will address the factors that lead to known risks, and often inadvertently harm youth in unexpected ways.

This is not to say that there are no risks, but that it is important to ask critical questions in order to get an accurate picture of the online environment and the risks youth face there. The Literature Review attached in Appendix C summarizes ongoing scholarly research that addresses these questions:

1. What threats do youth face when going online?
2. Where and when are youth most at risk?
3. Which youth are at risk and what makes some youth more at risk than others?
4. How are different threats interrelated?

The findings of these studies and the answers to these questions are organized around three sets of online threats: *sexual solicitation*, *online harassment*, and *problematic content*. Two additional sections focus on what factors are most correlated with risk and the role of specific genres of social media. There is also documentation of child pornography as it relates to youth's risks and a discussion of understudied topics and directions for future research. This overview summarizes the key findings presented in the review alongside a descriptive roadmap that provides context. It is not meant as a substitute for reading the full Literature Review.

1. Sexual Solicitation and Internet-Initiated Offline Encounters

Although numerous studies have examined sexual solicitation, three national datasets provide the most statistically valid findings – N-JOV, YISS-1, and YISS-2 – and are regularly analyzed in articles by Wolak, Finkelhor, Ybarra, and Mitchell. Findings in regional studies (e.g., McQuade and Sampat 2008; Rosen et al. 2008) affirm their trends.

The percentages of youth who receive sexual solicitations online have declined from 19% in 2000 to 13% in 2006 and most recipients (81%) are between 14–17 years of age (Finkelhor et al. 2000; Wolak et al. 2006). For comparison, a regional study in Los Angeles found that 14% of teens reported receiving unwanted messages with sexual innuendos or links on MySpace (Rosen et al. 2008) and a study in upstate New York found that 2% of fourth through sixth graders were asked about their bodies, and 11% of seventh through ninth graders and 23% of tenth through twelfth graders have been asked sexual questions online (McQuade and Sampat 2008). The latter study also found that 3% of the older two age groups admitted to asking others for sexual content (McQuade and Sampat 2008).

Youth identify most sexual solicitors as being other adolescents (48%; 43%) or young adults between the ages of 18 and 21 (20%; 30%), with few (only 4%; 9%) coming from older adults and the remaining being of unknown age (Finkelhor et al. 2000; Wolak et al. 2006). Not all solicitations are from strangers; 14% come from offline friends and acquaintances (Wolak et al. 2006, 2008b). Youth typically ignore or deflect solicitations without experiencing distress (Wolak et al. 2006); 92% of the responses

Where are recs!

amongst Los Angeles–based youth to these incidents were deemed "appropriate" (Rosen et al. 2008). Of those who have been solicited, 2% have received aggressive and distressing solicitations (Wolak et al. 2006). Though solicitations themselves are reason for concern, few solicitations result in offline contact. Social network sites do not appear to have increased the overall risk of solicitation (Wolak et al. 2008b); chat rooms and instant messaging are still the dominant place where solicitations occur (77%) (Wolak et al. 2006).

A study of criminal cases in which adult sex offenders were arrested after meeting young victims online found that victims were adolescents and few (5%) were deceived by offenders claiming to be teens or lying about their sexual intentions; 73% of youth who met an offender in person did so more than once (Wolak et al. 2008b). Although identity deception may occur online, it does not appear to play a large role in criminal cases in which adult sex offenders have been arrested for sex crimes in which they met victims online. Interviews with police indicate that most victims are underage adolescents who know they are going to meet adults for sexual encounters and the offenses tended to fit a model of statutory rape involving a post-pubescent minor having nonforcible sexual relations with an adult, most frequently adults in their twenties (Wolak et al. 2008a). Hines and Finkelhor note that youth often initiate contact and sexual dialogue; they are concerned that "if some young people are initiating sexual activities with adults they meet on the Internet, we cannot be effective if we assume that all such relationships start with a predatory or criminally inclined adult" (Hines and Finkelhor 2007: 301).

Not all youth are equally at risk. Female adolescents ages 14–17 receive the vast majority of solicitations (Wolak et al. 2006). Gender and age are not the only salient factor. Those experiencing difficulties offline, such as physical and sexual abuse, and those with other psychosocial problems are most at risk online (Mitchell et al. 2007). Patterns of risky behavior are also correlated with sexual solicitation and the most significant factor in an online connection resulting in an offline sexual encounter is the discussion of sex (Wolak et al. 2008b). Youth 15–17 years old are at the greatest risk, because they tend to engage in the riskiest behavior, and are most likely to communicate with strangers online (Wolak et al. 2008b).

Sexual solicitation and predation are serious concerns, but the image presented by the media of an older male deceiving and preying on a young child does not paint an accurate picture of the nature of the majority of sexual solicitations and Internet-initiated offline encounters; this inaccuracy leads to major risks in this area being ignored. Of particular concern are the sexual solicitations between minors and the frequency with which online-initiated sexual contact resembles statutory rape rather than other models of abuse. Finally, though some technologies can be more easily leveraged than others for solicitation, risk appears to be more correlated with a youth's psychosocial profile and risky behaviors than any particular technological platform.

2. Online Harassment and Cyberbullying

It is difficult to measure online harassment and cyberbullying, because these concepts have no clear and consistent definition. Some definitions include acts that embarrass or humiliate youth while others include only those that are deemed threatening. As a result, the frequency with which youth report being victimized varies wildly between studies (4%–46%) (Hinduja and Patchin 2009; Kowalski et al. 2007; Lenhart 2007; McQuade and Sampat 2008; Smith et al. 2008; Williams and Guerra 2007; Wolak et al. 2006; Ybarra et al. 2007a). Although each study is internally consistent and methodologically sound, an outsider might argue over whether the incidents being measured do or do not constitute harassment or bullying, making it difficult to translate these numbers into holistic impressions of the state of harassment and bullying. Furthermore, without consistent definitions across scholars, it is difficult to compare the studies. For all of these caveats, what is known is that using most definitions, online harassment or cyberbullying happens to a significant minority of youth, is sometimes distressing, and is frequently correlated with other risky behaviors and disconcerting psychosocial problems (Patchin and Hinduja 2006; Ybarra and Mitchell 2007), just as is the case offline (Hawker and Boulton 2000). Ybarra and Wolak (2007) found that 39% of victims reported emotional distress over being harassed online, that both victims and perpetrators are significantly more likely to use substances and experience depressive symptomatology, and that online victims are significantly more likely to harass others online and be victims of offline bullying.

Studies consistently find that youth reports of that bullying are more common than online harassment (Lenhart 2007; Li 2007; Smith et al. 2008; Williams and Guerra 2007), but this does not diminish the costs of online harassment. Hinduja and Patchin (2009) also found that 42.4% of youth who report being cyberbullied also report being bullied at school. Offline, adults are frequently unaware that bullying is taking place – let alone present at the moments in which it occurs. Online harassment may be more public and leaves traces that adults can later view (boyd 2008).

In online contexts, perpetrators may appear to be anonymous, but this does not mean that the victims do not know the perpetrators or that the victims are not able to figure out who is harassing them. Wolak et al. (2006) found that 44% know the perpetrator offline, but Hinduja and Patchin (2009) found that 82% know their perpetrator (and that 41% of all perpetrators were friends or former friends). Hinduja and Patchin suggest that the difference between their data may be a result of shifts in the practice of online harassment. Sibling-based online harassment is also reported, but not well measured; one regional study in New York found that 30.5% of seventh through ninth graders who reported being victimized online in some way (not just harassment) indicated that a nonparent family member was the perpetrator (McQuade and Sampat 2008). All studies reported that other youth constituted almost all of known cyberbullies. Studies differ on whether or not there is a connection between online and offline bully perpetration and victimization (Hinduja and Patchin 2007; Kowalski and Limber 2007; Raskauskas and Stoltz 2007; Ybarra et al. 2007a), but there is likely a partial overlap.

Likewise, the data vary on the overlap between bullies and victims (Beran and Li 2007; Kowalski and Limber 2007; Ybarra and Mitchell 2004a); a recent study found that 27% of teenaged girls were found to "cyberbully back" in retaliation for being bullied online (Burgess-Proctor et al. 2009).

Offline bullying tends to peak in middle school (Devoe et al. 2005), but online harassment tends to peak later and continue into high school (Smith et al. 2008; Wolak et al. 2006). Reports of gender differences are inconclusive, but generally, girls appear more likely to be online harassment victims (Agatston et al. 2007; DeHue et al. 2008). Although there are high-profile examples of adults bullying minors, it is not clear how common this is. Wolak et al. (2006) found that 73% of known perpetrators were other minors, but it is not clear how many of the remaining who are eighteen and over were young adults or slightly older peers. Other studies suggest that minors are almost exclusively harassed by people of similar age (Hinduja and Patchin 2009).

It is difficult to pinpoint the exact prevalence of cyberbullying and online harassment, because the definitions themselves vary, but the research is clear that this risk is the most common risk minors face online. Though there is a strong correlation between victimization (and perpetration) and psychosocial problems, causality is unknown. In other words, stopping online harassment may not curb the psychosocial problems that these minors face and addressing the psychosocial problems may be necessary to reduce incidents of online harassment. In order to help the most minors, addressing online harassment and its underlying causes should be the top priority.

3. Exposure to Problematic Content

Problematic Internet-based content that concerns parents covers a broad spectrum, but most research focuses on violent media (movies, music, and images) and adult pornography. Other problematic content that emerges in research includes hate speech, content discussing or depicting self-harm, child pornography, and content that could be considered obscene. Depending on one's family values, more categories of content may be considered problematic, but research has yet to address these other issues.

There are three core concerns with respect to problematic content: (1) youth are unwittingly exposed to unwanted problematic content during otherwise innocuous activities; (2) minors are able to seek out and access content to which they are forbidden, either by parents or law; (3) the intentional or unintentional exposure to content may have negative psychological or behavioral effects on children. The Literature Review focuses on the first two issues.

Encounters with pornography are not universal and rates of exposure are heavily debated. In a recent national study, 42% of youth reported either unwanted or wanted exposure or both; of these, 66% reported only unwanted exposure, and 9% of those indicated being "very or extremely upset" (Wolak et al. 2006). Rates of unwanted exposure were higher among youth who were older, reported being harassed or solicited online, victimized offline, and were depressed (Wolak et al. 2007). Most studies found

that males and older adolescents are more likely to be exposed to pornography (Flood 2007; Sabina et al. 2008; Ybarra and Mitchell 2005), but younger children are more likely to be distressed by it (Wolak et al. 2006).

While use of the Internet is assumed to increase the likelihood of unwanted exposure to pornography, this may not be true among all demographics. Younger children report encountering pornographic content offline more frequently than online (10.8% versus 8.1%) (Ybarra and Mitchell 2005) and a study of seventh and eighth graders found that of those who are exposed to nudity (intentionally or not), more are exposed through TV (63%) and movies (46%) than on the Internet (35%) (Pardun et al. 2005).

This finding, repeated across multiple studies with different methodologies and populations, raises more questions than it answers, especially because it conflicts with commonly held assumptions. Is exposure to pornography dependent on what kinds of Internet access these youth have (home access vs. school access)? Would the data look different if nudity were classified differently or broken down? Are certain types of households more likely to expose children to R- or X-rated TV shows and movies? Are families more likely to filter Internet content than TV and movie content? More qualitative research is necessary to uncover why younger children report being exposed to more pornographic content in traditional media than new media, but these findings do suggest that a high level of availability does not always equal exposure.

Exposure to violent content presents different concerns, because it usually occurs as a part of common online activities – children are exposed to violent content through videogames, on news sites, and through videos that are circulated among youth. Studies in the UK found that 31% of youth reported seeing violent content online (Livingstone and Bober 2004), but there are no studies that properly assess the frequency of exposure to violent content in the United States.

At present, the majority of research on problematic content focuses on exposure and consumption, although there are indications that youth are also contributing to the production of problematic content. Youth-created or -distributed problematic content includes fight videos, hate speech, pornographic images or videos of oneself or one's friends, and content for pro–eating disorder and self-injury websites. At present, there is limited data about the frequency of youth-generated problematic content or the psychosocial characteristics of those youth who contribute to it.

4. Different Risks

With all three types of threats (sexual solicitation, online harassment, and problematic content), some minors are more likely to be at risk than others. Generally speaking, the characteristics of youth who report online victimization are similar to those of youth reporting offline victimization and those who are vulnerable in one online context are often vulnerable in multiple contexts (Finkelhor 2008). In the same way, those identified as "high risk" (i.e., experienced sexual abuse, physical abuse, or parental

conflict) were twice as likely to receive online solicitations (Mitchell et al. 2008) and a variety of psychosocial factors (such as substance use, sexual aggression, and poor bonds with caregivers) were correlated with online victimization (Ybarra et al. 2007b, 2007c).

Depression, abuse, and substances are all strongly correlated with various risky behaviors that lead to poor choices with respect to online activities. A poor home environment that includes conflict and poor parent–child relationships is correlated with a host of online risks (Wolak et al. 2003; Ybarra and Mitchell 2004b).

Talking with strangers online does not appear to be universally risky, but it may increase the possibility of sexual solicitation, particularly among youth who are willing to engage in conversations about sexual topics (Wolak et al. 2008a). With talking to strangers, it is difficult to discern cause and effect – are youth more at risk because they talk to strangers or are at-risk youth more likely to talk to strangers?

Making connections online that lead to offline contact is not inherently dangerous. A regional study in New York found that 10% of seventh through eighth graders and 14% of tenth through twelfth graders have invited people they met online to meet offline (McQuade and Sampat 2008). An early study found that Internet-initiated connections resulting in offline contact are typically friendship-related, nonsexual, formed between similar-aged youth, and known to parents (Wolak et al. 2002); recent qualitative studies find similar patterns (Ito et al. 2008). For socially ostracized youth, these online connections may play a critical role in identity and emotional development (Hiller and Harrison 2007).

Contrary to popular assumptions, posting personally identifying information does not appear to increase risk in and of itself. Rather, risk is associated with interactive behavior. Further, youth who engage in a high number of different potentially risky online behaviors (e.g., having unknown people on a buddy list, seeking pornography online, using the Internet to harass others) are also more at risk (Wolak et al. 2008b; Ybarra et al. 2007c).

Though many of the studies focus on the Internet at large, minors face different risks in different online environments, sometimes because technologies facilitate certain kinds of communication between adults and minors or among minors. For instance, on social network sites, a popular genre of social media among youth, teens are more likely to interact with friends or friends-of-friends than complete strangers (Lenhart and Madden 2007). Norms may also play a role. For example, in gaming communities, it is more normative for youth to interact with people they do not know. At-risk youth are more attracted to some environments, such as sexually oriented chat rooms, thus elevating their levels of risk, as is demonstrated when depressed or sexually promiscuous youth are more frequent users of online chat and forums. Finally, certain environments provide means to actively combat solicitation and harassment, such as by blocking or ignoring users.

Although there is a correlation between online risk and high levels of online participation, online participation does not predict risk. Youth who are solicited and harassed do indicate that all genres of social media (IM, chat rooms, social network sites, email, blogging) are their top online activities (Ybarra and Mitchell 2008).

The risks presented by social network sites – most notably with respect to solicitation and, to a lesser degree, harassment – appear to be consistent with Internet risks more broadly and lower than those in other media (Ybarra and Mitchell 2008). Studies with broader definitions of bullying suggest that social network sites present an equal or slightly increased risk (Lenhart 2007), in part because these sites are popular tools of peer communication.

5. Future Research

In addition to the topics discussed here, some areas of youth online safety are critically under-researched, particularly: (1) minor–minor solicitation; (2) the creation of problematic (sexual, violent, self-harm) content by minors; (3) less visible groups, such as gay, lesbian, bisexual, or transgender (LBGT) youth and youth with disabilities who may be particularly vulnerable; (4) the interplay between socioeconomic class and risk factors; (5) the role that pervasive digital image and video capture devices play in minor-to-minor harassment and youth production of problematic content; (6) the intersection of different mobile and Internet-based technologies; and (7) the online activities of registered sex offenders. New research in this area requires a combination of funding and access. For example, researching the online activities of registered sex offenders requires the support and engagement of law enforcement and technology companies.

New methodologies and standardized measures that can be compared across populations and studies are also needed to illuminate these under-researched topics. Finally, because new environments present new risks, there is a need for ongoing large-scale national surveys to synchronously track these complex dynamics as they unfold.

IV. Summary Report from the Technology Advisory Board

In parallel to the work of the RAB, the TAB solicited, evaluated, and reviewed 40 written public submissions of technologies, and drew conclusions from these submissions about the state of technologies intended to enhance online safety for minors in a formal process described in detail in the report in Appendix D. The primary task of the TAB was to assess whether and how the submitted technologies would be useful in the context of enhancing online safety for minors. To conduct its work, the TAB was limited to the submission itself, written responses to several questions, and public presentations made to the Task Force. The TAB did not perform uniform, independent technical evaluations of the technologies submitted.

The technology categories that the TAB assigned, with the number of submissions in parentheses, were:

1. Age Verification/Identity Authentication (17)
2. Filtering/Auditing (13)
3. Text Analysis (5)
4. Biometrics (1) (+2 with biometrics as secondary category)
5. Other (4)

The objective criteria that the TAB used in assessing the technology take the form of 14 evaluative questions, which are included in the TAB Report in Appendix D.

In sum, the TAB's review of the submitted technologies leaves the TAB in a state of cautious optimism, with many submissions showing substantial promise. The youth online safety industry is evolving. Many of the technologies reviewed were point solutions rather than broad attempts to address the safety of minors online as a whole. There is, however, a great deal of innovation in this arena as well as passionate commitment to finding workable, reasonable solutions from companies both large and small. The TAB emerged from its review process encouraged by the creativity and productivity apparent in this field.

By the end of the review process, the TAB determined that no single technology reviewed could solve every aspect of online safety for minors, or even one aspect of it one hundred percent of the time. At the same time, there is clearly a role for technology in addressing this issue both now and in the future; most likely, various technologies should be leveraged together to help address the challenges in this arena.

Some critics may object to the use of technology as a solution, given the risk of failure and lack of total certainty around performance. However, the TAB believes that, though it is indeed true that even the cleverest, most robust technology can be circumvented, this does not necessarily mean that technology should not be deployed at all. It simply means that – even with deployment of the best tools and technologies available to jumpstart the process of enhancing safety for minors online – there is no substitute for a parent, caregiver, or other responsible adult actively guiding and supporting a child in safe Internet usage. Even the best technology or technologies should be only part of a broader solution to keeping minors safer online.

As a corollary, the TAB recommends that further evaluative work be conducted on any technology – whether or not it was among those reviewed in this process – prior to endorsing or broadly recommending its use, given the potential for significant new risks and unintended consequences. The benefits of each solution reviewed need further exploration and balancing against monetary costs, possible privacy and security concerns about user information, international implications and applicability, as well as other issues. Additionally, determining which technology or set of technologies will work best for a particular child, family, school, community, or any other context in which the safety of minors on the Internet is an immediate concern will always be a highly individualized decision. It is not always a decision that can reasonably be made without a great deal of familiarity with the situation in which a technology solution would function.

Listed here, and discussed in greater detail in the full TAB Report in Appendix D, are the specific conclusions and recommendations generated by the TAB's review process:

- Technology can play a role but should not be the sole input to improved safety for minors online.
- The most effective technology solution is likely a combination of technologies.
- Any and every technology solution has its limitations.
- Youth online safety measures must be balanced against concerns for the privacy and security of user information, especially information on minors.
- For maximum impact, client-side-focused technologies should be priced to enable all would-be users to purchase and deploy them.
- A common standard for sharing information among safety technologies would be useful.
- Developing standard metrics for youth online safety solutions would be useful.

The Members of the TAB were:

- **Ben Adida**, Harvard Medical School, Harvard University
- **Scott Bradner**, Harvard University
- **Laura DeBonis**, Berkman Center, Harvard University (chair)
- **Hany Farid**, Dartmouth College
- **Lee Hollaar**, University of Utah
- **Todd Inskeep**, Bank of America
- **Brian Levine**, University of Massachusetts–Amherst
- **Adi Mcabian**, Twistbox
- **RL Morgan**, University of Washington
- **Lam Nguyen**, Stroz Friedberg, LLC
- **Jeff Schiller**, Massachusetts Institute of Technology
- **Danny Weitzner**, Massachusetts Institute of Technology

Observers to the TAB were:

- **Rachna Dhamija**, Usable Security Systems
- **Evie Kintzer**, WGBH
- **Al Marcella**, Webster University
- **John Morris**, Center for Democracy and Technology

- **Teresa Piliouras**, Polytechnic University
- **Greg Rattray**, Delta-Risk
- **Jeff Schmidt**, Consultant
- **John Shehan**, National Center for Missing and Exploited Children

The full report of the TAB is attached to this Report in Appendix D.

V. Overview of Online Safety Efforts Made by Social Network Sites

In part through this Task Force process and as a result of the efforts of Attorneys General in bringing attention to the issue of youth online safety, social network sites have themselves continued to make strides in enhancing safety features on their sites to protect minors. The Task Force asked all Task Force representatives from social network sites to submit an overview of their efforts to enhance safety for minors on their sites. In response, the Task Force received eight submissions from social network sites, all of which are attached in Appendix E. These submissions were made by Bebo and AOL, Community Connect Inc., Facebook, Google orkut, Loopt, MySpace, MTV Networks/Viacom, and Yahoo!. These submissions were not reviewed by the TAB.

All of these companies develop and adopt technologies to protect children. The technologies they develop in-house are designed around their particular features, the users on their sites, and the issues that arise. All are committed to ongoing improvements in this area. The Task Force summarizes the following efforts of these eight leading social network sites, all taken from the submissions attached in Appendix E:

- **Report Abuse:** All eight of the social network sites who submitted to the Task Force provide a technology-driven mechanism by which users can report abuse to the site's operators.

- **Access to Age-Appropriate Content:** Several of the eight social network sites who submitted to the Task Force restrict users registered as minors from accessing certain inappropriate content. For example: AOL has online services for minors with age-appropriate content; Community Connect Inc. does not show minors advertisements designed for adults; MySpace denies users under 18 access to certain age-inappropriate areas, does not allow them to browse for certain inappropriate categories, and blocks access to advertisements related to alcohol, smoking, and drinking; and Yahoo! has search features designed specifically for minors that prevent the display of adult content.

- **Parental Control Software:** Some of the eight social network sites who submitted to the Task Force provide parental controls. For example, AOL and MySpace offer parental control software to their users for use in conjunction with their sites. Yahoo! offers parental controls via its access partners, such as AT&T and Verizon. Community Connect Inc.'s "Safety Tips for Parents includes a suggestion to consider using computer based blocking software."

- **Review for Inappropriate and Illegal Content:** Most of the eight social network sites who submitted to the Task Force review to some degree their own online spaces for inappropriate and illegal content, including pornography and child pornography, in addition to responding to user reports regarding such content. AOL, for instance, "has implemented technologies to identify and remove images of child pornography and to help eliminate the sending of known child pornography," including blocking transmissions of "apparent pornographic images." In addition, Bebo "proactively seeks out inappropriate content using software and other mechanisms to review such content"; Community Connect Inc. uses a "photo approval process for all social main photos to prevent inappropriate photos from appearing as the main photo on personal pages" and requires approval for "all main photos in Groups"; Facebook deploys a variety of technology tools, including easily available reporting links on photos and videos; Google orkut employs "image scanning technology" to detect child pornography and pornography; Yahoo! has "implemented technologies and policies" to help identify apparent child pornography violations on its network; MTV Networks/Viacom screens uploads for inappropriate content using "human moderation and/or identity technologies"; and MySpace "reviews images and videos that are uploaded to the MySpace servers and photos deep-linked from third-party sites."

- **Peer Verification for Minors:** Facebook uses a peer verification system for users who identify themselves as under 18. MySpace has a closed school section that relies on peer approval and moderation to separate current students from alumni and provides a report abuse category that allows current users to report underage users.

- **Restrictions on Changing Age Information after Registration:** Some of the eight social network sites who submitted to the Task Force restrict users from changing their date of birth or age after they have registered. For example, MySpace offers alerts, via its ParentCare software, to parents whose children change their ages and controls that limit how minors may change their ages. On Facebook, users cannot edit their birth date to one that makes them under 18 without first contacting the "User Operations Team for review." On Community Connect, Inc., "members can not change their date of birth after registering."

- **Enforcement of Age Restrictions:** Several of the eight social network sites who submitted to the Task Force use cookies or other technology to help enforce age restrictions. For example: Community Connect Inc. places a cookie on a registrant's browser to help prevent age falsification; people who try to sign up on Facebook with a birth date that makes them under 13 are blocked, and a persistent browser cookie is used to prevent further attempts at signing up; Google places a session cookie on a registrant's browser to help prevent age falsification when a user registers for orkut; and MySpace places a cookie on a registrant's browser to help prevent age falsification in addition to employing an algorithm to locate and remove underage users. Loopt has implemented an "age-neutral" screening

mechanism in its subscriber registration flow, which requires users to input their age, blocks users who do not meet the minimum requirement, and tags the mobile device of such unsuccessful registrants and prevents reregistration from the same device.

- **Restrictions on Searching for Minors:** Several of the eight social network sites who submitted to the Task Force restrict the ability of users registered as adults from searching for users registered as minors. For example: Bebo does not allow the use of search engines to search for users under 16; Facebook does not allow minors and adults on the same regional network to see one another's profiles and does not allow adults to search for minors based on profile attributes; MTV Networks/Viacom does not allow adults to search for minors, and adults can become "friends" with users under 16 only if they know the user's last name, email address, or username; and on MySpace, profiles for users under 18 are set to "private" upon account creation by default, and adults cannot add a user under 16 as a friend without knowing that user's last name or email address.

- **Removal of Registered Sex Offenders:** MySpace uses one of the technologies submitted to the Task Force to identify and remove registered sex offenders from its site. Facebook disables the accounts of convicted sex offenders and plans to "add the KidsAct registry" to disable accounts and prevent those on the list from registering. MTV Networks/Viacom is "exploring utilizing sex offender registry software to assist us in locating and removing RSO's" from its sites.

- **Amber Alerts:** AOL, MySpace, and Yahoo! participate with the National Center for Missing and Exploited Children in disseminating reports on missing children.

- **Educational Resources:** All eight of the social network sites who submitted to the Task Force offer educational resources and online safety tips for their users.

The submissions themselves, attached in Appendix E, provide much greater detail about these and other efforts being made by the social network sites, and should be read in tandem with this Report.

VI. Analysis

A. Background

The Task Force began with the premise that in order to determine how today's technologies can help promote online safety for minors, it is important first to have a clear understanding of the actual risks that minors face online. Taking the risks outlined by the Research Advisory Board in its presentations and in the Literature Review as the starting point, Task Force members considered information about the submitted technologies to determine the extent to which any category of those technologies could assist in addressing specific risks. The Task Force was limited to studying those technologies submitted through the process established by its Technology Advisory

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Board, though individual members sought out other approaches in university labs and in development at corporations for background consideration. The Task Force recognizes that there is further, ongoing technological innovation taking place in both academic and corporate settings that was not brought to its attention, in part due to the public nature of the Task Force process and, in particular, the Task Force's Intellectual Property policy, which required public disclosure of all submissions.

No single technology submitted to the Task Force is purported to solve all of the disparate problems that minors face online or even to eliminate completely any one risk. Instead, each technology seeks to address specific aspects of safety for minors in particular online contexts, often with significant parental or caregiver involvement. Moreover, a technology or combination of technologies designed for one environment or for use by one type of service provider may not be able to provide the same level of effectiveness in a different context. Each site has its own unique architecture, equipment, and operations, so integration of new software requires careful planning and testing in order to avoid unintended consequences or even site outages. Thus, any technological approach must be appropriately tailored for the context in which it operates, given the wide range of services on the Internet. Finally, not all risks identified by the Research Advisory Board are addressed by a technology submitted to the Task Force for review.

At the same time, many potential technological solutions give rise to legal and public policy considerations, particularly if subject to government requirements. Though a full analysis of these legal and public policy concerns is outside the scope of this Task Force and is better left to key public sector and private sector stakeholders, the Task Force urges that they be taken into account prior to use of any particular technology. Some technologies may offer improved safety, but may have harmful public policy consequences and unintended consequences for youth and parents that outweigh the safety improvement. A balanced perspective is particularly critical in light of the Internet's central role in enabling freedom of expression and access to information from around the world.

Additional issues are raised by the global nature of the Internet. The Task Force's mandate was focused primarily on technological solutions to online safety for minors in the United States. The Internet, on the other hand, is international, with services, sites, and users that transcend national boundaries. This has important ramifications for understanding the potential benefit of any technological approach to online safety for minors. If a technological solution is put into place for a given social network site or service provider, a user may choose to use a different site or service, including one based outside of the United States and therefore subject to different laws and protections. This may be particularly true for minors, who tend to be at the forefront of finding new, uncharted online spaces to explore and seek out spaces that give them maximum freedom. Pushing minors – especially at-risk minors – into these alternative environments may well result in a net loss for youth online safety. At the same time, to the extent that social network sites and others adopt technological safety solutions that are incompatible with users from of outside the United States, we risk closing our youth off from valuable interaction with the rest of the world. Finally, even if technological measures appear to

eradicate visible problems, they may not help at-risk minors who are engaged in risky online behaviors. Pushing those practices underground may complicate efforts to identify and serve the needs of at-risk youth. Given the Task Force's focus on the United States, we did not study regulations or industry policies in place outside of the United States.

The Task Force remains optimistic about the potential for technologies to play a role in enhancing safety for minors online, but – consistent with the guidance of the TAB – cautions against over-reliance on technology in isolation or on a single technological approach. Instead, used in combination with education, parental involvement, law enforcement, and sound policies by service providers, a technology or combination of technologies may help to reduce some risks minors face online.

B. How the Technologies Address Risks Identified by the RAB

Below, the Task Force uses the three broad categories of risks facing minors presented by the Research Advisory Board and considers the relative promise of the submitted technologies in each instance.

1. Sexual Solicitation and Internet-Initiated Offline Encounters

Most of the technologies submitted to the Task Force for review are intended to reduce, to some extent, the risk of sexual predation on minors by adults. Some seem to presuppose that deception as to age is a core contributor to sexual solicitation, yet the research suggests that this is not a prominent or common issue in solicitations that lead to sexual encounters. The data outlined in the Literature Review show that in most incidents of Internet-initiated offline encounters between adults and minors, the minor knows that the adult is older (usually in his or her twenties), knows that sex is desired, and believes that she or he can consent to a sexual encounter. Many solutions also assume that sexual solicitations that youth receive always come from older adults, even though almost half of solicitations are known to come from other minors and most of the rest come from adults who are between the ages of 18–25.

a. Identity Authentication and Age Verification

The area of greatest focus of technology developers, and corresponding innovation, is in the related areas of identity authentication and age verification technologies. Most technological approaches that were submitted in this area focus on the authentication of adults only.

Relative to certain other forms of technologies submitted, these approaches have been developed over a longer period of time and some have been in widespread commercial use in many fields. For instance, identity authentication is used today to facilitate commerce via the Internet in financial and medical services, e-commerce, and the sale of age-restricted products and services. Under Section 326 of the USA PATRIOT Act, certain financial institutions are required to implement a Customer Identification Program that includes verifying a customer's identity; the date of birth is listed as one of

the data points the financial institutions should gather. In addition, these technologies are used today to seek to ensure that those who purchase regulated items (such as alcohol or tobacco) or access adult-related content have a valid identity and are of a certain age.

However, these approaches are less effective in the child safety context – in other words, at creating safe environments for minors – than in the context of completing financial transactions or regulating purchases, especially to the extent that identity authentication and age verification focus solely upon adults. The reasons for this include the fact that in the commercial and financial contexts, an adult typically wants to verify his or her identity correctly in order to purchase a product or get access to records. Moreover, when adults purchase regulated items (such as alcohol or tobacco) online, in some cases a second form of age verification occurs when the item is delivered.

The identity authentication and age verification solutions that authenticate or verify only adults could be and are already sometimes used to reduce minors' access to adult-only sites. Because they do not authenticate or verify minors, however, they cannot be used to create environments for minors that require authentication or verification prior to access. To the extent that an adult nonetheless uses his or her own verifiable information when accessing an environment intended only for minors, these technologies could enhance the ability of Internet service providers and social network sites to exclude that adult. Of course, it seems unlikely that an adult with nefarious purposes would proceed in this manner. Thus, while these types of identity authentication and age verification technologies may be helpful for other purposes, they do not appear to offer substantial help in protecting minors from sexual solicitation.

Some of the technologies submitted would establish a system for authenticating the identity and/or age of minors as well as adults. Those technologies are intended to allow for the creation of environments intended only for minors for which authentication is required prior to access. Thus, adults – or some adults, such as registered sex offenders – could be excluded. Such a technology is more likely to allow for dedicated spaces online in which minors would theoretically have greater protection from sexual solicitation by adults than they would have elsewhere on the Internet, although concerns with that concept are noted below. The technologies that seek to authenticate minors' identities rely on verification by various means, including biometric devices, peer rating systems, and school-based authentication, each of which carries its own expense and challenges, as noted below.

Some Task Force members expressed a range of concerns – some of which also were noted by the RAB or TAB – with identity authentication and age verification technologies for both adults and minors. These concerns include:

- The authentication and verification technologies that validate login IDs or credentials for adult and/or minors could be subject to circumvention by users who trade or distribute IDs or credentials. Unlike in financial contexts, users in online social settings may have reduced incentives to maintain the confidentiality of login IDs and credentials, and members of the RAB report that sharing

credentials is common among young people. Moreover, there is a risk that the use of IDs or credentials could lead to a "black market" for them, in which (hypothetically) an adult could acquire a credential allowing them into an online area intended for minors.

- Technologies that seek to authenticate minors' identities relying on verification by biometric devices, peer rating systems, and school-based authentication all involve financial costs, especially if they must be implemented broadly to have an effect.

- Relying on schools to assist with the verification of minors would place a new burden on an educational system that is already unable to meet its goals based on current levels of funding, staffing, and support. In addition, federal and state laws restrict the ability of schools to provide certain personal information about minors to third parties, without requisite consent, which complicates school verification processes.

- Reliance on peer ratings for verifying minors, as the TAB noted in its report, could increase forms of bullying.

- Relying on parents and caregivers for verification presumes that all minors have healthy relationships with their parents and that parents are not themselves engaged in illicit activities. As discussed in the Literature Review, this is not always the case. Many children have unhealthy family dynamics and adults involved in crimes against children frequently have offline connections with minors. There is a risk that adults with nefarious purposes could register a minor in their charge and use that account to get access to a purportedly safe space where minors and their parents have relaxed their guard.

- The scope and effectiveness of some authentication and verification technologies may be limited in the context of the global Internet, with sites that welcome and encourage visitors from across the world to interact with one another. Many of the technologies are based on public records or social structures that are primarily found in the United States, and thus the technologies may not be able to verify or identify non-U.S. visitors to websites, including social network sites. This could lead to users leaving U.S. sites for less restrictive sites, or to users in the United States being isolated from the global discussion of issues of concern.
- The exclusion of all adults from a site by means of identity authentication and/or age verification technology would not eliminate many of the risks of sexual solicitation. None of these technologies account for the fact that minors usually choose to connect with adults, and indeed, many of the most popular online social sites are by design places where older minors and adults can communicate. In addition, sites that seek to exclude adults would not prevent the risk identified by the RAB that minors sexually solicit other minors.

- Not all interactions between adults and minors are unhealthy and potential solicitations. Many technologies do not account for the frequency with which minors interact with adult family members, teachers, and mentors online, or the frequency with which teenagers have friends who are over 18. Minors gain benefits by being able to engage in healthy and supportive interactions with adults, including known adults and adults who are participating alongside youth in communities of interest. In addition, excluding parents from a site could reduce their ability to monitor their children's use of the site, which could increase other problems, such as online harassment and bullying. Excluding teachers and other role models from sites could have unintended consequences for learning and development.

- To the extent that these technologies do allow "trusted adults" access to a site that otherwise was dedicated to minors, it is unclear how ~~a determ~~ination that an adult falls into that "trusted" category is to be made. Given the RAB's data that most sex crimes are committed by ~~family members or~~ offline acquaintances, including neighbors, friends' parents, leaders of youth organizations, and teachers, it seems unwise to allow all parents and caregivers access to sites intended only for minors. Moreover, lack of a criminal record or sex offender status is in no way an indication that the individual is in fact worthy of trust; many perpetrators simply have not been caught.

- There is a concern that some technology companies will sell information that they collect on minors to advertisers or otherwise target advertising to specific children or age groups. This concern is not limited to age verification and identity authentication technologies.

- The authentication and verification technologies submitted present privacy and security concerns, at least in theory.

b. Text Analysis, Individual Profiling, and Filtering and Monitoring Technologies

Other technologies that address the risk of sexual solicitation online include text analysis, individual profiling, and filtering and monitoring technologies.

Text analysis technologies are designed to detect predatory, bullying, or otherwise inappropriate conversations on the Internet. Text analysis has the potential to address many more of the risks involved in sexual solicitation, including solicitations between minors and those in which minors are active participants. The TAB has indicated that although these technologies are promising, the submissions received were at an early stage of development. No technology in this category appeared ready for widespread use. It is possible that parents could use some form of text analysis to assist in monitoring their child's interactions with others, but even that process contains a host of privacy- and security-related concerns that should be taken into account, especially when children are in unsafe households.

Individual profiling is a category of technology that endeavors to prevent certain categories of individuals, such as registered sex offenders, from gaining access to a given website or areas of a given website. This approach is an example of "selected exclusion," or disallowing access to those who meet certain criteria, rather than "selected admission," or admitting users based upon certain criteria (as in the case of identity authentication and age verification technologies). A selected exclusion approach, such as the removal of suspected registered sex offenders, can help to reduce unwanted contact between minors and sex offenders by limiting access to sites by the individuals who are profiled. This approach involves using identification mechanisms beyond the basic pedigree information that offenders will enter when registering for a site. As discussed previously, MySpace is presently working with one of the technologies submitted in this category.

As with other technologies, some Task Force members expressed concerns about limits to the effectiveness of such an approach:

- First, the database with information on a given individual must be accurate and the individual must seek to access the site using that information. It seems likely that at least some registered sex offenders and other individuals who are profiled would seek to circumvent this system if they had nefarious intentions.

- To the extent that a profiling technology focuses on registered sex offenders, it cannot prevent access to sites by individuals who prey on minors but have not yet been caught, convicted, and registered. In this way, the limitations of these technological approaches mirror the real world, as law enforcement officials cannot stop crimes that they do not know are being committed.

- This type of technology may not keep out those who have been removed from the site but sign up again using a different identity. Conversely, this approach may limit the access of those who have legitimate reasons to be on social network sites. Technology providers contend that they have developed effective means to reduce the incidence of both of these problems.

Despite these concerns, the Task Force heard praise for the continued promise of technology in finding and removing registered sex offenders from Internet sites.

The Joint Statement references a plan by MySpace to explore the establishment of email registries for children. The TAB received a few submissions with email registries for children as a component, one of which was withdrawn by the submitting company, and considered these in its assessment of age verification and identity authentication technologies. The Task Force did not focus extensively on this concept, but notes that there are a host of civil liberty, privacy, and safety concerns with collecting information on children for a registry of this sort.

To the extent that they prevent minors from accessing certain sites that are deemed less safe than others by parents or third parties, filtering and monitoring

identity not valid
and we are scared about making it 100%
└ National ID
ironic – they (middle america) might be most corrupt

technologies, sometimes referred to as "parental control" technologies, also may help reduce the risk of sexual solicitation involving younger children in particular. These technologies are discussed in greater detail below.

2. Online Harassment and Cyberbullying

Although the RAB has identified online harassment and cyberbullying as the most common risk that minors face, few technological solutions have been proposed to address these issues directly. Because so much of this activity takes place between minors who know one another, it is unclear that any of the technologies submitted to the Task Force presented would have a substantial impact in terms of reducing how often it occurs or its severity. The problem is further complicated by frequency of reciprocal harassment, blurring lines between victims and perpetrators, and the ways in which bullying moves between online and offline contexts and between different forms of social media.

Some Task Force members suggested that large-scale adoption of identity authentication for minors and adults alike, across all Internet services, could lead to more accountable behavior online, which in turn might result in less online harassment of minors. Even such a large-scale approach would not be foolproof, however. After all, young people who know each other bully one another face-to-face and, more often than not, victims of online bullying know who their harassers are.

Text analysis technologies also could address this problem by allowing for greater monitoring of communications between minors. As discussed earlier in this report and in greater detail in the TAB Report, these technologies carry many technological hurdles, as well as legal and privacy concerns. Additionally, many types of bullying cannot be detected through text, including those involving impersonation, password stealing, and the distribution of embarrassing images and video. Also, often the distinction between content that is part of social discourse and that which is harmful is context-dependent and technology is unlikely to be able to effectively recognize the "rumors" and "gossip" that make up the bulk of online harassment. At younger age-levels, monitoring features of parental control software could help provide parental insight and involvement into bullying situations. Text analysis may also be able to help psychologists and social workers address the problem.

3. Exposure to Problematic Content

As outlined by the RAB, problematic content raises two separate technical issues: (1) unwanted exposure by minors who are unwittingly exposed during otherwise innocuous activities; and (2) minors' ability to access content that they desire but that their parents do not want them to be able to access.

Filtering and monitoring technologies are perhaps the most mature of all of the technologies considered by the Task Force. These tools include the parental controls that are available through most Internet service providers. These tools can be and have been implemented by schools, libraries, and parents to limit minors' access to some categories

of problematic content. Filtering and monitoring technologies are a useful tool to assist parents and other responsible adults in determining their children's access to appropriate Internet content, particularly for younger children. They are, however, subject to circumvention by minors – especially older minors – who are often more computer-literate than their parents and who access the Internet increasingly from multiple devices and venues. Minors can circumvent these technologies most simply by using the Internet at friends' houses or in other places that do not use such technologies. Also, many handheld devices, such as gaming devices, have WiFi capabilities, and unsecured wireless networks can be accessed in the child's bedroom, backyard, or elsewhere, allowing for greater opportunity to bypass parental controls. Increasingly, minors are also learning how to use proxies to circumvent filters or to reformat their computers to remove parental controls. Home filters also cannot protect at-risk minors who live in unsafe households or do not have parents who are actively involved in their lives.

Filtering technologies are also limited in their scope. To date, most filtering technologies focus on sexual context and inappropriate language. Some fail to restrict access to violent content, hate content, and self-harm content. They also fail to address the rise of youth-generated problematic content distributed virally. Most filtering technologies do not yet address video- and image-centric content or content distributed over mobile phones.

Identity authentication tools that allow for the creation of adult-only environments from which minors are excluded can help to curb minors from accessing certain types of problematic content. That presupposes, however, that minors are not using verification information from their parents or other adults (or their own credit cards) to get into such an adult-only environment. Some identity authentication tools deploy interactive dynamic knowledge based authentication that makes misuse of parental information more difficult, but savvy teens can often answer these questions. Of course, these adult-only spaces are just one small part of the Internet as a whole, tend to cover only commercial adult content, and would not protect minors in any other context.

C. A Note on Technologies Not Submitted to the Task Force

The Task Force takes note of omissions from those technologies that it was presented with for review. A few areas deserve special mention.

First, there are many broad-based identity authentication technologies in development at universities, small companies, and large companies that might complement those specific technologies presented to the Task Force. Some of these authentication efforts are open source or based on open standards; others are proprietary. Examples of such identity technology efforts include OpenID, the Higgins project, and others described at http://informationcard.net and http://www.eclipse.org/higgins/.

Second, few submissions to the Task Force focused on technology tools that law enforcement officials – whether investigators, prosecutors, or computer forensics specialists – might use in their work. Of course, many such technologies are in use today.

The Task Force notes that innovation in this area could provide enormous benefits to online safety for minors, both in terms of deterrence and in bringing wrongdoers to justice and keeping them out of online and offline spaces where minors congregate.

Third, the TAB did not receive any submissions from technologies specifically intended to prevent access to child pornography. Because it is illegal throughout the United States even to possess images of children being sexually abused, the appropriate focus with child pornography is on preventing not just minors, but also adults, from accessing it. Use of the filtering and monitoring technologies discussed earlier could help protect some minors from access to child pornography, with the limitations already noted. As indicated in Part V above and in the submissions in Appendix E, some of the social network sites themselves are working on this problem. Under recent federal legislation, the National Center for Missing and Exploited Children may provide "elements relating to any apparent child pornography image of an identified child," including "hash values and other unique identifiers," to service providers, which may encourage greater development in this area. (18 U.S.C. § 2258C(a) (2008)).

Fourth, the TAB also did not receive any submissions from technologies specifically intended to prevent youth from creating and distributing sexual content of themselves or their peers. Finally, no submissions focused on tools that could help social services work to identify and protect at-risk minors.

Any subsequent review should take into account more of these efforts, which have not been explored in detail by this Task Force.

VII. Recommendations

The Task Force does not believe that the Attorneys General should endorse any one technology or set of technologies to protect minors online. While the Task Force understands the desire to find a solution and recognizes that technology plays a significant role in enhancing online safety, our review found too little evidence that any given technology or set of technologies, on their own, will improve safety for minors online to any significant degree. Moreover, the Internet itself, the ways in which minors use it, and the communities in which they participate all change constantly, and the available technologies are quickly evolving. The Task Force believes that the Attorneys General have played a key role in bringing national attention to the issue of online safety for minors, driving significant innovation and creativity in the area of child online safety. The Task Force is concerned that endorsement of any one technological approach would stifle future progress in this area.

The Task Force believes that the Attorneys General should continue to work collaboratively with all stakeholders to help enhance safety for minors online and reach out to some – like those involved in mental health and social services – who are not currently involved in helping find solutions to protect minors online. The Attorneys General are in a unique and important position to help guide efforts to help keep online communities safe for minors. Of course, any use of technology to enhance safety for

minors online must be in tandem with education, industry adoption of best practices, and the involvement of social services and law enforcement, in all of which the Attorneys General can play a crucial role. At the same time, the Task Force makes the following recommendations for the Internet community, recommendations regarding allocation of resources, and recommendations to parents.

A. Recommendations for the Internet Community

1. Members of the Internet community, including social network sites, should continue to develop and incorporate a range of technologies as part of their strategy to protect minors from harm online. They should consult closely with child safety experts, mental health experts, technologists, public policy advocates, law enforcement, and one another as they do so. But they should not overly rely upon any single technology or group of technologies as the primary solution to protecting minors online. Just as there is no single solution to protecting minors online, any technological approach must be appropriately tailored for the context in which it operates, given the wide range of services on the Internet. Parents, teachers, mentors, social services, law enforcement, and minors themselves all have crucial roles to play in ensuring online safety for all minors – and no one's responsibility to help solve the problem should be undervalued or abdicated.

2. Members of the Internet community, including social network sites, should continue to work together as well as with child safety experts, technologists, public policy advocates, social services, and law enforcement on the development and combination of the most innovative and promising technologies; setting standards for the use of technologies and the sharing of data, as needed; and identifying and promoting best practices on how to implement technologies as they emerge and as problems facing minors online evolve. In so doing, they should take into account what types of tools would be most effective for law enforcement and social services to use in enhancing the safety of minors online.

3. Prior to implementing any type of technology designed to address safety for minors online on a broad scale, the Internet community should carefully consider what the data show regarding the actual risks to minors' safety online and how best to address them, paying close attention to the most at-risk youth.

4. Prior to implementing any type of technology designed to address safety for minors online on a broad scale, the Internet community should carefully consider users' constitutional or other rights, including freedom of expression and access to information, as well as privacy and security concerns.

5. Prior to implementing any type of technology designed to address safety for minors online on a broad scale, structures should be put into place to measure the effectiveness of the technology at solving the existing problems and all such data and analysis should be consulted. No technology should be implemented without

a deep understanding of its effectiveness at addressing the risks minors face and understanding any unintended consequences presented by that technology.

6. As technologies designed to address safety for minors online develop, particular attention should be paid to ensuring the safety of at-risk youth, including those for whom positive parental involvement is not a given, those for whom cost is an issue, and those who are engaged in risky behaviors and may themselves contribute to the problem. Making sure that agencies, institutions and experts addressing at-risk youth are included in the discussion and evaluation of technological approaches is essential. For the same reasons, attention should be paid to ensuring that technologies are accessible to parents and caregivers with little or no experience in using technology and with limited understanding of the risks being addressed, and that non-English-speaking and functionally illiterate parents are given tools and guidance to address safety issues.

7. All technologies designed to address online safety for minors should take into consideration the international nature of the Internet. Any consideration of the Internet from an international perspective should take into account how other countries address online child safety and how cooperation can facilitate a safer international community.

B. Recommendations Regarding the Expenditure of Resources

1. To complement the use of technology, greater resources should be allocated to schools, libraries, and other community organizations to assist them in adopting their own risk management policies and for educating children, parents, and caregivers on issues relating to online safety.

2. To complement the use of technology, greater resources should be allocated to law enforcement for training and developing of technology tools to enhance law enforcement officers' computer forensic skills; to develop online undercover operations; and to enhance community policing efforts to educate minors, parents, and communities about youth online safety.

3. To complement the use of technology, greater resources should be allocated to help social services and mental health professionals who focus on minors and their families, including social workers and guidance counselors, to extend their practice and expertise to online spaces. Resources should also be provided to help these groups work with law enforcement and the Internet community to develop a unified approach for identifying at-risk youth and intervening before risky behavior results in danger.

4. To complement the use of technology, greater resources should be allocated for ongoing research into the precise nature of the risks facing minors online and how this shifts over time and is improved by interventions. As set forth in greater detail in the Literature Review appended to this report, there is a need in

particular for longitudinal studies that track minors across multiple domains. There is also a need for researchers and the public to gain a better understanding of the data that law enforcement officials are gathering through their work in the field. In order to allow for more systematic and thorough research, law enforcement should work with researchers and provide access, where possible, to data on offenders. One way to accomplish this goal would be to collaborate with the American Correctional Association to include questions about online activities in interviews of convicted sex offenders. In addition, data on the online practices of registered sex offenders should be maintained by technology companies and appropriately anonymized data should be made available for study where legally and technically possible.

C. Recommendations for Parents and Caregivers

1. Parents and caregivers should educate themselves about the Internet and the ways in which their children use it, as well as about technology in general. A list of resources is available at http://cyber.law.harvard.edu/research/isttf.

2. Parents and caregivers should explore and evaluate the effectiveness of available technological tools for their particular children and family context, and adopt those tools appropriately. The technologies submitted to this Task Force – especially the well-developed field of parental controls technologies – form the starting point for this exploration, guided by the evaluation begun by the Technology Advisory Board and the Task Force as a whole.

3. Parents and caregivers should be engaged and involved in the Internet use of their children, discussing it from an early age, setting appropriate limits and instilling good behavior from the start. Being attentive to early signs of harassment, both in terms of children as bullies and victims, is critical, especially because bullying tends to escalate over time.

4. Parents and caregivers should be conscious of the common risks that minors face and avoid focusing on rare or hypothetical dangers. Their strategies should center on helping their children understand and navigate the technologies and creating a safe context in which their children will turn to them when there are problems. Trust and open lines of communication are often the best tools for combating risks.

5. Parents and caregivers should be attentive to at-risk minors in their community and in their children's peer group, especially because youth frequently make their risky behaviors visible to their peers. Helping other at-risk minors get help and support benefits all online youth.

6. Parents and caregivers should recognize when they need to seek help from schools, mental health professionals, social services, law enforcement, and others regarding use of the Internet by their children.

VIII. Conclusion

The Internet Safety Technical Task Force is grateful to have had this opportunity to advance the understanding of the risks to online safety for minors and to assess how today's technologies can play a role in enhancing it. The Task Force thanks the Attorneys General for their leadership and the many volunteers who contributed their time, energy, and insight to this compressed review process. The Task Force concludes our work optimistic that collaboration and innovation in this field will continue in ways that will directly benefit of the safety of children.

APPENDIX A:

Joint Statement on Key Principles of Social Networking Safety

Parents can submit emails to ban list

DoS attack

Roy Cooper
North Carolina Attorney General

For Immediate Release
Date: January 14, 2008

Contact: Noelle Talley
Phone: 919/716-6413

AG Cooper announces landmark agreement to protect kids online

Cooper led effort to forge national agreement with MySpace to make social networks safer

New York: In a victory for social networking safety, Attorney General Roy Cooper and 49 other attorneys general today announced that MySpace has agreed to significant steps to better protect children on its web site, including creating a task force to explore and develop age and identity verification technology.

"We're joining forces to find the most effective ways to keep young children off these sites and to protect the kids who do use them," said Cooper. "This agreement sets a new standard for social networking sites that have been quick to grow but slow to recognize their responsibility to keep kids safe."

MySpace acknowledged in the agreement the important role of age and identity verification technology in social networking safety and agreed to find and develop on-line identity authentication tools. Cooper and the other attorneys general advocate age and identity verification, calling it vital to better protecting children using social networking sites from online sexual predators and inappropriate material.

Other specific changes and policies that MySpace agreed to develop include: allowing parents to submit their children's email addresses so MySpace can prevent anyone using those email addresses from setting up profiles, making the default setting "private" for profiles of 16- and 17-year-olds, promising to respond within 72 hours to inappropriate content complaints and committing more staff and/or resources to review and classify photographs and discussion groups.

Cooper commended MySpace for its willingness to make its site safer, calling it an industry leader and urging other social networks to adopt the safety principles in today's agreement.

The agreement culminates nearly two years of discussions between MySpace and the Attorneys General. The Attorneys General were led by North Carolina Attorney General Roy Cooper and Connecticut Attorney General Richard Blumenthal, co-chairmen of the multistate group's Executive Committee consisting of Connecticut, North Carolina, Georgia, Idaho, Massachusetts, Mississippi, New Hampshire, Ohio, Pennsylvania, Virginia and the District of Columbia. Attorneys General from 49 states and the District of Columbia signed the agreement.

Under the agreement, MySpace, with support from the attorneys general, will create and lead an Internet Safety Technical Task Force to explore and develop age and identity verification tools for social networking web sites. MySpace will invite other social networking sites, age and identify verification experts, child protection groups and technology companies to participate in the task force.

The task force will report back to the attorneys general every three months and issue a formal report with findings and recommendations at the end of 2008.
MySpace also will hire a contractor to compile a registry of email addresses provided by parents who want to restrict their child's access to the site. MySpace will bar anyone using a submitted email address from signing in or creating a profile.

MySpace also agreed to work to:

- Strengthen software identifying underage users;
- Retain a contractor to better identify and expunge inappropriate images;
- Obtain and constantly update a list of pornographic web sites and regularly sever any links between them and MySpace;
- Implement changes making it harder for adults to contact children;
- Dedicate meaningful resources to educating children and parents about on-line safety;
- Provide a way to report abuse on every page that contains content, consider adopting a common mechanism to report abuse, and respond quickly to abuse reports;
- Create a closed "high school" section for users under 18.

"This agreement tackles some of the most risky elements of social networking, but we must do even more to keep kids safe online," said Cooper. "We'll keep pushing to find child predators and put them behind bars, and well keep urging parents to pay attention to what their kids are doing on the computer."

###

JOINT STATEMENT ON KEY PRINCIPLES OF SOCIAL NETWORKING SITES SAFETY

MySpace and the Attorneys General have discussed social networking sites safety measures with great vigor over several months. MySpace and the Attorneys General agree that social networking sites are a powerful communications tool that provides people with great social benefits. However, like all communication tools, social networking sites can be misused as a means to commit crimes against minors and can allow minors to gain access to content that may be inappropriate for them.

MySpace and the Attorneys General recognize that millions of minors across the world access the Internet each day, and that many of these minors create social networking profiles on MySpace and other social networking sites. Based on recommendations MySpace received from the Attorneys General and online safety advocates, and as a result of its internal safety and engineering teams, MySpace has implemented technologies and procedures to help prevent children under 14 from using MySpace and to help protect minors age 14 and above from exposure to inappropriate content and unwanted contact by adults. The Attorneys General commend MySpace for its efforts to address these issues. They also call upon other social networking services to adopt these principles.

MySpace and the Attorneys General agree that additional ways to protect children should be developed. This effort is important as a policy matter and as a business matter.

PRINCIPLE: Providing children with a safer social networking experience is a primary objective for operators of social networking sites.

I. ONLINE ~~SAFETY~~ TOOLS

PRINCIPLE: Technology and other tools that empower parents, educators and children are a necessary element of a safer online experience for children.

PRINCIPLE: Online safety tools, including online identity authentication technologies, are important and must be robust and effective in creating a safer online experience, and must meet the particular needs of individual Web sites.

- MySpace will organize, with support of the Attorneys General, an industry-wide Internet Safety Technical Task Force ("Task Force") devoted to finding and developing such online safety tools with a focus on finding and developing online identity authentication tools. This Task Force will include Internet businesses, identity authentication experts, non-profit organizations, and technology companies.

- The Task Force will establish specific and objective criteria that will be utilized to evaluate existing and new technology safety solutions.

- MySpace and other members of the Task Force will provide adequate resources to ensure that all reasonable efforts are made to explore and develop identity authentication technologies.

- News Corporation will designate a senior executive to work with the Task Force.

- The Task Force will provide the Executive Committee of the Attorneys General Social Networking Working Group ("Executive Committee") with quarterly reports of its efforts and presentation of a formal report by the end of 2008. The Executive Committee will have continuing access to the Task Force and the designated senior executive of News Corporation.

II. DESIGN AND FUNCTIONALITY CHANGES

PRINCIPLE: Development of effective Web site design and functionality improvements to protect children from inappropriate adult contacts and content must be an ongoing effort.

- MySpace and the Attorneys General share the goal of designing and implementing technologies and features that will make MySpace safer for its users, particularly minors. More specifically, their shared goals include designing and implementing technologies and features that will (1) prevent underage users from accessing the site; (2) protect minors from inappropriate contact; (3) protect minors from inappropriate content; and (4) provide safety tools for all MySpace users.

- The Attorneys General acknowledge that MySpace is seeking to address these goals by (1) implementing the design and functionality initiatives described in Appendix A; and (2) working to implement the design and functionality initiatives described in Appendix B.

- MySpace and the Attorneys General will meet on a regular basis to discuss in good faith design and functionality improvements relevant to protecting minors using the Web site.

III. EDUCATION AND TOOLS FOR PARENTS, EDUCATORS, AND CHILDREN

PRINCIPLE: Educating parents, educators and children about safe and responsible social networking site use is also a necessary part of a safe Internet experience for children.

- MySpace will continue to dedicate meaningful resources to convey information to help parents and educators protect children and help younger users enjoy a safer experience on MySpace. These efforts will include MySpace's plan to engage in public service announcements, develop free parental monitoring software, and explore the establishment of a children's email registry.

- MySpace shall use its best efforts to acknowledge consumer reports or complaints received via its abuse reporting mechanisms within 24 hours of receiving such report or complaint. Within 72 hours of receiving a complaint or report from a consumer regarding inappropriate content or activity on the site, MySpace will report to the consumer the steps it has taken to address the complaint.

- For a two (2) year period MySpace shall retain an Independent Examiner, at MySpace's expense, who shall be approved by the Executive Committee. The Independent Examiner shall evaluate and examine MySpace's handling of these consumer complaints and shall prepare bi-annual reports to the Executive Committee concerning MySpace's consumer complaint handling and response procedures, as provided above.

IV. LAW ENFORCEMENT COOPERATION

PRINCIPLE: Social networking site operators and law enforcement officials must work together to deter and prosecute criminals misusing the Internet.

- MySpace and the Attorneys General will work together to support initiatives that will enhance the ability of law enforcement officials to investigate and prosecute Internet crimes.

- MySpace and the Attorneys General will continue to work together to make sure that law enforcement officials can act quickly to investigate and prosecute criminal conduct identified on MySpace.

- MySpace has established a 24-hour hotline to respond to law enforcement inquiries. In addition, News Corporation will assign a liaison to address complaints about MySpace received from the Attorneys General. MySpace will provide a report on the status of its response to any such complaint within 72 hours of receipt by the liaison.

Agreed to and accepted on January 14th, 2008:

Mike Angus
EVP, General Counsel, Fox Interactive Media

Richard Blumenthal
Attorney General of Connecticut

Peter Nickles
Interim Attorney General of D.C.

Lawrence Wasden
Attorney General of Idaho

Jim Hood
Attorney General of Mississippi

Marc Dann
Attorney General of Ohio

Robert McDonnell
Attorney General of Virginia

Roy Cooper
Attorney General of North Carolina

Thurbert E. Baker
Attorney General of Georgia

Martha Coakley
Attorney General of Massachusetts

Kelly Ayotte
Attorney General of New Hampshire

Tom Corbett
Attorney General of Pennsylvania

Troy King
Attorney General of Alabama

Talis Colberg
Attorney General of Alaska

Dustin McDaniel
Attorney General of Arkansas

Joseph R. Biden III
Attorney General of Delaware

Mark J. Bennett
Attorney General of Hawaii

Stephen Carter
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Paul Morrison
Attorney General of Kansas

Charles C. Foti, Jr.
Attorney General of Louisiana

Douglas Gansler
Attorney General of Maryland

Lori Swanson
Attorney General of Minnesota

Terry Goddard
Attorney General of Arizona

John Suthers
Attorney General of Colorado

Bill McCollum
Attorney General of Florida

Lisa Madigan
Attorney General of Illinois

Tom Miller
Attorney General of Iowa

Jack Conway
Attorney General of Kentucky

G. Steven Rowe
Attorney General of Maine

Michael A. Cox
Attorney General of Michigan

Jeremiah W. Nixon
Attorney General of Missouri

13. Personally identifiable information removed upon discovery.

14. Users under 18 cannot browse for swingers.

15. MySpace will not allow unregistered visitors to the site to view any search results related to mature areas of the site, profiles that are private to under 18s, or other groups and forums geared toward sexual activity and mature content.

16. MySpace will change the default for under 18 members to require approval for all profile comments.

17. MySpace will remove the ability for under 18 members to browse the following categories: relationship status, "here for", body type, height, smoke, drink, orientation and income.

18. If users under 16 override their privacy settings, they are still only viewable by other users under 18.

19. When user posts images, they will receive a note including IP address of the computer that uploaded the image.

20. Add sender URL in mail for private messages.

21. Locate underage users (searching specific keywords, reviewing groups and forums, and browsing certain age ranges).

22. Profiles of Registered Sex Offenders identified through Sentinel SAFE technology are reviewed and, once confirmed, are removed from the site. The associated data are preserved for law enforcement.

Protecting Younger Users from Inappropriate Content

1. Implementation of image policy for hosted images that employs hashing technology to prevent inappropriate image uploads.

2. Expand flag spam/abuse to allow categorization of flagged message.

3. Expand "Report Image" functionality to include a drop down menu that provides members with greater specificity on why they are reporting image. Categories to include Pornography, Cyberbullying, and Unauthorized Use.

4. Under 18s/under 21s cannot access tobacco/alcohol advertisements.

5. MySpace and Attorneys General commit to discuss with Google the need to cease directing age inappropriate linked advertisements to minors.

6. Events may be designated for all ages, for 18 + or for 21+.

7. MySpace will notify users whose profiles are deleted for Terms of Service Violations.

8. Groups reviewed for incest, hate speech or youth sex subjects with violators removed from site.

9. Members determined to be under 18 to be removed from mature Groups.

10. Posts determined to be made to mature Groups by under 18 members to be removed.

11. Any mature Groups determined to be created by under 18 members will be removed entirely and the user accounts may be deleted for violating the Terms of Service.

12. Users under 18 to be denied access to Romance & Relationships Forum and Groups.

13. Users under 18 will not have access to inappropriate parts of Classifieds (dating, casting calls).

14. Members may request to label Groups they create as mature.

15. Flagged Groups are reviewed and categorized by MySpace staff.

16. Members under 18 and non-registered users may not enter or view a Group page that has been designated as mature.

17. MySpace hired a Safety Product Manager.

18. Smoking/Drinking preferences blocked for under 18s/under 21s.

19. User accounts promptly deleted for uploading child pornographic images and/or videos and referred to NCMEC.

20. MySpace does not tolerate pornography on its site, and users determined to have uploaded pornographic images and/or videos flagrantly and/or repeatedly will have their accounts deleted.

Providing Safety Tools For All Members

1. All users may set profile to private.

2. All users can pre-approve all comments before being posted.

Mike McGrath
Attorney General of Montana

Catherine Cortez Masto
Attorney General of Nevada

Gary King
Attorney General of New Mexico

Wayne Stenehjem
Attorney General of North Dakota

Hardy Myers
Attorney General of Oregon

Henry McMaster
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Darrell V. McGraw, Jr.
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Bruce Salzburg
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Jon Bruning
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W.A. Drew Edmondson
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Patrick C. Lynch
Attorney General of Rhode Island

Lawrence E. Long
Attorney General of South Dakota

Mark L. Shurtleff
Attorney General of Utah

Rob McKenna
Attorney General of Washington

J.B. Van Hollen
Attorney General of Wisconsin

So 2008

APPENDIX A: DESIGN AND FUNCTIONALITY CHANGES

Preventing Underage Users

1. Browse function - limit to 68 years and below.

2. MySpace will implement "age locking" for existing profiles such that members will be allowed to change their ages only once above or below the 18 year old threshold. Once changed across this threshold, under 18 members will be locked into the age they provided while 18 and older members will be able to make changes to their age as long as they remain above the 18 threshold. MySpace will implement "age locking" for new profiles such that under 18 members will be locked into the age they provide at sign-up while 18 and older members will be able to make changes to their age as long as they remain above the 18 threshold.

Protecting Younger Users from Inappropriate Contact

1. Users able to restrict friend requests to only those who know their email address or last name.

2. "Friend only" group invite mandatory for 14 and 15 year olds.

3. "Friend only" group invite by default for 16 and 17 years olds.

4. Users under 18 can block all users over 18 from contacting them or viewing their profile.

5. Users over 18 will be limited to search in the school section only for high school students graduating in the current or upcoming year.

6. Users over 18 may designate their profiles as private to users under 18, and users under 18 may designate their profiles as private to users over 18.

7. Limit search engine ability to crawl all private profiles.

8. Users under 18 cannot designate themselves as swingers.

9. Users under 16 are automatically assigned a private profile.

10. Users over 18 cannot browse for users under 18.

11. A user cannot browse for users under 16.

12. Users over 18 cannot add users under 16 as friends unless they know the under 16 user's last name or email address.

3. Users can block another user from contacting them.

4. Users can conceal their "online now" status.

5. Users can prevent forwarding of their images to other sites.

6. MySpace adds "Report Abuse" button to Email, Video, and Forums.

7. Users over 18 can block under 18 users from contacting them or viewing their profiles.

8. All users can allow only those users whom they have proactively added to their Contact List to see when they are on IM and to contact them.

9. "Safety Tips" Available on every page of MySpace.

10. "Safety Tips" Appear on registration page for anyone under 18.

11. Users under 18 must affirmatively consent that user has reviewed the Safety Tips prior to registration. MySpace will require under 18 members to scroll through the complete Safety Tips upon registration. MySpace will also require under 18 members to review the Safety Tips on an annual basis.

12. Additional warning posted to users under 18 regarding disclosure of personal information upon registration.

13. Safety Tips are posted in the "mail" area of all existing users under 18.

14. Safety Tips contain resources for Internet Safety including FTC Tips.

15. Phishing warning added to Safety Tips.

16. Safety Tips for Parents provides links to free blocking software.

17. Parent able to remove child's profile through the ParentCare Hotline and ParentCare Email.

18. MySpace will have "Tom" become a messenger to deliver Safety Tips to minors on MySpace.

19. All users under 18 receive security warnings before posting content.

APPENDIX B: DESIGN AND FUNCTIONALITY INITIATIVES

MySpace will continue to research and develop online safety tools. Based on recommendations MySpace received from the Attorneys General and online safety advocates, and as a result of the work of its internal safety and engineering teams, MySpace's current plans include the following initiatives:

Limiting MySpace Membership to Users 14 and Over

1. Engage a third-party to build and host a registry of email addresses for children under 18. Parents would register their children if they did not want them to have access to MySpace or any other social networking site that uses the registry. A child whose information matches the registry would not be able to register for MySpace membership.

2. Strengthen the algorithm that identifies underage users.

Protecting Minors from Unwanted Contacts by Adults

1. Change the default setting for 16-17 year olds' profiles from "public" to "private."

2. Create a closed high school section for users under 18. The "private" profile of a 16/17 year old will be viewable only by his/her "friends" and other students from that high school who have been vouched for by another such student. Students attending the same high school will be able to "Browse" for each other.

Protecting Minors from Exposure to Inappropriate Content

1. MySpace will review models for a common abuse reporting icon (including the New Jersey Attorney General's "Report Abuse" icon). If MySpace determines that a common icon is workable and will improve user safety, it may substitute the common icon for the current report abuse icon MySpace places on each member profile.

2. Obtain a list of adult (porn) Web sites on an ongoing basis and sever all links to those sites from MySpace.

3. Demand that adult entertainment industry performers set their profiles to block access to all under 18 users.

4. Remove all under 18 users from profiles of identified adult entertainment industry performers.

5. Retain image review vendor(s) that can effectively and efficiently identify inappropriate content so it can be removed from the site more expeditiously.

6. Investigate the use of an additional image review vendor to provide automated analysis of images to help prioritize images for human review.

7. MySpace will (1) develop and/or use existing technology such as textual searching; and (2) provide increased staffing, if appropriate, in order to more efficiently and effectively review and categorize content in "Groups." MySpace will update the Attorneys General concerning its efforts to develop and/or use textual searching on a quarterly basis. Upon implementation of textual searching, the Attorneys General will review its efficacy with respect to "Groups" for a period of 18 months.

APPENDIX B:

Task Force Project Plan

Internet Safety Technical Task Force Project Plan
June 27, 2008

I. Background.

The Internet Safety Technical Task Force has been convened in response to a joint statement between MySpace and 49 State Attorneys General. The agreement, announced on January 14, 2008, reads, in part:

> "MySpace will organize, with support of the Attorneys General, an industry-wide Internet Safety Technical Task Force ("Task Force") devoted to finding … online safety tools with a focus on finding ... online identity authentication tools. This Task Force will include Internet businesses, identity authentication experts, non-profit organizations, and technology companies. … The Task Force will establish specific and objective criteria that will be utilized to evaluate existing and new technology safety solutions."

II. Scope.

The scope of the Task Force's inquiry is to consider those technologies that industry and end users can use to keep children safe on the Internet. The problems that the Task Force is working on are large and complex; their boundaries are hard to define. The key questions that we seek to answer are:

1. Are there technologies that can limit harmful contact between children and other people?

2. Are there technologies that can limit the ability of children to access and produce inappropriate and/or illegal content online?

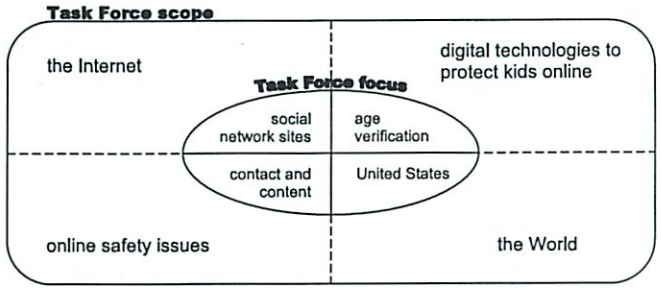
3. Are there technologies that can be used to empower parents to have more control over and information about the services their children use online?

Within each of these broad topic areas, the Task Force will seek to determine the most pressing aspects of the problem and, in turn, which technologies are most likely to help companies, parents, children, and others in addressing those aspects. The inquiry will address all minors (i.e., people under the age of 18), but the Task Force will seek where possible to tailor its recommendations to more refined subsets in age.

The Task Force is chartered specifically to assess age verification technology as a means to reduce the harmful contact and content experienced by children using social network sites in the United States. Popular media have highlighted privacy and safety concerns that arise when children use social network sites[1], but the nature of the danger

[1] danah m. boyd and Nicole. B. Ellison, Social Network Sites: Definition, History, and Scholarship, *Journal of Computer-Mediated Communication*, *13*(1), article 11, 2007, http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html.

to children remains the topic of ongoing research that places the problem in a broader social, technological, and geographical context. Recognizing this broader setting, the Task Force has the flexibility to consider harmful contact and harmful content in the context of online safety issues in general. Likewise, while focusing on harms that occur in social network sites, the Task Force will not ignore the broader environment of the Internet as a whole. Age verification technology will be assessed in the context of other digital technologies that protect children online. Finally, the Task Force will consider the problem of child safety on the Internet in an international context, with emphasis on issues arising in the United States.



The Task Force acknowledges that, given limited time and resources, its work will represent a series of next steps, but not final answers, to each of these problems. The Task Force acknowledges also that while we can list a number of problems, not every aspect of the problems of child safety online can be addressed in full during this process. The Task Force notes that much work has been done in these areas and every effort will be made to build off of previous efforts.

In assessing and describing the possible technical solutions, the Task Force will take into account the feasibility and cost of technology solutions. In the final report, the Task Force will place these technological approaches into a context that also includes related public policy issues. The final report will also include "specific and objective criteria that will be utilized to evaluate existing and new technology safety solutions," as set forth in the joint statement.

III. Structure.

The Task Force is comprised of those companies, NGOs, and academic groups that have agreed to join at MySpace's invitation. The Task Force is directed by John Palfrey, danah boyd, and Dena Sacco, all of the Berkman Center for Internet & Society. The work of the Task Force will be supported by a Research Advisory Board and a Technical Advisory

Board. The purpose of these supporting advisory boards is to enable the Task Force to accept input from experts on these topics who are not members of the Task Force. The Task Force will also include informal subcommittees comprised of Task Force members with a particular interest or expertise in the three issue areas.

The Research Advisory Board (RAB) will be chaired by the Berkman Center's danah boyd and will be comprised of scholars, professional researchers, and organizations investigating online safety-related issues through large scale data collection. Examples of this group include the UNH Crimes Against Children Research Center, Michele Ybarra, and the Pew and the Internet and American Life Project. The RAB will work with scholars to assess existing threats to youth online safety to determine which are the most common, which are the most harmful, and which potentially can be addressed by technological solutions. It will aggregate what is known about the state of child safety online and the effectiveness of different legal, technological, and educational approaches to addressing it. It will take into account the existing research in these areas, as well as evaluate what additional research would be most helpful. Ultimately, the Board will produce a report for the Task Force that describes the state of the research. Pending funding, the Board will recommend that the Task Force commission additional research as appropriate. Both the report and any future research proposals will be presented to the Task Force and be referenced in the Task Force's final report. Additionally, both will be made publicly available.

The Technical Advisory Board will be chaired by Laura DeBonis and will focus on the range of possible technological solutions to the problems of youth online safety, including identity authentication tools, filtering, monitoring, and scanning and searching. The Technical Advisory Board (TAB) will consider the potential solutions introduced by the Task Force, those that emerge through the Research Advisory Board, and those introduced by the public. It will develop technical criteria for assessing the various solutions. The TAB will reach out to a range of technologists who understand and can evaluate the different available technological approaches to online safety. The Board will accept proposals from a wide variety of vendors and will write a report for the Task Force addressing the different potential solutions. As with the Research Advisory Board, the Berkman Center will convene this ad hoc group prior to the June 20 meeting in Cambridge. It will be comprised of financially disinterested parties who are open to technological solutions to the Internet Safety concerns facing children.

Task Force members are each encouraged to join a subcommittee of the Task Force organized around each of the three key questions under consideration. Each of these subcommittees will be empowered to determine the most pressing issues within each issue area, to assess previous work in each of these areas, to come up with lists of technologies and research to be considered by others, and to propose topics to the Berkman Center team for the final report. The Berkman Center will support conference calls or other means of subcommittee self-organization.

IV. Systems.

A. Reports.

As set forth in the January, 2008 Agreement between the Attorneys General and MySpace, the Task Force owes quarterly reports to the Attorneys General, as well as a Final

Report on December 31, 2008. The Berkman Center will draft the reports. The first quarterly report was submitted to the Attorneys General in April. The reports will be circulated to Task Force members in advance of sending them to the Attorneys General for comment. The Berkman Center team will consider all comments from Task Force members.

B. Meetings.

To undertake its work, the Task Force as a whole will hold a series of day-long meetings. Four of the meetings will be open only to Task Force members and those the Task Force invites to make presentations and/or to observe. Each meeting will involve a segment that is open for the public to participate. We will publish minutes from each Task Force meeting on the web. The meetings will take place on the following dates:

March 12, 2008 (organizational meeting, in Washington, DC)
April 30, 2008 (first full meeting, in Washington, DC)
June 20, 2008 (second full meeting, in Cambridge, MA)
September 23, 2008 (public session in Cambridge, MA)
September 24, 2008 (third full meeting, in Cambridge, MA)
November 19, 2008 (fourth full meeting, in Washington, DC)

The open public meeting on September 24, 2008 is intended to provide a forum for all interested parties to present their views. The Berkman Center will solicit short written submissions from those who intend to attend the open meeting, in order to better keep track of attendees and their input, and will make those submissions available on the Task Force's public web site.

Both the Research Advisory Board and the Technological Advisory Board will likely hold a few conference calls as needed to facilitate their work. They will report their progress to the Task Force formally at the meetings and informally as appropriate.

The Task Force may convene an additional meeting or calls to review technologies and the draft report close to the end of the calendar year.

C. Website and Online Workspace.

The Task Force has a public-facing website that includes a description of the Task Force, contact information for the Berkman Center team, and an FAQ section. The Berkman Center has created a private Listserv for the Task Force as a whole and will do so for each of the Advisory Boards. Postings to the Task Force's listserv are considered off the record and are not to be forwarded to those not on the list.

V. Communications.

The Berkman Center will act as primary contact for the Task Force, both for press inquiries and for requests for involvement by interested parties. Task Force Members are welcome to forward press inquiries to the Berkman Center as appropriate. We ask that you copy all requests from interested parties seeking involvement in the work of the Task Force to us, so that we can act as a central clearinghouse for these requests and so that interested parties are not left out of invitations to participate.