

1995

Censorship on the Internet: Do Obscene or Pornographic Materials Have a Protected Status?

Paula Franzese
Seton Hall University School of Law

J. Robert Flores
United States Department of Justice, Criminal Division

Peter D. Kennedy
George, Donaldson & Ford

Robert T. Perry
Columbia University

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Paula Franzese, J. Robert Flores, Peter D. Kennedy, and Robert T. Perry, *Censorship on the Internet: Do Obscene or Pornographic Materials Have a Protected Status?*, 5 Fordham Intell. Prop. Media & Ent. L.J. 279 (1995).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol5/iss2/2>

This Transcript is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Panel II: Censorship On The Internet: Do Obscene Or Pornographic Materials Have A Protected Status?

Moderator: Paula Franzese, Esq.^a

Panelists: Dave Browde^b

J. Robert Flores, Esq.^c

Peter Drew Kennedy, Esq.^d

Police Officer Kevin Mannion^e

Robert T. Perry, Esq.^f

PROF. FRANZESE: Good morning, and thank you for staying with us. My name is Paula Franzese, and I am a Professor of Law at Seton Hall Law School. This year I am teaching at Fordham Law School. I am delighted to be moderating this panel.

Some say that it was bound to happen: "libidinous exchanges heating up bulletin board services, raunchy ads in the back pages of major computer magazines touting digitized scans and strip tease, quicktime movies, risqué demos at computer trade shows attracting hoards of oglers,"¹ and a slew of erotic and pornographic

a. Professor of Law, Seton Hall University School of Law, Newark, New Jersey; Barnard College, B.A. (*summa cum laude*, Phi Beta Kappa); Columbia University, J.D.

b. Reporter, National Broadcasting Company, New York, N.Y.; Cornell University, B.A.

c. Deputy Chief, United States Department of Justice, Criminal Division, Washington, D.C.

d. Senior Associate, George, Donaldson & Ford, L.L.P., Austin, Tx.; Southwestern University, B.A., 1985; University of Chicago School of Law, J.D. 1988.

e. Manhattan South Vice Enforcement Squad, New York City Police Department, New York, NY.

f. New York, NY; Brown University, Sc.B.-A.B., 1969, M.S. 1971; Columbia University, J.D. 1974.

1. S. Stefanac, *Sex and the New Media*, THE RECORDER, Sept. 8, 1993 at 8. See also Laura Evenson, *Interactive CD-ROMs Come of Age*, S.F. CHRON., Dec. 25, 1994, at 36; Andy Marx, *Will H'wood Rise to Challenge Posed by Adult Media?*, VARIETY, Sept. 12, 1994, at 33; Dean Takahashi, *Sex Play in Cyberspace: O.C. Firm's CD-ROMs Are*

CD-ROMs. Computers, for that matter, have replaced magazines and video tapes as the primary means of disseminating matters pertaining to child pornography.² In short, I guess it is fair to say that "multimedia's sleaze has arrived."³

Many worry about the treatment of women, certainly about sexual harassment, on the Internet. Others invoke concern about the eroding of family values. Still others, parents in particular, worry that their children can too easily gain ready access to this material. Calls for content labeling and even for outright censorship have prompted a host of First Amendment and First Amendment value-related concerns.⁴

Last Saturday's *New York Times* reported the plight of the University of Michigan student who was charged and actually jailed after publishing a sexually violent story on the Internet, a story that used a classmate's name.⁵ The sophomore was arrested by the FBI, and charged with the federal crime of transporting threatening materials across state lines.⁶ If convicted, he faces five years in prison.⁷ The story was discovered and reported by a University of Michigan alumnus who was on line while vacationing abroad.

This is only the latest in a series of cases in which law enforcement authorities in this country, as well as abroad, have tried to apply existing laws to this new domain, this cyberspace.⁸

2. For a general discussion see John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 989-99 (1994). See generally Fran Ellers, *KSU Teacher Out on Bond: Case Part of Florida Child Porn Sting*, COURIER-JOURNAL (Louisville, Ky.), Nov. 22, 1994, at 2B; P.L. Wyckoff, *Computer Specialist Guilty of Child Porn*, STAR-LEDGER (Newark, N.J.), Dec. 20, 1994, at 29.

3. See Stefanac, *supra* note 1, at 8.

4. See, e.g., David B. Johnson, Comment, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311 (1994); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

5. Peter H. Lewis, *Writer Arrested After Sending Violent Fiction Over Internet*, N.Y. TIMES, Feb. 11, 1995 at 10.

6. *Id.*

7. *Id.*

8. See generally David Landis, *Sex, Laws & Cyberspace / Regulating Porn: Does it Compute?*, USA TODAY, Aug. 9, 1994, at 1D; Gina Boubion, *Porn Goes High-Tech on Computer Networks; But Prosecuting Obscenity Offenders Is Difficult*, ARIZ. REPUBLIC,

The network has been referred to by many as the "Wild West."⁹ There is a certain lawlessness out there. Tens of millions of users are on-line every day. Certain self-governance patterns have emerged of late.¹⁰ One particular on-line service reveals the words, "You own your own words," as you log on, and attempts to disclaim any liability for the content and possible offensiveness of those messages.¹¹

One question that confronts this morning's panel is: Are commercial on-line service providers merely passive conduits of information with little liability, or alternatively, are they more akin to traditional publishers of information, such as newspapers and broadcasters? Further, who should be the arbiter of whether certain transmissions fit the legal definition of obscenity: who decides in this global context and international field?

In this country, state and federal regulations use relevant "community standards" to determine whether or not certain information is obscene.¹² However, if the community standards context is used, transmissions often considered less than offensive in the transmitting community could indeed constitute a violation in the receiving community. Which forum's laws govern, and which sovereign ultimately rules?¹³

What is the U.S. government's authority to prohibit foreign transmissions of indecent or obscene matters into the U.S. from abroad? Is electronic media to be relegated to a lesser place in the

Mar. 12, 1994, at A11.

9. See *Law in Cyberspace*, LEGAL TIMES, Jan. 23, 1995, at 527. See also *Internet Users Beware: Criminals Lurking in Wild West Atmosphere*, ATLANTA CONST., Feb. 19, 1995, at H8; Robert E. Calem, *Business Taps Internet as Wild West of 90s*, CRAIN'S N.Y. BUS., Oct. 10, 1994, at 26.

10. Peter H. Lewis, *Anarchy, a Threat on the Electronic Frontier?*, N.Y. TIMES, May 11, 1994, at D3.

11. See Tamar Lewin, *Ideas & Trends: If Flames Singe, Who Is to Blame?*, N.Y. TIMES, Sept. 25, 1994, § 4 (Week in Review), at 3.

12. See *Miller v. California*, 413 U.S. 15, 24-25 (1973); see also Scheller, *supra* note 2, at 991-92.

13. See, e.g., Mary C. Mertz Parnell, Note, *Applying Community Standards to International Direct Broadcasting Satellites: Can the United States Know Obscenity Without Seeing It?*, 17 SUFFOLK TRANSNAT'L L.REV. 473 (1994).

strata or hierarchy of First Amendment values, mindful that in traditional First Amendment jurisprudence print media has always reigned supreme?¹⁴ Is the fact that transmissions are taking place over an electronic, interactive network grounds for suggesting that the message, the content itself is subject, somehow, to a lesser standard of First Amendment protection? These and a number of other questions await us.

It is my pleasure to introduce the very distinguished panel, who will help us make sense of all of this. First, to my far right is Peter Kennedy. Pete is a practitioner with the Austin, Texas law firm of George, Donaldson & Ford. He is a trial lawyer who specializes in media defense and also computer communications.

Seated next to Pete is Dave Browde, whom I just met, but whose work in the broadcast medium I have admired for years. He is with NBC and it is a pleasure to have him here.

Police Officer Kevin Mannion is with the New York City Police Department Vice Squad. The Department is basically just starting on computer porn. They investigate cases of prostitution, pornography and pedophilia related offenses.

To my far left is Mr. Robert Perry. Robert is a communications and free speech lawyer. He is a practitioner as well as a professor at NYU. He was one of the key players in the recent 2-Live Crew obscenity litigation.¹⁵ He is also a frequent contributor to the *New York Law Journal*.

And, finally, to my immediate left is Mr. Robert Flores. Bob is the Acting Deputy Chief of the Child Exploitation and Obscenity Section for the Department of Justice in Washington. He oversees the federal response to the sexual exploitation of children.

Why don't we begin them with Mr. Kennedy.

14. See, e.g., *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367, 386 (1969).

15. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd sub nom. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.), *cert. denied*, 113 S. Ct. 659 (1992).

MR. KENNEDY: Good morning. I would like to thank the *Journal* for inviting me down here. I practice law in Austin, Texas, with a small boutique litigation firm called George, Donaldson & Ford. For years the firm has done traditional media defense of TV stations, newspapers, broadcasters, magazines, etc. We sort of "backed into" working with a number of the publishers and information providers on the Information Superhighway, based mostly on the fact that a small company called Steve Jackson *Games* suffered a bungled Secret Service raid a few years back in our home town.

We were brought in to represent the company in a law suit against the Federal government.¹⁶ Since that time I've been getting more and more involved in learning about computer communication issues and the law, or really the lack thereof, governing the different communications.

If there is one thing I would like for all of you to go away with by the end of today, it is that, in understanding the law in this area, it is probably more important than in any other area of law that you understand as much as you can about the industry and the systems.

I missed this morning's presentation, but apparently someone gave you all a good run down on how the computer communication world is currently set up.¹⁷ It is very complicated; there are a number of different players involved. The players exercise different responsibilities, they have different abilities and capabilities, and before you can make any type of judgment about them, it is important that you at least have a basic idea of where each of the players we are talking about fits into that scheme.

I don't know whether at Fordham you get an account on the Internet, but you should get one. If you are going to learn anything about these issues, if you are going to talk about them, and especially if you are going to write and publish about them in the *Journal*, you need to be on-line yourself. You need to nose around

16. *Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994).

17. *See* discussion *supra* Panel I (statement of Dr. Robert Schneider).

some of the commercial services, like CompuServe,¹⁸ Prodigy,¹⁹ or America Online,²⁰ to see what they look like. Even if you spend \$30 for one month, go in and take a look and see what is offered, what you can do, and what is done.

The Internet is more complicated. There is a bit more of a learning curve, but with a lot of the new software it is getting easier. You can run Mosaic²¹ on Windows,²² and everything shows up in nice pretty pictures, and you can point and click to move around.

It is important to realize where the different players fall. Rather than coming with a number of answers about how the law is set up, what I have done is sketched out a fact scenario, which is actually very typical of those lawyers, prosecutors and law enforcement agents will see when they are faced with the question of what we do, if anything, about adult materials on commercial bulletin boards²³ or on the Internet. Further, it touches on the difficulty of what we do about the problem that no one will defend—the distribution of child pornography.

18. CompuServe is a computer information service owned by H&R Block. See PETER KENT, *THE COMPLETE IDIOT'S GUIDE TO THE INTERNET* 351 (1994) [hereinafter *IDIOT'S INTERNET*]. It is one of the oldest and largest commercial providers. See ADAM C. ENGST, *INTERNET STARTER KIT FOR MACINTOSH* 575 (1993) [hereinafter *INTERNET STARTER*]. It was one of the first commercial services to provide interface with the Internet. See William A. Tolhurst et al., *USING THE INTERNET, SPECIAL EDITION* 1084 (1994) [hereinafter *USING INTERNET*].

19. Prodigy is an commercial on-line service which currently has limited Internet service available. *USING INTERNET, supra* note 18, at 1091.

20. America Online is the commercial service that currently offers, or is planning to offer in the near future, the most comprehensive Internet connection. *USING INTERNET, supra* note 18, at 1098.

21. Mosaic was the first software designed for browsing the World Wide Web while utilizing Windows' capabilities. See David Hoyer, *Window on the World Web: Surfers See Life in Full Color*, *PHOENIX GAZETTE*, Mar. 27, 1995, at C1. It was designed by the National Center for Supercomputing Applications, and can be downloaded from the Internet. *Id.*

22. Microsoft Windows is an operating-system shell that runs on top of the DOS operating system to supplement the operating system, and make it work in a manner similar to a MAC. RUSS WALTER, *THE SECRET GUIDE TO COMPUTERS* 59, 148 (1994).

23. A bulletin board system is a computer system to which other computers connect so that users can read and leave messages and files. *IDIOT'S INTERNET, supra* note 18, at 350.

So, it is important that you think and look at who the different players are. Here is a typical scenario and it would make a great law school question: Who is liable, what laws were broken, and where do they get prosecuted?

The first person to think of is the user. This is the bad person, who is at least the most liable anywhere in the chain. User number one lives in New York City. He takes three photos: a Playboy centerfold; an explicit picture of two adults having sex; and a third picture which is clearly child pornography, say a twelve-year-old child having sex with an adult. He takes the three photographs and scans them with a scanner and turns them into binary images,²⁴ JPGs²⁵ or GIFs.²⁶ We'll call these GIF images.

This binary information can be transmitted by computer. User number one takes his home computer and dials into a large commercial service on which he has an account. He has these three pictures, and he dials in and uploads them onto the commercial service. Within that commercial service, he goes to a forum.²⁷ The commercial services are divided into different areas. There is usually an area for hobbyists, and almost always one for amateur photographers to display their pictures. User number one goes to that forum, and he uploads the three pictures in their GIF format. Then he logs off. That's all he does that day.

Enter player two, the commercial service. The commercial service is set up as a corporation, and is located in a different state, Ohio. It has contracted with an outside contractor, rather than an inside employee, to take care of the photography forum. This person is an amateur photographer. He makes some money, depend-

24. A binary file is any file that contains nontextual data such as images and applications. INTERNET STARTER, *supra* note 18, at 573.

25. JPG is the file extension for a JPEG (Joint Photographic Experts Group) file. INTERNET STARTER, *supra* note 18, at 582. JPEG files have a compression scheme that reduces the size of image files by up to 20 times while slightly reducing the image quality. *Id.*

26. GIF is the extension normally used for GIF (Graphical Interchange Format) files. INTERNET STARTER, *supra* note 18, at 579. GI format was developed by CompuServe and is commonly used to distribute graphics over the Internet. *Id.*

27. "Forum" is CompuServe's term for its bulletin boards. The Internet equivalent is a "newsgroup." IDIOT'S INTERNET, *supra* note 18, at 353.

ing on the amount of usage in his area, on how many people will dial into the commercial service and download. He is paid based on the amount of activity going on in his bulletin board. He is not supervised by the large commercial service. This is a typical set up for a number of the commercial bulletin boards.

The manager of the Photo Forum is player number three. He has an "in-basket" where, essentially, users of the commercial service will provide him pictures in computer formats. At the end of the day player three goes and looks in his in basket. He sees the three photographs that were uploaded from New York by User number one. The first one is the Playboy centerfold picture. He looks at that and says, "Okay, I will make that available to the user." He puts it in the "out-basket" or the file section where people can download the photographs. Then he looks at the second one. It is the picture of two adults having sex. He says, "Well, that is a very explicit picture, but it doesn't seem that offensive to me, I am going to make it available." When he gets to the third picture, he looks at it and says, "My God, that is child pornography, I want nothing to do with that," and deletes it. Player three has now put the first two pictures in a place where they are available to all subscribers of the commercial bulletin board system.

User number two of the Commercial Bulletin Board system lives in San Francisco. It is his practice to log onto the commercial bulletin board service, and look at pictures on-line before he downloads them. He uses a sophisticated communication program such as ProComm Plus for Windows,²⁸ that allows him to view a picture before he actually makes a copy of it and brings it back to his computer in San Francisco.

This day he logs in; goes to the Photo Forum; and sees the two new pictures that had been submitted by User number one. He displays them on the screen, and looks at them. He says, "I like

28. Procomm Plus for Windows is a communications software from Datastorm Technologies designed for use in the Windows environment. Communications software interfaces with a modem to permit users to interact with other computers, faxes and the Internet. Frank J. Derfler Jr., *Do You Still Need Comm Software?*, PC MAGAZINE, Mar. 14, 1995, at 201.

these pictures. I want a copy of them." He issues a command to the computer at the commercial bulletin board system. It makes a copy, and sends it to him. Then he logs off. He now has two pictures at his house in San Francisco, downloaded from the commercial bulletin board system, that were submitted by User number one.

User number three lives in Waco, Texas, which is a small City north of Austin about fifty miles north of Austin. It is a conservative town—the home of Baylor University. They don't like dirty pictures in Waco. But there is a user in Waco who does, and he has an account on the large commercial bulletin board service. He dials in; goes to the photography forum; and sees the two pictures there. He doesn't have software that allows him to look at the pictures, so he just reads the descriptions.

There is an important distinction, which a lot of people are not familiar with and should realize, that a user may not have the ability to view the image before it is downloaded. The user may have to execute a command on that service that will send the photograph before it has been seen. User number three has very simple communication software, so that's what he does. He says, "I am going to look at these pictures." He downloads it into his computer in Waco, Texas, and then he uses separate software to view the pictures. He looks at them and decides to keep them. Now, both User number three in Waco and User number two in San Francisco have the two pictures.

User number four, again a subscriber to the same commercial service, is a fifteen-year-old boy. He doesn't have his own account, but he uses his daddy's account. So, the fifteen-year-old boy has obtained his father's password. He logs in, goes to the Photography Forum, and downloads the two pictures. Remember that User number four is a 15-year-old boy, and it doesn't much matter where he is because he has now obtained adult material he probably could not have obtained if he went to a book store and tried to buy it in person.²⁹

29. See, e.g., CAL. PENAL CODE §§ 313, 313.1 (West 1988 & Supp. 1995); GA. CODE ANN. §§ 16-12-102, 16-12-103 (1990); N.Y. PENAL LAW §§ 235.20, 235.21

Now, you could stop right here and just look at all the questions that are involved in the commercial bulletin board system where, as here, you have a paid subscriber to a particular account and you have a large service that does not regulate the content of its material, but instead contracts out to third parties who set up different forums and are responsible for regulating material. There are a number of interesting questions you can look at, as to who should be liable among all of these different groups for the distribution of this material. It gets far more complicated and interesting, and this is where most of the people that I counsel and deal with are confused and concerned, when you get into the Internet. A commercial bulletin board system is not part of the Internet. It may have a gateway to the Internet, but it is essentially run by a company that owns all the computer hardware in a particular place.

Now, we go back to User number one. He knows the Internet and how to use it. He is interested in distributing his pictures there as well. The next day he logs back into the commercial bulletin board system. It has a gateway to the Internet. He goes there, and he takes his three GIF files. The only way he can distribute these through the Internet is to convert them. So he encodes them using software that takes binary files and turns them into ASCII³⁰ files, essentially strings of characters which can then be read into electronic mail or read into postings on news groups.

So, User number one encodes these three pictures.³¹ If you look at them, they are now entirely gibberish, nothing but a string of characters and numbers; they don't make any sense. He encodes and then labels them. The first picture he labels "Playboy Centerfold," the second one he labels "Couple Having Sex," and the third one he labels "Child Pornography." But that's all there is, a label

(McKinney 1989); TEX. PENAL CODE ANN. §§ 43.21, 43.24 (West 1994).

30. ASCII stands for American Standard Code for Information Interchange. INTERNET STARTER, *supra* note 18, at 572. An ASCII file contains only text, i.e., numbers, letters and standard punctuation. *Id.*

31. Encoding is the process where binary files are converted to ASCII files for posting. HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE, 389-90 (1994) [hereinafter INTERNET COMPLETE]. Once the file is in ASCII format, a viewer must be used to see the picture, or the file must be decoded back into a binary file. *Id.*

and a bunch of numbers and figures.

He takes these three encoded files and places them on the Usenet.³² The Usenet is a highly anarchic system of protocols which are agreed upon among the computers parts on the Internet. It allows the distribution of things that look like bulletin boards all around the world to anyone who subscribes to them. There are thousands of news groups on the Usenet.

User number one takes his pictures and he figures they are fitting for the alt.binary.pictures.erotica news group.³³ There are a whole hierarchy of news groups running from interest in baseball, to sports, to fan clubs, to anything you can think of. There is also a long hierarchy of alternative news groups that get into adult materials, within which there are all sorts of subcategories.³⁴ One of them is alt.binary.pictures.erotica. He posts the three pictures there.

I don't understand the Usenet in great detail, but the way it is set up is that it takes all of the postings, strings them together, and then passes them around in batches to all the computers that are hooked up to the Internet. The postings are then available to anyone who has a subscription on the Internet and logs into their Internet provider. If they are a subscriber to a news group they will have access to its postings. When User number one does this, he no longer has any control over the distribution of his pictures. They are circulating essentially all around the world, anywhere that Usenet news groups go.

32. Usenet is a large, anarchic network composed of thousands of discussion groups. INTERNET STARTER, *supra* note 18, at 590; IDIOT'S INTERNET, *supra* note 18, at 361.

33. The newsgroup "alt.binaries.pictures.erotica" is the sixth most popular newsgroup. INTERNET COMPLETE, *supra* note 31, at 389.

34. Not all newsgroups are Usenet groups. Some groups are created in an "unauthorized manner." See IDIOT'S INTERNET, *supra* note 18, at 165. These groups are called alternative newsgroups. *Id.* In a newsgroup name the first designation is the top level, so the alternative newsgroups begin "alt." *Id.* What follows "alt." relates to the subcategories of the hierarchy. *Id.* Alternative newsgroups often deal with subjects that are outside of the norm. *Id.* Three of the top ten Usenet newsgroups, which are also alternative newsgroups, are sex-related: alt.sex.stories, alt.binaries.pictures.erotica and alt.sex. See David Landis, *Sex, Laws & Cyberspace / Regulating Porn: Does It Compute?*, USA TODAY, Aug. 9, 1994, at 1D. Monthly readership of these newsgroups is greater than 400,000 at times. *Id.*

The next person I am interested in are folks that I counsel and talk to. Well, actually there are two levels. The first one is a university provider. Let's assume the University of Texas runs a huge Internet node, one of the largest in the world. It subscribes to all the news groups, has thousands of individual subscribers, and also sells space where commercial Internet providers can get hooked up to the university computer. Then these Internet providers will, themselves, act somewhat like a commercial bulletin board system and sell accounts to the Internet. So rather than logging it to Prodigy, users get an Internet account, and then have all of the capabilities that they would if they logged into the Internet, unedited.

The commercial service provider does no filtering of news groups.³⁵ He offers all the news groups that are available through access to the Internet.

User number five is a subscriber to the commercial Internet service. He pays \$30 a month and gets access to the Internet. He is a subscriber to the news group, alt.pictures.erotica. He can log in and see what pictures have been posted without actually seeing the photographs. I think it is an interesting distinction that on the Usenet you don't see any of the pictures. All you can see is a very brief description of what the poster says the picture is of.

Our User number five is in Macon, Georgia. He logs into the Internet, looks at the news group, and sees these three pictures. Before he can see what the photographs are, he has to download them. In order to view them he must decode them back into photographs, and then run software to view the pictures. User number five downloads all three pictures, decodes them, and looks at all the three. He sees that the third one is child pornography. He is outraged and deletes it. He keeps the other two images.

The final twist is this: User number five has a friend in Canada, and he decides that the other two pictures are interesting enough. He takes the copies before decoding and attaches them to

35. Filtering is the removal of "inappropriate talk" by human or software censors. Michael Schrage, *Flame and Fortune: There's Money to be Made Curbing Internet Insults*, WASH. POST, Feb. 24, 1995, at F3. Both Prodigy and America Online use filters. *Id.*

electronic mail, and then sends them to his friend in Canada. Canada has more restrictive laws about child pornography and adult obscenity than the United States.³⁶ The friend in Canada receives the mail, sees the titles, but never looks at them. He keeps them in his mailbox and never gets around to looking at them. If you take a snapshot at that point, the permutations are almost endless as to how to figure out who violated what law and where, including jurisdictional questions.

A user in New York City distributed three pictures to a commercial on-line service in Ohio. A forum manager in Chicago decided whether those pictures would stay, and then people from San Francisco to Texas decided whether or not to download it. How do you decide what jurisdiction's laws are applicable? Where do you take someone to trial if you decide that the picture is obscene? What law is going to apply? Will the law of the local forum where the picture started apply, or will it be the law of the forum where the picture ended up?

These are especially difficult questions in obscenity because one of its substantive standards concerns the geographical situation of the defendant or of someplace.

I assume you are all familiar, at least basically, with the *Miller* test.³⁷ What the *Miller* test says is that the U.S. Constitution will allow for the prosecution of obscenity if it meets a three part test: (1) it is a patently offensive depiction of ultimate sexual acts; (2) it has to appeal to the prurient interest; and (3) it has to lack any serious literary, artistic, political or scientific value.³⁸ The first two prongs of that, the "patently offensive" and the "prurient interest" are determined based on community standards.³⁹ By using community standards, the Supreme Court allows local communities to enforce their own standards of obscenity.

36. See, e.g., CANADIAN CRIMINAL CODE, R.S.C. c. C-46, § 163(8) (1985). See also *Regina v. Butler*, 89 D.L.R.4th 449 (Can. 1992).

37. *Miller v. California*, 413 U.S. 15, 24 (1973).

38. *Id.* at 24-25.

39. *Id.*

What a "community standard" is is an unanswered question. Bob Flores may know better, as there has been some local prosecution. However, it is an unanswered question as to whether or not you apply the local standards of the person who distributed the material or the person who received it.

There was a prosecution fairly recently in Memphis, Tennessee where the Federal government decided to prosecute a couple that was running a commercial bulletin board service in California.⁴⁰ The couple was running their service from a neighborhood in San Francisco where essentially anything goes. And they had put all sorts of material on the machine. The government set up a sting operation from Memphis, and downloaded a number of these materials in Memphis. The government then extradited the couple from California to stand trial in Memphis, Tennessee. At the trial there, the jury was instructed that it was to apply the standards of Memphis in deciding whether or not the material that came from California was obscene.

The case has created a lot controversy and raised a lot of questions in the computer communications field. In particular, it raised this question: if you make anything available through the Internet or a commercial bulletin board, do you have to set the standards based on, essentially, the most conservative common denominator in the country?

It seems to me that the problem with the *Miller* standard is that it looks at the wrong community or the wrong geographical region. As a rule, it is set up to protect the sensibilities of local people from having book stores and adult movie theaters in their neighborhood. Is that a proper standard to apply when the material is being distributed essentially secretly, or without anyone in the local community having to see it or be offended by it? It is an interesting question. I think it has been preserved at trial in the *Amateur Action* case.⁴¹

40. United States v. Thomas, No. 94-20019, (N.D. Tenn. Dec. 2, 1994) (judgment), *appeals docketed*, No. 94-6648 (Robert Thomas) and No. 94-6649 (Carleen Thomas) (6th Cir. Dec. 9, 1994).

41. Amateur Action is the bulletin board service in Milpitas, California that was run

But more than coming with any of the answers, I wanted to lay out these facts. Maybe I gave too many facts and too many questions will be left unanswered, but that's the type of situation that practicing lawyers face when dealing with this. Before any pronouncements can be made about anyone's guilt or negligence or sloppiness in dealing with this material, it is important to understand how the system is structured, who it is you are going to point a finger at, and where there are positions of control.

It may be easy to control the distribution of adult materials through large commercial bulletin board providers, because there is a responsible person that the government can go to and say, "You need to set standards." The forum manager could be a focal point. You can say he must employ certain standards such as not making anything available at which he hasn't looked, and giving his judgment to as to whether it is obscene or not obscene.

It gets far more difficult, and the same rules may not apply, when you are dealing with something as amorphous as the Usenet. It becomes even more difficult to put your finger on where the distribution point is, and who is the person to be held accountable for the material that distributed through Usenet.

If you do anything in the next week or two, go get an Internet account; sign up for all of the alt.sex or the alt.binary news groups, and read them for a while just to see what is going on. It will give you an idea about the opportunities out there, and what people are talking about. You'll be in a better position when you go back to the law books and look at them to apply what was written twenty years ago to this "Wild West" atmosphere on the Usenet.

I am interested in hearing your questions and seeing what you have been dealing with. One thing is guaranteed: the younger you are, the more equipped you are to understand this and maybe come up with some answers. I am fairly young to be involved in these things myself, but already I feel that I am being outmoded by the next generations of lawyers in law schools.

by Robert and Carleen Thomas. See David Landis, *Sex, Laws & Cyberspace/Regulating Porn: Does it Compute?*, USA TODAY, Aug. 9, 1994, at 1D. See also *supra* note 40 and accompanying text.

PROF. FRANZESE: Thank you, Pete. That is a great hypothetical and we are going to try and use it as a common thread for the rest of our discussion. It is now my pleasure to introduce to you again Bob Flores, who will offer commentary directed specifically at perhaps the most horrifying aspects of obscenity on the Internet, those pertaining to the transmission of materials related to child pornography.

MR. FLORES: I, too, would like to thank the *Journal* and Julia for the invitation to participate. As a federal prosecutor who does try cases, this is a fascinating area to be involved in, primarily because it is new. It is just brand-spanking new. I remember sitting for hours on end listening to constitutional law professors and contracts professors. My eyes would glaze over because this activity had been going on for centuries at common law and will still be going on centuries from now, and I never felt I'd be able to make much of an impact on the law. But you folks seated out there, those of us seated at these tables here, we can have a significant impact in a very new area of law which will affect everyone's lives.

I work in a section of the Department which focuses primarily on two areas. One is adult obscenity, and the other is child pornography. Neither is granted full constitutional protection under the First Amendment, but the two are handled very differently, and I want to make sure that's understood.

Pornography is constitutionally protected. It enjoys what is called "presumptive protection" under the First Amendment.⁴² Unless and until a work is declared to be obscene, it is protected. Unless a jury comes back with a finding that particular material meets their community's test for obscenity, that material is presumed to be protected.⁴³

42. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

43. For a discussion of community standards, see *Miller v. California*, 413 U.S. 15, 24-25 (1973).

Child pornography, on the other hand, falls completely outside the sphere of constitutional protection, and is *per se* contraband.⁴⁴ That's the way the Department of Justice approaches the subject. Let me make the disclaimer that every career official makes: these comments that I am making today are my own. They are not necessarily the Department's. To the extent that I know what the Department's position is, I may incorporate that information. But the particular opinions and thoughts that I am offering are my own, distinctly, and I won't burden anyone else with them.

Let me say that I come to this issue with the primary focus of protecting children from sexual exploitation. This is an issue which no one approaches without some substantial bias. One may be a parent who is concerned about his child using a school's computer, or a neighbor's computer, and getting information or material that the parent does not want his children to have.⁴⁵ Or one may be an entrepreneur who wants to satisfy the great demand in this country for pornography and thereby make money providing sexually explicit material through the computer. Finally, one may be a law enforcement officer who has a professional responsibility to enforce the laws and protect children from harm. In each of these circumstances, people view the issue of computer pornography with a certain predisposition. And there is nothing you can do about that. I admit I have a bias. My wife gave birth to our first child this past Friday. One's perspectives are profoundly affected by the birth of a child. Given the fact that most people are inherently biased to some degree, all that we can do, in combatting computer crime, is to acknowledge these biases, and learn to work around them.

For law enforcement, the primary goal is protection of children. That is a fairly narrow focus. The defense attorney concentrates less on whether a crime has taken place, or whether a child has been exploited, than on whether his client is receiving proper legal

44. *New York v. Ferber*, 458 U.S. 747 (1982).

45. One mother's account of pornography entering her home without her knowledge is contained in Susan Kuczka, *Kids, Computers and Porn*, CHI. TRIB., Aug. 6, 1993 (News), at 1.

representation. The defense has unique obligations under the law and under the canons of ethics. Thus, it is from divergent positions that prosecutors and defense attorneys approach the issue of computer pornography.

In 1993, for the first time, the federal government launched a nationwide child pornography investigation called Operation Long Arm. This project was initiated when investigators stumbled upon evidence that numerous individuals were using computers to import child pornography from Europe.

After uncovering this information, U.S. officials entered into cooperative agreements with European law enforcement and were thereby able to get a list of all of the people in the United States who were downloading child pornography from certain bulletin board systems. Investigators were supplied with the names, addresses, and telephone numbers for these targets. In addition to this information, officials were supplied with the titles of the images each suspect had downloaded, copies of those images, and the dates that downloading took place. This information provided the perfect starting point for numerous child pornography investigations. Search warrants were executed on March 3, 1993, with more than forty homes and places of business searched simultaneously across the United States. It was during an ongoing Long Arm case that I first met Pete Kennedy. He was on the other side, at the defense table.

Pete gave you a fairly complex fact pattern, one that I would not want to encounter on a final exam. But it is a fact pattern that brings some heated issues to the forefront. One of those issues is what happens to an individual once he is implicated by a preliminary investigation. Let's say investigators notice that he has downloaded an image of child pornography. Now, we know it is child pornography because we have the picture. We have the systems operator's records, so we know where the image was sent. We have done surveillance, so we know there is a computer at the subject's house. Further, the suspect is the only person that lives in that house. Investigators get a search warrant, seize his computer, and, lo and behold, find that child pornography is in fact stored on the computer. But suppose the image has been erased, and

investigators have to use Norton Recovery System, or similar software to recover the image.⁴⁶ Does the picture constitute evidence of a violation of federal law? Yes, because the picture was imported.⁴⁷

The next issue is intent. Did the target import the image because he had read a description of it? Would it make a difference if the description was incredibly crude and very, very specific, leaving nothing to the imagination? Some defendants claim, "Well, listen, I didn't really think I was going to get child pornography. And, my God, when I saw what it was—I have daughters, I have a son that is the same age—I got rid of it. I went and told my wife, 'we are not going to do that anymore.' I called the system that provided me access to the child pornography, and I made a complaint, did those kinds of things." Does that mean that the federal law was not violated?

Those are questions that we as prosecutors confront regularly. These issues make up a large part of our investigations, because cases cannot be prosecuted until the issue of intent has been resolved.⁴⁸ As prosecutors, we must satisfy ourselves that we are dealing with someone who intentionally sought out this material, knowing what it was. Otherwise, you are not going after a criminal, you are not prosecuting someone who has knowingly exploited a child.

Between 1986 and 1992 the federal government, combining the forces of the Postal Inspection Service, the Customs Service and the FBI, initiated an aggressive, proactive effort to combat the dissemination of child pornography. The strategy involved identifying people who were trafficking in this material and then mounting vigorous prosecutions. Several thousand cases were prosecuted during this time.

46. For information on software recovery programs, see Erik Delfino, *UNDELETE to the Rescue*, ONLINE, July 1994, at 83.

47. 18 U.S.C. § 2252 (1988 & Supp. IV 1992).

48. The intent requirement for child pornography prosecutions is discussed at length in *United States v. X-Citement Video*, 115 S. Ct. 464 (1994).

One of the results of this effort was that officials virtually eliminated the use of the United States mails in the distribution of child pornography. We virtually eliminated the smuggling of child pornography through the suitcases of people returning from Europe. We witnessed a dramatic drop in the number of seizures at major border crossings, indicating a decrease in the importation of child pornography by these methods. Seizures at Kennedy Airport and at other major border crossings amounted to maybe one or two every couple of months as a result of random searches. In contrast, between 1986 and 1987, thirty to fifty seizures a month were being made at Kennedy Airport alone.

The federal effort reduced the commercial distribution of child pornography to a cottage industry. If you had child pornography and you wanted to sell it, you had to go out and find people who wanted the material. Encounters between purveyors and prospective buyers were face-to-face, so traffickers' risks increased. Officials knew what places sellers and buyers frequented, thus increasing the fear of running into an undercover police officer. In all, it was a very successful effort.

The advent of computer technology has changed the distribution methods of child pornography. The computer permits anonymous encounters with potentially millions of people. Computers provide a sense of anonymity and security. Users may be alone in their rooms, they can use a made-up name, and can indulge in conduct that they would not otherwise engage in for fear of prosecution. In addition, users can reach thousands of people with one message.

In terms of the technology, millions of people can be reached with one message on the Internet.⁴⁹ Many of the people they reach are not even looking for it. People may come across computer pornography inadvertently. If a pornographer can get a thousand people out of the many millions of people who use computers to sign up for a child pornography bulletin board system, charge them \$85 a year, with unlimited downloading privileges, he can make fairly painless \$85,000. What is the overhead? Maybe \$3,000 to

49. For detailed information on the Internet, see Rick Ayre, *Making the Internet Connection*, PC MAGAZINE, Oct. 11, 1994, at 118.

\$4,000. The subscribers pay for the telephone calls, and can upload more material to the systems operator. This allows the operator to add pictures to his collection, and to offer a wider variety to his customers. It also allows subscribers a cut rate on the subscription fee. This symbiotic relationship keeps the child pornographers in business.

The commercial incentives for trafficking in child pornography is perhaps greater than ever. Prior to 1982, the year the United States Supreme Court affirmed the constitutionality of banning child pornography in *New York v. Ferber*,⁵⁰ you had a limited amount of commercial traffic, that is, people who were just in the business to make money. Most traffickers had a more prurient interest in the child pornography, and were not in the business for the money alone.

Now that there is a renewed commercial incentive, the child pornography magazines which were once popular but which had been virtually eliminated, are back, readily available once more. There has been a reemergence of the European child pornography we formerly had under control. Not only are we seeing all of those pictures again, but we are seeing new pictures: images coming from the Pacific Rim and South America, where children's rights are not considered a priority. And those photographs are finding renewed popularity on computer systems. Furthermore, pornographers are charging relatively small fees for access to the photos. High prices are no longer needed for entrepreneurs to profit. The end result is a heightened risk to children.

This poses a problem for the computer community since child pornography is virtually indefensible. No one likes a child pornographer; no one likes a pedophile. So proposals to regulate conduct to attack this problem does not inspire traditional First Amendment debate. People are willing to set free-speech concerns aside in the name of protection of children. Prosecutors regularly argue in court for very harsh penalties and stringent restrictions. We also argue that the First Amendment does not apply in child pornogra-

50. 458 U.S. 747 (1982).

phy cases. Highly-charged emotions predominate in the debate regarding computer regulation. Fundamental civil liberties are implicated when we suggest requiring everyone to register with the federal government when they buy a computer, or allowing Internet users only one password, or forcing the computer industry to keep records on everyone. Yet less drastic measures may be insufficient.

Clearly, important constitutional questions arise from new technology. One recent example is the Digital Telephone Bill that went through Congress last year.⁵¹ Through that bill, the government sought to put a "clipper chip" into telephones and computers so that the FBI would have the ability to continue to do necessary wire taps and not be defeated by encryption.⁵² Drastic measures are becoming necessary to combat increasingly sophisticated criminals. Of course, constitutional restraints remain. Law enforcement agents must still apply to magistrates for warrants. But extreme measures are being considered as criminal technology is advanced. It is difficult having a constructive dialogue regarding these matters. Often the debate is couched in terms of national security issues or child exploitation, where questioning regulation in these matters brands one as anti-social or anti-patriotic.

I think that for prosecutors the issue boils down to how we can protect children from pedophiles who try to attract victims over the computer. I was at a demonstration where an FBI agent accessed the Internet and listed herself as a fourteen-year old boy. Within seconds there were several messages from adult men who wanted to talk to this "boy." The situation is simply that our powerful new technology, while beneficial in many ways, can be used in extremely destructive ways as well.

51. Also known as the Communication Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994).

52. See Timothy B. Lennon, Comment, *The Fourth Amendment's Prohibitions on Encryption Limitation: Will 1995 Be Like 1984?*, 58 ALB. L. REV. 467, 498-99, 503-04 (1994).

The Department of Justice is looking to proceed cautiously. We have directed most of our efforts up to this point at those individuals that we know are predisposed to engaging in behavior which sexually exploits children. Once we are satisfied that we have identified a suspect with the requisite intent, we move forward to make cases.

But there are many issues we have yet to confront. We are dealing with some very complicated problems which affect every parent and child. People are concerned. They want to make sure their children are protected. And we have an obligation to do that. That is one of our missions at the Department.

This is only a sampling of the issues that need to be taken into consideration as we tackle the problem of computer-based child exploitation. I am grateful to have participated in this particular dialogue, because I think that it is important for the Justice Department, its prosecutors and investigators, to talk with people from the computer community, the lawyers who represent them, and the media, because we need to make ourselves aware of the concerns of all of these groups.

I think it is extremely important to keep in mind that there are a variety of concerns out there, and that this subject generates vigorous debate. We can't simply tell parents that computers are not safe. That is not a satisfactory answer. If children are to be prepared for the challenges of the next century, they must know how to use a computer. Together we need to come up with a way to make computer providers responsible, and to develop some type of cooperative arrangement, so that the message is clearly sent: we are not going to tolerate the continued exploitation of children. Whether it is somebody seducing a child off the street or through the Internet, this behavior is not to be tolerated. How we do that, though, will be a continued topic of debate, and we federal prosecutors welcome input on combatting this massive problem.

PROF. FRANZESE: I am glad to introduce to you Police Officer Kevin Mannion.

P.O. MANNION: On behalf of the Police Commissioner and the rest of the Vice Division, I want to thank you for inviting me.

I want to give you an overview of New York Police Department as it relates to sex crimes and sexual exploitation. We have five sex crimes units that deal specifically with first degree rape, sodomy and sex offenses. Under that we have a Sex Crimes Hot Line. The Sex Crimes Hot Line takes any incoming calls regarding tips on sexual offenses. Every precinct has a detective squad that handles the investigation of crimes, including sex crimes. We have six vice squads. The vice squad was known as the Public Morals Division until about four months ago and now we are known as vice squads, dealing mostly with gambling, prostitution and alcohol-related offenses. Under the vice squad is my unit, the pedophilia squad. I deal with all cases relating to sexual exploitation, including pornography, prostitution and pedophilia.

I investigate cases with the FBI and the Immigration and Naturalization Service, and I do a lot of work with the Postal Inspectors in investigating the importation of child pornography through the mail. I also work with the New York City Board of Education. They have a special commissioner's office which essentially is an Internal Affairs bureau for the Board of Education.

People ask: Why do we need a pedophilia squad when we have a sex crimes unit? Sex crimes basically start with a victim. A boy or girl or maybe an older individual comes into a precinct and says that he or she has been raped. The investigation starts with a victim and works its way back to the suspect. My unit works the opposite way. For instance, somebody will provide us with information that pedophiles are in a certain bar; that pedophiles are at the bus terminal; or that a certain person is a pedophile. I try to find the producer of pornography or the source of the prostitution.

Our primary concern is with the sexual exploitation of children and I would like to say that when it comes to pedophiles, they are definitely recidivists. Anybody who has experience in law enforcement and prosecuting these cases will tell you that these people are repeat offenders. I would like to read a quick definition of pedophilia that we use. Pedophilia is the act or fantasy of engaging in

sexual activity with prepubescent children as a repeatedly preferred or exclusive method of achieving sexual excitement.

When we talk about pedophiles, we are talking about situational and preferential child molesters. Preferential child molesters are sexually excited solely by children. He is the secluded type, the loner type that you think of. The situational child molester might be married, he might have kids, he might have a normal life but he has those urges towards children. This is just to give you a quick profile of pedophiles, assuming there is "a" pedophile profile.

They come from all socioeconomic groups, they range from adolescents to old age. We have had adolescent pedophiles, eighteen, nineteen years old. The pedophile has an excessive interest in children. He has easy access to children and usually comes across as the "nice guy."

There are a lot of technical terms that psychologists use when it comes to pedophilia. "Pedophile" traditionally means somebody interested in children prior to puberty. You will also hear "pederast," which is somebody who enjoys anal sex with children.

Pedophilia is usually characterized by a seduction process. Pedophiles do not normally walk up to a kid and say: "I would like to have sex with you." This is very rare other than in a situation involving a child prostitute. Instead, they seduce children. Unfortunately, computers have made it a lot easier to seduce children. Computers have also allowed pedophiles access to a lot more children than they might already have. They probably can spend a lot more time at home. Now the computer provides the pedophile with worldwide access.

Joint law enforcement efforts several years ago drove pornography underground. Basically that industry was supported by organized crime. Pornography had strict enforcement from the FBI, Joint Task Force and Customs. The pornography I am finding now, notwithstanding computer pornography, is home-made. It is Polaroid photos it is video tapes and still photography. Why Polaroid photos as opposed to anything else? Polaroid photos don't go to a developer. A commercial developer will immediately notify law enforcement if they receive suspicious negatives. They provide

us with the name and the address of the customer and we do a controlled discovery. We come to your house, deliver the film, and then make the arrest.

Child pornography is no longer easy to obtain. Computers, however, are changing this. They greatly facilitate distribution of the contraband. Police departments at a local level, at least in New York City are rookies in the field. The FBI, Secret Service and Customs have really taken the lead, we are following along. We have only seriously looked at computer pornography within the last four years. In the last year I have started working, along with a computer team, specifically on cases of child pornography through computers.

One of the reasons computers facilitate pedophiles is that the pedophile gets an instant response. In seconds, the pedophile has access to millions of children. They gain access through the Internet. Furthermore, the computer provides the pedophile with anonymity. That is one of the major problems for law enforcement right now. People sign on under different names. A lot of these names are pseudonyms. It is very difficult tracing these back to its source.

Another problem is that equipment is easily accessible to children as well as pedophiles. For under a thousand dollars you can have access to a laptop, a printer, and a modem. Computer equipment is also highly portable. With a laptop one can basically hook up to any pay phone, download, upload and access any on-line service.

A side note to that is, if you have kids and you have computers you must be vigilant. Your child is in his room playing with his computer. You have to really watch what your kids are doing. You know that they are on line and that they have access to the Internet. You really have to pay attention to your kids and be interested in what they are doing in order to avoid pedophiles attempting to reach your children through on-line services.

On-line service is cheap and convenient. One has access to the Internet twenty-four hours a day, seven days a week. And conceivably, pedophiles on the Internet have access to children twenty-four

hours a day, seven days a week. Some user fees are as low as ten dollars a month and you have worldwide access. The problem for local law enforcement is, if I sign on to America Online, I want to know from where the sources are inputting on it.

There are bulletin boards that hook up to America Online and CompuServe that deal strictly with pornography. As a local law enforcement officer, I am looking for the local bulletin boards that are dealing just with pornography. I am not necessarily looking for what crosses state lines. I will kick that to the FBI or whatever agency deals with that. I am looking more for a local guy sitting in his home with a scanner, maybe some photos or a couple of disks of pornography, who is shipping it out as his business. He is selling access to his own computer, he is selling access to child pornography.

The question becomes, who regulates the information highway? Are we going to have an information highway patrol? To what extent are we going to regulate? In combatting child pornography, law enforcement faces problems that implicate the First Amendment's freedom of speech. Law enforcement can not play the role of big brother. That is why we have young, aspiring lawyers here to make sure that does not happen. However, we also have a need to regulate. Law enforcement has a definite need to eradicate child pornography and obscenity. And we know the First Amendment is not an absolute right. It does not apply to obscenity, as the Supreme Court held in *Miller*. When you cross that line into interfering with safety and public health, that is when the police really have to step in.

The First Amendment draws a fine line, as we know. One of the things I usually point to when considering these issues is the NAMBLA⁵³ Bulletin. You will never find anything in the NAMBLA Bulletin that is against the law. They will advocate sex with children, but nothing that is written in here is actually against the law. It is protected by the First Amendment.

53. The "North American Man-Boy Love Association," an organization which is sympathetic to such practices as pedophilia.

However, NAMBLA right now is one of the target groups we monitor. They are always communicating among themselves. They are a network that informs each other on how to communicate with children. Now they are telling their members about the Internet.

Another problem is that the obscenity laws regarding children on the state level are not clear. New York state law does not specifically address child sexual exploitation through the use of computers. However, on the federal level, attempts have been made to address this issue. Federal statute 2252⁵⁴ specifically states obscenity sent through the mails or by computer is illegal. New York state, unfortunately, is very behind the times and does not specifically mention "computer." However, other state laws address the promotion of sexual performances by a child and obscene sexual performances by a child. Federal enforcement has taken the lead, and we on the state level are lagging behind. There is also no New York state law that specifically addresses computer pedophilia or computer obscenity. We have computer crimes: for example, it is a crime to steal access to a service,⁵⁵ it is a crime to tamper with computers.⁵⁶ And that's where New York state has taken leave. But, of course, that comes lobbying from computer companies. Victims of pedophiles really have no one to speak for them.

Another problem in the law for New York state is inconsistency with ages in applicable state laws regarding child sexual exploitation. For endangering the welfare of a child, the child must be less than seventeen years old.⁵⁷ Whereas violating use of a child in a sexual performance, the child must be less than sixteen years old.⁵⁸

There is a bill in the state senate right now: it is referred to as S 188.⁵⁹ The subject of the bill is child pornography. This bill is aimed at putting a dent in the child pornography business by rais-

54. 18 U.S.C. § 2252(a) (1988 & Supp. IV 1992) (criminalizing the transport or shipment of child pornography by any means, including the mails or by computer).

55. 18 U.S.C. § 1030 (1988 & Supp. V 1993).

56. 18 U.S.C. § 632(l) (1988) (defining computer crime in the business context).

57. N.Y. PENAL LAW § 260.10 (McKinney 1994).

58. N.Y. PENAL LAW § 263.05 (McKinney 1994).

59. N.Y.A.B. 2235, 218th G.A., 1st Sess. (1995).

ing to eighteen the age under which it is illegal to use a child in a sexual performance. Currently people producing pornographic materials can exploit sixteen- and seventeen-year-old minors without violating the law.

I have had several cases just in the last couple of weeks that because of an age difference of a year or two I was unable to prosecute. I brought it to the District Attorney's office and was told the child was too old to prosecute the case. So, we are trying to raise the age for which a person may be in a sexual performance. The bill before the senate makes it a crime to use children under sixteen in a sexual performance. The bill passed the senate five years running, but it has no sponsor in the assembly. Unless somebody comes forward the bill will die in committee. It was voted 56 to 0 in the past. We really need people to look at this and to take this issue seriously. There are gaps in the law and they need to be addressed, especially on the local level in regards to computer obscenity and computer pedophilia.

Law enforcement also has problems with interagency cooperation. When it comes to narcotics, we have what we call a deck system. If I am working a narcotics case and monitoring an individual, I put his name in the computer: I say I am working on Joe Smith in Queens. And all of the law enforcement agencies can access that. They type in "Joe Smith" and it says hands off, somebody else is working on it. Right now with the scramble on the information highway, there is no similar system to take care monitor child pornography. I could put a lot of effort into communicating with someone who said they are a pedophile. It is conceivable that I could be talking to an FBI agent, Secret Service agent, a law enforcement agent in Florida or Virginia. The information highway cuts across the nation and, in so doing, across law enforcement jurisdictions. It could lead to some horror stories. Hopefully it will not get to that.

Another problem for law enforcement is lack of training. Cops at a local level really do not have the computer training or the training in investigating pedophilia to deal with these kind of issues. In March, I am attending a course in investigating sexual exploitation with the FBI. And they deemed it so important that

they are going to devote an entire day to computer pedophilia and pornography. We, on the state level, are slowly catching up to the Federal government.

And another problem we have is monitoring the reports of child pornography. As a local law enforcement agency, we are very reactive. We are not as proactive as we probably should be. We work based on complaints. I do not self-initiate cases. In the area of computers and child pornography, I don't receive many complaints. However, this may be due to the public's lack of knowledge that it is out there. Fortunately, every time something is in the newspaper about it, the next day I have four or five complaints. It is probably a public relations problem more than anything. We have to get the word out that we are very interested in computer crimes, especially those relating to obscenity and pedophilia. And we want access to that information. We need your help in order to get the job done.

A related problem is that a lot of these services don't regulate their users. I think the bulletin board services need to regulate their users. However, how do we regulate it? Is it a book store or is it a news medium? Is it like a print medium or an electronic medium?

Within these regulatory powers, I think they need to look at whether we should drop a user or report a user. When it comes to Kodak delivering obscene photographs or United Parcel delivering a suspicious package, if they know that there is narcotics inside or there is child pornography inside, they have a responsibility and they have taken it on their own to notify us. I think CompuServe, America Online and other services need to take that responsibility. They need to get in touch with us when they become aware of child pornography on the Internet or on their services.

Telephone technology allows us to identify the location of the user, if not the user himself. We have the ability when we go to NYNEX or AT&T with a subpoena and say: Who is the subscriber to telephone number, 555-1234? We get that information and find out that 555-1234 lives at a specific location.

The problem we have with America Online and the services is the users have pseudonyms. I can try to find out a subscriber's location, but now a problem arises with the local law enforcement where they live. I am guided by New York Penal Law. This person could live in New Jersey or in Connecticut. The anonymity presents a problem for law enforcement.

Another problem is that law enforcement usually likes a paper trail. Okay, we can start at A, go through some papers, look through some books and we get to B. Computer A could be in Connecticut or he could be bouncing off of pay phones. It is a problem for us to pin somebody down. Furthermore, I might get a location of a computer distributing child pornography; however, it is difficult to prove who had access to the computer during the relevant time periods.

Now, even if you have a case of a fifteen-year-old boy using his father's service, even though I knew that Computer A is at this address, who has access to that computer? Who has access to that at that time that the pornography was distributed?

Monitoring equipment is often expensive and small police departments do not have the budget to adequately investigate these local bulletin boards used by pedophiles. Fortunately, the FBI is very active in this area.

Moreover, case law does not adequately provide guidance for law enforcement in their investigation of these activities. The scarcity of case law makes it difficult to proceed with the knowledge that the investigation is within constitutional bounds. The question is: how do I proceed in an investigation? I am really a rookie on the information highway and I need to know how to proceed. I need to look at the case law and the problem is we really do not have the case law. We do not have specific case law in New York state or at a federal level that really addresses the issue. However, even now the law is rapidly developing in this area and it is very important for law enforcement to stay abreast of these developments.

PROF. FRANZESE: This is a tremendous panel, I think, most noticeably because of the breadth of perspectives that all the persons here bring. We now hear from someone on the front lines, from a journalist's point of view, Mr. Dave Browde.

MR. BROWDE: I got drafted to speak because I do WNBC-TV's computer reports. A funny thing happened by coincidence just last night, as we were preparing a report on child pornography on-line. Because February is a "sweeps" period for television, some producer had the idea that we would "discover" child pornography on-line.

We pointed out that we have been discovering pornography on-line each year for the past five, but that didn't matter. We proceeded along the lines that we usually do until a couple of lawyers from NBC approached us and said, "By the way, we have a little problem. Are you aware that you just violated federal law?"⁶⁰

What we had done was go to Usenet news groups and a variety of on-line services to see what was out there, to find out if, in fact, child pornography is a serious issue on-line. The analogy that we drew from our investigation was that if all of the Internet and all of the on-line services are the size of the Pacific Ocean, then all of the sexually explicit material is probably about the size of a Great Lake. All of the child pornography is probably about the size of a water tank on top of a New York City building. It is there, but you have to look for it.

We had gone out and sifted through an average of eight to ten thousand files on each of the "alt.sex." or "alt.binaries." areas of the Usenet. We had found some descriptions that indicated they might be about "young" children. "Young" is the current code word out there indicating child pornography.

We downloaded the files to find out the contents of them and we had transferred that to videotape. Therefore, I was walking around with this videotape of five images that we had found which

60. See Protection of Children Against Sexual Exploitation Act of 1977, as amended by the Child Protection Act of 1984, 18 U.S.C. §§ 2251-2257 (1988 & Supp. IV 1992); and Child Protection and Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4808 (1990) (codified as amended in scattered sections of 18 U.S.C.).

were arguably child pornography. We went to our managers and said: "What of this do we use? Do we digitize it so that you can't see areas in the two pictures that involved specific sexual activity?" There were also three that involved poses of kids where the children had no clothing on.

Our managers said, "Wait a minute, what does the law say?" It turns out, the law says that we arguably had committed a federal crime.⁶¹ We had knowingly downloaded these images across state lines. Our lawyer suggested calling the Justice Department to see what they thought about the situation.

We called Mary Jo White's office, our local U.S. Attorney. We thought we should get a second opinion there. We asked what their position would be if we were to show some of the images on television. They replied that they don't give advisory opinions and that we should consult our own experts. NBC decided we wouldn't use any of the images at all, and the tape no longer exists.

This shows you how crazy things get when you get to the subject of child pornography on-line. Since we could not use that material, we went on to America Online last night in a last-ditch effort to rescue the video for this package. Within about twenty-five minutes in the chat areas on-line, we found a variety of "rooms." One of the "rooms" was talking about the exchange of presumably explicit files since the name of the room was "XXX GIF" files, which are the picture files.

I entered the room using my America Online ID. People started talking about exchanging pictures. We asked what kind of pictures they were talking about. Within a couple of moments somebody came along and said, I am looking for "young" pictures. I asked what they meant by "young." We started getting messages from people offering us "young" pictures. We typed back and asked if they knew this was illegal. One of them said, "I don't know if it really is." The fact of the matter is that, depending on

61. See 18 U.S.C. § 2252(a) (1988 & Supp. IV 1992).

how “young” the pictures were, it was quite apparently illegal. To America Online’s credit, shortly after the word “young” appeared, they shut down the room. They have monitors who are very active, because they know that law enforcement is very active in this area and they are worried about their liability. They shut it down very, very quickly.

We went on and we did our story without the pictures. We used adult pictures to describe it. But it isn’t a question of whether there is a problem of regulating speech on the Internet. The question is, “Is speech on the Internet, or on ‘on-line’ services, less protected?” Jake Baker is an example which you have probably seen since it hit the *New York Times*,⁶² but he has been very active in the Internet world for about ten days now.

Jake Baker is, or was, a sophomore at the University of Michigan until he wrote a couple of stories. I’ve got a couple of these stories right here, we downloaded them from the Internet. They are exactly the way they were described. I will read to you the way one of them was described. The header says “[t]he following story contains . . . mf, nc, pedo, rape, tort, snuff, nouns, verbs, punctuation-marks For those of you who do, I write this to turn you on. For those of you who don’t, I write this to annoy you. Either way, I have an opinion. The greatest insult to a writer is not to have any feeling for his work.”⁶³

Mr. Baker wrote three stories. They are pretty gross stuff. In one of those stories he used, as the name of a victim who is raped and killed, the actual name of a classmate of his at the University of Michigan. He did not communicate this to her. In fact, there was no discussion of it at all inside of the University of Michigan. He simply put it up on a group called “alt.sex.stories,” amongst approximately ten thousand other stories. As you have heard, it was reported back to the university when an alumna saw it and

62. Peter H. Lewis, *Writer Arrested After Sending Violent Fiction Over Internet*, N.Y. TIMES, Feb. 11, 1995, at A10.

63. Jake Baker, *Going For a Walk*, alt.sex.stories, Jan. 7, 1995 (available on Internet).

recognized the university tie-in. Mr. Baker was suspended.⁶⁴

A few days later, he was arrested and charged, not with writing something obscene, but with criminal transmission in interstate or foreign commerce, which is a communication containing a threat to kidnap a person or a threat to injure a person.⁶⁵

Now you have an interesting legal issue. Where does free speech end? Does it matter that something you said, if you said it in a conversation, might very well be protected, but, by virtue of your writing it down and sending it out electronically, it is less protected? You get into a question of community standards.

American law enforcement in the Baker case is working with Canadian law enforcement because it turns out that Mr. Baker communicated about his fantasies with someone in Canada, where the laws are more restrictive.

“Community standards” is a truly interesting test. We have seen Pakistan recently ask that the United States extradite to it Madonna and Michael Jackson, claiming they are cultural terrorists and that they violate community standards in Pakistan.⁶⁶ In electronic media, where does the line get drawn?

Eventually what we are going to get, although it is going to take legislators a while to get there, is a true community standard. It is not going to be geographic standards, but a “within the medium” community standard. The test will be within the context of that community which is the Internet or perhaps a subsection of the ‘net. What is the standard there? It is going to be a tough standard, because frankly, right now, it is a “Wild West.” It is an area in which virtually anything goes. It is impossible, despite the best efforts of the New York City Police Department and the Justice Department, to police it.

Why is it impossible? Because as clever and as good as the undercover operations are, if the communication remains electronic, the technology is there to make it anonymous. There are comput-

64. See Lewis, *supra* note 62.

65. *Id.*; see also 18 U.S.C. § 875 (1988).

66. See *Pakistani Radicals Target Superstars*, S.F. EXAMINER, Feb. 13, 1995, at A15.

ers called "anon servers," for anonymous, the most famous of which is in Finland. If I wanted to anonymously post from my account, which has my name, address and credit card number registered with America Online, I would send it from that account to an anon server. The anon server would take the input, strip the source information from it, assign it a new randomly-generated account number and spit it back out to the Internet from the anon server. It would then destroy the record of where it came from except for a very brief period where it would relay responses to me.

Law enforcement finds out about this a couple of days later, if they are lucky, and tries to find out who the sender of the message is. Perhaps he is doing something considered really dangerous like child pornography. Maybe it is a threat to kill the President of the United States. Whatever it is, they go and get a warrant, but this takes time. They discover that the computer on which they want to serve the warrant is in Finland. This is a problem. Now, they've got to coordinate, but they are lucky it is Finland. Finland is a civilized country. If it was in some country which has a much less developed law enforcement system set up, they would have a problem serving it. By the time law enforcement gets there, the guy is gone and the records are gone.

You are going to have to get used to a certain amount of slack here. There is a certain "fog bank" out there that is this form of communication. No matter how hard you try and no matter how much you spend on it, it is not going to be susceptible to attack. No matter how good the cause is, no one is going to stand here and say, children should not be protected from exploitation. The question is: where do you draw the line in what you are going to do to attack a threat which may be real and tragic in one or two cases, but those are only one or two cases in a very vast universe?

It is not an easy thing. I suggest that the legislative solution is going to be tough. You are going to need new law here because frankly the current federal statute, while explicit in very many ways and every nicely drawn, talks about "knowingly receiv[ing]" child

pornography.⁶⁷

Do you know that you are going to receive child pornography from a two-line description that says it is child pornography? This is the argument I lost with my lawyers, by the way. I said, "we don't know that it is child pornography. We haven't violated the law. We know that it says it is child pornography and we want to find out if it is." They said, "you are going to lose," and they may be right. They decided they didn't want to take the chance.

When it comes to someone like Mr. Baker, where do you draw the line? I suggest that you cannot provide less protection for something simply because it is sent out by a computer. There is in this country, and I would suspect around the world, dating back to the days of science fiction, a tremendous fear of things that are computerized. This fear goes back to stories that I read when I was young which were by Isaac Asimov. There was one story about robots who couldn't harm humans, but there was one that became defective somehow. It might have harmed someone and they had to go after it.

There is that fear that everything is changed by computers. I suggest to you it is not. Pornography on computers is the same as pornography in a book store. The book store is just in a different place. You can go there if you want to, you don't have to go there if you don't want to. There are technology based solutions that are being brought on-line even as we speak. The Prodigies and America Onlines of this world are developing "lockout" controls. This occurs typically on a Prodigy situation with an "A" account holder, who will be the master account holder. The children will get separate sub-accounts. The "A" account holder is given the option of saying the children's accounts will not be able to access the Internet Gateway or the "chat" areas or other specific areas. You can lock out those areas.

If you have a computer and you are worried that a kid might have stolen your password, you have two options. One is to change the password, which takes about ten seconds. The other is

67. 18 U.S.C. §2252(a)(2) (1988 & Supp. IV 1992).

to use a new program that will allow your kid to use your computer but not to access the modem. The ultimate defense is to take the modem away. If there is no modem, the kid can still learn via computer and the kid can learn all the programs you can bring in, including CD-ROMs, but they can't communicate. If that is your concern, you can do it that way.

So, I suggest to you that it isn't going to be easy. The task of law enforcement has been complicated to the point that it is almost futile, though it is obviously important, to go after those who would attack children. Still, someone attacking children is one thing, but discussing it is another. I wonder whether we might be tempted to go too far because of the perception that there is a greater threat imposed by this new technology which is going to make pedophilia easier. But it doesn't really make pedophilia easier, it makes discussion of pedophilia easier. Someone still has to commit a crime, and it is at that point that I suspect law enforcement will still be effective and will still be able to act. But in the case of discussion, I think it is a whole new ballgame out there. The tools and methods that law-breakers have are going to defeat law enforcement in ninety percent of the cases.

PROF. FRANZESE: And for some final comments before we open the floor to questions, Mr. Robert Perry.

MR. PERRY: I am just going to make some brief *ad hoc* comments on various speakers' suggestions and observations. My viewpoint is decidedly pro-free-speech because I primarily represent marginal speakers from street musicians—I have a law suit against the City of New York Police Department—to public access producers, to defending record retailers, who sold allegedly obscene 2 Live Crew products several years ago.

I will follow up on several speakers' comments. You all have heard about the *Miller* test, as Pete mentioned in his introductory comments.⁶⁸ As you may or may not know, each one of the *Miller*

68. See *supra* notes 37-39 and accompanying text. Since 1973 the Supreme Court has relied on the following three-pronged test to determine whether material is obscene:

(a) whether the average person, applying contemporary community standards

test's three prongs is problematic. These prongs become even more so when applied to new technologies.

Whether material has a "patently offensive appeal" prong, for example, depends upon community standards. One question in the Memphis case⁶⁹ is, therefore, what are the appropriate community standards: California standards or Memphis standards?

You might want to note that this is not the first time in recent years that the "community standards" issue has come up in a criminal case involving the electronic media. In 1990, it arose in the context of satellite to home TV service. A New York City company called the American Exxtasy Channel marketed a scrambled, pay-per-view adult movie service which was up-linked in Utah, and delivered by satellite all around the country, including Alabama.⁷⁰

A prosecution was begun in Alabama. Ultimately, American Exxtasy's principals were indicted, as was the satellite common carrier, GTE Spacenet, that transmitted its programming. The Alabama prosecution, which was not the only prosecution of American Exxtasy, had a tremendous chilling effect. American Exxtasy eventually went out of business.⁷¹ Governor Cuomo refused to

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 applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (internal citations and quotations omitted). Although the *Miller* test has governed obscenity cases for twenty years, Professor Laurence Tribe describes it as "a formula likely to be as unstable as it is unintelligible." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-16, at 905 (2d ed. 1988). Each prong, indeed almost every word, of the *Miller* test, has proven to be problematic when applied to allegedly obscene materials.

69. See *supra* note 40 and accompanying text.

70. See *Home Dish Casualty of Pornography Debate*, MULTICHANNEL NEWS, May 14, 1990, at 4; *Satellite Dish Indictments Far-Reaching*, BIRMINGHAM NEWS, Feb. 21, 1990, at 1E. Also indicted in this case were American Exxtasy's New York parent company, Home Dish Satellite Networks Inc. ("Home Dish"), as well as U.S. Satellite, Inc. of Murray, Utah, which uplinked American Exxtasy's programming, GTE, Inc. of Stamford, Connecticut, and GTE Spacenet, Inc. of MacLean, Virginia, the satellite common carrier which transmitted American Exxtasy's programming. *Id.*

71. See Neil A. Lewis, *Obscenity Law Used in Alabama Breaks New York Company*, N.Y. TIMES, May 2, 1990, at A1.

extradite its principals, at the request of the Alabama governor.⁷²

Again the question is, what is the appropriate community standard? Dave Browde just made the point that maybe the appropriate community standard is not a geographic standard, but instead perhaps a "cultural" or "virtual community" standard. After all, what we are talking about here are virtual communities. A somewhat similar argument has been made before. We tried to make that argument in the first of the *2 Live Crew* cases, the February 1990 trial of Alabama retailer Tommy Hammond which preceded the *Nasty* cases in Florida later that year. Incidentally, very few people know that the strategies and theories adopted by 2 Live Crew's attorneys in Florida were formulated by Tommy Hammond's attorneys, without any support from 2 Live Crew.⁷³

One of our arguments was that you have to look at 2 Live Crew's music from the perspective of its targeted audience, which was largely African-American. It is not the entire African-American audience, because many African-Americans have limited or no interest in hip-hop, or at least the regional hip-hop of 2 Live Crew, but rather a segment of the African-American audience perhaps largely confined to the Southeast, which truly enjoyed 2 Live Crew's "bass music" and use of African American oral traditions such as "the dozens."⁷⁴ The proposal to adopt a kind of cultural community standard in obscenity cases has thus come up before.

Pete also mentioned that the obscenity laws basically developed predicated on the print medium. For many years the main focus was on books. Obscenity laws were later applied in the twentieth century to the film medium and to other electronic media. But each time you try to apply laws based upon pre-existing media to new media, there are all sorts of problems.

72. Sam Howe Verhovek, *Cuomo Turns Down Request to Extradite Cable Officials*, N.Y. TIMES, June 21, 1990, at B4.

73. See Robert T. Perry, & Carlton Long, *Obscenity Law, Hip-Hop Music and 2 Live Crew*, N.Y.L.J., July 13, 1990, at 5; Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y.L.J., July 20, 1990, at 5.

74. See Robert T. Perry & Carlton Long, *Obscenity Law, Hip-Hop Music and 2 Live Crew*, N.Y.L.J., July 13, 1990, at 5, 6; Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y.L.J., July 20, 1990, at 5, 6, 29.

A very recent example of that point, of which some of you may be aware, concerns the copyright laws, which came about because of the introduction of the printing press in Europe, which for the first time made copying relatively easy. Now we are finding all sorts of problems in applying the copyright laws in cyberspace.⁷⁵

Another aspect of the obscenity test that might be worth noting here concerns the third prong of the obscenity standard, the "serious value" prong. In assessing a work's value you don't apply community standards but rather consider the work from the perspective of a "reasonable person." The issue is whether such a person could find that the work as a whole has "literary, artistic, political or scientific value."⁷⁶

Questions arise as to the "work as a whole" every time there is a new medium. The prosecutors of 2 Live Crew music in Alabama and Florida tried to focus exclusively on the dirty words.⁷⁷ We argued early on that the raps, including dirty words, were not the work as a whole, because the recordings included music as well as the words. In particular, music critic John Leland testified as to the serious value of the music. While John had trouble with the words, he thought 2 Live Crew's bass music was artistically innovative. His testimony was critical in this regard.⁷⁸

Concerning Pete Kennedy's initial hypothetical where three photos were uploaded, the "work as a whole" question arises again. Can you simply isolate one photo or do you have to consider them together? Maybe there is some sort of thematic connection which makes each photo merely part of the whole.

75. See M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 172-81 (1989).

76. *Pope v. Illinois*, 481 U.S. 497, 501 (1987). As Justice Stevens observed in dissent, the "reasonable person" test offers little guidance for cases where reasonable persons might reasonably disagree on the value of the work at issue. *Id.* at 511 (Stevens, J., dissenting).

77. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp 578 (S.D. Fla. 1990), *rev'd in part sub nom. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.), *cert. denied*, 113 S. Ct. 659 (1992).

78. See Robert T. Perry & Carlton Long, *Obscenity Law Principles and the Hammond Case*, N.Y.L.J., July 20, 1990, at 5,6.

Of course, the hypothetical didn't explicitly raise issues of political speech or artistic speech, but maybe they are there. There are a number of unresolved questions in assessing a work's value under the obscenity test. For example, how relevant is the speaker's intention to the value judgments made? Does it matter that the speaker intended this to be a political message or is it simply the ultimate viewer's judgment that counts?⁷⁹

The panel discussion has touched on multimedia. Assuming that the obscenity laws will eventually be applied to multimedia works, you again have the "work as a whole" question. May the text, images, etc. be considered separately or must they be considered together? In addressing free speech issues in new media, one also has to take into account that each medium has its own First Amendment standards. Some media are more speech restricted than others. The broadcast medium, in particular, is the most restricted medium. The question will arise whether these new media will be protected by the print medium standards, which provide the greatest protections, or will they receive some lesser protection?⁸⁰

The question of which First Amendment standards should be applied becomes even more complicated because all media are seemingly converging. Telephone companies seek to offer video programming to the home, while cable companies seek to offer telephone services. Media convergence has been extensively dis-

79. Contrary to suggestions in various obscenity law decisions, the value of an allegedly obscene work is *not* fixed. As critical theorist Barbara Hernstein Smith has observed, "[a]ll value is radically contingent, being neither a fixed attribute, an inherent quality, or an objective property of things, but, rather, an effect of multiple, continuously changing, and continuously interacting variables." BARBARA HERNSTEIN SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* 30 (1988). While the speaker's intentions may be relevant to the evaluation of a work, such intentions do not necessarily fix the work's value. *See, e.g.*, WILLIAM K. WIMSATT, JR. & MONROE C. BEARDSLEY, *THE INTENTIONAL FALLACY IN PHILOSOPHY LOOKS AT THE ARTS: CONTEMPORARY AESTHETICS* 293 (Joseph Margolis ed., rev. ed. 1978).

80. *Compare* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC's fairness doctrine requiring broadcasters to provide airtime for replies to personal attacks and political editorials) *with* *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating Florida statute compelling newspapers to publish replies of political candidates whom they had attacked).

cussed, perhaps most eloquently by Ithiel de Sola Pool about ten years ago in his book, *Technologies of Freedom*.⁸¹

On the child pornography question, I will just reiterate the point made by Dave Browde at the end of his comment. Nobody is for child pornography. The problem arises because of the sometimes blurry boundary between what is child pornography and what is not. You hear about cases where parents are being prosecuted because they took explicit or semi-explicit photos of their kids.⁸² The question remains, is that child pornography or not? These are really difficult questions.

I would like to focus for a minute or two on adult materials and children's access to such materials. I am not referring to child porn, involving the use of kids in making sexually explicit programming, but rather adult material which is disseminated in cyberspace. Here you have, again, competing interests: on one hand, the interests of adults who disseminate such materials and adults who want to receive such materials, and, on the other hand, the interest of parents who wish to restrict their children's access to these materials.

There is a definitional problem here. Sometimes, the interest asserted is the *government's* interest in restricting children's access. But those of us who are pro-free-speech argue that the only legitimate interest is the government's interest in facilitating the *parents'* ability, if they so choose, to restrict their children's access to these materials.⁸³

Be that as it may, those of us who have advocated less speech-restrictive measures to accommodate the parental interest have long supported self-help mechanisms, such as were alluded to by Dave Browde at the end of his comments. So, for example, in the cable area, we advocated "lock-box" mechanisms that enable cable sub-

81. ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983).

82. See, e.g., *United States v. Mr. A.*, 756 F. Supp. 326 (E.D. Mich. 1991).

83. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (FCC general counsel conceded during oral argument on challenge to broadcast indecency regulations that "the government does not propose to act *in loco parentis* to deny children's access *contrary to parent's wishes*").

scribers to screen programming from their homes without censoring programming in other homes. In the Dial-A-Porn area, we advocated voluntary blocking programs instead of regulations that required adult service providers to scramble their signals or issue access codes.⁸⁴

By and large, those self-help mechanisms have not carried the day in the federal court litigation, at least in the Dial-A-Porn area, because the courts have concluded—erroneously I believe—that these mechanisms are simply inadequate to insure parental ability to restrict their children's access to these materials.⁸⁵

Finally, there is a move afoot to stave off government regulation of these media by "self regulation." Of course, most of the Information Superhighway is going to be privately owned and operated. This is, in part, because the government just doesn't have the money to build the Information Superhighway.

A lot of us who represent free speech interests are concerned, however, about access to a privately-owned Information Superhighway. To the extent that there is self regulation by private entities, we are concerned that there may or may not be constitutional protections for speakers on that highway. Thus, the question of "state action" is critical here. It is actually raised in a number of cable public access cases in which I am involved, in the D.C. Circuit and here in the Second Circuit.⁸⁶

84. See *American Civil Liberties Union v. FCC*, 852 F.2d 1554, 1579 (D.C. Cir. 1987) (rejecting FCC's interpretive ruling that cable operators need not make lock boxes available to cable subscribers for screening access programming), *cert. denied*, 485 U.S. 959 (1988); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 554, 556 (2d Cir. 1988) (directing FCC to reconsider feasibility of beep-tone devices that disconnect the telephone line upon "hearing" tone burst that would preface adult telephone messages), *cert. denied*, 488 U.S. 924 (1988).

85. *Carlin Communications*, 837 F.2d at 556 (affirming FCC's rejection of customer premises blocking equipment as adequate protection against children's access to adult message services).

86. See *Alliance for Community Media v. FCC*, 10 F.3d 812, 819-22 (D.C. Cir. 1993) (declaring cable operators' censorship of "indecent" programs from leased and public access channels pursuant to recently enacted federal legislation to be "state action"), *vacated and reh'g en banc granted*, Nos. 93-1169, 1171, 1270, 1276 (D.C. Cir. Feb. 16, 1994); *Glendora v. Cablevision Sys. Corp.*, 45 F.3d 36 (2d Cir. 1995) (vacating dismissal of public access producer's lawsuit against Long Island cable operator

In regard to self regulation, cable operators have no problem censoring public access and leased access channels that carry sexually explicit material if they can do so legally. The 1992 cable legislation authorizes such censorship, though the new statutory scheme is being challenged in federal court. At the same time, cable operators are aggressively marketing all sorts of adult programming over the channels they editorially control. There is doubtless an anti-competitive motive behind their double-standard.

In regard to the question of "virtual rapes" in cyberspace or sexual fantasies involving real names, I have a real problem with some of the crackdowns here, because there has for a long time been a speech-conduct distinction in First Amendment jurisprudence. Virtual rapes seem to me to be speech rather than conduct. To be sure, the speech-conduct distinction is a blurry line at times. The old "fire in the theater" hypothetical⁸⁷ is always cited as to why you can sometimes prosecute speech the same way you can prosecute conduct. As often noted, however, that hypothetical assumed a situation in which there was insufficient time to counter the "bad" speech with "good" speech. In most settings, there is such time. In addition, it is also often noted that there is sometimes a blurry line between yelling "fire" in the theater and "hey, there are not enough fire exits in this theater."⁸⁸

Beyond that, many of these controversies may be resolved via common law remedies, rather than through censorship of the new media. There are common law remedies like libel, false light or intentional infliction of emotional distress.

The final point I would like to briefly make concerns the anonymity issue. Whatever valid reasons may be asserted to justify disclosure of identity, there is a chilling effect in requiring speakers in cyberspace to disclose their identities. I was on one of the pan-

which had cancelled her weekly public access cable television series). On June 6, 1995, the D. C. Circuit en banc upheld the censorship scheme for public access and leased access channels by a 7-4 vote. *Alliance for Community Media v. FCC*, 1995 WL 331052 (D.C. Cir. 1995).

87. See *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes, J.).

88. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

els last year, discussing a case in which we threatened to file a lawsuit on behalf of a public access producer, whose alleged “hate speech” programming had triggered death threats. Queens Public Television (“QPTV”) had required that he make his name and home address available not only to QPTV but also to the general public on some theory of public accountability. If that producer had publicly disclosed such information, he and his family might have been killed. We threatened to sue, prompting QPTV to withdraw their disclosure requirement.⁸⁹

In sum, there is an important counter-concern, especially for political dissidents: anonymity is critical.

Thank you.

PROF. FRANZESE: We do have just a few minutes for questions. Some questions or comments?

QUESTION: Is the state action prerequisite going to be problematic to enforce in this particular context, the electronic media?

MR. PERRY: It depends. Private actors have, on occasion, been deemed to be “state” actors. But you have to show some sort of close nexus between the private actor and state actors. I am not sure that merely the interconnection of the lines is enough to trigger state action. I haven’t really thought that one through. But, again, you have to show some sort of “close nexus.” There are all sorts of cases out there. You have to go back and look at these cases to see in which ones that kind of nexus was found and, like all lawyers do, make arguments.

If you favor a finding of state action, you argue that they are factually apposite. If you are against a finding of state action you argue that there are critical factual distinctions there.

QUESTION: What about the concern for disparate treatment? While certain information could be banned from one segment of the Internet, it can nonetheless be allowed in another. How do we justify that?

89. See Panel, *Censorship of Cable Television’s Leased and Public Access Channels*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J., 801, 836-40 (remarks of Robert T. Perry).

MR. PERRY: I am not sure. It may not be practically possible to ban it from one area, if they are both interconnected. But a private actor can censor material from its network without raising any kind of First Amendment violations. So, yes, you can have that kind of disparate treatment of speech on a private network and on a public network.

MR. BROWDE: If I may, Prodigy has faced this issue, in particular. And in the previous panel, there was the case in which Prodigy banned certain types of speech for fear of liability that might attach to them. In an Internet unmoderated news group, you have a different issue.

But, hypothetically, if the message were to originate with the commercial provider, Prodigy, and then be delivered on to an Internet group or delivered and disseminated, even internally, with Prodigy for its network. You have a question of who is liable, if there is libelous speech in that. Is Prodigy the publisher?

MR. KENNEDY: Well, your question raises the interesting problem of when and where does the individual user have a right to access to a machine or a right to access the Internet. This is another reason why I emphasize that you have to concentrate on how the connections are set up. Generally, the individual, unless he or she is a student or a professor at a public university, will have an on-ramp to the Internet through some commercial provider of services, either Prodigy or CompuServe, that has gateways to the Internet, or directly through a commercial Internet provider.

Unless that first on-ramp is a government actor, then that first person providing the on-ramp can essentially set whatever standards it likes by contract with the person to whom it is providing the access. They can set up contracts that say, "I will only let you into certain areas, or if you use my service, you will obey certain guidelines, and if you don't obey those guidelines, I will cut you off."

There was a very highly publicized case, not a legal case, involving two non-practicing lawyers in Arizona, Canter & Siegel, a

husband and wife team.⁹⁰ They “spanned” the Usenet. If you are familiar with the term, it means they advertised their services by sending an advertisement, which is frowned upon on Internet, to every single news group in the world. It made a lot of people very unhappy.

A lot of the folks who didn’t like the fact that they were trying to advertise their services sent nasty replies back to them. Thousands of nasty replies were sent back to them. They multiplied so much that the service provider that they had signed up with in Arizona crashed and the service provider cut them off, saying they had broken the rules that were set up.

The lawyers turned around and threatened to sue the Internet provider, saying that they had the right to access.

Canter & Siegel actually did it twice and got cut off two Internet providers because they crashed two machines. All of that dispute between Canter & Siegel and the providers takes place under the purview of contract law, not First Amendment law or constitutional regulation. Their dispute will deal with the contract between them and the on-ramp that was provided to them.

MR. BROWDE: Well, let me give you a First Amendment twist to it. Let’s say that those people were to violate the terms of service, which is what they are typically called. The existence of the terms of service create an obligation on behalf of the Internet provider to actually enforce those terms of the service.

MR. KENNEDY: Well, yes, regardless of whether that’s a problem of the First Amendment or a problem of other areas of liability. The reason that I am, and other people like me are, so in demand with service providers is because they are in this bind. They don’t want to monitor any content at all, but they are worried about the liability for whatever flows through the machine. Will the government or private individuals try to sue them or put them in jail for what goes through the machine? If they put their hands on it and start to look at what goes through, does it get better or

90. See Peter H. Lewis, *An Ad (Gasp!) in Cyberspace*, N.Y. TIMES, Apr. 19, 1994, at D1.

worse? They may be able to get rid of the most obvious material and protect themselves from liability for that, but by taking control over the content, do they become a publisher?

MR. PERRY: Do they then, by censoring it, get sued for violating the free speech of those who would post that material?

MR. KENNEDY: They get sued only if they are a government actor. If they are not a government actor, or do not have a close enough nexus with the government actor, then they are just not subject to the First Amendment.

You will see lots of discussions about First Amendment rights and free speech rights on the Internet. Most of those are without a clear analysis of the law behind it. This is not to diminish the strong personal feelings Americans have against anyone else telling them what they can and can't say. But it doesn't necessarily get to the First Amendment.

PROF. FRANZESE: Other questions? All right, then, I would like to thank our superb panelists and invite you please to join us for lunch. Thank you.

