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Panel II: Indecency on the Internet: Constitutionality of the Telecommunications Act of 1996

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MR. JOLLYMORE: Although this panel is entitled Indecency and the Internet: The Constitutionality of the 1996 Telecommunications Act, we will also address other issues.

My name is Nick Jollymore and I am a lawyer at Time Inc., the book and magazine publishing subsidiary of Time Warner, Inc. Until two years ago, the only business in which Time Inc. was engaged was the publication of books and magazines. As a print publisher, we were privileged to en-

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joy the broadest First Amendment protection available.¹

1. Despite the First Amendment's unambiguous language that Congress create "no law" abridging free speech, U.S. CONST. amend. I, freedom of speech has never been protected absolutely. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("It is a fundamental principle long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish."); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) ("It is well understood that the right of free speech is not absolute."); see also *Roth v. United States*, 354 U.S. 476, 485 (refusing to interpret the First Amendment as protecting all speech); *Beauharnais v. Illinois*, 343 U.S. 250 (1954) (stating that rejecting obscenity from First Amendment protection is implicit in the history of the First Amendment). The Supreme Court created and has long recognized a hierarchy in the First Amendment's protection of speech from government regulation, affording greater protection to certain types of speech, and leaving other forms of speech more vulnerable to regulation. For a defense of such speech categorization, see John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization as Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). For an argument advocating the elimination of speech categorization and affording all varieties of speech equal value, see O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1 (1996). The Supreme Court explained in *Roe v. Wade* that such a speech hierarchy is not recognized by the U.S. Constitution:

The Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims . . . these tests or standards are not, and do not purport to be rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government.

410 U.S. 113 (1973).

The degree of First Amendment protection afforded speech generally depends on the type of speech involved. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 930 (2d ed. 1988) (stating that commercial speech, obscenity, child-pornography, and defamatory speech receive lesser, or no, First Amendment protection because of their content, regardless of the media through which they are communicated). The extent of First Amendment protection in the electronic media, however, is related not to the content of the speech, but rather to the medium in which the speech is communicated. *Id.* at 1003. Generally, print media receives the highest level of protection of the communications media, while the electronic media, including broadcasting, cable television, and computer networks, have received the lowest. The rationale cited by the courts for hierarchical protection based on the type of medium in which speech is communicated, as compared to the content of the speech, is technological characteristics of the media, which most commonly include pervasiveness and frequency scarcity. See *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1069-70 (1994).

Different news media receive varying degrees of First Amendment protec-

Now, however, we also operate in the environment of cyberspace. Time Inc. has made a huge investment, funded by our corporate parent, in online services. We have, I would say, a very elaborate and one of the most popular World Wide Web (“Web”)² sites, called Pathfinder.³ Pathfinder

tion in accordance with the particular characteristics of each means of communication. See *FCC v. Pacifica*, 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (applying a flexible First Amendment standard to broadcast media due to its unique problem of scarcity, and stating that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them”); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 960 (N.D. Cal. 1987) (noting that newspaper and other print media enjoy broad protection from government interference). The print media has consistently been afforded the greatest First Amendment protection of the various media. See *Group W Cable*, 669 F. Supp. at 959-60. For a discussion of the degrees of protection afforded the different media, see generally *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987). For a persuasive argument that the extent of protection afforded the different media should not be based on technological considerations, see generally *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1069-70 (1994); Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991) (on file with Harvard Law School Library) (“[T]he Constitution’s norms, at their deepest level, must be invariant under merely technological transformations.”).

2. The Web is one of three methods by which people can locate and retrieve information on the Internet. *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996); *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996). It is the most technologically advanced information system on the Internet, as well as the most rapidly developing, easy-to-use, and popular means of searching for and gathering information. *Id.* One commentator aptly explained how it functions:

The Web is a system of ‘pages’ or ‘sites’ consisting of video, interactive graphics, and text. ‘Hyperlinks’ connect the pages and enable users to ‘point and click’ their way through the Web. The first page, or screen, of a location on the Web, or ‘Web site,’ is the ‘home page.’

Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7, ¶ 6 (1996) (citations omitted). For a brief history and explanation of the basic operation of the Web, see *ACLU*, 929 F. Supp. at 836. For detailed information about the Web and its history, see BRYAN PFAFFENBERGER, *WORLD WIDE WEB BIBLE* 53-66 (2d ed. 1996). See also *About the World Wide Web* (visited May 28, 1997)

contains a collection of magazine and book contents from both our own properties and those under license. We sell advertising on it, and are looking forward to its eventually making a profit.

Most, if not all, of our magazines have their own presence on the Web, if not as Web sites, then on one of the commercial services, such as America Online ("AOL") or CompuServe.⁴ Some of our magazine Web sites include, for example, *People Online*, *Time Online*, *Sports Illustrated Online*, *Sports Illustrated for Kids Online*, *Money Online*, *Fortune Online*, and *Entertainment Weekly Online*.⁵

For our editors, who are by and large print editors, and for our lawyers, who are exclusively print lawyers, we are in a new realm where it is no longer certain that we, as entities

<<http://www.w3.org/pub/WWW/WWW>>.

3. Time, *Time Warner's Pathfinder* (visited Apr. 16, 1997) <<http://pathfinder.com>>.

4. AOL and CompuServe are online service providers ("OSP's"), which are national businesses that provide individuals with a means of accessing the Internet. *ACLU*, 929 F. Supp. at 833. In contrast to Internet service providers ("ISP's") which provide access to the Internet only, OSPs, in addition to providing Internet access, provide access to proprietary content unavailable to nonsubscribers. See Gerald Leibovits & Ian M. Singer, *Litigators who Untangle the Web Will Find Scores of Valuable Sites*, N.Y. L.J., May 20, 1997, at 5. AOL is currently the leading OSP, with 8 million customers, Compuserve is the second-largest, with 5.3 million subscribers, Microsoft is third-largest with 2.2 million subscribers, and Prodigy is the fourth largest, with 900,000 subscribers. See *Counting up the Online Market*, MULTIMEDIA WIRE, June 4, 1997 (1997 WL 7141311); *Review & Comment on the News*, 5 REP. ON MICROSOFT 11, June 2, 1997 (1997 WL 8661561). Others estimate Microsoft Network's subscriber list at 2.3 million. See Jon Schwartz, *Microsoft Backs off From Net Access*, S.F. CHRON., June 3, 1997, at C1 (1997 WL 6698669); Stuart J. Johnston, *Microsoft Grows On: Rising Sales and New Products Keep Growth Rates Soaring*, INFO. WEEK, June 2, 1997 (1997 WL 7602597). For a list of the 14 major internet service providers and their current number of subscribers, see *Counting up the Online Market*, MULTIMEDIA WIRE, June 4, 1997 (1997 WL 7141311). The "Big Three," AOL, Compuserve, and Microsoft, hold over 75% of the U.S. market, *E-mail Ranks Swell by 12.5 Million in First Quarter*, REP. ON ELECTRONIC COM., June 3, 1997 (1997 WL 8582658), and 35% of the European market, Kimberly A. Strassel, *On the Line: Small Internet Firms in EU Are Bracing For Consolidation*, WALL. ST. J. EUR., at 1 (1997 WL-WSJE 3812207).

5. Time, *Time Warner's Pathfinder* (visited Apr. 16, 1997) <<http://pathfinder.com>>.

involved in cyberspace, enjoy the same broad First Amendment protection enjoyed by the print media.⁶ Although no one knows exactly what is going to happen, we are certainly interested in what the courts will do with the First Amendment issues related to the Internet (“Net”).⁷ I certainly am excited to hear what our panelists have to say about it.

Before I introduce our panelists, however, let me briefly outline the topics that we are going to discuss today. First, we are going to talk about the Internet and what it is. Many of us, including myself, are trying to understand what the it is. In *ACLU v. Reno*,⁸ a case that we will discuss in some detail, Judge Sloviter of the Third Circuit made very extensive findings of fact concerning cyberspace.⁹ These findings, in my opinion, are some of the clearest statements about what the Internet is and how it works. In his decision, Judge Sloviter also made a rather sweeping statement regarding

6. See *supra* note 1 (explaining greater First Amendment protection afforded print media).

7. The Internet currently consists of 13 million host computers, BRYAN PFAFFENBERG, *WORLD WIDE WEB BIBLE* 36 (2d ed. 1996), linked by more than 50,000 connected computer networks. *Shea*, 930 F. Supp. at 925. The Internet is not controlled by a single entity, and the information found on it is actually located on individual computers throughout the world. *Id.* at 926. Approximately 30 to 60 million people currently have access to the Internet, and that number is expected to exceed 100 million by 1998. JILL H. ELLSWORTH & MATTHEW V. ELLSWORTH, *MARKETING ON THE INTERNET* 5 (2d ed. 1997) (quoting Vinton Cerf, an early Internet developer, testifying to the United States House of Representatives). The Internet community has recently experienced exponential growth. See Curt A. Canfield & Joseph Labbe, *Web or Windows?: Planning for Internet/Intranet Technology—Explosive growth Experienced*, N.Y. L.J., Jan. 21, 1997, at S2. The increased use of the Internet is due in part to increased advertising and ease of obtaining access. See Christopher Wolf & Scott Shorr, *Cybercops Are Cracking Down on Internet Fraud: Federal and State Officials Have Stepped Up Efforts in the Battle Against Info-Highway Robbery*, NAT'L L.J., Jan. 13, 1997, at B12.

8. 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996) (holding that speakers could not be held liable for indecent communication on the Internet because there were no effective means by which they could ensure that minors did not have access to speech).

9. *Id.* at 830-49 (detailing the nature and development of cyberspace, the Internet, and the World Wide Web, and describing Internet access to sexually explicit material, including existing and proposed methods of age verification).

cyberspace, commenting that, “[t]he Internet is . . . a unique and wholly new medium of worldwide human communication.”¹⁰

I, for one, think the statement is true and accurate. The Internet is, indeed, unique for a number of reasons. First, no single person controls it. In fact, control of Internet content is dispersed among thousands, and probably millions, of individuals and/or entities.¹¹ Therefore, the Internet is unlike a printing press, a broadcast station, or a cable television system.

Second, the Internet is unique because there are very low entrance barriers.¹² The old saw that “freedom of the press belongs to those who own one” is no longer true because the barriers to entry on the Internet require an investment, as Judge Sloviter estimated, of as little as maybe \$2,000.¹³

Third, the Internet is unique because it is very popular;¹⁴

10. *Id.* at 844 (stating that “[t]he Internet is therefore a unique and wholly new medium of worldwide communication.”).

11. *Id.* at 832 (“No single entity—academic, corporate, governmental, or non-profit—administers the Internet[, rather it is] hundreds and thousands of separate operators of computers and computer networks [without a] centralized . . . control point . . .”).

12. *Id.* at 843. The *ACLU* court described the unusually small entrance barriers:

The start up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines. This enables operation of their own Web sites not only by large companies, such as Microsoft and Time Warner, but also by small, not-for-profit groups, such as Stop Prisoner Rape and Critical Path AIDS Project.

ACLU, 929 F. Supp. at 843.

13. *Id.* at 833 (stating that “[w]ith an investment of as little as \$2,000.00 and the cost of a telephone line, individuals, non-profit organizations, advocacy groups, and businesses can offer their own dial-in computer bulletin board service where friends, members, subscribers, or customers can exchange ideas and information.”).

14. *Id.* at 831 (explaining the extraordinary growth of the Internet in recent years, with fewer than 300 computers linked to the Internet in 1981, as compared to over 9,400,000 in 1996). As of 1996, almost twelve million people in the United States alone subscribed to one of the major commercial online services. *Id.* at 833.

it has captured both our attention and our time. In *Reno*, the three-judge panel estimated that there are now forty million Internet users, and that by the end of the century there will be 200 million users.¹⁵ Certainly, no single magazine has such a circulation.

The power of the Internet makes a lot of people, including myself, nervous at times. For example, when I was getting ready for work yesterday, I heard a news report on National Public Radio that the Iraqi government newspaper had published a report attacking the Internet as “the end of civilizations, cultures, interests and ethics.”¹⁶ The Iraqi newspaper also alleged that the Internet “is one of the American means to enter every house in the world. . . . They want to become the only source for controlling human beings in the new electronic village.”¹⁷

Another country struck with Internet-phobia is the People’s Republic of China (“PRC”), which, you may have heard, last year announced its intention to construct an *intranet* for circulating information within the countries’ boundaries in order to further its goal of protecting its citizens from information from foreign sources.¹⁸

15. *Id.* at 831.

16. See Matthew McAllester, *The Surfing Evangelists*, *NEWSDAY*, Feb. 23, 1997, at A41 (quoting the Iraqi government newspaper *Al-Jumhuriya*); *Financial DIGEST*, *WASH. POST*, Feb. 18, 1997, at C8; *Off the Ticker*, *Business*, *S.F. EXAMINER*, Feb. 18, 1997, at C1.

17. *Id.*

18. See *CompuServe At Work on Forming Alliance to Enter Chinese Market*, *COLUMBUS DISPATCH*, Jan. 10, 1997, at 1F (discussing the PRC’s concern about giving its citizens access to politically sensitive or pornographic materials). China established its intranet, the China Wide Web (“CWW”), because it wanted a more controllable Internet as a result of its “nervousness about the openness of the Internet and its belief that the Internet as a “threat to social order.” Mark LaPedus, *China Intranet to Connect 50 Cities*, *ELECTRONIC BUYERS NEWS*, Feb. 3, 1997, at 66. In fact, China requires American citizens who sign up for CWW access to register with local police and to promise not to commit crimes against the country. *Id.* CWW last year banned what it deemed “illegal Internet addresses,” those addresses containing material it judged pornographic or politically sensitive, and recently banned the Web sites of CNN and the Wall Street Journal. *Id.*

In the United States, we have our own reaction, based on similar concerns, to the power of the Internet. But, because we come from a First Amendment tradition, we have a much more moderated response. That response is embodied, in part, in several provisions of the Telecommunications Act of 1996 (“Telecom Act”),¹⁹ which we will discuss today.

The second topic this panel will discuss is the First Amendment.²⁰ I have been teaching a course here at Fordham Law School for fifteen years on the First Amendment and mass media, and I can say one thing without equivocation: I have never met a student who is not in favor of the First Amendment. The moral values embodied in the First Amendment are part of a tradition that we all share, if not cherish.²¹ I presume that that is true of our panelists as well,

An intranet is an internal computer network using Internet computer network technology and effectively “sits on the side” of the Internet and can be connected only when those controlling it allow. Mar. 31, 1997. One of the primary reasons for the CWW is the facilitation of business dealings within the PRC. *Id.*

19. Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.) [hereinafter Telecom Act].

20. The First Amendment provides, in relevant part, “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

21. This hierarchy is based on the rationale that certain types of speech foster the values underlying the First Amendment—freedom of expression from regulation—more than others. There is an ongoing debate regarding whether the language of the First Amendment merely prohibits the government from limiting expression or whether it affirmatively requires the government to ensure that every citizen is afforded equal expression. The First Amendment is traditionally viewed as prohibiting government from limiting freedom of expression. *See, e.g., Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (describing the values embodied by the First Amendment to include “an overarching commitment to protect speech from Government regulation”). Some of the most commonly recognized values underlying the First Amendment include the encouragement of a “marketplace of ideas” and rich public debate. The “marketplace of ideas” theory was first recognized by Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919), in which he described the marketplace of ideas concept as “the ultimate good desired is better reached by full trade in ideas—the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Id.* at 630 (Holmes, J., dissenting). This principle, as well as Justice Holmes’ language, has been consistently cited in U.S. First Amendment jurisprudence. *See, e.g., FEC v. Mass Citizens for Life, Inc.*, 479 U.S. 238, 257-59 (1986); *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 534 (1980), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

and therefore that none of them is going to question the validity of the First Amendment as a legal principle.

The question regarding the First Amendment, then, is not whether First Amendment protection should exist, but rather how far it should extend. Should First Amendment protection for the Internet be as extensive as that enjoyed by print,²² or should it be as limited as that enjoyed by broadcast?²³ Currently, we do not have a model; should there be one?

It is not clear how the Supreme Court will approach the

For a comprehensive discussion of the historical developments of free speech and a discussion of its underlying values, see U. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Relaxing Values and Categories in First Amendment jurisprudence*, 34 AM. BUS. L.J. 1, 3-15 (1996).

22. See *supra* note 1 (discussing the greater First Amendment protection afforded print media and the differing degrees of protection afforded the various communication media). For example, while the government requires broadcasters to provide free air time to those whom they criticize, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the government does not require newspaper publishers to print the replies of the persons criticized by the print media, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

23. The broadcast media enjoys the least amount of First Amendment protection within the communications industry, and thus is subject to the greatest regulation by the government. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[O]f all the forms of communication, it is broadcasting that has received the most limited First Amendment protection.”); *id.* at 741 n.17 (“[I]t is well settled that the First Amendment has special meaning in the broadcasting context.”) (citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973)). For a persuasive argument that broadcast media should be free of government regulation and should receive the same broad First Amendment protections as print media, see generally LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST Amendment* (1988). Two of the most commonly cited rationales for the lesser protection of the broadcast media are its “unique pervasive presence in the lives of all Americans,” *Pacifica*, 438 U.S. at 748, and its unique accessibility to children without parental supervision or the ability to restrict the expression to adults, *id.* at 750. Among the other reasons recognized for requiring greater regulation of the broadcast media are: (1) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference, see *Rowan v. Post Office Dep’t*, 397 U.S. 728 (1970); (2) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (3) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. *Pacifica*, 438 U.S. at 731 n.2.

issue of First Amendment protection on the Internet. The Court has just barely touched upon the First Amendment model for cable television.²⁴ We do not know how traditional controls over content, such as the body of tort law that embraces privacy and defamation, will apply to the Internet. Indeed, we do not even know if these principles are applicable to, that is, if they make sense or are workable on, the Internet. Finally, we do not know how much commercial speech is on the Internet and whether or not it makes sense to have a legal regime under which such speech enjoys more limited First Amendment protection, as it does in other media.²⁵ All of these, and others, are open questions.

The third and final topic that we will discuss is the Communications Decency Act of 1996 (“CDA”),²⁶ which is part of

24. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (deciding that “[f]undamental technological differences between broadcast and cable television transmission renders relaxed standard of scrutiny for broadcast regulation inapplicable to First Amendment challenge of cable regulation; cable television does not suffer from inherent limitations of broadcast television arising from scarcity of available broadcast frequencies compared to number of would-be broadcasters”).

25. Commercial speech is “speech that advertise[s] a product or service for profit or for business purpose.” BLACK’S LAW DICTIONARY 271 (6th ed. 1990). Commercial speech is one of the least protected types of speech, and in fact was not afforded any protection until 1976. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In 1980, the Supreme Court formulated a four part test, which it continues to follow today, for determining the validity of a regulation restricting commercial speech. See *Central Hudson Gas & Electric Co. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). If a the commercial speech at issue is truthful and not misleading, thus passing the threshold factor, the Court evaluates whether the government has a substantial interest in regulating the speech, whether the means of regulation further that interest, and whether are the regulation is no more restrictive than necessary to achieve its goal. *Id.* at 564.

26. Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-36 (to be codified at 47 U.S.C.A. § 223(a)-(h) (West Supp. 1996)). The CDA seeks to regulate the Internet and other interactive computer services with regard to not only obscenity and child pornography, but also indecency. Modeled after the federal dial-a-porn laws, the CDA is an attempt to keep indecent online materials from children. Immediately after its passage, two pre-enforcement facial challenges to the CDA were brought in different courts. Both lawsuits assert that the law violates the First and Fifth Amendments. *ACLU v. Reno*; *American Library Association v. United States Dep’t of Justice*, Consolidated Nos. 96-963,

the Telecom Act. Two lawyers on this panel are directly involved in the constitutional challenge to the CDA that is currently before the Supreme Court, and the other panelists, I think, are familiar to very familiar with that case.

The CDA, to oversimplify, prohibits obscene transmissions on the Internet.²⁷ “Obscene” is, what I would call and

96-1458 (E.D. Pa.) and *Shea v. Reno*, 96 Civ. 976 (S.D.N.Y.). The CDA provides that any facial constitutional challenge to the Act will be heard by a three-judge district court. Courts in both cases issued decisions preliminarily enjoining enforcement of the Act.

The Act provides that any interlocutory or final judgment, decree holding any provision of the Act unconstitutional, shall be reviewable as a matter of right by direct appeal to the Supreme Court. On December 6, the Court noted probable jurisdiction in the *ACLU/ALA* case, and later held the *Shea* case pending resolution of *ACLU/ALA*.

27. *Id.* § 502(a)(1)(B) [hereinafter the “indecency provision”] Section 223(a)(1)(B), the “indecency provision,” subjects to a criminal fine and/or imprisonment of no more than two years, anyone:

- (1) in interstate or foreign communications . . . (B) by means of a telecommunications device knowingly—(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.

47 U.S.C.A. § 233(a)(1)(B). Although the Telecom Act does not define “telecommunications device,” the *ACLU* court agreed with its parties’ submission that the plain meaning and legislative history of the act supported the conclusion that a modem was included within this definition. *ACLU*, 929 F. Supp. at 829 n.5.

The new Section 223(d) of 47 U.S.C. provides, in pertinent part: (d) Whoever—

- (1) in interstate or foreign communications knowingly—
 - (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
 - (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
- (2) knowingly permits any telecommunications facility under such per-

others have called, hardcore pornography. Such material is outside the protection of the First Amendment, as the Supreme Court decided in *Roth v. United States*²⁸ and *Miller v. California*.²⁹ Therefore, the CDA's provision prohibiting obscenity is not a controversial aspect of the CDA. Because obscene transmissions are outside the protection of the First Amendment, it is unlikely that any of our panelists will argue that obscenity deserves First Amendment protection.

The controversial parts of the CDA are a number of provisions that deal with indecency on the Internet.³⁰ To oversimplify again, those provisions prohibit, and, in fact, impose criminal sanctions on, the transmission of indecent material if it will get into the hands of minors.³¹ The CDA

son's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

47 U.S.C.A. § 223(d).

28. 354 U.S. 476 (1957). *Roth* was the first case in which the Supreme Court was forced to face the issue of whether or not the First Amendment protects obscene materials. Most importantly, the Court, in considering the constitutionality of a statute criminalizing the mailing of obscene material, established its first test for determining whether or not material is obscene, asking "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest." *Id.* at 488-89.

29. 413 U.S. 15 (1973). In *Miller*, the Supreme Court revised its obscenity standard established in *Roth* by formulating a three-part test for identifying obscene material:

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

413 U.S. at 24.

30. 47 U.S.C.A. § 223(d)-(h). The statute's indecency provision fails to define the term indecency, and although the Supreme Court has not ruled on the issue, it has recognized the potential conflict. *ACLU*, 929 F. Supp. at 850-51 ("Notwithstanding Congress' familiarity with *Pacifica*, it enacted § 223(a), covering 'indecent' communications, without any language confining 'indecent' to descriptions or depictions of 'sexual or excretory activities or organs,' language it included in the reference to 'patently offensive' in § 223(d)(1)(B).").

31. The indecency provisions subject violators to criminal penalties of a maximum of two years imprisonment and/or a fine. 47 U.S.C.A. § 223(a); *see*

also provides certain defenses that we will probably touch on today as well.³²

The challenge to the CDA was brought by a number of interested parties. The American Civil Liberties Union (“ACLU”) led one charge,³³ and the American Library Association (“ALA”) led another.³⁴ Those two cases were consolidated and, last June, a three-judge panel in Philadelphia ruled that the CDA is unconstitutional.³⁵ The case is now before the United States Supreme Court.³⁶ The government filed its brief last month and the ACLU will file its brief tomorrow.

Now let me introduce our panelists. David Pawlik is with the Communications Group at Skadden, Arps, Slate, Meagher & Flom in the firm’s Washington, D.C. office. David’s clients include Bell operating companies, wireless cable carriers, broadcasters, and firms that write and publish Internet software. Before David entered law school, he spent twenty years in broadcasting and broadcast advertising.

ACLU, 929 F. Supp. at 849-50.

32. 47 U.S.C.A. § 223(e). The statute explicitly recognizes various “safe harbor” defenses, including, inter alia, individuals who merely provide Internet access and do not create the offensive material, *id.* § 223(e)(1), mere employers of violators, *id.* § 223(e)(4), and those who in good faith attempt to prevent access to minors through “reasonable, effective, and appropriate means,” *id.* § 223(e)(5)(A), including “requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number,” *id.* § 223(e)(5)(B).

33. See Brief for Petitioner American Civil Liberties Union at 9, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (No. 96-963) (consolidated with No. 96-1458). The ACLU filed its action the very day the CDA was signed into law, February 8, 1996, moving for a temporary restraining order to enjoin enforcement of the CDA’s amendments to sections 223(a)(1)(B) (the “indecent provision”) and 223(d)(1) (the “patently offensive provision”) of the Telecom Act.

34. Brief for American Library Association, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (No. 96-1458) (consolidated with No. 96-963). Soon after the ACLU, the ALA filed its action, which was substantially similar. *ACLU* at 827-28.

35. *ACLU*, 929 F. Supp. at 858. The Supreme Court heard oral argument on March 19, 1996. 1997 WL 136253 (U.S. Oral Argument—DIGEST).

36. The Supreme Court heard oral argument on March 19, 1996. 1997 WL 136253 (U.S. Oral Argument—DIGEST).

Preeta Bansal is a lawyer with a broad background in communications issues. She is currently at the New York office of Gibson, Dunn & Crutcher, where she is a litigator specializing in libel, copyright, and constitutional issues. Before she joined Gibson, Dunn, Preeta served in the Clinton Administration as Special Counsel to the Office of White House Counsel working on litigation matters and Supreme Court nominations. She also worked as a counselor to the Assistant Attorney General in the Antitrust Division of the Department of Justice, where she coordinated policy and litigation matters involving intellectual property, high-technology network industries, and international enforcement. She supervised the antitrust investigation of Microsoft, and was also involved in issues relating to violence on television. Before government service, Preeta was in private practice where she worked on the “must carry” cable television litigation, which concluded in the Supreme Court in the *Turner*³⁷ case.

Chris Hansen has had a long and distinguished career as a public interest lawyer. Chris is currently Senior Staff Counsel at the ACLU. He has been with the ACLU for the past twelve years, first as Special Litigation Counsel, then as Associate Director of the Children’s Rights Project, and since 1993 in his present position as Senior Staff Counsel. Before joining the ACLU, Chris was with the New York Civil Liberties Union for four years. He was also Director of the Mental Patients’ Rights Project, and was an attorney for the Mental Health Law Project and the Legal Aid Society of New York. Chris is an active speaker, legal scholar, and author, and has taught at Hofstra Law School as an Adjunct Professor. Among the many litigations in which Chris has been involved are cases concerning mental health, children’s rights, and a broad array of constitutional cases, including some important desegregation cases and many First Amendment

37. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

cases.

Chris is presently involved in four cases concerning First Amendment issues on the Internet. One of those cases is the case upon which this panel will focus today, *ACLU v. Reno*,³⁸ which, as I said, challenges the CDA on constitutional grounds. Chris argued that case last year on behalf of the ACLU and its co-plaintiffs before the three-judge panel that ruled in his favor.³⁹ He is actively involved in the appeal now pending before the Supreme Court.⁴⁰

Ted Hirt is a lawyer with the Department of Justice where he specializes in constitutional issues. Ted is the Assistant Branch Director of the Federal Programs Branch of Justice, which is the branch that defends the constitutionality of federal statutes. That branch is involved in issues ranging from the Brady gun control law,⁴¹ which involves both Second and Tenth Amendment constitutional issues, and a wide array of First Amendment issues. One of Ted's primary specialties is telecommunications issues, especially First Amendment work. Ted is the author of several articles on constitutional issues, including First Amendment matters and litigation practices.⁴² He has participated in the Department of Justice training program on the Federal Rules of Civil Procedure, discovery in pretrial practice, and financial institutions regulation. Finally, Ted supervised the govern-

38. 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996).

39. *Id.* at 833 (holding the CDA unconstitutional).

40. The Supreme Court heard oral argument on March 19, 1997. *ACLU v. Reno*: A Chronology (visited June 9, 1997) <<http://www.aclu.org/news/n050896.htm/>>. For a transcript of the oral argument, see 1997 WL 136253.

41. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 925A (1994)) (establishing a national computer system for instant checks of information on criminal backgrounds of potential gun purchasers to be made operational for use by gun sellers within five years).

42. See, e.g., Theodore C. Hirt, "Symbolic Union" of Church and State and the "Endorsement" of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence, 24 WAKE FOREST L. REV. 823 (1989).

ment attorneys involved in *ACLU v. Reno*.

Last, but not least, is Parry Aftab. Parry is a cyberspace and technology law expert. She is a partner of Aftab & Savitt, a Paramus, New Jersey law firm that has been recognized for its innovative practice using technology. You can reach its Web site at <www.aftab.com>. Parry is also the founder of the Virtual Law Firm Network, which is a network of lawyers that operates somewhat in the manner of a large firm but is organized through cyberspace.⁴³ The network has specialists in international and United States tax law, environmental law, regulatory law, trusts and estates law, and criminal matters.⁴⁴ Parry is also the host of America Online's Legal Information Network discussion board and Court TV Law Center's Legal Help Line. Finally, Parry created and runs Law Talk, which is a legal discussion forum on the Women's Interest Board on America Online.

Those are our panelists. I thank you all for joining us. I would now like to ask Dave Pawlik to begin with the opening statement.

MR. PAWLIK: Thank you. I first want to say that I am here substituting for Toni Cook Bush, who sends her apologies.

The Internet has been called "an untrammelled, uncontrolled, wholly liberated ocean of information" and "a great egalitarian town meeting."⁴⁵ Considering the vastness of its libraries and files, and the diversity of its contributors, it is no wonder that this ocean contains not only the waves of art, literature, and information, but also less edifying artifacts

43. See Aftab & Savitt, P.C., *The Virtual Law Network (VLFN)* (visited Apr. 20, 1997) <<http://aftab.com/vlfnet.htmvlfn/>>; Parry Aftab, *Sophistication Not Size Matters*, LEGAL TIMES, Mar. 18, 1996, at 40.

44. See, e.g., Karen Mills, *Investing in Indonesia* (visited Apr. 20, 1997) <<http://aftab.com/millsart.htm>> (supplying an article written by VLFN's Indonesian member).

45. Quotation from *The Spectator*, Feb. 4, 1995, reprinted in 141 CONG. REC. S9018 (daily ed. June 26, 1995) (statement of Sen. Grassley).

lurking deep in its darkness. This variety becomes a problem only because this ocean is frequently “surfed” by our children, who, in many families, are the most computer-literate members of the household.

Senator Exon warned us that the Internet was filled with dark places.⁴⁶ He compiled examples of what was available for downloading and displayed the resulting collection of pornography in his famous “blue book.”⁴⁷ Senator Grassley amplified Congress’ concern by citing a Carnegie Mellon study that was subsequently published in the *Georgetown Law Review*⁴⁸ and was the subject of a *Time* magazine cover story.⁴⁹ Although the Carnegie Mellon study has been criti-

46. “[The Internet] is a great boon to mankind. But we should not ignore the dark roads of pornography, indecency and obscenity it makes possible.” Sen. Exon, Letter to the Editor, WASH. POST., Dec. 2, 1995, at A20. See also 141 CONG. REC. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon) (discussing the plethora of pornography available on the Internet and expressing concern for children’s exposure to such material). Upon his initial introduction of the CDA on February 1, 1995, Senator Exon warned that without the passage of his legislation, the information superhighway would become a red light district. 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995).

47. *Id.* Senator Exon included some of the “rawer” Internet images in a blue folder and invited his colleagues to view them at his desk. *Id.* The pictures in the folder “made Playboy and Hustler look like Sunday-school stuff.” *Id.* The bill passed 84 to 16, many say because “[a]t the end of the debate—which was carried live on c-span—few Senators wanted to cast a nationally televised vote that might later be characterized as pro-pornography.

48. Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995).

49. Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38, reprinted in 141 CONG. REC. S9017-02. The Carnegie Mellon study, entitled *Marketing Pornography on the Information Superhighway*, reported the results of a team who surveyed 917,410 sexually explicit pictures, descriptions, short stories, and film clips over an 18 month period. 141 CONG. REC. at S9019. One of the most amazing and most often cited findings of the report was that 83.5% of the pictures on Usenet groups where digitized images are stored are pornographic. *Id.* Many of the images are of things that cannot be found in common pornographic materials (though most pictures are scanned from existing photographs): “pedophilia (nude photos of children), hebephilia (youths) and paraphilia—a grab bag of deviant material that includes images of bondage, sadomasochism, urination, defecation, and sex acts with a barnyard full of ani-

cized⁵⁰ and the *Time* story may have misinterpreted the study,⁵¹ the resulting concern in Congress and in homes across the nation gave us the CDA—new regulation in a de-regulatory era.

Senator Leahy, with support from Senators Levin, Biden, and Feingold, led the opposition to the CDA.⁵² Even Speaker Gingrich, who proudly introduced the House of Representatives' Internet-based system, "Thomas,"⁵³ commented that the CDA was a violation of free speech.⁵⁴ The National Telecommunications and Information Administration, the Justice Department, and the Chairman of the FCC also joined the opposition to the CDA.⁵⁵ In the end, the CDA's opposition was ineffective. Its passage was guaranteed by both lawmakers' fears of appearing to favor pornography in an election year and the overwhelming popularity of the Telecom Act to which the CDA was attached.

There is no question that pornography exists on the Internet. Even the staunchest supporters of Internet freedom

mals." *Id.* The study does point out that "pornographic image files, despite their evident popularity, represent only about 3 percent of all the messages on the Usenet newsgroups, while the Usenet itself represents only 11.5 percent of the traffic on the Internet. *Id.*

50. See, e.g., Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating the Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 53-57 (1996) (discussing common criticisms of the Rimm study, including its methodology and lack of peer review); Donna L. Hoffman & Thomas P. Novak, A Detailed Analysis of the Conceptual, Logical, and Methodological Flaws in the article, *Marketing Pornography on the Information Superhighway* (version 1.01, July 2, 1995) <<http://www2000.ogsm.vanderbilt.edu/rimm.cgi>>.

51. See Hoffman & Novak, *A Detailed Critique of the Time Article: "On a Screen Near You: Cyberporn"* (1995) (visited Apr. 16, 1997) <<http://www.hotwired.com/spe-cial/pornscare/hoffman.html>>.

52. Cannon, *supra* note 50, at 65.

53. *Thomas* (visited June 9, 1997) <<http://www.thomas.gov>>. The Thomas site was named for Thomas Jefferson. *Id.*

54. See Cannon, *supra* note 51, at 67. Denouncing the Exon amendment, House speaker Newt Gingrich stated: "It is clearly a violation of free speech and it's a violation of the right of adults to communicate with each other." 141 CONG. REC. S9017-02, at S9020.

55. Canon, *supra* note 51, at 69-70.

will generally concede that some material on the Internet may be harmful to children. The challenge presented to Congress, therefore, was how to address this situation without infringing on the First Amendment rights of adult Internet users.

The nature of the Internet makes its regulation a monumental task. There is no Internet “headquarters” with operational control to assure that only appropriate material is provided to children. Nor is there a bank of data libraries where material can be marked as “child-friendly.” Indeed, the Internet is the epitome of widely-distributed information processing and storage technologies. It is a “network of networks”⁵⁶ designed to be self-healing. In the event that any link between its sites is broken, the network will route information around the break using self-maintaining redundant links without any human intervention.⁵⁷

Censorship would be treated as just another break to be worked around. For example, if every file that could be considered indecent were somehow purged from every U.S. Internet server, the same material could find its way right back into the Internet from an overseas source with hardly a noticeable lag in search and retrieval time.

56. *ACLU*, 929 F. Supp. at 830 (“The Internet is not a physical or tangible entity but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.”).

57. *Id.* at 831-32 (stating that the Internet was designed to be a “decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable [particularly if the] network were damaged, say, in a war.”). For example, a computer message traveling from Washington to Baltimore that encounters broken or busy links on the most direct path may be automatically routed from Washington to Chicago to New York to Baltimore without a meaningful delay or without either the sender or receiver becoming aware of the rerouting. ED KROL, *THE WHOLE INTERNET: USER’S GUIDE & CATALOG*, 20-23 (3d ed. 1993); *see also ACLU*, 929 F. Supp. at 831 (“A communication sent over this redundant series of linked computers could travel any of a number of routes to its destination.”).

The use of the Internet has grown widely and rapidly to the point where its use is shared by adults and children of all ages for business, for education, and for pleasure.⁵⁸ Internet users from around the world may access Web sites, chat rooms, bulletin boards, and other Net locations created and supported by commercial entities, educational institutions, and even private individuals.⁵⁹ Material that many may consider to be pornographic can be found in all forms at each of these types of Internet locations. What is more, Internet material may be stored and accessed with a degree of anonymity that would make Joe Klein⁶⁰ envious.

Notwithstanding the practical considerations of regulating Internet content, the First Amendment issues are equally imposing. The CDA seeks to protect children from indecent material. Rather than invent a new "harmful to children" standard or redefine "indecenty," Congress adopted the definition of indecency used by the Supreme Court in *Pacifica*,⁶¹ the case involving George Carlin's "Seven Dirty

58. See *supra* notes 9-10 and accompanying text (estimating the current and projected numbers of Internet users). Although the Internet has existed for almost 30 years, it has gained popularity only in the past five years. *ACLU*, 929 F. Supp. at 831. For a comprehensive discussion of the origins and development of the Internet, see HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 65-70 (1993). While the Internet was used almost exclusively by researchers in government and at educational institutions, it has changed dramatically in a short period of time, as both the types of persons who use the Internet and the purposes for which they use it have expanded tremendously. *Id.*

59. See 47 U.S.C.A. § 230(a) (West Supp. 1996) (setting forth findings of Congress regarding the growth, use, and benefits of the Internet and other interactive computer services); see also *ACLU*, 929 F. Supp. at 832-34 (noting the increased variety of means through which individuals can access the Internet, including educational institutions, corporations and other employers, free local community networks, libraries, coffee shops, commercial and noncommercial Internet service providers, online services, or bulletin board systems).

60. Joe Klein is the author of the best-selling novel, *Primary Colors*, published under the pseudonym of "Anonymous." The public curiosity surrounding the identity of the author was great, and Joe Klein was discovered by the press to be the true author only after much investigation.

61. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

Words You Can't Say on TV" monologue.⁶² *Pacifica*, and subsequently the CDA, define indecency as:

[A]ny comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs⁶³

The CDA contains two principal prohibitions. The first provision makes it a criminal act to send an indecent message to a specific person or persons under the age of eighteen.⁶⁴ Although prohibiting communications directed specifically at children would be difficult to detect and prosecute. The provision seems at first glance to be reasonable and narrowly tailored to prohibit conduct that is reprehensible to most Americans.⁶⁵ However, the legal definition of "indecency" under the CDA also would include works of art and literature that may be important to the education of a

62. The transcript of Mr. Carlin's monologue is reprinted verbatim in an appendix to *Pacifica*. See *Pacifica*, 438 U.S. at 751; ACLU, *American Civil Liberties Union, Freedom Network* (visited Apr. 16, 1997) <<http://www.aclu.org>>. For a discussion of how George Carlin's monologue might be treated on the Internet, see generally Stacey J. Rappaport, *Rules of the Road: The Constitutional Limits of Restricting Indecent Speech on the Information Superhighway*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1995).

63. 47 U.S.C.A. § 223(d)(1)(B); 438 U.S. at 752.

64. 47 U.S.C.A. § 223(d)(1)(A); see *supra* note 27 (setting forth statutory language).

65. When the government attempts to regulate speech based on its content, the regulation is subject "strict scrutiny." *Carey v. Brown*, 447 U.S. 455, 460-62 (1980). The regulation must be "necessary to serve a compelling state interest and [be] narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Alternatively, if the regulation is not based on the speech's content, it will receive intermediate scrutiny wherein it will be deemed constitutional if it furthers an "important or substantial" government interest and is no greater than is essential." *United States v. O'Brien*, 391 U.S. 263, 270 (1981). The lowest level of protection is afforded to, among other categories of speech, indecent speech, wherein the government must simply have a valid or legitimate purpose for regulating the speech and the regulation must be merely "rationally related" to limiting the speech. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-54 (1938).

sixteen- or seventeen-year-old.⁶⁶

The CDA's second prohibition makes it a crime to post anything indecent on the Internet where a minor might have access to it.⁶⁷ This is the most controversial portion of the CDA because it holds the strongest threat to First Amendment freedoms. The CDA's definition of indecency causes controversy as well, as its reference to "contemporary community standards"⁶⁸ begs the question of what community a court should look to. Should it look to the community of the person who posts material on the Internet or the community of the person who downloads material from the Internet? Or perhaps the Internet itself is an electronic community without a geographic location.

The current standard for determining the community regarding the interstate transport of materials is to use the community standards of the geographic area where the material is sent—that is, where the message is downloaded.⁶⁹ Last year, this standard was upheld on appeal in the highly publicized case *United States v. Thomas*,⁷⁰ in which electronic images were transmitted, from computer to computer over phone lines, not using the Internet.⁷¹ The defendant, Thomas, allowed a customer in Tennessee to download photographs from Thomas' California computer. Thomas, the ACLU, and other *amici* argued that computer technology re-

66. See *supra* note 30 (indicating that the CDA does not explicitly define indecency).

67. 47 U.S.C.A. § 223(d)(1)(B); see *supra* note 27 (setting forth statutory language).

68. See 18 U.S.C.A. §§ 1460-1469 (West Supp. 1996) (codifying the judicially created doctrine in *Roth v. United States*, 354 U.S. 476, 489 (1957), which judges indecency according to contemporary community standards).

69. See *Hamling v. United States*, 418 U.S. 87, 106 (1974) (deeming constitutional the judging of contemporary community standards according to local community standards where obscene mail violating obscenity statute is transmitted); *Miller v. California*, 413 U.S. 15, 30-34 (1973) (declining to require a national standard in evaluating "contemporary community standards" and stating that local standards should control).

70. 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

71. *Thomas*, 74 F.3d at 710.

quires a new definition of community—one based on cyberspace.⁷² The court disagreed, and instead found that Thomas knew the location of the person downloading material from his computer, and stated that, if he did not want to abide by Tennessee community standards, he could have refrained from selling access to his computer images to a Tennessee resident.⁷³

If this same rationale is applied to information posted on the Internet, the standards of the most conservative community in the United States could be applied to every item posted on the Internet. *Thomas* dealt with a private, dial-in computer bulletin board, not the Internet.⁷⁴ If Thomas had posted his material to a free, public Usenet⁷⁵ bulletin board, or had incorporated it into a Web page that was available to anonymous users, he would have had no knowledge of the communities in which his material was being downloaded. The court's admonition to choose an audience with community standards in mind could not apply to a large portion of the Internet.⁷⁶ If the Internet user cannot determine which community standard is applicable, he will be motivated, by fear of criminal penalties, to steer far away from anything that could be found to be unpalatable in the most conservative of communities. The chilling effect this would have on the exercise of free speech is obvious.⁷⁷

72. *Id.* at 711.

73. *Id.*

74. *Id.* at 704.

75. The Usenet is a user-sponsored newsgroup, also known as a distributed message database. *ACLU*, 929 F. Supp. at 834. Usenet groups are similar to listservs, see *supra* note 195 and accompanying text, in that they are "open discussions and exchanges on particular topics." *Id.* at 835. Unlike listservs, and more similar to "bulletin boards," see *supra* note 171, Usenet newsgroups can be accessed at any time, without needing to subscribe. *ACLU*, 929 F. Supp. at 835. Usenet actually predates the Internet, but today, the Internet is used to transfer much of Usenet's traffic. See ED HOHL, *THE WHOLE INTERNET SM* (2d ed. 1994).

76. *Id.* at 711.

77. See *ACLU*, 929 F. Supp. at 851 (agreeing with plaintiffs and declaring that "the challenged provisions, if not enjoined, will have a chilling effect on [speakers'] free expression").

As the Court recognized in *Pacifica*, indecent material, unlike obscene material, is protected by the First Amendment.⁷⁸ Children may be protected from indecent material by measures that seek to channel such material to protect children from exposure to it, while not absolutely banning the material for adults.⁷⁹ To withstand a constitutional challenge, a law curbing indecent material must be narrowly drawn to serve the interests of protecting children. Lawmakers must choose the least restrictive means to further the government's interest.⁸⁰

In *Sable*, the Supreme Court case involving "dial-a-porn" services, the Court noted that First Amendment protection and the type of channeling that may be permitted for indecent material depends upon the attributes of the medium through which the material is presented.⁸¹ For instance, the Supreme Court, in a unanimous decision in *Butler v. Michigan*,⁸² held unconstitutional a law restricting the public's access to certain books in order to shield juvenile innocence. The Court commented that such a law effectively "burn[ed] the house to roast the pig."⁸³ According to the Court, other less restrictive means, such as permitting sales to adults only, would have satisfied the government's interest without unduly restricting the rights of adults to access materials protected by the First Amendment.⁸⁴

78. 438 U.S. at 746. "Obscenity" may be thought of as "indecent" that: (1) appeals to prurient interests, and (2)

lacks serious literary, artistic, political, or scientific merit. *Id.* at 739-42. The second of these factors is commonly referred to as the SLAPS test. *See infra* note 113 and accompanying text.

79. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 127 (1989) (holding unconstitutional a ban on the interstate transmission of indecent commercial telephone messages).

80. *Id.*; *see also supra* note 66 (explaining the least restrictive means requirement).

81. *Id.*

82. 352 U.S. 380 (1957).

83. *Id.* at 383.

84. *Id.* at 384.

Pacifica involved the “uniquely pervasive” presence of broadcasting in the home and the accessibility of broadcasting to children.⁸⁵ Even a child who cannot read could have his vocabulary significantly enlarged by listening to George Carlin’s monologue.⁸⁶ The constitutionally sound solution was to channel indecent material to hours of the broadcast day when children are not likely to be present in the audience.⁸⁷ The Court also noted that outside of the home the balance between the First Amendment rights of a speaker and those of a listener tips in favor of the speaker, requiring an offended listener just to turn away, as in the case of a drive-in movie showing indecent films.⁸⁸

The Supreme Court has previously declined to adopt the broadcast model for cable television because of what it refers to as fundamental technological differences.⁸⁹ But, more recently, cable has been found to have established a uniquely pervasive presence in the lives of all Americans, and therefore to be as accessible to children as over-the-air broadcasting, if not more so.⁹⁰ Last year, a three-judge panel found that the Telecom Act’s provisions restricting the carriage of sexually explicit or indecent programming⁹¹ were narrowly

85. *Pacifica*, 438 U.S. at 748-49.

86. *Id.* at 749 (“*Pacifica*’s broadcast could have enlarged a child’s vocabulary in an instant.”).

87. *Id.* at 733.

88. *Id.* at 749 n.27 (citing *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975)).

89. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (deciding that “[f]undamental technological differences between broadcast and cable television transmission renders relaxed standard of scrutiny for broadcast regulation inapplicable to First Amendment challenge of cable regulation; cable television does not suffer from inherent limitations of broadcast television arising from scarcity of available broadcast frequencies compared to number of would-be broadcasters”).

90. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996).

91. Referring to Section 505 of the CDA, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, cited in *Playboy Entert. Group, Inc. v. United States*, 945 F. Supp. 772, 774 (D. Del. 1996).

tailored and passed First Amendment scrutiny.⁹² The Telecom Act requires cable programming distributors to either fully scramble both the audio and video portions of channels containing indecent material⁹³ or channel the indecent programming to times when children are not likely to be present in the audience.⁹⁴

But, at least for now, the Internet is not as pervasive or prevalent in American homes as broadcast television or cable. Furthermore, unlike watching television, using the Internet is an active, rather than a passive, function.

Accessing the Internet may be compared to using the public switched telephone network for private commercial telephone communications. In *Sable*, dial-a-porn services were held to be substantially different from broadcasting.⁹⁵ In contrast to television viewing, where the Court found that the public has no meaningful opportunity to avoid contact with indecent material,⁹⁶ the dial-in situation requires a listener to take affirmative steps to receive a communication.⁹⁷ Credit cards and access codes were determined to be acceptable channeling mechanisms capable of protecting children from indecent phone messages.⁹⁸ An absolute ban on indecent phone messages cannot be justified by speculation that enterprising youngsters can and will evade the rules and gain access to phone sex services.⁹⁹

So, the next question is what model should be used for Internet material. The Internet is not a passive medium. It requires loading software, establishing an account and a connection, and actively searching for materials. Addition-

92. *Playboy Entert. Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996).

93. 47 U.S.C.A. § 561(a) (West Supp. 1996).

94. 47 U.S.C.A. § 561(b) (West Supp. 1996).

95. 497 U.S. at 127.

96. *Id.*

97. *Id.*

98. *Id.* at 121.

99. *Id.* at 129.

ally, downloading, decoding, and viewing material of the type in Senator Exon's blue book takes some degree of computer expertise—although such expertise is well within the grasp of a computer literate twelve-year-old. If the *Sable* model is chosen, indecent materials may not be prohibited, but some reasonable means of attempting to determine the age of a user may be required as a method of channeling indecent material toward adults. Even if the *Pacifica* broadcast/cable model is adopted, the First Amendment requires channeling rather than the complete elimination of indecent material.

Channeling on the Internet, however, may well be impossible. Time channeling will not work because computer file servers are available for access at all hours, not to mention the fact that, with a network that spans the globe, it is always midnight somewhere. Certain commercial sites with adult-oriented material require credit cards or age verification services,¹⁰⁰ which themselves use credit cards, for access. This is no solution, however, for the vast Usenet collection of bulletin boards available without additional charge beyond that required for access to the net.

Commercial services, such as AOL, provide software screening mechanisms for parental supervision of access to certain Internet areas.¹⁰¹ But the software is not foolproof

100. An Age Verification service, such as 18 Plus, Adult Check, and iShield, requires a subscriber to provide personal information, primarily credit card information. *ACLU*, 929 F. Supp. at 839-42. The Age Verification system operator purportedly checks the validity of the credit card (by charging an annual fee, usually less than \$10, to the card) and issues a password/ID number, which can then be used to gain access to the web pages "protected" by the Age Verification system. *Id.*

101. *Id.* at 839. Examples of screening software designed to limit children's access to the Internet include CyberPatrol, CYBERSitter, The Internet Filter, Net Nanny, Parental Guidance, SurfWatch, Netscape Proxy Server, and WebTrack. *Id.* The competition among the software companies is greatly increasing as the market for such software rapidly expands. *ACLU*, 929 F. Supp. at 839. Net Nanny is one type of age verification software that is designed to allow those concerned to filter unwanted material on the Internet. *Id.* For an explanation of the differ-

and can be bypassed by curious and ingenious children. Other programs, like Net Nanny, Cyber Patrol,¹⁰² and SurfWatch,¹⁰³ operate through the use of databases containing lists of sites with indecent material. With new sites added every day, however, these programs have obvious flaws. The World Wide Web Consortium, a group of software and service companies active in the Internet, has developed a set of technical specifications that permit filtering software to screen out Web pages containing certain types of material. This system, the Platform for Internet Content Selection (“PICS”),¹⁰⁴ can be used either for self-rating by Internet publishers, or by independent rating agencies.¹⁰⁵ These software solutions show promise, and because they do not involve government action—even though some of them were prompted by the CDA—they do not present First Amendment problems.

So, the problem of Internet pornography definitely exists as a threat to the welfare of our children. Nonetheless, the CDA is not without its own problems as a threat to free speech on the Internet. The Supreme Court is presented with an intriguing and important case, ably argued by both

ent types of age verification systems, see *id.*

102. Cyber Patrol, manufactured by Microsystems Software, Inc., was one of the first software packages, introduced in August 1995, designed to “give parents the comfort that their children can reap the benefits of the Internet while shielding them from objectionable or otherwise inappropriate materials based on the parent’s own particular tastes and values.” *Id.* at 839-40. Cyber Patrol’s slogan is “to Surf and Protect.” See Microsystems Software Website, (visited Apr. 20, 1997) <<http://www.microsys.com/cyber/default.htm>>; see also *Cyber Patrol by MSI “To Surf and Protect”* (visited Apr. 20, 1997) <<http://www.cybernothing.org/jdtalk/media-coverage/archive/msgD3082.html>>.

103. SurfWatch is another type of age verification system. *ACLU*, 929 F. Supp. at 841 (detailing the availability of SurfWatch software).

104. The PICS program was initiated by the World Wide Web Consortium to “develop technical standards that would support parents’ ability to filter and screen material that their children see on the Web.” *ACLU*, 929 F. Supp. at 838. PICS, when complete, will provide ratings for Web sites, facilitating parents’ ability to filter what their children are exposed to on the Internet. *Id.*

105. See *ACLU*, 929 F. Supp. at 839; W3C, *Platform for Internet Content Selection (PICS)* (visited Apr. 16, 1997) <<http://www.w3.org/pub/WWW/PICS/>>.

sides. We can speculate on what the ramifications of the Court's decision might be.

If the CDA is found to be unconstitutional, parents will continue to seek methods of protecting their children when they themselves are not available to supervise their children's Internet use. We can expect commercial services, such as AOL, to strengthen and to promote their internal filtering mechanisms. We can also expect new "all-kid" or family oriented online services to develop. The protection from indecent material offered by such services would provide a clear advantage to accessing the Internet through them, as opposed to direct connection through Internet service providers. Additionally, software programs will proliferate both as add-ins to browsers,¹⁰⁶ like Netscape Navigator, and as stand-alone products. Many companies will take advantage of the PICS system. Parents may find that they have to pay more attention to what their kids are doing on their computers. They may also need to initiate some frank family discussions about the materials that are out there and how a responsible child should handle such material when it appears.

On the other hand, if the CDA is upheld, credit card authentication and Age Verification systems will flourish on the Internet because they represent a viable method of protecting Internet publishers from criminal liability.¹⁰⁷ Free Web pages originating in the United States will be severely

106. A web browser provides the user with Internet access to both topical directories and search engines. Eugene Volokh, *Law and Computers: Computer Media for the Legal Profession*, 94 MICH. L. REV. 2058, 2064 (1996); see also Carl Oppedahl, *Analysis and Suggestions Regarding NSI Domain Name Trademark Dispute Policy*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 97 n.73 (1996).

107. *But see* *ACLU*, 929 F. Supp. at 845 ("There is no effective way to determine the identity or age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms. . . . For these reasons, there is no reliable way for a sender to know if the e-mail recipient is an adult or minor."); *ACLU*, 929 F. Supp. at 846 ("Verification of a credit card over the Internet is not now technically possible.").

curtailed in content, primarily through self-censorship by Internet publishers who do not want to risk running afoul of the community standard of the most socially conservative community in the nation. We can expect to see some informal contests to determine which community will hold that title. The old question, "Will it play in Peoria?" may become the motto of Internet publishers.

Additionally, foreign Usenet servers, bulletin boards, and Web servers will flourish because the interest in sexually oriented material will not evaporate; it will merely migrate overseas.¹⁰⁸ State legislators will be eager to adopt their own versions of the CDA, as protecting children and fighting pornographers are popular causes that may be expected to attract votes and campaign contributions.

The recent revision to New York's Penal Code is an example of the kind of state statute we can expect more of if the CDA is upheld.¹⁰⁹ The New York statute adds a "harmful to minors" standard to the "indecent" standard used in the CDA.¹¹⁰ The statute also provides an exception, similar to the Supreme Court's "SLAPS" test,¹¹¹ for persons with scientific, educational, governmental, or other similar justification for possessing disseminating, or viewing the material.¹¹² These two provisions of the New York statute adjust the focus of the law to material that is perhaps less deserving of protection than the *Pacifica* definition of "indecent," but,

108. See Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 FED. COMM. L.J. 217 (1996).

109. N.Y. PENAL LAW § 235.20-24 (McKinney 1996).

110. *Id.* § 235.20(6) (McKinney 1996).

111. SLAPS is an acronym for Serious Literary, Artistic, Political, or Scientific merit. See *Miller v. California*, 413 U.S. 15, 24 (1973). The Supreme Court has held that a state obscenity offense must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have "serious literary, artistic, political, or scientific value." *Id.*

112. See *Ginzburg v. United States*, 383 U.S. 463, 465-66 (1966) (finding that a court can take into consideration the setting in which the publication was presented "as an aid to determining the question of obscenity").

because of its focus on minors rather than the general population, does not reach the level of obscenity. New York's community standard for determining what is suitable for minors is the "adult community as a whole."¹¹³ The New York statute also has a provision criminalizing the use of the Internet to importune, invite, or induce a minor to engage in sexual activity.¹¹⁴ Because this prohibition is specific and not tied to merely publishing material protected by the First Amendment, it could be severed from the remainder of the statute and survive scrutiny. Accordingly, even if the CDA were to be struck down, at least part of the New York statute has a chance of surviving.

Attempting to censor the Internet is a monumental challenge; it may be impossible to accomplish. Censoring the Internet without trampling the First Amendment adds another dimension to the problem. When all is said and done, the ultimate solution will be to recognize the Internet for what it is: an unparalleled educational resource,¹¹⁵ the most participatory marketplace of mass speech that the world has yet seen,¹¹⁶ and an opportunity for diverse, frank, and uplifting discussion about all aspects of human existence.¹¹⁷

At the heart of the First Amendment is the principle that each person should decide the ideas and beliefs deserving of expression, consideration, and adherence.¹¹⁸ Our political system and cultural life rest upon this ideal. The Internet has evolved as it has because it has been free of content-based considerations.¹¹⁹ There is a time when, and a place where, censorship must be replaced with our responsibility

113. N.Y. PENAL LAW § 235-20(6)(a).

114. *Id.* at § 235-21(3).

115. Brief for the Appellants, Department of Justice, before the U. S. Supreme Court in *Reno v. ACLU*, 96-511, at 14-15 (1997).

116. *ACLU*, 928 F. Supp. at 881.

117. See Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969 (1995).

118. *ACLU*, 929 F. Supp. at 881.

119. *Id.* at 877.

as parents to raise our children to decide for themselves what is right and what is wrong, and to make informed and confident choices from among the waves of material that will come crashing over them—today from the Internet and tomorrow from sources we can hardly imagine.

Thank you.

MR. JOLLYMORE: Thank you very much, Dave. Now, to shift our perspective a little and add to the complexity of the issues, Preeta Bansal will talk about cyberspace, the Internet, and the law of libel and the First Amendment.

MS. BANSAL: I thought I would just briefly sketch, in outline form, some of the other areas in which the Internet is affecting First Amendment jurisprudence.

In the last few years, we have heard a lot about cyberspace, cyberspace law, and the First Amendment. Several scholars have suggested that the massive communicative power of the Internet may lead to a paradigm shift in our constitutional, statutory, and common law regimes affecting speech and information dissemination.¹²⁰ I would suggest that this debate is premature and that the Internet should not yet signal a paradigm shift in our legal regimes.

Every five or ten years—and in the last few years the frequency seems to have increased at an exponential rate—when there is an advent of new technology, the Supreme Court and lower courts grapple with how and whether existing legal rules can accommodate the challenges posed by the new technology, or whether there need to be new legal rules or new categories within those legal rules.¹²¹

120. See, e.g., David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 5 ALB. L.J. SCI. & TECH. 229 (1996); Eric Handelman, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards*, 59 ALB. L. REV. 709 (1995); Stacey J. Rappaport, *Rules of the Road: The Constitutional Limits on Restricting Indecent Speech on the Information Superhighway*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1995).

121. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417

For example, as recently as 1984, only thirteen years ago, the Supreme Court dealt with the advent of what was then the dramatic new technology of the video home recorder. In the context of copyright in *Sony Corp. of America v. Universal City Studios, Inc.*,¹²² the Court considered how and whether the judiciary should impose new legal rules to deal with new technology.¹²³ Justice Stevens, writing for the majority opinion in *Sony* in 1984, stated:

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of the new form of copying equipment—the printing press—that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. . . .

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology. In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.¹²⁴

(1984); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

122. 464 U.S. 417 (1984).

123. *Id.* (considering whether traditional copyright law principles are applicable to videotape recorders).

124. *Id.* 430-31 (footnotes and citations omitted).

Justice Stevens was, of course, talking about the copyright laws. But, just last year, in the *Denver Area Telecommunications*¹²⁵ case, the Supreme Court considered the effect of new technology, specifically cable television, on its traditional First Amendment jurisprudence. For what seemed to me to be the first time in a very long time, several members of the Court seemed willing to adopt a more ad hoc balancing approach and thus to gut the traditional categories and rules that have marked the First Amendment jurisprudence up to this day.¹²⁶

Whether or not that is justified in the context of the Internet is something we will debate later in this panel, especially in the context of the indecency provision. But, in the area of defamation and libel, in particular, a gutting of traditional First Amendment rules and common law rules for liability is not required. That is not to say that the Internet will not pose new challenges for the courts. Rather, the challenge will be to try and fit traditional legal principles into the context of the Internet environment.

There are three areas on which I want to focus today. These include areas in which the law will require some potential adjustment or rethinking of how the traditional First Amendment rules of libel and defamation should apply to the Internet. The first area addresses whether the rules governing libel or slander should apply to Internet-specific phenomena such as live chat rooms.

The second area concerns whether the actual malice standard, which is a speech, or First Amendment, protective standard,¹²⁷ should have greater application to private plain-

125. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

126. Compare *id.* at 2377 (concluding that countervailing interests and other forms of regulation provide an alternate basis for the Court's holding) with *supra* note 1 (explaining traditional First Amendment categorization of speech).

127. The actual malice standard, as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), requires a plaintiff in a defamation action who is

tiffs in the Internet environment than in the regular environment. This may be particularly true for two reasons. First, private plaintiffs, as opposed to public figure plaintiffs who traditionally get this protection,¹²⁸ arguably have access, in the Internet environment, to effective means of communication to counteract libelous utterances. Second, private plaintiffs, if they participate in the chat rooms, have arguably injected themselves into certain controversies. Therefore, private plaintiffs may be more akin to limited-purpose public figures.¹²⁹

deemed to be a public figure or public official to prove that the defendant made the defamatory statement with “actual malice,” defined as “knowledge of the falsity or reckless disregard of the truth.” *Id.* at 279-80. The public plaintiff is required to prove actual malice not merely by a preponderance of the evidence, but with “clear and convincing clarity.” *Id.* at 285-86. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court summarized who will be considered to be a public figure, and therefore, to whom the *Sullivan* standards will apply:

[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Gertz, 418 U.S. at 345.

128. *See id.*; *see also* Contrina L. Counts & C. Amavera Merton, *Libel in Cyberspace: A Framework Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083 (1996); Lee Levine, *Judge and Jury in the Lawyer Defamation: Putting the Horn Behind the Court*, 35 AM. U. L. REV. 3 (1958).

129. In the context of a defamation action, a limited purpose public figure is “an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Gertz*, 418 U.S. at 345. A limited purpose public figure is also subject to the *Sullivan* standard. *See supra* note 127 (explaining the *Sullivan* standard). *See also* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1292, *cert. denied*, 449 U.S. 898 (1980) (deciding plaintiff was a limited purpose public figure where “he was president of second largest cooperative in the country, was known as a leading advocate of certain precedent-breaking policies, was mover and shaper of many of the cooperative’s controversial actions and made it a leader in unit pricing and open dating, and public controversies existed over viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that the cooperative of which plaintiff was president was pioneering”); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (deeming political lobbyists limited purpose public figures); *Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985) (deeming

The third area in which the Internet will challenge traditional rules is the liability of new actors who are created by the Internet environment, particularly the online service provider.¹³⁰ Two recent cases, which I will discuss in detail when I address this topic, have addressed the liability of CompuServe¹³¹ and Prodigy,¹³² two online service providers. These decisions may have repercussions on commercial and noncommercial entities that actually disseminate the message, so to speak.

Let me quickly run through, in more detail, these three areas and suggest an approach in which to look at each of them.

The first issue is whether the categories of libel or slander should apply to transitory online discussions. As the three-judge court in the *ACLU* case detailed in its extensive findings of fact, one of the unique features of the Internet is live, or transitory, chat groups.¹³³ In these online groups, a message is transmitted to a wide number of people, but is not really stored in a computer's memory. A message therefore oftentimes has a very transitory existence.¹³⁴ A chat group is most akin to a live radio or television call-in show.

The issue, as I mentioned, is whether the rules of slander or libel are more applicable in the Internet environment. Under traditional common law principles, slander, in order to be actionable, requires proof of special damages or actual pecuniary loss by the plaintiff.¹³⁵ Four categories of excep-

wrestling coach limited purpose public figure).

130. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995); see also Joseph M. Campollo, *Childporn.GIF: Establishing Liability for Online Service Providers*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721 (1996).

131. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

132. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

133. *ACLU*, 929 F. Supp. at 835.

134. *Id.*

135. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 112, at 788 (5th ed. 1984).

tions are considered slander per se, however, in which you do not need to prove actual pecuniary loss, because the content of the statement is considered so horrendous.¹³⁶ Examples of libel per se include the chastity of a woman, sexual misconduct, or attributing loathsome diseases to the plaintiff.¹³⁷

In libel, there is also a distinction between libel in which you need not prove special damages, termed libel per se, and libel in which you must prove special damages.¹³⁸ In the libel context, though, it does not matter what the content of the communication is. Instead, if something is viewed as defamatory on its face, whatever the content of that utterance, then you need not prove special damages.¹³⁹

This traditional common law distinction between slander and libel on the need to prove damages is based on the theory that written words are generally more permanent and therefore have greater consequence, regardless of whether there is actual loss to the plaintiff.¹⁴⁰ In addition to greater permanency, written words also are capable of wider circulation (which also inherently leads to greater harm), and are viewed as the product of greater deliberation by the author. For all of these reasons, there is less need to prove special damages in the case of libel.

In the context of online chat rooms, the question arises as to whether an individual's message should be viewed as an oral statement, in which the rules of slander should apply, or as written words, in which the rules of libel should apply. On the one hand, particularly when the online chat rooms are not stored in the computer's memory, the words are transitory, and therefore more akin to slander. Unlike writ-

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. KEETON ET AL., *supra* note 135, § 112, at 786.

ten words that have a permanent value, the message immediate dissipates. Also, the words that people speak or write in the context of an online chat room are arguably more spontaneous. They do not have the same quality of deliberation that generally goes into the written word. Therefore, you could argue that the more relaxed rules of slander should apply.

On the other hand, one of the biggest arguments in favor of applying the rule of libel to the Internet is that words that are disseminated through the Internet, like written words, are capable of broad circulation.¹⁴¹ So, unlike the spoken word in which only a handful of people can hear you, in the Internet environment, you have widespread dissemination, which can lead to great potential harm. So, there is also an argument that the rules of libel are more applicable to speech on the Internet.

Not surprisingly, given how new this area of the law is, there is no published case addressing the issue of whether libel or slander is more applicable to Internet speech. Undoubtedly, courts will consider the different legal arguments. In my opinion, the existing framework and categorical distinctions between slander and libel can probably be accommodated in the context of a particular factual situation to address the issue.

The second area in which the Internet will challenge, or potentially expand, First Amendment protection for a traditional libel or defamation claim is in the context of private plaintiffs. For a public figure to prevail in a libel case against a media defendant, he or she must prove that the defendant acted with actual malice under the traditional standard set forth in the landmark case of *New York Times Co. v. Sullivan*.¹⁴² Actual malice in this context means either knowledge

141. See John Hielsher, *Banks Gear up to Give AC Banking Another Turn*, SARASOTA HERALD TRIB., Mar. 31, 1997, at 12.

142. 376 U.S. 254 (1964).

that a statement is false or subjective awareness of its probable falsity.¹⁴³ It is a pretty speech-protective standard, as it is not enough for a defendant to have published a statement that turns out to be false and defamatory through negligence or without full investigation.¹⁴⁴ If a newspaper runs something that turns out to be false, as long as it was not made with actual knowledge of falsity or awareness of probable falsity, the defendant would prevail when the plaintiff is a public figure.¹⁴⁵

In the private figure context, however, the rules are a little more relaxed. Although there is still no strict liability for defamation under the First Amendment, it is a lesser standard of care—usually negligence in most states.¹⁴⁶ A defendant may therefore be held liable to a private figure for negligently publishing a false and defamatory statement about the private figure.¹⁴⁷

The issue of whether there should be a greater or lesser standard of care in the Internet arises for two reasons. First, it is arguable that the private plaintiff, by entering a chat room or otherwise posting words on the Internet, entered into a realm of debate. It is analogous to the limited-purpose public figure who enters the vortex of a public debate. There is an argument that, like public figures, such private figures have exposed themselves to a certain amount of attention.

The second, and in my opinion more important, reason is that the private plaintiff in the Internet environment, like a public figure in the traditional environment, arguably has access to effective channels of communication to counteract any false speech. The traditional rationale for having a more relaxed standard of care for media defendants when a public

143. *See id.* at 279-80.

144. *See id.*

145. *See id.*

146. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

147. KEETON ET AL., *supra* note 135, § 112, at 788.

figure is involved is that a public figure has access to the press; if a false statement is uttered about her, she can go to the press and counteract false speech with more speech. A private figure, on the other hand, does not usually have the same access to effective channels of communication.

In the Internet environment, however, a private plaintiff arguably has greater access than usual to communication. A private plaintiff Internet user arguably can go back to the same chat room or bulletin board and counteract bad speech with more speech. So again, because of the greater dissemination of information that is capable on the Internet, higher First Amendment standards should apply. Therefore, there is less of a need to regulate potentially libelous statements.

The final area in which I think the First Amendment will be affected by Internet technology in the libel context is the liability of the online service provider. Two recent cases reached opposite conclusions on this issue.¹⁴⁸

Traditionally, liability for defamation attaches to not only the author of a defamatory statement, but also the publisher, the person who disseminates the information.¹⁴⁹ A print publisher, including a book publisher such as Random House or Time Inc., is presumed to have the author's knowledge of a publication's content.¹⁵⁰ Thus, the same knowledge is essentially attributed to the initial publisher as to the author.¹⁵¹ The law imposes this presumptive knowledge, in part, to require that the entity publishing—the primary publisher—fully inspect the content of its publications.¹⁵²

In contrast to the initial publisher, the distributor of print material, such as a newsstand or bookstore, is liable for

148. *See* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (1995).

149. KEETON ET AL., *supra* note 135, § 113, at 799-800.

150. *See id.* § 113, at 801.

151. *See id.*

152. *See id.*

defamation only if it actually knows or has reason to know of the defamatory content of the material.¹⁵³ A presumption of knowledge governs it¹⁵⁴—a lower standard that derives from the First Amendment. In the 1959 Supreme Court case of *Smith v. California*,¹⁵⁵ the Court held that a statute that imposed criminal liability on a book seller for selling an obscene book, even if the bookseller had no knowledge of the book's content, is prohibited under the First Amendment.¹⁵⁶ The Court was concerned about the self-censorship that would result if a book distributor or newsstand were forced to inspect the contents of every single item on its shelves.¹⁵⁷

Essentially, the issue in the Internet environment is whether the online service provider should be viewed more like an initial publisher, who has a duty to inspect the content of the statements that it publishes, or more like a book distributor, who does not. Two recent cases came to differing conclusions on this issue.

The first case, *Cubby v. CompuServe*,¹⁵⁸ was before the Southern District of New York in 1991. In *Cubby*, the court held that CompuServe acted more like a book distributor, and consequently was not liable as a primary publisher and had no First Amendment duty to inspect the content of whatever was distributed.¹⁵⁹

The second case was *Stratton Oakmont v. Prodigy*,¹⁶⁰ which was in the New York Supreme Court in 1995. That case held that Prodigy, for a number of fact-specific, and I would suggest erroneous, reasons, concluded that Prodigy was more like the initial publisher and should have screened

153. *See id.*

154. *See* KEETON ET AL., *supra* note 135, § 113, at 799-800.

155. 361 U.S. 147 (1959).

156. *See id.* at 155.

157. *See id.* at 153.

158. 776 F. Supp. 135 (S.D.N.Y. 1991).

159. *Id.*

160. 1995 WL 323710.

the content of the material. Prodigy in fact claimed to have screened the content of various materials, and so therefore could be liable, just as the original author and the original publisher.¹⁶¹

The *Stratton Oakmont* decision was essentially overruled legislatively by the CDA, not by the indecency provisions, but rather by the "Good Samaritan provision."¹⁶² That provision, section 230(c), states that "no provider or user of an interactive computer service shall be treated as a publisher or speaker of information provided by another content provider."¹⁶³ This basically means that the Prodigys and CompuServes of the world that publish information managed by an independent contractor (for example, the person who runs the bulletin board) cannot be held liable as the initial publisher.

The issue that now arises under this provision is whether this provision creates an absolute immunity from liability, which most people seem to think was not intended. So, although the CDA now says that the Prodigys and CompuServes of the world should not be treated as print publishers, the issue now is whether they can be held liable as book distributors. Under a literal reading of the new statutory provision, if CompuServe actually has notice or knowledge of defamatory material and continues to distribute the material, it cannot be held liable. That clearly was not what was intended by section 230(c), but it will be interesting to see how courts interpret it.

Overall, I think one of the most interesting areas that will emerge from this, besides the liability of the online service provider, is the liability of other new entities operating in the Internet environment, especially managers of the bulletin boards and independent contractors with whom the online

161. *See id.* at *4.

162. *See id.*; 47 U.S.C.A. § 230 (West Supp. 1996).

163. 47 U.S.C.A. § 230(c)(1).

service providers contract. It seems acceptable to have the online service provider viewed as a book distributor, but only if the law imposes the duty to inspect content upon an entity other than the author. Absent some finding that someone with a deeper pocket than the author is liable, we will have a rough world ahead in which a lot of defamatory utterances will probably be made with impunity.

MR. JOLLYMORE: We now go to the core topic of this panel, the CDA and its provisions. I trust that Chris Hansen will tell us why they are all unconstitutional.

MR. HANSEN: In order to talk about the *ACLU v. Reno* case, the ACLU's attack on the CDA, you must first discuss the concept of indecency. As the first speaker, Mr. Pawlik, suggested, we did not challenge the law against obscenity in the context of cyberspace; we challenged indecency. In my mind, there is a very simple way to understand the difference: obscenity is speech about sex that has no redeeming social value,¹⁶⁴ whereas indecency is speech about sex that does in fact have redeeming social value.¹⁶⁵ It is indecency, not obscenity, that the CDA attempts to make a crime.¹⁶⁶

Under the CDA, if you engage in speech about sex on the Internet, even if that speech is valuable speech (at least for adults), you can go to jail for up to two years.¹⁶⁷ That law applies not only to the media conglomerates to which we have previously applied indecency law, including the television and cable networks, but also to every single American who sends an e-mail message to her friends¹⁶⁸ or who communicates through a news group¹⁶⁹ or in a chat room.¹⁷⁰ It

164. See *Roth v. United States*, 354 U.S. 476, 484 (1957).

165. *Pacifica*, 438 U.S. at 746.

166. See 47 U.S.C.A. § 223(a), (b), (d) (West Supp. 1996).

167. See *id.* § 223(a), (d).

168. The term e-mail refers to electronic mail, which comprises messages sent from computer to computer via the Internet. See G. BURGESS ALLISON, *THE LAWYER'S GUIDE TO THE INTERNET* 332 (1995); see also *ACLU*, 929 F. Supp. at 834.

169. The term news group refers to a bulletin board style discussion group that is operated over the Internet. See ALLISON, *supra* note 168, at 336; see also

applies not just to the Web; it applies to all of the communicative aspects of the Internet, as well as to all of the display aspects of the Internet.¹⁷¹

There are two huge difficulties with the CDA that have led six federal judges unanimously to hold it unconstitutional.¹⁷² The first problem is that speakers cannot comply with the law. The CDA makes it a crime if you speak in such a way that it can be heard by someone under the age of eighteen.¹⁷³ For any of you who have been on the Internet, you know that it is not possible to determine whether the people reading your speech are over or under the age of eighteen. Well, if you are a Web site operator, or if you are posting a message on a news group or engaging in speech in a chat room, there is literally no way for you to know whether the person who is reading your message is over or under eighteen.

As a result, you cannot speak in so-called indecent words, you cannot speak about so-called indecent concepts, and you cannot engage in adult, socially valuable, constitutionally-protected speech on the Internet. All of us would have to take our speech on the Internet down to the level deemed suitable for the most vulnerable minors in the most conservative county in this country. The Supreme Court has repeatedly held that we cannot suppress adult speech in the guise of protecting children,¹⁷⁴ and that is precisely what the

ACLU, 929 F. Supp. at 834-35. Bulletin board services provide Internet access and allow individuals to communicate and exchange information. *ACLU*, 929 F. Supp. at 833.

170. Chat rooms are services offered by commercial Internet-access providers where users can interact with each other by text in real time. *ACLU*, 929 F. Supp. at 835.

171. See 47 U.S.C.A. § 223(d).

172. See *ACLU*, 929 F. Supp. at 883 (finding that the CDA violates the First Amendment and enjoining its enforcement); *Shea*, 930 F. Supp. at 950 (agreeing with the *ACLU* court that section 233(d) of the CDA is unconstitutional).

173. See 47 U.S.C.A. § 223(a), (b), (d).

174. See, e.g., *Butler v. Michigan*, 352 U.S. 380 (1957) (reversing defendant's conviction for violating Michigan obscene literature statute, holding that Michigan statute, which made it an offense to make available to general reading public

CDA attempts to do.

Now, let me give you some idea of the CDA's consequences by talking about some of the clients I represent in that case. As you heard, the ACLU filed a suit on the date the law was signed.¹⁷⁵ Approximately three weeks later, the ACLU was joined by the American Library Association, along with the entire Internet industry—CompuServe, Prodigy, Microsoft, AOL, and so on.¹⁷⁶ But I think it is most useful to talk about the kinds of people that I represent in the *ACLU* case.

I represent the ACLU itself. The ACLU has a Web site on which it posts a copy of the “seven dirty words” case discussed earlier.¹⁷⁷ It is available to anyone who wants to see it. The Supreme Court has already found that the monologue in that case, which is attached to the decision, is indecent.¹⁷⁸ The ACLU, therefore, by putting up a Supreme Court decision, risks going to jail under the CDA.

a book having a potentially deleterious influence on youth, violates due process clause by restricting freedom of speech and effectively reducing adult population to reading only what is fit for children); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (explaining its prohibition of government from banning the dissemination of indecent material to adults, while simultaneously acknowledging the government's compelling interest in protecting children from pornographic material, by stating, “the government may not reduce the adult population . . . to . . . only what is fit for children”); *Ginsberg v. New York*, 390 U.S. 629 (1968) (establishing that “because children generally do not possess the same capacity as adults to make informed choices about whether to view indecent material, and because the speech may have deep and harmful effects on children that cannot readily be undone, there is no First Amendment right to distribute indecent material to children.”); *id.* (“The government regulation that prohibits the dissemination of indecent material to children, while not prohibiting dissemination to adults, is fully consistent with the First Amendment.”). See Brief for Appellant at 20, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (No. 96-511).

175. The ACLU filed suit challenging the constitutionality of the CDA, and President Clinton signed the CDA into law, on February 8, 1996.

176. For a comprehensive list of organizations who joined the ACLU as plaintiffs in their challenge to the CDA, see *ACLU*, 929 F. Supp. at 827-28.

177. ACLU, *ACLU, American Civil Liberties Union, Freedom Network* (visited Apr. 16, 1997) <<http://www.aclu.org>>.

178. *Pacifica*, 438 U.S. at 741.

Similarly, I represent Human Rights Watch.¹⁷⁹ Human Rights Watch puts up its reports on human rights abuses all over the world.¹⁸⁰ Some of those reports contain descriptions of sexual torture and sexual abuse that are quite horrifying, quite graphic, and quite extreme.¹⁸¹ That speech is potentially criminal under the CDA.

I also represent Planned Parenthood and a series of other groups that put up on their Web sites speech involving safer sex practices.¹⁸² For example, I represent the Critical Path AIDS Web page that is run by a single guy in Philadelphia.¹⁸³ He puts up a huge amount of information on his Web site about safer sex practices. He does it for a couple of reasons. He does it because he wants to prevent the transmission of AIDS and he wants to prevent people from getting death-causing diseases.¹⁸⁴ In posting the information on his Web site, he sometimes uses the street names for various sexual practices and sexual organs, because in his view it is extremely important for adults—and, for that matter, for teenagers as well—to know what works and what does not work. If you post it using the Latinate terms for the various sexual practices and organs, not everyone will understand what you are trying to convey. He puts that kind of information on his Web site, which could result in his arrest and imprisonment under the CDA.

179. The Human Rights Watch conducts regular investigations of human rights abuses in approximately seventy countries around the world. Human Rights Watch, *About Human Rights Watch* (visited Apr. 20, 1997) <<http://www.hrw.org/about/about.html>>. The organization “addresses the human rights practices of governments of all political stripes, geo-political alignments, and of all ethnic and religious persuasions.” *Id.*

180. *Id.*

181. *Id.*

182. Planned parenthood web cite.

183. Critical Path AIDS Project, *The Critical Path World Wide Web site* (visited Apr. 16, 1997) <<http://www.critpath.org>>.

184. See Critical Path AIDS Project, *AIDS Prevention* (visited Apr. 16, 1997) <<http://www.critpath.org/prevent.htm>>.

I represent Wildcat Press,¹⁸⁵ which is a publisher of gay and lesbian literature, largely fiction. Wildcat Press has a discussion area called “Youth Art News,” a forum in which gay and lesbian teenagers can post poetry, artwork, and fiction, as well as nonfiction, about what it is to discover as a teenager that you are gay or lesbian, and what it is to deal with the kinds of feelings that affect you as you go through that process. They put that up not only because it is beneficial to the speakers—the kids who are putting up the information—but also because it is enormously useful, for example, for the one gay kid in Boise, Idaho, who has never met anyone else whom he knows is gay and who needs to make contact with other people to deal with his feelings. Under the CDA, the kids posting this material could potentially go to jail.

Now, based on what we have been doing in court, Ted may respond that I am exaggerating the dangers here—that is, the risk of people who might go to jail. However, remember that indecency is speech that is about sex but that has social value. If indecency does not include material like this, then I do not know what it includes. At a time when states and school boards are passing laws trying to take rights away from gay people and the Clinton Administration is trying to prevent gay people in the military from even saying out loud, “I’m gay,” to suggest that no one is going to find speech about being gay patently offensive seems to me hopelessly naive. I certainly do not feel comfort, and nor should anyone, at the thought that I might have to go to prison for engaging in that kind of speech.

The other negative result of the CDA is its effect on the Internet. As you know, the Internet contains a variety of different aspects, many of which are simple communication back and forth, including, for example, a news group, a chat

185. Wildcat Press, Gay Wired-Wildcat Press, *The Wildcat Press World Wide Web site* (visited Apr. 17, 1997) <<http://www.gaywired.com/~unity/wildcat>>.

room, a mail exploder,¹⁸⁶ and a list server.¹⁸⁷ All of these are methods by which we engage in conversation on the Internet. Because it is literally impossible to engage in age verification in any of these kinds of aspects, either people must use purely child-friendly speech, or we are simply going to drive all speech of that kind out of the Internet. We are going to reduce the Internet from what it has been: an incredibly empowering medium; a medium that gives me the same power to speak as Ted Turner or as Time Inc., a power that none of us has ever had in human history—the power for each individual to speak to every other individual around the globe. If the CDA is allowed to go into effect, either we are all going to be driven out of the Internet or we are going to have to censor our speech on this medium. Each and every one of us will have to be careful every time we open our mouths—that is, every time we go to our computers.

If put into effect, the CDA could well force the Internet to become much more like traditional broadcast media. Instead of many people speaking to many people, the CDA could force the Internet to be a medium where only big corporations can afford to screen their speech or to find out whether people coming to their site are minors. The CDA would have a potentially disastrous effect on the really wonderful qualities that have led the Internet to flourish.

The CDA is not the only statute addressing the Internet. I would like to talk about two others very briefly. One, the New York statute, has been referred to.¹⁸⁸ New York tries to do similar things as the CDA, with slightly different wrinkles, but it has all the same vices of the CDA.

186. The term “mail exploder” refers to automatic mailing list services that allow communication via e-mail about particular topics of interest to subscribers. *See Shea*, 930 F. Supp. at 927.

187. The term “listserve” refers to a particular brand of mail exploder. *See supra* note 186; *Shea*, 930 F. Supp. at 927. Listservs are mailing list services that “allow communication about particular subjects of interest to a group of people.” *ACLU*, 929 F. Supp. at 834.

188. N.Y. PENAL LAW § 235.00 (McKinney 1996).

There are other laws in Georgia, which the ACLU has also challenged:¹⁸⁹ one that prohibits anonymous speech on the Internet¹⁹⁰ and another that prohibits the use of trademarks on the Internet in such a way that it might imply that you have permission to use the trademark.¹⁹¹ Any of you who have an e-mail address understand how much prohibiting anonymous speech on the Internet would change the habits of the Internet.

More troubling, however, is that the New York and the Georgia laws are both state efforts to regulate the Internet. State law regulation of the Internet presents huge problems under the Commerce Clause,¹⁹² an issue that has not yet been fully litigated, but is being litigated in those two cases. How do we allow each of the fifty states to regulate what is essentially a global medium? If you have a Web site on the Internet, you can be found guilty in Georgia for one thing and in Alabama for the opposite thing. How can you possibly change your Web site in such a way that you are accommodating conflicting laws of different states? The short answer is that you cannot. State regulation of the Internet presents very serious Commerce Clause problems, which I suspect may be one of the next big areas of law that we must address concerning the Internet.

The Supreme Court is scheduled to hear argument on the CDA case on March 19 and should come to a decision by the end of this Term, roughly the end of June.¹⁹³ Thus, if we get together again, we can talk about the enormous way in

189. See *ACLU v. Miller*, No. 96-2475 (N.D. Ga. filed Sept. 23, 1996).

190. See GA. CODE ANN. § 46-5-3 (1996). For an excellent discussion of anonymity in cyberspace, see Jonathan I. Edelman, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231 (1996).

191. See *id.* § 16-9-93.1.

192. U.S. CONST. art I, § 8, cl. 3.

193. The Supreme Court heard oral argument on March 19, 1997. *ACLU v. Reno: A Chronology* (visited June 9, 1997) <<http://www.aclu.org/news/n050896.htm/>>. For a transcript of the oral argument, see 1997 WL 136253.

which the Supreme Court protected free speech on the Internet.

MR. JOLLYMORE: Thank you very much, Chris. Ted Hirt, do you have a few things to add to that?

MR. HIRT: Like Chris, I too will try to be brief and just hit the high points of the government's defense of the CDA.

I want to thank the *IPLJ* and Fordham Law School for their invitation. My principal caveat is that I do not purport to be an official spokesperson for the Department, so the views I express here today are my own, though, hopefully, they will coincide with the government's position in this case.

I want to talk briefly about the CDA and the government's defense of it. I will also make a few observations on the CDA's implications for regulation of the Internet generally.

I cannot resist starting with the vagueness challenge¹⁹⁴ that has been made against the CDA because the interesting thing is that, while I do not like to do head counting, there was a case that we should mention because it is in the "four corners" of this judicial district, called *Shea v. Reno*.¹⁹⁵ In *Shea*, a three-judge court, following the Philadelphia Court's decision in *ACLU*, struck down the CDA.¹⁹⁶ What is interesting about that decision is that all three judges, in contrast to two of the three Philadelphia judges, did not have trouble with the textual term "indecent" in terms of the vagueness issues raised by Mr. Hansen and his colleagues.¹⁹⁷

The *Shea* court pointed out that the Conference Report that led to the enactment of the CDA was very clear. The

194. The vagueness issue refers to the alleged vagueness in the meaning of "indecent" as used in the CDA. See 47 U.S.C.A. § 223(a), (d).

195. 930 F. Supp. 916 (S.D.N.Y. 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (1996) (No. 96-595).

196. See *id.* at 950.

197. See *id.* at 935-38.

report showed that Congress was using the definition of indecency that came out of a body of precedent, judicial and administrative, including the FCC.¹⁹⁸ So, for Mr. Hansen to say that “socially redeeming” Web sites will be attacked as a result of the CDA is not really the accurate story if you compare the Web sites of his plaintiffs with the Conference Report and FCC rulings that they cite.

*In re King Broadcasting Co.*¹⁹⁹ is one of the FCC rulings cited by the *Shea* court. In that case, the FCC decided to take no action in response to a complaint about a broadcast show—I believe it was on television—that involved frank discussions of teenage sexuality and had explicit language.²⁰⁰ I do not know if the material was as explicit as that on the Critical Path AIDS Web page noted by Mr. Hansen, but I also do not know that it would be meaningfully different. The *Shea* court essentially said, “Look, this is what Congress said, and this is what the government has represented, and we think that people can consult these bodies of precedents.”²⁰¹

Some of the interesting things about the Internet include, of course, what everyone talks about: its decentralization, that is, its lack of central control, and its twenty-four-hour-a-day availability. What people do not say, however, is that it will be ubiquitous or pervasive, because if they said that, then the logical corollary of this expansive syllogism brings us four-square into the very language of *Pacifica*, which emphasized the pervasiveness of broadcast media in upholding the challenged restriction of “indecent” speech.²⁰²

198. See 142 CONG. REC. H1129 (daily ed. Jan. 31, 1996) (introducing Conference Committee Report on the Communications Decency Act) (“The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in . . . *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).”).

199. 5 F.C.C.R. 2971 (1990).

200. *Id.*

201. See *Shea*, 930 F. Supp. at 938.

202. See *Pacifica*, 438 U.S. at 748-49.

It is ironic in the cable context that cable, as you may know, really grew up largely from nowhere in response to geographic concerns about the carriage of TV signals. Then we had the 1984 Cable Act,²⁰³ and by 1992, when the “must-carry” part of the 1992 statute²⁰⁴ was challenged,²⁰⁵ cable was starting to penetrate sixty to sixty-five percent of households. As the first speaker, Mr. Pawlik, indicated, the *Playboy* court,²⁰⁶ which dealt with cable scrambling of adult entertainment, pointed out that cable TV is, in a sense, as pervasive as former traditional broadcast.²⁰⁷ The *Denver Area* case comes close to saying that as well.²⁰⁸

I am not arguing that there is a computer in every household, but we know the trends of both demographics and education, and I think it is clear—I do not hear anyone disputing—that at least Congress, in representing the public interest, has a legitimate, if not compelling, interest in trying to regulate the access of children to indecency—or what I will call pornography.

So, if we start with the notion that there is a problem with indecent speech on the Web, then we hear that the problem is so vast, so uncontrollable, and so uncontainable, that the government can do nothing about it. But I do not think that is the way to look at how to deal with the problem—one that is visible, apparent, and has not gone away. Everything that we have seen shows that while private industry tries to use blocking mechanisms and tries to sell software, we always have the problem—which is true in any medium—that you

203. Cable Communications Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C.A. §§ 521-559 (West Supp. 1996)).

204. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

205. See *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994).

206. *Playboy Entert. Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996).

207. *Id.* at 786-87.

208. See *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996).

have parents who are unwilling, unable, or ignorant of how to put a lock on a cable box, how to take the remote control away, or how to program a computer. So, we are always going to have the “catch-up” problems of the private sector trying to regulate.

At the same time, people say that indecent speech cannot be regulated by the government, but then tell us that, somehow, the private sector will regulate it for us. So, I think there are some internal contradictions to some of the arguments made by the opponents of the CDA.

If we start with the premises that there is a problem and that the government can do something about it, then we turn to the practical problem: can the government do something about it in some meaningful, effective way?

I think it is interesting, in terms of the applications on the Internet, that Senator Exon and the other sponsors were really looking at what they identified as a very discrete problem. They were saying that computer bulletin boards and Web sites were being used by commercial pornographers, with their profits in mind, to purvey pornography, and that it was accessible to children.²⁰⁹ Putting up a warning on the first page of your home page saying, “Warning: You must be twenty-one to enter” is sort of an attractive nuisance.

What is interesting about the CDA is that what you see today in the real world is that the commercial pornographers do in fact have adult identification systems. One of the affirmative defenses, obviously, under the CDA’s section 223(e)(5)(b),²¹⁰ is the availability of adult identification or some sort of credit card or other type of check. So, ironically, the CDA can be extremely effective as a defense for the very pornographers to whom it was directed.

209. 141 CONG. REC. S8089-8090 (daily ed. June 9, 1995); 141 CONG. REC. S8333 (daily ed. June 14, 1995).

210. 47 U.S.C.A. § 223(e)(5)(b).

To some extent, I think that the plaintiffs and we are “two ships crossing in the night.” I do not know if that has been said in public before, but we have often said it to ourselves, because there are people, such as those represented by Mr. Hansen, who are very concerned about this particular issue. While I am not discounting their concern, when you look at what Congress was trying to do, you see that Congress was looking at an entirely different aspect of the Internet.

Mr. Hansen says that these two are going to get hopelessly enmeshed. I think that the vagueness issue, which I have addressed, tries to separate that out. If you have a clear body of precedent, you are not going to have a situation where the pornographers are going to be ignored and Mr. Hansen’s clients somehow are going to come under investigatory agency oversight in terms of prosecutions under the CDA.

But the second issue, which Mr. Hansen has pointed out, is how do you regulate this? I think we have pointed out that the commercial pornographers have a way of doing it, and they can do it. And, as the Solicitor General’s brief in the Supreme Court points out,²¹¹ if commercial users of the Internet can find ways to channel speech so that adults, but not children, can speak, then there is no reason why non-profit organizations cannot do that. There is no reason why they cannot have adult verification systems.

It is true that you cannot really verify anything over the Internet, per se, though recent electronic commerce is doing that with credit cards. But with computer bulletin board systems, as the *United States v. Thomas*²¹² case indicated, there are a lot of situations in which you call back, you send a driver’s license, or you send some age identifier or other verifier, allowing the sender to restrict transmissions by

211. Brief for Appellant at 10, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (No. 96-511).

212. 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996).

age.²¹³

So, I think that when we say things like, “we cannot regulate it,” “it is too big a problem,” and “you will have foreign sites,” public policymakers should look at these arguments. But when Congress looks at the problem as it does and says, “This is a medium. We are looking at it. We recognize the First Amendment implications. Here is how we think we can resolve these competing concerns,” I think that Congress in fact should be given deference in that respect.

Thank you.

MR. JOLLYMORE: Thank you very much, Ted. The last word, except for questions and answers, belongs to Parry Aftab.

MS. AFTAB: I will keep this short. Let me give you a slightly different perspective. How many of you have Internet accounts through an online service like AOL? Just about all of you. You understand that you cannot get to Web sites unless you have an address for the Uniform Resource Locator (“URL”),²¹⁴ or you do a search using one of the search engines²¹⁵ or other mechanisms for finding one site that will lead you there. If any of you have been searching for par-

213. In *Thomas*, the Sixth Circuit affirmed a federal obscenity conviction, holding that the intangible form of a computer bulletin board did not preclude prosecution for interstate transportation of lewd materials. 74 F.3d at 705. There, a federal postal inspector investigating a complaint about the Thomas computer site mailed an application form and \$55 fee to the site. *Id.* Defendant then gave the agent a password which would allow him to access the site. *Id.*

214. URL is the addressing format used to identify specific Internet locations. ALLISON, *supra* note 168, at 339.

215. According to one commentator:

Search engines typically disperse Web crawlers to scour the network and compile an index of existing documents. These agents note changes within existing documents and update the index, which is stored in the search-engine hardware’s RAM. . . . The deeper the crawler goes and the more elegantly the index cross-references, the more relevant results will be.

Jim Balderston, *Search Engine Vendors eye Intra nets: Tech Update Intranets Mean that search tools must be fine-tuned for Corporate needs*, INFOWORLD, July 1, 1996, at 41.

ticular sites and have had problems finding them, you know that it is not always easy to find Web sites.

When marketing a Web site on the Net, commercial sites are looking for hits—that is, the number of people who visit them— so that they can get outside advertisements.²¹⁶ Our Web site has about 10,000 regular visitors every month, and those numbers are important to us.

There are a lot of Web masters, people who design Web sites.²¹⁷ They want to increase the traffic so that they can say, “I had 20,000 hits last month,” or “I had 50,000 hits last month,” and “therefore, I am entitled to this much in advertisement revenue.” To accomplish this, they hide text in what is called metatext.²¹⁸ When you pull up a Web site, there are things that you do not see. Sometimes, if you have ever seen something printed out, you see all these little caret around certain language. That is coding, the way Word-Perfect would code certain things to tell the computer to indent text, to put in certain punctuation, or to do certain things with sizing. Metatext is invisible to the viewer, but it is very visible to the Web spiders and the search engines that go around, scour the Net, and pick up the first twenty-five or fifty words off of every Web site because they look for key words.²¹⁹

216. Kodak, for example, judged the success of its Web site, in part, by the 40,000 software files that were downloaded from its site in the first quarter of 1996. William Patalon III, *Grass Roots Effort to Create Kodak's Internet Home Page Proves Successful*, GANNETT NEWS SERVICE, July 24, 1996, at S12.

217. “Web master” is a term that may encompass a number of different responsibilities, including building and running a company’s web site, “responding to e-mail from customers, fixing technical glitches in a Web site, or writing and editing copy for the site.” S.F. CHRON., Feb. 13, 1997, at B1. Although Web masters are not nationally certified, there is a movement for national standards currently underway. *Id.* However, there is no agreement, even among members of the Webmaster’s Guild, as to what a Web master actually is. *Id.*

218. Metatext is the internal code in a computer program that contains formatting instructions. *Guide to the World of Multimedia, Part IA: Roundup of CD Formats*, NEW MEDIA AGE, June 22, 1995, at 11.

219. In terms of marketing:

[w]hen the information search itself becomes the primary focus [of data

People who are trying to market their site will put the word “sex” into the metatext.²²⁰ The more times you use it, the higher your number of hits, so that when people are looking for a lot of traffic and they go into Alta Vista,²²¹ or any of the other Web site search engines and they type in “sex,” their site is going to come up. Our site comes up when you type “sex” because we talk about sexual harassment and sex discrimination in our legal site. I do not know if that is part of the reason we get 10,000 hits a month, but I would like to think it is not.

You have to understand how the Net really works. Those of us who have been on the Net for a long time (and therefore have no life and are proud of the fact that we are geeks) have a lot of problems with censorship because a lot of the people who are trying to censor, regulate, or moderate activity on the Internet are people who do not understand how it works.

We talk about PICS and various filtering software. There are a lot of different ways of filtering what kids, or anyone else, is seeing on the Internet. Some of the filtering mechanisms use search words.²²² Others scour the Net and find offensive sites, or inoffensive sites, which is really what they are doing now, because it is a lot easier to find the ones that

upon which business decisions can be based], messages . . . are replaced by codes or metatexts. Under the impact of marketing discourse, one salient code or metatext is the ‘consumer orientation’ . . . [utilized so that] the market can be used as a justification for internal decisions.

Lars T. Christenson, *Buffering Organization Identity in the Marketing Culture*, EUR. GROUP ORGANIZATIONAL STUD., Sept. 22, 1995, at 651.

220. See Dan Gillmor, *Policing a Few Bad Apples Could Cut Into Internet Freedoms for All*, ST. PETERSBURG TIMES, Mar. 3, 1997, at 15; Marc Perton, *Netting the Right Fish*, ASIA, INC., June 1996, at 56.

221. Alta Vista Technology Inc., *The Alta Vista Technology Inc.* (visited Apr. 16, 1996) <<http://www.alta.vista.com>>.

222. Search words are terms or key words that are used by a search engine to locate sites on a particular topic. *Useful Strategies for Teachers Going Online*, DOMINION, May 27, 1996, at 22 [hereinafter *Useful Strategies*]; *ACLU*, 929 F. Supp at 836-37. In effect, “[t]he search engine ‘crawls’ the Web finding sites containing the words.” *Useful Strategies*, *supra*, at 22.

are clean under someone's standards, then to find the ones that are not.²²³

My problem is that when people are trying to regulate these, they really do not know what they are doing. PICS may be the way to go for the future on a lot of these things. But when you look to the Internet, you need to recognize that we are not New York City, New York State, or even the United States. The Internet is a very global network; it is global communication.

When we talk about the First Amendment, we are focusing on the United States. When we talk about community standards, we are focusing on a community within the United States, however we structure that. As Americans, we tend to think that the world revolves around our standards and our law. It does not. For example, when a neo-Nazi puts something on a site in Illinois, which may be incredibly offensive to most of us, it is protected speech within the United States.²²⁴ When that Web site can be accessed by someone in Germany, that same text would be deemed criminal because of neo-Nazi criminal laws. If that person is aware of that the German prosecutors are looking for him, he will not go to Germany; if he goes to Denmark, however,

223. For example, Surf Watch, a leader in content filtering software, "lets parents, teachers and employers block unwanted sexually explicit and other material from their computers' Internet access—without restricting the access rights of other Internet users." *Surf Watch Content Filtering Software from Spyglass Included in Microsoft's Internet Explorer Starter Kit*, PR NEWSWIRE ASS'N, Oct. 15, 1996; see also *ACLU*, 929 F. Supp. at 841-42.

224. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (invalidating Ohio Criminal Syndicalism Act that made advocating violence as a means of political reform a criminal act). In *Brandenburg*, the Court upheld the right of a Ku Klux Klan member to speak out at a Klan rally, disregarding the racially offensive content of his speech. *Id.* The Court also overruled *Whitney v. California*, 274 U.S. 357 (1927), in which the Court had previously held that a state may outlaw advocating violent means to effect political and economic change. *Brandenburg*, 395 U.S. at 449. The Court rested its decision on the "principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to [and likely to produce] imminent lawless action." *Id.* at 447.

he may be extradited to Germany because of a Danish-German treaty concerning neo-Nazi criminals. Unanticipated consequences? Certainly. Who would anticipate that someone who does something in Illinois can get arrested in Germany just because the world does not see things the way we do.²²⁵

So, we can talk about First Amendment all we want, but we must understand that there are global standards and there are substantial jurisdictional issues: district court judges in this country are saying, “You have a Web site? Gotcha in Connecticut.” It is a presence, a nexus, and they can sue you here.²²⁶ And judges around the country, because of their general lack of understanding of cyberspace, are saying the same thing. They are saying that you have to be very cautious about what you are saying, even without considering the legal effects of the CDA.²²⁷ You have to look at what you are saying and look at world standards.

Just as background, let me explain about privacy on the

225. An American attorney working in Frankfurt, Germany, who is very familiar with German cyberspace issues noted: “The Internet created a universal jurisdiction, so that once you are on the Internet you are subject to the laws of every country in the world.” *German Student Faces Charges Over Internet Site*, DALLAS MORNING NEWS, June 6, 1997, at 11D. For an example of a present day example of the previous scenario, see *id.* In Germany, a 25 year-old German university student faced criminal charges for creating an Internet home page providing an electronic link to a left-wing newspaper which, among other things, offered terrorism advice. *Id.*

226. See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). In *Inset*, a Connecticut corporation brought trademark infringement action against Massachusetts corporation that allegedly used its trademark as an Internet domain name. *Id.* at 161. In denying defendant’s motion to dismiss for lack of personal jurisdiction and improper venue, the District Court, Covello, J., held that: (1) foreign corporation’s advertising via the Internet was solicitation of sufficient repetitive nature to satisfy “solicitation of business” provision of Connecticut long-arm statute; (2) foreign corporation had sufficient minimum contacts with Connecticut to support exercise of personal jurisdiction; and (3) foreign corporation was, for venue purposes, deemed to reside in Connecticut. *Id.*

227. 47 U.S.C.A. § 223; see, e.g., *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

Net. The Electronic Frontier Foundation is a very good Web site.²²⁸ If you are looking for a URL that will give you a lot of information on censorship issues on the Net, you should access it at <www.eff.org>. It will help you understand the tensions between privacy and free speech.

One of the mechanisms suggested in the CDA is that Webhosts screen visitors to their site to ensure that minors do not have access to “indecent” material.²²⁹ It contemplates adult identification cards or use of a credit card, as indicia of majority. Registering, or giving credit card information for access to certain sites, involves giving up information about yourself to a lot of people out there whom you might not want to have that information. The Web is an unlimited source of information about demographics which can deprive many visitors of privacy rights, as it is. A lot of us on the Net, knowing how much information can be derived from reversed domain and other identification programs used at many sites, are very careful about the kind of statistics we glean from people who access our sites.

So, you have this tension. It is easy to say, “Sure; register; put in your credit card information; forget security and encryption issues for the time being; register and we will know who you are, and we will be able to check it and know how many times you hit this site that somebody else might think is indecent.” Where you go with “Big Brother” information is all part of what people who are concerned in the Net community are worried about. Using information obtained from the Electronic Frontier Foundation lets us see what the world is doing to censor or regulate certain speech or access to such speech on the Net. Canada’s Attorney General said he wanted to figure out how to censor the Net because he was concerned about “hate Web sites” and “white

228. *Electronic Frontier Foundation*, (visited Apr. 20, 1997) <http://www.eff.org/pub/censorship/online_services>.

229. 47 U.S.C.A. § 223.

power Web sites.”²³⁰ Germany just blocked an entire online service because a large Netherlands service, similar to AOL or Compuserve, provided access to one Web site that the German government considered offensive. The Netherlands’ online service provider refused to censor the site.²³¹ So, the German government blocked access to this Netherlands service in its country.²³²

Where are we going with country by country standards and censorship? In Singapore, Saudi Arabia, and mainland China, everything runs through government servers which screen what is deemed appropriate for Webbers located in that country.

What is going to happen next to information on the Net on a global basis? Once we get past what is decent or indecent in the United States, and what is obscene or not obscene in the United States, we need to understand that there is speech that may be protected under any of our standards in the United States that may be criminal someplace else in the world.

So, what I am doing is not in any way capping the analysis by review of the CDA.²³³ I want you to be aware of the expansiveness of communication on the Internet and the ramifications of putting something on your Web site, of sending something by e-mail to someone, and of accessing someone else’s Web site. And I want you to understand how global all of these legal issues are—jurisdictional, privacy, free speech, criminal—whether you are talking about minimum contacts, constitutional issues, state constitution, federal Constitution. These are the tensions that we have to balance, both in the United States and around the world.

230. See generally White Supremacy, *Hatewatch* (visited Apr. 20, 1997) <<http://hatewatch.org>>.

231. *Electronic Frontier Foundation* (visited Apr. 20, 1997) <http://www.eff.org/pub/censorship/online_services>.

232. *Id.*

233. *Id.*

So, when you come down either in favor of against the CDA, or the state equivalents of the DCS,²³⁴ as they may be adopted from time to time, you need to examine those standards in a global setting. I am a cyberlaw practitioner. I see cyberlaw globally and I want you to understand these issues and see them globally as well.

When regulating the Net, do you use the standards that are being used for every other media?²³⁵ Do you use the standards that have developed over the last 200 years in this country, or do you create a new standard because of the unique nature of the Internet media?

What we are talking about is creating a different standard for certain communication than you have elsewhere under the law. The problem is that the best thing about the Net is also the worst thing about the Net: we are all one gender, we are all one age, none of us are disabled, we are as smart as we are, as articulate as we are. Right now, the common language on the Internet is English;²³⁶ we all speak English. We are anonymous.

With a first name like "Parry," most of the people in the world think I am a man, and I get a lot of e-mail saying things like, "It is great that you are doing this. Those women" I have to point these people to my Website and my photo so that they understand.

But, as I said, the beauty of the Web is also the biggest problem that we are facing. For example, how much can you believe from an anonymous communication? A forty-seven-year-old guy in Ohio said he was a fifteen-year-old boy who was very interested in this twelve-year-old girl.²³⁷

234. NEED TO CALL AFTAB AND FIND OUT WHAT THIS IS. DEP'T OF CIVIL SERVICES OR DEP'T OF CORRECTIONAL SERVICES?

235. For an explanation of the different media standards, see *supra* note 1.

236. Candee Wilde, *Industry Moving to Multilingual Internet*, COMMS. WK. INT'L, Mar. 4, 1996, at 22.

237. See *Internet Seductions and Statutory Rape*, OMAHA WORLD HERALD, Feb. 16, 1997, at 10B.

Who really knows? If you read profiles on AOL, you will understand that it is the best fiction you have ever read. People on the Net can reinvent themselves, merely by saying they are what they had always hoped they would be.²³⁸

But understand that when you enter the Web, you have gone “through the looking glass,” notwithstanding that often regular laws will apply in cyberspace as well as in regular space. A crime perpetrated in cyberspace is no less a crime; it only uses a new medium.

But before everyone starts regulating or running to find a new way of regulating the Net to make it safe for the world, I want you to recognize the tension between what should be done and what is doable. Before we censor, let us ask ourselves what alternative we have. Is there filtering and blocking software? Yes.²³⁹ Are there ways to regulate certain activity on the Web? Sure. Is it going to get there during my lifetime? That depends on how long I live. But I want you to recognize that all of these exist. As law students, as future lawyers, and as practicing lawyers, we need to search for balance. We must see it as a global issue. Do not see us as Americans, or New Yorkers, or New York City people, or as law students. Just see it far more globally and understand that that is what you are facing. It will take more creativity and a broader understanding of legal and social issues. We will be expected to pull it all together, and know far more than we have ever known before. We will need to build global, cross-disciplinary teams of computer technology experts, online service providers, defamation and media legal experts, constitutional law and international law experts, and teams of these experts from around the world.

When you face free speech on the Internet, you face all of

238. Rosie Mestel, *Long Distance Cyberporn in Memphis, TN*, NEW SCI., Aug. 14, 1994, at S1.

239. See, e.g., *supra* note 223 (discussing SurfWatch, one type of filtering and blocking software).

these issues that are policy and practical issues, and we are going to try to grapple with how to take all of the jurisprudence that we have brought to the world and find a way of keeping them in balance to allow this incredible medium to enrich our lives and the lives of generations to come.

Thank you.

MR. JOLLYMORE: Now we would like to take a few questions.

QUESTION: This question is for Mr. Hirt or Ms. Aftab. The *Shea* decision contained a footnote that lumped together content that is transmitted with content that is simply made available on the Internet.²⁴⁰ Is there any problem with this lumping together of what essentially seem to be two different kinds of Internet content, the transmitted type and the made-available type?

MR. HIRT: I will try to take a stab at the question.

The statute does have textual differences in terms of A's transmitting to B as opposed to A's displaying and therefore making available to B through an infinite number people.²⁴¹ The so-called display provision, section 223(d)(1)(B), was enjoined.²⁴² But the courts did—the Philadelphia court in particular—²⁴³ because it had problems with the term “indecent” as used in 223(a), and so it also enjoined that provision.²⁴⁴

The Solicitor General's brief says that it is one thing to look at D and find problems with the displaying of content, but where you are intentionally sending content directly from A to B, especially if you know that B is under eighteen,

240. *Shea*, 930 F. Supp. at 925 n.2 (“We use the term ‘content’ to refer to any text, data, sound, program, or visual image transmitted over or made available for retrieval on an interactive computer service.”).

241. See 47 U.S.C.A. § 223(a)(1)(B), 223(d)(1)(A).

242. 47 U.S.C.A. § 223(d).

243. *ACLU*, 929 F. Supp. at 828.

244. *Id.* at 883.

that is a different issue. So that is the footnote; I cannot vouch for it, but if those are the two types of conduct, they are enjoinable; there is a difference in terms of how the statute operates. Now, Mr. Hansen may disagree with me as to whether it should operate that way or whether it constitutionally can operate that way, but there are different provisions of the CDA that have these different implications.

MS. AFTAB: Was your concern with your ability to receive something by e-mail, or were you concerned with your ability to access it from a Website, whether voluntary or involuntary?

QUESTIONER: I think the concern of the court's particular approach in writing the decision was the definition of content. Footnote two of *Shea* says content includes the text, the sound, or the images, and then it runs into the same strain as the description of the definition. Yet, the CDA seems to break it out.²⁴⁵ So, I wonder whether the court has made some sort of mistake. If this is the case, future courts will not be very clear, they will just continue to lump things together. If, for example, the CDA is found constitutional, we might get a broad-brush problem.

MS. AFTAB: I cannot comment on the *Shea* footnote because I do not recall it. But, I can tell you that many of the judges are looking at jurisdictional issues, such as whether it is information that is being sent to someone by way of unsolicited e-mail or list serves, or something that needs to be accessed from someone's Web site to determine the location of information. Although they consider the voluntary nature of the communication, most courts are still coming to the same conclusion. They find that you are subject to the jurisdiction of their courts.

QUESTION: Why is it that a lot of Web masters do not make their sites accessible to blind people who use com-

245. 47 U.S.C.A. § 223.

puters with speech capability, and what can be done about it from a technological standpoint?

MS. AFTAB: It looks like I am the technology person again.

There are different kinds of Web sites. There are commercial Web sites that cost a lot of money, and then there are Web sites that you or your neighbor may have put up. I keep my own Web site up and running, which is why none of my links work on a regular basis.

But there is a rapid growth of audio on the Net through Java and other technology, and a lot of the people who put up their Web sites want to use it. Unfortunately, it requires greater knowledge and generally more Web site space with the Website host company than most Website operators have at this time. It is also harder to maintain as you add new technology to your site. But, I think that the Web is a perfect place to accommodate these special concerns. Many people who have sight disabilities have computers that have speech capabilities built into them that are increasingly allowing them to use the Internet. But, it is an important issue and something that we should be taking into consideration. It is certainly something I will be looking at for our Web site as a result of your question.

QUESTION: The Department of Justice's brief in *ACLU v. Reno* spent a lot of time arguing that the provisions of the CDA should be separable, that each of the three provisions should be looked at on its own merits.²⁴⁶ I was just wondering what the ACLU's position is on whether the three provisions can be separated?

MR. HANSEN: The short answer is no. The government will be surprised to learn that we do not agree with them. The government did not make this argument below; this is

246. Brief for the Appellant at 18, *Reno v. ACLU*, 929 F. Supp. 824 (E.D. Pa. 1996) (No. 96-511).

something it has invented now that it has reached the Supreme Court. If you read the government's brief carefully, you will find that we still do not exactly know what its position is.

The government takes the position that the two knowing clauses prohibit an individual from knowingly sending indecent material to a minor.²⁴⁷ But the example it uses is enormously illustrative: it says if an individual goes into a chat room or onto a news group and discovers that somebody in the chat room or in the news group is a minor, then thereafter that individual may not send private e-mail that is indecent to that minor. Through its method of analysis, the government also implies that if the individual continues to speak to the news group or the chat room knowing that a minor has recently been there, that individual risks going to jail under the indecency provision.²⁴⁸

What the government has refused thus far to clearly address is whether the knowing provisions apply to communications between one person to one person, or whether they apply to any of the various one-to-many communications, like chat rooms and news groups. If those two provisions apply to the one-to-many conversations and address the situation where I enter a news group and I see that two messages above me someone has posted a message that says, "I'm seventeen and I come to this news group all the time," we still have the same problem. We would still have exactly the same problem that adults now have which required them to censor their speech in order to deal with the fact that there are some minors out there. The government has studiously refused to go near this question and analyze it that way.

MR. JOLLYMORE: Chris, I am intrigued by your background as an advocate for children's rights. Let me ask you

247. *Id.* at 15.

248. *Id.*

this: Dave Pawlik made the statement that there is a problem with indecency on the Internet concerning children. Is that true? Is it injurious to kids to be exposed to indecency on the Net; if so, is there anything that the government can do to protect kids?

MR. HANSEN: It depends. The answer to the first part of your question depends on what you mean by indecency, the age of the kid, the maturity of the kid, and the nature of the speech. There is certainly some speech on the Internet that probably all of us would agree we would not want six-, seven-, or eight-year-olds to see. There is probably also speech on the Internet that some of us would find appropriate for a seventeen-year-old and some of us would find offensive for a seventeen-year-old. So, part of the problem, in terms of whether there is a sufficient interest in banning speech to children, depends on with what we are dealing.

MR. JOLLYMORE: What if we take the first category, the speech we would all agree that we do not want certain age groups to see?

MR. HANSEN: And what about that speech?

MR. JOLLYMORE: Well, is there anything the government can do to protect kids?

MR. HANSEN: Absolutely. What the government ought to do in that context is something that is effective. One of the many problems of the CDA is that it does not reach overseas sites. If the CDA is upheld, and if it were limited the way you just described, that is, to that material that every single American agreed was inappropriate for a nine-year-old, it would still not get the fifty percent of all sites that originate overseas. It is just as cheap and easy to access a site in Denmark as it is to access a site in the United States. So, if we enforce the CDA, we will not have accomplished anything toward the goal of protecting children.

By contrast, if the government encourages the use of parental blocking mechanisms, which parents can load onto

their own home computers, such software would cover overseas sites just as it would cover domestic sites. It will be infinitely more effective in protecting the interests you are describing and the interests many people want to protect. Therefore, that is what the government ought to be doing.

MR. JOLLYMORE: I want to ask one quick question of everyone on the panel: if you can step aside from your role as an advocate, tell us briefly what you predict the Supreme Court will do in *ACLU v. Reno*.

MR. HANSEN: I am too close to it. Because I am trying to persuade them to move to a particular position, I cannot.

MR. JOLLYMORE: Parry?

MS. AFTAB: Can I say what I hope they are going to do? I hope they are going to invalidate the issue on the indecency that is before the Court. I just think it is too broad and I think it has very dangerous ramifications with the lowest common denominator is being what a minor is supposed to read. I hope that the remainder of the CDA survives, especially the section overruling the *Stratton* case concerning liability for online defamation.

MR. JOLLYMORE: Dave?

MR. PAWLIK: I think they will be consistent with the channeling aspects of *Pacifica* and *Sable* and they will say that the CDA is not an effective or constitutional method of channeling.

MR. JOLLYMORE: Ted?

MR. HIRT: Like Chris, I will decline. Even though I do not have a prudent reason for declining, my predictions on what judges will do are not a batting average I would want to share with any of you, in terms of district court, appellate court, or Supreme Court.

MR. JOLLYMORE: Let me ask Preeta.

MS. BANSAL: I think they are going to strike it down

using existing rules, and I think they are going to decline to enunciate a broad standard for the Internet.

MR. JOLLYMORE: I am going to add my opinion. I think they will strike it down too, for what it is worth. I want to thank our panelists for participating and all of you for staying a little later.