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Impact of the Communications Decency Act of 1996 on Federal Prosecutions of Computer Dissemination of Obscenity, Indecency, and Child Pornography

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by
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Introduction

Congress enacted the Communications Decency Act of 1996 (CDA)[1] as part of the Telecommunications Act of 1996[2] signed into law on February 8, 1996, in the first major overhaul of the United States' telecommunications laws since their inception in 1934. The Telecommunications Act itself relaxes the rules governing telephone, television, and computer services and has been described by one telephone executive as the "most important legislation . . . in the history of this country."[3] Federal prosecutors and members of the computer on-line and Internet communities, however, are expected to be most interested in the CDA's new criminal laws and enhanced penalties prohibiting "indecent" communications from being sent, or made available to, minors through computer networks.[4]

This commentary offers an early examination of the implications of the CDA on the use of computers and computer networks as instrumentalities of federal obscenity, indecency and child pornography crimes. First, this commentary provides an overview of the numerous federal statutes providing criminal sanctions for the dissemination of obscenity and child pornography, including distribution by computers. Second, this commentary reviews the CDA's changes to federal criminal laws governing dissemination of indecent material by computers or through computer networks. Finally, this commentary discusses a number of questions and issues that CDA prosecutions are likely to raise. These include the likely practical impact of the CDA on criminal prosecutions and on the use

1. Communications Decency Act of 1996, [hereinafter "CDA"], *in* Telecommunications Act of 1996, § 230, 501-61, Pub. L. No. 104-104, 110 Stat. 56, 133-43 (1996) (to be codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.) (citations to the CDA in this commentary correspond to section numbers used in the Telecommunications Act of 1996).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.).

3. Carolyn Lochhead, *Congress Eases Telecom Rules: Phone, Cable TV Industries Would be Opened Up,* S.F. CHRON., Feb. 2, 1996, at A1 (quoting Phil Quigley, Chief Executive Officer of San Francisco based Pacific Telesis).

4. *See, e.g.*, Ramon G. McLeod & Reynolds Holding, *Telecom Bill Called Threat to Free Speech on the Net,* S.F. CHRON., Feb. 7, 1996, at A1.

of computer networks, the potential proof problems prosecutors might face, and First Amendment challenges to the CDA.[5]

I
Pre-CDA Federal Law Criminalizing Computer Distribution of Obscenity and Child Pornography

Prior to the enactment of the CDA, a number of federal statutes provided criminal sanctions for the distribution of obscenity and child pornography, including distribution by computers, telephone or other broadcast mediums.

A. Obscenity/Indecency

Prohibitions against the use of the telephone, to communicate obscene or indecent content orally can be found in the Communications Act of 1934, as amended numerous times over the years.[6] Any person making a "comment, request, suggestion or proposal"[7] by means of the telephone "in the District of Columbia or in interstate or foreign commerce"[8] that is "obscene . . . or indecent"[9] or "knowingly permits any telephone facility under his control"[10] to be so used faces a maximum of six months imprisonment

5. Within a week of the CDA's passage, a temporary restraining order was issued barring enforcement of one of the law's provisions. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. June 11, 1996). On First Amendment challenges to the CDA since its passage, see *infra* note 83.

6. 47 U.S.C. § 223 (1994).

7. 47 U.S.C. § 223(a)(1)(A) (1994).

8. An interstate communication includes a communication between one state, the District of Columbia, or a United States territory and another state, the District of Columbia, or United States Territory. 47 U.S.C. § 153(e) (1994). A foreign communication, as expected, includes a communication between the United States and a foreign country. 47 U.S.C. § 153 (1994). These interstate and foreign communications definitions are similar to the interstate and foreign commerce definitions in the criminal statutes found in Title 18. *See* 18 U.S.C. § 10 (1994).

9. The United States Supreme Court defines "obscenity" using a three-part test. Miller v. California, 413 U.S. 15 (1973). Using the *Miller* test, courts must determine whether (1) "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (citations omitted).

Under the Communications Act, "indecency" over the telephone is defined by the Federal Communications Commission (FCC) as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." Dial Info. Serv. Corp. of N.Y. v. Thornburgh, 938 F.2d 1535, 1540-1541 (2d Cir. 1991).

10. 47 U.S.C. § 223(a)(2) (1994).

and a $50,000 fine.[11] Prior to the passage of the CDA, the Communications Act's prohibitions against obscene or indecent communications were expressly limited to communications by "telephone."[12]

The Communications Act also regulates the audiotext industry, more commonly known as "dial-a-porn"[13] providers. The Communications Act prohibits, under threat of criminal penalties, any "obscene" communication by telephone for commercial purposes regardless of who initiates the call. The Act also penalizes offenders who knowingly permit any telephone facility to be used for such activity.[14] "Indecent," as opposed to "obscene," consensual communications with adults are not prohibited.[15] The "dial-a-porn" provisions, however, criminally sanction "indecent" communications for commercial purposes that are made "available to any person under 18 years of age or to any person without that person's consent," regardless of who placed the call.[16] The statute is also violated if a person knowingly permits any telephone facility to be used to communicate such "indecent" content to minors.[17]

In the context of "indecent" communications to minors, the Communications Act provides statutory and regulatory defenses to, or "safe harbors" from, criminal prosecutions or civil charges. These regulatory defenses pertain to blocking "indecent" communications from reaching minors.[18] The statutory "safe harbor" requires telephone carriers who conduct the billing for "dial-a-porn" providers to allow only those subscribers who have so requested in writing to

11. 47 U.S.C. § 223 (1994). The statute also criminalizes telephone calls made with the intent to "annoy" or "harass," *i.e.*, "crank" calls. 47 U.S.C. § 223(a)(1)(B)-(D) (1994). The CDA amends subsection (a) of section 223. *See infra* note 39.

12. The CDA broadens the coverage of the prohibitions on two-way obscene or indecent communications to use of a "telecommunications device." *See infra* note 39.

13. *See, e.g., Dial Info. Serv.*, 938 F.2d at 1537.

14. 47 U.S.C. § 223(b) (1994). The CDA does not amend the "dial-a-porn" provisions of subsection (b) of section 223.

15. 47 U.S.C. § 223(b)(2).

16. 47 U.S.C.A. § 223(b)(2)(A) (West 1991 & Supp. 1995). The maximum penalty is six months imprisonment and a $50,000 fine. 47 U.S.C.A. § 223(b)(2)(B) (West 1991 & Supp. 1995). Additional $50,000 fines for each violation can also be imposed. 47 U.S.C.A. § 223(b)(4) (West 1991 & Supp. 1995). The FCC has regulatory and enforcement powers over telephone carriers and providers, along with the authority to impose civil fines. *See* 47 U.S.C.A. § 223(b)(5)(B) (West 1991 & Supp. 1995).

17. 47 U.S.C.A. § 223(b)(2)(B) (West 1991 & Supp. 1995).

18. 47 U.S.C.A. § 223(b)(3), (c) (West 1991 & Supp. 1995). The CDA does not amend these "safe harbor" provisions.

receive indecent communications.[19] The regulatory "safe harbors" are promulgated by the FCC and allow carriers to provide access to "dial-a-porn" services to customers using a credit card, adult access code, or descrambler.[20]

Title 18 of the United States Code, which sets forth the vast majority of federal criminal law, criminalizes the possession, mailing, interstate distribution, and importation of "obscene" matter. Transporting "obscene" matter for sale or distribution in interstate or foreign commerce[21] by personal travel or by any facility or means of interstate commerce is punishable by five years imprisonment and a $250,000 fine.[22] Importation of obscene materials via "any express company or other common carrier" is a separate violation, with the first offense punishable by five years imprisonment, and the second offense by ten years.[23] The statutes prohibiting the importation or other interstate or foreign transport of obscene materials are drafted broadly to include any means of distribution, including distribution by computer.[24] These statutes also include matters of "indecent character."[25]

The knowing use of the United States mail to transport obscene matter is punishable by five years imprisonment for the first offense and ten years for the second offense.[26] The possession with intent to sell or sale of an "obscene visual depiction" on federal property is also a felony.[27] Finally, "utter[ing] any obscene, indecent, or profane

19. 47 U.S.C.A. § 223(c)(1), (2) (West 1991 & Supp. 1995).

20. 47 C.F.R. § 64.201 (1995).

21. 18 U.S.C. § 1465 (1994). Evidence that obscene material was produced or manufactured in one state and found in another creates a rebuttable presumption that the material was transported, shipped, or carried in interstate (or foreign, as the case may be) commerce. 18 U.S.C. § 1469(a)-(b) (1994).

22. 18 U.S.C. § 1465 (1994). If not specified by the statute, the maximum fine for all felony convictions under Title 18 is $250,000. 18 U.S.C. § 3571(b)(3)(1994). Criminal forfeiture also applies for any obscenity violation under Title 18. 18 U.S.C. § 1467 (1994).

23. 18 U.S.C. § 1462 (1994).

24. 18 U.S.C. §§ 1462, 1465 (1994). In what are described as merely "clarifying" amendments, the CDA amends sections 1462 and 1465 to expressly add an "interactive computer service" as a prohibited means of distributing obscene material. 18 U.S.C.A. § 1462, 1465 (West 1996).

25. 18 U.S.C. §§ 1462(a), 1465 (1994).

26. 18 U.S.C. § 1461 (1994). "Indecent" matter is also covered. It is defined partially as "includ[ing] matter of a character tending to incite arson, murder or assassination." 18 U.S.C. §1461 (1994).

27. 18 U.S.C. § 1460 (1994). The maximum penalty is two years imprisonment and a $250,000 fine. 47 U.S.C. §§ 1460, 3571(b)(3) (1994).

language by means of radio communication" is punishable by two years in prison.[28] "Radio communication" includes radio and television broadcasts.[29]

B. Child Pornography

Title 18 also criminalizes dissemination of child pornography, including dissemination by computer.[30] The primary child pornography statute prohibits knowingly transporting or shipping in interstate or foreign commerce, "by any means including by computer or mails," any visual depiction of a minor engaging in "sexually explicit conduct."[31] Receipt or distribution of such visual depictions so transported is also proscribed, as is the reproduction of such depictions for distribution in interstate or foreign commerce.[32] The sale or possession with intent to sell on federal property is also banned.[33] In addition, the statute also proscribes possession on federal property of three or more visual depictions or any possession of three or more depictions that have been shipped or transported in interstate or foreign commerce.[34] Most violations carry a maximum penalty of ten years for the first violation, up to fifteen years for the second, and a $250,000 fine for either.[35]

II
The Communications Decency Act of 1996

The CDA's primary change to existing federal criminal law is found in its amendments to Section 223 of Title 47 of the United States Code. The CDA broadens the Communications Act's prohibitions on communicating "obscene" or "indecent" content by including communications made through the use of a

28. 18 U.S.C. § 1464 (1994). As with telephone communications, the FCC has regulatory and enforcement powers over the radio and television broadcast medium. 47 U.S.C. § 303 (1994). Obscenity, but not indecency, is banned from cable television. 47 U.S.C. § 559 (1994).

29. 47 U.S.C. § 153(b) (1994).

30. Like obscenity, child pornography enjoys no First Amendment protection. United States v. Arvin, 900 F.2d 1385, 1387 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991).

31. 18 U.S.C. § 2252(a)(1) (1994). The terms "minor" (under the age of eighteen) and "sexually explicit conduct" are defined at 18 U.S.C. § 2256 (1994). "Computer" is defined at 18 U.S.C. § 1030(e) (1994). 18 U.S.C. § 2256(6) (1994).

32. 18 U.S.C. § 2252(a)(2) (1994).

33. 18 U.S.C. § 2252(a)(3)(A).

34. 18 U.S.C. § 2252(a)(4)(A)-(B).

35. 18 U.S.C. § 2252(b)(1).

"telecommunications device"[36] or an "interactive computer service."[37] The CDA also increases the maximum prison term for such communications from six months to two years and the maximum fine from $50,000 to $250,000.[38]

A. Telecommunications Device

Pursuant to the CDA, the new subsection (a) of Section 223 subjects to criminal penalties "whoever . . . in interstate or foreign communications . . . by means of a telecommunications device[39] knowingly . . . makes, creates, or solicits, and . . . initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene . . . or indecent, with intent to annoy, abuse, threaten, or harass another person."[40] The amendment does not prohibit a consensual communication of this type and manner to an adult. Regardless of consent, however, the same content transmitted by a "telecommunications device" is prohibited if the sender "know[s] that the recipient of the communication is under 18 years of age, regardless of whether the maker of such [a] communication placed the call or initiated the communication."[41] The CDA also proscribes knowingly permitting a "telecommunications facility" under your control to be used to communicate the above content.[42]

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36. CDA § 502(1)(A),(B), 47 U.S.C.A. § 223(a)(1)(A),(B) (West 1996). *See infra* note 39 for definition of "telecommunications device."

37. CDA § 502(2), 47 U.S.C.A. § 223(d)(1). (defining "interactive computer service"). *See infra* note 46.

38. CDA § 502(1),(2), 47 U.S.C.A. § 223(a),(d). The CDA amendment to section 223(a) imposes a maximum fine of $250,000 under Title 18. *See supra* note 22.

39. Neither the CDA nor the Telecommunications Act of 1996 itself defines "telecommunications device." The CDA only specifies that the term does not include an "interactive computer service." CDA § 502(2), 47 U.S.C. § 223(h)(1)(B) (West 1996). *See infra* note 46 (defining "interactive computer service"). "Telecommunications" is defined in the Telecommunications Act as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Telecommunications Act of 1996 § 3, 47 U.S.C.A. § 153(2)(48) (West 1996). It has been assumed in First Amendment litigation arising from the CDA that the term "telecommunications device" includes a modem. *See* ACLU v. Reno, 929 F. Supp. 824, 828 n.5 (E.D. Pa. June 11, 1996).

40. CDA § 502(1), 47 U.S.C.A. § 223(a)(1)(A).

41. CDA § 502(1), 47 U.S.C.A. § 223(a)(1)(B).

42. CDA § 502(1), 47 U.S.C.A. § 223(a)(2).

B. "Interactive Computer Service"

The CDA contains an on-line version of the "dial-a-porn" prohibitions discussed above.[43] The CDA also provides the concomitant defenses and "safe harbors" for indecent communications using an "interactive computer service" knowingly sent, or "made available," to minors under the age of eighteen.[44] The CDA defines "interactive computer service" broadly to include, at a minimum, on-line service providers (OLSP) and electronic bulletin board systems (BBS), World Wide Web pages and FTP[45] sites.[46] The same increased criminal penalties apply.[47]

Applying the FCC's definition of "indecent" for the broadcast medium,[48] the new "on-line-porn" provision applies to

> whoever . . . in interstate or foreign communications knowingly . . . uses an interactive computer service to send to a specific person or persons under 18 years of age, or . . . 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.[49]

As in other contexts under Section 223, a person who knowingly permits a "telecommunications facility" under that person's control to be used for the proscribed indecent communications via an interactive computer service also faces the same criminal penalties.[50]

The CDA creates several new statutory defenses to accompany both the amendments relating to "telecommunication devices" and the

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43. *See supra* notes 13-17 and accompanying text.

44. CDA § 502(2), 47 U.S.C.A. § 223(d).

45. FTP or "file transfer protocol" allows an on-line user to establish a network connection to another computer and then transfer files between the two computers. DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS, 275-76 (1994).

46. The CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." CDA § 509, 47 U.S.C.A. § 230(e)(2) (West 1996). "Access software provider" is also defined. *See* CDA § 509, 47 U.S.C.A. § 230(e)(4).

47. The maximum penalty is two years imprisonment and a $250,000 fine. CDA § 502(2), 47 U.S.C. § 223(d)(2) (West 1996).

48. *See supra* note 9.

49. CDA § 502(2), 47 U.S.C.A. § 223(d)(1)(A)-(B).

50. CDA § 502(2), 47 U.S.C.A. § 223(d)(2).

on-line-porn via "interactive computer services." First, in an effort to relieve the telephone and cable carriers of a difficult policing responsibility, a person will not be found to have violated the CDA solely for "providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication."[51]

Second, as in the case of the "dial-a-porn" provisions, the CDA effectively requires OLSPs and BBS operators to make reasonable efforts in blocking minors' access to indecent or obscene communications. A "good faith" defense[52] can be invoked against CDA charges such as sending minors prohibited communications through a "telecommunications device,"[53] knowingly permitting a "telecommunications facility" to be used for that purpose,[54] and using an "interactive computer service" to send or make available, indecent communications to minors.[55] The defense is available if a person "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a [prohibited] communication . . . which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology."[56] Borrowing from the FCC's "dial-a-porn" regulations, the defense also recognizes the use of specific blocking devices that would constitute "good faith:" "verified credit card[s], debit account[s], adult access code[s], or adult personal identification number[s]."[57]

The CDA charges the FCC, in an advisory role only, with the task of promulgating descriptions of additional "reasonable, effective, and appropriate" blocking devices.[58] The use of these additional measures

51. CDA § 502(2), 47 U.S.C.A. § 223(e)(1). This defense does not apply when the telephone or cable carrier conspires with the entity creating the illegal communication, or when the carrier owns the facility or network engaged in the violation. CDA § 502(e), 47 U.S.C.A. § 223(e)(2),(3) (West 1996).

52. CDA § 502(2), 47 U.S.C.A. § 223(e)(5) (setting forth "good faith" defense).

53. CDA § 502(1), 47 U.S.C.A. § 223(a)(1)(B).

54. CDA § 502(1), 47 U.S.C.A. § 223(a)(2).

55. CDA § 502(2), 47 U.S.C.A. § 223(d)(A),(B).

56. CDA § 502(2), 47 U.S.C.A. § 223(e)(5)(A).

57. CDA § 502(2), 47 U.S.C.A. § 223(e)(5)(B).

58. CDA § 502(2), 47 U.S.C.A. § 223(e)(6).

would serve as evidence of "good faith" efforts in the restriction of minors' access to indecent communications via interactive computer services.[59] The FCC has no enforcement or approval authority over the failure to use such on-line blocking devices.[60] The CDA also cautions that the FCC's limited role should not be "construed to treat interactive computer services as common carriers or telecommunications carriers" under the FCC's jurisdiction.[61]

The CDA also expressly shields a person from civil or administrative liability in connection with any activity undertaken in good faith to implement a defense authorized in the new law, or was otherwise taken to prevent the transmission of, or access to, a prohibited communication to a minor.[62] The immunity, however, has a significant limitation. The activity must not be in "violation of any law punishable by criminal or civil penalty" for the shield to apply.[63]

Finally, the CDA prohibits state and local governments from imposing additional liability "for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education" in connection with the CDA's prohibited interstate and foreign communications.[64] Private or non-commercial activities or communications, however, are fair game for state and local governments. There are also no restrictions on states promulgating consistent, non-federal liability and regulations for *intrastate* commercial services.[65]

III
Questions and Issues Facing CDA Prosecutions

Before the CDA was enacted, federal prosecutors used criminal laws to prohibit the distribution of obscenity and child pornography via computers and computer networks. Distributing obscenity in interstate or foreign commerce, by virtually any means, including by

59. CDA § 502(2), 47 U.S.C.A. § 223(e)(5)(B).

60. CDA § 502(2), 47 U.S.C.A. § 223(e)(6)(B).

61. *Id.*

62. CDA § 502(2), 47 U.S.C.A. § 223(f)(1).

63. CDA § 502(2), 47 U.S.C.A. § 223(f)(1). Elsewhere, the CDA eliminates civil liability for actions taken in good faith by any provider or user of an interactive computer service to restrict "access to or availability of material" the provider/user considers to be "obscene, lewd . . . or otherwise objectionable, whether or not such material is constitutionally protected . . . ." CDA § 509, 47 U.S.C.A. § 230(c)(2)(A) (West 1996).

64. CDA § 223, 47 U.S.C.A. § 223(f)(2).

65. CDA § 223, 47 U.S.C.A. § 223(f)(2).

computer, was, and is now illegal.[66] The criminal prohibition against child pornography is even broader, covering the use of computers in distributing, receiving, reproducing and even simply possessing such materials, with any connection to interstate or foreign commerce.[67] The United States Department of Justice (DOJ) has a Child Exploitation and Obscenity section that oversees investigations and prosecutions of crimes such as the distribution of obscenity and child pornography through computer networks. In September of 1995, DOJ conducted a nation-wide series of arrests and search warrants directed at America Online customers who allegedly exchanged such pornographic images.[68] Similarly, in July, 1996 the U.S. Attorney's Office in San Jose, California, indicted sixteen members of an international and domestic child pornography ring that had formed a password-restricted Internet Chat room through which they produced and traded child pornography.[69]

In light of these statutory and prosecutorial resources, DOJ urged Congress as early as May, 1995 (prior to the CDA's passage) to allow the department to conduct a comprehensive review of the current laws and law enforcement resources available for prosecuting on-line obscenity and child pornography.[70] Due to First Amendment concerns over the CDA's restrictions on indecent content, DOJ also suggested that further studies should be conducted regarding the technical means available to enable parents and users to control the commercial and non-commercial communications available on-line.[71] The original version of the House telecommunications bill (which did not include the CDA) directed the Attorney General to submit such a report to various House and Senate committees within 150 days of passage.[72]

However, DOJ's report was never completed and the CDA was passed without a preliminary comprehensive review. While the ink is still fresh on the bill, it is admittedly difficult to assess the CDA's full impact on the use of computers and on-line networks as

66. *See supra* note 24.

67. *See supra* note 32 and accompanying text.

68. David Johnston, *FBI Exposes On-Line Porn Cybersmut: 12 Arrested in Nationwide Investigation of Child Exploitation,* SAN JOSE MERCURY NEWS, Sept. 14, 1995, at 1A.

69. Brandon Bailey and Meranda Ewell, *Net Porn: Web's Dark Side or New Wrinkle on Old Crime,* SAN JOSE MERCURY NEWS, July 23, 1996 at 1A.

70. Letter from Kent Markus, Acting Assistant Attorney General, to U.S. Senator Patrick Leahy (May 3, 1995) <http://www.cdt.org/policy/freespeech/doj_050395.ltr.html>.

71. *Id.*

72. H.R. REP. No. 1555, 104th Cong., 1st Sess., § 110 (1995).

instrumentalities of obscenity and pornography crimes. Courts and juries will eventually establish case law and Washington will issue directives on prosecuting CDA charges. However, even in its infancy the CDA raises many questions and concerns for federal prosecutors, but provides few answers.

A. Much Ado About Nothing?

In light of existing federal criminal law, the primary activity newly criminalized by the CDA is communication through computer networks of constitutionally protected "indecent" speech to minors.[73] The CDA does not add any further restrictions on the dissemination of obscenity or child pornography. Thus, the ban on displaying indecent content "in a manner available" to minors (*i.e.*, public display) is certain to draw the most Constitutional fire.

The CDA's definition of "indecency" potentially includes a broad range of common, scientific, and artistic expression. Arguably, the CDA criminalizes everything from George Carlin's "seven dirty words monologue,"[74] to parts of literary classics such as *Catcher in the Rye* and *Ulysses,* to on-line discussions about safe sex practices, birth control methods, and AIDS prevention.[75] One early critic of the CDA described it as making "R-rated" material a felony.[76] CDA supporters counter that critics are tossing out "red herrings," comparing the Act instead to laws making adult bookstores off-limits to minors.[77]

Few argue with the proposition that obscenity and child pornography should not go unchecked on the Internet and other on-line arenas. The government faces the challenging question, however, of what prosecutorial and investigative resources it is willing to devote to prosecuting indecency on computer networks. These are policy decisions Washington will have to make. Passing a law is only part of the equation of a criminal prosecution; prosecutorial discretion must also be exercised. The tens of thousands of BBSes and more than 3,500 newsgroups on Usenet will make enforcement difficult.[78] Additionally, the CDA's impact in forums allowing anonymous postings could be limited. Absent an available witness standing over a

73. *See supra* note 49.

74. *See infra* note 85.

75. 142 CONG. REC. 51180-04, 51181 (daily ed. Feb. 9, 1996) (statements of Sen. Leahy).

76. McLeod & Holding, *supra* note 4 (quoting Mike Godwin, attorney for the Electronic Freedom Foundation).

77. *Id.* (quoting Cathy Cleaver, Director of Legal Affairs for the Family Research Council).

78. DERN, *supra* note 45, at 16, 196.

sender's computer, prosecution for anonymous postings will be difficult, if not impossible.[79]

B. Proof Problems

In addition to the hurdles created by anonymous communications, a federal prosecutor is likely to face other proof problems when piecing together a CDA case. First, the difficulty in making OLSPs criminally responsible for content on their network is multiplied by the broad spectrum of information available through, and unique characteristics of, on-line networks and the various functions generated by interactivity. There is no comparison between the relatively narrow informational content from a "dial-a-porn" provider and the informational and entertainment programming over the broadcast medium, and what is available through OLSPs. An OLSP can be variously described as a message center, movie house, bookstore, publishing house, and town square. Given the potential range of material covered by the CDA and the inherent uncertainty over what is "indecent,"[80] any monitoring process by the OLSPs will be difficult. Thousands of communications are potentially placed at issue. Will a jury hold a provider to such a task with the risk of criminal sanctions? Will a jury convict an OLSP or BBS operator for providing something that is readily accessible in bookstores, libraries, newspapers, and on cable TV? What evidence will be required to show that an OLSP "knows" that its telecommunication facility is being used for indecent content? Is it enough that the OLSP knows generally that its network is used for communicating such content or is knowledge of a specific posting required?

Second, what proof will be necessary to show that a user or provider of an "interactive computer service" knows a particular communication is "available" to minors? If evidence that a particular user or provider knew a particular posting site is frequented by minors is not required, then the CDA arguably applies to anyone making an indecent posting. This could include postings of all communications not directed to specific recipients (*i.e.*, newsgroups, ftp sites, and BBSes). Furthermore, what if an OLSP sets up blocking devices to

79. In on-line communities such as America Online or CompuServe, anonymity may be more difficult to maintain.

80. The uncertainty over what is "indecent" applies equally to prosecutions of individual users, whether sending an annoying indecent e-mail or publicly posting potential indecent material. *See generally* 142 CONG. REC., *supra* note 75, at 51181.

restrict access to minors, but knows, as is certain to be the case, that it is not 100% effective?

Third, the "good faith" defenses are sure to generate uncertainty and litigation. What burden will be placed on an OLSP to use the latest technology in restricting access to minors? What might be technologically and economically feasible for America Online might not be a reasonable alternative for a small, non-profit BBS. Similarly, can an OLSP be held liable if it does not check a household for resident minors and does not allow for the opportunity to block all minor access?

C. FCC's Limited Role

With many viewing the Internet as the last frontier of the First Amendment, there was much angst over what role, if any, the FCC would play in the CDA.[81] The government, through the FCC, heavily regulates the telephone, broadcast, and cable industries. On the other hand, the commercial pioneers of the Internet and other on-line arenas, including OLSPs, BBS operators, and software manufacturers, have existed in a highly competitive free-for-all, where government involvement has been traditionally minimal, if existing at all. Similarly, one need not "surf the net" for long to discover that many users oppose any government regulation of the Internet.

Opponents of government regulation won at least a partial victory because of the FCC's limited role under the CDA. There was, however, a cost. For example, in the context of the broadcast medium and dial-a-porn context, the FCC's indecency regulations and enforcement actions have been debated, modified, and adjudicated in civil and administrative litigation. Under the CDA, most of the clarification and modification will undoubtedly arise from case law following successful criminal prosecutions.[82] While a dispute over an FCC sanction often spills over into civil or administrative litigation, such a relatively non-punitive avenue for debate and modification is unavailable under the CDA. The application of criminal case law to clarify and fill gaps in criminal statutes is always troubling, and might prove especially difficult in the highly fluid and dynamic on-line world. The stakes will be much higher.

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81. *See* <http:\\www.cdt.org\policy\freespeach\exon-coats_analysis.html>.

82. Of course, some clarification should come from pending suits seeking to enjoin enforcement of the CDA. If First Amendment challenges to the CDA prove to be ultimately successful, the prosecutorial impact of the Act could be significantly narrowed.

D. First Amendment

CDA violations will not likely be prosecuted until the law survives what have already been rigorous Constitutional challenges under the First Amendment, which will ultimately have to be decided by the Supreme Court.[83] Although a complete discussion of the First Amendment implications of the CDA is beyond the scope of this commentary, the primary issues are readily apparent.

Sexual expression that is indecent, but not obscene, is protected under the First Amendment and may only be regulated, according to its content, to promote a compelling government interest, and that interest must be furthered by the least restrictive means.[84] Based in part on the uniquely pervasive nature of the broadcast medium and its accessibility to children, the Supreme Court upheld an FCC finding that George Carlin's monologue entitled "Filthy Words," broadcast on radio, was "indecent."[85] Nearly ten years of litigation, along with modifications to the regulations, were necessary before the dial-a-porn statutes were found to be consistent with the First Amendment.[86]

Primarily at issue with the CDA will be whether the blocking devices and other "good faith" defenses are the least restrictive means to prevent minors' access to indecent materials through computer networks, and whether the CDA's potentially chilling effect on constitutionally protected speech between adults is constitutionally permissible. Critics of the CDA will argue that available and developing software already enables parents to filter voluntarily and

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83. On June 11, 1996, a three-judge panel in the U.S. District Court of the Eastern District of Pennsylvania granted on First Amendment grounds a preliminary injunction against enforcement of those provisions of the CDA restricting "indecent" or "patently offensive" communications. ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. June 11, 1996) (holding §§ 223(a)(1)(B) and 223(a)(2) facially unconstitutional to the extent they reach indecent communications and §§ 223(d)(1) and 223(d)(2) facially unconstitutional). The court applied the stricter First Amendment standard used by the Supreme Court when analyzing the telephone medium in Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 125 (1989), rather than the lesser burden to which the Supreme Court held the government in the broadcast medium. *See ACLU*, 929 F. Supp. at 851-52. One month later, a three-judge panel in the Southern District of New York also granted on First Amendment grounds a preliminary injunction as to Section 223(d) of the CDA. Shea v. Reno, 930 F. Supp. 916, 923 (S.D.N.Y. July 29, 1996).

84. *Sable Communications*, 492 U.S. at 125.

85. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978). The FCC's definition of "indecent" for the broadcast medium is the same as in telephone communications, *see supra* note 9, as measured by contemporary community standards for the broadcast medium. Action for Children's Television v. FCC, 932 F.2d 1504, 1508 (D.C. Cir. 1991).

86. Dial Info. Serv. Corp. of N.Y. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991).

block minors' access to objectionable material on-line.[87] Ratings and labeling systems are also expected to be proffered.[88]

The Constitutional battle over the CDA will be long and tenaciously fought. Two particular characteristics of the CDA are likely to make the fight for its survival at least as difficult, if not more so, than the struggles over FCC telephone and broadcast regulations. First, the CDA arguably requires that absolutely everything publicly available on-line be suitable for young children. Second, the CDA is a criminal statute with sanctions far more severe than available in previous FCC litigation. Such a difference in penalties ups the ante significantly for the reviewing courts.

IV
Conclusion

The CDA's primary impact, if it survives Constitutional scrutiny, will be in criminalizing indecent communications with minors through computer networks. How CDA prosecutions eventually play out will not be known until after a number of questions and issues, including those raised in this commentary, are addressed. However, one thing is certain: many of these issues will be addressed with the threat of enhanced criminal penalties raising the stakes for all involved.

87. *See ACLU*, 929 F. Supp. at 839.

88. *Id.* at 838.