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THE COMMUNICATIONS DECENCY ACT OF 1996: KEEPING ON-LINE PROVIDERS ON THE HOOK

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First of all, I believe we should refer to the question that has been raised about the ability to discuss abortion on the Internet. That provision of the Telecommunications Act, amending 18 U.S.C. § 1462, was added at the last minute by Henry Hyde, without adequate consultation with counsel.[1] As soon as it was on the floor, it was attacked.[2] We were contacted and we supplied Mr. Hyde's office with the cases showing that such a provision was invalid—*Associated Students v. Attorney General*[3] and *Bolger v. Young's Drug Products Corporation*.[4] In *Bolger*, the Supreme Court quoted *Associated Students*, stating that this activity could

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Mr. McGeady has prepared model legislation for states and municipalities. He was instrumental in preparing the language of the present Texas Obscenity Statute, the Texas Child Pornography Statute, and the New York Obscenity Statute.

In 1978, he appeared as Amicus in a brief presented to the Supreme Court of the United States on behalf of Morality in Media in the case of *F.C.C. v. Pacifica Foundation*, the famous "Seven Dirty Words" case. Mr. McGeady's intervention was requested by the attorney for the Federal Communications Commission. Currently, he is participating as Amicus Counsel in the case of Reno v. ACLU, No. 96-511, now pending in the United States Supreme Court. Recently, he has testified before the Attorney General's Commission on Pornography at the request of the Commission.

In addition, Mr. McGeady has authored the Obscenity-RICO Federal statute, has served on various civic boards and organizations, and is the Editor of the Obscenity Law Bulletin and the recently published Obscenity Law Reporter.

[1] H.R. 1555, 104th Cong., 1st Sess., § 403 (1995). At the last moment in the process of enacting the Telecommunications bill, Representative Henry Hyde slipped an amendment into the conference committee report stating that the section dealing with the distribution of abortion information covered telecommunications devices.

[2] *See House-Senate Conference on Telecommunications Reform Has Implications for First Amendment Application to the Internet*, 141 CONG. REC. S15,152-01, S15,153 (1995) (discussing Hyde Amendment and on-line communication); *see also* Eric Zorn, *Hyde's Tinkering With an Old Law Raises New Fears*, CHI. TRIB., Mar. 20, 1996, at 1 (same).

[3] Associated Students v. Attorney General, 368 F. Supp. 11, 22 (C.D. Cal. 1973) (holding unconstitutional statute preventing mailing of information regarding contraception and abortion because no significant governmental interest can be asserted).

[4] Bolger v. Young's Drug Prods. Corp., 463 U.S. 60, 75 (1983) (finding statute prohibiting unsolicited mailing of contraceptive advertisements unconstitutional).

not be prohibited. It is a dead issue. It is unconstitutional and it will not be enforced. The Justice Department recognizes this fact.

What does the Communications Decency Act[5] say in this regard? I do not believe anyone today has summarized its provisions in a manner that is easily understood, and I would like to begin by doing just that.

First of all, there are four prohibitions in the Act. The first is a prohibition against the use of a telecommunications device to knowingly send obscene or indecent comments or images to annoy or to harass.[6] Nobody can complain about this prohibition; it refers to and is an extension of the existing telephone law against harassment.

The second is a prohibition against the use of a telecommunications device to send obscene or indecent comments or images while knowing the recipient is under age eighteen.[7] The author, or rather, amender of much of this legislation, was Bruce Taylor from Janet LaRue's office.[8] He tells us that provision was added relative to faxing indecent material, and that this is the provision against which the Temporary Restraining Order [TRO] was issued by Judge Buchwalter in Philadelphia.[9]

The provision relative to computer indecency was left alone—no TRO was issued against it. The reason that there is some confusion concerning this provision is its language, which was not addressed by Judge Buchwalter. Let me read it:

> "Whoever . . . 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

[5] 47 U.S.C. § 233 (a)-(h) (1996). The Communications Decency Act is embodied in Title V of the Telecommunications Act of 1996.

[6] 47 U.S.C. § 233 (a)(1)(A).

[7] 47 U.S.C. § 223 (a)(1)(B).

[8] National Law Center for Children and Families is a non-profit legal center that strives to encourage the fair and effective enforcement of existing criminal laws against obscenity and child exploitation.

[9] ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996) (granting plaintiff, including online service providers, request for TRO against enforcing parts of Communications Decency Act).

of such service placed the call or initiated the communication . . . .[10]

This statute includes the definition of indecency enunciated by the Supreme Court in *FCC v.Pacifica*,[11] and by the Second Circuit in the Dial-A-Porn cases[12] and by the Ninth Circuit.[13] In effect, such cases indicate that there is nothing wrong with the wording of the statute.[14] We have a situation where the TRO which was reported in the press as banning the Communications Decency Act was inaccurate, to say the least.

What are the defenses under the Communications Decency Act? It is a defense if you solely provide access.[15] This wide open, broad defense takes on-line companies and universities off the hook—at least on indecency. There is also a defense for the pornographer who in good faith takes reasonably effective and appropriate action to restrict or to prevent access—including a verified credit card, a debit account, an adult access code, or an adult personal identification number.[16] In other words, Congress recognizes that when indecency is restricted, it still must be accessible to adults. Congress, in the Act, created a way for adults to access indecent communication; they laid out what the pornographer has to have

[10] Communications Decency Act of 1996, 47 U.S.C. §223 (d)(1)(A), (B).

[11] F.C.C. v. Pacifica Found., 438 U.S. 726, 732 (1978). The Court defined indecent as "nonconformance with accepted standards of morality" but did not find fault with the FCC statement that it is "intimately connected with the exposure of children to language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities, and organs at times of the day when there is a reasonable risk that children may be in the audience." *Id.* The court, however, also found that indecent broadcasts "confront the citizen in the privacy of his home." *Id.*

[12] *See* Dial Info. Servs. Corp. of New York v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992) (holding definition of indecent has been defined by FCC to prevent minors from accessing dial-a-porn).

[13] *See* Information Providers' Coalition for Defense of the First Amendment v. F.C.C., 928 F.2d 866, 875 (9th Cir. 1991) [hereinafter *Information Providers'*] (finding definition of "indecent" in Communications Decency Act to be constitutionally sufficient as it is taken directly from long line of Supreme Court cases).

[14] *See Thornburgh*, 938 F.2d at 1540; *Information Providers'*, 928 F.2d at 876. "By imposing reasonable and sensible optional "safe harbors" the F.C.C. has not burned the house to roast the pig." *Id.*

[15] Communications Decency Act, 47 U.S.C. § 233 (e)(1). According to this section:

> No person shall be held to have violated subsection (a) or (d) of this section 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.

Id.

[16] *Id.* § 233 (e)(5).

out there and what is available for customers to accept. Arguably, there are some adult-use restrictions here. An adult must use his credit card, or he must obtain an I.D. This is the same language in the Dial-A-Porn law that has been upheld; therefore such language is not new. It is a system of dividing adults from children in some reasonably effective manner.

The other section on defenses is that commercial entities, nonprofit libraries, and institutions of higher education may not be given any less protection under any state law.[17] If we read what Judge Buckwalter said in the Federal District Court in Philadelphia in February 1996, we found that he had no quarrel with the argument that Congress has a compelling interest in protecting the well being of minors.[18] He continued, that plaintiffs had not convinced him that Congress has failed to narrowly tailor the CDA.[19]

As I mentioned before, the TRO was with respect to a fax device section—at least that was the original intent. The distinction was not made between obscene material, or obscenity and indecency. The constitutional definition of obscenity is indicated by a three prong test: (1) an appeal to lust; (2) that is a patently offensive description or depiction of certain sexual activities or organs; (3) lacking serious literary, artistic, political, and scientific value—it has to lack all four values.[20] The second prong of the obscenity test is the test for indecency. In order for material to be obscene, it must be indecent. This is not a new constitutional analysis.

There is one significant problem in the law, that being the global availability of indecent material on the Internet. If I were a pornographer placing obscene images on a bulletin board in Detroit and these images are suddenly deemed unconstitutional , I can pack my equipment and move over the river to Canada where such law will not affect me. This is the flaw in the current law, and this is what needs to be amended. The on-line companies should not be let off the hook, because there is no other possible

[17] *Id.* § 233 (f)(2).

[18] *ACLU v. Reno*, 929 F. Supp. 824, 857-65 (E.D. Pa. 1996).

[19] *Id.* at 856.

[20] *See, e.g.*, Miller v. California, 413 U.S. 15, 21 (1973) (replacing 'utterly without redeeming social value' test with application of "contemporary community standards," but maintaining inquiry into whether work is lacking "serious literary, artistic, political, and scientific value").

way to prevent obscene or indecent material from being exposed to children unless the on-line companies are liable.

By what rationale can the on-line companies be held liable? An appropriate analogy is the federal drug laws.[21] Anyone who facilitates the commission of a drug offense in any regard is held to be equally guilty of the offense. The on-line companies are facilitating this material, and I believe that the same theory should apply to them; they should be held liable in order to resolve this problem.[22] They should not be off the hook as they have the ability to block the transmission of the material. The law needs to be amended in this regard.

As a conservative estimate there are at least a thousand porn bulletin boards in existence. There was a suggestion that they are difficult to locate, however, I scarcely believe that anyone in the audience really accepts that proposition. It is possible to visit the corner bookstore and purchase a computer guide which will indicate their location on the Net, including a web site address.

Further, there are three cases that have been decided, as I mentioned before:[23] which indicated that the provision of the FCC regulation relative to credit cards, access, scrambling, etc.,[24] was a valid way to separate children and adults.[25] Thus, I believe the government will eventually prevail in its quest to prevent children from accessing both obscenity and indecency on the Internet.

In certain instances where the Act should not be applied, we will find a court stating that it is "unconstitutional as applied," and it is from here we will achieve the exceptions.

[21] *Compare* 21 U.S.C. § 841 (a) (1), (2) (1994). This section makes it illegal to:
knowingly or intentionally manufacture, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance; or . . . to create, distribute, or dispense or possess with intent to distribute or dispense a counterfeit substance.
Id.

[22] *See, e.g.*, United States v. Maxwell, 42 N.J. 568, 580 (A.F. Ct. Crim. App. 1995) (holding that obscene visual images electronically transmitted through on-line computers are included within term "transporting obscene materials in interstate or foreign commerce").

[23] Sable Communications v. F.C.C., 492 U.S. 115, 128 (1989) (holding that outright denial of adult access to indecent, not obscene, phone messages is unconstitutional as there are feasible and effective ways to prohibit minors from gaining access without infringing rights of adults); Dial Info. Servs. Corp. of New York v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Information Providers'*, 928 F.2d 866, 875 (9th Cir. 1991).

[24] Communications Decency Act, 47 U.S.C. § 233(e)(5) (1996).

[25] *Sable*, 492 U.S. at 128; *Thornburg*, 938 F.2d at 1542-43; *Information Providers'*, 928 F.2d at 870-71.