The Communications Decency Act of 1996

Raj Shah

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Abstract

Throughout American History, one of the defining characteristics of the United States has been the fact that free speech is an inherent right in all U.S. citizens. Imprinted into law by the First Amendment to the Constitution, written when the nation was in its infancy, free speech has, more or less, been preserved as a sacred institution of the democratic government of the United States. A number of times, however, the United States government, for varying reasons, has attempted to abridge this right. Many times, as in the case of child pornography or speech that advocates the forceful overthrow of the government, the government has prevailed, and the meaning of the First Amendment has been subtly altered. However, just as many if not more times, the government has been stopped by the judicial branch in its attempts to abridge free speech. From the Alien and Seditious Acts in the late 1790s down to a law preventing the burning of the U.S. Flag, the courts have stepped in and told the government that the First Amendment cannot be construed to block certain acts.

Now, in 1996, many proponents and opponents of the newest revolution in media and communications, the Internet, are attempting to extend laws to cover the Internet or defend the Internet from being covered by certain laws. On February 1st, the first federal law attempting to regulate communications on the Internet was passed as a rider to a sweeping telecommunications bill. The Communications Decency Act (CDA), as the rider was titled, attempts to block “indecent” material from being accessed by a minor. Normally, this would not draw any type of outcry from the populace. However, on the 27th of February, in a Philadelphia federal court, a team of lawyers representing some eight thousand plaintiffs - ranging from mega-corporations such as Netscape Communications, Apple Computers, Microsoft and America Online to private individuals and students - filed a lawsuit against the Department of Justice and Attorney General Janet Reno in an attempt to prevent the CDA from being enforced. This paper deals with the events surrounding the passage of the law as well as the reasons why the plaintiffs in the Philadelphia suit are likely to win their case.
Background

In order to understand the intricacies of the events surrounding the Communications Decency Act, it is necessary to present two pieces of background. The first deals with the history of the Internet and the methods of transmission of the vast quantities of data that moves along the Internet. The second deals with constitutional law and the regulation of obscene and patently offensive material in the United States.

Currently, the Internet is structured in a hierarchy. At the top, each country has at least one public backbone network. Backbone networks are made of high speed lines that connect to other backbones. The first backbone, the basis for the United States backbone, was the ARPANet. Below the top level hierarchy is the domain service. Each organization or private individual can apply for a domain name which is unique in the world. (.mit.edu is a domain, as is .staford.edu, .ibm.com etc.) A step below that are machines within the hierarchy. (shadowcloak.mit.edu, www.mit.edu, www.stanford.com, deep-blue.ibm.com, etc.)

In the early 1960's the Cold War was escalating and the United States Government was faced with a problem: How could the country communicate in the event of a nuclear war? The Pentagon's Advanced Research Projects Agency, ARPA, had a solution. They would create a network that linked from city and bases without a center. The network was designed to function when parts of it were destroyed. The network could not have a center because it would be a primary target for enemies. In 1969, ARPANET was created, named after its original Pentagon sponsor. There were four supercomputer stations, called nodes, on this high speed network. Later that year, four more nodes, including MIT, were added.

ARPANET grew during the 1970's as more and more supercomputer stations were added. The users of ARPANET had changed the high speed network to an electronic post office. Scientists and researchers used ARPANET to collaborate on projects and to trade notes. Soon after, the mailing list was developed. Mailing lists were discussion groups of people who would send their messages via e-mail to a group address, and also receive messages. This could be done twenty-four hours a day.

As ARPANET became larger, a more sophisticated and standard protocol was needed. The protocol would link users from other small networks to ARPANET, the main network. The standard protocol invented in 1977 was called TCP/IP. Because of TCP/IP, connecting to ARPANET backbone from any other network was made possible. In 1983, the military portion of ARPANET broke off and formed MILNET. The same
year, TCP/IP was made a standard and it began to be used by everyone. It linked all parts of the branching complex networks, which soon came to be called the Internet.

In 1985, the National Science Foundation (NSF) began a program to establish Internet access centered on its six powerful supercomputer stations across the United States. They created a backbone called NSFNET to connect college campuses via regional networks to its supercomputer centers. ARPANET officially expired in 1989. Most of the networks were gained by NSFNET. The others became parts of smaller networks. The Defense Communications Agency shut down ARPANET because its functions had been taken over by NSFNET. Amazingly, when ARPANET was turned off in June 1990, no one except the network staff noticed.

In the early 1990’s the Internet experienced explosive growth. It was estimated that the number of computers connected to the Internet was doubling every year. It was also estimated that at this rapid rate of growth, every man, woman and child in the world would have an e-mail address by the year 2020. The main cause of this growth was the creation of the World Wide Web.

The World Wide Web was created at CERN, a physics laboratory in Geneva, Switzerland. The Web’s development was based on the transmission of web pages over the Internet, called Hyper Text Transmission Protocol or HTTP. It is an interactive system for the dissemination and retrieval of information through web pages. The pages may consist of text, pictures, sound, music, voice, animations, and video. Web pages can link to other web pages by hypertext links. When there is hypertext on a page, the user can simply click on the link and be taken to the new page. Previously, the Internet was black-and-white, consisting of text and files. The web added color. Web pages can provide entertainment, information, or commercial advertisement. The World Wide Web is the fastest growing Internet resource. Pictures, sounds and video can now be transmitted and viewed over the Web.

As previously noted, the NSFNET has centered the United States backbone in its six supercomputer stations. When MCI and Sprint (both telecommunications giants) entered into the Internet data-carrying business, the number of supercomputing “nodes” grew to twenty, mainly clustered in Washington DC, San Diego, Atlanta, Chicago and Denver. Through these massive computers pass all the data that moves in the United States along the public networks that encompass the Internet.

The second piece of background centers around Constitutional Law. The first amendment of the United
States Constitution reads “Congress shall make no law respecting an establishment of religion, or prohibiting
the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people
peaceably to assemble, and to petition the Government for a redress of grievances.” ¹. Over the years, The
Supreme Court has made numerous interpretations of the law, especially with reference to obscenity and
pornography. In the most recent case, Miller vs California (1973), the Court decided that obscenity was a
community standard. The court further argued that any government regulation of “indecent” or “patently
offensive” speech may withstand constitutional scrutiny only if it is in the “compelling interest” of the public
and it employs the “least restrictive means possible,” and only if the benefit of the action outweighs the cost
of the loss of constitutional rights. ²

Because any data sent between two domains in the United States passes through at least one node of the
twenty supercomputing “nodes” in the United States, approximately 95% of Internet traffic in the United
States passes over a state line ³, thus giving the federal government the constitutional ability to attempt to
regulate the Internet as inter-state commerce.

¹Constitution, Amendment I
²CIEC Complaint
³Internet Domain Survey
Martin Rimm and the Cyberporn scandal

On February 1st, 1996, Congress passed, and the President signed into law, the Telecommunications Bill of 1996. Included in the bill was reform for cable providers, telephone companies and the telecommunications industry. Also included was the V-chip rider, and another rider penned by Senator James Exon, called the Communications Decency Act (CDA). On February 27th, in the Philadelphia Federal Court District, a group of private corporations, public organizations, and individuals filed suit against the Department of Justice to prevent enforcement of all of the portions of the bill that formed the CDA rider. The plaintiffs were headed by The American Civil Liberties Union and the Electronic Frontier Foundation, and also included powerful organizations from Microsoft, Apple and Netscape to private individuals, including the author of this paper. This act was the culmination of a movement against nearly tragic set of actions that spawned the creation of the Communication Decency Act.

Like most events in history, especially current events, the beginning of this act is shrouded in a certain degree of mystery. No one definitive point in time can be pointed to as the point as which the boulder began rolling down the hill. The personal conflicts of Congressmen, the growing political influence of “the religious right,” and the search of one undergraduate student for a breakout topic to make his name are all intertwined in a web too intricate to unravel. There is, however, a definitive point at which members of the Internet and free speech communities turned their head at a strange sound and saw the shape of the boulder coming down the hill through the fog.

On November 4th, 1994, a Carnegie Mellon undergraduate student in computer science, named Martin Rimm, approached the Electronic Frontier Foundation (EFF) for funding for a research paper. Rimm’s faculty adviser at CMU, Marvin Sirbu, wrote to the EFF that he was working on a study that could “be useful in countering or confirming assertions that community standards in places like Memphis are different from other regions of the country.” What both Sirbu and Rimm had hinted at was that they could bypass the Supreme Court’s statements in Miller v. California (1973) that obscenity is a community-defined standard.

Rimm approached numerous well-respected telecommunications and Internet legal experts, asking for

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4Godwin, Dissection...
reviews of his articles and primary source material for his paper. However, many refused on the grounds that they had agree beforehand to give a favorable comment on the paper in order to read the paper or could choose only read the footnotes. To many people, Rimm’s requests were impractical or unethical, for obvious reasons. When asked, Rimm would not give any reason for his impractical demands.

Many of the more conservative legal experts did, in fact, sign on to the Rimm study, including some experts who were flirting with the ideas of censoring the Internet. One of the more surprising experts that signed onto the Rimm study was Caroline Meyer, a staunch anti-censorship feminist. However, in retrospect it appears that Rimm was coldly calculating in who he used and who he did not. Rimm told Meyer certain portions of his results (as yet unpublished) in a telephone interview. Meyer used the figures in one of her papers, attempting to prove that the pornography present on the Internet was not “focusing on actual infliction of nonconsensual pain on unwilling women.” 5. In return, Rimm was able to use Meyer’s study as a footnote to point out what types of pornography was available on the Internet. Meyer catalogs a huge list of the them in here paper, including pedophilic images, bestiality and rape pictures. The tradeoff here is apparent. Meyer gets a small piece of data, and Rimm gets some of the backup for his outrageous claims. The quotation in Meyer’s report read, “Interestingly, the Carnegie Mellon study never found such descriptions as snuff, kill or murder and rarely found such others as pain, torture, agony, hurts, suffocates and the like. The term rape appeared fewer than a dozen times in descriptions of more than 900,000 images.” 6 The quotation in Rimm’s report that referenced Meyer’s report read,

The Internet makes it possible for people with enormously varied backgrounds and religious or moral belief systems to engage in distanced and therefore relatively safe discussion of otherwise emotionally difficult subjects such as sexual beliefs and practices. Imagine, for example, an uninhibited cross-cultural discussion of the Colombian Caribbean coast practice in which teenage boys matriculate to manhood by having sex with donkeys. Subscribers to sexual-, anthropologic-, zoophilic- or bestiality-related newsgroups could debate whether this ritual may be a more effective way to prevent teen pregnancy than those rituals promoted by their own cultures. They could argue about whether proving one’s manhood with donkeys is worse than doing so by abusing young women or by purchasing the services of prostitutes.7

What were Rimm’s claims? By spring 1995, rumors were floating around the Internet’s inner circles that a study was being done by a Carnegie Mellon student about pornography on the Internet. At that

5Godwin, Dissection...
6Ibid.
7Rimm, “Marketing Pornography.....”. 


point it was widely viewed that the study was no threat. People familiar with the Internet knew that pornography existed on-line, but it was in no way a major component or influence on the Internet. It was known that Rimm was approaching Internet and communications legal experts for supporting evidence or source material. However, Rimm was still not releasing the text of his paper to the experts unless they agreed to give him material. Unknown to most people, Rimm had sold his paper, prior to publishing it, to *Time* magazine’s senior reporter, Phillip Elmer De-Witt, in *early November 1994, eight months before it was due to be finished*. At the time, Elmer De-Witt was finishing an assignment on estrogen for *Time* and then, in early June of 1995 return to the story, which was put on the back burner.

At the same time, in December of 1994, Rimm somehow managed to secure a promise from the student-run *Georgetown Law Journal* that they would publish his paper. How exactly Rimm managed to secure this promise is to this day still unclear. In early March of 1995, as Elmer De-Witt refocused on the story, the editors of the Law Journal began to look for collaboration on the study. They quickly found that Rimm had locked them into a secret agreement. “No one, absolutely no one who isn’t directly involved in the publishing of his study will be allowed to see it. Two outside legal experts, both writing companion articles to Rimm’s study - which turn out to be highly supportive of its findings - have been allowed to see advance copies.” 8 Again, the precise terms of the Rimm-Law Review deal are still unknown, and it is hard to speculate on how Rimm managed to get the law students to agree to a secrecy clause.

In the second week of June, Rimm’s veil of secrecy began to unravel. On June 8th, Rimm delivered the full (still unpublished) study to De-Witt at *Time*. Elmer De-Witt, finishing the estrogen study, started the story through the *Time* process, assigning four junior reporters to the story to get background material and analyses. As Elmer De-Witt pushed *Time* management to give the story “Cover Story” importance, one of Elmer De-Witt’s junior reporters Hannah Bloch, contacted legal expert Donna L. Hoffman, an associate professor of management at Owen Graduate School of Management at Vanderbilt University. Hoffman and her husband, Tom Novak, also an associate professor of management at Owen Graduate School of Management at Vanderbilt University, have solved some of the Net’s trickiest usage-based problems, developing some of the first quantitative models for accurate Web “traffic accounting.” Unbeknownst to Rimm, Bloch

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8 Meeks, Muckracker
sent Hoffman and Novak a copy of Rimm’s abstract. Hoffman voiced her concern to Bloch about the study and its methodology, but felt that Bloch “didn’t get it [her concerns].” 9 As a last recourse, Hoffman emailed Elmer De-Witt, asking to see a copy of the full text of the study. Elmer De-Witt balked, citing the secrecy arrangement with Rimm. Again, Hoffman laid out her concerns about Rimm’s methodology from reading the abstract. Among other concerns, Hoffman noted that a study of such reported significance should have been subject to some kind of peer review before presentation to the public. Elmer De-Witt did not respond to this.

On Friday June 23rd, in a meeting group on The Well, a San Francisco-Bay Area Internet Provider, a user posted the following,

Topic 1029 [media]: The Newsweeklies (Time, Newsweek, USN&WR), continued
#2 of 895: Jim Thomas (jthomas) Fri Jun 23 ’95 (22:43) 21 lines
((From Voter Telecommunications Watch)):
VTW BillWatch: A weekly newsletter tracking US Federal legislation
Issue #6, Date: Fri Jun 23 23:02:33 EDT 1995

Time is expected to put out an issue this coming Monday that contain a study of how much pornography is being transferred on the Internet. The catch is that no one even knows if the study’s methods are valid, because no one is being allowed to read it due to an exclusive deal between Time and the institution that funded the study. Rumor Central is taking this opportunity to ask the editors of Time to let us see a copy of the study so we can see if the methodology is truly worthy of the high standards we hold Time’s Science and Technology staff to uphold. 10

In one of the great coincidences of this story, Mike Godwin, HotWired staff reporter and General Counsel to the EFF, Brock N. Meeks, self-labelled “cyber-activist” and publisher of a syndicated column on free speech, Donna Hoffman and Elmer De-Witt were all frequent posters in this group. The transcripts of the conversation held on this board from the Friday, the 23rd of June through Thursday, the 6th of July read like a short play, with its build-up, climax and then denouement. Following are excerpts from the two week long thread of posts. (The headers have been stripped to present only the relevant information.)

Donna Hoffman, Sat Jun 24 ’95 (06:23): “This is going to be a true disaster for defenders of the Net as-we-know it.” 11

John Schwartz Sat Jun 24 ’95 (07:30): “the appearance of this study in Time is going to give it a great deal of exposure and credibility, of course... whether it’s credible or not.” 12

9Meeks, Muckraker
10HotWired, The Well Transcripts
11Ibid.
12Ibid.
From Saturday into early Monday morning, the conversation centered on political philosophy and discussion of copyright issues on the Internet. On Monday, June 26th, the Cyberporn issue of Time was released. Preliminary reactions on the board were guarded and centered not around the content, but around questions of who exactly Rimm was. Members of the board were analyzing the article and the claims. The insight into Rimm’s study was shocking. The article’s foundation read as follows:

What the Carnegie Mellon researchers discovered was:

There’s an awful lot of porn online. In an 18-month study, the team surveyed 917,410 sexually explicit pictures, descriptions, short stories and film clips. On those Usenet newsgroups where digitized images are stored, 83.5 percent of the pictures were pornographic.

It is immensely popular. Trading in sexually explicit imagery, according to the report, is now “one of the largest (if not the largest) recreational applications of users of computer networks.” At one U.S. university, 13 of the 40 most frequently visited newsgroups had names like alt.sex.stories, rec.arts.erotica and alt.sex.bondage.

It is a big moneymaker. The great majority (71 percent) of the sexual images on the newsgroups surveyed originate from adult-oriented computer bulletin-board systems (BBS) whose operators are trying to lure customers to their private collections of X-rated material. There are thousands of these BBS services, which charge fees (typically $10 to $30 a month) and take credit cards; the five largest have annual revenues in excess of $1 million.

It is ubiquitous. Using data obtained with permission from BBS operators, the Carnegie Mellon team identified (but did not publish the names of) individual consumers in more than 2,000 cities in all 50 states and 40 countries, territories and provinces around the world—including some countries like China, where possession of pornography can be a capital offense.

It is a guy thing. According to the BBS operators, 98.9 percent of the consumers of online porn are men. And there is some evidence that many of the remaining 1.1 percent are women paid to hang out on the ”chat” rooms and bulletin boards to make the patrons feel more comfortable.

It is not just naked women. Perhaps because hard-core sex pictures are so widely available elsewhere, the adult BBS market seems to be driven largely by a demand for images that can’t be found in the average magazine rack: pedophilia (nude photos of children), hebephilia (youths) and what the researchers call paraphilia—a grab bag of ”deviant” material that includes images of bondage, sadomasochism, urination, defecation, and sex acts with a barnyard full of animals.

The Internet community reeled. At MIT, the Student Information Processing Board (SIPB) which runs MIT’s newserver fielded over thirty phone calls from newspapers, private individuals and the attorney general’s office, in the space of one hour. That day alone, records indicate that the SIPB received over three hundred phone calls on the subject. On the Well, there was an ominous silence from ten in the morning until
about two o’clock in the afternoon. Finally, around 2:30 PM (San Francisco time), Mike Godwin ripped into Elmer De-Witt.

Mike Godwin Mon Jun 26 ’95 (14:39): “Philip’s story is an utter disaster, and it will damage the debate about this issue because we will have to spend lots of time correcting misunderstandings that are directly attributable to the story.

“For example, when Philip tells us what the Carnegie Mellon researchers discovered, he begins his list with this:

‘THERE’S AN AWFUL LOT OF PORN ONLINE. In an 18-month study, the team surveyed 917,410 sexually explicit pictures, descriptions, short stories and film clips. On those Usenet newsgroups where digitized images are stored, 83.5 percent of the pictures were pornographic.’

“Who but the most informed among us will not come away with the impression that the CMU study involved a survey of 917,410 items *on Usenet*? (Guess what – it didn’t.)

“And the profound problems with the study’s methodology go undiscussed. Sure, we have a guy pointing the possibility of a ”gaper” phenomenon, which tells us something about how to interpret the results of a correctly conducted survey. But not a hint of how methodologically flawed the study is, or about how the people doing the study were rank amateurs, or about how the legal footnotes were spiced with citations from anti-porn zealots like Catharine MacKinnon and Bruce Taylor.”

Philip Elmer-DeWitt Mon Jun 26 ’95 (17:27): [responding to Mike Godwin] “Also, you seem to have bought into the as yet unproven assertions about ”profound problems with the study’s methodology.” So far, the chief criticism that’s been leveled against it here is that it was headed by an undergraduate. I’m waiting for something more specific. And meaningful.”

Brock N. Meeks Mon Jun 26 ’95 (20:24): “All this crap about ”97% of all images...” and 917,XXX images surveyed, give me a break. What a [expletive] scoop: You look in alt.sex.binaries usegroups and – ohmygawd – you find sexual (pornographic) pictures!

“You look in Playboy and you see – ohmygawd – tits! Moreover, 97% of the images of females in Playboy, including the cartoons, show – ohmygawd – [breasts]!

“You could have *easily* started your story with:

“The first ever exhaustive study of pornography on the Internet found that only 3% of all information trafficked on the computer network contains material of a sexual nature.

“Not quite the ”hook” though, is it? Instead, we have to wade through half the piece before we find this gem.

“Studies and stats can be tweaked any way you want.

“And the fact that Rimm is an EE major playing himself off as an expert for a sex study? Whew...”

By 9:30 PM Monday night, Elmer De-Witt was on the defensive. The almost endless pounding doled out by Meeks and Godwin on the Well, and the support of the majority of the users there induced a crack to form. Elmer De-Witt admitted it himself that night, acknowledging that he ”should have had a graph” in the story that referenced the advance criticism of the study. “That was probably a screw up,” he wrote on...
The Well. He said he “couldn’t risk” giving anyone, such as Hoffman, an advance copy of the study for fear it would “leak.” In fact, if he and his team had had more time and “more presence of mind” they would have called in an “outside expert” to review the study, he wrote. 18.

On Tuesday, June 27th, Mike Godwin, Elmer De-Witt, and Ralph Reed, of the Christian Coalition appeared on Nightline, engaging in a discussion about on-line porn and the new Exon law. The discussion was mediated by Ted Koppel, and during the conversation, Martin Rimm was interviewed via phone. From the beginning, Godwin voiced concern that Rimm’s still unpublished study, which was the basis of the Time article was flawed in its methodology. Godwin defended the Internet well. He played the “family value” before Reed could speak, and countered Reeds “facts” and figures at every turn. Godwin later commented that “Reed sounded like he had read the study. His figures were alarmingly predictable.” 19. Rimm would respond that “Ralphy never saw the [expletive] study.” 20

The next day, Wednesday the 28th, the Washington Post ran a short article on the interview. They criticized Time for not portraying the study correctly. 21. And then, after a profound silence of two days, Prof. Hoffman sent a simple message to the board.

Donna L. Hoffman Wed Jun 28 ’95 (14:00): “Tom Novak and I are preparing a detailed methodo-

logical critique - we are in possession of the full study, article and commentary. I am sorry to say

that it is much worse than it first appeared from the materials Rimm sent me last December.” 22

That simple statement marked the climax of the chain of events. Hoffman had contacted Marvin Sirbu and demanded a copy of Rimm’s study. Sirbu relented and faxed the study to Hoffman and Vanderbilt. With the full text of the study in the hands of the “opposition,” it was only a matter of time before the truth about the methodology came out. Two hours after Hoffman posted her message, Godwin sent a message to the board that added fuel to the fire. The message contained a text from a David Post, a former Supreme Court clerk and now a member of the Georgetown Law Center Faculty. Post raised the following questions about Rimm’s methodology,

1. Usenet Groups. Rimm’s study of Usenet groups was confined to those groups with the

”alt.binaries” prefix (p. 1865).

18 Meeks, Muckraker
19 Ibid.
20 Ibid.
21 HotWired, The Well Transcripts
22 HotWired, The Well Transcripts
The researchers determined that "seventeen of the thirty-two alt.binaries newsgroups located on the Usenet contained pornographic images" (p. 1867). During a single seven-day period (9/21/94 to 9/27/94), the researchers logged 827 image postings to the "non-pornographic" newsgroups (Rimm’s descriptor), and 4206 image postings to the "pornographic newsgroups." Thus, of the $827 + 4206 = 5033$ images posted, 83.5% (4206) were to newsgroups that contain pornographic material.

Preposterously, in his "Summary of Significant Results of the Carnegie Mellon Study, Rimm writes that "83.5% of all images posted on the Usenet are pornographic." The correct conclusion, of course, is that 83.5% of the images posted to a subset of newsgroups (the alt.binaries newsgroups) are to newsgroups that contain pornographic images. Rimm’s conclusion is the precise methodological equivalent to the following: (a) restricting a study of printed pornography to magazines located in the "adult” area of a bookstore, (b) finding that 83.5% of reader submissions during a one-week period were to magazines that contained "pornographic" material, and concluding (c) that 83.5% of all reader submissions to all magazines are pornographic.

4. World Wide Web. In his Summary of Significant Results, Rimm reports that "[p]edophilic and paraphilic pornography are widely available through various computer networks and protocols such as the Usenet, World Wide Web, and commercial 'adult' BBS" (p. 1849). No evidence is presented to demonstrate that such material is available anywhere on the Web. Indeed, in the Appendix dealing with the results of a March 1995 Web Survey (Appendix C), Rimm reports locating only 123 Web sites containing any "sexually explicit imagery or materials," (p. 1923), only 9 of which had any "pornographic material" at all. Rimm provides no information that any of these sites – which constitute, in any event, far less than one-tenth of sites – contain pedophilic or paraphilic material. 23

For the next five days, Elmer De-Witt was hounded on-line. Finally, on the 3rd of July, freelance writer David Kline wrote that Elmer-DeWitt failed to conduct what he called “journalistic due diligence” because he did not investigate the study thoroughly and failed to mention that other experts had raised several doubts. A broken Elmer De-Witt responded that, “I think he’s put his finger on precisely where I screwed up.” 24

On the 4th of July, Hoffman and Novak released a nine thousand word article on the flaws of the Rimm study. The conclusion of the critique read,

> In general, the conclusions Rimm makes are not supported by his analysis. Because the content analysis and classification scheme are "black boxes," because no reliable and valid results are presented, because no statistical testing of the differences both within and among categories for different types of listings has been performed, and because not a single hypothesis has been tested, formally or otherwise, no conclusions should be drawn until the issues raised in this critique are resolved. 25

To this day, Rimm has never dealt with those issues, and his lack of actions has had consequences. After graduating from Carnegie Mellon, Rimm applied in early 1995 to MIT for admissions to graduate school in

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23 HotWired, The Well Transcripts
24 Meeks, Muckraker
Electrical Engineering and Computer Science. Based on his academic record, Rimm was admitted. However, in late August 1995, MIT issued a statement that it has taken its offer of admission back, citing Rimm’s poor methodology for his bachelor’s thesis as a cause for the revocation. On the 5th of September, the full version of Rimm’s study was published on the Web (the first time it was popularly accessible), and soon after Rimm faded out of the scene.

The people that had slammed the Rimm study and *Time*’s treatment pulled back from what they had done and turned their attention to other subjects. Hoffman and Novak would continue to teach law at Vanderbilt. Meeks and Godwin joined Wired Magazine’s staff to write about politics (and would re-emerge by the end of the summer). De-Witt stayed at *Time*, which in mid-August would print a retraction of the story, an only then would Elmer De-Witt state that the Time had erred. In an interview three months later, his only statement about why he pushed the article through so quickly was,

> So I think any reporter would recognize that this is an interesting thing, to have first crack at what sounded like a definitive study out of Carnegie-Mellon, which is a university with a long tradition in the Internet. It is a study that triggered this controversial crackdown at Carnegie-Mellon. 26 And as it happened, the issue of pornography on the Internet had grown and come to the front burner. The study was going to be breaking at the exact time senators, goofball senators, were introducing an amendment to give away our free-speech rights! 27

Elmer De-Witt said he agreed to Rimm’s secrecy agreements so that he could have the scoop, and that this was “standard practice to get a really good scoop.” 28 The public retraction came too late. As will be seen, the *Time* article had added to the Internet Sex Panic, and would help tip the scales against the Internet.

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26 CMU had cracked down on sexual material on its own campus computer system. Whether or not Rimm’s study was a cause of this is still unknown
27 Brickman and Elmer De-Witt, Interview
28 Ibid.
The Communications Decency Act

In July 1994, *Dateline NBC* ran a story on on-line pedophiles and how they were haunting chat rooms on on-line services such as America Online, Compuserve and Delphi, trolling for children to meet and either converse with on-line, or, more dangerously, in real-life. One of the viewers of the story was Senator James Exon (D-Nebraska). Exon stated that he was appalled and decided to take steps.

Speculatively, though, there may have been an underlying reason for this. Exon was coming under fire from the more conservative of his constituents, especially the faction sometimes called the “Religious Right” or the “Christian Coalition.” Today, Exon is considered to be a middle-of-the-road Democrat with an independent streak. In 1990, Exon had faced stiff questioning by members of the right. Although he won, with 59% he presume that Exon wanted to show the right that he was a man with family values. Exon’s voting record in 1993, 1994 and 1995 reflect this, showing that he voted to prevent gays from serving in the military, and restrict abortion. 29 Exon now had an attractive idea to curtail pornography on the Internet, which could draw bipartisan support.

That summer, Exon introduced an unsuccessful attempt to totally ban online erotica and anything with indecent material in it. The attempt failed in the Senate Commerce Committee. However, Exon was not through. On February 1st, 1995, Exon and Republican Senator Slade Gorton, of Washington, introduced the now infamous Senate Resolution S314, titled the “Communications Decency Act” as an amendment to the still infant Telecommunications bill, which was picking up riders and amendments throughout the Senate. What gave the bill impetus was that Gorton was the author of the Telecommunications Bill, and he lent some support to Exon’s claims.

Between June 1994 and February 1995, Exon was not inactive. He had compiled a “blue binder” full of “disgusting material” downloaded from the Internet to wave in front of the Senate, “narrated by ghoulish tales of online child-porn and bestiality GIFs.” 30 Exon’s bill gained support as the binder made the rounds of the Senate offices. 31

While Exon’s act was gathering force, activists on the Internet were attempting to find someone that

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29 Congressional Quarterly, “American Voter ’96.”
30 Corcoran, “From DC to your PC”
31 One news commentator noted that the binder was getting more attention than Senator Exon during a report of the ABC evening news.
would act to counter its momentum. Many senators were approached, but declined to act unless the Internet community proved it was behind a counter measure. For months, the “Christian coalition [had been] rallying its troops; organizing letter writing campaigns, lobbying Congress....fashioning its censorship proposals as essential measures to protect children from on-line pornography.”

In response, a petition to stop the Communications Decency Act was formed, and in within a week it had garnered over a hundred thousand “electronic signatures”. The petition was sent to the White House and the offices of Senators who had pledged their support. Cynicism abounded on the Internet as to whether or not the contacted Senators would do anything. Surprisingly, or perhaps not, Senator Patrick Leahy (D-Vermont) submitted a Clinton-backed proposal to prevent immediate action. Leahy’s bill “would have directed the Department of Justice and the Commerce Department to conduct a study of ways that users can self-select content on the Net, and to assess the need for new laws addressing cyberspace.”

Leahy’s attempt failed, and Exon’s amendment to the Telecommunications bill passed by a whopping 84 to 16 vote. The date was July 14th, 1995. The Internet community reeled. It could not believe what had happened, and why it had happened. When later questioned about the event, Leahy would say he was “run over by Grassley.”

Senator Charles E. Grassley, the Republican senior senator from Iowa, had delivered a stirring speech on June 26th that many people considered to be the crux of the Communications Decency Act debate. He had introduced S.892, called the Protection of Children from Computer Pornography Act of 1995, which he would later drop in favor of the Communications Decency Act. Grassley had rushed to the floor of the Senate to deliver a speech on the afternoon of 26th for one very specific reason. Earlier that morning, a Grassley aide had picked up the *Time* Cyberporn issue, and all through the morning, the Grassley public relations team had worked on a speech to get support for the bill. Grassley appeared on the floor of the Senate on Monday afternoon, and brandishing the Time article in front of the Senate and delivered a rousing speech.

Mr. President, this morning I want to speak on a topic that has received a lot of attention around here lately. My topic is cyberporn, and that is, computerized pornography. I have introduced S.

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32 Davies, “Don’t Mourn, Organize!
33 Corcoran, “From DC to your PC”
34 Ibid.
892, entitled the Protection of Children from Computer Pornography Act of 1995. This legislation is narrowly drawn. It is meant to help protect children from sexual predators and exposure to graphic pornography.

Mr. President, Georgetown University Law School has released a remarkable study conducted by researchers at Carnegie Mellon University. This study raises important questions about the availability and the nature of cyberporn. It is this article I ask to have printed in the Record.

The university surveyed 900,000 computer images. Of these 900,000 images, 83.5 percent of all computerized photographs available on the Internet are pornographic. Mr. President, I want to repeat that: 83.5 percent of the 900,000 images reviewed—these are all on the Internet—are pornographic, according to the Carnegie Mellon study.

Now, of course, that does not mean that all of these images are illegal under the Constitution. But with so many graphic images available on computer networks, I believe Congress must act and do so in a constitutional manner to help parents who are under assault in this day and age. There is a flood of vile pornography, and we must act to stem this growing tide, because, in the words of Judge Robert Bork, it incites perverted minds. I refer to Judge Bork from the Spectator article that I have permission to insert in the Record.\(^{35}\)

The “remarkable study” that Grassley refers to is none other than the Rimm study, which would be debunked later in the week. However, the damage was done, and the Senate was cornered. The Communications Decency Act allowed for fines of up to US$100,000 and prison terms of up to two years for “obscene, lewd, lascivious, filthy, or indecent” language on the Net that is intended to annoy or harass. The Federal Communications Commission, under the amendment, would be granted broad powers to regulate the Net. Online services and ISPs would be liable for illegal material posted by their customers. The Senate passed the Telecommunications Bill with Exon’s Communications Decency Act attached.

The House of Representatives, on the other hand, was another story. House Speaker Newt Gingrich was considered to be one of the most computer savvy members of the House. He had put the House of Representatives on the Internet using a system called “Thomas” (named after Thomas Jefferson), believing that the Internet represented the best medium for the free dissemination of information. Gingrich stood by his platform of freedom of information, and in a speech to the House (which at this time was still under his sway after the “Republican Revolution” in 1994) all but killed the House version of the Communications Decency Act, calling it “unconstitutional and unenforceable.”\(^{36}\) Following Gingrich’s lead, Representatives Chris Cox (R-California) and Ron Wyden (D-Oregon) drafted the “Internet Freedom and Family Empowerment” amendment to the Telecommunications Bill. The amendment would have barred the FCC from imposing regulations on the Internet or other interactive media, and implementing policy that would prohibit other

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\(^{35}\)Grassley, “Cyberporn”

\(^{36}\)Corcoran, “From DC to your PC”
content regulation in interactive media. The amendment also removed the liability of online service providers who make a good-faith effort to restrict access in order to protect minors from indecent or obscene material. On August 4th, the House approved the Cox-Wyden amendment by an overwhelming 420 to 4.  

Unfortunately, the House also passed contradictory language in the same bill. In the Manager’s Amendment to the bill, nestled in 40 unrelated amendment, was a provision authored by Representative Henry Hyde (R-Illinois) that would that would have made it punishable to “intentionally communicate by computer ... to any person the communicator believes has not attained the age of 18 years, any material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” Under the amendment, it would also have been a crime to receive the prohibited content.  

Since the House version of the bill and the Senate version of the bill differed in numerous places, the bill was forwarded to a conference committee to remove the differences. Cox and Wyden were not named to the conference committee. Exon and Hyde (a self declared “friend” of the Christian Coalition 39) were named to the committee.

During the month the Telecommunications Bill was in conference committee, representative Rick White (R-Washington) drafted a compromise proposal. White narrowed the definition of illegal material in Exon’s amendment from “indecent to “harmful to minors.” Material harmful to minors is defined as obscenity (graphic sexual images so hardcore as to not be protected by the First Amendment), applied to people under 18, and was dramatically more pointed than the nebulous ”indecency.”40 White’s proposal also changed the scope of the law to content sent directly to minors or posted in areas accessible by minors. Also from Cox-Wyden, the White compromise saved online services and ISPs from liability for violations of these laws that escape their scrutiny. 41

In late November of 1995, White proposed the compromise to the conference committee. The committee spent a week in deadlock, and then on December 6th, Hyde and Representative Bob Goodlatte (R-Virginia) said that they would vote for the compromise if the the White amendment would change the “material

37 Ibid.
38 EFF 'Censorship - Exon Committee Decency Act & Other Net Censorship Bills' Archive
39 Corcoran, “From DC to your PC”
40 EFF 'Censorship - Exon Committee Decency Act & Other Net Censorship Bills' Archive
41 Ibid.
harmful to minors” language back to “indecent”. The committee went into a closed session, and then reported back a 17-16 vote in favor of the change. The same vote passed the compromise amendment, still called the Communications Decency Act back onto the Telecommunications Bill. On February 1st, the House passed the bill 414-16 (the Senate had passed in about a week earlier, 91-5) and sent it to the President. Voicing “misgivings” about some of the provisions in the bill (but not specifying which provisions), the President signed the bill into law on February 8th. 42

The specific language of the Communications Decency Act now read

Telecommunications Bill, Section 502(2)43

(a) Whoever--
   (1) in interstate or foreign communications--
   (A) by means of a telecommunications device knowingly--
       (i) makes, creates, or solicits, and
       (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;
   (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

42Ibid.
43Exon, “Communications Decency Act”
Aftermath

When asked about the Communications Decency Act and why he wrote the bill, Exon replied with “There is enough of the self-serving philosophy of the ‘hands-off elite.’ They seem to rationalize that the framers of the Constitution planned and plotted at great length to make certain that above all else, the profiteering pornographer, the pervert, and the pedophile must be free to practice their pursuits in the presence of children on a taxpayer created and subsidized computer network. This is nonsense.” Exon believed that the American people were behind the measure and that the measure was fully constitutional. 44 Others however did not. On February 8th, 1996, the ACLU, EFF and seventeen other entities (including Brock Meeks) filed a joint suit in federal district court in Philadelphia in front of Judge Ronald L. Buckwalter. Later that day, Buckwalter issued an order preventing the government from prosecuting people under the CDA until the judge reviewed the ACLU’s request for a temporary restraining order. On the 15th, Buckwalter issued the restraining order preventing the government from prosecuting on the indecency language, but not on the “patently offensive” language. Also on the 15th, a three judge panel was named to hear the ACLU case. The judges named to the panel were: Chief Judge Dolores K. Sloviter, Judge Stuart Dalzell, and Judge Ronald L. Buckwalter.

On the 26th of February, in federal district court in Seattle, the Citizens Internet Empowerment Coalition (CIEC), a group of more than 20 corporate and trade organizations, including Microsoft, Apple and Netscape, filed a second challenge against the CDA. The Department of Justice, not wanting to fight the same battle twice, asked that the CIEC and ACLU suit be combined. All parties agreed, and on the 27th, the two suits were merged in Philadelphia. On the 21st of March, the trial began in Philadelphia.

It is not my intention to deal with the history of the suit in this section, but to deal with the reasoning behind the lawsuit, and why ultimately I believe the plaintiffs in the suit are likely win.

When contacted by Wired Magazine for comments on why they voted for the Communications Decency Act, many Representatives and Senators gave fairly partisan answers. Representative Patricia Schroeder (D-Colorado) answered with, “My requests [for more options]... were ignored- not too surprising from a Republican majority which rushed through too much legislation by a similarly slipshod method.” 45 However

44 Meeks, “The Rogues Gallery”
45 Ibid.
a small group answered along the lines of Senator Dianne Feinstein (D-California), “I recognize that there currently are software filtering programs that have the potential to screen out certain pornographic ‘discussion groups’ to prevent our children from being able to access them. I hope that better software can be developed to address this problem more successfully in the future.” Senator Barbara Boxer (D-California) also went on record stating that she “wanted to send a signal to technology companies to encourage them to come up with better solutions for protecting kids from indecent material.” An examination of the Office of Technology and Science’s (OTS) records shows that at no time during the cyberporn debate was any request made for filtering technologies. The OTS is supposed to be Congress’ technology adviser, and evaluation of filtering technology would fall into their domain. Apparently, the information given to Congress about filtering technology was from an outside source, and apparently it was flawed.

The reason that this information was deemed “flawed” was that available filtering technology could and would block out pornography from being accessed from any platform that could process the TCP/IP protocol. The ACLU/CIEC suit contended that the CDA violated the principle of Miller v. California that any government regulation of “indecent” or “patently offensive” speech may withstand constitutional scrutiny only if it employs the “least restrictive means possible,”. The cornerstone of the ACLU/CIEC suit was that the current software 1.) makes it possible to screen the Internet for pornography and that 2.) it was less restrictive than the Communications Decency Act. The ACLU/CIEC suit contended that “every application of the act unnecessarily and unconstitutionally abridges the First Amendment right of adults, and did so even though there were less drastic alternatives that would have been more protective of minors.”

The first clause of the complaint - “every application of the act unnecessarily and unconstitutionally abridges the First Amendment right of adults” took root in the content found on the Internet. While a large portion of the content of the Internet does not fall under the (unclear) range of material deemed “indecent”, there is a fair amount of material that would be considered “indecent” for minors in some
communities, but not obscene or indecent to adults. On the contrary, some of the material is considered to be extremely valuable and useful to adults. Such content includes, for example, great works of art and literature (containing depictions and descriptions of nudes and sexual content); examples of popular culture (containing music lyrics, movie images of literature with sexual content); medical information (containing depictions and descriptions of childbirth, sexually transmitted diseases and sexually related medical conditions); and historical and scientific information (containing, for example, descriptions of criminal trials). Such content is effectively banned by the act. Beyond that, a tremendous amount of common human discourse will be banned by the act. Vigorous and heated debate often occurs with heated or vulgar words. The use of vulgar words which would be perfectly legal in a letter or “on a basketball court” would be severely restricted on the Internet for fear that a minor might receive the material.

Also left unclear in the act was the true definition of “indecent”. The second problem in dealing with the act was the true definition of “indecent”. Certain communities have banned books such as J.D. Salinger’s *Catcher in the Rye* and Mark Twain’s *The Adventures of Huckleberry Finn*, calling them “indecent”. Yet other communities have attacked the Bible, calling it “indecent” for minors. Based on the view that the Internet is a unique medium that reached into almost every community in the United States, which definition of “indecent” to be used was unclear. The Supreme Court has been unwilling to define the term “obscene”, referring it to a community standard. Before content could be defined “indecent”, the term “indecent” needed to be defined. As attorney William Bennet Turner points out,

Indecent material - dirty words or pictures that the government can’t prohibit adults from seeing but can keep from children - is treated differently from obscene material. The ban on “indecent” communications on the Internet is plainly invalid under the recognized principles that forbid vague, overly broad, content-based restrictions promoting interests that can served by less restrictive means. The Supreme Court threw out, on those grounds, the comparable prohibition of “indecent” speech on the telephone in the *Sable Communications* case in 1989.  

As members of the Congress (and Senator Exon) articulated, the CDA was intended to “assist parents in supervising their children’s access to expressive materials.” However, the act interfered with the ability of parents to expose their children to some of the “indecent” material (e.g. information on sexually transmitted diseases) for either educational or unspecified reasons. The act prevented parents from exercising their own

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52 Ibid
53 Turner, “What Part of ‘No Law’ Don’t you Understand,”
54 Exon, “Communications Decency Act”
judgment due to its blanket prohibition on all access by all persons under the age of 18 to such material.

The second clause of the ACLU/CIEC complaint was that “there are less drastic alternatives that would be more protective of minor.” Consider now, the example just given. The parent, acting as a filter, decided that the child could view certain material, but would not allow the child to access other material. As stated previously, the Communications Decency Act’s interest was to aid parents in supervising this access. And yet, there were software programs expressly dedicated to this purpose that were available at no charge from both Microsoft and Netscape. The two software programs allowed passwords for adults to get behind the filter, and allowed parents to configure the program in various ways; for example, the program could block out specified websites and newsgroups, check content for certain words before displaying content and check filenames for certain strings before displaying the content. Both Microsoft and Netscape offered a list of websites and newsgroups that they felt contained “indecent” material, and both companies updated this list twice a week, posting their findings on the web, where the file could easily be downloaded and in a matter of seconds plugged into the software program. In the opinions of many Internet experts, this was the “least restrictive” and “least drastic” manner of preventing minors from accessing “indecent” material.

Untouched by the ACLU/CIEC case was the looming question of “If the act is upheld as constitutional, can the enforcement be upheld as constitutional?” For the government to actively enforce the Communications Decency Act, it must screen all the information passing through the main data routers of the United States for the content, the sender and the recipient. This, in and of itself, is a massive violation of the First Amendment, as the government would be monitoring all the traffic and all the conversation on the national net, and approximately 85% of all global traffic. The ACLU had vowed to fight active enforcement of the act all the way to the Supreme Court, and most legal experts agree that active enforcement would not stand up to constitutional scrutiny. The Christian Coalition had offered to police the Internet (as had myriad other organizations including the Guardian Angels), and had already served notice to Playboy Enterprises that as soon as the Philadelphia federal court’s restricting order was dropped, they would move to endite Playboy Enterprises under the act. The FCC and the Department of Justice have not, as of yet, released their plans for enforcement of the CDA should the ACLU/CIEC suit fail.

\footnote{CIEC complaint}
Conclusion

The Communications Decency Act is the first organized attempt to censor the Internet since the Internet was formed in the early 1960’s. Drawing the majority of its strength from a panic that occurred in late 1994, the crux of which was the Martin Rimm study and the *Time* Cyberporn article, the CDA was a debacle of poor intentions and back room politics. Now being challenged in federal court, the CDA potentially violates the rules for censorship set down by the Supreme Court in *Miller v. California*, specifically the rule stating that the government intervention must be “the least restrictive means possible.”

If all goes well, as this paper is presented, the ACLU and CIEC lawyers will have finished their arguments before the three judge panel in Philadelphia (using arguments similar to those presented), and if the Internet is lucky, the CDA will be ruled unconstitutional.
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