The Internet and the Legacy of the Communication Decency Act, 1996: Divergent Perceptions of a New Communication Technology

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Abstract

This paper examines the controversy and legacy of the 1996 Communication Decency Act (CDA). The paper highlights the analogies that favored the CDA, in the Congress and courts, and juxtaposes them against critics' arguments. With audio and video streaming the Internet has become a broadcast medium. Thus, debate over indecency on the Internet is far from over.

Key Words: Internet; decency; children; Supreme Court; law; censorship.

Introduction

This paper examines the legacy of the 1996 Communication Decency Act (CDA) and the controversy it triggered in the United States. The paper explores how politicians, lawmakers, entrepreneurs, and educators perceived the Internet as a new communication technology. It focuses on how the proponents and the opponents of the CDA envisaged protection of minors from indecent material on the Internet. Highlights the analogies presented by the advocates of the CDA, in the Senate, the House, media and courts, are matched proponents' arguments with critics' counter-arguments. Special attention to statements of Senator James Exon (D-NB) sponsored the CDA, and Senator Patrick Leahy (D-VT) opposed it. The paper sheds light on some of the social and ethical problems that new technologies can trigger. It also juxtaposes two competing philosophies: one calling for government intervention to cure social ills; other demanding market-driven solutions. Examining the CDA from a communication perspective renders legislative history and details of courts' rulings beyond the purview of this paper.

A Definition of Indecency

The Federal Communication Commission (FCC) defines indecency as "language that depicts or describes, in terms patently offensive by contemporary community standards for the broadcast medium, sexual or excretory activities or organs" (Rivera-Sanchez, 1996, p. 332). The Commission has the authority to issue fines for transmitting indecency under Title 18, Section 1464 of the U.S. Code. The Commission's definition is so vague that it led litigation and expensive court battles. Moreover, the definition fell short of seeing indecency in some controversial language usage considered indecent by many conservatives.

FCC and Indecent Speech

The history of modern state's intervention to regulate transmission of indecent and obscene material dated back to the 1800s. The Supreme Court's decision on FCC v. Pacifica Foundation in 1978 became a landmark in the recent history of regulating indecent speech. In accordance with that ruling, the FCC took action against a radio station, which broadcast George Carlin's 'Filthy Seven Words,' at 2:00 P.M. The Court endorsed the definition of indecency as stated by the FCC in its Memorandum Opinion and Order. The Court upheld the power of the FCC under 18 U.S.C. 1464 'to regulate a radio broadcast that is indecent but not obscene.' The Court, however, emphasized the "narrowness of its holding" (Cohen, 1995, pp.14-15).

Following many court rulings, the FCC allowed broadcasters to air indecent material from 10 p. m. until 6 a. m. In 1987, however, the FCC announced that indecent speech was not restricted to the seven words of Carlin's monologue. "[T]he generic definition of indecency as stated in Pacifica would now be used to determine whether broadcasts were indecent. Thus, non-explicit innuendoes could be rendered indecent if they were surrounded by explicit references which made the meaning of the innuendoes clear and patently offensive" (Ballard & Rivera-Sanchez, 1996, p. 7). Consequently, the context became of prime importance. Thus, "frank discussions of sex, including sexual techniques, are not necessarily indecent unless presented in a pandering or titillating manner" (Rivera-Sanchez, 1996, p. 333). Asserting its interest in protecting the children and the youth, the FCC declared that the previously accepted time for airing indecent material should be changed. An earlier attempt by the Congress to direct the FCC to "enforce the indecency regulations twenty-four hours per day" was struck down by the D.C. Circuit Court (Saunders, 1997, p.191). The FCC stated that "the safe harbor would operate only from the hours of midnight to 6:00 A.M."(Ballard & Rivera-Sanchez, 1996, p. 8). The courts upheld the constitutionality of this statute.

A Brief History of the Communication Decency Act Of 1996

Senator Jim Exon (D-NB) made a failed attempt in 1994 to pass an amendment restricting indecent material on the Internet. That failure followed a preemptive move by Senator Patrick Leahy (D-VT), to persuade the Congress that there was no need for government's regulation of the Internet. His demand for studying the issue instead of regulating the Internet gained President Clinton's support. Leahy's delaying tactics did not prevent the Senate to pass the CDA in July 1995. The Act carried fines up to $ 100,000 and two years of prison for violations. Moreover, it held Internet access providers liable for offensive material posted by users. Representatives Chris Cox (R-California) and Ron Wyden (D-Oregon) succeeded in introducing the Cox-Wyden Amendment, which passed the House, 420 to 4. The amendment - known as the 'Internet Freedom and Online Family Empowerment' amendment- "prohibited the Federal Communications Commission from regulating the Internet, and relieved access providers form liability regarding the material their customers posted"(Bruce, 1996, p.1). The Conference Committee convened and reconciled the Senate's CDA and the House's bill. But, the Senate made a major change on the Cox-Wyden Amendment. It was "switching the specific and more liberal term, 'harmful to minor', to 'indecency', which is very vague and left open to much interpretation"(Bruce, 1996, p.2).

On February 1, 1996, the Congress passed the Telecommunication Reform Bill, which included the CDA. President Clinton signed the Bill into law on February 8, 1996. This took place after heated debates between the proponents and the opponents of the CDA. Cannon (1996) asserts that the most significant changes in the CDA in its final version included:

(1) [V]irtually eliminating FCC jurisdiction over the content of on-line computer communications, (2) replacing the word 'indecency' in the CDA with the definition of indecency from *Pacifica*, (3) couching the language aimed at the Internet in its own subsection governing 'interactive computer services,' and (4) specifically targeting the CDA at content providers. P.92

The provisions of two sections of the CDA became controversial and received elaborate debate. One is "Section 223 (a)(1)(B) which applies to 'telecommunications device[s]' and makes it a felony to transmit an 'indecent' communication 'knowing that the recipient of the communication is under 18 years of age'"(Biegel, 1996, p. 1). The second, Section 223(d) (1) which applies to "interactive computer services." Section 223 (d)(1)(A) makes it "a crime to 'use an interactive computer service to send [such material] to a specific person or persons under 18 years of age'. Section 223(d) (1)(B) makes it a crime to 'display [such material] in a manner available' available to any person under eighteen" (Biegel, 1996, p.1). Under the CDA, violators are subject to penalties of up to $ 250,000 and two years in person**.**

The Nature of the Internet

The Internet can be described as a global network of interconnected computers. It started in 1969 as military program called "ARPANET." The Internet experienced a dramatic growth in 1980s and 1990s. The number of 'host' computers – storing information and relaying communications— jumped from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. According to Stevens (1996), "Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999" (p.1).

The number of the Internet users outside the United States is increasing at a fast rate. In 1996 the Internet reached "60 million users in 160 countries, with the number doubling each year…. European users are expected to double every year, reaching 100 million in 2001 "(Wilske & Schiller, 1996, pp.119-120). The Internet and World Wide Web (WWW) users in Asia -numbered 3 million in 1996- are expected to reach 25 to 30 million by the year 2000. The Internet and WWW users in South America and Africa are also increasing at remarkable rates. These phenomenal increases turned the Internet into a flourishing international forum.

Research Questions

This paper aspires to answer the following research questions:

1. How do politicians and entrepreneurs envision the Internet?
2. What are the arguments for and against invoking the First Amendment to protect indecent speech on the Internet?
3. Who should protect the public, namely minors, the government or the private sector?
4. Can free markets alone resolve social problems that market economics create?

Method

The paper uses historical research as a method for the study. To contextualize the controversy surrounding the CDA, it was important to examine various historical documents containing pertinent statements about the CDA. To answer research questions, library archives, newspapers, journals, court as well as Congress hearings were used as sources of information. Moreover, online publications containing insightful statements were considered vital data sources for this research. The time frame chosen for this study extended from 1995 to 1997. This period of time was chosen because it witnessed the rise and demise of the CDA.

The CDA in the Senate

Senator James Exon (D-NB) introduced the first version of the CDA bill S.314, on Feb. 1, 1995. He stated, "this legislation … extend(s) standards of decency which have protected telephone users to new telecommunications devices"(Weise, 1998b, p. 1). It included many of the provisions in Exon/Gorton's bill aimed at amending section 223 of the Communication Act of 1934. Many of these amendments called for striking the word "telephone" and replacing it with the word "communication device." Thus, the notion of considering the Internet as analogous to telephone was there from the beginning. In a live interview on CNN on Feb. 13, 1993, Senator Exon asserted that "what we are trying to do with our law is to simply apply the laws that are now enforced on telephone to the new information superhighway" ("Panelists…," 1995, p. 2). During the same interview, Privacy Advocate Marc Rotenberg responded by saying that "it would be a mistake to try to regulate Internet communications as we currently regulate the telephone network" ("Panelists…," 1995, p. 2). Whereas, Senator Exon, underscored the dangers that the Internet posed, Rotenberg emphasized the opportunities that the Internet opened. President Clinton, whose administration was not in favor of Senator Exon's bill, emphasized the danger of pornography on the Internet. In an address to The American Society of Newspaper Editors, in Dallas Texas, he argued that the government had the legal right to protect children from obscenity. Clinton added, "it is a folly to think that we should sit idly by when a child who is a computer whiz may be exposed to things on that computer, which in some ways are more powerful, more raw and more inappropriate than those things from which we protect them when they walk in a 7-Eleven" [Online] Available at: http://www.eff.org/pub/Censorship/E…_s314_clinton_speech.excerp).

On June 9, 1995, Senator Exon refined his bill, and informed the Senate that "[t]he distribution of obscenity and indecency to minors by means of telecommunications devices would be covered by new sections in the revised language. Unlike the current dial-a-porn statute, there would be no noncommercial loophole in the new provisions"(Congressional Record Online, 1995, p. 5). He defended the constitutionality of his bill on the MacNeil/Lehrer news hour. Exon argued, "It is not a violation of free speech, and I called on a lot of well-known lawyers to make sure that this bill be properly tested on the constitutional rights provision…. We based this on the law that has been in effect and been approved constitutional with regard to pornography on the telephones and pornography in the U.S. mail" ("MacNeil/Lehrer…," 1995, p. 2). Responding Exon, Jerry Berman of the Center for Democracy and Technology, argued that unlike the closed systems of the telephone and the U.S. mail "when you communicate on the Internet, you make information available, you put it up, and anyone can come and get it. And it is important in this technology to understand that you have to come to get it" ("MacNeil/Lehrer…," 1995, p. 2).

The rationale for regulating indecency on the Internet

Senator Exon and the advocates of the CDA relied heavily on the Pacifica case, to bolster their case for regulating the Internet. They -including the government- preferred to view the Internet as a broadcast medium. According to Biegel (1996), "The Justice Department's brief relies heavily on FCC v. Pacifica, 438 U.S. 726 (1978)…. In Pacifica, the Court found that 'broadcasting has the most limited First Amendment protection'" (p.2). Building its argument on this decision, the government asserted that it could regulate online speech because there can be unintentional exposure of minors to indecent material on the Internet.

The advocates of the CDA reasoned that the Act did not violate freedom of speech. They referred to the government's concerns, and contended that individuals should exercise freedom intelligently and responsibly. They added that parents could not be present with their children all the time. Moreover, children could have access to the Internet at other places, like schools. Thus, "Even if the parents install protection software to keep their kids from accessing indecent material, the kids will eventually find a way to get by the protection" ("The Communication…," 1996, p. 2).

Senator Patrick Leahy (D-VT) who opposed the CDA indicated that many Members of the Congress perceived computer monitors as television sets. He cautioned, "Congress is not yet what you call a repository of expertise on even the technical and practical aspects of regulating or censoring the Internet. Many Members in Congress view the computer monitors in their offices as television sets that don't get CNN"(Leahy, 1997).

Senator Exon made interesting comments during his statement before the Senate on June 9, 1995. He compared the Internet to a printing press. Referring to pornographers, Exon argued that "what they do is to use free access, without charge advertising with the best of some of their pornographic, obscene material, and they put it over here on the Internet with their printing press. That is a printing press and everybody has one" (Congressional Record Online, 1995, p. 5). He also compared these sites on the Internet as an adult bookstore. Exon argued that his bill was aimed against pornographers who profited from selling smut. He added, "People on this pornography bulletin board, not unlike the Library of Congress, if I dare use that example, have a complete library of anything and everything that you could possibly imagine that you might see in an adult bookstore" (Congressional Record Online, 1995, p. 5).

On the other hand, Senator Leahy envisaged the Internet as a different bookstore. He argued, "In bookstores and on library shelves, the protections of the First Amendment are clear, even for indecent speech. Altering the protections of the First Amendment for on-line communications could cripple this new mode of communication" (Leahy, 1997). The opponents of the CDA, preferred to depict the Internet as print media. They rejected the argument likening Internet to broadcast media and asserted that "if the Internet is analogous to any form of media, the most appropriate analogy would be newspapers and magazines – which are afforded much greater First Amendment protection under constitutional law."(Biegel, 1996, p.2). The intention of the opponents of the CDA was to accord the Internet maximum First Amendment protection. They claimed that if the government had to monitor the Internet to protect minors, why it shouldn't monitor telephone conversations, and the U.S. Postal Service to protect minors from receiving indecent material ("The Communication …, 1996, p. 2).

The Senate's Hearing

On July 24, 1995, the Senate held a hearing on "Cyberporn and children: The scope of the problem, the state of the technology and the need for congressional action." It is interesting to note that this hearing took place after the Senate had passed the restrictive Exon-Coats Communication Decency Act on June 14, 1995. It was not clear, however, why the Congress did not hold prior hearings on the CDA, despite the interest of many civil rights and business groups in that bill.

During the hearings of the Subcommittee on the Judiciary, some witnesses made interesting analogies for the Internet. Mike Godwin of the Electronic Frontier Foundation argued that the Internet was analogous to a printing press. He argued, "If, as A. J. Liebling once commented, freedom of the press belongs to those who own one, the Internet suggests that we all may someday own one" ("Cyberporn and children…," 1995, p.178). During the hearing, Senator Russell Feingold (D-Wisconsin) described the Internet as a boon for democracy, and depicted it as similar to writing and publishing. He asserted that "On the Internet, one can act as a publisher and a writer simultaneously" ("Cyberporn and children…," 1995,p. 33). In her testimony, Susan Elliot -a resident of Virginia- referred to safe harbors in broadcast media. She called on computer industry to adopt similar standards ("Cyberporn and children…," 1995, p.51).

William Burrington, of America Online, referred to the availability of filtering technology, and argued that "parental control …is the only answer"("Cyberporn and children…," 1995, p.70). Many references were made to the chilling effect of the bill on education. Some witnesses referred to the bill's adverse effects on health education, particularly birth control and AIDS. Some witnesses mentioned the similarities between the Internet and bookstores, and questioned the constitutionality of the bill. References were also made to the bill's negative impact on serious literary works, like Joyce's Ulysses. Senator Exon was asked on MacNeil/Lehrer news hours, whether a discussion among adults of Joyce's Ulysses might be against the law if a child logged on. The Senator responded that they would be prosecuted and the judge would decide on that ("MacNeil/Lerher…," 1995, p. 3).

The hearings in the House

On July 26, 1995, a Joint hearing on "Cyberporn: Protecting our children from the back allies of the Internet was held before the subcommittee on basic research and the subcommittee on technology of the Committee on Science. Constance Morella (D-MD), Chairman of Subcommittee on technology, argued that "the Internet has become the gateway for information, education and entertainment. It is fast becoming a fixture of our work and personal life" ("Cyberporn: Protecting…," 1995, p.12). Pete Gergen (D-TX) added that "the value of the Internet as an educational resource is enormous" ("Cyberporn: Protecting…," 1995, p.17). Ann Duvall of Surf-Watch Software, described the Internet as an electronic community, and opined that, "we are the people who are settling this land. This is a community without the traditional borders that have given us national identity" ("Cyberporn: Protecting…," 1995, p.60).

Mr. Vernon Ehlers -Representative from Michigan- argued that holding the Internet service providers responsible for the content of the material they transmitted, was "like holding the post office responsible for obscene material that is mailed" ("Cyberporn: Protecting…," 1995, p.84). Kevin Manson, of Cyber Law Enforcement BBS, stated that his organization provided education on law enforcement. He described the Internet as virtual streets that needed policing. Describing online policing as inconspicuous, Manson argued, "the I'way Patrol does not always want its presence publicized on the Net with 'marked cars" ("Cyberporn: Protecting…," 1995, p.91). In short, the thrust of the hearing was in favor of using screening and blocking technologies to address the problem of pornography and indecency on the Internet.

The House version of the CDA

Timothy Johnson (D-S.D.) introduced a bill pertaining to the Internet and computer networks as H.R. 1004. A version of Senator Leahy's alternative to Exon's CDA was also introduced in the House. According to the Center for Democracy and Technology, the House's bill was an attempt to weaken Senator Exon's version, which the Senate had passed on June 14, 1995. The House also revealed its intention to make Internet Service Providers (ISPs) less liable under the new bill. Speaker Newt Gingrich (R-GA) criticized Senate's passage of Exon's amendment depicting it as a violation of free speech. He added that maintaining "the right of free speech for adults while also protecting children in a medium which is available to both" was problematic (Gingrich, 1995, p. 1).

The Conference Report on the CDA

The Senate's version and the House's version of the CDA were sent to the Conference Committee. The Conference Committee adopted the Senate provisions with modifications, and inserted some of the House's provisions. In the reconciliation process "New defenses are provided to assure that the mere provision of access to an interactive computer service does not create liability. The access provider's provision is not available to one who provides access to a system with which they conspire or own or control" (Telecommunication…," 1996, p. 2). The conferees relied on previous court cases, namely Pacifica, and Sable, with a view of "narrow" tailoring the definition of indecency.

The conferees agreed that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989). These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these cases firmly establish the principle that the indecency standard is fully consistent with the Constitution and specifically limited in its reach so that the term is not unconstitutionally vague (Telecommunication…," 1996, p. 2). One of the major challenges facing the Conference was the "harmful to

minors" standard, which the conferees rejected. The proponents of the 'harmful to minors' standard argued, "That standard contained an exemption for material with 'serious literary, artistic, political, and scientific value,' and therefore was the better of the two alternatives standards" (Telecommunication…," 1996, p. 2). Jerry Berman of the Center for Democracy and Technology, cautioned, "[b]y substituting a prohibition against transmitting 'indecent' material to children with one that blocks material that is 'harmful to children,' …the prohibition would be much more narrowly tailored to material that contains frontal nudity and other graphic images or words"(Andrews, 1995, Dec. 2, p. 9, Column., 1). The conferees expanded subsection 223 (f)(2) to exempt public library and educational institutions from liability. They wanted "to protect the important work of nonprofit libraries and higher educational institutions in providing the public with both access to electronic communications networks like the Internet, and valuable content which they are uniquely well-positioned to provide" (Telecommunication…," 1996, p. 2). The opponents of the bill considered the ensuing compromise in the Conference unsatisfactory. Jerry Berman questioned the need for any legislation. Referring to the divergent views, he argued that "the Senate passed a bill that went one way and the House passed a bill that went another way, and we have to deal with that"(Andrews, 1995, Dec. 2, p. 9, Column, 1). Andrews suggested that the opponents of the new legislation had accepted the compromise though they were certain that Congress would add more prohibition to the bill. He reasoned, "Instead they are trying to fend off efforts by the Christian Coalition and conservative Republicans, led by Representative Henry Hyde of Illinois, to impose even stricter regulations than those passed by the Senate in June" (New York Times, 1995, December 2, p. 9, Column, 1).

The views of the opponents of the CDA

On February 9, 1996, Senator Leahy addressed the Senate and presented a bill to repeal the amendments made by the CDA of 1995. He argued that the CDA would not pass the First Amendment challenge because many of its parts "are fatally flawed and unconstitutional"(Leahy, 1995, p.1). Asserting that the CDA violated adults First Amendment rights, Leahy added that, "No literary quotes from racy parts of Catcher in the Rye or Ulysses will be allowed. Certainly, online discussions of safe sex practices, or birth control methods, and of AIDS prevention methods will be suspect. Any user who crosses the vague and undefined line of 'indecency' will be subject to two years in jail and fines"(Leahy, 1995, p.2). He concluded that, "the Communication Decency Act tramples on the principles of free speech and free flow of information that has fueled the growth of the medium.…Banning indecent material from the Internet is like using a meat cleaver to deal with the problem better addressed with a scalpel"(Leahy, 1995, pp.3-4). Leahy's argument alluded to alternative options, including blocking technologies, which were "less restrictive." Many civil rights groups and powerful companies and corporations rallied behind the American Civil Liberties Union (ACLU) to protest against the CDA. The major companies opposing the Act were America Online and Microsoft Corporation. These civil rights and corporate groups opposing the CDA, strongly argued that the First Amendment guaranteed freedom of speech. They criticized the CDA for "vagueness and over breadth". They suggested that, "'[I]decency' and 'patently offensive' – have never been positively defined by the courts or the Congress, and so create uncertainty as to the scope of the restriction, necessarily resulting in a 'chilling effect' on protected speech"("Electronic…," 1996, p. 6). Thus, speech protected by the First Amendment was to be compromised in compliance with the CDA. They made it clear that, "To restrict what the governments see as indecent to protect the kids also means it is restricting the rights of adults to these material which is unconstitutional" (The Communication…," 1996, p. 1).

Is the Internet a broadcast medium?

Critics of the CDA argued against comparing the Internet with broadcast media. They argued that, "Unlike broadcast [ing] the Internet is not pervasive. The user is not likely to stumble upon the offensive. The Internet gives the user a full range of options for blocking out material not acceptable to the user"(Cannon, 1996,p.80). Another argument was that on the Internet the communicator could not choose the audience. Thus, once a message is online it can be viewed in many parts of the world, and not in selected areas. Moreover, on the Internet there was no scarcity of spectrum as in broadcast media. They cautioned, "This law is an example of how lawmakers to date are misunderstanding the nature of the medium. They are trying to extend laws relating to broadcast medium to a networked medium and it doesn't work at all"(Weise, 1998b, p. 2). Shabbir Safdar of the Voters Telecommunications Watch argued that the Internet was different from television and telephone. Thus, "It's not as if I'm sitting at home eating dinner and the salesman calls me. I have to go looking for whatever I want to find" (Weise, 1998a, p. 1).

Is the Internet a print medium?

The opponents of the CDA argued, "lawmakers should see the Internet as something much like a print medium and grant it the same kinds of First Amendment protection a newspaper, bookstore or publisher would have"(Weise, 1998b, p.2). One critic cautioned that the bill "would have a chilling effect on the development of on-line services, and that it holds cyberspace to a more stringent standard than print…. It is unconstitutional and a direct threat to free speech on the information highway"(Shwartz, 1995, p. A 24).

The Internet as an empowering tool

The disputants over the CDA agreed that the Internet was vital for enhancing democratic discourse. They pointed out that "The Internet is an American technology that has swept around the world. As its popularity has grown, so have efforts to censor it" (Leahy, 1995, p.3). Senator Leahy described the Internet as an empowering medium. He said that "New information technologies, such as the Internet, make accessible vast amounts of information from around the world, and the Internet is proving to be a catalyst for change in emerging democracies"(Leahy, March, 5, 1997). Reference to the positive sides of the Internet was highlighted during the CDA controversy. One argument suggested that "The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity"(Section 230 (3)).

The Internet as a menace

On the downside, Senator Exon articulated the dangers that loom on the Internet. In his address to the Senate on March, 7, 1996, he said, "[b]efore the passage of the Communications Decency Act, the Internet had been described as the Wild West. At least, there is now some degree of law and order. In effect, the new law is a zoning measure. Adults are free to engage in otherwise legal indecent activities and communications, just not with, or in the knowing presence, of children" (Telecommunications Act, p. 3). Senator Exon added that children and families deserved protection, despite the "protests from the profiteers of child pornography that are rampant on the Internet today"(p.3). He argued that he wanted "to keep the information superhighway from resembling a red light district" (Shwartz, 1995, March, 24, p. A24, Col. 1).

During a Senate hearing on June 9, 1995, Senator Exon said that it was important to "clean up the Internet - or the information superhighway … to make that superhighway a safe place for our children and our families to travel on" (Congressional Record Online, 1995, p. 1). Exon and the advocates of the CDA portrayed the Internet as a dangerous space because they wanted to rally more support for the bill in the Senate and the House. Depicting the Internet as a dangerous space became a recurrent frame stressed in the Senate, in the House, and in the media.

The issue of terrorism became apparent during the debate. On May 11, 1995, Senator Arlen Specter (R-Pa), Chairman of the Subcommittee on Terrorism, Technology and Government Information, called for a hearing to investigate "the availability of bomb making information on the Internet." In a nutshell, the hearing depicted the Internet as threatening to innocent citizens and children. Specter argued that, "[t]here are serious questions about whether it is technologically feasible to restrict access to the Internet or to censor certain messages" (Cyber Wire Dispatch, 1995, pp. 1-4).

Screening and Blocking Technologies

The opponents of the CDA referred to available technologies that could block minors' access to indecent material. These software programs included Surfwatch, Net Nannie, and the Platform for Internet Content Selection (PICS). Cannon (1996) described these software packages as more effective than government regulation. He reasoned, "First, the United States government does not have jurisdiction over a significant portion of the Internet…. Second, the government faces a constitutional task of defining appropriate material"(Cannon, 1996,p.83). Senator Leahy's bill S.714, cited as "The Child Protection, User Empowerment, and Free Expression in Interactive Media Study," aimed at helping parents protect their children. Leahy argued, "[i]nstead of rushing to regulate the content of information services, we should encourage the development of technology that gives parents and other consumers the ability to control the information that can be accessed over a modem"(Bill to empower…,"1995). The opponents of the CDA expressed serious concerns regarding the screening role exercised by the Internet Service Providers (ISPs) and content providers. In their attempts to comply with the CDA and avoid liability, these service and content providers might intrude on the rights of users' privacy (Cannon, 1996, p. 89).

In a nutshell, the opponents of the CDA were in favor of user's empowerment, and against government's intervention. Thus, "[p]aternalism is rejected in favor of responsibility; regulation is rejected in favor of decentralization and self-discrimination; censorship is rejected in favor of democratic discourse" (Cannon, 1996, p.93).

Censoring and policing the Internet

It is interesting to note that the opponents of the CDA framed the Act as a government's attempt to censor and police the Internet. To allay these fears, Senator Exon argued that the CDA was not meant to censor protected speech. He added, "Those who cry censorship hide behind the First Amendment to make defense of those who would give pornography to children and engage children in sexual conversations" (Telecommunication Act, p.3). Exon indicated that Penthouse and Hustler had "removed indecent material from their publicly available bulletin boards in response to the new law and their material are now available only to adults through credit card access"(p.3)

Referring to the notion of policing the Internet, Rotenberg –a privacy advocate- argued that, "we want the university policing its own community, and we want the online service providers policing its own community" ("Panelists…," 1995, p. 4). He added that the problem would arise when the FCC tried to set the standards. Rotenberg added, "[r]equiring U.S. providers of access to the Internet to police everything that flows through their wires would violate the very freedom that has made this global exchange of information so powerful"(Weise, 1998a ,p.2). In the same vein, Andrews (1995, March 24) argued, "[t]here are also big questions about whether anyone, including the Federal Government, can police an electronic world linked by little more than a common technical language and governed by virtually no one"(p. D7).

When Senator Leahy introduced his amendment S. 714, he said that policing the Internet impinged on privacy and involved complex issues. Emphasizing the need to protect privacy, he asserted, "I disagree with pending bills in Congress that would deal with obscenity on the Internet by censoring private online communications, invading our privacy, and deputizing information service providers as smut police"("Bill to empower…" 1995). Lessig (1996) viewed the issue from a different perspective, and argued that the CDA was meant to "subsidize technologies of control – to increase the ability to select who gets access to what – and the medium Cyberspace is perfectly designed for that control"(p.1409).

The Court of Appeal ruling: Reno v. ACLU

A three-judge Federal Panel in Philadelphia deliberated on Reno v. ACLU, and examined the CDA as it applied to the Internet. Commenting on a new trend, courtroom observers stated that "this is the first time in history that a federal courtroom has been wired to the Net for purposes of the trial" (Biegel, 1996, p.2). On 12 June 1996, the Panel declared major parts of the CDA unconstitutional. The Panel reaffirmed that unprotected speech (obscenity and child pornography) deserved to be outlawed on the Internet as well as on other media. The Panel, however, believed that lack of affordable screening technology "had the effect of turning a regulation of indecency into a ban, because Internet providers could not take the risk that children might see indecent content" (Greenhouse, 1997, p. A11).

Judge Sloviter found that the Congress could have assisted in protecting minors from unsuitable material available on the Internet, "by the development of the technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene but indecent and patently offensive books and magazines abound" (ACLU v. Reno, 1995, p. 3). Thus, the legislative was to blame for lack of affordable screening technologies.

Judge Buckwalter reasoned that the CDA "is overbroad and does not meet the strict scrutiny standard in Sable Communications" (ACLU v. Reno, 1995, p. 3). He concluded that, "the Congress' reliance on Pacifica is misplaced. In addition…technology as it currently exists…cannot provide a safe harbor for most speakers on the Internet, thus rendering the statute unconstitutional under a strict scrutiny analysis"(p.4). Consequently, the CDA violated both the First Amendment and the Fifth Amendment.

Judge Dalzell did not find the government's argument relating to Pacifica, persuasive. He referred to the inapplicability of broadcast rationale to regulate cable television, and argued that "the Court concluded that the rules for broadcast were 'inapt' for cable because of the 'fundamental technological differences between broadcast and cable transmission" (ACLU v. Reno, 1995, p. 3). Dalzell concluded:

> *Pacifica's holding is not persuasive authority here, since plaintiffs and the Government agree that Internet communication is an abundant and growing resource. Nor was Sable a persuasive authority, since the Supreme Court's holding in that case addressed only one particular type of communication (dial-a-pron), and reached no conclusions about the proper fit between the First Amendment and telephone communications generally. Again, the plaintiffs and the Government here agree that the Internet provides content as broad as the imagination (ACLU v. Reno, 1995, p. 3.*

Thus, the Panel found that "broad attempts by the Government to limit indecent, offensive but constitutionally protected material that would be available to children who use the Internet would place unacceptable restrictions on what adults can publish or see as well"(Lewis, 1996, p. A 18). Thus, the Panel concluded that:

> *The Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion. Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. (ACLU v. Reno, 1995, p. 9.)*

Whereas the supporters of the CDA expressed disappointment with the ruling, the opponents hailed it as a victory for freedom of expression. Commenting on the ruling of the Philadelphia court, Senator Exon described the court's argument regarding the unavailability of child screening technological devices as faulty. He said that the court overlooked available procedures and technology that block child access to certain Internet sites. Exon also criticized the court for depicting the term "indecency" as vague. He added, "The Philadelphia court overlooks that no court has applied the indecency standard to prohibit serious works of art, literature or medical information" (Exon, 1996, p.96). Senator Exon argued that the Congress had crafted the CDA to protect children from indecency. He opined that "Congress modeled the statute after the existing dial-a-porn law which allows telephone sex services to ply their wares to adults but prohibits access by minors"(Exon, 1996, p.96). In a previous decision the Supreme Court has found that the "dial-a-porn law" did not violate the First Amendment. Senator Exon expected the Supreme Court to find the CDA constitutional. On the other hand, Senator Feingold, commended the panel's decision "which …recognized the unique nature of the Internet" (Congressional Record Page S6130).

The Supreme Court and the CDA

The U.S. Supreme Court heard oral presentations in Reno v. ACLU on March 19, 1997. The hearing was crucial for the proponents of the CDA, because it was the first time for the Court to consider issues pertaining to users' rights and responsibilities in cyberspace. Appellees in the case included 19 plaintiffs led by the ACLU and 27 plaintiffs organized as the Citizens Internet Empowerment Coalition (Biegel, 1996, p. 1) In the court, Washington, D.C. Attorney Bruce J. Ennis who represented the plaintiffs faced Deputy Solicitor General Seth P. Waxman who represented the government. According to Greenhouse (1997) "the Justices appeared less interested in constitutional theory than in learning about the available technology by which those who post material on the Internet and those who receive it on their computer screens can filter or mark the portions not suitable for children"(p. B 10).

Some interesting analogies for the Internet were presented during the oral presentation. Waxman's presentation depicted the Internet as a library. Accordingly, indecent material should be shelved in a "different room." Waxman suggested that "the Internet is more like a city, with obscene and pornographic material equivalent to adult stores and video stores" (Biegel, 1996, p.1). Having in mind the case of Renton v. Playtime Theatres, he wanted the dispute to be viewed as a "zoning issue." In Renton, 475 U.S. 41 (1986), theater owners argued, in vain, that their First and Fourteenth Amendment rights had been violated by a "zoning regulation" that prohibited the building of X-rated theaters near residential areas, schools, churches and parks. The court emphasized the 'secondary effects' of pornographic theaters, and decided that quality of life issues were in jeopardy. If such a frame of reference was accepted, "By analogy the quality of life online users can be seen as being affected by the presence of obscene and pornographic material" (Biegel, 1996, p. 2). Justice Breyer suggested that the Internet was analogous to a telephone. He wondered whether high school students' conversations about their sexual experiences be criminalized.

At this point, Ennis –on behalf of opponents of the CDA- reminded the Court that "in Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) the Court had 'in the telephone context' struck down a law that banned 'telephone indecent speech'" (Biegel, 1996, p.2). Justices O'Connor and Kennedy considered the Internet analogous to "a street corner or a park." This view resonated with other views depicting the Internet as a "shopping mall" or a "public parade." This analogy rendered the Internet subject to the First Amendment analysis. Some of the attorneys and the justices suggested that the Internet was analogous to a "private living room," whereas others perceived it as a "public educational institution."

On June 26, 1997, the Supreme Court decided that major provisions of the CDA were unconstitutional under the First Amendment. The Court depicted the Internet as a "unique," "market place of ideas." It determined that the World Wide Web is analogous to a library or a shopping mall. The Court rejected the government's argument that the Internet could be viewed as broadcast media. It argued that though sexually explicit material was abundant online, "users seldom encounter such content accidentally." In its First Amendment analysis, the Court explained that "the many ambiguities concerning the scope of [the CDA's] coverage render it problematic for purposes of the First Amendment" and decided that the Act "unquestionably silences some speakers whose messages would be entitled to constitutional protection." The Court maintained that the lower court in this case "was correct to conclude that the CDA effectively resembles the ban on 'dial-a-porn'" invalidated in a previous decision – Sable Communications of Cal., Inc. v. FCC, 492 U. S. 115 (1989). On the issue of balancing the rights of adults and protection of children, the justices declared that:

> *In order to deny minors access to potentially harmful speech the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another… we have repeatedly recognized the governmental interest in protecting children from harmful materials, … that interest does not justify an unnecessarily broad suppression of speech addressed to adults. (Reno v. ACLU, 1997, p. 1)*

According to Sableman (1997), the Supreme Court affirmed the Philadelphia court's ruling "because of its conclusion that the World Wide Web is 'comparable, from the reader's perspective, to both a vast library, including millions of readily available and indexed publications, and a sprawling mall offering goods and services" (p. 247) Reflecting on the Court's decision, Zelezny (1997) reasoned that rationale for regulating the content of broadcast media "would hardly seem justifiable for the Internet, which utilizes an expanding 'superhighway' infrastructure of enormous capacity and without limits set by nature" (Zelezny, 1997, p.498).

Conclusion

The legacy of the CDA and the prospects of its application on the Internet have demonstrated that laws and regulations are social constructs reflecting conflicting economic and social interests. The perceptions of the proponents of the CDA, the analogies and frames they presented reflected their interest in ensuring government interference to control nonconforming speech and images on the new medium. The rationale used for regulating broadcast media did not persuade the Court to regulate the Internet. Moreover, the argument demanding treating the Internet as a telephone was not persuasive. Nonetheless, it is interesting to note that the Philadelphia Panel depicted the Internet as a conversation, whereas the Supreme Court perceived it as a library. During the debate, references to texts and educational material were more pronounced compared to references to images.

The views of the CDA critics, and the analogies they gave, revolved around the notion of deregulation. They argued that market forces would solve the problem. They articulately portrayed the Internet as analogous to print to accord the Internet maximum First Amendment protection. Their underpinning philosophy suggested that the forces of free market were the best vehicles for addressing social problems. The Internet, as a new communication technology, triggered heated debates over intractable economic, social, and intellectual issues pertaining to property rights, privacy and cultural preferences.

The debate over the constitutionality of the CDA reflected divergent visions representing two schools of thought. One school saw a compelling reason for government intervention to protect the interests of families and communities, namely the children. This argument reflected a political trend favoring government intervention to protect public interest. The other school of thought saw no need for government interference, and called for empowerment of parents, and self-responsibility. It envisioned no need for government intervention to regulate the Internet. The opponents of the CDA made strong arguments against regulating online speech. The winning argument was that the CDA violated the rights of adults under the First Amendment. Another good argument was that citizens should have the power to decide what is good for themselves and their children.

Because the Internet and the WWW transcend national boundaries, the U.S. government should not penalize the Internet users worldwide. From this perspective, the best solution is an effective software package that blocks uninvited sites, and enables different cultural groups to define and choose what is good for them and for their children. The argument of the opponents of the CDA suggested that as long as there is a will to profit from transmitting indecent material on the Internet, there will be a way to overcome screening barriers. The advent of broadband Internet with its Webcasting and streaming audio and video transforms the Internet into a global broadcast media. Moreover, market forces may not provide appropriate solutions to all social ills. Thus, although the CDA is now down, it is not yet out. The controversy over regulating indecency on the Internet will continue.

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