1-1-1998

Regulating Internet Indecency

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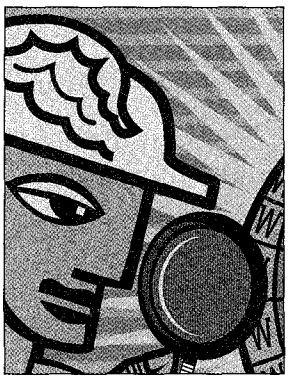

Regulating Internet Indecency

Is a law limiting access to Internet sites constitutionally possible?

Kevin W. Saunders

Update on Law-Related Education, 22.2, 1998, pp. 8–11.

Sex on the Internet

From the concern that has been expressed, it would seem that the Internet is filled with sexually explicit material. In reality, while the Net does contain some sexually explicit material, that matter constitutes only a small portion of Internet content. For the World Wide Web, less than one-tenth of one percent of Web sites are indecent. Despite this small proportion, sexually explicit material is easy to search out and even possible to stumble upon. Some publishers seem to intend such accidental exposure. Some pornographic sites have addresses identical, except, for example, for the suffix, to sites that even an elementary school student might try to access for a school paper. The child who uses the wrong suffixes is in for a surprise. In other cases, the inclusion of young children among those gaining access may be unintentional. Nonetheless, Web searches using the names of movies popular with young children turn up sexually explicit sites.

Concerns over children searching out or stumbling onto indecent material have led to the development of screening software. The software works in several ways. It may contain a list of sites containing pornographic material and block access to those sites. There are, however, so many sites and such regular changes in the content of some sites that keeping an accurate list of objectionable sites is at least difficult. The approach's inadequacy is seen in the fact that the searches using children's movie titles have turned up Web links to sexually explicit sites, even with screening software running. The software can also block all Web sites with addresses containing character strings common to pornographic sites, but this approach still allows access to pornographic sites not using such labels.

Software can also screen for sexually suggestive words or phrases, but this approach may block too little or too much. A program might block sites containing the word *breast,* but that would include sites discussing breast cancer. Even for more sexually suggestive terms, few do not also have nonsexual uses. Screening based on possible sexual words might then bar access to important information. On the other hand, the software may not block enough. It can screen only for text, so pictures remain unblocked.

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Communications Decency Act

The United States Congress' concern over potential exposure of children to Internet indecency led to the passage of the Communications Decency Act of 1996 (CDA). The CDA made it a crime to transmit obscene or indecent communications to a recipient known by the sender to be a minor. The CDA also made it a crime to use an interactive computer service to send or display in a manner available to a person under age 18 any communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

Information in this article is used in the Teaching Strategies on pages 37 and 41.

Internet publishers were allowed a defense. They would not be liable if they took "good faith, reasonable, and appropriate actions" to prevent minors from receiving the communication by using any methods possible under current technology or if they required using a verified credit card or adult access code or personal identification number.

The CDA was quickly challenged in court. The President signed the CDA on February 8, 1996, and on that very day, the American Civil Liberties Union (ACLU) went to federal court seeking an injunction against enforcing the CDA, claiming that it was a violation of the First Amendment. A

similar action was filed in another federal court by Joe Shea, the publisher of an electronic newspaper. Both district courts found the CDA to be barred by the First Amendment's protections for free expression. The government then appealed to the United States Supreme Court.

The Supreme Court, in a case titled *Reno v. ACLU,* had little difficulty agreeing, in a relatively short opinion, that the CDA was unconstitutional. The Court expressed concern that the statute was not clear as to what was prohibited. One part addressed material that is "indecent" while another section addressed material that depicts or describes sexual or excretory activities or organs in a way that is "patently offensive as measured by contemporary community standards." The statute's lack of definition for either the term or the phrase, combined with the different language used in the two sections, was seen as making people uncertain what the standards mean. Vagueness in criminal regulation of content is unacceptable because of what is known as the "chilling effect," inhibitions on communicating protected material out of concern that it may be held to be obscene or unprotected for some other reason.

Vagueness was also not the only concern. The Court found that the CDA would lead to the suppression of a great deal of speech that adults have the constitutional right to send to and receive from other adults. That sort of effect is unacceptable, despite the government interest in protecting children from harmful material, if there are less restrictive alternatives. Even the prohibition on sending indecent material to a recipient known to be a minor would have an unacceptable effect. If one member of a chat room was known to be a minor, the conversation of all the adult participants would be limited.

The Court was also troubled by the possibility that the content of the Internet would become limited to that acceptable in the least tolerant community. An Internet publisher is not the same as a print publisher or movie producer, who can choose to limit the areas in which a magazine or movie is distributed or shown. The Internet is available to all, and the possibility of prosecution in a less tolerant town would limit the material available to everyone, even to those in places that are more tolerant. The Court also saw as a problem the possible application of the CDA to parents who might send material to their own children that other members of the community would consider inappropriate.

The Court also said that the defenses the statute provided were inadequate to save the CDA. The technology spoken of simply does not currently exist. While credit cards are a possibility and are required by some Web

Indecency and Other Media

The Internet is not the first medium to raise the issue of sexually indecent material, material that is pornographic but not sufficiently offensive or explicit so as to be obscene. With regard to print material, *Ginsberg v. New York,* 390 U.S. 629 (1968), held that the distribution of a magazine containing provocatively posed nudes to minors could be prosecuted, even though such photos would not be obscene if distributed to adults. It is also clear, however, that attempts to limit access by minors must not limit adult access.

The difficulty with electronic media is that it is put out there for anyone to receive. The broadcaster or Web page publisher does not have the opportunity to determine whether or not each individual receiver is a minor or an adult. The issue of what effect such a broad and undifferentiated audience should have arose for the broadcast media in *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978).

In *Pacifica,* the Supreme Court recognized society's interest in protecting children from exposure to indecent material in broadcast programming. The Court held that it was constitutional for the FCC to restrict the broadcast of indecent material to hours when children would be less likely to be in the audience. The channeling of such material into late-night hours was the subject of several lower court cases, resulting in rules limiting indecent broadcasts to between 10:00 P.M. and 6:00 A.M.

Another important case involved a complete ban on telephone "dial-a-porn" services. The ban was declared unconstitutional in *Sable Communications v. Federal Communications Commission,* 492 U.S. 115 (1989). The Court concluded that a ban on indecent, but not obscene, material could not be justified. The exposure of children was limited by the fact that the services charged a fee. Furthermore, a total ban would unconstitutionally limit adult access.

Much of the discussion of the constitutionality of the Communications Decency Act, prior to the decision being issued by the Supreme Court, was, not surprisingly, phrased in terms of whether the Internet is more like the broadcast media or more like a telephone. It is, of course, similar in some ways to each and differs from each in other ways. It is clear from the earlier cases, and from the Communications Decency Act case itself, that each new medium must be examined to determine whether and how children can be protected, without unconstitutionally limiting adult communication.

publishers, the verification of credit-card numbers is an expense that would prevent marginally profitable or non-commercial publishers from making indecent material available.

Current Attempts at Regulation

Despite this initial setback, Congress is not willing to give up on its efforts to protect children from the pornographic material that exists on the Internet. Senator Dan Coats, who with Senator James Exon introduced the original CDA, introduced a bill this year designed to avoid some of the CDA's difficulties. Representative Michael Oxley introduced a similarly worded bill in the House of Representatives. The bills attempt to eliminate the vagueness concerns and also limit the application of the bill to commercial entities on the Web. Chat rooms, bulletin boards, and ordinary E-mail would be unaffected. Specifically, the bills prohibit commercial distribution of material that is harmful to minors to persons under 17 years old. They define "material that is harmful to minors" as material that

i. taken as a whole and with respect to minors appeals to a prurient [that is, shameful] interest in nudity, sex, or excretion;
ii. depicts, describes, or represents, in a patently offensive way with respect to what is suitable to minors, an actual or simulated sexual act or contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
iii. [in the language of the Oxley bill and what will probably become the language of the Senate bill] taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

That definition is similar to one used in a New York statute banning the distribution of such material to minors, and the Supreme Court, in 1968 in *Ginsberg v. New York,* 390 U.S. 629 (1968), found the statute constitutional; so it might, at least with some minor changes, avoid the vagueness problem. There would remain, however, concern about the community by which these standards are to be judged.

There are other problems as well. While the courts have recognized a compelling governmental interest in protecting children from material that is harmful to them, any such attempt must not significantly or unnecessarily limit adult access. In the CDA case, this came down to whether the defenses provided in the statute would really allow the conveyance of indecent material to or among adults. Chat rooms and list servs presented problems for the CDA, since if one participant was known to be a minor, everyone was limited in the material he or she could communicate. Senator Coats' bill avoids that problem by its limitation to the Web and to commercial publishers. There may, however, still be problems with that limitation. The bill does not define "commercial distribution," and, while some Web publishers may be clearly commercial, others may find their status unclear. Representative Oxley's bill does add some specificity by defining those engaged in the Web business as devoting time or labor "as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that [the activities] be the person's sole or principal business or source of income." Even with this addition, the vagueness issue will certainly be raised.

Even for commercial publishers, the defense granted by the bill may not be adequate to quiet First Amendment concerns. The Web publisher has a defense if it requires the use of a "verified credit card, debit card, adult access code, or adult personal identification number or in accordance with other procedures as the Commission may prescribe." One of the lower courts in the CDA case expressed concern over that statute's credit-card defense. The court argued that not all commercial publishers could absorb the costs of requiring and verifying credit cards. The Oxley bill's inclusion of those not in fact earning a profit among commercial publishers would certainly keep this concern alive.

Even the requirement of adult access codes or identifications may present problems. In the context of cable television regulation, the Supreme Court expressed concern over a requirement that cable viewers who wish to access indecent material request unblocking of the cable signal in writing. The concern was that potential viewers would be chilled by the possibility of exposure of the fact that they had requested such access. Here, too, some adults might be chilled in obtaining access to indecent, but protected, material.

An alternative route to protecting children was offered in a Senate bill introduced by Commerce Committee chair Senator John McCain, joined by the ranking minority member of the committee, Senator Ernest Hollings, and Senators Coats and Murray. Senator McCain's bill requires all schools and libraries receiving federal funds for Internet access to install filtering or blocking software to prevent access by children to material deemed inappropriate for minors. The determination of what is appropriate for minors is to be made locally without federal direction or review. Libraries need not install filtering software on all their computers but must make one such computer available to minors.

It is clear that the federal government may attach conditions to the receipt of federal funds. The conditions must be related to the purpose of the funds, and here both concern making the valuable aspects of the Internet widely available. The conditions must also, however, not themselves be constitutionally barred. The McCain bill raises fewer problems than the Coats and Oxley bills, but it is likely to be

challenged. The community standards to be used are clearly those of the locality. There is little or no chilling effect on publishers. There is also a much smaller effect on adult access than was present in the other bills. Adults might be affected if a library had only one Internet access computer and its required filtering software could not easily be turned off for adult use. This limited effect on adults not being able to use others' equipment to access blocked material might be justified, if the requirement is necessary to, and does, protect children.

The difficulty here is that which was already discussed in considering the CDA. The filtering programs do not filter out enough harmful material. They also may filter out too much valuable material. As the ACLU has pointed out, a teacher could not assign Internet research on female genital mutilation or abortion rights since blocking software typically bars access to sites with information on these topics. An approach that fails to protect minors, while blocking constitutionally protected material from child or adult access, may be of questionable constitutionality.

Can the Internet Be Regulated?

Despite the concerns expressed over the constitutionality of the approaches offered, there may still be ways to protect children from the effects of exposure to indecent material. The Supreme Court, in *Roth v. United States,* 354 U.S. 476 (1957), recognized that obscene material is not protected by the First Amendment. *Miller v. California,* 413 U.S. 15 (1973), provided the Court's definition of obscenity as asking

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

Furthermore, the *Ginsberg* case on which the Coats bill is based recognized that material may be obscene for minors, if distributed to minors, even though it would not be obscene when distributed to adults. That is, when distributed to a minor, the material is judged for its prurience, offensiveness, and value based on what is acceptable for minors. Any limitations on the distribution to minors must not, however, infringe on adult rights to obtain such material.

I have suggested a requirement that all software used to post to or publish on the Internet provide senders or publishers an option to make their material available to all or to adults only. Receiving software would be required to have an option to be set by parents to receive only material indicated as suitable for all. Each Web publisher or other Internet mailer or poster would rate his or her own material as to its suitability for minors, with the page or message containing a signal indicating suitability or nonsuitability for minors. Parents could then use software to screen out material that is rated as unsuitable. Publishers or senders would be liable only if they fail to attach a signal to material that is determined to be obscene as to minors. I also suggest rules regarding links that strongly limit any liability for material found on those pages.

Adults are free to communicate indecent material to each other and may receive such material without providing identification. The only chilling effect is the potential decision to make material unavailable to minors that may not be obscene for minors, but even then, minors whose parents consider them mature enough to view such material would have access.

Even this approach has at least one potential weakness, and it is a weakness that all regulatory attempts will face. Universal access to the Internet makes the community standards against which prurient interest and offensiveness are judged a problem. While the community might be defined as the Internet community, any trial will take place in a real community, and the standards of the least tolerant may govern. This is a potential problem for all Internet regulation. It is, however, possible that the Court will decide that community standards as to what is appropriate for minors is not as different from community to community as it is for adults. If society is to be allowed to provide children any protection from Internet indecency, some such concession will be required. ♦

Reference

Saunders, Kevin W. "Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases." 46 *Drake Law Review* 1: 1–51. (Includes information about the *Ginsberg* case)

Who Am I?

They are the pickpockets of cyberspace. With a computer, your name, and Social Security number, they can buy cars with your credit cards and transfer money out of your accounts. And who do the authorities come looking for when payment is due? With $117 billion in financial transactions estimated to occur on line by the year 2000, it may just be the crime of the millennium. One device cyberpolice have cooked up to protect your privacy: biometric IDs—the computer scans your eye or fingerprint to determine if you are who you say you are.

Adapted from ABA Experience, *Spring 1998, p. 25.*