

Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis

INTRODUCTION

Technological advances in the area of telecommunications have resulted in explosive growth in the telecommunications industry.¹ Along with this growth there has been a corresponding increase in the number of Internet users.² As a result, the Internet has permeated all aspects of society—business, academia, and the home.³ The Internet is thus becoming a mode of communication to which children have increasingly ready access at home, in school, in libraries, and elsewhere.⁴ Pornography is more freely available over the Internet than in other mass communications media.⁵ As a medium to which access by children is increasing everyday, the Internet has become the subject of intense debate over content regulation.⁶ In the United States, calls for regulation are countered by First Amendment freedom of speech issues.⁷ The debate becomes more complex because the Internet has no international boundaries, leading it to being termed a “borderless technology.”⁸ Legal questions have been raised as to the regulation of

¹ See Amy Knoll, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275, 276 (1996).

² See *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel Discussion*, 14 CARDOZO ARTS & ENT. L.J. 343, 344 (1996) (statement of Frank J. Macchiarola) [hereinafter Panel Discussion]. In 1987, only a few million Americans had Internet access. *Id.* In 1997, estimates of Internet users range up to forty million users worldwide. See Rachel Schwartz, *Legal Perspectives*, THE DELANEY REP. No. 3 (Jan. 27, 1997), available in 1997 WL 8655788. More than 200 million Internet users are expected worldwide by 1999. See Tom Landis, *Cyberspace Crusader/Springfield Company's On-Line Service Blocking Offensive Material*, THE STATE J. REG., Feb. 16, 1997, available in 1997 WL 6986441.

³ See Panel Discussion, *supra* note 2, at 344 (statement of Frank J. Macchiarola).

⁴ See Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Providers*, 13 NO. 7 COMPUTER LAW. 1, 1 (1996).

⁵ See *id.*

⁶ See *id.*

⁷ See Panel Discussion, *supra* note 2, at 349 (statement of Mike Godwin), 364 (statement of Nadine Strossen).

⁸ See Knoll, *supra* note 1, at 276.

this global computer network.⁹ Additional problems arise when nations which have vastly different ideas on individual liberties and obscenity share the same communication forum.¹⁰

This Note examines the arguments for and against content regulation of the Internet and compares the approaches taken by the United States and the United Kingdom in their efforts to control borderless technology. Part I defines the Internet and provides an explanation and short historical background of its development. Part II examines arguments for and against content regulation of pornography on the Internet. Part III examines various measures that the United States has taken or could potentially take to regulate obscenity, in general, and content on the Internet, in particular. Part IV provides a survey of law in the United Kingdom relating to obscenity and the Internet. Part V analyzes the legal and practical questions these measures will create. This Note concludes that existing laws in the United States and the United Kingdom as amended are sufficient to control the most worrisome forms of pornography on the Internet, such as child pornography and obscenity. New laws specifically targeted toward the Internet, such as the Communications Decency Act, adopted by the United States, and later found to be unconstitutional, in part, by the U.S. Supreme Court, go too far towards repressing freedom of speech and should not be enacted. Instead, a program of self-regulation, such as that instituted by the United Kingdom, should be adopted by the United States.

I. WHAT IS THE INTERNET?

A. *History/Definition*

The Internet is a collection of computer networks connected by a set of software protocols.¹¹ The protocols allow the networks and the computers attached to them to communicate with other computers attached to the Internet.¹² While the core of the Internet is a set of high capacity networks in the United States, over the years, thousands

⁹ See *id.*; Panel Discussion, *supra* note 2, at 344 (statement of Frank J. Macchiarola).

¹⁰ See GRAHAM J.H. SMITH ET AL., INTERNET LAW AND REGULATION: A SPECIALLY COMMISSIONED REPORT 1 (Graham J.H. Smith ed., 1996). For example, service providers must be concerned about being prosecuted in a jurisdiction with very strict standards, such as Saudi Arabia, for material which would probably not be offensive in its nation of origin. See *id.*

¹¹ See *id.* at 1.

¹² See *id.*

of other networks around the world have linked into the Internet, making it virtually impossible to define the physical boundaries of the Internet.¹³ In short, the Internet is a vast web of telecommunications links that connect computers all over the world.¹⁴

B. *Classification of Medium*

One problem encountered by those attempting to regulate the Internet is how to classify the medium invoked in Internet usage.¹⁵ The Internet can be compared to a broadcast, a telephone call, or a publication. Depending on how the Internet is classified, various existing laws regulating indecency may or may not be applicable.¹⁶

The Internet may be compared to a radio or television broadcast because it is uniquely accessible to children, unlike some other forms of media.¹⁷ The U.S. Supreme Court has relied on this argument to justify Federal Communications Commission (FCC) regulation of indecent speech on broadcast media.¹⁸ The analogy between the Internet and a broadcast, however, could be inappropriate for several reasons.¹⁹ Conventional broadcasts, such as radio and television stations, are confined to a limited number of bands.²⁰ In the United States, for example, the government's rationale for regulating radio and television broadcasts for content is the scarcity of the bandwidths.²¹ For this reason, the government's permission is required to establish a radio or television system.²² In contrast to radio and television broadcasts, the bandwidth on the Internet is unlimited and the government's permission is not required to attach a server.²³ Furthermore, in the case of a radio or television broadcast, the viewer or listener is more passive than an Internet user.²⁴ He or she could be accidentally exposed to

¹³ See *id.*

¹⁴ See Knoll, *supra* note 1, at 277.

¹⁵ See JONATHAN WALLACE & MARK MANGAN, SEX, LAWS, AND CYBERSPACE 182, 194, 226, 228, 236 (1996).

¹⁶ See *id.* at 231. Three major categories which the Internet could fall under—the press, the telephone, and broadcast media, receive different treatment under the law. See *id.*

¹⁷ See WALLACE & MANGAN, *supra* note 15, at 215, 220.

¹⁸ See FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978).

¹⁹ See WALLACE & MANGAN, *supra* note 15, at 175.

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See WALLACE & MANGAN, *supra* note 15, at 220 (quoting Sable Communications v. FCC, 492 U.S. 115, 128 (1989)).

content being broadcast, simply by turning on a television or radio.²⁵ In contrast, the Internet user goes through a much more active process to seek out the material viewed.²⁶

Information and other materials on the Internet are brought into the home by the user.²⁷ The user visits websites and can choose to bring the material into the home by downloading it.²⁸ The Court used this line of reasoning in holding that telephone communications could not be regulated to the same extent as broadcasts.²⁹ In so holding, the Court stated that broadcasts could be regulated because they are uniquely pervasive, intrusive without prior warning, and uniquely accessible to children.³⁰

The Internet can also be compared to a telephone call.³¹ Logging onto the Internet involves a telephone communication.³² Also, the level of control that the Internet user possesses is often more similar to a telephone conversation than a broadcast.³³ In the case of e-mail and chat-rooms, for example, the user controls and contributes to the content of the conversation, much like in a telephone conversation.³⁴

In addition, those who provide content on the Internet could be compared with publishers.³⁵ This may also serve as a better analogy than the broadcast analogy because there is no limit to the amount of material that can be published.³⁶ There is a limit, however, to the amount that can be broadcast due to bandwidth scarcity.³⁷

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.* Downloading is the process of copying a file from the Internet and saving it onto the user's hard drive. See Knoll, *supra* note 1, at 281 n.35.

²⁹ See *Sable Communications*, 492 U.S. at 128.

³⁰ See *id.*

³¹ See Panel Discussion, *supra* note 2, at 345 (statement of Marci A. Hamilton).

³² See SMITH ET AL., *supra* note 10, at 1.

³³ See Wade Rowland, *REGULATING THE NET Saddling the Internet with content controls is not only ill-advised, it might be sheer folly as well*, TORONTO STAR, Jan. 16, 1997, available in 1996 WL 3816257.

³⁴ See *id.* E-mail is an asynchronous and often informal method for sending messages from one person to another. Knoll, *supra* note 1, at 277 n.13. A "chat room" is an area where many people can communicate at the same time by exchanging e-mail messages simultaneously and instantaneously. See *id.* at 277 n.14.

³⁵ See WALLACE & MANGAN, *supra* note 15, at 175.

³⁶ See *id.*; Panel Discussion, *supra* note 2, at 353 (statement of Richard A. Kurnit).

³⁷ See WALLACE & MANGAN, *supra* note 15, at 175; Panel Discussion, *supra* note 2, at 353 (statement of Richard A. Kurnit).

II. BACKGROUND OF THE DEBATE OVER REGULATION OF OBSCENITY ON THE INTERNET

One of the most frequently cited arguments against regulating obscenity on the Internet is that it smacks of censorship and conflicts with free speech and expression.³⁸ Citizens of the United States value freedom of speech as an individual liberty, as evidenced in the First Amendment to the U.S. Constitution.³⁹ Although the United States has been the forerunner in Internet development,⁴⁰ critics of U.S. leadership in this area may argue that U.S. values should not set the standards for a global communications network.⁴¹ Freedom of speech and freedom of expression, however, are not values exclusive to the United States.⁴² In fact, many international organizations espouse the same values.⁴³

Article 19 of the United Nations Universal Declaration of Human Rights⁴⁴ provides that "[e]veryone has the right . . . to seek, receive and impart information and ideas through any media and regardless of frontiers."⁴⁵ Article 20 speaks of the right of peaceful assembly and the right of freedom of association with others.⁴⁶ Other authorities which support this view are the International Covenant on Civil and Political Rights,⁴⁷ the American Convention on Human Rights,⁴⁸ and the European Convention on Human Rights.⁴⁹

Arguments in favor of regulating obscenity and pornography on the Internet focus on protection of individuals and family values.⁵⁰ Many of the arguments revolve around the need to protect children from viewing immoral and potentially harmful content on the Internet.⁵¹ Advocates for content regulation on the Internet argue that obscenity

³⁸ See Panel Discussion, *supra* note 2, at 364 (statement of Nadine Strossen).

³⁹ U.S. CONST. amend. I.

⁴⁰ See Knoll, *supra* note 1, at 279.

⁴¹ See *id.* at 300.

⁴² Gara Lamarche, *International Free Expression Principles in Cyberspace*, 17 WHITTIER L. REV. 279, 279-80, 282 (1995).

⁴³ See *id.*

⁴⁴ See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 19, at 71, U.N. Doc. A/810 (1948).

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

⁴⁸ American Convention on Human Rights, Nov. 22, 1969, art. 13, O.A.S.T.S. No. 36.

⁴⁹ European Convention of Human Rights, Nov. 4, 1950, art. 10, 213 U.N.T.S. 221.

⁵⁰ See Panel Discussion, *supra* note 2, at 354 (statement of Richard A. Kurnit).

⁵¹ See Clapes, *supra* note 4, at 1.

is not a protected form of free speech.⁵² It is true that obscenity in the United States is not protected by the free speech provisions of the First Amendment.⁵³ Possession of obscenity in the privacy of one's home, however, is protected.⁵⁴ The Internet is often accessed in an individual's home, yet can also be accessed in public places, such as the community library.⁵⁵ The question then becomes whether or not the Internet is a public forum.⁵⁶ The danger of regulating the Internet as a public forum, however, is the risk that the most conservative group will then be the determinant factor of the content for all users.⁵⁷ This effect is known as the "Lowest Common Denominator."⁵⁸ Internet libertarians also alert others to the dangers of restricting pornography on the Internet because if carried to an extreme, it could also lead to the censorship of educational or medically necessary information, such as certain chat groups that exchange medical information.⁵⁹

Finally, in the area of child pornography, many who oppose special rules for regulation of the Internet would argue that existing laws are sufficient—so no new laws are needed.⁶⁰ Regulation of child pornography in the United States, however, has historically focused on conduct.⁶¹ In other words, laws are aimed at protecting the individual child, who was victimized in the manufacturing of the pornographic material, from harm.⁶² Due to technological developments, however, it is now possible to manufacture a completely computer-generated image of a child, or to use computers to manipulate pornographic images of adults to appear as children, although no child is actually involved in the pornography.⁶³ Some civil libertarians argue that this type of

⁵² See *id.*

⁵³ See *Roth v. United States*, 354 U.S. 476, 485 (1957).

⁵⁴ See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

⁵⁵ See Geeta Anand, *Library chief, mayor clash on Internet censoring*, BOSTON GLOBE, Mar. 12, 1997, at A28; Julie Mason, *Council studies drawing the line online at library*, HOUSTON CHRON., Feb. 14, 1997, available in 1997 WL 6540295; Clapes, *supra* note 4, at 1.

⁵⁶ See Knoll, *supra* note 1, at 279.

⁵⁷ See WALLACE & MANGAN, *supra* note 15, at 181; *Butler v. Michigan*, 352 U.S. 380, 383 (1957); 141 CONG. REC. S8310-03, S8334 (daily ed. June 14, 1995) (statement of Sen. Feingold).

⁵⁸ 141 CONG. REC. S8310-03, S8334 (daily ed. June 14, 1995) (statement of Sen. Feingold).

⁵⁹ See Panel Discussion, *supra* note 2, at 366 (statement of Nadine Strossen), 379-80 (statement of Richard A. Kurnit); Wendy Kaminer, *Secret Censors*, BOSTON GLOBE, Mar. 13, 1997, at A19; Mason, *supra* note 55.

⁶⁰ See Stephen Dooley, *Obscene Material on the Internet*, 139 SOLICITOR'S J. 868, 868 (1995).

⁶¹ See Panel Discussion, *supra* note 2, at 351 (statement of Mike Godwin).

⁶² See *id.*

⁶³ See SMITH ET AL., *supra* note 10, at 127; Panel Discussion, *supra* note 2, at 351 (statement of Mike Godwin).

image should not be regulated, since no child is harmed in the manufacturing of the image.⁶⁴ The opposing argument is that children as a whole are harmed by the existence of the image. Furthermore, proliferation of this type of material could result in a desensitization of society as a whole to the serious problem of the victimization of children by pornographers.⁶⁵ Some Internet users also argue that the government should not be involved in regulating the Internet.⁶⁶ Because the Internet is supported in part by government funds, and its growth and development are promulgated by the federal government, such arguments have little force.⁶⁷

III. REGULATION OF INTERNET CONTENT IN THE UNITED STATES

A. *Survey of Obscenity Law in the United States*

The First Amendment of the U.S. Constitution guarantees citizens a right to free speech.⁶⁸ In 1957, the U.S. Supreme Court held that obscenity is not protected by the First Amendment in *Roth v. United States*.⁶⁹ In *Roth*, the Court defined obscene material as that which "deals with sex in a manner appealing to the prurient interest."⁷⁰ The Court contrasted obscenity, which is not protected by the First Amendment, with pornography, which is defined as sexually explicit material

⁶⁴ See Panel Discussion, *supra* note 2, at 367-71 (statement of Nadine Strossen).

⁶⁵ See *id.* at 360-61 (statement of Barbara Bennett Woodhouse).

⁶⁶ See Knoll, *supra* note 1, at 279-80. The Declaration of Independence of the Electronic Frontier Foundation, an organization which promotes civil liberties in cyberspace states:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

See *id.* at 275.

⁶⁷ See *id.* at 279-80. In 1994, the National Science Foundation received \$329 million to fund its high performance computer and communications program, a large amount of which is marked for Internet use. See *id.* at 280 n.26.

⁶⁸ U.S. CONST. amend. I.

⁶⁹ See *Roth*, 354 U.S. at 485.

⁷⁰ See *id.* at 487.

and is protected by the First Amendment as long as it does not depict children.⁷¹

In 1973, the Court developed the modern definition of obscenity in *Miller v. California*.⁷² In *Miller*, the Court established a three prong test.⁷³ The first prong is satisfied if the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a "prurient interest" in sex.⁷⁴ The second prong is met if the work depicts or describes sexual conduct in a patently offensive manner.⁷⁵ The third prong is satisfied "if the work, taken as a whole, lacks substantial literary, artistic, political or scientific value."⁷⁶ The *Miller* test has been called a geographically-based test because the first prong requires an application of community standards.⁷⁷ Thus, material not considered obscene under one community's standards may be found obscene under those of another community.⁷⁸

Although obscene material is not protected by the First Amendment, the Court has held that people may possess obscene material in the privacy of their own homes.⁷⁹ Though the Court permits possession of obscene materials in the home, the Court has held that the government can prohibit the transportation, distribution, and receipt of obscene materials.⁸⁰ Congress has also prohibited the interstate transportation of obscene material for sale or distribution.⁸¹ Congress also passed a law that makes it a federal offense to make obscene comments over telephone lines for a commercial purpose.⁸² In addition, Congress has passed a law⁸³ prohibiting the broadcasting of obscene language which provides: "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."⁸⁴

⁷¹ See *id.*; John S. Zanghi, *Community Standards in Cyberspace*, 21 U. DAYTON L. REV. 96, 97, 103, 111 (1995).

⁷² See *Miller*, 413 U.S. at 24.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *Miller*, 413 U.S. at 24; Zanghi, *supra* note 71, at 112.

⁷⁸ See SMITH, *supra* note 10, at 128.

⁷⁹ *Stanley*, 394 U.S. at 568.

⁸⁰ *United States v. Orito*, 413 U.S. 139, 143 (1973).

⁸¹ 18 U.S.C. § 1465 (1994).

⁸² 47 U.S.C. § 223(b) (1990).

⁸³ 18 U.S.C. § 1464.

⁸⁴ *Id.*

The United States has taken a tougher stance on child pornography than that taken against pornography featuring adults.⁸⁵ Any material that portrays minors in a sexually explicit fashion is considered child pornography and is therefore illegal.⁸⁶ Unlike material that is merely obscene, possession of child pornography, even in the privacy of one's home, is forbidden by law.⁸⁷ Since child pornography is illegal in all cases, the *Miller* standard does not apply to child pornography.⁸⁸ Furthermore, it is a crime to knowingly transport, distribute, or receive, in intrastate or foreign commerce, material showing minors engaged in sexually explicit conduct.⁸⁹

The most recent crackdown on child pornography was the passage of the Child Pornography Prevention Act of 1996,⁹⁰ sponsored by Senator Orrin Hatch (R-Utah), which made it illegal to use computer technology to depict what appears to be children in sexual situations.⁹¹ Prior to passage of the law, depictions of children produced by computers without using children were outside the scope of federal law.⁹² The new law is a change from prior child pornography laws which prohibited conduct rather than content.⁹³ By making so-called virtual child pornography illegal, Congress hopes to correct the failure of federal laws to keep pace with the technology of purveyors of child pornography.⁹⁴

The aforementioned laws demonstrate that the U.S. government views the protection of children from pornographic victimization as a compelling interest.⁹⁵ In addition, the government has expressed an interest in protecting children from viewing pornography.⁹⁶ States may

⁸⁵ See *infra* notes 86–93 and accompanying text.

⁸⁶ *New York v. Ferber*, 458 U.S. 747, 756 (1982).

⁸⁷ See *id.* at 758.

⁸⁸ See *id.* at 756.

⁸⁹ 18 U.S.C. § 2252 (1996).

⁹⁰ 18 U.S.C. § 2251.

⁹¹ Jackie Frank, *U.S. Outlaws Computer-Generated Child Pornography*, REUTERS, Oct. 1, 1996, available in LEXIS, News Library, Curnws File.

⁹² See *id.*

⁹³ See Panel Discussion, *supra* note 2, at 351–52 (statement of Mike Godwin).

⁹⁴ See Frank, *supra* note 91. The Judiciary Committee had determined that computer-generated pornography poses many of the same dangers to children as does pornography made from unretouched photographs, as computer-generated pornography can be used to seduce children into sexual activity or to encourage a pedophile to prey upon children. See *id.*

⁹⁵ See *supra* notes 86–91.

⁹⁶ See *Ginsberg v. New York*, 390 U.S. 629, 637 (1967).

bar the distribution to children of materials which are pornographic but not obscene, and therefore legally distributed to adults.⁹⁷

B. *Application of Obscenity Law to the Internet in the United States*

The statutes and case law mentioned thus far demonstrate the course of development of obscenity law in the United States.⁹⁸ Although many of the laws have standards that may be applicable to the Internet, the Internet was either not in existence or not a major factor as those laws were developing. In *United States v. Thomas*, the existing laws that regulated obscenity were first applied to conduct which took place on the Internet.⁹⁹ *Thomas* applied 18 U.S.C. § 1465 to a married couple living in California that operated a computer bulletin board system on the Internet which listed "GIF" files¹⁰⁰ available for downloading and videos available for purchase.¹⁰¹ The files and videos contained sexually explicit materials.¹⁰² A postal inspector in Tennessee purchased a membership and videos from the couple.¹⁰³ The couple was tried and found guilty in Tennessee.¹⁰⁴ The *Miller* test was applied, and the material that the couple was providing was found to be obscene according to the community standards of Tennessee.¹⁰⁵ This demonstrates the problem with applying geographically based laws, such as the three-prong *Miller* test, to the Internet, which has no geographic boundaries.¹⁰⁶ The court's holding could be interpreted as requiring the couple to know the different standards of every community that could possibly download their material. The effect of this interpretation of *Thomas*, if followed, would result in the Internet being governed by the standards of the least tolerant community.¹⁰⁷

⁹⁷ See *id.*

⁹⁸ See *supra* Part I.A and accompanying notes.

⁹⁹ *United States v. Thomas*, 74 F.3d 701, 709 (6th Cir. 1996).

¹⁰⁰ GIF files, or Graphic Interface Format files, are computer files containing images that can be accessed, transferred, and downloaded by individuals using a telephone, modem, and personal computer. See *id.* at 705.

¹⁰¹ See *id.* A list containing brief, sexually explicit descriptions of the GIF files was available to persons calling the bulletin board system without a password. See *id.* Access to the GIF files, however, was limited to members, who were given a password after they paid a membership fee and submitted a signed application form which requested the applicants age, among other information, and was reviewed by the Defendant Robert Thomas. See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 706.

¹⁰⁵ See *Thomas*, 74 F.3d at 710–11.

¹⁰⁶ See WALLACE & MANGAN, *supra* note 15, at 29–31.

¹⁰⁷ See *id.* at 30; *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Butler*, the Supreme Court

C. Attempts to Regulate the Internet in the United States

In February, 1996, the U.S. Congress passed the Communications Decency Act (CDA), specifically targeting obscenity and child pornography on the Internet.¹⁰⁸ The CDA made it a crime to use a telecommunications device to create, or solicit any communication which is obscene, lewd, lascivious, filthy, or indecent with the intent to annoy, abuse, threaten, or harass.¹⁰⁹ The CDA also made it a crime to make any obscene or indecent communication knowing the recipient is under eighteen years old, no matter who initiated the communication.¹¹⁰

Furthermore, the CDA made it a crime to use an interactive computer service to (1) send specific minors a communication that depicts or describes sexual or excretory activities or organs in terms patently offensive under contemporary community standards, regardless of who initiated the communication; or (2) display such communication in a manner available to a person under eighteen years of age; or (3) intentionally permit one's telecommunications facility to be used for the acts described above.¹¹¹ The prohibited acts were made punishable by fines and imprisonment for up to two years.¹¹²

The CDA offered statutory defenses to on-line service providers and others who took action to limit access to obscene or indecent materials.¹¹³ If a person took good-faith, reasonable, and appropriate actions to prevent or restrict access by minors, or restricted such access by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number, that person would not incur any liability under the CDA in the event a prohibited communication to a minor occurred.¹¹⁴ It was uncertain, however, what level of safety was provided for service providers by this safe harbor provision.¹¹⁵

held a Michigan law unconstitutional which made it a crime to sell books that might have a harmful effect on youth. 352 U.S. at 383. The Court stated that it is not constitutionally permissible for a state to reduce its adult population to reading what is fit for children. *See id.* The *Thomas* case, however, seems to have the effect of reducing the national population to reading only what is fit for Tennessee. *See WALLACE & MANGAN, supra* note 15, at 29-31.

¹⁰⁸ 47 U.S.C. §§ 223, 230(b) (1996).

¹⁰⁹ 47 U.S.C. § 223(a)(1).

¹¹⁰ 47 U.S.C. § 223(a)(1)(B)(ii).

¹¹¹ 47 U.S.C. § 223.

¹¹² *See id.*

¹¹³ 47 U.S.C. § 223(e).

¹¹⁴ *See* 47 U.S.C. § 223(e).

¹¹⁵ *See Clapes, supra* note 4, at 6.

Within minutes after the CDA was passed, the American Civil Liberties Union (ACLU) and other civil liberties organizations filed a lawsuit to enjoin its enforcement.¹¹⁶ In June 1996, in *ACLU v. Reno*, the U.S. District Court for the Eastern District of Pennsylvania held certain provisions of the CDA unconstitutional and enjoined the Justice Department from enforcing it.¹¹⁷ The court found that the terms "indecent" and "patently offensive" were theoretically applicable to constitutionally protected transmissions between adults and thus, vague.¹¹⁸ In finding the provisions dealing with indecent and patently offensive language unconstitutionally broad, the three-judge panel found that (1) content providers cannot control what access providers do with their content; (2) access providers cannot control what content providers post to their servers; and (3) there are no technologically or economically effective means of reasonably segregating adults and children on the Internet.¹¹⁹

In reaching its holding, the court applied strict scrutiny, distinguishing regulation of content on the Internet from the regulation of broadcast radio and television, which receives the lowest level of First Amendment scrutiny.¹²⁰ On June 16, 1997, the U.S. Supreme Court affirmed the District Court's decision.¹²¹ It is important to note that the *Reno* decision was based on the language dealing with indecent and patently offensive language, which is otherwise constitutionally protected.¹²² Obscenity and child pornography have no First Amendment protection, and the CDA was not challenged with respect to its language on obscenity or child pornography.¹²³

D. Self-regulation in the United States

In the United States, there have been several efforts aimed at controlling access to content on the Internet.¹²⁴ One such method is

¹¹⁶ Panel Discussion, *supra* note 2, at 365 n.91.

¹¹⁷ *ACLU v. Reno*, 929 F. Supp. 824, 856, 858 (E.D. Pa. 1996).

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.* In *Red Lion Broadcasting v. FCC*, the Supreme Court held that regulation of broadcasts receives the lowest level of First Amendment scrutiny due to the scarcity of frequencies. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 383, 389 (1969). The District Court held that the low standard articulated in *Red Lion* is inapplicable to the Internet. *See Reno*, 929 F. Supp. at 852.

¹²¹ *See Reno v. ACLU*, 117 S. Ct. 2329 (1997).

¹²² *See id.*

¹²³ *See Clapes, supra* note 4, at 1.

¹²⁴ *See infra* notes 125-46.

software packages that are available for installation to restrict children's access to pornographic sites.¹²⁵ Local communities in the United States have taken the initiative to install such programs.¹²⁶ In Boston, Mayor Thomas Menino ordered the Boston Public Library to install a program called CyberPatrol on every computer accessible to children.¹²⁷ Programs such as CyberPatrol have a list of websites that contain objectionable material.¹²⁸ A problem with this type of software is that its effect can be overbroad.¹²⁹ Some non-objectionable sites are inexplicably and inappropriately included on the list.¹³⁰ Libraries in other communities in the United States have held workshops to educate families on the Internet and how to navigate it.¹³¹ In addition, some community libraries have adopted an outright ban on Internet use by children under a certain age.¹³² However, the Internet is viewed as an educational tool for children, and its use by children has been promoted and encouraged by the Clinton Administration; therefore, an outright ban would conflict with the policy of the Clinton Administration.¹³³

Another method implemented by some communities is the use of parental control features included on some software.¹³⁴ Many adult sites register themselves with the blocking software companies.¹³⁵ In addition, most of the software includes a list of target words that trigger the blocking function.¹³⁶ A problem with this type of software is that its reliance on general terms to block explicit material can carry unin-

¹²⁵ See Simon L. Garfinkel, *Casting too wide a 'Net: Mayor's plan to block children's access to porn ultimately sends wrong message*, BOSTON GLOBE, Feb. 20, 1997 at D4.

¹²⁶ See *id.*; Mason, *supra* note 55.

¹²⁷ See Garfinkel, *supra* note 125, at D4.

¹²⁸ See *id.*

¹²⁹ See *id.*; Mason, *supra* note 55.

¹³⁰ See Garfinkel, *supra* note 125, at D4. Included on the list of groups whose Websites were blocked were the University of Newcastle Computer Science Department, an animal rights group, a group called League for Programming Freedom, which opposes software patents, and a Web site devoted to Christian dating. See *id.*

¹³¹ See Mason, *supra* note 55.

¹³² See *id.*

¹³³ See Clapes, *supra* note 4, at 1.

¹³⁴ See Garfinkel, *supra* note 125, at D4.

¹³⁵ See *id.*

¹³⁶ See Michael Sanders, *Keeping kids from 'Net's steamy side*, BOSTON GLOBE, Jan. 6, 1997, at C6, available in 1997 WL 6236608. "The parent can direct the software to shut down the computer or blank out the offending items when these words or phrases appear in incoming data from a WebPage, online chat room, or downloaded file." *Id.* Other programs include CYBERSitter, Intergo, Net Nanny, Newview, Internet in a Box For Kids, and Surfwatch. See *id.*

tended consequences.¹³⁷ For example, software designed to block sexually explicit categories of material may use words such as "sex" or "breast" as target words, which trigger the blocking function.¹³⁸ A consequence of such a program would be that medical and educational information on "breast" cancer and "Middlesex, England" would be blocked.¹³⁹

An alternative to software packages is on-line services that block pornography and other objectionable material for clients.¹⁴⁰ These services differ from software packages in that the provider, not the user, is doing the blocking and they are easier to use and install.¹⁴¹ In addition, these services cannot be removed, like a software package, and cannot be circumvented by clever children.¹⁴²

Rating systems have also been implemented.¹⁴³ The Recreational Software Advisory Council¹⁴⁴ has devised a rating system which is used by at least one on-line service that blocks content.¹⁴⁵ Finally, adult sites themselves have begun to block out objectionable material and limit sites to adult subscribers.¹⁴⁶ A possible effect of the aforementioned self-regulatory measures is that their adoption will limit the risk of further government intervention.¹⁴⁷ If Internet providers do the work themselves, the government is less likely to find a need for further regulation.¹⁴⁸

Thus, historically, obscenity law in the United States has balanced the constitutional right to free speech against the protection of societal mores.¹⁴⁹ Efforts to balance these competing interests have resulted in

¹³⁷ See Mason, *supra* note 55.

¹³⁸ See *id.*

¹³⁹ See *id.* The sexually explicit category is also likely to block discussions of free speech that refer to the censorship of pornography, discussion of sexual harassment cases, and educational sites focusing on sexuality. See Kaminer, *supra* note 59, at A19.

¹⁴⁰ See Landis, *supra* note 2.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ The Recreational Software Advisory Council (RSAC) is an industry based in Alexandria, Virginia. See *id.* The RSAC has developed a system which provides guidance to the content of software and on-line sites. See *id.* The system rates violence, nudity-sex, and language on a scale of 0-4, with most objectionable material receiving a rating of 4. See *id.* The RSAC hopes to head off further government intervention by refining the system. See *id.*

¹⁴⁵ See Landis, *supra* note 2.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *supra* part III.A-B.

laws which are more protective of sexually explicit material that is viewed in the privacy of one's home, by adults, featuring adult subjects.¹⁵⁰ Once material leaves the confines of the home and/or becomes more accessible to children, it is protected to a lesser degree.¹⁵¹ Finally, material featuring children as the subject matter is not protected at all.¹⁵² In dealing with the Internet, the United States has explored various methods of content regulation, including self-regulation, application of existing laws of obscenity to the Internet, and the adoption of the CDA which unsuccessfully attempted to encompass indecency in the category of material subject to government control.¹⁵³

IV. REGULATION OF OBSCENITY AND THE INTERNET IN THE UNITED KINGDOM

A. *Survey of Obscenity Law in the United Kingdom*

In contrast to the local community standards test adopted by the United States to define obscenity, the United Kingdom defines obscenity according to the type of person who may obtain the material.¹⁵⁴ The U.K. Obscene Publications Act¹⁵⁵ provides that if a viewer is likely to be depraved and corrupted by the material, then the material meets the standards for obscenity.¹⁵⁶ As in the United States, children are viewed as being especially at risk of being depraved and corrupted.¹⁵⁷ Thus, in the United Kingdom, most conventional pornography in printed form would not be considered obscene because access to it is controlled.¹⁵⁸ Since children, who are most likely to be depraved or corrupted, are not likely to obtain the material, the print form material often does not meet the standards for obscenity.¹⁵⁹ Pornography in electronic form on the Internet, however, is not subject to the same controls.¹⁶⁰ A child, therefore, is more likely to gain access to electronic pornog-

¹⁵⁰ See *supra* part III.A.

¹⁵¹ See *supra* notes 80–84.

¹⁵² See *supra* notes 86–87, 89–90.

¹⁵³ See *supra* parts III.B–D.

¹⁵⁴ See SMITH ET AL., *supra* note 10, at 126.

¹⁵⁵ Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1 (Eng.).

¹⁵⁶ See *id.*

¹⁵⁷ See SMITH ET AL., *supra* note 10, at 126–27.

¹⁵⁸ See *id.* at 127.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

raphy on the Internet than pornographic materials in print form.¹⁶¹ Thus, under U.K. standards, material not considered obscene in print form is likely to be considered obscene when it is on the Internet because the likely pool of viewers has changed.¹⁶² The Public Order Act of 1994 (1994 Act)¹⁶³ extended the Obscene Publications Act of 1959¹⁶⁴ to cover the transmission of electronically stored data.¹⁶⁵

The 1994 Act also makes service-providers liable for content even in some circumstances where they did not consent to the placement of the material.¹⁶⁶ A service provider could be held liable under the 1994 Act for material placed on the Internet by a third party, as long as the service provider had reasonable cause to suspect that pornography was being transmitted.¹⁶⁷ Thus, to minimize their liability, service providers may be required to monitor material for obscene matter.¹⁶⁸

As in the United States, the United Kingdom has stricter rules for child pornography than for other forms of pornography.¹⁶⁹ The Protection of Children Act of 1978¹⁷⁰ is similar to the Obscene Publications Act, except that the material must only meet a standard of indecency rather than obscenity.¹⁷¹ By the U.K. standards, a photo that is not obscene may still be indecent.¹⁷² Furthermore, a photo that may not even be considered indecent when depicting an adult may be indecent if a child is involved.¹⁷³

In addition, the Criminal Justice Act of 1988¹⁷⁴ makes it a crime to possess an indecent photograph of a child.¹⁷⁵ Both of these Acts were similarly amended in 1994 to cover material which is in electronic form.¹⁷⁶ The Public Order Act of 1994 provides that data stored on

¹⁶¹ See *id.*

¹⁶² See SMITH ET AL., *supra* note 10, at 126-27.

¹⁶³ Criminal Justice and Public Order Act, 1994, ch. 33, § 84 (Eng.).

¹⁶⁴ Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1 (Eng.).

¹⁶⁵ Criminal Justice and Public Order Act, 1994, ch. 33, § 84 (Eng.); SMITH ET AL., *supra* note 10, at 127.

¹⁶⁶ See SMITH ET AL., *supra* note 10, at 127.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See Protection of Children Act, 1978, ch. 37, § 1(1)(a) (Eng.); *Ferber*, 458 U.S. at 756; SMITH ET AL., *supra* note 10, at 127.

¹⁷⁰ Protection of Children Act, 1978, ch. 37, § 1(1)(a) (Eng.).

¹⁷¹ See *id.*; Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1 (Eng.).

¹⁷² See SMITH ET AL., *supra* note 10, at 127.

¹⁷³ See *id.*

¹⁷⁴ Criminal Justice Act, 1988, ch. 33, § 160 (Eng.).

¹⁷⁵ *Id.*

¹⁷⁶ See SMITH ET AL., *supra* note 10, at 128. The Acts were amended by the Public Order Act of 1994. See *id.*

computer disk, or by other electronic means which is capable of conversion into a photograph, is a photograph by definition, and thus, covered by the Act.¹⁷⁷ In addition, an image that can be resolved by computer graphics or otherwise into an image that appears to be a photograph is defined in the Act as a pseudo-photograph, and is also covered by the Act.¹⁷⁸ Thus, the Act would cover both an image that did not actually include a child, but was manipulated so that it appeared to include a child, and an image that was entirely computer-generated to represent a child.¹⁷⁹ This Act has implications similar to those of the U.S. Child Pornography Prevention Act.¹⁸⁰

The Indecent Displays Act of 1981¹⁸¹ (1981 Act) makes it a crime to display indecent matter publicly.¹⁸² Those liable under the 1981 Act are the individual making the display and any individual causing or permitting the display.¹⁸³ If material is visible from any public place, it is considered to be under display.¹⁸⁴ Thus, material viewed over an Internet terminal located in a public place would be covered.¹⁸⁵ Any material that can only be viewed for a fee, however, is not considered to be on public display.¹⁸⁶ Thus, an adult bulletin board could escape liability under this Act by requiring a membership fee.¹⁸⁷

Finally, the Telecommunications Act of 1984¹⁸⁸ makes it a crime to send a message by telephone from the United Kingdom which is grossly offensive or of an indecent, obscene, or menacing character.¹⁸⁹ Since the Internet invokes the transmission of data over telephone lines, the Telecommunications Act applies to the Internet.¹⁹⁰ The Act applies to the originator of the message rather than the service provider.¹⁹¹

Thus, the United Kingdom, like the United States, has amended existing laws to keep pace with technology.¹⁹² The United Kingdom also

¹⁷⁷ Criminal Justice and Public Order Act, 1994, ch. 33, § 84 (Eng.).

¹⁷⁸ *See id.*

¹⁷⁹ *See* SMITH ET AL., *supra* note 10, at 127.

¹⁸⁰ *See* 18 U.S.C. § 2251.

¹⁸¹ Indecent Displays Act, 1981, ch. 42, § 1 (Eng.).

¹⁸² *See id.*

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See* SMITH ET AL., *supra* note 10, at 128.

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ Telecommunications Act, 1984, ch. 12, § 43 (Eng.).

¹⁸⁹ *See id.*

¹⁹⁰ *See* SMITH ET AL., *supra* note 10, at 128.

¹⁹¹ *See id.*

¹⁹² *See* SMITH ET AL., *supra* note 10, at 127-28.

shares the U.S. interest in protecting children from harmful material and complete intolerance for child pornography.¹⁹³ The United Kingdom differs from the United States, however, in classifying material as pornography.¹⁹⁴ The United Kingdom classifies material as pornography according to the individual who views the material.¹⁹⁵ In contrast, the United States bases the classification on the geographic location in which the material is viewed.¹⁹⁶

B. *Attempts by the United Kingdom to Regulate Content for Indecency on the Internet*

In August 1996, Scotland Yard¹⁹⁷ mounted a massive monitoring operation in which it sent letters to Internet companies specifying that certain newsgroups that contained offensive articles, information, and pictures be removed from the worldwide system.¹⁹⁸ The United Kingdom has also inaugurated a system of self-regulation where an independent body called the Internet Watch Foundation¹⁹⁹ was made responsible for evaluating material circulated on the Internet and handling complaints about illegal practices.²⁰⁰ Service providers will also be required to prohibit illicit messages and restrict users' ability to communicate anonymously.²⁰¹ In addition, the British Parliament considered a proposal that would subject the Internet to existing defamation law, which would apply to the Internet the same advertising standards

¹⁹³ See sources cited *supra* notes 170, 175.

¹⁹⁴ See SMITH ET AL., *supra* note 10, at 126; Dooley, *supra* note 60, at 868.

¹⁹⁵ See Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1 (Eng.).

¹⁹⁶ See *Miller*, 413 U.S. at 24.

¹⁹⁷ Scotland Yard is another name for the London Police, so called because it is headquartered in Scotland Yard. THE NEW ENCYCLOPEDIA BRITANNICA vol. 10, p. 563 (15th ed. 1994). Scotland Yard supervises all of Greater London with the exception of the city of London. See *id.* It is responsible for maintaining links between British law enforcement agencies and Interpol. See *id.*

¹⁹⁸ See Nick Fielding, *Internet Porn Pedlars (sic) Caught in Police Web; 'Probe Those Sick Videos,'* MAIL ON SUNDAY, Aug. 25, 1996, at 13, available in LEXIS, News Library, Curnws File.

¹⁹⁹ The Internet Watch Foundation is an industry initiative formed to sweep child pornography off the Internet. See Kimberley Strassel, *Watch Group in U.K. Hails Internet Self-Regulation*, WALL ST. J. EUR., Jan. 9, 1997, available in 1997 WL-WSJE 3804393. The project was created in the course of a series of amicable meetings between industry bodies, police, and government officials. See *id.* The service offers a hotline, which users call to report allegations of child pornography. See *id.* The hotlines investigate the reports and if necessary, contact the service provider that maintains the page, the creator of the page, and/or the police. See *id.*

²⁰⁰ See *Telecommunications: Ministers Seek to Stomp Out Child Porn on the Internet*, EUR. REP., Oct. 2, 1996, available in 1996 WL 11073333.

²⁰¹ See *id.*

regarding obscenity that are now applied to television.²⁰² Family-oriented individuals in the United Kingdom share many of the same concerns about protecting their children from pornography on the Internet as those in the United States.²⁰³

Another development in the United Kingdom was a move toward classifying Internet sites as broadcasts.²⁰⁴ In the United Kingdom, the Independent Television Commission (ITC) serves as a watchdog organization with licensing power over all commercial television broadcasts.²⁰⁵ The ITC is empowered under the Broadcast Act of 1990.²⁰⁶ The Broadcast Act also empowers the ITC to impose financial penalties and revoke licenses.²⁰⁷ In one incident, the ITC asked a company that maintains a twenty-four hour soft-porn web site to submit more information about its Internet site to assess whether it might need a broadcast license.²⁰⁸ The ITC's concern was that adult material transmitted by the company was available twenty-four hours a day, where the ITC restricts conventional broadcasting stations to showing soft-porn material between 11 p.m. and 5 a.m.²⁰⁹ If companies with web sites comply with the ITC's request, it could establish a precedent that the ITC does have jurisdiction over the Internet.²¹⁰

The European Union (EU), of which Great Britain is a Member State, has also taken actions regarding Internet regulation.²¹¹ In November 1996, the Telecommunications Council of the EU stated that Member States should promote self-regulation and rating systems to control illegal and harmful material on the Internet.²¹² Measures considered included codes of conduct, self-regulatory bodies, and public hotlines.²¹³

²⁰² See Carter Alexander, *Europe Slowly Warming to the Internet*, UPSIDE, Nov. 1996, at 115, available in LEXIS, News Library, Curnws File.

²⁰³ See *id.*

²⁰⁴ See Karen Demsey, *UK: Media-Web Site Queries ITC's Power*, MARKETING, Oct. 24, 1996, available in 1996 WL 9423890.

²⁰⁵ See *id.* The ITC believes it has a stake in Internet regulation because given developing technology, the Internet will someday appear on television screens. See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See Demsey, *supra* note 204.

²¹⁰ See *id.*

²¹¹ See *Telecoms Council Calls for Self-regulation of Internet*, REUTERS EUR. COMMUNITY REP., Nov. 28, 1996, available in LEXIS, Intlaw Library, ECnews File.

²¹² See *id.*

²¹³ See *id.* The call for self-regulation was much more restrained than an original commission Green Paper discussion which spoke of encryption access to payers only, or installing a V-chip to

Another option discussed was an international convention, which the Culture Commission believes is the only realistic way to regulate because Internet servers could just move to a non-EU Member State if European regulation becomes too strict.²¹⁴ The Commission also considered the possibility of extending the scope of existing rules for printed matters, television, and radio to cover the Internet, focusing on protection of integrity and protection of minors.²¹⁵ Thus, while the United Kingdom has considered some heightened government involvement in regulation of the Internet, it has not taken any definitive steps comparable to the CDA in the United States.²¹⁶ Instead, the United Kingdom, independently and in conjunction with the EU, has adopted a system of self-regulation which will minimize government involvement in regulation of the Internet.²¹⁷

V. ANALYSIS

Governments, Internet users, and service providers worldwide must develop a system to control content on the Internet that will strike a balance between freedom of speech values and protection of family values, morals, and children.²¹⁸ Proponents of a censorship-free Internet advocate abandoning case law dating back more than half a century.²¹⁹ Ironically, the United States, which often criticizes other countries for restricting free speech, is at the forefront of content regulation.²²⁰ The United States was the first nation to adopt regulation

screen for pornographic content. See Janet McEvoy, *Commission Green Paper to Broach Porn on the Internet*, REUTERS EUR. COMMUNITY REP., Sept. 24, 1996, available in LEXIS, Intlaw Library, ECnews File. EU Culture Commissioner Marcelino Oreja also suggested a professional code of ethics. See *id.* Mr. Oreja's suggestion is an acknowledgment that European regulation of the Internet may run into problems with freedom of information grounds. See *id.* However, he also stated that such a code should help to balance wide differences among EU member countries, which have widely different laws on what can be considered pornography and eroticism. See *id.*

²¹⁴ See McEvoy, *supra* note 213.

²¹⁵ See *Gradin Speech to EP on Fighting Sexual Abuse of Children*, REUTERS EUR. COMMUNITY REP., Sept. 24, 1996, available in LEXIS, Intlaw Library, ECnews File. On November 29, 1996, the Council of the EU adopted a Joint Action to consider a project aiming to start measures to prevent the use of telecommunications facilities, including the Internet system, for the purpose of trade in human beings and sexual exploitation of children. Council Joint Action 96/700/JHA, arts. 1, 6, 1919 O.J. (L 322) 1.

²¹⁶ See *supra* notes 208, 212, 214.

²¹⁷ See *supra* notes 208, 220-22.

²¹⁸ See generally Panel Discussion, *supra* note 2 (presenting views of child advocates and civil libertarians).

²¹⁹ See Knoll, *supra* note 1, at 279-80.

²²⁰ See *id.* at 279.

specifically targeted towards the Internet.²²¹ In addition, the United States has tried to take regulation a step further; by attempting to regulate indecency as well as obscenity, the United States has tried to make content which is legal in print form illegal on the Internet.²²² Government regulation has some validity, such as in imposing existing standards of obscenity and child pornography to the Internet. The CDA went too far towards repressing freedom of speech, however, because it extended government regulation into the traditionally protected area of indecency.²²³

In contrast, the United Kingdom has merely attempted to extend existing obscenity laws to the Internet.²²⁴ Because U.K. obscenity laws define obscenity according to the type of individual who has access to it, the application of existing obscenity laws to the Internet may have a similar effect as that in the United States.²²⁵ The United States attempted to punish not only obscenity, which is not protected by the First Amendment, but also indecency, which is protected in other mediums.²²⁶ However, because of the way each respective country defines obscenity, it is likely that the United Kingdom will have more success applying its laws to content that may be harmful to children.²²⁷ Since the U.K. definition of obscenity, unlike that of the United States, focuses on the individual who views the material rather than the community in which it is viewed, most sexually explicit material viewed by children would be classified as obscene.²²⁸ In the United States, however, children in a community with more tolerant views towards pornography may still be at risk of exposure to pornographic content.²²⁹ On the other hand, the U.K. approach in focusing on the viewer seems to provide a more workable standard.²³⁰ Simply by restricting a child's access to the material, the material will no longer be considered obscene.²³¹ Thus, it appears that in the United Kingdom, a content provider who takes appropriate steps toward preventing children from

²²¹ 47 U.S.C. § 223.

²²² See Knoll, *supra* note 1, at 280.

²²³ 47 U.S.C. § 223; Knoll, *supra* note 1, at 280.

²²⁴ See SMITH ET AL., *supra* note 10, at 126–28.

²²⁵ See *id.* at 126–27.

²²⁶ See Knoll, *supra* note 1, at 280.

²²⁷ See Miller, 413 U.S. at 24; SMITH ET AL., *supra* note 10, at 126–27.

²²⁸ See SMITH ET AL., *supra* note 10, at 126–27.

²²⁹ See Miller, 413 U.S. at 24.

²³⁰ See SMITH ET AL., *supra* note 10, at 126–27.

²³¹ See *id.*

accessing explicit material will be protected from the laws.²³² By contrast, in the United States, a content provider who takes sufficient measures to restrict children's access may still be subject to criminal prosecution if the community in which the material is viewed finds the material obscene.²³³ The United Kingdom offers a bright-line, less subjective test which has the advantage of predictability for the content provider.²³⁴ Although the U.K. test is not entirely objective, it is easier to define what is inappropriate for a child's eyes than to know the standards of every single community whose members may have access to material placed on an electronic bulletin board.

Existing laws will protect children from exploitation in the manufacture of child pornography.²³⁵ In addition, newly adopted laws that make pseudo-photos illegal are also important because children are still harmed by such forms of pornography.²³⁶ Thus, existing laws that regulate material which features children or child-like images as the subject matter further a legitimate government interest in protecting children from harm.²³⁷ Protecting children from merely viewing material that is not obscene by adult standards (and thus afforded constitutional protection), however, is not as compelling an interest. Regulating material that is merely indecent would have the effect of imposing on adults a standard designed for children.²³⁸ Furthermore, parents must take some responsibility for controlling their children's access to the Internet.²³⁹ There is an important purpose for some material, such as medical and educational material, self-help groups, and other types of speech that may be deemed indecent by adult standards to be on the Internet.²⁴⁰ Even adult pornography is constitutionally protected, and therefore should not be banned from the Internet.²⁴¹

If there is enough demand for V-chips, censoring software programs, and content-screening on-line service providers, there will surely be a

²³² See *id.*

²³³ See *Miller*, 413 U.S. at 24.

²³⁴ See SMITH ET AL., *supra* note 10, at 126-27.

²³⁵ See *Ferber*, 458 U.S. at 756; 18 U.S.C. § 2252; Protection of Children Act, 1978, ch. 37, § 1 (1)(a) (Eng.); Criminal Justice Act, 1988, ch. 33, § 160 (Eng.).

²³⁶ See Frank, *supra* note 91.

²³⁷ See *id.*

²³⁸ 141 CONG. REC. S8310-03, S8334 (daily ed. June 14, 1995) (statement of Sen. Feingold); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

²³⁹ See 141 CONG. REC. S8310-03, S8334 (daily ed. June 14, 1995) (statement of Sen. Feingold); *Butler*, 352 U.S. at 383.

²⁴⁰ See *e.g.*, Panel Discussion, *supra* note 2, at 379-80 (statement of Richard A. Kurnit).

²⁴¹ See *id.* at 350 (statement of Mike Godwin).

supply.²⁴² These methods can be used to protect children from viewing what may be harmful materials without infringing on others' constitutionally protected freedom.²⁴³ In addition, this type of regulation solves the problem that arises when countries with different standards of obscenity share the same global communication forum.²⁴⁴ Instead of banning all content which is obscene by the standards of the least tolerant community, each country can tailor the accessible material to its own tolerance level.²⁴⁵

The telecommunications industries in both the United States and the United Kingdom have seen a need to get involved in some sort of self-regulation in order to ward off further government intervention.²⁴⁶ Many providers seem to be acting responsibly.²⁴⁷ Perhaps due to their responsible conduct, in both countries, service providers have seen their risk of liability reduced.²⁴⁸ In the United States, the CDA provides a safe-harbor provision for service providers.²⁴⁹ In addition, *Cubby v. CompuServe* held that service providers are not liable for content.²⁵⁰ Similarly, in the United Kingdom, the Telecommunications Act of 1984 applies to the content provider rather than the service provider.²⁵¹ Despite this apparent move towards relieving service providers of responsibility, both countries have considered classifying the Internet as a broadcast—a move which could again put service providers at risk.²⁵²

Service providers should adopt self-regulating groups that demonstrate a commitment to help the government weed out the illegal material so that legal material is protected.²⁵³ These measures, if properly implemented, can successfully protect children from adult content while still protecting adults' rights to express and to view such content.²⁵⁴ Thus, the U.S. Supreme Court acted appropriately in abandoning those provisions of the CDA that dealt with constitutionally-pro-

²⁴² See *id.*

²⁴³ See *id.* at 349.

²⁴⁴ See SMITH ET AL., *supra* note 10, at 128.

²⁴⁵ See Panel Discussion, *supra* note 2, at 349 (statement of Mike Godwin).

²⁴⁶ See Strassel, *supra* note 199; Landis, *supra* note 2.

²⁴⁷ See Strassel, *supra* note 199; Landis, *supra* note 2.

²⁴⁸ See *infra* notes 249–51.

²⁴⁹ 47 U.S.C. § 223(e).

²⁵⁰ See *Cubby v. CompuServe*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

²⁵¹ Telecommunications Act, 1984, ch. 12, § 43 (Eng.).

²⁵² See Demsey, *supra* note 204.

²⁵³ See Strassel, *supra* note 199.

²⁵⁴ See *id.*

tected indecent language. The United States should adopt a program similar to that which has been implemented in the United Kingdom.²⁵⁵

CONCLUSION

Governments, Internet users, and service providers must develop a system which protects children and others from harmful content on the Internet without intruding on the fundamental rights of freedom of speech and expression. Existing laws in both the United States and the United Kingdom are already applicable to the most harmful content on the Internet, such as obscenity and child pornography. New laws targeted specifically towards the Internet, such as the United States' Communications Decency Act, are unnecessary and infringe on freedom of speech rights which are protected in other mediums. Mechanisms are available so that individuals who find certain constitutionally protected speech and expressions to be offensive can screen out the objectionable material. The government should continue to regulate content on the Internet only to the extent it is regulated in other media. The United States should therefore institute a system of self-regulation, such as that adopted in the United Kingdom.

Dawn A. Edick

²⁵⁵ *See id.*