Free Speech

Professor Grimmelmann

Internet Law

Fall 2007

Class 7

Where we are

- Introduction
- Part I: Public Law
  - Jurisdiction
  - Free Speech
  - Intermediaries
  - Privacy
- Part II: Private Law

In today's class

- The Communications Decency Act (CDA)
  - History
  - Negotiation exercise
  - *Reno v. ACLU*
- The Child Online Protection Act (COPA)
  - History
  - *Ashcroft v. ACLU*

The Communications Decency Act of 1996

1994–95: Rimm cyberporn study

ARTICLES

Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories

MARTY RIMM*

I. OVERVIEW

A. PORNOGRAPHY[1] ON COMPUTER NETWORKS

As Americans become increasingly computer literate, they are discover-

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In an effort to present an informative and balanced report, members of the Carnegie Mellon research team (the principal investigator, his faculty advisors, and research assistants) have consulted with organizations and experts who hold a wide variety of viewpoints about pornography, although the overwhelming majority of contacts have been with the pornography industry itself. While this article discusses a number of different viewpoints on significant legal and policy issues related to the regulation of pornographic material, the research team does not advocate or endorse any particular viewpoint or course of action concerning pornography on the Information Superhighway.

1. "Pornography" stems from the Greek words, porno, meaning prostitutes, and graphos, meaning writing. Over the course of history, it has assumed many definitions and meanings. *See generally* LYNN HUNT, THE INVENTION OF PORNOGRAPHY (1993). Many historians have commented on the difficulty of defining pornography. *See, e.g.*, WALTER KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE (1987). The Carnegie Mellon study adopts the "definition" utilized in current everyday practice by computer pornographers. Accordingly, "pornography" is defined here to include the depiction of actual sexual contact

ing an unusual and exploding repertoire of pornographic imagery on computer networks.[2] Every time consumers log on, their transactions assist

[hereinafter "hard-core"] and depiction of mere nudity or lascivious exhibition [hereinafter "soft-core"]. The courts and numerous statutes concur with the distinction presented here between "hard-core" and "soft-core." *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973); Ballew v. Georgia, 435 U.S. 223, 228 (1978); ARK. CODE ANN. § 5-68-302(2) (Michie 1987); LA. REV. STAT. ANN. § 106 (West 1994). By this definition, not all pornography meets the legal test for obscenity, nor should all depictions of sexual activity be construed as pornographic. Accordingly, data was collected for this article only from bulletin board systems (BBS) which clearly marketed their image portfolios as "adult" rather than "artistic." Any BBS or World Wide Web site which made even a modest attempt to promote itself as "artistic" or "informational" was excluded.

"Pornographer" is defined to include BBS operators who do any of the following: commission photographers to provide new pornographic images; scan pornographic images from magazines; pirate pornographic images from other boards; or purchase adult CD-ROMs for distribution via modem to their customers. "Adult" is the term used by most BBS system operators who market pornography.

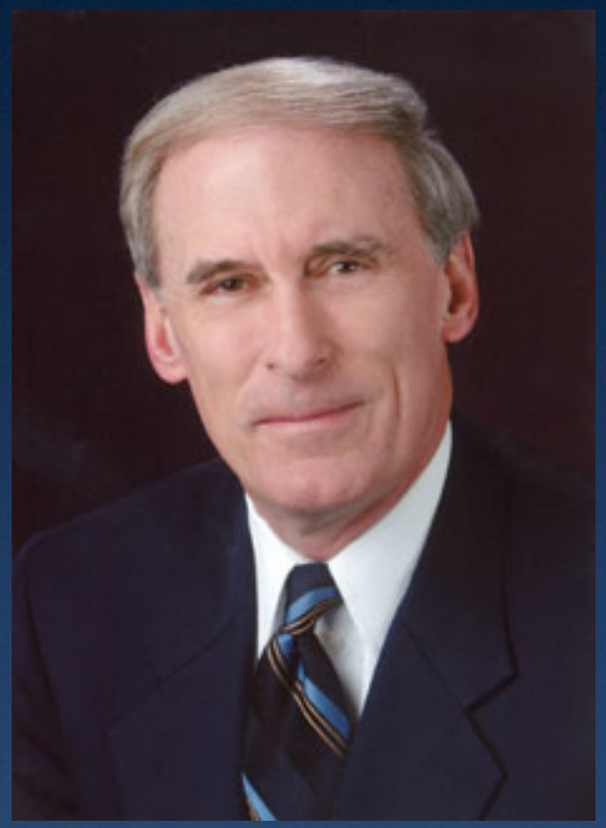
2. The question of whether a sexually explicit image enjoys First Amendment protection is the subject of much controversy and reflects a fundamental tension in contemporary constitutional jurisprudence. While this article discusses only the content and consumption patterns of sexual imagery currently available on the Internet and "adult" BBS, the law enforcement and constitutional implications are obvious. Thus, it is necessary to briefly discuss the constitutional status of sexually explicit images.

Obscene material does not enjoy First Amendment protection. *See* Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973). In *Miller*, the Supreme Court established the current tripartite definition for obscenity. In order to be obscene, and therefore outside the protection of the First Amendment, an image must (1) appeal to a prurient (i.e., unhealthy or shameful) interest in sexual activity, (2) depict real or simulated sexual conduct in a manner that, according to an average community member, offends contemporary community standards, and (3) according to a reasonable person, lack serious literary, artistic, political, or scientific value. *Id.* at 25-27; *see also* Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (rejecting "ordinary member of given community" test, in favor of "reasonable person" standard for purposes of determining whether work at issue lacks literary, artistic, political, or scientific value); Pinkus v. United States, 436 U.S. 293, 298-301 (1978) (excluding children from "community" for purpose of determining obscenity, but allowing inclusion of "sensitive persons" in the "community"); Ginzburg v. United States, 383 U.S. 463, 471-74 (1966) (allowing courts to examine circumstances of dissemination to determine existence of literary, artistic, political, or scientific value); *see also* United States v. Orito, 413 U.S. 139, 143 (1973) (holding that constitutionally protected zone of privacy for obscenity does not extend beyond the home).

To complicate matters, all adult pornographic material is initially presumed to be nonobscene. *Cf.* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62 (1989) (requiring judicial determination of obscenity before taking publication out of circulation); Marcus v. Search Warrant, 367 U.S. 717, 730-31 (1961) (requiring procedures for seizure of obscenity which give police adequate guidance regarding the definition of obscenity to ensure no infringement on dissemination of constitutionally protected speech). Accordingly, law enforcers and prosecutors attempting to pursue an obscenity investigation or prosecution face constitutionally mandated procedural obstacles not present in other criminal matters. *See* New York v. P.J. Videos, Inc., 475 U.S. 868 (1986). For instance, the so-called "plain view" exception to the Fourth Amendment warrant requirement, whereby contraband plainly visible to a law enforcement officer may be seized, does not apply to allegedly obscene material because, prior to a judicial determination, nothing is obscene and therefore, *a fortiori*, nothing be can be considered contraband. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979) (requiring that search warrants contain specific description of allegedly obscene items to be seized).

1995: Media frenzy

1995: Legislative pressure



Dan Coats (R-IN)

James Exon (D-NE)

Charles Grassley (R-IA)

Let's Make a Deal

The CDA as passed: Prohibitions

- § 223(a) criminalizes transmission of of "obscene or indecent" material to minors
- § 223(d) criminalizes transmission and display of "patently offensive" material that depicts "sexual or excretory activities or organs" to minors

The CDA as passed: Defenses

- "Knowingly" element part of § 223(a),(d)
- § 223(e)(5)(a) provides affirmative defense if you took "good faith, reasonable, effective, and appropriate actions" to prevent access by minors
- § 223(e)(5)(b) provides affirmative defense if you required a credit card or adult identification for access

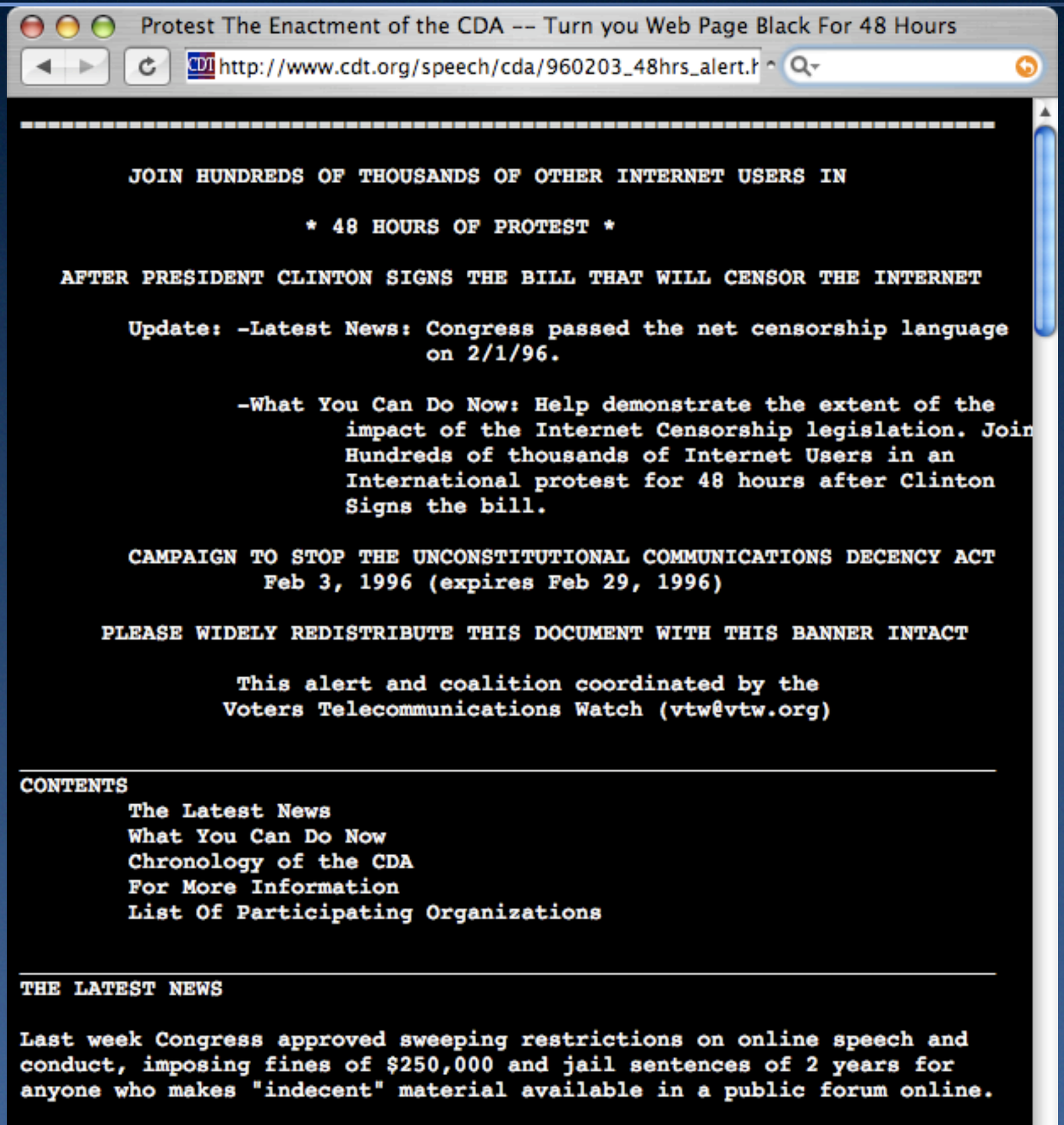
The CDA as passed: Intermediaries

- § 223 includes a defense from prosecution for those who *only* provide network access
- § 230 says that providers of "interactive computer services" won't be treated as the speakers of information provided by others
  - Absolute civil immunity for good-faith self-censorship of objectionable material
  - IP is specifically excepted

Cui bono?

- Family values coalition: an anti-porn law, plus immunity for self-regulation
- ISPs and web hosts: freedom to self-regulate, plus won't be deemed to be the "speakers" of porn sent through them
- Content industries: IP not part of § 230
- Civil libertarians: § 230, plus they can still sue claiming unconstitutionality

The Internet Rallies



ACLU v. Reno

- Three-judge District Court, with direct appeal of right to the Supreme Court (!)
- The court rules 3-0 to enjoin the statute, but Judge Dalzell's opinion gets the press

Judge Dalzell's ode to the Internet

"The Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion. True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing:

> What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.

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, 929 F. Supp. 824 (E.D. Pa. 1996) (Dalzell J.)

Reno v. ACLU: Threshold question

- Is there a medium-specific reason justifying closer restriction of the Internet?
  - Is there a history of Internet regulation?
    - Is it "invasive," like radio and TV?
    - Is it scarce (thus justifying rationing)?
- No, no, and no!

Reno v. ACLU: Vagueness

- The *Miller* definition of obscenity (which can be banned outright):
  - (1) appeals to the prurient interest,
  - (2) offensively depicts sexual or excretory conduct or functions, and
  - (3) lacks serious literary, artistic, political, or scientific value
- The CDA has (2), but not (1) or (3)

Reno v. ACLU: Overbreadth

- Unconstitutional if an equally effective alternative restricts less protected speech
- The CDA restricts:
  - "general, undefined terms"
  - "not limited to commercial speech"
  - "community most likely to be offended"
- The government hasn't shown narrow tailoring

Reno v. ACLU: Knowledge defense

- The government argues that the "knowingly" means that the CDA doesn't restrict adult-to-adult speech
- First problem: deemed knowledge
- Second problem: heckler' veto

Reno v. ACLU: Kid-blocking defenses

- In "tagging," servers indicate which of their stuff is kid-safe and which isn't
  - But that's not an "effective" system because the software to interpret tags doesn't exist and isn't in universal use
- As for the credit-card safe harbor:
  - That's not a reasonable option for non-commercial speakers

O'Connor's concurrence in *Reno*

- Notice her interesting narrowing construction
- Describes the CDA as a form of "zoning"
- Anti-porn zoning is okay in the physical world because it's easy to keep kids out
- But in cyberspace, no one knows you're a kid

Peter Steiner, *The New Yorker* (1993)

"On the Internet, nobody knows you're a dog."

The Child Online Protection Act (1998)

The Child Online Protection Act

- 1998: passed to the *Reno* blueprint
- 1999: E.D. Pa. preliminary injunction
  - 2000: 3rd Circuit affirms
    - 2002: Supreme Court vacates
  - 2003: 3rd Circuit affirms again
    - 2004: Supreme Court affirms
- 2007: E.D. Pa. grants permanent injunction

Ashcroft v. ACLU

- How does COPA respond to *Reno*?
  - Uses all three *Miller* prongs
  - Restricted to commercial posters
  - *Ashcroft I*: reliance on "community standards" isn't overbroad
- That's all three of the major problems with the CDA. Why isn't that enough?

Ashcroft v. ACLU: filtering

- COPA is uncontitutional because filtering software is a less restrictive alternative!
- We'll talk about the virtues and vices of filters next time
- But how steamed must the family values coalition be at this result?
  - Eleven years and three Supreme Court cases to go nowhere

Online speech law in five bullets

- Online speech laws are generally tested in the same way as offline speech laws
  - Obscenity is unprotected (*Miller* test)
  - Always check for vagueness
  - Overbreadth: there must not be equally effective but less restrictive alternatives
- Filters are an "effective" alternative, but . . . [to be continued]

Next time

Filters and free speech