Cybercontent Regulation: From Proximate-Community Standards to Virtual-Community Standards?

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Abstract

This paper examines recent U.S. efforts to regulate cybercontent considered to be pornographic. The stretching beyond the breaking point of the concept of proximity-based community underlying recent U.S. regulation of content deemed to be pornographic is demonstrated. The extraterritorial extension of jurisdiction implicit in the initiative and its likely effect on the creation of multilateral or plurilateral regulatory regimes is discussed. An alternative approach based on virtual communities, that would be in harmony with the trends of economic liberalization and is presaged by policy developments related to screening technologies such as the Platform for Internet Content Selection (PICS) and V-chips, is outlined.

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1.0 Introduction

Traditional telecommunication regulation did not deal with content, except in very marginal instances. Common carrier doctrine applicable to transportation clearly includes the separation of content from conduit (Clippinger, 1980). Generally, communication common carriers have no editorial control of what they carry (*National Association of Broadcasters v. FCC*, 740 F. 2d 1190 (D.C. Cir. 1984), p. 1203). From this, some draw the corollary that telecommunication common carriers are not liable for the content of messages carried by them (Kapor & Weitzner, 1993). Because of the diffuse nature of communication via telecommunication networks, particularly the multitude of communicators, medium-specific regulation of content did not develop, with the possible exception of federal and state level criminalization of the use of the telephone for obscene or harassing calls and wire fraud. There was almost nothing in common between the regulation of obscene telephone calls and the regulation of pornography in point-to-multipoint media. With the emergence of audiotex and chatline services that exemplified the blurring of the distinction between point-to-point and point-to-multipoint communication, government regulation of pornography was extended to interactive media, eroding the principle that common carriers have no control over or liability for content (Samarajiva & Mukherjee, 1991). In addition, *Chesapeake & Potomac Telephone Co. v. United States* (830 F. Supp. 909 (E.D. Va. 1993) and a series of similarly decided cases that struck down line-of-business restrictions on information provision by common carriers on First Amendment grounds eroded the principle further.

The rapid rise in the popularity of cybercommunication has heightened interest in cybercontent regulation. Cybercommunication differs from traditional telecommunication in five ways. First, many of its capabilities allow for one-to-many communication. Even electronic mail, the classic one-to-one functionality within

cybercommunication can seamlessly convert to a one-to-many form. Second, there are no significant technical barriers to message production and distribution in cybercommunication. The barrier is at the level of gaining attention to one's message. Third, there are few chokepoints in the distribution mechanism, and even the ones that exist are not perfect (Ang & Nadarajan, 1995). Fourth, the regionalization of cybernetworks is much less than in telecommunication networks. On the Internet, a homepage or user in Thailand is as close as, or as far as, a homepage or user in one's office or neighborhood. Fifth, cybercontent is relatively less evanescent than its telephonic equivalent, allowing for the storage and reproduction of messages and routine logging of usage.

By themselves, technical barriers do not preclude regulation. All efforts by governments to regulate the behavior of persons and corporations are probabilistic in nature. The enforcement of laws against the most heinous crimes such as murder and rape is probabilistic. Indeed, the primary effect of criminal law may not be in enforcement, but in prevention. Knowing that the law exists and that some transgressors have been apprehended and punished, potential transgressors are likely to avoid the proscribed behaviors. In the same way, laws regulating distribution of or access to cybercontent need not be perfectly enforceable to significantly affect behavior. In addition, regulation of content in traditional telecommunication in areas such as obscene and harassing calls and audiotex provides precedent.

This paper examines recent U.S. efforts to regulate cybercontent considered to be pornographic. The stretching beyond the breaking point of the concept of proximity-based community underlying recent U.S. regulation of content deemed to be pornographic is demonstrated. The extraterritorial extension of jurisdiction implicit in the initiative and its likely effect on the creation of multilateral or plurilateral regulatory regimes is discussed. An alternative approach based on virtual communities is outlined.

2.0 U.S. Regulation of Cybercontent

The current framework for regulation of non-broadcast pornographic content in the U.S. was primarily established in *Miller v. California*, 413 U.S. 15 (1973). In a case under California obscenity law involving the mailing of unsolicited sexually explicit materials, the U.S. Supreme Court specified that the guidelines for the trier of fact are: (a) whether the average person, applying "contemporary community standards" would find that the work appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (pp. 23-25). Rejecting a requirement to impose a hypothetical national "community standard," the *Miller* Court found that the applicable community standard was that of the State of California (p. 30). Elaboration on "community standards" was provided in *Jenkins v. Georgia*, 418 U.S. 153 (1974), where the Court allowed states considerable latitude in framing statutes under the "community standards" element of *Miller*. This includes the freedom to define an obscenity offense in terms of "contemporary community standards" without any further specification of the applicable community, as was done in *Jenkins*, or to define the standards in more precise geographic terms, as was done in *Miller* (*Jenkins*, p. 157).

Obscenity prosecutions under federal, rather than state, laws have led courts to expand on the applicability of state laws and the proper determination of community standards. In *Smith v. United States*, 431 U.S. 291 (1977), the Supreme Court found that despite changes in a state law decriminalizing the distribution of arguably obscene materials, where federal obscenity laws still apply to such actions, state laws cannot be used to define conclusively for jurors the contemporary community standards of obscenity as established in *Miller*. In federal prosecutions, those issues remain fact questions for juries, to be judged in light of their understanding of contemporary community standards (*Smith*, pp. 299-308). Furthermore, federal courts have ruled that

prosecutors may elect to bring obscenity charges against defendants in either the district in which the communication in question originated or the district in which it was received, in order to discourage forum-shopping by distributors (*U.S. v. Bagnell*, 679 F.2d 826 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983)). Interestingly, prior to a 1958 amendment to the "Comstock Act" (18 U.S.C., Chapter 71), a long-standing court rule required criminal prosecutions to be brought in the district where the alleged obscene materials were mailed (Paul & Schwartz, 1977, p. 185).

The Supreme Court has adopted an additional category for regulation when dealing with broadcast content deemed offensive. In 1978, the Court's ruling in *FCC v. Pacifica*, 438 U.S. 726 (1978) made the broadcast of "indecent" material an offense separate from the broadcast of "obscene" material. The *Pacifica* Court ruled that non-obscene "indecent" material, permissible for adult audiences, can be prohibited for non-adult audiences. *Pacifica* is based on the policy solution of "channeling" which seeks to segregate adult and child audiences and ensure that programming intended for adults do not reach children.

As discussed above, the silence of traditional telecommunications regulation on content regulation has been broken by recent successful efforts to legislate audiotex content deemed to be pornographic. In 1989, the U.S. Supreme Court in *Sable v. FCC*, 492 U.S. 115 (1989) found unconstitutional an amendment to Section 223 of the Communication Act that banned all indecent commercial telephone messages within Washington, D.C. or in interstate or foreign communication, but upheld the ban on all obscene commercial telephone messages in the District of Columbia or in interstate or foreign communications. The ban on commercial indecency was found to be overbroad. The *Sable* Court distinguished the Section 223 ban on indecent commercial telephone communications from the *Pacifica* remedy of "channeling" indecent radio broadcasting to hours in which children would be unlikely to be listening (*Sable*, p. 127). The *Sable* court ruled that the private commercial telephone communications at issue were different

from public radio broadcasts. An indecent telephone message received as a result of "affirmative steps" was held to be less "invasive or surprising" than the "unexpected outburst on a radio broadcast" (*Sable*, pp. 127-28). Even more importantly, the Court found that more narrowly tailored alternatives for protecting children from indecent commercial telephone messages were available. The decision affirmed the constitutionality of other means of preventing access by minors to indecent content including credit-card, access-code and scrambling rules.[1] The Telecommunications Act of 1996, § 502, extended these principles to cybercommunication.

Cybercontent providers (and the burgeoning direct broadcast satellite industry) have reach into countless "communities" with varying or nonexistent boundaries, as well as unpredictable and inconsistent obscenity standards. In upholding the then language of § 223(b) banning obscene commercial telephone communications within the District of Columbia or in interstate and foreign communication, the *Sable* Court glossed over the difficulties of applying the "contemporary community standards" requirement from *Miller* (pp. 123-24). What are the "community standards" applicable to telecommunication services that inherently cross the boundaries of geographically defined, proximity-based communities? The court proposed that, in order to comply with diverse obscenity standards throughout the country, the commercial provider of the adult

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[1] A 1989 amendment to Section 223 made some changes to the language which was considered by the Supreme Court in *Sable*. Sections 223 (b)(1)(A) and (b)(2)(A) now criminalize anyone who knowingly makes obscene commercial telephone communications (or indecent communications available to persons under 18 years old) "within the United States," replacing the language "in the District of Columbia or in interstate or foreign communication." 47 U.S.C. § 223(b) (1989). Furthermore, Section 223(c)(1) now requires that, to the extent technically feasible, common carriers within the District of Columbia or within any State, or in interstate or foreign commerce, block access to a communication specified in Section 223(b) which has not been previously requested in writing by a telephone subscriber, if that carrier collects an identifiable charge from subscribers for such communication that is then remitted, in whole or part, to the provider of such communication. Section 223(c)(2) provides defenses for common carriers which make good faith efforts to restrict access to Section 223 (b) services, and which rely in good faith on the lack of representation by an audiotex service provider that it is providing Section 223(b) services. 47 U.S.C. § 223(c) (1994). Thus, while makers of obscene (and particular indecent) commercial telephone communications are criminally liable under the current statute, common carriers can invoke defenses for good faith efforts to restrict access, and recipients of indecent and obscene communications appear to have no criminal liability if their actions are limited to receiving the communications in question.

service either monitor the source of calls on its own or contract with the telephone carrier to arrange for the advance identification of calling communities and determination of their community standards of obscenity. But as Samarajiva & Mukherjee (1991, p. 154) point out, it is unrealistic to assume that information providers can ascertain "communities" and their "standards." Neatly demarcated communities and undisputed community standards are not available "off the shelf" but are defined in the heat of a criminal trial.

Many proximate communities, whether or not connected by telecommunication services, lack the permanence and coherence necessary for precise definition, reflecting the increasing mobility, diversity, interaction and "post-modern" identity constructions in society. The wide range of perceptions of community -- virtual as well as proximate -- and the flexibility of courts regarding legal definitions of and obscenity standards for communities, have led to concerns about forum-shopping by prosecutors, leading to a chilling effect on the distribution of materials that might be deemed non-obscene to members of some communities, because they might at the same time be considered obscene to members of others (Huelster, 1995, pp. 874-876; Mitchell, 1994, pp. 192-194; Schauer, 1976, pp. 125-126).

In February 1996, President Clinton signed into law the Telecommunications Act of 1996, Public Law 104-104, Title V of which is referred to as the "Communications Decency Act of 1996." Title V amends § 223 of the Communication Act, adding new provisions subjecting to criminal penalties anyone who knowingly, in interstate or foreign communications, makes, creates or solicits and initiates obscene communications (or indecent communications, in the case of recipients under 18 years of age) by means of a "telecommunications device," even if the creator of the message did not initiate the communication (§ 502(a)(1)). The Act also penalizes the person in control of a "telecommunications facility" who knowingly allows such an activity (§ 502(a)(2)). Although "telecommunications device" and "telecommunications facility" are not

explicitly defined in the new law, these terms appear designed to expand existing coverage from "telephone" and "telephone facility" to more sophisticated telecommunication services and networks, including cyber systems. These proposed provisions are of particular importance because, unlike existing § 223(b), which applies only to obscene or indecent commercial telephone communications (47 U.S.C. § 223 (1994)), the new law also applies to non-commercial facilities and content providers.

§ 502(2) adds a new paragraph to 47 U.S.C. § 223 extending criminal penalties to anyone who knowingly uses an interactive computer service, in interstate or foreign communications, to send or display any material that, in context, depicts or describes in terms "patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to a person under 18 years of age. This new paragraph essentially extends indecency prohibitions recognized in *Pacifica* and *Sable* to the cyber arena. § 507 revises key sections of chapter 71 of Title 18, the "Comstock Act," which codifies federal criminal obscenity law. The original language criminalizing the transportation by mail of obscene material within or into the U.S., is amended by adding communication by computer as a means of transportation.[2]

A section entitled "Online family empowerment," shields network providers and users of cyber services from liability as "publishers" as a result of actions taken to block or screen potentially offensive material. Its language is not to be construed to impair the enforcement of criminal law, including amended § 223 (outlined above) of the Telecommunications Act, and amended Title 18.

Parts of the law have been held unconstitutional on appeal (*ACLU et al. v. Reno*, Civil Action No. 96-963 & 96-1458, U.S. District Court for the Eastern District of Pennsylvania). Given the government's intention to appeal this decision, it is almost

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2 Paul & Schwartz (1977) provide a historical overview of the application of federal laws to the transportation of "obscene" material. The parallel between regulation of the mail service and online services is worth further exploration, particularly now that the "Comstock Act" is to be extended to computer communication.

certain that the Supreme Court will take up the issue in the next session. What has been lost sight of in the euphoria resulting from the Philadelphia Appeals Court's ruling is that it did not cover the entirety of the provisions governing cybercontent, only a subset. The preliminary ruling denying the appellants' request for a stay of all the cybercommunication-related provisions, was in a way more significant than the final decision (*ACLU et al. v. Reno*, Civil Action No. 96-963, U.S. District Court for the Eastern District of Pennsylvania, memorandum opinion of Judge Buckwalter, February 15, 1996). Reflecting the unsettled status of the law, this paper analyzes all the cybercontent-related provisions of the 1996 Act, including those invalidated on appeal. The affirmation by the 6th Circuit Appeals Court of the guilty decision in the Amateur Action BBS obscenity case further demonstrates the non-comprehensiveness of the Appeals Court ruling on the Communication Decency Act.

In 1994, Robert and Carleen Thomas, operators of the California-based Amateur Action BBS, were convicted in federal district court in Tennessee of, among other things, interstate transmission of obscene material in violation of 18 U.S.C. § 1465 (*U.S. v. Robert A. Thomas and Carleen Thomas*, 1994). The Court of Appeals rejected the claim that 18 U.S.C. § 1465 applies only to interstate transportation of "physically tangible objects" and not to "intangible computer data" sent over telephone lines.[3] In a parallel development, the Telecommunications Act of 1996 unambiguously extended the criminal provisions of 18 U.S.C. § 1465 to cybercommunication.

A fundamental element in obscenity and indecency proceedings is the determination of the appropriate community standard. Determination of the "contemporary community standard" for "indecency" of cybercontent is required in § 502(2) of the new law. The appeals in the *Thomas* case also raised the issue of the appropriate community standard. Robert Thomas asserted that the trial court should have

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[3] Relevant appellate briefs were obtained from the Records Office at the Potter Stewart Courthouse in Cincinnati OH, where the appeal was heard.

applied the community standards of Northern California, rather than those of Memphis, Tennessee, to the materials that were downloaded in the latter location from the Amateur Action BBS. Thomas claimed that he did not mail the GIF files or cause them to be sent in interstate commerce and contends that his BBS service is like an electronic bookstore to which customers travel (albeit virtually) to review and retrieve material. Therefore, the community standards of Northern California, where the BBS was located, should apply, as they would to a traditional bookstore in which customers (e.g., from Tennessee) visit and select materials (Brief of the Appellant Robert Thomas at 31-34, hereafter "Thomas App. Brief"). Furthermore, Thomas, together with amicus curiae (including the American Civil Liberties Union, Interactive Services Association and Electronic Frontier Foundation), argued that standards of geographic communities are inappropriate for dealing with modern "cyberspace communities," and that the applicable standards are those of relevant "computer-oriented communities" (Thomas App. Brief at 34-37). The U.S. Attorney contended that the community standard of Memphis was properly applied, citing cases holding that obscenity prosecutions may be brought in the district of transmission or the district of receipt and that local community standards are applied, and respected, accordingly (Brief of the United States at 37, hereafter "U.S. App. Brief"). Furthermore, the U.S. Attorney opposed the use of standards based on a "computer-users' community" as unrealistic because "computers essentially create a *world* community" (U.S. App. Brief at 38-39, emphasis in original).

The Appeals Court rejected the argument that cybercommunication services require a new definition of community without which there would be a chilling effect on protected speech because BBS operators cannot select who gets the material they make available on their bulletin boards (*U.S. v. Thomas*, LEXIS p. 24). The court distinguished the facts in *Thomas*, stating that access to the bulletin board was limited, membership was required, and applications were screened prior to the issuance of passwords. This may be interpreted as acknowledgment of the need to define virtual communities in situations

where the information provider does not have similar mechanisms to screen users and identify their "communities" (*U.S. v. Thomas*, LEXIS p. 25). However, the subsequent reiteration of *Sable* provides fodder for the opposing argument as well. Providers of allegedly obscene material, the court held, could choose to serve only certain communities. That screening users and ensuring that messages met differing community standards would cause additional costs to be incurred was not held to be a constitutional impediment (*U.S. v. Thomas*, LEXIS p. 26).

The *Thomas* court continues the *Sable* court's avoidance of the nub of the conflict between traditional obscenity standards based on geographic or proximate communities, themselves hard to define, and standards created as a result of the existence of virtual cyber communities, which are unconstrained by state (e.g., Tennessee) and national borders.[4] Domestic prosecutions that extend the obscenity and indecency standards of conservative proximate communities to cybercommunication providers in more liberal proximate communities, provide a potential foundation for cross-border criminal actions that impose conservative U.S. community standards on communication providers in foreign countries with more liberal community standards, or vice versa.

The criminal provisions of the new law portend extension of extraterritorial jurisdiction by the U.S. The new offenses created by §502 apply to persons outside the U.S. who use a telecommunications device "in foreign communications with the United States" to knowingly engage in the prohibited acts. These criminal provisions extend restrictive U.S. community standards of obscenity and indecency to cybercommunication with or from more permissive foreign communities.[5] The amended language of 18 U.S.C. § 1465 and §1465, dealing with importation, transportation and sale of obscene or

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4 A similar case involving satellite transmitted material was settled at the District Court level in Salt Lake City, Utah (McEntee, 1991). With the rapid growth of direct broadcast television in the U.S., it is likely that this issue will be brought to the appeal courts soon.

5 Foreign recipients of obscene or indecent telecommunication or computer communications which originate in the U.S. do not appear to be the intended target of the proposed legislation.

indecent materials, covers "foreign commerce." Persons outside the U.S. whose telephone, cyber, or material communications are received by persons within the U.S. are brought within U.S. jurisdiction. In the case of criminal obscenity, however, persons within the U.S. who receive prohibited material from interactive computer services are also made subject to prosecution. In addition, voluntary technological screening and blocking software standards are likely to apply to cybercommunicators located outside the United States.

Extension of extraterritorial jurisdiction by the U.S. in these instances is part of a historical pattern. Hart (1994) states that the U.S. has stood aloof from the broad international consensus around three basic principles of international law disallowing the unilateral extension of jurisdiction outside a nation's territory. The principles are: first, acceptance of the sovereign equality of states; second, agreement that one government cannot frustrate or undermine the law or policy of another; and third, the maxim that national laws must reflect self-limitation that respects the sovereignty of other nations (comity). Hart notes that the U.S. is the only country with a strongly developed body of doctrine and practice favoring the extra-territorial application of its laws for purposes such as defense of U.S. citizens, extension of U.S. values or political priorities, antitrust matters, national security (export controls), labor matters, securities, drug and racketeering enforcement and intellectual property protection. He notes further that the U.S. Congress and judiciary have begun to assert a "universal" jurisdiction over issues such as human rights and the environment (p. 378 & n.39).

3.0 Implications for cybercontent regulation

The fact that a homepage or a user in a foreign country is as close or as far as a homepage or user within national jurisdiction suggests that effective regulation of cybercontent reception requires either the extension of extraterritorial jurisdiction or the establishment of multilateral or plurilateral regimes for the regulation of cybercontent. The 1996 Telecommunications Act shows that U.S. legislators are inclined to take the former path

without paying much heed either to its short-term efficacy or to the long-term impact on efforts to create cybercontent regulation regimes. The *Sable* and *Thomas* decisions show that the U.S. judiciary is content to live in a state of denial, refusing to recognize the inapplicability of proximity-based community standards to contemporary cybercommunication. The only response to repeated pleadings that application of such standards results in the creation of a national (and indeed, worldwide) standard of obscenity and indecency has been to recommend extremely privacy-invasive and in many cases impracticable remedies that would force every provider of cybercontent to ascertain and maintain records of recipients.

Beginning from the premise that individual choice is paramount, libertarians would conclude that the only solutions are to push for laissez faire policies or, even better, to win the battle for strong cryptography. If governments lose the ability to read cybercontent, the question of cybercontent regulation would become moot. While recognizing the viability of this position, the discussion below will begin from a different premise.

Humans are social animals. Membership of social collectives necessarily constrains individual choice. The continuance of social collectives ranging from families to religious groups suggests that the libertarian premise is problematic. This is not to deny individual choice altogether. Generally, constraints imposed by collectives temper individual choice and do not negate it. In modern and "post-modern" societies, the constraints imposed by collectives have been affected by a relative loosening of the processes of entry and exit.

Community is a difficult term to define, partly because of the emotional overloading of meaning and the multiple usages. However, a rudimentary definition would include two components: a network of transportation and/or communication as a necessary material condition, and a shared "imagination" as a sufficient symbolic condition (Anderson, 198?). Historically, shared imagination was enabled by the "thick"

interpersonal communication networks within the narrow bounds of physical proximity. In other words, historically all communities were proximate communities. As technologically mediated communication developed, it increasingly became possible to maintain "thick" communication linkages without physical proximity. Indeed, Anderson's claim that print capitalism enabled the creation of a imagined community implies that technological means of storing and distributing information (print technology) across distance (via mechanized transportation using specialized infrastructures) were necessary for the emergence of the modern nation state. The past one and a half centuries since the commercial application of telegraphy has witnessed the rise of groups of non-proximate persons with shared imaginations, or virtual communities. While this is not an outcome of cybernetworks, contrary to Rheingold (1993), it is clear that the "thickness" of communication made possible by cybernetworks accelerated the process.

Community and the sharing of imagination includes a sense of place, a sense of what is accepted and not accepted "here." This sense distinguishes one community or place from another (Curry, 1996). Indeed, community standards are a sine qua non of community. The U.S. judiciary from *Miller* onward has been right about community standards. What they have been wrong about is the definition of community as exclusively proximate. It is possible that a conjuncture of factors has finally created the conditions for the replacement of the legal fiction of community as a proximate collective by real communities, virtual or proximate in form as the case may be.[6]

First, the definition of community as proximate community has been stretched beyond breaking point. The proximity based definition of community was ridiculous when applied to adult bookstores or theaters located near freeway exits. Applying such

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6 Curry (1996) makes a sophisticated argument, referring among others to the Thomas case, that connects information use in virtual environments to identity. That argument will be addressed in a subsequent draft.

criteria to tele- or cyber- communication networks that are almost completely disconnected from proximate space is beyond ridiculous.

Second, the legitimacy of classic content regulation has been eroded. As the Canadian authorities found in their recent attempt to regulate news coverage of the sensational Teale-Homolka sex-crime and murder trial, there were many citizens who were willing to subvert the rules (Sansom, 1995).

Third, local or national attempts to regulate content on cybernetworks flies in the face of systemic tendencies favoring mobility of capital, goods and services and labor. Specifically, attempts to regulate cybercontent such as that documented above are generally NAFTA and GATS illegal (Hadley & Samarajiva, forthcoming; Samarajiva & Hadley, 1996). While it may be possible to fit cybercontent regulation under certain exceptions, it is clear that the classic cybercontent regulation of the form found in the Telecommunications Act of 1996 is contrary to the spirit and the letter of economic liberalization.

Fourth, and perhaps most importantly, the Telecommunications Act of 1996 includes in inchoate form an alternative policy solution that allows communities to regulate cybercontent according to their community standards. This is the basic idea of technological screens or filters. An industry alliance including IBM, Microsoft, AT&T, MCI, America Online, Netscape Communications, Time Warner and Viacom has been formed to create standards (PICS--Platform for Internet Content Selection) for this purpose (*Wall Street Journal*, 1995, p. A3). Software such as SurfWatch and Net Nanny are currently available to allow individuals to monitor and block access to undesired services identifiable by targeted phrases, electronic addresses or other identifying characteristics (Quittner, 1995, p. 45). The Telecommunications Act of 1996 encourages the use of technological solutions for controlling access via public telecommunication networks to arguably objectionable content. The Federal Communications Commission and other regulatory agencies are authorized to describe (but not enforce) "reasonable,

effective and appropriate measures" for restricting access by minors. Persons acting to restrict access are shielded from prosecution (§ 502). In addition, the new Act protects from civil suit individuals and access providers acting in good-faith to block or screen access to material the access provider or users consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Access providers providing technological means to "filter, screen, allow, or disallow content; pick, choose, analyze, or digest content; or transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content" will not be treated as publishers or speakers (§ 230), thereby retaining immunity from liability for content, among other things.

The screening solution has many unresolved problems including persuading cybercontent providers to "code" their messages and ensuring that the codings are accurate. However, it breaks from the classic form of chokepoint-based content regulation and moves the task of determining the parameters of acceptability down to the receivers of messages. V-chip based regulation of television content, being implemented in Canada, starting in September 1996, may be seen as a prototype of the cybercontent regulation solution.

4.0 Virtual Communities and Cybercontent Regulation

If a community is defined by what is acceptable and not acceptable within it, it is reasonable to expect real communities to have community standards and the will to enforce them. It is also reasonable to expect that members of real communities will not have to be coerced into adhering to such standards, but that they will voluntarily and willingly adhere to those standards. Where such adherence is not manifested, the claim of community would be questionable.

The "demand" for cybercontent regulation may be caused by one of two things. First, the demand may be created by persons belonging to a specific community or communities to extend their standards to other communities backed by the power of the

state. The active role played by religious groups in cybercontent regulation supports this explanation. Second, the proliferation of technologically mediated communication may be creating difficulties of managing the inflow of messages. The mobilization of state power to impose the values of one community over another is understandable but not worthy of support. The second cause for the demand for cybercontent regulation can be addressed through the screening solution exemplified by the PICS standard.

As Canada found in the case of the v-chip, even screening technologies require the cooperation of actors outside national boundaries. The Canadian government could ensure that v-chip attachments would be made available to Canadian TV users and could mandate that programming originating in Canada would be properly encoded. However, a majority of content on Canadian television originates abroad, particularly in the U.S. Unless this content is encoded, the v-chip will not be fully effective. If Canada tries to coerce foreign suppliers of TV programs to code according to Canadian standards, foreign governments may charge that Canada is placing barriers to trade and retaliate. In order to implement the new form of content regulation, Canada had to seek the concurrence of the government of the U.S. where most of its imported TV programs originated (Canada News Wire, 1996). In the same way, any governments seeking to implement screening solutions will have to win the concurrence of the governments of countries that are significant content exporters. The most logical way in which these agreements can be made is via multilateral or plurilateral agreements.

The analysis of current U.S. policies regarding the regulation of cybercontent found strong language favoring extra-territorial jurisdiction. This aspect of U.S. communication policy is likely to lead to frictions with trade and communication partners whose cooperation the U.S. will need for the creation and maintenance of effective international communication regimes. While some may see extra-territorial jurisdiction as an inalienable element of U.S. national sovereignty, it appears difficult to defend in an increasingly interdependent world where the U.S. is no longer the undisputed economic

superpower. Of course, others may advocate extra-territorial jurisdiction as a second-best solution in the absence of the ideal solution of an effective international regime. The validity of this claim would depend on an assessment of the second-best solution's impact on the prospects of achieving the ideal solution. If an effective international regime is not a mirage, it would seem that forbearance from extra-territorial jurisdiction has considerable merit.[7]

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[7] Mayer-Schönberger & Foster (1995) point to an intriguing solution to the problem of regulating content, nationally and potentially internationally, drawing from jus cogens. Unfortunately, there is very little international consensus on obscenity. However, their solution is applicable to hate speech, another form of online communication that has become controversial.

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