

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF DAVIS

NAUGHTY NETSURFERS, INC.,
Plaintiff

v.

Janet RENO, Attorney General of the United States of America,
Defendant

MEMORANDUM OPINION AND ORDER
July 29, 1996

No. 96 CIV. 0977

I.
INTRODUCTION

Before this Court is a motion for a preliminary injunction filed by the Plaintiff, Naughty Netsurfers, Inc., a corporation incorporated in the state of Davis which markets sites containing sexually explicit material designed for adult entertainment. Naughty Netsurfers' sites are accessible via the World Wide Web. Plaintiff challenges, on constitutional grounds, the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC), which comprises Title VI of the Telecommunications Act, Pub.L. No. 105-105, § 504, 110 Stat. 57, 134-136. The specific provisions challenged are to be codified at 47 U.S.C. § 226(d) and (e).¹ Plaintiff argues that ESC, which targets commercial content providers who send via the Internet material which might be deemed "indecent" for minors, defined as persons under the age of eighteen, violates rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment.

The Government contends that ESC does not violate the Constitution because § 226(d) incorporates the definition of "indecent" already accepted by the judiciary and ESC "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." Denver Area Educ. Telecommunications Consortium v. FCC, --- U.S. ---, 116 S.Ct. 2374, 2385 (1996). The Government also stresses that the United States Supreme Court has ruled that minors have no constitutional right to indecent material. Ginsburg v. New York, 390 U. S. 629 (1968).

¹ The statute and section numbers are modeled on existing law, but are not identical. Counsel should refer only to Appendix B for the relevant text at issue and not refer to the actual Telecommunications Act.

Before Nino, J.

II. DISCUSSION

47 U.S.C. § 226(d) targets commercial content providers who send or display material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Plaintiff claims that § 226(d) is unconstitutional on its face because it is vague and substantially overbroad. Plaintiff seeks a preliminary injunction to stay governmental action taken pursuant to a statutory scheme; thus, Plaintiff must show a likelihood of success on the merits of its claims and that Plaintiff will suffer irreparable harm in the absence of an injunction. Able v. United States, 44 F.3d 128, 131 (2nd Cir. 1995). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion). Hence, if a court concludes that a governmental regulation has a chilling effect on free expression, a finding of irreparable harm automatically follows.

Plaintiff argues that 47 U.S.C. § 226(d) is vague in that it does not convey to persons of ordinary intelligence reasonable notice of what conduct is prohibited, and it creates a danger of arbitrary and discriminatory enforcement. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). The Due Process Clause of the Fifth Amendment is violated where a federal statute or regulation fails to give a fair warning of the behavior that will give rise to criminal liability. Where a statute's or regulation's purpose is to limit freedom of expression, it is vague if it operates to inhibit the exercise of First Amendment rights. Id. The language of § 226(d) essentially codifies the definition of "indecent" adopted by the FCC in 1975 in the broadcast context.² FCC v. Pacifica Found., 56 F.C.C.2d 94, 98 (1975). An application of this definition was upheld in FCC v. Pacifica Found., 438 U.S. 726, 751 (1978), although the Court never specifically addressed whether the FCC's definition was unconstitutionally vague. However, the Court concluded that the broadcast at issue in Pacifica was indecent and quoted the elements of the FCC's indecency definition with approval. Id. at 739. Hence, the opinion has been read to foreclose a vagueness challenge to the FCC's definition for indecency in the broadcast medium. See Action for Children's Television v. FCC (ACT I), 852 F.2d 1332, 1339-40 (D.C.Cir. 1988). The Courts of Appeals have found vagueness challenges to analogous FCC definitions concerning commercial telephone communications and cable

² This definition of "indecent" is rooted in the United States Supreme Court's obscenity jurisprudence. See Miller v. California, 413 U.S. 15, 24 (1973).

programming unavailing. See Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1540-41 (2d Cir. 1991); Alliance for Community Media v. FCC, 56 F.3d 105, 129 (D.C.Cir. 1995), aff'd in part and rev'd in part sub nom, Denver Area Consortium, 116 S.Ct. 2374.

In light of precedent rejecting claims that the language used by the FCC to define indecency is unconstitutionally vague, this Court declines to conclude that Plaintiff has demonstrated a likelihood of success on his claims that the incorporation of a virtually identical verbal formulation into § 226(d) renders that statute fatally vague.

Plaintiff also calls this Court's attention to another defect in the language of § 226(d). Section 226(d) requires that content providers judge what "community standards" govern the transmission of "patently offensive" materials, that is they must determine what content will or will not subject them to criminal liability by reference to an unidentified or fictitious "community." A communication that is posted in New York and that falls outside the range of the patently offensive for that community is made, by virtue of its posting, available to countless users who may reside in communities where that material falls within the range of the patently offensive, subjecting the content provider to criminal prosecution. In light of the fact that modern communications have long transcended community borders, this argument is unpersuasive. The definition of obscenity entails the same requirements. See Sable Communications v. FCC, 492 U.S. 115, 125-126 (1989). There is no reason to conclude that Internet content providers are less capable than content providers who are subject to obscenity laws or other indecency restrictions to acquire a general familiarity with the relevant standards. Indeed, one might conclude that a content provider's contact with others around the country and around the world through interactive computer services would cultivate a heightened awareness of regional and cultural differences.

In sum, Congress did not fashion the "patently offensive" provision of § 226(d) out of whole cloth. To the extent that the FCC and courts have, in construing similarly worded indecency provisions against the backdrop of the First Amendment, previously found vagueness arguments unavailing, this Court declines to conclude that Congress's choice of language in § 226(d) is unconstitutionally vague. Thus, the plaintiff has not shown a likelihood of success on its first claim.

Plaintiff claims that § 226(d), considered together with certain defenses to criminal prosecution set forth in § 226(e)(5), is substantially overbroad and therefore facially invalid. Specifically, Plaintiff argues that ESC fails to preserve a means for adults to engage in certain constitutionally

protected communications.

Section 226(d) is a content-based regulation of speech, and in most contexts, would be subject to strict judicial scrutiny. To survive such judicial scrutiny, the regulation must be narrowly tailored to achieve a compelling interest. See Sable Communications, 492 U.S. at 126. In light of the Supreme Court's recent decision in Denver Area Consortium, --- U.S. ---, 116 S.Ct. 2374, the Government maintained that a less severe standard should be applied to ESC. The Government reasons that, like cable television, commercial content providers' materials are pervasive and highly accessible to children and that patently offensive material can easily assault the viewer with little or no warning.

However, this Court has no doubt that strict scrutiny should apply here. Gaining access to indecent materials on the Internet is more like accessing such material via telephone communications than like gaining access via cable television or regular television broadcasting. The person desiring access must take several affirmative steps. While accidental viewing of sexually explicit material is possible, the record does not support a finding that such accidents are likely or frequent.

For purposes of our discussion, this Court will assume that the government has a compelling interest in restricting minors' access to "patently offensive" material. In other words, this Court assumes that all such material is harmful to minors. The question, then, is whether § 226(d) coupled with § 226(e) is narrowly drawn to serve a compelling government interest without unnecessarily interfering with First Amendment freedoms. Sable Communications, 492 U.S. at 126.

Because commercial content providers have no way of transmitting indecent content with certainty that it will not reach a minor, the only way for such a provider to comply with § 226(d), standing alone, would be to refrain from transmitting any indecent content. Section 226(d), however, does not stand alone. Section 226(e)(5) provides two affirmative defenses to liability under ESC.

Section 226(e)(5)(A) provides that it is a defense to a prosecution under § 226(d) that a person "has taken, in good faith, reasonably effective actions under the circumstances to restrict or prevent access by minors to [covered] communication[s] . . . including any method which is feasible under available technology. Reasonably effective actions include, but are not limited to, labeling sites indicating their coverage under this Act coupled with the use of software configured to identify and block tagged material, and registering with the marketplace of software able to identify and to block covered materials."

Section 226(e)(5)(B) provides that it is a defense to a prosecution under § 223(d) that a person "has restricted access to [covered] communications by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." Thus, the appropriate inquiry is whether these statutory defenses adequately ensure that would-be commercial speakers can use the Internet to transmit constitutionally protected communications to adults. These defenses will be discussed in reverse order.

Based on the findings of fact, this Court concludes that § 226(e)(5)(B) serves as an adequate defense. This Court notes that the category of "commercial content providers" is not defined in the statute, but it is apparent that those who could be deemed "commercial" content providers could absorb the cost of credit card verification. Plaintiff would have this Court conclude otherwise. Plaintiff points out, for example, that a software developer can make a program available on line for users to download (that is, copy to the hard drive of the user's computer) without charge for a short trial period, with the understanding that the user will remit a registration fee if the user decides to retain the program after the trial period. Such a software developer has a commercial purpose, yet, according to Plaintiff, it is not clear that the developer could bear the economic burden of verifying the credit card of everyone who accesses the software. This argument is unpersuasive. The cost of credit card verification, like any other cost of doing business, can be passed on to the consumer. Moreover, commercial content providers who wish to post indecent materials can do so through newsgroups with limited memberships, a "closed" mailing list. As managers of such limited access forums, the content providers also could establish age through credit card verification. In the marketplace for cybersmut, the principles of supply and demand would set prices just as they do in any other free market system.

Section 226(e)(5)(A), the "good-faith" defense, also provides a safe harbor for commercial content providers. Content providers who "in good faith" take "reasonably effective actions under the circumstances," including any steps "feasible under available technology," to prevent minors' access to communications falling within the scope of ESC have an affirmative defense. Tagging sites, coupled with the use of software capable of detecting and blocking sites, is one such defense. Registering with the marketplace of browser software is another.

Tagging identifies material of a particular content by inserting a tell-tale "tag" into a site's name or address. Server software, called browser or blocking software, can be installed and is capable of detecting such a tag. Browser software is readily available. Microstroft Browser, which has

five percent of the national market, screens content based on labels that are compatible with "PICS" (Pulpit for Internet Content Selection) tags. PICS tags are also recognized by CompuSlave and Genius, browser software that constitutes sixty percent of the market. Because there is a range of browser and blocking software capable of detecting tags and this software constitutes sixty-five percent of the national market, commercial providers can take steps that are reasonably effective in restricting or preventing minors' access to indecent material on the Internet. For the same reasons, commercial content providers who register their sites with the marketplace of browser software would also find a safe harbor in § 226(e)(5)(A). In short, § 226(e)(5)(A) will lessen the chill on protected expression created by § 226(d). Thus, the plaintiff has not demonstrated a likelihood of success on the merits of its second substantial overbreadth claim.

However, the inquiry is not complete. It must also be decided whether the potential ineffectiveness of ESC renders the statute constitutionally defective. ESC regulates commercial content providers in the United States, yet thirty percent of sexually explicit material on the Internet originates abroad. Foreign content providers are not required to tag their sites. Thus, even though sixty-five percent of the national market uses blocking software, thirty percent of the indecent material on the Internet will not be blocked. Additionally, ESC does nothing to prevent a minor from gaining access to noncommercial content providers' sites who post material that would be covered by ESC. As a result, a significant amount of indecent material remains unregulated, and minors may access this material.

Nonetheless, this Court finds that the government has a compelling interest in the degree of reduction of minors' access to indecent material on the Internet that is technologically feasible. Moreover, the limits imposed on free speech by ESC do not outweigh the benefit in reducing minors' exposure to indecent material. ESC applies only to commercial providers, who may still post indecent material so long as they either tag it with a recognized PICS label or register with the marketplace of browser software. Although ESC does not eradicate the potential for minors to access indecent material on the Internet, under current technology, nothing short of a complete ban of indecent communications could be as effective. Thus, this Court declines to conclude that ESC is constitutionally infirm for lack of effectiveness.

Accordingly, this Court finds that the plaintiff has not shown a likelihood of success on the merits of its claims. Therefore, Plaintiff's request for a preliminary injunction is denied. It is so ordered.

APPENDIX A: FINDINGS OF FACT

1. On June 5, 1996, John Doe, a minor who at the time of the incident was ten years of age, accessed photographs of nude men and women engaged in sexual acts while researching the history of photography for a school project.
2. Using his mother's password, John Doe gained access to these pictures at the Davis Community College Library through NetView, a popular software package which enables users to access the Internet via a personal computer.
3. John Doe typed in "picture" as his search term. This request yielded several choices, one of which was "100 Photos Your Mother Wouldn't Want You to See," posted by Naughty Netsurfers, Inc. A second click on this title resulted in three depictions of men and women engaged in sexual acts. These portrayals were a part of a sales pitch for a subscription to Naughty Netsurfers' website and chatrooms. Thus, there was no charge to see these three pictures.
4. Further access required entry of a credit card account number, preventing John Doe from viewing any additional material posted by Naughty Netsurfers.

A. The Internet

1. The Internet is not a tangible entity, but rather a giant network that connects a series of smaller networks. It is thus a network of networks. A network is a group of computers linked to each other for the purpose of exchanging files and messages. When one network is connected to another network, it permits each computer in any network to communicate with computers in any other network in the system. In this manner, a Global web of linked networks and computers has been created and is called the Internet. Today over 9,400,000 host computers world-wide, of which approximately 60% are located within the United States, are estimated to be linked to the Internet. This count does not include the personal computers people use to access the Internet. In all, reasonable estimates are that as many as 40 million people around the world can and do use the Internet. That figure is expected to grow to 200 million by 1999.
2. The whole of the Internet is a decentralized, global medium of communications, or "cyberspace." The Internet links people, corporations, organizations, and governments around the world, as it is these entities that own the computers connected to the Internet. Hence, literally tens of millions of people with access to the Internet are able to

exchange information.

3. These global communications created through multiple links of computers result in messages travelling any number of routes to their destinations. Thus, a message sent from a computer in Washington, D.C. to a computer in Houston, Texas might first be sent to a computer in Kentucky and then to a computer in Virginia and then to a computer in Arkansas before finally reaching its final destination. The message is automatically routed without human intervention or knowledge, and the transmissions occur in a matter of seconds.
4. No single entity administers the Internet. It exists and functions because thousands of separate networks of computers and computer operators independently decided to exchange information with other computers. There is no centralized location, control point, or communications channel, and it would not be technically feasible for a single entity to control all of the information exchanged on the Internet.
5. Once one has access to the Internet, there are a variety of different methods of communication and information exchange over the network. These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of Internet communications can be divided into six categories: (1) one-to-one messaging (such as "e-mail"), (2) one-to-many messaging (such as "listserv"), (3) distributed message databases (such as "USENET newsgroups"), (4) real time communication (such as "Internet Relay Chat"), (5) real time remote computer utilization (such as "telnet"), and (6) remote information retrieval (such as "ftp," "gopher" and the "World Wide Web"). Most of these methods of communication can be used to transmit data, text, computer programs, sound, images, and moving video pictures.

B. Access to the Internet

1. Access to the Internet can take any one of several forms. First, many educational institutions, businesses, libraries, and individual communities maintain a computer network linked directly to the Internet and issue account numbers and passwords enabling users to gain access to the network. Second, "internet service providers," generally commercial entities charging a monthly fee, offer access to computers or networks linked directly to the Internet. Third, national commercial "on-line services," such as Microstroft, CompuSlave, and Genius, allow subscribers to gain access to the Internet while providing extensive content within their own proprietary networks. Finally, organizations and

businesses can offer access to the electronic bulletin-board systems, which, like national on-line services, provide certain proprietary content; some bulletin-board systems in turn offer users links to the Internet.

2. Even though commercial access to the Internet is expanding rapidly, many Internet users, such as college students, do not pay individually for access to the Internet. These and other Internet users can access the Internet without paying for such access with a credit card or other form of payment.

C. The World Wide Web

1. Access to the Internet can also be achieved through the World-Wide Web, which allows users to view text, images, sound, animation, and moving video. Any web site can include links to other sites or resources. One can click using a computer mouse and be immediately connected to the other resource. These connections are called hyper-links and allow people to access related information efficiently even if it is stored on numerous computers all over the world. A user may leap from overview documents to more detailed documents, from tables of contents to particular pages, but also to cross-references, footnotes, and new forms of information structure.
2. The power of the Web stems from the ability of a link to point to a variety of documents from the hastily typed idea to the professionally executed corporate file. Thus the Web is truly a modern-day commons, a forum for the free exchange of information. In the same medium, information concerning commercial opportunities, gossip, humor, political satire, and the profane is exchanged.
3. Web publishers can make their Web sites open to the general pool of all users, or they can restrict them to only those users with advance authorization. Many choose to keep their Web sites open to all to give their information the widest available audience. Some users, however, restrict access to members of their own organization or require passwords to access the site.
4. Like the Internet, the World Wide Web does not have a single centralized control. Nor is there a central site from which individual Web sites or services can be blocked from the Web.
5. The Internet presents extremely low entry barriers to those who wish to convey Internet content or gain access to it. The relative ease of speaker entry and the relative parity among speakers accounts for the unprecedented and virtually unlimited opportunities for political discourse, cultural development, and intellectual activity.

D. Access to Sexually Explicit Content on the Internet

1. In most instances, a user must affirmatively seek sexually explicit material to view it. On some occasions, however, a search not intended to retrieve sexually explicit material may retrieve a link to a sexually explicit site. In the vast majority of cases, the character of a sexually explicit site will be clear from the entry or link. Nevertheless, there is a potential for occasional accidental viewing of sexually explicit material. It is difficult to know how often accidental viewing can occur.
2. There is no evidence that sexually explicit content constitutes a substantial portion of available Internet content, although it is difficult to ascertain with any certainty how many sexually explicit sites are accessible through the Internet. The president of a manufacturer of software designed to block access to sites containing sexually explicit material testified that there are approximately 5,000 to 8,000 individual pages containing such content, that is that some sites have more than one page of such material.
3. Although only a tentative approximation is possible, the record suggests that as much as thirty percent of the sexually explicit material currently available on the Internet originates abroad.

E. Blocking Tools and Labeling Schemes

1. Several commercial on-line services and software companies have developed features and packages designed to enable parents to limit children's exposure to potentially inappropriate Internet material, known as browsing or blocking software. For example, U.S. Online, Genius, and Microstroft Network, which permit their subscribers to obtain access to Internet material, offer parental control options free of charge to their members. U.S. Online, for example, allows parents to establish a separate account for their children limited to the service's own proprietary content. In addition, screening software, such as Microstroft Browsers, CompuSlave, and Genius recognize PICS (Pulpit for Internet Content Selection) "tags." These tags are labels attached to sites that identify whether the material is suitable to children, much like a movie rating system. The browser software is capable of detecting these tags and blocking the sites tagged as inappropriate for minors. These browsers comprise sixty-five of the national market. A commercial content provider of indecent materials can tag its site with any of the recognized PICS tags, such as XXX, -L18, or NOT. A minor trying to gain access to such

material would be blocked from doing so as long as the appropriate software was in use. Because of the constant change in the number and location of Internet sites, these manufacturers of browser software offer regular subscription or update services. However, even when such software is installed and operational, it is possible to retrieve some sexually explicit material.

2. Commercial content providers can also query the user for a credit card number. The cost of credit card verification ranges from sixty cents per transaction to more than a dollar per transaction.

APPENDIX B: PROVISIONS OF ESC AT ISSUE

§ 226. Offensive or indecent telephone calls in the District of Columbia or in interstate or foreign communications.

- (d) Sending or displaying offensive materials to persons under 18.

Any commercial content provider who

- (1) in interstate or foreign communications knowingly --
 - (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
 - (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

indecent material, which is defined as: any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

- (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent

shall be fined not less than \$1000, or imprisoned not more than two years, or both.

- (e) Defenses.

In addition to any other defenses available by law:

. . . (5) It is a defense to a prosecution under subsection (d) of this section that a commercial content provider --

(A) has taken, in good faith, reasonably effective and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to

restrict minors from such communications, including any method which is feasible under available technology. Reasonably effective actions include, but are not limited to, labeling sites indicating their coverage under this Act coupled with the use of software configured to identify and block tagged material, and registering with the marketplace of software able to identify and to block covered materials; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Docket No. 96-398

NAUGHTY NETSURFERS, INC.,
Appellant,

v.

Janet RENO, Attorney General of the United States of America,
Appellee

August 30, 1996

Before Saunders, Chaffin, and Visger, Circuit Judges.

Saunders, Chief Circuit Judge:

This is an appeal by Naughty Netsurfers, Inc., a corporation incorporated in the state of Davis with its corporate headquarters in Davis, challenging the constitutionality of the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC), which comprises Title VI of the Telecommunications Act, Pub.L. No. 105-105, § 504, 110 Stat. 57, 134-136. Naughty Netsurfers claims ESC is unconstitutionally vague and overbroad. The District Court denied Naughty Netsurfer's motion for a preliminary injunction, reviewing the statute under the strict standard of review and finding ESC a constitutional exercise of Congress' power to protect children from indecency on the Internet.

This Court affirms the lower court's decision to use the strict standard of review to evaluate a First Amendment challenge in the context of communications on the Internet. However, this Court reverses the lower court's holding that the statute is not unconstitutionally vague. We find that the statute has failed to define adequately the term "indecent," leaving commercial content providers without guidance as to what material would be prohibited by the statute. Further, ESC does not specify which community standards prosecutors and courts would use to judge communications. Moreover, because the means the government has chosen to further its stated interest in reducing the exposure of children to indecency on the Internet are not the least restrictive, and because the statute will chill constitutionally-protected free speech, this Court also reverses the lower court's ruling that the statute is narrowly tailored.

I. PRELIMINARY INJUNCTION STANDARD

Before a court will issue a preliminary injunction, the proponent of such an injunction must demonstrate a likelihood of success on the merits of his claims and that he will suffer

irreparable harm in the absence of an injunction. Able v. United States, 44 F.3d 128, 131 (2nd Cir. 1995) (per curium). We also must consider whether the potential harm to the appellee from issuance of an injunction outweighs any possible harm to the appellant if such relief is denied, and whether the granting of injunctive relief is in the public interest. See Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 90-91 (3rd Cir. 1992); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1175 (3rd Cir. 1990). Also, as we consider whether the statute in question chills First Amendment speech, we recall that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion). Appellant Naughty Netsurfers challenges the lower court's refusal to grant a preliminary injunction on the grounds that the statute chills First Amendment speech in that it is both unconstitutionally vague and overbroad.

II. VAGUENESS

First, we consider whether the challenged provisions of ESC are unconstitutionally vague. Naughty Netsurfers claims the statute fails to convey to persons of ordinary intelligence reasonable notice of what conduct is prohibited and creates a danger of arbitrary and discriminatory enforcement. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); See also Connally v. General Const. Co., 269 U.S. 385, 391 (1926). The Supreme Court has established that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids". Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Appellant Naughty Netsurfer's vagueness challenge involves two main issues. First, Naughty Netsurfers claims that ESC is vague because it does not include a definition of the term "indecenty." Second, Naughty Netsurfers claims that an Internet commercial content provider will not be able assess what "community standards" govern the transmission or display of indecent materials. We address each of these concerns in turn.

The district court found that ESC essentially codifies the standard FCC definition of indecency sustained by the Supreme Court in Pacifica. FCC v. Pacifica, 438 U.S. 726 (1978). Even if we were to accept this view, speakers attempting to conform to ESC would still be left without guidance. In Pacifica, the Court did not consider a vagueness challenge to the term "indecent," but considered only whether the government could regulate the particular indecent broadcast at issue in that case -- George Carlin's Monologue entitled "Filthy Words." Id. In fact, the Court has never considered a vagueness challenge to the term "indecent." Id.

Several other circuit courts have upheld the use of the term

in statutes regulating different media. In Information Providers' Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991), the Ninth Circuit Court of Appeals evaluated the vagueness of the term "indecent" in the 1989 Amendment to the Communications Act regulating access to telephone dial-a-porn services and the FCC's implementing regulations of that statute. The FCC had defined "indecent" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." Id. at 874. The court stated that the FCC's definition of "indecent" was no less imprecise than was the definition of "obscenity" announced in Miller v. California, 413 U.S. 15, 25 (1973), and thus held that "indecent," as the term pertained to dial-a-porn regulations survived a vagueness challenge. See also Dial Information Servs. v. Thornburgh, 938 F.2d 1535 (2nd Cir.1991), (upholding the use of "indecent" in the same amendment to the Communications Act); Action for Children's Television v. FCC, 932 F.2d 1504, 1508 (D.C.Cir.1991) (rejecting vagueness challenge to "indecent" provision in broadcast television regulations).

In these telephone and cable television cases, however, the FCC had defined indecent as patently offensive by reference to contemporary community standards for that particular medium. See, e.g., Pacifica, 438 U.S. at 732; Dial Information Servs., 938 F.2d at 1540. Here, the statute is not so limited. The statute makes no effort to conform the restricting terms to the medium of cyberspace, as is required by Pacifica and its progeny.

Further, the fact that Pacifica and its progeny define indecent in relation to community standards introduces the question of what community standards are to be used in the Internet medium. Are the contemporary community standards to be applied those of the vast world of cyberspace? The Government offered no evidence of any such national or worldwide standard as to what would be considered "patently offensive." This void leaves the reader of ESC unable to discern the relevant "community standard" and will inevitably cause Internet commercial content providers to "steer far wider of the unlawful zone" than if the community standard to be applied were clearly defined. The chilling effect on the Internet users' exercise of free speech is obvious. See Baggett v. Bullitt, 377 U.S. 360, 372 (1964). This is precisely the vice of vagueness. Consequently, we hold the statute to be unconstitutionally vague.

III. APPLICABLE STANDARD OF REVIEW

The challenged provisions of ESC are a content-based restriction of speech, and the speech at issue is entitled to constitutional protection. See Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (finding that "[s]exual expression which is

indecent but not obscene is protected by the First Amendment"). Consequently, the statute is subject to strict scrutiny, and will be upheld only if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest. Sable, 492 U.S. at 126; see also Turner Broadcasting v. FCC, --U.S.--, 114 S.Ct. 2445, 2459 (1994).

The Government has argued that we should use the less stringent standard of review employed in broadcasting cases. The Government primarily relies upon Pacifica, where the Supreme Court found that "each medium of expression presents special First Amendment problems" and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. The Court in Pacifica used a less stringent standard of review specifically because of the unique properties of broadcasting: the broadcast media are uniquely pervasive in the home, prior warnings cannot protect the listener, and the medium is uniquely accessible to children. Pacifica, 438 U.S. at 748-49.

We agree with the district court that these same properties do not exist in the context of the Internet. While computers have gained a certain level of prominence in the home in recent years, they are not as pervasive in the living rooms of Americans as are radios and televisions. Also, in the context of Internet communications, one cannot come across indecent communications unaware; the problem of listeners tuning in and out which the Court found persuasive in Pacifica is simply not a problem in the Internet context. Most importantly, the Internet is not as accessible to children as are radio and television. Accessing the Internet takes a certain amount of skill, whereas tuning in to a radio or television program takes only the ability to turn on a switch or push a button on a remote control. We do not find that the same properties exist in the context of the Internet that the Court found necessitated a less stringent standard of review in Pacifica, and hence we hold that strict scrutiny is the correct standard of review to employ in the context of communications on the Internet.

IV. IMPACT ON PROTECTED SPEECH

The Government asserts that it has a compelling interest in protecting children from indecent materials on the Internet and that ESC is narrowly tailored to achieve that interest without unnecessarily chilling the protected First Amendment right of adults to engage in indecent speech. While we find that the government does have a compelling interest in protecting children from indecent materials on the Internet, we do not find that ESC is narrowly tailored to achieve that interest. Also, we find that ESC would chill indecent speech by adults, which is protected under the First Amendment. Consequently, we reverse

the district court's holding.

The Supreme Court has long recognized that there is a compelling interest in protecting minors from materials which would not be considered obscene by adult standards:

[w]hile the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

Ginsberg v. New York, 390 U.S. 629, 640 (1969) (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966)).

In addition to showing a compelling interest, the Government must show that ESC is narrowly tailored to achieve that interest. Sable, 492 U.S. at 126. In other words, if the means chosen by the government sweep more broadly than necessary and chill the expression of adults, it has infringed upon rights protected by the First Amendment. Sable, 492 U.S. at 131. The Government argues that the statute's affirmative defenses and the fact that it is limited to commercial content providers makes it the least restrictive means of advancing the government's compelling interest of protecting children. Naughty Netsurfers argues that ESC effectively bans a substantial category of protected speech from most parts of the Internet, and that neither section 226(e)(5)(A) or (B), the "good faith defense" and the "credit card defense" is adequate, rendering ESC constitutionally infirm.

We find that the affirmative defenses do not provide an effective way for commercial content providers to protect themselves from prosecution under ESC without seriously impeding their ability to publish indecent material. Contrary to the district court's conclusion, we find that the record shows it is economically prohibitive for most content providers to ensure that indecent material they display on the Internet does not become inadvertently transmitted to children. While credit card verification may be feasible for some commercial providers of Web sites, it would be too economically burdensome for content providers such as small software companies who distribute their product on the Internet. Furthermore, adults who do not have credit cards would be prevented from engaging in indecent communications on the Internet to which they have a constitutional right.

Further, we agree with Appellee that § 226(e)(5)(A) does not provide an adequate defense. Although "tagging" is widely employed by Internet users, effective tagging still requires the cooperation of third parties, who must configure the browser software to detect the tags. Content providers have no means to ensure that such configurations are put in place. As a result, § 226(e)(5)(A) does not give providers of indecent communications a viable defense. Therefore, we hold that the Government has failed to demonstrate that ESC is narrowly tailored to achieve the compelling state interest in protecting children from indecency on the Internet. We also hold that the challenged provisions of ESC are unconstitutionally overbroad because they chill the First Amendment rights of adults to engage in indecent communications on the Internet.

Affirmed in part, Reversed in part, and Remanded.

Chaffin, Circuit Judge, concurring:

I agree with the court that the challenged provisions of ESC are unconstitutionally overbroad and that they chill the rights of adults under the First Amendment to engage in indecent speech on the Internet. I also agree that the statute is unconstitutionally vague and that courts should review statutes such as ESC which regulate speech on the Internet with strict scrutiny. I would add to the court's opinion, however, that I find the challenged provisions of ESC to be ineffective in achieving the Government's stated objective of protecting children from indecency on the Internet. Because ESC regulates only commercial content providers of Internet content in the United States, and because some children might be able to circumvent the credit card and tagging mechanisms, children would still be able to view indecency on the Internet. Hence, in addition to chilling the First Amendment rights of adults to engage in indecent communications on the Internet, the statute is not effective in preventing the very evil it sets out to prevent. In my opinion, this ineffectiveness also renders this piece of legislation unconstitutional.

Visger, Circuit Judge, dissenting:

I would affirm the district court's holding that ESC is constitutional. Furthermore, I disagree with both the district court and the majority of this Court as to the appropriate standard of review to be employed in this context. I would use the less stringent standard of review the Court employed in Pacifica in the Internet context. I find that the three aspects of the broadcast medium which the Supreme Court discussed in Pacifica (accessibility to children, pervasiveness in the home, and lack of protection of prior warnings) apply to the Internet.

438 U.S. at 748-49. Just as the broadcast medium is accessible to children, so too the Internet is uniquely attractive to children. From a very young age, children learn how to use computers in school and for recreation. In many cases, children are more proficient users of the computer than their parents -- a fact which enables children to access information on the Internet many parents do not even know exists. Also, many homes in America contain a personal computer. Some parents even purchase computers specifically for their children to use. Therefore, I would find that courts should review statutes which involve the protection of children from indecent speech on the Internet under a less stringent standard of review than the court uses when reviewing other statutes which implicate the First Amendment.

Employing this less stringent standard of review, I would find that the government's interest in protecting children from indecency on the Internet justifies the regulation of otherwise protected expression. I find the government's interest in protecting the minds of the nation's children from indecent material to be very compelling. In addition, it is important to note that the statute does not ban indecent speech entirely from the Internet, it only places reasonable restrictions on the distribution of this indecent speech to advance the very legitimate goal of protecting children. As the Court in Pacifica found, the statute will at most "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern." 438 U.S. at 743.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Janet RENO, Attorney General for the United States,
Respondent.

v.

NAUGHTY NETSURFERS, INC.,
Petitioner,

No. 96-100455

ORDER

The petition for certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby granted that this Court may hear and consider whether the Anti-Indecency and Effective Standards for Cyberspace Communications Act is void for vagueness and/or overbreadth. It is further ordered that this case be set down for an expedited hearing in the October 1996 term of this Court.

HUGH HAEFNER, Clerk
United States Supreme Court

Dated September 16, 1996
Washington, D.C.

BENCH MEMORANDUM

**JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,**

vs.

**NAUGHTY NETSURFERS, INC.,
Respondent.**

STATEMENT OF THE CASE

On June 5, 1996, John Doe, a minor of ten years of age, accessed photographs of nude men and women engaged in explicit sexual acts while researching the history of photography for a school project. Doe gained access to these pictures through NetView, a popular software package which enables users to access the Internet via a personal computer. By typing in the word "picture" as his search term, John was able to view three depictions of men and women in sexual acts on his screen; these were part of a sales pitch for a subscription to Naughty Netsurfers' website, and accordingly, there was no charge for John to see these pictures.

The district court found that today there are more than 9,400,000 host computers around the world with computers in the United States accounting for 60% of that total. This count does not include the number of personal computers that serve as hosts. Forty million people have access to the Internet; that figure is expected to reach two hundred million by 1999.

Naughty Netsurfers, Inc. which markets sites that are accessible via the World Wide Web and that contain sexually explicit material designed for adult entertainment, moved for a preliminary injunction against Janet Reno, Attorney General of the United States of America,

challenging on constitutional grounds the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC), which comprises Title VI of the Telecommunications Act, Pub.L. No. 105-105, § 504, 110 Stat. 57, 134-136. The specific provisions challenged are to be codified at 47 U.S.C. §226(d) and (e). Naughty Netsurfers argued that ESC was unconstitutionally vague and overbroad, and thus it violated rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment. The Government argued that ESC passes judicial scrutiny because it incorporates the definition of "indecent" already accepted by the judiciary and because it addresses a compelling interest by narrowly tailored means, without interfering with First Amendment freedoms.

The district court denied Naughty Netsurfers' motion for a preliminary injunction, finding that (1) § 226(d) was not unconstitutionally vague because its language essentially codifies the definition of "indecent" adopted by the FCC in the broadcast medium and upheld by this Court in 1978; (2) ESC was not unconstitutionally overbroad because under strict judicial scrutiny, § 226(d) coupled with § 226(e) was narrowly tailored to achieve a compelling interest, and (3) ESC was not unconstitutional for lack of effect.

On appeal, the United States Court of Appeals for the Fourteenth Circuit, affirmed the district court's decision to use strict scrutiny, but reversed both the court's holding that ESC was not unconstitutionally vague and that it was not overbroad. In holding that ESC was vague, the court of appeals found that its language left commercial content providers unable to discern the relevant community standards for this particular medium and thus caused a chilling effect on Internet users' access to constitutionally protected speech. Furthermore, the court found that ESC is not narrowly tailored to further the government's compelling interest in

protecting minors from indecent speech because the stated defenses do not achieve their purpose in leaving a means for adults to engage in constitutionally protected indecent speech. Hence, it found ESC void for overbreadth as well as vagueness. This Court granted certiorari on September 16, 1996.

OVERVIEW OF RELEVANT CASE LAW

This case is one of first impression before this Court, as there is no precedent which concerns the regulation of content on the Internet. However, Supreme Court precedent does exist which concerns the constitutionality of content-based regulations that concern other media, specifically, radio broadcast, telephone communications, and cable television broadcasts. Additionally, circuit court precedent concerning similar regulations pertaining to radio broadcast, network television broadcast, cable television broadcast, and telephone communications also exists. These cases provide helpful analogies for this case in that the language employed in those regulations that were before this Court and the circuit courts is nearly identical to the language of ESC. Additionally, the Internet can be seen as a compilation of all these other media, and as such, it can be regulated with similar means. The opposing position is, of course, that while the Internet may be all media at once, as such, it is unique and possesses attributes that make it unamenable to regulation.

I. United States Supreme Court Precedent

Denver Area Telecommunications Consortium v. FCC, 116 S. Ct. 2034 (1996).

The Cable Television Consumer Protection and Competition Act of 1992 was before the Court. Section 10(b) which applies only to leased access channels, required cable operators to segregate "patently offensive" programming on a single channel, to block that channel from viewer access, and to unblock it (or later reblock it) within 30 days of a written request. Part III of the opinion was a majority holding that § 10(b) violated the First Amendment. Its "segregate and block" requirements had obvious speech-restrictive effects for viewers who cannot watch programs segregated on the "patently offensive channel without considerable advance planning or receive just an occasional few such programs, and who may judge a programs' value through the company it keeps or refrain from subscribing to the segregated channel out of fear that the operator will disclose its subscriber list. Further, §10(b) is not appropriately tailored to achieve its basic, legitimate objective of protecting children from exposure to "patently offensive" materials. Less restrictive means used by Congress elsewhere to

afford such protection for children show that § 10(b) is overly restrictive while its benefits are speculative. These less restrictive means include "V-chips" and the lockbox requirement that has been in place since the Cable Act of 1994.

A plurality of the Court, four justices, also found that the definition of "indecent" materials was not unconstitutionally vague. That definition was contained in § 10(a) of the statute and read: "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." The Court found that the definition was not overly broad, asserting that this conclusion was further indicated by this Court's construction of the phrase "patently offensive" in *Pacifica*. The Court found that that construction would narrow the category late at night when the audience is basically adult. The requirement that screening be permitted only pursuant to a written request also conformed to the concerns in *Pacifica*. Finally, the definition's "reasonable belief" qualifier seemed designed to provide a legal excuse for the operator's honest mistake, and it constrained the operator's discretion as much as it protects it.

Sable Communications v. FCC, 492 U.S. 115 (1989).

Involved a "dial-a-porn" company which brought an action challenging the constitutionality of the Communications Act which prohibited indecent (& obscene) interstate commercial telephone messages. The language was similar to that found in ESC. However, the statute effected a total ban. The Supreme Court found that, while the Government has a legitimate interest in protecting children from exposure to indecent telephone messages, the statute was not sufficiently narrowly drawn to serve that purpose & thus violated the First Amendment. The Court suggested that had the statute incorporated defenses such as credit card verification or other means to ensure that an adult was calling the statute would probably be constitutional.

FCC v. Pacifica, 438 U.S. 726 (1978).

A radio station broadcast a satiric monologue by George Carlin entitled "Filthy Words" during the afternoon. A father who heard the broadcast while driving with his young son complained to the FCC. The FCC determined the broadcast was indecent, placed the complaint in the station's license file, and stated that, if the radio station were to receive any additional complaints, it would consider using one of the sanctions at its disposal (including removal of the license). The Court found that the FCC's determination that the language in the broadcast was indecent was correct and that the FCC's order did not violate the broadcaster's First Amendment rights. The Court defined indecent as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children

may be in the audience."

II. Circuit Court Precedent

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

Mr. and Ms. Thomas were convicted of violating federal obscenity laws concerning their operation of a computer bulletin board system. Mr. Thomas bought sexually-explicit magazines from an adult bookstore, scanned the images into his computer and would deliver them to paying members with passwords. Nonmembers could access an introductory screen which contained brief, sexually explicit descriptions of the picture files and adult videotapes that the Thomas' sold after getting an e-mail request for them. Passwords were not assigned until a payment and application form had been approved. The application form requested the age of the buyer, phone number, and required a signature.

The court ruled: (1) prosecutions may be brought in the district of dispatch or the district of receipt; (2) obscenity is determined by the standards of the community where the trial takes place; and (3) it is not unconstitutional to subject interstate distributors of obscenity to varying community standards. The court also found that the because Thomas's had knowledge of where the materials were going, there was no need for a more flexible definition of community. Further, the court found that the cost burdens imposed under this standard were not significant impediment.

Action for Children's Television v. FCC (ACT III), 58 F.3d 654 (D.C.Cir. 1995).

Group of broadcasters, programmers, listeners and viewers challenged a provision in the Public Telecommunications Act of 1992 which provided that indecent material may only be broadcast between the hours of midnight and 6 a.m. (except in the case of public stations that go off the air at or before midnight -- they were allowed to broadcast indecent materials between 10 p.m. and midnight). The court held that because the regulation distinguished between the two categories of broadcasters in a way which bore no relation to the government's compelling interest in protecting children from exposure to indecent broadcasts, the more restrictive limitation (the midnight to 6 a.m. one) was unconstitutional.

Dial Information Services v. Thornburgh, 938 F.2d 1535 (2nd Cir 1991).

Companies providing indecent telephone message service sought to preliminarily enjoin enforcement of a statute regulating their activity. The statute protected children from accessing the messages. "Indecent" was administratively defined as "description or depiction of sexual or excretory activities or organs in patently offensive manner as

measured by contemporary standards for telephone medium."

The court found that the statute was not unconstitutionally vague. The definition tracked the one the FCC had developed in the radio broadcast medium which passed muster for a vagueness challenged in the Supreme Court in *Pacifica*. Also the court found that the statute offered "safe harbor" defenses for providers that complied with telephone company pre-subscription procedures or engaged in independent billing and collection. At same time, the court found that voluntary blocking was not an effective means of prohibiting children access.

Information Providers' Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991).

Coalition of dial-a-porn providers challenged an FCC regulation establishing reverse blocking of telephone access (providing telephone access only to those who request the service) as a "safe harbor" against criminal prosecution under § 233 of the Communications Act. The Coalition wanted to be able to use "voluntary" blocking, where access is provided to all users except those who chose no access. The Coalition argued that the regulation was not narrowly tailored to serve the compelling government interest in protecting minors from exposure to indecent telephone messages and that the FCC's definition of indecent was unconstitutionally vague.

The court held that reverse blocking was technologically feasible and that voluntary blocking would not effectively limit minors' access to dial-a-porn and that "indecent" was not unconstitutionally vague. In assessing the vagueness challenge, the court found that the Supreme Court in *Pacifica* implicitly found that the FCC's definition of indecency was not unconstitutionally vague. The court also considered the argument that because "community standards" was not discussed by the courts for the telephone medium, it was vague. The court found that if the Supreme Court intended *Pacifica*'s approval of FCC's definition of indecency (including the community standards aspects) to only apply to the broadcast medium, it would have said so in *Sable*.

American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990).

An association of booksellers challenged a Georgia statute which made it a criminal offense to display, in places accessible to minors, any material deemed harmful to minors. The court found the statute's definition of "harmful to minors" was not overly broad. The court's analysis included an exploration of the Ginsberg variable definition of obscenity (i.e., the idea that a state may deny minors access to materials which are acceptable for adults but obscene for minors). Specifically, the court considered whether the reach of the "harmful to minors" definition must be evaluated from the perspective of any reasonable minor, including an older minor, or whether the tests must be applied in light of "most" minors or the "average" minor or the youngest

minor who might seek access to these types of materials.

The court found that if any reasonable minor, including a seventeen year old, would find serious literary value in a work, the material is not "harmful to minors." Consequently, the court held that the statute was not overbroad in the sense that it prevented older minors from gaining access to materials which would not be harmful for them but might be harmful for younger minors.

The court also considered whether the statute was void for vagueness. Specifically, the court reviewed the statute to see whether it was so vague so as to be overbroad (overbreadth from indeterminacy). The court held that the definition of "harmful to minors" did not render the ban substantially overbroad due to indeterminacy, finding that the statute did not unconstitutionally burden adults' access to such material because placing the materials behind "binder racks" would satisfy the statute and would only slightly burdens adults' access.

Fabulous Associates v. Pennsylvania Public Utility Commission, 896 F.2d 780 (3rd Cir. 1990).

"Dial-a-porn" providers challenged the constitutionality of a Pennsylvania statute which required that adults who wished to listen to sexually explicit telephone messages must apply for a nine digit access code. The court found that, while the government did have a legitimate interest in protecting minors from indecency, the statute was overbroad. The court found that the means the government used, requiring an access code, substantially burdened the First Amendment rights of adults to access to protected materials and was not the least restrictive alternative to achieve the compelling end sought.

Carlin Communications v. FCC, 837 F.2d 546 (2nd Cir. 1988) ("Carlin III").

Providers of "dial-a-porn" services sought review of FCC regulations which established defenses to prosecution for allowing minors access to indecent or obscene materials. The regulations provided that providers had a defense if they: (1) required payment by a credit card before transmission of the message, (2) required an access code before transmission of the message, or (3) scrambled their messages so that they could be received intelligibly only by using a unscrambling device. The dial-a-porn providers argued that the underlying statute is unconstitutional because it was vague and overbroad, it violated due process; it created an impermissible national standard of obscenity; and it constituted an unconstitutional delegation of authority to the FCC. The court characterized the issue as whether the regulating scheme was a feasible and effective method for restricting minors' access to obscene telephone messages, without unreasonably interfering with the constitutional rights of the service provider to send, and adults to receive such messages.

The court held that: (1) the regulating scheme was a feasible and effective way to serve the compelling state interest in protecting minors from obscene speech, (2) the means chosen by the FCC were the least restrictive, (3) the FCC should reopen proceedings if beep-toned devices (less restrictive technology) become available, (4) the underlying statute did not unconstitutionally delegate power to the FCC, (5) the statute was not unconstitutionally overbroad or vague, (6) the term "indecentcy" as used in this criminal statute had the meaning of obscenity in Miller, and (7) the statute did not create an impermissible national obscenity standard.

THE GOVERNMENT'S (PETITIONER) ARGUMENT

I. ESC IS NOT UNCONSTITUTIONALLY VAGUE.

The Court of Appeals erred in finding that 47 U.S.C. §226 of the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC) is unconstitutionally vague. The language of §226(d) essentially incorporates the definition of indecency implicitly approved by this Court in ECC v. Pacifica Foundation, 438 U.S. 726 (1978), for the broadcast medium, and by subsequent courts as applied to different mediums.

Further, contrary to Naughty Netsurfers' contention, the absence of a reference to a particular communications medium targeted by ESC does not render the statute unconstitutionally vague. Similarly, subjecting Naughty Netsurfers to varying community standards of the jurisdictions into which they transmit their materials does not render ESC unconstitutional for vagueness. Commercial content providers must bear the burden of complying with community standards.

A. The language in § 226(d) incorporates the definition of "indecency" already accepted by the judiciary as constitutional.

The FCC's definition of "indecency" in §226(d) originated in the Supreme Court's obscenity case law. In Miller v. California, 413 U.S. 15, 24 (1973), a work was held to be legally obscene if it portrayed "sexual conduct in a patently offensive way." Since Miller, courts have consistently used the terms "indecent" and "patently offensive" interchangeably. See ECC v. Pacifica Foundation, 438 U.S. 726 (1978); Action for Children's Television v.

ECC, 852 F.2d 1332 (D.C.Cir. 1995). Thus, when court have held that the words "patently offensive" survived a vagueness challenge, they have considered and ruled on a vagueness challenge to the term "indecent," as well.

In drafting the definition of "indecent" in § 226(d), it is apparent that Congress simply turned to the broadcast industry to borrow a definition for indecency that had been upheld by the Supreme Court since it was first promulgated by the FCC in 1975. Information Providers Coalition v. FCC, 928 F.2d 866, 874 (9th Cir. 1991). In Pacifica, this Court concluded that the language of a monologue entitled "Filthy Words" was indecent as broadcast within the meaning of the statute which proscribed the use of any obscene or indecent language over the radio. 438 U.S. at 751. The Pacifica decision has been read to foreclose a vagueness challenge to the FCC's definition of indecency in the broadcast medium. Action for Children's Television v. FCC, 852 F.2d 1332, 1339-40 (D.C.Cir, 1988).

In addition, the absence of a reference to a particular communications medium targeted by ESC does not render the statute unconstitutionally vague. After Pacifica, courts have held that Pacifica's definition of "indecent" as applied to different mediums is not vague. Information Providers Coalition v. FCC, 928 F.2d 866, 875 (9th Cir. 1991) (holding that "if the indecency definition passes the void for vagueness test for persons of ordinary intelligence who broadcast radio communication, it certainly must pass the same test for those who offer indecent communications over the telephone line"); see Denver Area Education Telecommunications Consortium v. FCC, 116 S.Ct. 2374 (1996) (finding that the statutory definition of indecency for the cable medium is not vague); Dial Information Services v. Thornburgh, 938 F.2d 1535 (2nd Cir. 1991) (holding statute regulating indecent telephone

message service not unconstitutionally vague); Alliance for Community Media v. FCC, 56 F.3d 105 (holding that statute regulating cable television is not unconstitutionally vague). The mere fact that ESC regulates the internet as opposed to other media does not require the Court to diverge from this consistent practice of finding the definition of indecency which the Court upheld in Pacifica not unconstitutionally vague in reference to other media.

B. ESC is not unconstitutionally vague because it requires commercial content providers to bear the burden of complying with community standards of indecency.

In the obscenity context, the Court has held that statutes which require the distributors of obscene materials to bear the burden of complying with community standards of indecency are not unconstitutionally vague. Hamling v. U.S., 418 U.S. 14 (1973); Miller v. California, 413 U.S. 15 (1973). Because the indecency definition in §226(d) is based on obscenity jurisprudence, ESC's requirement is likewise not unconstitutionally vague. See Sable Communications v. FCC, 492 U.S. 115, 125-126 (1989)(finding a statute which banned both obscenity and indecency and required commercial content providers in the telephone medium to bear the burden of complying with the community standards of the jurisdictions it transmitted to not unconstitutionally vague). Internet content providers like Naughty Netsurfers are no less capable than those subject to obscenity laws or subject to indecency regulations in the context of other media to acquire a familiarity with relevant community standards.

II. ESC IS NOT UNCONSTITUTIONALLY OVERBROAD.

ESC is not unconstitutionally overbroad because it does not chill the constitutionally protected speech of Naughty Netsurfers or other persons not before the court. Furthermore, it passes strict scrutiny analysis because the government has a compelling interest in protecting children from viewing indecency on the Internet and ESC employs narrowly tailored means to achieve that compelling government interest.

A. ESC does not chill the constitutionally protected speech of Naughty Netsurfers or others not before the Court.

ESC's carefully constructed defenses allow commercial content providers to provide indecent material on the Internet to adults. A statute is unconstitutionally overbroad when the restriction deters parties not before the court from participating in protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973). "Invalidation of a statute on overbreadth grounds is strong medicine, and is inappropriate unless the overbreadth is substantial and no limiting construction could be placed upon the challenged statute." *Id.* at 613. In this instance, ESC's affirmative defenses ensure that the statute does not restrict the rights of Naughty Netsurfers or others not before the Court to engage in constitutionally protected speech, and ESC is clearly not substantially overbroad.

The affirmative defenses of §226(e) ensure that commercial content providers can protect themselves from prosecution without impeding their ability to transmit constitutionally protected communications on the Internet to adults. Section 226(e)(5)(B) provides that it is a defense to prosecution under §226(d) if a person has "restricted access to [covered] communications by requiring use of a verified credit card, debit account, adult access code, or

adult personal identification number." Under this provision, commercial content providers who wish to transmit indecent material to adults may do so without fear that they might face prosecution. In Sable Communications v. FCC, the Court found that the very defenses at issue in this case, credit card verification and adult access codes, were a "satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors." 492 U.S. 115, 128 (1989).

Section 226(e)(5)(A), the "good faith" defense, provides a safe harbor for commercial content providers who "in good faith" take "reasonably effective actions," including any steps "feasible under available technology," to prevent minors' access to patently offensive communications. ESC also gives examples of "reasonably effective actions" which would indemnify a commercial content provider under the statute. These include labeling sites containing indecent material and registering with the marketplace of software capable to identify and block indecent material. This is technologically feasible, as evidenced by the fact that a wide range of browser and blocking services capable of detecting "tags" are already available on the market. (R. at 10). Thus, a commercial content provider can easily tag its indecent material and freely transmit indecent material to adults without any fear of sanctions under ESC.

The affirmative defenses contained in §226(e) are not economically prohibitive or excessively burdensome such that they would substantially chill the constitutionally protected speech of Naughty Netsurfers or others not before this Court. ESC is limited in scope to commercial content providers. Hence, those affected by the statute will by their very nature be able to pass on the cost of the screening devices to their customers just as they pass on the

costs of employees and equipment. As this Court noted in *Sable*, while the content provider "may be forced to incur some costs in developing and implementing a system for screening...there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages." 492 U.S. 115, 125-126.

B. ESC is narrowly tailored to achieve the compelling governmental interest of protecting minors from indecency.

In addition to not chilling constitutionally protected speech, ESC is constitutional under strict scrutiny because the government has a compelling interest in protecting minors from exposure to indecent material, and Congress chose a narrowly tailored means to achieve that interest when it enacted ESC. Beginning with the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court has consistently maintained that the government has a compelling interest in protecting children from indecent material. 390 U.S. at 636. In the recent case of *Denver Area Education Telecommunications Consortium*, this Court again found that the interest of protecting children from exposure to patently offensive sex-related material is compelling. *Denver Area Education Telecommunications Consortium*, 116 S.Ct. 2374, 2387 (1996).

As a content based regulation of speech, ESC must be narrowly tailored to meet the government's compelling interest. *Sable*, 492 U.S. 115 (1989); *Butler v. Michigan*, 352 U.S. 380 (1957). ESC is narrowly tailored to achieve the government's interest in protecting children from indecent material on the Internet because, as noted above, the defenses contained in §226(e) ensure that the statute adequately protects minors from indecent material while not

restricting the constitutional rights of adults to view indecent material on the Internet. Further, Congress carefully limited the scope of ESC to commercial content providers.

The benefit gained from the statute, namely the protection of minors from indecent material on the Internet, far outweighs the minimal potential loss of constitutionally protected rights incident to this regulation. ESC will at most deter the transmission of "patently offensive reference to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern." FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

NAUGHTY NETSURFERS'(RESPONDENT) ARGUMENT

I. THE ANTI-INDECENCY AND EFFECTIVE STANDARDS FOR CYBERSPACE COMMUNICATIONS ACT IS UNCONSTITUTIONALLY VAGUE.

Naughty Netsurfers has a constitutional right to market sites on the Internet which contain sexually explicit material. The marketed material is not obscene. Because it is not obscene and because it is content-based speech, it qualifies for First Amendment protection whether or not it has serious merit. *cite*. The Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC) is the government's first attempt to regulate speech over the Internet by making it a criminal offense to knowingly disseminate "indecent" content to any minor. Because Naughty Netsurfers has a fundamental free speech right to engage in such communications with adults, *cite*, ESC cannot stand unless it gives "the person of ordinary intelligence a reasonable opportunity to know what [conduct] is prohibited."

Grayned v. City of Rockford, 408 U.S. 104, 108 (1971). In other words, the statute may not be vague. Striking laws for vagueness ensures against arbitrary and discriminatory enforcement and guides citizens so that they may behave lawfully. Where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. ESC fails to give adequate notice of the conduct it proscribes. Consequently, it is impermissible vague and must be struck.

II. ESC FAILS TO ADEQUATELY DEFINE "INDECENT."

The government argues that Esc essentially codifies the standard FCC definition of indecency upheld by the Supreme Court in FCC v. Pacifica, 438 U.S. 726 (1978). This argument fails for two reasons: (1) it wrongly presumes that the definition is adequate for all modes of communication and (2) the inability of content providers to know or control where their message is retrieved renders the definition vague.

The Court in Pacifica never ruled that the FCC definition survived a vagueness challenge. Thus, the government's contention that similar language must be facially valid is only an assumption. This language has never been considered as applied to the Internet as a communications medium. When it is so applied, it is clear that the definition cannot survive a vagueness challenge because the medium is so different that the language is unworkable.

In Pacifica, the Court only concluded that regulation of a particular indecent broadcast, George Carlin's dirty words, was justified. The Court emphasized the unique attributes of broadcasting that warranted government regulation: its pervasiveness in the home and as a medium that can affront the listener without prior warning of its content, and its unique

accessibility to children -- even those too young to read. *Id.* at 749.

The Internet's attributes are quite different. It requires the viewer to take several affirmative steps to receive the communication. There is no "captive audience" problem; consumers are willing recipients. Thus, there are no unexpected surprises or invasions that are unsought. Moreover, it is not uniquely accessible to children, nor can such indecent material be retrieved by one who cannot read.

For similar reasons, the use of "contemporary community standards" as a guide for those who are covered by ESC renders the statute void for vagueness. Similar language as a means to regulate content-based speech has before this Court not only with regard to radio broadcast but also with regard to the telephone medium, *See Sable Communications v. FCC*, 492 U.S. 115 (1989), and the cable television medium *Denver Area Education Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996). However, each of those mediums differ in a dispositive way from the Internet. Radio broadcasters, telephone porn profiteers, and cable programmers can discover readily the community to which their message is being sent. There is no such ability on the part of an Internet content-provider. **cite to record.** Because Internet content-providers cannot know the community into which their message is sent, ESC's language forces them to tailor their content to the least tolerant community to avoid prosecution.

This need to conform to the most conservative community is an unconstitutional impediment to their constitutional right to free speech and warrants striking ESC for vagueness. For even if the legislative purpose is legitimate, and one of substantial governmental interest, the government cannot pursue it by means that broadly stifle personal

liberties if the end can be more narrowly achieved. Shelton v. Tucker, 364 U.S. 479 (1960).

The government's use of "community standards" to define indecency significantly inhibits the free speech of content-providers such as Naughty Netsurfers. Consequently, ESC does not use the least restrictive means to regulate content on the Internet and must be ruled void for vagueness.

II. ESC IS UNCONSTITUTIONAL BECAUSE IT IS OVERBROAD

An overbroad statute is one that is designed to burden or punish activities that are not constitutionally protected, but its flaw is that, as drafted, it also includes conduct protected by the First Amendment. In other words, an overbroad statute is one that is not sufficiently narrowly drawn, and as a consequence, it infringes on the constitutional protected rights, not necessarily those of the litigant but those of others not before the court. An overbroad statute chills the protected speech of others. See generally Broadrick v. Oklahoma, 413 U.S. 601 (1973). ESC is overbroad because it fails to leave a means by which adults may engage in constitutionally protected speech over the Internet.

Although minors do not have a constitutional right to engage in indecent speech, adults do retain that right. Ginsburg v. New York, 390 U.S. 629, 636 (1968). Hence, the government has a legitimate interest in protecting children from indecency; however, if it decides to regulate indecent communications, it must do so by using narrowly drawn means that do not infringe on the rights of adults to engage in such speech. Grayned, 408 U.S. at 117. Section 226(d) of ESC criminalizes the dissemination of indecent speech to minors; section 226(e) provides affirmative defenses for content-providers who publish indecent speech. The government argues that this combination saves ESC from an overbreadth

challenge. However, it does not.

The purpose of the defenses is to provide a means for content-providers to deal in indecent communications with adults without fear of prosecution -- to leave open a means by which adults may exercise their First Amendment rights. However, the defenses fail to achieve their purpose. This failure chills adults' speech on the Internet; this chill warrants that ESC be struck for overbreadth.

Section 226(e)(5)(B) requires that commercial content providers make use of restricted access codes or credit card verification to ensure the indecent material they publish does not become available to children. This defense is economically prohibitive for smaller companies. Each transaction costs from sixty-cents to over one dollar. So even if of the forty million Internet users only one million reside in the United States, those one million users could translate into overhead costs of one million dollars. Although the theoretical possibility of passing these costs on to the consumer exists, it is not a practical reality for the internet market. The larger companies would likely be able to absorb some of this cost while smaller companies would have to pass the whole to their consumers forcing their prices up, making them unable to compete, driving them from the market.

Section 226(e)(5)(A) also fails to permit publishers to post indecent material without fear of prosecution. This section provides an affirmative defense if a publisher tags its material, but that tag must also be "coupled with" browser software capable of detecting the tag. This defense necessarily requires the cooperation of third parties. Each computer capable of accessing the Internet must be equipped with this browser software. Content-providers cannot control the decisions of all computer owners. Hence, the publisher cannot be assured

that tagging will be an "effective" means of blocking indecent material from reaching minors. Yet it is the publisher who will be facing criminal penalties, including a term of imprisonment, if his arguably indecent content reaches a minor. Although browsing software capable of detecting tags constitutes sixty-five percent of the market for such software, there remains thirty-five percent of the United States market that is not covered. This remaining portion of the market dictates that even if a provider tagged, he or she would nonetheless risk criminal prosecution with each posting of material which has the potential to be deemed indecent. Hence, tagging is no assurance against prosecution. Accordingly, ESC fails to leave open a means for content-providers to publish indecent speech for adults, and it must be struck for overbreadth.

III. ESC IS A CONTENT-BASED REGULATION THAT FAILS TO PASS STRICT SCRUTINY

As a content-based regulation of speech, ESC must also be able to survive strict scrutiny in order to be constitutional. ESC fails to pass the strict scrutiny test because it is not narrowly tailored means to achieve a compelling government interest. ESC cannot meet these requirements for much the same reasons that it fails to survive an overbreadth challenge. Its means are not sufficiently narrowly tailored nor is the government able to show a compelling interest because ESC will have so little effect that the interest is not compelling.

Just as the vagueness doctrine requires that the least restrictive means be employed and just as the overbreadth doctrine requires narrowly drawn language, strict scrutiny also requires the government to regulate in a way that leaves those with a constitutional right to the conduct being proscribed a way to exercise that right. Again the use of "community standards" causes

publishers of indecent material on the Internet to tailor their content to the most conservative community, and the defenses do not resolve this problem. Moreover, as thirty percent of the indecent material that is available on the Internet derives from foreign publishers and as ESC does not cover non-commercial publishers of indecent material, the statute is largely ineffective. This ineffectiveness lessens the governmental interest in regulating the speech, rendering it no longer compelling. Accordingly, the government cannot show that ESC employs narrowly tailored means to achieve a compelling government interest, and the statute must be struck for failure to survive strict scrutiny.