IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT AT NASHVILLE

BILLY CULLEN, CLAUDETTE CULLEN, TRACY CULLEN, JERRY FROELICH, DANA BARRETT, KAREN SAWYER, AND MIKE GREEN,	)	
Plaintiffs,	)	
v.	)	**Case No. 04C-197**
	)	**Judge Kurtz**
PHILLIP YBARROLAZA and JOHN DOES 1-10,	)	**JURY DEMAND**
Defendants.	)	

PLAINTIFFS' FILING OF AUTHORITY FROM THE CONGRESSIONAL RECORD

Since the hearing on January 28, 2005, Plaintiffs have searched again the Congressional Record with regard to the intent in establishing Section 230 "publisher immunity" from state defamation laws in the Communications Decency Act ("CDA"). As noted at the hearing, the CDA was primarily focused on Internet pornography.[1] The vast bulk of Congressional debate understandably centered on the pornography issue. There were, however, scattered references in the debates as to just how far Congress intended to extend the immunity.

For example, House Judiciary Committee Chairman Rep. Henry Hyde stated on February 1, 1996, that "the conference report expressly provides an absolute legal defense to any **on-line**

[1] "In general, the legislation is directed at the creators and senders of obscene and indecent information." Statement of Senator James Exon, sponsor of the Communications Decency Act, 142 Cong. Rec. 714, attached hereto as Exhibit B.

access provider, software company, employer, and any other, 'solely for providing access or connection to or from a facility, system or network not under that person's control,' so long as **that person in not involved in 'the creation of the content of the communications.'"** 142 Cong. Rec. H. 1158, attached hereto as Exhibit A. (Emphasis added).

During the Senate debate on the same date, CDA sponsor Sen. James Exon stated, "The legislation generally does not hold liable **any entity that acts like a common carrier without knowledge of messages it transmits or hold liable an entity which provides access to another system over which the access provider has no ownership of content** ... Congress does not hold the mailman liable for the mail that he/she delivers ... In other words, the telephone companies, the computer services such as Compuserve, universities that provide access to sites on Internet which they do not control, are not liable." 142 Cong. Rec. 714, attached hereto as Exhibit B.(Emphasis added).

Perhaps most telling of all is an earlier exchange between Senator Coats and Senator Exon on June 5, 1995.

> **Mr. Coats:** I wanted to clarify that it is the intent of this legislation that persons who are providing access to or connection with Internet or other electronic services not under their control are exempted under this legislation.
>
> **Mr. Exon:** Defense (f)(1) **explicitly exempts a person who merely provides access to or connection with a network like the Internet for the act of providing such access**. Understanding that providing such access or connection to online services is an action which can include other incidental acts, this legislation is intended to exempt from prosecution the provision of access including transmission, downloading, storage, and certain navigational functions which are incidental to providing access or connection to a network like the Internet. An online service that is providing its customers with a gateway to networks like the Internet or the worldwide web **over which it has no control is generally not aware of the contents of the communications which are being made on these networks**, and therefore it should not be responsible for those communications. **To the extent that service providers are doing more than merely providing access to a facility or network over which they have not control, the exemption would no longer apply**.

141 Cong. Rec. S. 8345, attached hereto as Exhibit C. (Emphasis added).

In short, as Plaintiffs have argued, it is clear from these passages from the Congressional Record that the "publisher immunity" in the Communications Decency Act was intended to apply to Internet Service Providers ("ISPs") and common carriers, **not** to individual web sites and webmasters such as the defendant. Here, the defendant (1) was involved in the "creation of the content of the communications"; (2) does not "provide access to or connection with a network like the Internet"; (3) unlike an internet service provider, has complete "control" over the website and its contents, and was undeniably "aware" of the defamatory nature of the material in question; and (4) has "ownership of content" posted on the website.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Filing Supplemental Authority from the Congressional Record was served upon the following by placing the same in the United States Mail, First Class postage prepaid, upon this the 8th day of February, 2005:

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James G. Stranch, III

THAT ANY BOC PROVIDING ALARM MONITORING SERVICES WILL OPERATE UNDER SPECIFIC NONDISCRIMINATION, CROSS-SUBSIDY, AND CUSTOMER INFORMATION OBLIGATIONS AND PROTECTIONS. AFTER 5 YEARS, THERE WILL BE NO ENTRY, EQUITY, OR FINANCIAL CONTROL RESTRICTIONS ON BOC PROVISION OF ALARM MONITORING SERVICES.

FINALLY AND IMPORTANTLY, TITLE V OF S. 652 WILL PROHIBIT USING AND INTERACTIVE COMPUTER SERVICE FOR THE PURPOSE OF SENDING INDECENT MATERIAL TO A SPECIFIC PERSON UNDER THE AGE OF 18. IT ALSO OUTLAWS THE DISPLAY OF INDECENT MATERIAL WITHOUT TAKING precautions to shield that material from minors. Defenses to these violations are provided to assure that enforcement will focus on those who knowingly transmit such material to minors. In fact, the conference report expressly provides an absolute legal defense to any on-line access provider, software company, employer, and any other, "solely for providing access or connection to or from a facility, system or network not under that person's control," so long as that person is not involved in "the creation of the content of the communication." Employers are also protected so long as the actions of their employees fall outside of the scope of their employment or if the employer has not ratified the illegal activity.

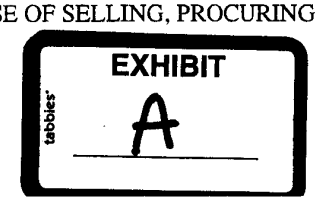
THIS PROVISION CODIFIES THE DEFINITION OF INDECENCY THAT HAS BEEN UPHELD IN v., 438 U.S. 726 (1978), and v., 492 U.S. 115 (1989). Material that is "indecent" is "material that, in context, depicts or describes, in terms patently offensive as **[*H1159]** measured by contemporary community standards, sexual or excretory activities or organs." Thus, the standard contained in S. 652 is fully consistent with the Constitution; it is not unconstitutionally vague.

THE UNDERLYING LEGAL PRINCIPLE OF THE INDECENCY CONCEPT IS PATENT OFFENSIVENESS. SUCH A DETERMINATION CANNOT BE MADE WITHOUT A CONSIDERATION OF THE CONTEXT OF THE DESCRIPTION OR DEPICTION AT ISSUE. AS APPLIED, THE PATENT OFFENSIVENESS INQUIRY TO BE MADE INVOLVES TWO DISTINCT ELEMENTS: THE DESIRE TO BE PATENTLY OFFENSIVE, AND A PATENTLY OFFENSIVE RESULT. GIVEN THESE INQUIRIES, IT IS CLEAR THAT MATERIAL WITH SERIOUS REDEEMING VALUE IS QUITE OBVIOUSLY INTENDED TO EDIFY AND EDUCATE, NOT TO OFFEND. THEREFORE, IT WILL BE IMPERATIVE TO CONSIDER THE CONTEXT AND THE NATURE OF THE MATERIAL IN QUESTION WHEN DETERMINING ITS PATENT OFFENSIVENESS.

FURTHERMORE, TITLE V CLARIFIES CURRENT FEDERAL OBSCENITY STATUTES SO IT IS UNDENIABLE THAT THOSE LAWS COVER THE USE OF A COMPUTER TO DISTRIBUTE, TRANSPORT, OR IMPORT OBSCENE MATTER. THE REGULATION OF INTERNET INDECENCY CONTAINED IN THE CONFERENCE REPORT IS NOT BASED ON WHAT SHOULD BE SEEN OR DISCUSSED VIA THE VAST COMPUTE NETWORK, BUT RATHER ON WHERE OR HOW IT IS MADE AVAILABLE. THE PROVISIONS OF THE BILL ARE NOT THE MOST RESTRICTIVE MEANS, ON THE CONTRARY, THEY ARE REASONABLE AND NARROWLY TAILORED SO NOT TO OVERLY BURDEN ONE'S RIGHT TO ENGAGE IN INDECENT COMMUNICATIONS WHILE AT THE SAME TIME ACHIEVING THE GOVERNMENT'S POLICY OBJECTIVE OF PROTECTING OUR CHILDREN.

CONCERNS HAVE BEEN RAISED ABOUT THE AMENDMENT TO 18 U.S.C. 1462 REGARDING AN INTERACTIVE COMPUTER SERVICE. SECTION 1462 GENERALLY PROHIBITS THE IMPORTATION OR TRANSPORTATION OF OBSCENE MATTER. SUBSECTION 1462(C) PROHIBITS THE IMPORTATION OR INTERSTATE CARRIAGE OF "ANY DRUG, MEDICINE, ARTICLE, OR THING DESIGNED, ADAPTED, OR INTENDED FOR PRODUCING ABORTION, OR FOR ANY INDECENT OR IMMORAL USE; OR ANY WRITTEN OR PRINTED CARD, LETTER, CIRCULAR, BOOK, PAMPHLET, ADVERTISEMENT, OR NOTICE OF ANY KIND GIVING INFORMATION, DIRECTLY OR INDIRECTLY, WHERE, HOW, OR OF whom, or by what means any of such mentioned articles, matters or things may be obtained or made * * *."

WE ARE TALKING ABOUT THE ADVERTISEMENT, SALE OR PROCUREMENT OF DRUGS OR MEDICAL INSTRUMENTS OR DEVICES, USED TO BRING ABOUT AN ABORTION. THIS LANGUAGE IN NO WAY IS INTENDED TO INHIBIT FREE SPEECH ABOUT THE TOPIC OF ABORTION, NOR IN ANY WAY TO LIMIT MEDICAL OR SCIENTIFIC DISCOURSE ON THE INTERNET. THIS AMENDMENT TO SUBSECTION 1462(C) DOES NOT PROHIBIT SERIOUS DISCUSSIONS ABOUT THE MORAL QUESTIONS SURROUNDING ABORTION, THE ACT OF ABORTION ITSELF, OR THE CONSTITUTIONALITY OF ABORTION. THIS STATUTORY LANGUAGE PROHIBITS THE USE OF AN INTERACTIVE COMPUTER SERVICE FOR THE EXPLICIT PURPOSE OF SELLING, PROCURING OR FACILITATING THE SALE OF



chief mail and wire fraud enforcement agency. They do a very good job and this provision gives them an important new tool to protect the elderly and other Americans from scam artists and swindlers.

I also succeeded in adopting a provision to help stop another outrageous phone scam that has added hundreds, even thousands of dollars, to a family's phone bill. Worst of all, this ripoff exposes young people to dial-a-porn phone sex services-even when families take the step of placing a block on extra cost 900-number calls from their home.

Companies promoting phone sex, psychic readings and other questionable services-often targeted at adolescents-use 800-numbers for calls and then patch them through to 900-number service via access codes. My amendment closes the loophole that allows these unseemly services to swindle families and restores public confidence in toll free 800-numbers.

If we pass this bill today, these provisions will become the law of the land. As Microsoft giant, Bill Gates said in a recent interview with Newsweek,

The revolution in communications is just beginning. It is crucial that a broad set of people participate in the debate about how this technology should be shaped. If that can be done the highway will serve the purposes users want. Then it will * * * become a reality.

This bill is a starting point, a gateway to the revolution, that allows all Americans to participate. I urge my colleagues to support this conference report.

Mr. LEVIN. Mr. President, I would like to engage my colleague from Nebraska, the author of Title V of the telecommunications conference report, in a colloquy. I have a number of questions I hope you can answer to help clarify the intent of title V.

Is a company such as Compuserve which provides access to all mainframes on the Internet liable for anything on those mainframes which its users view?

Is a company like Compuserve which maintains its own mainframe and which allows people to post material on its mainframe liable for prohibited material that other people post there in the absence of an intent that it be used for a posting of prohibited material?

Is the entity that maintains a mainframe, such as a university, that allows a person to post material on its mainframe liable for prohibited material that other people post there in the absence of an intent that it be used for a posting of prohibited material?

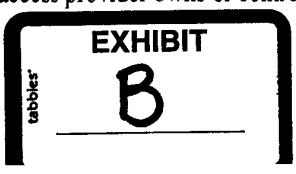
When a user accesses prohibited material on a mainframe that was posted by a third party, does that constitute an "initiation" of transmission for which the entity maintaining the mainframe or the entity providing access to the mainframe is liable?

Mr. EXON. I appreciate the questions raised by my colleague, Senator Levin. These questions are important and helpful. In general, the legislation is directed at the creators and senders of obscene and indecent information. For instance, new section 223(d)(1) holds liable those persons who knowingly use an interactive computer service to send indecent information or to display indecent information to persons under 18 years of age. You can't use a computer to give pornography to children.

The legislation generally does not hold liable any entity that acts like a common carrier without knowledge of messages it transmits or hold liable an entity which provides access to another system over which the access provider has no ownership of content. Just like in other pornography statutes, Congress does not hold the mailman liable for the mail that he/she delivers. Nothing in CDA repeals the protections of the Electronic Message Privacy Act.

For instance, new section 223(e)(1) states that "no person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, * * * that does not include the creation of the content of the communication." In other words, the telephone companies, the computer services such as Compuserve, universities that provide access to sites on Internet which they do not control, are not liable.

There are some circumstances, however, in which a computer service or telephone company or university could be held liable. If, for instance, the access provider is a conspirator with an entity actively involved in creating the proscribed information (223(e)(2)), or if the access provider owns or controls a facility, system, or network engaged in



The Supreme Court noted that daytime radio is "uniquely accessible to children." I submit that computers are not only "uniquely accessible to children," but also "uniquely inaccessible to their parents." I expect that any child or grandchild with basic computer skills can outperform any member of this body when it comes to operating a computer.

As the Supreme Court has noted in a number of cases, the Congress has a compelling state interest in protecting the physical and psychological health of America's children. We should not throw our hands up and allow every child's computer to become a branch office of Pornography Incorporated.

Mr. HATCH. As chairman of the Committee on the Judiciary, I would like to ask the Senator from Nebraska for clarification on one point. Title IV of this legislation, the Communications Decency Act, includes provisions **[*S8345]**

amending section 223 of the Communications Act to address, among other issues, the circumstances under which providers of network services may be held criminally liable for the transmission or distribution of obscene, indecent, or harassing materials.

Copyright matters are, of course, within the jurisdiction of the Judiciary Committee, and it is my understanding that those provisions in title IV of the bill, as reported by the Commerce Committee, were not intended to-and in fact do not-serve as a precedent for addressing copyright infringement carried out over online services or other telecommunications or digital networks. Am I correct in that understanding?

Mr. EXON. The Senator is correct. The liability standards contained in my proposal have no applicability to liability for copyright infringement. Nor are they intended to set any precedent in the copyright field.

Mr. HATCH. I thank my colleague for this clarification.

Mr. COATS. I wanted to clarify that it is the intent of this legislation that persons who are providing access to or connection with Internet or other electronic services not under their control are exempted under this legislation.

Mr. EXON. Defense (f)(1) explicitly exempts a person who merely provides access to or connection with a network like the Internet for the act of providing such access. Understanding that providing access or connection to online services is an action which can include other incidental acts, this legislation is intended to exempt from prosecution the provision of access including transmission, downloading, storage, and certain navigational functions which are incidental to providing access or connection to a network like the Internet. An online service that is providing its customers with a gateway to networks like the Internet or the worldwide web over which it has no control is generally not aware of the contents of the communications which are being made on these networks, and therefore it should not be responsible for those communications. To the extent that service providers are doing more than merely providing access to a facility or network over which they have no control, the exemption would no longer apply. For instance, if an access provider were to create a menu to assist its customers in finding the pornographic areas of the network, then that access provider would be doing more than solely providing access to the network. Further, this exemption clearly does not apply where the service provider is owned or controlled by or is in conspiracy with a pornographer who is making communications in violation of this legislation.

Mr. COATS. I understand that in a recent N.Y. State decision, Stratton Oakmont versus Prodigy, the court held that an online provider who screened for obscenities was exerting editorial content control. This led the court to treat the online provider as a publisher, not simply a distributor, and to therefore hold the provider responsible for defamatory statements made by others on the system. I want to be sure that the intend of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable.

Mr. EXON. Yes; that is the intent of the amendment.

Mr. COATS. And am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel.

Mr. EXON. Yes; that is the intent of section (f)(4).

Mr. COATS. Similarly, if a system operator discontinued service to a customer who was generating objectionable material, it is the intent in offering this amendment, and specifically the intent of subsection (f)(4), that no breach of contract action would lie against the system operator?