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COMMENT

CYBER-PORN OBSCENITY: THE VIABILITY OF LOCAL COMMUNITY STANDARDS AND THE FEDERAL VENUE RULES IN THE COMPUTER NETWORK AGE

I. INTRODUCTION

Instead of glossy magazine photos and video tapes, today's media for pornography are "simple '1's and '0's, the binary numbers that serve as the building blocks for digital information."¹ Transport of these "nasty numbers" is so easy that porn purveyors need only a computer, modem and phone line to instantaneously² transmit pornography.³ The lack of physical and temporal boundaries associated with computer data creates both substantive and procedural legal complications. The obscenity standard and the determination of proper venue become problematic as applied to First Amendment and privacy rights.⁴

Such problems are illustrated by *United States v. Thomas*.⁵ There, Robert and Carleen Thomas, operators of an adult, members-only computer bulletin board system ("BBS") in Milpitas, California, were convicted of the interstate transport of "obscenity" based on the local standards of

1. Dan Heath, *Computer Porn War Shows Need for New Definition of Community*, HOUS. POST, Aug. 13, 1994, at A27; see Chris Conley and Rob Johnson, *Porn Laws Against Computer Graphics Go On Trial Here*, COM. APPEAL (Memphis), July 18, 1994, at 1A. Until the past two years, obscene magazines and videos were the focus of federal prosecution. *Id.*

2. In reality, the speed of electronic transmission is almost instantaneous. Jim McMahon, *Cyberporn Can be Regulated: Computers & Technology*, S.F. EXAM., Aug. 21, 1994, at B5.

3. Heath, *supra* note 1.

4. Eric Schlachter, *Cyberspace, The Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 97 (1993).

5. No. 94-20019-G (W.D. Tenn. filed Mar. 15, 1994) (Defense Motion for Transfer is located on file at Loyola of Los Angeles Entertainment Law Journal Office). No. 94-20019-G (W.D. Tenn. filed Apr. 18, 1994) (Defense Motion to Dismiss is located on file at Loyola of Los Angeles Entertainment Law Journal Office).

Memphis, Tennessee.⁶ This holding has set a dangerous precedent: "It means that if you have questionable material on your computer system, and your system is open to the public 'whether over direct phone lines . . . or the Internet' the U.S. Attorney's office in Memphis wants you."⁷

This Comment will examine the murky status of current regulation of the interstate transport of computer obscenity. Part II will give an overview of computer networks, both BBSs and the Internet, and how their unique characteristics create problems in regulating obscenity. Part III will discuss the federal laws which apply to computer obscenity and their constitutional limitations. Part IV will discuss the facts of *United States v. Thomas* and the problems the holding raises. This Comment limits the analysis of *Thomas* to the following issues: (1) the obscenity standard used, and (2) forum shopping as it applies to the violation of due process principles. Part V will offer potential solutions to each of these problems.

This Comment will focus on obscenity only as it applies to adult pornography.⁸ Although this Comment will not discuss child pornography, it will focus on the governmental interest in protecting children from exposure to obscenity on BBSs.⁹

II. COMPUTER NETWORKS: THE INTERNET AND BULLETIN BOARDS SYSTEMS

A. Background Information on Computer Networks

"Cyberspace"¹⁰ is "virtual reality,"¹¹ a "dimensionless place,"¹²

6. Naaman Nickell, *Obscenity Convictions Raise Fears on Bulletin Boards*, ARIZ. REPUB., Aug. 8, 1994, at E3.

7. Joshua Quitner, *Computers in the '90's Life In Cyberspace: The Issue of Porn on Computers*, NEWSDAY, Aug. 16, 1994, at B27.

8. Child pornography need not meet obscenity standards to be banned. See *New York v. Ferber*, 458 U.S. 747 (1982). Because of the compelling state interest in protecting children, the First Amendment does not protect child pornography, provided that the state law is adequately defined. *Id.* at 765; see also 18 U.S.C. § 2252.

9. Conley, *supra* note 1. "Operation Long Arm, the first such computer investigation in U.S. history, netted dozens of federal child pornography charges last year." *Id.* The United States Department of Justice claimed that the federal campaign against pornography was to prevent minors from accessing obscene materials and to prevent child molesters from contacting minors. *Id.*

10. William Gibson, a science fiction novelist, first coined the term "cyberspace" in his 1984 book, "Neuromancer." Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, PREPARED REMARKS AS KEYNOTE ADDRESS AT THE FIRST CONFERENCE ON COMPUTERS, FREEDOM & PRIVACY (Mar. 26, 1991) (Transcript available at Loyola Law School, Los Angeles, Library).

where interactive communication can be achieved without the use of physical senses. Though used by a small population in comparison to the telephone, computer networks are the up-and-coming means of exchanging "electronic conversation,"¹³ offering cheap and instant global communication.¹⁴

The Internet was created in the mid 1980's by the National Science Foundation ("NSF"),¹⁵ which funded the fiber-optic links that formed the backbone of the Internet. Initially, the Internet was mostly limited to users who had a job-related electronic mail account on a computer run by their employer.¹⁶ In 1991, the NSF lifted restrictions against commercial use.¹⁷ Today, the Internet is available to anyone with a personal computer, modem and telephone line.¹⁸

Touted as the prototype¹⁹ for the "information superhighway,"²⁰ the Internet is the world's largest computer network.²¹ As the "network of

11. "Virtual reality" is virtual in that what is seen or heard on the computer is generated by electronic data.

12. Don Oldenburg, *Rights on the Line: Defining the Limits on the Networks*, WASH. POST, Oct. 1, 1991, at E5.

13. *Id.*

14. Carla Lazzareschi, *Wired: Businesses Create Cyberspace Land Rush on the Internet*, L.A. TIMES, Aug. 22, 1993, at D1, D2. The original purpose of the Internet was to link the United States Defense Department with its suppliers across the nation. *Id.*

15. Philip Elmer-Dewitt, *Take a Trip into the Future on the Electronic Superhighway*, TIME, Apr. 12, 1993, at 50, 53 [hereinafter *Trip*]. Senator Al Gore was one of the first advocates for the creation of the Internet. *Id.*; see also Lazzareschi, *supra* note 14.

16. These fiber-optic links are high-speed, long distance data lines. Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62 [hereinafter *First Nation*]; see also Barry D. Bayer, and Benjamin H. Cohen, *Explaining and Exploring the Internet*, LAW OFF. TECH. REV., June 22, 1993, 1993 WL 278668.

17. *First Nation*, *supra* note 16.

18. *Id.* at 63. While many other computer networks are free, individual access to the Internet requires a fee.

19. Adam S. Bauman, *Computer at Nuclear Lab Used for Access to Porn*, L.A. TIMES, July 12, 1994, at A1. The Internet is often viewed as the prototype of the information superhighway of the future. *Id.*; see *The Message in the Medium: The First Amendment on The Information Superhighway*, 107 HARV. L. REV. 1062 (1994) [hereinafter *Superhighway*]. The information superhighway will consist of a fiber-optic network "that will carry virtually limitless television banking, interactive computer data bases, channels, home shopping and entertainment and video games, and commercial transactions." *Id.* at 1067.

20. *Superhighway*, *supra* note 19, at 1062, n.3. The term "information superhighway" was first popularized by Senator Al Gore. Al Gore, *Networking the Future: We Need National "Superhighway" for Computer Information*, WASH. POST, July 15, 1990. "This is by all odds the most important and lucrative marketplace of the 21st century." *Trip*, *supra* note 15, at 52 (quoting Vice President Al Gore).

21. Bauman, *supra* note 19; see also Philip Elmer-Dewitt, *Battle for the Soul of Internet*, TIME, July 25, 1994, at 54 [hereinafter *Battle*].

networks," it has grown dramatically in size and technical sophistication in recent years.²² "The Internet currently consists of 20,000 computer networks linked together, with the number of networks doubling annually from 1988 to 1993."²³ The Internet links together large computer networks, like CompuServe and Prodigy,²⁴ as well as tens of thousands of universities, laboratories, government entities, corporations and individuals, with users in 102 countries.²⁵ The number of network users has doubled between 1988 and 1993,²⁶ resulting in a recent count of 25 million worldwide.²⁷

B. Characteristics of the Internet

As with most newly emerging technologies, the advantages and disadvantages of cyberspace are not all self-evident.²⁸ Depending on one's perspective, one glaring advantage or disadvantage is that the Internet is presently impossible to censor for purely technical reasons.²⁹ The Internet was designed to work around censorship and blockage.³⁰ As long as the cyberspace community was small, it could be self-policing; anybody who got out of line could be "shouted down or shunned."³¹ Now that the population of Internet users is "larger than that of most European countries," informal rules of behavior are breaking down.³²

22. Bauman, *supra* note 19, at A1, 18.

23. Dean Takahashi, *Troubles Ahead on the Information Superhighway*, L.A. TIMES (Orange County Ed.), Dec. 21, 1993, at D8.

24. Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1190 (1993). These large commercial networks provide access to BBSs in addition to innumerable electronic information services, such as sports scores, national and regional news, computer games, on-line shopping, electronic encyclopedias, and instant airlines reservations. *Id.*

25. *Superhighway*, *supra* note 19, at 1065.

26. Takahashi, *supra* note 23.

27. Mike Godwin, *Protests Rock Internet After Porn Conviction*, SACRAMENTO BEE, Aug. 3, 1994, at D2 [hereinafter *Protests Rock*] (Mike Godwin is an attorney for the Electronic Freedom Foundation, a public interest group representing computer users operated from Washington D.C.).

28. *Superhighway*, *supra* note 19, at 1067.

29. *First Nation*, *supra* note 16, at 64.

30. "The Internet evolved from a computer system built 25 years ago by the Defense Department to enable academic and military researchers [sic] to continue to do government work even if part of the network were taken out in a nuclear attack." *Battle*, *supra* note 21, at 52.

31. *Id.* at 53.

32. *Id.*

Today, no one owns the Internet.³³ Thus its order is still maintained by local network administrators who cooperate with one another because they benefit by doing so.³⁴ The Internet "exists in a state of suspended anarchy to serve subscribers who have resisted attempts over the years to impose stricter controls on it."³⁵ This aspect raises the question of responsibility for "obscene" images anonymously found on the Internet.

In addition, geographically speaking, the paths over which data travel have become less and less direct. For example, the current Internet connection from Berkeley, California to Seattle, Washinton invokes a network configuration as follows: Berkeley, California to Santa Clara, California to Washington D.C. to New York, New York to Cleveland, Ohio to Chicago, Illinois to San Francisco, California and finally to Seattle, Washington.³⁶ Because geographic boundaries are rendered meaningless by Internet use,³⁷ questions arise regarding the definition of "transporting" data, such as graphic pornographic images, from one state to another through the network.

C. Characteristics of Computer Bulletin Boards

In 1992, there were about 180,000 computer bulletin board systems.³⁸ Over the last 15 years, these BBSs have grown exponentially and now include over ten million users.³⁹ BBSs have become forums for people to communicate/interact with one another without the hindrance of geographical distance.⁴⁰ Offering instant, multiple and anonymous interactive communication⁴¹ by allowing users to read and post mes-

33. *First Nation*, *supra* note 16, at 62. Nobody owns all of the data networks that comprise the Internet, and no single entity controls its use. Although the NSF has built the backbone of the Internet, "the major costs of running the network are shared in a cooperative arrangement by its primary users: universities, national labs, high-tech corporations and foreign governments." *Id.*

34. Lazzareschi, *supra* note 14, at D2.

35. *Id.*

36. *Id.* at D1.

37. See Woody Baird, *Computer Bulletin Board Gets Operators Indicted: Couple Charged With Obscenity*, NEW ORLEANS TIMES PICAYUNE, July 21, 1994, at B8.

38. Schlachter, *supra* note 4, at 91 (citing Judith Berk, *It's No Longer Just Techno-Hobbyists Who Meet By Modem*, N.Y. TIMES, July 19, 1992, § 3, at 12). "Computer bulletin boards" is the popular name for electronic information services. See Miller, *supra* note 24, at 1189.

39. Schlachter, *supra* note 4, at 91.

40. Mike Godwin, *Problems Policing Porn On-Line Computers & Technology Community Standards Difficult to Apply in Cyberspace*, S.F. EXAM., Aug. 14, 1994, at B5 [hereinafter *Problems Policing*].

41. Eric Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 223 (1987).

sages,⁴² BBSs "are rapidly supplanting traditional media as the least expensive and most effective means of communicating to a large audience."⁴³ BBSs can be used to trade digital graphic images and to download data onto the user's own computer.⁴⁴ BBSs range in size from large commercial networks, such as CompuServe and Prodigy, which serve millions of users, to small BBSs run by hobbyists, which may be accessible to as few as ten people.⁴⁵ Most of these latter BBSs are small-scale computer networks run out of hobbyists' homes.⁴⁶

D. *The Emergence of Pornography on Computer Bulletin Boards*

There is a large, growing market for explicit, sexually-oriented material.⁴⁷ In addition, the general content of adult magazines has become unquestionably more graphic over the past thirty years.⁴⁸ Although computer pornography has been around since the early 1980s,⁴⁹ its widespread transmission has been available only within the last few years, concurrent with the emergence of BBSs. Computer networks have played an increasingly significant part in this industry.⁵⁰ Now, graphic images are easily transmittable and are almost as clear as the photos from which they were reproduced.⁵¹

Porn aficionados can purchase pornography from any place in the world on-line⁵² rather than going to the local adult video or book store.⁵³

42. *Superhighway*, *supra* note 19 at 1067.

43. Edward J. Naughton, *Is Cyberspace A Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 413 (1992).

44. *Superhighway*, *supra* note 19 at 1067.

45. Naughton, *supra* note 43, at 413.

46. *Protests Rock*, *supra* note 27. The proliferation of hobbyist-type BBSs is due to the low cost of startup (about \$2,500) and the unregulated nature of the BBS market. See Jensen, *supra* note 41, at 220. A BBS can be operated and accessed from any phone line. *Id.* at 233.

47. Barry W. Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: *New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 30 (1986).

48. *Id.* at 31.

49. Reese Erlich, *Computer Porn At the Office Weighing the Rights of Workers and Employers*, S.F. CHRON., Aug. 13, 1989, at 7/1.

50. Jensen, *supra* note 41, at 225.

51. *Feds Cracked Down on Computer-Generated Child Pornography*, *All Things Considered* (National Public Radio radio broadcast, Aug. 31, 1993).

52. A user is "on-line" when he has accessed a network through his computer and modem.

53. *Couple Found Guilty of Selling Pornography on Internet*, *All Things Considered* (National Public Radio radio broadcast, July 29, 1994) [hereinafter *Couple Found Guilty*].

Moreover, in recent years, sexually explicit material has flooded BBSs from all over the world.⁵⁴

Cyberspace pornography may be preferable to traditional methods of accessing pornography because of the anonymity it provides.⁵⁵ Through a computer, a person can subscribe to a BBS, usually with a credit card number.⁵⁶ Once a fee is paid, the subscriber "is given an identification number and the password [required] to access the system."⁵⁷ The subscriber views titles of images stored in the system's computer.⁵⁸ Digital transmissions of graphic files over telephone lines occur from the BBS computer to the subscriber's own computer.⁵⁹ The subscriber can then save those files to his own computer or print them.⁶⁰ It's "as easy to share pictures with someone in Hong Kong or Moscow as it is with someone down the street."⁶¹

E. *The Characteristics of BBSs That Allow Abuse*

1. Lack of Control Over Content

A BBS operator typically dedicates a computer and one or more telephone lines at his home or business for the sole use by the "virtual

54. Gina Boubion, *On Line Pornography is Creating a Whole New Set of Problems: Zoning Ordinances Cover Adult Bookstores, But What Do You Do About Home Computers?*, PHIL. INQR., Mar. 12, 1994, at A4.

55. McMahon, *supra* note 2. However, some critics find the issue of computer pornography overblown: "using the net to get pornography is like using your car as a paperweight: it works but there are much easier ways It takes a lot of effort, time, money and disk space to deal with a single dirty picture." See Robert Rossney, *The Big Porno Media Scare*, S.F. CHRON., Aug. 4, 1994, at E9. "There's not too much point in getting this stuff on-screen when you can go the corner bookstore and buy some." See David Landis, *Sex, Laws & Cyberspace Regulating Porn: Does it Compute?*, USA TODAY, Aug. 9, 1994, at 1D (quoting Mike Godwin, a lawyer with the public interest group, Electronic Freedom Foundation). "It is more expensive to use a computer to get [pornography] than it is to go a bookstore or video store and get it." See Al Andry, *X-Rated Sex Moves Into Cyber-Space*, CINN. POST, Aug. 29, 1994, at 1B (quoting Daniel Silver, National Chair of the First Amendment Lawyers Association).

56. Conley, *supra* note 1. Proof of age methods range from speaking to the subscriber by phone to requiring a photocopy of a driver's license to requiring fee payment by credit card. *Id.*; see Jensen *supra* note 41, at 221. Access to some hobbyist BBSs are free of charge. *Id.*; see also Landis, *supra* note 55.

57. Jensen, *supra* note 41, at 221.

58. Conley, *supra* note 1.

59. *Id.*

60. *Id.*

61. *Id.*

community of users."⁶² However, the BBS operator may be unaware of the distribution of potentially obscene material due to the automatic operation of his software.⁶³ Although constant surveillance is not impossible, it is impracticable for most BBS operators due to associated prohibitive costs.⁶⁴ Moreover, "[t]he operator has ultimate, but not immediate, control over [his BBS]; he can turn the board on or off and delete messages, but cannot practically prescreen the messages."⁶⁵ As a result, most BBS operators do not monitor their BBSs regularly.⁶⁶

2. Lack of Regulations

The BBS market is generally unregulated.⁶⁷ The interactions between users and BBSs, both legally and technically, are more the result of accommodation and consensus than law or regulation.⁶⁸ When it comes to restricting content, the community standards of the virtual community tend to prevail in most small networks.⁶⁹ "We put all of the responsibility on our community of users to do whatever policing they want."⁷⁰ The users, through "flaming,"⁷¹ will attack the highly offensive remark.⁷²

Computer pornography is especially difficult to regulate and enforce for several reasons. First, the existing laws are unclear regarding which civil liberties computer users and BBS operators retain.⁷³ Second, "[c]omputer networks do not fit neatly into any traditional category of communication."⁷⁴ Third, traditional laws are based on geography,

62. *Problems Policing*, *supra* note 40.

63. *Id.*

64. Jensen, *supra* note 41, at 232, n.81.

65. *Id.* at 219.

66. *Id.* at 232, n.81. Even large commercial BBSs such as CompuServe do not monitor, other than to remove messages if complaints arise. *Id.*

67. *Id.* at 219.

68. Oldenburg, *supra* note 12.

69. *Id.*

70. *Id.* (quoting Frank Burns of Meta Net, a commercial network). At The "WELL" (Whole Earth 'Lectronic Link), a commercial network with 5,000 plus subscribers, managers try to run the network "in a way that it feels more like a small town where you don't want to create a lot of personal enmity. There is a definite community standard." *Id.* (quoting Cliff Figallo, manager of The WELL).

71. "Flaming" is a technique in which abusive messages are sent to the offender. Oldenburg, *supra* note 12.

72. *Id.*

73. Boubion, *supra* note 54.

74. Naughton, *supra* note 43, at 412.

whereas computer communication by its nature has no boundaries.⁷⁵ Fourth, computer communication primarily takes place in the home, thereby making detection difficult.

Any potential regulation of BBSs would likely aim at eliminating their anonymous character by requiring operators to know the names of their users and pass them on to authorities, thereby defeating many of the benefits of BBSs.⁷⁶ Moreover, if operators were required to constantly monitor users, many hobbyist BBSs would go underground due to high costs.⁷⁷ Only a few BBSs could afford to comply,⁷⁸ and as a result, there would be a chilling effect on the legitimate use of BBSs.⁷⁹

3. Data Manipulation

Although this Comment will not discuss child pornography, the ease of manipulating electronic data to depict children pornographically warrants mention. Skilled computer operators can easily manipulate images.⁸⁰ Using computer techniques, programmers can use explicit images of young adults and make them look like children, instead of using actual children.⁸¹ Although such pictures may be deemed obscene, they would not constitute child pornography.⁸²

4. Anonymity

Anonymity on networks can lead to opportunities for abuse.⁸³ For example, pedophiles may lure young children who have access to home computers into engaging in obscene conversations.⁸⁴ "On the Internet, nobody knows you're a dog,"⁸⁵ or for that matter, that you are a child molester trying to converse with a minor on the BBS. "The anonymous

75. Boubion, *supra* note 54.

76. Jensen, *supra* note 41, at 232.

77. *Id.* at 233; see discussion *infra* part II.E.1.

78. Jensen, *supra* note 41, at 233. -

79. *Problems Policing*, *supra* note 40.

80. Michael Prescott and Howard Foster, *Police Get New Powers to Fight Computer Porn*, THE TIMES (London), Nov. 14, 1993. It is very easy to map the face of a child onto the computer image of a young adult to create the illusion of child pornography. *Id.*

81. Takahashi, *supra* note 23, at D8; see also Prescott, *supra* note 80. Pedophiles have superimposed children's features onto adult images to create their own "child" pornography. *Id.*

82. Mary Eisenhart, *Who Decides What You See and Say? Censorship on the Net: EFF Staff Counsel Mike Godwin On Legal (And Other) Issues*, MICROTIMES, Sept. 5, 1994, at 84.

83. Takahashi, *supra* note 23, at D8.

84. Boubion, *supra* note 54.

85. *First Nation*, *supra* note 17, at 62 (quoting the caption on a *New Yorker* cartoon showing two computer savvy canines).

nature of computer communication is the perfect milieu for criminality⁸⁶ because "[i]t's all disturbingly available without any social inhibitors."⁸⁷

III. BACKGROUND OF RELEVANT LAW

A. Federal Obscenity Laws

Congress enacted three statutes to regulate obscenity: (1) 18 U.S.C. Section 1461 proscribes the mailing of obscene material through Congress' postal power;⁸⁸ (2) 18 U.S.C. Section 1462 proscribes the transport or import of obscene materials;⁸⁹ and (3) 18 U.S.C. Section 1465 proscribes the transport and import of obscene materials for the purpose of sale or distribution.⁹⁰

86. Boubion, *supra* note 54.

87. *Id.* (quoting Santa Clara County deputy district attorney, Frank Berry).

88. 18 U.S.C. § 1461, Pub. L.No. 91-662, §§ 3, 5(b), 6(3) (1971), 84 Stat. 1973,1974 which provides in pertinent part:

Every obscene . . . article, matter, thing, device, or substance . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

Id.; see also Pamela J. Stevens, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 715 (1982).

89. 18 U.S.C. § 1462, Pub. L. No. 91-662, § 4 (1971), 84 Stat. 1973 states in pertinent part:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce —

(a) any obscene, lewd, lascivious, filthy book, pamphlet, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonographic recording, electrical transcription, or other article or thing capable of producing sound; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful — [s]hall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both for each such offense thereafter.

Id.

90. 18 U.S.C. § 1465, Pub. L. No. 100-690, Title VIII, §§ 7521(c), 7522(b), 102 Stat. 4489, 4494 (1988) which provides in pertinent part:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility

All three federal obscenity statutes require a showing of scienter.⁹¹ This is necessary "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."⁹² However, scienter does not mean that the government shoulders the burden of proof in showing that a defendant had knowledge that the legal status of the material is "obscene."⁹³ The Supreme Court explicitly rejected such a contention on the ground that it would "permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law."⁹⁴ Thus, "knowingly" simply means that the defendant knows the "character and nature of the materials [being transported]."⁹⁵ Furthermore, the Supreme Court stated that the "specific prerequisites [to meet the definition of obscenity] will provide fair notice to a dealer in [obscene] materials that his public and commercial activities may bring prosecution."⁹⁶

Applying such a liberal definition of scienter to BBS operators leaves them very vulnerable.⁹⁷ This vulnerability occurs because BBS operators cannot completely block calls from any given community.⁹⁸ As discussed in Part II.E.1, the most a BBS operator can do is to completely and frequently monitor his BBS. It is illogical to infer a defendant's criminal intent to distribute obscenity into a given community merely because he

or means of interstate commerce *for the purpose of transporting obscene material* in interstate or foreign commerce, any obscene . . . book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article of producing sound or any other matter of immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both for each such offense thereafter.

The transportation as aforesaid of two or more copies of any publication of two or more of any article of the character described above, or combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

Id. (emphasis added).

91. Scienter is defined as "knowingly." This term is frequently used to signify a defendant's guilty knowledge. BLACK'S LAW DICTIONARY 1345 (6TH ED. 1990).

92. *Commonwealth v. Rosenberg*, 398 N.E.2d 451, 454 (Mass. 1979) (quoting *Mishkin v. New York*, 383 U.S. 502, 511 (1966)).

93. *Hamling v. United States*, 418 U.S. 87, 123 (1974).

94. *Id.*

95. *Id.*

96. *Miller v. California*, 413 U.S. 15, 27 (1973).

97. *Problems Policing*, *supra* note 40.

98. *Id.* Even if BBS operators were to screen users, there is no guarantee that this would protect them from prosecution. "A user could simply lie about which state he is calling from, or obtain . . . membership while living in California and maintain it after moving to Tennessee." *Id.*

cannot ensure that someone else in that community cannot download that material.⁹⁹ To do so will create a chilling effect throughout the country, as BBSs censor themselves or cease operations.¹⁰⁰ This will send "a frightening message to virtual communities. It doesn't matter if you're abiding by your own community's standards, you have to abide by [any other community's] as well."¹⁰¹ Consequently, even if access from certain communities could be restricted,¹⁰² the BBS operator would still be required to know, *a priori*, that the material is "obscene."

B. The Definition of "Obscenity" And Local Community Standards

1. The Miller Standard

Obscenity is not defined by federal statute,¹⁰³ but rather, by the test enunciated by the Supreme Court in *Miller v. California*.¹⁰⁴ Furthermore, obscenity regulation is confined to one area: it must be connected with sex.¹⁰⁵ "Blasphemous or sacrilegious expression is not considered obscene by the Court nor, generally, are scatological profanities."¹⁰⁶ Even violence has been found obscene only when linked with sex.¹⁰⁷ To conclude that the material in question is obscene, it must meet each of the following three prongs set by *Miller*:¹⁰⁸

99. *Problems Policing*, *supra* note 40. Since the BBS was not in Tennessee, if it's wrong for New York to set standards for Tennessee, the converse is also true. *Id.*

100. *Id.*

101. *Id.*

102. For example, blocking access from certain area codes is unavailable with current technology.

103. Henry Cohen, *Obscenity Defies All Reason*, NAT'L. L.J. 14, Dec. 7, 1992. Obscenity is not an objective test; in the famous words of Justice Potter Stewart, "I know it, when I see it." *Id.*

104. 413 U.S. 15 (1973).

105. *Id.* at 24. However, pornography and obscenity are not equivalent. See *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980) (holding that *Penthouse* and *Oui* were obscene whereas *Playboy* was not).

106. Timothy J. McNulty, *Video, Computers Complicate Fight Against Obscenity*, CHI. TRIB., Oct. 20, 1985, at 9C.

107. *Id.*

108. *Problems Policing*, *supra* note 40, at B5. "[I]n layman's terms[:] the trial court would ask questions like (1) Is it designed to be sexually arousing? (2) Is it arousing in a way that one's local community would consider unhealthy or immoral? (3) Does it depict acts whose depictions are specifically prohibited by state law? (4) Does the work, when taken as a whole, lack significant literary, artistic, scientific, or social value?" *Id.*

- a) Would the average person, applying contemporary community standards find that the material as a whole, appeals to the prurient interest?
- b) Does the material depict or describe in a patently offensive manner, sexual conduct specifically defined by applicable state law?
- c) Does the material, taken as a whole, lack serious literary, artistic, political or scientific value?¹⁰⁹

The Court in *Miller* reaffirmed its holding in *Roth v. United States*¹¹⁰ that the First Amendment does not afford protection to obscene expression or speech.¹¹¹ However, the Court replaced the then-existing national contemporary standard of obscenity with a "local contemporary community standard."¹¹² The *Miller* standard is recognized in both federal and state prosecutions.¹¹³ This "contemporary community standard," embodied in prongs one and two, varies with locality and time. The Court reasoned that "[p]eople in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."¹¹⁴ Consequently, widely varying standards from state to state may ensue. Some people have concluded that even the most explicit pornography has some redeeming social value,¹¹⁵ and, as a result, have deregulated pornography altogether.¹¹⁶ Other more conservative states have continued to enforce their obscenity statutes.¹¹⁷

109. *Miller*, 413 U.S. at 24.

110. 354 U.S. 476 (1957).

111. *Miller*, 413 U.S. at 18-19.

112. *Id.* at 37.

113. *Smith v. United States*, 431 U.S. 291, 299 (1977). Under its postal authority, Congress may prohibit transportation, either intrastate and interstate, of obscenity through the *mail* pursuant to 18 U.S.C. § 1461. *Id.* Any other means of interstate transport of such material is proscribed pursuant to 18 U.S.C. § 1465. See *Stevens*, *supra* note 88. Thus, a federal prosecutor may enforce the federal obscenity statutes in any jurisdiction through which pornography is transported. *Id.*

114. *Miller*, 413 U.S. at 33.

115. See United States Commission on Obscenity and Pornography, *THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY* 27 (1970).

116. See Harold Leventhal, *An Empirical Inquiry into the Effect of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 928 (1977).

117. *Id.* at 929.

2. Recognition of Jury Discretion Limitations

The "local community standard" may be sensible in theory if confined to purely intrastate activities as in the facts of *Miller*.¹¹⁸ In such a situation, all those persons impacted by the activity can be represented using the local community standard.¹¹⁹ Arguably, a local community standard may be the least restrictive means to reduce the chilling of legitimate speech since its legitimacy is defined by the local community and would not undermine a competing principle of federalism.¹²⁰ Such a result would accord the jury greater power in deciding the types of activities that may occur in the local community.

However, in practice, the notion that juries represent the views of the local community is questionable.¹²¹ "[I]t is impossible to disregard the fact that people are influenced, sometimes unknowingly, by their perceptions of the opinions, values, and expectations of others."¹²² Jurors are likely to believe that the community agrees with their own views and to project their own opinions upon the community.¹²³ This is particularly true regarding such a highly charged and emotional subject as obscenity.

"[S]tatistics [have] suggest[ed] that juries are rarely composed of representatives of all groups of the community."¹²⁴ Moreover, courts do not require evidence of community standards. Thus, to obtain a conviction, all a federal prosecutor needs to do is show the pornography itself to the jury, whose "determination . . . of what is abnormal or deviant is probably

118. *Miller*, 413 U.S. at 33. The appellant conducted a mass mailing of advertisements for adult books solely within California's geographical boundaries to unwilling recipients who did not request the material. In affirming the appellant's conviction, the Court held that distribution of obscene materials may be prohibited if "the mode of distribution entails the risk of offending unwilling recipients or exposing the material to juveniles." *Id.* at 19. A state may regulate obscenity pursuant to its "traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines." *Id.* at 34; see, e.g., CAL. PENAL CODE § 311.2(a).

119. *Miller*, 413 U.S. at 33.

120. See Stevens, *supra* note 88 at 723-26. The author suggests that to promote this standard, one possible solution may be to generate federal obscenity legislation that would merely back up state law. *Id.*

121. Joseph T. Clark, *The 'Community Standard' in the Trial of Obscenity Cases — A Mandate For Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13, 17 (1993) (Clark, J. was a Common Pleas Court judge for Fairfield County, Ohio).

122. *Id.* at 21.

123. *Id.*

124. *Id.* at 22.

based on the prejudices of the individual jurors — their distaste for the views of other members of the [same] community.”¹²⁵

The Supreme Court in *Jenkins v. Georgia*¹²⁶ acknowledged this problem to some degree. In *Jenkins*, the Court reversed a jury conviction of a movie theater operator who showed an allegedly obscene film on the ground that even though “prurient interest” and “patently offensive” are questions of fact, juries do not have “unbridled discretion in determining what is patently offensive.”¹²⁷ By limiting local jury discretion, the Court has implicitly applied an “average local community standard” as opposed to a purely local community standard.

Further, in an effort to restrict jury bias, the Supreme Court in *Pope v. Illinois*¹²⁸ confined the third prong of the *Miller* test to a “reasonable person” standard.¹²⁹ Thus, rather than inquiring whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in allegedly obscene material, the test is “whether a reasonable person would find such value in the material, taken as whole.”¹³⁰ The Court found that, unlike the first two prongs which “are issues of fact for the jury to determine applying contemporary community standards[,] . . . [t]he First Amendment protects works which, taken as a whole, . . . [have] value, regardless of whether the government or a majority of the people approve of the ideas these works represent.”¹³¹ Use of local community standards creates the risk of a juror feeling compelled to bind himself to “follow prevailing local views on ‘value’ without considering whether a reasonable person would arrive at a different conclusion.”¹³² In contrast, the “reasonable person” standard precludes the consideration of all minority opinions, and compels following the opinions of the majority.¹³³ The Court apparently opted for a more

125. Stevens, *supra* note 88, at 723.

126. 418 U.S. 153 (1974).

127. *Id.* at 160; see Stevens, *supra* note 88, at 723. The author suggests that if a local standard is used, restrictive guidelines during jury instructions in the determination of the local community view, such as expert testimony, may also be necessary. *Id.*

128. 481 U.S. 497 (1987).

129. *Id.* The Court opined that this standard was analogous to tort laws’ “reasonable man” standard. *Id.* at 501, n.3.

130. *Id.* at 501.

131. *Id.* at 500 (quoting *Miller*, 413 U.S. at 34).

132. *Id.* at 501, n.3.

133. Sencere Smith, *Obscenity: Is the Value of a Literary or Artistic Work to be Judged by Individual Community Standards?*, 15 S.U. L. REV. 129, 138-39 (1988).

objective test.¹³⁴ By expressly recognizing the limitations of a purely local standard in *Pope*, in addition to the standard enunciated in *Jenkins*, the Supreme Court implicitly advocated a national standard.

3. The *Miller* Standard As Applied to BBS Activities

The *Miller* Court recognized the legitimate governmental interest in "prohibiting . . . obscene material [which poses a] significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."¹³⁵ In this context, the Supreme Court was "called on to define the standards which must be used to identify obscene material."¹³⁶ Thus, if the governmental action does not relate in any way to the governmental interest, that action is certainly invalid.

Where proscribed activities reach multiple localities, any particular local standard used must relate to the governmental interest, at least in some way. In light of the interest in preventing "significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles," a logical choice would be the community which "suffers the brunt of harms."¹³⁷

However, the above rationale inherently and erroneously assumes a manageable geographic boundary;¹³⁸ therefore, it does not apply to a BBS with its associated virtual boundaries. In the instance of a BBS, those who may be subjected to such harm are those who affirmatively access the material found on the BBS. Thus, if the governmental objective is to protect these individuals, the use of a standard based on a geographic community is questionable.¹³⁹ It would be more reasonable to use the "virtual community" to judge whether the material is obscene.¹⁴⁰ Moreover, if the user doesn't like the material, he can always avoid participating in that particular BBS. Finally, by virtue of his voluntary

134. *Id.* at 137. The Court's decision reflected the most objective test possible because it utilized *any* reasonable person and not just the majority of people. *Id.* at 138-39. As a result, the scope of material that may constitute obscenity has been narrowed. *See id.* at 137.

135. *Miller*, 413 U.S. at 18-19.

136. *Id.* at 19-20.

137. *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983).

138. Dan Gillmor, *Blue Superhighway What's Obscene, Anyway? That's Been a Matter of Debate for Decades*, DET. FREE PRESS, Aug. 8, 1994, at 7F. "A lot of law is based on geography, and cyberspace bypasses geography." *Id.* (quoting Stephen Bates, from the Annenberg Washington Program, a communications think tank).

139. *Problems Policing*, *supra* note 40.

140. Telephone Interview with Richard D. Williams, Law Offices of Richard D. Williams, P.C. (Aug. 23, 1994).

action, the viewer arguably is not in fact suffering "harm," rather, he is more likely enjoying himself.

C. Federal Venue Legislation

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by [a] district wherein the crime shall have been committed, which district shall have been previously ascertained by law."¹⁴¹ This amendment requires that the offense have some connection to the state of prosecution. Without violating such principles, Congress ensured that venue would lie "not only at the place at which the objectionable matter is mailed, but also at the place of address or delivery, [and in any judicial district through which such matter is carried.]"¹⁴² Congress enacted 18 U.S.C. Section 3237 to govern offenses begun in one district and completed in another where any offense could be prosecuted in "any district in which such offense was begun, continued, or completed."¹⁴³ Thus, any of the following districts could logically act as the "community standard": state of receipt, state of dissemination, or any district in which the purported obscene material touches during transport.

The legislative history shows that both the district from which the obscene material was mailed and the district in which it was received were held to be valid districts for prosecution.¹⁴⁴ Congress expressly rejected a limitation of venue to only the place of dissemination.¹⁴⁵ Further, the Supreme Court held that it is constitutional to prosecute in any of those

141. U.S. CONST. amend. VI (emphasis added).

142. H.R. REP. NO. 1614 and S.R. REP. NO. 1839, 85th Cong. 2d Sess. (1958).

143. 18 U.S.C. § 3237(a), Pub. L. No. 98-473, 98 Stat. 2152 (1984) provides in pertinent part:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed .

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

Id. (emphasis added).

144. *United States v. Thomas*, 613 F.2d 787 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

145. *Reed Enters. v. Corcoran*, 354 F.2d 519, 521 (D.C. Cir. 1965). The court upheld the constitutionality of the 1958 congressional amendment which did not limit venue to the place of mailing. *Id.*

states through which material is transmitted because such materials transported interstate seemingly touch each state.¹⁴⁶

Most of the lower courts have allowed trials to take place either in the district which receives or sends the contraband or both. The Eleventh Circuit held that venue was proper where the obscene materials were *received*, notwithstanding any forum shopping argument.¹⁴⁷ The court stated, "the interstate shipment of [obscene] materials are *continuing* offenses that occur in every judicial district which the material touches."¹⁴⁸ Consequently, the government may constitutionally prosecute in any district into which the alleged obscene material is sent.¹⁴⁹ Likewise, the Fifth Circuit held that in light of the *Miller* test's contemporary community standards, it was "logical to try a defendant . . . in the district which he allegedly mailed obscene materials."¹⁵⁰ On the other hand, the Eighth Circuit reserved judgment on cases in which material passes a district en route to another destination because of underlying due process principles and the legislative history of the 1958 amendment to section 1461 even though the liberal venue provisions of section 3237 would seem to allow it.¹⁵¹

Congress stated that its purpose in enacting the 1958 amendment of section 1461 was to designate that anywhere through which allegedly obscene material passes, constituted proper venue so as to provide multiple choices to facilitate successful prosecution.¹⁵² Further, Congress may apply section 3237 to BBSs which transmit obscene messages, since BBSs are a means of interstate commerce.¹⁵³

146. *Hamling v. United States*, 418 U.S. 87, 106-07 (1974) (holding it constitutionally permissible to subject a defendant to different community standards throughout various federal judicial districts into which a defendant issued obscene material).

147. *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983).

148. *Id.* at 830 (emphasis added).

149. *Id.*

150. *United States v. Slepicoff*, 524 F.2d 1244, 1249 (5th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). The court affirmed the defendant's conviction despite his arguments that the federal prosecutor forum shopped to ensure a conviction and the multivenue provisions of § 3237 facilitated selective enforcement. *Id.*

151. *United States v. McManus*, 535 F.2d 460, 463-64 (8th Cir. 1976), *cert denied*, 429 U.S. 1052 (1977).

152. *United States v. Walker*, 559 F.2d 365 (5th Cir. 1977); *Reed Enters. v. Corcoran*, 354 F.2d 519 (D.C. Cir. 1965); *United States v. Germain*, 411 F. Supp. 719 (S.D. Ohio 1975); *United States v. Treatman*, 399 F. Supp. 258 (W.D. La. 1975); *United States v. Elkins*, 396 F. Supp. 314 (C.D. Cal. 1975); *United States v. Levy*, 331 F. Supp. 712 (D. Conn. 1971); *United States v. Sidelko*, 248 F. Supp. 813 (M.D. Pa. 1965); *United States v. Lueros*, 243 F. Supp. 160 (N.D. Iowa 1965).

153. H.R. REP. NO. 910, 99th Cong. 2d Sess. 5 (1986).

The only available remedy for a defendant charged with obscenity, is to petition a transfer of district under the Federal Rules of Criminal Procedure Rule 21, provided that he can show prejudice.¹⁵⁴ However, the Eleventh Circuit in *United States v. Bagnell*,¹⁵⁵ recognized that the district of receipt "suffers the brunt of the harms associated with the distribution of pornography and is most in need of protecting itself by the application of its community standards to the material in question."¹⁵⁶ Accordingly, that court held that "[c]ourts should thus exercise restraint in granting Rule 21(b) motions in obscenity prosecutions."¹⁵⁷ Thus, transfers are not only up to the trial court's discretion, but are also a discouraged practice.¹⁵⁸ Furthermore, where local communities differ, the conservative community (vis-a-vis the trial court judge) has a self-serving interest to prevent the transfer of cases from its jurisdiction in order to ensure conviction.

As applied to BBSs, the consequence is that if the federal obscenity statute requires the prosecution to use the local standard of the place of receipt, then the BBS operator will be subject to the laws of any place from where such information is accessed. The district in which the user unilaterally accesses the computer pornography from a foreign state BBS constitutes "the place of receipt." Thus, all a federal prosecutor needs to do to win an obscenity conviction is to go to the most conservative venue and "access" the alleged contraband.¹⁵⁹ As a result, the most conservative, "Bible-Belt" state may wind up dictating the obscenity laws of all

154. FED. R. CRIM. PRO. Rule 21 states in pertinent part:

(a) *For Prejudice in the District.* The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) *Transfer in Other Case.* For the convenience of parties and witnesses and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

Id. (emphasis added).

155. 679 F.2d 826 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983).

156. *Id.* at 832.

157. *Id.*

158. *United States v. Feig*, 1992 WL 170893 (W.D.N.Y. July 9, 1992).

159. Quittner, *supra* note 7. The movie, DEEP THROAT (Aquarius 1972), was not being shown in Memphis at the time — that is, until federal prosecutors screened it for the jury. "The case was brought on the theory that a copy of the movie was flown over that prudish city in an airplane, en route elsewhere." *Id.*

other states¹⁶⁰ as the lowest common denominator of sexual acceptability.¹⁶¹

Any "material" in a BBS is found in the BBS locale, and it is only "found" in the user's locale when the user affirmatively accesses that material. Any subsequent dissemination of the alleged obscenity occurs solely because of the user. By analogy; a person, knowing that a potentially obscene magazine exists in California, could come to California from Tennessee, buy the magazine, and take it back to Tennessee. Does that mean that the magazine seller should be held liable for obscenity as defined by Tennessee community standards? Moreover, if that buyer then starts dispersing the obscenity in Tennessee, unbeknownst to the seller in California, should the seller be held criminally liable? The fundamental notions of fairness require an answer of "no" to both questions.

D. Right to Privacy

The current federal privacy laws which explicitly limit governmental intrusion (federal wire tap laws, Electronic Communications Privacy Act of 1986 and the Privacy Protection Act of 1980)¹⁶² were all written before the explosion in personal computer usage.¹⁶³ Although the FBI recently stated that electronic transmissions have the same privacy rights as surface mail, it is unclear whether such rights in fact apply to BBSs.¹⁶⁴ The details of these federal laws conferring statutory privacy protection will not be discussed in this Comment.

The Supreme Court has recognized a constitutional right to privacy in possessing obscene materials in the home.¹⁶⁵ Subsequent cases, however,

160. *Cyberporn Challenge in South: Moral Stop Sign Sought by U.S. on Info Highway*, CHI. TRIB., July 21, 1994, at 4 [hereinafter *Cyberporn Challenge*].

161. Stevens, *supra* note 88 at 712. If an obscenity statute requires that the prosecution apply the local standard of the origin of disseminated material, any person in a conservative locale may access material that his own community would find obscene, thus undermining his own community standards. Conversely, if a person from a liberal locale accesses such material, he may be subject to the "strictest interpretation of sexual acceptability." *Id.* at 713. "There is something wrong with Memphis dictating the standards of California. Or you can say the whole idea of geographic communities is bankrupt . . ." *Couple Found Guilty*, *supra* note 53 (quoting Mike Godwin).

162. See Wire and Electronic Communications Interception and Interception of Oral Communications, 18 U.S. § 2510-2521 (1989); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986); Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879-1883 (1980).

163. Boubion, *supra* note 54.

164. Sandy Rovner, *Molesting Children by Computer*, WASH. POST, Aug. 2, 1994, at Z15.

165. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

have severely limited this right.¹⁶⁶ Federal obscenity statutes prohibiting mailing of obscene material were held constitutional as applied to the distribution of obscene materials to willing adult recipients.¹⁶⁷ The Court distinguished the distribution and sale of obscene material from the mere ownership of it.¹⁶⁸ Such a holding sets out the principle: “[Y]es, you can own it, but no, you can’t buy it.”¹⁶⁹

E. Media Based Approach for First Amendment Protection

The Supreme Court has made distinctions among media to confer various levels of constitutional protection to pornographic or indecent speech¹⁷⁰ from content-based regulation.¹⁷¹ These distinctions are based on the “pervasiveness doctrine.”¹⁷² Under this doctrine, broadcasting media,¹⁷³ such as television or radio, is “a uniquely pervasive presence in the lives of all Americans. . . . [T]he broadcast audience is constantly tuning in and out, [such that] prior warnings cannot completely protect the listener or viewer from unexpected program content.”¹⁷⁴ Thus, broadcasting “receives the most limited First Amendment protection.”¹⁷⁵

166. See, e.g., *United States v. 12,200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 127 (1973) (upholding the proscription of imported obscene films even though the material was intended for private use); see also, *Osborne v. Ohio*, 495 U.S. 103, 108 (1990) (holding that “Stanley should not be read too broadly”); see also *United States v. Orito*, 413 U.S. 139 (1973) (upholding defendant’s conviction for violating § 1462 although the alleged obscene material was intended for private use).

167. *United States v. Reidel*, 402 U.S. 351 (1971) (holding consent alone insufficient).

168. *Id.* at 355.

169. Landis, *supra* note 55.

170. Pornographic and indecent speech may also include obscene speech.

171. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

172. *Id.*

173. The Federal Communications Commission (“FCC”) is authorized to censor indecent, obscene or profane broadcast. Jay A. Gayoso, *The FCC’s Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871, 887 (1989). Material is indecent if it depicts or describes, “in terms that are patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.” *Id.* at 872.

174. *Pacifica*, 438 U.S. at 748.

175. *Id.* In broadcasting, indecency does not require “appeal to the prurient interest” of viewers, and a variable community standard is unnecessary. Gayoso, *supra* note 173, at 891.

In contrast to broadcasting,¹⁷⁶ which is more likely to be considered "pervasive" because it comes directly into the home, unsolicited and uninvited, cable television and telephones are more likely to be deemed an "invited guest" rather than an "intruder."¹⁷⁷ The Supreme Court has opined that "differences in the characteristics of new media justify the differences in the First Amendment standards applied to them."¹⁷⁸ Thus, the distinction between "invited guest" and "intruder" implies that "the less control the individual has over the receipt of speech, the greater room government has to make some of the individual's choices for her."¹⁷⁹

For example, dialing services such as dial-a-porn¹⁸⁰ serve no "captive audience"; callers are generally not unwilling listeners.¹⁸¹ In the context of dialing services, the caller seeks and is willing to pay for such services.¹⁸² Unlike an unexpected outburst from a broadcast, the message that one receives from a dial-a-porn service is not such an invasion or a surprise that "it prevent[s] an unwilling listener from avoiding exposure to it."¹⁸³ To deny total access to such services far exceeds that which is necessary to protect unwilling listeners and to limit access to minors, and thus does not survive constitutional scrutiny.¹⁸⁴

In practice, this approach has resulted in a hierarchy of protections, depending upon the media.¹⁸⁵ In *FCC v. Pacifica Foundation*,¹⁸⁶ the Supreme Court upheld an FCC prohibition of an indecent, although not obscene, broadcast.¹⁸⁷ However, the Court emphasized the narrowness of its holding.¹⁸⁸ In contrast, the Court in *Sable Communications v.*

176. Courts have held that cable television is worthy of more constitutional protection than broadcast television. Gayoso, *supra* note 173, at 908. The distinction between broadcast and cable television is that with cable, subscribers must affirmatively elect to have cable service come into their homes. Moreover, parents may obtain "lockboxes" or "parental key" devices enabling parents to deny access to material which is "objectionable to children." *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985).

177. *Superhighway*, *supra* note 19, at 1079.

178. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

179. *Superhighway*, *supra* note 19, at 1080.

180. "Dial-a-porn" is the popular known name for sexually-oriented, pre-recorded telephone messages. *Miller*, *supra* note 24 at 1152, n.36.

181. *Sable Communications v. FCC*, 492 U.S. 115, 128 (1989).

182. *Id.*

183. *Id.*

184. *Id.* at 131.

185. *Superhighway*, *supra* note 19, at 1062.

186. 438 U.S. 726 (1978).

187. *Id.* at 748.

188. *Id.* at 750. "This case [regarding broadcast] does not involve a two-way radio conversation between a cab driver and a dispatcher." *Id.* This distinction is particularly applicable to BBS communication. *Jensen*, *supra* note 41, at 238.

FCC¹⁸⁹ struck down the FCC's denial of adult access to telephone messages that were indecent but not obscene.¹⁹⁰ Likewise, cable television is not held to be as pervasive or intrusive as the broadcast medium because subscribers "must affirmatively elect to have cable service come into [their homes and since subscribers] must make the additional affirmative decision whether to purchase any 'extra' programming services, such as HBO."¹⁹¹

Although BBSs do not fit neatly into any traditional category of media, BBSs are more likely to fall towards the "least intrusive" end of the media spectrum.¹⁹² Like using dial-a-porn, a BBS user must make a voluntary decision and a substantial investment to receive information from a BBS.¹⁹³

Some have proposed a national obscenity standard comparable to the FCC's indecency standard for television.¹⁹⁴ However, this standard is overbroad because "indecency" casts a larger net over free expression than "obscenity."¹⁹⁵ Moreover, because BBSs are analogous to dial-a-porn services, the FCC is unlikely to be granted regulatory power over BBSs as "the least intrusive means of achieving the governmental interest."¹⁹⁶

F. *Balancing Privacy Rights*

The right to free expression and personal privacy of the willing user must be balanced against any intrusive effect upon the privacy rights of unwilling viewers.¹⁹⁷ The latter privacy concern focuses on the non-user, i.e., the bystander. However, the "use of adult computer services . . . intrudes upon no privacy rights of others."¹⁹⁸ It is the quintessential example of an individual's right to privately receive information and ideas: "[t]he service can be accessed only by the complex, affirmative act of a voluntary participant who has clear knowledge of what he or she is about

189. 492 U.S. 115 (1989).

190. *Id.* at 128.

191. *Cruz*, 755 F.2d at 1420.

192. *Miller*, *supra* note 24, at 1192.

193. *Jensen*, *supra* note 41, at 239.

194. *Landis*, *supra* note 55 (quoting Majorie Heins of the American Civil Liberties Union's Arts Censorship Project).

195. The "indecency" standard, more restrictive than "obscenity," is constitutionally impermissible as applied to telephones. *Sable Communications*, 492 U.S. at 115.

196. *Jensen*, *supra* note 41, at 240.

197. *Lynn*, *supra* note 47, at 113.

198. *Id.* at 113-14.

to view or experience."¹⁹⁹ Moreover, because BBS information comes directly into the home, its impact is less intrusive on the community than traditional methods of distributing pornography.²⁰⁰

Critics of BBS pornography have only focused on the issue of exposure to minors. Critics assert that the danger of "[e]xposing minors to any form of pornography is child abuse,"²⁰¹ regardless of whether the incident is great or small. Such a viewpoint is untenable because a *total* prohibition of pornography would be required to prevent *any* exposure to children, and even then, there might not be complete eradication. "We need a way to shield the child, but not chill the adult access."²⁰²

Critics also contend that accessing BBSs is simply too easy.²⁰³ However, that contention is far too speculative.²⁰⁴ Although children are becoming increasingly computer literate, the threat to children accidentally stumbling across such files is overblown: access to almost all pornography on computer networks requires a fee and buyers must use credit cards; to suggest that children have credit cards and are signing up for these systems lacks support.²⁰⁵ "[T]his is really [a] consenting adult . . . transaction."²⁰⁶

In addition, parents can reasonably control children's access to such technology without the need for legal impediments against consenting adults.²⁰⁷ Suggestions include the imposition of liability upon BBS operators under mandatory reporting requirements for known violations; parental locks similar to those found on cable boxes;²⁰⁸ and security codes given only to those who have proven their age.²⁰⁹

The government may be able to ban all pornographic material that is accessible without proof of age. Such action should survive strict scrutiny because it would be the least restrictive alternative to protect the compel-

199. *Id.* at 114.

200. *Couple Found Guilty*, *supra* note 53.

201. Carla Bumpas, *Protecting the Eyes of Babes: Some Control of Porn Needed*, SEATTLE TIMES, Aug. 24, 1994, at D2.

202. McNulty, *supra* note 106.

203. McMahon, *supra* note 2. "A reasonably intelligent 8-year-old can log onto a computer system, dial a modem and connect to a bulletin board or network. A few well-placed answers and a credit card number, and access is theirs. The child would have to falsify a signature, electronic or otherwise, but that's no bar at all." *Id.*

204. *Couple Found Guilty*, *supra* note 53.

205. *Id.*

206. *Id.* (interviewing Mike Godwin, Electronic Freedom Foundation).

207. Lynn, *supra* note 47, at 114.

208. Andry, *supra* note 55.

209. Bumpas, *supra* note 201.

ling interest of reducing exposure of pornographic material to minors.²¹⁰ Such a restriction would be similar to a minimum age requirement for entry into adult movie theaters. However, limiting BBS access to adults offers no solution to obscenity violations.

IV. UNITED STATES V. THOMAS

On July 28, 1994, Robert and Carleen Thomas were convicted of eleven counts of transmitting obscenity (images of bestiality and other sexual fetishes)²¹¹ over interstate phone lines through their BBS.²¹² The Thomases face up to five years in prison and a \$250,000 fine for each count.²¹³

From Milpitas, California, the Thomases operated an adult, members-only, sexually explicit Amateur Action Bulletin Board System (AA-BBS).²¹⁴ Subscribers from all over the world paid ninety-nine dollars per year to use the AA-BBS.²¹⁵ Its subscribers, totaling about 3,500,²¹⁶ could chat with other users at any time and could make copies of any of the over 20,000 sex pictures on the BBS.²¹⁷ The vast majority of these pictures were not obscene.²¹⁸ The Thomases were convicted of obscenity charges²¹⁹ when a postal inspector, working with a United States Attorney, accessed the information from Tennessee.²²⁰

210. *Sable Communications*, 492 U.S. at 131. The court found that a total ban on indecent telephone pornography transmission was not the least restrictive alternative to promote the compelling interest of protection of children. So as a whole, the ban did not survive constitutional scrutiny. *Id.*

211. Defense Motion for Transfer, *supra* note 5, at 3, lines 17-18. The charges included conspiracy to distribute obscene materials. *Id.*

212. Nickell, *supra* note 6.

213. *Protests Rock*, *supra* note 27.

214. *Problems Policing*, *supra* note 40.

215. Boubion, *supra* note 54.

216. Approximately five of these subscribers were residents of Tennessee. Defense Motion for Transfer, *supra* note 5, at 3, line 1.

217. Boubion, *supra* note 54.

218. *Id.*

219. *Problems Policing*, *supra* note 40. The Thomases faced a dozen obscenity counts from the computer images which included a charge arising from an unsolicited child porn video sent to the Thomases by the postal inspector. The Thomases were convicted on all counts for obscenity, but were acquitted on the child pornography count because the jury believed that the couple had been entrapped when they received material sent to them through the mail by government officials. *Id.*; see also, Nickell, *supra* note 6.

220. *Problems Policing*, *supra* note 40. The postal inspector, under a fake name, accessed and then downloaded "sexuaPS," a graphic file, in Tennessee. *Id.*

This case is the first court case involving the downloading of sexual images of adults.²²¹ Previously, law enforcement efforts had concentrated on BBSs containing child pornography.²²² Moreover, this case marks the first time the government in an obscenity prosecution went after a BBS operator in the locale where the material was received, rather than where it originated.²²³

To federal prosecutors, the Internet is just a collection of wires "connecting" real communities rather than "virtual communities" of computer users.²²⁴ The Assistant United States Attorney in Memphis, stated that, "[t]he crime occurred here."²²⁵ The remark appears to be based on "local community standards": the principle premised on the notion that the people who are affected by the obscenity should have the right to decide whether they want to put up with it.²²⁶

The district court judge rejected all of the defense's arguments. These arguments included violations of the Fourth Amendment, Equal Protection and Due Process Clauses of the Fifth Amendment,²²⁷ and a proposal to use of a national obscenity standard over a local standard.²²⁸

The defense argued that obscenity should be based on a national standard instead of the existing local community standard,²²⁹ pursuant to *Miller v. California*.²³⁰ The defense also argued that the prosecutors shopped around for a forum with a conservative and computer-illiterate jury.²³¹ The defense claimed that Tennessee is "reputed to have the most radically conservative jury pool in the nation."²³² Thus, when the prosecutors went to Tennessee and accessed the material, they, in effect,

221. *Id.*

222. *Id.*

223. Baird, *supra* note 37.

224. Heath, *supra* note 1.

225. *Computer Porn Trial Breaking New Ground: '73 Community Standards Ruling May Get Stern Test*, SUN SENTINEL (Palm Beach), July 21, 1994, at 4A [hereinafter *Computer Porn Trial*] (quoting Devon Gosnell, an Assistant United States Attorney in Memphis, Tennessee).

226. *Id.*

227. Defense Motion to Dismiss, *supra* note 5. The defense also argued that the charge was preempted by the North American Free Trade Agreement. *Id.*

228. *Id.*

229. *Id.* at 6, lines 8-9.

230. 413 U.S. 15 (1973). The *Miller* test is discussed *infra*, part III.B.1 along with the accompanying notes.

231. *Computer Porn Trial*, *supra* note 225, at 4A. "Prosecutors [in Memphis] have a history of attacking what they consider obscene." *Cyberporn Challenge*, *supra* note 161. "Memphis prosecutors made headlines in the late 1970s when they went after the cast and producers of *Deep Throat . . .*" *Id.*

232. Defense Motion for Transfer, *supra* note 5, at 2, lines 18-19.

induced the material to be transported there.²³³ "The essential impact is that the most puritanical, blue-nosed district in the country could dictate policy on this issue for the entire nation."²³⁴

V. AN OVERVIEW OF POSSIBLE SOLUTIONS

A. A National Standard For Obscenity

The list of suggestions for the regulation of obscenity on BBSs embraces one type of national standard or another, whether viable or not. Although the Supreme Court has previously rejected a national standard,²³⁵ the Court may need to revisit the issue, at least with respect to BBSs. One suggestion is to use the "virtual community"²³⁶ in defining obscenity,²³⁷ which implies a national standard of BBS users. However, a national *indecent* standard for BBSs, as discussed in Part III.E is not viable.

A national per se rule of obscenity for "hard-core porn" has also been suggested.²³⁸ Under this per se rule, the specific definition of "hard-core" is provided thereby promoting objectivity.²³⁹ This definition is clearer than the *Miller* standard and also provides an "out" for "bona fide scientific, educational, or research purposes, and/or provide[s] an exception for serious literary, artistic, political, or scientific uses."²⁴⁰ However, because this proposal still subjects potentially "obscene" material to the

233. Defense Motion to Dismiss, *supra* note 5, at 9, lines 13-15.

234. *Computer Porn Trial*, *supra* note 225, at 4A (quoting Stephen Bates, a senior fellow at the Annenberg Washington Program, a communications think tank in Washington D.C.).

235. *Miller*, 413 U.S. at 33.

236. Conley, *supra* note 1 (statement of Richard D. Williams, Thomases' defense attorney).

237. Defense Motion to Dismiss, *supra* note 5.

238. Bruce Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 272 (1987/88). "Hard-core" refers to "ultimate sex acts" where penetration is clearly visible. *Id.* at 272. "Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, anilingus, and masturbation, where penetration, manipulation or ejaculation of the genitals is clearly visible." *Id.* This would not include simulated descriptions of sex acts and "lewd exhibitions of genitals." *Id.* at 275.

239. In *Miller*, the Supreme Court did not define "hard-core" when it referred to obscenity as depictions or descriptions of "hard core" sexual conduct. *Miller*, 413 U.S. at 27. The Court did, however, provide a nonexhaustive list of examples of "hard core porn": "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . [and] representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals." *Id.* at 25.

240. Taylor, *supra* note 238, at 272.

Miller test,²⁴¹ it still offers no solution. Nevertheless, from this suggestion, a more workable solution may be achieved. To limit "obscenity" to "hard-core" pornography would maintain the advantages of a more objective test, but would also limit the range of material that would qualify as "obscene."²⁴²

Whichever solution the Supreme Court chooses, the viability of the local community standard as defined in *Miller* is questionable in cases involving BBSs. Assuming that the government may impose restrictions on access to minors, the only compelling governmental interest is the protection of unwilling recipients of obscene material. And since there are no "unwilling recipients" exposed to such material,²⁴³ there is no remaining governmental interest. Therefore, the only interests to consider are the *user's* and *operator's* privacy rights. A national standard would give the most latitude to such privacy rights.

A national standard is also consistent with the federal venue provisions. Even under the broadest reading of proper venue, where prosecution may be instituted in any district where the material touches, courts may use a national standard. Under such circumstances, the jury in the district of prosecution should be instructed on the "virtual community," "hard-core" pornography, or another national standard to determine what is obscene. Additionally, a national standard would reduce the chilling effect on protected materials because BBS operators would be able to choose their operations in venues with familiar views of obscenity.

B. *Limiting Federal Venue Provisions to Place of Mailing in the Application of BBSs*

If the local community standard is maintained, the current liberal interpretation of federal venue provisions needs to be reconsidered. The liberal federal venue laws have eroded due process principles by applying local community standards to BBSs. To be consistent with due process notions, if the courts require local community standards, a solution might be to limit prosecution to the place of mailing: those jurisdictions in which the BBS operator stores the data, prior to the user's access.

241. *Id.* at 274.

242. *Id.*

243. *See infra* part III.E.

VI. CONCLUSION

The Supreme Court needs to revisit the current standard for obscenity as applied to BBSs. As BBSs' growth continues exponentially, the need will become urgent. Undoubtedly, the Supreme Court will resolve the current quandary over the applicable standard of obscenity for BBSs in the near future. *United States v. Thomas* may be the vehicle.²⁴⁴

This Comment suggests that the current standard for obscenity may need to become a national standard to protect the constitutional rights of the BBS operator.²⁴⁵ Alternatively, if existing local community standards are maintained, the federal venue provisions must be reinterpreted to restrict proper venue to the place of mailing.²⁴⁶ To be sure, both the local community standard and the liberal reading of the current venue provisions are unlikely to prevail as applied to BBSs.

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244. The defendant intends to appeal as far as the Supreme Court. Telephone Interview with Richard D. Williams, Law Offices of Richard D. Williams, P.C. (Aug. 23, 1994).

245. *See infra* part IV.G.1.

246. *See infra* part IV.G.2.

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