HOW I LEARNED TO STOP WORRYING AND LOVE THE COMMUNICATIONS DECENCY ACT

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I. INTRODUCTION

Sometimes, a trip down the information superhighway can be just as infuriating as a drive through downtown during rush hour. Spammers,[1] phishers,[2] pop-ups, spyware,[3] people who believe "c u l8r"[4] is acceptably spelled, and a plethora of computer viruses join forces to test the Internet user's mettle at every turn. These "contaminants" provide no useful information to the user and can negatively affect the value of a network as a whole, counter to the conventional wisdom that an information network's value increases in proportion to its population of users.[5]

This is not to say, however, that the Internet has completely degenerated into a wasteland devoid of useful content. In addition to remaining an avenue

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1. Spamming is the practice of sending masses of undirected, frequently low-content messages to garner interest in or advertise a product, service, or Web site. Steven Johnson, *Googlemania!: The (Evil) Genius of Comment Spammers*, WIRED, Mar. 2004, at 2, 8, *available at* http://www.wired.com/wired/archive/12.03/google.html?pg=7&topic=&topic_set=.

2. The term "phishing" encompasses a variety of scams used to obtain passwords or other secured information from its victims. *Phishing*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Nov. 20, 2007), *http://en.wikipedia.org/wiki/Phishing*. Frequently, the individual perpetrating the scam either sets up a false Web site or poses as a staff member for an Internet-based business (*e.g.* Ebay, Paypal, Amazon.com) and asks the victim directly for their login information, citing some need to confirm their identity. *Id.*; Michael Stutz, *AOL: A Cracker's Paradise?*, WIRED, Jan. 29, 1998, htp://www.wired.com/scinece/discoveries/news/1998/01/9932.

3. Spyware is software installed on a computer that relays user information to a third party, who can use that information for advertising, as well as more sinister purposes such as identity theft. Webroot Software, Spyware Info and Facts that All Internet Users Must Know, http://www.webroot.com/resources/spywareinfo (last visited Oct. 3, 2007) (recommending a removal tool to deal with such spyware).

4. Shorthand for "See you later." *See generally* Michelle M. Kazmer, *Beyond C U L8R: Disengaging from Online Social Worlds*, 9 NEW MEDIA AND SOC'Y 111 (discussing the unique characteristics of online social structures).

5. *See* Philip E. Ross, *5 Commandments*, IEEE SPECTRUM, Dec. 2003, at 30, 34-35 (explaining that the value of a network grows with users until it is counterbalanced by the amount of contaminants and difficulty in finding information, forming a bell curve). Eventually, a network may become so crowded as to be useless. *Id.*

of commerce and a vast pool of research, the Internet has rapidly become a stage on which anyone can perform and a rostrum open to every debate. Individual contributions to databases and social networks, such as Wikipedia,[6] YouTube,[7] and MySpace,[8] have come to be recognized as even more influential than contemporary leaders and political figures.[9] Although the majority of this content can be politely described as amateur, a great deal of professional-quality work is produced as well, especially in the arenas of political and legal commentary.[10]

The problem then becomes filtering out the contaminants that abuse the free flow of communication, while maintaining the valuable elements of a full and robust debate. Some commentators worry that the "solution" would threaten those who create annoying content over the Internet with significant criminal penalties, regardless of whether that content is legitimate speech.[11]

The law distressing commentators is the 2006 amendment to the Communications Decency Act.[12] The relevant language is that "Whoever . . . utilizes a telecommunications device . . . without disclosing his identity and with intent to annoy . . . shall be fined under Title 18, or imprisoned not more than two years, or both."[13] The most recent amendment expands[14] the definition of a telecommunications device to apply to "any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet."[15]

What makes this new law potentially troubling is that the Internet is a uniquely anonymous medium. Users are accustomed to communicating under assumed "screen names" or via e-mail addresses.[16] While these may sometimes be derived from the user's actual name, they are rarely the user's

6. *Wikipedia*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Nov. 21, 2007), http://en.wikipedia.org/wiki/Wikipedia (describing itself as a multilingual encyclopedia comprising the contributions of a wide array of volunteers).

7. YouTube is a Web site that allows users to upload video clips which are then viewable by visitors to the cites. YouTube—Broadcast Yourself, http://www.youtube.com/t/about (last visited Nov. 21, 2007).

8. MySpace is a social network that allows users to post information about themselves and meet other users. MySpace.com, About Us, http://www.myspace.com/Modules/Common/Pages/ AboutUs.aspx (last visited Nov. 17, 2007).

9. Citing individual contributions to the above-mentioned Web sites, *Time* magazine named "you" its person of the year for 2006. Lev Grossman, *Time's Person of the Year: You*, TIME, Dec. 13, 2006, at 38, 38.

10. *See,* Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, WIS. LAW., Mar. 2006, at 8, 8 ("At their best, blogs provide a civil, usually lucid, and running debate about subjects of public interest and concern.").

11. Declan McCullagh, *Perspective: Create an E-annoyance, Go to Jail*, CNET NEWS.COM, Jan. 9, 2006, http://news.com.com/Create+an+e-annoyance,+go+to+jail/2010-1028_3-6022491.html [hereinafter *Perspective*] (explaining that criminal penalties could range up to a stiff fine and two years in prison).

12. Pub. L. No. 109-162, §113, 119 Stat. 2960 (2006) (codified at 47 U.S.C. § 223 (2006)); Declan McCullagh, *FAQ: The New 'Annoy' Law Explained,* CNET NEWS.COM, Jan. 11, 2006, http://news.com.com/FAQ+The+new+annoy+law+explained/2100-1028_3-6025396.html [hereinafter *FAQ*].

13. 47 U.S.C. § 223 (2000).

14. The extent to which the amendment "expands" the scope of the Communications Decency Act as a practical matter is open to some debate. *See infra* Parts II.A, III.A.2.

15. 47 U.S.C. § 223 (2006).

16. *See* America Online, Screen Name Hints, http://www.aim.aol.com/netscape/hints.html (last visited Nov. 21, 2007) ("Your screen name is the name by which you will be known to all your 'buddies' . . . . It will become your Instant Messenger identity online.").

full legal name.[17] While such a moniker identifies the user to others in cyberspace,[18] it may or may not have any correlation to the user's actual identity, and thus it is no better than a completely fabricated name.[19] Therefore, an Internet user, by following accepted customs and identifying him- or herself by screen name or e-mail address, could face disproportionate criminal charges and even imprisonment for sending a vexing message.

To provide an illustrative example, some communication programs, such as AOL Instant Messenger, provide a "warn" function which can be used against others who send unwanted messages to the user.[20] When enough warnings are sent, the harasser's access to the program is limited, temporarily removing the annoyance.[21] The 2006 amendment to the Communications Decency Act purportedly replaces the gentle and temporary "warn" function of AOL Instant Messenger with either a fine or prison sentence for the annoying individual.[22] Although pressing charges under the Act is certainly more difficult than merely pressing a button,[23] it is definitely a much more attractive option than the potential expense involved in a private lawsuit for harassment or defamation.[24] Additionally, a potential defendant may take the threat of a criminal prosecution more seriously than the threat of a civil suit.

The concern that many common Internet users could be labeled criminals quickly sparked considerable confusion and debate among legal scholars, both in terms of the 2006 amendment's constitutionality[25] and its interpretation.[26] A week after the amendment was signed into law, an article entitled "*Create an E-Annoyance, Go to Jail*" circulated the Internet, forecasting disaster for free speech in a variety of web-based communication forms.[27] Several respondents were not as concerned, citing prosecutorial discretion, as well as other considerations, as tempering the potential impact of the law.[28] In the

17. In fact, due to the requirement that all such identifiers be unique, it is quite possible that a user will not be able to use his or her own name. *Id.* ("Many first and last names . . . are already taken.").

18. Cyberspace is defined as, "the online world of computer networks and especially the Internet." *Cyberspace,* MERRIAM-WEBSTER'S ONLINE DICTIONARY (Nov. 21, 2007), http://www.merriamwebster.com/dictionary/Cyberspace.

19. *See* America Online, *supra* note 16 (suggesting users "make up an unusual phrase or word" for their screen name).

20. AIM, Using AIM on Windows, http://www.aim.com/help_faq/using/win/warnings.adp (last visited Nov. 21, 2007).

21. *Id.*

22. 47 U.S.C. § 223 (2006).

23. Although a full discussion is well beyond the scope of a minor footnote, the difficulties inherent in dealing with an anonymous Internet user should not be understated. *See* Peterson, *supra* note 10, at 11 (discussing such difficulties in the context of anonymous blogging).

24. Aside from the extra cost of private litigation as opposed to having the state pursue the claim, there are some further considerations, although beyond the scope of this note, that make private actions against communication on the Internet unique. *See, e.g.*, *id.* at 10 (pointing out that other portions of the Communications Decency Act may provide a defense to civil defamation actions).

25. The Communications Decency Act was subject, even before this amendment, to a number of challenges on First Amendment free speech grounds. *See* discussion *infra* Parts II.A-B, III.C.

26. *FAQ*, *supra* note 12 (summarizing and addressing a variety of the arguments as to whether the amendment actually expands the scope of the law, or merely updates it to reflect changing technology).

27. *Perspective*, *supra* note 11.

28. *E.g.*, Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/ chain_1142900679 (Jan. 10, 2006, 12:12 EST).

end, neither side was persuaded by the other, and the Internet user was left to worry about how his or her conduct might be interpreted.

Such debate may come to a head quite soon. An aptly named Web site, Annoy.com, allows users to send politically charged postcards anonymously.[29] The company's chief executive officer, Clinton Fein, had already challenged the Communications Decency Act prior to the 2006 amendment and has made statements indicating that he is considering a challenge to the new provision as well.[30]

The intention of this Note is to analyze both past and present debates concerning the Communications Decency Act and to determine what effect, if any, the recent amendment has on speech through e-mail, weblogs,[31] and other Internet-based media.[32] Part II of this Note tracks the Communications Decency Act through its tumultuous decade-long history and also introduces and discusses the sections affected by the 2006 amendment. Part III of this Note conducts an in-depth analysis of the statute's language and relevant legislative history to reveal readily apparent ambiguities and inconsistencies, for which this Note suggests potential remedies. Further, Part III evaluates case law directed at previous incarnations of the Communications Decency Act in order to put current constitutional issues in perspective. Finally, Part IV of this Note argues that, while the amendment creates ambiguities and a revision is likely required to clarify the law, the threat to constitutionally protected speech is relatively minor and not worth the controversy that followed the signing of the 2006 amendment. In the absence of an additional amendment, this Note recommends the use of sound prosecutorial discretion to prevent unconstitutional or unreasonable charges.

II. Background

Before turning to the current version of the Communications Decency Act, it is helpful to look at prior constitutional challenges and subsequent amendments to the Act in order to provide some context for the analysis.

A. Prior Decisions Under the Communications Decency Act of 1996

This is not the first time the Communications Decency Act has come under fire; it faced similar challenges of overbreadth and constitutional invalidity when it was originally passed in 1996.[33] In the notable case of *Reno*

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29. Clinton Fein, *With Intent to Annoy*, ANNOY.COM, Jan. 9, 2006, http://annoy.com/editorials/doc.html?DocumentID=100761.

30. *See id.* (discussing Fein's continued commitment to exercising the freedom Annoy.com has worked to ensure).

31. Frequently shortened to "blogs," a weblog is essentially a journal entry posted to a Web site. Peterson, *supra* note 10, at 8.

32. Some other examples might include Internet Realtime Chat, Bulletin Board Systems, Usenet, and Instant Messaging.

33. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 864 (1997) (finding the Communications Decency Act of 1996 in violation of the First Amendment due to overbreadth).

v. ACLU, the Supreme Court of the United States upheld the lower court's decision that provisions of the Communications Decency Act relating to indecent content were unconstitutional in light of the First Amendment's protection of free speech.[34] The Court took particular issue with restrictions on "patently offensive" material, a phrase that had no prior legal meaning.[35] In *Reno v. Shea*, a similar case decided the next day, the Supreme Court affirmed the district court,[36] holding that the Communications Decency Act's protection of children from indecent speech was too broad.[37] Although most of these challenges were directed at the law's prohibitions on indecency or obscenity on the Internet,[38] courts first had to decide the question of whether or not Internet usage was a type of media covered by the Communications Decency Act.[39]

The Communications Decency Act does not apply to all forms of communication or expression but rather requires that the party running afoul of the Act make use of a telecommunications device to facilitate his or her objectionable communication.[40] Thus, merely walking up to someone on the street and screaming obscenities at them would not fall under the Communications Decency Act, whereas calling the person on a telephone and shouting profanities could.[41] Therefore, the court is required to analyze not only the allegedly harassing or obscene communication but also whether the medium used to express this communication would be considered a telecommunications device as defined in the statute.[42] Unfortunately, prior to the 2006 amendment, the only guides as to the scope and meaning of the term "telecommunications device" were specific exemptions from the definitions of broadcasters and interactive computer services.[43] A major point of confusion in the interpretation of the 2006 amendment is the tension between the general definition of a telecommunications device and the explicit exemption for an interactive computer service, which includes a system that provides access to the Internet.[44]

Somewhat prophetically, the trial court in *ACLU v. Reno*[45] recognized the tension between prohibitions on use of telecommunications devices to transmit obscene material and the definitions section of the statute, which states that the

34. *Id.*

35. *Id*. at 877 ("The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material . . . .").

36. Reno v. Shea, 521 U.S. 1113, 1113 (1997).

37. Reno v. Shea, 930 F. Supp. 916, 949 (S.D.N.Y. 1996).

38. *Id.*

39. *See* ACLU v. Reno, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996) (noting a preliminary order asking the parties to address the definition of a telecommunications device).

40. 47 U.S.C. § 223(a) (2000). Note that other parts of § 223 involve the use of different devices, such as telephones. *E.g.*, *id.* § 223(b). However, in the interests of a focused argument, only § 223(a) is discussed.

41. *Id.* § 223(a)(1)(C). There are, of course, other requirements for conviction under this section with regard to the content of the communication, the intent of the defendant, and whether or not the defendant identified him- or herself. *Id.* § 223(a)(1)-(2).

42. *Id.* § 223(h)(1); *ACLU*, 929 F. Supp. at 828.

43. 47 U.S.C. § 223(h)(1)(A)-(B).

44. *Id.* § 230(f)(2); *see* analysis *infra* Part III.A.2 (illustrating the importance of utilizing legislative history in order to assist in statutory interpretation).

45. *ACLU*, 929 F. Supp. at 828.

term "telecommunications device . . . does not include an interactive computer service."[46] An "interactive computer service" is defined to include "specifically a service or system that provides access to the Internet."[47] The court stated that "the resolution of the tension between the scope of 'telecommunications device' and the scope of 'interactive computer service' . . . must await another day."[48] Further, the court agreed with both the plaintiffs and defendants in the action that a modem (at that time, the device used by most people to access the Internet) was a telecommunications device within the meaning of the statute.[49] Without significant discussion, the court concluded that the exclusion of interactive computer services was meant to shield the operators of an interactive computer service but not its users.[50]

Therefore, it appears that, as early as 1996, using a modem to transmit material over the Internet already fell within the scope of using a telecommunications device and, as such, would subject the user to regulation under the Communications Decency Act. Even taking into account the changes in Internet technology since 1996, it seems reasonable that the serious threat to Internet communication raised by some commentators[51] should already have manifested itself over the past decade. This is particularly likely since prior evaluations of the Communications Decency Act stipulated that communication via the Internet was by means of a telecommunications device.

B. Subsequent Amendments and Regulation

In light of the challenges to the statute's applicability to lewd and indecent content, it was amended in 2003 to circumvent the constitutional concerns expressed in *Reno v. ACLU* and to replace the language restricting indecent or patently offensive conduct with "communication which is obscene or child pornography."[52] A more recent challenge to the constitutionality of restrictions on obscenity was unsuccessful in the Southern District of New York, where the plaintiff argued that the community standards by which obscenity was judged were subject to geographic variation and that the possibility of being judged by the most restrictive community resulted in a chilling effect.[53] This decision was affirmed by the Supreme Court of the United States without opinion.[54]

More relevant to the current debate, however, is the blanket prohibition against the use of a telecommunications device with "intent to annoy." Although this prohibition has raised red flags with today's commentators, it

46. 47 U.S.C. § 223(h); *ACLU*, 929 F. Supp. at 828.
47. 47 U.S.C. § 230(f)(2).
48. *ACLU*, 929 F. Supp. at 828 n.5.
49. *Id.*
50. *Id.* (reasoning that since both parties were in agreement on this issue, it was difficult to say why the exception for an interactive computer service was read narrowly).
51. *FAQ*, *supra* note 12.
52. 47 U.S.C. § 223(a) (2003).
53. Nitke v. Gonzales, 413 F. Supp. 2d 262, 272-73 (S.D.N.Y. 2005).
54. Nitke v. Gonzales, 547 U.S. 1015 (2006).

has survived unchanged in the face of these constitutional challenges.[55] This is not to say that such language has not been examined by the courts. Notably, in the case of *United States v. Popa*,[56] the D.C. Circuit Court overturned the conviction of a man who had repeatedly called to insult a U.S. Attorney and was then charged with anonymously using a telecommunications device with intent to annoy, abuse, or harass.[57] The court found that "[i]nsofar as the intents to annoy, to abuse, or to harass were implicated, the statute fails intermediate scrutiny as applied to Popa's conduct."[58] However, having determined that the statute was unconstitutional as applied, the court declined to go on to determine the merits of the statute on its face.[59] Thus, while the case vindicated the applicable First Amendment rights, it did not specifically interpret the intent to annoy.

The Sixth Circuit Court of Appeals took a considerably closer look at the "to annoy" language in the case of *United States v. Bowker.*[60] The court noted a prior decision where the term "annoy" was found unconstitutionally vague when standing alone, because while some people might be annoyed by some conduct, others might not be.[61] However, the Sixth Circuit differentiated the prior decision, pointing out that in the Communications Decency Act "annoy" does not stand alone and that it should be given similar meanings as "threaten" and "harass."[62] Unfortunately, Bowker had engaged in conduct that quite clearly rose to the level of threats and harassment, so the court's interpretation of the "annoy" language was not entirely necessary to the decision.[63]

In addition to statutory and judicial directives, there is another source of guidance in interpreting laws if an administrative agency or other regulatory body has promulgated regulations relating to the subject matter. Although federal regulations have been propagated by the Federal Communications Commission ("FCC") in interpreting parts of 47 U.S.C. § 223(b)(2), these regulations relate primarily to provisions on commercial activities.[64] They also provide guidance for how a purveyor of indecent communication for a commercial purpose can protect him- or herself from prosecution by taking steps to verify that his or her customers are over eighteen years of age.[65] These are the only regulations provided in the relevant session law,[66] and,

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55. 47 U.S.C. § 223(a); *FAQ*, *supra* note 12.
56. 187 F.3d 672, 677 (D.C. Cir. 1999).
57. *Id.*
58. *Id.* at 678.
59. *Id.*
60. 372 F.3d 365, 382 (6th Cir. 2004). Note that although this case was vacated by the Supreme Court of the United States, all portions of the opinion (except for a sentencing issue) were later reinstated by the Sixth Circuit. Bowker v. United States, 543 U.S. 1182 (2005); United States v. Bowker, 125 Fed. Appx. 701 (6th Cir. 2005).
61. *Bowker*, 372 F.3d at 382 (citing Coates v. Cincinnati, 402 U.S. 611, 614 (1971)).
62. *Id.* at 382-83.
63. *Id.* at 383.
64. *E.g.*, 47 C.F.R. § 64.201 (2007).
65. *Id.*
66. Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, 97 Stat. 1467, 1469-70 (1983).

unfortunately, they do not aid the analysis here.

C. The Statutory Language at Issue

Having reviewed the amendments to—and prior decisions under—the Communications Decency Act, it is appropriate to analyze the current language of the statute, which reads that:

> Whoever . . . makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications . . . shall be fined under Title 18, or imprisoned not more than two years, or both.[67]

Also to be examined are the relevant definitions:

> (1) The use of the term "telecommunications device" in this section— . . .
> (B) does not include an interactive computer service; and
> (C) in the case of subparagraph (C) of subsection (a)(1), includes any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet . . .
> (2) The term "interactive computer service" has the meaning provided in section 230(f)(2) of this title.[68]

Finally, the definition of an interactive computer service, as laid out in section 230(f)(2), is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[69] The application of these provisions is the subject of the following Analysis.

III. ANALYSIS

Although the prior history of the statute provides valuable context, it leaves unanswered the question of how the statute will be interpreted in light of the 2006 amendment. When a defendant is next charged under this statute, the court will be called on to interpret the new amendment and determine whether the defendant's conduct is regulated, as well as whether such an application of the statute is constitutional. Therefore, it seems appropriate to structure the analysis of the 2006 amendment in accordance with traditional notions of judicial statutory interpretation.

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67. 47 U.S.C. § 223(a)(1)(C) (2006).
68. *Id.* § 223(h)(1)-(2).
69. *Id.* § 230(f)(2).

A. Statutory Interpretation: The Scope of "Telecommunications Device"

In recent decades there has been great discussion of revised or updated methods of statutory interpretation.[70] Although "new" canons or the "new textualism" approach are both interesting alternatives, the traditional approach still has considerable stock with the courts.[71] Thus, this Note takes the traditional approach to statutory interpretation, which consists of three levels of analysis:

> 1. the text and context of the statutory provision, as a starting point;
> 2. the legislative history, if but only if, the intent is not clear from the text and context legislative;
> 3. canons of construction, if the legislative history does not provide an answer . . . .[72]

The goal of the traditional analysis is to determine the legislature's meaning in the statute, while simultaneously reining in judicial activism and lawmaking.[73]

1. The Text of the Statute: The Plain Meaning Rule

Recognizing the same tension as did the district court in *ACLU v. Reno*, it is appropriate to apply rules of statutory interpretation to attempt to resolve the tension between the various provisions outlined above.[74] The first step in any attempt at statutory interpretation is the "plain meaning rule," which states that if the meaning of a statute is plain and unambiguous on its face, there is no need to examine legislative history.[75] As long as the plain language of the statute does not lead to an absurd result, the analysis should simply end.[76]

Upon careful examination, there appear to be some inconsistencies in the statute as written. For example, the software and modem in a computer that several family members use could constitute a "device . . . that can be used to originate telecommunications or other types of communications that are transmitted . . . by the Internet," which would bring it under the coverage of the

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70. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 51 (1997).

71. *See id.* at 51-53 (noting the "continued force of canons" and providing an overview of several theories for "new" canons).

72. *Id.* at 50 (citing Portland Gen. Elec. Co. v. Bureau of Labor and Indus., 859 P.2d 1143 (Or. 1993) as "a clear judicial statement of the traditional approach").

73. *Id.* at 50-51.

74. *See supra* Part II.C.

75. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 n. 29 (1978); MIKVA & LANE, *supra* note 70, at 9-10 ("If a reading of the statute provides a clear answer to the case . . . most judges and commentators would agree . . . that any inquiry should end." (citing Caminetti v. United States, 242 U.S. 470, 485 (1917))). However, some judges, notably Justice Breyer, have taken a stronger purposivist approach to statutory interpretation and would argue that the statute's purpose is more important than its plain text. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). A discussion of the relative merits of various approaches to statutory interpretation is beyond the scope of this Note, and so a traditional approach is used.

76. MIKVA & LANE, *supra* note 70, at 10. However, in some cases, the judiciary will still look to legislative intent even in the absence of a per se "absurd result." *Id.* at 11-12 (citing *Tenn. Valley Auth.*, 437 U.S. at 173).

statute as a telecommunications device.[77] However, it could also constitute a "system . . . that provides or enables computer access by multiple users to a computer server, including specifically a . . . system that provides access to the Internet," which would fit the definition of an interactive computer service that is exempt from coverage.[78]

Thus, there is a conflict between the two sections. Clearly, the definition of a communications device should not be interpreted to include something that fits the description of an interactive computer service. One way to remedy this would be to simply construe the specific exemption for the interactive computer service to trump the broader definition of a telecommunications device.

However, this would seem to be contrary to the implications of *ACLU v. Reno*, where a modem was necessarily held to be within the definition.[79] Although a modem by itself may not fit the definition of a system, a modem by itself cannot really do anything.[80] A modem needs to be somehow controlled by other computer hardware and software in order to be functional and send content.[81] In other words, a modem works as part of an integrated computer "system."[82] Thus, it would appear that for a relatively common example the statute is not clear on its face, and it is appropriate to proceed with the analysis to an examination of the legislative history.[83]

2. *Legislative History: The Problem or Evil to be Remedied*

Having deemed the language of the statute ambiguous, a court would be free to continue its pursuit of legislative intent further. The next step is to search the available legislative history for guidance as to the meaning of an

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77. 47 U.S.C. § 223(h)(1)(C) (2006).

78. *Id.* §§ 223(h)(1)(B), (2), 230(f)(2).

79. ACLU v. Reno, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996).

80. *See* Howstuffworks, How Modems Work, http://computer.howstuffworks.com/modem4.htm (last visited Nov. 21, 2007) (describing the modem as a sort of relay between a computer and an Internet service provider).

81. *Id.*

82. As an illustrative example of how complicated a computer system is, consider the case of sending a simple e-mail. Unlike a telegraph, merely typing the keys on a computer keyboard does not instantly cause the message to appear on the receiving end. IEEE Virtual Museum, How Did the Telegraph Work?, http://www.ieee-virtual-museum.org/collection/tech.php?id=2345687&lid=1 (last visited Nov. 21, 2007). Even discounting the basic software that allows a computer to coordinate all of its functions and provide the user an interface with these functions, the user must at least open an e-mail program, stored in the computer's permanent memory (frequently a Hard Disk Drive or HDD), which transfers the program to a temporary memory (generally called Random Access Memory or RAM). Howstuffworks, How PCs Work, http://computer.howstuffworks.com/pc.htm (last visited Nov. 21, 2007). The computer's processor interprets information transmitted from the keyboard, and in coordination with the e-mail program, generates a file of information in the computer's RAM. Howstuffworks, PCs: The Operating System, http://computer.howstuffworks.com/pc3.htm (last visited Nov. 27, 2007). When the user decides that his or her e-mail is complete and sends it, the e-mail file is sent to the modem, which then relays the message into cyberspace. *See id.* (using the example of browsing the Internet instead of sending an e-mail). Thus, multiple devices and programs are required to work together even before the user transmits his or her message to the multiple computers that form the Internet.

83. MIKVA & LANE, *supra* note 70, at 50.

unclear statute.[84] However, not all documentation of the legislative process is relevant; the document must generally be a significant part of the enactment process.[85] Committee reports, which are written by those legislators with arguably the closest relation to the bill at hand, are considered to be the most persuasive in the hierarchy of legislative history.[86] Interpreting legislative silence can be a tricky endeavor, and one must be careful not to draw false conclusions from congressional inaction.[87]

Additionally, the use of legislative history is not without its own problems; congressional committees and representatives are aware that from time to time the judiciary will look at enactment history.[88] There is a potential for abuse when statements are read into the record or otherwise inserted to inappropriately influence later judicial opinions.[89] However, the principles of legislative history interpretation, unlike canons of interpretation, originate from the legislative branch of government.[90] As such, referring to legislative history may help allay the concerns of those who fear an overly activist judiciary.[91]

Unfortunately, the legislative history for this amendment is particularly problematic. First of all, the amendment was passed as part of an appropriations bill.[92] As per the rules of construction, the amendment cannot be construed to affect the meaning given to the term "telecommunications device," which was in the Act before it was amended.[93] This unusual placement of the amendment in a bill that essentially *had* to be passed has led to allegations that certain members of the legislature may have tried to sneak the amendment in under Congress's nose.[94] As a general rule, appropriations bills should not affect the interpretation of substantive law.[95] This raises the serious question of what meaning, if any, should be given to an appropriations bill that amends the definition of what is covered by a criminal statute.

There is also a previous version of the amendment, passed by the House, which takes a significantly different approach to the final amendment.[96] Instead of amending provisions originally directed to communication via telephone, it is directed towards the more general provisions of Title 18.[97]

84. *Id.*
85. *Id.* at 36.
86. *Id.*
87. *Id.* at 37.
88. Id. at 30-32.
89. *Id.*
90. *Id.* at 32.
91. *Id.*
92. *FAQ, supra* note 12.
93. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 113, 119 Stat. 2960, 2987 (2006) (codified at 47 U.S.C. §223(h) (2006)).
94. *FAQ*, *supra* note 12.
95. United States v. Will, 449 U.S. 200, 221-22 (1980) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190). Further, the Court in *Will* notes that there are specific provisions affecting both the United States House of Representatives and the Senate that govern the handling of an amendment to substantive law contained within an appropriations bill. *Will*, 449 U.S. at 221-22.
96. H.R. 3402, 109th Cong. (2005) (enacted), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h3402eh.txt.pdf.
97. *Id.* § 509.

While the House amendment only prohibits acts that cause "substantial emotional harm" to the recipient, instead of the broader "with intent to annoy" language of the enacted amendment, it explicitly covers the use of any interactive computer service.[98] Perhaps this provides a clue as to what areas of technology Congress intended to regulate.

Another way of looking at the problem would be to ascertain the exact problem or evil that Congress was attempting to remedy as a way of gauging legislative intent.[99] Unfortunately, the House Committee Report is silent on the portion of the bill relating to the 2006 amendment to the Communications Decency Act.[100] Similarly, the House Conference Report for the 1996 incarnation of the Communications Decency Act does not directly address what is meant by a "telecommunications device" or "interactive computer service."[101]

Taking a broader look at the recent amendment, it is packaged as a general appropriations bill for the Department of Justice, with additional provisions directed against violence towards women.[102] Although the specific amendments do not seem to be directed at violence against women, the relevant section of the session law is entitled "Preventing Cyberstalking."[103] A press release by Senator Pete V. Domenici states that the purpose of the amendment is to expand "the definition of a telecommunications device to include any device or software that uses the Internet and possible Internet technologies such as voice over internet services."[104] Some scholars take this to mean that the new law is intended to be directed solely at voice over Internet protocol ("VOIP") technology and to eliminate a potential loophole in the previous law.[105] It is important to note that a press release is unlikely to have any persuasive value in court, since it does not actually document the enactment process of the law.[106] However, even taking the statement at face value, it is still broad enough to encompass most types of communication via

98. *Id.*

99. *E.g.*, Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454, 464 (1987).

100. H.R. Rep. No. 109-233, at 97 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 1636, 1647-48.

101. H.R. Rep. No. 104-458, at 188-191 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124, 201-05. Although there is some language directed to content posted on the Internet, such language is directed at the provisions of 47 U.S.C. § 223(d) which applies to use of an "interactive computer service." *Id.*

102. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §113, 119 Stat. 2960, 2987 (2006).

103. *Id.* Cyberstalking is the use of electronic media, such as the Internet, to stalk someone. The National Center for Victims of Crime, Cyberstalking, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&documentID=32458 (last visited Nov. 21, 2007). That being said, it is unclear how cyberstalking and online harassment is any more of a women's issue than a general public concern, especially considering that in *Popa* at least, the victim of the alleged harassment was male. United States v. Popa, 187 F.3d 672, 673 (D.C. Cir. 1999).

104. Press Release, Senator Pete V. Domenici, Congress Votes to Extend Violence Against Women Act Through 2011 (Dec. 17, 2005) (on file with author).

105. Cal Lanier, *Annoy Away. Just Put it in Writing*, FOOTBALL FANS FOR TRUTH, Jan. 10, 2006, http://www.footballfansfortruth.us/archives/001318.html [hereinafter *Annoy Away*]; Cal Lanier, *Really, Honestly, Just About VOIP, I Still Think,* FOOTBALL FANS FOR TRUTH, Jan. 10, 2006, http://footballfansfortruth.us/archives/001319.html [hereinafter *Just About VOIP*].

106. *See* MIKVA & LANE, *supra* note 70, at 36 ("For a piece of legislative history to be probative of legislative intent, it must bear a significant relationship to the enactment process.").

the Internet.[107] If Congress intended the statute to cover merely VOIP technology, it should have just said so.[108]

As at least one case affirmed by the Supreme Court has already held, modems were covered by the Communications Decency Act of 1996, albeit leaving the question of apparently conflicting statutory provisions to another day.[109] This raises the question: "What result did Congress think it would achieve?" Perhaps Congress meant to preserve the definition that included a modem, while attempting to add some clarity to account for new technology. That intention would certainly explain the specific statement that the amendment *did not* change the definition. Notwithstanding the above, this does little to help resolve the tension that already existed in the definitions under the original Act of 1996.

3. Canons of Statutory Interpretation

Lacking a satisfactory answer after a survey of the legislative history, the final step the court would take is to consider canons of statutory interpretation.[110] The canons are general rules created by the judiciary in an attempt to provide uniform guidelines by which a statute can be interpreted in the absence of any more concrete guidance or authority on point.[111] There are, of course, criticisms of these maxims, and most academics consider them incapable of actually deriving any sort of uniform rule.[112] This is mostly due to the ease with which selective application of the canons can be used to craft whichever result a judge desires, in addition to the argument that many of the canons are logically flawed.[113] However, keeping in mind that most judges still rely on the canons from time to time,[114] it is informative to include them in this analysis. There are numerous such canons,[115] but in this instance only a few are particularly applicable.

a. The More Recently Enacted Provision Trumps

One such canon is that in the case of a conflict the most recently enacted

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107. *See Perspective*, *supra* note 11 (discussing the downside to a sweeping Internet law banning annoyances).

108. *See FAQ*, *supra* note 12 (pointing out that the term VoIP has been used in other bills).

109. ACLU v. Reno, 929 F. Supp. 824, 828 (E.D. Pa. 1996).

110. MIKVA & LANE, *supra* note 70, at 50.

111. *Id.* at 23-24.

112. *Id.* at 25 (pointing out that "almost everybody thinks that canons are bunk" (quoting WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 630 (1988))).

113. *Id.* at 25-26 (explaining that many of the canons actually contradict each other, and that taken individually, many of the canons seem to have little rational basis and may even directly contradict important steps taken in the legislative process).

114. *Id.* at 27.

115. *Id.* at 25-26. There are over a dozen commonly used canons, and there is also a push for other, "new" canons. *Id.* at 24-25, 51. However, while some canons—for example "titles do not control meaning"—may be somewhat applicable to the instant case, they do not significantly add to the discussion of the interpretation of this statute, and so are omitted.

provision trumps older provisions.[116] However, as is discussed below, repeals by implication are not favored, and the earlier statute does not give way to the later one unless there is some sort of express conflict between the two.[117] As has already been observed, there is a potential conflict between the language of § 223(h)(1)(C) and § 223(h)(1)(B), in that something can be considered both a telecommunications device that is covered by the statute and an interactive computer service that is not.[118]

Since the recent amendment modified the definition of a telecommunications device, under this canon it would seem that posting content to the Internet or sending an e-mail would be covered by the statute. However, this interpretation seems to directly contradict the rule of construction promulgated along with the amendment stating that there should be no change to the definition of a telecommunications device.[119] Although it would result in a clear-cut answer to how to interpret this statute, direct application of this canon would be in conflict with the language of the amending act. It would be inappropriate to apply the canon under circumstances that would directly contradict stated congressional intent.

b. Repeals by Implication are Disfavored

Building on that idea, another relevant canon holds that repeals by implication are disfavored.[120] This basically means that courts prefer not to interpret an act of Congress to repeal another statute unless such an intent is "clear and manifest."[121] However, as mentioned above, if there is an irreconcilable conflict, then an intent to repeal may be inferred.[122] In fact, the pairing of these two canons well illustrates the common criticism that "there are two opposing canons on almost every point."[123]

However, while there may be two opposing canons on point, that does not necessarily mean that they are both equally persuasive. The disfavorable view of repeals by implication is particularly strong in appropriations bills, so that members of Congress can go about the efficient procurement of funds for various governmental projects without worrying about accidentally changing substantive law.[124] This canon is well-aligned with the rule of construction promulgated along with the amendment.[125] It implies that, if at all possible,

116. *See, e.g.*, United States v. Fausto, 484 U.S. 439, 453 (1988) ("[T]he implications of a statute may be altered by the implications of a later statute.").

117. *Id.*

118. *See supra* Part III.A.1.

119. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §113, 119 Stat. 2960, 2987 (2006) (codified at 47 U.S.C. § 223(h) (2006)).

120. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 187 (1978).

121. Rodriguez v. United States, 480 U.S. 522, 524 (1987) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

122. *Id.*

123. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

124. *Tenn. Valley Auth.*, 437 U.S. at 190.

125. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-

the language of § 223(h)(1)(B), which provides an exception in coverage for an interactive computer system, should not be overwritten by the amendment language despite the apparent conflict.

c. Meaning Should be Given to all Sections of a Statute: *In Pari Materia*

Despite such a conflict, a third canon is that courts will not interpret one section of a statute in such a way as to render another section of the statute meaningless.[126] Another very closely related canon states that courts should not read a statute such that two sections are redundant.[127] Although an admirable goal, application of these canons here is problematic. The rule of construction states that the amendment shall not be construed to affect the definition of telecommunications device as it was in effect before the amendment.[128] Although that implies redundancy, the only other way a "telecommunications device" is defined is in terms of negatives, whereas the amendment adds a positive definition.[129] Thus, although perhaps a bit repetitive, the amendment may not be redundant. With regard to granting meaning to all sections of the statute, there are a few possible interpretations.[130]

One is that the new amendment applies merely to VOIP technology and is closing a loophole.[131] Unfortunately, this implies that the definition of a "telecommunications device" previously did not include VOIP technology. Thus, this amendment would be changing the definition to include VOIP technology, which conflicts with the rule of construction.

Alternately, one could apply the same interpretation as the Federal District Court in *ACLU v. Reno*, where the judge read the definition of a "telecommunications device" to include a modem and that of an "interactive computer service" only to exclude entities such as Internet service providers.[132] Thus, the amendment would seem to be not so much altering the definition, as merely clarifying it to reflect what has already been included in judicial interpretation of the definitions. The amendment language would provide positive guidance and clarification for the definition of a "telecommunications device" but would not alter the definition from what the court had already interpreted the law to encompass. Under this definition, e-mail, Usenet, Web pages, and other postings to the Internet would all be covered by the statute. However, this would be due to the Communications

162, §113, 119 Stat. 2960, 2987 (2006) (codified at 47 U.S.C. § 223(h) (2006)) (stating that the definitions "shall not impose new obligations").

126. MIKVA & LANE, *supra* note 70, at 24.

127. *Id.*

128. Violence Against Women and Department of Justice Reauthorization Act §113.

129. *See* 47 U.S.C. § 223(h)(1) (2000) ("telecommunications devices in this section—(A) shall not impose . . . (B) does not include . . .").

130. *E.g.*, ACLU v. Reno, 929 F. Supp. 824, 828 (E.D. Pa. 1996); *Just About VOIP*, *supra* note 104; *Perspective*, *supra* note 11.

131. *Just About VOIP*, *supra* note 105.

132. *ACLU*, 929 F. Supp. at 828 n.5.

Decency Act of 1996, not the most recent amendment.[133]

d. Statutes Should be Read to Avoid Constitutional Issues

A final canon of statutory interpretation that is vehemently adhered to is that courts should interpret statutes to avoid constitutional issues, the rationale being to avoid making rulings on the constitutionality of a statute if such an issue is not directly implicated by the statute itself.[134] In the instance of § 233(a)(1)(C), however, which regulates communication and transmission of expressive content, a First Amendment question seems unavoidable regardless of how the definition of a "telecommunications device" is construed.[135] Although the Internet constitutes a "unique medium,"[136] it seems that the First Amendment issues raised by the statute are as likely to arise whether the definition of a telecommunications device implicates the Internet[137] or is simply restricted to communication or conversations via telephone.[138] However, this canon may be considerably more enlightening with regard to the scope of some other troubling language, specifically, the "intent to annoy" provision that is particularly worrisome to commentators.[139]

B. Statutory Interpretation: The Scope of "Intent to Annoy"

Perhaps because of the constitutional implications of the statute,[140] there is somewhat more guidance in case law as to what constitutes an "intent to annoy."[141] Several commentators point to the vagueness of the word "annoy" as their major point of concern with the statute.[142] Indeed, the Sixth Circuit agrees that "the word 'annoy,' standing alone and devoid of context and definition, may pose vagueness concerns."[143]

However, that court interpreted the word "annoy" in light of the other listed intents, namely, to "abuse, threaten, or harass."[144] Given that "threaten"

133. *See* Reno v. ACLU, 521 U.S. 844, 879 (1997) ("the CDA effectively censors discourse on many of the Internet's modalities—such as chat groups, newsgroups, and mail exploders").

134. *See* MIKVA & LANE, *supra* note 70, at 24 (discussing various frequently used canons of statutory interpretation).

135. *See* discussion *supra* Parts II.A-B, III.C. (discussing First Amendment issues within 47 U.S.C. § 223 (a)(1)(c)).

136. *See ACLU*, 521 U.S. at 850 (describing the Internet, noting that it is a unique medium).

137. *See id.* at 844 (discussing First Amendment issues surrounding telecommunications devices and the Internet).

138. *E.g.*, United States v. Popa, 187 F.3d 672, 673 (D.C. Cir. 1999).

139. *FAQ*, *supra* note 12.

140. *See* discussion *supra* Part II.A-B (highlighting the constitutional implications of the Act).

141. *See, e.g.*, United States v. Bowker, 372 F.3d 365, 381-82 (6th Cir. 2004) (analyzing intent to annoy with § 223(a)(1)(c)); *Popa*, 187 F.3d at 677 (interpreting § 223(a)(1)(c)).

142. *FAQ*, *supra* note 12 ("The use of the word 'annoy' is particularly problematic . . . ."); *Perspective*, *supra* note 11 ("Deleting the word 'annoy' . . . would probably have eliminated the free speech problems."); *see* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_01_08-2006_01_14.shtml (Jan. 10, 2006, 14:07 EST) [hereinafter Volokh, Posting of Jan. 10] (discussing the vagueness of "annoy" and potential interpretations).

143. *Bowker*, 372 F.3d at 382.

144. *Id.*

and "harass" have relatively clear meanings, there was context for the use of "annoy" that mitigated any vagueness concerns.[145] Similarly, the D.C. Circuit, in finding the statute unconstitutional in application to one engaged in political discourse, construed the term "annoy" in the same sense as "to abuse" or "to harass."[146] This would certainly be in keeping with the aforementioned canon that statutes should be read so as to avoid constitutional issues.[147]

That being said, basic tenets of statutory interpretation should still be kept in mind. As noted above, the plain meaning of the statute is the strongest indicator of congressional intent.[148] As also mentioned above, statutory language should not be construed so as to be redundant.[149] While the decision in *Popa* does provide some guidance by interpreting the word "annoy" in the same scope as the other listed intents,[150] in order to avoid redundancy, "annoy" cannot simply be construed as a synonym for "harass." Thus, the scope of the term may remain somewhat broader than the aforementioned decisions imply.

Although not relied on by the courts in the previously discussed decisions,[151] dictionary definitions are sometimes helpful in the determination of the plain meaning of a term.[152] Merriam-Webster defines "annoy" as "to disturb or irritate esp. by repeated acts" or "to harass esp. by quick brief attacks."[153] In distinguishing between "annoy" and some of its synonyms, the dictionary goes on to point out that "annoy" implies some sort of repeated action.[154] Indeed, it seems to raise the question as to whether a single act could ever be committed with intent to annoy or whether only a pattern of conduct would be required. Of further interest is the definition of "harass," which is "to annoy persistently."[155] Thus, it would seem that there is very little difference with the terms in common usage, and the distinction between them may be solely the degree of repetition, which certainly bolsters the court's argument in *Popa* that the terms should be considered together.[156]

C. The Threat to Free Speech

The scope of what constitutes an intentional annoyance is particularly

145. *Id.* at 382-83.

146. *Popa*, 187 F.3d at 676-77. The jury delivered a general verdict at the district court level, so some drawing of generalities was required in evaluating the appropriateness of the application of the statute to the defendant. *Id.* However, the D.C. Circuit did draw a distinction between "to annoy, to abuse, or to harass" and "to threaten," implying that "annoy" can be read more readily in the context of abuse and harassment. *Id.*

147. *Supra* Part III.3.d.

148. MIKVA & LANE, *supra* note 70, at 9.

149. *Id.* at 24.

150. *Popa*, 187 F.3d at 677.

151. *Id.*; United States v. Bowker, 372 F.3d 365, 82 (6th Cir. 2004).

152. Note, *Looking It up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) (pointing out that the Supreme Court has referred to dictionaries in hundreds of cases).

153. MERRIAM-WEBSTER, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 47 (10th ed. 2000).

154. *Id.*

155. *Id.* at 529. This Note will refrain from comment about the sense behind defining two different words in terms of each other. While not terribly helpful in defining the words in the abstract, it does seem to provide some insight as to the intimate relatedness of the two words.

156. *Popa*, 187 F.3d at 677.

relevant to the major point of controversy regarding the amendment to the Communications Decency Act, that is, to what extent the amendment treads upon free speech.[157] One argument takes the position that the holding of *United States v. Popa*—which found that the Act failed scrutiny as applied to the defendant's public or political discourse—should be sufficient to allay any fears that the provisions of § 223(a)(1)(C), restricting the use of a telecommunications device with intent to annoy, will impinge on any First Amendment rights.[158] The counter argument is that *Popa* may be too narrow, only protecting political speech,[159] or in the alternative, that the holding of *Popa* is ambiguous enough that any given user or prosecutor could be uncertain about what is permissible speech and what is not.[160] The latter could result in a situation where a prosecutor does not know what to prosecute nor a user know when he or she is about to run afoul of the law.[161] This could have a chilling effect on what would be otherwise perfectly valid speech.

Another argument—one repeated since the first incarnation of the Communications Decency Act—is that telephone conversations, being one-to-one speech, are considerably different from Internet communication, which can be one-to-many.[162] The problem arises in that speech directed at different audiences may have different intents.[163] For example, a corporation's Chief Executive Officer might be annoyed intentionally by a blog poster criticizing the his or her practices, but shareholders who read the material may be enlightened.[164] Thus, commentary that may potentially be quite valuable to the public could fall under the ambit of the prohibitions of § 223(a)(1)(C).[165]

What both of these arguments miss are the points outlined above. The phrase "intent to annoy" does not have to be read in a vacuum but can instead be read in the context of harassment, abuse, and threats.[166] It is difficult to see how a single post on a blog could be seen as harassing or abusive, considering that common usage strongly implies that it would take multiple incidents to rise to the level of annoyance.[167] This is especially true given the passive nature of the communication that is contained in Web sites, blogs,[168] and, to a lesser extent, e-mail; the intended target can choose whether to view the potentially annoying transmission at his or her own discretion.[169] The

157. Volokh, Posting of Jan. 10, *supra* note 142.
158. Kerr, *supra* note 28.
159. Volokh, Posting of Jan. 10, *supra* note 142 (noting that *United States v. Popa* interprets 47 U.S.C. § 223(a)(1)(c) (1996) narrowly when the text of statute appears to be broad).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *See id.* (stating that the word "annoy" is relative to each person).
165. *See id.* (describing how 47 U.S.C. § 223 (1996) was amended so that it now applies to the Internet).
166. *See* United States v. Bowker, 372 F.3d 365, 382 (6th Cir. 2004) (describing how intent to annoy has potential to be overbroad if prohibited speech is not analyzed on a case-by-case basis).
167. MERRIAM-WEBSTER, *supra* note 153, at 47.
168. For a further discussion of legal issues related specifically to blogs, see Peterson, *supra* note 10.
169. *See* Reno v. ACLU, 521 U.S. 844, 854 (1997) ("[U]sers seldom encounter such content accidentally. 'A document's title or a description of the document will usually appear before the document itself' . . . 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than

defendants in both *Bowker* and *Popa* made constant, repeated, inflammatory telephone calls to their targets, which go beyond a simple blog posting.[170]

The other flaw is that these arguments assume that regulation of speech over the Internet by the Communications Decency Act is new, when the amendment itself implies that such protection has been there the entire time, albeit not explicitly stated.[171] Theoretically, untold numbers of irritating bloggers could have already been prosecuted under the statute using the aforementioned rationale that a modem can be considered a "telecommunications device."[172] This gives tacit support for the argument that prosecutorial discretion is sufficient to avoid trying every marginal case where someone has been irritated by an anonymous party over the Internet.[173] Any supposed exacerbation of the problems with the "intent to annoy" language found in the statute should have occurred long ago, when the statute was expanded to cover a telecommunications device and not merely a telephone.

IV. RECOMMENDATION

Upon analysis, the recent amendment raises several issues: ambiguity in the definition of "telecommunications device," the constitutionality of the statute as written, and the constitutionality of the statute as applied. The first two of these may be best remedied by an amendment to either the statute itself or the implementing regulations, whereas the third is probably best left to sound prosecutorial discretion.

A. Ambiguity in the Scope of "Telecommunications Device"

As mentioned above, some scholars have reconciled the ambiguity by theorizing that the meaning of the amendment is to extend already existing telephone law to VOIP technology.[174] However, this proposition is contradicted in two ways. First, the definition of a "telecommunications device" has already been held to encompass usage of a modem beyond the realm of VOIP.[175] Second, if Congress had intended only to reach VOIP technology, it could simply have used a term more narrowly tailored to that

merely turning a dial.'").

170. *Bowker*, 372 F.3d at 383 (6th Cir. 2004) ("[A federal agent] specifically warned Bowker that he might be arrested if he persisted in his course of telephone harassment, but Bowker ignored that warning."); United States v. Popa, 187 F.3d 672, 673 (D.C. Cir. 1999) ("Between April 10 and May 9, 1997, he made seven telephone calls . . . .").

171. *Supra* Part III.3.

172. ACLU v. Reno, 929 F. Supp. 824, 828 (E.D. Pa. 1996).

173. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_03_19_2006_03_25.shtml#1142900679 (Mar. 20, 2006, 18:24 EST) [hereinafter Volokh, Posting of Mar. 20] ("[A]nd perhaps federal prosecutors would have been solicitious [sic] enough of free speech (or uninterested enough in online insults) that they would never bring such a protection.").

174. *Just About VOIP*, *supra* note 105. *Contra FAQ*, *supra* note 12 (arguing that the text of the amendment is broader than necessary to merely cover VOIP).

175. ACLU, 929 F. Supp. at 828, n.5.

specific technology.[176]

As written, the statute has much broader implications, and if Congress indeed intended such a narrow interpretation, another amendment would be required.[177] Another alternative—since the FCC would have the proper amount of expertise in this particular subject matter[178]—would be to instruct the FCC to develop regulations consistent with Congress's intent to clarify which technology and modes of communication are subject to the statutory provisions. This is especially true considering that a lot of the difficulty in regulating VOIP has been generated by the FCC's insistence that VOIP is an "information service" instead of a "telecommunications service."[179]

Given the preceding analysis, it seems likely that the amendment is merely an attempt to clarify the fact that the statute already covered communication over the Internet. However, the rather convoluted analysis required to reach that conclusion and the apparent textual conflict between the various provisions of § 223 suggest that some further amendment or clarification by Congress would be useful.[180] If, as has been suggested, the exception for an "interactive computer service" applies only to Internet service providers and other network operators, then that should be clarified.[181] The use of the word "system" is particularly troublesome, as it could encompass anything from a single desktop computer system to a massive system of networked computers and servers.[182]

Additionally, it would be helpful if the exclusion was applied, not to the "interactive computer service" itself, but to the operators and providers of such a service. This would help to draw the line between someone using their connection to the Internet for impermissible harassing communication and the operator of a network put to such use by its users.

Another potential option would be to create a non-exclusive list in the definitions section of the statute to provide illustrative examples of what is covered by the various terms and what is not.[183] This would have the added benefit of definitively including some items, such as modems or VOIP technology, whose inclusion may previously have been uncertain. Since the list would be non-exclusive and the full definition of a telecommunication device would be retained, the statute would gain a great deal in terms of clarity

176. *FAQ*, *supra* note 12.

177. *Id.*

178. 47 U.S.C. § 151 (2000) (articulating the rationale behind establishing the FCC).

179. *Annoy Away*, *supra* note 105.

180. *See* Kerr, *supra* note 28 ("I suppose you can criticize Congress for being lazy . . . . The formulation is a bit awkward.").

181. ACLU v. Reno, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996).

182. *See supra* note 77-78 and accompanying text. *See* MERRIAM-WEBSTER, *supra* note 153, at 1197 (relevantly defining a system as "a regularly interacting or interdependent group of items forming a unified whole" and "group of devices or artificial objects or an organization forming a network esp. for distributing something or serving a common purpose").

183. For example, such a section might read, "For the purposes of this section, the definition of a telecommunications device may include but is not limited to: telephones, modems, cable modems, radios, devices that transmit communications via the Internet, and other electronic or electrical devices capable of transmitting communication."

without losing much breadth of coverage.

Again, if Congress would rather leave such a task to an agency with the requisite expertise, the FCC is certainly able to assess the proper language for regulation of that technology and apply it appropriately.[184] It would merely take an instruction from Congress to promulgate such regulations.

B. Constitutionality and the Scope of "Intent to Annoy"

An amendment may also help to cure the majority of the perceived constitutional defects with the statute. As already pointed out, the usage of the word "annoy" in the intent requirement of the crime is at the heart of the controversy.[185] In light of the decision in *United States v. Bowker* that "annoy" should be construed in the same context as the words "harass, abuse, and threaten," it is reasonable to conclude that the controversial usage of the word "annoy" is superfluous.[186] It is unlikely that mere annoyances are going to be a terribly high priority for the Federal Bureau of Investigation, regardless of statutory coverage,[187] and the significant cases of *Popa* and *Bowker* both related to more egregious behaviors that could have easily qualified as harassment, abuse, or threats.[188]

Not only would this serve to head off some of the criticism this Act has received, but it may also avoid otherwise unnecessary constitutional challenges to the law as well.[189] This would also help to align the scope of the statute as it is applied with the scope of the statute as it is written. In turn, this would resolve the problem that some potentially valuable speech might be deterred if someone read the language of an overly broad statute without understanding the underlying case law that limits its application.[190] It could even be argued that the debate caused by the confusion over this new amendment, and the resulting attention the debate received on the Internet, would have a much greater chilling effect on potential speech than a small, arcanely worded provision tucked away in an appropriations bill.

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184. Internet Tax Freedom Act, 47 U.S.C. § 151 (2000) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities . . . for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority . . . there is created a commission to be known as the "Federal Communications Commission"). Interestingly, unlike most administrative agencies, the FCC is not accountable to the executive branch, but is an "independent" agency accountable to Congress. Cybertelecom, FCC, http://www.cybertelecom.org/notes/fcc.htm (last visited Nov. 21, 2007).

185. *FAQ*, *supra* note 12 ("The use of the word 'annoy' is particularly problematic . . . ."); *Perspective*, *supra* note 11 ("Deleting the word 'annoy' . . . would probably have eliminated the free speech problems."); Volokh, Posting of Jan. 10, *supra* note 142.

186. United States v. Bowker, 372 F.3d 365, 382-83 (6th Cir. 2004).

187. *FAQ*, *supra* note 12.

188. *Bowker*, 372 F.3d at 382; United States v. Popa, 187 F.3d 672, 673 (D.C. Cir. 1999).

189. Certainly, Clinton Fein, CEO of Annoy.com, might feel less inclined to challenge the suit. *See generally* Fein, *supra* note 29 (examining the difficulty in establishing a concrete and objective standard for annoyance).

190. *See* Kerr, *supra* note 28 (noting the existence of popular misconceptions of the law's effect).

C. Cooler Heads Prevail: Sound Prosecutorial Judgment

It is worth restating that the relevant section of the Communications Decency Act does not create a private action; rather, it can only be enforced by government prosecutors, leaving private parties only with the ability to bring traditional defamation or harassment suits.[191] Although it has been argued by some scholars that the chilling of speech may occur merely due to the statute being on the books, that threat would be somewhat lessened if the law was not aggressively prosecuted.[192] Even assuming prosecutors do start taking an interest in Internet "flame wars,"[193] there are significant practical difficulties to overcome.

The most notable of these is the difficulty of prosecuting an anonymous party. The law specifically requires that, regardless of whether the defendant's intent was to annoy or harass or what type of communications device they use, the transmission must be done anonymously.[194] While in some instances it may be easy to track an e-mail message back to its actual source, anonymity can create some difficulty in obtaining a legal remedy.[195] When combined with a First Amendment defense and an unclear statute, the anonymity provision makes this a fairly unattractive option for enforcement. In light of these difficulties and the understanding that the government will probably not pick fights it does not consider worthwhile, it is unlikely that a case of mere annoyance not rising to the level of serious harassment will be brought.

V. CONCLUSION

The protections of the First Amendment are sure to be a flashpoint of debate whenever they are implicated. In fact, it seems that a favorite topic of discussion among legal scholars is their freedom to discuss important political and public topics. Instead of crying "Censorship!" and letting loose the dogs of war,[196] however, a careful analysis of the law at hand can shed a great deal of light on the question of whether impermissible regulation has occurred. In the instant case, it appears that the confusion and concern over the amendment to the Communications Decency Act is due to imprecise drafting, rather than any "Big Brother" intentions of Congress. A few simple amendments to bring the written word of the statute in line with the application it has been given by the judiciary would do a great deal to resolve such confusion.

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191. 47 U.S.C. § 223(a)(1)(C) (2000); Volokh, Posting of Mar. 20, *supra* note 173.

192. *See* Volokh, Posting of Mar. 20, *supra* note 173 (suggesting a likely lack of interest on the part of federal prosecutors in pursuing an action based on online insults).

193. *Id.* In the ever-growing vocabulary of the Internet, a "flame war" is a discussion over the Internet that has degenerated to the point of insults and personal supremacy, frequently arising out of trivial misunderstandings and bruised egos. *Flaming (Internet)*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Nov. 21, 2007), http://en.wikipedia.org/wiki/Flaming_%28Internet%29.

194. 47 U.S.C. § 223(a)(1)(C).

195. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 454-56 (Del. 2005) (providing a helpful illustration of the procedure required to bring suit against an anonymous party for deafamation).

196. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 1 ("Cry 'Havoc,' and let slip the dogs of war . . . .").

This is not to say that the First Amendment does not need vigilant guardians. It would be inordinately careless to simply write off a constitutionally questionable amendment as congressional laziness or sloppiness, while trusting prosecutorial discretion and the judiciary to properly apply a potentially self-contradicting statute. Constitutional rights should not be left to the mercy of imprecise wording.

In short, very little has actually been done to change the coverage of the Communications Decency Act. Although application to the Internet is now explicit, the history of the law implies that a possibility for such application has always existed. As for the "intent to annoy" language, absent an amendment by Congress, the courts will likely continue to construe that element in light of more egregious acts of harassment.