EXHIBIT 1

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United States District Court,N.D. Indiana, Hammond Division.
Lisa and James Michael RYAN, Plaintiff,
v.
THE TOWN OF SCHERERVILLE, INDIANA, Defendant.
No. 2:03-CV-530.

May 4, 2005.

OPINION AND ORDER

LOZANO, J.

***1** This matter is before the Court on Defendant's Motion for Summary Judgment, filed on January 14, 2005; and Schererville's Motion to Strike Plaintiffs' Appendix and Supporting Affidavits, filed by Defendant on February 25, 2005. For the reasons set forth below, the motion for summary judgment is GRANTED IN PART and DENIED IN PART; the motion to strike is DENIED. The motion is GRANTED as to Lisa Ryan's claim of Intentional Infliction of Emotional Distress, James Ryan's claim of retaliation, and Lisa Ryan's claims of sex discrimination through disparate treatment, with the exception of the portion of the claim regarding Defendant's failure to train her. The Clerk is ORDERED to DISMISS these claims with prejudice. The motion is DENIED in all other respects. This case REMAINS PENDING as to Lisa Ryan's hostile work environment claim, claim of retaliation, and claim of sex discrimination (failure to train only). The Clerk is ORDERED to CLOSE this case with respect to Plaintiff JAMES RYAN ONLY.

BACKGROUND

Plaintiff, Lisa Jean Ryan ("Lisa Ryan"), had been employed by Defendant, Town of Schererville (the "Town"), since December, 1993. In 1995, Lisa Ryan was transferred from the Sewer Department to the Department of Public Works' Street Department. Lisa Ryan was the only female employee who worked outside of the office pursuant to her regular work assignment. Lisa Ryan was subsequently promoted on at least two occasions, and held the position of "maintenance worker 1" when her employment was terminated. Lisa Ryan met and married her husband, James Ryan ("James Ryan"), at the Street Department, where the two of them worked together. Lisa Ryan alleges that she was subjected to a hostile work environment while she worked at the Street Department. Lisa Ryan alleges that after she filed a charge with the EEOC, she was retaliated against in numerous ways. In addition to Lisa Ryan's claim of retaliation, James Ryan claims that he was subjected to retaliation for supporting his wife through the process. In addition to the alleged violations of Title VII through sexual discrimination, hostile work environment, and retaliation, Lisa Ryan also alleges a state law claim of intentional infliction of emotional distress. Defendant has now moved for summary judgment on all claims. The issues have been fully briefed, and are ripe for adjudication.

FN1. Defendant states that Lisa Ryan was transferred in 1995; however, in her deposition, Lisa Ryan claims to have been transferred in January 1996. (Lisa Ryan Dep., p. 53; Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment, p. 1 ("Memo in Support").) This discrepancy is not material, but must be acknowledged.

FN2. The parties are not consistent in their name of the department, rotating between "Street Department" and "Streets Department." The Court chooses to use "Street Department" for purposes of this Order, although the parties do not indicate which is actually correct.

FN3. Occasionally, the two other female employees would work in the field if it was absolutely necessary.

FN4. Lisa Ryan's termination is not at issue in this case. As her claim for retaliatory discharge is currently not before this Court, but rather the Equal Employment Opportunity Commission ("EEOC"), it will not be addressed further in this Order.

FN5. 42 U.S.C. § 2000, *et seq.*

DISCUSSION

The standards that generally govern summary judgment motions are familiar. Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only if it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In other words, the record must reveal that no reasonable jury could find for the nonmovant. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir.1991); *see also* *Anderson v. Liberty Lobby, Inc.*, 477 U .S. 242, 250 (1986). In deciding a motion for summary judgment, a court must view all facts in the light most favorable to the nonmovant. *Anderson*, 477 U.S. at 255; *Nucor Corp. v. Aceros Y Maquilas De Occidente*, 28 F.3d 572, 583 (7th Cir.1994).

***2** The burden is upon the movant to identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," if any, that the movant believes demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the movant has met this burden, the nonmovant may not rest upon mere allegations but "must set forth specific facts showing that there is a genuine issue for trial ." Fed.R.Civ.P. 56(e); *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir.1990); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir.1989). "Whether a fact is material depends on the substantive law underlying a particular claim and 'only disputes over facts that *might affect the outcome* of the suit under governing law will properly preclude the entry of summary judgment." ' *Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir.1988) (citing *Anderson*, 477 U.S. at 248).

"[A] party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County REMC*, 840 F.2d 405, 410 (7th Cir.1988) (emphasis in original); *see also* *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1391 (7th Cir.1993). Therefore, if a party fails to establish the existence of an essential element on which the party bears the burden of proof at trial, summary judgment will be appropriate. In this situation, there can be " 'no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

Motion to Strike

It is unfortunate that the resolution of the summary judgment motion was made significantly more difficult and time consuming due to Plaintiffs' attorney's complete disregard of summary judgment procedure. In response to the instant summary judgment motion, Plaintiffs submit an "Appendix-Plaintiffs' Statement of Genuine Issues of Material Fact," along with supporting affidavits. The affidavits were prepared *after* the close of discovery, and *after* the instant motion for summary judgment was filed. For the most part, Plaintiffs then simply cite to these affidavits, instead of the various materials prepared during the discovery process.

The submitting of these after-prepared affidavits, instead of what should have been submitted, undermines the discovery process, undermines the principle of full disclosure, and undermines the resolution of the summary judgment motion on the merits. The attorney is advised that such underhanded tactics will not be tolerated in the future. While the Court considered imposing sanctions (in an amount equal to Defendant's fees to bring and argue the motion to strike), the Court elected not to do so. However, the attorney is advised sanctions may be imposed, should he elect to not play by the rules in the future in other cases.

***3** As for the motion to strike, it is DENIED. First, the Court did not consider the Appendix in making its decision on the summary judgment motion. The Court could not even use the Appendix, as it cites completely to the affidavits, and not the actual deposition testimony.

Second, the Court did not rely on the affidavits in making its decision. Even though the Court was not required to, the Court sifted through the record submitted by Defendant (and other evidence submitting by Plaintiffs), reviewing Plaintiffs' deposition testimony. In general, the affidavits are summaries and highlights of the information contained in the deposition testimony. As it turns out, the Court was able to find the facts relied on in this order in the actual deposition and other testimony. It is unfortunate the Court had to perform the work of Plaintiffs' attorney. However, in the interests of justice and fairness, the Court felt it appropriate to scour the record to find the facts that support Plaintiffs' representations. As detailed below, the

Court was able to locate facts in the record that are indeed disputes of material facts with respect to some of Plaintiffs' claims. In sum, the Court did not rely on any facts that could not be found elsewhere in either the Defendant or Plaintiffs' materials.

Whether Defendant Is Entitled to Summary Judgment With Regard to Plaintiffs' Title VII Claims

Factual Allegations Prior to the 300 Days Before Lisa Ryan Filed Her Charge of Discrimination May Be Considered With Regard to Her Hostile Work Environment Claim

The first issue is whether the Court may consider factual allegations regarding Defendant's alleged misconduct, which fall outside of the 180 or 300-day limitations included within Title VII. The Court concludes that it may. This conclusion is based upon *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Defendant alleges that "Lisa Ryan may not litigate allegations of a hostile work environment claim which took place more than 180 days prior to the filing of her charges of discrimination." (Memo in Support, p. 7.) In support of this, Defendant cites *Morgan*, 536 U.S. at 104-05. Defendant claims "[t]he Supreme Court has held that a plaintiff may not rely on the continuing violations when allegations of discrete acts fall outside of the limitations period." (Memo in Support, p. 7 (citing *Morgan*, 536 U.S. at 114-15).) Moreover, "[a]cts which are so discrete in time or circumstances that they do not reinforce each other cannot reasonably be linked together into a single chain or single course of conduct to defeat the statute of limitations." (Memo in Support, p. 7 (citing *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 708 (7th Cir.2002)).

FN6. In Defendant's Reply to Plaintiff's Response ("Reply"), Defendant corrects the number of days to 300. (Reply, p. 2).

Defendant correctly argues that the continuing violation doctrine is not a viable option for Plaintiff to avoid issues regarding the statute of limitations with regard to discrete acts of discrimination. However, Plaintiff has not attempted to use the continuing violation doctrine, nor has Plaintiff alleged discrete acts of discrimination outside of the statute of limitations. Rather, Plaintiff alleges a hostile work environment made up of many predicate bad, although not necessarily individually actionable, acts on the part of Defendant and Defendant's agents.

***4** Under *Morgan,* discrete acts of discrimination occur when they happen. *Morgan*, 536 U.S. at 110 (stating "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' "). Thus, the *Morgan* Court held that "the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period." *Id.* at 105. However, Defendant ignores the sentence of the Court's opinion that directly follows the sentence Defendant so heavily relies upon in asserting that "Lisa Ryan may not litigate allegations of a hostile work environment claim which took place more than 180 days prior to the filing of her charges of discrimination." (Memo in Support, p. 7.) In deciding the issue Defendant argues in the negative, the Court stated, "[w]e also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.*

FN7. *See supra* note 5 (actual limitations period is 300 days).

Given Defendant's misunderstanding of *Morgan* and the Court's holding, this Court deems it necessary to clarify the principles set forth therein and more fully apply these principles to the instant case. In *Morgan,* Morgan filed a claim with the EEOC and received his right to sue letter. In his charge, Morgan, an African-American, alleged that he had been disciplined more harshly than his white counterparts, that he had been harassed, and subjected to a hostile work environment both in the 300 days that preceded the filing and in the time prior to the 300 days before filing with the EEOC. The district court granted summary judgment for the defendant on the grounds that it was not unreasonable to expect the plaintiff to bring suit earlier, given the fact that he knew of the harassing acts prior to the 300 days before filing the charge with the EEOC. The Ninth Circuit reversed, citing the continuing violation doctrine, stating that so long as the discrimination is not isolated, sporadic or discrete, the claim was not time barred.

FN8. In addition to using spurious argumentation in its Memo in Support, Defendant's Reply shows a clear misunderstanding for the principles of

> *Morgan.* Defendant states that "Lisa Ryan may not litigate allegations of a hostile work environment claim which took place more than 300 days prior to the filing of her February 3, 2003 charge of discrimination. In her Response, Lisa Ryan contends that all 'harassment' allegations are part of one alleged unlawful employment practice." (Reply, p. 2.) Although imprecisely worded in Plaintiffs' Response due to the double use of the term "harassment," Lisa Ryan's claim (that Defendant seemingly scoffs), is entirely correct. The predicate bad acts which make up a claim for hostile work environment do make up one unlawful employment practice, namely a hostile work environment.

The Supreme Court reversed the decision of the Ninth Circuit in part and affirmed it in part. *Morgan,* 536 U.S. at 104-05. The Court stated that the statute clearly requires that any charge be filed within the specified period of time after an alleged unlawful employment practice. *Id.* at 109. Unlawful employment practices occur on the day that they happen. *Id.* at 110. Since discrete discriminatory acts are individually unlawful employment practices, when they fall outside of the statutory period of limitations, such acts are time barred and cannot be considered by a court. *Id.* The Court stated that since there is a clear statutory definition of what qualifies as an unlawful employment practice, and that the statute never refers in any way to related discrete acts as making up an individual unlawful employment practice, the continuing violation doctrine is not supported by the statute. *Id.* at 111; *see* 42 U.S.C. § 2000e-2(a) (stating "[i]t shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....").

> FN9. This period is 300 days if the plaintiff lives in a "deferral state" such as California and Indiana, and 180 days if the plaintiff does not live in such a state. 42 U.S.C. § 2000e-5(a).

***5** Hostile work environment claims must be treated differently. *Morgan,* 536 U.S. at 115 (stating "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct."). Not only does a hostile work environment inherently involve "repeated conduct," but also hostile work environment is *an* unlawful employment practice that "cannot be said to occur on any particular day." *Id.* A hostile work environment occurs over time, sometimes even years. *Id.* Generally, the discrete acts which compose a hostile work environment are not individually actionable. *Id.* (citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986)). Thus, it can be said that a hostile work environment is really the cumulative effect of many small acts, which standing alone are not actionable under Title VII. *Id.*

A plaintiff, according to the Court, is required to file within 180 or 300 days "[a]fter the alleged unlawful employment practice occurred." *Id.* at 117. A hostile work environment is *one* unlawful employment practice. *Id.* (emphasis added). The fact that some of the "component acts" fall outside the 300 days is of no consequence to the determination of whether the component act, falling outside of the relevant period, should be considered. *Id.* Therefore, the Court concluded, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.*

In the instant case, Lisa Ryan makes no claim as to a continuing violation; therefore, Defendant's argument based upon continuing violation is specious and unavailing. Defendant's claim that Lisa Ryan is unable to use component acts that occurred prior to the 300 days prior to filing her EEOC because the component acts do not create a continuing violation of the type contemplated prior to *Morgan* (and for that matter, in *Tinner*), is true. However, a hostile work environment is not a continuing violation; it is a single violation which happens so long as the cumulative effect of the component parts create such an environment. So Lisa Ryan does not need to even address the continuing violation doctrine, as it is never implicated with regard to an alleged hostile work environment. Defendant correctly states "[t]he 'continuing violation' doctrine has no application here," and thus should not have even brought it into the argument.

Additionally, Defendant's reliance on *Tinner* is wholly misplaced. *Tinner* was decided by the Seventh Circuit Court of Appeals after *Morgan,* and thus must be addressed, as it is controlling precedent

upon this Court. The *Tinner* court did not address the hostile work environment claim brought by Tinner, instead focusing upon three discrete acts which Tinner claimed were acts of discrimination. Each of these acts occurred outside of the 300 days prior to the EEOC charge. The Seventh Circuit held that these three discrete acts were time barred under *Morgan* since the continuing violation doctrine was no longer viable. *Tinner,* 308 F.3d at 708. The court continued, stating that even if the continuing violation doctrine remained viable after *Morgan,* and the Seventh Circuit by no means held that the doctrine did remain viable, Tinner would nonetheless not be allowed to use the doctrine to slide such acts in through the back door. *Id.* at 708-09. The Seventh Circuit never addressed the hostile work environment claim, nor did it address *Morgan* insofar as the Supreme Court distinguished discrete acts and a hostile work environment. *Id.*

***6** *Tinner* does not address the operative issue that Defendant raises. Rather, Lisa Ryan's claims are squarely within the auspices of *Morgan.* With regard to the hostile work environment claim brought by Lisa Ryan, the Court holds that since many of the component acts alleged to have caused the hostile work environment, such as the directed bad language, occurred within the 300 days prior to Lisa Ryan's filing of a charge with the EEOC, all component acts will be considered by the Court in determining whether Defendant is entitled to summary judgment. Thus, since the Supreme Court acknowledged that a hostile work environment is *one* unlawful employment practice, that this one practice may occur over the course of years, and that a court may look to all component acts without regard to the 300 day statute of limitations, all allegations used by Plaintiff to argue that a hostile work environment existed will be used when determining the central issues of Defendant's motion.

Insofar as Lisa Ryan may argue that any of these component acts constitute an individual discrete act of discrimination, and fall outside of the 300 day limit, such acts will be disregarded, except for their effect on the hostile work environment. As Lisa Ryan does not rely on such acts for her charge of sex discrimination, this statement may be rendered nugatory. However, it is important to note that discrete acts of alleged discrimination should not be dressed up as component acts of a hostile work environment so as to avoid the statute of limitations problem. Therefore, if an alleged component act would be actionable, if true, on its own, the Court disregards such an act as to the hostile work environment claim. Individual acts of bad language, and non-directed displays of pornography, are not discrimination and therefore can be considered with regard to a hostile work environment.

The occurrences Lisa Ryan alleges to be acts of sex discrimination are supervisory use of discretion in a discriminatory manner, failure to take corrective action, failure to provide a women's restroom near her workstation, and not providing equal pay for equal work. (Am.Compl.¶ ¶ 8-16.) None of these acts allegedly occurred outside of the 300 day period, and insofar as any of the acts did occur outside of that time period, they will not be considered. None of these acts are used in support of the hostile work environment claim either; additionally, noticeably missing from this list are the alleged component parts of the hostile work environment claim, save the failure to correct, which was alleged for purposes of stopping an affirmative defense available to Defendant, not necessarily in support of such a claim. (Am.Com pl.¶ ¶ 17-22.) Since the allegations supporting the hostile work environment claim are not individually actionable, they may be used in support of the claim without regard to their timing, as they allegedly happened regularly, including days after the beginning of the 300 day period.

Defendant Is Not Entitled to Summary Judgment With Regard to Lisa Ryan's Hostile Work Environment Claim

***7** The second issue which the Court must address is whether Defendant is entitled to summary judgment with regard to Lisa Ryan's claim that she was subjected to a hostile work environment throughout her employment with Defendant. The Court concludes Defendant is not so entitled. In drawing this conclusion, the Court notes that significant issues of fact remain with regard to whether the working environment was hostile and with regard to whether Defendant has met its burden as to its **affirmative defense**. Each of these two reasons for the Court's determination is addressed in turn.

A cause of action for "hostile work environment" was first recognized by the Supreme Court in *Meritor Savings Bank v. Vinson.* 477 U.S. 57, 66 (1986) (stating "[s]ince the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."). The Court stated that in order to be actionable, the harassing conduct must

be so severe or pervasive as to affect a term or privilege of the alleged victim's employment. *Id.* at 67; *see also* *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (requiring that the harassment be so severe or pervasive that the terms or conditions of employment are affected).

The Seventh Circuit Court of Appeals has stated that actionable sexual harassment in the form of a hostile work environment is actionable if the plaintiff can show that he or she was subjected to unwelcome sexual harassment; the harassment was based upon sex; the harassment unreasonably interfered with work performance by creating an intimidating, hostile, or offensive working environment that seriously affected the alleged victim's psychological well-being; and that there is a basis for employer liability. *McPherson v. City of Waukegon*, 379 F.3d 430, 437-38 (7th Cir.2004) (citing *Robinson v. Sappington*, 351 F.3d 371, 328-29 (7th Cir.2003)). The conduct creating a hostile work environment must be so severe or pervasive as to alter the terms and conditions of employment and create an abusive work environment. *Id.* at 438 (citing *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 462-63 (7th Cir.2002)). The actions must create a "hellish" environment, meaning one in which it is clear that a female does not belong or is not wanted. *See McKenzie v. Milwaukee County*, 381 F.3d 619, 624-25 (7th Cir.2004) (observing that men and women were treated in the same derogatory manner; thus women were no less welcome than men that the supervisor did not like); *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir.1996), *abrogated* as to continuing violations *by Morgan*, 536 U.S. 101 (stating "there is no evidence [ ] that women do not belong in the work force or are not entitled to equal treatment with male employees. In these circumstances no inference could be drawn by a reasonable trier of fact that Bullock's behavior, undignified and unfriendly as it was, created a working environment in which Galloway could rationally consider herself at a disadvantage in relation to her male coworkers by virtue of being a woman.").

***8** The environment must be both subjectively and objectively hostile. *McKenzie*, 381 F.3d at 624; *McPherson*, 379 F.3d at 438 (citing *Hilt-Dyson*, 282 F.3d at 462-63). In order to determine whether the environment was objectively hostile, the Court looks to the frequency and severity of the conduct, whether the conduct was threatening or humiliating as opposed to merely "an offensive utterance," and whether the harassment unreasonably interfered with the plaintiff's work. *McPherson*, 379 F.3d at 437-38 (citing *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975-76 (7th Cir.2004)). The difficulty is drawing the line between merely some offensive activity and an objectively hostile environment. *Id.* "On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, or coarse or boorish workers.... It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other." *Id.* (citing *Bakersville v. Culligan Int'l. Co.*, 50 F.3d 428, 430-31 (7th Cir.1995)).

In *McPherson*, the Seventh Circuit determined that the environment was not objectively hostile when a supervisor occasionally behaves in a boorish manner, and even occasionally touches a female employee. *Id.* at 439. The Court cited much precedent for the proposition that actions, which, although vulgar or boorish, are spread out over time and are few and far between, are neither severe nor pervasive to the extent necessary to show that an objectively hostile work environment existed. *Id.* (citing *Hilt-Dyson*, 282 F.3d at 463-64; *Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 754 (7th Cir.2002); *Adusumilli v. City of Chicago*, 164 F.3d 353, 361-62 (7th Cir.1998)). When determining whether the alleged acts create a hostile work environment, the Court must view secondhand information as having a lesser impact than direct, firsthand acts experienced by the plaintiff. *McKenzie*, 381 F.3d at 624.

Defendant asserts that the only timely claims that could lead to a hostile work environment are Lisa Ryan receiving information that she had been called a "fucking bitch" in January, 2003 outside of her presence; Chip Bell searching the Plaintiffs' car (Bell also searched the car of another employee at that time); and the fact that there was pornography present in the break area during the winter of 2002-03. As was discussed above (*see supra*), because at least one alleged act in the creation of a hostile work environment took place during the 300 days prior to Lisa Ryan's EEOC filing, all acts will be considered when determining whether a reasonable trier of fact could find that Lisa Ryan was subjected to a hostile work environment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) (holding "[a] charge alleging a hostile work environment claim, however, will not be time barred so long as all acts

which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.").

*9 Lisa Ryan claims that she was called a "fucking bitch" and a "fucking cunt" as well as "lesbian," "dyke," "pussy-licker," and "carpet muncher" on an almost daily basis. (*See, e.g.,* Lisa Ryan Dep., p. 90 (explaining how Lisa Ryan reported sexual harassment to her supervisors "every day or every other day....").) Lisa Ryan also alleges that she was subjected to a rumor near the beginning of her employment with the Street Department, that she was giving "blow jobs" to the men on the night shift. She further alleges that pornography was prominently displayed and openly viewed in her presence. Moreover, she was subjected to questioning regarding the pornography, and the pornographic pictures were deliberately shown to her. Lisa Ryan claims that she was mocked monthly due to her menstrual cycle; the men, including supervisors, allegedly used many derogatory terms about her cycle and her. At one point, someone left a dildo on the time clock where Lisa Ryan was required to punch in for work. Additionally, she alleges that her car was searched for a flashlight which was missing.

Defendant compares Lisa Ryan's allegations in the instant case to cases in which the allegations were simple vulgarities. However, if Lisa Ryan's allegations are in fact true, this case is clearly distinguishable from any case of mere vulgarity. Defendant first cites *Bakersville v. Culligan Int'l. Co.*, 50 F.3d 428 (7th Cir.1995) for the proposition that "a supervisor making nine sexually derogatory comments over a seven month period is not sufficient to constitute a Title VII violation." (Reply, p. 4.) In *Bakersville,* the following nine alleged acts were assumed to have taken place. First, a supervisor for the defendant, Culligan, stated "there's always a pretty girl giving me something to sign off on" when talking to the plaintiff in that case; second, the supervisor grunted in a suggestive manner at a skirt the plaintiff was wearing; third, the plaintiff commented on the supervisor's office being hot, to which he replied "not until you stepped your foot in here;" fourth, the supervisor told the plaintiff that "may I have your attention please" meant "all pretty girls run around naked;" fifth, the supervisor called the plaintiff a "tilly;" sixth, the supervisor stated that he needed to clean up his act and that he had better think of the plaintiff as "Anita Hill;" seventh, he told the plaintiff at the Christmas party that he needed to leave because there were so many pretty girls that he thought that he would lose control; eighth, she complained that the office was smoky from cigarettes and he responded by asking if she meant like we're dancing at a night club?; ninth, he suggested masturbation by a hand gesture after telling her that he was lonely at his hotel room. *Id.* at 430. The Seventh Circuit determined that this was not enough to constitute a claim for hostile work environment. *Id.* at 431 (holding that no reasonable jury could find that the supervisor was a sexual harasser).

*10 Defendant claims that the acts of the Town's employees and supervisors cannot be distinguished from those of the supervisor in *Bakersville.* (Reply, p. 4.) This is not true. The reality is that if Lisa Ryan's allegations are true, they are easily distinguishable. First, whereas the acts in *Bakersville* were not threatening, the behavior Lisa Ryan was allegedly subjected to is clearly threatening and thus falls further to the side of hostile work environment than did the acts in *Bakersville. See* *McPherson*, 379 F.3d at 437-38 (citing *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975-76 (7th Cir.2004) (noting that in order to determine whether the environment was objectively hostile the Court looks to the frequency and severity of the conduct, whether the conduct was threatening or humiliating as opposed to merely "an offensive utterance," and whether the harassment unreasonably interfered with the plaintiff's work)).

Although there have been cases which state that the use of the word "bitch" is not necessarily gendered and thus not always harassing, when a women is being called names such as F __ B __ *and* F __ C __, as well as numerous other derogatory terms relating to her sexuality and her menstrual cycle, a reasonable trier of fact could find that there was an objectively hostile and threatening work environment. *See* *Galloway*, 78 F.3d at 1168 (stating "[t]he terms 'fucking broads' and 'fucking cunts' are more gendered than 'bitch'; and there was much else in the case to establish the sexual character of the harassment. We do not suggest, moreover, that the word 'bitch' can *never* figure in a sex discrimination case. When a word is ambiguous, context is everything. The word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper, selfishness, malice, cruelty, and spite,' and latterly as a label for women considered by some men to be too aggressive or careerist.") (internal citation omitted) (emphasis in original). Thus, here the threatening nature of the use of such terms, the almost daily use of such terms to refer to Lisa Ryan, and the clarity with which such terms are used in regard to females make this case clearly distinguishable from *Bakersville.*

Defendant next argues that if there are no allegations beyond boorish behavior and vulgar language, the Court should grant summary judgment. (Reply, pp. 4-5.) To this end Defendant cites *Weiss v. Coca-Cola Bottling Co. of Chicago,* 990 F.2d 333, 337 (7th Cir.1993). The *Weiss* court held that when a supervisor repeatedly asked about the plaintiff's personal life, told her how beautiful she was, asked her to join him for a couple of dates, called her a dumb blonde, touched her shoulder six times, placed "I love you" signs on her work station, and tried to kiss her on one occasion at a bar and twice at work (although this was contradicted by the plaintiff's deposition), there was not enough evidence of a hostile work environment. *Id.*

***11** Yet again, the cases are clearly distinguishable. Whereas in *Weiss,* the actions were not carried out everyday, in the instant case the alleged harassment took place nearly on a daily basis. If there was any threat to Weiss, it was not remotely as severe as the alleged threat to Lisa Ryan. As was stated above, Lisa Ryan dealt daily with insults, and sexually derogatory name calling. Lisa Ryan was also reduced to tears on a monthly basis because she was screamed at by Jeff Huet. Moreover, the allegations in the present case indicate that women were not welcome, aside from office and secretarial work, in the Street Department. Weiss' allegations did not show that women were unwelcome or that women were not deserving of equal treatment in the workplace. Lisa Ryan was allegedly subjected to treatment that goes quite a way beyond the point where the "only issue before the court involves boorish behavior and/or vulgar language." (Reply, p. 4.) The cumulative effect upon Lisa Ryan, and upon a reasonable person, in the instance that the allegations are true (which the Court does not pass upon here), are much different than being subjected to questioning about one's personal life, asked to go on dates, being complimented on looks, etc. Terms such as "fucking cunt" and "fucking bitch" as well as derogatory means of indicating that Lisa Ryan was a lesbian, although married to a male co-worker, when coupled with the pornography, the dildo on the time clock, and general mistreatment due to her being female, are not simple vulgar language and boorish behavior claims. These type of allegations likely fall within the first side of the dichotomy set forth by the Seventh Circuit in *McPherson. McPherson,* 379 F.3d at 437-38 (citing *Bakersville v.. Culligan Int'l. Co.,* 50 F.3d 428, 430-31 (7th Cir.1995) (stating "[o]n one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.... It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other.")).

Finally, Defendant claims that the behavior in the present case, and Lisa Ryan's inability to remember specific dates of certain harassment, indicates that summary judgment is proper. (Reply, pp. 5-6.) Defendant claims that Lisa Ryan's claims are "fatally indistinguishable" from the claims of the plaintiff in *Wieland v. Department of Transportation, State of Indiana,* 98 F.Supp.2d 1010 (N.D.Ind.2000). In *Weiland,* the court determined that there was no violation of Title VII because the harassment was not "but for" her sex, and her deposition was "full of 'I don't remember' " and similar statements. *Id.* at 1019. The supervisor in *Wieland* treated everyone equally as badly. He did not make sexual comments, or refer to the plaintiff in a sexual manner. He did cuss a lot, as did the rest of the employees, including the plaintiff. The plaintiff did not remember any specific comments at all, with one exception. The only remotely sexual comment made by the supervisor was that "women could 'bitch and complain about your pussy hurting' and get off the job." *Id.*

> FN10. The *Wieland* plaintiff finalized a divorce between the filing of the case and the decision, at which point she changed her name back to her maiden name, Garza. She will be referred to as "plaintiff" for simplicity's sake.

***12** In fact, *Wieland* is almost exactly as Defendant describes it. "[the *Wieland*] plaintiff's deposition was full of 'I don't remembers'; (sic) the alleged sexual harassment mainly consisted of 'bad language'; (sic) plaintiff admitted that she swore and that most employees used cuss words; that the plaintiff was never touched; their supervisor ever (sic) asked for sexual favors or tried to date her, never made sexual comments directed to her like 'nice T and A'; (sic) never referred to her sexually; acknowledged that the main alleged harasser used cuss words when he talked to everyone regardless of gender; an old pinup was on an employee's locker; that the plaintiff herself brought in a risqué magazine and showed it to coworkers; admitted that she never complained about

'pornography'; and did not receive a timely bathroom break when she was having her menstrual cycle. Further, the court found that the plaintiff could not demonstrate that any of the activities occurred based on her gender." (Reply, p. 5 (citing Weiland, 98 F.Supp.2d at 1019-20).)

The bad language in *Wieland* was described by the court as "cussing," and there was no indication that any cuss words other than generic non-gender oriented words were used. In fact, the plaintiff herself did not indicate that the "bad language" was sexual in nature. *Id.* at 1019. In the present case, the bad language was clearly sexual in nature, particularly when looked at in context. It is not possible to separate the term "fucking cunt" from its derogatory connotations regarding women and women's sexual organs. Moreover, the derogatory terms used to describe Lisa Ryan as a lesbian are clearly gender based because none would be used to describe a man. *See* Galloway, 78 F.3d at 1168 (stating "[t]he terms 'fucking broads' and 'fucking cunts' are more gendered than 'bitch'; and there was much else in the case to establish the sexual character of the harassment. We do not suggest, moreover, that the word 'bitch' can *never* figure in a sex discrimination case. When a word is ambiguous, context is everything. The word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper, selfishness, malice, cruelty, and spite,' and latterly as a label for women considered by some men to be too aggressive or careerist.") (internal citation omitted) (emphasis in original).

Arguably, the allegation that Jeff Heut reduced Lisa Ryan to tears on a monthly basis is not directly attributable to her being female. If this is the case, then this allegation must be discounted with regard to whether a hostile work environment existed because if it was not motivated by Lisa Ryan's sex, then it cannot be discrimination based upon sex. *See* Wieland, 98 F.Supp.2d at 1017 (stating "[t]he key inquiry in these cases is whether the alleged acts of harassment occurred 'but for' the employee's sex."). Plaintiff's brief seems to imply that Lisa Ryan's reduction to tears resulted from being ridiculed for her menstrual cycle; however, this is not directly said. (Pls.' Resp., p. 4.) Even if this allegation is not considered, the situation is still clearly distinguishable from the situation in *Wieland.*

***13** Lisa Ryan does not remember specific dates. This simple fact does not make the instant case the same as that in *Wieland.* It is true that the plaintiff in *Wieland* did not remember specific dates of alleged occurrences; she also did not remember specific comments or instances of harassment. Instead, the *Wieland* plaintiff stated that "[i]t just wasn't right." The importance of this is not as much that she did not remember dates or other specifics and therefore had no claim; rather, she could not remember enough specific instances to show that the harassment that she subjectively felt was objectively harassing and caused by her sex. Wieland, 98 F.Supp.2d at 1019. In the present case, Lisa Ryan remembers many specific instances, and never claims that it just did not feel right, or that she simply subjectively felt harassed. The fact that she does not remember specific dates of each occurrence says nothing about whether she stated a claim. There is significant evidence (from Lisa Ryan herself and witnesses) that the statements she claims to have been made about her actually were made about her, both in front of her and behind her back.

The fact that Lisa Ryan used cuss words too is not the same as the statement in *Wieland* that the plaintiff used cuss words just like her co-workers. Lisa Ryan did not refer to her co-workers (or she has not been alleged to have) as "fucking cunts," "fucking bitches," "pussy lickers," "carpet munchers," or other derogatory terms to which she was allegedly subjected. Moreover, the fact that the supervisors who controlled her job assignments did not subject her to such ridicule is a red herring. Defendant never claims that supervisors were not among those who did make the sexually derogatory comments; rather, Defendant argues that two of its many supervisors never made such comments. Defendant argues that Lisa Ryan never complained about the pornography in the office, and brought in suggestive cards for co-workers. Her lack of complaint has no place in this portion of Defendant's argument, as it should be addressed in Defendant's affirmative defense. The fact that she brought in cards with enlarged penises on them should not be compared so quickly to magazines and posters depicting men and women, or women and women, performing sex acts upon each other. A spoof or joking card, although possibly in bad taste, is a matter to be settled between the giver and receiver of that particular card. Being involuntarily subjected to perpetual viewing of pornography in the breakroom at work is simply not the same as the occasional card containing humor in bad taste.

This case is most similar to Rhodes v. Illinois Department of Transportation, 359 F.3d 498 (7th Cir.2004), in which the employer, on similar facts, admitted that a hostile work environment existed.

Although the facts were similar, the treatment Lisa Ryan allegedly endured was worse than that endured by Rhodes. Rhodes worked for the Illinois Department of Transportation ("IDOT") as a seasonal, but full-time, worker. She worked in the area of snow removal. After two years of service, IDOT received a complaint from one of the citizens on Rhodes' route that the service was slow and not up to par. IDOT responded by assigning Rhodes to a shorter route the next year when she returned. Rhodes objected, but was unsuccessful. Conditions deteriorated after that. She was called a "bitch" and a "cunt," was forced to wash her truck in sub-zero temperatures, assigned to work in the yard for several days, was not allowed to drive the foreman's truck when filling potholes, pornography was prevalent (both videos and magazines), and once was taped to her locker. Additionally, there was some sort of a rumor about her and one of her superiors having "something going on." She was also marked absent on what turned out to be her last day of work even though she had called and informed someone with some authority (the incorrect person to call) to inform him that she would be gone. IDOT conceded that this was enough to create a hostile environment.

***14** Rhodes was called sexually vulgar names for a significantly shorter period of time than Lisa Ryan. Lisa Ryan was subjected to such treatment for the duration of her employment, whereas Rhodes was only subjected to such treatment during one of her three years of service. Since longer exposure to being disrespected can arguably cause greater harm, Lisa Ryan's treatment was significantly more pervasive, and severe. Similarly, there is a difference between the present case and the pornography in *Rhodes.* In *Rhodes,* the IDOT employees who viewed the pornography used lookouts and warned each other of women and bosses in the area, whereas Lisa Ryan was directly exposed to the pornography. Lisa Ryan was asked whether she looked like this woman, or wanted to look like that woman. Additionally, the men allegedly continued to view pornographic material, regardless of whether Lisa Ryan was in the area and allegedly made no efforts to prevent Lisa Ryan from finding such material. Again, the treatment of Lisa Ryan was more severe than that of Rhodes. Yet IDOT simply conceded that a hostile work environment existed.

For the above reasons, this Court holds that there remains a genuine issue of material fact with regard to whether the actions of the Town and the supervisors within the Street Department created a hostile work environment which was severe or pervasive, and both objectively and subjectively hostile. The Town may be entitled to an affirmative defense as discussed in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). It is to this which the Court now turns.

Defendant Is Not Entitled to Summary Judgment on Plaintiff's Hostile Work Environment Claim Due to Its Faragher/Ellerth *Affirmative Defense*

When a supervisor creates a hostile work environment, and there is no tangible employment action (such as firing the employee), the employer may avoid liability, if the employer/defendant can show that it took reasonable care to prevent or correct the harassing behavior *and* that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities. Faragher, 524 U.S. at 807-08; Ellerth, 524 U.S. at 765. Defendant states that for the purposes of this defense, Lisa Ryan's claim that she reported the harassment to the appropriate authorities cannot be enough for her to survive summary judgment. (Memo in Support, p. 13 (citing Lucas v. Chicago Transit Auth., 367 F.3d 714, 726 (2004)).) Thus, there must be more, in Defendant's estimation, than Lisa Ryan's assertions that she reported the harassment to the proper authorities in order for the Court to deny the instant motion.

The persons committing the acts yielding a hostile work environment must be the alleged victim's supervisors for purposes of Title VII liability. Rhodes v. Illinois Dept. of Transp., 359 F.3d 498, 506 (7th Cir.2004). Otherwise, the alleged victim must show that the employer was negligent in discovering or remedying the violation. *Id.* To show negligence, the employer must have had actual notice unless the violations were apparent to the point that the employer should have known of the harassing behavior. *Id.* Lisa Ryan alleges that Chip Bell, Jeff Huet, Al Lewandowski, and Gene Poston each participated in the acts which created a hostile work environment.

***15** Whether someone constitutes a supervisor for the purposes of Title VII depends upon the amount of control he or she wields over the alleged victim. For example, in Hall v. Bodine Electric Co., 276 F.3d 345 (7th Cir.2002), the Seventh Circuit determined that an individual with authority to direct the day-to-day work operations of a subordinate, who had input on the subordinate's job evaluations, and worked as a

trainer, was not a supervisor for Title VII purposes. A supervisor will generally possess the power to hire, fire, demote, promote, discipline, and transfer an employee. *Id.* at 355. In the instant case, Volkman stated that the town manager, the foreman, and the assistant have the authority to discipline employees. (Volkman Dep., p. 29.) Thus, at least Gene Poston (the assistant director of public works), Chip Bell (the maintenance foreman), and Al Lewandowski (the equipment foreman), are arguably supervisors. These individuals could "directly affect the terms and conditions of the plaintiff's employment." *Rhodes*, 359 F.3d at 506.

The *Faragher/Ellerth* defense is available to claims involving a hostile work environment, and therefore Defendant *might* be able to take advantage of it in this case. Defendant has a policy regarding sexual harassment, and Lisa Ryan knew about the policy. It is located in the "Town of Schererville Personnel Policy Manual," which has been attached to Defendant's motion for summary judgment as "Exhibit H." The policy states that Defendant unequivocally will not tolerate sexual harassment, that disciplinary action will result from any sexual harassment that may go on, and "[a]ny employee experiencing an alleged violation of this policy, who would prefer to discuss the circumstances away from his or her particular work area, shall meet with their department head *or* the Town Administrator, *or* a member of the Town Council." (Def.'s Ex. H, p. 8 (emphasis added).)

Defendant first misconstrues its own sexual harassment policy. The policy clearly uses the disjunctive "or" when stating to whom an individual with a complaint must address the complaint. (*Id.*) Surprisingly, Defendant claims that the complaint should be addressed to the "town manager and town council." *Id.* The fact that Lisa Ryan never approached the town council has nothing to do with whether or not she reasonably took advantage of the policy. There is evidence she did speak to Town Manager Krame in 1998. Lisa Ryan also alleges that she reported the harassing behavior on an almost daily basis to her supervisors, which is also an acceptable method of reporting under the policy manual's reporting requirements. (*See id.*)

Defendant claims that Lisa Ryan's statements, standing alone, are not enough to defeat an *Ellerth* **defense**. (Memo in Support, p. 13 (citing *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 726 (7th Cir.2004)).) To argue this is to misunderstand the *Faragher/Ellerth* **defense's** nature as an **affirmative defense**. *See Ellerth*, 524 U.S. at 765 (stating "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an ***affirmative defense*** to liability or damages, subject to proof by a preponderance of the evidence.") (emphasis added); *Faragher*, 524 U.S. at 807 (stating "[w]hen no tangible employment action is taken, a defending employer may raise an ***affirmative defense*** to liability or damages, subject to proof by a preponderance of the evidence.") (emphasis added)).

When a defendant raises an **affirmative defense**, the **burden** of **proof** rests squarely upon the defendant, not the plaintiff. *See Ellerth*, 524 U.S. at 765 (stating "[w]hen no tangible employment action is taken, *a defending employer may raise an* ***affirmative defense*** to liability or damages, subject to proof by a preponderance of the evidence.") (emphasis added); *Faragher*, 524 U.S. at 807 (stating "[w]hen no tangible employment action is taken, *a defending employer may raise an* ***affirmative defense*** to liability or damages, *subject to proof by a preponderance of the evidence"*) (emphasis added)). In reality, Defendant's allegations, standing alone, cannot establish the **defense**; it is not the other way around, as Defendant would have the Court believe.

***16** Defendant's attempt to cast the burden upon Lisa Ryan to prove that she reported the hostile work environment is unavailing. Defendant, in claiming that Lisa Ryan's statement that she reported the hostile behavior to her supervisors is insufficient to avoid the *Faragher/Ellerth* defense, forgets to put on any proof whatsoever that she did not. If Defendant cannot show, by a preponderance of the evidence, that Lisa Ryan did not report the behavior, then the burden cannot be placed upon Lisa Ryan to make a showing that she reported the actions. To do so would be no different than forcing Defendant to prove that it did not discriminate against Lisa Ryan after her making blanket statements that it did with absolutely no proof of the allegations. *Cf. Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 508 (7th Cir.2004) (explaining that although the burden of production may shift in an indirect **proof** scheme, the **burden** of persuasion is always on the plaintiff (or here, Defendant, as this is an **affirmative defense**)). The party which bears the burden must meet the burden; here, Defendant has not.

Additionally, Defendant's own claims show that Lisa

Ryan must have lodged complaints to persons in authority. Defendant states, "Lisa Ryan admits that she believes the 1996 rumor from Jeff Girten was handled in an acceptable manner. Additionally, it was undisputed that Volkman investigated allegations that Chip Bell used profanity." (Memo in Support, p. 13.) Volkman also, according to Defendant, removed the pornography. Defendant does not claim that any of this was done in response to the EEOC charge. *Id.* The fact that these instances were addressed by Defendant shows that someone must have reported them, or in the alternative, had actual knowledge of these problems. In her deposition, Lisa Ryan claims that she reported the hostile behavior on an almost daily basis. Defendant makes no claim that anyone other than Lisa Ryan reported these instances. It is reasonable to infer that Lisa Ryan reported these instances, and if she did, then a reasonable inference can be made that she reported all such behavior just like she claims. Since Defendant has the burden of proof, and has done nothing to establish, by a preponderance of the evidence, that the above inference is false, it has not carried its burden.

***17** Moreover, Defendant has not shown that it responded reasonably to cure the hostile environment, nor has Defendant acted to prevent its continuance. Defendant cites the above instances where it addressed the issue. Defendant then goes on to claim that it found no discrimination in any way against Lisa Ryan. Defendant investigated the allegations, through its attorneys, after receiving the EEOC charge. This is too little too late. Since Defendant has failed to prove that Lisa Ryan had not reported, and since Lisa Ryan claims to have made proper complaints, only responding after the EEOC charge is insufficient action on Defendant's part, to address the allegations made by Lisa Ryan. Because the Court must view all facts in the light most favorable to Lisa Ryan along with all reasonable inferences there from unless there is clear evidence to the contrary, the Court cannot conclude that a response after the EEOC charge is a reasonable means of addressing Lisa Ryan's nearly daily complaints.

It must be noted there are issues of material fact as to the first prong of the defense as stated in *Faragher:* Was the Town negligent in hiring Bell, Lewandowski, and Poston as supervisors? Were they in fact "supervisors"? Was the Town negligent in supervising these individuals? Was the Town negligent in allowing the described activities to occur? The answers to these unaddressed questions will determine whether the Town knew or should have known about Bell, Lewandowski, and Poston's behavior.

Even if Bell, Lewandowski, and Poston are not considered to have been Lisa Ryan's supervisors, and it is not likely that Poston could avoid that classification, the Town knew or should have known about the behavior and did not adequately address it. The allegation that Poston participated in acts that created a hostile work environment, and observed others doing so, makes it impossible to believe that the employer did not know about the harassing behavior. Poston, as the assistant director of public works, having engaged in the behavior and observed others doing so, has sufficient standing as a supervisor, if not Lisa Ryan's, that his knowledge should be charged to the Town. He supervised the activities of the lower level supervisors and reported only to Volkman and those above Volkman. His knowledge and the arguable lack of an adequate remedy to the entire situation could lead a reasonable jury to conclude that the Town was negligent in addressing the harassment.

Finally, even though the Town does not fully address the **defense** as detailed in *Faragher,* the Court considered the Town's arguments on the subject. However, the **defense** detailed in *Faragher* is an **affirmative** one. This **affirmative defense** was not raised in Defendant's amended answer as required by Federal Rule of Civil Procedure 8(c). As a result, the **defense** may very well be waived. *See Maul v. Constan,* 928 F.2d 784 (7th Cir.1991); *Braddock v. Madison Cty, Ind.,* 34 F.Supp.2d 1098, 1112 (S.D.Ind.1998). This issue has not been briefed by the parties, and the Court will not address it further.

***18** Accordingly, Defendant's Motion for Summary Judgment is DENIED with regard to Lisa Ryan's claim of discrimination by means of a sexually hostile work environment.

Defendant Is Partially Entitled to Summary Judgment With Regard to Lisa Ryan's Claim of Sex Discrimination

Defendant claims that Lisa Ryan did not allege sex discrimination through disparate treatment, aside from alleging a sexually hostile work environment, and therefore Lisa Ryan cannot be allowed to litigate the issue of sex discrimination. Lisa Ryan responds by stating that the Charge of Discrimination contains the following sentence as Count II, "I believe I have been discriminated against based on my sex, female,

in violation of Title VII of the 1964 Civil Rights Act as amended." (*See* Def.'s Ex. P.) Because Count II was included in the Charge, Lisa Ryan asserts that she sufficiently stated a claim for sex discrimination in her charge and should be allowed to litigate the matter in federal court. Lisa Ryan is correct in this assertion.

Title VII claims cannot be brought in federal court unless the claims were included in the EEOC charge. *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir.1994). This rule is not jurisdictional, and therefore is properly raised in the present motion for summary judgment. *Id.* The requirement serves a dual purpose. *Id.* It allows the EEOC to engage in conciliatory work and provides the employer with notice of the charges. *Id.* However, as most charges are filed by individuals without assistance from attorneys who know and understand the process, "[t]he test for determining whether an EEOC charge encompasses the claims in a complaint therefore grants the Title VII plaintiff significant leeway: all Title VII claims set forth in the complaint are cognizable that are like or reasonably related to the allegations of the charge and growing out of such allegations." *Id.* (quoting *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 588 F.2d 164, 167 (7th Cir.1976)); *see also Hottenroth v. Village of Slinger*, 388 F.3d 1015, 1035 (7th Cir.2004) (stating "because EEOC complaints are most often compiled without assistance of counsel, we afford plaintiffs considerable leeway and ask only whether a claim set forth in the complaint is 'like or reasonably related to the allegation of the charge and growing out of such allegations." ') (quoting *Cheek*, 31 F.3d at 500).

This minimal requirement does not avoid the requirement that the Charge give reasonable notice to both the EEOC and the charged party of the nature of the charges. *See id.* (holding that the plaintiff's claim was not sufficiently related to or arising out of the claims she made in the Charge). The same is arguably true in the present case. Cause II is ambiguous at best. A hostile work environment based upon sex is addressed by the statement in Cause II, but sex discrimination through disparate treatment could also be read into the sentence. Thus, Cause II must be read in conjunction with Cause I in order to determine whether a sex discrimination cause of action was stated in the Charge. To determine whether such a cause was stated, the Court looks to whether "the facts and allegations set forth in" the Charge are sufficiently related to or like the claims growing out of the allegations. *Id.; see also Cheek*, 31 F.3d at 500.

***19** The allegations in Cause I include many of the facts that Lisa Ryan relies upon in her claim for disparate treatment. For example, in addition to the hostile work environment elements in it, the Charge states that there is no women's restroom in her primary work area, that she has been forced to use the men's restroom, and she has not been allowed to drive the large trucks although she is fully qualified. Disparate treatment claims rest upon such allegations, and thus Defendant had sufficient notice that such a claim could be brought if the EEOC gave Lisa Ryan her right to sue letter. Since the Court determines that Lisa Ryan sufficiently stated her claim for sex discrimination in the EEOC Charge, the issue of whether Defendant is entitled to summary judgment regarding that claim will now be fully addressed.

There are two methods of proving a disparate treatment claim under Title VII. First, a plaintiff can show intentional discrimination through the direct method by putting forth evidence of clear and intentional discriminatory conduct that affected the terms and conditions of her employment. *See Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 497, 504 (7th Cir.2004) (setting out the requirements for the direct method of proving a disparate treatment case). Second, she may utilize the indirect method. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 729 (1973) (setting out the requirements for proving discrimination through the indirect method).

To be successful in utilizing the direct method, a plaintiff must produce either direct or circumstantial evidence that an "employer's decision to take an adverse job action against him was motivated by an impermissible purpose, such as sex." *Rhodes*, 359 F.3d at 504 (citing *Cianci v. Pettibone Corp.*, 152 F.3d 723, 727-28 (7th Cir.1998)). Direct evidence is evidence that, standing alone, proves intentional discrimination if believed by the trier of fact. *Id.* Basically, to be successful using direct evidence, under the direct method, a plaintiff must have an admission by the employer. *Id.* Alternatively, a plaintiff may utilize circumstantial evidence to prove sex discrimination under the direct method. *Id.* To do so, the plaintiff must produce a "convincing mosaic" of circumstantial evidence, thus allowing the trier of fact to make an inference of intentional discrimination. *Id.* The circumstantial evidence must point directly to an impermissible motive. *Id.* It is clear that the direct method is a difficult path to proving impermissible discrimination under Title VII. *See id.*

Lisa Ryan argues that there is direct evidence of discrimination. The Court disagrees. Lisa Ryan claims that the following facts are sufficient to show intentional discrimination. First, Chip Bell said that the "fucking bitch" was not going to operate his tractor, and on another occasion that, that "fucking bitch" was not going to get a new tractor seat. (Pls.' Response, p. 7.) Even if true, this says nothing about Lisa Ryan's sex. As was stated above, the word "bitch" is not inherently sexual, and standing alone does not show sex bias and is not necessarily a gendered term. *See* Galloway, 78 F.3d at 1168 (stating "[t]he terms 'fucking broads' and 'fucking cunts' are more gendered than 'bitch'; and there was much else in the case to establish the sexual character of the harassment. We do not suggest, moreover, that the word 'bitch' can *never* figure in a sex discrimination case. When a word is ambiguous, context is everything. The word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper, selfishness, malice, cruelty, and spite,' and latterly as a label for women considered by some men to be too aggressive or careerist."). Moreover, the denial of a new seat and of the use of Bell's tractor makes no indication that such denial was due to sex. Rather, the denial could have been for a proper reason or even due to pure dislike. Either way, there is no showing of impermissible motive in either instance.

***20** Gene Poston allegedly "laughed her off" when Lisa Ryan asked to use the heavy equipment. (Pls.' Resp., p. 7.) Again, there is nothing in that allegation to indicate that an impermissible motive was involved in such a response to Lisa Ryan's request. Similarly, Robert Volkman's statement that Lisa Ryan should not max herself out by becoming an "operator" or "crew leader" does not directly point to an impermissible motive. (*Id.*) The statement, backed up by no factual evidence, that Richard Krame "wanted to protect his guys" not only lacks basis and is pure speculation, but also does not point to impermissible motive. (*Id.*) The term "guys" could be used for his entire crew, even though there was a woman on it. Moreover, why wouldn't an individual in charge look out for those under his or her direct control? Finally, the fact that the president of the town council wanted to fire the Ryans cannot be used to show impermissible sex discrimination, since one of the Ryans happens to be male. It may be some proof of a retaliatory intent depending upon when such a statement was made, but it says nothing about intentional sex discrimination or disparate treatment.

Likewise, the combination of all of these allegations, used as circumstantial evidence, does not rise to the level of a "convincing mosaic" of evidence that would allow an inference of impermissible discrimination. When looked at together, no indication is given that there was an impermissible motive behind the actions of Defendant. The allegations may go so far as to indicate that the supervisors in the Street Department and even some persons with more authority in the Town did not like Lisa Ryan, but there is nothing to show that this dislike stemmed from her sex. Since the circumstantial evidence does not directly point to impermissible motive, under the direct method of proof, Lisa Ryan's claim must fail.

Under the indirect method, established in *McDonnell Douglas v. Green,* 411 U.S. 729 (1973), Lisa Ryan must begin by showing that she is a member of a protected class, that she was performing her job satisfactorily, that she was subjected to an adverse employment action, and that similarly situated individuals not in the protected class were treated differently. *Rhodes,* 359 F.3d at 504. The burden then shifts to Defendant to produce a legitimate non-discriminatory reason for the adverse employment action. *Id.* If Defendant is successful in this, the burden of production returns to Lisa Ryan to show that Defendant's proffered reason was pretextual. *Id.* The burden of persuasion is always on Lisa Ryan. *See id.* at 508 (discussing the burdens of each party when the burden shifting, indirect approach, is used in a retaliation claim).

As a woman, Lisa Ryan is clearly a member of a protected class. During the time of the alleged harassment, she was performing her duties as expected. Although Defendant had given her verbal and written warnings, Lisa Ryan has proffered evidence showing that she performed her duties in accordance with reasonable expectations. The central issues are whether Lisa Ryan was subjected to any adverse employment actions, and whether similarly situated individuals were treated differently.

***21** An adverse employment action is something "more than a mere inconvenience or an alteration of job responsibilities." *Id.* at 504 (quoting *Crady v. Liberty Nat'l Bank & Trust Co.,* 993 F.2d 132, 136 (7th Cir.1993) (quotation marks omitted)). Rather, there must be a significant change in the plaintiff's employment status such as hiring, firing, denying promotion, re-assignment with substantially less responsibility, or a substantial change in benefits. *Id.* Temporary inconvenience to the plaintiff is not an adverse employment action, especially if the

inconvenience is consistent with the plaintiff's job description. *Id.*

The adverse employment actions that Lisa Ryan allege essentially break down into four categories. First, abuse of supervisory discretion; second, failure to take corrective action; third, failure to provide a women's restroom near her workstation; and fourth, she did not receive equal pay for equal work. Lisa Ryan claims that supervisory discretion was abused in that she was consistently assigned to more menial tasks than her male colleagues. Aside from the assignment to yard duty (addressed in the retaliation section), Lisa Ryan's claims of being assigned menial tasks prior to October of 2000 are time barred under *Morgan. Morgan,* 536 U.S. 101. She also alleges that she was denied opportunities for advancement, and was not allowed to operate the Town's heavy equipment. The use of the equipment and the experience thereby gained was the means by which an employee was able to obtain promotions. Therefore, because Lisa Ryan was not allowed to gain the experience when others were, she was passed over for available promotions. Lisa Ryan alleges that this shows a deliberate denial of career opportunities to her on the part of the Town. The male employees allegedly were allowed to use the equipment upon beginning their employment, whereas Lisa Ryan was not allowed to use the equipment even though she had more seniority than the males. Lisa Ryan alleges that the denial of training resulted in her being passed over for promotions. The failure to promote also resulted in Lisa Ryan being paid less than others who possessed equal skill and seniority because she was artificially held back from being promoted.

The Town's failure to correct the alleged hostile work environment and Lisa Ryan's mistreatment by co-workers and supervisors alike was addressed adequately above. Lisa Ryan also claims that the failure to provide a women's room near her normal on-site workstation was an adverse employment action. She was not given a new tractor seat; she also was put on yard detail, and was not paid for holiday and vacation time that she allegedly earned.

At least some of Lisa Ryan's claims, if true, rise to the level of materially adverse. This is true because all but the yard detail were more than mere temporary inconveniences, and all but being placed on yard detail affected the terms and conditions of her employment. Moreover, as to the failure to promote, and the failure to allow Lisa Ryan to use equipment such that she could gain experience and eventually be promoted, similarly situated individuals were allegedly treated differently. The same is true of the restroom situation, as males did have a restroom in the building in which they worked. As to the other claims, similarly situated individuals were not treated differently. Defendant must therefore produce a legitimate, non-discriminatory reason for its actions.

***22** First, Lisa Ryan did not receive holiday and vacation pay because she had used all that she had earned. (Def.'s Ex. W). There is no indication by Lisa Ryan that this is pretextual. Moreover, all employees were subject to the same policy with regard to vacation pay, thus she was treated no differently than any similarly situated individual. To show this, James Ryan received the same memo when he requested the same pay. (Def.'s Ex. X). Therefore, the denial could not have been based upon sex in the first place.

Second, with regard to the failure to promote, the Town claims that it did not have any positions available after the year 2000. Under *Morgan,* Lisa Ryan may only look back 300 days prior to filing her Charge with the EEOC with regard to any claims other than hostile work environment. Therefore, she may not look to any actions which may be discriminatory and occurred prior to October of 2000. If there were no positions available at a higher level than that which Lisa Ryan had previously attained, the Town could not promote her. This is a legitimate non-discriminatory reason for not promoting Lisa Ryan. There is nothing to indicate that the lack of available positions was pretextual for the Town's failure to promote Lisa Ryan.

Third, the lack of a women's restroom in the building where Lisa Ryan worked was a condition of her employment before the time period in which she is allowed to allege discrete acts of discrimination. However, this condition existed during the time frame as well. Defendant claims that it provided a women's restroom for its female employees in a building only 150 feet away from the building in which Lisa Ryan worked. Lisa Ryan counters that, that bathroom was not to be used for cleaning up after working in the field, which was necessary given her position. Further, she states that although she did in fact use the male restroom in her building, she was harassed with regard to this use through complaints made by Jeff Girten. Jeff Girten even filed a police report against Lisa Ryan for using the men's room to wash up. Lisa Ryan does not allege that she was disciplined for her use of this restroom, nor did she use it for its toilets. Instead, she continued to use it for washing up. The harassment is more properly

addressed in her hostile work environment claim. The fact that a restroom was provided for her in another building nearby, that her work was not usually done inside the building, and the fact that she was allowed to use the restroom to "wash up" shows that there was no discriminatory intent in that there was not an adverse employment action. If this constituted an adverse employment action, then the Town's actions in allowing the use for washing up, providing a restroom for her to use only a short distance away thus determining that an additional restroom was not necessary in building are legitimate non-discriminatory reasons. Moreover, there is no showing of pretext because the Town did what was necessary to accommodate Lisa Ryan.

***23** Finally, the failure to train and allow Lisa Ryan to use the heavy equipment is an adverse employment action. The fact that new male employees were allowed to use the equipment shows that similarly situated individuals were treated differently. Lisa Ryan claims that Jeff Huet determined who would go to training classes for certain types of job activities including tractor training in 2003, trenching and shoring training in 2003, chainsaw training in 2003, and bucket truck training in 2002. Her name was never on the prepared list of employees to be trained. As she was the only female who could be eligible for such training, and males went to the training, similarly situated men arguably were treated differently.

> FN11. Lisa Ryan's affidavit also mentions bucket truck training in Summer 2000, but this claim would be time barred under *Morgan*, 536 U.S. 101, and therefore is not considered.

Defendant does not provide any non-discriminatory reason for its actions in not training Lisa Ryan. Instead, it argues that she has not made out a prima facie case for failure to train. In reality, the failure to train was not alleged as a separate claim, but only as a particular adverse employment action. Insofar as it may be construed as a separate action, Lisa Ryan has made out the prima facie case enough to pose a genuine issue of material fact. She is a member of a protected class, the employer provided training, she was eligible (or at least Defendant does not state or give any proof that she was not eligible), and similarly situated individuals outside of the protected class were trained. These failures, which fell within the proper time frame, raise a genuine issue of material fact.

For the forgoing reasons, the Court DENIES Defendant's Motion for Summary Judgment to the extent that it relates to Lisa Ryan's claim that she suffered discrimination with regard to the failure to train. Summary Judgment is GRANTED with regard to the failure to promote, failure to provide a women's restroom in building 1, and failure to pay Lisa Ryan for vacation days in December of 2003.

Defendant is Entitled to Summary Judgment with Regard to James Ryan's Claim Of Impermissible Retaliation Only

In order to prove retaliation in violation of Title VII, Plaintiffs must show that they engaged in statutorily protected action, were subjected to an adverse employment action, and that there is a causal connection between the two. *Rhodes*, 359 F.3d at 508. Plaintiffs must first establish a prima facie case by showing that they engaged in a protected action, that they continued to perform their jobs satisfactorily, that they were subjected to an adverse employment action, and that similarly situated employees who did not complain were treated differently. *Id.* Then Defendant has the opportunity to produce a legitimate non-discriminatory reason for such action. *Id.* Plaintiffs then have the burden of proving that Defendant's proffered reason is pretextual. *Id.*

James Ryan's claim of retaliation rests on claims that his midnight crew was reduced in number earlier than usual, his supervisory power as a crew leader was diminished, and that he and Lisa Ryan were placed on yard duty for a month. James Ryan had engaged in a statutorily protected activity by supporting his wife's EEOC claim, and he performed his duties in a satisfactory manner.

***24** The fact that the midnight crew was reduced in number was not an adverse employment action. The terms and conditions of James Ryan's employment were not changed by this action as there was not enough work that needed to be done overnight to justify the additional employees on that shift. Therefore, he was not harmed by such action. Even if the Court were to consider this an adverse employment action, Defendant argues that it reduced the number of employees because the winter was unusually light, and the amount of work did not justify the number of people working overnights. Additionally, it was the Town's practice to reduce the crew at the point when it became clear that so many

people were unnecessary. Thus, Defendant argues that Town policy rather than retaliation was the reason for this action. There is nothing which sufficiently shows pretext with regard to Defendant's proffered reason beyond timing. However, timing is accounted for by Defendant's proffered reason and thus pretext is not established.

James Ryan claims that his supervisory capacity as a crew leader was taken away from him because he had no crew to work under him. This may be an adverse employment action, as it is arguably a sever reduction in responsibility. Defendant argues that it was not an adverse employment action as crew leaders do not always have crews working under them. The work load determines whether or not a crew is assigned to work under the leader. This argument is convincing in that if having a crew is not part of the crew leader's necessary responsibilities, then it cannot have been taken away. The general purpose of a crew leader does not include supervision of other employees; rather, some supervision duties will be exercised. (Def.'s Ex. E). It is not the case that a crew leader will always be exercising a supervisory capacity and thus the Town's policy that crew leaders do not always supervise a crew is not inconsistent with the job description. Moreover, the fact that James Ryan did not have his crew is no more than a regular occurrence according to the Town's policy.

Even assuming that it constitutes an adverse employment action, Defendant again proffers a non-discriminatory reason. Town policy and the job description do not require that the crew leader does not always have his own crew or run large projects. The work did not warrant James Ryan running an entire crew on the midnight shift, and the Town's proffered reason is legitimate and non-discriminatory. There is no evidence of pretext as to this matter. With regard to being placed on yard detail, this was a mere temporary inconvenience that cannot be considered to be an adverse employment action. *See* Rhodes, 359 F.3d at 505. The placement only lasted for one month, his skills were utilized in this project, and others helped. Defendant is entitled to summary judgment with regard to James Ryan's claim of impermissible retaliation.

In addition to the same claims made by James Ryan (with regard to which summary judgment has been granted), Lisa Ryan claims that she was retaliated against in that she was continually subjected to a hostile work environment. It seems to be true that a hostile work environment could constitute an adverse employment action for the purposes of a retaliation claim. *See* Bart v. Telford, 677 F.2d 622 (7th Cir.1982) (holding that for the purposes of a First Amendment claim under 42 U.S.C. § 1983, a campaign of petty harassment was an adverse employment action in retaliation for political views against the Mayor espoused by an employee of the Mayor's office). Lisa Ryan was subjected to the same comments as were discussed *supra.* She was also accused of stealing from the Town, a charge which was never substantiated, and placed on yard detail. The issue of being placed on yard detail was sufficiently addressed above. Lisa Ryan was also followed, and watched by persons other than her direct supervisor which she alleges added to the hostile environment.

***25** The facts creating a genuine issue of material fact as to the existence of a hostile work environment have been sufficiently dealt with above, save the following. The use of pornography had been addressed. Volkman stated in his deposition that he had told the employees that they were not to keep pornography in the shop. However, he also noted that he was sure that some had been removed while other pornographic materials were hidden, and that no one was disciplined for having pornography. Moreover, the historical hostile work environment must be taken into account as it is necessary to understand the context in which the alleged verbal abuse, as well as Huet and Girten's continual surveillance of Lisa Ryan took place. Given that there is a genuine issue of material fact as to the existence of a hostile work environment prior to the filing of the claim, and that most of the behavior leading thereto continued after the filing, a genuine issue of material fact exists as to whether Lisa Ryan was retaliated against, unless the Town proffered a legitimate non-discriminatory reason for the existence of this hostile work environment.

Defendant has not proffered such a reason, and instead relies on its claim that there was no hostile work environment. That being true, the Court DENIES Defendant's Motion for Summary Judgment with regard to Lisa Ryan's claim for retaliation.

Lisa Ryan's Claim of Intentional Infliction of Emotional Distress Is Preempted by Her Title VII Cause of Action

In Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir.1997), the court ruled that Title VII preempts common law claims of Intentional Infliction of Emotional Distress ("IIED") if such a

claim is based upon the same operative factual allegations. *Id.* at 493. Lisa Ryan's complaint uses facts to support her claim of her IIED claim that are identical to those she used to support her Title VII claim. Furthermore, her IIED claim is not addressed in her response, so it appears Lisa Ryan has abandoned this claim. The Court has reviewed the Town's arguments on this claim, and has determined it is entitled to summary judgment for this reason.

As *Jansen* applied Illinois law, and the Court has been unable to locate a similar case applying Indiana law, the Town is alternatively entitled to summary judgment on Lisa Ryan's IIED claim as it is undisputed that Lisa Ryan failed to file a tort claim notice pursuant to I.C. Section 34-13-3-10. *See J.A.W. v. State,* 650 N.E.2d 1142, 1153 (Ind.Ct.App.1995). Furthermore, upon review of Lisa Ryan's claim, Lisa Ryan has failed to establish the Town's conduct was "extreme and outrageous" and "[went] beyond all possible bounds of decency...." *See Conwell v. Beatty,* 677 N.E.2d 768, 777 (Ind.Ct.App.1996). Of course, Lisa Ryan also cited to no evidence nor did she present any argument on this claim. Accordingly, summary judgment is GRANTED for Defendant with regard to Lisa Ryan's IIED claim.

CONCLUSION

***26** For the reasons set forth above, Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART; the motion to strike is DENIED. The motion is GRANTED as to Lisa Ryan's claim of Intentional Infliction of Emotional Distress, James Ryan's claim of retaliation, and Lisa Ryan's claims of sex discrimination through disparate treatment, with the exception of the portion of the claim regarding Defendant's failure to train her. The Clerk is ORDERED to DISMISS these claims with prejudice. The motion is DENIED in all other respects. This case REMAINS PENDING as to Lisa Ryan's hostile work environment claim, claim of retaliation, and claim of sex discrimination (failure to train only). The Clerk is ORDERED to CLOSE this case with respect to Plaintiff James Ryan only.

N.D.Ind.,2005.
Ryan v. Town of Schererville, Ind.
Not Reported in F.Supp.2d, 2005 WL 1172614 (N.D.Ind.)

END OF DOCUMENT

GROUP EXHIBIT 2

Chicago Tribune
—ONLINE EDITION—

http://www.chicagotribune.com/business/chi-0603260181mar26,1,3934149.story

Craigslist suit faces speech hurdle

Communications law may trump fair housing

By Mike Hughlett
Tribune staff reporter

March 26, 2006

A Chicago fair housing group recently made headlines nationwide when it sued Craigslist, saying the popular Web site ran about 100 discriminatory housing ads over a six-month period.

Meanwhile, federal housing regulators are fielding more complaints about discriminatory ads these days--including one against Craigslist--and they say they have made the issue a priority.

Both the Department of Housing and Urban Development and The Chicago Lawyers' Committee for Civil Rights Under Law argue that the Fair Housing Act (FHA) applies to the Internet just as it does to print media. And that would mean all Web sites--just like newspapers--are liable for discriminatory housing ads.

But there is another landmark federal statute--Section 230 of the Communications Decency Act (CDA)--that has stacked the odds against HUD and the Chicago Lawyers' Committee, Internet law experts say.

The CDA provides broad protection for Internet forums that post ads and opinions submitted by their users. Web sites often wield the law to fight defamation claims, but it has also been used at least once to successfully fight a housing discrimination suit.

A federal judge in California cited the CDA in 2004 when he dismissed a suit by two fair housing groups against Roommates.com, a roommate search service. The case, which is on appeal, is similar to the one against Craigslist.

"CDA 230 is a very powerful shield," said Kurt Opsahl, an attorney with the Electronic Frontier Foundation, a technology and civil liberties group. "I think Craigslist has the law on its side."

Opsahl said the suits against Craigslist and Roommates.com highlight what is ultimately a policy dispute--Internet freedom versus civil rights--one that should be ultimately decided by Congress.

"Will it prompt Congress to take action, and if so, will Congress be able to walk a balance?"

Robert Schwemm, a fair housing law expert at the University of Kentucky, said there is a "real good chance Congress will revisit it."

That's because housing classifieds are increasingly migrating to the Internet.

Schwemm, a law professor, said that when he asks his students if they have heard of Craigslist, 100 percent raise their hands in the affirmative.

"You can't take a fair housing law that governs all advertising and say, "We have this new technology that a younger generation uses--it's not covered,'" Schwemm said. "You have a hole here that is just going to get bigger."

Passed in 1968, the Fair Housing Act bars discrimination based on race, sex, religion and other factors. Publishers of ads deemed discriminatory can be held liable for violating the law.

Monitored 6 months

The Chicago Lawyers' Committee has 44 member firms whose lawyers do pro bono work on civil rights issues. It sued Craigslist in February after monitoring the site for six months beginning in July.

Many of the ads cited in the suit were prohibitions against renters with children--a lesser-known violation of the Fair Housing Act--and preferences for singles.

Others note simply that a rental was near a church, which could be construed as a violation of the FHA.

But several pointedly brought up race or religion. "No Minorities," read one. "African Americans and Arabians tend to clash with me so that won't work out," read another.

Craigslist's chief executive, Jim Buckmaster, has said the site is "very concerned about discrimination in housing ads." Craigslist has a system in which its own users can flag inappropriate or illegal ads--ads that are quickly removed.

The suit against Craigslist came several months after HUD began pursuing a similar complaint against the site by a group from Austin, Texas. HUD declined to identify the group or reveal more about the complaint, noting that such complaints are made public only if HUD files a lawsuit.

"We have had discussions with Craigslist," said Kim Kendrick, assistant HUD secretary for fair housing and equal opportunity.

The complaint has not been settled, but since those discussions, "We have seen more prominently displayed links [on Craigslist] to fair housing sites," Kendrick said. "I applaud them for doing something."

Pursuing a complaint through HUD is more conciliatory than suing. HUD tries to reach a settlement. It can sue, but hasn't done so on a Web ad complaint, HUD officials say.

The Department of Justice, which can also pursue such complaints, has sued--though only once. It sued the proprietor of theSublet.com in federal court in New Jersey, alleging discriminatory rental ads.

The suit was settled in December 2003, with theSublet.com's parent firm agreeing to pay a $5,000 civil penalty and to establish a $10,000 fund to compensate people hurt by the ads.

HUD has seen an increase in complaints about discriminatory Web ads over the past year, Kendrick said. The agency is currently investigating about a dozen complaints, including the one against Craigslist.

About half of HUD's Web ad caseload stems from sites put up to help Hurricane Katrina victims finds shelter.

Kendrick said, too, that fair housing groups have increasingly been asking HUD about its position on Web ads. Kendrick said that in her view the FHA applies as much to the Internet as it does to print media.

Congress' intent

"For society, we would be going backwards saying that now that we have this new innovation, we can discriminate," Kendrick said. She added that allowing the CDA to essentially trump the FHA, "can't be what Congress intended."

That may well be true. When the CDA's protections were created, Congress probably had in mind defamation and libel claims--not discrimination, said Eugene Volokh, a professor at UCLA's law school and an expert in cyber civil liberties.

Congress created the CDA in 1996 primarily to restrict children from Internet pornography. But the Supreme Court later struck down much of the law, saying it violated free speech protections.

Section 230 of the CDA was spared, though. And it specifically says that an "interactive computer service" should not be treated as a publisher of information provided by somebody else.

Courts have essentially interpreted Section 230 to mean this: Run a Web site and write your own material, you're liable for your statements; post opinions or ads crafted by others, and you're not (though the posters themselves may be).

Internet law experts say Section 230 has been vital for the Internet's rapid, unfettered growth.

"Web sites [like Craigslist] get thousands of posts a day and you can't physically cull them all," Opsahl said. Only big, rich media companies would have the ability to do so, Opsahl said.

Opsahl and Volokh said CDA Section 230 was written broadly and has been interpreted broadly by the courts.

"It doesn't limit itself to defamation," Volokh said. "The principle is the same, whether it's libel or discrimination."

That's what a court in California concluded in October 2004 in a suit against Roommates.com, a popular Arizona-based site.

The fair housing councils of San Diego and the San Fernando Valley sued Roommates.com in December 2003.

U.S. District Court Judge Percy Anderson noted that he was mindful of the plaintiffs' worries that the CDA might eviscerate the FHA. But the CDA immunized Roommates.com from any housing discrimination claims under the FHA, he ruled.

The Roommates.com case has similarities to the suit filed in Chicago against Craigslist, said Michael Evans, a lawyer for the housing councils and an assistant professor at Whittier Law School.

In one way, though, he said his clients' case against Roommates.com was perhaps stronger than the case against Craigslist.

Unlike Craigslist, Roommates.com requires users to fill out a form that asks their gender, sexual orientation and whether they have children. The housing council claims the form itself discriminates.

Roommates.com disagrees, its attorney saying the form is geared for people who will essentially be living together, and they have the right to be comfortable with each other.

Laurie Wardell, fair housing director for the Chicago Lawyers' Committee, said the Roommates.com decision is not a le-gal precedent for the suit in Chicago against Craigslist.

That's because the two cases are in different federal judicial circuits, she said.

Wardell said case law--which helps shape a judge's opinion--in the Illinois circuit is more favorable for a pro-FHA argument than in California.

In federal court in Illinois, "we have a better shot," she said.

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Civil rights clash with cyber rights

The players:

Federal housing regulators and fair housing advocates like the Chicago Lawyers' Committee for Civil Rights

Web sites that run housing classified ads like Craigslist and Roommates.com

The federal laws:

The 1968 Fair Housing Act (FHA)

The 1996 Communications Decency Act (CDA)

What the laws say:

FHA: It's unlawful to "make, print or publish, or cause to be made printed or published" discriminatory housing ads.

CDA: No provider of an "interactive computer service shall be treated as a publisher" of information provided to it by others.

Heart of the issue: Is a Web site protected by the CDA when someone posts a housing ad that runs afoul of the FHA?

WRITTEN STATEMENT OF
ASSISTANT SECRETARY KIM KENDRICK
FAIR HOUSING AND EQUAL OPPORTUNITY
U.S DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

HEARING ON

FAIR HOUSING ISSUES IN THE GULF COAST IN THE AFTERMATH OF HURRICANES KATRINA AND RITA

BEFORE THE

HOUSE SUBCOMMITTEE ON HOUSING AND

COMMUNITY OPPORTUNITY

UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 28, 2006

Chairman Ney, Ranking Member Waters, and Members of the Committee, I appreciate this opportunity to share with the Committee how HUD has been helping secure the fair housing rights of displaced Gulf Coast residents as they seek new housing.

My name is Kim Kendrick. I am the Assistant Secretary for Fair Housing and Equal Opportunity at the U.S. Department of Housing and Urban Development. I oversee the federal government office with the primary responsibility for enforcing the fair housing laws of the United States—most notably Title VIII of the Civil Rights Act of 1968, as amended (also known as "the Fair Housing Act"). The Fair Housing Act prohibits discrimination in housing and housing-related transactions on the basis of race, color, national origin, religion, sex, disability, or against families with children.

President Bush nominated me for this position on June 30, 2005. Between that date and my confirmation by the Senate on October 7, 2005, Hurricanes Katrina and Rita hit the Gulf Coast, displacing hundreds of thousands of residents.

Two days before Hurricane Katrina reached landfall, HUD Secretary Alphonso Jackson assembled a team that would be ready to respond to housing needs that he anticipated would arise in the aftermath of the hurricane. That team, called the HUD Recovery and Response Center, drew on employees from all HUD program offices, including HUD's Office of Fair Housing and Equal Opportunity, or FHEO.

While HUD typically is not a first responder in the event of national emergencies and natural disaster, Secretary Jackson's response to Katrina was immediate. HUD staff was on the ground in Louisiana, within days, to assist with the housing relocation effort.

We saw, like the rest of the world, that a disproportionate number of those persons with no place to go were poor, African-American, and people with disabilities.

In particular, HUD's Office of Fair Housing and Equal Opportunity (FHEO), anticipating possible housing discrimination as large populations of African-American and other minority residents relocated to surrounding communities, immediately dispatched staff to Baton Rouge to work with the Federal Emergency Management Administration (FEMA) in the Disaster Recovery Centers.

FHEO's General Deputy Assistant Secretary and Deputy Assistant Secretary for Enforcement and Programs both made visits to Baton Rouge within the first two months. FHEO has maintained a staff presence of three to five persons in Baton Rouge since September. This is in addition to the dozens of other HUD personnel who have also been on the ground, assisting and advising FEMA since the beginning. We have also increased our presence in Mississippi, and HUD has always maintained an office in Houston, where the greatest number of hurricane evacuees have relocated

So after I was sworn in on October 13, 2005, I saw it as my responsibility to make sure that HUD does all it can to protect this population from unlawful discrimination as they search for new housing.

That means: making sure people know their rights; actively enforcing the law when we learn about violations; and working with the housing industry to prevent such discrimination in the first place.

From the start, most of the complaints that HUD received from the Gulf Coast region alleged discrimination against African-Americans as they sought new housing. In general, the on-site staff was able to address these reports of discrimination directly, on account of being present in the community.

Staff provided on-site assistance on disability-accessibility issues or advised a landlord they could not discriminate against families with children before someone filed a formal complaint. By providing on-the-spot education to landlords and mobile home park owners, FHEO staff was able to prevent some discrimination.

The staff also worked closely with the fair housing and disability-rights advocacy organizations in the Gulf Coast Region. HUD funds many of these groups through its Fair Housing Initiatives Program, or FHIP. HUD allocated an additional $1.2 million to these Gulf Coast fair housing groups to aid them in their post-hurricane fair housing efforts. These efforts include outreach to evacuees, landlords, and conducting investigations of possible discrimination.

HUD recognized, however, that many individuals seeking housing, and many landlords providing it, might not know their rights and responsibilities under the Fair Housing Act. So, in that first month after the hurricane, HUD took out advertisements in local papers in the Gulf Coast advising people of the Fair Housing Act's prohibitions of discrimination and how to report such discrimination to HUD. HUD staff also distributed fair housing posters and flyers at Disaster Recovery Centers, at shelters, and among other organizations throughout the Gulf Coast. HUD staff and our fair housing partners in the Gulf Coast also appeared on radio and television programs to provide information on fair housing. In all instances, staff provided the number of HUD's Housing Discrimination Hotline, where anyone in the country can report discrimination toll-free. That number is 1-800-669-9777.

Also, on October 25, 2005, in my third week as Assistant Secretary, I sent an open letter to the housing industry advising them that it is against the law to discriminate in housing-related transactions on any basis prohibited under the Fair Housing Act.

I have provided a copy of this letter, and samples of HUD's other education and outreach materials to the Committee for inclusion in the record.

To date, HUD has received nearly 100 complaints of discrimination from displaced Gulf Coast residents. HUD has been investigating those complaints and obtaining relief for individuals where the parties could arrive at some mutually satisfactory resolution. HUD has resolved a fifth of the cases this way. This includes a complaint out in California – evacuees have relocated throughout the county – where HUD obtained for three African-

American women the relief they sought-- $600 each from a potential landlord whom they alleged denied them the rental of an apartment because they are black.

Over 60 percent of the cases are still under investigation as they have been filed recently. For example, HUD is currently investigating a number of complaints that the National Fair Housing Alliance has filed alleging racial discrimination by housing providers throughout the Gulf Coast. The Greater New Orleans Fair Housing Action Center has also filed complaints alleging discriminatory advertising on Katrina-relief Web sites that are currently under investigation.

The remainder HUD has dismissed with a finding of no discrimination, or because the person who filed has declined to pursue the case.

HUD has also found that while the Internet is a valuable resource, helping hurricane evacuees find housing, obtain supplies, and locate loved ones, it can also cause harm. HUD has received and is investigating complaints alleging that some Internet sites have carried advertisements offering housing to evacuees, but only if they were of the right race or religion, or have no children. The Fair Housing Act makes it unlawful to publish discriminatory statements in connection with the sale or rental of housing. HUD takes all allegations of discriminatory advertising seriously, particularly when the language inflicts harm on people who have already gone through so much. We are currently investigating complaints that allege that advertisers and the Web site publishers of these advertisements have violated the Fair Housing Act. In the meantime, a number of Web sites have begun to purge their sites of these discriminatory ads and have posted prominent public-information notices about the obligation of all advertisers to comply with the Fair Housing Act. We have reason to believe that the Web sites have taken these steps in response to actions by HUD and HUD-funded fair housing groups.

In the case of Katrina-relief Web sites, HUD has also provided information about the Fair Housing Act to FEMA so that it does not inadvertently direct evacuees to Web sites that allow the posting of discriminatory ads.

HUD continues to educate the general public about its fair housing rights. Last month, on January 19th, I joined HUD Secretary Alphonso Jackson in announcing the launch of a nationwide Public Service Announcement campaign to inform displaced hurricane survivors of their fair housing rights. Working with the Ad Council, the nation's top producer of PSA campaigns, we produced compelling television, radio, and newspaper ads that inform the public that "the storm isn't over" for those hurricane evacuees who are facing discrimination as they search for new housing. The ads inform evacuees that "there is hope because there is help" from HUD, the federal agency charged with combating housing discrimination.

In the months immediately following the hurricanes, the first priority for many evacuees was having a roof over their heads and food to eat. People who face housing discrimination have a full year to file a complaint of discrimination with HUD. We expect that when people see our public-service announcements and reflect on the

obstacles they experience in their housing search, we will likely see a rise in complaints. Moreover, we expect we will see additional complaints as people leave the FEMA hotel-reimbursement program and begin their housing search.

HUD is not waiting for people to file complaints to take action against discrimination. We have used our authority to initiate investigations based on reports of discrimination that we have received, but where no one has stepped forward to file a complaint. Specifically, HUD is investigating the Louisiana parishes that have either refused to site FEMA trailers or have imposed significant restrictions on the placement of such trailers. Legitimate reasons may exist for some of these parish policies, but some allege that the parish objections are motivated by the fear that African-Americans will move into these communities. HUD is looking into these allegations.

A significant part of our Gulf Coast effort has been to advise FEMA on disability accessibility as it creates mobile-home communities to temporarily house the people displaced by the hurricanes. HUD provided FEMA with a design for an accessible mobile home, provided guidelines on how to make mobile-home communities accessible, and worked with FEMA to establish a standard for all manufactured-housing communities that at least 14 percent of homes be accessible to people with disabilities. HUD has also detailed a staff member to FEMA's long-term recovery effort to advise on disability-rights issues, promote the hiring and training low-income persons on certain HUD-assisted projects, and to advise on fair housing, in general.

We have also directed more of our accessibility education efforts to the Gulf Coast, to make sure that as developers rebuild, they make sure properties are accessible to people with disabilities. Our Fair Housing Accessibility FIRST program, which has been praised by industry and disability advocates alike, held training programs for builders and others in Mississippi and Louisiana last November. FIRST will soon hold seminars in Texas and Florida and host training at the American Institute of Architects annual conference. The FIRST program is a shining example of how industry, advocates, and government are working together, on behalf of people with disabilities in the hurricane recovery effort.

HUD will continue to work with all parties who have a role in ensuring housing opportunities in the Gulf Coast are available, free of discrimination—architects and builders, fair housing advocacy organizations, and the general public. At a time when thousands of families are struggling to recover from the biggest natural disaster to strike this nation, HUD is firmly committed to ensuring that they have the opportunities they need to rebuild their lives.

I thank the Committee for this opportunity to testify on HUD's post-hurricane fair housing efforts.

EXHIBIT 3

R. ALEXANDER ACOSTA
Assistant Attorney General
STEVEN H. ROSENBAUM
Chief
JEANINE M. WORDEN, JW-9094
Deputy Chief
CHARLA D. JACKSON, CJ-4493
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CHRISTOPHER J. CHRISTIE
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(973)645-2700

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.
Civil Action No. 03-1509 (DMC)

SPYDER WEB ENTERPRISES, LLC.

Defendant.

CONSENT DECREE

1. The United States initiated this action pursuant to Section 28 U.S.C. §1345 and 42 U.S.C. §3614(a), alleging that the Defendant has engaged in a pattern or practice of discrimination in violation of 42 U.S.C. §3604(c) of the Fair Housing Act.

2. Defendant Spyder Web Enterprises, LLC, a New Jersey limited liability company located in Bergen County, New Jersey in the District of New Jersey, owns and operates a website called "TheSublet.com". This website lists private apartments and houses for rent. A landlord or person

seeking to sublet an apartment can post the advertisement for a rental unit in any region throughout the country free of charge; the fee is paid by the individual looking for housing. The Defendant also owns and operates the following three (3) websites that pertain to rental housing:

www.cityleases.com; www.metroroomates.com; and www.roommatematches.com, and other websites directly related thereto.

3. Upon accessing the website, a reader is given information on housing in a geographical region of his or her choice. Once a geographic region is chosen, the reader is provided with detailed information about available rentals. The details include information about the dwelling unit and its location, monthly rent, and availability dates. The reader can then respond directly to the housing provider by way of the website or other means, as indicated in the advertisement.

4. The United States, in its Complaint, has alleged that, through its website, "TheSublet.com", the Defendant publishes or causes to be published notices, statements, and advertisements with respect to the rental of dwellings that indicate preferences, limitations, and discrimination based on race, sex, familial status, and national origin in violation of 42 U.S.C. §3604(c).

5. In an effort to avoid costly litigation, the United States and the Defendant have voluntarily agreed, as indicated by the signatures below, to resolve the United States' claims against the Defendant without the necessity of a hearing on the merits, which will include the payment of damages by Defendant.

6. The Court takes no position on the merits of the allegations in this case, nor on the defenses raised, but concludes that the entry of this Consent Order comports with the Fair Housing Act and other federal laws, and is appropriate under these circumstances.

Wherefore, it is ORDERED, ADJUDGED and DECREED:

I. Injunctive Relief

7. Defendant Spyder Web Enterprises, LLC, and its officers, agents, employees, and those persons in active concert with them who receive actual notice of this Decree, are enjoined from making, printing, publishing, or causing to be made, printed, or published any notice, statement or advertisement with respect to the rental of a dwelling unit that states any preference, limitation or discrimination in violation of 42 U.S.C. § 3604(c).

8. Throughout the term of this consent decree, Defendant shall make available to the United States access to "TheSublet.com" rental search service, as well as to each of the other websites listed in Paragraph 2 of this Decree, for purposes of monitoring compliance with this consent decree.

II. Notice to Public of Nondiscrimination Policies

9. Within thirty (30) days after the date of entry of this Consent Decree, the Defendant shall take the following steps to notify the public of their nondiscriminatory policies:

Defendant shall develop a nondiscrimination policy that states, at a minimum, that all submissions to "TheSublet.com", and to each of the other websites listed in Paragraph 2 of this Decree, are subject to federal fair housing laws making it illegal to indicate in any advertisement "any preference, limitation, or discrimination because of race, color, religion, sex, family status, and national origin."

Whenever landlords or tenants seeking to sublet and/or lease their apartments contract with Defendant for submission of listings, advertisements, or notices

for publication on the "TheSublet.com" website, or any of the other websites listed in Paragraph 2 of this Decree, Defendant shall advise such persons, in writing, of its nondiscrimination policy;

Defendant shall post a short statement summarizing this non-discrimination policy as a footer on the homepage of "TheSublet.com" website, and on the homepage of each of the other websites listed in Paragraph 2 of this Decree; and

Defendant shall include the words "Equal Housing Opportunity" and/or the fair housing logo in all print advertising conducted by Defendant, its agents or employees, in emails, and in newspapers, flyers, handouts, telephone directories, and other written materials; as well as on radio, television or other media broadcasts that exceed 15 seconds in length; and on all billboards, signs, pamphlets, or other promotional literature. The words and/or logo shall be prominently placed and easily readable. A specific exception to the requirements of this provision will be made for print advertisements which contain fifteen (15) words or less, and advertisements that have already been published or have been contracted to be published.

III. Mandatory Training

10. Within ninety (90) days after the date of entry of this Consent Decree, the Defendant shall provide an educational program for its officers, agents, and employees who have responsibilities for placing or maintaining advertisements for rentals or sublets on any of Defendant's websites listed in Paragraph 2 of this Decree, the cost of which shall be paid by the Defendant. The program shall provide copies of this Consent Decree and the nondiscrimination policy required by Paragraph 8, and offer instruction regarding the officers, agents, or employees' obligations under the Decree, the non-discrimination policy, and the Fair Housing Act.

11. Each individual required to participate in the educational program referenced in this Section shall sign a statement, Attachment A , certifying that he or she has participated in the educational training program, has read and understood this Consent Decree and other material provided to him/her as part of such program, and has acknowledged his or her duties and responsibilities under this Consent Decree and the federal Fair Housing Act.

IV. Scope and Duration of Consent Order

12. The provisions of this Consent Order shall apply to Defendant Spyder Web Enterprises and its officers, agents and employees who have responsibilities for placing or maintaining advertisements for rentals or sublets on any of Defendant's websites listed in Paragraph 2 of this Decree.

13. This Consent Order is effective immediately upon its entry by the Court and shall remain in effect for three (3) years from the date of entry.

14. The Court shall retain jurisdiction for the duration of this Consent Decree to enforce the terms of the Decree, after which time the case shall be dismissed with prejudice.

15. The Court may, upon motion by the United States, extend the period in which this Order is in effect if it determines that the Defendant has likely violated one or more terms of this Order or if the interests of justice otherwise require an extension of the terms of the Order.

16. The parties to this Consent Order shall endeavor in good faith to resolve informally any differences regarding interpretation of and compliance with this Order prior to bringing such matters to the Court for resolution. However, in the event that the Defendant either fails to perform in a timely manner any act required by this Order or acts in violation of any provision of this Order, the United States may move the Court to impose any remedy authorized by law or equity, including, but not limited to, an order requiring performance or non-performance of certain acts and an award of any damages and costs that may have been occasioned by the Defendant's action(s) or inaction.

17. Any time period set forth within this Order for the performance of any act may be changed by written agreement of the parties without Court approval.

V. Monetary Damages

18. Within ninety (90) days after entry of this Order, Defendant shall establish and deposit **$10,000.00 (Ten Thousand and No/100 Dollars)**in an interest bearing account at a financial institution for purposes of establishing a victim fund ("Fund") which will be used to compensate any subscribers to "TheSublet.com" website who may have suffered damages as a result of the Defendant's discriminatory conduct. Defendant shall provide the United States with notice regarding the establishment of the Fund within five (5) business days after the funds are deposited. All interest accruing to the moneys deposited to the Fund shall be the property of the Fund.

19. Within ninety (90) days after the entry of this Order, Defendant shall send a Notice to Potential Victims of Housing Discrimination ("Notice") via email to all persons who subscribed to "TheSublet.com" website during the time period beginning October 1, 2001 through March 30, 2003. Defendant shall send an email or a carbon copy of each such Notice, and/or a list of those individuals to whom the Notice was sent, to counsel for United States within five (5) business days of the Notice being sent. A copy of the Notice is attached as Exhibit B .

20. Allegedly aggrieved persons shall have 90 days from the date that the Notice was sent to contact the United States in response to the Notice. The United States shall investigate the claims of allegedly aggrieved persons and, within one (1) year from the entry of this Order, shall make a preliminary determination of which persons are aggrieved and an appropriate amount of damages that should be paid to the each such persons. The United States will inform Defendant in writing

of its preliminary determinations, together with a copy of a sworn declaration from each aggrieved person setting forth the factual basis of the claim. Defendant shall have thirty (30) days to review the declaration and provide to the United States any documents or information that they believe may refute the claim.

21. After receiving Defendant's comments, the United States shall submit its final recommendations to the Court for approval, together with a copy of the declarations and any additional information submitted by the Defendant. When the Court issues an order approving or changing the United States' proposed distribution of funds for aggrieved persons, Defendant shall, within ten (10) days of the Court's order, deliver to the United States checks payable to the aggrieved persons in the amounts approved by the Court. In no event shall the aggregate of all such checks exceed the sum of the Fund, including accrued interest. No aggrieved person shall be paid until he/she has executed and delivered to counsel for the United States the release at Attachment C.

22. In the event that less than the total amount in the fund including accrued interest is distributed to aggrieved persons, the remainder of the fund shall be distributed to the Housing Rights Center ("HRC") located at the following address: 520 S. Virgil Avenue, Suite 400, Los Angeles, CA 90020, or to some other court approved fair housing organization, to be used for the purpose of furthering fair housing.

23. Defendant shall permit the United States, upon reasonable notice, to review any available records that may reasonably relate to the claims of alleged aggrieved persons.

V. Civil Penalty

24. Within ninety (90) days after the entry of this Consent Order, the Defendants shall pay the sum of Five Thousand Dollars ($5,000.00) to the United States as a civil penalty pursuant to 42 U.S.C. 3614 (d)(1)(C). This payment shall be delivered to counsel for the United States in the form of a check payable to the "United States Treasury."

25. In the event that any of the Defendants or their agents or employees are found liable for any future violation(s) of the Fair Housing Act, such violation(s) shall constitute a "subsequent

violation" pursuant to 42 U.S.C. 3614(d).

V. Notices and Correspondence

26. All notices and correspondence required to be sent to the United States under the provisions of this Decree shall be sent to the U.S. Department of Justice, c/o the undersigned counsel for the United States, at the following addresses:

Regular U.S. Mail: 950 Pennsylvania Avenue, N.W.Washington, D.C. 20530
Overnight Mail: 1800 G Street, N.W
Suite 7062
Washington, D.C. 20006

It is so ORDERED this ____ day of _____, 2003.

_____
UNITED STATES DISTRICT JUDGE

The undersigned agree to and request the entry of this Consent Order:

For the United States:

CHRISTOPHER J. CHRISTIE
United States Attorney
for the District of New Jersey

R. ALEXANDER ACOSTA
Assistant Attorney General

STEVEN H. ROSENBAUM
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For the Defendant:

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The Levine Law Firm
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ATTACHMENT A

EXHIBIT 4

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 3799488 (C.D.Cal.), 33 Media L. Rep. 1636
(Cite as: Not Reported in F.Supp.2d)

C

United States District Court,C.D. California.
FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY; Fair Housing Council of San diego, individually and on behalf of the General Public,
Plaintiffs,
v.
ROOMMATE.COM, LLC, Defendant.
No. CV 03-09386PA(RZX).

Sept. 30, 2004.

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ANDERSON, J.

***1** Before the Court are cross-motions for summary judgment. Plaintiffs Fair Housing Council of San Fernando Valley and Fair Housing Council of San Diego (collectively "Plaintiffs") have filed a Motion for Summary Judgment (Docket No. 47) ("Plaintiffs' Motion"). Defendant Roommate.Com, LLC ("Roommate") has also filed a Motion for Summary Judgment (Docket No. 44) ("Roommate's Motion").

Plaintiffs' Motion seeks a ruling that Roommate is liable for making and publishing "discriminatory statements that indicate preferences based on race, religion, national origin, gender, familial status, age, sexual orientation, source of income, and disability, all in violation of fair housing laws." Plaintiffs' Memorandum of Points and Authorities, p. 2, ll. 11-13. Roommate's Motion seeks a judgment that it is immune from suit pursuant to section 230 of the Communications Decency Act ("CDA") because Plaintiffs seek to make it liable for the publication of content provided by third parties. Roommate alternatively argues that Plaintiffs' claims are barred by the First Amendment.

I. *FACTUAL BACKGROUND*

Roommate owns and operates www.roommates.com, an Internet website which provides a roommate locator service for individuals who have residences to share or rent out, and individuals looking for residences to share. The website allows those with residences, and those looking for residences, to post information about themselves and available housing options on a searchable database. Basic membership is free and allows a user to create a personal profile, conduct searches of the database, and send "roommail"-a type of internal e-mail system-to other users. Paid memberships allow users to view the free-form essay "comments" posted by other users, view full-size photos, and receive roommail from other users. Roommates.com currently receives over 50,000 visits and 1,000,000 page views per day. Approximately 40,000 users are offering rooms for rent, 110,000 users are looking for a residence to share, and 24,000 users have paid for upgraded memberships.

To become a member of Roommate's service, a person must author a personal profile. The profile includes information, much of which is entered by selecting from among a number of predetermined options provided by Roommate, concerning, among other things, the person's age, gender, sexual orientation, occupation, and number of children. A user must provide a response for each inquiry. Roommate's questionnaire makes no inquiries concerning a user's race or religion. Users create their own nicknames, can attach photographs, and may add a free-form essay to personalize the entry by describing themselves and their roommate preferences. When listing a room for rent, the user responds to prompts which result in the posting of specific details about the area, rent and deposit information, date of availability, and features of the residence. Information may also be posted about the current occupants of the household and roommate preferences for the incoming roommate. In addition to admittedly non-discriminatory information such as cleanliness, smoking habits, and pet ownership, these preferences can, when selected, include the user's responses to Roommate's questions about age, gender, sexual orientation, occupation, and familial status.

***2** Under its terms of service, Roommate informs users that it does not screen postings. The terms of service also inform users that they are "entirely responsible" for all content and that Roommate is not the author of the information posted on the website. As soon as a new user completes the questionnaire, the resulting profile is made available online to other users. Although Roommate does not review or edit

the text of users' profiles, Roommate does review photographs before they are posted to make sure that they do not contain images that violate the terms of service.

II. *DISCUSSION*

Plaintiffs filed their Complaint on December 22, 2003 and a First Amended Complaint on April 21, 2004. The First Amended Complaint alleges a claim under the Fair Housing Act ("FHA"), 42 U.S.C. section 3604(c), and state law causes of action for violations of the California Fair Employment and Housing Act and the Unruh Civil Rights Act, and claims for unfair business practices and negligence. Plaintiffs seek monetary damages, punitive damages, declaratory and injunctive relief, disgorgement of profits, and attorneys' fees.

Plaintiffs contend that Roommate violates state and federal fair housing laws in three ways. First, Plaintiffs object to the nicknames which some users have picked for themselves. These nicknames include: ChristianGrl, CatholicGirl, Asianpride, Asianmale, Whiteboy, Chinesegirl, Latinpride, and Blackguy. Second, Plaintiffs object to the free-form essays written by some users which indicate at least potentially discriminatory preferences. Some of the essays include statements such as: "looking for an ASIAN FEMALE OR EURO GIRL"; "I'm looking for a straight Christian male"; "I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims or mortgage brokers"; and "Here is free rent for the right woman ... I would prefer to have a Hispanic female roommate so she can make me fluent in Spanish or an Asian female roommate just because I love Asian females." Third, Plaintiffs contend that the questions posed by Roommate's questionnaire, by requiring the disclosure of information about a user's age, gender, sexual orientation, occupation, and familial status, violate the fair housing laws. Roommate argues that it is entitled to the grant of immunity provided by the CDA notwithstanding any potential violations of the fair housing laws.

A. *Plaintiffs' Federal Fair Housing Act Claim*

Plaintiffs' federal claim seeks to make Roommate liable for making unlawful inquiries into the personal characteristics of people looking for a place to live which are then published. The FHA makes it unlawful:

To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

***3** 42 U.S.C. § 3604(c). Plaintiffs' FHA claim deals solely with section 3604(c)'s prohibition against making or publishing of discriminatory statements. Plaintiffs have neither alleged nor presented any facts in support of their FHA claim which do not relate to Roommate's role as a publisher.

B. *CDA's Immunity for Content Provided by Third Parties*

Roommate argues that the CDA shields it from liability for Plaintiffs' claims. The immunity provision of the CDA at issue here provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA clarifies its effect on other laws and specifically exempts federal criminal laws, laws pertaining to intellectual property, and the Electronic Communications Privacy Act of 1986. 47 U.S.C. § 230(e). State laws which are consistent with the CDA are not barred, but "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

This is apparently the first case to address the relationship between the CDA's grant of immunity and the FHA's imposition of liability for the making or publishing of discriminatory real estate listings. The FHA is not among the types of laws which are specifically exempted from the CDA. As such, and without evidence of contrary legislative intent, a court may not create an exemption for the fair housing laws without violating the maxim *expressio unius est exclusio alterius*. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993). " 'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." ' *TRW Inc. v. Andrews*, 534 U.S.

19, 28, 122 S.Ct. 441, 447, 151 L.Ed.2d 339 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910, 64 L.Ed.2d 548 (1980)). In the absence of contrary legislative intent, therefore, the Court finds that the CDA applies to shield Roommate from liability for the FHA violations alleged by Plaintiffs to the extent that Plaintiffs seek to make Roommate liable for the content provided by its users.

As the Ninth Circuit has indicated, "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.' Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue." *Carafano v. Metrosplash.Com. Inc.*, 339 F.3d 1119, 1123 (9th Cir.2003). In *Carafano,* the Ninth Circuit applied the CDA's immunity provision to invasion of privacy, defamation, and negligence claims brought against Matchmaker.com arising out of a false listing on Matchmaker's website. As in this case, the questionnaire at issue there contained both multiple choice and essay questions. *Id.* at 1121. In the multiple choice section, members could select from answers to more than fifty questions from menus providing between four and nineteen options. *Id.* "The actual profile 'information' consisted of the particular options chosen and the additional essay answers provided." *Id.* at 1124.

***4** In *Carafano,* the Ninth Circuit concluded that Matchmaker "was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph." In those circumstances, Matchmaker could not be "considered an 'information content provider' under the statute because no profile has any content until a user actively creates it." *Id.* The Ninth Circuit went on to find that "the fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a 'developer' of the 'underlying misinformation.' " *Id.*

Plaintiffs express a concern that application of the CDA might eviscerate the FHA. Though mindful of that concern, the most that can be said is that operators of Internet sites such as Roommate have an advantage over traditional print media because websites, unlike newspapers, are exempt from 42 U.S.C. section 3604(c) and the related state fair housing laws for publishers. This is a concern created by Congress' adoption of the CDA, and is not unique to the FHA. Instead, it is identical to the numerous other federal and state statutes and common law remedies for which the CDA's immunity provision applies. *See Batzel v. Smith,* 333 F.3d 1018, 1026-27 (9th Cir.2003) ("The specific provision at issue here, § 230(c)(1), overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. As a matter of policy, 'Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.' Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory test, and, indeed, at least with regard to publishers, even if unaware of the statement. Congress, however, has chosen to treat cyberspace differently.") (quoting *Blumenthal v. Drudge,* 992 F.Supp. 44, 49 (D.D.C.1998)).

The Ninth Circuit's decision in *Carafano* compels the conclusion that Roommate cannot be liable for violating the FHA arising out of the nicknames chosen by its users, the free-form comments provided by the users, or the users' responses to the multiple choice questionnaire. Plaintiffs' federal claims against Roommate are therefore barred by the CDA. This result does not, however, leave Plaintiffs without a remedy under the fair housing laws. Any individual user of Roommate's service who posts discriminatory preferences is not shielded from liability by the CDA. The users who posted the descriptions and preferences of which Plaintiffs complain are responsible for the content they have provided. Moreover, the FHA's safe harbors for single family homes and four-unit dwellings rented by an owner do not apply to section 3604(c). 42 U.S.C. § 3603(b). As a result, Plaintiffs could, if they so decided, pursue actions against Roommate's users and members without running afoul of the CDA's immunity provision.

C. Roommate's First Amendment Argument

***5** Having found that Plaintiffs' FHA claim is barred by the CDA, the Court declines to reach Roommate's alternative argument which seeks to invalidate the

FHA as an unconstitutional abridgement of the First Amendment's free speech guarantee. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445, 108 S.Ct. 1319, 1322, 99 L.Ed.2d 534 (1998); *see also United States v. Lamont,* 330 F.3d 1249, 1251 (9th Cir.2003) ("This principle means that 'a decision on a constitutional question is appropriate only after addressing the statutory questions.' Here, our statutory analysis resolves the issue and there is thus no cause to reach the constitutional question.") (quoting *United State v. Odom,* 252 F.3d 1289, 1293 (11th Cir.2001)).

D. *Plaintiffs' Remaining Supplemental State Law Claims*

The only basis for jurisdiction alleged in the Complaint was federal question jurisdiction based on the FHA claim. Plaintiff's remaining causes of action brought pursuant to California's Fair Employment and Housing Act, Unruh Act, negligence, and unfair business practices claims, however, raise only state law causes of action. "The district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Once supplemental jurisdiction has been established under section 1367(a), the district court "can decline to assert supplemental jurisdiction over a pendant claim only if one of the four categories specifically enumerated in section 1367(c) applies." *Executive Software v. U.S. Dist. Court for Cent. Dist. of California,* 24 F.3d 1545, 1555-56 (9th Cir.1994).

The four bases to decline supplemental jurisdiction under section 1367(c) are: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates the claims over which the district court has original jurisdiction, (3) the district court dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *Id.* at 1556. This Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims as the only claim over which it had original jurisdiction is now dismissed. *See* 28 U.S.C. § 1367(c)(3). The Court additionally declines to exercise supplemental jurisdiction because Plaintiffs' claim that Roommate has aided and abetted its users' violations of the Fair Employment and Housing Act raises a novel issue of California law. The parties should, as a first resort, have access to California's courts to resolve the state law issues. Accordingly, the Fair Employment and Housing Act, Unruh Act, negligence, and unfair business practices claims, which can be brought in state court, are dismissed without prejudice.[FN1]

FN1. 28 U.S.C. § 1367(d) provides that:
The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

III. *CONCLUSION*

***6** For all of the foregoing reasons, the Court finds that Plaintiffs' FHA claim is barred by the immunity provision of the CDA. The Court therefore grants Roommate's Motion for Summary Judgment as to the FHA claim. Plaintiffs' state law claims, over which this Court declines to exercise supplemental jurisdiction, are dismissed with prejudice. Plaintiffs' Motion for Summary Judgment is denied.

IT IS SO ORDERED.

C.D.Cal.,2004.
Fair Housing Council of San Fernando Valley v. Roommate.Com, LLC.
Not Reported in F.Supp.2d, 2004 WL 3799488 (C.D.Cal.), 33 Media L. Rep. 1636

END OF DOCUMENT

EXHIBIT 5

104TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT 104–458

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SECTION 507—PROTECTION OF MINORS AND CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

Senate bill

No provision.

House amendment

Section 403(a)(2) of the House amendment made conforming and clarifying amendments to sections 1462, 1467, and 1469 of title 18, United States Code. Those statutes currently prohibit the interstate transportation of obscenity for the purpose of sale or distribution, whether commercial or non-commercial in nature. These statutes outlaw the importation of obscenity, by whatever means. These provisions were intended to simply clarify sections 1462, 1465, and 1467 of title 18, United States Code.

Conference agreement

The Senate recedes to the House with modifications. Section 507 simply clarifies that the current obscenity statutes, in fact, do prohibit using a computer to import and receive an importation of, and transport to sell or distribute, "obscene" material.

The amendments made by this section are clarifying and shall not be interpreted to limit or repeal any prohibition contained in sections 1462 or 1465 of title 18, United States Code, before such amendment, under the rule established in *United States v. Alpers*, 338 U.S. 680 (1950).

SECTION 508—COERCION AND ENTICEMENT OF MINORS

Senate bill

Several provisions of the Senate bill protect children from harassing, indecent or obscene communications.

House amendment

Several provisions of the House amendment protect children from obscene or indecent communications.

Conference agreement

Section 508 would amend section 2422 of title 18 to prohibit the use of a facility of interstate commerce which includes telecommunications devices and other forms of communication for the purpose of luring, enticing, or coercing a minor into prostitution or a sexual crime for which a person could be held criminally liable, or attempt to do so. On July 24, 1995, the Senate Judiciary Committee held a hearing on online indecency, obscenity, and child endangerment. The record of this hearing supports the need for Congress to take effective action to protect children and families from online harm.

SECTION 509—ONLINE FAMILY EMPOWERMENT

Senate bill

No provision.

House amendment

Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software.

The conferees do not intend, however, that these protections from civil liability apply to so-called "cancelbotting," in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

SUBTITLE B—VIOLENCE

SECTION 551—PARENTAL CHOICE IN TELEVISION PROGRAMMING

Senate bill

Sections 501–505 of Senate bill gives the industry one year to voluntarily develop a ratings system for TV programs. If the industry fails to do so, a Federal TV Ratings Commission would set the ratings. The Commission would be appointed by the President, subject to confirmation by the Senate and would establish rules for rating the level of violence and other objectionable content in programs. The Board would also establish rules for TV broadcasters and cable systems to transmit the ratings to viewers. The Commission would be authorized funds necessary to carry out its duties. The Senate bill requires TV manufacturers to equip all 13 inch or greater TV sets with circuitry to block rated shows.

House amendment

Section 305 of the House amendment gives the cable and broadcast industries one year to develop voluntary ratings for video programming containing violence, sex and other indecent materials and to agree voluntarily to broadcast signals containing such ratings. If the industry fails to come up with an acceptance plan, the

EXHIBIT 6

104TH CONGRESS, 2d Session | SENATE | REPORT 104–230

TELECOMMUNICATIONS ACT OF 1996

FEBRUARY 1, 1996.—Ordered to be printed

Mr. PRESSLER, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SECTION 507—PROTECTION OF MINORS AND CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

Senate bill

No provision.

House amendment

Section 403(a)(2) of the House amendment made conforming and clarifying amendments to sections 1462, 1467, and 1469 of title 18, United States Code. Those statutes currently prohibit the interstate transportation of obscenity for the purpose of sale or distribution, whether commercial or non-commercial in nature. These statutes outlaw the importation of obscenity, by whatever means. These provisions were intended to simply clarify sections 1462, 1465, and 1467 of title 18, United States Code.

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House amendment

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EXHIBIT 7

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 104th CONGRESS, FIRST SESSION

Vol. 141 WASHINGTON, FRIDAY, AUGUST 4, 1995 No. 129

House of Representatives

The House met at 8 a.m. and was called to order by the Speaker pro tempore [Mr. BUNN of Oregon].

DESIGNATION OF THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore (Mr. BUNN of Oregon) laid before the House the following communication from the Speaker:

WASHINGTON, DC,
August 4, 1995.

I hereby designate the Honorable JIM BUNN to act as Speaker pro tempore on this day.

NEWT GINGRICH,
Speaker of the House of Representatives.

PRAYER

The Chaplian, Rev. James David Ford, D.D., offered the following prayer:

Your word, O God, proclaims the message of faith and hope and love and we long to experience that joy and peace. Yet often we wonder where that word of grace is amid the cluttered affairs of the world and the untidy arrangements of each day. Our prayer, gracious God, is that we will hear Your still small voice in spite of the clamor and noise of life and that we will experience the power of Your spirit in the depths of our own hearts. With gratefulness, O God, we believe that Your presence is greater than the din of the world and we are thankful that underneath are Your everlasting arms. In Your name, we pray. Amen.

THE JOURNAL

The SPEAKER pro tempore (Mr. BUNN of Oregon). The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Pursuant to clause 1, rule I, the Journal stands approved.

PLEDGE OF ALLEGIANCE

The SPEAKER. Will the gentleman from Texas [Mr. BRYANT] come forward and lead the House in the Pledge of Allegiance.

Mr. BRYANT of Texas led the Pledge of Allegiance as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

COMMUNICATIONS ACT OF 1995

The SPEAKER pro tempore (Mr. BUNN). Pursuant to House Resolution 207 and rule XXIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the further consideration of the bill, H.R. 1555.

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IN THE COMMITTEE OF THE WHOLE

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the further consideration of the bill (H.R. 1555) to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies, with Mr. KOLBE in the chair.

The Clerk read the title of the bill.

The CHAIRMAN (Mr. KOLBE). When the Committee of the Whole House rose on Wednesday, August 2, 1995, all time for general debate had expired.

Pursuant to the rule, the amendment in the nature of a substitute printed in the bill is considered as an original bill for the purpose of amendment and is considered read.

NOTICE

Issues of the Congressional Record during the August District Work Period will be published each day the Senate is in session in order to permit Members to revise and extend their remarks.

All material for insertion must be signed by the Member and delivered to the respective offices of the Official Reporters of Debates (Room HT–60 of the Capitol), Monday through Friday, between the hours of 10:00 a.m. and 2:00 p.m.

None of the material printed in the Congressional Record may contain subject matter, or relate to any event, that occurred after the House adjournment date.

Members of Congress desiring to purchase reprints of material submitted for inclusion in the Congressional Record may do so by contacting the Congressional Printing Management Division, at the Government Printing Office, on 512–0224, between the hours of 8:00 a.m. and 4:00 p.m. daily.

By order of the Joint Committee on Printing.

WILLIAM M. THOMAS, *Chairman.*

business on certain occasions and say, 'It's not just about competition, it's about the public interest.'"—Reed Hundt, Federal Communications Commission Chair as quoted in The New Yorker

Mr. CONYERS. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Michigan [Miss COLLINS].

(Miss COLLINS of Michigan asked and was given permission to revise and extend her remarks.)

Miss COLLINS of Michigan. Mr. Chairman, I rise in strong support of the Conyers amendment and urge my colleagues to adopt it.

Many have argued during this debate that we must deregulate the telecommunications industry, and by eliminating any role for the Department of Justice in determining Regional Bell operating company entry into long distance, we are working toward and goal. Well I think you are making a terrible mistake if you confuse forbidding the proper anti-trust role of the Department of Justice with deregulation.

The Republicans in this body should recall it was under the Reagan administration that the Department of Justice broke up the Bell system over a decade ago. That decision has been an undisputed success. Without the role played by the Department of Justice, consumers would still be renting large rotary black phones and paying too much for long distance services. The Department of Justice actions promoted competition, not regulation.

Without the Department of Justice role, we can expect those communication's attorneys to be in court, fighting endless anti-trust battles. The role we give the Department of Justice in this amendment will make it less likely that we will end up back in court, and the Department will ensure that anti-trust violations would be minimal, prior to the decision granting a Bell operating company the ability to offer long distance service.

Calling this amendment regulatory, is doing a disservice to the potential for true deregulation—which is full competition in all markets. The structure provided by the Department of Justice ensures that the markets will develop quickly, and with less litigation.

Mr. Chairman, I urge my colleagues to support this amendment. I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from New York [Mr. HINCHEY].

(Mr. HINCHEY asked and was given permission to revise and extend his remarks.)

Mr. HINCHEY. Mr. Chairman, this bill has been described as a clash between the super rich and the super wealthy. That Is unquestionably true, but in the clash of these titans, the question is, who stands for the American public?

The answer to that question is, without the Conyers amendment, no one. The American people stand naked before the potential excesses of these giants unless we have some protection from them offered by the Justice Department.

There is an incredibly high standard in this bill, Mr. Chairman. There must be a dangerous probability of substantially impeding justice before the Justice Department comes in. Let us pass the Conyers amendment and protect the American people.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from Pennsylvania [Mr. KLINK].

Mr. KLINK. Mr. Chairman, I thank the gentleman from Michigan [Mr. CONYERS] for yielding the time.

The FCC is essentially the agency that would be able to consult with the Department of Justice under the manager's mark that we passed this morning. But when we talk about going from a monopoly industry, which telecom was after 1934, to a competition-based industry, the competition agency, those who keep the rule, those who decide if there is a dangerous probability, if those gigantic billionaires players are being fair, is the Department of Justice.

Mr. Chairman, I simply say that the Conyers amendment makes sure that fairness is done, that the referee is in place. I urge my colleagues to support the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 2½ minutes to the gentleman from Ohio [Mr. OXLEY] for purposes of closing the debate on our side.

(Mr. OXLEY asked and was given permission to revise and extend his remarks.)

Mr. OXLEY. Mr. Chairman, I rise in opposition to the Conyers amendment. This bill in all of its forms does not repeal the Sherman Act. We have had the Sherman Act for over 100 years.

It does not repeal the Clayton Act passed in 1914. Anticompetitive behavior will be reviewed by the Justice Department, whether it is the telecommunications industry or whether it is the trucking industry or any other kind of industry that we are talking about. The Justice Department is not going away.

What we are trying to do, Mr. Chairman, or what the Conyers amendment seeks to do, is basically replace one court with another, except a different standard.

This amendment guts the underlying concept of this bill, which is pure competition, and the idea to get Congress back into the decisionmaking process. How long do we have to have telecommunications policy made by an unelected Federal judge who has no accountability to anyone; when are we going to get back to providing the kind of responsible decisionmaking that we are elected to do?

Mr. Chairman, I suggest to my colleagues that the underlying bill provides that kind of ability and accountability for the duly elected representatives of the people.

This amendment creates needless bureaucracy by having not one, but two Federal agencies review the issue of Bell Co. entry into long distance. The purpose of this legislation is to create conditions for a competitive market and get the heavy hand of Government regulation out of the way. This Conyers amendment is inconsistent with that purpose.

Mr. Chairman, this is a huge opportunity to provide competitive forces in the marketplace away from Government. If we believe that competition and not bureaucracy is the answer to modernizing our telecommunications policy, to providing more choice in the marketplace, to providing lower prices, to making America the most competitive telecommunications industry in the entire world, we will vote against the Conyers amendment and support the underlying bill.

Mr. Chairman, I ask my colleagues to join me in opposition to the Conyers amendment.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified.

The question was taken; and the chairman announced that the ayes appeared to have it.

Mr. BLILEY. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified, will be postponed until after the vote on amendment 2-4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider the amendment, No. 2-3, printed in part 2 of House Report 104-223.

AMENDMENT OFFERED BY MR. COX OF CALIFORNIA

Mr. COX of California. Mr. Chairman, I offer an amendment numbered 2-3.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment number 2-3 offered by Mr. COX of California:

Page 78, before line 18, insert the following new section (and redesignate the succeeding sections and conform the table of contents accordingly):

SEC. 104. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL; FCC REGULATION OF COMPUTER SERVICES PROHIBITED.

"(a) FINDINGS.—The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political,

educational, cultural, and entertainment services.

"(b) POLICY.—It is the policy of the United States to—

"(1) promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;

"(3) encourage the development of technologies which maximize user control over the information received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

"(5) ensure vigorous enforcement of criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of—

"(1) any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

"(2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED.—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.

"(e) EFFECT ON OTHER LAWS.—

"(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) IN GENERAL.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

"(f) DEFINITIONS.—As used in this section:

"(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service that provides computer access to multiple users via modem to a remote computer server, including specifically a service that provides access to the Internet.

"(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided by the Internet or any other interactive computer service, including any person or entity that creates or develops blocking or screening software or other techniques to permit user control over offensive material.

"(4) INFORMATION SERVICE.—The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.".

The CHAIRMAN. Pursuant to the rule, the gentleman from California [Mr. COX] will be recognized for 10 minutes, and a Member opposed will be recognized for 10 minutes. Who seeks time in opposition?

PARLIAMENTARY INQUIRY

Mr. COX of California. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. COX of California. Mr. Chairman, given that no Member has risen in opposition, would the Chair entertain a unanimous-consent request?

The CHAIRMAN. If no Members seeks time in opposition, by unanimous consent another Member may be recognized for the other 10 minutes, or the gentleman may have the other 10 minutes.

Let me put the question again: Is there any Member in the Chamber who wishes to claim the time in opposition?

If not, is there a unanimous-consent request for the other 10 minutes?

Mr. WYDEN. There is, Mr. Chairman. Although I am not in opposition to this amendment, I would ask unanimous consent to have the extra time because of the many Members who would like to speak on it.

The CHAIRMAN. Is there objection to the request of the gentleman from Oregon?

There was no objection.

The CHAIRMAN. The gentleman from California [Mr. COX] will be recognized for 10 minutes, and the gentleman from Oregon [Mr. WYDEN] will be recognized for 10 minutes.

The Chair recognizes the gentleman from California [Mr. COX].

Mr. COX of California. Mr. Chairman, I wish to begin by thanking my colleague, the gentleman from Oregon [Mr. WYDEN], who has worked so hard and so diligently on this effort with all of our colleagues.

We are talking about the Internet now, not about telephones, not about television or radios, not about cable TV, not about broadcasting, but in technological terms and historical terms, an absolutely brand-new technology.

The Internet is a fascinating place and many of us have recently become acquainted with all that it holds for us in terms of education and political discourse.

We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet. But as you know, there is some reason for people to be wary because, as a Time Magazine cover story recently highlighted, there is in this vast world of computer information, a literal computer library, some offensive material, some things in the bookstore, if you will, that our children ought not to see.

As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into on line. I would like to keep that out of my house and off of my computer. How should we do this?

Some have suggested, Mr. Chairman, that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace.

Frankly, there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time. Certainly, criminal enforcement of our obscenity laws as an adjunct is a useful way of punishing the truly guilty.

Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a $200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

Prodigy said, "No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us."

The court said, "No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of

material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricker liability because you tried to exercise some control over offensive material."

□ 1015

Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. That is where we should be headed, and that is what the gentleman from Oregon [Mr. WYDEN] and I are doing.

Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

There are other ways to address this problem, some of which run head-on into our approach. About those let me simply say that there is a well-known road paved with good intentions. We all know where it leads. The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.

Mr. Chairman, I reserve the balance of my time.

Mr. WYDEN. Mr. Chairman, I rise to speak on behalf of the Cox-Wyden amendment. In beginning, I want to thank the gentleman from California [Mr. COX] for the chance to work with him. I think we all come here because we are most interested in policy issues, and the opportunity I have had to work with the gentleman from California has really been a special pleasure, and I want to thank him for it. I also want to thank the gentleman from Michigan [Mr. DINGELL], our ranking minority member, for the many courtesies he has shown, along with the gentleman from Massachusetts [Mr. MARKEY], and, as always, the gentleman from Virginia [Mr. BLILEY] and the gentleman from Texas [Mr. FIELDS] have been very helpful and cooperative on this effort.

Mr. Chairman and colleagues, the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise. We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe. So let us all stipulate right at the outset the importance of protecting our kids and going to the issue of the best way to do it.

The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats. Parents can get relief now from the smut on the Internet by making a quick trip to the neighborhood computer store where they can purchase reasonably priced software that blocks out the pornography on the Internet. I brought some of this technology to the floor, a couple of the products that are reasonably priced and available, simply to make clear to our colleagues that it is possible for our parents now to childproof the family computer with these products available in the private sector.

Now what the gentleman from California [Mr. COX] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids. In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. The fact of the matter is that the Internet operates worldwide, and not even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children who use the new interactive media, and I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter.

Mr. Chairman, the new media is simply different. We have the opportunity to build a 21st century policy for the Internet employing the technologies and the creativity designed by the private sector.

I hope my colleagues will support the amendment offered by gentleman from California [Mr. COX] and myself, and I reserve the balance of my time.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Texas [Mr. BARTON].

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, Members of the House, this is a very good amendment. There is no question that we are having an explosion of information on the emerging superhighway. Unfortunately part of that information is of a nature that we do not think would be suitable for our children to see on our PC screens in our homes.

Mr. Chairman, the gentleman from Oregon [Mr. WYDEN] and the gentleman from California [Mr. COX] have worked hard to put together a reasonable way to provide those providers of the information to help them self-regulate themselves without penalty of law. I think it is a much better approach than the approach that has been taken in the Senate by the Exon amendment. I would hope that we would support this version in our bill in the House and then try to get the House-Senate conference to adopt the Cox-Wyden language.

So, Mr. Chairman, it is a good piece of legislation, a good amendment, and I hope we can pass it unanimously in the body.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from Missouri [Ms. DANNER] who has also worked hard in this area.

Ms. DANNER. Mr. Chairman, I wish to engage the gentleman from Oregon [Mr. WYDEN] in a brief colloquy.

Mr. Chairman, I strongly support the gentleman's efforts, as well as those of the gentleman from California [Mr. COX], to address the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornographic materials available on the Internet.

Telephone companies must inform us as to whom our long distance calls are made. I believe that if computer online services were to include itemized billing, it would be a practical solution which would inform parents as to what materials their children are accessing on the Internet.

It is my hope and understanding that we can work together in pursuing technology based solutions to the problems

we face in dealing with controlling the transfer of obscene materials in cyberspace.

Mr. WYDEN. Mr. Chairman, will the gentlewoman yield?

Ms. DANNER. I yield to the gentleman from Oregon.

Mr. WYDEN. Mr. Chairman, I thank my colleague for her comments, and we will certainly take this up with some of the private-sector firms that are working in this area.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Washington [Mr. WHITE].

Mr. WHITE. Mr. Chairman, I would like to point out to the House that, as my colleagues know, this is a very important issue for me, not only because of our district, but because I have got four small children at home. I got them from age 3 to 11, and I can tell my colleagues I get E-mails on a regular basis from my 11-year-old, and my 9-year-old spends a lot of time surfing the Internet on America Online. This is an important issue to me. I want to be sure we can protect them from the wrong influences on the Internet.

But I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent.

That is why I was proud to cosponsor this bill, that is what this bill does, and I urge my colleagues to pass it.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from California [Ms. LOFGREN].

Ms. LOFGREN. Mr. Chairman, I will bet that there are not very many parts of the country where Senator EXON's amendment has been on the front page of the newspaper practically every day, but that is the case in Silicon Valley. I think that is because so many of us got on the Internet early and really understand the technology, and I surf the Net with my 10-year-old and 13-year-old, and I am also concerned about pornography. In fact, earlier this year I offered a life sentence for the creators of child pornography, but Senator EXON's approach is not the right way. Really it is like saying that the mailman is going to be liable when he delivers a plain brown envelope for what is inside it. It will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment, and I would urge its approval so that we preserve the first amendment and open systems on the Net.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Virginia [Mr. GOODLATTE].

(Mr. GOODLATTE asked and was given permission to revise and extend his remarks.)

Mr. GOODLATTE. Mr. Chairman, I thank the gentleman from Oregon [Mr. WYDEN] for yielding this time to me, and I rise in strong support of the Cox-Wyden amendment. This will help to solve a very serious problem as we enter into the Internet age. We have the opportunity for every household in America, every family in America, soon to be able to have access to places like the Library of Congress, to have access to other major libraries of the world, universities, major publishers of information, news sources. There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. This will cure that problem, and I urge the Members to support the amendment.

□ 1030

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Massachusetts [Mr. MARKEY], the ranking member of the subcommittee.

Mr. MARKEY. Mr. Chairman, I want to congratulate the gentleman from Oregon and the gentleman from California for their amendment. It is a significant improvement over the approach of the Senator from Nebraska, Senator EXON.

This deals with the reality that the Internet is international, it is computer-based, it has a completely different history and future than anything that we have known thus far, and I support the language. It deals with the content concerns which the gentlemen from Oregon and California have raised.

Mr. Chairman, the only reservation which I would have is that they add in not only content but also any other type of registration. I think in an era of convergence of technologies where telephone and cable may converge with the Internet at some point and some ways it is important for us to ensure that we will have an opportunity down the line to look at those issues, and my hope is that in the conference committee we will be able to sort those out.

Mr. WYDEN. Mr. Chairman, I yield 30 seconds to the gentleman from Texas [Mr. FIELDS].

Mr. FIELDS of Texas. Mr. Chairman, I just want to take the time to thank him and also the gentleman from California for this fine work. This is a very sensitive area, very complex area, but it is a very important area for the American public, and I just wanted to congratulate him and the gentleman from California on how they worked together in a bipartisan fashion.

Mr. WYDEN. Mr. Chairman, I yield myself such time as I may consume. I thank the gentleman for his kindness.

Mr. Chairman, in conclusion, let me say that the reason that this approach rather than the Senate approach is important is our plan allows us to help American families today.

Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today.

Mr. COX of California. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I would just like to respond briefly to the important point in this bill that prohibits the FCC from regulating the Internet. Price regulation is at one with usage of the Internet.

We want to make sure that the complicated way that the Internet sends a document to your computer, splitting it up into packets, sending it through myriad computers around the world before it reaches your desk is eventually grasped by technology so that we can price it, and we can price ration usage on the Internet so more and more people can use it without overcrowding it.

If we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that.

Mr. GOODLATTE. Mr. Chairman, Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet. Most parents aren't around all day to monitor what their kids are pulling up on the net, and in fact, parents have a hard time keeping up with their kids' abilities to surf cyberspace. Parents need some help and the Cox-Wyden amendment provides it.

The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.

We have been told it is technologically impossible for interactive service providers to guarantee that no subscriber posts indecent material on their bulletin board services. But that doesn't mean that providers should not be given incentives to police the use of their systems. And software and other measures are available to help screen out this material.

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material.

The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut

from their systems. It also encourages the online services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access. And, it is important to note that under this amendment existing laws prohibiting the transmission of child pornography and obscenity will continue to be enforced.

The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment.

The Chairman. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from California [Mr. COX].

The question was taken; and the Chairman announced that the ayes appeared to have it.

Mr. COX of California. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from California [Mr. COX] will be postponed until after the vote on amendment 2–4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 2–4 printed in part 2 of House Report 104–223.

AMENDMENT NO. 2–4 OFFERED BY MR. MARKEY

Mr. MARKEY. Mr. Chairman, I offer an amendment, numbered 2–4.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. MARKEY of Massachusetts: page 126, after line 16, insert the following new subsection (and redesignate the succeeding subsections and accordingly):

(f) STANDARD FOR UNREASONABLE RATES FOR CABLE PROGRAMMING SERVICES.—Section 623(c)(2) of the Act (47 U.S.C. 543(c)) is amended to read as follows:

"(2) STANDARD FOR UNREASONABLE RATES.—The Commission may only consider a rate for cable programming services to be unreasonable if such rate has increased since June 1, 1995, determined on a per-channel basis, by a percentage that exceeds the percentage increase in the Consumer Price Index for All Urban Consumers (as determined by the Department of Labor) since such date.".

Page 127, line 4, strike "or 5 percent" and all that follows through "greater," on line 6.

Page 129, strike lines 16 through 21 and insert the following:

"(d) UNIFORM RATE STRUCTURE.—A cable operator shall have a uniform rate structure throughout its franchise area for the provision of cable services.".

Page 130, line 16, insert "and" after the semicolon, and strike line 20 and all that follows through line 2 on page 131 and insert the following:

"directly to subscribers in the franchise area and such franchise area is also served by an unaffiliated cable system.".

Page 131, strike line 6 and all that follows through line 21, and insert the following:

"(m) SMALL CABLE SYSTEMS.—

"(1) SMALL CABLE SYSTEM RELIEF.—A small cable system shall not be subject to subsections (a), (b), (c), or (d) in any franchise area with respect to the provision of cable programming services, or a basic service tier where such tier was the only tier offered in such area on December 31, 1994.

"(2) DEFINITION OF SMALL CABLE SYSTEM.—For purposes of this subsection, 'small cable system' means a cable system that—

"(A) directly or through an affiliate, serves in the aggregate fewer than 250,000 cable subscribers in the United States; and

"(B) directly serves fewer than 10,000 cable subscribers in its franchise area.".

The CHAIRMAN. Pursuant to the rule, the gentleman from Massachusetts [Mr. MARKEY] will be recognized for 15 minutes, and a Member opposed will be recognized for 15 minutes.

Does the gentleman from Virginia [Mr. BLILEY] seek the time in opposition?

Mr. BLILEY. Mr. Chairman, I do.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 15 minutes.

The Chair recognizes the gentleman from Massachusetts [Mr. MARKEY].

Mr. MARKEY. Mr. Chairman, I yield myself at this point 3 minutes.

Mr. Chairman, the consumers of America should be placed upon red alert. We now reach an issue which I think every person in America can understand who has even held a remote control clicker in their hands.

The bill that we are now considering deregulates all cable rates over the next 15 months. But for rural America, rural America, the 30 percent of America that considers itself to the rural, their rates are deregulated upon enactment of this bill.

Now, the proponents are going to tell you, do not worry, there is going to be plenty of competition in cable. That will keep rates down. For those of you in rural America, ask yourself this question: In two months do you think there will be a second cable company in your town? Because if there is not a second cable company in your town, your rates are going up because your cable company, as a monopoly, will be able to go back to the same practices which they engaged in up to 1992 when finally we began to put controls on this rapid increase two and three and four times the rate of inflation of cable rates across this country.

The gentleman from Connecticut [Mr. SHAYS] and I have an amendment that is being considered right now on the floor of Congress which will give you your one shot at protecting our cable ratepayers against rate shock this year and next across this country, whether you be rural or urban or suburban.

We received a missive today from the Governor of New Jersey, Christine Whitman. She wants an aye vote on the Markey-Shays bill. Christine Whitman. She does not want her cable rates to go up because she knows, and she says it right here, there is no competition on the horizon for most of America.

So this amendment is the most important consumer protection vote which you will be taking in this bill and one of the two or three most important this year in the U.S. Congress.

Make no mistake about it. There will be no competition for most of America. There will be no control on rates going up, and you will have to explain why, as part of a telecommunications bill that was supposed to reduce rates, you allowed for monopolies, monopolies in 97 percent of the communities in America to once again go back to their old practices.

Mr. BLILEY. Mr. Chairman, I yield myself 1 minute.

The Markey amendment, Mr. Chairman, tracks the disastrous course of the 1992 cable law by requiring the cable companies to jump through regulatory hoops to escape the burdensome rules imposed on them after the law was enacted.

The Markey amendment fails to take into account the changing competitive video marketplace that has evolved in the last 2 years. Direct broadcast satellite has taken off, particularly in rural areas, and there will be nearly 5-million subscribers by the end of the year. With the equipment costs now being folded into the monthly charge for this service, this competitive technology will explode in the next few years.

The telephone industry will be permitted to offer cable on the date of enactment and will provide formidable competition immediately. There are numerous market and technical trials going on now to ramp up to that competition.

The Markey amendment turns back the clock. It seeks to continue the government regulation and micromanagement that has unfairly burdened the industry over the past several years.

Vote "no" on Markey and duplicate the Senate, they overwhelmingly voted it down over there.

Mr. MARKEY. Mr. Chairman, I yield 1 minute to the gentleman from Tennessee [Mr. CLEMENT].

Mr. CLEMENT. Mr. Chairman, it's Christmas in August in Washington. On the surface, the Communications Act of 1995 looks like a Christmas gift to the people and the communications industries. You've heard the buzz words: competition, lower rates, and more choices. But a closer look reveals another story.

While the cable provisions in the bill will give a sweet gift to the cable industry, the American consumer, and especially those in rural America, will wake up on Christmas morning to nothing more than less competition, higher cable rates, and less choice.

The bill as it stands immediately deregulates rate controls on small cable systems—those which serve an average of almost 30 percent of cable subscribers in America and account for at least 70 percent of all cable systems. This bill discourages competition in these markets because it deregulates these cable companies regardless of

[Roll No. 630]

AYES—151

Abercrombie
Ackerman
Barcia
Barrett (WI)
Becerra
Beilenson
Bentsen
Bereuter
Berman
Bono
Borski
Brown (CA)
Bryant (TX)
Bunn
Canady
Cardin
Chabot
Chapman
Clyburn
Coleman
Collins (IL)
Collins (MI)
Conyers
Cooley
Costello
Coyne
Cremeans
Cunningham
Danner
DeFazio
DeLauro
Dellums
Dixon
Doggett
Durbin
Edwards
Evans
Farr
Fawell
Fazio
Filner
Flake
Foglietta
Ford
Frost
Furse
Gejdenson
Gekas
Gephardt
Gibbons
Gonzalez
Goss
Green
Gutierrez
Hall (OH)
Heineman
Hinchey
Hobson
Holden
Hostettler
Hoyer
Hyde
Jackson-Lee
Jacobs
Johnson (SD)
Johnson, E. B.
Johnston
Kanjorski
Kaptur
Kasich
Kildee
Kleczka
Klink
Knollenberg
LaFalce
Lantos
LaTourette
Leach
Levin
Lewis (KY)
Lipinski
Lofgren
Luther
Martinez
Matsui
McCarthy
McCollum
McDermott
McHale
Meyers
Mfume
Miller (CA)
Mineta
Mink
Myers
Nadler
Neumann
Norwood
Oberstar
Obey
Olver
Orton
Owens
Pastor
Payne (NJ)
Pomeroy
Poshard
Quillen
Ramstad
Rangel
Reed
Richardson
Rivers
Rogers
Rose
Roybal-Allard
Rush
Sabo
Sanders
Sawyer
Schiff
Schroeder
Schumer
Scott
Sensenbrenner
Serrano
Skelton
Slaughter
Smith (MI)
Spratt
Stark
Stenholm
Stokes
Studds
Stupak
Thomas
Thornton
Torres
Torricelli
Traficant
Tucker
Velazquez
Vento
Volkmer
Waters
Watt (NC)
Waxman
Whitfield
Woolsey
Wyden
Yates

NOES—271

Allard
Archer
Armey
Bachus
Baesler
Baker (CA)
Baker (LA)
Baldacci
Ballenger
Barr
Barrett (NE)
Bartlett
Barton
Bass
Bevill
Bilbray
Bilirakis
Bliley
Blute
Boehlert
Boehner
Bonilla
Bonior
Boucher
Brewster
Browder
Brown (FL)
Brown (OH)
Brownback
Bryant (TN)
Bunning
Burr
Burton
Buyer
Callahan
Calvert
Camp
Castle
Chambliss
Chenoweth
Christensen
Chrysler
Clay
Clayton
Clement
Clinger
Coble
Coburn
Collins (GA)
Combest
Condit
Cox
Cramer
Crane
Crapo
Cubin
Davis
de la Garza
Deal
DeLay
Deutsch
Diaz-Balart
Dickey
Dicks
Dingell
Dooley
Doolittle
Dornan
Doyle
Dreier
Duncan
Dunn
Ehlers
Ehrlich
Emerson
Engel
English
Ensign
Eshoo
Everett
Ewing
Fattah
Fields (LA)
Fields (TX)
Flanagan
Foley
Forbes
Fowler
Fox
Frank (MA)
Franks (CT)
Franks (NJ)
Frelinghuysen
Frisa
Funderburk
Gallegly
Ganske
Geren
Gilchrest
Gillmor
Gilman
Goodlatte
Goodling
Gordon
Graham
Greenwood
Gunderson
Gutknecht
Hall (TX)
Hamilton
Hancock
Hansen
Harman
Hastert
Hastings (FL)
Hastings (WA)
Hayes
Hayworth
Hefley
Hefner
Herger
Hilleary
Hilliard
Hoekstra
Hoke
Horn
Houghton
Hunter
Inglis
Istook
Jefferson
Johnson (CT)
Johnson, Sam
Jones
Kelly
Kennedy (MA)
Kennedy (RI)
Kennelly
Kim
King
Kingston
Klug
Kolbe
LaHood
Largent
Latham
Laughlin
Lazio
Lewis (CA)
Lewis (GA)
Lightfoot
Lincoln
Linder
Livingston
LoBiondo
Longley
Lowey
Lucas
Maloney
Manton
Manzullo
Markey
Martini
Mascara
McCrery
McDade
McInnis
McIntosh
McKeon
McKinney
McNulty
Meehan
Meek
Menendez
Metcalf
Mica
Miller (FL)
Minge
Molinari
Mollohan
Montgomery
Moorhead
Moran
Morella
Murtha
Myrick
Neal
Nethercutt
Ney
Nussle
Oxley
Packard
Pallone
Parker
Paxon
Payne (VA)
Pelosi
Peterson (FL)
Peterson (MN)
Petri
Pickett
Pombo
Porter
Portman
Pryce
Quinn
Radanovich
Rahall
Regula
Riggs
Roberts
Roemer
Rohrabacher
Ros-Lehtinen
Roth
Roukema
Royce
Salmon
Sanford
Saxton
Schaefer
Seastrand
Shadegg
Shaw
Shays
Shuster
Sisisky
Skaggs
Skeen
Smith (NJ)
Smith (TX)
Smith (WA)
Solomon
Souder
Spence
Stearns
Stockman
Stump
Talent
Tanner
Tate
Tauzin
Taylor (MS)
Taylor (NC)
Tejeda
Thompson
Thornberry
Tiahrt
Torkildsen
Towns
Upton
Visclosky
Vucanovich
Waldholtz
Walker
Walsh
Wamp
Ward
Watts (OK)
Weldon (FL)
Weldon (PA)
Weller
White
Wicker
Wilson
Wise
Wolf
Wynn
Young (FL)
Zeliff
Zimmer

NOT VOTING—12

Andrews
Bateman
Bishop
Hutchinson
McHugh
Moakley
Ortiz
Reynolds
Scarborough
Thurman
Williams
Young (AK)

☐ 1150

So the amendment, as modified, was rejected.

The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. COX OF CALIFORNIA

The CHAIRMAN. The pending business is the demand for a recorded vote on the amendment offered by the gentleman from California [Mr. COX] on which further proceedings were postponed and on which the ayes prevailed by voice vote.

The Clerk will redesignate the amendment.

The Clerk redesignated the amendment.

RECORDED VOTE

The CHAIRMAN. A recorded vote has been demanded.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 420, noes 4, not voting 10, as follows:

[Roll No. 631]

AYES—420

Abercrombie
Ackerman
Allard
Archer
Armey
Bachus
Baesler
Baker (CA)
Baker (LA)
Baldacci
Ballenger
Barcia
Barr
Barrett (NE)
Barrett (WI)
Bartlett
Barton
Bass
Becerra
Beilenson
Bentsen
Bereuter
Berman
Bevill
Bilbray
Bilirakis
Bishop
Bliley
Blute
Boehlert
Boehner
Bonilla
Bonior
Bono
Borski
Boucher
Brewster
Browder
Brown (CA)
Brown (FL)
Brown (OH)
Brownback
Bryant (TN)
Bryant (TX)
Bunn
Bunning
Burr
Burton
Buyer
Callahan
Calvert
Camp
Canady
Cardin
Castle
Chabot
Chambliss
Chapman
Chenoweth
Christensen
Chrysler
Clay
Clayton
Clement
Clinger
Clyburn
Coble
Coburn
Coleman
Collins (GA)
Collins (IL)
Collins (MI)
Combest
Condit
Conyers
Cooley
Costello
Cox
Coyne
Cramer
Crane
Crapo
Cremeans
Cubin
Cunningham
Danner
Davis
de la Garza
Deal
DeFazio
DeLauro
DeLay
Dellums
Deutsch
Diaz-Balart
Dickey
Dicks
Dingell
Dixon
Doggett
Dooley
Doolittle
Dornan
Doyle
Dreier
Duncan
Dunn
Durbin
Edwards
Ehlers
Ehrlich
Emerson
Engel
English
Ensign
Eshoo
Evans
Everett
Ewing
Farr
Fattah
Fawell
Fazio
Fields (LA)
Fields (TX)
Filner
Flake
Flanagan
Foglietta
Foley
Forbes
Ford
Fowler
Fox
Frank (MA)
Franks (CT)
Franks (NJ)
Frelinghuysen
Frisa
Frost
Funderburk
Furse
Gallegly
Ganske
Gejdenson
Gekas
Gephardt
Geren
Gibbons
Gilchrest
Gillmor
Gilman
Gonzalez
Goodlatte
Goodling
Gordon
Goss
Graham
Green
Greenwood
Gunderson
Gutierrez
Gutknecht
Hall (OH)
Hall (TX)
Hamilton
Hancock
Hansen
Harman
Hastert
Hastings (FL)
Hastings (WA)
Hayes
Hayworth
Hefley
Hefner
Heineman
Herger
Hilleary
Hilliard
Hinchey
Hobson
Hoekstra
Hoke
Holden
Horn
Hostettler
Houghton
Hoyer
Hutchinson
Hyde
Inglis
Istook
Jackson-Lee
Jacobs
Jefferson
Johnson (CT)
Johnson (SD)
Johnson, E. B.
Johnson, Sam
Johnston
Jones
Kanjorski
Kaptur
Kasich
Kelly
Kennedy (MA)
Kennedy (RI)
Kennelly
Kildee
Kim
King
Kingston
Kleczka
Klink
Klug
Knollenberg
Kolbe
LaFalce
LaHood
Lantos
Largent
Latham
LaTourette
Laughlin
Lazio
Leach
Levin
Lewis (CA)
Lewis (GA)
Lewis (KY)
Lightfoot
Lincoln
Linder
Lipinski
Livingston
LoBiondo
Lofgren
Longley
Lowey
Lucas
Luther
Maloney
Manton
Manzullo
Markey
Martinez
Martini
Mascara
Matsui
McCarthy
McCollum
McCrery
McDade
McDermott
McHale
McHugh
McInnis
McIntosh
McKeon
McKinney
McNulty
Meehan
Meek
Menendez
Metcalf
Meyers
Mfume
Mica
Miller (CA)
Miller (FL)
Mineta
Minge
Mink
Molinari
Mollohan
Montgomery
Moorhead
Moran
Morella
Murtha
Myers
Myrick
Nadler
Neal
Neumann
Ney
Norwood
Nussle
Oberstar
Obey
Olver
Orton
Owens
Oxley
Packard
Pallone
Parker
Pastor
Paxon
Payne (NJ)
Payne (VA)
Pelosi
Peterson (FL)
Peterson (MN)
Petri
Pickett
Pombo
Pomeroy
Porter
Portman
Poshard
Pryce
Quillen
Quinn
Radanovich
Rahall
Ramstad
Rangel
Reed
Regula

Richardson	Skaggs	Towns
Riggs	Skeen	Traficant
Rivers	Skelton	Tucker
Roberts	Slaughter	Upton
Roemer	Smith (MI)	Velazquez
Rogers	Smith (TX)	Vento
Rohrabacher	Smith (WA)	Visclosky
Ros-Lehtinen	Solomon	Volkmer
Rose	Spence	Vucanovich
Roth	Spratt	Waldholtz
Roukema	Stark	Walker
Roybal-Allard	Stearns	Walsh
Royce	Stenholm	Wamp
Rush	Stockman	Ward
Sabo	Stokes	Waters
Salmon	Studds	Watt (NC)
Sanders	Stump	Watts (OK)
Sanford	Stupak	Waxman
Sawyer	Talent	Weldon (FL)
Saxton	Tanner	Weldon (PA)
Schaefer	Tate	Weller
Schiff	Tauzin	White
Schroeder	Taylor (MS)	Whitfield
Schumer	Taylor (NC)	Wicker
Scott	Tejeda	Wilson
Seastrand	Thomas	Wise
Sensenbrenner	Thompson	Woolsey
Serrano	Thornberry	Wyden
Shadegg	Thornton	Wynn
Shaw	Tiahrt	Yates
Shays	Torkildsen	Young (FL)
Shuster	Torres	Zeliff
Sisisky	Torricelli	Zimmer

NOES—4

Hunter	Souder
Smith (NJ)	Wolf

NOT VOTING—10

Andrews	Ortiz	Williams
Bateman	Reynolds	Young (AK)
Moakley	Scarborough	
Nethercutt	Thurman	

□ 1156

So the amendment was agreed to.

The result of the vote was announced as above recorded.

PERSONAL EXPLANATION

Mr. NETHERCUTT. Mr. Chairman, I was not recorded on rollcall vote No. 631. The RECORD should reflect that I would have voted "aye."

AMENDMENT OFFERED BY MR. MARKEY

Mr. MARKEY. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. MARKEY: Page 150, beginning on line 24, strike paragraph (1) through line 17 on page 151 and insert the following:

"(1) NATIONAL AUDIENCE REACH LIMITATIONS.—The Commission shall prohibit a person or entity from obtaining any license if such license would result in such person or entity directly or indirectly owning, operating, controlling, or having a cognizable interest in, television stations which have an aggregate national audience reach exceeding 35 percent. Within 3 years after such date of enactment, the Commission shall conduct a study on the operation of this paragraph and submit a report to the Congress on the development of competition in the television marketplace and the need for any revisions to or elimination of this paragraph."

Page 150, line 4, strike "(a) AMENDMENT.—".

Page 150, line 9, after "section," insert "and consistent with section 613(a) of this Act,".

Page 154, strike lines 9 and 10.

The CHAIRMAN. Under the rule, the gentleman from Massachusetts [Mr. MARKEY] will be recognized for 15 minutes, and a Member in opposition will be recognized for 15 minutes.

The Chair recognizes the gentleman from Massachusetts [Mr. MARKEY].

Mr. MARKEY. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, the amendment which we are now considering addresses one of the most fundamental changes which has ever been contemplated in the history of our country. The bill, as it is presented to the floor, repeals for all intents and purposes all the cross-ownership rules, all of the ownership limitation rules, which have existed since the 1970's, the 1960's, to protect against single companies being able to control all of the media in individual communities and across the country.

□ 1200

In this bill it is made permissible for one company in your hometown to own the only newspaper, to own the cable system, to own every AM station, to own every FM station, to own the biggest television station and to own the biggest independent station, all in one community. That is too much media concentration for any one company to have in any city in the United States.

This amendment deals with a slice of that. The amendment to deal with all of it was not put in order by the Committee on Rules when it was requested as an amendment, but it does deal with a part of it. It would put a limitation on how many television stations, CBS, ABC, NBC, and Fox could own across our country, how many local TV stations, and whether or not in partnership with cable companies individual TV stations being owned by cable companies at the local level could partner to create absolutely impossible obstacles for the other local television broadcasters to overcome.

Who do we have supporting our amendment? We have just about every local CBS, ABC, and NBC affiliate in the United States that supports this amendment. We do not have ABC, CBS, and NBC in New York because they want to gobble up all the rest of America. This would be unhealthy, it would run contrary to American traditons of localism and diversity that have many voices, especially those at the local level that can serve as well as a national voice but with a balance.

Vote for the Markey amendment to keep limits on whether or not the national networks can gobble up the whole rest of the country and whether or not in individual cities and towns cable companies can purchase the biggest TV station or the biggest TV station can purchase the cable company and create an absolute block on other stations having the same access to viewers, having the same ability to get their point of view out as does that cable broadcasting combination in your hometown.

Mr. Chairman, I reserve the balance of my time.

Mr. BLILEY. Mr. Chairman, I yield myself 2 minutes.

(Mr. BLILEY asked and was given permission to revise and extend his remarks.)

Mr. BLILEY. Mr. Chairman, I rise in opposition to the amendment of the gentleman from Massachusetts [Mr. MARKEY] restricting the national ownership limitations on television stations to 35 percent of an aggregate national audience reach.

The gentleman's amendment would limit the ability of broadcast stations to compete effectively in a multichannel environment. Indeed, the Federal Communications Commission on this issue in its further notice of proposed rulemaking issued this year, the FCC noted that group ownership does not, I repeat does not result in a decrease in viewpoint diversity. According to the FCC the evidence suggests the opposite.

Mr. Chairman, I ask the Members to look at their own broadcast situation. Who owns your local ABC, NBC, CBS affiliate? Is it local? I venture to say that 90 percent of us the answer is no, they are owned by somebody else out of town. So it is a nonissue.

As to what the gentleman says about cross ownership and saturation, I invite the Members to read page 153 of the bill. The commission may deny the application if the commission determines that the combination of such station and more than one other nonbroadcast media of mass communication and would result in a undue concentration of media voices in the respective local market. This amendment is not needed. Vote it down.

Mr. Chairman, I rise in opposition to Mr. MARKEY'S amendment restricting the national ownership limitations on telephone stations to 35 percent of an aggregate national audience reach. Mr. MARKEY'S amendment would limit the ability of broadcast stations to compete effectively in a multichannel environment. Mr. MARKKEY'S amendment would limit the ability of broadcast stations to compete effectively in the multichannel environment. Mr. MARKEY defends the retention of an arbitrary limitation in the name of localism and diversity. The evidence, however, does not support his claim.

I would simply refer Mr. MARKEY to the findings of the Federal Communications Commission on this issue in its further notice of proposed rulemaking issued this year. The FCC noted that group ownership does not result in a decrease in viewpoint diversity. According to the FCC, the evidence suggests the opposite, that group television station owners generally allow local managers to make editorial and reporting decisions autonomously. Contrary to Mr. MARKEY'S suggestion that relaxation of these limits are anticompetitive, the FCC has found that in today's markets, common ownership of larger numbers of broadcast stations nationwide, or of more than one station in the market, will permit exploitation of economies of scale and reduce costs and permit improved service.

Finally, I would note that in its notice of proposed rulemaking, the FCC questioned whether an increase in concentration nationally has any effect on diversity or the local market. Most local stations are not local at all, but are run from headquarters found outside the State in which the TV station is located. Moreover,

EXHIBIT 8

Not Reported in N.Y.S.2d
Not Reported in N.Y.S.2d, 1995 WL 323710 (N.Y.Sup.), 63 USLW 2765, 23 Media L. Rep. 1794
(Cite as: 1995 WL 323710 (N.Y.Sup.))

Supreme Court, Nassau County, New York,
Trial IAS Part 34.
STRATTON OAKMONT, INC. and Daniel Porush,
Plaintiff(s),
v.
PRODIGY SERVICES COMPANY, a Partnership of Joint Venture with IBM Corporation and Sears-Roebuck & Company, "John Doe" and "Mary Doe", Defendant(s).

May 24, 1995.

STUART L. AIN, Justice.

***1** The following papers read on this motion:

Plaintiffs' Notice of Motion & Exhibits	1
Plaintiff's Supporting Exhibits P & Q (filed separately under seal pursuant to a confidentiality agreement)	1A
Plaintiffs' Memo of Law in Support	2
Appendix to Plaintiffs' Memo of Law	3
Defendant's Opposing Affidavit and Exhibits	4
Defendant's Memo of Law in Opposition	5
Reply Affidavit	6
Reply Memo of Law	7

Upon the foregoing papers, it is ordered that this motion by Plaintiffs for partial summary judgment against Defendant PRODIGY SERVICES COMPANY ("PRODIGY") is granted and this Court determines, as a matter of law, the following two disputed issues as follows:

(i) that PRODIGY was a "publisher" of statements concerning Plaintiffs on its "Money Talk" computer bulletin board for the purposes of Plaintiffs' libel claims; and,

(ii) that Charles Epstein, the Board Leader of PRODIGY's "Money Talk" computer bulletin board, acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint.

At issue in this case are statements about Plaintiffs made by an unidentified bulletin board user or "poster" on PRODIGY's "Money Talk" computer bulletin board on October 23rd and 25th of 1994. These statements included the following:

(a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.;

(b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud";

(c) PORUSH was "soon to be proven criminal"; and,

(d) STRATTON was a "cult of brokers who either lie for a living or get fired."

Plaintiffs commenced this action against PRODIGY, the owner and operator of the computer network on which the statements appeared, and the unidentified party who posted the aforementioned statements. The second amended complaint alleges ten (10) causes of action, including claims for *per se* libel. On this motion, "in order to materially advance the outcome of this litigation" (Zamansky affidavit, par. 4), Plaintiffs seek partial summary judgment on two issues, namely:

(1) whether PRODIGY may be considered a "publisher" of the aforementioned statements; and,

(2) whether Epstein, the Board Leader for the computer bulletin board on which the statements were posted, acted

with actual and apparent authority as PRODIGY's "agent" for the purposes of the claims in this action.

By way of background, it is undisputed that PRODIGY's computer network has at least two million subscribers who communicate with each other and with the general subscriber population on PRODIGY's bulletin boards. "Money Talk" the board on which the aforementioned statements appeared, is allegedly the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments and other financial matters. PRODIGY contracts with bulletin Board Leaders, who, among other things, participate in board discussions and undertake promotional efforts to encourage usage and increase users. The Board Leader for "Money Talk" at the time the alleged libelous statements were posted was Charles Epstein.

***2** PRODIGY commenced operations in 1990. Plaintiffs base their claim that PRODIGY is a publisher in large measure on PRODIGY's stated policy, starting in 1990, that it was a family oriented computer network. In various national newspaper articles written by Geoffrey Moore, PRODIGY's Director of Market Programs and Communications, PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper. (see, Exhibits I and J to Plaintiffs' moving papers.) In one article PRODIGY stated:

> "We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate."

(Exhibit J.)

Plaintiffs characterize the aforementioned articles by PRODIGY as admissions (see, *Dattner v. Pokoik,* 81 A.D.2d 572, app. dsmd. 54 N.Y.2d 750) and argue that, together with certain documentation and deposition testimony, these articles establish Plaintiffs' *prima facie* case. In opposition, PRODIGY insists that its policies have changed and evolved since 1990 and that the latest article on the subject, dated February, 1993, did not reflect PRODIGY's policies in October, 1994, when the allegedly libelous statements were posted. Although the eighteen month lapse of time between the last article and the aforementioned statements is not insignificant, and the Court is wary of interpreting statements and admissions out of context, these considerations go solely to the weight of this evidence.

Plaintiffs further rely upon the following additional evidence in support of their claim that PRODIGY is a publisher:

(A) promulgation of "content guidelines" (the "Guidelines" found at Plaintiffs' Exhibit F) in which, *inter alia,* users are requested to refrain from posting notes that are "insulting" and are advised that "notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to PRODIGY's attention"; the Guidelines all expressly state that although "Prodigy is committed to open debate and discussion on the bulletin boards, ... this doesn't mean that 'anything goes' ";

(B) use of a software screening program which automatically prescreens all bulletin board postings for offensive language;

(C) the use of Board Leaders such as Epstein whose duties include enforcement of the Guidelines, according to Jennifer Ambrozek, the Manager of Prodigy's bulletin boards and the person at PRODIGY responsible for supervising the Board Leaders (see Plaintiffs' Exhibit R, Ambrozek deposition transcript, at p. 191); and

***3** (D) testimony by Epstein as to a tool for Board Leaders known as an "emergency delete function" pursuant to which a Board Leader could remove a note and send a previously prepared message of explanation "ranging from solicitation, bad advice, insulting, wrong topic, off topic, bad taste, etcetera." (Epstein deposition Transcript, p. 52).

A finding that PRODIGY is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it. [*Cianci v. New Times Pub. Co.,* 639 F.2d 54, 61; Restatement, Second Torts § 578 (1977).] In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. [*Cubby Inc. v. CompuServe Inc.,* 776 F.Supp. 135, 139; see also *Auvil v. CBS 60 Minutes,* 800 F.Supp. 928, 932.] A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault. [*Auvil, supra;* see also *Misut v. Mooney,* 124 Misc.2d 95 (claims against printer of weekly newspaper containing allegedly libelous articles dismissed in absence of any evidence that printer knew or had reason to know of the allegedly libelous nature of the articles). However, a newspaper, for

example, is more than a passive receptacle or conduit for news, comment and advertising. [*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258.] The choice of material to go into a newspaper and the decisions made as to the content of the paper constitute the exercise of editorial control and judgment (*Id.*), and with this editorial control comes increased liability. (See *Cubby, supra.*) In short, the critical issue to be determined by this Court is whether the foregoing evidence establishes a *prima facie* case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.

Again, PRODIGY insists that its former policy of manually reviewing all messages prior to posting was changed "long before the messages complained of by Plaintiffs were posted". (Schneck affidavit, par. 4.) However, no documentation or detailed explanation of such a change, and the dissemination of news of such a change, has been submitted. In addition, PRODIGY argues that in terms of sheer volume--currently 60,000 messages a day are posted on PRODIGY bulletin boards--manual review of messages is not feasible. While PRODIGY admits that Board Leaders may remove messages that violate its Guidelines, it claims in conclusory manner that Board Leaders do not function as "editors". Furthermore, PRODIGY argues generally that this Court should not decide issues that can directly impact this developing communications medium without the benefit of a full record, although it fails to describe what further facts remain to be developed on this issue of whether it is a publisher.

***4** As for legal authority, PRODIGY relies on the *Cubby* case, *supra.* There the defendant CompuServe was a computer network providing subscribers with computer related services or forums including an online general information service or "electronic library". One of the publications available on the Journalism Forum carried defamatory statements about the Plaintiff, an electronic newsletter. Interestingly, an independent entity named Cameron Communications, Inc. ("CCI") had "contracted to manage, review, create, delete, edit and otherwise control the contents of the Journalism Forum in accordance with editorial and technical standards and conventions of style as established by CompuServe". The Court noted that CompuServe had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe's computer banks. Consequently, the Court found that CompuServe's product was, "in essence, an electronic for-profit library" that carried a vast number of publications, and that CompuServe had "little or no editorial control" over the contents of those publications. In granting CompuServe's motion for summary judgment, the *Cubby* court held:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.
> (776 F.Supp. 135, 140.)

The key distinction between CompuServe and PRODIGY is two fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content (see, *Miami Herald Publishing Co. v. Tornillo, supra*), and such decisions constitute editorial control. (*Id.*) That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.

An interesting comparison may be found in *Auvil v. CBS 60 Minutes (supra),* where apple growers sued a television network and local affiliates because of an allegedly defamatory investigative report generated by the network and broadcast by the affiliates. The record established that the affiliates exercised no editorial control over the broadcast although they had the power to do so by virtue of their contract with CBS, they had the opportunity to do so by virtue of a three hour hiatus for the west coast time differential, they had the technical capability to do so, and they in fact had occasionally censored network programming in the past, albeit never in connection with "60 Minutes". The *Auvil* court found:

> ***5** It is argued that these features, coupled with the power to censor, triggered the duty to censor. That is a leap which the Court is not prepared to join in.
>
> * * *
>
> ... plaintiffs' construction would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot

discretionary calls or face $75 million dollar lawsuits at every turn. That is not realistic.

* * *

More than merely unrealistic in economic terms, it is difficult to imagine a scenario more chilling on the media's right of expression and the public's right to know.

(800 F.Supp. at 931-932.) Consequently, the court dismissed all claims against the affiliates on the basis of "conduit liability", which could not be established therein absent fault, which was not shown.

In contrast, here PRODIGY has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed, it could be said that PRODIGY's current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what PRODIGY wants, but for the legal liability that attaches to such censorship.

Let it be clear that this Court is in full agreement with *Cubby* and *Auvil.* Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. [See Edward V. DiLello, *Functional Equivalency and Its application to Freedom of Speech on Computer Bulletin Boards,* 26 Colum.J.Law & Soc.Probs. 199, 210-211 (1993).] It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.

PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice. For the record, the fear that this Court's finding of publisher status for PRODIGY will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure. [See, Eric Schlachter, *Cyberspace, The Free Market and The Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions,* 16 Hastings Communication and Entertainment L.J., 87, 138- 139.] Presumably PRODIGY's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a market it perceived to exist consisting of users seeking a "family-oriented" computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences. In addition, the Court also notes that the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which are pending in Congress, is enacted. [See, Congressional Quarterly US S 652, Congressional Quarterly US HR 1004, and Congressional Quarterly US S 314.]

***6** The Court now turns to the second issue presented here, of whether Epstein was PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint. Agency is a legal relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act. [*Maurillo v. Park Slope U-Haul,* 194 A.D.2d 142; Restatement (Second) of Agency § 1.] The starting point for an agency analysis in this case is the "Bulletin Board Leader Agreement" ("the Agreement" found at Exhibit A to Opposition Affidavit of William C. Schneck) between PRODIGY and Epstein. This Agreement sets forth eleven specific responsibilities expected of a Board Leader including (I) the posting of a minimum of 120 notes on the bulletin board each month; (II) working with member Representatives; (III) providing monthly reports and (IV) following any additional procedures provided by PRODIGY. The Agreement also requires prior PRODIGY approval of all promotional efforts. In addition, the Agreement contains the following language.

Although you will not be a Prodigy representative, your actions as Board Leader will still reflect on Prodigy.

* * *

You will be solely responsible for all of your actions as a Board Leader. While Prodigy will certainly support your actions as a Board Leader as a general matter (so long as they are not in breach of this Agreement), we will not assume any liability for anything you do (or fail to do) as a Board Leader. You hereby indemnify and agree to hold Prodigy harmless from and against all claims cost, liabilities judgments ... arising out of or in connection with anything you do ...

* * *

Being a Board Leader does not make you a Prodigy Services Company employee, representative or agent, and you agree not to claim or suggest that you are one.

Prodigy relies on this language to extricate itself from any alleged agency relationship with Epstein. However, talismanic language does not determine an agency relationship. [*Matter of Shulman Transport Enterprises, Inc.,* 33 B.R. 383, 385, aff'd 744 F2d 293.] The Court must look to the substance of the relationship. (*Id.*) Where one party retains a sufficient degree of direction and control over another, a principal-agent relationship

exists. [*Garcia v. Herald Tribune Fresh Air Fund, Inc.*, 51 Ad2d 897.] In addition, whether one is an independent contractor is not determinative of whether one is an agent. [*Columbia Broadcasting System, Inc. v. Stokely-Van Camp, Inc.*, 522 F2d 369; *Ackert v. Ausman*, 29 Misc2d 962, aff'd 20 AD2d 850.]

As to the substance of the relationship between PRODIGY and its Board Leaders, PRODIGY Security Officer McDowell testified that Board Leaders are required to follow the Guidelines and that PRODIGY performs a "management function" with respect to the activities of the Board Leaders. (McDowell deposition transcript p. 78, found at Exhibit S to the moving papers.) Furthermore, Epstein's Supervisor, Jennifer Ambrozek, testified that PRODIGY reviews the Guidelines with Board Leaders, who are then required to enforce the Guidelines. (Ambrozek deposition transcript pp. 23 and 191, found at Exhibit R to the moving papers.) Board Leaders are also given a 28 page "Bulletin Board Leader Survival Guide" (Exhibit O to the moving papers), dated October 1994, wherein many technical terms and procedures are explained, and the following caveat is given:

> *7 IF YOU DON'T KNOW WHAT SOMETHING IS OR WHAT IT'S SUPPOSED TO DO, LEAVE IT ALONE UNTIL YOU CAN ASK.

Where the facts are not disputed the question of agency should be resolved by the court. [*Plymouth Rock Fuel Corp. v. Leucadia, Inc.*, 100 A.D.2d 842.] This is such a case. The aforementioned testimony by PRODIGY employees and documentation generated by PRODIGY, together with the Guidelines themselves, cannot be disputed by PRODIGY and leave no doubt that at least for the limited purpose of monitoring and editing the "Money Talk" computer bulletin Board, PRODIGY directed and controlled Epstein's actions. In reaching this conclusion the Court has taken care not to rely on any testimony by Epstein, inasmuch as it is the conduct of the principal which must create the impression of authority, not the conduct of the agent. [See, *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 473.] Based on the foregoing, the Court holds that Epstein acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint.

Not Reported in N.Y.S.2d, 1995 WL 323710 (N.Y.Sup.), 63 USLW 2765, 23 Media L. Rep. 1794

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EXHIBIT 9

107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–449

DOT KIDS IMPLEMENTATION AND EFFICIENCY ACT OF 2002

MAY 8, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TAUZIN, from the Committee on Energy and Commerce, submitted the following

REPORT

[To accompany H.R. 3833]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3833) to facilitate the creation of a new, second-level Internet domain within the United States country code domain that will be a haven for material that promotes positive experiences for children and families using the Internet, provides a safe online environment for children, and helps to prevent children from being exposed to harmful material on the Internet, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

99–006

Section 2. Findings and purposes

Section 2 makes certain Congressional findings and describes the purposes of the bill.

Section 3. NTIA authority

Section 3 amends the National Telecommunications and Information Administration Organization Act (47 U.S.C. §901 et seq.) (NTIA Act) to specifically provide NTIA with responsibility to establish and oversee the ".kids.us" domain consistent with the requirements of the new section 157 of the NTIA Act, as added by this bill.

Section 4. Child-friendly second-level internet domain

Section 4 of the bill adds a new section 157 to the NTIA Organization Act. New section 157(a) mandates NTIA to require the registry, or operator, selected to operate and maintain the United States country code (".us") to establish, operate, and maintain a second-level domain (".kids.us" or "new domain") that provides access only to material that is "suitable for minors" and "not harmful to minors."

New section 157(b) provides that the NTIA shall not renew the ".us" registry contract with the initial registry unless the initial registry enters into an agreement with the NTIA, within 90 days of enactment of the bill, to provide the ".kids.us" domain consistent with the duties in new section 157(b)(1)–(12). Additionally, new section 157(b) makes the same requirement of any successor registry within 90 days of selection by NTIA. Under the terms of the current contract between NeuStar and the NTIA, after the four-year term of the contract, the NTIA has the sole discretion to exercise two one-year options. These duties outlined in new section 157(b)(1)–(12) are not requirements the registry must perform pursuant to the terms of the contract. However, should NeuStar, or any successor registry, opt not to enter into an agreement with the NTIA to undertake the duties outlined in new section 157(b)(1)–(12), then the NTIA shall exercise its existing contractual right not to renew the registry of the ".us" contract for the two one-year options.

Pursuant to new section 157(b)(1), the registry must draft written content standards for the new domain (NTIA has no authority to establish such standards). These content standards must be consistent with the "suitable for minors" and "not harmful to minors" standards in the bill. Under new section 157(b)(2), the registry must enter into written agreements with registrars to ensure that use of the new domain is in accordance with the standards of the registry and require registrars to enter into written agreements with registrants to use the domain in accordance with the standards of the registry. New section 157(b)(3) requires agreements with registrars that require them to contractually obligate registrants to use the new domain in accordance with the standards of the registry. New section 157(b)(4) requires the registry to create rules for oversight and enforcement that minimize the chance the new domain will allow access to material that is not in accordance with the standards of the registry. The Committee understands that no system can guarantee 100% effectiveness in finding and keeping inappropriate images from the eyes of children. Even the

technology industry has found it difficult to keep pace with Internet hackers. However, this bill is drafted to encourage the maximum effectiveness that the Committee acknowledges is significantly better than the current Internet environment.

Under new section 157(b)(5), the registry must create a process for removing content not in accordance with the standards of the registry. New section 157(b)(6) provides that the registry must create a process allowing prompt, expeditious and impartial dispute resolution for material excluded from the new domain. While this process need not provide a formal and protracted hearing, it should accord registrants with the basic protections of due process. Under new section 157(b)(7), the registry must provide for continuous and uninterrupted service of the new domain during any transition to a new registry.

New section 157(b)(8) requires the registry to promote the accuracy of the registrant contact data maintained by the registrars so it may locate registrants who act contrary to the standards of the registry or in violation of the law. The Committee recognizes the so-called "who-is" database contact information may assist individuals and companies to locate website owners. With respect to a subdomain specifically dedicated to children, however, where children themselves may have individual websites, the public listing of home address, phone, and contact information may be information that many parents elect or desire not to publicly post in order to protect the safety of their children. That is why an increased emphasis on non-public contact data held by registrars is of particular importance and usefulness. New section 157(b)(9) mandates that the registry must be operational within one year of enactment. "Operational" is intended to mean that the new domain is available to, and accessible by, the public.

Pursuant to new section 157(b)(10), the registry must enter into written agreements with registrars that require registrars to contract with registrants to prohibit two-way and multiuser interactive services, unless the registrant can certify that such services can be offered in compliance with the content standards created by the registry and will not compromise the safety or security of the minors. The Committee is aware of some organizations, such as the I–SAFE Foundation, that are working on models to make such interactive services safe for children. This language is intended to cover communications with an upstream and downstream transmission, such as chat, instant messaging and e-mail. Since most child predators utilize these kind of communication mediums to lure or harass children, special care should be taken in the new domain to protect minors from the dangers inherent in such interactive communications. This language is not meant to prohibit such things as interactive games, assuming there is no transfer of personally identifiable information or the users do not have the ability to pursue or stalk children. Although physical harm can occur when a predator uses the Internet to meet a child, emotional and psychological harm can also result from harassing and inappropriate communications. The language in new section 157(b)(10) is intended to cover both such communications. Moreover, any communications on the new domain, whether it be static content, advertising, or interactive communications, must also be consistent

with the Child Online Privacy Protection Act (15 U.S.C. § 6501 et seq.) and other applicable law.

Under new section 157(b)(11) the registry must enter into agreements with registrars that require registrars to contract with registrants to prohibit hyperlinks that take users of ".kids.us" outside of ".kids.us" domain. The new domain is meant to be a safe space for children and such safety cannot be assured if only a few clicks of the mouse can transport minors to material that may not be "suitable for minors" or may be "harmful to minors." Finally, new section 157(b)(12) allows the NTIA to take any other action that may be necessary to establish, operate or maintain the new domain consistent with the bill.

In order to provide incentives for rigorous and thorough content control, new section 157(c) provides limited liability protection for the actions taken by certain entities on the ".kids.us" domain. This provision utilizes existing section 230(c) of the Communications Act of 1934 (47 U.S.C. § 230(c)), otherwise known as the "Good Samaritan" protections. New section 157(c) expands the definition of "interactive computer services" in section 230(c) to include those functions undertaken by the ".kids.us" registry, registrars, and any company contracted with the registry, such as independent monitoring companies, only to the extent that such entities carry out the functions under this bill. These entities will have the current protections afforded to Internet Service Providers (ISPs) for any actions voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. Additionally under section 230(c), neither the ".kids.us" registry, registrars, nor parties contracted to operate the new domain, shall be treated as the publisher or speaker of any information provided by another information content provider.

As noted in new section 157(c)(2), nothing in this section shall be construed to affect the application of any other provision of title II of the Communications Act of 1934 (47 U.S.C. § 201 et seq.) to the parties protected in this bill. The section 230(c) protections will continue to apply to entities that clearly fall within the definition of "interactive computer service" in section 230(f)(2), such as the entity hosting the third party's web site. New section 157(c) is only intended to clarify that the new domain registry, registrars, and entities under contract to the registry would also fall within the scope of section 230(c) protections.

New section 157(c) is intended to shield the ".kids.us" registry, registrars, and parties who contract with the registry, from liability based on self-policing efforts to intercept and take down material that is not "suitable for minors" or is "harmful to minors." The Committee notes that ISPs have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe* v. *America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co.* v. *America Online,* 206 F.3d 980 (2000); *Zeran* v. *America Online*, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by H.R. 3833.

New section 157(d) requires the NTIA to carry out a program to publicize the availability of the ".kids.us" domain and to educate parents about filtering and blocking technologies that can be used in conjunction with the new domain to provide a safe environment for children on the Internet. The Committee expects that the NTIA will fulfill this obligation by advertising the new domain on its website, incorporating the availability of the website into speeches, and drafting and distributing pamphlets to schools, libraries, and parents.

New section 157(e) requires the new domain registry to, within 30 days of the new domain becoming publicly accessible, consult with appropriate federal government agencies regarding steps that can be taken to prevent minors from being targeted for predatory behavior, exploitation, or other illegal actions. The Committee expects the new domain registry will also communicate with children's organizations, including the National Center for Missing and Exploited Children, among others, to make the new domain as safe as possible for minors. Under new section 157(e), the new domain registry must take such actions as may be necessary to prevent the targeting of minors for illegal purposes.

New section 157(f) requires the new domain registry to prepare an annual compliance report, detailing the registry's monitoring and enforcement procedures, to be submitted to the Committee on Energy and Commerce of the U.S. House of Representatives and the Committee on Commerce, Science, and Transportation of the U.S. Senate.

New section 157(g)(1)(A) deals with consumer acceptance of the new domain. The Committee expects that the ".us" country code will be remarkably profitable, and also expects the ".kids.us" domain to be successful. The Committee recognizes, however, that the ".kids.us" domain could pose a potential financial drain on the registry should consumer acceptance be slow. If the new domain registry can make a good faith showing to the NTIA that it suffers "extreme financial hardship" in the operation of the new domain, the registry may relinquish the right to operate and maintain the new domain. Should the ".kids.us" registry elect to relinquish the new domain, the NTIA shall select a subcontractor to operate and maintain the new domain under a competitive bidding process. For purposes of this bill, a subcontractor of the ".kids.us" domain will have all of the rights and duties of the registry under the bill, but shall not include the technical maintenance of the new domain. "Extreme financial hardship" is defined in new section 157(g)(1)(B) as the costs of operating and maintaining the new domain exceeding the revenues generated by registrants by more than 25 percent for a period of more than six (6) consecutive quarters, following the first year of operation.

New section 157(g)(2) sets forth the competitive bid process for the NTIA's selection of a subcontractor for the new domain. The selection process shall begin and end not later than 120 days after the new domain registry elects to relinquish the ".kids.us" domain for "extreme financial hardship." The NTIA must provide adequate notice to prospective applicants of the opportunity to submit an application and the criteria used to select the subcontractor. The selection criteria must be written and objective and must ensure that the new domain is operated and maintained under the require-

ments of new section 157(b) and that the subcontractor selected is the most capable and qualified to operate and maintain the new domain. Not more than 60 days after the conclusion of the period for submission of applications, the NTIA must review and apply the selection criteria to each application and, based on that criteria, select an application and award to the applicant a subcontract to operate and maintain the new domain. If the NTIA fails to find a subcontractor pursuant to this process, the NTIA shall permit the registry to cease operation of the ".kids.us" domain.

New section 157(h) allows the NTIA, upon its own review or a good faith petition by the registry, to suspend operation of the ".kids.us" domain if the new domain cannot be operated as it was intended. The Committee intends the new domain to be a safe space on the Internet for children. However, there is no guarantee that ".kids.us" will prevent all inappropriate and harmful content. Although some seepage of inappropriate content into the new domain may be inevitable, H.R. 3833 is designed to ensure that such harmful content is removed as soon as practicable. This provision is not applicable for such occasional occurrences. New section 157(h) is designed to suspend the operation of the new domain should it become so populated with harmful and inappropriate content that it no longer is a place suitable for children under the age of 13. The Committee expects this to be used sparingly, as an effort of last resort.

New section 157(i) contains the definitions for the bill. New section 157(i)(1) defines "harmful to minors" as material that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, that it is designed to appeal to, or is designed to pander to, the prurient interest; (B) the material depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (c) taken as a whole, the material lacks serious, literary, artistic, political, or scientific value for minors.

This definition of "harmful to minors" was taken from the "harmful to minors" test set forth by the U.S. Supreme Court in *Ginsberg* v. *New York,* 390 U.S. 629 (1968), as modified by *Miller* v. *California,* 413 U.S. 15 (1973) in identifying "patently offensive" material. H.R. 3833 mirrors many of the state laws already in place that have been upheld by the Supreme Court. The Committee intends for the definition of harmful to minors to parallel the *Ginsberg* and *Miller* definitions of obscenity and harmful to minors, as those definitions were later refined in *Smith* v. *U.S.,* 431 U.S. 291 (1977) and *Pope* v. *Illinois,* 481 U.S. 497 (1987).

The Committee further recognizes that the applicability of community standards in the context of the World Wide Web is difficult. However, it is an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is inappropriate for children under 13 years of age.

New section 157(i)(2) defines "minor" as any person under 13 years of age.

New section 157(i)(3) defines "suitable for minors" as material that (A) is not psychologically or intellectually inappropriate for mi-

nors, and (B) serves (i) the educational, informational, intellectual, or cognitive needs of minors; or (ii) the social, emotional, or entertainment needs of minors. This definition is a combination of language from the Supreme Court case of *Board of Education* v. *Pico,* 457 U.S. 853 (1982) and the Children's Television Act of 1990 (47 U.S.C. § 303 et seq.) and its regulations (47 CFR part 73.671). The Committee believes that this definition of "suitable for minors" is broad enough to include programming that is healthy for children and is attractive to children. Moreover, this definition is narrowly tailored to preclude Constitutional vagueness concerns.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION ORGANIZATION ACT

* * * * * * *

TITLE I—NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

PART A—ORGANIZATION AND FUNCTIONS

* * * * * * *

SEC. 103. ESTABLISHMENT; ASSIGNED FUNCTIONS.

(a) * * *

(b) ASSIGNED FUNCTIONS.—

(1) * * *

* * * * * * *

(3) ADDITIONAL COMMUNICATIONS AND INFORMATION FUNCTIONS.—In addition to the functions described in paragraph (2), the Secretary under paragraph (1)—

(A) may assign to the NTIA the performance of functions under section 504(a) of the Communications Satellite Act of 1962 (47 U.S.C. 753(a)); [and]

(B) shall assign to the NTIA the administration of the Public Telecommunications Facilities Program under sections 390 through 393 of the Communications Act of 1934 (47 U.S.C. 390–393), and the National Endowment for Children's Educational Television under section 394 of the Communications Act of 1934 (47 U.S.C. 394)[.]; *and*

(C) shall assign to the NTIA responsibility for providing for the establishment, and overseeing operation, of a second-level Internet domain within the United States country code domain in accordance with section 157.

* * * * * * *

EXHIBIT 10

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Charles R. Norgle	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 6018	DATE	9/24/2004
CASE TITLE	GEORGE S. MAY INTERNATIONAL vs. XCENTRIC VENTURES, LLC		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Plaintiff's motion for a temporary restraining order is granted. Status hearing set for October 8, 2004 at 9:30 a.m.

(11) ■ [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.		number of notices
	No notices required.		SEP 27 2004
	Notices mailed by judge's staff.		date docketed
	Notified counsel by telephone.		
✓	Docketing to mail notices.		docketing deputy initials
	Mail AO 450 form.		
	Copy to judge/magistrate judge.		date mailed notice
EF	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials

Document Number 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE S. MAY INTERNATIONAL COMPANY,	)	04C 6018
Plaintiff,	)	DOCKETED
-vs-	)	Case Number SEP 27 2004
	)	Judge JUDGE NORGLE
XCENTRIC VENTURES, LLC, RIP-OFF REPORT.COM BADBUSINESSBUREAU.COM, ED MAGEDSON, VARIOUS JOHN DOES, JANE DOES AND ABC COMPANIES,	)	MAGISTRATE JUDGE MASON
Defendants.	)	

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT BE ENTERED (PROPOSED)

THIS CAUSE comes before the Court upon Plaintiff, George S. May International Company's ("George S. May's") Motion for a Temporary Restraining Order against Defendants Xcentric Ventures, LLC, Rip-off Report.com, Badbusinessbureau.com, Ed Magedson, Various John Does, Jane Does and ABC Companies ("Defendants").

George S. May's motion is supported by its Verified Complaint, Memorandum of Law, the Declaration of Charles Black, and the Exhibits annexed thereto.

This Court having given full consideration to George S. May's papers submitted and the relevant authorities, and having heard the arguments of counsel, in accordance with Federal Rule of Civil Procedure 65(b).

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. George S. May's Complaint asserts claims for false or misleading description and representation under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); defamation

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and trade libel under Illinois Common law, Illinois Unfair and Deceptive Trade Practices under 815 ILCS § 505/1-12 and Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/1-7.

2. This court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1332 and 1338 and the principles of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

3. This court has personal jurisdiction over Defendants by virtue of its ownership of and operation of commercial Internet Website in this District.

4. George S. May is a business management consulting firm.

5. Defendants own and/or operate two Internet Websites, www.ripoffreport.com and www.badbusinessbureau.com (the "Sites") which post materials written about various businesses. On and through the Sites, Defendants sell books related to "getting even" with companies.

6. Defendants are currently posting content on the Sites that contains false and deceptively misleading statements concerning George S. May, its owner and its business. George S. May has previously asked Defendants to take down such false content without success.

7. Based on the Black Declaration submitted with George S. May's Motion for a Temporary Restraining Order, it appears that the false statements appearing on the Sites are causing George S. May irreparable harm.

8. George S. May has demonstrated that (a) it is and will continue to suffer irreparable injury if the injunction is not issued; (b) it has a strong likelihood of success on the merits of their false description and representation, defamation and related claims; (c) the

balance of hardships favors George S. May; and (d) the public interest would be served by the issuance of the injunction.

IT IS FURTHER ORDERED that:

Defendants be temporarily enjoined from making, hosting or transmitting false or deceptively misleading, descriptions, statements or representations concerning George S. May, its business, owner, officers, employees and/or agents;

AND, it appearing to the Court that Defendants are making, hosting and/or transmitting false or deceptively misleading, descriptions, statements or misrepresentations about George S. May, its business, owner, officers, employees and/or agents and will continue to carry out such acts unless restrained by Order of the Court, it is:

ORDERED that Defendants show cause on the ___th day of _____, 2004 at a.m. or as soon thereafter as counsel may be heard, in Courtroom 10/8/04 9:30, in the United States District Court for the District of Illinois, why an Order pursuant to Federal Rule of Civil Procedure 65, Sections 34 and 43(a) of the Lanham Act and the Illinois Unfair and Deceptive Practices Act and Illinois Uniform Deceptive Trade Practices Act, should not be entered granting George S. May a preliminary injunction that would further restrain Defendants from committing the acts set forth above; and it is further

ORDERED, that pending the hearing on George S. May's application for a preliminary injunction, Defendants, its officers, agents, servants, employees, attorneys, and any and all persons acting in active concert or participation with it or having knowledge of this Order by personal service or otherwise (including any and all internet service providers served with a copy of this Order) be, and they are, hereby temporarily restrained from committing any of the acts set forth above; and it is further

ORDERED, that George S. May shall maintain a corporate surety bond or company or attorney check in the amount of One Thousand Dollars ($1,000) as security, determined adequate for the payment of such damages as any person may be entitled to recover as a result of the entry of a wrongful restraint hereunder; and it is further

ORDERED, that the Temporary Restraining Order shall remain in effect until the date of the hearing on the order to show cause set forth above, or such further dates as set by the Court, unless Defendants stipulate, or have not objected to the preliminary injunction; and it is

ORDERED, that George S. May's answering papers, if any, shall be filed with the Clerk of this Court and served upon the attorneys for George S. May by delivering copies thereof to the offices of Seyfarth Shaw LLP, 55 East Monroe, Suite 4200, Chicago, Illinois 60603, Attention: Bart A. Lazar, before __:00 p.m. on _____, 2004. Any reply shall be filed and served by George S. May at the hearing;

AND it is finally ordered that the Clerk of the Court may issue summons in the name of "John Doe", "Jane Doe" and/or "ABC Companies".

IT IS HEREBY ORDERED.

Date: September 24, 2004

Time: 10:55 a.m

Charles R Norgle

UNITED STATES DISTRICT JUDGE