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# Are Contemporary Community Standards No Longer Contemporary

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ARE “CONTEMPORARY COMMUNITY STANDARDS” NO  
LONGER CONTEMPORARY?

I. INTRODUCTION ..... 105

II. OBSCENITY LAW AND ITS HISTORICAL BACKGROUND ..... 107

III. MODERN TEST FOR OBSCENITY ..... 109

    A. *Community: What is it?* ..... 112

IV. INTERNET AND FREE SPEECH ..... 117

    A. *Bulletin Boards Should be Distinguished from  
        the World Wide Web* ..... 118

    B. *Speech Regulation on the Internet* ..... 119

        1. Federal Attempts to Regulate the Internet ..... 119

        2. Challenge to COPA ..... 122

        3. State Internet Laws ..... 123

V. SHOULD THERE BE A NEW STANDARD OR NO STANDARD  
AT ALL? ..... 124

    A. *Community Standards Versus Other Standards* ..... 125

        1. National Standard ..... 125

        2. Virtual Community Standards ..... 125

        3. Is Obscenity Even a Problem? ..... 128

        4. Children and Sexually Explicit Content of  
            the Web ..... 129

        5. Self-regulation of Internet Content is a  
            Constitutional Way to Achieve Legitimate  
            Governmental Purposes ..... 129

VI. CONCLUSION ..... 132

I. INTRODUCTION

To preserve the freedom of the human mind and freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will, and speak as we think, the condition of man will proceed in improvement.<sup>1</sup>

On June 22, 2000, the Third Circuit upheld the preliminary injunction<sup>2</sup> ruling that the Child Online Protection Act (C.O.P.A.), 42 U.S.C. § 231, designed to protect

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<sup>1</sup>Letter from Thomas Jefferson to William Green Mumford (June 18, 1799), The Letters of Thomas Jefferson: 1793-1826, at <http://educ.let.zng.nv~usa/P/tj3/writings/bzf/jefl127.htm> (last visited Sept. 16, 2000).

<sup>2</sup>ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000).

juveniles using the World Wide Web from “harmful material”<sup>3</sup> measured by “contemporary community standards,” violated the First Amendment and thus, was unconstitutional. The federal court’s criticism of the “community standard” test for determining obscenity came very close to declaring that the test was unworkable with respect to the internet and determined that as far as obscenity was concerned, the internet deserved special consideration apart from other media such as books, videos, and broadcast.

This note concurs with the decision reached by the Third Circuit. The federal obscenity law, which incorporated the contemporary community standards test is unconstitutional as applied to expression on the internet because it has chilling effect on the exercise of freedom of speech as guaranteed by the First Amendment to the Constitution of the United States. Such unconstitutionality is demonstrated in situations where people exercising their right to free speech potentially face prosecution under federal obscenity laws where the obscenity test is likely to be based on the community standards of the most stringent contemporary views.<sup>4</sup>

Incoherent guidelines and differing community standards create a chilling effect on the exercise of First Amendment rights because creators of websites risk prosecution in communities that have the most stringent views on obscenity. For example, what happens if a resident of California creates a website displaying sexually explicit materials which conform to the community standards of the community, in which he or she resides and those materials are downloaded by a viewer in Oklahoma? In this situation, even though the host of the website did not intentionally solicit the download in this particular geographical region, the owner of the website may be prosecuted under the federal law and likely convicted if the materials posted on the web are found obscene by the assumingly less liberal community standards of Oklahoma.

At the present time, there is no technology that would allow a website operator to limit the locales in which the sexually explicit material might appear. Therefore, in order to avoid prosecution, a person intending to express himself by publishing sexual materials on the internet must ensure that such materials comply with the most stringent contemporary standards in the country. Web publishers do not have another alternative, because there is no guarantee that somebody from that community will not access the website and by virtue of this possibly subject the owner of the materials to criminal prosecution. As a result, freedom of speech is unreasonably and unconstitutionally restrained.

Because freedom of speech would be restrained by any incorporation of community standards in federal regulation of the internet, the legislature should refrain from adopting a standard that would apply in all internet situations. Rather, with respect to obscenity, the internet should be left to self-regulation.

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<sup>3</sup>“Harmful material” is defined by Child Online Protection Act as any “communication . . . that is obscene or that—the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; depicts, describes, or respects, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and taken as a whole, lacks serious literary, artistic political, or scientific value to minors.” 47 U.S.C. § 231(e)(6) (2000).

<sup>4</sup>*See United States v. Thomas*, 74 F. 3d 701 (6th Cir. 1996).

In reaching this conclusion, Part II provides a brief historical timeline in the development of obscenity law. Part IV of this comment examines the nature of the ever-changing medium of the internet and governmental actions directed at regulating speech expressed through this medium. After that, Part V of the article looks into the soundness of the contemporary community standards aspect of the current obscenity test as it applied to the internet, and also examines alternatives to the test. Finally, the comment concludes that the *Miller v. California* test for obscenity is not workable as applied to the internet and for lack of another constitutionally protective test, this medium should be left free from federal regulation.

## II. OBSCENITY LAW AND ITS HISTORICAL BACKGROUND

Courts and juries have always been puzzled when facing the task of determining what constitutes obscenity. The long process of developing a workable test is still far from the finish line and there is little hope that it will ever be reached. In 1868, the first attempt to establish an obscenity test was authored by Lord Chief Justice Cockburn in *Regina v. Hicklin*.<sup>5</sup> In *Hicklin*, the matter in controversy was a pamphlet describing the immoral character of Catholic priests.<sup>6</sup> The test for obscenity proposed by the Chief Justice was “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”<sup>7</sup> For a number of years, the *Hincklin* test was recognized as the primary standard for obscenity in the United States as well. The test, however, underwent wide criticism,<sup>8</sup> which eventually led to the adoption of a different test in *Roth v. United States*.<sup>9</sup>

The First Amendment to the Constitution prohibits the United States government from limiting the expression of speech.<sup>10</sup> Obscene material is, however, not entitled to constitutional protection under the First Amendment. In *Roth*, the Court stated that the First Amendment was not meant to protect obscene speech since obscene matter had no social value.<sup>11</sup> The new test for obscenity espoused by the *Roth*

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<sup>5</sup>3 L.R.-Q.B. 360 (Eng. 1868).

<sup>6</sup>*Id.* at 362.

<sup>7</sup>*Id.* at 371.

<sup>8</sup>In *United States v. Kennerly*, 209 F. 119, 120-21 (S.D.N.Y. 1913), Judge Learned Hand considered the test as unduly harsh. See also *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1913).

<sup>9</sup>354 U.S. 476, 479 (1957) (upholding a federal statute that made it a crime to mail “[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character”).

<sup>10</sup>“Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

<sup>11</sup>The Court concluded that:

[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First

decision was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to prurient interest.”<sup>12</sup> It was in *Roth* that the Court first defined a “prurient interest” as a “shameful or morbid interest in nudity, sex, or excretion, where the material goes substantially beyond customary limits of candor in description or representation of such matters.”<sup>13</sup> Once again, the Court’s attempt at creating an obscenity test was far from being clear—it was neither possible to ascertain who was an “average person,” or what “contemporary community standards” entailed.

Half a decade later, in *Manual Enterprises, Inc. v. Day*,<sup>14</sup> the patent offensiveness aspect of the modern test for obscenity began to form. In this case, the Supreme Court had to decide whether magazines, which appealed to prurient interests but were not patently offensive could be deemed obscene. The Court held that the magazines were not obscene because they could not be deemed “so offensive on their face as to affront current community standards of decency,” thereby, establishing the patent offensiveness test which has survived to the present day as part of the modern test for obscenity.<sup>15</sup>

The next struggling effort by the Supreme Court to determine whether obscene speech could be meaningfully defined or punished criminally was in *Jacobellis v. Ohio*.<sup>16</sup> In *Jacobellis*, the Court, although reaffirming the test in *Roth*, held that judgment as to whether a particular work was obscene should be made on the basis of a national standard.<sup>17</sup> Justice Brennan, writing for the majority, gave his interpretation of “contemporary community standards” under the *Roth* test. In doing so, he pointed out that a standard representing views of a particular local community, in which a certain matter is deemed obscene, would inevitably deny access to such material in communities where it is considered acceptable.<sup>18</sup>

A different test was outlined in *A Book Named “John Clelands’ Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*.<sup>19</sup> Setting forth the new standard, the Court stated:

as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating

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Amendment is the rejection of obscenity as utterly without redeeming social importance...

354 U.S. at 484.

<sup>12</sup>*Id.* at 489.

<sup>13</sup>*Id.* at 488 (equating the case law meaning of prurient interest with the definition of Model Penal Code § 207.10(2) (Tent Draft No. 6, 1957)).

<sup>14</sup>370 U.S. 478 (1962).

<sup>15</sup>*Id.* at 482.

<sup>16</sup>378 U.S. 184 (1964); *see id.* at 197 (Stewart, J., “I know it when I see it”).

<sup>17</sup>*Id.* at 195 (“It is, after all, a national Constitution we are expounding.”).

<sup>18</sup>*Id.* at 193.

<sup>19</sup>383 U.S. 413 (1966).

to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.<sup>20</sup>

Thus, the Supreme Court established a new tripartite test for obscenity. Applying the newly constructed test, the Court reversed the trial court's ruling that the Clelands' book was obscene.<sup>21</sup> The Court reasoned that the book could not be considered obscene if it possessed some minimal literary, scientific, or artistic value.<sup>22</sup> After the *Memoirs* test, it became a more difficult task for the prosecution to prove that a particular matter was obscene. Thus, the scope of obscenity regulation was limited.<sup>23</sup>

The current obscenity standard was fleshed out by the Supreme Court in the 1973 decision of *Miller v. California*.<sup>24</sup> In *Miller*, the Court was called upon to review the constitutionality of California Penal Code section 311.2(a).<sup>25</sup> Pursuant to the California statute, distribution of matters considered obscene constituted a misdemeanor. Miller, the defendant, was convicted under this statute for making unsolicited mass mailings of "adult" material depicting men and women engaging in a variety of sexual activities.<sup>26</sup> In order to determine whether the material was obscene the Court constructed the following test:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>27</sup>

### III. MODERN TEST FOR OBSCENITY

The new three-prong test for obscenity formulated by the Court in *Miller v. California* was based primarily on the *Roth* test.<sup>28</sup> As the first prong of the new

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<sup>20</sup>*Id.* at 418.

<sup>21</sup>*Id.* at 419.

<sup>22</sup>*Id.*

<sup>23</sup>FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 43 (1973).

<sup>24</sup>413 U.S. 15 (1973).

<sup>25</sup>*Id.* at 16.

<sup>26</sup>*Id.* at 18.

<sup>27</sup>*Id.* at 24.

<sup>28</sup>The primary federal statute incorporating *Miller* test for obscenity is title 18, section 1462 of the United States Code. Under this statute, the following materials were found to be obscene: a magazine named *The Name is Bonnie*, a forty-eight page publication containing forty-five pages of nude photographs of same female model, emphasizing model's sex organs, see *Miller v. United States*, 507 F.2d 1100 (9th Cir. 1974); films depicting adult men and women participating in various sex acts including sexual intercourse with penetration, fellatio, cunnilingus, and masturbation, such acts being committed heterosexually and homosexually between couples and in groups, and which on several occasions showed semen ejaculated and then spread on women's bodies, see *United States v. American Theater Corp.*, 526 F.2d 48

definition of obscenity, the Court retained the prurient interest test articulated in *Roth*. Thus, material would be obscene if an “average person,” would find that the material appeals to the prurient interest.<sup>29</sup> The contemporary community standard first established in *Roth* was reconsidered and modified in *Miller*. In *Miller*, the Court discarded the national standards part of the *Roth* test by giving this provision a more literal meaning.<sup>30</sup> Under the holding in *Miller*, the fact finder has to apply contemporary community standards rather than national ones when determining whether material appeals to the prurient interest.<sup>31</sup> In the opinion of the Court, it was “neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”<sup>32</sup> Moreover, the Court stated that the application of a national community standard would be an endeavor in futility.<sup>33</sup>

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(8th Cir. 1975), film *Pornography: Copenhagen 1970*, and trailers *The Trucker’s Girl*, *Tender is the Flesh*, *Penetrator*, *Midnight Cowgirl*, revealing almost every form of sexual intercourse, both natural and unnatural, in various positions, see *United States v. Strand Art Theatre Corp.*, 325 F. Supp. 256 (W.D. Mont. 1970), pictures portraying ultimate sexual act, both normal and perverted, consisting of representations of masturbation, genital exhibition, and various forms of sexual fetishes, see *United States v. Kelly*, 398 F. Supp. 1374 (E.D. Mont. 1975), *rev’d on other grounds*, 529 F.2d 1365 (8th Cir. 1976), and books comprising short stories explicitly describing various homosexual activities, including fellatio and sodomy, between men and boys and photographs showing completely nude boys with their genitals exposed, see *United States v. Brown*, 328 F. Supp. 196 (E.D. Va. 1971).

In contrast, the following sexually explicit materials were determined to be not obscene or immoral within the *Miller* test: a scientific book written with seriousness and decency, and giving information to the medical profession regarding the operation of birth control clinics, including patron instructions necessary to be given out at such clinics, see *United States v. One Book Entitled “Contraception,”* 51 F.2d 525 (2d Cir. 1931), and a publication of informative and instructive character, explaining to married people how their mutual sexual life might be improved, see *United States v. One Book Entitled “Married Love,”* 48 F.2d 821 (2d Cir. 1931).

<sup>29</sup>In *Roth*, the Court defined the prurient appeal of the material as “material having a tendency to excite lustful thoughts.” *Roth*, 354 U.S. at 487. It should also be noted that the Court stated that “under the holding announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.” *Miller*, 413 U.S. at 27.

<sup>30</sup>See *id.* at 32.

<sup>31</sup>In articulating that community standards did not mean the standards of the nation as a whole, the Court referred to the comment of Chief Justice Warren in his dissent in *Jacobellis v. Ohio*:

It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to ‘community standards,’ it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable ‘national standard.’ ... At all events the Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.

See *Miller*, 413 U.S. at 32.

<sup>32</sup>*Id.* Many scholars brought into question whether the *Miller* “community standards” test has a constitutional source. See RONALD D. ROTUNDA & JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.60 (3rd ed. 1999); see also Gregory J. Battersby, *Obscene and Indecent Materials*, in GEORGE B. DELTA & JEFFREY H. MATSUURA,

The second part of the obscenity test enunciated in *Miller* is whether the work depicts or describes in a “patently offensive” way sexual conduct that is prohibited by the applicable state law.<sup>34</sup> This prong of the test poses a requirement that the state obscenity statutes be specific in defining sexual depictions that are considered obscene.<sup>35</sup> The patent offensiveness part of the test must be determined applying community standards.<sup>36</sup>

The third prong of the *Miller*, namely: “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value” [hereinafter “SLAPS test”] replaced the “utterly without redeeming social value” test in *Roth*.<sup>37</sup> It should be noted that in contrast to the first two parts of the *Miller* test, it was held that the SLAPS test<sup>38</sup> is to be applied using a reasonable person standard.<sup>39</sup> In this respect, when determining the value of the work, contemporary community standards have

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LAW OF THE INTERNET § 8.01, 8-9 (Aspen Law & Business 2001-1 Supp.) (questioning the discord between the community standards enunciated by the Court and the national nature of the First Amendment’s scope). According to the Court, even though the fundamental limiting principles of the First Amendment on the states’ power are no different from one community to another, the diversity of tastes and attitudes of people in different states should not “be strangled by the absolutism of imposed uniformity.” *Miller*, 413 U.S. at 33.

<sup>33</sup>*Id.* at 30.

<sup>34</sup>*See id.* at 24.

<sup>35</sup>The Court provided several “plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion . . . .” *See id.* at 25. “The examples of such conduct included: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” *Id.* It should also be noted that the Court stated that “under the holdings today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.” *Miller*, 413 U.S. at 27.

<sup>36</sup>*Smith v. United States*, 431 U.S. 291, 301 (1977) (stating that out of the three prongs of the *Miller* test only the first two—prurient appeal and patent offensiveness—are determined by applying contemporary community standards. Accordingly, the first two parts of the test are to be determined by local juries and the third prong is to be decided by the judge).

<sup>37</sup>*See ROTUNDA & NOWAK, supra* note 32, at 722 (noting that the replacement of the *Memoirs* “utterly” standard to “serious” empowered juries with more discretion under the new standard). In rejecting the *Memoirs* standard, the Court reasoned that the standard created a “burden virtually impossible to discharge under our criminal standards of proof.” *Miller*, 413 U.S. at 22.

<sup>38</sup>“SLAPS test” is the name by which attorneys refer to the “serious literary, artistic, political, or scientific value” test.

<sup>39</sup>*Pope v. Illinois*, 481 U.S. 497 (1987). “[T]he Court’s opinion stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population . . . the value that may be found in various pieces of work. . . . Reasonable people certainly may differ as to what constitutes literary or artistic merit. . . . [T]he Court’s opinion today envisions that even a minority view among reasonable people that a work has value may protect that work from being judged ‘obscene.’” *Id.* at 506 (Blackmun, J., concurring).

no application because “literary, artistic, political, or scientific value” of materials is not deemed to vary from community to community.<sup>40</sup>

A. *Community: What is it?*

Although the court defined the obscenity test in *Miller*, it failed to provide a specific definition or geographic dimensions of the community standards for a jury to consider when deciding whether a particular work is obscene. The Supreme Court attempted to articulate the notion of community in subsequent cases. In *Hamling v. United States*,<sup>41</sup> the Court interpreted *Miller* as permitting a state to constitutionally proscribe obscenity in terms of a statewide standard.<sup>42</sup> However, delineation of such precise geographic area is not required “as a matter of constitutional law.”<sup>43</sup> Thus, the Court reaffirmed its holding in *Miller* that the proper standards applied in federal obscenity prosecutions should be those of a community and not of a nation.<sup>44</sup>

In *Jenkins v. Georgia*,<sup>45</sup> the Court held that the Constitution did not establish a requirement to instruct juries, in state obscenity cases, to apply the standard of a hypothetical statewide community.<sup>46</sup> Furthermore, the Court approved the trial court’s actions in instructing a jury to apply community standards without defining community.<sup>47</sup> Affirming the *Miller* decision, the Court in *Jenkins* stated that a state was free to allow juries to rely “on the understanding of the community from which they came as to contemporary community standards,” and that the state had full

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<sup>40</sup>*Id.* at 501.

<sup>41</sup>418 U.S. 87 (1974). In *Hamling*, William Hamling was convicted of mailing and conspiring to mail an obscene brochure with sexually explicit photographs in violation of federal law. *Id.* At trial, the jury was instructed to judge obscenity according to “what is reasonably accepted according to the contemporary standards of the community as a whole. . . . Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.” *Id.* at 103. On appeal, the Court, acknowledging that such an instruction delineated a wider geographic area than warranted by *Miller*, held that the jury instruction referring to the standard of the “nation as a whole” nevertheless accomplished the principal purpose of the requirement that a judgment be made on the basis of “contemporary community standards,” which is “the material is judged neither on the basis of each juror’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.” *Id.* at 107.

<sup>42</sup>*Id.* at 105.

<sup>43</sup>*Hamling*, 418 U.S. at 105.

<sup>44</sup>*Id.* at 104.

<sup>45</sup>418 U.S. 153 (1974) (In *Jenkins*, the Supreme Court had to decide the validity of conviction of a theater manager who violated a Georgia obscenity statute for playing the motion picture *Carnal Knowledge*.).

<sup>46</sup>*Id.* at 157.

<sup>47</sup>*Id.*

discretion to provide a statutory definition of a community.<sup>48</sup> Many states have acted on this proposition and established a statutory definition of a community.<sup>49</sup>

Three years later, in *Smith v. United States*,<sup>50</sup> the Supreme Court determined that although states were permitted to impose a geographic limit on community standards, no state legislature may proscribe what those standards should be.<sup>51</sup> According to the Court, juries are entitled to rely on their own knowledge of community standards and consider the “entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority.”<sup>52</sup> Nevertheless, all definitions of obscenity, make little sense because “this type of judgment is inevitably subjective and personal. Court and juries continue to differ over what constitutes obscenity, often including in that category materials that have

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<sup>48</sup>*Id.* The court also noted that an obscenity offense in terms of contemporary community standards could be defined by states similarly to the definition in *Miller*, or in more precise geographic terms. *Id.* Many states have acted on this proposition and have established statutory definitions of a community. A states’ definition of community vary greatly with other states, examples include communities equated with the size of (a) state, (b) county, locality, or vicinage, and (c) the area from which the jury is drawn. For a comprehensive list of jurisdictions, which have statutorily defined community see Richard N. Coglianesse, *Sex, Bytes, and Community Entrapment: The Need for a New Obscenity Standard for the Twenty-First Century*, 24 CAP. U.L. REV. 385, 406 n.162-64, 166 (1995).

<sup>49</sup>The states’ definitions of community vary greatly and examples include communities equated with the size of (a) state, (b) county, locality, or vicinage, and (c) the area from which the jury is drawn. Military courts have gone beyond the idea of a geographic community and apply a military community standard. See *United States v. Maxwell*, 42 M.J. 568 (A.F. Crim. App. 1995); *United States v. Dyer*, 22 M.J. 578 (A.C.M.R. 1986). For a comprehensive list of jurisdictions which have statutorily defined the community see Coglianesse, *supra* note 48, at 406 nn.162-64, 166. For a compilation of jurisdictions determining the dimensions of a community through judicial process see Patrick T. Egan, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 144 n.204-05 (1996).

<sup>50</sup>431 U.S. 291 (1977).

<sup>51</sup>*Id.* at 303. In *United States v. Danley*, 523 F.2d 369 (9th Cir. 1975), the court held that lack of state prohibition on dissemination of obscene materials in Oregon did not establish community standards for that state; violation was of a federal statute which was neither dependant nor incorporated state laws. The court reasoned that the fact that certain conduct is permitted by the state did not necessarily mean that that people within the state approve of such conduct. The court also approved the trial court’s consideration of community as embracing more than the state of Oregon.

<sup>52</sup>*Smith*, 431 U.S. at 305. One commentator expressed concern regarding the jury’s discretion as to the determination of what community standards are, by stating that:

If the trier of fact is free to identify and apply community standards unrestrained by judicial or legislative specification of the relevant community, and without regard to evidence introduced at trial, the trier of fact’s conclusions ... with the weight of the evidence, and unaware of he specific community whose standards were supposedly applied, an appellate court is left without benchmarks by which to judge the validity of a finding of prurient appeal and patent offensiveness.

See Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1844 (1975).

won world-wide acclaim.”<sup>53</sup> The concept of community standards has been very controversial since its inception, and it gave birth to a host of problems, especially with respect to jurisdictional issues.

The issue of what community standards should govern in an obscenity prosecution is even more problematic when allegedly obscene materials travel through multiple communities. This critical issue of defining the applicable community standard with respect to transmission of obscene materials via the internet was highlighted in *United States v. Thomas*.<sup>54</sup> In this case, operators of the Amateur Action Computer Bulletin Board System were convicted and sentenced to prison for transmitting obscene materials over interstate telephone lines.<sup>55</sup> The defendants, who operated their computer bulletin board from California, were prosecuted in Memphis, Tennessee, when the pornographic materials were transmitted to a U. S. Postal Inspector, a resident of Tennessee.<sup>56</sup>

The Court found that the federal statute criminalizing transmission of obscenity over interstate telephone lines covered transmission of computerized images.<sup>57</sup> The Court rejected the contention that the only information transferred by their system were intangible strings of binary code, which were arguably beyond the scope of the statute.<sup>58</sup> The Court found that it was “spurious” for the defendants to claim that they did not intend to sell, disseminate or share obscene files.<sup>59</sup> The defendants argued that the relevant community standards, which should be employed by the Court, were those of the place where the transmission originated.<sup>60</sup> The predominant view, however, is that the appropriate legal standard to be used is the place where the obscene materials are received.<sup>61</sup>

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<sup>53</sup>AMERICAN CIVIL LIBERTIES UNION, CENSORSHIP OF OBSCENITY: PORNOGRAPHY AND INDECENCY, POLICY NO. 4, POLICY GUIDE, at [http://www.eff.org/pub/censorship/obscenity\\_and\\_censorship\\_aclu.article](http://www.eff.org/pub/censorship/obscenity_and_censorship_aclu.article) (last visited Sept. 25, 2001).

<sup>54</sup>74 F.3d 701 (6th Cir. 1996).

<sup>55</sup>*Id.* at 705.

<sup>56</sup>*Id.* at 705-06.

<sup>57</sup>*Id.* at 706-07.

<sup>58</sup>*Id.* at 706. When the case was appealed to the Court of Appeals for the Sixth Circuit, the defendants’ contention was that title 18, section 1465 of the United States Code applied only to tangible materials and did not apply to intangible images stored and transmitted as computer files.

<sup>59</sup>*Thomas*, 74 F.3d at 706-07.

<sup>60</sup>*Id.* at 711.

<sup>61</sup>*See Hamling*, 418 U.S. at 106 (providing that “[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity”); *see also* *United States v. Cohen*, 583 F.2d 1030 (8th Cir. 1978) (holding that in a prosecution for distribution of obscene material, the applicable community standards were those of the district where materials were shipped to and delivered, and in which the federal government prosecuted the case rather than the standards of the district where the materials were mailed).

One of the questions that accompanies any obscenity prosecution is which community's standards should be applied in a given case. It has long been established that it is constitutional to subject interstate distributors of obscenity to varying community standards.<sup>62</sup> It has also been recognized that issues pertaining to which community's standards are to be applied in an obscenity prosecution have a lot in common with issues regarding venue.<sup>63</sup> According to 18 U.S.C. § 3237, venue for federal obscenity prosecutions lies in any district from, through or into which the allegedly obscene material moves.<sup>64</sup> Thus, either the "district of dispatch or the district of receipt" may serve as a forum for prosecutions, with the community standards being of the place where the trial takes place.<sup>65</sup> Such a state of law allows the prosecution to forum shop and adds even more confusion into already complicated community standards issues. Keeping in mind that the prosecution has a choice of bringing a prosecution either in the district of receipt or the district of transmittal, if the indictment is originally brought in a district where obscene materials were mailed or transmitted, standards of that community may still be used if the case is transferred to the district of delivery.<sup>66</sup>

The court in *United States v. Mohney*<sup>67</sup> voiced a concern regarding such an application of community standards. In *Mohney*, nine defendants were indicted for using a common carrier for interstate carriage of obscene material in violation of 18 U.S.C. §§ 2, 1462 (1976).<sup>68</sup> The allegedly obscene materials were placed in interstate commerce in the Eastern District of Michigan and distributed in multiple districts around the country.<sup>69</sup> The case was originally brought in the Eastern District of Michigan, but eventually was transferred to the District of Hawaii, where the court had to address the issue of the applicable obscenity standards.<sup>70</sup> Attempting to solve this issue, the court acknowledged that given the prosecution's ability to choose a forum between either the place of mailing or the place of address or delivery, under the then and now current law, "the applicable standards should be those of the community where the action is brought."<sup>71</sup> Because the charges were brought in the

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<sup>62</sup>See *Hamling*, 418 U.S. at 106; *United States v. Sandy*, 605 F.2d 210, 217 (6th Cir. 1979).

<sup>63</sup>*United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996).

<sup>64</sup>*Id.* (stating that "[t]his may result in prosecutions of persons in a community to which they have sent materials which is obscene under that community's standards though the community from which it is sent would tolerate the same material.").

<sup>65</sup>*Id.* (citing *United States v. Bagnell*, 679 F.2d 826, 830-31 (11th Cir. 1982)).

<sup>66</sup>*United States v. Mohney*, 476 F. Supp. 421 (D. Haw. 1979).

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 423.

<sup>69</sup>*Id.* (the destinations to which the sexually explicit materials were delivered included Philadelphia, Pennsylvania; Studio City, California; Atlanta, Georgia; Honolulu, Hawaii; Denver, Colorado; and Providence, Rhode Island).

<sup>70</sup>*Id.* (District of Hawaii was one of communities in which the allegedly obscene materials were distributed).

<sup>71</sup>*Mohney*, 476 F. Supp. at 425.

Eastern District of Michigan, the court would have to instruct the jury from the District of Hawaii to determine and apply the local community standards of the Eastern District of Michigan.

While admitting that theoretically such resolution of the matter was possible “so long as the government ha[d] the right to choose its own forum, and so long as local community standards [were] the measuring stick,”<sup>72</sup> the court opined that since “[i]t would be senseless to allow the community where the materials were transmitted to make the obscenity determination, but force that community to use the standards of the community where the materials were distributed,” it would equally make little sense to have the jury from the district of receipt of allegedly obscene material to make the determination of obscenity judging by community standards of the district of transmission.<sup>73</sup> “If jurors cannot draw on personal knowledge, the idea of local community standards is a totally useless concept.”<sup>74</sup>

Although issues like the one described above do not come up frequently in obscenity prosecutions under federal law, they create more of a concern in state cases. For instance, in an obscenity case tried under state law in a jurisdiction recognizing “statewide” community standards, the jury is instructed to apply the standards of the community that is the size of the state. The jury pool in such prosecution is, however, comprised not of the citizens of the state as a whole but rather of residents of a judicial district where the court sits, be it a county or other municipal subdivision of the state. The problem that arises under such circumstances is that the “statewide community standards” is nothing but fiction because jurors being pulled from a very small locality would not be able to use their own considerations on what is considered obscene in the community with which they are familiar, but rather they would have to guess at what the state standards are. To prove such “statewide” standards, the prosecution is usually free to put on expert testimony. At the same time, “[w]hile expert opinions may be relevant, jurors are completely free to disregard all expert testimony.”<sup>75</sup>

Application of the community standards concept to the internet has created even more problems for the courts to deal with. Courts applying the *Miller* test could not have possibly anticipated that there would be a new community that would defy traditional definitions and make application of the *Miller* test even more of a challenge than it already had been. If the test is replete with difficulties even when applied to conventional media, in the era of the internet the community standards aspect of the test is practically unworkable.

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<sup>72</sup>*Id.* at 427.

<sup>73</sup>*Id.* at 425-26. The court also noted that there was no precedent on the issue of whether the community standards of the district of transmission might be used when the case is originally brought in that district and then transferred. In the court’s opinion such question was unlikely to come up because of high likelihood of the transmission district being a large city with more liberal views than smaller communities in which the material would be distributed and thus the defendants would be reluctant to transfer the case elsewhere. *Id.* at 426 n.6.

<sup>74</sup>*Id.* at 427.

<sup>75</sup>*Mohney*, 476 F. Supp. at 426-27 (reasoning that the cornerstone of the decisions in *Miller* and *Hamling* was the idea that jurors should draw on personal knowledge of their own community).

## IV. INTERNET AND FREE SPEECH

“Internet,” “cyberspace,” and “information superhighway” are some of the many names people have been calling a relatively new medium known also as world wide web. This medium originally started out as a creation of the Advanced Research Projects Agency [hereinafter “ARPA”], an entity under control of the Department of Defense.<sup>76</sup> The ARPAnet—a communications network created by ARPA in 1969 and intended for use as a safe place to discuss military research—soon lost much of its secrecy and other networks that were open for access by virtually anyone emerged.<sup>77</sup>

It is hardly possible to determine the dimensions of the internet.<sup>78</sup> This “network of networks”<sup>79</sup> constantly evolves and grows in numbers of its users.<sup>80</sup> The world wide web is comprised of millions of web sites all linked together so that a user is enabled to travel from one web page to another with the ease of a click of a button.<sup>81</sup> In a short period of time, the world wide web<sup>82</sup> became a forum for communicating one’s ideas to “an audience larger and more diverse than any the Framers could have imagined.”<sup>83</sup> “The internet in general, and the [world wide] web in particular, represents the most participatory marketplace of mass speech yet developed, it is in

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<sup>76</sup>The ARPA was established in 1957 as a response by the United States to the launch of the first artificial earth satellite Sputnik by the USSR. In light of fear by the Pentagon that new Soviet technology made possible for the nuclear warheads to reach the United States, the purpose of the agency was to achieve scientific and technological supremacy of the United States within the military field. The idea was to come up with technology enabling computers network. In case of a nuclear attack, even if some computers were destroyed, the rest would continue to function. See Dave Kristula, *The History of the Internet*, at <http://www.dave.site.com/webstation/net-history.shtml> (last visited Jan. 6, 2001). See also Maureen A. O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 615 (1998) (describing origins of the Internet); Douglas C. Heumann, *United States v. Thomas: Will the Community Standard Be Roadkill on the Information Superhighway?*, 23 WIS. L. REV. 189 (1995).

<sup>77</sup>David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L.J. SCI. & TECH. 229, 231, 481 n.10 (1996).

<sup>78</sup>See *ACLU v. Reno*, 31 F. Supp. 2d 473, 481 (E.D. Pa. 1999) (stating that due to its nature the Internet size is almost impossible to be determined at a given moment).

<sup>79</sup>*ALA v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997) (defining the Internet as a “decentralized, self-maintaining series of redundant links among computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control”).

<sup>80</sup>See Scott A. Shail, Note, *Reno v. ACLU: The First Congressional Attempt to Regulate Pornography on the Internet Fails First Amendment Scrutiny*, 28 U. BALT. L. REV. 273, 292 (1998) (reporting that the total number of computer users with Internet access was expected to reach 200 million by the year 1999).

<sup>81</sup>*ACLU v. Reno*, 217 F.3d 162, 169 (3d Cir. 2000)

<sup>82</sup>See *Pataki*, 969 F. Supp. at 166 (noting that World Wide Web, a publishing forum, should be distinguished from the Internet).

<sup>83</sup>*ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999). “[S]exually explicit material includes text, pictures, audio and video images, extends from the modesty titillating to the hardest core.” *Id.* at 484.

many ways a far more speech-enhancing medium than radio or television, print, the mails or even the village green.”<sup>84</sup> The type of information published on the web includes “every facet of art, literature, music, news, and debate,” as well as sexually explicit materials.<sup>85</sup> As soon as the content of the web is made available for viewing—“published”—anybody anywhere in the world may access it.<sup>86</sup>

*A. Bulletin Boards Should be Distinguished from the World Wide Web*

Bulletin Board Systems (hereinafter BBS), like the one involved in *United States v. Thomas*,<sup>87</sup> in which a prosecution of a California couple for interstate transportation of obscene materials took place, are a variation of on-line services. Bulletin boards are defined as systems consisting of modems and personal computers, which allow its users to access other remote computers to transfer and download files, and also to use such services as e-mail, chat lines, and public messages.<sup>88</sup> It should be noted that while the decision in *United States v. Thomas* dealt specifically with electronic bulletin boards, some argue that this precedent should be equally applicable to the internet and the world wide web.<sup>89</sup>

These different on-line services should not be treated equally. One of the important differences between world wide web and a BBS is that to become a member of most BBS one has to be approved for membership to such web sites and, therefore, access is limited.<sup>90</sup> Thus, when a host of a website approves a potential member from a different jurisdiction, he or she explicitly approves transmissions of sexually explicit material into locations where users reside. In this case, there should be no surprise for the website host if obscenity charges are brought against him and the community standards applied in a prosecution are of those locales where users receive the allegedly obscene materials. In this respect, a BBS is a service with a great deal of interaction between users and administration of the website. And accordingly in this type of situation, distribution of obscene materials can be prevented simply by denying membership and service to users from those jurisdictions which community standards are patently more puritanical.<sup>91</sup>

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<sup>84</sup>Complaint in *ALA v. Pataki*, 969 F. Supp 160, at 1\*, at <http://www.aclu.org/court/nycdacomplaint.html> (last visited Jan. 5, 2001).

<sup>85</sup>See *Pataki*, 969 F. Supp. at 163.

<sup>86</sup>*Reno*, 31 F. Supp. 2d at 484 (stating that no obstacles exist to prevent the content from entering any geographic location once it is published).

<sup>87</sup>74 F.3d 701 (6th Cir. 1996).

<sup>88</sup>*Id.* at 705.

<sup>89</sup>Battersby, *supra* note 32, at § 8.03[A], 8-42.

<sup>90</sup>Even the opinion in *Thomas* points out the important feature of BBS in that its operators by employing certain screening procedures could deny user access in jurisdictions where the risk of finding of obscenity was greater than that in California. See 74 F.3d at 711.

<sup>91</sup>In fact, many large-scale commercial distributors located in more liberal jurisdictions being aware of the fact that they may be prosecuted for distribution of obscenity into conservative jurisdictions have chosen against distributing into jurisdictions where likelihood of prosecution is high. See Mike Godwin, *Community Standards and BBSs*, at [http://www.eff.org/pub/Censorship/obscen\\_virtcom\\_stds\\_godwin.article](http://www.eff.org/pub/Censorship/obscen_virtcom_stds_godwin.article) (last visited Nov. 10, 2000).

The nature of world wide web differs significantly from BBS in this respect. The operators of regular websites cannot preclude the risk of liability even if they wished not to subject themselves to liability in communities with less tolerant obscenity standards. The nature of web sites is passive because there is little or no interaction between hosts of those sites and users. Moreover, a host, once he publishes materials on the site, cannot restrict access to and downloading of those materials onto computers of users who reside in communities in which such matters are considered obscene.<sup>92</sup> In fact, anybody anywhere in the world if equipped with a computer and internet access can download to his computer whatever material is posted on the site.

Many issues, such as jurisdictional ones, that followed the introduction of a new medium are not new, but with respect to attempts to bridle them, a strong temptation exists to treat them within old concepts that are inappropriate for the new context. Unsuccessful state and federal legislative attempts to regulate the medium of the new era examined below demonstrate the need for new approaches in solving problems accompanying the internet.

### B. *Speech Regulation and the Internet*

The internet may fairly be regarded as a never-ending worldwide conversation. The government may not, through the Communications Decency Act of 1996 (hereinafter "CDA"), interrupt that conversation.<sup>93</sup>

#### 1. Federal Attempts to Regulate the Internet

Ever since the electronic wonder of the internet came to life, Congress was concerned with the issues of regulating the content of this medium. Easy availability of pornographic and obscene materials on the internet provoked the first attempt by the government to regulate the content of online communications in the CDA.<sup>94</sup> Congress decided to treat the internet as a broadcast medium and susceptible to strict governmental regulation in contrast to print media.<sup>95</sup> Thus, the CDA was placed under the jurisdiction of the FCC, which is responsible for enforcement of the broadcast medium's regulations such as television, radio, and cable.<sup>96</sup> The CDA included provisions dealing with three main felonious prohibitions.

The first prohibition related to telecommunications devices that were used knowingly in the transmission of any obscene or indecent material with an intent to annoy, abuse, threaten, or harass any other person or with knowledge that the recipient of the communication is under eighteen years of age.<sup>97</sup> Section 223(d)(1) of the CDA prohibited use of an "interactive computer service" to "display in a manner available to a person under 18 years of age" a communication that, "in context,

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<sup>92</sup>"Once a provider posts content on the Internet, it is available to all other Internet users worldwide." *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1997).

<sup>93</sup>*Reno*, 929 F. Supp. at 883 (Dalzell, J., concurring).

<sup>94</sup>47 U.S.C. § 223(a)(B), (a)(2)(d) (2000).

<sup>95</sup>See Battersby, *supra* note 32, at § 8.02[C], 27.

<sup>96</sup>See *id.*

<sup>97</sup>47 U.S.C. § 223(a)(1)(B) (2000).

depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” Finally, section 223(a)(1)(A)(ii) made it a crime to use a telecommunications device to send an indecent communication “with intention to annoy” to any person, regardless of age. Almost immediately after enactment of the CDA, lawsuits were filed to challenge the constitutionality of the statute.

In *ACLU v. Reno*,<sup>98</sup> plaintiffs filed suit seeking enjoinder of the enforcement of two of the above mentioned provisions.<sup>99</sup> The purpose of the provisions was to prevent minors from gaining access not only to obscene materials, but also to “indecent” and “patently offensive” materials communicated over the internet.<sup>100</sup> The opponents of the CDA argued that the statute restricting internet content infringed upon adults’ right to free speech. On February 15, 1996, the CDA was enjoined to the extent it purported to prohibit “indecent” material, regulation of which was not within the government’s power.<sup>101</sup>

The decision was appealed to the United States Supreme Court, and the Court affirmed the holding finding the challenged provisions unconstitutional.<sup>102</sup> The Court reasoned that the content-based restrictions on transmission of speech were ambiguous, chilled protected speech, and were not sufficiently narrowly tailored to the goals of protecting children from indecent materials.<sup>103</sup> More specifically, the Court held that the CDA failed to satisfy the three-prong test designed in *Miller*, in that the banned material was not “specifically defined by the applicable law.”<sup>104</sup> The Court also determined that the internet should not be regulated in a manner similar to broadcast media, such as television and radio, and should not be subject to the same relaxed First Amendment scrutiny as the broadcast medium, but rather should be entitled to full First Amendment protection.<sup>105</sup> Because the CDA purported to regulate the content of speech, the government had a high burden of proving that the statute complied with the constitutional requirements and thus, in striking down the federal law, the Court emphasized that “in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.”<sup>106</sup>

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<sup>98</sup>929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

<sup>99</sup>The challenged provisions included: 47 U.S.C. § 223(a)(1)(B) and (d) (2000).

<sup>100</sup>47 U.S.C. § 223(a)-(d) (2000).

<sup>101</sup>*See Reno*, 929 F. Supp. at 824 (providing a comprehensive opinion as to the reasons for granting preliminary injunction).

<sup>102</sup>*Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>103</sup>*Id.* at 879.

<sup>104</sup>*See Miller*, 413 U.S. at 24.

<sup>105</sup>*Reno*, 521 U.S. at 868-69.

<sup>106</sup>*Id.* at 885.

In *ApolloMedia Corp.*<sup>107</sup> v. *Reno*,<sup>108</sup> the constitutionality of another section of the CDA was brought into question, i.e., § 223(a)(1)(A)(ii). This provision criminalized the use of a telecommunications device to send an obscene or indecent communication with “intent to annoy, abuse, threaten, or harass another person.” The court in *ApolloMedia* upheld the challenged portion of the CDA, holding that the language of the statute was intended to regulate only obscenity, and not indecent language.<sup>109</sup>

The second and most recent Congressional attempt to regulate the content of the internet in the name of “the children,” was the Child Online Protection Act of 1998 (hereinafter “COPA”).<sup>110</sup> After the Supreme Court struck down the provisions of the CDA that sought to regulate the dissemination of indecent materials over the internet, its successor, referred to by some as “the son of the CDA”,<sup>111</sup> represents the attempt of Congress to get around the constitutional defects of the CDA. The governmental intervention through the enactment of the COPA was premised on findings that the “harmful material” posted on the world wide web was easily accessible by children while the current technology proved to be ineffective in restricting such access.<sup>112</sup> Section 231 of Title 47 provided in pertinent part that “[w]hoever knowingly and with knowledge of the character of the material, in interstate or foreign communication for commercial purposes that is available to any minor and that includes any material that is harmful<sup>113</sup> to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.”<sup>114</sup> Before liability can attach under the COPA, material published on the web must be found “harmful to minors” by applying a three-part test, which mirrors that in *Miller*.<sup>115</sup>

The COPA also provided a “safe harbor”—three affirmative defenses for web sites operators who in good faith, restricted access by minors to material that is harmful to minors. Defendants could avoid conviction for violating the COPA if they (a) required “use of a credit card, debit account, adult access code, or adult personal identification number;”<sup>116</sup> or (b) accepted a digital certificate that verifies

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<sup>107</sup>Plaintiff, a corporation maintaining a web site entitled “annoy.com,” allowed its users to send e-mail messages that might be considered indecent by some communities to various government public officials and public figures.

<sup>108</sup>19 F. Supp. 2d 1081 (N.D. Cal. 1998).

<sup>109</sup>*Id.* at 1096.

<sup>110</sup>47 U.S.C. § 231 *et seq.* Sponsored by Rep. Mike Oxley, R-Ohio, and Sen. Dan Coats, R-Ind. and approved by the 105th Congress, COPA was signed into law by President Clinton on October, 23, 1998.

<sup>111</sup>Henry Cohen, *When Smut Hurts*, LEGAL TIMES, Aug. 14, 2000, at 70.

<sup>112</sup>ACLU v. *Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff’d* 217 F.3d 162 (3d Cir. 2000).

<sup>113</sup>For definition of “harmful to minors” as outlined in COPA, *see supra* note 3.

<sup>114</sup>47 U.S.C. § 231(a)(1) (2000).

<sup>115</sup>47 U.S.C. § 231(e)(6) (2000).

<sup>116</sup>47 U.S.C. § 231(c)(1)(A) (2000).

age;<sup>117</sup> or (c) restricted access by minors to harmful material “by any other reasonable measures that are feasible under available technology.”<sup>118</sup>

## 2. Challenge to COPA

The COPA was challenged immediately by the American Civil Liberties Union on behalf of seventeen groups and individuals in *ACLU v. Reno*.<sup>119</sup> The constitutional challenges raised by ACLU were as follows: (1) the COPA was facially invalid under the First Amendment as a burden to speech that is constitutionally protected for adults, (2) it was facially invalid because it violated the First Amendment rights of minors, and, (3) it was unconstitutionally vague in violation of the First and Fifth Amendments.<sup>120</sup> In February 1999, enforcement of the provisions of the COPA was enjoined by the federal district court in Philadelphia. In April 1999, the Justice Department appealed to the Third Circuit Court of Appeals. The Third Circuit upheld the district court finding that COPA “impos[ed] a burden on speech that is protected for adults” and, therefore, was unconstitutional in violation of the First Amendment.<sup>121</sup> In affirming the grant of preliminary injunction, the appellate court based its opinion primarily on the basis of the likely unconstitutionality of the clause defining “harmful to minors” applying “contemporary community standards.”<sup>122</sup> The overbreadth of this provision which was “virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument” was of such concern to the court that it was led to conclude as to the likelihood of the COPA’s unconstitutionality, in its entirety without reference to its other provisions.<sup>123</sup>

Although enforcement of the statute was enjoined, the work of the Commission on Online Child Protection (hereinafter “Commission”), which Congress established along with the COPA in October 1998, continued. The Commission was composed of nineteen members representing internet access services; providers of internet filtering, blocking services or software; academic experts; content providers, and government.<sup>124</sup> This entity was directed to conduct a study in order to identify

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<sup>117</sup>47 U.S.C. § 231(c)(1)(B) (2000).

<sup>118</sup>47 U.S.C. § 231(c)(1)(C) (2000).

<sup>119</sup>31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff’d* 217 F. 3d 162 (3d Cir. 2000) (The plaintiffs, a group of web site operators and publishers, included ACLU (on behalf of all its members including Nadine Strossen, Lawrence Ferlinghetti, Patricia Nell Warren, Mitchell Tepper and David Bunnell); Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation for Free Expression (on behalf of all its members); Artnet Worldwide Corporation; Blackstripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; Internet Content Coalition; OBGYN.NET; Philadelphia Gay News; Powell’s Bookstore; RIOTGRRL; Salon Internet, Inc.; West Stock, Inc. and PlanetOut Corporation).

<sup>120</sup>*Id.* at 477.

<sup>121</sup>*Reno*, 217 F.3d at 162.

<sup>122</sup>*Id.* at 166.

<sup>123</sup>*Id.* at 174.

<sup>124</sup>COPA COMMISSION, INFORMATION AND RESOURCES ABOUT THE COMMISSION ON ONLINE CHILD PROTECTION (COPA), at <http://www.copacommission.org/commission/orginal.shtml>

technological and other methods for reducing access by minors to material that is harmful to minors on the internet. In doing so, the Commission was supposed to assess potential solutions in light of the technical realities of the internet and legal concerns raised by the First Amendment, privacy and law enforcement interests. The Commission's mandate expired, and on October 20, 2000, the Commission submitted a detailed report to Congress setting forth its recommendations on how these problems should be handled.<sup>125</sup>

### 3. State Internet Laws

State legislatures have not been idle as far as the regulation of the internet content is concerned, and many censorship laws have been enacted while others are in the making. Many of the newly passed bills have been challenged on different constitutional grounds. In *American Library Association v. Pataki*,<sup>126</sup> the New York Decency Law<sup>127</sup> was invalidated on Commerce Clause grounds.<sup>128</sup> Here, New York law made it a crime to transmit material "harmful to minors" via computer to anyone aged seventeen or younger.<sup>129</sup> The court held that the law unconstitutionally regulated conduct outside the state's borders, created an impermissible intrusion into interstate commerce, and subjected use of the internet to inconsistent regulation.<sup>130</sup>

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(last visited Sept. 25, 2001). Among the members of the Commission were representatives of Network Solutions Inc., Internet Content Rating Association, Security Software Systems, Center for Democracy & Technology, Rocky Mountain College, National Law Center for Children and Families, Education Networks of America, Department of Justice, Crosswalk.com, Federal Trade Commission, Department of Commerce/NTIA, San Jose State University, PSINet Inc., Walt Disney Internet Group, Yahoo! Inc., Nortel Networks, America Online, Inc. and author of Kids Online/Founder, Protectkids.com. COPA COMMISSION, INFORMATION AND RESOURCES ABOUT THE COMMISSION ON ONLINE CHILD PROTECTION ACT (COPA), at <http://www.copacommission.org/report/commissioners.shtml> (last visited Sept. 25, 2001).

<sup>125</sup>See COMMISSION ON ONLINE CHILD PROTECTION, REPORT TO CONGRESS (2000), available at <http://www.copacommission.org/report/> (last visited Sept. 25, 2001) [hereinafter COMMISSION].

<sup>126</sup>969 F. Supp. 160 (S.D.N.Y. 1997).

<sup>127</sup>N.Y. PENAL LAW § 235.21(3) (1997).

<sup>128</sup>969 F. Supp. at 167.

<sup>129</sup>N.Y. PENAL LAW § 235.21(3) (1997).

<sup>130</sup>*Pataki*, 969 F. Supp. at 173-80. With respect to the inconsistent effect of the law on the Internet, the court stated that

[A]n internet user cannot foreclose access to her work from certain states or send differing versions of her communications to different jurisdictions. In this sense, the Internet user is in a worse position than the truck driver or train engineer who can steer around Illinois or Arizona, or change the mudguard or train configuration at the state line; the Internet user has no ability to bypass any particular state. The user must thus comply with the regulation imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution. . . . Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace.

*Id.* at 183.

In *ACLU v. Johnson*,<sup>131</sup> the court affirmed issuance of preliminary injunction preventing enforcement of a New Mexico statute,<sup>132</sup> which made it a crime to disseminate material “harmful to a minor” by computer.<sup>133</sup> The statute was declared unconstitutional since the law would impermissibly regulate conduct outside New Mexico and thus violate the Commerce Clause,<sup>134</sup> and would burden protected adult communication on the internet in violation of the First Amendment right to such speech.<sup>135</sup>

In a more recent decision, *Cyberspace Communications, Inc. v. Engler*,<sup>136</sup> the court of appeals for the Sixth Circuit affirmed the order of the district court granting the preliminary injunction enjoining enforcement of a Michigan statute,<sup>137</sup> which purported to prohibit the use of computers or the internet to disseminate “sexually explicit matter” to minors.<sup>138</sup>

#### V. SHOULD THERE BE A NEW STANDARD OR NO STANDARD AT ALL?

As discussed earlier, the concept of community standards was established in *Miller* as part of the test for obscenity after the Supreme Court’s struggling efforts in 1950’s and 1960’s to determine whether “obscene” speech could be either meaningfully defined or punished criminally.<sup>139</sup> This prong of the *Miller* test is probably the most problematic with respect to its applicability to the internet.<sup>140</sup> This

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<sup>131</sup>194 F.3d 1149 (10th Cir. 1999).

<sup>132</sup>N.M. STAT. ANN. § 30-37-3.2(A) (Michie Supp. 1998).

<sup>133</sup>*Id.*

<sup>134</sup>*Johnson*, 194 F.3d at 1160-61.

<sup>135</sup>*Id.* at 1155 (In agreeing with the holding of the district court, the appeals court stated that the statute violated the First Amendment “‘because it effectively bans speech that is constitutionally protected for adults;’” ... “it was not ‘the least restrictive means of serving its stated interest;’” and it does not directly and materially advance a compelling governmental interest.).

<sup>136</sup>238 F.3d 420 (6th Cir. 2000).

<sup>137</sup>1999 Mich. Pub. Acts 33, MICH. COMP. LAWS § 722.671 (2001) *et seq.*

<sup>138</sup>In reaching its decision, the district court stated that the statute limiting the receipt and communication of information through the Internet based on the content of that information was unconstitutional in that it “offend[ed] the guarantee of free speech in the First Amendment. . . .” 55 F. Supp. 2d 737, 751 (E. D. Mich. 1999).

<sup>139</sup>*See, e.g., Miller v. California*, 413 U.S. 15 (1973); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Roth v. United States*, 354 U.S. 476 (1957).

<sup>140</sup>The criticism of the test as a whole was expressed even by several members of the Court. *See, e.g., Pope v. Illinois*, 481 U.S. 497, 505-06 (1987) (Scalia, J.) (voicing need for “reexamination of *Miller*,” since determination of whether material has literary or artistic value is matter of taste and “De gustibus non est disputandum”); *id.* at 516 n.11 (Stevens, J.) (criminal prosecution for obscenity involving consenting adults should not be permitted); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting); *cf. Alexander v. United States*, 509 U.S. 544, 573 (1993) (Kennedy, J., dissenting, with Blackmun, Stevens and Souter, JJ.) (“obscenity separated from protected expression only by a ‘dim and uncertain line’”); *Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting) (“line between communications which ‘offend’ and those which do not is too blurred to identify

concept connotes the standards of a community varying in size, but in no event, the size of such community reaching the dimensions of the nation. The Court in *Miller* entertained the idea of applying the nationwide standards but promptly rejected it as unrealistic and vague.

#### A. Community Standards Versus Other Standards

##### 1. National Standard

When attempting to formulate a national standard for obscenity, one can probably pursue several approaches. One way to define the nationwide standard would be by adopting, as the standard, the views of the community recognized as the most liberal and most acceptable to obscenity in the country. The other would be to adopt the look at obscenity through the eyes of the people residing in the locale who have the least tolerance to the obscenity.<sup>141</sup> It is evident that whatever approach is chosen, the end result will be that somebody's tastes and attitudes will be trumped by differences of another group of people. This result is inevitable, even if one tries to work out a standard in between these extreme points of view on obscenity.

Recognizing that conducting obscenity prosecutions on the basis of a national "community standard" would be an exercise in futility, the Court in *Miller* stated that "[o]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards [of what is patently offensive] could be articulated for all 50 states in a single formulation."<sup>142</sup> In Court's opinion "[i]t [was] neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."<sup>143</sup> Thus, in denouncing the national standard, the Court was trying to prevent states with very liberal views from dictating their standards on more conservative states.

Although the Supreme Court in *Miller* deemed it wrong and inadmissible for New York or Las Vegas to dictate their opinion on what is considered obscene to the conservative communities, the federal courts, as the decision in *United States v. Thomas*<sup>144</sup> illustrates, consider it quite all right for a conservative community like Memphis, Tennessee to set standards for Milpitas, California. Such an approach, however, should be equally inappropriate. In this respect, it is laudable that the

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criminal conduct"); *accord*, Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987) (O'Connor, J.: line too "murky"). One of problems specific to the "community standards" prong of the Miller test is that a defendant is deprived of due process, since no notice of community standards is given until a jury identifies the relevant community and the content of such community standards. See Cohen, *supra* note 111.

<sup>141</sup>Under this interpretation the national standard would "have the effect of prohibiting the distribution of material in a more permissive community." See SCHAUER, *supra* note 23, at 119.

In fact, the nature of the Internet transforms the "local community standard" into a "national community standard" by pressuring Internet content providers to tailor speech to the least tolerant community.

<sup>142</sup>413 U.S. at 30.

<sup>143</sup>*Id.* at 32.

<sup>144</sup>74 F.3d 701 (6th Cir. 1996).

Appellate Court for the Third Circuit found it likely unconstitutional to use “community standards” to judge speech communicated by means of a non-geographic medium like the internet.<sup>145</sup> “Because of the peculiar geography-free nature of cyberspace,” the appeals court wrote, “a ‘community standards’ test would essentially require every Web communication to abide by the most restrictive community’s standards.”<sup>146</sup> The non-geographic nature of the internet allows online communications to circulate throughout the world while the speaker, as a rule, has no information as to who the audience is and which communities the readers are from.<sup>147</sup> Due to the fact that the web is not geographically constrained, applying the geographically oriented “community standards” simply does not work with the internet.

An important point made by the court in *ACLU v. Reno* is that the internet is entitled to special considerations, because “each medium of expression must be assessed for the First Amendment purposes by the standards best suited to it, for each may present its own problems.”<sup>148</sup> One of the main differences between the technology-laden medium of the internet and more conventional media such as books or videos is that a seller of adult books ordinarily makes a conscious and voluntary decision to distribute his product into a particular jurisdiction in which he might be subsequently prosecuted. In this event, criminal intent is clearly established for the purpose of prosecution for distributing obscenity. On the other hand, distribution from a website may occur without a website operator being aware of it. Moreover, once material is published, website operators are totally without any means to limit access to their sites and prevent viewers of a given geographic community from receiving sexually explicit material in their jurisdiction.<sup>149</sup> In the opinion of the Third Circuit, these crucial differences between a “brick and mortar outlet” and the online web dictate that a different approach is taken in applying a First Amendment analysis to the new medium.<sup>150</sup>

## 2. Virtual Community Standards

In light of the fact that revolutionary advancement in communications media changes the conventional meaning of “community,” a question arises as to whether it still makes sense to define the “community standards” in a localized geographic context. One such alternative of defining “community standards” in terms of a non-geographic community was proposed by defendants in *Thomas*—a virtual

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<sup>145</sup>*ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

<sup>146</sup>*Reno*, 521 U.S. at 877-78.

<sup>147</sup>*See* *Shea v. Reno*, 930 F. Supp. 916, 927 (S.D.N.Y. 1996) (“An individual sending a message that will be retransmitted by a mail exploder program has no way of knowing the e-mail addresses of other subscribers”); “[O]ne who posts an article to a news group has no way of knowing who will choose to retrieve it.” *Id.* at 928.

<sup>148</sup>217 F. 3d 162, 174 (3rd Cir. 2000).

<sup>149</sup>*American Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (“[A]n Internet user cannot foreclose access to . . . work from certain states or send differing versions of . . . communication(s) to different jurisdictions . . . . The Internet user has no ability to bypass any particular state”).

<sup>150</sup>*Reno*, 217 F.3d at 175.

community “that is based on the broad-ranging connections among people in cyberspace.”<sup>151</sup> The court in *Thomas* avoided consideration of whether a virtual community standard could be determined. The court found it unnecessary to adopt a new definition of “community” for use in obscenity prosecutions involving bulletin boards because the defendants in *Thomas* knowingly sent the pictures to a specific recipient in Tennessee who was approved for membership of the board before placing a request that the pictures be sent to Tennessee.<sup>152</sup>

Arguments made in favor of accepting online “community standards” for purposes of judging obscenity include a suggestion that the same reasoning applied by the Court in *Miller* should be applied to the online world. In *Miller*, the Court, recognizing that different communities have different moral standards, held that like-minded people living in those communities should be able to choose the rules by which to abide.<sup>153</sup> An argument has been made that, by the same token, those who spend part of their lives online ought to be afforded an opportunity to live in a community where they feel comfortable. Therefore, for purposes of determining whether a certain work distributed online is obscene, the standards of the virtual community should be taken as a guideline.<sup>154</sup> At the same time, the proponent of these virtual standards raises a concern that, assuming the virtual community is recognized for purposes of obscenity test, the courts will have to establish who comprises this online community.<sup>155</sup>

Among possible solutions as to how the online community should be defined one commentator suggests several alternatives: that it should encompass the whole world, only active users of the internet at a given moment, or that there should be not one but numerous communities comprised of people who communicate with each other.<sup>156</sup> Others elaborate that applying virtual community standards would entail instructing the jury as to the nature of the internet, extent of sexually explicit material on the internet, availability of blocking and filtering devices as well as other information reasonably representing the virtual culture.<sup>157</sup>

The endeavor to define virtual internet community and identify its populace is likely to prove to be a difficult if not impossible one, because the nature of this “community” changes and evolves so rapidly. The problem that most proponents of

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<sup>151</sup>74 F.3d at 711.

<sup>152</sup>*Id.* at 712.

<sup>153</sup>413 U.S. at 32.

<sup>154</sup>LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 250-51 (1995). *See also* Egan, *supra* note 49 (technological aspects of the Internet compel a virtual community standard; Cyberspace users should have an opportunity to control the kind of information that is available in their online communities).

<sup>155</sup>ROSE, *supra* note 154, at 251. The author raises an unanswered question whether the Internet community should be thought of as comprised of the entire population of the cyberworld or only users of adult online services. *Id.*

<sup>156</sup>Kimberly A. Gobla, *The Infeasibility of Federal Internet Regulation: The Online Parental Control Act of 1996 – A Reaction to the Communications Decency Act of 1996*, 102 DICK. L. REV. 93, 108 (1997).

<sup>157</sup>*See* Egan, *supra* note 49, at 147.

the virtual community standards do not mention is that it would be equally impossible to establish certain guidelines for determining obscenity considering the dimensions of the Cyberspace. “[T]he ‘community’ for the Internet is literally the world.”<sup>158</sup> And, because the jury plays an important role in determining prurient interest and patent offensiveness parts of the obscenity test, some of the problems courts will have to face if the virtual community standards come up for consideration again will be related to jury impaneling. As one commentator put it, defining an appropriate jury pool and assembling potential jurors for trial will be beyond the courts’ strength for reason that not too many people living in Florida would accept jury duty in Alaska.<sup>159</sup>

### 3. Is Obscenity Even a Problem?

Denying First Amendment protection to obscenity, the Court in *Roth v. United States* justified its decision as furthering “the social interest in order and morality.”<sup>160</sup> This exception to the First Amendment, therefore allows the majority to censor speech on the basis of its taste.<sup>161</sup> But should the majority’s ability to dictate what kind of speech it likes or dislikes reach as far as the domain of the internet? It may be conceded that obscenity can hurt individuals when it is integrated into the community by means of bookstores, movie theaters or newsstands. As one commentator observes, in contrast, the potentially obscene material published on the web is out of the public view and thus, presents little “danger of offending the sensibilities of unwilling recipients.”<sup>162</sup> The impact on the community is minimal because the material that is made available for viewing only to those members of the community who voluntarily choose to do so. In this regard, if these viewers find the work offensive, they obviously want to be offended.<sup>163</sup>

Even if the government continues its efforts to develop a test applicable in prosecutions of dissemination of obscene materials on the web, Congressional

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<sup>158</sup>See Gobla, *supra* note 156, at 108.

<sup>159</sup>Dominic F. Maisano, *Obscenity Law and the Internet: Determining the Appropriate Community Standard after Reno v. ACLU*, 29 U. TOL. L. REV. 555, 577 (1998). Another problem with the virtual community standard is difficulty to instruct jurors as to what “virtual community” considers obscene. Although according to the Court in *Kaplan v. California*, 413 U.S. 115, 121 (1973), “the defense should be free to introduce appropriate expert testimony” on the issue of community standards, in the light of the enormous size of the virtual community and vast variety of opinions, it is difficult to imagine that some common denominator of views on obscenity can be outlined.

<sup>160</sup>354 U.S. 476, 485 (1957).

<sup>161</sup>See generally Cohen, *supra* note 111 (stating that determination of whether a particular work is obscene is a question of taste).

<sup>162</sup>See Eric Handelman, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB. L. REV. 709, 730 (1995) (citing *Miller v. California*, 413 U.S. 15, 19 (1973) (recognizing that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles)).

<sup>163</sup>John T. Mitchell, *An Exclusionary Rule for Protecting Obscenity*, 10 J.L. POL. 183, 195 (1994).

attempts to prohibit obscenity on the internet will not achieve the desired goal unless the worldwide effort is taken to regulate internet communications. It is undisputed that a significant portion of sexually explicit material originates abroad<sup>164</sup> and thus, even assuming that domestic legislation is successful in eradicating distribution of obscenity via the internet within the United States, sexually explicit materials will still be made available for viewing to Americans by the foreign websites. The cycles of legislation and litigation that involve federal attempts to regulate the content on the internet indicate that future federal legislation on the subject, if any, is likely to be unsuccessful in passing constitutional muster. Using the language of United States District Judge Stewart, it should be kept in mind that “Congress may not regulate indecency on the Internet at all . . . . Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.”<sup>165</sup>

#### 4. Children and Sexually Explicit Content of the Web

Aside from preserving “order and morality,” protection of children from pornography which is so abundant in the Cyberworld is another interest that drives state and federal legislatures to enact laws regulating internet content. While “the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards,” according to the Second Circuit, the government “may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.”<sup>166</sup> Enjoining enforcement of the COPA, United States District Judge Lowell Reed, Jr. mentioned that “blocking or filtering technology may be at least as successful as COPA would be in restricting minors’ access to harmful material online without imposing the burden on constitutionally protected speech. . . .”<sup>167</sup> In light of governmental ineptitude to formulate constitutionally sound and workable regulations of the internet content, self-regulation by virtue of filtering and blocking unwanted material on the internet may be the only way to achieve the goal of protecting children from harmful material as well as preserving “order and morality” of the society at large.

#### 5. Self-Regulation of Internet Content is a Constitutional Way to Achieve Legitimate Governmental Purposes

In the wake of two failed Congressional attempts to regulate online content through the CDA and the COPA, the approach of self-regulation was strongly suggested among other recommendations presented by the Commission in its 49-

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<sup>164</sup>See *Shea v. Reno*, 930 F. Supp. 916, 931 (S.D.N.Y. 1996) (“as much as thirty percent of the sexually explicit material currently available on the Internet originates in foreign countries”).

<sup>165</sup>*Reno*, 929 F. Supp. at 877, 883, *aff’d*, *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>166</sup>*Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988) (internal quotations omitted).

<sup>167</sup>*ACLU v. Reno*, 31 F. Supp. 2d 473, 497 (E.D. Pa. 1999), *aff’d*, 217 F. 3d 162 (3d Cir. 2000).

page report to Congress.<sup>168</sup> More specifically, with respect to self-regulation the COPA Commission recommends that Internet Service Providers (hereinafter “ISP”s) should voluntarily undertake “best practices” to protect minors.<sup>169</sup> In the language of the Commission “best practices” that the ISPs are encouraged to pursue mean “voluntarily providing, offering, or enabling user empowerment technologies to assist end-users to protect children from materials that is harmful to minors.”<sup>170</sup> In promoting “best practices,” ISPs are also encouraged to apprise consumers of the right of ISPs to take bona fide action to restrict availability of material that violates such practices.<sup>171</sup> Timely removal of child pornography by ISPs when made aware of its presence on their servers is also recommended by the Commission as part of “best practices.”<sup>172</sup>

There are numerous ways in which self-regulation of the internet content is already being implemented today.<sup>173</sup> Net Nanny,<sup>174</sup> Cyber Patrol,<sup>175</sup> SurfWatch,<sup>176</sup> and others provide consumers with software for blocking offensive content on the ISPs’ systems. This type of filtering/blocking, referred to as client-side filtering, is achieved by using Universal Resource Locator (hereinafter “URL”) lists.<sup>177</sup> Each blocking software maker compiles its own encrypted list of blocked websites which may or may not be disclosed.<sup>178</sup> A list of sites, the content of which is blocked by a particular piece of software, can be made on the basis of automated processes, user

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<sup>168</sup>COPA Commission’s recommendations were grouped in five categories:

- (1) educating the public by the government as well as by the private sector about technologies and methods available to protect children online;
- (2) empowering consumers with protecting technologies to make choices of online content for their children;
- (3) enforcing existing federal and state laws against obscenity and child pornography as well as addressing international aspects of Internet crime;
- (4) encouraging Internet Service Provider industry to self-regulate by voluntarily undertaking “best practices” to protect minors;
- (5) encouraging adult industry to self-regulate in order to restrict minors’ ready access to commercial online adult content. *See* COMMISSION, *supra* note 122, at 39-46.

<sup>169</sup>*Id.* at 44-45.

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* at 45.

<sup>172</sup>*Id.*

<sup>173</sup>For a detailed overview of filtering/blocking tools and their effectiveness *see* COMMISSION, *supra* note 125, at 19-22.

<sup>174</sup>For information on this filtering software *see* <http://www.netnanny.com> (last visited Dec. 15, 2000).

<sup>175</sup>For information on this filtering software *see* <http://www.cyberpatrol.com> (last visited Dec. 15, 2000).

<sup>176</sup>For information on this filtering software *see* <http://www.surfwatch.com> (last visited Dec. 15, 2000).

<sup>177</sup>“URL” refers to the address of an Internet site.

<sup>178</sup>*See* COMMISSION, *supra* note 125, at 19.

options and human review.<sup>179</sup> The COPA Commission's rating of the effectiveness of server-side filtering was 7.4 on a scale of zero to ten.<sup>180</sup> This was the highest rating regarding the relative effectiveness of different technologies and methods available today and examined by the Commission.<sup>181</sup> The Commission also determined that while the server-side filtering raised First Amendment concerns because of its potential to be over-inclusive in blocking content, such impact is insignificant as long as the consumers are apprised of the criteria for filtering and filters are made customizable and flexible.<sup>182</sup>

Because filtering and blocking software achieves somewhat effective results in censoring the internet content, the same technological tools that are being developed and used to prevent children from exposure to sexually explicit material on the web can be made available to adults who find such materials offensive and do not want to exercise their right to freedom of speech online to the full extent.<sup>183</sup> Undertaking of the "best practices" advocated by the COPA Commission can be extended to apply not only to protection of children from material harmful to them, but also to protection of adults who find sexually explicit material offensive. This could be achieved by having the ISPs develop tools for access to the internet with different levels of censorship. As a result, consumers will have an ability to browse the web content to the extent it was filtered by the web browser of their choice.<sup>184</sup> Consumers who do not find sexually explicit material offensive or obscene and those not concerned with the possibility that their children might be exposed to harmful materials, while exploring the online world, would be able to subscribe to services provided by ISPs with the content of the internet not subjected to any kind of blocking or filtering whatsoever.

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<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>Besides server-side filtering, the following methods and technologies used for reducing access by children to harmful to minors materials were evaluated: online information resources that collect information regarding the technologies and methods that can protect children; family education programs; client-side filtering; filtering using text-based content analysis; labeling and rating systems; age verification systems; new top-level domain/zoning; increased prosecution and others. Ratings were made regarding the relative effectiveness, accessibility, user cost, cost imposed on sources of lawful harmful to minors materials, and adverse impacts on privacy, First Amendment values, and law enforcement. *Id.*

<sup>182</sup>*Id.* at 19-20.

<sup>183</sup>Attempts to block unwanted content are being compromised by counter efforts to develop computer programs that disable blocking software. A group of free speech advocates called Peacefire: Open Access for the Net Generation released a new program that according to their claim can easily disable all popular Windows censorware (SurfWatch, Cyber Patrol, Net Nanny, CYBERSitter, X-Stop, PureSight and Cyber Snoop). The release of the software is done in response to the passage of a Congressional bill requiring the use of blocking software in libraries and schools funded by the federal government.

<sup>184</sup>Corporations such as Microsoft, America OnLine, Netscape or Internet search engines like Yahoo, Infoseek, Alta Vista, Hot Bot and others could develop and market several variations of the Internet browsing products each being tailored to the needs and concerns of a particular group of consumers.

On the other hand, consumers with heightened concerns for the online safety of their children and those consumers who do not seek sexually explicit content, by choosing a web browser equipped with filtering and blocking software, would be able to extract from the internet only the content rid of unwanted speech. Thus, by allowing consumers to make an informed decision in tailoring their preferences with respect to the speech published online, the problem of affecting unwilling recipients would be eliminated. Also, the First Amendment right to free speech would not be seriously affected by potential over-inclusivity in blocking content if consumers voluntarily choose the software with particular filtering criteria and are aware of the fact that certain speech, though not the type they are trying to avoid, will be made unavailable to them due to present technological shortcomings of the software.

#### VI. CONCLUSION

The obscenity law has not changed since the decision in *Miller v. California*. The invention of the internet and its non-geographic nature practically rendered the *Miller* test unconstitutional when applied to this new medium. The concept of contemporary community standards of the current obscenity test is out of pace with the advancement of new technologies. To avoid the chilling effect on freedom of expression by subjecting materials published on the internet to vague and subjective community standards the content of the internet communications should be left to self-regulation. Freedom of individual consumers as to the type of internet content they choose to view should not be curtailed. Necessity to come up with new approaches of solving problems related to freedom of speech in the era of the internet is dictated by this unconventional medium. The time is ripe to reconsider the fundamentals of the First Amendment's guarantee in order to keep freedom of speech in the default setting.

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