

The Catholic Lawyer

Volume 39
Number 2 *Volume 39, Summer-Fall 1999*
Number 2-3

Article 4

November 2017

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Recommended Citation

Joel Sanders (1999) "The Regulation of Indecent Material Accessible to Children on the Internet," *The Catholic Lawyer*. Vol. 39 : No. 2 , Article 4.

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THE REGULATION OF INDECENT MATERIAL ACCESSIBLE TO CHILDREN ON THE INTERNET:

IS IT REALLY ALRIGHT TO YELL FIRE IN A CROWDED CHAT ROOM?

INTRODUCTION

Lord of all life, we praise You for the advancements in computerized communications that we enjoy in our time. Sadly, however, there are those who are littering this information superhighway with obscene, indecent, and destructive pornography. Virtual but virtueless reality is projected in the most twisted, sick misuse of sexuality Cyber solicitation of teenagers reveals the dark side of online victimization.

Lord, we are profoundly concerned about the impact of this on our children. We have learned from careful study how children can become addicted to pornography at an early age. Their understanding and appreciation of Your gift of sexuality can be denigrated and eventually debilitated. Pornography disallowed in print and the mail is now readily available to young children who learn how to use the computer.

. . . [H]elp us care for our children. Give us wisdom to create regulations that will protect the innocent Lord, give us courage to balance our reverence for freedom of speech with responsibility for what is said and depicted Amen.¹

Freedom of speech took a great leap forward with the expansion of the Internet, presenting not only Americans but the world with an unprecedented opportunity to communicate equally It is ironic, to say the least, that this

¹ CHARLES PLATT, ANARCHY ONLINE, PART 2: NET SEX, 211 (1997) [hereinafter PLATT] (reciting "A Prayer for a World without Porn" by the Senate Chaplain immediately before debate of Senator Exon's Communications Decency Act, which was read into the Congressional Record. 141 CONG. REC. S8329 (1995) (statement of Sen. Exon).

democratizing, global medium is being censored by the very country that is supposed to be a beacon of freedom.²

In our view there is no such thing as a 'Constitution-proof' law criminalizing so-called indecency in cyberspace.³

[L]aws based on a desire to protect children are as dangerous as they are compelling [R]egulations that 'drive certain ideas or viewpoints from the marketplace' for children's benefit, risk destroying the very 'political system and cultural life,' that they will inherit when they come of age. We hope the Supreme Court will agree.⁴

As Internet usage expands, it has revitalized the pornography industry in a new cyber form. As parents and, as a result, legislators, push to regulate the distribution of pornographic material, especially to children, the Supreme Court has pushed back. In recognition of the enormous reach and public forum appeal of the Internet, it has been afforded the highest level of First Amendment protection.

Protecting children from exposure to lurid pornography versus protecting freedom of speech on the Internet has arguably become one of the most passionately contested debates of the decade. Lines in the sand are being drawn with the ACLU, net users, computer geeks, student activists, libertarians, anarchists, and powerful online service providers uniting against the fundamentalists, legislators, pundits, religious organizations and concerned parents.

Legislators fired the first shot when Congress passed the Communications Decency Act ("CDA") in 1996⁵ in a broad attempt to prevent children from accessing "indecent" and

² ACLU Press Release, *Reno v. ACLU: Supreme Court Hears Arguments Today on the Future of Free Speech in Cyberspace* (Mar. 19, 1997) (visited July 17, 1999) <<http://www.aclu.org/news/n031997d.html>> [hereinafter *Supreme Court Hears Arguments*] (quoting Christopher Hansen, ACLU national staff attorney and *Reno v. ACLU* lead counsel).

³ ACLU Press Release, *ACLU, EPIC Call on Congress and Clinton to "Take the First Amendment Pledge"* (June 16, 1997) (visited July 17, 1999) <<http://www.aclu.org/news/n061697c.html>> (quoting Christopher Hansen).

⁴ *Supreme Court Hears Arguments*, *supra* note 2 (quoting Ann Beeson, ACLU national staff attorney and member of *Reno v. ACLU* legal team).

⁵ 47 U.S.C. §§ 230, 560-61 (1994) (declared unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997)).

“patently offensive” material over the Internet. In what netizens,⁶ the ACLU, and other “online freedom fighters” consider a “round one” victory, the Supreme Court struck down two provisions of the CDA in a landmark 7-2 decision written by Justice Stevens. The Court held that the CDA placed “an unacceptably heavy burden on protected speech [that] threatens to torch a large segment of the Internet community.”⁷ In response, Ira Glasser, Executive Director of the ACLU, stated that “[t]his is why independent courts are required to protect liberty Everyone knew the CDA was unconstitutional, but Congress passed the law and the President signed it. Today’s historic decision affirms what we knew all along: cyberspace must be free.”⁸

Realizing, however, that the ACLU may have won the battle but not the war, David Sobel, legal counsel for the Electronic Privacy Information Center (EPIC) and co-counsel in *Reno v. ACLU*, warned that “[a]ttempts to censor the Net will not end with the Supreme Court decision. . . . Proponents of Internet content regulation have already indicated their desire to take a ‘second bite of the apple’ if the Communications Decency Act is struck down.”⁹ True to this warning and in the wake of the controversial publication of the Kenneth Starr report on the Internet, the House Subcommittee on Telecommunications, Trade, and Consumer Protection approved new restrictions on publishing content deemed “harmful to minors” on the Internet. H.R. 3783, known as the Child Online Protection Act or CDA II,¹⁰ represents Congress’s second round attack, aimed at regulating pornography on the Internet. Almost immediately following the

⁶ A “netizen” was a term coined in the early 1990s to describe Internet users. This term was extrapolated from the English term Net Citizen and subsequently shortened to netizen. Netizens are net citizens who utilize and populate the Internet, making it a human resource.

⁷ *ACLU*, 521 U.S. at 882.

⁸ ACLU Press Release, *Supreme Court Rules: Cyberspace Will be Free! ACLU Hails Victory in Internet Censorship Challenge* (June 26, 1997) (visited July 17, 1999) <<http://www.aclu.org/news/n062697a.html>> (quoting ACLU Executive Director Ira Glasser at a live “cyber-cast” news conference at the American Civil Liberties Union’s national offices in New York).

⁹ ACLU & Electronic Privacy Information Center Joint Press Release, *ACLU, EPIC Call on Congress and Clinton to “Take the First Amendment Pledge”* (June 16, 1997) (visited July 17, 1999) <<http://www.aclu.org/news/n061697c.html>> (quoting David Sobel, legal counsel for EPIC and co-counsel in *Reno v. ACLU*).

¹⁰ Child Online Protection Act, 47 U.S.C.A. § 231 (Supp. 1999).

news, Electronic Frontier Foundation President Barry Steinhardt launched a retaliatory scud, dubbing CDA II "a Trojan horse," and challenging it as only ostensibly innocuous.¹¹

This Note will analyze the constitutionality of the Child Online Protection Act¹² under the First Amendment "strict scrutiny" standard set forth by the Supreme Court in *Reno v. ACLU*. Furthermore, it will discuss the challenges and issues that the *ACLU* decision will present to concerned parents and lawmakers as Internet usage inevitably expands and becomes more ingrained in our everyday lives.

I. THE INTERNET AS A FORUM

Background on the Internet

By now, most people have heard of the Internet, although misconceptions still abound. Even though the Internet has been around since 1969,¹³ it is only in the last decade or so that the Internet has become a household word. As the District Court explained in *ACLU v. Reno*:

The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.

... No single entity—academic, corporate, governmental, or non-profit—administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers¹⁴

In essence, the Internet is simply a global communications network that utilizes the standard communication protocol Transmission Control Protocol/Internet Protocol (TCP/IP) for the purpose of allowing connected computers to communicate with

¹¹ ACLU Press Release, *In the Wake of the Starr Report, CDA II Approved By House Subcommittee* (Sept. 17, 1998) (visited July 17, 1999) <<http://www.aclu.org/news/n091798a.html>> (quoting Electronic Frontier Foundation (EFF) President Barry Steinhardt).

¹² 47 U.S.C.A. § 231 (Supp. 1999).

¹³ The Internet was established in 1969 by the U.S. Pentagon. Known as ARPANET, it allowed academic and corporate researchers and government officials to share data using e-mail and remote computers. See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

¹⁴ *Id.* at 830, 832.

each other.

The most widely used and most popular method of Internet communication is the World Wide Web. "The Web utilizes a 'hypertext' formatting language called hypertext markup language (HTML), and programs that 'browse' the Web can display HTML documents containing text, images, sound, animation and moving video."¹⁵ Millions of people gain access to the Internet via the World Wide Web through major online service providers such as America Online, The Microsoft Network, and Prodigy. These service providers have facilitated use of the Internet by developing

[a] variety of systems . . . that allow users of the Web to search particular information among all of the public sites that are part of the Web. Services such as Yahoo, Magellan, Altavista, Webcrawler, and Lycos are all services known as 'search engines' which allow users to search for Web sites that contain certain categories of information, or to search for key words.¹⁶

II. THE INTERNET, CHILDREN, AND PORNOGRAPHY

Cutting edge technologies such as the World Wide Web have helped move the Internet from a back room research tool into the foreground of everyday life. Declining access fees, faster computers, and "friendly" graphical user interfaces have attracted children as one of the fastest growing demographic groups on the Internet and the Web. Many schools now introduce children to the Internet as early as the third and fourth grade. The Web affords school children the opportunity to access a vast amount of relevant and desirable information through the mere click of a mouse. The interactive nature of the Internet makes it a far more exciting alternative to other forms of media such as print, broadcast, and video.

The Internet, however, is also becoming the fastest growing medium for pornography distribution. It is been deemed by some to be the best hunting ground for pedophiles¹⁷ and "the most efficient pornography distribution engine ever conceived."¹⁸ "In the Senate, James Exon waved bestiality pictures at his

¹⁵ *Id.* at 836.

¹⁶ *Id.* at 837.

¹⁷ See Dan Glaister, *Tap of the Devil*, GUARDIAN (London), July 3, 1995, at T1.

¹⁸ Bill Frezza, *Morality and Imagination: Technology Challenges Both*, COMM. WK., Jan. 13, 1997, at 31.

fellow legislators and warned that children all over America could view this vileness with a click of a mouse button.¹⁹ In an attempt to quantify the problem of netporn, Martin Rimm, an undergraduate at Carnegie-Mellon University, undertook a study published in the Georgetown Law Journal and featured in Time magazine.²⁰

The study purported to prove that netporn was more prevalent and perverse than anyone had thought possible.²¹ Rimm's study was swiftly discredited, however, forcing decency crusaders to disavow him.²² Rimm cited shocking statistics such as "83.5 percent of all images posted on the Usenet are pornographic"²³ with little or no empirical data to support his claim. Serious questions were raised regarding the accuracy of Rimm's data and the methodology used in compiling his statistics.²⁴ Moreover, Rimm was only an undergraduate student and his school, Carnegie-Mellon, called the study improperly supervised. Rimm's invitation to attend the Senate's 1995 summer hearings on the Communications Decency Act was rescinded.²⁵ The study, which for a short while looked like it would answer the question, "how much pornography is there on the Internet," ended up raising more questions than it answered. Nonetheless, the publicity surrounding the study helped to raise public awareness and concern over the issue.

Even though Rimm's study left the scope of Internet pornography unresolved, many online users have acquired a sense of its scope on their own. "The World Wide Web Consortium launched the PICS ('Platform for Internet Content Selection') program in order to develop technical standards that would support parents' ability to filter and screen material that their children see on the Web."²⁶ Sales of stand alone software programs allowing parents to limit Internet access by their children such as *Cyber patrol*, *CYBERsitter*, *Net Nanny*, and *SurfWatch* have grown. Much of this growth can be attributed to parents coming across unsolicited e-mails (commonly referred to

¹⁹ PLATT, *supra* note 1, at 3.

²⁰ *See id.* at 6.

²¹ *See id.* at 13.

²² *See id.* at 6.

²³ *Id.* at 19.

²⁴ *See id.* at 22-23.

²⁵ *See id.* at 6.

²⁶ *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996).

as Spam),²⁷ placing them three to four clicks away from a Web page that would make even the most diehard ACLU parent cringe.

III. THE INTERNET COMPARED TO BROADCAST AND OTHER MEDIA

As with many new breakthrough technologies, especially ones which have grown as quickly as the Internet, Congress and the courts must react after the fact to begin to establish laws surrounding these new leading edge technologies and the issues they raise. This has proven to be particularly prevalent in the area of mass media, where technology continues to push the envelope, providing more innovative ways of making entertainment and information available to the public.

In addition to evaluating indecency regulations imposed on traditional printed matter, the Supreme Court has also on several occasions reviewed indecency regulations imposed on traditional mass media, such as broadcast radio, television, telephone, and cable. Although "strict scrutiny" had been applied to indecent expression prior to the mass media decisions, several members of the Supreme Court have indicated that some expression may be of "lesser value" than other expression, and have implied that something less than strict scrutiny review might apply.²⁸ This theory, however, was never adopted by a majority of the Court. As a result, both telephone and cable media have been afforded strict scrutiny review by the Court.²⁹

²⁷ Spam, in the context of the Internet, is defined as (1) the same information posted an unacceptably high number of times to one or more newsgroups, or (2) the same e-mail sent out to an unacceptably high number of recipients. Spam is named after the pink luncheon meat made by Hormel, commonly thought to have no nutritive or aesthetic value. The prevailing theory on the origins of the term Spam is that it comes from the song in Monty Python's famous "Spam-loving Vikings sketch." The Vikings, who were sitting in a restaurant whose menu only included dishes made with Spam, would sing "Spam Spam Spam Spam Spam Spam" over and over, rising in volume until it was impossible for the other characters in the sketch to converse. See *The Net Abuse FAQ*, (last modified Dec. 23, 1998) <<http://www.cybernothing.org/faqs/net-abuse-faq.html>>.

²⁸ See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (The "lesser value" theory was set forth in the context of broadcast, where the nature of the medium is "uniquely pervasive" and "uniquely accessible to children"); see also discussion *infra* pp. 132-33.

²⁹ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989); see also discussion *infra* pp. 135-36.

Comparison of the Various Media

Dating as far back as 1476, when William Caxton first introduced the printing press in England, the sweeping impact of technological innovation in the area of mass media became evident.³⁰ The societal impact brought forth by the introduction of new mass media technology has pushed the envelope of First Amendment protection. The issue according to the courts, however, is not necessarily *what* is said, but rather *how* it is said.

The Internet represents the pinnacle of mass communication technology. Since it is not controlled by any one entity, including the government, and it spans international boundaries,³¹ limiting access is difficult and impractical. The courts and legislators have struggled to frame the Internet in the context of previous mass communication media. Similarities to the Internet can be found across a broad spectrum of media. Newspaper and magazine articles can be retrieved from the Internet and read in a fashion similar to print media. People can communicate interactively with each other via voice communication over the Internet just as they communicate over the telephone. News clips and videos can be watched and listened to on the Internet just as they are viewed on more traditional broadcast media.

Analogizing the Internet to a single medium is difficult because the Internet is less like any one medium, and more like a combination of several media. This stems from the fact that the Internet is not a physical medium, but instead a virtual, intangible medium. The Internet, unlike television and radio, is a protocol or standard for communicating information—any information. Today, the most popular device used to communicate across the Internet is the personal computer (“PC”). Due to the power and flexibility of hardware and software, a PC is capable of emulating print, television, radio, motion picture, and the mail. Therefore, instead of being labeled as a revolutionary new *medium*, the Internet can be thought of as a revolutionary new *communication standard* allowing several forms of media to exist simultaneously on the same device. As an example, people are currently accessing the

³⁰ See David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 442 (1983).

³¹ See discussion of international aspect *infra* p. 144.

Internet through television, via *Web TV*, as well as through the telephone. The cable companies and phone companies are battling and positioning themselves to become the providers of the "pipeline" through which all media will be accessed in the home.

Dubbed the information superhighway and cyberspace, the Internet has become an extremely controversial and difficult area to effectively legislate. Although the future of the Internet and its ultimate role is unclear, it is clear that the bright line drawn between the Internet and other media is blurring, and the push to combine several forms of media together on the Internet is becoming readily apparent. As mass media boundaries dissolve, media-specific First Amendment standards will become even less clear than they are now. Would a television or radio broadcast become any less intrusive coming into the home via the Internet instead of traditional broadcast channels? Is an e-mail much different from a printed brochure or catalog delivered through the postal service? Is it any more difficult to locate a "channel" on America Online than it is to locate a "channel" on television? Indeed, as technology continues to grow at an ever increasing pace, these questions become more difficult to answer. The answers change faster than legislators are able to pass laws to keep up with advances in technology. The one common thread throughout the history of developing new mass media is that it consistently attracts pornographic and indecent material, and in turn makes that material more easily accessible to children.

IV. THE COMMUNICATIONS DECENCY ACT AND THE *ACLU* DECISION

A. *The Communications Decency Act*

Title V of the Telecommunications Act of 1996, also known as the Communications Decency Act ("CDA"), was introduced by Senator James Exon (D-Neb.) on February 1, 1995, and signed into law by President Clinton on February 8, 1996. This Act represented the first attempt to regulate speech on the Internet. In order to gather support for passage of the CDA, Senator Exon assembled his "Blue Book," a collection of pornography downloaded from various sites on the Internet, which he kept in a blue folder and made available to the Senate for review. Apparently, the contents of the folder made "Playboy and

Hustler look like Sunday-school stuff.”³² The CDA faced strong opposition from Senator Leahy (D-Vt.), who believed the government should take no additional steps to regulate the Internet.³³ Also opposed was Speaker of the House, Newt Gingrich, who declared that the CDA clearly violated free speech and that it was not an earnest way to approach a serious issue.³⁴ As one writer has noted, “[t]he CDA comprise[d] a minor portion of the Telecommunications Act of 1996 . . . which primarily sought to reduce regulation and to encourage ‘the rapid deployment of new telecommunications technologies.’”³⁵ “Upon signing the Act into law, President Clinton stated: ‘[t]his is truly revolutionary legislation that will bring the future to our doorsteps.’”³⁶ Due to the CDA, however, the Act gained notoriety as a censor of free speech on the Internet.³⁷ On virtually the same day that the CDA became law, the ACLU and nineteen other plaintiffs filed suit against the Attorney General, challenging two provisions of the CDA.³⁸

³² Coe William Ramsey, Note, *Burning the Global Village to Roast a Pig: The Communications Decency Act of 1996 Is Not “Narrowly Tailored” in Reno v. ACLU*, 32 WAKE FOREST L. REV. 1283, 1291 (1997).

³³ See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 65 (1996).

³⁴ See *id.* at 67.

³⁵ Al Harrison, *Internet: Supreme Court Holds That Communications Decency Act Is Unconstitutional*, 35 HOUS. LAW. 44, 44 (1998).

³⁶ John J. McGuire, Comment, *The Sword of Damocles Is Not Narrow Tailoring: The First Amendment’s Victory in Reno v. ACLU*, 48 CASE W. RES. L. REV. 413, 415 (1998) (quoting Mimi Whitefield, *A New Era In Telecommunications*, MIAMI HERALD, Feb. 9, 1996, at C1).

³⁷ See generally Dominic Andreano, Note & Comment, *Cyberspace: How Decent is the Decency Act?*, 8 ST. THOMAS L. REV. 593 (1996) (discussing the debate between opponents and proponents of the CDA); David Kushner, Comment, *The Communications Decency Act and the Indecent Indecency Spectacle*, 19 HASTINGS COMM. & ENT. L.J. 87 (1996) (arguing that these regulations would introduce sweeping new ways of censoring free speech).

³⁸ See *ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996). Section 223(a)(1)(B), often referred to as the “indecent transmission” provision, proscribed the use of “a telecommunications device” to create or solicit, and initiate any “obscene or indecent” transmission, “knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.” 47 U.S.C. § 223(a)(1)(B) (1994 & Supp. 1997). The legislative history indicates that Congress intended the term “telecommunications device” to reach individual Internet users. See *ACLU*, 929 F. Supp. at 828 n.5 (finding that the plain meaning of the phrase and the intent of the sponsors was for the Act to reach individual users). Section 223(d)(1), often referred to as the “patently offensive display” provision, proscribed

B. *ACLU v. Reno* (ACLU I)

The ACLU filed suit against the Department of Justice in the United States District Court for the Eastern District of Pennsylvania.³⁹ In addition to the ACLU, the plaintiffs consisted of various companies and organizations associated with the computer and communications industry, as well as parties who published material on the Internet or belonged to various citizen groups.⁴⁰ The ACLU challenged two provisions of the CDA, sections 223(a)(1)(B) and 223(d), on constitutional grounds.⁴¹ No objection was made to the statutory provision covering obscenity or child pornography because these were already proscribed prior to the enactment of the CDA.⁴²

The case was heard by a three-judge panel of the District Court, led by Chief Circuit Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit. Both sections of the CDA were found to be unconstitutional.⁴³ The District Court applied the strict scrutiny standard to the Internet provision and concluded that despite a compelling governmental interest to protect children from indecent speech, the provision was not narrowly tailored to attain that interest, and was therefore unconstitutionally overbroad.⁴⁴ Judge Sloviter compared the provision to a “criminal statute that hover[ed] over

the knowing use of any interactive computer service to send or display to any person under 18 years of age any communication that “depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.” 47 U.S.C. § 223(d)(1). Violation of these provisions carried criminal fines and imprisonment for up to two years. *See id.* § 223(a). Section 223, however, did set forth defenses against prosecution under the Act. A person could escape liability if he or she did not control the content of the communication system or network that was in violation of the CDA. *See id.* § 223(e)(3). Additionally, an employer was not liable for the conduct of an employee unless it was within the scope of his or her employment, and the employer either authorized or recklessly disregarded the conduct. *See id.* § 223(e)(4). Moreover, liability could also be avoided by applying “good faith, reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors” or by “restrict[ing] access . . . [to minors] by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.” *See id.* § 223(e)(5).

³⁹ *See ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

⁴⁰ *See id.* at 827 n.2.

⁴¹ *See id.* at 828.

⁴² *See id.* at 829.

⁴³ *See id.* at 849.

⁴⁴ *See id.* at 851, 857.

each content provider, like the proverbial sword of Damocles."⁴⁵

C. *Reno v. ACLU* (ACLU II)

The government appealed the District Court's judgment directly to the Supreme Court under a special review provision, section 561 of the CDA.⁴⁶ In a 7-2 majority opinion written by Justice Stevens, the United States Supreme Court affirmed the decision of the District Court,⁴⁷ upholding the application of the strict scrutiny standard to Internet speech.⁴⁸ In rejecting the government's analogies to previous Supreme Court decisions involving other forms of mass media which received less than strict scrutiny review, the Court distinguished the Internet from traditional broadcast media.⁴⁹ The Court cited the history of extensive government broadcast regulation,⁵⁰ the scarcity of available frequencies,⁵¹ and broadcast's invasive nature.⁵² Although the Court agreed that the government had a compelling interest in protecting children from indecent material, the Court found that sections 223(a)(1)(B) and 223(d) were not narrowly tailored to achieve that interest, and the sections would therefore suppress a far greater spectrum of speech than was constitutionally permissible.⁵³

V. RECENT LEGISLATION—INDECENT SPEECH ON THE INTERNET

A. *The Child Online Protection Act—CDA-II*

On April 30, 1998 Representative Mike Oxley (R-Ohio) and Senator Dan Coats (R-Ind.) co-sponsored the Child Online

⁴⁵ *Id.* at 855-56. Damocles was "[a] member of the court of Dionysius the Elder, tyrant of Syracuse, who assertedly forced Damocles to sit at a banquet under a sword suspended by a single hair, to demonstrate the precariousness of a king's fortunes." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 333 (William Morris, ed. 1969). "[T]he value of a sword of Damocles is that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

⁴⁶ *See Reno v. ACLU*, 521 U.S. 844, 864 (1997).

⁴⁷ *See id.* at 885.

⁴⁸ *See id.* at 868-70.

⁴⁹ *See id.*

⁵⁰ *See id.* at 868.

⁵¹ *See id.* at 870.

⁵² *See id.* at 869.

⁵³ *See id.* at 875.

Protection Act ("COPA"),⁵⁴ a companion bill to the Senate's Internet Indecency Act.⁵⁵ The bill was dubbed "CDA II" by opponents.⁵⁶ The effort to pass COPA represented Congress' second attempt to protect children from exposure to indecent material on the Internet by narrowing the CDA, previously held unconstitutional. The House Commerce Subcommittee on Technology, Trade, and Consumer Protection approved COPA less than a week after Independent Counsel Kenneth Starr's sexually explicit report on President Clinton was posted on the Internet.⁵⁷ President Clinton signed the bill into law on October 21, 1998⁵⁸ as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.⁵⁹ The COPA hitchhiked a ride with other Omnibus Appropriations measures, including a moratorium on Internet taxes ("The Internet Tax Freedom Act")⁶⁰ and enhanced copyright protection for online works.⁶¹ Broad public support for legislative action to protect children from Internet pornography, coupled with political pressure "for the White House to regain its moral compass" *vis-a-vis* the Monica Lewinsky Presidential debacle, have been cited as possible reasons the Act was allowed to remain entrenched as part of the \$520 billion federal spending package.⁶²

Less than twenty-four hours after President Clinton signed the bill, the ACLU along with sixteen other plaintiffs filed papers in federal District Court in Philadelphia seeking an

⁵⁴ See H.R. 3783, 105th Cong. § 1 (1998) (enacted).

⁵⁵ See S. 1482, 105th Cong. (1997).

⁵⁶ See Kimberly S. Keller, Comment, *From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in Public Libraries*, 30 ST. MARY'S L.J. 549, 554-55 (1999); see also ACLU Press Release, *Spawn of CDA: New Internet Censorship Bills Slither Through Senate* (Mar. 12, 1998) (visited July 11, 1999) <<http://www.aclu.org/news/n031298b.html>>.

⁵⁷ See ACLU Press Release, *In the Wake of the Starr Report, CDA II Approved by House Subcommittee* (Sept. 17, 1998) (visited Apr. 8, 1999) <<http://www.aclu.org/news/n091798a.html>>.

⁵⁸ See Statement by President William J. Clinton Upon Signing H.R. 4328, 1998 U.S.C.C.A.N. 576.

⁵⁹ Pub. L. No. 105-277, 1998 U.S.C.C.A.N. (112 Stat. 2681) 3; see also Child Online Protection Act, 144 CONG. REC. H9902 Title I § 101 (daily ed. Oct. 7, 1998).

⁶⁰ Internet Tax Freedom Act, Pub. L. No. 105-277, 1998 U.S.C.C.A.N. (112 Stat. 2681-719) 3.

⁶¹ Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-34, 1998 U.S.C.C.A.N. (112 Stat. 2877) 3.

⁶² Frank James, *Internet Anti-Smut Law Challenged As Unconstitutional*, CHI. TRIB., Oct. 23, 1998, at 3.

injunction against the new law—*deja vu*.⁶³

Title I of the Act, entitled, “Protection From Material That is Harmful to Minors,” states:

Whoever knowingly . . . in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.⁶⁴

Internet Service Providers (“ISPs”), Online Service Providers (“OPSs”), providers of browser software, and other related service providers are exempted from liability under the Act.⁶⁵ The Act also sets forth affirmative defenses allowing a defendant to avoid prosecution by restricting access to harmful material by minors.⁶⁶ These defenses include requiring the use of a credit card, debit account, adult access code, adult personal identification number (“PIN”), accepting a digital certificate verifying age, or any other reasonable measure that is “feasible under available technology.”⁶⁷ The following definitions are also set forth in the Act:

(1) By means of the World Wide Web. The term “by means of the World Wide Web” means by placement of material in a computer server-based file . . . [making it] publicly accessible over the Internet.

(2) Commercial Purposes; Engaged in the Business. [These terms mean to knowingly] make a communication . . . by means of the World Wide Web, that includes any material that is harmful to minors . . . as a regular course of such person’s trade or business, with the objective of earning a profit.⁶⁸

. . . .

(6) Material that is harmful to minors. The term “material that is harmful to minors means any . . . matter . . . that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with

⁶³ *See id.*

⁶⁴ 47 U.S.C.A. § 231(a)(1) (Supp. 1999).

⁶⁵ *See id.* § 231(b).

⁶⁶ *See id.* § 231(c)(1).

⁶⁷ *Id.* § 231(c)(1)(A–C).

⁶⁸ *Id.* § 231(e)(1)–2)(B).

respect to minors, is designed to appeal to . . . the prurient interest;

(B) depicts . . . in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact . . . and taken as a whole, lacks serious literary, artistic, political or scientific value for minors."⁶⁹

(7) Minor. The term "minor" means any person under 17 years of age.⁷⁰

Section 103 obligates a service provider to notify online service customers that parental control protections are commercially available to assist them in limiting access to material harmful to minors.⁷¹

Additionally, section 104 establishes the temporary Commission on Online Child Protection, which was formed for the purpose of conducting a study regarding methods available to help reduce access by minors to harmful Internet material.⁷²

Finally, Title II, entitled Children's Online Privacy Protection, protects children from the release of personal information collected by a Website or online service.⁷³

1. Proponents

As expected, the Act solicited strong reactions from free speech activists and those favoring restrictions to safeguard children, as did its predecessor, the CDA. Proponents of the COPA point out its adherence to the Supreme Court's treatment of the CDA, balanced by the need to protect children from indecency on the Internet. According to Senator Coats, the Act "[will] correct[] mistakes that led to the Supreme Court ruling that the CDA was unconstitutional."⁷⁴ Representative Tauzin (D-La.) asserted that the Act "makes an honest attempt, without interfer[ing] with the [F]irst [A]mendment, to . . . [prevent] our

⁶⁹ *Id.* § 231(e)(6)(A-B).

⁷⁰ *Id.* § 231(e)(7).

⁷¹ See Pub. L. No. 105-277, 112 Stat. 2681-736, 739.

⁷² See *id.*

⁷³ See Children's Online Privacy Protection, 144 CONG. REC. H9902-01 Title II § 202 (daily ed. Oct. 7, 1998).

⁷⁴ *Lawmakers to Impose Barriers on Web to Keep Porn, Stalkers from Children*, EDUC. TECH. NEWS, Sept. 16, 1998, at *1. Senator Coats further noted that he "think[s] it would be a sad day indeed if Congress acted to provide a tax shelter for commercial porn sites on the Web without first requiring them to take responsible measures to protect children from exposure to the[ir] smut." *Id.*

sons or daughters . . . [from] easily access[ing]”⁷⁶ pornography online without our consent. “It is effective because it focuses on the commercial seller of pornography, [and] . . . attempts to address all the issues raised by the Supreme Court.”⁷⁶ Representative Oxley (R-Ohio) supported the Act by stating the “COPA . . . does not restrict an adult’s ability to access pornographic Websites and does not apply to content with redeeming value. . . . The bill merely proposes that Web porn be treated in the same manner as the print media.”⁷⁷ Representative Greenwood (R-Pa.) also voiced his support by stating: “[t]he First Amendment certainly protects the right of people to have any kind of literature in their adult bookstores, but it certainly does not mean that proprietors can . . . display their merchandise [in] the windows of their store visible to . . . children That is what this legislation does on the Web.”⁷⁸

Representative Pitts (R-Pa.) also stood behind the Act. He stated:

Opponents of this bill will claim that we are attempting to federally [c]ensor the [I]nternet. This is simply not true. In fact, the legislation specifically states that it must not be construed to authorize the FCC to regulate in any manner the content of any information provided on the worldwide web. The bill simply requires commercial providers to place materials that are harmful to minors on the other side of adult verification technology.⁷⁹

Representative Stearns (R-Fla.) pointed out that “[t]he bill uses the constitutionally defensible ‘harmful to minors’ standard rather than the constitutionally questionable ‘decency’ standard.”⁸⁰ Representative Bliley (R-Va.) announced:

H.R. 3783 does not “burn the house to roast the pig.” Adults may still view any materials on the Internet they wish, with minimal inconvenience, and engage in adult conversations in chat rooms, e-mails, and bulletin board services. Thus, H.R. 3783 strikes the appropriate balance between the First Amendment rights of adults and the government’s compelling

⁷⁶ 144 CONG. REC. H9902-01, H9906 (daily ed. Oct. 7, 1998) (statement of Rep. Tauzin).

⁷⁶ *Id.*

⁷⁷ *Id.* at H9907 (statement of Rep. Oxley).

⁷⁸ *Id.* at H9908 (statement of Rep. Greenwood).

⁷⁹ *Id.* at H9909 (statement of Rep. Pitts).

⁸⁰ *Id.* at H9910 (statement of Rep. Stearns).

interest to protect children.⁸¹

2. Opponents

Opponents voiced strong concerns, however, and view the COPA as merely the CDA in sheep's clothing.⁸² The ACLU coalition launched the first attack against the COPA, this time armed with a powerful letter that the Department of Justice sent to Representative Bliley before the bill was passed.⁸³ The letter voiced serious concerns about the COPA.

The Department's enforcement of a new criminal prohibition such as that proposed in the COPA could require an undesirable diversion of critical investigative and prosecutorial resources that the Department currently invests in combating traffickers in hard-core child pornography, in thwarting child predators, and in prosecuting large-scale and multidistrict commercial distributors of obscene materials.

....

[Additionally,] such a provision would likely be challenged on constitutional grounds, since it would be a content-based restriction applicable to "the vast democratic fora of the Internet," a "new marketplace of ideas" that has enjoyed a "dramatic expansion" in the absence of significant content-based regulation.

....

Finally, the COPA as drafted contains numerous ambiguities concerning the scope of its coverage. Such ambiguities . . . might "render [the legislation] problematic for purposes of the First Amendment," by "undermin[ing] the likelihood that the [bill] has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."⁸⁴

ACLU President Nadine Strossen stated that "[t]his Act is absolutely misdescribed as being for children. It is no more for children than it is for free speech."⁸⁵ The ACLU also suggested

⁸¹ *Id.* (statement of Rep. Bliley).

⁸² See *In the Wake of the Starr Report, CDA II Approved by House Subcommittee* (Sept. 17, 1998) (visited Apr. 8, 1999) <<http://www.aclu.org/news/n091798a.html>> (calling the CDA II "a Trojan Horse").

⁸³ Letter from L. Anthony Sutin, Acting Attorney General, Department of Justice, to Thomas Bliley, Chairman of the Committee on Commerce, House of Representatives, 144 CONG. REC. S12741, S12796-98 (daily ed. Oct. 21, 1998).

⁸⁴ *Id.* at S12796-97 (citations omitted).

⁸⁵ *Civil Liberties Group Challenges Internet Porn Law*, L.A. TIMES, Oct. 23,

that the COPA was passed merely on the coattails of Kenneth Starr's report on President Clinton. They noted that news sites carrying the report may have been subject to criminal prosecution under the COPA, and called the censorship "a free political ride."⁸⁶ Barry Steinhardt, president of the Electronic Frontier Foundation ("EFF"), hopped on the Starr Report bandwagon by stating that "[i]t is the height of irony that the same Congress that plastered the salacious Starr Report all over the Internet now passes a plainly unconstitutional law to suppress a vaguely defined category of 'harmful' material."⁸⁷ Although many people question the degree to which Starr's \$50 million plus report benefits mankind, the ACLU is correct in stating that the right to publish the report is undeniably protected by the First Amendment. Nonetheless, the Starr Report would probably survive liability under the "harmful to minors" section of the COPA due to its political value.⁸⁸ Ann Beeson, attorney for the ACLU, stated: "[j]ust like the CDA, this bill will once again criminalize socially valuable adult speech and reduce the Internet to what is considered suitable for a six-year-old."⁸⁹ Other opponents include Senator Leahy (D-Vt.), who vehemently opposed the CDA and stated in the Congressional Record:

CDA-II makes a valiant effort to address many of the Supreme Court's technical objections to the CDA. Nevertheless, while narrower than its CDA-I predecessor, this legislation continues to suffer from substantial constitutional and practical defects. The core holding of the CDA-I case was that "the vast democratic fora of the Internet" deserves the highest level of . . . First Amendment scrutiny. Courts will assess the constitutionality of laws that regulate speech over the Internet by the same demanding standards that have traditionally applied to laws affecting the press. The CDA-II provisions

1998, at C10.

⁸⁶ *In the Wake of the Starr Report, CDA II Approved by House Subcommittee*, *supra* note 83.

⁸⁷ *Meddling With the Internet: The New "CDA2" Censorship Act*, ONLINE NEWSL., Nov. 1, 1998, at *1, available in 1998 WL 2088398.

⁸⁸ See Starr Report, <<http://www.fednet.net/starr/1cover.htm>> (Sept. 9, 1998) (visited on July 30, 1999); see also 47 U.S.C.A. § 231(e)(6)(C) (Supp. 1999) (defining "[m]aterial that is harmful to minors" as, inter alia, something that "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors").

⁸⁹ *Meddling With the Internet: The New "CDA2" Censorship Act*, *supra* note 87, at *1.

included in the Omnibus Appropriations bill do not meet those standards.⁹⁰

B. *Analysis of COPA Under ACLU II*

To survive the “strict scrutiny” standard of review imposed by the Supreme Court, regulations restricting speech on the Internet must be *necessary* to promote a *compelling* governmental interest. The regulations must be both narrowly tailored to achieve that interest and the least restrictive alternative available.⁹¹

The Court in *ACLU II* agreed that the government has a compelling interest to protect children from indecent material on the Internet.⁹² For COPA to survive strict scrutiny, it must be narrowly tailored to achieve that compelling interest, and it must be the least restrictive technological means available to protect children from indecent material on the Internet. Drafters of the COPA addressed these and other issues in an attempt to create legislation that could restrict indecent Internet material and pass constitutional muster.

1. Regulation Limited to the World Wide Web

The COPA specifically and exclusively targeted the World Wide Web as the area of the Internet to regulate. The CDA, on the other hand, targeted a much broader spectrum of communication on the Internet. The COPA does not attempt to regulate chat rooms, e-mail, and other less graphic forms of communication on the Internet. By targeting the Web as opposed to the entire Internet, Congress has greatly narrowed the scope of online expression it seeks to regulate. This resolved many of the problems caused by the CDA’s attempt to regulate a forum as vast and far reaching as the Internet. In *ACLU I*, the court discussed the ineffectiveness of adult verification technology in determining the age or identity of users of e-mail, newsgroups, and chat rooms.⁹³ The COPA effectively addresses the court’s concern by limiting its jurisdiction to the World Wide

⁹⁰ 144 CONG. REC. S12794 (daily ed. Oct. 21, 1998) (statement of Sen. Leahy).

⁹¹ See *ACLU v. Reno*, 929 F. Supp. 824, 861 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997)

⁹² See *id.* at 853.

⁹³ See *id.* at 845.

Web, where adult verification technology is far more effective.⁹⁴ Moreover, the World Wide Web is by far the most popular user interface on the Internet, and most of the indecent material easily accessible by children on the Internet can be effectively controlled by managing the World Wide Web.⁹⁵

By restricting foreign as well as interstate Web commerce,⁹⁶ however, the COPA may force the Court to address the international aspect of the World Wide Web and Congress' authority to exert its control in this arena. In *ACLU II*, the Court left this issue unresolved, acknowledging only that "[b]ecause so much sexually explicit [material] originates overseas," difficult issues are raised regarding the scope and extraterritorial application of the CDA.⁹⁷ In addition to the Court, opponents have challenged attempts at regulating the Internet because of its "borderless" characteristics.⁹⁸ Many have suggested that international treaties and consortiums would be better equipped to control the Internet.⁹⁹

⁹⁴ The court notes:

An e-mail address provides no authoritative information about the addressee, who may use an e-mail "alias" or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses . . . [and] no reliable way . . . for a sender to know if the e-mail recipient is an adult or a minor Because of similar technological difficulties, individuals posting a message to a newsgroup or engaging in chat room discussions cannot ensure that all readers are adults [However], [u]nlike other forms of communication on the Internet, there is technology by which an operator of a World Wide Web server may interrogate a user of a Web site [A] fill-in-the-blank [electronic] "form" to request information from a visitor to a Web site [can be used], and this information can be transmitted back to the Web server and be processed by a computer program. . . .

Id.

⁹⁵ See Shawn G. Pearson, Comment, *Hype or Hypertext? A Plan for the Law Review to Move into the Twenty-First Century*, 1997 UTAH L. REV. 765; Dan Thu Thi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 188 (1998); Ray Moseley, *Gruesome Belgian Sex Case Puts Focus on Child Abuse*, CHI. TRIB., Sept. 3, 1996, at 6.

⁹⁶ See Child Online Protection Act, 47 U.S.C.A. § 231(a)(1) (Supp. 1999).

⁹⁷ *Reno v. ACLU*, 521 U.S. 844, 878 n.45 (1997).

⁹⁸ See *Global Electronic Marketplace: Hearings Before the House Commerce Comm.*, 105th Cong. (1998) (statement of William M. Daley, Secretary of Commerce), available in 1998 WL 12762557 (discussing such characteristics in tax/tariff context); see also Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1203 (1998); Eric Rothschild, *No Need for CRTC to Regulate Internet*, TORONTO STAR, Sept. 24, 1998, at A23.

⁹⁹ The international response to Internet regulation is varied. China has taken strong measures to regulate the Internet by requiring all service providers to

2. Definition of a Minor

The COPA specifically addressed the Court's concern in *ACLU II* for the definition of a minor. In comparing the CDA to the statute challenged in *Ginsberg*¹⁰⁰ the Court stated that "the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority."¹⁰¹ Section 231(e) of the COPA follows the New York statute in *Ginsberg* and defines a *minor* as any person under seventeen years of age.

3. Commercial Transactions

The Court in *ACLU II*, also referring to *Ginsberg*, stated that "the New York statute applied only to commercial transactions, whereas the CDA contains no such limitation."¹⁰² Section 231(a)(1) of the COPA attempts to address this issue by only prohibiting communication over the World Wide Web for *commercial purposes*. Further, the Act defines commercial purposes in section 231(e)(2) as World Wide Web communications made in the "regular course of . . . trade or business, with the objective of earning a profit."¹⁰³ Although this was clearly an attempt at addressing the Court's concern, the ACLU points out in its complaint:

The Act does not restrict the *sale* of speech on the Web. In fact, the Act provides an explicit defense for providers who charge for their speech by credit or debit card. Rather, the Act explicitly and purposefully bans a wide range of protected

register with authorities. See Wendy Grossman, *Connected: A Grip on the Net Analysis Britain's New Internet Control Scheme Is Based on a Self-Regulatory Approach*, DAILY TELEGRAPH (London), Oct. 1, 1996, at 12 (comparing Britain's regulations with those found in other countries). Germany has set up a regulatory agency and passed laws to help state officials to better monitor the Internet. See *id.* Britain, which has strong laws governing child pornography, has increased the punishment for possession of indecent photographs of children, including computer-generated images. See *Internet Safety-Net to Tackle Child Porn*, Sept. 25, 1996, available in 1996 WL 11275170. At the other extreme, possession of child pornography is legal in Spain and Sweden. See Moseley, *supra* note 95, at 6 ("Sweden's liberal laws on freedom of expression, similar to the U.S. 1st Amendment guarantees, have made it impossible so far to outlaw possession of child pornography.").

¹⁰⁰ *Ginsberg v. New York*, 390 U.S. 629 (1968). The *Ginsberg* Court upheld a New York statute proscribing the sale of "girlie" magazines to minors. *Id.* at 641-43.

¹⁰¹ *ACLU*, 521 U.S. at 865-66.

¹⁰² *Id.* at 865.

¹⁰³ Child Online Protection Act, 47 U.S.C.A. § 231(e)(2)(B) (Supp. 1999).

expression that is provided *for free* on the Web by organizations and entities who happen to be communicating on the Web “for commercial purposes.”¹⁰⁴

This raises the issue of whether “entrepreneurs, small businesses and other companies who maintain a Web site as a way to enhance their business may face criminal liability if they post material . . . which some community . . . may perceive to be ‘harmful to minors.’”¹⁰⁵ The New York statute attacked in *Ginsberg* specified that “[i]t shall be unlawful for any person knowingly to sell or loan for monetary consideration.”¹⁰⁶ The COPA specifically targets World Wide Web communications made with the “*objective of earning a profit as a result of such activities.*”¹⁰⁷ The Court could easily restrict this language to apply only to people who are in the business of selling material that is harmful to minors on the World Wide Web. Indeed, the legislative history supports that interpretation.¹⁰⁸

Limiting restrictions on speech to “commercial transactions,” however, does not guarantee a favorable response from the Court. It did not save a statute aimed at prohibiting “indecent . . . interstate *commercial* telephone messages”¹⁰⁹ from being struck down by the Court in *Sable*.¹¹⁰ Moreover, the Court has analogized the “non invasive nature” of the Internet more closely with the telephone than other media.

4. Criminal Penalties

Although Congress reduced criminal liability under the COPA to a maximum of six months imprisonment (from a maximum of two years under the CDA), the Court may still compare the criminalization of indecent speech on the Internet to the hanging sword of Damocles. In *ACLU II*, the Court

¹⁰⁴ Civil Action No. 98-CV-5591 Preliminary Statement § 5, Electronic Privacy Information Center (Oct. 22, 1998) (visited July 24, 1999) <http://www.epic.org/free_speech/copa/complaint.html>.

¹⁰⁵ 144 CONG. REC. S12794 (daily ed. Oct. 21, 1998) (statement of Sen. Leahy) (expressing concern over the commercial purposes provision of the COPA).

¹⁰⁶ *Ginsberg v. New York*, 390 U.S. 629, 647 (1968).

¹⁰⁷ 47 U.S.C.A. § 231 (e)(2)(B) (Supp. 1999) (emphasis added).

¹⁰⁸ *See id.*

¹⁰⁹ *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (emphasis added).

¹¹⁰ *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (invalidating a ban on dial-a-porn).

distinguished the FCC order in *Pacifica*¹¹¹ from the CDA because “unlike the CDA, . . . [the FCC order in *Pacifica*] was not punitive; we expressly refused to decide whether the indecent broadcast ‘would justify a criminal prosecution.’”¹¹² The criminal liability provision of the COPA, evaluated under the high level of protection afforded the Internet, will likely make this Act a tough pill for the Court to swallow.

5. Barring Parents From Purchasing Indecent Material for Their Children

In *ACLU II*, the Court discussed the fact that the New York statute in *Ginsberg* did “not bar parents from purchasing the magazines for their children. Under the CDA, by contrast, neither the parents’ consent—nor [] their participation . . . would avoid the application of the statute.”¹¹³ Although the COPA does not address this concern directly, it does leave the door open for parents who wish to obtain indecent material on the Web for their children. Requiring the use of a credit card or adult access code exempts the purveyor of indecent material on the Web from liability. Therefore, parents can either access the Websites for their children or give their codes to their children, thereby allowing direct access.

¹¹¹ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The facts of *Pacifica* involved broadcast radio and the allegedly indecent weekday afternoon radio broadcast called “Filthy Words,” a selection from one of George Carlin’s comedy albums. *Id.* at 729–30. The Federal Communications Commission (“FCC”) issued a declaratory order holding that *Pacifica*, the owner of the New York radio station that aired the Carlin monologue, “could have been the subject of administrative sanctions” pursuant to Title 18 U.S.C. section 1464, which proscribes the use of “any obscene, indecent, or profane language by means of radio communications.” *Id.* at 730–31 (internal citation & quotation omitted). Justice Stevens’ opinion stated that the indecent language in Carlin’s monologue was “unquestionably ‘speech’ within the meaning of the First Amendment.” *Id.* at 744. Nonetheless, he also wrote that “each medium of expression presents special First Amendment problems, [and] . . . it is broadcasting that has received the most limited First Amendment problems.” *Id.* at 748. A plurality upheld the FCC’s “power to regulate a radio broadcast that is indecent but not obscene.” *Id.* at 729. “[W]hen the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.” *Id.* at 750–51. However, four members of the Court rejected Justice Stevens’s view that this kind of speech was of lesser value, thus making the subject matter more conducive to regulation. *See id.* at 762–77 (Brennan, J., dissenting); *see also id.* at 777–80 (Stewart, J., dissenting).

¹¹² *ACLU*, 521 U.S. at 867.

¹¹³ *Id.* at 865 (footnote omitted).

6. Definition of Indecent and Patently Offensive

The Court in *ACLU II* compared the terms “indecent” and “patently offensive” in the CDA to the term “harmful to minors” in the New York statute in *Ginsberg*. The New York statute defined “material that is harmful to minors” by specifying that it must be “utterly without redeeming social importance for minors.”¹¹⁴ The CDA failed to even define “indecent.” Additionally, the Court held that the CDA failed to require that “patently offensive” material must also “lack serious literary, artistic, political, or scientific value.”¹¹⁵ The COPA directly addressed this issue by specifically defining “material that is harmful to minors” in a manner very similar to the obscenity standard set forth in *Miller*.¹¹⁶ Presumably, this was done to close the gap between material that is *harmful to minors* and material that is *obscene*, the latter of which does not receive First Amendment protection. One important difference between the COPA definition and the *Miller* definition, however, is that the “patently offensive” provision of the *Miller* test follows a *community based standard*—“whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the *applicable state law*.”¹¹⁷ Conversely, in section 231(e)(6)(B), the COPA effectively sets a *national* standard for determining whether material is “patently offensive with respect to minors.”¹¹⁸ Instead of allowing each state to set its own definition, the COPA defines the term as “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.”¹¹⁹ The Supreme Court has not yet approved of a single, national obscenity or “patently offensive” standard. Even though the standard set forth in the COPA appears on its face to be drawn narrowly as applied to minors, the Court in *Miller* stated that “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹¹⁷ *Id.* (emphasis added) (describing proper guidelines for considering state laws that regulate obscene material).

¹¹⁸ Child Online Protection Act, 47 U.S.C.A. § 231(e)(6)(B) (Supp. 1999).

¹¹⁹ *Id.*

conduct found tolerable in Las Vegas, or New York City.”¹²⁰ The *Miller* standard has been upheld since 1972, and attempting to alter it for the Internet may not survive strict scrutiny review by the Court.

7. Least Restrictive Alternative Means

One of the most difficult hurdles for Congress to clear will be convincing the Court that criminal penalties are the least restrictive means to control access of indecent material on the Internet by children. The Court has already acknowledged an alternative which requires the “tagg[ing]” of indecent material in a way that “facilitates parental control of material coming into their homes.”¹²¹ Additionally, the rapid development of user-based blocking programs is affording parents more and more control over what their children can view online. The COPA itself even recognizes this alternative in section 103, which requires that customers be notified of commercially available parental control protections. Additionally, Congress acknowledged that it had not adequately researched other alternatives restricting indecent material on the Internet when it established the Commission on Online Child Protection, set up specifically to identify other methods of reducing access by minors to harmful Internet material. The Court addressed this issue in *ACLU II*: “Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored”¹²²

On the other hand, one of the *least restrictive alternatives* mentioned by the *ACLU II* Court was to regulate only “portions of the Internet—such as *commercial web sites*—differently than others, such as chat rooms.”¹²³ This was precisely the route taken by Congress when it limited the scope of the COPA to the World Wide Web and to “commercial transactions.” Additionally, if the COPA were to come before the Court, the “adult fire wall” or “adult zone” set up *vis-a-vis* credit card or password access might appeal to Justice O’Connor. In her dissent in *ACLU II*, she stated that “precedent indicates that the creation of such

¹²⁰ *Miller*, 413 U.S. at 32. (footnote omitted)

¹²¹ *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

¹²² *Id.*

¹²³ *Id.* (emphasis added).

zones can be constitutionally sound.”¹²⁴ She felt the CDA was unconstitutional because it “stray[ed] from the blueprint [] prior cases have developed for constructing a ‘zoning law’ that passes constitutional muster.”¹²⁵ She went on to say that “a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material.”¹²⁶ Justice O’Connor would have upheld the CDA to the extent that it prohibited indecent speech between an adult and one or more minors.

By instituting an adult screening requirement for Web based material only, the COPA comes very close to Justice O’Connor’s model of allowable regulation of indecent material on the Internet. Since the COPA does not attempt to regulate e-mail, newsgroups, or chat rooms, adults are free to communicate with other adults via these channels in an indecent manner, whether or not a minor is present. Communications between adults over the World Wide Web are protected, even if a minor is present, so long as the Web site has “adult verification technology.” The COPA cites “adult verification technology,” however, as an affirmative defense rather than a provisional requirement, which may tend to lessen the weight of this provision in the eyes of the Court.

8. Summary

Although Congress addressed many of the issues raised by the Court in *ACLU II* and has tailored the COPA much more narrowly than its predecessor, the CDA, the strict scrutiny standard afforded the Internet will make any content based regulation of speech in this medium very difficult. Two factors that will make it very difficult for the COPA to survive strict scrutiny review by the Court are: (i) the COPA still imposes criminal liability upon violators, and (ii) Internet screening software is advancing rapidly, thereby creating a viable and less restrictive alternative. These factors may render the COPA unconstitutional, similar to the CDA. Moreover, the ACLU has again lined up a coalition in opposition to the new Act, with compelling ammunition from the Justice Department and a recent 7-2 Supreme Court decision in its favor.

¹²⁴ *Id.* at 886. (O’Connor, J., concurring in the judgment, dissenting in part).

¹²⁵ *Id.*

¹²⁶ *Id.* at 888.

CONCLUSION – REGULATION OF THE INTERNET

As round two of the “freedom of speech on the Internet” battle heats up, we again see the ACLU coalition battling for our First Amendment rights against a Congress trying to avoid being dubbed pornography sympathizers by its constituents. Whether the COPA was signed into law for political reasons or out of a true concern over the welfare of our children, the result will likely be another drawn out First Amendment dispute.

The real tragedy, however, is that while the ACLU battles to protect our First Amendment rights and the legislators battle to get re-elected, there are apparently children out there in cyberspace suffering irreparable damage and harm from all the pornography available online, and online solicitation by pedophiles. Although the magnitude of the problem has not yet been quantified, it nonetheless exists. It is difficult to predict whether the COPA will survive strict scrutiny and pass constitutional muster. If screening software and “cyber zoning” seem to be the least restrictive means to protect children from online pornography, then Congress would be well advised to heavily fund this area of development and invest in educating parents and children about the dangers of cyberspace. Government funding in this area would probably provoke far less opposition, and a technological rather than a legislative solution to this problem probably represents the “handwriting on the wall” anyway. Furthermore, existing legislation already qualifies most of the really offensive material on the Internet as “obscenity” or “child pornography,” thereby making it illegal. The proliferation of this material is probably more a function of the difficulty involved in “policing” the Internet than a lack of legislation. Although I would personally not be averse to a narrowly tailored regulation restricting the flow of the pornography in cyberspace, a solid technological “firewall” or “adult zone” made available to Internet savvy parents seems to be a more productive and reasonable alternative at this juncture.

Joel Sanders

