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WWW.OBSCENITY.COM:
AN ANALYSIS OF OBSCENITY AND INDECENCY REGULATION ON THE INTERNET

“ ‘Uncle Sam Out Of My Homepage!’ ”¹

I. INTRODUCTION

Imagine that you sit down at your personal computer and log on to the Internet to access Independent Counsel Kenneth Starr’s recent report on the alleged relationship between President Clinton and Monica Lewinsky.² To your surprise, a screen appears requesting you input your credit card number to prove you are of the requisite age to view the report. Now imagine you have no credit card, or more realistically, you do not feel comfortable giving your credit card number to an unknown party over a communication system which spans the globe. Therefore, because you do not own a credit card or you wish to maintain your privacy, you are prohibited from reading constitutionally protected material regarding the developments in our nation’s democracy. Unfortunately, this is the reality of the Child Online Protection Act (COPA),³ Congress’ latest attempt to regulate Internet content.

This comment explores the constitutionality of federal regulations as applied to Internet content and alternatives to government regulation. Part II provides background on the Internet, First Amendment obscenity and indecency law as applied to communications media, and past and current legislation enacted to regulate Internet content. Part III analyzes the constitutionality of COPA, and discusses why other alternatives are more effective and preferable to government regulation. Part IV concludes that protecting children from harmful Internet content is the responsibility of parents, and therefore, Internet regulation should begin at home.

II. BACKGROUND

A. *The Internet: Its History and How it Works*

The Internet began in 1969 as a project of the Advanced Research Project Agency Network, ARPANET, a branch of the Department of Defense.⁴ The Agency set up a

¹ Janelle Brown, *CDA--The Sequel*, SALON MAGAZINE (Sept. 23, 1998) <<http://www.salonmagazine.com/21st/feature/1998/09/23feature2.html>> [hereinafter *Sequel*].

² The government released the Starr Report over the Internet on September 11, 1998. *USA Today Tech Report* (visited Oct. 15, 1998) <<http://www.usatoday.com/life/cyber/tech/ctd392.htm>>. The report was available on the following government web sites: <<http://thomas.loc.gov/icreport>>, <<http://www.house.gov/icreport>>, <http://www.access.gpo.gov/congress/icreport>>, <<http://www.house.gov/judiciary>>.

³ PUB. L. NO. 105-277, 112 STAT. 2681 (codified at 47 U.S.C. § 231 (1998)). On November 19, 1998, the United States District Court for the Eastern District of Pennsylvania granted a motion for a temporary restraining order and halted enforcement of COPA until a court resolves its constitutionality. Michael Rubinkam, *Judge Suspends Internet Law, The Child Online Protection Act Seeks to Protect Children From Online Pornography*, YORKDAILY RECORD (Philadelphia), Nov. 20, 1998, at A-02. On February 1, 1999, United States District Judge Lowell A. Reed issued a preliminary injunction blocking enforcement of COPA. Leslie Miller, *Judge Block’s Net Porn Law Ruling Cites Free-Speech Protection*, USA TODAY, Feb. 2, 1999 at 01A, available in Westlaw PAPERS File.

⁴ Maureen A. O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82

computer network via phone lines designed to withstand nuclear attack so that the government and researchers could communicate over great distances, regardless of the type of computer used.⁵ Computers from universities, corporations, and individuals began to connect to the network and by the late 1980's, it evolved into a giant network of networks.⁶

The Internet consists of computers linked together to form small networks, and those networks are linked to other networks through routers⁷ and software protocols.⁸ The first step in reaching speech on the Internet is obtaining access through a service provider.⁹ Next, the user's computer is linked to that of the provider through a modem.¹⁰ Once logged on, users may access various methods of communication such as e-mail,¹¹ electronic bulletin boards,¹² or the world wide web.¹³ The world wide web

MINN. L. REV. 609, 615 and n. 13 (1998) (describing the origins of the Internet and noting how the Department of Defense wanted to make computer communication available between government-funded researchers and the government, regardless of their geographic location and the type of machine being used).

⁵ *Id.* at 615 and n.14; John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207, 218 n.59 (1997) (discussing how the United States Department of Defense developed the Internet in an effort to maintain communications during war time).

⁶ *See, e.g.*, GRAHAM J.H. SMITH, INTERNET LAW AND REGULATION 1 (2nd ed. 1997); ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) [hereinafter *Reno I*]; Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L L. 541, 548-49 (1998) (discussing the history of the Internet, examining the regulation of child pornography on the Internet, and concluding an international structure of regulation and enforcement is necessary for successful regulation).

⁷ SMITH, *supra* note 6, at 3. Routers are computers designed to receive and forward data. *Id.*

⁸ *Id.* at 1-3 (describing an overview of the Internet); Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 286 (1996). This system enables anyone with a computer and a modem to connect the computer to the telephone line and communicate with anyone also connected in the same way. O'Rourke, *supra* note 4, at 616. Generally, this communication consists of sharing information directly with other users, as well as posting and retrieving information made available by other users. Kimberly A. Gobla, Comment, *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, 96 (1997).

⁹ TRACY LAQUEY, THE INTERNET COMPANION: A BEGINNER'S GUIDE TO GLOBAL NETWORKING 113 (2nd ed. 1994) (noting that a service provider offers access to the Internet and can be a company or an individual); SMITH, *supra* note 6, at 9-10 (stating a typical service provider is a commercial organization that sells Internet access to commercial and home users and offers a variety of services such as web site hosting and design and software distribution).

¹⁰ Eric Handelman, Comment, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB.L.REV. 709, 711 (1995) (describing how pornographic images are transmitted over the Internet and how finding an Internet service, such as a bulletin board service (BBS), is like a database like Westlaw or LEXIS because users can retrieve information from the BBS, but it is also different in that users can leave information on the BBS for other users).

¹¹ E-mail is similar to traditional paper mail in that it allows correspondence to take place. Joseph N. Campolo, Note, *Childporn.Gif: Establishing Liability for On-Line Service Providers*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721, 739 (1996). However, an individual may instantly respond to, store, or delete an e-mail. *Id.* at 740. Additionally, it allows messages to be sent to large mailing lists with just a few keystrokes. *Id.*

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is the most popular method of communication because it is easy to use.¹⁴ Users may access and transmit pictures, videos, sound and text on the web.¹⁵

Every document on the web has a unique address called a Uniform Resource Locator (URL)¹⁶ and the documents are stored on servers throughout the world.¹⁷ Any user can create a “home page” with his own URL, so others may access the web site.¹⁸

The content of these web sites and documents may contain sexually explicit material and other material harmful to children.¹⁹ This troubles many parents because of the accessibility of those images by “pointing-and-clicking” with the computer mouse,²⁰ a task simple enough for a small child to perform.

Internet growth has been drastic in the last decade. The number of computers that store information and relay communications, also known as host computers, has risen from approximately 300 in 1981, to 36,739,000 in 1998.²¹ In 1992, the estimated range of Internet users was ten to twenty-five million.²² In 1998, 157 million people had access worldwide, according to estimates, and the projected number for the end of 2000 is 327 million.²³ In the United States alone, 70.5 million (34.9%) of approximately 202 million adults currently use the Internet.²⁴

¹² There are approximately 5,000 newsgroups on the Internet and each is focused on an area of particular interest where users with that interest can read and respond to messages. Robert F. Goldman, Note, *Put Another Log on the Fire, There’s a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1086 (1995). Some newsgroups are devoted to sex and/or pornography. *Id.* at 1086-87. Electronic bulletin boards (EBBs) are similar to electronic town meetings. Campolo, *supra* note 11, at 741. A user picks a board, reads the messages, and replies. *Id.* EEBs are located primarily on the Internet. *Id.*

¹³ The world wide web enables users to access the hard drive of others. Goldman, *supra* note 12, at 1088. Users may access text, images, recordings, and video images posted on the Web. *Id.*; see also Angela E. Wu, Comment, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263, 269 (1997) (describing the most common means of communication over the Internet, including one-to-one messaging, one-to-many messaging, distributed message databases real time communication, and remote information retrieval).

¹⁴ *Reno I*, 929 F. Supp. 824, 838 (E.D. Pa. 1996).

¹⁵ *Id.* at 834.

¹⁶ *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996), *aff’d*, 117 S. Ct. 2501 (1997).

¹⁷ *Id.*

¹⁸ *Reno I*, 929 F. Supp. at 836-37.

¹⁹ James V. Dobeus, Comment, *Rating Internet Content and the Spectre of Government Regulation*, 16 J. MARSHALL J. COMPUTER & INFO. L. 625, 631 (1998); *Reno I*, 929 F. Supp. at 844; see generally Jamie N. Nafziger, *Time To Pay Up: Internet Service Providers’ Universal Service Obligations Under the Telecommunications Act of 1996*, 16 J. MARSHALL J. COMPUTER & INFO. L. 37 (1997) (discussing the efforts of the FCC to assert jurisdiction over the Internet).

²⁰ Goldman, *supra* note 12, at 1083.

²¹ Mark K. Lottor, *Network Wizards Internet Domain Survey* (visited Oct. 15, 1998) <<http://www.nw.com/zone/host-count-history>>.

²² Randolph Stuart Sergent, *The “Hamlet” Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671, 672 (1996) (providing statistics on the Internet’s rapid growth and discussing how the Internet has changed the way the world communicates due to its ability to relay communication instantaneously).

²³ *Global Internet Statistics* (visited Oct. 15, 1998)

A recent example of the increased use and technological achievement of the Internet is the release of Independent Counsel Kenneth Starr's report to Congress on the alleged relationship between President Bill Clinton and Monica Lewinsky. The government voted to release the 445-page report to the public via the Internet on September 11, 1998, and in a matter of hours the full text was available online.²⁵ The traffic of millions of people attempting to download the document overwhelmed parts of the Internet. For example, the number of users accessing the CNN web site was more than 300,000 per minute before the report was even available online.²⁶ That number peaked at 340,000, breaking the record set August 31, 1998 set when the stock market average plunged.²⁷ On the afternoon the government released the report, only one in ten attempts to access the House of Representatives' web site succeeded.²⁸ The slowdown was felt all across the Internet.²⁹ According to one source,

[t]o longtime Internet watchers, the real news about the release of the Starr report was the use of the global network as the primary means of distributing unfiltered, primary news to millions of Americans. 'This is an historic event . . . [which] shows that the net is making an impact on our nation's democracy.'³⁰

While the ability to regulate the increased number of Internet users is a concern to the government, the real issue for both Congress and parents is what material is made available via the Internet and how it may affect children.³¹ Approximately one-fifth of

<<http://www.euromktg.com/globstats/>>.

²⁴ *USA Today Tech Report* (visited Oct. 15, 1998)

<<http://www.usatoday.com/life/cyber/tech/ctd392.htm>>.

²⁵ Darnell Little and Kelly McEvers, *A Wide Net Casts for Starr Report*, (visited Sept. 11, 1998) <<http://chicagotribune.com/news/nationworld/wsite/0,1267,2899-2938-14399,00.html>>.

Congress posted the report on four of the government web sites and gave copies to the top commercial news sites. *Id.* Aaron Pressman (Reuters), *Internet Withstands Crush of Starr Report Seekers* (visited Sept. 11, 1998)

<http://dailynews.yahoo.com/headlines/p1/story.html?s=-v/nm/19980911/p1/internet_3.html>.

Yahoo!, an Internet search engine, was one of the first web sites to publish the report. Little & McEvers, *supra*. It uploaded the document from the House of Representatives at 1:45 p.m. CST and five minutes later it was available on the web. *Id.*

²⁶ Chris Allbritton, *Millions Swamp Internet for Report* (visited Sept. 11, 1998) <http://dailynews.yahoo.com/headlines/ap/washington/story.html?s=-v/ap980911/washington/stories/clinton_internet_1.html>.

²⁷ Pressman, *supra* note 25.

²⁸ *Id.*

²⁹ Allbritton, *supra* note 26.

³⁰ Pressman, *supra* note 25 (quoting Internet political consultant and co-founder of Mindshare Internet Campaigns, Jonah Seiger). *But see* Murray Fromson, *Online Journalism Review: Triumph for the Internet, Tragedy for the Country?* (visited Sept. 11, 1998) <http://orj.usc.edu/sections/news/98_stories/ojnews_fromson_091198.htm> ("The Internet speed of news delivery is unquestionably a technological achievement, but the hasty flashing of raw and salacious data to an eagerly awaiting world market may prove tragic.")

³¹ Brian M. Werst, Comment, *A Survey of the First Amendment "Indecency" Legal Doctrine and Its Inapplicability to Internet Regulation: A Guide for Protecting Children from Internet Indecency After Reno v. ACLU*, 33 GONZ. L. REV. 207, 208 (1998) (arguing the nature of the Internet and the goal of protecting children does not warrant regulating the Internet because there is very little chance that children will accidentally access indecent material on the Internet, and concluding that because of the global nature of the Internet, Congress may need to find an international answer or rely on the parents to monitor their

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users of the world wide web regularly view at least one of the over six hundred available commercial pornography sites, and the number of these sites increases daily by thirty-nine.³² The Internet is an easy avenue for the distribution of pornography due to the anonymity of the distributor and receiver through the use of passwords.³³ Much of the illegal Internet pornographic material is encrypted and law enforcement cannot access the content of such material without the passwords, which are available only from the sender or receiver.³⁴ Another concern is the relative simplicity of viewing pornography online for a person of any age with only modest experience.³⁵ Because there are many adult bulletin board services³⁶ on the web, access to free pornographic images only requires a mouse click on a button labeled “yes” when a person is presented with the question, “Are you 18 years of age or older?”³⁷

A recent case showing the impact of easy access and exchange of harmful material to children involves forty-two year-old Francis Kufrovich of Woodland Hills, California.³⁸ Kufrovich used the Internet to attempt to lure a thirteen year-old Connecticut girl into having sex with him.³⁹ When he first contacted the girl on the

children’s access).

³² *Id.* at 208; see also Sara Silver, *Sex Sells Briskly in Cyberspace, Creating Lucrative New Industry with Internet as Gateway to Private-Site Peep Shows, Porn May Again Take Lead in Spurring New Technology*, AKRON BEACON JOURNAL, June 18, 1997, at C7 (describing the Internet sex oriented business developed by Madeleine Altmann in New York City).

³³ Marc S. Friedman and Kristin Bissinger, “*Infojacking*”: *Crimes on the Information Super Highway*, 9 No. 5 J. PROPRIETARY RTS. May, 1997, at 2, 9 (stating that America Online now offers a “kids-only” chat room because pornography is prevalent on the Internet). Another problem with anonymity on the Internet stems from the use of “anonymous remailers.” *Id.* at 8. Some pedophiles utilize remailers to re-send email messages using a fictitious origin. *Id.* Children who receive such emails have no way of knowing if the sender is a friend or a child abuser. *Id.* at 8-9.

³⁴ *Id.* at 9 (discussing how both the sender and receiver of encrypted pornographic material remain anonymous and the only effective way for authorities to infiltrate this type of situation is an expensive and time-consuming investigation).

³⁵ Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Providers*, COMPUTER LAW, July 1996, at 1, 2 (finding the technology industry should be responsible to find a solution to protect children from online pornography, rather than parents, because parents are less “net-savvy” than their children).

³⁶ For information on bulletin board services (BBSs) and electronic bulletin boards (EBBs), see *supra* note 12 and accompanying text.

³⁷ Clapes, *supra* note 35, at 2-3.

³⁸ *Valley Man Faces Net Sex Charge*, DAILY NEWS OF LOS ANGELES, July 24, 1997, at N1, available in Westlaw, PAPERS File; see also Robyn Forman Pollack, *Creating the Standards of a Global Community: Regulating Pornography on the Internet -- An International Concern*, 10 TEMP. INT’L & COMP. L.J. 467, 478-79 (1996) (discussing other recent cases involving children being lured away from their homes and molested by computer pedophiles, and how technology needs to “catch-up” with the legal difficulties created by the Internet; concluding that because the Internet is a global medium, regulation must be agreed upon internationally, which includes reconciling legal venue and jurisdiction).

³⁹ *Valley Man Faces Net Sex Charge*, *supra* note 38, at N1.

Internet he pretended to be a teenager.⁴⁰ Kufrovich allegedly tried to sexually assault the young girl after meeting her in person.⁴¹

There was also the case of forty-seven year-old Paul Brown, Jr. of Cleveland, Ohio.⁴² Brown used the Internet to entice female minors to send him sexually explicit videos and pictures of themselves and to engage in sexual conduct.⁴³ Police found letters and photographs from fifteen girls, ages fourteen to sixteen, in his apartment.⁴⁴ Authorities released Brown's home and e-mail address in hopes of identifying other victims.⁴⁵

In another incident, a former high-school vice principal pleaded guilty to using the Internet to lure teenage boys into having sexual relations with him.⁴⁶ Lewis Powell, fifty-six, admitted he used the Internet to talk to minors about "sexual fantasy stuff."⁴⁷

A recent poll found that indecency on the Internet was a concern of eighty-five percent of Americans.⁴⁸ However, there are two characteristics which make regulating the Internet very difficult, its decentralization and openness.⁴⁹ Simply stated, "[n]o one

⁴⁰ *Id.*; see also Mike McPhee, *Oregon Man Held in Internet Sex Sting*, DENVER POST, Feb. 14, 1998, at B-03, available in Westlaw, PAPERS File (discussing the indictment of Steven Tubbs, forty-two, who entered a chat room established for teenagers in order to contact "a teen romate (sic) for cleaning and various personal services").

⁴¹ *Valley Man Faces Net Sex Charge*, *supra* note 38, at N1. Kufrovich traveled to Irving, Texas, where the girl went with her mother for a swim meet. *Id.* The mother intervened in the assault. *Id.*

⁴² *Prosecutors Seek Victims in Internet Sex Scandal*, CHARLESTON DAILY MAIL, Feb. 21, 1997, at 3A, available in Westlaw, PAPERS File.

⁴³ *Id.* Brown faces up to ten years in prison, as well as a \$250,000 fine. *Id.*

⁴⁴ *Id.* Police also found pictures of ten girls with only their first names written on the back. *Id.*; see also *Police Close Case About Internet Sex*, AKRON BEACON JOURNAL, Sept. 16, 1998, at B4, available in Westlaw, PAPERS File (noting the police seized and searched a suspect's computer and software to determine if a crime was committed after the police caught him in an undercover operation where a detective posed as a fourteen year-old girl in a chatroom).

⁴⁵ *Prosecutors seek victims*, *supra* note 42, at 3A. A U.S. Attorney urged parents to check phone bills for calls to Brown's telephone number. *Id.* Brown had six online accounts and numerous e-mail addresses. *Id.*

⁴⁶ *Former Vice-Principal Pleads Guilty to Internet Sex Charge*, LEDGER-ENQUIRER, Jan. 13, 1998, at B2, available in Westlaw PAPERS File.

⁴⁷ *Id.*

⁴⁸ Werst, *supra* note 31, at 209 (finding Internet pornography is the third largest area of sales on the Internet with an estimated annual revenue of \$100 million, and noting that many adult Internet sites are accessed more than two million times in a one-month period).

In particular, the increased availability of indecency on the Internet has generated a serious concern for children. The scores of amicus curiae that participated in Internet regulation litigation pointed to the resulting harm to children from exposure to sexual content on the Internet. Many of these parties also argued that increased availability of pornography affects not only children, but also the sexual attitudes of American adults.

Id. (footnotes omitted). Compare Peter Johnson, *Pornography Drives Technology: Why Not to Censor The Internet*, 49 FED. COMM. L.J. 217, 218 (1996) (stating pornography is a "positive good" that not only encourages experimentation with various forms of new media, but has economic value as well).

⁴⁹ O'Rourke, *supra* note 4, at 617 (discussing how the Internet was designed so that if one link in the network was broken there would be no disruption to the communication, and

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owns the Internet, thus no one controls it.”⁵⁰ It is open to anyone with a computer and modem,⁵¹ unbounded by geographical barriers, and its content “is as diverse as human thought.”⁵² Therefore, controlling the content of the Internet is extremely difficult because no one knows where the material originates, who is receiving the material, or if it has crossed international boundaries.⁵³

B. First Amendment Protection for Content-Based Regulations

The First Amendment of the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech.”⁵⁴ However, the Constitution does not protect all forms of speech.⁵⁵ Obscene material does not receive any First Amendment protection.⁵⁶ Indecent speech, on the other hand, is constitutionally protected and subject to strict scrutiny.⁵⁷ This means that in order for a regulation to survive strict scrutiny “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”⁵⁸ The strict

noting there is no organization responsible for regulating the Internet).

⁵⁰ Pollack, *supra* note 38, at 467 (finding the Internet’s unique characteristics, including the fact that it is unbounded, make it impractical to use existing laws to regulate Internet content). “ ‘Almost like posters on telephone poles, the Internet appears to defy regulation.’” *Id.* (quoting Warren Caragata, *Crime in Cybercity*, MACLEAN’S, May 22, 1995, at 50).

⁵¹ O’Rourke, *supra* note 4, at 618 (noting the decentralization of the Internet is responsible for its openness, as anyone with a personal computer and modem can connect to a computer already linked in, and get access to the Internet).

⁵² *Reno I*, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). Chief Judge Dolores Sloviter of the Court of Appeals for the Third Circuit found regulation and enforcement of the Internet was technologically impossible. *Id.* at 854; *see generally* Lawrence Lessig, *Reading The Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996) (presenting the two arguments on how courts are to apply the Constitution to advanced technology such as the Internet: (1) courts should be deferential for the time being to allow ordinary understandings to catch up to technology; (2) courts should actively respond to the Internet to protect citizens’ rights from being violated by increasing government intervention).

⁵³ Pollack, *supra* note 38, at 468.

⁵⁴ U.S. CONST. amend. I. The full text of the First Amendment is: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

⁵⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-46 (1974) (finding libelous statements against private citizens receive less First Amendment protection than libelous statements directed toward public figures); *Miller v. California*, 413 U.S. 15, 23 (1973) (holding obscene speech receives no First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (finding under the First Amendment the government may forbid speech that constitutes fighting words).

⁵⁶ *Miller v. California*, 413 U.S. 15, 23 (1973).

⁵⁷ *Sable Comm., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (holding that just because protected speech may offend some people, it does not justify suppression).

⁵⁸ *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *see also* Samantha L. Friel, *Porn by Any Other Name? A Constitutional Alternative to Regulating “Victimless” Computer-Generated Child Pornography*, 32 VAL. U. L. REV. 207, 234 (1997) (discussing strict scrutiny and its application to computer generated child pornography that does not involve child abuse, and concluding there should be a rebuttable presumption established under federal law that a photograph that looks like a child engaging in sexual activity is child

scrutiny standard is applied to any government legislation that limits the content of protected speech.⁵⁹ The following section provides an overview of the law relating to obscene and indecent material.

1. Obscenity Law

In 1868, Lord Chief Justice Cockburn established the first obscenity test in *Regina v. Hicklin*,⁶⁰ which involved a pamphlet describing the alleged immorality of Catholic Priests. The Chief Justice defined the test as “[w]hether the tendency of the matter charged . . . 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.”⁶¹ The American courts adopted that test until it came under great criticism.⁶² This led the Supreme Court to adopt a different test in *Roth v. United States*.⁶³ There, the Court established that obscene material is not constitutionally protected by the First Amendment⁶⁴ and defined the obscenity test as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁶⁵ However, courts struggled to apply the *Roth* standard and numerous opinions found the issue was unsettled.⁶⁶

In *Miller v. California*,⁶⁷ the Supreme Court created the current obscenity test and reaffirmed that obscene material is not constitutionally protected.⁶⁸ The new three-part standard is:

- (a) whether “the average person, applying contemporary community standards” would find that the work, when taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct

pornography).

⁵⁹ *Simon & Schuster, Inc. v. New York*, 502 U.S. 105, 118 (1991).

⁶⁰ *United States v. Kennerley*, 209 F. 119, 120 (S.D.N.Y. 1913) (citing L.R.-Q.B. 361 (Eng. 1868)).

⁶¹ *Id.*

⁶² *Kennerley*, 209 F. at 120-21 (Judge Learned Hand found the *Hicklin* test to be unduly harsh because he believed it did not reflect the understanding and morality of the time); *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182, 184-85 (S.D.N.Y. 1933) (rejecting the *Hicklin* test and suggesting a pornographic intent standard with a determination of the effect on an average reader).

⁶³ 354 U.S. 476 (1957). In *Roth*, the Court convicted the defendant of mailing obscene books, photos and advertisements. *Id.* at 480.

⁶⁴ *Id.* at 484-85.

⁶⁵ *Id.* at 489.

⁶⁶ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79 (1973) (Brennan, J., dissenting) (“[O]ur efforts to implement . . . [the *Roth* standard] demonstrate that agreement on the existence of something called ‘obscenity’ is still a long and painful step from agreement on a workable definition of the term.”); *Ginsberg v. New York*, 390 U.S. 676, 704-05 (1968) (Harlan, J., separate opinion) (finding the *Roth* approach has “produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication”).

⁶⁷ 413 U.S. 15 (1973). In *Miller*, the Court affirmed the conviction of the defendant for conducting a mass mailing which advertised the sale of adult material. *Id.* at 16. The brochures contained explicit drawings of men and women in groups of two or more engaged in sexual activities. *Id.* at 18.

⁶⁸ *Id.* at 23.

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specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶⁹

Significantly, the Court recognized 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 conduct found tolerable in Las Vegas, or New York City.”⁷⁰ Therefore, the test incorporated a community standard, as opposed to a “national” standard.⁷¹

In *Ginsberg v. New York*,⁷² the Court employed a slightly different application of obscenity law toward children. The *Ginsberg* Court affirmed the conviction of a defendant who distributed material considered “harmful to minors” to children under age seventeen.⁷³ The Court found that the State has a compelling interest in protecting the welfare of children.⁷⁴ It held that the State could bar the distribution of obscene

⁶⁹ Donald T. Stepka, *Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material*, 82 CORNELL L. REV. 905, 917 (1997) (summarizing the test from *Miller v. California*, 413 U.S. 15, 24 (1973)). The test described in layman’s terms is as follows:

[T]he trial court would ask something like these four questions:

Error! Main Document Only.. Is it designed to be sexually arousing?

Error! Main Document Only.. Is it arousing in a way that one’s local community would consider unhealthy or immoral?

Error! Main Document Only.. Does it depict acts whose depictions are specifically prohibited by state law?

Error! Main Document Only.. Does the work, when taken as a whole, lack significant literary, artistic, scientific, or social value?

If the answer to all four questions is “yes,” the material will be judged obscene, and it will be constitutional to prosecute someone for distributing it.

Mike Godwin, *Virtual Community Standards: BBS Obscenity Case Raises New Legal Issues*, in HIGH NOON ON THE ELECTRONIC FRONTIER, CONCEPTUAL ISSUES IN CYBERSPACE 269, 271 (Peter Ludlow ed., 1996).

⁷⁰ *Miller*, 413 U.S. at 32.

⁷¹ *Id.* at 37. For a discussion on the application of the community standard to the Internet, see *infra* Part III.B.

⁷² 390 U.S. 629 (1968). In *Ginsberg*, the Court found a minor’s constitutional right to freedom of expression was not invaded by the New York statute which gave minors under age seventeen more restricted rights than adults, as applied to what sexual material they could see. *Id.* at 636-37. Specifically, the Court concluded that magazines with pictures of female nudity are not obscene for adults, but are obscene as applied to minors under age seventeen. *Id.* at 634-65.

⁷³ *Id.* at 632. The defendant owned a lunch counter. *Id.* at 631. He personally sold two “girlie” magazines to a 16 year-old boy. *Id.* The New York statute in question defined “harmful to minors” as the

quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

Id. at 646 (citing N.Y. PENAL LAW § 484-h, later replace by §§ 235.20-235.22 (McKinney 1998)).

⁷⁴ *Id.* at 640-41. The Court based its finding of a compelling interest on two reasons. *Id.* at 639. First, the Court found that parents have the authority in the household in our society

material to children, even though it would not qualify as obscene when distributed to adults.⁷⁵ Although the protection of children qualifies as a compelling government interest, a regulation designed to achieve this goal must be narrowly tailored or the least restrictive means available to survive the strict scrutiny standard.⁷⁶

2. Indecency Law

Short of obscenity, indecent speech is constitutionally protected, but it may be regulated if the content is offensive to a compelling state interest.⁷⁷ Indecent material includes offensive sexual expression which is not obscene when distributed to adults, as determined by the *Miller* obscenity test.⁷⁸ The cornerstone case for the regulation of indecent speech is *FCC v. Pacifica Foundation*,⁷⁹ which involved a radio station broadcast of comedian George Carlin's monologue entitled "Filthy Words."⁸⁰ The FCC concluded the language used in the broadcast was indecent and violated 18 U.S.C. §1464,⁸¹ because certain words depicted excretory and sexual activities in an offensive manner.⁸² Justice Stevens, writing for the majority, found that the statutory terms "obscene," "indecent," and "profane" had independent meanings.⁸³ He went on to adopt the FCC's definition of the term "indecent."⁸⁴ The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."⁸⁵ The Court found that

and "are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* Second, it found "[t]he State also has an independent interest in the well-being of its youth." *Id.* at 640.

⁷⁵ *Id.* at 638. *But see* *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (holding the State could not totally suppress the material harmful to minors based on the state interest in protecting children to such exposure because it would "reduce the adult population . . . to reading only what is fit for children").

⁷⁶ *See supra* notes 56-59 and accompanying text (describing the strict scrutiny standard and its application to content-based regulations); *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997) [hereinafter *Reno II*].

⁷⁷ Recent Development, *Reno v. American Civil Liberties Union: Supreme Court Strikes Down Portions of the Communications Decency Act of 1996 as Facially Overbroad in Violation of the First Amendment*, 24 J. CONTEMP. L. 111, 121 (1998) (discussing the background of the First Amendment and finding free speech guarantees remain constant even though communication mediums continually change).

⁷⁸ *Sable Comm., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

⁷⁹ 438 U.S. 726 (1978).

⁸⁰ *Id.* at 729-30.

⁸¹ The statute states, "[W]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. §1464 (1994).

⁸² *Pacifica*, 438 U.S. at 739.

⁸³ *Id.* at 739-40.

⁸⁴ Clapes, *supra* note 35, at 5 (citing *Pacifica*, 438 U.S. at 743, and discussing First Amendment law terminology, including the history of the terms "indecent" and "patently offensive," and concluding because the Internet is so difficult to regulate through legislation, the information technology industry needs to step forward and accept its responsibility to protect children from the technology it brought into people's homes).

⁸⁵ Clapes, *supra* note 35, at 5 (quoting *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n.10 (1993)).

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the FCC properly held the broadcast indecent and in violation of the statute because the broadcast content was offensive and shocking.⁸⁶

C. Medium-Specific First Amendment Analysis

The Court treats forms of communicative technology differently when applying First Amendment standards because of the different characteristics of each medium.⁸⁷ For example, in *Pacifica*, the Court justified the application of a reduced level of scrutiny to a radio broadcast due to distinct characteristics of the broadcast medium: (1) radio and television are easily accessible by children; (2) broadcasting invades the privacy of people's homes and creates a constant risk of exposure to offensive broadcasts (pervasive nature); and (3) the government must regulate the limited supply of frequency space (scarcity of frequencies).⁸⁸

The scarcity of frequencies argument originally surfaced in the case of *Red Lion Broadcasting Co. v. FCC*.⁸⁹ The Court concluded that because there are a limited number of broadcasting frequencies, the government should manage them to best serve

⁸⁶ *Pacifica*, 438 U.S. at 727.

⁸⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). One example is print media, where a print publisher may be a primary publisher and liable for the contents of its publication, like a newspaper, if the publisher played a major part in creating and editing the illegal communication. Campolo, *supra* note 11, at 747 (analogizing print publisher liability to that of an electronic information service (EIS) or an Internet service provider and finding if the EIS has reason to know the obscene or indecent material is posted on its service it is legally obligated to remedy it). The alternative classification is that of a republisher where there is no presumption of knowledge of the illegal material, like a bookstore. *Id.* Traditionally, print media has been free from government regulation. *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1071 (1994). In *Smith v. California*, the Supreme Court addressed the issue of publisher liability and determined that booksellers were republishers and could not be held strictly liable for the contents of the published material they sold. 361 U.S. 147, 153 (1959). Recently, some courts found Internet service providers were republishers, while others classified them as primary publishers. *E.g. Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding CompuServe's status was a republisher because it had no editorial control over material posted on its service and because of the infeasibility of examining all the material on its service); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy was a primary publisher responsible for member postings because Prodigy held itself out as maintaining editorial control over material postings on its service, like a newspaper); *see generally* Jennifer J. Lee, *The Internet and First Amendment Values: Renov. ACLU and the Democratization of Speech in the Marketplace of Ideas*, 22 COLUM.-VLAJL & ARTS 61 (1997) (finding the Internet is different from any traditional form of communications media, but concluding the Internet is closest to telephone communication because an Internet user must affirmatively search for information, like a caller placing a telephone call).

⁸⁸ *Pacifica*, 438 U.S. at 731 n.2; Recent Development, *supra* note 77, at 123 (describing the *Pacifica* decision in which the Court upheld the FCC's authority to sanction broadcasters for transmitting indecent speech and finding broadcasting was "uniquely accessible to children," as well as a "uniquely pervasive presence in the lives of all Americans").

⁸⁹ 395 U.S. 367, 388-89 (1969). In *Red Lion*, the Court held it was constitutional to regulate broadcast media more strictly than other media because broadcast channels were a scarce public resource. *Id.* The Court noted that the radio broadcast spectrum had become very congested. *Id.* at 398. The government's job was to properly allocate the scarce broadcast frequencies so as to best serve the public interest. *Id.* at 396.

the public interest.⁹⁰ In sum, the government may not regulate the content of objectionable material where individuals have control over its dissemination.⁹¹

The Court addressed the telephonic medium in *Sable Communications, Inc. v. FCC*,⁹² where a dial-a-porn service challenged § 223(b) of the 1988 version of the Telecommunications Act, which banned the transmission of obscene or indecent commercial phone recordings.⁹³ The Supreme Court held that the portion of the statute banning obscene communications was constitutional, as obscenity is not protected by the First Amendment.⁹⁴ However, the Court found that the “dial-it-medium” was less pervasive than the broadcast medium in *Pacifica* because a caller must take affirmative steps to receive a dial-a-porn message.⁹⁵ Therefore, in terms of the ban on indecent communication, the Court analyzed telephonic communication under the strict scrutiny standard.⁹⁶ While the Court acknowledged that protecting the well-being of minors is a compelling government interest,⁹⁷ it found that alternatives existed that were less restrictive than a complete ban on indecent speech, which would deny adult access.⁹⁸

The Supreme Court provided a lesser First Amendment protection to cable television because, like broadcasts, cable is accessible to children and has a potentially pervasive presence in a viewer’s home.⁹⁹ However, in *Turner Broadcasting System, Inc. v.*

⁹⁰ *Id.* at 400. The right at issue was that of the viewers or listeners and not the broadcasters. *Id.* at 390.

⁹¹ *Reno II*, 117 S. Ct. 2329, 2343 (1997); Sean Adam Shiff, Comment, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. R. 731, 753 (1996) (arguing the Court should re-examine the *Miller* obscenity standard and allow obscenity to receive First Amendment protection and only be suppressed when the government has a compelling interest to do so). The author argued:

[T]he ultimate issue for sexually-explicit content on the Internet would be whether users could adequately control the content appearing on their screen, as well as what their children could access. If technology advances to the point where exposure to all unwanted material could be thwarted, then the government would no longer have a compelling interest in suppression.

Id. at 765.

⁹² 492 U.S. 115 (1989). In *Sable*, the Court struck down a statute designed to prohibit minors from accessing telephone dial-a-porn because the statute was not narrowly tailored to meet the government purpose of protecting minors. *Id.* at 130-31.

⁹³ 47 U.S.C. § 223(b) (1982); *Sable*, 492 U.S. at 117-19. A dial-a-porn service is where individuals use the telephone to access and listen to obscene or indecent recordings for a fee. *Id.* at 118; Congress began to regulate dial-a-porn in the 1980’s in an attempt to protect children from the harmful effects of pornography. Wu, *supra* note 13, at 280.

⁹⁴ *Sable*, 492 U.S. at 124. The Court held that it was a constitutional violation to deny adult access to indecent communication over the telephone. *Id.* at 131.

⁹⁵ *Id.* at 127-28.

⁹⁶ *Id.* at 126. The Court found “sexual expression” that is indecent, but not obscene, is protected by the First Amendment. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 131. “The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.” *Id.* at 126.

⁹⁹ Werst, *supra* note 31, at 221; Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 745, 2386-87 (1996) (holding cable television is as pervasive and accessible to children as broadcast media). *But see Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (holding cable television is not pervasive because individuals decide whether to have cable installed in their homes and noting that parents may obtain lockboxes from their cable

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 FCC,¹⁰⁰ the Court found that the *Red Lion* “scarcity of frequency” rationale did not apply to cable television, and the Court affirmed the application of strict scrutiny or something very close to strict scrutiny for content-based government regulations.¹⁰¹

Later, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,¹⁰² the Court struck down two provisions of the 1992 Cable Act, that imposed heavy regulations on the cable industry.¹⁰³ One provision of the 1992 Cable Act allowed cable services the power to prohibit indecent programs on public channels.¹⁰⁴ The other provision was the “segregate and block” provision which the Court found violated the First Amendment because it allowed cable services to regulate the content of their service.¹⁰⁵ The holding reflects the view that the First Amendment is consistent with the promotion of diversity of speech.¹⁰⁶

D. The Communications Decency Act of 1996: The First Round

1. Legislative History

Congress passed the Telecommunications Act of 1996 to encourage development and reduce regulation of new telecommunications technologies.¹⁰⁷ Title V of this Act includes the Communications Decency Act (CDA),¹⁰⁸ which was an amendment proposed by Senator James Exon (D-Neb.) in an effort to make the Internet “superhighway a safe place for our children and our families to travel on.”¹⁰⁹

company to prohibit child access to certain channels); *Reno I*, 929 F. Supp. 824, 876 (E.D. Pa. 1996) (Dalzell, J.,) *aff’d*, 521 U.S. 844 (1997); Dawn L. Johnson, *It’s 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 51, 68 (1996).

¹⁰⁰ 512 U.S. 622 (1994), *aff’d*, 520 U.S. 180 (1997). In *Turner*, a group of cable operators challenged the 1992 Cable Act. *Id.* at 634. The Act imposed rate regulations, must-carry provisions, and restrictions on the distribution of indecent programs. Wu, *supra* note 13, at 278 (discussing the regulation within the cable industry and how the 1992 Cable Act converted the cable industry from virtually unregulated to heavily regulated). The Court held the must-carry provisions supported the important governmental interest of making free television available and guaranteeing that a key part of the United States’ communication system remains intact. *Turner*, 512 U.S. at 646-47.

¹⁰¹ *Turner*, 512 U.S. at 637-38, 641-42; The Court ultimately applied intermediate scrutiny in *Turner* because it determined the provisions in question were content-neutral. *Id.* at 661-62.

¹⁰² 518 U.S. 727 (1996).

¹⁰³ *Id.* at 733 (citing Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. §§ 521-555 (1994))).

¹⁰⁴ *Id.* at 732; *see also* Wu, *supra* note 13, at 276-80 (noting cable television is like broadcasting in that the transmission is one-way, but unlike broadcasting because cable subscribers may select a particular cable plan to receive in their home, while with broadcasting the viewer receives what the broadcaster transmits).

¹⁰⁵ *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 733; Wu, *supra* note 13, at 279.

¹⁰⁶ Wu, *supra* note 13, at 279-80 (discussing the historical regulation of cable television and concluding that regulation of the Internet will halt the free and effective exchange of ideas for which the Internet was created).

¹⁰⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-641 (Supp. 1996)).

¹⁰⁸ Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 223 (a)-(h) (Supp. 1996)).

¹⁰⁹ 141 CONG. REC. S8087-04 (June 9, 1995) (statement of Sen. Exon); *see also* 141 CONG. REC. S1920 (Feb. 1, 1995) (introducing the CDA); 141 CONG. REC. S1820 (June 9, 1995); 141

The explicit purpose of the CDA was to shield children from indecent material on the Internet.¹¹⁰ The indecency portions of the Act made it a criminal violation to use a computer to transmit any “obscene, lewd, lascivious, filthy, or indecent [communications], with [the] intent to annoy, abuse, threaten, or harass another person.”¹¹¹ It also criminalized the computer transmission of any obscene or indecent communication if the party sending the material knew the recipient was under the age of eighteen, regardless of whom initiated the communication.¹¹²

Next, the CDA made it a criminal violation to use a computer to transmit a communication to a specific minor that depicted or described sexual or excretory activities or organs in terms that are patently offensive according to contemporary community standards, no matter whom initiated the communication,¹¹³ or to transmit the communication in such a way that it would be accessible to anyone under eighteen years old.¹¹⁴

2. A Challenge to the CDA

On February 8, 1996, President Clinton signed the Telecommunications Act into law and on the same day various groups advocating the First Amendment right to free speech moved for a temporary restraining order in the Federal District Court of the Central District of Pennsylvania to enjoin enforcement of the indecency portion of the CDA.¹¹⁵ Proponents of the regulation, including the federal government and advocates of family rights, argued that the law protected children from objectionable content being readily available on-line.¹¹⁶ Opponents, such as free speech advocates and the computer technology industry, argued that any legislation restricting the content of the Internet infringed upon adults’ right to free speech.¹¹⁷ The three-judge panel granted

CONG. REC. S8386-02 (June 14, 1995) (proposing two amendments to the proposed regulation).

¹¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104 § 502, 110 Stat. 56. The CDA was an update of the Communications Act of 1934, which regulated telephone technology. *See* 47 U.S.C. § 609 (Supp. 1996).

¹¹¹ 47 U.S.C. § 223(a)(1)(A) (Supp. 1996).

¹¹² § 223(a)(1)(B).

¹¹³ § 223(d)(1)(A).

¹¹⁴ § 223(d)(1)(B).

¹¹⁵ *Reno I*, 929 F. Supp. 824, 826-27 (E.D. Pa. 1996), *aff’d*, 117 S. Ct. 2329 (1997); plaintiffs included the American Civil Liberties Union, AIDS Education Global Information System, Bibliobytes, Clarinet Communications Corp., Computer Professionals for Social Responsibility, Critical Path AIDS Project, Inc., Electronic Frontier Foundation, Electronic Privacy Information Center, Human Rights Watch, Institute for Global Communications, Journalism Education Association, National Writers Union, Queer Resources Directory, Stop Prisoner Rape, Wildcat Press Inc., Declan McCullagh, John Troyer, Brock Meeks, Jonathan Wallace, and Planned Parenthood Federation of America, Inc. *Id.* at 827 n.2.

¹¹⁶ C. Richard Martin, *Censorship in Cyberspace*, 34 HOUS. LAW. 45, 47 (1996); *see also* Brief filed by Dept. of Justice in *ACLU v. Reno*, in *TAKING SIDES, CLASHING VIEWS ON CONTROVERSIAL LEGAL ISSUES*, 201, 201-04 (M. Ethan Katsh ed., 7th ed. 1996).

¹¹⁷ Werst, *supra* note 31, at 212; *see generally* Bret Alan Dublinske, *Free Speech, the Internet, and The CDA: Is a “Decent” Opinion Just a Dream?*, 30 CREIGHTON L. REV. 1229 (1997) (discussing the CDA and concluding it is unconstitutional because it impairs a significant amount of constitutionally protected adult speech); Laura J. McKay, *The Communications Decency Act: Protecting Children From On-Line Indecency*, 20 SETON HALL LEGIS. J. 463 (1996) (discussing the CDA and its First Amendment issues).

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the order, finding the provisions in question were unconstitutional because they were overbroad and vague in the use of the terms “indecent” and “patently offensive.”¹¹⁸

3. The United States Supreme Court Decision

In *Reno v. ACLU*,¹¹⁹ the Supreme Court affirmed the district court’s holding in a 7-2 decision and invalidated the CDA indecency provisions of 47 U.S.C. §223(a) and 223(d).¹²⁰ The Court found that the statute lacked the precision required under the First Amendment to regulate speech content.¹²¹ The decision also affirmed the district court’s holding of vagueness and overbreadth.¹²²

The government argued that the CDA was constitutional, based on previous cases in which the Court upheld government regulations designed to protect minors from speech that was not obscene by adult standards.¹²³ This line of precedent included *Ginsberg v. New York*,¹²⁴ *FCC v. Pacifica Foundation*,¹²⁵ and *City of Renton v. Playtime Theaters*,

¹¹⁸ *Reno I*, 929 F. Supp. at 855. The statute provided for review by a district court three-judge panel, with direct appeal to the Supreme Court. Werst, *supra* note 31, at 212. The judges in the district court were Chief Judge Dolores K. Sloviter, Chief Judge of the United States Court of Appeals for the Third Circuit, District Judge Ronald L. Buckwalter and District Judge Stewart Dalzell. *Reno I*, 929 F. Supp. at 827.

¹¹⁹ 117 S. Ct. 2329 (1997).

¹²⁰ *Id.* at 2346-51. Justice Stevens delivered the Court’s opinion, joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsberg and Breyer. *Id.* at 2333. Justice O’Connor, joined by Chief Judge Rehnquist, wrote separately, concurring in part and dissenting in part. *Id.*; see also Ian C. Ballon, *Linking, Framing and Other Hot Topics in Internet Law and Litigation*, 520 P.L.I/PAT 167, 299-302 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998) (listing the remaining constitutional provisions of the CDA); see generally Nathan M. Semmel, *Talking Back to Cyber-Mum: Challenging the Communications Decency Act of 1996*, 14 N.Y.L. SCH. J. HUM. RTS. 533 (1998) (concluding the passing of the CDA showed a lack of confidence in American family values and finding it is up to parents to choose what their children see and read); Al Harrison, *Internet: Supreme Court Holds That Communications Decency Act is Unconstitutional*, 35-FEB HOUS.LAW.44 (1998) (providing details of the Supreme Court decision in *Reno II*).

¹²¹ *Reno II*, 117 S. Ct. at 2346. The Court found that due to the vagueness of the CDA, it silenced speech that would be otherwise entitled to constitutional protection. *Id.* According to the Court:

[T]he CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Id.

¹²² *Id.* at 2344-50. The Court agreed that due to the unique characteristics of the Internet, previous Supreme Court opinions “provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet].” *Id.* at 2344. The Court also agreed the statute was similar to the *Sable* dial-a-porn ban. *Id.* at 2346. In *Sable*, the Court made it clear that just because a regulation is passed to protect minors from harmful material doesn’t end the inquiry as to whether the regulation is valid. *Id.*

¹²³ *Id.* at 2341-43. In the government’s appeal it argued the district court erred in finding the CDA was overbroad and in violation of the First Amendment and that the CDA was vague and violated the First Amendment. *Id.* at 2341. The Supreme Court affirmed the district court’s decision without reaching the Fifth Amendment inquiry. *Id.*

¹²⁴ 390 U.S. 629 (1968) (upholding statute prohibiting the sale to minors of material otherwise available for sale to adults due to the state’s interest in the welfare of its children).

*Inc.*¹²⁶ Justice Stevens declined to follow precedent and distinguished the Internet from traditional broadcast media.¹²⁷

The Court went on to identify three important criteria to explain why the Internet was subject to strict scrutiny, while broadcast media was subject to a lesser standard of review:¹²⁸

- ? The Internet has no history of extensive government regulation.¹²⁹
- ? The Internet has no scarcity of available frequencies.¹³⁰
- ? The Internet does not “invade” an individual’s home.¹³¹

In particular, the Court focused on the non-invasive nature of the Internet, as compared to radio or television.¹³² The Court held that the CDA was similar to the case of *Sable Communications, Inc. v. FCC*,¹³³ where it struck down a ban on “dial-a-porn” services.

The Court likened the telephone used to access pornographic recordings to using a computer to access pornography on the Internet, because both require “the listener to take affirmative steps to receive the communication.”¹³⁴

The Court held that the indecency provisions of the CDA were unconstitutionally overbroad.¹³⁵ Although the Court stated that protecting children from exposure to sexually explicit material was a compelling governmental interest, it found that the CDA

¹²⁵ 438 U.S. 726 (1978) (upholding FCC restriction of radio broadcasts that it found indecent, but not obscene, because the broadcast in question was aired in the afternoon with children in the listening audience).

¹²⁶ 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult theaters from locating in residential areas).

¹²⁷ *Reno II*, 117 S. Ct. 2329, 2341-44 (1997). The Court determined the *Ginsberg* holding was narrower than the CDA because the CDA took away parents’ ability to choose what material was proper for their children. *Id.* at 2341. The Court determined the *Pacifica* case involved broadcasting which received the least First Amendment protection due to its scarcity of frequencies and invasive nature, while the Internet could not compare. *Id.* at 2342. The Court distinguished *Renton* on the basis that the Internet does not have identifiable boundaries like the zoning ordinance at issue in that case. *Id.*

¹²⁸ Gary D. Allison, *The Cyberwar of 1997: Timidity and Sophistry at the First Amendment Front*, 33 TULSA L.J. 103, 115 (1997) (summarizing the differences between the Internet and broadcasting media as found by the Supreme Court in *Reno II*).

¹²⁹ *Reno II*, 117 S. Ct. at 2343 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 397-400 (1969)). The Court noted the Internet has never been subject to government regulation, unlike traditional broadcast media. *Id.*

¹³⁰ *Id.* (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994)). The Court found that because over 40 million users across the world have the capacity to access the Internet at a low cost, the medium does not have scarce operating resources. *Id.* at 2344.

¹³¹ *Id.* at 2343 (citing *Sable Comm., Inc. v. FCC*, 492 U.S. 115, 128 (1989)). The Court found a user must take “affirmative steps” to access pornography on the Internet. *Id.*

¹³² *Reno II*, 117 S. Ct. 2329, 2343-44 (1997) (agreeing with the district court’s finding that Internet communications do not invade the user’s home).

¹³³ *Sable*, 492 U.S. 115, 131 (1989).

¹³⁴ *Reno II*, 117 S. Ct. at 2343 (quoting *Sable*, 492 U.S. at 127-28). “Placing a telephone call [or retrieval of information from the Internet] is not the same as turning on a radio and being taken by surprise by an indecent message.” *Id.* (quoting *Sable*, 492 U.S. at 128).

¹³⁵ *Id.* at 2343 (citing *Sable*, 492 U.S. at 127-28).

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suppressed an unacceptable amount of constitutionally protected speech for adults.¹³⁶ Since the Internet is open to anyone, regardless of age, the Court found that under the Act, adults had no feasible method to engage in constitutionally protected indecent speech.¹³⁷ As a result, the unprecedented breadth of the CDA imposed a heavy burden on the government to explain why a less restrictive alternative would not be acceptable, a burden the government could not overcome.¹³⁸

Beyond the overbreadth issue, the Court invalidated the CDA's indecency provisions on grounds of vagueness.¹³⁹ Under the void for vagueness doctrine, a law is void on its face if individuals of "common intelligence must necessarily guess at its meaning and differ as to its application."¹⁴⁰ The Court found that the failure of the statute to define the terms "indecent" and "patently offensive" left speakers uncertain as to what the terms meant, which resulted in a chilling effect on free speech.¹⁴¹ Additionally, the Court held the statute needed to include all three prongs of the *Miller* standard, rather than just one, to avoid vagueness.¹⁴² Consequently, the majority concluded that the CDA "amounted to 'burn[ing] the house to roast the pig.'"¹⁴³ The ruling makes it clear that statutes that attempt to regulate content on the Internet must meet the highest level of scrutiny.¹⁴⁴

E. Legislative Tools in Place to Regulate Obscenity

The existing federal obscenity statute has been successfully applied to the Internet.¹⁴⁵ Those sections which may be applicable to the Internet are as follows: 18 U.S.C. § 1460 makes it a crime to possess obscene material with the intent to

¹³⁶ *Id.* at 2346.

¹³⁷ *Id.* at 2349-50.

¹³⁸ *Id.*

¹³⁹ *Id.* at 2344-46.

¹⁴⁰ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

¹⁴¹ *Reno II*, 117 S. Ct. 2329, 2344 (1997).

¹⁴² *Id.* at 2345. The Court found the third prong of the *Miller* test was extremely important because it set a national floor as to what constitutes artistic, political, literary, or scientific value. *Id.* The Court felt this was important because the first two prongs of the test are judged by only local opinion, so each state can assert its values as to what is obscene. *Id.* Consequently, the majority held the CDA's use of the terms "indecent" and "patently offensive" undermined the goal to establish a uniform national standard for regulation of Internet speech. *Id.* at 2344-45 and n.39.

¹⁴³ *Id.* at 2350 (citing *Sable Comm., Inc. v. FCC*, 492 U.S. 115, 127 (1989)). The Court went on to find "[t]he CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community." *Id.*

¹⁴⁴ Kim L. Rappaport, Note & Comment, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM U. INT'L L. REV. 765, 784 (1998) (reviewing freedom of speech on the Internet, along with proposed legislation in the United States and Germany, and concluding technological solutions to control Internet content are just as restrictive of free speech as government interference because technology uses private parties to do the censoring the government would have done); see generally John J. McGuire, *The Sword of Damocles is Not Narrow Tailoring: The First Amendment's Victory in Reno v. ACLU*, 48 CASE W. RES. L. REV. 413 (1998) (arguing the Court should continue to fully protect the Internet due to the free and diverse forum of communication it offers).

¹⁴⁵ 18 U.S.C. §§ 1460-69 (1994 & Supp. 1997); see also Goldman, *supra* note 12, at 1108-11 (describing current federal anti-pornography statutes and determining the statutes are medium-related and are not clearly applicable to the Internet).

distribute,¹⁴⁶ while 18 U.S.C. § 1462 makes it a crime to distribute or receive obscene materials through a common carrier in interstate or foreign commerce.¹⁴⁷ 18 U.S.C. § 1464 prohibits broadcasting “obscene, indecent, or profane language.”¹⁴⁸ Finally, 18 U.S.C. §§ 1465 and 1466 prohibit one from knowingly transporting or engaging in the business of selling obscene, lewd or filthy material through interstate commerce.¹⁴⁹

The Sixth Circuit Court of Appeals successfully applied 18 U.S.C. § 1465 in *United States v. Thomas*,¹⁵⁰ the first Internet obscenity case tried.¹⁵¹ There, the court determined that using a computer to transmit pornographic material violated 18 U.S.C. § 1465.¹⁵²

Finally, another federal anti-obscenity law is the Child Pornography Act (CPA), which prior to September 30, 1996 provided:

anyone who knowingly ships, distributes, or receives . . . ‘by any means including computer,’ or knowingly possesses, three or more copies of, any visual depiction of sexually explicit conduct produced by means involving the use of a minor engaging in such conduct, is guilty of a felony punishable by up to ten years in prison¹⁵³

The Child Pornography Prevention Act of 1996 (CPPA) amended and broadened the CPA by prohibiting the production and distribution of computer-generated or other mechanically altered images of a minor engaging in sexually explicit conduct.¹⁵⁴

¹⁴⁶ 18 U.S.C. §1460 (1994); The text of this statute states, in part:

Whoever . . . in the . . . territorial jurisdiction of the United States, . . . knowingly sells or possesses with intent to sell an obscene visual depiction shall be punished by a fine in accordance with the provisions of this title or imprisoned for not more than 2 years, or both.

Id.

¹⁴⁷ 18 U.S.C. §1462 (1994 & Supp. 1997); *see also* Goldman, *supra* note 12, at 1109 (noting that among the current anti-obscenity laws, Section 1462 is the most applicable to the Internet because an Internet service provider is analogous to a common carrier and thus falls within the provisions of Section 1462).

¹⁴⁸ 18 U.S.C. §1464 (1994). The statute states “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.” *Id.*; *see generally* Charles D. Ferris and Terrence J. Leahy, *Red Lions, Tigers and Bears; Broadcast Content Regulation and the First Amendment*, 38 CATH. U.L. REV. 299 (1989) (arguing that broadcast content requires a limited amount of government oversight).

¹⁴⁹ 18 U.S.C. §§1465-1466 (1994 & Supp. 1997); for the text of 18 U.S.C. §1465, *see infra* note 246; 18 U.S.C. 1466 states, in part:

Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

18 U.S.C. § 1466 (1994).

¹⁵⁰ 74 F.3d 701 (6th Cir. 1996).

¹⁵¹ For further discussion on the *Thomas* case, *see infra* notes 245-48 and accompanying text.

¹⁵² *Thomas*, 74 F.3d at 707-08.

¹⁵³ Clapes, *supra* note 35, at 7-8 (citing 18 U.S.C. § 1461, 1463, 1464, 1468).

¹⁵⁴ 18 U.S.C. § 2252A (Supp. 1997); Omnibus Consolidated Appropriations Act, 1997, Pub.

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Recently, the First Circuit Court of Appeals successfully applied this statute in *United States v. Carroll*,¹⁵⁵ which involved the distribution of child pornography on the Internet.¹⁵⁶ There, the court determined that Internet distribution was the same as transportation in interstate commerce.¹⁵⁷

F. *Child Online Protection Act (COPA): The Second Round*

The Child Online Protection Act (COPA) is Congress' second attempt at restricting Internet content. President Bill Clinton signed COPA into law on October 21, 1998.¹⁵⁸ Less than twenty-four hours later, the same groups who challenged the CDA in 1996¹⁵⁹ challenged COPA as unconstitutional claiming it is overbroad and threatens adult access to legitimate, constitutionally protected material.¹⁶⁰ On November 19, 1998, the United

L. No. 104-208, Title I, §121(3a); 110 Stat. 3009-28 (amending 18 U.S.C. §§2241, 2243, 2251, 2252, 2256, 42 U.S.C. §2000aa, and adding 18 U.S.C. §2252A); *see also* David J. Loundy, *Who Hasn't Noticed? Child Porn Already Illegal*, CHI. DAILY L. BULL., May 14, 1998, at 6 (arguing the CPPA is unnecessary Internet legislation because existing child pornography laws work to prevent harm caused by the distribution of the material online; no child is harmed in the creation of synthetic porn prohibited by the CPPA); *see generally* Sheri A. Dillon, Douglas E. Groene, et. al., *Computer Crimes*, 35 AM. CRIM. L. REV. 503, 518-19 (1998) (summarizing the CPPA); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997); Jennifer Stewart, *If This is the Global Community, We Must Be On The Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INT'L L. 205 (1997).

¹⁵⁵ 105 F.3d 740 (1st Cir. 1997).

¹⁵⁶ For further discussion on the *Carroll* case, see *infra* notes 249-252 and accompanying text.

¹⁵⁷ *Carrol*, 105 F.3d at 742.

¹⁵⁸ *See, e.g., Channel 2000 - ACLU Fights New 'Net Restrictions* (visited Oct. 23, 1998) <<http://www.cbs2.com/news/stories/news-981022-053838.html>>; Dan Robrish, *ACLU Files Suit vs. Internet Law* (visited Oct. 23, 1998) <http://dailynews.yahoo.com/headlines/ap/technology/story.html?s=v/ap/19981022/tc/internet_decency_1.html>; Representative Mike Oxley (R-Ohio) authored the new law. *See, e.g.,* David Walsh, *World Socialist Web Site, US Group Sues Over Attempt at Internet Censorship* (visited Nov. 1, 1998) <<http://www.wsws.org/news/1998/oct1998/net-024.shtml>>. The Clinton administration raised objections to the bill based on an analysis by the United States Justice Department concluding it was probably unconstitutional. *Id.* However, Oxley pressured the White House by stating to reporters, in reference to the Monica Lewinsky investigation, "Here's a chance for the White House to lead . . . [and] regain its moral compass. I sincerely hope they join us in trying to lift this country up." Frank James, *Internet Anti-Smut Law Challenged as Unconstitutional*, CHI. TRIB., Oct. 23, 1998, at 3.

¹⁵⁹ The 17 plaintiffs include the American Civil Liberties Union (on behalf of all its members), The American Booksellers Foundation for Free Expression, A Different Light Bookstore, ArtNet, The Blackstripe, Electronic Frontier Foundation (on behalf of all its members), Condomania, Electronic Privacy Information Center, Free Speech Media, LLC, Internet Content Coalition (whose members include CBS New Media, The New York Times Electronic Media Company, Time Inc., C/Net, Warner Bros. Online, Playboy Enterprises, MSNBC, Sony Online and ZDNet), OBGYN.NET, PlanetOut Corporation, Philadelphia Gay News, Powell's bookstore, RIOTGRRL, Salon Magazine, and Weststock.com. *American Civil Liberties Union Freedom Network: ACLU v. Reno, Round 2: Broad Coalition Files Challenge to New Federal Net Censorship Law* (visited Nov. 9, 1998) <<http://www.aclu.org/features/f1101698a.html>> [hereinafter *Round 2*].

¹⁶⁰ The plaintiffs filed suit in the United States District Court in Pennsylvania requesting a preliminary injunction to block the enforcement of the law. Walsh, *supra* note 158.

States District Court for the Eastern District of Pennsylvania granted a motion for a temporary restraining order and halted enforcement of COPA until a court resolves its constitutionality.¹⁶¹ On February 1, 1999, the judge issued a preliminary injunction blocking enforcement of the law, finding it threatened the right to free speech.¹⁶²

Congress' explicit purpose and alleged compelling government interest in passing the new law was to protect children from harmful material on the web while preserving adults' First Amendment rights.¹⁶³ The main difference between the new law and the CDA is that COPA purports to apply only to commercial web sites, and it embodies a "harmful to minors" standard rather than the obscenity standard of the CDA.¹⁶⁴

COPA makes it a federal crime to knowingly make "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."¹⁶⁵ The Act provides affirmative defenses to liability if commercial adult web site operators block minors from accessing material deemed "harmful to minors" on their sites.¹⁶⁶ Actions that a content provider could take include "requiring

According to Ann Beeson, attorney for the ACLU, "This law, just like Congress' first attempt to regulate speech on the Internet, makes it a crime for adults to communicate and receive information on the Web that is clearly constitutionally protected." Elizabeth Weise, *First Federal Net Privacy Law Approved*, USA TODAY, Oct. 22, 1998, at D1.

¹⁶¹ American Civil Liberties Union Freedom Network, *Judge Halts Enforcement of Internet Censorship Law* (Nov. 19, 1998) <<http://www.aclu.org/features/f101698a.html>>; American Civil Liberties Union Freedom Network, *Temporary Restraining Order Memorandum in ACLU v. Reno II* (visited Nov. 20, 1998) <http://www.aclu.org/court/aclurenoII_tro.html>. Judge Lowell A. Reed, Jr. found the plaintiffs established a likelihood of success on the claim that COPA violates adults' First Amendment rights. *Id.* He found the plaintiffs raised "serious and substantial questions as to the technological and economic feasibility of these affirmative defenses." *Id.*

¹⁶² Miller, *supra* note 3, at 01A. United States District Judge Lowell Reed posted the decision on the internet at www.paed.uscourts.gov, the court's web site. He wrote, "[i]ndeed, perhaps we do the minors of this country harm if the First Amendment protections, which they will with age inherit fully, are chipped away in the name of protection." *Id.* Government lawyers must now decide whether to ask for a full trial before Judge Reed, appeal the decision, or allow it to stand. *Id.*

¹⁶³ H.R. Rep. No. 105-775, at 5 (1998).

¹⁶⁴ Walsh, *supra* note 158; 47 U.S.C. § 231(a)(1)(1998); COPA states:

'material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-

(Error! Main Document Only.) 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;

(Error! Main Document Only.) depicts, describes, or represents, 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 breasts; and

(Error! Main Document Only.) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6)(1998).

¹⁶⁵ § 231(a)(1).

¹⁶⁶ § 231(c)(1) (specifying the affirmative defenses to the Act); *see also* James, *supra* note 158.

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use of a credit card, debit account, adult access code, or adult personal identification number,”¹⁶⁷ “accepting a digital certificate that verifies age,”¹⁶⁸ or “any other reasonable measures”¹⁶⁹ prior to allowing users to view the web site content. Penalties for not implementing such measures include fines of up to \$50,000 for each day in violation and up to six months in prison.¹⁷⁰ The government may also bring a civil suit against individuals with a penalty of up to \$50,000 for each violation.¹⁷¹

III. ANALYSIS

A. *The COPA is Unconstitutional*

Like the CDA, the effect of COPA is that it criminalizes constitutionally protected adult speech and “reduces the Internet to what is fit for a six-year-old.”¹⁷² Congress claims COPA applies only to commercial web transactions which display material that is harmful to minors, and not to non-commercial activities.¹⁷³ However, the law actually bans a wide range of protected speech that is provided without a fee by individuals who also happen to be communicating for other commercial purposes.¹⁷⁴ In order to fully understand this idea, one must carefully examine the Act’s broad definition of “commercial purposes.”¹⁷⁵ It states that a person makes a communication for commercial purposes if he “is engaged in the business of making such communications.”¹⁷⁶ The Act’s definition of “engaged in the business” states “it is not necessary that the person make a profit . . . [nor] that the making . . . [of] such communications be the person’s . . . principal business.”¹⁷⁷

Many content providers carry material that relates to sex and allow users to access their content for free, while attempting to make a profit by means other than selling the material, such as in the following situations:

¹⁶⁷ 47 U.S.C. § 231(c)(1)(A)(1998); *see also* H.R. Rep. No. 105-775, at 14 (1998). In order to obtain a personal identification number (PIN) for access to an adult site, the consumer clicks on a link to the age verification system used by the site. *Id.* Consumers may instantly receive a PIN by submitting an application to the system with credit card information. *Id.* If the information is verified, a PIN number is issued. *Id.* The verification generally takes five to ten seconds. *Id.*

¹⁶⁸ 47 U.S.C. § 231(c)(1)(B) (1998).

¹⁶⁹ § 231(c)(1)(C).

¹⁷⁰ § 231(a)(1); § 231(a)(2).

¹⁷¹ § 231(a)(3). In sum, “if you’re supplying smut, you must set up an age verification process . . . if you don’t, you’ll face a \$50,000 fine and six months in jail.” *Sequel, supra* note 1.

¹⁷² *Round 2, supra* note 159 (quoting ACLU attorney, Ann Beeson). “Whether you call it the ‘Communications Decency Act’ or the ‘Congress Doesn’t Understand the Internet Act,’ it is still unconstitutional . . .” *Id.*; *see, e.g.,* Walsh, *supra* note 158.

¹⁷³ H.R. Rep. No. 105-775, at 12 (1998) (stating COPA applies only to commercial web transactions which contain material harmful to minors and it does not prohibit non-commercial activities).

¹⁷⁴ *Round 2, supra* note 159; American Civil Liberties Union Freedom Network, *ACLU v. Reno Complaint for Declaratory and Injunctive Relief*, (visited Nov. 9, 1998) <http://www.aclu.org/court/acluvrenoII_complaint.html> [hereinafter *ACLU Complaint*]. Providers who sell content on their web sites that is harmful to minors are exempt from the Act when the purchaser pays with a debit or credit card. 47 U.S.C. §231(c) (1998).

¹⁷⁵ § 231(e)(2)(A).

¹⁷⁶ *Id.*

¹⁷⁷ § 231(e)(2)(B).

- ? A web publisher which attempts to make a profit through advertising, just like a traditional newspaper or magazine;
- ? An online music store or art store which allows users to browse their content for free, like browsing in an ordinary bookstore or art gallery; or
- ? A content provider who attempts to make a profit by charging contributors, but gives users free access.¹⁷⁸

According to the Act's "commercial purposes" definition, these "commercial" content providers would be forced to implement a means to restrict access by minors, even though their material is non-commercial.¹⁷⁹ Therefore, COPA does not prohibit only the sale of material harmful to minors, it actually restricts non-commercial speech as well.¹⁸⁰ This is the same overbreadth characteristic that the Supreme Court struck down in the CDA in *Reno v. ACLU I*.¹⁸¹ Additionally, requiring content providers to obtain a credit card number from a user "essentially forces free speech to become commercial speech in order to remain legal."¹⁸² If an adult user does not have a credit card, he cannot read constitutionally protected material.¹⁸³

¹⁷⁸ *ACLU Complaint, supra* note 174 (providing these examples to support its argument that COPA bans constitutionally protected speech that various individuals and organizations provide for free, including the web content provided by popular magazines and news web sites).

¹⁷⁹ The Starr Report is an example of free content which would be illegal under COPA. *Sequel, supra* note 1. Many of the online content providers that carry the document are news web sites which make profits by charging contributors or advertisers, but users access their sites for free. *ACLU Complaint, supra* note 174. However, due to the graphic sexual details contained in the Starr Report, it would be illegal for these news sites to carry the report. James, *supra* note 158. According to Mark Segal, editor of the Philadelphia Gay News, We once published in newspapers in Philadelphia and on web sites, (former Surgeon General) C. Everett Koop's complete report on AIDS. If this law was active at that time, those of us who published that could go to jail . . . [the law] is life-threatening [because banned web site information could save lives]. Walsh, *supra* note 158.

¹⁸⁰ *Department of Justice Letter on CDA II* (visited Oct. 23, 1998) <http://www.aclu.org/court/acluvrenoII_doj_letter.html> [hereinafter *DOJ Letter*] (discussing COPA and its many ambiguities in the scope of its coverage, and finding it is evidence that the Act is not narrowly tailored as required by the strict scrutiny standard for the Internet).

¹⁸¹ 117 S. Ct. 2329, 2347. The Court stated that:

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them . . . in the presence of minors.

Id.; Despite lawmakers' claim that the new bill is narrowly tailored to apply only to minors, ACLU Staff Attorney Ann Beeson said that the constitutional flaws in this law are identical to the flaws that led the Supreme Court to strike down the CDA. Walsh, *supra* note 158. *But see* H.R. Rep. No. 105-775, at 13 (1998) (stating Congress' view that COPA is limited to commercial transactions as required by *Reno II*).

¹⁸² Joe Nickell, *Government Sued Over Online Anti-Porn Law* (visited Oct. 23, 1998) <http://dailynews.yahoo.com/headlines/wr/story.html?s-v/hm/19981022/wr/speech_1.html> (summarizing the argument of Stanton McCandlish, program director for the Electronic Frontier Foundation, a co-plaintiff in the current suit). Additionally, "[t]hose of us who have

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Although the Act provides affirmative defenses to liability, none of them are technologically or economically achievable for providers of free web content.¹⁸⁴ The credit or debit card option is unavailable to free content providers because financial institutions will not verify them without a financial transaction.¹⁸⁵ Adult identification systems may currently be used by some commercial distributors of adult content,¹⁸⁶ but it is technologically and economically unavailable to providers who provide their content for free.¹⁸⁷ Because free Internet content is available to all users, regardless of age, and there are no reasonable means for free content providers to verify users' age, these providers are only left with the options of making speech available to all users or to none.¹⁸⁸

Further evidence of the unconstitutionality of COPA is found in an analysis of the bill written by the United States Justice Department which was sent to Congress on October 5, 1998, sixteen days before President Clinton signed COPA into law.¹⁸⁹ In

credit cards have another problem. Is there anybody in the world we want to possess our credit card numbers less than commercial porno peddlers?" Aaron Myers, *A Bad Idea Gets Even Worse*, THE BROOKINGS REGISTER, Oct. 29, 1998, at A4.

¹⁸³ Nickell, *supra* note 182 (quoting Stanton McCandlish, program director for the Electronic Frontier Foundation, a co-plaintiff in the current suit).

¹⁸⁴ *ACLU Complaint, supra* note 174 (finding 47 U.S.C. § 231(c)(1)(A) is the same as a CDA defense the Court found unavailable to content providers in *Reno I*). It is an affirmative defense under COPA if a content provider that carries material that is harmful to minors has restricted access by minors "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." 47 U.S.C. §231(c)(1)(1998).

¹⁸⁵ *ACLU Complaint, supra* note 174. The ACLU believes there are no reasonable means, given available technology, for free content providers to restrict access by minors. *Id.*

¹⁸⁶ H.R. Rep. No. 105-775, at 14 (1998) (finding the use of the various forms of age verification prescribed in the Act are standard practice among some commercial pornography distributors on the web). According to Congress:

It is not only economically feasible for commercial content providers to comply with the bill, but profitable for them to do so. . . . Given that the scope of the bill is limited to commercial activity, and that the age verification system procedures prescribed under the bill represent standard procedures for conducting commercial activity on pornographic Web sites, the effect of the bill is simply to . . . require age verification before pornography is made available

Id.

¹⁸⁷ *ACLU Complaint, supra* note 174. The ACLU states in its recent complaint: Even if age or credit card verification were technologically or economically feasible, such requirements would fundamentally alter the nature and values of the new computer communication medium, which is characterized by spontaneous, instantaneous, albeit often unpredictable, communication by hundreds of thousands of individual speakers around the globe, and which provides an affordable and often seamless means of accessing an enormous and diverse body of information, ideas and viewpoints. Pre-registration or screening requirements would undermine the unique characteristics of this new technology.

Id.

¹⁸⁸ *Id.* On its face, the Act applies to adult communications because all free web content is available to both minors and adults. *Id.*

¹⁸⁹ *DOJ Letter, supra* note 180. Acting Assistant Attorney General L. Anthony Sutin sent the letter to Representative Thomas Bliley (R-Va.), chairman of the House Commerce

that analysis the Justice Department said the bill suffered from serious constitutional problems and found it would not be wise to divert resources away from more important initiatives, such as combating online traffickers of hard-core child pornography and predators of children.¹⁹⁰ Constitutional problems noted in the analysis include numerous ambiguities with regard to the scope of its coverage.¹⁹¹ The Justice Department found the presence of such ambiguity undermines “the likelihood that the [bill] has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.”¹⁹² According to the Justice Department, one of the “troubling ambiguities” involves the breadth and clarity of the three part “harmful to minors” standard.¹⁹³ It found the standard was unclear, particularly because the first prong is ambiguous as to which “contemporary community standard” would be dispositive.¹⁹⁴

The Justice Department also found that it is uncertain whether the Act will limit access by minors to harmful materials, as children still would be able to access pornography from alternative sources, including chat rooms.¹⁹⁵ Further, the Internet is global in nature and all web content, regardless of origin, is available to all users worldwide.¹⁹⁶ Therefore, children have access to an infinite amount of overseas web sites. Because 40% of web content originates overseas and cannot be regulated by

Committee. James, *supra* note 158.

¹⁹⁰ DOJ Letter, *supra* note 180. The Department of Justice currently devotes a large amount of resources to the “Innocent Images” FBI undercover operation which started in 1995. *Id.* Through this operation, agents and officers go online to track individuals who are victimizing children. *Id.* To date, the initiative has obtained 196 indictments, 202 arrests, 207 convictions, and 456 evidentiary searches were carried out. *Id.*; see generally Marc D. Goodman, *Why The Police Don’t Care About Computer Crime*, 10 HARV. J.L. & TECH. 465 (1997).

¹⁹¹ DOJ Letter, *supra* note 180.

¹⁹² *Id.* (quoting, 117 S. Ct. 2329, 2344 (1997)). The analysis predicted that COPA would be challenged on constitutional grounds because it is a “content-based restriction applicable to ‘the vast democratic form of the Internet.’ ” *Id.* (quoting *Reno II*, 117 S. Ct. at 2329, 2343, 2351); There are many more effective alternative means to assist parents in limiting their children’s access to harmful material, including special software applications. *Id.*

¹⁹³ DOJ Letter, *supra* note 180. COPA partially defines material that is “harmful to minors” as material “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.” 47 U.S.C. §231(e)(6)(A) (1998) (stating the first prong of a three-part test).

¹⁹⁴ DOJ Letter, *supra* note 180. The Justice Department’s analysis asks:

Which “contemporary community standards” would be dispositive? Those of the judicial district (or some other geographical “community”) in which the expression is “posted”? Of the district or local community in which the jury sits? Of some “community” in cyberspace? Some other “community”? Resolution of this question might well affect the statute’s constitutionality.

Id.; see also *infra* Section III.B.

¹⁹⁵ DOJ Letter, *supra* note 180. The DOJ found COPA does not address those other sources of Internet material that is harmful to minors. *Id.* Practically and legally it would be difficult to regulate web sites overseas due to the serious questions of “extraterritorial enforcement.” *Id.*

¹⁹⁶ ACLU Complaint, *supra* note 174 (finding the government cannot show COPA will reduce minors’ access to material that is harmful to minors because of the global nature of the Internet).

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Unites States law, the Act will not meet its purpose of protecting children from sexually oriented web content.¹⁹⁷

B. *The Community Standard and COPA*

The COPA criteria for “material that is harmful to minors” embodies the community standard guideline established in *Miller v. California*.¹⁹⁸ The community standard leaves it up to jurors in the local community to decide what is obscene under the obscenity standard or, in the alternative, what is harmful to minors under COPA’s “harmful to minors” standard.¹⁹⁹

The community standard is extremely difficult to apply to the Internet because the Internet’s reach is worldwide.²⁰⁰ When someone in a country with a conservative community standard receives sexually explicit material via the Internet from a country that permits and encourages bigamy or nudity, for example, it becomes difficult to determine which community standard should govern.²⁰¹ For this reason, never has a community been so difficult to define as that of the Internet.²⁰²

Because the Internet is a global medium, COPA’s mandated application of the community standard to the Internet creates a national or international community standard where the standard of the nation or the world as a whole determines what is harmful to minors.²⁰³ Originally, Justices Harlan and Brennan advanced the idea of a

¹⁹⁷ *Id.* It is not possible to block overseas content from entering the United States and users may access content from overseas just as easily as content which originates from local sources. *Id.* Therefore, the Act will not accomplish its goal of protecting children from web material that is harmful to minors. *Id.*

¹⁹⁸ 413 U.S. 15 (1973). The first of the three criteria in the COPA “harmful to minors” standard includes “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.” 47 U.S.C. § 231(e)(6)(A)(1998) (emphasis added).

¹⁹⁹ *Miller*, 413 U.S. at 30; *see also* 47 U.S.C. §231(e)(6) (1998).

²⁰⁰ Handelman, *supra* note 10, at 731; *see also* Todd H. Flaming, *The Rules of Cyberspace: Informal Law in a New Jurisdiction*, 85 ILL. B.J. 174, 178 (1997) (discussing the application of local law to cyberspace and finding the application difficult because cyberspace crosses international and local jurisdictional and geographical boundaries).

²⁰¹ Pollack, *supra* note 38, at 472; *see generally* Dawn A. Edick, *Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis*, 21 B.C. INT’L & COMP. L. REV. 437 (1998) (concluding the United Kingdom’s program of self-regulation is preferable to the United States’ federal legislation because federal legislation represses freedom of speech); Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet’s Role in Strengthening National And Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423, 424 (1998) (finding the Internet will strengthen global governance and cooperation by “(1) strengthening international law; (2) strengthening economic interdependence; (3) empowering non-governmental organizations and improving their abilities to contribute productively to the development of international regimes designed to deal with global problems; and (4) supporting international security mechanisms”).

²⁰² Goble, *supra* note 8, at 122; *see generally* Susan J. Drucker, *The Tenets of Jurisdiction: Lost in Cyberspace?*, 69 N.Y. Sr. B.J. 30 (December, 1997) (concluding international agreements are the answer to Internet content issues due to the Internet’s global reach).

²⁰³ According to David Sobel, general counsel for the Electronic Privacy Information Center and plaintiff co-counsel, “There is a very real problem with applying a highly subjective standard, the ‘harmful to minors’ standard, which has traditionally been applied at

national standard in two plurality opinions of *Manual Enterprises, Inc. v. Day*²⁰⁴ and *Jacobellis v. Ohio*.²⁰⁵ Subsequently, the Court rejected the concept in *Miller* due to its unmanageability.²⁰⁶ Because various communities in the world differ in their tolerance of sexually oriented material, an international standard will impose the standards of one community upon the rest of the world.²⁰⁷ A permissive community will force less tolerant communities to accept material they deem offensive and likewise, the standard of a restrictive community will prevent tolerant communities from accessing materials they would otherwise accept.²⁰⁸

To overcome this problem, some have suggested that Congress apply the *Miller* community standard to the virtual community or the community of users online, regardless of geographic location.²⁰⁹ The argument concludes that while a user is on-line, he is part of a virtual community and is governed by its standards.²¹⁰ Advocates

the local level, to a global medium.” Nickell, *supra* note 182. Compare Godwin, *supra* note 69, at 272-73 (suggesting courts should abandon the community standard guideline altogether, due to the chilling effect of users having to censor themselves to avoid being prosecuted under another community’s standard).

²⁰⁴ 370 U.S. 478 (1962). Justice Harlan analyzed the *Roth* standard and determined it included a national community standard. *Id.* at 488. He concluded a local standard would result in “the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.” *Id.*

²⁰⁵ 378 U.S. 184 (1964). Justice Brennan concluded a local community standard would be unconstitutional because it could not “properly be employed in delineating the area of expression that is protected by the Federal Constitution.” *Id.* at 193. He felt a local community standard would limit First Amendment rights. *Id.* at 194.

²⁰⁶ Stepka, *supra* note 69, at 918 (discussing the history of the community standard prong of the obscenity test and concluding that a local standard is better than a national standard because communities should not have their standards set by other communities); Handelman, *supra* note 10, at 730.

²⁰⁷ Stepka, *supra* note 69, at 918 (arguing that a willing viewer who downloads obscene material from the Internet is analogous to a willing person traveling to another community and returning with the material); “[T]he ‘community standards’ criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message.” *Reno II*, 117 S. Ct. 2329, 2347 (1997); see generally Stephan Wilske and Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117 (1997) (finding states should exercise jurisdiction over the Internet because international solutions are still at an early state of development).

²⁰⁸ Stepka, *supra* note 69, at 918. According to Joey Manely, director of Free Speech Internet Television, a co-plaintiff in the current suit, COPA is “a thinly veiled attempt to impose the community standards of the most repressive communities in America on all of the Internet community.” Nickell, *supra* note 182.

²⁰⁹ Stepka, *supra* note 69, at 935-36; Wu, *supra* note 13, at 302-03; see generally Flaming, *supra* note 200.

²¹⁰ Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1652-54 (1995) (analyzing the options of which community standard to apply to the Internet, including the community of the provider, the downloading user, or the virtual community, concluding if it negatively impacts the local community the jurisdictional rules of the geographical location should apply); Joanna H. Kim, Comment, *Cyber-Porn Obscenity: The Viability of the Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L.J. 415, 430, 441 (1995) (finding it is “more reasonable to use the ‘virtual

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argue that the privacy established while the user is on the computer isolates him from the geographic community.²¹¹

Problems with implementing this option include the following: even while on-line the user remains part of the geographic community; the scope of the on-line community is difficult to define as not all users access the same services; and the virtual community may choose to reject an aspect of traditional government, forcing lawmakers outside the virtual community to recognize a form of government with which they disagree.²¹²

In order to illustrate the difficulty of applying the *Miller* community standard to the Internet, it is necessary to return to the case of *United States v. Thomas*.²¹³ The Thomas's ran their adults-only Internet bulletin board system out of their home in Milpitas, California.²¹⁴ Federal agents indicted them in Memphis, Tennessee, where the U.S. Postal Inspector was sitting at the time he browsed the Thomas's BBS.²¹⁵

The court disregarded the suggestion of a virtual community standard because the Thomas's required users to submit an application to join the BBS, and based on that information, they should have known that users in Memphis viewed their pornographic material.²¹⁶ Ironically, although the Thomas's were never in Tennessee, they were convicted on pornography charges in Tennessee for violation of Tennessee law by a Tennessee jury applying the Memphis community standard as dictated by *Miller*.²¹⁷

community' to judge whether material is obscene" when a BBS [bulletin board service] is involved because those users that may be harmed by the allegedly obscene material are those that affirmatively access the BBS).

²¹¹ Stepka, *supra* note 69, at 935. The idea behind the virtual community is: that on-line computer users form a sufficiently robust community to be recognized by the law, at least for purposes of the Miller obscenity analysis [The idea is plausible as] a result of the inherent privacy of the user/computer relationship. This privacy isolates the computer user from his or her geographic community, and imparts a feeling of participation in a self-sufficient on-line community.

Id.; see generally Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach--Potential, Problems, and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175 (1998) (suggesting the implementation of a dispute resolution system for cyberspace which integrates the customs and rules of virtual communities).

²¹² Stepka, *supra* note 69, at 935-36; Flaming, *supra* note 200, at 181 (arguing that allowing the Internet community to develop its own rules and resolve internal disputes may end up challenging the country's traditional form of government because the Internet community favors decentralization and opposes hierarchy).

²¹³ 74 F.3d 701 (6th Cir. 1996).

²¹⁴ *Id.* at 705. The Thomas's followed FCC rules by requiring users to pay for bulletin board use with credit cards. Goldman, *supra* note 12, at 1105 n.162. Users could download, view, and print pornographic materials after paying a membership fee and receiving a password. *Thomas* 74 F.3d at 705.

²¹⁵ Goldman, *supra* note 12, at 1105-06. A U.S. Postal inspector, working undercover, downloaded obscene pictures from the Thomas's hard drive. *Thomas*, 74 F.3d at 705. As a member of the bulletin board the inspector had access to 17,000 sexual and graphic computer photos, indexed by topics including bestiality, torture or pedophilia. *Id.*

²¹⁶ *Thomas*, 74 F.3d at 710-11. The application required applicants to the BBS to fill in their name, address, phone number and signature. *Id.* at 705.

²¹⁷ Pollack, *supra* note 38, at 475 (concluding the *Miller* holding is ineffective in a time of changing technology and communication because what constitutes a community is also changing).

The end result is that the values of a more conservative jurisdiction in Tennessee may govern Internet speech all over the world.²¹⁸

Because the standard can produce different results based on the location of the receiver, reasonable users will be unable to predict what is deemed harmful to minors.²¹⁹ This may deter constitutionally protected speech because speakers who cannot meet the infeasible affirmative defenses of COPA²²⁰ will be hesitant to share material over the Internet for fear of being charged with violating the “harmful to minors” standard of a distant community.²²¹ The community standard incorporated into Internet legislation prevents users like the Thomas’s from understanding what is invalid and subjects them to penalties if their guess proves to be wrong.²²²

Justice Stevens’ finding in *Reno v. ACLU*²²³ regarding the vagueness of the CDA is equally applicable to this idea, as it “may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.”²²⁴ Even if the user knows the location of the community whose standards govern, a determination of whether the material in question offends those standards remains entirely subjective.²²⁵

²¹⁸ *Id.* Handelman, *supra* note 10, at 731 (finding all users must follow values of the most restrictive community if the *Miller* standard applies to the Internet).

²¹⁹ Clapes, *supra* note 35, at 7; *see also* Gobla, *supra* note 8, at 129 (“Due to the very nature of the Internet, defining a community by which to judge potentially offensive material is impossible.”); David J. Loundy, *Knee-jerk Reaction Not a ‘Healthy Thing,’* CHI. DAILY L. BULL., Jan. 11, 1996, at 6 (noting web site authors must remember, when designing their sites, that they may subject themselves to many different regulations in many different countries).

²²⁰ For a discussion on the technological and economic infeasibility of the affirmative defenses of COPA, *see supra* notes 184-188 and accompanying text.

²²¹ William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 210 (1995) (finding if Internet users are forced to restrict speech to comply with the most restrictive community standards one of two results will occur: (1) ideas will remain unexpressed or (2) the Internet community, as a whole, will block access to users located in restrictive jurisdictions; finding either option chills free speech); Handelman, *supra* note 10, at 737. According to David Sobel, general counsel for the Electronic Privacy Information Center and co-counsel for the plaintiffs, “In order to avoid potential prosecution, a lot of the material would potentially disappear because a lot of sites would not want to risk being hauled into court in Mississippi or some such place.” Nickell, *supra* note 182. Also,

[R]equiring users to provide identifying information prior to being able to even browse a site to determine what it offers will deter users from entering those sites, and will reduce the commercial opportunities provided to plaintiffs and other speakers using the Web. Requiring adults to identify themselves before they can access speech defined as “harmful to minors” will also stigmatize that speech and thus deter access to protected speech.

ACLU Complaint, *supra* note 174.

²²² Allison, *supra* note 128, at 116.

²²³ 117 S. Ct. 2329 (1997) (striking down portions of the CDA because the Act suppressed valid adult speech in an effort to protect minors from harmful speech).

²²⁴ *Reno II*, 117 S. Ct. at 2344-45. The majority noted the *Miller* community standard was not unconstitutionally vague. *Id.* at 2345.

²²⁵ Clapes, *supra* note 35, at 7. The Starr Report is an example of material that some communities may deem harmful to minors while others may not. *Sequel*, *supra* note 1. Peggy Peterson, communication director for Representative Michael Oxley (R-Ohio), sponsor of COPA, claims COPA would not censor the Starr Report. *Id.* However, “the fact that filtering programs blocked the report and that MSNBC online . . . blocked portions of Clinton’s

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C. *The Internet Does Not Fit Into Any Traditional Medium Category . . . Yet*

The Supreme Court created a “spectrum of control” which determines the appropriate First Amendment analysis for speech on various forms of technological communications.²²⁶ The least protected medium for speech is broadcasting because it enters the home with no invitation²²⁷ and it suffers from a scarcity of frequencies.²²⁸ In the middle is cable television because it can be accessed with affirmative steps²²⁹ and is potentially pervasive. The most protected medium is the telephone because users must take deliberate, affirmative steps to access the service.²³⁰ Currently, the Internet does not closely resemble any of these traditional categories.²³¹

If the Court is compelled to fit the Internet into a category, it seems to resemble the dial-a-porn rationale of *Sable* more than that of broadcasting or cable television for two reasons.²³² First, the Internet is not pervasive; it is not an intruder.²³³ Like dial-a-porn users, the computer user takes deliberate steps to invite the Internet into his home.²³⁴ According to Lisa M. Fantino, reporter and writer for WCBS -AM Radio in New York, NY:

[T]he Internet explorer must make a monthly decision whether to continue his subscription to the Internet and, if dissatisfied, he may cancel his subscription at any time. The Internet explorer is a pilot charting his own course. By virtue of the subscription-only access, innocent bystanders

testimony demonstrates that some people do consider Clinton’s cigar shenanigans harmful to minors.” *Id.*

²²⁶ *Reno II*, 117 S. Ct. at 2341-44; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774-75 (1996) (Souter, J., concurring) (finding the constitutionality of indecency regulation for a medium depends partly on the characteristics of that medium).

²²⁷ *FCC v. Pacifica Found.*, 438 U.S. 726, 731 n.2 (1978); Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L. J. 51, 79 (1996) (discussing the Supreme Court’s First Amendment analysis of various communication media and how it considers the unique characteristics of each, as well as whether the government interest presented is compelling; concluding the Internet “is the opportunity for all citizens to have a voice” and the value of that opportunity outweighs the possible harm of offensive speech).

²²⁸ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969); *Pacifica*, 438 U.S. at 731 n.2; *see supra* notes 88-90 and accompanying text.

²²⁹ Werst, *supra* note 31, at 220; *see supra* notes 98-105 and accompanying text.

²³⁰ Werst, *supra* note 31, at 220.

²³¹ *Id.* at 224 (finding the Internet is different than other communication technologies due to its evolution free of any content-based considerations, decentralization with no single point of control, global reach and the fact that users have no ability to select their audience).

²³² The majority in *Reno* found the Internet was analogous to dial-a-porn, rather than broadcast media and cable television. *Reno II*, 117 S. Ct. 2329, 2343 (1997). Therefore, the CDA was subject to strict scrutiny. *Id.* at 2344.

²³³ *Id.* at 2343 (affirming that Internet communications do not invade a user’s home; users rarely encounter sexually explicit content by accident; and most of the sexually explicit Internet material is preceded by content warnings).

²³⁴ Symposium, *Panel III: Restricting Speech on the Internet: Finding an Appropriate Regulatory Framework*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 413 (1998) [hereinafter *Restricting Speech*] (stating the views of panelist, Lisa M. Fantino, reporter and writer for CBS radio station WCBS-AM in New York City, who believes Congress suppressed free speech through the enactment of the CDA); *Reno II*, 117 S. Ct. at 2343.

cannot be offended . . . nor can children . . . access World Wide Web sites without the knowledge to type commands that will get them there.²³⁵

Accessing content on the Internet requires more knowledge, as well as more deliberate and affirmative steps, than merely turning a dial to access the radio or television.²³⁶ Second, the Internet is not afflicted with a scarcity of broadcast frequencies.²³⁷ On the contrary, whenever a new computer connects to the Internet, the Internet's capabilities and size increase.²³⁸

It is important to note that the Internet's exemption from protected speech regulation may be only temporary.²³⁹ Cable modems and media alliances are beginning to turn the Internet into a type of medium closer to that of broadcasting.²⁴⁰ The Court relied upon specific Internet characteristics when determining the appropriate level of First Amendment protection. If these characteristics no longer exist, the protection also may disappear.²⁴¹

D. Existing Obscenity & Pornography Laws Work

Although the Internet presents unique characteristics for legal application, there is no reason to believe it will force courts to abandon well-established legal concepts merely because the speech in question is communicated by computer.²⁴² "Protected speech should be protected speech, no matter what its form."²⁴³ Some courts have easily applied existing legal restrictions on various forms of speech to Internet communication.²⁴⁴

²³⁵ *Restricting Speech*, *supra* note 234, at 413 (footnotes omitted).

²³⁶ *Reno I*, 929 F. Supp. 824, 845 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

²³⁷ *Reno II*, 117 S. Ct. at 2344.

²³⁸ Pollack, *supra* note 38, at 483. *But see* Allison, *supra* note 128, at 128-29 (arguing the Internet may suffer from scarce resources in the future because the Internet is growing rapidly and straining the resources which handle the increased traffic).

²³⁹ Allison, *supra* note 128, at 132-33; The Supreme Court in *Reno* determined the Internet was entitled to full protection of the First Amendment. *Reno II*, 117 S. Ct. at 2344.

²⁴⁰ Clapes, *supra* note 35, at 9.

²⁴¹ Allison, *supra* note 128, at 132-33.

²⁴² William Bennett Turner, *The First Amendment and the Internet*, 482 PLI/Pat 33, 52-53 (1997) (finding general state and federal laws established for other forms of communication are equally applicable to the Internet); *see generally* William Bennett Turner, *Federal and State Attempts to Regulate the Internet after Reno v. ACLU*, 520 PLI/Pat 595 (1998) (listing recent proposals for state and federal Internet regulation); Charles S. Sims, *After the Communications Decency Act: Content Regulation in the Electronic Age*, 516 PLI/Pat 447 (1998) (discussing the historical development of obscenity and indecency regulation prior to the CDA and proposed regulations after the Court struck down the CDA).

²⁴³ Peter Ludlow, *Introduction to Chapter IV of HIGH NOON ON THE ELECTRONIC FRONTIER, CONCEPTUAL ISSUES IN CYBERSPACE*, 253, 253 (Peter Ludlow ed., 1996) (discussing *United States v. Thomas* and determining the community standard of the *Miller* obscenity test should not be applied to the Internet).

²⁴⁴ Jessica McCausland, *Regulating Computer Crime after Reno v. ACLU: The Myth of Additional Regulations*, 49 FLA. L. REV. 483, 491 (1997) (finding some courts have had little or no trouble applying established law to the new Internet situations and discussing the case of *United States v. Thomas*, which involved Internet obscenity).

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For example, in *United States v. Thomas*²⁴⁵ federal agents charged the Thomas's with violating federal anti-obscenity laws, including 18 U.S.C. §1465, which specifically regulates the "transportation of obscene matters for sale or distribution."²⁴⁶ The defendants argued the statute did not apply to intangible objects such as computer files.²⁴⁷ The court disagreed and construed the federal obscenity law to include computer transmissions because the action allowed hard copies to be transmitted to distant locations.²⁴⁸

In *United States v. Carroll*,²⁴⁹ the defendant was charged under the existing federal child pornography statute²⁵⁰ after his wife discovered that he took sexually-explicit photographs of his 13-year old niece with the intention of distributing them on the Internet.²⁵¹ The First Circuit Court of Appeals found that the transmission of photographs over the Internet was equivalent to transporting them in interstate commerce and affirmed the defendant's conviction.²⁵²

The legislature passed these and other statutes long ago to criminalize such activities as the distribution of pornography.²⁵³ COPA and any future regulations enacted for this type of crime committed via the Internet result in double criminal liability for a defendant merely because he used a computer.²⁵⁴ This implies crimes committed over the Internet are somehow more culpable.²⁵⁵ To the contrary, the distribution of

²⁴⁵ 74 F.3d 701 (6th Cir. 1996). For a discussion of the *Thomas* case, see *supra* notes 213-18 and accompanying text.

²⁴⁶ 18 U.S.C. §1465 (1994 & Supp. 1997). The statute states, in part:

Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service . . . in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film . . . or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

Id.

²⁴⁷ *Thomas*, 74 F.3d at 706.

²⁴⁸ *Id.* at 707-08.

²⁴⁹ 105 F.3d 740 (1st Cir. 1997).

²⁵⁰ 18 U.S.C. §2251(a) (1994); This section states:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished . . . if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

Id.

²⁵¹ *Carroll*, 105 F.3d at 741-42. The defendant's wife found two rolls of undeveloped film which contained 46 photos of their 13 year-old niece posing suggestively with sex toys and dressed in lingerie. *Id.* at 741. The court affirmed the defendant's conviction under the federal child pornography statute. *Id.* at 745.

²⁵² *Id.* at 742. The court found the transmission of photos via the Internet was the same as moving them across state lines and therefore, equivalent to transportation in interstate commerce. *Id.*

²⁵³ McCausland, *supra* note 244, at 496.

²⁵⁴ *Id.* at 497-98 (arguing a pedophile who looks for minors at an elementary school to sexually exploit is just as culpable as one that reaches the same goal via the Internet).

²⁵⁵ *Id.*

pornography is no more dangerous over the Internet than through the mail.²⁵⁶ The Internet does not increase these crimes, it just makes them easier to commit.²⁵⁷ For example, “[c]hild pornographers are going to do what they do with or without the internet,”²⁵⁸ as the Internet is just another method for delivery of pornographic material.²⁵⁹ Therefore, this second wave of obscenity and pornography regulation is difficult to justify based on the idea that courts cannot apply existing laws or that a computer makes certain crimes more dangerous.²⁶⁰

E. *Effective Alternatives to Government Regulation*

There are many varieties of filtering and blocking computer programs available which screen out access to questionable Internet material.²⁶¹ These programs empower parents with an effective tool to supervise their children’s use of the Internet.²⁶² This is the least restrictive means available to meet the government’s goal of protecting minors from indecency, while preserving the fundamental right to free speech.²⁶³

Filtering or blocking software blocks access to questionable web sites according to PICS (Platform for Internet Content Selection).²⁶⁴ PICS is a set of standards written in

²⁵⁶ *Id.* at 500 (finding the existence of the Internet has not increased the prevalence of crimes involving pornography).

²⁵⁷ *Id.* (describing the arguments of those that oppose government regulation of the Internet).

²⁵⁸ *Id.* at 499 (quoting Robbie Honerkamp, engineer for Mindspring Enterprises and former Director of Electronic Frontiers of Georgia).

²⁵⁹ *Id.* at 500 (finding that only a small percentage of pornographic material is produced for the Internet). For example, a distributor of child pornography will upload pictures to their web page rather than spending money on postage to distribute the material through the United States Postal Service. *Id.* at 499-500.

²⁶⁰ McCausland, *supra* note 244, at 498-500. Because the existing laws work for these crimes and it is unclear whether crimes have increased due to Internet use, new regulations are unnecessary. *Id.* at 500. Compare John C. Scheller, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 1013 (1994) (concluding that current legislation does not work effectively to control child pornography transmission on the Internet, and in order for new legislation to be effective it must destroy the anonymity of the illegal transmissions).

²⁶¹ *Restricting Speech*, *supra* note 234, at 414. The industry developed this software to aid parents in the supervision of their children’s Internet access. *Id.* The programs screen out questionable web pages. *Id.*

²⁶² Dobeus, *supra* note 19, at 656 (concluding parents must be responsible for the content their children access on the Internet in their homes because “[u]ser control of Internet content” and existing laws are adequate to protect children from potentially harmful Internet content).

²⁶³ *Restricting Speech*, *supra* note 234, at 414-15; Action for Children’s Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995). Broadcasters, authors, listeners, program suppliers and viewers challenged section 16(a) of the Public Telecommunications Act of 1992, which was enacted to protect minors from indecent radio and television programs by limiting the hours in which they could be broadcast. *Id.* at 656. The Act made an exception for public radio and television stations. *Id.* The court found the government had a compelling interest in protecting children. *Id.* However, it held the Act was not the least restrictive means to obtain the government’s goal. *Id.* at 682.

²⁶⁴ Platform for Internet Content Selection (visited Jan 22, 1999) <<http://www.w3.org/PICS/>> (providing specific information on PICS, including links to pages

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a common language used by rating services to label Internet content.²⁶⁵ The filtering software allows private parties to choose the ratings they prefer and block any material they do not want to access.²⁶⁶ The software is commercially accessible from numerous companies.²⁶⁷

Some of the software manufacturers also serve as the rating service for their filtering product, such as Cyber Patrol²⁶⁸ and CYBERSitter.²⁶⁹ Cyber Patrol rates sites using fifteen categories including “violence/profanity” and “sexual acts” and within each category assigns a label of CyberNOT or CyberYES.²⁷⁰ On the other end of the spectrum, CYBERSitter blocks from single lists of questionable sites with no opportunity to block only a portion of any list.²⁷¹

Another rating service is the Recreational Software Advisory Council (RSAC) which also follows the PICS standard in its own rating system (RSACi).²⁷² Under this system, web site creators voluntarily rate their own site content based on the categories of violence, nudity, sex and language.²⁷³ This system is available on SurfWatch,

describing technical specifications and frequently asked questions).

²⁶⁵ PICS provides a standard labeling format so the filtering software can process a PICS complaint label. Gobla, *supra* note 8, at 125-26. Creators or third parties may use a PICS based ratings system to label individual web sites. Paul Resnick and James Miller, *PICS: Internet Access Controls Without Censorship* (visited 10/25/98) <<http://www.w3.org/PICS/iacwcv2.htm>> (concluding that filtering software using the PICS labeling language can meet diverse needs unlike a blanket restriction, which can never meet everyone’s needs).

²⁶⁶ Jeffrey Rosen, *Zoned Out: Can the Government Stop Cyberporn?*, NEW REPUBLIC, Mar. 31, 1997, at 15.

²⁶⁷ David K. Djavaherian, *Reno v. ACLU*, 13 BERKELEY TECH. L.J. 371, 383 (1998). The software blocks certain questionable sites and prevents “inappropriate search terms” from being used. *Id.* at 384. For prices of some of the available software programs, see *infra* notes 268-269.

²⁶⁸ Cyber Patrol allows parents to restrict children’s access to certain hours of the day, limit total on-line time, and block access to specific web sites. *The Cyber Patrol Fact Sheet* (visited 11/15/98) <<http://www.cyberpatrol.com/fact.htm>>. A company team, including parents and teachers, reviews web sites. *Id.* The price of the software is \$29.95 for the first three months and subsequent 12-month subscriptions cost \$29.95. *How to Download/Order, Register/Review, Upgrade & Price Cyber Patrol* (visited 11/15/98) <http://www.cyberpatrol.com/cp_order.htm#pricing>.

²⁶⁹ CYBERSitter claims to block 100,000’s of sites unsuitable for children, such as sites regarding pornography, sexual issues and racism. *CYBERSitter For a Family Friendly Internet* (visited 11/15/98) <<http://www.solidoak.com/cybinfo.htm>>. The price is \$39.95 with no additional charges for updates. *Id.*

²⁷⁰ The CyberNOT label criteria relate to advocacy information, such as how to obtain inappropriate materials and how to build, grow or use them. *Cyber Patrol CyberNOT List Criteria* (visited 11/15/98) <http://www.microsys.com/cyber/cp_list.htm>. The categories do not relate to sites expressing an opinion or educational information. *Id.*

²⁷¹ *CYBERSitter For a Family Friendly Internet*, (visited 11/15/98) <<http://www.solidoak.com/cysitter.htm>>.

²⁷² The Software Publishers Association created RSAC in 1994 to establish a rating system for computer games and other media, such as the Internet. *Recreational Software Advisory Council on the Internet* (visited 11/15/98) <<http://www.rsac.org/homepage.asp>>.

²⁷³ Gobla, *supra* note 8, at 127-28. A web site questionnaire allows providers to rate their own sites using the system. *Recreational Software Advisory Council on the Internet* (visited 11/15/98) <<http://www.rsac.org/homepage.asp>>.

CyberPatrol 3.0 and Microsoft Internet Explorer 3.0.²⁷⁴ Parents use a password to select the level of each category for their child.²⁷⁵ If a content provider does not self-rate his web site, it is blocked.²⁷⁶ There are three important advantages to using filtering software rather than government regulation to protect children from indecent Internet content:

First, blocking [and/or filtering] software is available from several different companies at little or no cost. Second, the software can filter across jurisdictional boundaries . . . allow[ing] the user to block offensive Internet content that originates . . . from anywhere in the world. . . . Third, the First Amendment right to free speech is better served by user based filtering programs rather than any form of government regulation²⁷⁷

Like anything else in the technological world, these software programs are not perfect. Regulation supporters argue software which filters material rated by third parties is deficient for two reasons. First, because the software cannot block every questionable site, a determined child could bypass the filter and find indecency on the Internet.²⁷⁸ Second, critics claim the software is overly effective in that it blocks access to sites with appropriate material.²⁷⁹ For example, some of the programs utilize string-recognition software which rejects certain four-letter words embedded in text.²⁸⁰

CYBERSitter utilized this feature to white out certain selected words while displaying the rest of the text, resulting in changing the sentence "President Clinton opposes

²⁷⁴ Gobla, *supra* note 8, at 127-28.

²⁷⁵ *Id.* at 128.

²⁷⁶ Dobeus, *supra* note 19, at 634; Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 472-74 (1997). Unrated sites must be blocked or too many questionable sites will filter through. *Id.* at 471. The majority of the industry believes blocking unrated sites is necessary, or the rating system will not be useful. *Id.* at 471-72.

²⁷⁷ Dobeus, *supra* note 19, at 657 (footnotes omitted). According to the plaintiffs in *ACLU v. Reno II*:

Unlike the COPA, user-based solutions provide a way for concerned parents to prevent sexually oriented material from reaching minors: (1) from foreign sites; (2) from amateur or non-commercial commercial sites; and (3) from sites that require a credit card for payment. The use of such software is also notably less restrictive than the COPA's criminal ban.

American Civil Liberties Union Freedom Network, *Temporary Restraining Order Brief in ACLU v. Reno II* (visited Nov. 20, 1998) <http://www.aclu.org/court/aclurenoII_tro.html> [hereinafter *TRO Brief*].

²⁷⁸ Robert W. Peters, *There is a Need to Regulate Indecency on the Internet*, 6 CORNELL J.L. & PUB. POL'Y 363, 364 (1997); see also Jon Bigness, *Sifting Problems of Web Filters*, CHI. TRIB., Feb. 16, 1998, at 3 (noting filtering software effectiveness depends a great deal on the taste level and care of the publishers that produce the software because the publisher chooses the sites they consider inappropriate for children).

²⁷⁹ Electronic Privacy Information Center, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet* (Dec. 1997) (visited Jan 21, 1999) <<http://www2.epic.org/reports/filter-report.html>> (finding that filtering software prevented kids from accessing useful information available on the Internet as evidenced by a test the Center conducted which showed out of 100 searches, the software prevented access to almost 90 percent of material which contained the search terms because of the filter); see generally David J. Loundy, *Filtering Software Poses Legal Pitfalls*, CHI. DAILY L. BULL., March 12, 1998, at 5.

²⁸⁰ Weinberg, *supra* note 276, at 460.

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 homosexual marriage” to “President Clinton opposes marriage.”²⁸¹ However, companies may solve these types of problems by improving software design.²⁸²

Self-rating systems receive criticism because they require authors of Internet content to voluntarily rate their sites with rigid labels.²⁸³ If they refuse to apply a label, filters will probably block the site.²⁸⁴ Critics argue that this leaves little incentive to self-rate sites containing questionable material because filtering software blocks it, regardless of whether it is rated.²⁸⁵ However, self-rating systems are a less restrictive means to protect children than government regulation.

This is a free market economy. If consumers (parents) wish to purchase filtering software that is “overly effective” and blocks unrated sites, that is their choice.²⁸⁶ If consumers want access to unrated sites, they may purchase a less effective type of software. The objective behind the creation of filtering software was to empower parents to monitor children’s Internet access to indecency, rather than passing government regulations to do so.²⁸⁷ Now we need to let parents use that power as they see fit.²⁸⁸ This includes acknowledging that consumers have a choice of which software to buy based on, in part, their feelings regarding the imperfections of the various software programs.

²⁸¹ *Id.* Another example of a difficulty with string-recognition software occurred when software utilized by America Online would not let users from “Scunthorpe,” England, register with the service. *Id.* Also, Surfwatch software prevented the University of Kansas Medical Center from accessing their own “Archie R. Dykes Medical Library [sic].” *Id.* Some companies, like CYBERSitter, filter out gay and lesbian sites even when they do not contain a reference to sex. *Id.* at 461. This is most likely a temporary setback because eventually most rating services will correct the labels on each of these document. *Id.* at 460.

²⁸² *Id.*

²⁸³ Rappaport, *supra* note 144, at 807; Charlie Stross, *RSACi Ratings Dissected* (visited 10/25/98) <<http://www.antipope.org/charlie/nonfiction/rant/rsaci.html>> (finding RSACi system cannot evaluate content for literary, educational or social value and, therefore, labels force the author of a safe sex message to group it with web sites depicting explicit sexual material).

²⁸⁴ Weinberg, *supra* note 276, at 471-72 (finding that rating services will probably block access to all unrated sites because too much questionable material would filter through for them to market themselves as reliable screeners).

²⁸⁵ Dobeus, *supra* note 19, at 647. The legislature introduced a bill mandating that Internet access providers provide screening software to permit parents to control internet access by their children. Family-Friendly Internet Access Act of 1997, H.R. 1180, 105th Cong. (1997). Compare Weinberg, *supra* note 276, at 473-77 (finding a mandatory self-rating law is unconstitutional because it requires a speaker to associate himself with an idea with which he disagrees).

²⁸⁶ Weinberg, *supra* note 276, at 476 (finding that even if software did not block unrated sites, parents still may restrict children’s access to them by instructing the software to block unrated sites).

²⁸⁷ *Restricting Speech*, *supra* note 234, at 415 (stating the industry voluntarily developed filtering software as a tool for parents to use in limiting access by their children to questionable material on the Internet).

²⁸⁸ The Supreme Court has a long line of precedent recognizing parental rights to raise their children as they see fit. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a law that required children to attend public schools because it interfered with the rights of parents to direct the education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a law that banned teaching children foreign languages because it interfered with parent’s rights to control the education of their children).

Parents who allow their children to participate in new technology must step forward and assume the responsibility of protecting them.²⁸⁹ Giving parents the responsibility of monitoring their children allows them to shield their children as they see fit, while “making the Internet a safer place for the Constitution.”²⁹⁰ Parents should not look to Congress to legislate away parental responsibility that is “part and parcel of rearing children.”²⁹¹ Allowing Congress to do so

gets the federal government into a job in which it has no business - parenthood, a job which doubtless should be left to parents. Any parents who believe they need the government’s help to raise their kids should be forced to leave their 16-year-old daughter with Bill Clinton for a weekend.²⁹²

IV. CONCLUSION

The Internet is a vast global universe of ideas and interactive communication. Entry into this universe is inexpensive, as well as fast, effective, and anonymous. It is unlike any other form of media encountered in our planet’s history.

Federal regulations employed to regulate the unique characteristics of the Internet will lead to a ruling of unconstitutionality.²⁹³ The CDA was the victim of such a decision after the government’s first round of Internet legislation.²⁹⁴ COPA is the second round of legislation and it also raises First Amendment questions. This time the legislation attempts to regulate under the guise of “the protection of children.”²⁹⁵ No matter how one feels about the importance of protecting children from harmful materials, COPA is still unconstitutional because it is not narrowly tailored to meet that goal.²⁹⁶

²⁸⁹ Goble, *supra* note 8, at 129. According to Albert Veza, an MIT senior research scientist working on the development of filtering software standards, technology is just a tool and “[t]he real answer is parenting: understanding what your kids are doing online, talking to them about it and guiding them.” Peters, *supra* note 278, at 366; *see also* Anne R. Carey and Web Bryant, *USA Snapshots: Who’s Watching Kids On Line*, USA TODAY, Sept. 24, 1998, at 1A (finding the following percentages of parents whose children have Internet access sit with the children and participate: 36% Never; 25% Occasionally; 24% Always; 13% Rarely; and 2% Don’t Know).

²⁹⁰ Wu, *supra* note 13, at 301. *But see* Clapes, *supra* note 35, at 10 (finding it is not primarily the parent’s burden to protect children from indecent material on the Internet because it is the industry that brought obscenity into homes, and therefore, it has commensurate responsibility to control it).

²⁹¹ *Restricting Speech*, *supra* note 234, at 415.

²⁹² Myers, *supra* note 182, at A4.

²⁹³ Goble, *supra* note 8, at 128-29 (finding any federal law will be overbroad and unconstitutional because it is impossible to define a community by which to judge what material is unlawful).

²⁹⁴ *Reno II*, 117 S. Ct. 2329, 2349-51 (1997) (striking down portions of the CDA due to vagueness and overbreadth).

²⁹⁵ For a discussion on COPA and the reasons for which Congress enacted it, see *supra* Part I.F.

²⁹⁶ For discussion on why COPA is unconstitutional, see *supra* Part III.A & B. Any content-based regulation is subject to strict scrutiny, which means the regulation must be necessary to serve a compelling government interest and must be narrowly tailored to achieve that interest. *Arkansas Writers’ Project Inc., v. Ragland*, 481 U.S. 221, 231 (1987).

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Parents who allow their children to use the Internet must step up and assume the responsibility to protect them from harmful materials, in spite of the fact it may be easier to “pass the buck” to the government.²⁹⁷ Filtering software offers parents an effective solution and is far less restrictive than COPA, which imposes criminal penalties on constitutionally protected speech between adults.²⁹⁸ Therefore, Internet regulation should begin at home.

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²⁹⁷ Myers, *supra* note 182, at A4 (finding speech cannot be criminalized just because some find it potentially harmful to children); Gobla, *supra* note 8, at 129. “Those parents who allow their children to participate in that [new] technology must also accept the responsibility of monitoring their children.” *Id.*

²⁹⁸ *TRO Brief*, *supra* note 277 (noting that Congress recognized it had not done thorough research on other alternatives before passing COPA and concluding that if Congress had done a thorough investigation, it would have revealed other less restrictive available alternatives).