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Executive Summary

{1} In 1996, Congress passed the Communications Decency Act ("CDA") in an effort to regulate indecent speech on the Internet. Through the CDA, Congress sought to protect children from easily accessible, harmful materials on the Internet. In spirit, the law had noble intentions; however, on its face, the CDA raised serious constitutional questions and was immediately challenged by First Amendment advocates in *ACLU v. Reno* ("*Reno I*").[1] Using broad and vague terms such as "indecent" and "patently offensive," the CDA threatened to restrict adult access to a tremendous amount of speech that was constitutionally protected.[2] Additionally, through the imposition of criminal sanctions, the CDA could have had a "chilling effect" on speech.[3] The CDA was reviewed and rejected by a federal district court and ultimately, the U.S. Supreme Court. In their analyses, both courts pointed to the vague language and criminal penalties found in the CDA as primary reasons for invalidating the statute. Further, the courts were keenly aware of the Internet's free and open nature, its diversity of content, and its status as a powerful new medium for mass communications. The Supreme Court, in affirming the district court, did not want to endanger the free flow of information on the Internet.

{2} Following the sound rejection of the CDA, Congress passed a second act in 1998 with the similar aim of protecting minors from harmful material on the Internet. Congress still saw the need to regulate content on the Internet and attempted to do so with the Child Online Protection Act ("COPA"). The COPA was a congressional effort to regulate speech on the Internet and remedy the constitutional defects in the CDA. The statute was again challenged by First Amendment advocates in *ACLU v. Reno* ("*Reno III*").[4] The COPA was distinct from the CDA in several important ways. First, the COPA incorporated some language used in the *Miller* obscenity test to prevent a void for vagueness challenge. Next, the COPA is facially limited only to commercial distributors of pornography. This would restrict the reach of the statute, which was a problem for the CDA. Finally, the COPA provides a number of affirmative defenses, which Congress presumably included to facilitate compliance with the statute. This aspect of the COPA was also important, since the affirmative defenses in the CDA were found to be inadequate. Still, after a thorough review of the statute, a district court has concluded that the COPA is overreaching and infringes on speech protected by the First Amendment. Despite the many changes, the COPA has met with the same reception at the district court level as its predecessor.

{3} The government has appealed this decision and the case will be heard by a panel of judges in the Third Circuit Court of Appeals in Fall 1999. The final determination of this issue could have widespread ramifications on the ability of an individual to convey and to receive information freely across the various avenues of the Internet.

I. Introduction

{4}The Internet has revolutionized communications and has evolved into a powerful arena for speech on a global scale. With its phenomenal growth and increasing influence, the Internet has raised numerous legal and ethical issues previously foreign to the law. One issue that the law has been scrambling to address is the exposure of children to harmful material via the Internet. Though difficult to quantify, this medium includes a tremendous number of adult-oriented sites containing material that could be classified as pornographic or obscene.[5] Children who use the Internet run a very real risk of intentionally or accidentally visiting or viewing a portion of one of these sites through their normal use of the World Wide Web.[6] Responding to this risk, Congress has made an unsuccessful attempt to regulate adult content on the Internet through the Communications Decency Act of 1996 ("CDA").[7] This act, which was invalidated by the U.S. Supreme Court,[8] was followed by another attempt at regulating content on the Internet, the Child Online Protection Act of 1998 ("COPA").[9] This article will examine the efficacy of Congress' most recent attempt to regulate the Internet, and whether it can succeed where the CDA failed.

{5}This note demonstrates that, with the COPA, Congress failed to address the numerous constitutional shortcomings of the CDA. Part II offers a brief background on the Internet as a major medium of mass communication and discusses the historical background behind the debate over harmful material on the Internet. In addition, Part II will present some of the First Amendment issues implicated by the statutes. Part III analyzes the CDA and its undoing in *ACLU v. Reno* ("*Reno I*") and *Reno v. ACLU* ("*Reno II* ")[10] as the judicial fate of the COPA cannot truly be understood without an exhaustive study of its predecessor. Part IV introduces the COPA and discusses its likelihood of becoming a successful means of regulating harmful material following *ACLU v. Reno* ("*Reno III*").[11] Part V examines the future of Internet regulation following the ruling in *Reno III* and considers the likelihood of effectively protecting children from harmful materials while also respecting the constitutional rights of adults to engage in free speech. Part VI summarizes the arguments presented and concludes the note.

II. Historical Background

A. *Brief History of the Internet*

{6}The Internet is a unique and evolving technology that provides "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[12] Though this technology has seen astounding growth only recently, it has existed since 1969.[13] At that time, it was "an experimental project of the Advance Research Project Agency ("ARPA"), and was called ARPANET."[14] The ARPANET was a network that connected computers operated by "the military, defense contractors, and university laboratories conducting defense-related research."[15] Initially, the Internet was a research tool for the military and defense industries and was created to provide a series of links between their computer networks with no central point of control.[16] As ARPANET evolved, other similar networks were created to connect universities, researchers and others worldwide.[17] With time, "each of these networks were themselves linked together" which allowed "users of any computers linked to any one of the networks to transmit communications to users of computers on other networks."[18] Today, the Internet remains similar to its original design and is essentially a "giant network interconnected with a series of smaller networks."[19] Due to the interconnectedness of sites, navigation through the Internet is easy, even for a child. Further, due to its size, there is no Internet administrator, nor governing body who regulates the various sites.[20] Such supervision and maintenance "would not be technically feasible for a single entity" to handle.[21] The Internet is clearly a massive, expansive and powerful medium of communication that will not be easy to regulate as a whole, through even the most sweeping legislation.

B. *A Forum Like No Other: The Unique Characteristics of the Internet*

{7}The Internet cannot truly be compared to any existing medium, and any attempt to legislate it must account for its unique qualities.[22] In terms of both access and content, the Internet is a medium that does not mirror any other method of mass communication. For example, to access the Internet, a user must take several affirmative steps. A person "must have access to a computer with the ability to reach the Internet. A user must then direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data."[23] Plainly, receiving information through this medium mandates actions that are "more deliberate and directed than merely turning a dial."[24] This is a key factor that must be considered by any legislature seeking to regulate the Internet. For, unlike television and radio, the user is not merely presented with unwanted information by turning on the computer. Rather, he must take numerous steps in order to request and to receive the desired information.

{8}Once connected to the World Wide Web[25] on the Internet, a user may access information using its unique hypertext transfer protocol ("http"), which offers "hypertext links that [transport] you from site to site."[26] Use of these 'hyperlinks' allows "information to be accessed and organized in very flexible ways, and allow[s] people to locate and efficiently view related information even if the information is stored on numerous computers all around the world."[27] Put simply, much of the powerful appeal of the Internet "stems from the ability of a link to point [a user] to any document, regardless of its status or physical location."[28]

{9}Content, in both its presentation and substance, is another distinguishing characteristic of the Internet. One of the Internet's major strengths is its incredibly diverse and seemingly limitless content that almost defies classification.[29] Though many may think of the Internet as only the World Wide Web ("WWW"),[30] it also includes numerous methods of "communication and information retrieval," which are "constantly evolving."[31] Among the more widely-used are the WWW, e-mail and real-time chats.[32] Through the various avenues of interaction, "a user of the Internet may speak or listen interchangeably, blurring the distinction between 'speakers' and 'listeners' on the Internet."[33]

{10}Through normal navigation of the WWW, a user can find**,** for example**,** medical advice just as easily as hardcore pornographic material.[34] While, the user may not be a "captive audience,"[35] the ease of access

to pornographic material may present a threat to children using the Internet. The use of search engines facilitates the ease of navigation through the World Wide Web by allowing a user to find desired materials by entering key words or phrases.[36] This aspect of the Internet is a cause for alarm for groups such as the National Law Center for Children and Families, which has stated that, of the "[t]ens of thousands of sites that sell pornography," many "openly allow children, as well as adults, to view hard-core and soft-core porn pictures by simply clicking on any link to a pornographic company's Web page, even when searching for innocent material such as 'teen,' 'boy,' 'girl,' 'toy,' 'pet,' etc."[37] In the years since its creation, the Internet has achieved its growth and expansion with few legal restrictions on its content and without significant government intervention.[38] This changed when Congress passed legislation to regulate the Internet in reaction to the availability of these potentially harmful materials to children.

C. *First Amendment Concerns Raised by the Internet*[39]

{11}The Internet has become a popular marketplace for interaction and discussion on a wide range of topics. Currently, over 215 million people worldwide access the Internet, and that number is projected to reach 327 million by next year. [40]In the U.S. alone, there are an estimated 70.5 million adults who regularly use the Internet.[41] To date, the Internet has developed largely unfettered by restrictions on its content,[42] but Congress has begun to take note of its potential effect on children and may soon create judicially approved legislation to regulate content on the Internet. Congress' concern may be spurred by the fact that there are now five million children under twelve on the Internet everyday.[43] Before examining congressional regulations of the Internet, it may be helpful to introduce the constitutional concerns which underlie them.

{12}The CDA and COPA drew attention from First Amendment advocates primarily because they were both content-based[44] restrictions on speech, as opposed to content-neutral[45] restrictions. The Supreme Court in *R.A.V. v. City of St. Paul* stated plainly that "[c]ontent-based regulations are presumptively invalid."[46] Under the rule in *Sable Communications v. FCC*, the government cannot "regulate the content of constitutionally protected speech" unless the regulation meets the standards of strict scrutiny.[47] Those standards require that the regulations must, 1) "promote a compelling [state] interest"; and 2) and that they represent "the least restrictive means to further the articulated interest."[48] If the means chosen are not carefully tailored to promote the government's compelling interests, the regulation would violate the First Amendment's prohibition on content-based regulations of speech.[49]

{13}Another major issue with both, the CDA and COPA is the manner in which they attempt to control access to obscenity. The leading test for obscenity was established in *Miller v. California*.[50] In determining whether subject matter is obscene, the test inquires as to

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[51]

The significance of the *Miller* test and other First Amendment concerns will be discussed further, as they were instrumental to the courts' rulings in *Reno I*, *II* and *III*.

III. *Reno I* AND *II*: Judicial Review of the Communications Decency Act

A. *The CDA: Congress Takes on the Internet*

{14}In 1996, Congress passed the Telecommunications Act ("the Act")[52] in an effort to "reduce regulation and encourage the rapid deployment of new telecommunications technologies."[53] As part of that Act, the Communications Decency Act attempted to regulate "indecent" and "patently offensive material" on Internet sites by utilizing criminal sanctions in an effort to protect children from such material.[54] However, the Act was challenged on constitutional grounds almost immediately after being signed by the President.[55]

{15}The disputes in *Reno I* and *II* centered around two key provisions of this act. First, the plaintiffs challenged § 223(a), which prohibited the knowing transmission of obscene or indecent material to a person under the age of eighteen.[56] In addition, the plaintiffs found fault with § 223(d), which prohibited the intentional sending of patently offensive messages to a person under the age of eighteen.[57] The complaining parties also objected that a violation of statutory provisions would be punishable by criminal sanctions. However, these parties emphasized that they did not dispute the portions of the statute that dealt with the regulation of obscenity and child pornography.[58]

{16}In defending the statute, the government argued that the protection of minors from harmful material was a "compelling interest" that justified the CDA.[59] In addition, the government pointed to the affirmative defenses available to violators under the statute.[60] The government also argued that the act would only have an effect on commercial distributors of pornography on the Internet.[61]

B. *Standard of Scrutiny Applied to the CDA*

{17}The courts in *Reno I* and *II* discussed the appropriate level of judicial scrutiny to apply to the statute. District court Judge Buckwalter stated that, though it is true that "the content of speech can indeed be regulated," it must follow "that the regulation will directly and materially advance a compelling government interest, and that it is narrowly tailored to accomplish that interest in the least restrictive manner. [A]ny content-based restriction must survive this most exacting scrutiny."[62] The test applied to the CDA was patterned after the decision in *Sable Communications v. FCC* which made clear that regulations restricting protected speech would be subject to the highest levels of scrutiny.[63] However, due to its broad and sweeping language, the CDA "is not narrowly tailored" to meet the government's interest in protecting children from indecent speech.[64] The courts believed that the Internet should be free from overreaching governmental interference that may hamper its growth because it is currently the largest and most inclusive medium for mass communication.[65] The aim of the statute may be to protect children, but practical application of the statute will impermissibly burden adults. Justice Stevens asserted that, this intrusion on the constitutional rights of adults "cannot be justified if it could be avoided by a more carefully drafted statute."[66]Because the overall effect of the statute is so far removed from its supposed goal of protecting children, the statute cannot stand. It seems that Congress could very likely formulate a much narrower means to achieve its aim of protecting children who use the Internet. Since the statute was a content-based regulation and threatened protected speech, both the district court and the U.S. Supreme Court applied a strict scrutiny analysis to their examination of the CDA.

C. *The Vagueness Issue -- What Does the CDA Mean by 'Indecent' and 'Patently Offensive'?*

{18}Justice Stevens and the district court each focused heavily on the argument that the CDA violated the First[67] and Fifth[68] Amendments, due to its use of the vague terms "indecent" and "patently offensive."[69] Under the principle of due process guaranteed by the Fifth Amendment, "an enactment is void for vagueness if its prohibitions are not clearly defined."[70] But, neither "indecent" nor "patently offensive" were defined by Congress in the CDA.[71] Justice Stevens believed that the vagueness of the statute was "a matter of special concern" because "the CDA is a content-based regulation of speech" and its ambiguity would have an "obvious chilling effect on free speech."[72] The Court feared that validating a vaguely written statute "may trap the innocent by not providing fair warning."[73] In this case, the CDA threatened to punish adults who tried to access constitutionally-protected speech. Based on the Supreme Court's past

rulings on speech regulation in radio and television, Judge Dalzell stated that, "any regulation of indecency" on the Internet "must [nevertheless] give adults access to indecent speech, which is their right."[74] The Supreme Court was firm in its opinion that the CDA, on its face, was

> not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace[d] all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. Furthermore, the general, undefined terms, 'indecent' and 'patently offensive' cover[ed] large amounts of nonpornographic material with serious educational or other value.[75]

Due to the ambiguous terms at issue, the CDA would prove to reach much further than Congress may have intended. Access to indecent speech would most likely be blocked, and the statute would regulate the constitutionally-protected speech of adults, rather than simply sheltering only children from objectionable material.

{19}In response, the government argued that the CDA was "no more vague"[76] than the standard for obscenity established by the Supreme Court in *Miller v. California*.[77] But Justice Stevens compared the CDA to the *Miller* standard and found a number of significant differences. The government reasoned that because the 'patently offensive' standard of the CDA is part of the *Miller* test, the CDA is not unconstitutionally vague.[78] However, Justice Stevens wrote that under the *Miller* test, "the proscribed material [must] be 'specifically defined by the applicable state law."[79] In addition, the CDA definition of patently offensive encompasses "1] 'excretory' activities as well as 2] 'organs' of both a sexual and excretory nature," while *Miller* stops at "sexual conduct."[80] Stevens' opinion goes on to state that another area where the CDA falls short of the *Miller* standard is in the absence of a "societal value requirement."[81] Such a standard would permit "appellate courts to impose some limitations and regularity on the definition by setting ... a national floor for socially redeeming value."[82] Despite the governments efforts to prove otherwise, the CDA did not measure up to the *Miller* test. Its failure to meet the *Miller* standard left the Court apprehensive of the harm it may cause to constitutionally-protected speech.[83]

D. *Reaching Too Far? The CDA Imposes Criminal Sanctions*

{20}Significantly, the CDA mandates that a violation of its provisions would result in criminal penalties. These sanctions raised a red flag with Justice Stevens, who believed that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[84] The severity of the sanctions caused the majority in *Reno II* to question the government's asserted interest in regulating the content of speech on the Internet. The Supreme Court believed that,

> [i]t is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year- old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term.[85]

Also, due to the fact that, "it is currently impossible to determine or control who has access to most of the Internet, [the CDA] effectively criminalizes nearly everyone who posts an 'indecent' image on the Internet." [86] The impact of such a broad statute on adults could be frightening in its actual effect.

{21}The Court was also wary of validating a statute that punished constitutionally-protected speech, even though it intended to protect minors. In the past, the Court has maintained that, despite the strength of the government's interest in preventing minors from accessing 'indecent' and 'patently offensive' material online, if the means it has chosen sweeps more broadly than necessary, and thereby, chills the expression of adults, it has overstepped into rights protected by the First Amendment.[87] This underlying point helps to solidify the

view that the CDA was far too broad and sweeping to be upheld by the Court.

{22}To combat the assertion that the CDA was too expansive, the government argued that the statute would only punish commercial providers of pornography. However, the court in *Reno* I, based on statutory language and legislative history, disagreed, stating that, "Congress did not intend to limit application [of the CDA] to commercial purveyors of pornography."[88] The district court further asserted that Congress did not intend to confine the CDA "to material that has a prurient interest or appeal," and instead "sought to reach farther."[89] In the three-judge panel in the district court, Judge Sloviter concluded that the CDA "reaches speech subject to the full protection of the First amendment, at least for adults."[90] Judge Sloviter's opinion is supported by the Supreme Court in *Sable Communications v. FCC*, which held that "sexual expression which is indecent, but not obscene is protected" under the Constitution.[91] In agreeing with the findings of the district court, Justice Stevens wrote that, due to the "breadth of this content-based restriction of speech," the government carried "an especially heavy burden" of "explain[ing] why a less restrictive provision would not be as effective as the CDA."[92] Thus, the courts in *Reno I* and *Reno II* agreed that the language of the CDA threatened to include a tremendous amount of speech that should not be covered by the statute.[93] Such far-reaching application may be what doomed the statute. As noted above, the CDA is facially vague with regard to its coverage, and according to the Supreme Court in *Reno* II, "it unquestionably silences some speakers whose messages would be entitled to constitutional protection."[94]

E. *CDA Conclusions*

{23}The Supreme Court affirmed the district court's ruling that the CDA was unconstitutionally vague and violated the First and Fifth Amendments.[95] Both courts agreed that the CDA would be extremely disruptive to Internet communications. This may be largely due to the fact "that the Internet evolved free of content-based considerations."[96] Congress' attempt to regulate the Internet through the CDA shows that it gave little consideration to the unique nature of the medium. As a forum for debate and exchange on an unprecedented scale, the Internet has the power to enrich the freedom of speech tremendously. Rather than encouraging this power, the statute "will ... undermine the substantive, speech-enhancing benefits that have flowed from the Internet."[97] This will primarily occur as the "wholesale disruption" to the medium caused by the CDA will drive adults away and lower their involvement on the Internet.[98]

{24}To regulate speech content, a statute must be narrow and precise, qualities which are lacking in the CDA.[99] In denying minors access to speech that may or may not be harmful, "the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[100] Such a suppression of protected speech by Congress is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[101] In concluding, the Supreme Court held that "the CDA places an unacceptably heavy burden on protected speech" and rejected the government's argument that the statute was narrowly tailored to meet a compelling interest.[102] The CDA was overly broad, unconstitutionally vague and was soundly rejected by the courts.

IV. *Reno III*: Judicial Review of the Child Online Protection Act

A. *The COPA: Has Anything Changed?*

{25}Following *Reno I* and *II*, the Internet continued to evolve and to expand, and the concerns which prompted passage of the CDA remained. Ironically, many of the same traits which endear the Internet to proponents of free expression, that is, "ease of participation and diversity of content and speakers," also make it a possible threat to children.[103] Through normal navigation of the Internet, children can easily be led to adult sites and exposed to sexually explicit pictures through the use of advertisements called "teasers."[104]

In 1998, Congress passed the COPA in an effort to protect children from this harmful material, and to "remedy the constitutional defects in the CDA,"[105] which, as discussed above, was ultimately rejected by the Supreme Court.[106] However, rather than learning from its past mistakes, Congress replicated many of them in the language of the COPA. Though Congress did attempt to rectify some of the shortcomings in the CDA, the new legislation was still overly broad and far too vague to survive the strict scrutiny that is applied to content-based regulation of speech.

{26}The COPA prohibits the intentional posting of material harmful to minors on the Internet for commercial purposes and punishes violations with either a criminal or civil penalty, or both.[107] The Act deems a person to be making a communication for commercial purposes "only if such person is engaged in the business of making such communications."[108] This language is an overt attempt by Congress to mend one of the major faults of the CDA.[109] Through this phrase, Congress undoubtedly wanted to show it did intend to narrow the scope of the law with The COPA. However, despite Congress' intent to improve on the CDA, The COPA still faced many of the same constitutional challenges that undermined the CDA. In *Reno* III, plaintiffs asserted that COPA was unconstitutionally vague, overly broad, and that the affirmative defenses offered in the statute did not outweigh the burden the act places on free speech.[110] As with the CDA, plaintiffs never challenged the obscenity provision of the act.[111] In response, the government argued that the statute was not broad and applied only to the commercial providers of pornography, that the free speech rights of minors and adults were not damaged by the act, and that the government stood behind the effectiveness of its affirmative defenses.[112]

B. *Judicial Analysis of The COPA: Outlining the Court's Attack*

{27}In determining the constitutionality of the statute, the district court examined a number of key issues. First, it discussed whether the COPA was overly expansive in its reach, and thus, facially invalid.[113] Additionally, the court examined the financial burden that may apply to Internet-based content providers if the statute were to take effect.[114] As with the CDA, the court also looked at the efficacy of using criminal penalties for punishing a violation of the statute.[115] Next, the court discussed whether the COPA could constitutionally regulate the speech content on the Internet.[116] To establish whether the COPA is a valid regulation of speech content, the court applied a strict scrutiny standard of review to the statute.[117] Underlying the court's analysis and a key to understanding the validity of both, the CDA and COPA are the unique technological attributes of the Internet.[118] A review of these aspects of the court's decision in *Reno III* will allow one to forecast the fate of the COPA under future judicial review.

C. *The Obscenity Issue: Has the COPA Closed the Miller Gap?*

{28}Congress made an obvious attempt to narrow the scope of The COPA with language intended to isolate the group that would fall under the statute's reach. However, the court still found that the statute, like the CDA, was overly broad. In the Supreme Court's reasoning in *Reno* II, two of the shortcomings of the CDA were that it was far too vague, and that it failed the *Miller* obscenity test.[119] The term "material that is harmful to minors" in the COPA is defined in language that almost mirrors the *Miller* language, and is more than likely Congress' attempt at fixing a glaring weakness in the CDA.[120] However, while Congress may have clarified the statute with respect to harmful materials, it was not as clear as to the parties who might be liable under the COPA. Judge Reed's opinion asserted that, "nothing in the text of the COPA . . . limits its applicability to . . . commercial pornographers only."[121] The district court elaborated by stating that the COPA's text applies to any speaker "who knowingly makes any communication for commercial purposes," and thus, is not confined to commercial pornographers.[122] Even the Department of Justice had doubts about the statute, and stated in a letter to the House Committee on Commerce that, "the COPA as drafted contains numerous ambiguities concerning the scope of its coverage."[123] Congress' attempt to regulate the Internet was found to be too broad, once again. The lower court's decision on the COPA will most likely be affirmed on this ground.

D. *The COPA Compliance: Will it Drain the Cyber-Marketplace?*

{29}The Internet is the ideal arena for allowing free speech to flourish. Though there are dangers, such as those intended to be addressed by the CDA and COPA, courts will place a premium on protecting the accessibility of participants to the medium. The financial burden caused by the COPA will hinder the ability of adults to participate on the Internet and may dissuade a large number from continued participation. Elaborating on this point, Justice O'Connor's opinion in *Simon & Schuster Inc. v. Members of the New York State Crime Victims Bd.*[124] stated that, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[125] This presumption arises because if the restriction were allowed to stand,"the government may effectively drive certain ideas or viewpoints from the marketplace."[126] The Internet is successful and thriving primarily because of the number and diversity of its participants, and content providers benefit from this healthy volume of traffic. Compliance with the COPA would not cause direct economic harm to these providers through out-of-pocket expenses; instead,there would be an "economic harm that would result from loss of traffic to the site. . . ." [127] A prime example of a site that would suffer if the government implemented the COPA is PlanetOut, a website dedicated to serving the informational needs of the gay and lesbian online community.[128] The founder of PlanetOut firmly believes that compliance with the COPA would cause "a drastic fallout in our traffic," which could severely injure the company financially.[129]

E. *Still Reaching Too Far? The COPA Imposes Criminal Sanctions*

{30}Enforcement of the COPA invites a familiar set of problems for the courts. As with the CDA, the COPA allows for criminal penalties against violators of the statute.[130] Aside from the First Amendment issues that the COPA raises, the imposition of criminal penalties introduces the same Fifth Amendment concerns that also proved fatal to the CDA.[131] While, Congress may believe that harsh punishment is necessary for the law to be effective, the court in *Reno III* questioned this approach. The decision stated that Congress may well have been able to achieve its goals "without the imposition of possibly excessive and serious criminal penalties, including imprisonment and hefty fines, for communicating speech that is protected as to adults. . . ."[132] In addition, the Court believed that Congress could have created an effective statute "without exposing speakers to prosecution and placing the burden of establishing an affirmative defense on them instead of incorporating the substance of the affirmative defenses in the elements of the crime."[133] The Court faulted the COPA for imposing unjustifiably harsh penalties on legally sanctioned activity, and for failing to provide adequate defenses for persons accused of violating the statute. In *Reno* III, the court found the statute slanted against the rights of the speaker and overturned the statute. The court noted that, though the public has a strong interest in protecting children, "the public interest is not served by the enforcement of an unconstitutional law."[134]

F. *CDA II or Something New? The COPA Restricts the Content of Speech on the Internet*

{31}The COPA's regulation of speech content generally protected for adults diminishes its chances of judicial approval.[135] The Constitution typically does not permit the government to censor a speaker based on his message. In *R.A.V. v. City of St. Paul*[136] the Supreme Court asserted that a law which regulates speech on the basis of its content is "presumptively invalid."[137]Regarding the First Amendment rights of adults, the court stated "[s]exual expression which is indecent but not obscene is protected" under the Constitution.[138] In Sable, the Court considered the validity of a ban on indecent 'dial-a-porn' communication. The rule in Sable established that the government could only regulate speech content "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[139] In addition, the Court in Sable held that a law will be struck down if it "denie[s] adults their free speech rights by allowing them to read only what was acceptable for children."[140] Similarly, the COPA would apply a broad restriction that interferes with the free speech rights of adults. Though the protection of minors is a compelling interest, the government's desire to shield minors from harmful speech "does not justify an

unnecessarily broad suppression of speech addressed to adults."[141] For a statute to survive strict scrutiny, "the burden imposed on speech must be outweighed by the benefits gained by the challenged statute."[142] Thus, the COPA may potentially impose an unfair burden on adults. As Judge Reed noted in *Reno* III, the Supreme Court has repeatedly stated that an adult's right to free speech "may not be reduced to allow them to read only what is acceptable for children."[143]Congress appears so focused on protecting children that it is producing legislation that actually harms the rights of adults. The COPA, like its predecessor, seems to give little consideration for the constitutional rights of adults.

G. *Not Good Enough: Problems with the COPA's Affirmative Defenses*

{32}Congress included a number of affirmative defenses in the COPA to enable the statute to survive to survive constitutional challenge.[144] The affirmative defenses comprised supposedly- reliable and convenient methods of controlling access, such as requiring credit cards, adult ID numbers, or digital certificates.[145] However, these forms of access control are neither reliable, nor convenient. Dan Farmer, an expert witness in *Reno* III, illustrated numerous weaknesses in these COPA defenses. Farmer emphatically asserted that, "[t]here is currently no service that content providers can utilize to validate age on the Internet using digital certificates!" [146] Farmer also warned that, "the user doesn't actually have to have a credit card or any of these other items ... they simply have to know a valid number, code, or digital certificate."[147] In his expert analysis of the COPA, Farmer also remarked that, "[i]f the goal is to verify that children don't gain access to illicit material, then . . . this is not only a weak form of authentication, but it is a foolish, naive one that doesn't accomplish the goal."[148] Determining and controlling who is accessing a particular website is clearly not as simple as Congress may have anticipated when it drafted the COPA. The scope of the Internet is simply too massive for Congress to cover with one statute. Farmer testified that there were no systems "currently available for verifying age that would work on the enormous scale required on the Internet."[149] Any attempt to cover the scope of the Internet would likely lead to unhealthy results with content providers. Tom Reilly, founder of PlanetOut, stated that "his site couldn't realistically comply with the COPA's requirement to obtain credit-card numbers or adult IDs."[150] Farmer bolstered this skepticism with his statement that, "[c]ompliance with [the] COPA . . . will cause most commercial content providers to engage in self-censorship or complete shutdown rather than [engage in] the tremendous risks and expenses of compliance."[151] Reilly concurred and predicted that his site would suffer a drop in traffic if it complied with the COPA.[152] Restricting adults only to speech suitable for children troubled the courts in the two previous cases, *Reno I* and *Reno II*. Farmer offered no hope that the COPA would fare any differently, and reiterated that, "there are no other currently available options for content providers to restrict access of certain material by minors while continuing to provide it to adults."[153]

H. *Is the COPA Fit for the Internet?*

{33}Finally, the true worth of any regulation cannot be established without an exhaustive understanding of the forum to be regulated. As stated by the district court in *Reno* I, the Supreme Court's history "compels us to consider the special qualities of [the] new medium," in order to determine whether a statute is a valid, constitutional authority.[154] Though the district court was referring specifically to the CDA, its rationale applies directly to Congress' approach to the COPA. The CDA was a statute rife with problems, largely because Congress did not seriously consider the unique characteristics of the Internet when creating that statute.[155] The decision in *Turner Broadcasting Systems v. FCC*[156] established the importance of reviewing the traits of each individual medium. In that case, the Supreme Court refused to apply the rationale behind broadcast regulations to cable television.[157] The ruling was based on the "fundamental technological differences between broadcast and cable transmission. . . ."[158] Upon a thorough evaluation of the statute, Dan Farmer concluded that it "was written by well-meaning people who don't understand the technical details of how the Internet functions. . . ."[159] That case confirmed the importance of focusing on the underlying technology that takes the information to the user. Congress again failed to take this underlying technology into account when drafting the COPA, which is the primary reason that the COPA possesses many

of the same fatal flaws as the CDA. Therefore, it is likely that the COPA will not be validated upon further judicial review.

I. *Current Status of The COPA*

{34}The COPA has been rejected at the district court level, but its proponents have not yet lost faith in its merits. Judge Reed's decision in *Reno III* imposed a preliminary injunction against the enforcement of the COPA.[160] Following his February 1, 1999 ruling, the government had sixty days to appeal.[161] If they chose not to appeal, the case would have proceeded to a trial on the merits.[162] However, the government did file an interlocutory appeal on April 2, 1999, and the case will now move to a three-judge panel in the Third Circuit Court of Appeals.[163] Congress has shown that it will not sit idly until the appellate arguments begin. In July of this year, five influential members of Congress filed an amicus brief that essentially asks the appeals court "to uphold the COPA."[164] Specifically, the congressmen argued, "that the COPA is a narrowly crafted law that will affect just pornographers" and "that it is the least restrictive way to accomplish Congress' stated objective of protecting children online."[165] In addition, the brief implored the Third Circuit Court of Appeals to "go out of its way to find a way to ensure [that the COPA] is constitutional."[166]

{35}Despite these efforts by the government, the ACLU and its allies appear confident that the COPA will meet the same fate on appeal as did the CDA. David Sobel, general counsel for the Electronic Privacy Information Center points out that, "[t]he government has not yet managed to convince even one federal judge that the First Amendment permits any form of Internet censorship."[167] Sobel believes, in light of the history of the CDA, that the government faces "an uphill battle" when the case is heard on appeal. ACLU attorney, Ann Beeson concurs with this view, and contends that, "the similarities between the two laws are so striking that the appeal will be tough to pull off."[168] First Amendment expert, Bob O'Neil also has doubts about the success of the COPA on appeal, and asserts that, "a measure that outlaws certain types of Web content is unlikely to pass First Amendment muster."[169] Regardless of these skeptics, the government will continue to champion the constitutionality of the COPA, and it will have the opportunity to present oral arguments before the Third Circuit Court of Appeals in November 1999.

V. Future of Internet Regulation

{36}Clearly, Congress is seeking to establish a regulatory presence on the Internet. However, any attempt to regulate the medium as a whole is likely to meet the same fate as did the CDA. The Internet is far too broad and expansive to be covered by one sweeping statute, while still respecting the constitutional rights of its users. Congress will likely have more success protecting underage users by dissecting the components of its goal, and by creating narrow, targeted legislation that addresses each target area individually. Examples of Congress taking such an approach, include the Children's Internet Protection Act ["CIPA"][170] and the Children's Privacy Protection and Parental Empowerment Act ["CPPA"], [171] two bills currently being considered in congressional committees.

A. *CIPA: A Brief Discussion*

{37}The CIPA is a bill that seeks to mandate the use of filtering or blocking technology in schools and libraries that have Internet access.[172] The bill almost avoids the problem of interfering with an adult's right to free speech on the Internet by limiting its application to elementary and secondary schools and public libraries.[173] A detail seemingly ignored by the CIPA is the fact that adults also use the Internet in public schools and libraries. The bill, in its present form, will invite strong opposition from the ACLU, who has stated that it will oppose mandatory blocking software in schools and public libraries. A federal court in Virginia has already spoken to part of this issue, holding that blocking software in public libraries violates the First Amendment.[174]

1. *Public Libraries May Be Off Limits*

{38}The federal judiciary has now sent a clear message that regulations requiring the use of blocking software in public libraries must pass First Amendment muster. In a case watched closely by the ACLU, Judge Leonie Brinkema ruled that, "forcing adults to use blocking software in public libraries 'offends the guarantee of free speech,' and permanently blocked government officials in Loudoun County, Virginia from unconstitutionally restricting online access."[175] Judge Brinkema was asked to decide "whether a public library may, without violating the First Amendment, enforce content-based restrictions on access to Internet speech."[176] In deciding this question, Judge Brinkema found that the Library Board had "misconstrued the nature of the Internet" and likened the Internet to "a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons."[177] Such action amounted to a prohibition on speech content, and the court asserted that the First Amendment limited a public library's ability to place such constraints "on access to constitutionally protected materials within its collection."[178] Judge Brinkema held that a library "may not adopt and enforce content-based restrictions on access to protected Internet speech absent a compelling state interest and means narrowly drawn to achieve that end."[179]

{39}The ACLU is keen on preventing the government-imposed use of blocking software in public libraries. Ann Beeson, an ACLU Staff Attorney who argued the case, took the ruling to mean that, "[t]he court clearly agreed that mandatory filtering blocks adult library patrons from accessing important online speech on issues ranging from safer sex to fine art to popular news columns."[180] Beeson stated that the alternative strategies proposed by the ACLU "include placing privacy screens around terminals, establishing Internet use policies, and allowing optional filtering on terminals used by children."[181] The decision was significant in the context of the debate over online privacy rights, especially because 73% of libraries [and 90% of schools] offer Internet access.[182] Judge Brinkema's decision last year "marks the first time in America's legal history that a court has applied First Amendment principles to Internet access at public libraries."[183] The ruling clearly does not offer hope for the future of the CIPA. Unless the bill is drastically altered, it will be opposed by First Amendment advocates and rejected by the courts. Kent Willis, Executive Director of the ACLU of Virginia, believes that library boards considering use of blocking software should review this decision closely. The ruling, he argues, "will remind them of why we have libraries and why an unfettered Internet serves the fundamental purpose of libraries better than any invention since the printing press."[184]

B. *CPPA: Brief Discussion*

{40}The CPPA, the other bill being considered by Congress, takes a targeted approach to protecting children by empowering parents. Under the Act, no person may sell information about a child in interstate commerce without the parent's written consent.[185] The Act does not mention the Internet, but seems to subsume the medium into the broader category of interstate commerce. Its primary utility on the Web would be to curb the sales of child pornography, which is one of the more dangerous areas of the Internet for children. Through a study of these two bills, it is apparent that Congress has chosen a decidedly different path to regulating issues relating to the Internet. Should this trend cause Congress to create targeted legislation with a narrowed scope, it will have much more success in establishing a constitutionally sound regulatory presence on the Internet.

C. *Is Blocking Software Viable?*

{41}The ACLU firmly opposes the mandatory use of blocking software in both, schools and public libraries, and believes such software is ineffective in protecting children from harmful online material. In a letter to the Senate Committee on Commerce, Science and Transportation, the ACLU explained that, "[b]locking software restricts access by adults and minors to valuable protected speech while leaving other material unrestricted."[186] Blocking software is disfavored because it relies on "subjective human judgment by program manufacturers - not parents, librarians or teachers - to decide what speech is acceptable and what should be restricted."[187] The ACLU advised Congress that, "blocking programs are a band-aid solution to parental

concerns" about indecent material on the Internet and should not be considered as a viable long-term remedy. [188] Demonstrating the ineffectiveness of blocking technology, an ACLU study states the following proposition:

> Typical examples of blocked words and letters include 'xxx,' which blocks out Superbowl XXX sites; 'breast,' which blocks website and discussion groups about breast cancer; and the consecutive letters 's,' 'e' and 'x,' which block sites containing the words 'sexton' and 'Mars exploration,' among many others. Some software blocks categories of expression along blatantly ideological lines, such as information about feminism or gay and lesbian issues. Yet most websites offering opposing views on these issues are not blocked. For example, the same software does not block sites expressing opposition to homosexuality and women working outside the home.[189]

Rather than mandating constitutionally-questionable blocking software, a possible alternative may be for schools and libraries to "establish content-neutral rules about when and how young people should use the Internet, and hold educational seminars on responsible use of the Internet."[190] Such an approach would shift responsibility to the user (or to the user's parent) and remove the librarian from the role of monitoring the Internet habits of adults and children.

VI. Conclusion

{42}Congress' attempts at regulating speech content on the Internet may have been well-meaning, but were woefully inadequate from a constitutional standpoint. Future legislation must account for the technological growth of the medium if it intends to capture the various avenues of the Internet under one statute. As of yet, none of the statutes discussed here have done so.

{43}The clear lessons emerging from judicial review of the CDA and COPA reveal that Congress must temper its ambition to subject the Internet to government regulation. Due to its unique characteristics, the Internet cannot be conceptualized under the traditional notions of "speakers," "listeners," or "ease of access." Instead, the Internet warrants its own classification as a medium of mass communication, and not simply a hybrid class created from existing media. With time, Congress may fully appreciate the intricacies of the Internet. However, Congress must also realize that as a tremendously expansive medium, the Internet cannot be controlled by a single administrative body, nor regulated by any single piece of legislation. Any attempt to do so will undoubtedly result in interference with the constitutional rights of individuals. A unique quality of the Internet is that by gaining access to the Internet, a user has immediate access to the entire library of Internet publications, from the educational to the obscene.[191] A prohibition on an "offensive" portion of that spectrum will invariably implicate an "innocent" portion as well. As stated by the district court in *Reno* I, "the First [A]mendment denies Congress the power to regulate protected speech on the Internet."[192] Only when Congress takes a more narrowly-tailored approach to meeting its goals through targeted legislation will it truly begin to effect substantive changes on the Internet.

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[**]. **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Dharmesh S. Vashee, Note, ACLU v. Reno: *Congress Places Speed Bumps on the Information Superhighway*, 6 RICH J.L. & TECH. 16 (Winter 1999-2000), *at* http://www.richmond.edu/jolt/v6i3/note4.html.

[1]. *See* ACLU v. Reno, 929 F. Supp. 824, 844 (1996), *aff'd*, 521 U.S. 844 (1997) [hereinafter *Reno I*].

[2]. 47 U.S.C. § 223 (Supp. 1997).

[3]. Reno v. ACLU, 521 U.S. 844 (1997) [hereinafter *Reno II*].

[4]. *See* ACLU v. Reno, 31 F. Supp.2d 473, 476 (1999) [hereinafter *Reno III*].

[5]. *See* ACLU v. Reno, 929 F. Supp. 824, 844 (1996), *aff'd*, 521 U.S. 844 (1997) [hereinafter *Reno I*].

[6]. *See id*; *see also* ACLU v. Reno, 31 F. Supp.2d 473, 476 (1999) [hereinafter *Reno III*].

[7]. *See* 47 U.S.C. § 223 (Supp. 1997).

[8]. *See* Reno v. ACLU, 521 U.S. 844 (1997) [hereinafter *Reno II*].

[9]. *See* 47 U.S.C.A. § 231 (Supp. 1999).

[10]. For the purposes of this paper, *Reno I* refers to the district court's decision, 929 F. Supp. 824 (1996), and *Reno II* refers to the Supreme Court's decision on appeal, 521 U.S. 844 (1997).

[11]. *Reno III*, 31 F. Supp.2d 473 (1999).

[12]. 47 U.S.C. § 230(a)(3) (Supp. 1997). Protection for private blocking and screening of offensive material.

[13]. *See Reno I*, 929 F. Supp. at 831.

[14]. *Id*.

[15]. *Id*. This research network was exclusive and the military and academic users did not anticipate that their research tool would become a global phenomenon. See id.

[16]. *See id*.

[17]. *See id*. at 832.

[18]. *Id*.

[19]. *Id*. at 830.

[20]. *See id*. at 832.

[21]. *Id*.

[22]. *See* Brian Werst, *Comment, A Survey of the First Amendment "Indecency" Legal Doctrine and its Inapplicability to Internet Regulation: A Guide for Protecting Children from Indecency After Reno v. ACLU*, 33 GONZ. L. REV. 207, 217 (1998).

[23]. *Reno I*, 929 F. Supp. at 844.

[24]. *Id*. at 845.

[25]. *See id*. at 836-37 (describing the World Wide Web and how users may access information), *infra* note 27.

[26]. *ACLU v. Reno II Expert Report of Dan Farmer* (visited Nov. 18, 1999) <http://www.aclu.org/court/acluvrenoII_farmer_rep.html>.

[27]. *Reno I*, 929 F. Supp. at 836.

[28]. *Id*. at 837.

[29]. *See id*. at 842.

[30]. *See supra* note 25.

[31]. *Reno I*, 929 F. Supp. at 834.

> The most common methods of communications on the Internet . . . can be roughly grouped into six categories: (1) one-to-one messaging (such as 'e-mail), (2) one-to-many messaging (such as 'listserv'), (3) distributed message databases (such as 'USENET newsgroups'), (4) real time communication (such as 'Internet Relay Chat'), (5) real time remote computer utilization (such as 'telnet'), and (6) remote information retrieval (such as 'ftp,' 'gopher,' and the 'World Wide Web').

Id.

[32]. *See Reno II*, 521 U.S. at 850.

[33]. *Reno I*, 929 F. Supp. at 843.

[34]. *See Reno III*, 31 F. Supp.2d at 476.

[35]. Sable Comm. v. FCC, 492 U.S. 115, 127-128 (1989). "In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no *captive audience* problem here ...." *Id*. (emphasis in original).

[36]. *See Reno I*, 929 F. Supp. at 837 (naming several popular search engines and describing how computer users use search engines to locate information).

[37]. Declan McCullagh, *GOP: Save the Net Smut Law*, WIRED NEWS, July 19, 1999 *available at* (visited Oct. 22, 1999) <http://www.wired.com/news/news/politics/story/20813.html>; (quoting amicus brief filed by the National Law Center for Children and Families in *ACLU v. Reno* ("*Reno III*"), 31 F. Supp.2d 473 (1999)). *See infra* note 34 and accompanying text.

[38]. *See Reno I*, 929 F. Supp. at 877.

[39]. *See* U.S. CONST. amend. I (stating "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble ....").

[40]. *See Global Internet Statistics* (visited Oct. 22, 1999) <http://www.glreach.com/globstats/> (compiling data on population and Internet use from various sources).

[41]. *See* Elizabeth Wiese, *America's Online: 70.5 Million Adults*, USA TODAY TECH REPORT, Jan. 26, 1999, *available at* (visited Oct. 22, 1999) <http://www.usatoday.com/life/cyber/tech/ctd392.htm>.

[42]. *See Reno I*, 929 F. Supp. at 877 (Dalzell, J.).

[43]. *See* Alice Park, TIME, Aug. 30, 1999, at 76. Park also states that children aged six to eleven years-old average four hours a week online, while children aged two to five years-old average three hours a week.

[44]. *See Reno II*, 521 U.S. at 866 (emphasis added).

[45]. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 661-62 (1994) (emphasis added). The regulation at issue were Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992. The provisions would require cable operators to carry specified local commercial and noncommercial television stations, but did not regulate the content that the cable operators could provide. The Supreme Court affirmed the district court's ruling that the burden on speech imposed by the regulations did not warrant strict scrutiny. *See id*.

[46]. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), *citing* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (Kennedy, J., concurring in judgment). The case involved a St. Paul, Minnesota ordinance which punished cross-burning and other behavior that may incite violence based on race, religion, gender, etc. The U.S. Supreme Court ruled that the ordinance violated the First Amendment by discriminating against a particular viewpoint. *See id*.

[47]. Sable Comm.. v. FCC, 492 U.S. 115, 126 (1989).

[48]. *Id*.

[49]. *See id*., *quoting* Butler v. Michigan, 352 U.S. 380 (1957).

[50]. 413 U.S. 15 (1973).

[51]. *Id*. at 24 (citations omitted).

[52]. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[53]. *Reno II*, 521 U.S. at 857.

[54]. *Id*.

[55]. *See id*. at 860.

[56].

> Whoever - (1) in interstate or foreign communications . . . (B) by means of a telecommunications device knowingly - (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or

indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a) (Supp. 1997) (emphasis added).

[57].

Whoever - (1) in interstate or foreign communications knowingly - (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(d) (Supp. 1997) (emphasis added).

[58]. *See Reno I*, 929 F. Supp. at 829.

[59]. *Id*. at 852.

[60]. *See id*. at 856.

[61]. *See id*. at 854.

[62]. *Id*. at 858 n.3 (Buckwalter, J.), *citing* Sable Comm.v. FCC, 492 U.S. 115, 126 (1989).

[63]. *See supra* note 43 and accompanying text.

[64]. *Reno I*, 929 F. Supp. at 857 (Sloviter, J.).

[65]. *See id*. at 883 (Dalzell, J.).

[66]. *Reno II*, 521 U.S. at 874.

[67]. *See supra* note 39.

[68]. *See* U.S. CONST. amend. V (stating "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[69]. *Reno I*, 929 F. Supp. at 854 (Sloviter, J.).

[70]. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Supreme Court upheld an anti-noise ordinance that defendant violated by participating in a demonstration in front of his high school. The Court also struck down an ordinance prohibiting picketing within 100 feet of a school as it violated the equal protection clause of the Constitution. *See id*.

[71]. 47 U.S.C. § 223(h) (Supp. 1997).

[72]. *Reno II*, 521 U.S. at 871.

[73]. *Grayned*, 408 U.S. at 108-109.

[74]. *Reno I*, 929 F. Supp. at 866 (Dalzell J.).

[75]. *See Reno II*, 521 U.S. at 844.

[76]. *Id*. at 872.

[77]. *See supra* note 50 and accompanying text.

[78]. *Reno II*, 521 U.S. at 872.

[79]. *Id*.

[80]. *Id*.

[81]. *Id*.

[82]. *Id*.

[83]. *See id*. at 873.

[84]. *Id*. at 872.

[85]. *Id*. at 878; *see also* 47 U.S.C. § 223(a)(2) (Supp. 1997).

[86]. Sean Petrie, *Note, Indecent Proposals: How Each Branch of the Federal Government Overstepped its Institutional Authority in the Development of Internet Obscenity Law*, 49 STAN. L. REV. 637, 653 (1997); *see also Reno II*, 521 U.S. at 376.

> [Due to] the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults.

[87]. *See* Sable Comm. v. FCC, 492 U.S. 115, 131 (1989), supra note 47.

[88]. *See Reno I*, 929 F. Supp. at 855 (Sloviter, J.).

[89]. *Id*.

[90]. *Id*.

[91]. *Sable*, 492 U.S. at 126. Sable was a case involving a ban on indecent speech in "dial-a-porn" communications, or phone sex. The ban was upheld as it applied to obscene telephone messages, but was overruled as it applied to indecent speech. Indecent speech was determined by the court to be constitutionally protected for adults. *See id*.

[92]. *Reno II*, 521 U.S. at 879.

[93]. *See id*. at 873.

[94]. *Id*.

[95]. *See id*. at 884.

[96]. *Reno I*, 929 F. Supp. at 877.

[97]. *Id*. at 878.

[98]. *Id*. at 879.

[99]. *See supra* notes 76-83 and accompanying text.

[100]. *See Reno II*, 521 U.S. at 874.

[101]. *Id*.

[102]. *Id*. at 882.

[103]. *Reno III*, 31 F. Supp.2d at 476.

[104]. *See id*. (defining teasers as free images used to draw users into the actual site).

[105]. *Id*.

[106]. *See id*., *citing Reno II*, 521 U.S. 844 (1997).

[107]. *See* 47 U.S.C.A. § 231(a) (Supp. 1999).

(1) Prohibited conduct. Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, *makes any communication for commercial purposes* that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both. (2) Intentional Violations. In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. . . (3) Civil Penalty. In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a *civil penalty* of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

Id. (emphasis added).

[108]. 47 U.S.C.A. § 231(e)(2)(A) (Supp. 1999).

[109]. *See supra* note 70 and accompanying text.

[110]. *See Reno III*, 31 F. Supp.2d at 479.

[111]. *See id*. at n.1.

[112]. *See id*. at 479.

[113]. *See id*. at 480-81.

[114]. *See id*. at 487-91.

[115]. *See id*. at 497.

[116]. *See id*. at 493-95.

[117]. *See id*. at 495-97.

[118]. *See supra* notes 18-33 and accompanying text.

[119]. *See Reno II*, 521 U.S. at 872; *see also supra* note 50 and accompanying text (detailing the requirements for the *Miller* obscenity test).

[120]. *See* 47 U.S.C.A. §231(e)(6) (Supp. 1999).

> (e) Definitions. (6) Material that is harmful to minors. The term "material that is harmful to minors" means any communication ... that is obscene or that -- (A) *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*; (B) depicts, describes or represents, in a manner *patently offensive* with respect to minors, an actual or simulated sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, *lacks serious literary, artistic, political, or scientific value for minors*.

Id. (emphasis added).

[121]. *Reno III*, 31 F. Supp.2d at 480.

[122]. *Id*.

[123]. Letter from L. Anthony Sutin, Acting Assistant Attorney General, to the Honorable Thomas Bliley, Chairman, Committee on Commerce, U.S. House of Rep. October 5, 1998, *available at ACLU, Department of Justice Letter to Chairman, House Committee on Commerce* (visited Sept. 28, 1999) <http://www.aclu.org/court/acluvrenoII_doj_letter.html>

[124]. 502 U.S. 105 (1991). Under the "Son of Sam" statute, an accused or convicted criminal's income from publications describing his crime was to be held in an escrow account in order to benefit the victims' families. The Supreme Court held that the statute was presumptively invalid and not narrowly tailored to the government's goal of compensating victims' families. See id. at 123.

[125]. *Id*. at 115 (citation omitted).

[126]. *Id*. at 116 (citation omitted).

[127]. *Reno III*, 31 F. Supp.2d at 491.

[128]. *See* PlanetOut, *PlanetOut: Land On It* (visited Sept. 21, 1999) <http://www.planetout.com>. PlanetOut bills itself as the number one online community of gay, lesbian, bi and trans people worldwide. *See id*.

[129]. Declan McCullagh, WIRED NEWS, Jan. 21, 1999, at 2 *available at* Wired News, *CDA II: Tempest in a D-Cup* (visited Sept. 19, 1999)

<http://www.wired.com/news/news/email/member/politics/story/17465.html>.

[130]. *See* 47 U.S.C.A. § 231(a) (Supp. 1999) (describing prohibited conduct under the statute).

[131]. *See Reno I*, 929 F. Supp. at 859 (Buckwalter, J.).

[132]. *Reno III*, 31 F. Supp.2d at 497.

[133]. *Id*.

[134]. *Id*. at 498.

[135]. *Id*. at 492-93.

[136]. 505 U.S. 377, 382 (1992).

[137]. *Id*. at 382.

[138]. Sable Comm. v. FCC, 492 U.S. 115, 126 (1989).

[139]. *Id*.

[140]. *Id*. at 127.

[141]. *Reno II*, 521 U.S. 844, 875 (1997).

[142]. *Reno III*, 31 F. Supp.2d 473, 493 (1999).

[143]. *Id*.

[144]. *See* 47 U.S.C.A. §231(c)(1) (Supp. 1999):

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors-- (A) by requiring use of a *credit card, debit card, 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*.

Id. (emphasis added).

[145]. *Id*.

[146]. Expert Report of Dan Farmer, *ACLU v. Reno* ("*Reno III*"), 31 F. Supp.2d 473 (E.D. Pa. 1999) (No. 98-CV-5591) *available at ACLU v. Reno II Expert Report of Dan Farmer* (visited Oct. 20, 1999) <http://www.aclu.org/court/acluvrenoII_farmer_rep.html> (emphasis in original), *supra* note 26.

[147]. *Id*. (emphasis in original).

[148]. *Id*. (emphasis in original).

[149]. *Id*.

[150]. Declan McCullagh, *supra* note 129, at 2.

[151]. Expert Report of Dan Farmer, *supra* note 26.

[152]. *See supra* note 128-29 and accompanying text.

[153]. Expert Report of Dan Farmer, *supra* note 26.

[154]. *Reno I*, 929 F. Supp. 824, 872 (1996) (Dalzell, J.).

[155]. *See* Werst, *supra* note 22, at 209 (stating that "after virtually no congressional consideration or evaluation of the Internet," the President signed the legislation).

[156]. 512 U.S. 622 (1994).

[157]. *See id*. at 638-39.

[158]. *Id*. at 639.

[159]. Expert Report of Dan Farmer, *supra* note 146.

[160]. *See Reno III*, 31 F. Supp.2d at 498-99; *see also* FED. R. CIV. P. § 65(d).

[161]. *See* FED. R. APP. P. 4(a)(1)(B). "When the United States or its officer or agency is a party, the notice of appeal may be filed by any part within [sixty] days after the judgment or order appealed from is entered."

[162]. *See Reno III*, 31 F. Supp.2d at 499 (stating that "this preliminary injunction shall remain in effect until a final adjudication on the merits of plaintiffs' claim has been made").

[163]. *See* Maria Seminerio, ZD NET NEWS, April 5, 1999 *available at* Maria Seminerio, *DOJ Appeals: What's Next for COPA?* (visited Oct. 21, 1999) <http://www.zdnet.com/zdnn/stories/news/0,4586,2237110,00.html>.

[164]. *See* Declan McCullagh, WIRED NEWS, July 19, 1999 *available at* Declan Mccullagh, *GOP: Save the Net Smut Law* (visited Oct. 21, 1999) <http://www.wired.com/news/news/politics/story/20813.html>, *supra* note 37. The members of Congress participating in the brief are Senator John McCain (R-Ar.), Senator Dan Coats (R-Ret.), Congressman Tom Bliley (R-Va.), Congressman Michael Oxley (R-Oh.) and Congressman James Greenwood (R-Pa.). *See id*.

[165]. *Id*.

[166].

[167]. Maria Seminerio, *supra* note 163.

[168]. *Id*.

[169]. *Id*.

[170]. S. 97, 106th Cong. § 2(a)(1) (1999), *available at* (visited Nov. 18, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/D?c106:1:./temp/~c106es|Uxf::>.

[171]. H.R. 369, 106th Cong. § 2 (1999) *available at* (visited Nov. 18, 1999) <http://thomas.loc.gov/cgi-bin/query/C?c106:./temp/~c106KPbBKH>.; *see infra* text accompanying note 180.

[172]. *See* S. 97, 106th Cong. § 2(a)(1) (1999), *available at* (visited Nov. 18, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/D?d106:4:./temp/~bd3Ygc::l/bss/d106query.html>.

[173]. *See id*.

[174]. *See* Mainstream Loudoun v. Board of Trustees, 2 F. Supp.2d 783, 796-97 (1998).

[175]. ACLU, *Virginia Court Says Internet Blocking for Adult Library Users is Unconstitutional* (last modified Apr. 23, 1999) <http://www.aclu.org/news/n112398a.html>; *see also* Mainstream Loudon v. Board of Trustees, 2 F. Supp.2d 783, 796-97 (E.D. Va. 1998).

[176]. *Mainstream Loudoun*, 2 F. Supp.2d at 792.

[177]. *Id*. at 793-94.

[178]. *Id*. at 794. The court referred to public libraries as "places of freewheeling and independent inquiry," and was clearly trying to protect this status with its ruling. *Id*. at 795.

[179]. *Id*. at 795. The court found that libraries are not required to provide Internet access to patrons, but if they do, they may not limit what parts of the Internet its patrons may access. *Id*. at 795-96.

[180]. ACLU, *supra* notes 175-79.

[181]. *Id*.

[182]. *See* Stacy Lawrence, *School Online Access* (visited Sept. 28, 1999) <http://www.iconocast.com/icono-archive/icono.081299.html>. Of the 73%, only about 14% use filtering software of some kind. The latter number is not likely to change until a final determination of the issue of blocking software in libraries is made.

[183]. ACLU, *supra* notes 175-79; *see also Mainstream Loudoun*, 2 F. Supp.2d 783 at 787 (referring to case as one "of first impression [] involving the applicability of the First Amendment's free speech clause to public libraries' content-based restrictions on Internet access").

[184]. ACLU, *supra* notes 175-79.

[185]. *See* H.R. 369, 106th Cong. § 2 (1999).

> (a) Whoever, in or affecting interstate or foreign commerce, being a list broker, knowingly - (1) sells, purchases, or receives remuneration for providing personal information about a child, knowing that such information pertains to a child, without the written consent of a parent of that child ... shall be fined under this title or imprisoned for not more than [one] year, or both.

Id. (emphasis added).

[186]. Letter from Laura W. Murphy, Director, ACLU Washington Office, et. al, to Members of the Senate Committee on Commerce, Science and Transportation (Mar. 11, 1998) *available at* ACLU, *Letter to Senate Commerce Committee on Internet Censorship* (visited Nov. 18, 1999) <http://www.aclu.org/congress/lg031198a.html>.

[187]. *Id*.

[188]. *Id*.

[189]. ACLU, *ACLU White Paper - Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* (visited Sept. 19, 1999) <http://www.aclu.org/issues/cyber/box.html>.

[190]. *Id*.

[191]. *See* Mainstream Loudoun v. Board of Trustees, 2 F. Supp.2d 783, 795 (1998).

[192]. *Reno I*, 929 F. Supp. 824, 872 (1996).

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