



---

## Lost in Cyberspace: An Analysis of How the Supreme Court May Help Children Find Their Way Safely on the Internet

Emily R. Novak

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

---

### Recommended Citation

Emily R. Novak, *Lost in Cyberspace: An Analysis of How the Supreme Court May Help Children Find Their Way Safely on the Internet*, 14 DePaul J. Art, Tech. & Intell. Prop. L. 325 (2004)

Available at: <https://via.library.depaul.edu/jatip/vol14/iss2/6>

This Case Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

Novels Lost in Cyberspace: An Analysis of How the Supreme Court May Help  
**LOST IN CYBERSPACE: AN ANALYSIS OF HOW  
THE SUPREME COURT MAY HELP CHILDREN  
FIND THEIR WAY SAFELY ON THE INTERNET**

I. INTRODUCTION

In 1969 the United States Government developed a military program known as “ARPANET” that allowed computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another.<sup>1</sup> Although ARPANET disbanded, it paved the way for today’s vast superhighway of information most commonly referred to as the Internet. The Internet provides individuals worldwide with an immense knowledge of information that can be retrieved instantaneously once connected to the World Wide Web (“the Web”). What began in 1981 with only 300 host computers<sup>2</sup> has exponentially grown to more than 36.7 million hosts in July 1998.<sup>3</sup> The most recent online study revealed that in September 2001, 143 million Americans (about 54 percent of the population) were using the Internet.<sup>4</sup> In addition, this study calculated that the growth rate of Internet use in the United States is currently two million new Internet users per month.<sup>5</sup> The content on the Internet is as “diverse as human thought”<sup>6</sup> acting as a virtual library with

---

1. Reno v. ACLU, 521 U.S. 844, 849-50 (1997).

2. *Id.* at 850. Computers that store information and relay communications

3. ACLU v. Reno, 31 F. Supp. 2d 473, 481 (E.D. Pa. 1999). In 1998, approximately 70.2 million people of all ages used the Internet in the United States. It is now estimated that 115.2 million Americans use the Internet at least once a month and 176.5 million Americans have Internet access either at home or at work. Ashcroft v. ACLU, 535 U.S. 564, 567 (2002).

4. *A Nation Online: How Americans Are Expanding Their Use of the Internet*, February 2002, U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration  
*available at*  
<http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (last visited November 23, 2003).

5. *Id.*

6. ACLU v. Reno 31 F. Supp. 2d 473, 482 (E.D. Pa. 1999).

voluminous sources. However, with this expansive abyss of information comes the threat of potentially harmful material inappropriate for children to view.

In addition to the diverse political, cultural, and educational sources available on the Internet, also available is a wide variety of sexually explicit material. In 1998, there were approximately 28,000 adult sites promoting pornography on the Web that were easily accessible to children using computers at home, school, or even a local library.<sup>7</sup> Websites with sexually explicit material create, name and post both text and pictures in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search.<sup>8</sup> Young children researching for school projects or playing on the Internet commonly find themselves subjected to offensive depictions or descriptions.

A study conducted by The Crimes Against Children Research Center found that a quarter of the youth (ages 10-17) had at least one unwanted exposure to sexual pictures in the last year.<sup>9</sup> Further, 71 percent of these exposures occurred while the youth was searching or surfing the Internet, and 28 percent happened while opening E-mail or clicking on links in E-mail or Instant Messages.<sup>10</sup> Imagine for a moment Tommy, an eleven-year-old

---

7. *Ashcroft v. ACLU*, 535 U.S. 564, 567 (2002). It is estimated that these 28,000 operating pornography sites generate close to \$925 million in annual revenues. H.R. REP. NO. 105-775, at 7 (1998).

8. *Reno v. ACLU*, 521 U.S. 844, 853 (1997). In addition, a child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web. *Ashcroft v. ACLU*, 535 US 564, 567 (2002).

9. *Online Victimization: A Report on the Nation's Youth* by the Crimes Against Children Research Center, June 2000 *available at* [http://www.missingkids.com/en\\_US/publications/NC62.pdf](http://www.missingkids.com/en_US/publications/NC62.pdf) (last visited November 23, 2003).

10. *Online Victimization: A Report on the Nation's Youth* by the Crimes Against Children Research Center, June 2000 *available at* [http://www.missingkids.com/en\\_US/publications/NC62.pdf](http://www.missingkids.com/en_US/publications/NC62.pdf) (last visited November 23, 2003).

boy, who is searching the Internet for game sites where he can download fun and exciting computer games. He innocently types “fun” into his search engine and a series of web sites are listed for him. Instinctively he selects “fun.com” from the array of choices thinking that will lead him to enjoyable games. However, to Tommy’s surprise, “fun.com” leads him to a pornography site and not fun games to download.<sup>11</sup> Now picture Amy, a sixteen-year-old girl trying to view “teen.com.” However, when she accidentally types “teen.com” into her browser she is directed to a pornography site. There are numerous hard-core pornography sites on the Internet using “copycat URLs” to take advantage of innocent mistakes such as Amy’s, which bring traffic to their graphic sexual images.<sup>12</sup> Tommy and Amy are just two examples of the many children who find themselves victims of unwanted sexual exposure on the Internet.

This note will explore the various steps Congress has taken to prevent excessive sexual material available on the Internet. It will predominantly focus on the development and constitutionality of the Child Online Protection Act (“COPA”) with regards to the Supreme Court’s granting writ on October 14, 2003. Part II focuses on legislation drafted to appease parents and contain the spread of sexually explicit material not suitable for children, and explores how courts have evaluated the constitutionality of these

---

11. Typing the word “dollhouse” or “toys” into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites. *ACLU v. Reno*, 31 F. Supp. 2d at 476. *See also* H.R. REP. NO. 105-775, at 8 (1998). Searches for toys, dollhouses, girls, boys, pets, teen cheerleader, actress, gang, beanie babies, Bambi, and doggy will lead to material harmful to minors. *Id.*

12. H.R. REP. NO. 105-775, at 8 (1998). Examples include children searching the Internet for the official Web site of the White House who are confronted by hard-core pornography by mistyping “www.whitehouse.com” rather than “www.whitehouse.gov” and children who mistype “www.betscape.com” instead of “www.netscape.com” or “www.sharware.com” instead of “www.shareware.com” will be confronted with live sex shows and other X-rated pictures. Furthermore, brand names are often misused in ways that direct people to sexually explicit material. *Id.*

statutes. Part III will evaluate how the Supreme Court will likely decide the issue of COPA's constitutionality in light of previous cases. Finally, Part IV will suggest alternative approaches available to protect children from unwanted sexual exposure on the Internet, while simultaneously upholding the Constitution's guarantees of freedom of speech.

## II. BACKGROUND

### *A. The Legislative History of Internet Censorship, the Communications Decency Act of 1996<sup>13</sup>*

In 1996, the United States Congress passed the Communications Decency Act (CDA), the first federal law to specifically regulate computer-generated or transmitted pornography.<sup>14</sup> The CDA, a small portion of the Telecommunications Act of 1996, contained provisions that were added both during executive committee hearings and as amendments offered during floor debate on the legislation.<sup>15</sup> The CDA attempted to protect minors from indecent material on the Internet in two important ways. First, under section 223(a), it prohibited the knowing transmission of obscene or indecent messages to any recipient less than eighteen years of age.<sup>16</sup> More specifically the text stated that:

Whoever in interstate or foreign communications 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

---

13. 47 U.S.C. § 223 (2003).

14. 61 AM. JUR. POF 3D § 51 (2003).

15. *Reno v. ACLU*, 521 U.S. at 858. It is important to note that the major components of the Telecommunications Act have nothing to do with the Internet, but that the CDA was added as an afterthought. *Id.*

16. *Id.* at 859.

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.<sup>17</sup>

Second, the provision set forth in section 223(d) provided that:

Whoever 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.<sup>18</sup>

In addition, the CDA provided two affirmative defenses for those prosecuted under the statute. The first protected those individuals who took reasonable, effective, and appropriate actions to restrict or prevent access by minors to a communication specified in the subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology.<sup>19</sup> The second affirmative defense under section 223(d) protected those who restricted access to covered materials by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.<sup>20</sup> All of these discussed portions

---

17. 47 U.S.C. § 223(a)(1).

18. 47 U.S.C. § 223(d)(1).

19. 47 U.S.C. § 223(e)(5)(A).

20. 47 U.S.C. § 223(e)(5)(B).

of the Communications Decency Act of 1996 were challenged.

Immediately after President Bill Clinton signed the CDA several individuals filed suit against the Attorney General of the United States and the Department of Justice challenging the constitutionality of both the “indecent transmission” provision and the “patently offensive display” provision.<sup>21</sup> A three-judge District Court unanimously decided to enter a preliminary injunction against the enforcement of both of the challenged provisions.<sup>22</sup> However, the Government was permitted to investigate and prosecute obscenity or child pornography activities, but it was restrained from enforcing any prohibitions as they relate to “indecent” communications.<sup>23</sup> The Government then appealed to the Supreme Court.

The Supreme Court, in affirming the district court’s ruling, held that the statute abridged the freedom of speech protected by the First Amendment.<sup>24</sup> In *ACLU v. Reno (Reno I)*, the Court articulated that there is a greater interest in encouraging freedom of expression than any unproven benefit of censorship.<sup>25</sup> In coming to this conclusion, the Court found several problems with the text of the CDA. First, the language of the CDA was ambiguous and inconsistent. The two parts of the statute in dispute use different linguistic form.<sup>26</sup> Furthermore, this

---

21. *Reno v. ACLU*, 521 U.S. at 861. Plaintiffs included the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp, Institute For Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc, Wildcatpress, Inc. Declan McCullagh dba Justice on Campus, Brook Meeks dba Cyberwire Dispatch, John Troyer dba The Safer Sex Page, Jon Athan Wallace dba The Ethical Spectacle, and Planned Parenthood Federation of America, Inc. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

22. *Reno v. ACLU*, 521 U.S. at 862.

23. *Id.* at 864.

24. *Id.* at 849.

25. *Id.* at 885.

26. *Id.* at 871. The first uses “indecent” while the second discusses that

dissimilarity causes confusion as to how the two standards relate to each other and what they actually mean without a clear definition.<sup>27</sup> The Court emphasized that this uncertainty undermines Congress' attempt to create a statute that will legitimately protect children.

Second, the Court was concerned with the statute's vagueness because the CDA is a content-based regulation of speech and a criminal statute.<sup>28</sup> Both the vagueness and stigma of a criminal conviction lead to an obvious chilling effect on free speech that would undoubtedly silence speakers whose messages would otherwise receive constitutional protection.<sup>29</sup> The Court found that this content-based statute was vague and overly broad. Further, the Supreme Court has historically agreed with the government that protecting minors is a compelling interest. However, in an effort to protect children from indecent material, the CDA's expansive prohibition shielded adults from material that is not obscene by an adult standard. The statute denied minors access to potentially harmful speech while restraining speech that adults have a constitutional right to receive. The Court explained that the Government may not "reduce the adult population . . . to . . . only what is fit for children."<sup>30</sup> The Court found that this burden on adults was unacceptable and stressed that there must be a less restrictive alternative that is narrowly tailored to the government's legitimate purpose.<sup>31</sup>

Finally, the Government argued that the affirmative defenses

---

which is "patently offensive" as measured by contemporary community standards. *Id.*

27. *Reno v. ACLU*, 521 U.S. at 871. Section 223(a) uses the word "indecent," while section 223(d) speaks of material "in context, depicts or describes, in terms patently offensive as measured by contemporary standards, sexual or excretory activities or organs." *Id.*

28. *Id.* at 871-72.

29. *Id.* at 874.

30. *Id.* at 875. The Court also eloquently states that "regardless of the strength of the government's interest" in protecting children, "the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.*

31. *Reno v. ACLU*, 521 U.S. at 875.



provided in the statute saved the constitutionality of the CDA.<sup>32</sup> However, the Court found this argument unpersuasive and inaccurate for two reasons. First, at the time of trial no screening software was in existence that could help establish and prove a “good faith” defense. Second, the uses of age verification methods, such as credit cards or adult identification, are costly procedures. The district court found that it was not economically feasible for most noncommercial speakers to employ such verification.<sup>33</sup> As a result, many speakers who would be unable to afford protective measures called for in the statute would remain silent. On June 26, 1997 the Supreme Court struck down the Communications Decency Act in violation of the First Amendment of the Constitution.

### *B. The Child Online Protection Act of 1998*<sup>34</sup>

On October 21, 1998 Congress signed into law the Child Online Protection Act (“COPA”) as part of the Omnibus Appropriations Act.<sup>35</sup> COPA represents the efforts of Congress to remedy the constitutional defects of the Child Decency Act.<sup>36</sup> The text of COPA prohibits a person from knowingly making, by means of the World Wide Web, any communication for commercial purposes that is harmful to minors, unless such person makes a good faith effort to restrict access by minors.<sup>37</sup> In addition, a person violating

---

32. *Id.* at 881.

33. *Id.* at 881.

34. 47 U.S.C. § 231 (2003).

35. Plaintiffs’ Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction. Civ. Act. No. 98-CV-5591.

36. *ACLU v. Reno*, No. 98-5591, 1998 U.S. Dist. LEXIS 18546, at \*3 (E.D.Pa. 1998). The Committee Report articulates that the bill strikes the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web in response to the Supreme Court’s decision in *Reno v. ACLU*. H.R. REP. NO. 105-775, at 5 (1998).

37. H.R. REP. NO. 105-775, at 5 (1998).

COPA could be subject to criminal and civil penalties.<sup>38</sup>

In an attempt to cure the constitutional defects of the CDA, Congress sought to define most of COPA's key terms.<sup>39</sup> First, COPA attempts to restrict its scope to material on the Web rather than the Internet as a whole in section 231(e)(1).<sup>40</sup> Second, the bill states that only entities engaged in the commercial business of making communications that contain material harmful to minors can be liable under the statute.<sup>41</sup> More specifically, COPA stipulates that a person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.<sup>42</sup> Furthermore, the statute defines a person "engaged in the business" as one who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such persons trade or business, with the objective of earning a profit as a result of such activities.<sup>43</sup> Third, Congress defined "material that is harmful to minors" as any communication, picture, image, graphic image file, article, recording, writing, or other matter that meets the three-part test.<sup>44</sup> Finally, COPA defines a minor as any person under the age

---

38. *Id.*

39. *ACLU v. Reno*, 217 F.3d 162, 167 (3d Cir. 2000).

40. *Id.* Section 231(e)(1) defines by means of the world wide web as the placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol. 47 U.S.C. § 231 (e)(1) (2003).

41. H.R. REP. NO. 105-775, at 6-7 (1998).

42. 47 U.S.C. § 231(e)(2)(A) (2003).

43. 47 U.S.C. § 231(e)(2)(B) (2003). Note that it is not necessary that the person make a profit or that the making or offering to make such communications be the persons sole or principal business or source of income.

44. 47 U.S.C § 231(e)(6) (2003). The statute defines material harmful to minors if (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, that such material is designed to appeal to our panders 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 sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or female

of seventeen.<sup>45</sup>

COPA also lists affirmative defenses that a business may assert to establish compliance with the law in the event of prosecution. Examples include the use of a credit card, debit account, adult access code, adult personal identification number, or a digital certificate that verifies age.<sup>46</sup> In addition, a general affirmative defense exists for businesses that make a good faith effort to restrict access of minors to potentially harmful material. Finally, the bill contains a notice requirement that obligates a provider of interactive computer service, at the time of entering an agreement with a customer for services, to notify such customer of the parental control protections commercially available to limit access of minors to harmful material.<sup>47</sup>

### C. Court Cases Involving COPA

#### 1. *American Civil Liberties Union v. Reno (Reno II)*<sup>48</sup>

After Congress passed the Child Online Protection Act, plaintiffs sought a temporary restraining order to prohibit the Attorney General from enforcing the statute that was to go into effect on November 20, 1998.<sup>49</sup> In order to receive a temporary

---

breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

45. 47 U.S.C. § 231(e)(7) (2003).

46. 47 U.S.C. § 231 (c) (2003).

47. 47 U.S.C. § 230(d) (2003). Examples of parental control protections include computer hardware, software, or filtering services.

48. *ACLU v. Reno*, No. 98-5591, 1998 U.S. Dist. LEXIS 18546 (E.D. Pa. Nov. 23, 1998).

49. *Id.* at \* 2. The plaintiffs are comprised of those representing individuals and entities who are speakers and content providers on the Web. They include American Civil Liberties Union, Androgony Books, Inc., A different Light Bookstores, American Booksellers Foundation for Free Expression, ArtNet Worldwide Corporation, BlackStripe, Addazi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc., now know as

restraining order (“TRO”) the plaintiffs would have to prove the following four elements: (1) likelihood of success on the merits of the case; (2) irreparable harm; (3) that less harm will result to the defendant with a TRO than to the plaintiffs without a TRO; and (4) that the public interest, if any, weighs in favor of plaintiff.<sup>50</sup>

The plaintiffs argued that because COPA provides no way for speakers to prevent their communications from reaching minors without also denying access to adults, COPA directly threatens plaintiffs, their members, and millions of other speakers with severe criminal and civil sanctions for communicating protected expression on the Web.<sup>51</sup> On the other hand, the government contended that COPA on its face is not a total ban on protected adult speech because commercial communicators may protect themselves with the affirmative defenses to prosecution.<sup>52</sup> However, the plaintiffs retorted that the affirmative defenses are neither technologically nor economically feasible for many of the plaintiffs and that this burden will limit acceptable material available on the Web.

The District Court for the Eastern District of Pennsylvania determined that strict scrutiny must be applied to COPA. Therefore, the court had to determine whether there was a likelihood of success on the merits that COPA is narrowly tailored to achieve a compelling government interest.<sup>53</sup> Furthermore, the court found that the plaintiffs raised substantial questions as to the affirmative defenses, without which COPA on its face would prohibit speech protected for adults.<sup>54</sup> The court struck a balance between the harm to plaintiffs caused by infringement of their First Amendment rights and the government’s interests in protecting

---

ImageState North America Inc. *Ashcroft v. ACLU*, 535 U.S. 564, 571 n4 (2002).

50. *ACLU v. Reno*, 1998 U.S. Dist. LEXIS at \*3.

51. Plaintiffs’ Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, Civ. Act. No. 98-CV-5591.

52. *ACLU v. Reno*, 1998 U.S. Dist. LEXIS 18546.

53. *Id.* at 4-6.

54. *Id.* at 8.

minors and weighed in favor of the plaintiffs granting them a temporary restraining order.

## 2. *American Civil Liberties Union v. Reno (Reno III)*<sup>55</sup>

The temporary restraining order granted on November 20, 1998, enjoined the enforcement of COPA until December 4, 1998, but was then extended until February 1, 1999.<sup>56</sup> The District Court for the Eastern District of Pennsylvania had to decide whether the constitutional right to freedom of speech or Congress' interest in protecting children from harmful material should prevail. The plaintiffs raised several arguments. First they felt that the "harmful to minors" language of the statute threatened a large portion of speech protected for adults.<sup>57</sup> Next the plaintiffs argued that the affirmative defenses burdened speech.<sup>58</sup> Finally, they maintained that COPA is not narrowly tailored to a compelling government interest or the least restrictive means to accomplish its ends because it is vague and overbroad.<sup>59</sup> On the other hand, the government argued that the statute only targets commercial pornographers that distribute harmful material to minors as a regular course of their business.<sup>60</sup> In addition, the government asserted that COPA is narrowly tailored to the government's compelling interest in protecting minors from harmful material.<sup>61</sup>

The court determined that COPA, a content-based regulation of speech, must meet the requirements of strict scrutiny by serving a compelling interest and being narrowly tailored to serve those interests.<sup>62</sup> After determining the level of scrutiny, the court calculated that the financial deterrent of COPA imposes a burden on speech that is protected for adults. In *Simon & Schuster, Inc v.*

---

55. *ACLU v. Reno*, 31 F. Supp. 2d 473.

56. *Id.* at 477.

57. *Id.* at 479.

58. *Id.*

59. *Id.*

60. *Id.*

61. *ACLU v. Reno*, 31 F. Supp. 2d at 479.

62. *Id.* at 493.

*Members of the New York State Crime Victims Board*,<sup>63</sup> the Supreme Court found 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.<sup>64</sup> Both parties stipulated that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that loss of users of such material may affect the speakers' economic ability to provide such communications.<sup>65</sup> Furthermore, the Supreme Court found in *Reno I* that there is a high economic burden of age verification for some sites that will "inevitably curtail a significant amount of adult communication on the Internet."<sup>66</sup> Finally, the court determined that, based on the evidence the plaintiffs could show, COPA imposed a burden on protected speech.

Next, the court found that the Government had a legitimate and compelling interest in drafting COPA to protect minors from harmful pornographic material widely available on the Web. However, the court articulated that the compelling interest was not justified by the means. The statute was not the least restrictive means available to achieve the goal of restricting access of minors to this material and COPA was not narrowly tailored to meet its objectives.<sup>67</sup> Finally, after reviewing all the evidence before it, the court granted the motion for a preliminary injunction.

### 3. *American Civil Liberties Union v. Reno (Reno IV)*<sup>68</sup>

The Third Circuit reviewed the district court's grant of the preliminary injunction and affirmed its issuance. The court based its determination of COPA's likely unconstitutionality solely on the "contemporary community standards."<sup>69</sup> The court noted that

---

63. *Reno v. ACLU*, 502 U.S. 105.

64. *ACLU v. Reno*, 31 F. Supp. 2d at 493.

65. *Id.* at 495.

66. *Id.* at 494.

67. *Id.* at 497.

68. *ACLU v. Reno*, 217 F.3d 162.

69. *Id.* at 173.

the unique characteristics of the Web require a closer analysis of First Amendment protections. For instance, the Web is not geographically constrained.<sup>70</sup> In addition, it is unique because once content is published on the Web, existing technology does not permit the published material to be restricted to a particular state or jurisdiction.<sup>71</sup> Similarly, a web publisher cannot restrict access to site based on the geographic locale of the Internet user visiting their site.<sup>72</sup> As a result COPA assumes that the materials available on a given web site conform to the State with the most stringent standard. The court concluded that this result imposes an overreaching burden and restriction on constitutionally protected speech.<sup>73</sup>

The Government urged the court to narrowly interpret the “contemporary community standards” language as an “adult” rather than “geographic” standard in an attempt to find COPA in conformity with the First Amendment.<sup>74</sup> However, the court did not find this argument strong enough to rescue this clause from unconstitutionality. The court stated that there is no evidence to suggest that adults across the United States would agree to the same standards when determining what is harmful to minors.<sup>75</sup> Furthermore, the courts have always interpreted the community standards as a geographic standard without uniformity.<sup>76</sup>

The court then analyzed the four prongs of a preliminary injunction determination. First, the court determined that it is more likely than not that COPA would be found unconstitutional on the merits.<sup>77</sup> Next, the court found that if a preliminary injunction were not issued, the affected Web publishers would most likely suffer irreparable harm.<sup>78</sup> In addition, the court

---

70. *Id.* at 175.

71. *Id.* at 169.

72. *Id.* at 176.

73. *Id.* at 177.

74. *ACLU v. Reno*, 217 F.3d at 178.

75. *Id.* at 178.

76. *Id.*

77. *Id.* at 179.

78. *Id.* at 180.

asserted that COPA's threatened constraint on constitutionally protected free speech outweighs the damage that would be imposed by failure to affirm the preliminary injunction.<sup>79</sup> Finally, the court determined that the injunction would be in the public's interest and affirmed the district court.<sup>80</sup>

#### 4. *Ashcroft v. American Civil Liberties Union*<sup>81</sup>

The Government appealed to the Supreme Court based upon the narrow holding of the Court of Appeals for the Third Circuit. The Supreme Court must now determine whether the Child Online Protection Act's use of "community standards" to identify "material that is harmful to minors" violates the First Amendment.<sup>82</sup>

The court of appeals, in finding COPA a burden on protected speech, relied heavily on the Supreme Court's discussion of the overreaching community standards language of the CDA.<sup>83</sup> The court of appeals feared that COPA's community standards component would force all speakers on the Web to abide by the "most puritan" community standards because there is no ability to limit access to sites on a geographic basis.<sup>84</sup> Furthermore, the court of appeals did not find that Congress had adequately remedied the overreaching "community standards" provision when drafting COPA.<sup>85</sup>

The Supreme Court however found several distinctions between the CDA and COPA which clarifies its holding that community standards alone do not render the statute in violation of the First Amendment. The CDA's use of community standards was found problematic due to its vagueness and lack of limiting terms.<sup>86</sup>

---

79. *Id.*

80. *ACLU v. Reno*, 217 F.3d at 181.

81. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

82. *Id.* at 566.

83. *Id.* at 577.

84. *Id.*

85. *Id.*

86. *Id.* at 578. The Court finds that the "community standards" requirement



COPA on the other hand, does not have similar faults because it applies to significantly less material than did the CDA.<sup>87</sup> Furthermore, COPA defines the “harmful to minors” prohibition in a manner parallel to the *Miller*<sup>88</sup> definition of obscenity that further limits restricted material.<sup>89</sup> In addition, the serious value requirement of COPA asks “whether a reasonable person would find. . . value in the material, taken as a whole” calling the courts to set a definition assuring some limitations and regularity.<sup>90</sup>

Next, the Court believed that the Internet’s unique presence worldwide does not render COPA unconstitutional. As the Court found in both *Hamling v. US*<sup>91</sup> and *Sable Communications of California, Inc. v. FCC*,<sup>92</sup> there is no constitutional barrier under *Miller*, which prohibits obscene communications geographically.<sup>93</sup> What may violate local standards in some communities may not be found obscene in others. The Court justified its decision finding that if a publisher wants its material to be suitable for standards of a particular community it can utilize the proper medium to target that audience effectively.<sup>94</sup>

In reaching the decision to find the “community standards” provision within the confines of the First Amendment, the Court emphasized that its holding is very limited. The Court did not lift the preliminary injunction granted by the District Court. Instead the Court instructed the court of appeals to examine whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the

---

is similar to the second prong of *Miller*’s three-prong test. However, both the requirements that restricted material appeal to the prurient interest and excluded works with serious literary, artistic, political, or scientific value from the *Miller* test were missing from the CDA. *Ashcroft v. ACLU*, 535 U.S. at 578.

87. *Id.*

88. *Miller v. CA*, 413 U.S. 15 (1973).

89. *Ashcroft v. ACLU*, 535 U.S. at 578. The two additional restrictions substantially limit the amount of material covered by COPA. *Id.* at 579.

90. *Id.* at 579.

91. *Hamling v. United States*, 418 U.S. 87 (1974).

92. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

93. *Ashcroft v. ACLU*, 535 U.S. at 581.

94. *Id.* at 583.

District Court correctly concluded that the statute likely will not survive strict scrutiny analysis.<sup>95</sup>

5. *Subject Opinion: ACLU V. Ashcroft*<sup>96</sup>

This note will now analyze the Third Circuit’s decision in *ACLU v. Ashcroft*. It is the fifth case in which the constitutionality of Congress’ attempts to monitor Internet content has been at issue. At each juncture, the respective courts have found Internet regulation to be an overbroad infringement of adults’ First Amendment rights. Congress has rewritten and amended previous legislation in an attempt to correct the overbroad and vague language. However, the Supreme Court was unsatisfied after reviewing COPA and remanded the case back to the court of appeals for a more detailed analysis of the legislation instead of basing its unconstitutionality on only one issue.

At the request of the Supreme Court, the United States Court of Appeals for the Third Circuit once again revisited the constitutionality of the Child Online Protection Act. Instead of focusing on the “community standards” provision, the court expanded its analysis to find several flaws in the construction of COPA. Although the Court agrees with the District Court granting the preliminary injunction, it must also evaluate the overbreadth and vagueness of COPA in accordance with the Supreme Court’s mandate.<sup>97</sup> The court affirmed the preliminary injunction finding that COPA fails to meet strict scrutiny and is overbroad.<sup>98</sup>

The court found that although there is a compelling governmental interest in protecting children from detrimental material available on the Internet, Congress has failed to narrowly tailor legislation to meet those interests. Several clauses within COPA fail to meet the strict scrutiny analysis and therefore do not meet the First Amendment’s requirements. First, “material

---

95. *Id.* at 585-86.

96. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *cert. granted*, *Ashcroft v. ACLU*, 124 S. Ct. 399 (2003).

97. *Id.* at 243.

98. *Id.*

harmful to minors” is not narrowly tailored because it restricts protected speech for adults, limits material to individual expressions rather than its context, and does not sufficiently limit the term “minor”.<sup>99</sup> Second, the court finds that while the “commercial purposes” definition of COPA is narrower than that of its predecessor CDA, it still subjects a wide range of commercial non-obscene web publishers to liability.<sup>100</sup> Finally, the court determined that the affirmative defenses will likely deter adults from viewing protected speech because many will be reluctant to give personal information required under COPA to gain access.<sup>101</sup> In concluding its strict scrutiny analysis, the court found that COPA does not employ the least restrictive means to achieve the Government’s compelling interest in protecting minors.<sup>102</sup>

Next, the court analyzed several components of COPA to determine that it is substantially overbroad. Following the same analysis as in the strict scrutiny determination, the court found that within the “material harmful to minors” clause, the term “minor,” the “commercial purposes” phrase and the affirmative defenses are all substantially overinclusive.<sup>103</sup> In addition, the court determined that the “community standards” requirement, when viewed in conjunction with the other provisions listed above, further broadens the scope of speech covered by the statute.<sup>104</sup> Finally, the court declined to rewrite the statute in order for it to pass muster with the First Amendment because that would be a “serious invasion of the legislative domain.”<sup>105</sup>

---

99. *Id.* at 252-55.

100. *Id.* at 256.

101. *Id.* at 261.

102. *Id.*

103. 322 F.3d at 267-69.

104. *Id.* at 270.

105. *ACLU v. Ashcroft*, 322 F.3d 240, 270 (3d Cir. 2003), *citing* *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995).

### III. ANALYSIS

The Court in *ACLU v. Ashcroft* made the correct decision although it was not the one that Congress had hoped for. The Child Online Protection Act suppresses speech and encroaches upon communications that are protected by the First Amendment. However, Congress has a legitimate and compelling interest to protect minors from harmful material that is easily accessible on the Internet. Congress poorly drafted COPA because it too broadly encompasses protected speech. The statute has been susceptible to much criticism by the Courts and therefore the Supreme Court of the United States must determine COPA's fate.

#### *A. Why the Third Circuit's Decision in ACLU v. Ashcroft Was Correct*

There are three prevalent arguments why the court in *ACLU v. Ashcroft* correctly decided that the Child Online Protection Act is a content-based restriction on speech that fails to satisfy strict scrutiny. First, several phrases within the text of COPA are substantially overbroad and severely restrict a large portion of protected speech. Second, there are several other methods of restricting material unsuitable for children's eyes that are less restrictive than the methods under COPA. Third, due to the requirements and consequences of COPA, adults will be deterred from communicating what the First Amendment rightfully protects.

##### *1. Language Not Narrowly Tailored to Achieve Government's Compelling Interest*

The statute sets out to protect minors from offensive material on the Internet that is found to be unsuitable for innocent children. Looking to the plain language of the statute, it defines materials that are harmful to minors as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of

any kind that is obscene.”<sup>106</sup> Following this list of specific forms of communications that may qualify as a violation of the statute, a three-prong test modifies the list:

the average person, applying contemporary community standards, would find, taking the *material as a whole* and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; depicts, describes, or 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 breast; and *taken as a whole*, lacks serious literary, artistic, political, or scientific value for minors.<sup>107</sup>

Looking at the definition of “harmful to minors” within COPA, it is clear for three reasons that the language used is not narrowly tailored in order to achieve the Government’s compelling interests.

First, the definition begins by unambiguously concentrating on minors. Although this narrows the audience for which the statute applies, it impacts non-obscene speech targeted towards adults that is unquestionably protected by the First Amendment. The Supreme Court has stated that, “speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.”<sup>108</sup> Although there is a legitimate interest in preventing children from viewing material that is objectionable, the government cannot regulate the maturity level of speech in a way that holds adults to the same standard as minors.

Second, the specific materials that are harmful to minors, followed by the three-prong test, are interpreted to say that such material is to be judged by itself as a whole to determine if such

---

106. 47 U.S.C. § 231(e)(6) (2003).

107. *Id.* (emphasis added).

108. *ACLU v. Reno*, 322 F.3d at 260, citing *Free Speech Coalition*, 122 S.Ct. at 1402.

material appeals to the prurient interests or lacks serious literary, artistic, or scientific value for minors.<sup>109</sup> However, the First Amendment requires the consideration of works in its context and not in isolation.<sup>110</sup> Judging a picture, image, or writing on its own, taken out of context, would deem protected speech in violation of COPA. However, a much different outcome would result if pictures, images, or text were evaluated in context with an entire Web site. Take for instance a medical Web site that individuals can turn to in order to receive qualified medical advice or read about common symptoms of a specific disease. In helping people learn about a common symptom or cure, an informative and educational picture of a naked individual is posted on this Web site for anyone to view. If COPA is enacted, this picture would be found harmful to minors and therefore the Web site provider would be subject to civil and criminal penalties. On the other hand, if the picture of the naked individual was judged in context with the entire medical Web site, most likely it would be found that this picture does not appeal to the prurient interests and furthermore does not lack serious scientific value for minors. As this example illustrates, the language of COPA would severely restrict the amount of protected speech available on the Internet.

Finally, the term “minor” as defined by the statute means any person under seventeen years of age.<sup>111</sup> This definition is problematic because it is too vague. There is a significant difference between a four year old and a sixteen year old. It is difficult to determine how to censor material with such a broad definition of minor and no further guidance than an age limit. Therefore, this term, which is used in all three prongs of the harmful to minors test, is not narrowly tailored to satisfy the rudiments of the First Amendment.

---

109. *Id.* at 252.

110. *Id.*

111. 47 U.S.C. § 231(e)(7) (2003).

## 2. *A Substantial Amount of Protected Free Speech Will Be Chilled*

The Child Online Protection Act can have a chilling effect on protected speech for two reasons. First, publishers will be deterred from posting protected speech for fear of prosecution under this statute. Section 231 (a) provides:

(1) 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) 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. For purposes of this paragraph, each day of violation shall constitute a separate violation. (3) 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.<sup>112</sup>

These harsh civil and criminal penalties provided by the statute will prevent several individuals from communicating ideas through the Internet medium.

Second, the affirmative defenses allow adults to obtain access to restricted material conditioned upon dissemination of personal information that would attempt to guarantee that the viewer is of majority. Section 231 (c)(1) stipulates that:

It is an affirmative defense to prosecution under this

---

112. *Id.* at § 231(a)(1)-(3).

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 account, adult access code, or adult personal identification number*; (B) *by accepting a digital certificate that verifies age* (emphasis added).<sup>113</sup>

Although these restrictions seem like a logical solution to prevent minors from accessing unacceptable material, they require recipients to identify themselves before being granted access to the protected speech. In several cases, the Supreme Court has held that such restrictions can have an impermissible chilling effect on those would-be recipients.<sup>114</sup> Many viewers of constitutionally protected indecent material enjoy anonymity and would no longer view such material because they would be embarrassed to reveal their identities. Both the threat of prosecution and the fear of identification will undoubtedly hinder the displaying and viewing of protected speech.

### 3. COPA Does Not Employ the “Least Restrictive Means”

The Supreme Court announced that “if a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”<sup>115</sup> Under COPA, as addressed in the

113. *Id.* at § 231(c)(1)(A) & (B).

114. *ACLU v. Reno*, 322 F.3d at 259-60.

*See Lamont v. Postmaster General*, 381 U.S. 301 (1965). In *Lamont*, the court held that a federal statute requiring the Postmaster to halt delivery of communist propaganda unless affirmatively requested by the addressee violated the First Amendment. *Id.*

*See also Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 732-733 (1996). Here, the court found a federal law requiring cable operators to allow access to sexually explicit programming only to those subscribers who requested access to the programming in advance and in writing unconstitutional. *Id.*

115. *ACLU v. Reno*, 322 F.3d at 260, quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).



section above, affirmative defenses are provided for those facing prosecution. However, the alternatives provided by COPA that are technologically feasible impose a heavier burden upon speakers than other available options. In order for a Web site to implement the verification of credit card numbers, several costly and time consuming measures must be adopted.<sup>116</sup>

In addition to the heavy imposition COPA places upon Web site operators, it may not be the most effective method of preventing various forms of content. However blocking and filtering technology is a less restrictive means of achieving the goals of Congress by restricting minors to inappropriate material available on the Internet. These programs may be downloaded and installed on a user's home computer at a price of approximately forty dollars.<sup>117</sup> Alternatively, it may operate on the user's Internet Service Provider.<sup>118</sup> Blocking and filtering software will prevent minors from "accessing material harmful to minors posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP."<sup>119</sup> In

---

116. *ACLU v. Reno*, 31 F. Supp. 2d at 488. According to testimony given to the court, measures to verify credit card numbers require the following steps: (1) setting up a merchant account, (2) retaining the services of an authorized Internet-based credit card clearinghouse, (3) inserting common gateway interface, or CGI, scripts into the Web site to process the user information, (4) possibly rearranging the content on the Web site, (5) storing credit cards numbers or passwords in a database, and (6) obtaining a secure server to transmit the credit card numbers. *Id.* Furthermore, the cost of credit card verification services range from a start-up cost of approximately three-hundred to thousands of dollars, plus per transaction fees, for a service that does not automatically verify or authorize the credit card numbers. *Id.*

117. *ACLU v. Reno*, 322 F.3d at 261. For example, Net Nanny can be purchased for \$39.95 and allows parents to filter Web sites, control online chat, limit time spent online, protect their privacy, and much more. For more information on this product go to [www.netnanny.com/index.html](http://www.netnanny.com/index.html) (last visited November 23, 2003).

118. *ACLU v. Reno*, 322 F.3d at 261. ISP's such as America Online provide blocking and filtering software to prevent its younger users from seeing harmful material. Parents are able to set the controls to block what they deem unfit for their children.

119. *ACLU v. Reno*, 31 F. Supp. 2d at 492. It is important to understand

addition it is probable that a minor may legitimately possess a valid credit or debit card or acquire permission to use a parent's credit card.<sup>120</sup> Therefore it is quite possible for a minor to access harmful material while remaining within the confines of COPA.

COPA attempts to restrict only Web publishers who make any communications "for commercial purposes" under the United States jurisdiction. Therefore, blocking and filtering devices will protect children from a much wider range of unsuitable communications than COPA. Furthermore, blocking and filtering systems are not in violation of the First Amendment because they are not mandatory, but voluntary.

The Report of the House Committee on Commerce was written on October 5, 1998 in support of enacting COPA. The House Committee suggested techniques that would be used in conjunction with blocking and filtering software in order to combat harmful material. Zoning effectively places the seller of pornography in a red-light district in cyberspace that identifies or classifies material harmful to minors.<sup>121</sup> Tagging provides information that will alert users of adult content by describing who created the Web page, how often the page is updated, what the page is about, and which keywords represent the pages content.<sup>122</sup> Voluntary ratings systems allow Web sites to self-regulate based upon categories such as sex, violence, nudity, and language.<sup>123</sup> Finally, domain name zoning would create a generic top-level domain on the Internet that would be specifically reserved for adult content.<sup>124</sup> The Committee believed that because methods such as zoning, tagging, ratings, and domain name zoning had

---

how the blocking and filtering programs are run. Some software blocking vendors employ individuals who browse the Internet for sites to block, while others use automated searching tools to identify which sites to block. One product actually analyzes the content instead of using a predefined list of sites. The product is capable of screening inappropriate material from chat rooms, e-mail, attached documents, search engines, and web browsers.

120. *ACLU v. Reno*, 31 F. Supp. 2d at 489.

121. 105 H.R. REP. NO. 105-775, at 12 (1998).

122. *Id.*

123. *Id.*

124. *Id.*

never been adopted, they were impractical and ineffective. However, proof that such procedures existed in 1998 illustrates that less restrictive means could have been adopted to prohibit children from harmful speech that is acceptable for adults.

### *B. Why the Third Circuit's Decision in ACLU v. Ashcroft Was Not Correct*

Three common arguments exist as to why the Third Circuit in *ACLU v. Ashcroft* should have overruled the district court's issuance of the preliminary injunction and found COPA constitutional. First, Congress has a compelling governmental interest in protecting the physical and psychological well being of children. Second, COPA was narrowly tailored to limit restricted speech to prevent unnecessary burden upon the First Amendment rights of adults. Finally, the statute is the least restrictive means because other technological options are not as effective at protecting minors from harmful material.

#### *1. Congress Has a Compelling Interest in Protecting Children*

The Government has a compelling interest to protect children from exposure to sexually explicit material. The Supreme Court has repeatedly expressed this interest articulating that "safeguarding the physical and psychological well-being of a minor is compelling."<sup>125</sup> Furthermore the Court has found that the government may enact laws designed to shield children from exposure to sexually explicit material.<sup>126</sup> The purpose of COPA is to continue this tradition of maintaining the well being of minors in this new technology age by protecting children from harmful material located on the Internet.

Although most people would agree that restricting children's

---

125. *Id.* at 9, quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982).

126. 105 S. REP. NO. 225 at 3 (1998), referencing *Ginsberg v. New York*, 390 U.S. 629 (1968), *FCC v. Pacifica*, 438 U.S. 726 (1978), *Denver Area Ed. Tel. Consortium v. FCC*, 116 U.S. 2374 (1996).

access to sexually explicit material is of high importance, this belief alone is not enough to declare COPA constitutional. In order to pass muster with the First Amendment, this content-based restriction on speech must meet the strict scrutiny test. Therefore, even if there is a compelling government interest, COPA must be narrowly tailored without unnecessarily interfering with adults' First Amendment rights.

## 2. *COPA Is Narrowly Tailored To Meet Its Compelling Interests*

The government has an undisputed compelling interest in restricting the content that minors are able to access on the Internet. When Congress drafted COPA it drastically limited the scope of its predecessor, the Child Decency Act of 1996. Congress was weary of encroaching upon adults' First Amendment freedoms and therefore restructured several provisions of the statute.

First, the restriction of communications harmful to minors only applies to material posted on the World Wide Web and not other features of the Internet. For example, COPA does not apply to speech communicated through one-to-one messaging (e-mail), one-to-many messaging (list-serv), distributed message databases (USENET newsgroups), real time communications (Internet relay chat), real time remote utilization (telnet), or remote information retrieval other than the World Wide Web (ftp and gopher).<sup>127</sup> Second, COPA only prohibits commercial distribution of material harmful to minors and does not impose any burdens upon noncommercial speech on the Web. Third, COPA deletes the terms "indecenty" and "patently offensive" to define harmful to minors and instead inserts a three-prong test similar to the *Miller*.<sup>128</sup> obscenity test upheld by the Supreme Court. Finally, Congress lowered the age threshold to seventeen, which is the usual definition for a minor. Congress believes that creating a new statute incorporating these limiting provisions will allow COPA to

---

127. 105 H.R. REP. NO. 105-775 at 9 (1998).

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

pass strict scrutiny analysis where the CDA had failed.

### 3. *COPA Is the Least Restrictive Means*

COPA is the least restrictive and most effective means to achieve the government's compelling interest in protecting children from sexually explicit material online. The statute does not impose an excessive burden upon constitutionally protected speech because it only requires that commercial pornographers on the Web redirect their content in a way that is not as readily accessible by minors. By providing reasonable affirmative defenses, COPA offers commercial publishers acceptable means to communicate that uphold adults' First Amendment rights and protect children from harm.

Current technology enables parents, schools, and libraries to implement blocking and filtering software in order to restrict children's access to harmful material. However, this preventative software is flawed in two regards. First, the filtering software is voluntary which places the burden upon adults to protect minors. Some adults are not technologically savvy and do not understand how to operate a computer let alone how to download the requisite software. Furthermore, some adults may be oblivious to the existence of the current technology available to them. Finally, adults have different opinions and standards in regards to what is suitable for their children and may find that blocking harmful material is unnecessary. Second, blocking and filtering software is untrustworthy because it may be both under- and over-inclusive of harmful material. The software may block too little by not blocking some Web sites that are found to be inappropriate for minors. While on the other hand, the software may block too much material by prohibiting some Web sites that are age appropriate.

## IV. IMPACT

The Third Circuit's decision in *ACLU v. Ashcroft* will greatly impact the future analysis of COPA. After floundering in the court

system since its enactment in 1998, the court dissected the terms of COPA to find that it does not meet the rigid confines of the First Amendment regime. This creates urgency for the Supreme Court to determine COPA's fate. Now that the court of appeals has examined the difficult issues surrounding COPA's composition in greater detail, the Supreme Court must review the lower court's decision to shed light on COPA's constitutionality.

It is undisputed that the Supreme Court has found that there is a compelling governmental interest in protecting the well being of children. However, there are certain fundamental rights that may not be trumped by the government's efforts to protect America's youth. The Supreme Court will most likely agree with the court of appeals' analysis and determine that COPA is unconstitutional because there are other less restrictive alternatives technologically available that would not infringe upon protected speech.

The Supreme Court will most likely agree with the court of appeals, which found that COPA does not employ the least restrictive means to accomplish the Government's compelling interest in protecting minors.<sup>129</sup> There are other less restrictive alternatives technologically available at this time that would not hinder adult protected speech while simultaneously preserving the innocence of children from harmful material.<sup>130</sup> Furthermore, it has long been recognized that protecting children from inappropriate material has been left to the discretion of parents because our society has traditionally placed the protection of minors from harmful speech upon the shoulders of the parent.<sup>131</sup> In

---

129. *ACLU v. Reno*, 322 F.3d at 261.

130. Several technological alternatives are now available such as A+ Internet Filtering for Families, ActivatorDesk Dot-Kids, ActivatorMail, AmiWeb Personal Childrens Browser, AOL Parental Controls, Bess/Sentian, Bsecure Protection Products, CleanChat IRC Network, Crayon Crawler, Cyber Patrol, Cyber Sentinel, CYBERsitter, Desktop Surveillance, DynaComm i:filter, Enologic Net Filter Home, Famil.Net, FilterGate, Gaggle E-mail, Garfield Island, Integrity Online/Everyware, Internet 4 Families, iProtect You, Kidsnet Parental Controls, Mailbox Guard, Microsoft Internet Explorer, MyWeb, and Net Nanny. Detailed information about these programs can be found at <http://kids.getnetwise.org> (last visited November 23, 2003).

131. *ACLU v. Reno*, 322 F.3d at 263. Previously, the Supreme Court found a

1968 the Supreme Court recognized in *Ginsberg v. New York*<sup>132</sup> that the claim of parents “to direct the rearing of their children is basic in the structure of our society.”<sup>133</sup> This section will discuss the current alternatives available for parents that are more effective than the proposed government action through COPA.

### A. Technological Alternatives

The Internet is a vast information retrieval system that allows individuals to easily access materials that would otherwise be unobtainable due to geographic constraints or unavailable at one location. In addition, access to this information source is no longer limited to a computer at home, school or in a library, but may be acquired through other technologies such as handheld organizers, cell phones, and wireless paging devices. Due to the infinite possibilities of obtaining such vast information parents must set guidelines to protect their children from reaching inappropriate material. Blocking and filtering software and monitoring devices are two technological alternatives that can be used individually or simultaneously to decrease the unacceptable material available to children.<sup>134</sup>

---

federal statutory provision that required cable operators to scramble sexually-oriented programming or block the channels completely between the hours of 10 p.m. and 6 a.m. to prevent children’s exposure to the content contained therein unconstitutional. The Court determined that there was a less restrictive means provided by an opt-out provision that allowed cable subscribers to request the cable company to scramble fully or block completely the receipt of sexually explicit material. The Court noted that this voluntary option allowed the parent to be responsible for what was appropriate for their children to view. *Id.* at 262, *citing* Playboy Entm’t Group, Inc., 529 U.S. at 807 (2000).

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

133. Committee to Study Tools and Strategies For Protecting Kids from Pornography, National Research Council, *Youth, Pornography and The Internet* § 4.1.3 (Dick Thornburgh & Herbert S. Lin. Eds., 2002), *available at* [http://www.nap.edu/html/youth\\_internet/](http://www.nap.edu/html/youth_internet/) (last visited Nov. 10, 2003).

134. Adults now have several options available to them when attempting to prevent inappropriate material from children. For instance, AOL Version 9.0 has parental controls which empower parents to filter, review, and customize their children’s Web access, control how much time they spend online, approve

### 1. *Blocking and Filtering Software*

When a child goes to the library to do research for a class project there are several classification systems set in place to help lead that child in the right direction. In addition, there are librarians available to help guide the child to the correct form of information and its physical location in that library. On the other hand, when a child goes to a search engine on the Internet there is no discretion in what sources will be retrieved. Furthermore, there is no librarian to help guide the child on what key terms would provide the best results or which Web sites will reveal the most helpful information. Blocking and filtering software act as a virtual librarian who guides the child to the desired information by preventing retrieval of objectionable material.

“Filtering technologies allow Internet material or activities that are deemed inappropriate to be blocked, so that the individual using that filtered computer cannot gain access to that material or participate in those activities.”<sup>135</sup> Software can be purchased with standard blocking capabilities or the software can be customized based on certain specifications. There are four filter options: client-side filters, content-limited Internet service providers, server-side filters, and search engine filters. Client-side filters are installed on the computer and the adult with the password is responsible for configuring the profile of the system preventing others from accessing inappropriate material.<sup>136</sup> Content-limited Internet service providers allow access to a certain subset of the Internet and all subscribers are prohibited from the same

---

friends and relatives to exchange email and Instant Messages with their children, and block or allow access to software downloads, newsgroups, and AOL Premium Services. In addition, AOL provides internet access controls to prevent kids from surfing outside the AOL service and inside AOL kids are blocked from pornography, gambling, hate, weapons, violence, drugs, alcohol, and tobacco. *See* <http://kids.getnetwise.org> (last visited November 23, 2003).

135. Committee, *supra* note 133, at § 2.3.1.

136. Committee, *supra* note 133, at § 12.1.1.



material.<sup>137</sup> Sever-side filters are more appropriate for an institutional setting such as a school district where users at all access points must conform to the access policy defined by the institution.<sup>138</sup> Finally, search engine filters when activated by the user do not return links to inappropriate content found in a search, but they do not block access to specifically named Web sites.<sup>139</sup> Although blocking and filtering software is not perfect, a combination of the above mentioned filtering systems would reduce error and protect children from inappropriate material in an effective manner.

In 2000, Congress enacted the Children's Internet Protection Act ("CIPA")<sup>140</sup> in an effort to eliminate availability of Internet pornography in public libraries. "Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."<sup>141</sup> Although filtering software has its flaws, if an adult patron encounters a blocked site, CIPA expressly authorizes a library official to disable a filter for "bona fide research or other lawful purposes."<sup>142</sup> In *United States v. American Library Association*, the Supreme Court found that the use of filtering software in public libraries does not violate patrons' First Amendment rights and therefore found CIPA constitutional.

This decision helps shed some light on how the Supreme Court will likely rule on the Child Online Protection Act. Under CIPA, the Supreme Court determined that mandatory filtering software in

---

137. Committee, *supra* note 133, at § 12.1.1. In addition, chat rooms and bulletin boards are monitored for appropriate content and e-mail and instant messages can be received only from specified parties and/or other users of the system. Committee, *supra* note 133, at § 12.1.1.

138. Committee, *supra* note 133, at § 12.1.1.

139. Committee, *supra* note 133, at § 12.1.1.

140. Dot Kids Implementation and Efficiency Act of 2003, Pub. L. No. 107-317 (2002).

141. *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

142. *Id.* at 229.

public libraries for federal funding is constitutional. This finding strengthens the argument that COPA is unconstitutional because there is proof that less restrictive alternatives are available to protect children from harmful material. Filters are now mandated in libraries, increasingly common in the business environment, and are widely available for home use. Finding that filtering software in libraries does not violate the First Amendment will pave the way for the government to turn to less restrictive methods of censorship.

## 2. *Monitoring Devices*

Monitoring devices are another option available for parents to protect children from inappropriate material on the Internet. This alternative acts as a deterrent rather than a preventative measure because the parent monitors the child's online activity rather than blocking material. The threat of punishment or embarrassment will deter children from viewing Web sites that they know are unsuitable for their eyes. There are two ways for adults to monitor someone's use of the Internet. First, monitoring systems are built into the browser or operating system and the purchase of additional technology is unnecessary.<sup>143</sup> Second, commercial monitoring systems are available that can capture all of the keystrokes made by a child, allow a supervising adult to monitor on his or her screen what appears on a child's screen, and enable an adult responsible for a child to read old E-mails.<sup>144</sup> Although monitoring systems have become widespread in corporate America, some adults may feel that this method is not as effective as blocking and filtering software. In order for monitoring to be most effective, adults need to take an active role in disciplining children who intentionally access inappropriate material. Without

---

143. Committee, *supra* note 133, at § 12.2.1. Internet browsers have a history file that can be easily viewed by an adult to determine the sites visited most recently, usually within the past twenty days. In addition, most browsers have a temporary "cache" that contains images that have been displayed on a user's screen. Committee, *supra* note 133, at § 12.2.1.

144. Committee, *supra* note 133, at § 12.2.1.

persistent reprimand, monitoring devices will be inconsequential for protecting children from harmful material available on the Internet.

### *B. Congressional Action*

Since the creation of COPA in 1998, several technological advances and other Congressional action have occurred, furthering the argument that COPA is unduly restrictive in light of other alternatives. COPA imposes civil and criminal sanctions upon web publishers and provides only limited affirmative defenses that unduly burden publishers and chill viewers' protected First Amendment rights. However, the Dot Com domain in combination with other available technology will protect children from inappropriate material while upholding adults' First Amendment freedoms. In addition, the CyberTipline gives adults and children an outlet to report wrongdoing in an active way to protect children from the dangers of the Internet.

#### *1. Dot Com Domain*

Due to the growing concern voiced from parents, educators, and children the federal government established a second-level Internet domain within the United States country code domain where children can safely explore an online environment. Under the Dot Kids Implementation and Efficiency Act of 2002, this new domain will be filled only with material that is appropriate for children under thirteen years of age.<sup>145</sup> When President George W. Bush signed the Act on December 4, 2002 he said that "we must give our nation's children every opportunity to grow in knowledge without undermining their character. . .we must give parents the peace of mind knowing their children are learning in safety."

The Act requires that NeuStar serve as the administrator of the ".us" country code top-level domain. Through this role, NeuStar has the responsibility to establish a kids.us domain to promote

---

145. 107 H.R. REP. NO. 449, at 7 (2002).

positive experiences for children online by preventing exposure to harmful material.<sup>146</sup> All content that resides within the kids.us domain must be in compliance with existing laws; widely adopted children's online protection policies; advertising policies, privacy requirements and other policies; and restrictions and guidelines approved by NeuStar and the National Telecommunications and Information Administration.<sup>147</sup> The Committee Reports compare the new child-friendly domain to the children's section of a public library, which in no way imposes an unnecessary burden upon the rights of adults.<sup>148</sup>

## 2. *CyberTipline*

In addition to the technological preventative measures, the

---

146. Kids.US Content Policy: Guidelines and Restrictions *available at* [www.kids.us](http://www.kids.us) (last visited November 21, 2003).

147. *Id.* In addition, the following information or content is not permitted within the kids.us domain: (1) mature content that is actual and/or simulated normal or perverted sexual acts or sexual contact; sexually explicit information that is not of medical or scientific nature; (2) pornography meaning content that is sexually explicit and/or has a purpose of arousing a sexual or prurient interest; (3) inappropriate language such as the use of profane, indecent, pornographic or sexually-related language, including the seven words identified in *Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978), in the domain name or content of any kids.us Web site; (4) violence which advocates or provides instructions for causing physical harm to people, animals or property; (5) hate speech with hostility or aggression toward an individual or group on the basis of race, religion, gender, nationality, ethnic origin, or other involuntary characteristics or denigrates others on the basis of these characteristics or justifies inequality on the basis of these characteristics; (6) content that advocates the illegal use of drugs, or abuse of over-the-counter or prescription medications; (7) alcohol that advocates or contemplates alcohol consumption; (8) tobacco that features smoking or use of other tobacco products; (9) gambling which advocates legal or illegal gambling; (10) weapons meaning content that sells or advocates the use of weapons; and (11) criminal activities such as content that advocates or provides information or instruction for engaging criminal activity. *Id.*

148. 107 H.R. REP. NO. 449, at 7 (2002).

National Center for Missing & Exploited Children, which was established in 1984, now provides ways to reduce risks associated with children and the Internet. In 1998, the CyberTipline was created to safeguard children from accessing illegal content on the web, receiving inappropriate and unsolicited E-mail or chat messages, and preventing individuals who prey on children through use of the Internet. Individuals can report incidents of child-sexual exploitation including possession, manufacture, and distribution of child pornography and online enticement of children for sexual acts.<sup>149</sup> Although not every occurrence will be reported, the CyberTipline has received over 64,400 reports, including reports of child pornography, online enticement for sexual acts, child molestation (outside the family), and child prostitution, which have lead to the arrest of habitual offenders.<sup>150</sup>

## V. CONCLUSION

The United States Government has a compelling interest to protect the physical and psychological well-being of minors. Every year the Internet, which is constantly growing, plays a more dominant role in Americans' lifestyles through communication, business, culture, and education. The Internet serves as a marketplace of ideas where individuals can freely express themselves with little or no censorship. Although this freedom of expression is fundamental to the First Amendment, children must be protected from speech, which may be deemed harmful for their viewing. Congress attempted to solve this dilemma with the

---

149. See [www.cybertipline.com](http://www.cybertipline.com) (last visited Nov. 13, 2003). In addition, individuals can report child prostitution, child sex tourism, child sexual molestation (not in the family), and unsolicited obscene material sent to a child. *Id.*

150. 107 P.L. 317, 2 (2002). The CyberTipline received a report that a 53-year-old convicted of murder had been communicating online with a 14-year-old female in Wisconsin trying to arrange a meeting offline for sexual activity. Information was given to law enforcement and the suspect was arrested. This is just one of several success stories from using the CyberTipline, *available at* [www.cybertipline.com](http://www.cybertipline.com) (last visited Nov. 13, 2003).

passage of the Child Decency Act and its successor the Child Online Protection Act, which were both found unconstitutional. The Supreme Court will most likely find that although there is a compelling government interest to protect minors from harmful speech, COPA is not the least restrictive alternative to achieve the government's means. Unless Congress can draft a statute that does not unduly burden adults' First Amendment protected speech, the government will have to rely on adults implementing voluntary technological alternatives to protect the nation's youth from harmful material on the Internet.

*Emily R. Novak*

---

\* Editor's Note: The Supreme Court in June 2004 affirmed the preliminary injunction against enforcement of COPA. *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004). The Court stated that the Government had failed to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to the statute. *Id.* at 2788.

