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The Child Online Protection Act: Taming the World "Wild" Web

Peter Jacobson

THE CHILD ONLINE PROTECTION ACT: TAMING THE WORLD "WILD" WEB

INTRODUCTION

Imagine arriving home one evening after a hard day's work. Your child is sitting at the brand new computer that you just purchased for the family. You thought it would be a great idea to have a computer in the home so you could convince your child to do his or her detested homework. However, on this particular night, you observe your child working diligently on a report about the executive branch of government. Looking over his shoulder, your eyes widen in horror. On the 13-inch monitor, you see a crystal clear picture of a completely naked woman engaged in a number of sexual acts.

The reason these shocking images appear on the screen instead of information about the White House is because your son has typed the World Wide Web address www.whitehouse.com rather than www.whitehouse.gov. This results in a connection to a pornographic Web site with free samples that anyone, regardless of age, can access.[1]

Congress previously attempted to protect minors from material such as this by enacting the Communications Decency Act of 1996 ("CDA") which, among other things, banned obscene or indecent communications over the Internet to persons under the age of 18, and banned patently offensive communications over the Internet to persons under the age of 18.[2] Despite Congress' good intentions, the CDA was struck down as unconstitutionally vague and overbroad by the Supreme Court[3]. The 105th session of Congress has again attempted to shield children from what they see as indecent and harmful material by passing the Child Online Protection Act ("COPA") in October of 1998.

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1. H.R. Rep. No. 105-775, at 11 (the report states that minors searching for the official White House Web site could innocently come across a site filled with hardcore pornography quite easily).

2. 47 U.S.C.A. § 223(a), (d).

3. *See* Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997).

Section II of this article will address the history of speech regulation of other types of media by the Supreme Court. Section III will summarize the characteristics of the Internet itself and the prevalence of it in the public's minds. Section IV analyzes the Supreme Court's decision in *Reno v. American Civil Liberties Union*[4], the decision that led to the enactment of COPA. Sections V and VI discuss COPA itself and why Congress feels that it will pass muster under constitutional scrutiny. Section VII addresses recent developments with COPA, and analyzes whether or not the new law will survive under immense pressure to strike it down.

I. BACKGROUND OF SPEECH REGULATION OF THE MEDIA

Reno v. ACLU was the latest in a long line of Supreme Court cases discussing the rights of minors, as compared to adults, to access obscene or indecent materials. The new twist in *Reno* was the medium involved: an entirely new means of communication know as the Internet. But as history demonstrates, the Court has gone to great lengths to define a standard for obscenity and indecency for the more traditional forms of mass communication.

A. Ginsberg v. New York[5]

The Supreme Court addressed the issue of children and "harmful materials" for the first time in 1972 in *Ginsberg v. New York*, a case where the statute prohibited the sale of obscene materials to minors under 17, focusing primarily on whether the materials could be considered obscene to children.[6] The appellant in this case did not argue that the state had no power to restrict the sale of certain materials to minors. Rather, he contended that if material was not considered to be obscene to adults, then it should not be considered as obscene to a minor.[7]

4. *Id.*
5. 390 U.S. 629 (1968).
6. *Ginsberg* 390 U.S. at 631.
7. *Id.* at 636.

The Court rejected this argument.[8] It stated that minors had no constitutionally protected freedoms to read sexually explicit materials. "The power of the state to control the conduct of the children reaches beyond the scope of its authority over adults."[9] The Court stated that there were two justifications for this type of regulation, assuming the legislature found that such material might be harmful to minors.[10] First, the Constitution recognizes that parents want to protect their children from this type of material, and should have the full support of the law. Second, the Court recognized that the state has a separate interest in the well being of its youth.[11] These interests necessitated laws like the New York statute to protect minors from harmful materials, as long as they did not hinder the efforts of adults to gain access to the same materials not deemed as obscene.[12]

B. Federal Communications Commission v. Pacifica[13]

Four years after *Ginsberg*, the Supreme Court confronted broadcast indecency for the first time in the *Pacifica* case, which presented to the Court the dilemma over whether the FCC had the authority to regulate the content of indecent material over the airwaves. The commission argued that though it could not necessarily ban non-obscene but indecent language, it did have the power to "channel" the material by enforcing time, place and manner restrictions.[14]

The Court agreed with the FCC.[15] It stated two major justifications for the regulation. First, it recognized the "uniquely

8. *Id.* at 629.

9. *Id.* at 638, *citing* Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170 (1944).

10. *Ginsberg*, 390 U.S. at 639.

11. *Id.* at 639-40.

12. *Id.* at 635.

13. 438 U.S 726 (1978).

14. *Pacifica,* 438 U.S. at 731-32, *citing* In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975).

15. *Pacifica*, 438 U.S. at 726.

pervasive presence" of broadcast radio.[16] The Court thought the fact that listeners continuously tune into and away from radio stations rendered any warning system ineffective. Once someone tuned in and heard something offensive, the harm had already occurred. Also, the Court recognized that indecent material "presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[17]

The second justification for regulation was that broadcasting's unique accessibility to children. The Court turned to *Ginsberg* for support, stating that the "government's interest in the 'well being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected speech."[18] Coupled with the easy accessibility to radio, the regulation was considered acceptable by the Court.

C. Sable Communications v. Federal Communications Commission[19]

After approving limited regulation of broadcast material, the Court addressed the issue of government regulation of telephone usage and indecency. Referred to as the "dial-a-porn" case[20], the Supreme Court made it clear that although the government could regulate non-obscene, indecent speech broadcast over the airwaves, it was somewhat restricted in doing so with other types of media that were not as widely-disseminated or as easily accessible.

At issue in this case was Section 223(b) of the Communication Act of 1934, as amended in 1988.[21] The statute imposed a ban on

16. *Id.* at 748.
17. *Id.*
18. *Id.* at 749, *citing Ginsberg*, 390 U.S. 629, 640.
19. 492 U.S. 115 (1989).
20. *Sable Communications,* 492 U.S. at 118.
21. 47 U.S.C § 223(b).

any interstate commercial phone messages that were either obscene or indecent.[22]

The Court agreed with the Congress on the matter of transmitting obscene messages through commercial pornographic phone outlets, stating that the First Amendment has never offered protection to any type of obscene material.[23] However, it ruled differently on the ban on indecency, holding that the statute was not narrowly drawn enough to achieve its legitimate purpose of protecting minors from indecent pornographic telephone messages.[24]

The government tried to rely on *Pacifica*[25] to bolster its argument that this behavior should be criminalized, but the Court was not convinced.[26] The Court distinguished *Pacifica* from the dial-a-porn situation, stating that the FCC did not place a total ban on indecency, but rather placed a time/place/manner restriction on broadcast.[27] The Court also recognized that in Pacifica, the unique attributes of broadcasting had been a decisive factor in the ruling.[28] It could not find that telephones shared the similar enough characteristics to warrant a ban like the one at issue. While material broadcast over radio is fairly difficult to avoid when channel surfing, dial-a-porn required "affirmative steps to receive the communication."[29] The Court noted that in *Pacifica*, it had been "careful 'to emphasize the narrowness of [its] holding.'"[30]

While a regulation merely limiting indecent material had been upheld in the past by the Court, legislation that infringed upon adults' rights to obtain this type of material by banning it altogether would not be tolerated. Though the Court saw protecting minors from indecency as a legitimate government interest, banning this type of communication prevented adults from

22. *Sable Communications*, 492 U.S. at 117.
23. *Id.* at 124.
24. *Id.* at 126.
25. *Pacifica*, 438 U.S. at 726.
26. *Sable Communications*, 492 U.S. at 127.
27. *Id.*
28. *Id.*
29. *Id.* at 127-28.
30. *Sable Communications*, 492 U.S. at 128, *citing Pacifica*, 438 U.S. at 750.

gaining access to material that they had a constitutional right to hear.

In short, these three cases display the Government's power to regulate obscenity and indecency communicated by certain media. Access to minors can be restricted as long as adults' constitutional rights are not infringed upon. These rules may sound fairly simple to enforce, but the dawn of the Internet, particularly the World Wide Web, has rendered attempts at Government regulation of this type much more difficult.

II. BRIEF HISTORY OF THE INTERNET

The Internet is unlike any other sort of communication medium the world had ever experienced, defined as "a unique and wholly new medium of worldwide human communication."[31] It presents opportunities to disseminate information like no other. There are no regional limitations on the Internet as there are on radio and television broadcasts. Someone in China could be reading the same message that someone is creating in Janesville, Wisconsin. It is a complex network that allows for one-on-one communications, as well as for hundreds of people to have a discussion on a range of topics. It presents a number of problems for a Government that wants to regulate it by following the same rules for regulating broadcast and print media because the Internet is just so completely different than those media; yet its impact is being felt worldwide.

A. Background Information

It seems that in this day and age, a computer is almost a necessity to keep in touch with what is going on in the world. A primary reason for that is the ever-expanding usage of what is known as the Internet.

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31. *Reno*, 117 S.Ct. at 2334.

The Internet is defined as a "catch-all word used to describe the massive world-wide network of computers. The word 'internet' literally means 'network of networks.'"[32] The Internet is "an international network of interconnected computers" that began as an outgrowth of a military program called "ARPANET" in 1969.[33] The system was designed to enable military computers to communicate with each other, even if some portions of the network were damaged during war, by communicating over redundant channels.[34] This network, while no longer in operation, provided an example of the mass amounts of information that could be communicated over a network linking millions of people together.[35]

The World Wide Web is mainly utilized over the Internet, but, unlike what most people think, they are not one and the same. While the Internet refers to the "physical side of the global network," meaning the mass of cable and computers utilized across the world, the World Wide Web (referred to as the "Web") refers to "a body of information-an abstract space of knowledge."[36] The official description of the Web is a "wide-area hypermedia information retrieval initiative aiming to give universal access to a large universe of documents," as well as pictures, naughty or nice.[37]

The Web was created in March 1989 as a means of transporting ideas and information throughout the European Council for Nuclear Research ("CERN")[38], a collective of European physics researchers. It was seen as an efficient means of communication since the members of CERN were located throughout the

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32. *Entering the World Wide Web: A Guide to Cyberspace,* (visited Jan. 13, 1999), <http://www.hcc.hawaii.edu>.

33. *Reno,* 177 S.Ct. at 2334 (explaining that "ARPANET" is an acronym describing the network developed by the Advanced Research Project Agency).

34. *Id.*

35. *Id.*

36. *Entering the World Wide Web: A Guide to Cyberspace, supra* note 32.

37. *Id.*

38. The acronym CERN refers to the earlier French title of the organization, "Conseil Europeen pour le Recherche Nucleaire," (or in English, European Council for Nuclear Research). *See* CERN Web Site at <http://www.cern.ch>.

continent.[39] Since its inception in 1989, the Web has expanded beyond what anyone had imagined.

The sheer number of Web pages is simply mind-boggling. As of July 1998, there were 300 million sites, and every day, there were 1.5 million new sites being created.[40] If the numbers alone do not convince of the impact the Internet has had on the world, one only has to look at the number of users. Each month, the increase in total Internet traffic approaches 30 percent.[41]

B. Growth of the Internet and Ease of Use

It seems more and more that the Internet is everywhere: schools, libraries, and, more prevalently than ever, homes. Since January of 1996, one month before the CDA was enacted, the number of computers physically connected to the Internet has more than tripled, from approximately 9.4 million hosts to more than 29.6 million hosts.[42] More importantly, the number of minors using the Internet has increased. Robert Pitosfsky, Chairman of the Federal Trade Commission, testified before Congress as to the number of minors who access the Internet. According to Chairman Pitosfsky, the number of minors on the Web has doubled since the previous year, to about 16 million users as of September of 1998.[43] The Supreme Court noted in *Reno v. ACLU* that by this year, the number of people using the Internet would "mushroom" to 200 million.[44]

Congress noted that the pornographic material infiltrates this same communications network that an immense number of minors utilize.[45] It reported that pornography on the Internet is a

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39. *Id.*

40. *History of the Internet and WWW-Part 8: Statistics*, (visited Jan. 13, 1999), <http://www.wenet.net/netvalley>.

41. *Id.*

42. H.R. Rep. No. 105-775, at 10 (1998).

43. *Id.*

44. *Reno*, 117 S.Ct. at 2334.

45. H.R. Rep. No. 105-775 at 8.

flourishing business, with about 28,000 different Web sites generating almost $925 million in revenues per year.[46] Though the Supreme Court has declared that the Internet cannot be regulated under the same standard as broadcast communications because of the lack of invasiveness of the Internet, Congress disagrees. It stated in the Commerce Committee report on COPA, discussed below, that "while clearly the Internet is not yet as 'invasive' as broadcasting, its popularity and growth because of electronic commerce and expansive Federal subsidy programs[47] make it widely accessible to minors."[48] The Commerce Committee recognized that any minor who can read and type on a keyboard can easily access materials on the Internet because of the software's simplicity.[49]

The committee also found that a history of extensive regulation of the adult entertainment industry provides the Government with the authority to further regulate the industry on the Internet, though the communications network itself had been subject to little or no legislation at all.[50]

III. SUPREME COURT STRIKES DOWN INTERNET PROVISIONS: RENO V. AMERICAN CIVIL LIBERTIES UNION[51]

On the very same day that President Clinton signed the CDA into law, the American Civil Liberties Union ("ACLU") filed suit in the United States District Court for the Eastern District of Pennsylvania. That court struck down the provisions at issue, and

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46. *Id.*

47. This "subsidy" refers to a national effort to connect all schools and libraries to the Internet. *See* In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket 96-45, FCC 97-157 (May 8, 1997).

48. H.R. Rep. No. 105-775, at 10.

49. *Id.*

50. *Id.* at 8.

51. 117 S. Ct. 2329 (1997).

the battle of *Reno v. ACLU* had begun.[52] The next step was arguing its constitutionality to the United States Supreme Court.

Reno was the first time the Court was confronted with the complex issue of Internet speech regulation. As explained above, the complexities of this network made it much more difficult for the Government to tailor criteria so that the constitutional freedoms of adults would not be curbed when trying to prevent minors from accessing inappropriate material.

The Supreme Court dealt a major blow to Internet regulation when it handed down its decision in *Reno*. This ruling mandated a strict scrutiny analysis to any speech regulation of the Internet.[53]

The Court dealt with two provisions of the CDA[54]. Section 223(a) prohibited any person from making any communication over the Internet "which is obscene or indecent, knowing that the recipient is under 18 years of age." Section 223(d) prohibited any person from knowingly sending over the Internet any communication that would be available to a person under the age of 18 and that depicted or described "in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[55] Both provisions were struck down as being unconstitutionally vague and overbroad.[56]

The Court began its discussion by comparing other forms of mass media that had been regulated by the Government. The petitioners relied on *Ginsberg* and *Pacifica* to support their argument that the CDA was constitutional, but the Court distinguished the forms of mass communication that were regulated in those situations.[57]

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52. Kim L. Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L. REV. 765, 778-780 (1998).

53. Sheri A. Dillon, Douglas E. Groene, & Todd Hayward, *Computer Crimes*, 35 AM. CRIM. L. REV. 503, 518 (1998).

54. Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

55. 47 U.S.C.A. §223(a), §223(d).

56. *Reno*, 117 S. Ct. at 2329.

57. *Id.* at 2341.

The statute in *Ginsberg* prohibited the selling of material to people under 17 that would be considered obscene to them even if not considered obscene as to adults. The Court saw this statute as narrowly drawn to meet the governmental interest because it did not infringe upon adults' rights, it was aimed at strictly commercial transactions, and it defined the regulated material very specifically.[58] The CDA provisions infringed upon all Internet users, regardless of age. It also regulated all types of communications on the Internet, commercial and private. The CDA also failed to specifically define its restrictions.[59] In fact, it completely failed to define "indecent," and did not require that the "patently offensive" material being regulated lack any serious literary, artistic, political, or scientific value pursuant to the *Miller*[60] obscenity standard.[61]

The Court also found significant differences between *Pacifica* and the present case. Radio, a medium that had been regulated for decades by the government, "had 'received the most limited First Amendment protection' in large part because warnings could not adequately protect the listener from unexpected program content."[62] Also of importance was that the FCC regulation was not punitive in manner, nor was it a total ban on indecency, but rather a time, place and manner restriction. The Internet had no such history of governmental monitoring or regulation.[63] The CDA placed a total ban on the communications enumerated in the Act, as well as criminal sanctions against those who violated the law.[64]

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58. *Id.*, *citing Ginsberg*, 390 U.S. at 646-647.

59. *Reno*, 117 S.Ct. at 2341.

60. Miller v. California, 413 U.S. 15, 24 (1973) (the Court provided the basic guidelines for the trier of fact to determine obscenity: (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 state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value).

61. *Reno*, 117 S.Ct. at 2341.

62. *Id.* at 2342, *citing Pacifica*, 438 U.S. at 750.

63. *Reno*, 117 S.Ct. at 2342.

64. *Id.*

The Court also pointed out that the regulations imposed upon pornographers and radio were aimed at commercial behavior and entities. No such claim could be made about the CDA. It punished the behavior of Internet pornographers and the actions of consenting adults having a private communication.

The Court emphasized the nature of the Internet when comparing it to the broadcast media being regulated in *Ginsberg* and *Pacifica*.[65] It did not possess the same invasive nature of the broadcast medium. The Court pointed out this fact by quoting the District Court: "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[66]

Turning to the issue of vagueness, the Court found that the differing definitions of what was restricted by the two provisions being contested were unconstitutionally vague.[67] Because of the lack of definition for "indecent" or "patently offensive," Internet users would be unsure of what they were and were not allowed to communicate on-line, causing an overall chilling effect on speech. Furthermore, the fact that the two sections utilized different descriptions of what was outlawed would lend to a great amount of confusion.[68] The inability to identify exactly what was inappropriate constituted a major problem when applying the CDA.[69]

The CDA was also unconstitutionally overbroad, according to the Court.[70] It stated that the "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was

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65. *Id.* at 2343.

66. *Id.* at 2343, *citing* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996).

67. *Reno,* 117 S.Ct. at 2344.

68. *Id.* at 2344 (explaining the different linguistic form used in the two different sections: Sec. 223(a) used the word indecent; Sec. 223(d) described the restricted material as that which "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs").

69. *Id.* at 2346.

70. *Id.*

enacted to serve."[71] The regulation would punish speech that may be illegal for minors to receive, but is protected if the communication is between two adults. Along the same lines, the Court pointed out that with the advent of the "chat room,"[72] it would be next to impossible for an adult to know a minor has entered the chat room.[73] Fear of this could have a chilling effect on discussion of important issues by adults. Therefore, the CDA could not pass constitutional muster.

IV. CHILD ONLINE PROTECTION ACT

Though the Supreme Court did impose a strict scrutiny standard on any proposed content regulation of the Internet, it did leave plenty of room for Congress to create a law that would be more narrowly tailored and still protect the interest of minors. This is precisely what Congress has done with the introduction of COPA.[74] Congressman Billy Tauzin of Louisiana stated during debate over the proposed bill the basic objective: to "simply make it illegal to sell pornography to minors on the World Wide Web unless and until an adult verification system is in place."[75] He added that the bill addressed all the points made by the Supreme Court in *Reno*. He added that the bill "has a narrow prohibition, tighter definition, and a realization that the applicability of the law may change as technology is involved."[76]

COPA was introduced in the House of Representatives on April 30, 1998 by Congressman Michael Oxley as House Resolution

71. *Id.*

72. A "chat room" is an online interactive discussion group on the Internet. Merriam-Webster Online Dictionary, (visited May 5, 1999) <http://www.m-w.com>.

73. *Reno*, 117 S.Ct. at 2347 (explaining that "given 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...would surely burden communication among adults").

74. H.R. 3783, 105th Cong. (1998).

75. 144 Cong. Rec. H9906-01.

76. *Id.*

3783.[77] H.R. 3783 was sent to the House Commerce Committee on that date, and was reported out on September 24, 1998.[78] The bill was passed in the House a few weeks later on October 7, and subsequently was signed into law by President Clinton.

A. Availability of Harmful Material

The Commerce Committee issued a report to the House floor in September recommending passage of COPA. It stated that in 1996, about half of the material online was "unsuitable" for children.[79] In 1998, that number had risen to almost 70 percent.[80] The report also stated that many times Internet users would stumble upon these "unsuitable" sites accidentally, especially when the sites use misleading names to take advantage of a user's innocent mistake or ignorance.[81]

Once the committee established the fact that minors could access pornographic material very easily on the Internet, it turned to showing how sexually explicit material is harmful to minors. The report stated that a minor's sexual development occurs gradually throughout childhood, and that exposure to pornography gives them the wrong impression about sexuality.[82] The committee said that pornography "teaches without supervision or guidance, inundating children's minds with graphic messages about their bodies, their own sexuality, and those of adults and children around them."[83] Testimony before the committee from Dr. Mary Anne Layden backed up the assumption that pornography is

77. 105 Bill Tracking Report H.R. 3783.

78. *Id.*

79. 144 Cong. Rec. H9902-01, H9906, *citing Half of 'Net Content Said Unsuitable for Children*, REUTERS FINANCIAL SERVICE (Jan. 10, 1996).

80. H.R. Rep. No. 105-775 at 11, *citing The Net's Dirty Little Secret: Sex Sells*, UPSIDE PUBLISHING COMPANY (April 1998).

81. H.R. Rep. No. 105-775 at 11 (the report states that minors searching for the official White House Web site, when typing "www.whitehouse.com" instead of "www.whitehouse.gov" will encounter a Web site filled with hard-core pornography).

82. *Id.*

83. *Id.*

harmful to minors. She stated that it produces "permission-giving beliefs" for sexual pathology and violence.[84]

B. New Regulatory Statute Introduced

The fact that the Internet is the "medium of choice for electronic commerce," and has "the ability to reach more Americans on more topics, including pornography, than we have seen from traditional mediums of communications in the past," gave Congress motivation to enact COPA to protect minors from accessing obscene or indecent material on the World Wide Web.[85]

The bill was referred to the House of Representatives' Committee on Commerce in order to amend Section 223 of the Communications Act of 1934 (the same section that had been amended by the CDA). The committee reported favorably on the bill, and recommended passage by the House.[86]

Section 231(a)(1) of the act prohibits the following 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 the 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."[87]

The prohibited conduct can be broken down into three basic parts: (1) The communication must be a knowing transmission to a minor (under the age of 17); (2) The transmission must be made for commercial purposes; and (3) The material must be proven harmful.

The result of any violation under COPA would be $50,000 per each violation[88]. Each day communications of the prohibited type continue would be considered a new violation, hence a new fine.[89]

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84. *Id.* at 12.
85. *Id.* at 9.
86. 105 Bill Tracking Report H.R. 3783.
87. 47 U.S.C. § 231(a)(1).
88. *Id.*
89. 47 U.S.C. § 231(a)(2).

In addition to criminal liability, the violator may be subjected to civil fines of up to $50,000 per violation as well.[90]

Congress did provide three possible affirmative defenses that could be raised by someone, in good faith, accused of making a prohibited communication. One defense is if the defendant requires use of a credit card, debit account, adult access code, or adult personal identification number in order to access the material on that particular Web site, he may be absolved from guilt.[91] Secondly, if the defendant uses a system of accepting digital certificates that verify age, he may be innocent of wrongdoing.[92] Third, if the defendant uses any other reasonable measures that are feasible under existing technology, he can escape liability.[93]

The statute defines what would be considered harmful to give commercial entities that market Web sites some guidance. The act states that harmful means:

> Any communication, picture image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual conduct, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubertal female breast; and taken as a whole lacks serious literary, artistic, political, or scientific value.[94]

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90. 47 U.S.C. § 231(a)(3).
91. 47 U.S.C. § 231(c)(1)(A).
92. 47 U.S.C. § 231(c)(1)(B).
93. 47 U.S.C. § 231(c)(1)(C).
94. H.R. 3783, 105th Cong. Sec. (3)(e)(6)(A), (B), (C).

By enacting COPA, Congress felt that it had satisfied all the criticisms that the Supreme Court had leveled at the CDA by drafting legislation that would not be overbroad or vague, and yet still be effective in preventing children from accessing inappropriate material.

V. CONGRESS ARGUES THE CONSTITUTIONALITY OF COPA

A. Congress Has a Compelling Interest in Protecting Children.

The Supreme Court stated in *New York v. Ferber* that "it is evident beyond the need for elaboration that the State's interest in safeguarding the physical and psychological well-being of a minor is compelling."[95] The Court has stated that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards.[96]

Congress recognizes that the primary responsibility in caring for a child's welfare is held by the parent, all parents deserve all the help from the Government that they can get.[97] This is especially relevant when children have plenty of opportunities to access the Internet outside of the home.[98]

B. H.R. 3783 is Narrowly Tailored to Meet the Compelling Interest.

Congress tailored this bill to limit its effects to commercial speech, absolutely avoiding the attempt of regulating private, non-commercial communications.

95. 458 U.S. 747, 757 (1982).
96. *Sable Communications*, 492 U.S. at 126.
97. H.R. Rep. No. 105-775 at 12.
98. *Id.*

COPA also avoids limiting one-on-one e-mail transmissions, real-time communications (i.e. chat rooms), telnet services, or gopher services, like "Yahoo" or "Excite!".[99]

The bill also provides a great amount of flexibility for Internet companies in the business of selling pornography. The three affirmative good faith defenses a company can raise provides ample protection from prosecution if the companies can show that they adopted reasonable measures to restrict a minor's access to material that is harmful.[100]

C. Congress Declares H.R. 3783 is Consistent with Reno v. ACLU

The House Commerce Committee stated in its report that this bill is specifically designed to address the concerns of the Supreme Court in *Reno* because this piece of legislation is not an unnecessarily broad law that will suppress more speech than it is meant to suppress.[101]

1. "Harmful to minors" is clearly defined within the statute.

The Court was extremely concerned over the vagueness of the terms "indecency" and "patently offensive" definitions in the CDA.[102] COPA modified the "patently offensive" language from the CDA and explicitly described material that is harmful to minors in this bill. It states that "material that displays an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals or female breast."[103] The new definition of what is harmful to minors

99. Services such as "Yahoo!" or "Excite" are known as search engines, which are services that can be utilized to search the World Wide Web for many types of information. *See* <http://www.yahoo.com>or <http://www.excite.com> for more information.

100. H. R. Rep. No. 105-775 at 13.

101. *Id.*

102. 47 U.S.C.A Sec. 223(a), (d).

103. H.R. Rep. No. 105-775 at 13.

also states that the material is only harmful if "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value for minors."[104]

The House Commerce Committee also cites to the fact that state display laws containing a "harmful to minors" definitions have repeatedly been upheld when challenged in federal appellate courts.[105]

2. The scope is limited to commercial transactions

The Court in *Reno* expressed its unhappiness with the fact that the CDA regulations were not limited to commercial speech, but also covered "all non-profit entities and individuals posting indecent messages or displaying them in the presence of minors."[106]

In response to this concern, COPA was careful to limit this bill to criminalizing commercial behavior only. The committee report on the bill states that it "does not prohibit non-commercial activities over the Web, or over the Internet for that matter, and thus the concerns raised by the Supreme Court are no longer applicable."[107]

Since, as the committee noted, a large amount of harmful material will be available to minors through non-commercial outlets, § 230(f)(2) of COPA anticipates the submission of proposals from the computer industry on how to limit minors' access to inappropriate materials.[108]

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104. *Id.*

105. *Id.* at 13-14 *citing* Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1249 (1997); American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990); American Booksellers Ass'n v. Com. Of Virginia, 882 F.2d 125 (4th Cir. 1989); Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

106. *Reno*, 117 S. Ct. at 2347.

107. H.R. Rep. No. 105-775 at 14.

108. *Id.*

3. Age verification systems are technologically and economically feasible.

The committee notes in its report that the Supreme Court stated in its *Reno* opinion that, "with regard to restricting access by minors by requiring use of a verified credit card or adult verification, that 'such verification is not only technologically available but is used by commercial providers of sexually explicit material.'"[109] The Court had also been concerned that non-commercial outlets would not be able to afford this type of technology, essentially creating a chilling effect on these operators' speech.[110]

The committee also recognized the fact that the Court has already upheld similar commercial restrictions in *Sable*,[111] where either payment by credit card or authorization by access or identification code was required to hear dial-a-porn messages.[112] The committee report states that the Court in *Sable* "found such commercial restrictions would be effective in excluding most juveniles" except for the most "enterprising and disobedient" minors.[113]

It is also pointed out that many commercial distributors on the Web already utilize the means proposed by this bill to limit minors' access to this material. Besides being economically wise for the providers to comply with the provisions of the bill (with the penalty being a $50,000 fine per violation), it could be profitable as well, seeing that many sites require payment of a fee through use of a credit card to enter a site.[114]

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109. *Id.*, *citing Reno,* 117 S.Ct. at 2349.
110. *Reno,* 117 S.Ct. at 2347.
111. *Sable Communications*, 492 U.S. at 115.
112. H.R. Rep. No. 105-775 at 14-15.
113. *Id.* at 15 *citing Sable Communications*, 429 U.S. at 130.
114. H.R. Rep. No. 105-775 at 15.

4. Parents maintain control and minor is defined as people under seventeen.

The committee report points out that, unlike the CDA, this bill does not infringe upon the rights of a parent to raise a child in a manner he or she sees fit. The CDA criminalized parental behavior if pornographic material was obtained for a minor by his or her parent, as well as indecent communications that a an adult and child took place in on the Internet, whether or not that adult was the child's parent. This issue is resolved by restricting the bill's reach to commercial pornography providers.[115]

5. Congress has the power to regulate the Internet.

The committee report states that Congress definitely has the power to regulate the Internet, as is evident through the laws that it has enacted during the 105th session: intellectual property rights over the Internet, whether the Internet should be taxed, and how communications over the Internet can be kept secure.[116] The report goes on to state that Congress' authority to regulate the Internet is derived directly from Article I, Section 8, Clause 3 of the United States Constitution.[117] The committee says, "Regardless of whether Congress exercises its authority under this section, the power of Congress to regulate in this area remains constant."[118]

6. Legislative hearings highlight the problem.

It was reported that both the House and the Senate had held extensive hearings in order to find ways of reducing a minor's

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115. *Id.*

116. *Id.* at 16.

117. *Id.*

118. *Id.* (said in response to claims made by the Court in *Reno* that the Internet cannot be so regulated by Congress because of the lack of history of regulation).

access to harmful materials such as these.[119] This was in response to criticism of the Court in *Reno* that no legislative hearings were held to determine if the CDA provisions were the appropriate measures to take at the time.[120]

Though Congress felt COPA would survive a court's analysis, another battle had begun. History repeated itself last fall when the ACLU once again challenged the constitutionality of the new law in federal courts. A restraining ordered was issued until a full trial could be held to determine the law's merits.

VI. CONSTITUTIONALITY OF COPA QUESTIONED

A. COPA Struck Down In Federal Court

It was déjà vu for the Government. Three years earlier, in the very same courtroom, the CDA had been struck down by a federal judge in the United States District Court for the Eastern District of Pennsylvania. [121] On February 1, 1999, that same judge blocked the implementation of COPA, stating that the impact of the new law would be to chill speech online.[122] Judge Lowell Reed Jr., of the United States District Court for the Eastern District of Pennsylvania, handed down his ruling after first issuing a temporary restraining order last fall against enforcement of the law.

The ACLU brought suit, joined by an eclectic group of media and Internet enterprises, ranging from The New York Times and MSNBC to Condomania, an online condom retailer. [123]

In ruling in favor of the petitioners, Judge Reed, stating his views on threatened speech, sets the tone for the opinion: "If speech, even unconventional speech that some find lacking in

119. H.R. Rep. No. 105-775 at 16.

120. *Id.*

121. Pamela Mandels, *Internet Smut Law Enters Court, With a Snag*, N.Y. TIMES, Jan. 20, 1999.

122. Pamela Mandels, *Setback for a Law Shielding Minors from Adult Web Sites*, N.Y. TIMES, Feb. 2, 1999.

123. Mandels, *supra* note 121.

substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered."[124]

B. The Arguments For and Against COPA

The petitioners attacked COPA on several grounds. They began by stating that the new law is unconstitutional on its face and as applied to them because regulation of speech that is "harmful to minors" places a burden on a large amount of speech that is considered protected as to adults.[125] They also allege that the fact the statute only provides affirmative defenses to this direct ban on protected speech adds to the burden.[126] By implementing the procedures suggested by the act as affirmative defenses, the government is imposing both an "economic and technological burden" upon Internet operators who are unsure if the material they transmit is even covered by the act.[127] By imposing these technological procedures, such as registering with the site to prove age, the speaker loses users by forcing them to disclose their identity. Both sides subsequently suffer.[128]

The Government argued that COPA survives strict scrutiny because it is narrowly tailored to meet a compelling government interest, that interest being protecting minors from "harmful materials."[129] The overbreadth argument is addressed by the Government, which that the "harmful to minors" definition only applies to commercial pornographers who distribute such material "as a regular course" of their business.[130] The Government claims that none of the material on any of the petitioners' Web sites is included within the definition.

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124. American Civil Liberties Union v. Reno, 31 F. Supp. 473, 476 (E.D. Pa. 1999).

125. *Id.* at 478.

126. *Id.* at 479.

127. *Id.*

128. *Id.*

129. *Reno,* 31 F. Supp. at 479.

130. *Id.*

Lawyers for the ACLU argued that the new law is much broader than its supporters will admit.[131] Ann Beeson, a lawyer for the ACLU, proposed that many news sites and other sites that deal with controversial topics like homosexuality and sexual education will be too costly for organizations that do not have the money necessary to implement safeguards. Being forced to implement digital barriers to deter minors from visiting the sites, the petitioners argued, will deter adults as well. This will prevent these sites from communicating freely, and also from generating revenue from advertising, among other sources.[132] Beeson said that the law "does not apply simply to adult-oriented businesses on the Internet, but has a much broader definition that could apply to any commercial Web site that distributes material that could be deemed harmful to minors."[133]

The Justice Department, defending COPA, stated that the ACLU and its coalition of plaintiffs were "describing a world that is really pure fantasy, a world of those who object to any regulation of the Internet whatsoever."[134]

C. District Court Analysis

Judge Reed agreed with the petitioners that the statute's coverage, by use of the term "harmful to minors," was vague and overbroad. In response to the Government's argument, he stated that "there is nothing in the text of the COPA, however, that limits its applicability to so-called commercial pornographers only; indeed, the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that includes any material that is harmful to minors,' and defines a speaker that is engaged in the business as one who makes a communication 'that includes any material that is harmful to minors.'" Therefore, the statute would cover any speaker who has a Web site that only has some material that would be considered

131. Jeri Clausing, *U.S. Argues Online Smut Law*, N.Y. TIMES, Jan. 27, 1999.
132. *Id.*
133. *Id.*
134. *Id.*

harmful to minors.[135] Among the petitioners are speakers who offer Web sites that transmit information, including visuals, concerning gynecology, sexual health, visual art and poetry, resources for gays and lesbians, and online magazines. Some of this material would undoubtedly be covered by the statute, while obviously not being in the business of commercial pornography.[136]

Judge Reed utilized strict scrutiny in analyzing COPA. Looking to *Ginsberg* and *Sable Communications*, he stated that the Government clearly has a compelling interest in protecting minors, "including shielding them from materials that are not obscene by adult standards."[137] However, the means used to achieve this interest were not narrowly tailored as to be constitutional. The Government failed to introduce any evidence to the Court that minors would not be able to circumvent any sort of identification technologies that Web sites would implement.[138] Judge Reed cited a Third Circuit opinion, *Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*,[139] a case concerning dial-a-porn services requiring access codes. In rejecting the scheme, the Third Circuit stated that "preventing 'a few of the most enterprising and disobedient young people' from obtaining access to these messages did not justify a statute that had the 'invalid effect of limiting the content of adult telephone conversations to that which is suitable for children.'"[140] In essence, this court was not ready to enforce a law abridging adults' constitutional rights when minors may be capable of circumventing the technology. Judge Reed found that blocking or filtering technology, suggested by the petitioners, would be at least as protective without being as restrictive.[141]

In conclusion, Judge Reed that this was a difficult decision for him to make, especially since the best interests of minors were involved. However, the "hard fact is that sometimes we must make decisions that we do not like. We make them because they

135. *Reno*, 31 F. Supp. at 480.
136. *Id.* at 484.
137. *Id.* at 495.
138. *Id.* at 496.
139. 896 F.2d 780 (3d Cir. 1990).
140. *Reno*, 31 F. Supp. at 496.
141. *Id.* at 497.

are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases."[142]

Judge Reed stated that he personally regretted delaying the protection of children from inappropriate materials.[143] However, this law was so sweeping in nature that its impingement upon First Amendment principles would do more harm than good to children in the long run.[144] The Government has the option of appealing the injunction to the Third Circuit Court of Appeals.[145]

D. Does COPA Have a Future?

Once again, it seems that vague definitions have doomed Congress' latest attempt to protect minors from material on the Internet. The District Court discussed in depth why the "harmful to minors" definition would cause a problem. However, the court did not reach the issue of how that term would be defined. It merely stated that certain Web sites that provided information about sexual practices, among other things, would most likely fall under the coverage of the statute, even though they are not commercial pornographers.

As mentioned previously, COPA adopts the basic obscenity test from *Miller v. California* to determine what would be "harmful" to minors. Within this definition is the phrase "applying contemporary community standards," language lifted right out of the *Miller* decision.[146] Where Congress thinks it is being extremely careful by abiding by Supreme Court precedent, it is in fact making a large error.

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142. *Id.* at 498.
143. Mandels, *supra* note 122.
144. *Id.*
145. *Id.*
146. *Reno,* 117 S.Ct. at 2329.

The nature of the Internet is obvious in that it is a worldwide network, enabling people to communicate with each other, no matter their location. It is unclear how community standards could be employed to block certain material on a Web site that originates from an entirely different location. What may be considered harmful to minors in Salt Lake City, Utah may be perfectly acceptable to people in New York City. Yet it would be impossible for a Web site to transmit certain material to Internet browsers in New York than it was transmitting to those in Salt Lake City. This seems to be another stumbling block the statute will face if the Government chooses to appeal the District Court judgment.

CONCLUSION

COPA seems to be headed down the exact same path that the CDA took when the Supreme Court struck it down. The courts are obviously very cautious about regulating the Internet, a medium that is still very new and mysterious to many people. As Judge Reed recognized in his opinion, "unlike the newspaper, broadcast station, or cable system, Internet technology gives a speaker a potential worldwide audience."[147] Until Congress can harness the power of this vast medium without trampling on the Constitution, the Internet will go unregulated.

Peter Jacobson

147. *Reno*, 31 F. Supp. at 484.