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CONTENT-BASED REGULATION OF ELECTRONIC MEDIA: INDECENT SPEECH ON THE INTERNET

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Indecency in the media? Say it isn't so! Scantily-clad women in lingerie on prime-time television? The shock of it has caused a representative of the five-member panel of the Federal Communications Commission ("FCC") to urge the agency to revise its definition of indecency. All this as a result of the Victoria's Secret lingerie fashion show that aired on prime-time television November 20, 2002.[1]

The difficulty with indecency is that while adults have a First Amendment right prohibiting laws from abridging their freedom of speech, the United States Supreme Court has acknowledged the government has a compelling interest in trying to protect minors from harmful speech.[2] As the Supreme Court noted:

> as a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'. . .[h]owever, this principle . . . is not absolute. Obscene speech, for example, has long been held to fall outside the purview of the First Amendment.[3]

While Victoria's Secret is causing "old" media, like television, to continue to struggle with defining indecency, the Internet as a "new" media is having even more difficulty. The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems" and that "each method [of expression] tends to present its own

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1. Supermodels Are Lonelier Than You Think! (SALTYT), *No More VS Show? FCC's Cops Seeks Indecency Standard Overhaul* <http://www.saltyt.antville.org/stories/213754> (assessed Nov. 22, 2002).

2. *See e.g. Ginsberg v. N.Y.*, 390 U.S. 629, 641 (1968); *Sable Comm. v. FCC*, 492 U.S. 115, 126 (1989).

3. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

peculiar problems."[4]

Congress has been unable to craft federal legislation protecting children on the Internet that passes muster under the U.S. Constitution. This problem is largely because the government, Congress and the courts are unable to determine which type of "traditional" media the Internet is most similar to and thus which laws should apply. The Internet combines broadcasting, telephone/cable, and data into one medium forcing reconsideration of the distinctions drawn between these media.

With more than 140 million Americans using the Internet and ninety percent of children between the ages of five and seventeen using computers,[5] this is clearly an issue the government needs to resolve. Part I of this paper examines the federal[6] treatment of indecency in "traditional" media—radio, broadcast television, and cable. Part II examines the numerous failed attempts to address indecency on the Internet. Part III analyzes the similarities and differences among the types of media, the role of technology, and the newest attempt to protect children from indecency on the Internet. The Conclusion suggests an approach which would likely pass constitutional muster.

I. TREATMENT OF INDECENCY IN "TRADITIONAL" MEDIA

The FCC "was established by the *Communications Act of 1934* and is charged with regulating interstate and international communications by radio, television, wire, satellite, and cable."[7] As the Supreme Court has noted, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[8] Indecent broadcasting receives special regulatory treatment because of the ease with

4. *Burstyn v. Wilson*, 343 U.S. 495, 502-03 (1952) (regarding motion pictures).

5. NeuStar, Inc., *Proposal for Guidelines and Requirements for the kids.us Second Level Domain* 2 <http://www.neustar.us/kids/kidsus_content_policy.pdf> (assessed Aug. 2002) (citing Dept. of Com., Econ. & Statistics Administration, Natl. Telecomm. & Info. Administration, *A Nation Online: How Americans are Expanding their Use of the Internet* (Feb. 2002)); *see also* law.com, *E-Legal: kids.us—A Safe Place on the Internet for Children* <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1032128596357&live=true&cst=1&pc=0&pa=0> (assessed Sept. 24, 2002).

6. *See e.g.* CNET, *Court Weighs Virginia Anti-Porn Law* <http://www.news.com.com/2102-1023-963796.html> (assessed Oct. 29, 2002) (discussing Virginia's amendment to its criminal laws making it illegal to display any "file or message" that is "harmful to juveniles" on the Internet and noting that Virginia joins New York and New Mexico in enacting similar laws). States are also making attempts to protect children on the Internet, an issue not discussed here and one that would surely be preempted by federal statute.

7. FCC, *About the FCC* ¶ 1 <http://www.fcc.gov/aboutus.html> (accessed Dec. 14, 2002).

8. *FCC v. Pacifica*, 438 U.S. 726, 748 (1978).

which children can access broadcast material as well as the concerns recognized by *Ginsberg v. New York*.[9]

A. Radio and Broadcast Television

The FCC can impose fines or prison on licensees who "utter[s] any obscene, indecent, or profane language by means of radio communications."[10] An obscenity test was set by the U.S. Supreme Court in *Miller v. California* which holds today:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[11]

The FCC applied the *Miller* standard to the radio broadcast of George Carlin's *Filthy Words* and characterized it as "patently offensive"[12] and thus indecent when broadcasted on radio or television (but not obscene).[13]

> [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards[14] for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[15]

The FCC also noted that consideration should be given to whether the words are broadcast at a time when children are likely to be in the audience.[16]

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9. *Id.* at 749-50; *see also Ginsberg*, 390 U.S. at 646 (holding that it was appropriate to protect minors from material which was "utterly without redeeming social importance to minors" and thus harmful when it upheld a New York statute making it a criminal offense to knowingly sell to a minor under 17 magazines which contained harmful material).

10. 18 U.S.C.§ 1464 (2000).

11. 413 U.S. 15, 24 (1973).

12. *See In re Infinity Broadcasting Corp.*, 3 FCC Rcd. 930, 931-32 (1987) (stating only when material is presented in a manner which is patently offensive will it be classified as incedent; the phrase "patently offensive" is also used in the obscenity context; it is a phrase that must be construed with reference to specific facts and subject matter alone does not render material indecent).

13. *In re Pacifica Found. Station*, 56 FCC 2d 94, 97 (1975), *aff'd, FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978).

14. *In re Infinity Broadcasting Corp.*, 3 FCC Rcd. at 933 (stating that "contemporary community standards" are the views of the "average person in the community;" "in a Commission proceeding for indecency, in which the Commission applies a concept of 'contemporary community standards for the broadcast medium,' indecency will be judged by the standard of an average broadcast viewer or listener").

15. *In re Pacifica Found. Station,* 56 FCC 2d at 98.

16. *Id.*

It was the challenge of this FCC ruling which became *FCC v. Pacifica,*[17] in which the U.S. Supreme Court held that a radio station's afternoon broadcast of George Carlin's *Filthy Words*, which repeatedly listed colloquial uses of "words you couldn't say on the public airwaves," was indecent.[18] The Supreme Court stated that one reason broadcast media receives the most limited First Amendment protection is because broadcast media has a "uniquely pervasive presence" that allows it to confront people both in public and in the privacy of their own home which prior warnings are ineffective to completely protect the listener or viewer from unexpected program content.[19] Another reason is because broadcasting is "uniquely accessible to children, even those too young to read."[20]

As Justice Powell noted in his concurring opinion in *Pacifica*:

> [t]he difficulty is that such a physical separation of the audience [a door which can keep children out of bookstores or movie theatres] cannot be accomplished in the broadcast media. This. . .is one of the distinctions between the broadcast and other media . . . [that justifies] a different treatment of the broadcast media for First Amendment purposes.[21]

Nearly ten years later, the FCC addressed indecency again. In the Howard Stern case, the FCC issued a warning against a radio station which broadcast sexually-oriented language including double entendre and sexual innuendo.[22] The FCC found the speech indecent because it included "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs" and were broadcast at times of the day when there was a reasonable risk that children could be in the audience.[23]

The FCC's definition of "indecency" adopted in *Pacifica* was applied to television and upheld in *Action for the Children's Television v. FCC.*[24] It took the FCC several tries[25] before it could settle on times of the day

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

18. *Id.* at 730. "The original seven words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* at 751.

19. *Pacifica,* 438 U.S. at 748.

20. *Id.* at 750.

21. *Id.* at 758.

22. *In re Infinity Broadcasting Corp.*, 2 FCC Rcd. 2705, 2706 (Apr. 29, 1987).

23. *Id.*

24. *Action for the Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) [hereinafter *ACT I*].

25. *Id.; see also In re Infinity Broadcasting Corp*, 3 FCC Rcd. 930 (consolidating 3 FCC rulings and holding that midnight to 6 am was an appropriate standard for indecent broadcasts. Holding also that the generic definition of indecency applied on a case-by-case basis was appropriate, but that a ban from 6 am to 10 pm would not ensure children are not likely to be viewing/listening so the ban should be 6 am to midnight); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) [hereinafter *ACT II*] (holding that a 24

when children were not likely to be in the broadcast audience, and thus determining when indecent speech could be broadcast. The final determination was between the hours of 10:00 p.m. to 6:00 a.m.[26]

> Broadcasting is a unique medium; it is not possible simply to segregate material inappropriate to children, as one may do, e.g., in an adults-only section of a bookstore. Therefore, channeling must be especially sensitive to the first amendment interests of broadcasters, adults, and parents.[27]

B. Cable Television

Technology causes the main distinction between broadcast and cable television, as noted by the U.S. Supreme Court in *Turner v. FCC:*

> Broadcast and cable television are distinguished by the different technologies through which they reach viewers. Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range. Cable systems, by contrast, rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers.[28]

It is this "unique physical limitations of the broadcast medium" [the limited number of electromagnetic signals available, called spectrum scarcity] which is "[t]he justification for our distinct approach to broadcast regulation."[29]

> Access further distinguishes cable from broadcast television.
>
> Cable television's peculiar advantages derive directly from this matter of choice [where t]he consumer is offered potentially limitless access to programming services and content, whether entertaining, educational, religious, or otherwise entertaining [and p]eople deliberately subscribe to cable TV services in order to benefit from this expanded opportunity to choose."[30] Cable "is not an uninvited intruder. . .[because it] is a subscriber medium," has premium channels available, and the availa-

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hour ban on indecent broadcasts is unconstitutional); *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993) (holding a ban on indecent broadcasts from 6 am to midnight violates the First Amendment), *vacated*, 15 F.3d 186 (1994), *remanded*, 58 F.3d 654 (1995), *cert. denied, sub nom. Pacifica Found. v. FCC*, 516 U.S. 1043 (1996); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (6am to midnight ban restrictive so remanded to make 10am to 6pm), *cert. denied, sub nom. Pacifica Found. v. FCC*, 516 U.S. 1043 (1996).

26. *Action for Children's Television*, 58 F.3d at 670.

27. *Action for Children's Television ("ACT I")*, 852 F.2d at 1340, n.12.

28. *Turner v. FCC*, 512 U.S. 622, 627-28 (1994).

29. *Id.* at 637.

30. *HBO v. Wilkinson*, 531 F. Supp. 987, 1001-02 (D.Ct. Utah 1982).

bility of a "lock box."[31]

The courts have required application of the *Miller* obscenity standards to cable television[32] but originally refused to apply *Pacifica* to cable because cable is not pervasive and as accessible to children.[33] One court[34] provided a chart of the differences between cable and broadcast:

Cable	Broadcast
User needs to pay fee to subscribe and holds power to cancel subscription	User need not subscribe
Limited advertising	Extensive advertising
Transmittal through wires	Transmittal through public airways
Wires are privately owned	Airways are not privately owned but are publicly controlled
User receives signal on private cable	User appropriates signal from the public airwaves
User receives preview of coming attractions	User receives daily and weekly listing in public press or commercial guides
Distributor or distributee may add services and expanded spectrum of signals or channels and choices	Neither distributor not distributee may add services or signals or choices

Pacifica was analogized too, however, in *Denver Area Educational Telecommunications Consortium v. FCC*,[35] where the U.S. Supreme Court reviewed First Amendment challenges to statutes designed to regulate broadcasting of "patently offensive" sex-related material on cable television.[36] Under this statute, cable operators were *permitted* to prohibit broadcasting programs it reasonably believed described or depicted sexual or excretory activities or organs in a patently offensive manner.

31. *Community Television of Utah v. Wilkinson*, 611 F. Supp. 1099, 1113 (D. Utah 1985), *aff'd by Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *see also Cruz v. Ferre*, 755 F.2d 1415 (10th Cir. 1995) (holding that a cable television does not intrude into the home).

32. *See HBO*, 531 F. Supp. at 993 (striking down a state law which did not apply the "substantive requirements" of *Miller*); *Cruz*, 755 F.2d at 1421-22 (stricking down a Miami cable television ordinance as overbroad because it went beyond *Miller*'s obscenity provision in having "no regard to the time of day or other variables such as context of program or composition of viewing audience"); *Jones*, 800 F.2d at 991 (affirming the decision of the District Court that the state cable indecency law was unconstitutional because it did not adhere to the *Miller* test).

33. *Cruz*, 755 F.2d at 1420; *Community Television of Utah v. Roy City*, 555 F. Supp. 1164 (D. Utah 1983).

34. *Roy City*, 555 F. Supp. at 1167.

35. *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996).

36. *Cable Television Consumer Protection and Competition Act of 1992*, 106 Stat. 1486, §§ 10(a), 10(b), 10(c), 47 U.S.C. §§ 532(h), 532(j), and note following § 531.

The court held that the First Amendment was not violated by permitting the operator to choose whether to broadcast patently offensive programs on a leased channel, nor by segregating and blocking such programming on a leased channel. The court analogized *Pacifica* because "cable television broadcasting is. . .'accessible to children' as over-the-air broadcasting. . .[and also has] 'established a uniquely pervasive presence' in the lives of all Americans."[37]

However, also under this statute cable operators are *required* to segregate certain patently offensive programming by placing it on a single channel and blocking such channel from viewer access unless the viewer requests access in writing in advance. The court held the First Amendment was in fact violated by requiring viewers to request access in advance for public access channels because this was not narrowly tailored to achieve the compelling interest of protecting children from exposure to patently offensive material while not interfering with the First Amendment rights of adults to view such programming.[38] An example of a "significantly less restrictive" means to protect children included broadcasting them over public access channels (unleased cable channels) which cable operators could block with a V-chip or lock box if requested by the subscriber.

The courts have refused to extend *Pacifica* to any medium except broadcast. The Supreme Court, in *Sable Communications v. FCC*,[39] held that a ban on indecent telephone messages violated the First Amendment because the ban denied access by adults and distinguished *Pacifica*:

> In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication . . . Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.[40]

Further, in *Bolger v. Youngs Drug Products*,[41] the Supreme Court held that a statute prohibiting the mailing of unsolicited advertisements

37. *Denver Area*, 518 U.S. at 744-45.

38. *Id.* at 765. Important to the understanding of the court's holding in *Denver Area* was distinguishing between leased channels and public access channels. *Id.* at 732-34. Leased channels require the cable operator, via federal law, to reserve these channels for commercial lease by unaffiliated third parties. *Id.* at 734. In contrast, public access channels channels which local governments require cable operators to set aside for public, educational or governmental purposes in exchange for permission to install cables under city streets and to use public rights-of-way. *Id.*

39. *Sable Comm.*, 492 U.S. 115 (1989).

40. *Id.* at 127-28.

41. 463 U.S. 60 (1983).

for contraceptives violated the First Amendment and rejected the application of *Pacifica* because:

> [t]he receipt of mail is far less intrusive and uncontrollable [than broadcasting] . . . Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.[42]

II. FAILED EXAMPLES TO ADDRESS INDECENCY ON THE INTERNET

There have been numerous legislative proposals to protect children from indecency on the Internet, and three main laws, but none have yet been successful. Discussed below are the *Communications Decency Act*, the *Child Online Protection Act*, and the *Children's Internet Protection Act*, along with the recently approved *Dot Kids Implementation and Efficiency Act of 2002.*

A. *THE COMMUNICATIONS DECENCY ACT*

Sections of the *Communications Decency Act* ("CDA")[43] attempted to protect children on the Internet. To this end, it prohibited the transmission of "obscene or indecent" messages to any recipient under eighteen years old,[44] or knowingly sending or displaying messages that are "patently offensive" to a person under eighteen years old.[45] The district court granted a temporary restraining order against the enforcement of the "indecent" provision on the basis that the term was too vague, and then a preliminary injunction against both provisions of the CDA. Under the CDA's special review provisions, the government appealed directly to the U.S. Supreme Court.

In *Reno v. ACLU*, the Supreme Court dismissed the government's argument that the CDA was constitutionally based on *Ginsberg* primarily.[46] *Reno* upheld the constitutionality of prohibiting the sale of material considered obscene to minors under seventeen years old by noting that the statute upheld in *Ginsberg* was narrower than the CDA in four important respects.[47] First, the New York statute upheld by *Ginsberg* permitted parents to purchase the obscene material for their children whereas under the CDA the parents' consent to or participation in the

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42. *Id.* at 74.

43. Pub. L. No. 104-104, Title V, 110 Stat. 56; 47 U.S.C. § 223(a), (d) (2000).

44. *Id.* § 223(a).

45. *Id.* § 223(d).

46. *Reno v. ACLU*, 521 U.S. 844, 865 (2000); *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

47. *Reno*, 521 U.S. at 865.

communication would not avoid application of the statute.[48] Second, the *Ginsberg* statute only applied to commercial transactions whereas the CDA has no such limitation.[49] Third, the *Ginsberg* statute required the material which was harmful to minors to be "utterly without redeeming social importance to minors"[50] whereas the CDA does not define "indecent" and does not include a requirement that the "patently offensive" material lack social importance to minors ("serious literary, artistic, political, or scientific value"). Fourth, the *Ginsberg* statute defined a minor as a person under seventeen years old whereas the CDA applied to persons under eighteen years old.[51]

Further, *Reno* held that the CDA's vagueness presented a greater threat of censoring speech than did *Miller* and rejected the government's argument that the CDA was no more vague than the obscenity standard set in *Miller*.[52] The first affirmative defense protected those who acted in good faith to restrict minors from accessing obscene, indecent, and patently offensive material over the Internet, and the second affirmative defense protected those who restricted minors from accessing such material by requiring a verified credit or debit card, or an adult access code. The *Reno* court found that the First Amendment problems could not be overcome: existing technology in the form of filtering software was not effective enough to prevent minors without also denying access to adults, the undefined terms "indecent" and "patently offensive" were vague, and the affirmative defenses were not sufficiently narrow.

Therefore, the Supreme Court held the CDA suppressed a large amount of speech that adults had a right to and was an unacceptable burden on adult speech which was insufficiently narrowly tailored, in that the government had not proven that less restrictive alternatives would be at least as effective in achieving the legitimate purpose the statue was enacted to serve.[53] The Court also held that application of a "community standards" criteria to the Internet requires all communication to be "judged by the standards of the community most likely to be offended by the message."[54] This was too great a constitutional burden.

B. *The Child Online Protection Act*

The *Child Online Protection Act* ("COPA")[55] sought to succeed where the CDA failed. To this end, COPA applied only to material displayed on

48. *Id.*
49. *Id.*
50. *Ginsberg*, 390 U.S. at 646.
51. *Reno*, 521 U.S. at 865.
52. *Reno*, 521 U.S. at 872-75.
53. *Id.* at 874-79.
54. *Id.* at 878-79.
55. 47 U.S.C. § 231.

the World Wide Web (and not the entire Internet as the CDA did), covered only communications made "for commercial purposes" (whereas the CDA covered all communications), defined minors as those under seventeen years old (and not eighteen years old as the CDA did), and restricted only "material that is harmful to minors"[56] (based on the *Miller* obscenity test and a narrower category than CDA's "indecent" or "patently offensive" communications). COPA's affirmative defenses were largely the same as those in the CDA, with the more narrowly defined terms.

In *Reno II*, the district court granted a preliminary injunction on the basis that COPA was a content-based restriction on speech which would not withstand a strict scrutiny First Amendment analysis at trial.[57] The district court held that COPA was not the least restrictive means of preventing minors from accessing material which was harmful to them due to technological limitations in limiting access of the material by minors.

In *Reno III*, the Third Circuit affirmed, and based its decision on the holding that COPA was overbroad in its use of "contemporary community standards" to identify material that was harmful to minors because the Internet knows no geographic bounds.[58]

In *Ashcroft v. ACLU*,[59] the Supreme Court limited its decision to the narrow question addressed by the Third Circuit—whether use of "community standards" to identify "material that is harmful to minors" violated the First Amendment — and remanded the case after holding that COPA was not facially unconstitutional.[60] Relying on two of its earlier decisions which held in favor of a community standard rather than a national standard,[61] the Supreme Court held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment because it is

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56. 47 U.S.C. § 231(e)(6). Material harmful to minors is defined as:

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

Id.

57. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) [hereinafter *Reno II*]; *ACLU v. Reno*, 1998 U.S. Dist. LEXIS 18546 (E.D. Pa. Nov. 20, 1998) (granting TRO).

58. *ACLU v. Reno*, 217 F.3d 162, 166 (3d Cir. 2000) [hereinafter *Reno III*], *cert. granted*, 2001 U.S. App. LEXIS 3820.

59. 535 U.S. 564 (2002).

60. *Id* at 566.

61. *See Hamling v. U.S.*, 418 U.S. 87, 88 (1974); *Sable Comm.*, 492 U.S. at 116.

the publisher's responsibility to abide by the community standards of the community it reaches into. In reaching this decision, the majority for the Supreme Court dismissed the Court of Appeals' conclusion that these two cases were distinguishable from the present case on the basis that the defendants had the ability to geographically control the distribution of controversial material whereas Web publishers have no such control, and the arguments of Justices Kennedy and Stevens that the Internet's unique characteristics justify adopting a different approach.[62] The Supreme Court further held that COPA was not overbroad because respondents had not proven that such overbreath was substantial enough to violate the First Amendment.[63]

The remand decision by the Third Circuit again struck down COPA.[64] The court held that COPA did not withstand strict scrutiny because while it served the compelling interest of protecting minors, it was neither narrowly tailored to achieve this interest nor was COPA the least restrictive means of advancing this interest.

COPA was not narrowly tailored because the definition of "material harmful to minors" required consideration of the material "as a whole" in terms of whether it appealed to the "prurient interests" of minors, and whether such material lacked serious literary or other value for minors. The court found this even more overlybroad than in *Reno III* for two reasons.

First, COPA was unclear as to what should be judged "as a whole." The court interpreted its meaning based on Congressional intent and held its intent to be that each individual communication had to be deemed "a whole"—a judgment made more difficult on the Internet where the whole could be a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites.[65] Thus, one sexual image may be harmful to minors although not harmful when considered in the context of an entire Renaissance artwork collection.

Second, the definition of "minors" included all persons under seventeen. This was found to be too broad age range because a five year old's prurient interest is vastly different than that of a sixteen year old.

COPA was also not narrowly tailored in its affirmative defenses. The court held that age verification measures such as credit cards or digital certificates could deter adult users from assessing material that was harmful to minors, and Web site owners and content providers might self-censor due to economic disincentives. Further, chat rooms and dis-

62. *Ashcroft*, 535 U.S. at 581-83.

63. *Id.* at 584-86.

64. *ACLU v. Ashcroft*, 2003 U.S. App. LEXIS 4152 (3d Cir. 2003) [hereinafter *Reno IV*].

65. *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996).

cussion groups would need to screen all users or edit all content to ensure compliance with COPA.

In addition, COPA was not the least restrictive means because blocking and filtering technology, despite its voluntary opt-in nature and its potential to be over- or under-inclusive, these were less restrictive means than COPA.

Finally, COPA was substantially overbroad because "it places significant burdens on web publishers' communication of speech that is constitutionally protected as to adults"[66] Moreover, while "community standards" alone could not render COPA substantially overbroad, its application only exacerbated the constitutional problems raised by COPA.

While recognizing it was not their place to tell Congress what to do, the Third Circuit hinted strongly as to what would pass constitutional muster in its eyes of the Third Circuit. First, the definitions of "commercial purposes," "minors," "harmful to minors," and the scope of "contemporary community standards" would need to be redefined in light of its holding. Second, a new set of affirmative defenses would need to be designed. In short, the Third Circuit wants Congress to go back and start again.

C. *THE CHILDREN'S INTERNET PROTECTION ACT*

The *Children's Internet Protection Act* ("CIPA")[67] was Congress' next attempt at crafting legislation to protect children using the Internet which would pass constitutional muster. CIPA required the use of Internet software filters at public library Internet terminals to block access to content — visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors — as a requirement to the library receiving critical federal grants and discounts.

A group of libraries, library patrons, and Web site publishers challenged CIPA in *American Library Association v. United States*.[68] They claimed CIPA was facially unconstitutional because it induced public libraries to violate the First Amendment rights of its patrons and requires libraries to give up their First Amendment rights as a condition to receiving the federal funds. Due to this federal aid, consisting of about $217.5 million in discounted Internet services and direct grants in Fiscal 2002, nearly ninety-five percent of all U.S. libraries now offer Internet access.[69] And of the approximately 143 million Americans who use the Internet regularly, about ten percent of those users rely on access at a

66. *Am. Lib. Assn.*, 201 F. Supp. 2d at 490-91.

67. Pub. L. No. 106-554 (Dec. 21, 2000).

68. 201 F. Supp. 2d 401 (E.D. Pa. 2002).

69. Charles Lane, *Justices to Hear Web Porn Case* A08 <http://www.washingtonpost.com/ac2/wp-dyn/A45772-2002Nov12?language=printer> (assessed Nov. 13, 2002); Michael

public library.[70]

The district court held that Congress exceeded its exercise of the spending powers because the conditions of CIPA induced public libraries to violate the First Amendment. The court's decision was based on its conclusion that filtering software was technologically incapable of effectively blocking Web sites without overblocking or underblocking a substantial[71] amount of the materials, resulting in a suppression of constitutionally protected speech. The standard of constitutional review applied by the court was strict scrutiny, rather than the lower standard of rational basis review urged by the government, because "where a public library opens a forum to an unlimited number of speakers around the world to speak on an unlimited number of topics, strict scrutiny applies to the library's selective exclusions of particular speech whose content the library disfavors."[72]

American Library held that the government has a compelling interest in preventing the distribution of obscenity, child pornography, or material harmful to minors but that Internet software filters were a restriction on speech that did not survive strict scrutiny.[73] CIPA and the use of software filters were held not to be narrowly tailored to further the government's legitimate compelling interest in preventing the dissemination of visual depictions that are obscene, child pornography, or harmful to minors due to substantial over- and under-blocking of the filters.[74]

Finally, *American Library* held that the constitutional defects in CIPA were not cured by CIPA's disabling provisions requiring library patrons to ask that a Web site to be unblocked because patrons would both be deterred by their embarrassment in asking and their desire to remain private or anonymous.[75] The court held that the government did not prove the ineffectiveness of less restrictive alternatives such as: enforcement by libraries of Internet use policies prohibiting the access of illegal speech with resulting penalties for violators; requiring parental consent to or presence during unfiltered access; restriction of minors' unfiltered access to terminals within the view of library staff; and optional filtering, privacy screens, recessed monitors, and placement of unfiltered terminals outside of view.[76]

Janofsky, *What Would Dewey Do? Libraries Grapple with Internet*, NY Times A13 (Dec. 2, 2002).

70. Lane, *supra* n. 69.

71. *Am. Lib. Assn.*, 201 F. Supp. 2d at 442. Minimum estimates of overblocking varied among different software packages, and ranged from six to fifteen percent. *Id.*

72. *Id.* at 466.

73. *Id.* at 448-50.

74. *Id.* at 490-91.

75. *Id.*

76. *Id.* at 410.

The Bush administration used the fast-track appeals process included in the Act to request certiorari from the United States Supreme Court, which was granted on November 12, 2002.[77] Oral arguments were heard on March 5, 2003[78] and a decision is expected by July 2003.[79]

III. THE SAME OR DIFFERENT?

As noted by the Supreme Court, these series of First Amendment cases attempting to protect children from harm on the Internet while not suppressing the free speech rights of adults "[present] a conflict between one of society's most cherished rights — freedom of expression — and one of the government's most profound obligations"[80] — protecting children. The Internet as a new medium knowing no geographic boundaries has exacerbated this problem because it is difficult to limit speech on it.

Which form of "traditional" media is the Internet most like? Among its unique characteristics that distinguish it from traditional media are its ability to facilitate the interaction of users with other users, interaction with various content, and its non-invasive nature which users must proactively go to.[81] At first blush it appears cable television is most like the Internet because it is a subscription service transmitted by wires which users must proactively bring into their homes.[82] But this argument fails because cable television does not facilitate the interaction with other users and with various content, nor is it as accessible in schools or libraries.

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77. *U.S. v. Am. Lib. Assn.*, 123 S.Ct. 551 (2002).

78. Linda Greenhouse, *Justices to Review Internet Pornography Filters*, NY Times A24 (Nov. 13, 2002); *U.S. v. Am. Lib. Assn.*, 2003 U.S. TRANS LEXIS 20 (Mar. 5, 2003).

79. Lane, *supra* n. 69; *see also* Katie Dean, *Hey Filters, Leave Kids Alone* ¶ 3 <http://www.wired.com/news/school/0,1383,55243,00.html?tw=wn_ascii> (assessed Sept. 19, 2002) (noting that a press conference held in San Francisco by protesters demanding repeal of CIPA "drew only a handful of media and a homeless man eating his lunch").

80. *ACLU*, 217 F.3d at 165 (citing *Am. Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990)).

81. *See ACLU*, 929 F. Supp. at 843-44.

82. *See generally* A. Nati Davidi, *Patrolling the Red Light District of the Information Superhighway*, 49 Admin. L. Rev. 429, 449 (1997) (quoting *U.S. v. S.W. Cable Co.*, 392 U.S. 157, 178 (1968)) (stating that the analogy to cable television and radio fails because the Internet's loose regulatory system "is not 'reasonably ancillary' to the FCC's obligation to regulate broadcasters or common carriers"); Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 Cornell Intl L.J. 435, 450 (2000) (discussing regulation attempts in other media and stating that "the Internet's predecessors . . .television, radio, and telephone, presently offer the same global capability as the Internet, but are still comparatively easy to regulate"); Dawn L. Johnson, *It's 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet*, 15 John Marshall J. Computer & Info L. 51, 66-72 (1996) (comparing the Internet with other media).

Perhaps the reason the question of which media the Internet is most like has not been answered thus far is because this is the wrong question to ask. Perhaps the correct question, in terms of indecency treatment on the Internet, is "what would it take to protect children at this time in this particular media?" The Supreme Court noted it was "aware of the changes taking place in the law, the technology, and the industrial structure related to telecommunications" in refusing to pick one analogy to cable television, and further stated that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes."[83] Five years later, the court is still correct. The Internet, and the technology industry in general, is advancing rapidly and functions available today will seem like a dim memory in another five years. A broad framework is called for, rather than trying to fit the Internet into another category labeled "radio," "broadcast television," or "cable television."

Moreover, the court's decisions on indecency have been impacted by the advances of technology. As to dial-a-porn, the court held that an FCC regulation requiring access codes, credit card payments, and scramblers to block a minor's access to dial-a-porn was the least restrictive means available, but that blocking devices were ineffective because children could easily avoid them by unplugging or reprogramming them.[84]

In *Playboy Entertainment Group v. U.S.*,[85] the court held the First Amendment was violated by a statute[86] which required some cable operators[87] to fully scramble or time channel "sexually explicit adult programming or other programming that is indecent" to eliminate signal bleed[88] because more narrow tailoring was available in the form of complete scrambling or time-channeling into the safe harbor hours.[89]

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83. *Denver Area*, 518 U.S. at 741-42.

84. *Carlin v. FCC*, 837 F.2d 546, 554-56 (2d Cir. 1988); *see generally In re Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd. 2714 (1987).

85. *Playboy Ent. Group v. U.S.*, 30 F. Supp. 2d 702 (D. Del. 1998) (related cases *see Playboy Ent. Group v. U.S.*, 918 F. Supp. 815 (D. Del 1998); 945 F.Supp. 772 (D.Del. 1990), *aff'd*, 520 U.S. 1141 (1997)).

86. *Playboy*, 30 F. Supp. 2d at 720 (citing the *Communications Decency Act*, 47 U.S.C. § 561).

87. *Id.* at 706. Multi System Operators are cable operators which provide cable channel packages for monthly fee and pay-per-view channels. *Id.*

88. *Id.* Signal bleed is where partial reception of cable television is available to non-subscribers. *Id.*

89. *Id.* at 717-18. § 504 provided "safe harbor hours" between 10 pm to 6 am and was less restrictive because it provided for free voluntary blocking to consumers who requested it with adequate notice so was content neutral. *Id.* at 713.

Both *Reno v. ACLU*[90] and *American Library Association v. U.S.*[91] held that the First Amendment was violated when constitutionally protected speech was overblocked or underblocked by filtering software, which was technologically incapable of effectively blocking Web sites for children without also denying access to adults.[92] Minimum estimates of overblocking in *American Library* varied among different software packages, but were between six and fifteen percent.[93] This technological "deficiency" remains: a recent report on several blocking programs found that nearly a million Web pages were incorrectly blocked or miscategorized.[94] In *Reno IV*, however, the Third Circuit held that blocking and filtering software was a less restrictive means of protecting children than was COPA, despite the recognition that software still had the potential to be over- or under-inclusive.[95]

A new technological solution, rather than attempting blocking, is to technologically create a separate area of the Internet for children. The "zoning" solution suggested by Justice Ginsburg in her dissent to *Reno v. ACLU*[96] five years ago was signed into law as The *Dot Kids Implementation and Efficiency Act of 2002* ("Dot Kids Act") on December 4, 2002.[97]

The *Dot Kids Act* creates a new kid-safe area of the Internet for children under age thirteen to be operational in one year and designated with the second-level Internet domain of .kids.us domain name. The .kids.us domain will be regulated by the U.S. government and managed by a private telecommunications company which will set written content standards that Web site registrars must agree to by written agreement. Web sites with this designation must certify they will provide content which is "suitable for minors"[98] and not "harmful to minors,"[99] are pro-

90. 521 U.S. 844.

91. 201 F. Supp. 2d 401.

92. *Reno*, 521 U.S. at 865; *ACLU*, 929 F. Supp. 824; *Am. Lib. Assn.*, 201 F. Supp. 2d 401.

93. *Am. Lib. Assn. v. U.S.*, 201 F. Supp. 2d at 442.

94. Elect. Frontier Found., *Internet Filtering Software Wrongly Blocks Many Sites* <http://www.eff.org/Censorship/Academic_edu/Censorware/net_block_report/20020918_eff_pr.html> (assessed Sept. 18, 2002).

95. *U.S. v. Saldana*, 2003 U.S. App. LEXIS 314 (9th Cir. 2003).

96. *Reno*, 521 U.S. at 844; *see also* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (1996).

97. Washington Post, *President Signs 'Dot-Kids' Legislation* <http://www.washingtonpost.com/ac2/wp-dyn/A8016-2002Dec4> (assessed Dec. 4, 2002).

98. "Suitable to minors" is defined as material that "(A) is not psychologically or intellectual inappropriate for minors; and (B) serves (i) the educational, informational, intellectual, or cognitive needs of minors; or (ii) the social, emotional, or entertainment needs of minors."

99. "Harmful to minors" is defined as material that "(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, that it is designed to appeal to, or is designed to pander to, the prurient

hibited from linking to sites outside the kids area, and instant messaging or chat rooms are banned unless they are certified as safe.[100]

In addition, the Internet Corporation for Assigned Names and Numbers ("ICANN") announced it will add three new top-level domains, one of which may be dot-kids.[101]

It is as yet unclear how parents can *limit* access on the Internet by little Bobby or little Suzie to *only* this kid-safe domain. Perhaps filtering software in fact is technologically capable of blocking any attempt by the user to enter an http address which does not end with .kids.us or simply any other .kids domain.

Of course there are no guarantees that a wiley child will not find a way to circumvent access protection measures. "No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child."[102] Further, "the Government is undoubtedly correct that some minors will find access. . .to sexually explicity programming if they are determined to do so."[103] Even the manager of the new .kids.us domain admits "there is no single approach that will, on its own, protect children from online dangers."[104] This is a problem with the Internet as many children are more proficient on the computers than their parents, and many of the world's hackers are teenagers.

IV. CONCLUSION

Clearer standards will help to ensure everyone's rights are protected. In 1996, some Internet filters blocked access to the Thirtieth Super Bowl because, like all Super Bowls, it was designated with Roman

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interest; (B) the material 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-pubescent female breast; and (C) taken as a whole, the material lacks serious, literary, artistic, political, or scientific value for minors."

100. David Ho, *Congress Creates Kids' Internet Area* ¶ 6 <http://www.siliconvalley.com / mld/siliconvalley/news/editorial/4530132.htm> (assessed Nov. 15, 2002).

101. Joanna Glasner, *ICANN to Add These New Domains* ¶ 1 <http://www.wired.com/ news/print/0,1294,56879,00.html.> (assessed Dec. 17, 2002).

102. *Denver Area*, 518 U.S. at 759.

103. *Playboy Ent. Group v. U.S.*, 30 F. Supp. 2d at 720; *see also Sable Comm.*, 492 U.S. at 130.

104. The Natl. Acadamies, *Youth, Pornography, and the Internet* <http://www4.nas.edu/ news.nsf/isbn/s0309082749?OpenDocument> (assessed May 2, 2002) (statement of Dick Thornburgh, Counsel, Kirkpatrick & Lockhart LLP, Washington, D.C., Former U.S. Atty. Gen. and Chair., Comm. to Study Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content, before the Sen. Subcomm. on Commerce, Science, Tech. & Space of the Sen. Comm. Of Commerce, Science, & Transp.).

numerals as Super Bowl XXX.[105] Public libraries, confused by how to legally protect children on the Internet, are applying a host of different tactics: in Cleveland, Ohio Internet access in not limited; in Raleigh, North Carolina blocking software has been installed; in Great Falls, Montana parents must sign consent forms before their children can use the computers; and in Phoenix, Arizona patrons viewing sexual material "might get a tap on the shoulder from the librarian and a request to look at something more suitable."[106]

Based on the court's holdings thus far, constitutionality will hinge on three factors. First, the definition of "harmful to minors" must meet the *Miller* standard ("prurient interests," "contemporary community standards," "patently offensive," "lacks literary, artistic, political, and social value") and take into account *Reno IV* (clear definition of the material to be considered "as a whole"). Second, the level of constitutional review applied—strict scrutiny or rational basis. Third, the burden on speech must be narrowly tailored (a burden which may not be met until technology advances to the point where filtering software is more accurate).

The Internet has been called a "unique and wholly new medium of worldwide human communication."[107] And although lingerie is surely an old form of "communication," the courts and the FCC have their eyes on each of them in terms of indecency.

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105. Janofsky, *supra* n. 69, at ¶ 16.
106. *Id.* at ¶ 6.
107. *ACLU*, 929 F. Supp. at 842.