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Fear-Mongering, Filters, the Internet, and the First Amendment: Why Congress Should Not Pass Legislation Similar to the Deleting Online Predators Act

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Notes & Comments

Fear Mongering, Filters, the Internet and the First Amendment: Why Congress Should Not Pass Legislation Similar to the Deleting Online Predators Act

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[1]

I. INTRODUCTION

Congress maintains that "[t]hough the Internet represents tremendous potential in bringing previously unimaginable education and information opportunities to our nation's children, there are very real risks associated with the use of the Internet."[2] Accordingly, Congress has "repeatedly reaffirmed"[3] the government's compelling interest in protecting children from potentially harmful material on the Internet.[4] Juxtaposed against this legitimate concern is the First Amendment, which guarantees Americans that "Congress shall make no law . . . abridging the

1. Olmstead v. United States 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. CHILDREN'S INTERNET PROTECTION ACT, S.REP. NO. 106-141, at 2 (1999).

3. *Id.* at 7.

4. *See* New York v. Ferber, 458 U.S. 747, 757-58 (1982).

freedom of speech, or of the press."[5] Early attempts at regulating the harmful material available to minors over the Internet were unsuccessful because the Supreme Court found each to be a flagrant violation of the First Amendment.[6] Congress succeeded in balancing concern for child welfare with constitutional requirements when it passed the Children's Internet Protection Act (CIPA) in 2000.[7] For the first time, Congress addressed fears "that the E-rate and Library Services and Technology Act (LSTA) programs were facilitating access to illegal and harmful pornography."[8] To curtail growing concern, CIPA conditioned funding from these subsidized programs, requiring that schools and libraries have technology filters in place to prevent children from accessing obscene or harmful material on the Internet, and that these filters could be disabled if necessary.[9] The filter requirement was upheld by the Supreme Court, and for the first time Congress believed it had made strides in adopting an effective policy of Internet safety.[10]

What Congress did not anticipate, given the rapidly evolving reach of the Internet, was the rise of social-networking sites, and the wave of panic that news stories regarding these sites would create.[11] As a result, the House of Representatives, in an attempt to "appear pro-child and pro-family," introduced the Deleting Online Predator's Act (DOPA) in 2006. Riding on a wave of "MySpace Madness,"[12] the House of Representatives fed off the mostly unwarranted fears of parents, which were promulgated by the media, and then accused dissenters of being weak on child

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5. U.S. CONST. amend. I.

6. *See* Ashcroft v. ACLU (*COPA II*), 542 U.S. 656, 670 (2004); Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002); Reno v. ACLU, 521 U.S. 844, 845 (1997).

7. M. Megan McCune, Comment, *Virtual Lollipops and Lost Puppies: How Far Can States Go To Protect Minors Through the Use of Internet Luring Laws*, 14 COMMLAW CONSPECTUS 503, 520 (2006).

8. United States v. Am. Library Ass'n, 539 U.S. 194, 200 (2003).

9. Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified at 20 U.S.C. § 9134 (2000)).

10. *Am. Library Ass'n*, 539 U.S. at 201.

11. *See* Nat'l Coal. Against Censorship, *The Dangers of the Deleting Online Predators Act*, July 27, 2006, http://www.ncac.org/Internet/20060515~USA~Deleting_Online_Predators_Act.cfm.

12. Tom Zeller Jr., *Link by Link: A Lesson for Parents on MySpace Madness*, N.Y. TIMES, June 26, 2006, at C4.

protection.[13] The DOPA departed from the constitutionally acceptable filters required under the CIPA, and conditioned filters based on technology and not on content.[14] The proposed filters under the DOPA are aimed at the dreaded commercial social-networking site, yet would not necessarily block all harmful material and would purposefully ensnare a tremendous number of valuable websites, which are protected by the First Amendment.[15] This constitutional infirmity cannot be cured through the implementation of disabling features. "Treating MySpace sites like poison,"[16] proponents of the DOPA touted it as "legislation not designed to limit speech or infringe on the rights of law-abiding adults,"[17] but to combat social-networking sites which "have made it easier for pedophiles and child predators to contact children and to groom, or befriend, and seduce, them."[18] Luckily, a new session of Congress in January of 2007 assured that the DOPA would not become law.[19] However, those who were concerned with the clear First Amendment violations of the DOPA cannot rest easy, for on January 4, 2007, Senator Ted Stevens of Alaska proposed the Protecting Children in the 21st Century Act, which includes a section that mirrors the DOPA word for word.[20] Protecting children from harm when they are often not capable to do it themselves is a vital goal of government and "every right-thinking

13. *See* Nat'l Coal. Against Censorship, *supra* note 11.

14. *See* Alex Halperin, *No Space for MySpace?*, BUSINESS WEEK, May 12, 2006, http://www.businessweek.com/technology/content/may2006/tc20060512_299340.htm.

15. *See* Am. Library Ass'n Office for Intellectual Freedom, *Podcast Script: Online Social Networking and Intellectual Freedom*, http://www.ala.org/ala/oif/ifissues/issuesrelatedlinks/podcastnetworking.htm (last visited May 12, 2008).

16. Declan McCullagh, *Lawmakers Take Aim at Social-networking Sites*, CNET NEWS, Dec. 19, 2006, http://news.com.com/Lawmakers+take+aim+at+social-networking+sites/2100-1028_3-6071040.html?tag=sas.email.

17. 152 CONG. REC. H5883, H5886 (July 26, 2006) (statement of Rep. Fitzpatrick).

18. STAFF OF H.R. COMM. ON ENERGY AND COMMERCE, 109TH CONG., REPORT ON SEXUAL EXPLOITATION OF CHILDREN OVER THE INTERNET, 2 (Comm. Print 2007).

19. H.R. 5319 [109th]: Deleting Online Predators Act of 2006, http://www.govtrack.us/congress/bill.xpd?bill=h109-5319 (last visited May 12, 2007).

20. S. 49 [110th]: Protecting Children in the 21st Century Act, http://www.govtrack.us/congress/bill.xpd?bill=s110-49 (last visited May 12, 2007).

and decent American;"[21] however, Congress cannot partake in "fear mongering"[22] as motive to ignore the requirements of the First Amendment. The DOPA, and any similar legislation would fail to meet constitutional requirements due to the large burden placed on protected speech. Because the proposed filters target the technology of the site, and not necessarily the content, the reach of this legislation is so broad that it is irrational.

Part II of this Comment examines the ways in which Congress has attempted to protect children from potential harm on the Internet. Part III provides information on social-networking sites, and the fear that they have engendered. Part IV discusses the actual language of the DOPA, and Part V illustrates how the DOPA and similar subsequent legislation do not survive constitutional scrutiny on First Amendment grounds. In addition, Part VI alerts the reader to the newly proposed Protecting Children in the 21st Century Act, which mimics the DOPA word for word.

II. PREVIOUS CONGRESSIONAL ATTEMPTS TO PROTECT CHILDREN AGAINST HARMFUL MATERIAL ON THE INTERNET

Congress has a significant interest in protecting children from being harmed by material they view on the Internet.[23] Since the founding of the Internet, this concern has prompted Congress to pass legislation in an attempt to effectuate its paramount goal: protecting children from harm. Early Congressional attempts at regulating material on the Internet were promptly met with First Amendment challenges and were ultimately held unconstitutional by the Supreme Court,[24] and it was only when Congress focused on filtering material on the Internet, and linking these mandatory filters with federal subsidies, that it found success.[25]

A. The Communications Decency Act of 1996

The Communications Decency Act (CDA), part of the

21. 152 CONG. REC. H5883, H5888 (2006) (statement of Rep. Dingell).

22. Halperin, *supra* note 14 (quoting Anne Collier, co-founder of BlogSafety.com).

23. *See Ferber*, 458 U.S. at 757-58.

24. *See COPA II*, 542 U.S. at 670; Ashcroft v. Free Sp. Coal., 535 U.S. 234, 240 (2002); Reno v. ACLU, 521 U.S. 844, 845 (1997).

25. *See* McCune, *supra* note 7.

Telecommunications Act of 1996, was Congress's first attempt to regulate children's access to harmful information on the Internet.[26] The CDA "criminalized the online transmission of 'any comment, request, suggestion, proposal, image or other communication which is . . . indecent' to a person known to be under the age of eighteen, as well as the display of 'patently offensive' material 'in a manner available to' a person under eighteen."[27] Senator James Exon, sponsor of the legislation, argued before the Senate that "the most disgusting, repulsive pornography is only a few clicks away from any child with a computer,"[28] and not just "Playboy or Penthouse magazines,"[29] but "[t]he most hardcore, perverse types of pornography, photos and stories featuring torture, child abuse, and bestiality."[30]

The CDA was "quickly challenged"[31] by theAmerican Civil Liberties Union in *Reno v. ACLU*.[32] The Supreme Court of the United States recognized "the legitimacy and importance of the congressional goal of protecting children from harmful materials,"[33] yet ultimately found that the CDA abridged the freedom of speech protected by the First Amendment.[34] The Court found the breadth of the CDA's coverage wholly unprecedented,[35] and that the CDA differed from various laws and orders upheld in previous cases in that:

> [I]t does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of 'indecent' and omits any requirement that 'patently offensive' material lack socially redeeming value; neither limits its

26. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000).

27. ROBERT S. PECK, LIBRARIES THE FIRST AMENDMENT AND CYBERSPACE 126 (Eloise L. Kinney ed., American Library Association 2000) (quoting CDA (internal quotations omitted)).

28. 141 CONG. REC. S8310, S8330 (June 14, 1995) (Statement of Sen. Exon).

29. *Id.*

30. *Id.*

31. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 167 (New York University Press 2003).

32. *Reno*, 521 U.S. at 845.

33. *Id.* at 849.

34. *See id.*

35. *Id.* at 877.

> broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech.[36]

The portion of the CDA prohibiting the knowing transmission of obscene materials was the only portion of the regulation that survived constitutional scrutiny, as obscenity does not enjoy First Amendment protection.[37]

B. The Child Pornography Prevention Act

The Child Pornography Prevention Act (CPPA) attempted to expand the existing law regarding child pornography on the Internet to include computer generated images "of what appear to be children engaging in sexually explicit conduct, that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct."[38] The statute prohibited "possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging."[39] Congress stressed that the elimination of child pornography and the protection of children from sexual exploitation provide a

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36. *Id.* at 845. The Court's opinion compared the CDA to the rulings in three cases relied upon by the government: Ginsberg v. New York, 390 U.S. 629, 646 (1998) (Upholding the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults); Renton v. Playtime Theaters, 475 U.S. 41, 49 (1986) (Court upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"—such as crime and deteriorating property values—that these theaters fostered); and FCC v. Pacifica, 438 U.S. 726, 730 (1978) (Court upheld a declaratory order of the FCC, holding that the broadcast of a recording of a 12-minute monologue entitled "Filthy Words" that had previously been delivered to a live audience "could have been the subject of administrative sanctions"). *Id. at 845.*

37. *Id.* at 883.

38. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 2251 (2000)).

39. *Free Speech Coal.*, 535 U.S. at 240.

compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer."[40]

The Free Speech Coalition challenged the constitutionality of the CPPA in *Ashcroft v. Free Speech Coalition*.[41] The Court found that "by prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process."[42] The CPPA's restrictions on images that appear to involve a minor, or images that convey the impression that person pictured is a minor, were overbroad, in that the statute "bans materials that are neither obscene nor produced by the exploitation of real children."[43] Essentially, the CPPA criminalized speech "that records no crime and creates no victims by its production."[44] Although the government argued that virtual child pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct,"[45] the Court held that "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[46] Ultimately, the CPPA failed because the Court ruled that "[p]rotected speech does not become unprotected merely because it resembles the latter,"[47] and "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[48]

C. The Child Online Protection Act

In direct response to the Court's decision in *Reno v. ACLU*,[49]

40. *Id.*
41. *Id.* at 234.
42. *Id.* at 240 (citing *Ferber*, 45 U.S. at 757-58).
43. *Free Speech Coal.*, 535 U.S. at 240.
44. *Id.* at 250.
45. *Id.* at 253.
46. *Id.* (quoting Hess v. Indiana, 414 U.S. 105, 108 (1973)).
47. *Free Speech Coal.*, 535 U.S. at 255.
48. *Id.*
49. PECK, *supra* note 27, at 131-32.

Congress passed the Child Online Protection Act (COPA) in 1998.[50] COPA was essentially "a bar on commercial Internet expression that is harmful to minors."[51] In an attempt to narrowly tailor the regulation, Congress "incorporated the Supreme Court's test for obscenity, as stated in *Miller v. California,*"[52] which hinges upon community standards to determine if the material is obscene.[53] With "[t]he limitation to commercial expression and the harmful to minors standard,"[54] Congress was anxiously trying to "fit within the rubric of the *Reno* decision."[55] Committee reports evidence that Congress firmly believed "that the bill str[uck] the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web."[56] In addition to providing much clearer terms, the COPA gives explicit examples of good faith affirmative defenses that would allow a commercial entity to protect itself from prosecution.[57] Under the COPA, these defenses consist of "requiring use of a credit card, debit account, adult access code, or adult personal identification number, or. . . any other reasonable measures that are feasible under available technology."[58]

The constitutionality of the COPA was challenged by the American Civil Liberties Union in *Ashcroft v. ACLU* (COPA I),[59]

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50. Child Online Protection Act, Pub. L. No. 105-277, §§ 1401-1406, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230-231 (2000)).

51. PECK, *supra* note 27, at 131 (internal quotations omitted).

52. McCune, *supra* note 7, at 517 (citing Miller v. California, 413 U.S. 15, 24 (1973)). "The test announced by the Supreme Court to determine whether communications are obscene is:

> (a) whether the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") McCune, *supra* note 7, at 517 n.110.

53. McCune, *supra* note 7, at 518.

54. PECK, *supra* note 27, at 132.

55. *Id.*

56. Child Online Protection Act, H.R. Rep. No. 105-775 (1998) (alteration in the original).

57. Child Online Protection Act, Pub. L. No. 105-277, §§ 1401-1406, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. §§ 230-231 (2000)).

58. *Id.*

59. Ashcroft v. ACLU (*COPA I*), 535 U.S. 564, 585 (2002).

and was appealed to the Supreme Court after the Third Circuit affirmed the District Court's ruling that the COPA's use of contemporary community standards to identify material that is harmful to minors rendered the statute substantially overbroad.[60] The Court ultimately held that "the COPA's reliance on community standards to identify 'material that is harmful to minors' does not by itself render the statute substantially overbroad for purposes of the First Amendment,"[61] and remanded the case back to the Third Circuit to review the constitutionality of the COPA according to the ruling.[62] The "second review by the Third Circuit found that the COPA did not use the least restrictive means to protect children from harmful material and consequently violated the First Amendment."[63] In *Ashcroft v. ACLU* (COPA II),[64] the Supreme Court upheld the Third Circuit's ruling on the COPA, but the "Court's reasoning was based on a narrower, more specific rationale than the court of appeals."[65] The Court agreed that, "the Government has failed, at this point, to rebut the plaintiffs' contention that there are plausible, less restrictive alternatives to the statute,"[66] and that "filtering software may be a less restrictive means and more effective protection then the COPA in protecting children on the Internet."[67] The Court again remanded the case to allow further evidence to "be introduced on the relative restrictiveness and effectiveness of alternatives to the statute."[68]

D. The Children's Internet Protection Act

Notwithstanding the failure of the CDA, the CPPA, and the COPA, Congress passed the Children's Internet Protection Act in 2000 (CIPA).[69] Unlike the other statutes, the CIPA reflected

60. *Id.* at 564.
61. *Id.* at 585.
62. *See id.* at 586.
63. McCune, *supra* note 7, at 519.
64. *Ashcroft* (*COPA II*), 542 U.S. at 656.
65. Sue Ann Mota, *Protecting Minors From Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court*, 7 TUL. J. TECH. & INTELL. PROP. 95, 103 (2005).
66. *Ashcroft* (*COPA II*), 542 U.S. at 660.
67. McCune, *supra* note 7, at 519.
68. *Ashcroft* (*COPA II*), 542 U.S. at 673.
69. Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat.

"Congress['s] fear that federal subsidies for the Internet were facilitating access in public libraries to obscenity, child pornography, and other materials harmful to minors."[70] While the CDA, the CPPA, and the COPA "focused primarily on Web site operators, CIPA focuses on Internet users."[71] Schools and libraries that "participate in certain federal programs,"[72] namely the E-rate[73] program and programs under the Library Service and Technology Act of 1996[74] would be "obligated to comply" with the CIPA.[75] The E-rate program "ensure[s] that schools and libraries have affordable access to advanced telecommunications."[76] The Library Service and Technology Act of 1996," makes grants to state library administrative agencies to electronically lin[k] libraries with educational, social, or information services, assis[t] libraries in accessing information through electronic networks, and pa[y] costs for libraries to acquire or share computer systems and telecommunications technologies."[77] The CIPA requires libraries and schools to have "in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are, obscene; child pornography; or harmful to

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2763, 2763A-340 (2000) (codified at 20 U.S.C. § 9134 (2000)).

70. Leah Wardak, Note, *Internet Filters and the First Amendment: Public Libraries After* United States v. American Library Association, 35 LOY. U. CHI. L.J. 657, 692 (2004).

71. Katherine A. Miltner, Note, *Discriminatory Filtering: CIPA's Effect on Our Nation's Youth and Why the Supreme Court Erred in Upholding the Constitutionality of the Children's Internet Protection Act*, 57 FED. COMM. L.J. 555, 560 (2005).

72. MADELINE SCHACHTER, LAW OF INTERNET SPEECH 267 (Carolina Academic Press 2002).

73. *See* 47 C.F.R. §§ 54.501-54.502 (2003).

74. *See* 20 U.S.C. § 9101 (2001).

75. Miltner, *supra* note 71, at 560.

76. The U.S. Department of Education, E-Rate Questions and Answers, http://www.ed.gov/Technology/overview.html (last visited Feb. 17. 2007) (eligible schools and libraries can receive discounts of 20-90 percent on telecommunication services, Internet access and internal connections necessary for deploying technology into the classroom). In the year ending June 30, 2002, libraries received $58.5 million in such discounts. *Am. Library Ass'n Inc.*, 539 U.S. at 199.

77. United States v. Am. Library Ass'n Inc., 539 U.S. 194, 199 (2003) (alteration in original) (internal quotations omitted). In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants. *Id. at* 199.

minors."[78] The term "technology protection measure" is defined as "a specific technology that blocks or filters Internet access"[79] to obscene material, child pornography or other material that may be harmful to minors. The "CIPA permits libraries to disable the filtering technology to allow access for bona fide research or other lawful purposes."[80] When the library/school receives E-rate funding, [81] the filters may only be disabled for adults, but when libraries receive LSTA funding, the filters can technically be disabled for both children and adults. [82]

The American Library Association challenged the constitutionality of the CIPA in *United States v. American Library Association.*[83] Plaintiffs in the case "argued that the filtering requirement was overbroad and that it unconstitutionally infringed upon patrons' First Amendment rights."[84] The Court ruled that "Internet access in public libraries is neither a traditional nor a designated public forum,"[85] and that libraries do not provide access to the Internet in order to create a public forum, but "facilitate research, learning, and recreational pursuits by furnishing materials of the requisite and appropriate quality."[86] The Court reasoned that "while a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable material,"[87] and "[g]iven that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content."[88] The Court further held that any concerns over blocking protected speech were "dispelled by the ease with which patrons may have the filtering software disabled."[89] The Court also determined that there were no valid issues concerning the funding correlation, because "when the

78. Childrens Internet Protection Act, 47 U.S.C. § 254 (2001).
79. *Id.*
80. Wardak, *supra* note 70, at 693.
81. 47 U.S.C § 254(h)(6)(D).
82. 20 U.S.C. § 9134(f)(3).
83. United States v. Am. Library Ass'n Inc., 539 U.S. 194 (2003).
84. Miltner, *supra* note 71, at 561.
85. *Am. Library Ass'n*, 539 U.S. at 205 (internal quotations omitted).
86. *Id.* at 206.
87. *Id.* at 208.
88. *Id.* (alteration in original).
89. *Id.* at 209.

Government appropriates public funds to establish a program it is entitled to define the limits of that program."[90] Ultimately the Court upheld the CIPA "[b]ecause public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power."[91] The CIPA "provoked tension between two competing interests: protecting minors from cyber pornography and safeguarding First Amendment rights,"[92] and for the first time Congress was successful in tipping the scales in its favor.

Prior to the DOPA, Congress could pass legislation regulating the Internet if: the legislation is aimed at unprotected speech, the legislation does not prohibit speech just because it increases the chance that a crime will be committed in the future,[93] the legislation contains specific and narrowly tailored definitions regarding what material Congress is attempting to combat,[94] and the legislation contains disabling provisions that allow adults and/or children access to potentially overblocked material.[95] In addition, if the legislation is reviewed under heightened scrutiny, there will inevitably be problems if the legislation does not use the least restrictive means possible to prevent children from access to harmful material.[96]

III. THE RISE OF SOCIAL-NETWORKING SITES AND THE SUBSEQUENT RISE OF THE DELETING ONLINE PREDATORS ACT

While the Internet had always contained potentially harmful material, the rise of social-networking sites and interactive web based applications presented a host of new challenges for Congress. Hyped up concern surrounding these new sites, particularly MySpace, and their possible link to online child predation, prompted Congress to once again introduce legislation aimed at regulating children's use of the Internet.

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90. *Id.* at 211 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)).
91. *Id.* at 214.
92. Miltner, *supra* note 71, at 557.
93. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).
94. *See* Reno v. ACLU, 521 U.S. at 845.
95. *See Am. Library Ass'n.*, 539 U.S. at 208.
96. *See* Ashcroft v. ACLU (*COPA II*), 542 U.S. 656, 660 (2004).

A. Interactive Web Applications and Social-Networking Sites

Interactive web application "is a broad term encompassing many types of online tools, many of which allow people to communicate with each other either in real time or through posts."[97] These applications include "online distance education, instant messaging, chat rooms, message boards, photo and video sharing sites, blogs that allow comments, and even sites like Amazon.com and Evite."[98] These applications "are changing how we all work with the Web,"[99] but crucial to their success is the fact that the "people who use the tools make them even more useful by contributing their knowledge and data."[100]

"Interactive web application" also encompasses social-networking sites which "are, generally speaking, online spaces where people connect with others who share similar interests."[101] These sites were developed to allow members to "interact with current friends and to meet new ones,"[102] while "sharing thoughts, ideas, and information."[103] There are literally "hundreds of these sites on the Web, including Facebook, Friendster, LiveJournal, and MySpace."[104] Facebook calls itself "a social utility that connects you with the people around you,"[105] that "is made up of many networks, each based around a company, region, high school or college,"[106] which will allow you to "share information with people you know, see what's going on with your friends, and look up people around you."[107] Friendster's website states that "Friendster is the best way to stay in touch with your friends and it's the fastest way to discover the people and things that matter to you most."[108] LiveJournal "is a simple-to-use communication

97. Am. Library Ass'n Office for Intellectual Freedom, *supra* note 15.
98. *Id.*
99. Steve Apiki, *What You Need To Know About Web 2.0*, July 25, 2006, http://www.smallbusinesscomputing.com/biztools/article.php/3622356.
100. *Id.*
101. Am. Library Ass'n Office for Intellectual Freedom, *supra* note 15.
102. *Id.*
103. *See id.*
104. *Id.*
105. Welcome to Facebook, http://www.facebook.com, (last visited Feb. 17, 2007).
106. *Id.*
107. *Id.*
108. About Friendster, http://www.friendster.com/info/index.php?statpos=

tool that lets you express yourself and connect with friends online,"[109] which you can use "in many different ways: as a private journal, a blog, a social network and much more."[110] Lastly, MySpace labels itself as "an online community that lets you meet your friends' friends,"[111] where you can "share photos, journals and interests with your growing network of mutual friends."[112] While most adults are dumfounded by these sites, "they function very much like the malls and burger joints of earlier eras,"[113] where young people go "to hang out, gossip, posture, dare, and generally figure out how the world works."[114]

Social-networking sites "have literally exploded in popularity in a few short years."[115] A recent poll shows that "87 percent of those aged 12 to 17 use the Internet on a regular basis."[116] In addition, "of this 87 percent, approximately 61 percent report having personal profiles on networking Web sites like MySpace[] [or] Facebook. . ."[117] While other sites are certainly utilized, MySpace is the most popular of the social-networking sites.[118] MySpace "currently has more than 100 million profiles, with 230,000 new members signing up everyday."[119] In July of 2006 MySpace "became the most-visited Web site in the United States over Google and Yahoo Mail,[120] and accounted for "81% of visitors to leading social-networking sites, according to Hitwise, a market research company."[121] The thoughts of one teenager, "[if] you are

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footer (last visited Feb. 17, 2007).

109. What is LiveJournal, http://www.livejournal.com/ (last visited Feb. 17, 2007).

110. *Id.*

111. MySpace "About Us", http://collect.myspace.com/misc/about.html (last visited Feb. 17, 2007).

112. *Id.*

113. Michelle Andrews, *Decoding MySpace*, U.S. NEWS AND WORLD REPORT, Sept. 18, 2006, at 48.

114. *Id.*

115. 152 CONG. REC. H5883, H5886 (daily ed. July 26, 2006) (statement of Rep. Fitzpatrick).

116. 152 CONG. REC. H5883, H5889 (daily ed. July 26, 2006) (statement of Rep. Biggert).

117. *Id.*

118. *See* Andrews, *supra* note 113.

119. *Id.*

120. Whitney McFerron, *Censoring MySpeech: Is the First Amendment Lost in the MySpace Debate*, STUDENT PRESS LAW CENTER, 2006, http://www.splc.org/report_detail.asp?id=1289&edition=40.

121. Andrews, *supra* note 113.

not on MySpace, you don't exist,"[122] demonstrate that MySpace is "a cultural requirement for American high school students."[123]

B. Fears Over Social Networking Sites

Since social-networking sites have exploded in popularity they have become the focus of intense parental, and thus political, concern.[124] It is true that "[a]mong the many millions of people visiting these sites, some, indeed are sexual predators, and there have been some highly publicized accounts of teenagers who've been lured into offline meetings at which they have been [sexually] assaulted."[125] In what has been deemed the first lawsuit of its kind, a fourteen-year-old girl and her mother sued MySpace and its parent company News Corporation Incorporated, alleging that the girl was raped after meeting a man she met on the site.[126] The complaint details how the girl, even though she was under the age of fourteen, created a profile and was soon contacted by Peter Solis (Solis), a nineteen-year-old community college student (who had told the girl he was fourteen), whom she then began communicating with on a regular basis.[127] The girl "eventually met him for dinner and a movie after which they drove in his car to the parking lot of an apartment complex, where, the complaint alleges, he sexually assaulted her."[128] The complaint "makes claims against MySpace and News Corp[oration] for negligence, gross negligence, fraud and negligent

122. Danah Boyd & Henry Jenkins, *MySpace and Deleting Online Predators Act (DOPA)*, MIT TECH TALK, May 26, 2006, http://www.danah.org/papers/MySpaceDOPA.html\.

123. *Id.*

124. Andrews, *supra* note 113, at 47.

125. *Id.* at 48 (alteration in original).

126. Jane Doe v. MySpace, Inc., No. D-1-GN-06-002209 (D.C. of Travis Cty., Tex. June 19, 2006) (Jane Doe MySpace complaint page 13). On February 14, 2007, a federal judge in Texas dismissed the lawsuit against MySpace that blamed the Web site for lacking proper safeguards to protect underage users. Peter Lattman, *Federal Judge Tosses MySpace Lawsuit*, THE WALL ST. J., February 15, 2007 *available at* http://blogs.wsj.com/law/2007/02/15/federal-judge-tosses-myspace-lawsuit. The judge ruled that expecting MySpace to verify every user's age "would of course stop MySpace's business in its tracks," and if anyone had a duty to protect Julie Doe, it was her parents, not MySpace." *Id.*

127. *Id.*

128. Rebecca Porter, *Advocates Look to Protect Kids From Web Networking Dangers*, 42 OCT. TRIAL 16 (2006).

misrepresentation and against Solis for sexual assault and intentional infliction of emotional distress,"[129] for which the plaintiff "seeks damages for present and future medical and psychological care, pecuniary loss, mental anguish, psychological trauma, pain and suffering, and emotional distress."[130] The complaint details what the plaintiff deems to be "a disturbing number of incidents [that] have occurred nationwide in which adult MySpace users contacted young underage MySpace users on MySpace,"[131] then "arranged to meet the minors, and often sexually assaulted them."[132] The plaintiff contends, "there are absolutely no meaningful protections or security measures to protect young underage users from being contacted by sexual predators on MySpace."[133] Understandably "parents are traumatized by such stories,"[134] however there is real debate over whether these concerns are warranted.[135]

Many argue that the "national media coverage of MySpace and other similar sites has overplayed a few instances of child predation online,"[136] and created a situation that is "ripe for moral panic."[137] The media would have people believe that social-networking sites are "a haven for online sexual predators who have made these corners of the Web their own virtual hunting ground."[138] "The latest wave of parental concern seems to have been largely spurred by 'To Catch a Predator,' a series on the NBC news magazine program 'Dateline' that began in September of 2004."[139] Through the use of hidden cameras, this program has offered "visual evidence,"[140] of pedophiles coming to meet children

129. *Id.* at 16, 18.
130. *Id.* at 18.
131. Jane Doe, et al. v. MySpace, Inc., No. D-1-GN-06-002209 (D.C. of Travis Cty., Tex June 19, 2006).
132. *Id.*
133. *Id.*
134. Andrews, *supra* note 113.
135. Boyd & Jenkins, *supra* note 122.
136. McFerron, *supra* note 120, at 1.
137. Boyd & Jenkins, *supra* note 122, at 7.
138. 152 CONG. REC. H5883, H5886 (2006) (statement of Rep. Fitzpatrick).
139. Anna Bahney, *Don't Talk to Invisible Strangers*, N.Y. TIMES, Mar. 9, 2006, at G2.
140. 152 CONG. REC. H5883, H5886 (July 26, 2006) (statement of Rep. Fitzpatrick).

they initially contacted over the Internet.[141] Seen as the "complete and utter tipping point,"[142] "To Catch A Predator," has the American public "convinced the Internet Bogeyman is going to come into their window."[143]

Danah Boyd, a Ph.D student at the School of Information at the University of California-Berkley, has done extensive research on social-networking sites, and argues that "[t]he media coverage of predators on MySpace implies that 1) all youth are at risk of being stalked and molested because of MySpace; 2) prohibiting youth from participating on MySpace will stop predators from attacking kids,"[144] and that "[b]oth are misleading; neither is true."[145] Statistics prove that "kids are more at risk at a church picnic or a boy scout outing than they are when they go on MySpace."[146] The risk is often covered extensively, while few actual cases emerge, exploiting anxiety and feeding fears.[147] When people are allowed to "indulge[] in fear mongering"[148] there is naturally "a call to take action, even if it is wrong, a call to action which races well ahead of any serious research or thoughtful reflection on the matters at hand."[149]

Unfortunately, "it was in this atmosphere that the House of Representatives passed the Deleting Online Predators Act, or DOPA."[150] Given the fervor of "MySpace Madness,"[151] the legislation was eagerly embraced by politicians who wished to appear "pro-child and pro-family."[152] The DOPA was proposed by Representative Michael Fitzpatrick, a Republican from Pennsylvania,[153] who was a member of the Suburban Caucus, "a

141. Bahney, *supra* note 139. The men exposed in the "Dateline" series included a high-school teacher, a rabbi and a doctor. *Id.*
142. Bahney, *supra* note 139.
143. *Id.*
144. Boyd & Jenkins, *supra* note 122.
145. *Id.*
146. *Id.*
147. *See id.*
148. Halperin, *supra* note 14.
149. Boyd & Jenkins, *surpa* note 122 (internal quotations omitted).
150. Am. Library Ass'n Office for Intellectual Freedom, *supra* note 15.
151. Zeller, *supra* note 12.
152. Nat'l Coal Against Censorship, *supra* note 11.
153. H.R. 5319 [109th]: Deleting Online Predators Act of 2006, http://www.govtrack.us/congress/bill.xpd?bill=h109-5319 (last visited Feb. 17, 2007). Representative Fitzpatrick lost his bid for reelection in the November

newly formed group of Republican representatives who are focused on addressing the concerns of suburban voters."[154] Legislative history demonstrates that Congress played upon the fears promulgated by the media, and touted the DOPA as legislation that would combat "the dark underside of social networking Web sites, which have been stalking grounds for sexual predators who are preying on children all across the nation."[155] Advocates of the legislation argued, "[s]ocial networking sites such as MySpace and chat rooms have allowed sexual predators to sneak into homes and solicit kids,"[156] and through these cyber-relationships, children are being victimized.[157] Reports to Congress detail the process of "grooming," where "by communicating with children regularly over the Internet, the child predator is able to befriend the child and make him or her comfortable with sharing personal information with someone he or she has not met face-to-face,"[158] and then "[e]ventually these communications become sexual in nature, often as a precursor to asking the child to meet the predator or to share sexual images of herself or himself."[159] The DOPA was described as a new tool to protect our children from online sexual predators, and its supporters challenged anyone to oppose. The truth is "[w]ith the media whipping the nation into hysteria about the perils of MySpace, what politician wouldn't want to be seen as protecting kids?"[160] The fear factor was alive and well, and "whatever their real opinion, politicians. . .vote[d] for DOPA rather than risk being painted as pro-predator."[161] When panic is a component, "the Web gets censored in an

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2006 election. U.S. Politics Today, http://uspolitics.einnews.com/news/mike-fitzpatrick.

154. Nat'l Coal Against Censorship, *supra* note 11.

155. 152 CONG. REC. H5883, H5884 (July 26, 2006) (statement of Rep. Upton).

156. 152 CONG. REC. H5883, H5885 (July 26, 2006) (statement of Rep. Poe).

157. Porter, *supra* note 128, at 16.

158. STAFF OF H.R. COMM. ON ENERGY AND COMMERCE, 109TH CONG., REPORT ON SEXUAL EXPLOITATION OF CHILDREN OVER THE INTERNET (Jan. 2007) at 11.

159. *Id.*

160. Brian Kenney, *The Deleting Online Predators Act Is Both Dopey and Dangerous*, 52 SCH. LIB. J. 6, 11 (2006).

161. *Id.*

increasingly broad, slipshod way,"[162] which was clearly the case with the DOPA. The DOPA "raises questions about how much the federal government should regulate the Internet,"[163] and while protection is a necessary goal it should not be "pursued to the detriment of a legitimate and often vital exchange of ideas."[164] The DOPA raises "red flags for all First Amendment advocates,"[165] because it "threatens free speech and education online, while doing little to deter online predators."[166]

Congress, faced with growing media hype over isolated incidents of child predation, and genuine concern for child safety, passed the DOPA. While Congress' intentions were undoubtedly righteous, the DOPA goes beyond the goal of protecting children and infringes on First Amendment rights.

IV. THE DELETING ONLINE PREDATORS ACT

Officially, the Deleting Online Predators Act would "amend the Communications Act of 1934 to require recipients of universal service support for schools and libraries to protect minors from commercial social networking sites and chat rooms."[167] The legislation conditions E-rate funding for schools upon proof that they are:

> Enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that (I) protects against access through such computers to visual depictions that are obscene; child pornography; or harmful to minors; and (II) protects against access to a

162. Steven Barrie-Anthony, *Through Hell, High Water or Web Filters as Congress Mulls Action, Some Schools Already Limit MySpace Access. But It Hasn't Kept Teens Off the Site*, L.A. TIMES, May 31, 2006, at E1.

163. Jim Puzzanghera, *Bill Seeks to Block Access to MySpace in Schools Legislation Is Prompted by Reports of Pedophiles Trolling Popular 'Social Networking' Sites*, L.A. TIMES, May 12, 2006, at A26.

164. Joan E. Bertin, *Moral Panic, Version 2.0*, THE NATIONAL COALITION AGAINST CENSORSHIP NEWSLETTER – CENSORSHIP NEWS, SPECIAL ISSUE: FREE EXPRESSION ONLINE, (NCAC, New York, N.Y.) 2006.

165. Nat'l Coal Against Censorship, *supra* note 11.

166. *Id.*

167. Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006) (official title as introduced).

> commercial social networking website or chat room unless used for an educational purpose with adult supervision.[168]

In addition, E-rate funding for libraries is conditioned upon certification that the library:

> Is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene; child pornography; or harmful to minors; and protects against access by minors without parental authorization to a commercial social networking website or chat room, and informs parents that sexual predators can use these websites and chat rooms to prey on children.[169]

While the final definition of a commercial social-networking website will be determined by the Federal Communications Commission, the DOPA suggests that the Commission:

> Take into consideration the extent to which a website is offered by a commercial entity; permits registered users to create an on-line profile that includes detailed personal information; permits registered users to create an on-line journal and share such a journal with other users; elicits highly-personalized information from users; and enables communication among users.[170]

The bill would allow access to these sites in schools with adult supervision and only if the site is being accessed for an educational purpose.[171] In libraries access to the blocked sites would be allowed during use by an adult or by minors with adult supervision to enable access for educational purposes.[172] Finally, the DOPA requires the Federal Trade Commission to:

> Issue a consumer alert regarding the potential dangers to children of Internet child predators, including the

168. *Id.* § 3(a) at 2-3 (Certification by Schools).
169. *Id.* § 3(b) at 3-4 (Certification by Libraries).
170. *Id.* § (c) at 5 (Definitions).
171. *See id.* § 3(a) at 2-3.
172. *Id.* §3(b) at 3-4.

> potential danger of commercial social networking websites and chat rooms through which personal information about child users of such websites may be accessed by child predators, and establish a website to serve as a resource for information for parents, teachers and school administrators, and others regarding the potential dangers posed by the use of the Internet by children, including information about commercial social networking websites and chat rooms through which personal information about child users of such websites may be accessed by child predators.[173]

V. FIRST AMENDMENT CONCERNS WITH THE DOPA IN LIGHT OF THE RULING IN *UNITED STATES v. AMERICAN LIBRARY ASSOCIATION*

In *Reno v. ACLU*, the Supreme Court held that unlike invasive radio or television, the Internet is not "subject to the type of government supervision and regulation that has attended the broadcast industry."[174] For the Court, the Internet is entitled to the highest degree of First Amendment protection similar to the protection afforded to print media.[175] However, the Court has consistently acknowledged that the government has a compelling interest in protecting children from physical and psychological harm, including obscene and indecent material.[176] As a result, the government can apply restrictions for children in areas where they would not be allowed to limit adults, and these restrictions are often given deference by the courts.[177] According to the Court, Congress finally found an acceptable balance between these competing concerns when it passed the CIPA,[178] the only child protection Internet regulation to pass judicial scrutiny thus far.[179]

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173. *Id.* §§ 4(a)(1)-(2) at 6.
174. Reno v. ACLU, 521 U.S. 844, 869 (1997).
175. *See id.* at 870.
176. *See* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989). *See also* Ginsberg v. New York, 390 U.S. 629, 636-43 (1968); FCC v. Pacifica Foundation, 438 U.S. 726, 748 50 (1978); New York v. Ferber, 458 U.S. 747, 757 (1982); Denver Area Ed. Tel. Consortium v. FCC, 518 U.S. 727, 755 (1996); and Reno v. ACLU, 521 U.S. at 878.
177. *See Ginsberg*, 390 U.S. at 636.
178. *See* McCune, *supra* note 7, at 519.
179. *Id.*

The DOPA has been compared to the CIPA, as proponents see this new legislation as simply an extension of what had already been deemed constitutional by the Supreme Court.[180] The CIPA is considered "the dominant federal law in the area of schools, libraries, and the Internet,"[181] so it is seems crucial to analyze the constitutionality of the DOPA under the same framework utilized by the Court in *United States v. American Library Association.* Even when analyzed under the *American Library Association* structure the DOPA is constitutionally problematic because the filters lead to extensive overblocking of constitutionally protected speech.

A. Level of Scrutiny

With the CIPA, the Court held that "the government has broad discretion to make content based judgments in deciding what private speech to make available to the public."[182] The first crucial step in the Court's analysis was determining whether a library is considered a public forum for purposes of First Amendment examination.[183] The public forum analysis determines the level of scrutiny the Court will apply to the challenged legislation.[184] Content-based restrictions aimed at a public forum require strict scrutiny, while content-based regulations aimed at a non-public forum only have to survive rational basis.[185] While examining the constitutionality of the CIPA, the Court held that libraries are not considered public forums for purposes of the First Amendment, and that libraries offer their resources "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[186] Thus, the Court reviewed the CIPA under

180. *See* George Pike, *MySpace and Library Filters*, INFO. TODAY, July 1, 2006, Volume 23; Issue 7 at 15, 19.

181. Anita Ramasastry, *Why the Delete Online Predators Act Won't Delete Predatory Behavior: Requiring Libraries and Schools To Block Access to Sites like MySpace.com and Facebook.com Isn't The Best Option To Solve the Problem*, Aug. 7, 2006, http://writ.corporate.findlaw.com/ramasastry/20060807.html (last visited Oct. 19, 2007).

182. United States v. Am. Library Ass'n Inc., 539 U.S. 194, 204 (2003).

183. *Id.*

184. *See* Wardak, *supra* note 70, at 667.

185. *Id.* at 666.

186. *Am. Library Ass'n*, 539 U.S. at 206.

a rational basis standard, but only with a plurality of justices agreeing.[187] Although *American Library Association* did not discuss schools, the Court has held that "school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations."[188] In addition, "[t]he government does not create a public forum by inactions or by permitting limited disclosure, but only by intentionally opening a non-traditional forum for public discourse."[189] For the Court, "the Internet is simply another method for making information available in a school or library."[190] Therefore any constitutional challenge to the DOPA, which is aimed at both schools and libraries, will likely be subject to rational basis review. Rational basis review requires the government to only show a legitimate state interest and that the law in question is rationally related to that interest.[191] Even under rational basis, which is viewed as an undemanding standard, the DOPA does not pass constitutional scrutiny because the commercial social-networking definition is so broad that it is irrational.

Some argue that the DOPA should be subject to a higher degree of scrutiny. This argument is analogous to Justice Breyer's concurrence in *American Library Association*.[192] For Breyer the CIPA should have been analyzed under "heightened, but not strict, scrutiny,"[193] where the Court should have "examin[ed] the statutory requirements in question with special care."[194] This was especially necessary when "complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental

187. Miltner, *supra* note 71, at 568.
188. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).
189. *Am. Library Ass'n,* 539 U.S. at 206 (quoting Cornelius v. NAACP Legal Defense and Ed. Fund, Inc., 473 U.S. 788, 802 (1985)).
190. *Id.* (quoting S. Rep. No. 106-141, 7 (1999) (alteration in original).
191. Robert Corn-Revere, United States v. American Library Association*: A Missed Opportunity for the Supreme Court to Clarify Application of First Amendment Law to Publicly Funded Expressive Institutions*, (CATO SUPREME COURT REV.) 105, 115 (2003).
192. *See Am. Library Ass'n*, 539 U.S. at 216-17 (Breyer, J. concurring).
193. *Id.* at 216.
194. *Id.*

interests."[195] Under this heightened scrutiny, the Court must determine "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives."[196] To resolve this question the Court should consider "the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion."[197] Ultimately Justice Breyer found that even under the heightened scrutiny, "[g]iven the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives."[198] Because the decision in *American Library Association* was only a plurality opinion, many argue that rational basis review will not be the last word on such filtering issues. It is possible that in the future the Court might review legislation such as the DOPA under Breyer's heightened scrutiny standard, a view more in keeping with decisions prior to *American Library Association*.[199] Reviewing legislation under heightened scrutiny allows the Court to question the fit of the law and its objectives, as well as less onerous filtering alternatives.[200] These issues were discussed at length in earlier cases deciding the constitutionality of Congressional attempts at regulating the Internet for children.[201] Logically if the DOPA fails rational basis, it also would be constitutionally infirm under a heightened scrutiny as well.

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195. *Id.*
196. *Id.* at 217.
197. *Id.* at 217-18.
198. *Id.* at 220 (alteration in original).
199. *See* Corn-Revere, *supra* note 191, at 116.
200. United States v. Am. Library Ass'n Inc., 539 U.S. 194, 217 (2003).
201. *See Ashcroft v. ACLU* (*COPA II*), 542 U.S. at 660. The Court held that the government failed to rebut the contention that there were plausible less restrictive alternatives available. *Id. See also Free Speech Coal.*, 535 U.S. 234, 255 (2002). The Court held that the CPPA failed constitutional muster because it prohibited protected speech. *Id.*

B. Broad Definition of Commercial Social-Networking Sites Leads to Overblocking

Critics challenged the CIPA because of "its tendency to overblock access to constitutionally protected speech that falls outside the categories software users intend to block."[202] The objective of the CIPA was to "block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them,"[203] however challengers argued that the legislation screened out material that was constitutionally protected. This was of particular concern regarding adults, for they would "be denied access to a substantial amount of non-obscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one."[204] The Court seemed to summarily dismiss this argument by holding that "such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[205] The CIPA allowed the filters to be disabled "to enable access for bona fide research or other lawful purposes,"[206] and stated that adults can ask for the filters to be disabled at anytime.[207]

While a disabling feature salvaged the CIPA, it is unlikely that the DOPA's disabling element would produce the same result. The CIPA filters were aimed at preventing certain types of harmful information to reach minors, so websites were filtered based on content,[208] however, the DOPA proposed filters, created to prevent harmful information from reaching minors, appear more focused on technology than content. Instead of blocking sites that simply contain harmful information, the DOPA would make restrictions based on the technology of the website,[209] under the assumption that sites utilizing this technology are "a haven for online sexual predators who have made these corners of the Web

202. *Am. Library Ass'n*, 539 U.S. at 195-96.
203. *Id.* at 199.
204. *Id.* at 233-34.
205. *Id.* at 209.
206. *Id.* at 201 (quoting 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254 (h)(6)(d)) (internal quotations omitted).
207. *See id.* (quoting U.S.C. § 254 (h)(6)(d)).
208. *See* Children's Internet Protection Act, 47 U.S.C. § 254 (2001).
209. Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006).

their own virtual hunting ground."[210] Essentially the DOPA would require blocking access to the social-networking sites themselves, without even looking at whether there was harmful material on the site. This restriction would reach more constitutionally protected speech, for both minors and adults, than a filter that might prevent initial access to www.SuperBowlXXX.com because it contains the keywords "XXX."[211] While the majority of the speech blocked by the CIPA is harmful to minors, most of the speech blocked by the DOPA is not harmful, and thus constitutionally protected.[212] Although the DOPA allows access to social-networking sites for educational purposes with adult supervision,[213] this is likely not enough when one considers the sheer magnitude of websites caught in the cross-fire. The majority of the blocked websites would contain speech that is protected both for children and adults. The language of the DOPA is "overly broad and too restrictive,"[214] and thus is irrational in scope.

Even with disabling provisions, the number and assortment of websites that would be ensnared in the DOPA's proposed definition for commercial social-networking sites is intolerable even under a rational basis standard. The DOPA would "put off-limits a wide swath of the Internet: MySpace, but also Blogger, AIM, parts of Google and Yahoo!, and perhaps even news sites like the NYTimes.com (which allows visitors to create profiles and add comments)."[215] In addition the DOPA would block blogging tools, mailing lists, video and podcast sites, and photo sharing sites,[216] and even sites like Amazon.com (where you can make a wish list) and the government's own First Gov website.[217] The potential for children to obtain or encounter harmful material through social-networking sites, "may not be enough to overcome the free speech

210. 152 CONG. REC. H5883, H5884 (2006) (statement of Rep. Upton).
211. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning*, ACLU Legal Department, Mar. 17, 2002, http://www.aclu.org/privacy/speech/15145pub20020317.html.
212. *See* 152 CONG. REC. H5885 (2006) (Mr. Stupak quoting the American Library Association).
213. *See* Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006).
214. Kenney, *supra* note 160.
215. *Id.*
216. Boyd, *supra* note 122.
217. Ramasastry, *supra* note 181.

problems that the bill creates by its broad restrictions on access to and use of this and similar sites,"[218] even under rational basis.

When one takes into consideration the potentially positive attributes of the material being overblocked by the DOPA, the lack of a rational relationship between the objective of protecting children, and the all encompassing commercial social-networking definition is clear. The DOPA's description of a commercial social-networking site does not take into account the "real pedagogical value"[219] of Internet sites labeled under the definition. Teachers are beginning to:

> Use blogs for knowledge sharing in schools; they use mailing lists to communicate expectations about homework with students and parents;"[220] "[t]hey are discovering that students take their assignments more seriously and write better if they are producing work which will reach a larger public rather than simply sit on a teacher's desks;"[221] and they are "linking together classrooms around the country and around the world, getting kids from different cultural backgrounds to share aspects of their everyday experience with each other."[222]

If according to the Court, the "worthy mission"[223] of libraries and schools is to "facilitate learning and cultural enrichment,"[224] it seems unlikely that it would accept such a tenuous link between protecting children, and blocking all social-networking sites.

In addition to the loss of educational tools, "there are countless positive uses for networking applications that are not necessarily related to formal education."[225] The definition of a commercial social-net-working site would include "educational tools used to provide distance education, community forums that allow children to discuss issues of importance, online e-mail

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218. Pike, *supra* note 180.
219. Boyd, *supra* note 122.
220. *Id.*
221. *Id.*
222. *Id.*
223. United States v. Am. Library Ass'n Inc., 539 U.S. 194, 225 (2003).
224. *Id.*
225. Hearing Before the H. Sub. Comm. on Telecommunications and the Comm. on Energy and Commerce, 109th Cong. (2006) (testimony of Beth Yoke, Executive Director, Young Adult Library Services Association).

programs through which family members can communicate with each other and with teachers and librarians at their local schools and libraries, and even find one another in case of emergency."[226] The commercial social-networking site definition found in the DOPA appears to assume that all sites that fit into the definition harbor some material that is harmful to children, but the definition fails to take into consideration "the value of Interactive Web applications."[227] Social-networking sites "include support groups for teenagers with physical and emotional disabilities, forums for the exchange of ideas, and even tools to help kids become acclimated to new surroundings."[228] For instance, "David Smith, executive director and founder of Mobilizing America's Youth, the Washington D.C. based group that operates Mobilize.org, said that many students . . . are finding that social networking sites can be a great tool for social activism."[229] In March of 2006, "thousands of high school students across the country, including an estimated 40,000 in Southern California, walked out of school in protest of the anti-illegal immigration legislation, many of which were organized in part on MySpace."[230] Danah Boyd, argues that "giving youth access to a public of their peers, MySpace provides a fertile ground for identity development and cultural integration.[231] In addition, the DOPA may "increase the digital divide,"[232] because "lower-income kids may have their only access [to the Internet] at schools or libraries,"[233] and thus would be prevented from "participat[ing] in online communications, websites, and from learn[ing] the skills that come from the use of such sites."[234] Research proves that these "[n]ew Internet-based applications (also known as social-networking technologies) for collaboration, business, and learning are becoming increasingly important, and young people must be

226. *Id.* at 2.
227. 152 CONG. REC. H5883, H5885 (2006) (statement of Rep. Stupak).
228. Hearing Before the H. Sub. Comm. on Telecommunications and the Comm. on Energy and Commerce, 109th Cong. (2006) (testimony of Beth Yoke, Executive Director, Young Adult Library Services Association).
229. McFerron, *supra* note 120.
230. *Id.*
231. Nat'l Coal Against Censorship, *supra* note 11.
232. Ramasastry, *supra* note 181.
233. *Id.* (alteration in the original).
234. Nat'l Coal Against Censorship, *supra* note 11.

prepared to thrive in a work atmosphere where meetings take place online and where online social networks are essential communication tools."[235]

In *American Library Association*, the Court determined that under the CIPA, the number of overblocked sites would not create a significant restraint on constitutionally protected speech, because the content-based filters were specifically targeted "to prevent computer users from gaining Internet access to child pornography, obscenity or material comparably harmful to minors,"[236] and the ease with which the filters could be disabled.[237] Alternatively, the DOPA would place a significant burden on protected speech because the technology-based filters have little rational connection to the proposed basis for the legislation, which is protecting minors from obscene material, child pornography, and any other material that might be deemed harmful to minors.[238] While "it is important to protect children from predators, laws should not inflict the collateral damage of preventing Internet use."[239] Given the widespread filtering authorized under the DOPA, even the disabling feature does little to cure the constitutional infirmity of overblocking. Because the DOPA would purposefully block access to many valuable "websites whose benefits outweigh their detriments,"[240] a library patron or student would be forced to ask to release a significantly higher percentage of websites they wished to visit This does not equate with the "ease with which patrons may have the software disabled,"[241] for inadvertently blocked websites under the CIPA. The DOPA as it was written would not survive constitutional scrutiny under rational basis because blocking access to all commercial social-networking sites is unreasonable when the focus of the legislation is to protect children from harmful material on the Internet. If the mandated filters from the CIPA are formatted to block harmful material, the definition espoused

235. American Library Association, *DOPA Information Packet: A Resource for Librarians and Library Workers*, Aug. 8, 2006, http://www.ala.org/yalsa.
236. United States v. Am. Library Ass'n Inc., 539 U.S. 194, 215 (2003).
237. *Id.* at 209.
238. Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006).
239. Halperin, *supra* note 14.
240. 152 CONG. REC. H5883, H5885 (2006) (statement of Rep. Stupak quoting American Library Association).
241. *Am. Library Ass'n*, 539 U.S. at 209.

in the DOPA does not add additional safeguards; it simply blocks additional protected speech. The DOPA is so overbroad it is irrational, and thus does not pass constitutional muster.

VI. THE DEMISE OF THE DOPA AND THE BIRTH OF THE PROTECTING CHILDREN IN THE 21ST CENTURY ACT

Luckily the DOPA never became law.[242] However, even if it had, it would have been struck down on First Amendment grounds. After passing in the House of Representatives by an overwhelming majority thanks to unusual bipartisan support,[243] the legislation lingered in the Senate after having been referred to the Committee on Commerce, Science, and Transportation.[244] When a new session of Congress began in January of 2007, all proposed bills and resolutions that had not passed (including DOPA), were removed from consideration.[245] In addition, the DOPA's main sponsor, Michael Fitzpatrick, lost his bid for re-election in November of 2006 when he was defeated by the Democratic challenger, Patrick Murphy.[246] Although this momentarily allowed school children across the country to breathe a sigh of relief,[247] commentators agreed that it was very "possible that in the next session . . . the issue of social networking technologies might come to the forefront again."[248] Harsh critics of the DOPA worry that another MySpace-related panic will lead to new legislation aimed at social-networking sites.[249]

These fears were cemented on January 4, 2007 when Senator Ted Stevens of Alaska proposed the Protecting Children in the 21st

242. H.R. 5319 [109th]: Deleting Online Predators Act of 2006, http://www.govtrack.us/congress/bill.xpd?bill=h109-5319 (last visited Feb. 17, 2007).

243. *Id.* Vote totals were 410 ayes, 15 nays, and 7 present/not voting. *Id.* Role number was 405. *Id.*

244. *Id.*

245. *See id.*

246. Vikas Bajaj, *Northeast*, N.Y. TIMES, Nov. 9, 2006, at P10.

247. *See* Matthew Nelson, *DOPA Dead (Probably)*, Jan. 3, 2007, http://blog.clickz.com/070103-182147.html.

248. Young Adult Library Services Association, DOPA (Deleting Online Predators Act), http://teentechweek.wikispaces.com/DOPA (last visited Feb. 17, 2007).

249. *See* LibraryJournal.com, *Why Did DOPA Die? The Senate, the Foley Scandal, and the Election*, Jan. 8, 2007, http://www.libraryjournal.com /article/CA6404709.html.

Century Act.[250] Although the legislation is in its very early stages and has just recently been referred to the Senate Commerce, Science and Transportation Committee,[251] many are already labeling the legislation as the "DOPA Jr.,"[252] or "DOPA II."[253] The asserted purpose of the new legislation is "to amend the Communications Act of 1934 to prevent the carriage of child pornography by video service providers, to protect children from online predators, and to restrict the sale or purchase of children's personal information in interstate commerce."[254] The second section of the new bill is even called "Deleting Online Predators,"[255] and this section contains virtually the same language as the DOPA.[256] In addition to the DOPA language, this section also calls for "a policy of Internet safety for minors that prevents cyberbullying and includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access."[257] As written, the Protecting Children in the 21st Century Act would raise the exact same constitutional concerns as the DOPA, with the additional concern that this legislation is still viable and susceptible to the same fear mongering. On Tuesday, February 13, 2007, "Dateline" aired the results of its ninth undercover investigation in the "To Catch a Predator" series.[258] The continual visibility of such remote threats is bound to keep "MySpace Madness"[259] alive and well, and the pressure on Congress to protect our nation's children will be stronger then

250. S. 49 [110th]: Protecting Children in the 21st Century Act, http://www.govtrack.us/congress/bill.xpd?bill=s110-49 (last visited Feb. 17, 2007).

251. *Id.*

252. Andy Carvin, *The Birth of DOPA Jr.*, Jan. 23, 2007, http://www.pbs.org/teachersource/learning.now/2007/01/the_birth_of_dopa_jr.html.

253. Xendi Jardin, *Senator "Series of Tubes" Stevens Introduces DOPA II: The Sequel*, Jan. 23, 2007, http://www.tuzworld.com/index.php/archives/954.

254. Protecting Children in the 21st Century, S. 49, 110th Cong. (1st Sess. 2007).

255. *Id.*

256. *Id.*

257. *Id.*

258. Chris Hansen, *All Kinds of Men, All Kinds of Stories – Part One of the Texas Investigation*, DATELINE, Feb. 13, 2007, http://www.msnbc.msn.com/id/17137110/.

259. Zeller, *supra* note 12.

ever.

VII. CONCLUSION

In addition to the constitutional questions surrounding the DOPA and similar legislation, there is the realization by many that this type of legislation would do little to protect children from danger on the Internet.[260] The reality is, "Internet protection is a moving target, and social networking is evolving more quickly than the legislation aimed at regulating it."[261] Many advocates of child safety believe that the most effective way to protect children is through education where children can "learn how to use all kinds of applications safely and effectively, and where young people can learn how to report and avoid unsafe sites."[262] It is difficult to see the wisdom in legislation that would "actually drive children to go to unsupervised places, to go online, where they will become more vulnerable to child predators."[263] To truly shield children from harmful material, Congress cannot let emotion and fear play a predominant role in legislation, because "reacting in ignorance and fear. . . they increase the risks and discard the benefits of these emerging cultural practices."[264] Congress should "take the initiative to research, identify, and develop the most effective means to protect minors without restricting their access to constitutionally and socially essential materials."[265] The DOPA does not represent the most effective means to protect children from harmful material on the Internet because it would be struck down as a violation of the First Amendment due to pervasive needless overblocking.

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260. Ramasastry, *supra* note 181.

261. Halperin, *supra* note 14.

262. American Library Association, *DOPA Information Packet: A Resource for Librarians and Library Workers*, Aug. 8, 2006, http://www.ala.org/yalsa.

263. 152 CONG. REC. H5883, H5885 (2006) (statement of Rep. Stupak).

264. Boyd & Jenkins, *supra* note 122.

265. Miltner, *supra* note 71, at 578.

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