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Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures

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NOTE

Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures

Heather L. Miller*

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I. INTRODUCTION

In 1995, *Time* magazine ran a cover story about the proliferation of pornography on the Internet.¹ The story was based on a study conducted by Marty Rimm, which was later discredited, but the *Time* article was indicative of the nation's concern about the accessibility of such material to children. This concern prompted Congress to pass the Communications Decency Act of 1996 (CDA).² However, the U.S. Supreme Court struck the Act down as unconstitutional in 1997.³ Congress responded by drafting new legislation aimed at protecting children from online pornography and passed the Child Online Protection Act (COPA) in October 1998.⁴ Congress stated in its report accompanying the COPA that the Act "has been carefully drafted to respond to the Supreme Court's decision in *Reno v. ACLU*."⁵ The American Civil Liberties Union (ACLU) disagreed and filed suit, along with sixteen other plaintiffs, alleging that the COPA is unconstitutional under the First and Fifth Amendments.⁶ The U.S. District Court for the Eastern District of Pennsylvania responded to the lawsuit by issuing a preliminary injunction against the COPA's enforcement in February 1999.⁷

This Note demonstrates that although narrower in scope than the CDA, the COPA cannot withstand constitutional scrutiny. Part II provides general background information about the World Wide Web (Web). Part III discusses the availability of sexually explicit material on the Web. Part IV reviews the CDA, which was Congress's first attempt at regulating minors' access to sexually explicit material via the Internet. Part V begins the

1. See Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38.

2. See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 53-57 (1996).

3. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

4. See *ACLU Files Suit Challenging the Child Online Protection Act* (visited Aug. 26, 1999) <<http://techlawjournal.com/censor/81023.htm>>.

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

6. See *ACLU Files Suit Challenging the Child Online Protection Act*, *supra* note 4; see also Plaintiffs' Complaint for Declaratory and Injunctive Relief, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>.

7. See *ACLU v. Reno*, 31 F. Supp.2d 473, 477 (E.D. Pa. 1999).

analysis of the COPA's constitutionality. Specifically, Part V first addresses the COPA's "harmful to minors" definition, reviewing the difficulty of applying this definition to the Internet medium. In addition, this Note explains why the "harmful to minors" definition is vague. Second, the analysis reviews the economic and technological unavailability of the COPA's affirmative defenses. Finally, the COPA analysis addresses the privacy and security concerns connected with the use of age verification procedures. Part VI concludes the Note with an explanation as to why legislation is an ineffective mechanism to address the problem of minors' access to online pornography.

II. THE WORLD WIDE WEB GENERALLY

The Internet is not a physical entity, but rather "an international network of interconnected computers."⁸ Many networks are connected in a way that allows the computers in one network to communicate with computers in any other network, thus forming the Internet.⁹ The Internet is not controlled or administered by any single entity. Rather, the Internet is the result of independent computer operators and networks communicating with each other through common data transfer protocols.¹⁰ Approximately fifty-four to sixty-five million computers worldwide are connected to the Internet.¹¹

The most common way computer users access information on the Internet is through the Web.¹² The Web is a type of "publishing forum,"¹³ consisting of documents stored on different computers in any one of 150 different nations.¹⁴ Web documents can consist of text, still images, sounds, and video.¹⁵ Web documents use a common formatting language called hypertext markup language (html), which allows the documents to be dis-

8. *Reno*, 521 U.S. at 849.

9. *See* *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

10. *See id.* at 832.

11. *See Net Market Size and Growth: Domains, Hosts, and Sites* (visited Aug. 29, 1999) <http://www.emarketer.com/estats/nmsg_domains.html> (citing an Internet Society statistic that 65 million computers are connected to the Internet and citing an eStats statistic that 54 million computers are connected to the Internet).

12. *See* David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 193 (1998-99); *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996), *aff'd*, *Reno v. Shea*, 521 U.S. 1113 (1997).

13. *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 166 (S.D.N.Y. 1997); *see also* Steve Lawrence & C. Lee Giles, *Searching the World Wide Web*, SCIENCE, Apr. 3, 1998, at 98 (referring to the Web as "a searchable 15-billion-word encyclopedia").

14. *See* Steve Woodward, *Act of Protection vs. Oppression*, PORTLAND OREGONIAN, Nov. 2, 1998, at B1.

15. *See* *ACLU*, 929 F. Supp. at 836.

played through browser programs, such as Netscape Navigator, Mosaic, or Internet Explorer. Computer users access Web content through the use of these browsers.¹⁶

Computer users on the Web "must actively seek out with specificity the information they wish to retrieve."¹⁷ Computer users can retrieve information in one of three ways. First, each Web site has an address called a Uniform Resource Locator (URL). Users can type a Web site's URL to directly access the site.¹⁸

Second, a user can conduct a search through a search engine, such as Yahoo or Webcrawler, which are tools offered to Web users free of charge to help them navigate the Web.¹⁹ Search engines are popular among Web users. Yahoo, for example, has forty million users.²⁰ A user utilizes a search engine by typing in relevant terms as a search request. In response, the search engine will provide the user with a list of sites matching the request.²¹ Yahoo, for example, maintains a site directory. When a user enters a search request, Yahoo returns a list of the sites in its directory that match the request.²² However, even the most comprehensive search engines only browse approximately one-third of the more than 320 million pages on the Web.²³

The third way in which users can access Web information is through links located on a Web site. Many sites contain links, which often consist of either blue or underlined text or images. Links refer to other Web documents, which can be located anywhere in the world, and when the user clicks on the link with a computer mouse, the linked document is dis-

16. See Expert Report of Dan Farmer, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_farmer_rep.html>.

17. Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

18. See Declaration of Professor Donna L. Hoffman at para. 31, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_hoffman_dec.html>; *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 166 (S.D.N.Y. 1997).

19. See *Pataki*, 969 F. Supp. at 166.

20. See Steven Levy, *Xmas.com*, *NEWSWEEK*, Dec. 7, 1998, at 54.

21. See *Pataki*, 969 F. Supp. at 166.

22. See *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1997), *aff'd*, *Reno v. Shea*, 521 U.S. 1113 (1997).

23. See Lawrence, *supra* note 13, at 100 (The following estimates are "in terms of the fraction of the indexable Web that the individual engines cover: HotBot, 34%; AltaVista, 28%; Northern Light, 20%; Excite, 14%; Infoseek, 10%; and Lycos, 3%."); Thomas E. Weber, *Web's Vastness Foils Even Best Search Engines*, *WALL ST. J.*, Apr. 3, 1998, at B1.

played.²⁴

The Web is rapidly and constantly growing, making its size difficult to determine with any certainty, although current estimates range from 3.5 million Web sites²⁵—which is an increase from the 1.2 million sites in 1997²⁶—to 320 million Web pages.²⁷ The number of Internet users has been rapidly increasing as well.²⁸ According to Mediamark Research's Spring 1999 CyberStats report, 32.5% of adults use the Internet, which equals 64.2 million adult users.²⁹ According to a study conducted by Arbitron New Media, 62% of children ages eight to fifteen use the Web.³⁰ In addition, 78% of public schools have Internet access, and the Department of Education predicts that this figure will increase to 95% by the year 2000.³¹

III. SEXUALLY EXPLICIT MATERIAL ON THE WEB

Sexually explicit or pornographic sites do not constitute a substantial portion of the content available on the Web, although determining the number of sexually explicit Web sites with any certainty is difficult.³² The

24. See Declaration of Professor Donna L. Hoffman at para. 31, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_hoffman_dec.html>; *Pataki*, 969 F. Supp. at 166; *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996).

25. See Declaration of Professor Donna L. Hoffman at para. 48, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_hoffman_dec.html>.

26. See *Net Market Size and Growth: Domains, Hosts, and Sites* (visited Aug. 26, 1999) <http://www.emarketer.com/estats/nmsg_domains.htm>.

27. See Weber, *supra* note 23; Declaration of Professor Donna L. Hoffman at para. 50, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_hoffman_dec.html>.

28. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html> ("The amount of traffic on the Internet is doubling approximately every 100 days.")

29. See *Almost 65 Million Americans Online* (visited Aug. 26, 1999) <http://cyberatlas.internet.com/big_picture/geographics/article/0,1323,5911_150971,00.html>. In addition, the Mediamark report found that 83.7 million American adults have access to the Internet. See *id.*; cf. *Internet Becoming a Daily Essential* (visited Aug. 26, 1999) <http://cyberatlas.internet.com/big_picture/demographics/article/0,1323,5901_150321,00.html> (citing a study conducted by Strategis, reporting that 42% of Americans use the Internet).

30. See *Parents Lack Skills to Supervise Children Online* (visited Aug. 26, 1999) <http://cyberatlas.internet.com/big_picture/demographics/article/0,1323,5901_164711,00.html>. In addition, the study reported that "[m]ore than one-third of the children surveyed cited the Internet as their first choice for research information over more traditional forms of media, such as books and magazines . . . and the library." *Id.*

31. See H.R. REP. NO. 105-775, at 9 (1998).

32. See James V. Dobeus, Comment, *Rating Internet Content and the Spectre of Government Regulation*, 16 J. MARSHALL J. COMPUTER & INFO. L. 625, 632 n.37 (1998).

number of sexually explicit sites, however, has been increasing in recent years as the size of the Web has been increasing. In 1997, the *New York Times* reported that the Web was home to ten thousand pornographic sites.³³ In 1998, estimates ranged from twenty-eight thousand to seventy-two thousand sexually explicit sites.³⁴ *Newsday* reported in February 1999 that thirty thousand to sixty thousand Web sites featured sexually explicit material accessible to children.³⁵ Jeffrey Douglas, Executive Director of the Free Speech Coalition, the trade association of the adult entertainment industry, testified before Congress in September 1998 that the Internet is the area of "greatest growth and growth potential" for the pornography industry.³⁶

Compared to the overall size of the Web, however, the proportion of sites that are devoted to sexually explicit material is small. In his testimony in the 1996 case of *Shea ex rel. American Reporter v. Reno*,³⁷ the president of a blocking software manufacturer testified that even if the 1996 pornographic Web site estimates of five thousand to eight thousand were doubled, this would constitute only one-tenth of one percent of all Web sites.³⁸

Despite the small number of Web sites devoted to sexually explicit material, commercial pornography sites are among the most profitable sites on the Web.³⁹ In 1998, commercial pornography sites garnered between \$750 million and \$1 billion.⁴⁰ The adult Web site company Internet Entertainment Group expects to generate \$100 million in revenue and \$35 million in profit in 1999, and the "use of the name Pamela Lee Anderson, former 'Baywatch' actress and Playboy nude model, generates about \$77 million a year in online revenue."⁴¹ Still, these figures are small in compari-

33. See Amy Harmon, *For Parents, a New and Vexing Burden*, N.Y. TIMES, June 27, 1997, at A21.

34. See Woodward, *supra* note 14.

35. See Edward Negron, *Looking at Porn in the Library*, NEWSDAY, Feb. 7, 1999, at G6; cf. Susan Aschoff, *Parents Have to Struggle to Stay Above the Web Tide*, SAN DIEGO UNION-TRIBUNE, Feb. 6, 1999, at E6. According to Enough is Enough, a conservative Internet lobbying organization, 40,000 to 100,000 commercial pornography sites exist on the Web.

36. *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearings on H.R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 47 (1998) (statement of Jeffrey J. Douglas, Executive Director, Free Speech Coalition).

37. 930 F. Supp. 916 (S.D.N.Y. 1996).

38. See Dobeus, *supra* note 32, at 632 n.37.

39. See Harmon, *supra* note 33.

40. See John Leland, *Let's Talk About Sex*, NEWSWEEK, Dec. 28, 1998/Jan. 4, 1998, at 65.

41. Pat Shellenbarger, *Opinion 2000: The Press Poll of West Michigan . . . Safe Surf-*

son to the money consumers spend on pornography from all media, which in 1997 reached an estimated \$8 billion.⁴²

Nine million people visit sexually explicit Web sites each day.⁴³ The *New York Times* reported in 1997 that approximately eight percent of the thirty percent of Web users who visit sexually explicit sites are teenagers.⁴⁴ In 1998, Media Metrix estimated that forty-three percent of all Web traffic visited a sexually explicit Web site between May and August of that year.⁴⁵ In addition, a study conducted by the U.S. Commission on Pornography, appointed ten years ago, found that kids between the ages of twelve to seventeen are among pornography's primary consumers.⁴⁶

Although some sexually explicit sites are accessed deliberately by Web users—"sex," for example, is the most popular search term Web users request⁴⁷—sexually explicit material can be accessed unintentionally. First, users may locate sexually explicit sites through an innocent search engine request. Children, for example, could request a search engine to locate sites on subjects such as toys, dollhouses, girls, and boys, which all will result in some sexually explicit material being located.⁴⁸ In fact, the sites girls.com and boys.com are both sexually explicit Web sites. Girls.com, for example, features "125,000 [sic] hardcore pics" and "Pam Anderson [and] Tommy Lee uncensored videos."⁴⁹

In addition, a search for "Sleeping Beauty," "Little Women," or "Babe" returns results for sites devoted to the movies as well as sites devoted to sexually explicit material.⁵⁰ An August 1999 search for "Little Women" using the Excite search engine, for example, returned links to a site that sells adult videos, a link to nude-amateurs.com, and a link to hard-

ing, GRAND RAPIDS PRESS, May 20, 1999, at A1.

42. See Harmon, *supra* note 33.

43. See Shellenbarger, *supra* note 41.

44. See Harmon, *supra* note 33.

45. See Richard Tedesco, *Porn Sites Making Hay*, BRDCST. & CABLE, Oct. 26, 1998, at 64. "Playboy pulled in 2.3 million PC users during the second quarter of 1998, according to Media Metrix, which estimates X-Pix, 123 Adult [sic] and Triple-X at about 5 million visitors each. In fact, Media Metrix estimates that some 22 million Web surfers—43% of all Web traffic in the second quarter—found their way to sex sites . . ." *Id.*

46. See Negron, *supra* note 35.

47. See *How Ordinary Americans View the Web* (visited Aug. 30, 1999) <http://cyberatlas.internet.com/big_picture/demographics/article/0,1323,5901_150041,00.html> (noting that seven of the top twenty search terms inputted by Web users relate to adult content).

48. See H.R. REP. NO. 105-775, at 10 (1998).

49. *Girls.com* (visited Oct. 12, 1999) <<http://www.girls.com/index.shtml?4133>>.

50. See *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 931 (S.D.N.Y. 1996), *aff'd*, *Reno v. Shea*, 521 U.S. 1113 (1997).

coresexlive.com.⁵¹ The same search using Yahoo returned the "Little Women Forum," which is a site "dedicated to small breasted women," as the first link on its list,⁵² and Webcrawler returned links to pussygopher.com, hornyteenagers.com, and beautifulteens.com, which is "A Guide To XXX Teen Internet Sex Sites."⁵³

Similarly, a July 1999 search for "Sleeping Beauty" using the Webcrawler search engine located sexually explicit Web sites as well as Web sites featuring the fairy tale princess. In fact, five of the top ten sites Webcrawler returned—including the first two sites on the list—featured sexually explicit material. The first site on the list boasted "The Complete Internet Sex Resource Guide,"⁵⁴ and the second site welcomed visitors to "Beauty's World where fantasy and reality meet."⁵⁵ The third site on the list was the first site offering child-friendly material, such as "How to Get Into the Princess Aurora Fan Club" and the "Top [Thirty-Six] Reasons Why Aurora is Better Than Any Other Disney Princess."⁵⁶

However, even though a user may access a link to a sexually explicit Web site through a search engine request, the user typically will not accidentally access the sexually explicit material available on the site itself. When a search engine returns a list of matches, the list will usually offer the title of the Web site and may also offer a description of the material available on the site.⁵⁷ This description will act as a warning, helping to prevent users who do not want to view sexually explicit material from accidentally clicking on a link to a sexually explicit site.

Even if the user were to click on a link to a sexually explicit site,

51. See *All Little Women* (visited Aug. 29, 1999) <<http://www.ontap2.com/video/alw.htm>>; *Young Girl Nude Teen Amateur Women* (visited Aug. 29, 1999) <<http://nude-amateurs.com>>; *hardcoresexlive* (visited Aug. 29, 1999) <<http://www.hardcoresexlive.com/sex2/cum3y7d.html>>.

52. *Little Women Forum* (visited Aug. 29, 1999) <<http://www.lwforum.com>>.

53. *List of Quality Sex Sites with Teens, Pussy, and Gay Men* (visited Aug. 29, 1999) <<http://pussygopher.com>>; see also *HornyTeenagers.Com* (visited Aug. 29, 1999) <<http://hornyteenagers.com>>; *BeautifulTeens.Com* (visited Aug. 29, 1999) <<http://beautifulteens.com>>.

54. *The Complete Internet Sex Resource Guide* (visited Aug. 29, 1999) <<http://sleepingbeauty.com/world/netsex.html>>.

55. *Welcome to Beauty's World* (visited Aug. 29, 1999) <<http://sleepingbeauty.com/world/welcome.html>>.

56. Steve C. Liu, *Fan-written Articles* (visited Aug. 29, 1999) <<http://www.access.digex.net/~admiral/sbfan.html>>.

57. See *ACLU v. Reno*, 521 U.S. 844, 852 (1997); *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996); *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 931 (S.D.N.Y. 1996), *aff'd*, *Reno v. Shea*, 521 U.S. 1113 (1997); Dobeus, *supra* note 32, at 632 n.38 ("In most cases, the title of the document and a description of its content appear before an Internet user takes the step of actually accessing the document.").

many of these sites offer warnings that the site contains sexually explicit material.⁵⁸ For example, WhiteHouse.com presents a warning that "by clicking on the link below or clicking on our Daily Teaser Pics, you warrant you are interested in seeing material of a pornographic nature."⁵⁹ Similarly, Hot Teen Pussy warns users that "by accepting this agreement, [you] certify . . . [that you] do not find images of nude adults, adults engaged in sexual acts, or other sexual material to be offensive or objectionable."⁶⁰ These warnings also state that minors cannot enter the site.⁶¹ Despite these warnings, many of these Web sites, including WhiteHouse.com and Hot Teen Pussy, offer sexually explicit visuals on the warning page. Furthermore, for many sites, once the user clicks on the link to enter the site, there is no age verification program that the user must satisfy before being exposed to sexually explicit images.⁶² Web site owners generally offer some free sexually explicit images to advertise and entice the user to subscribe to the site, which would give the user full access to the site's sexually explicit material.⁶³ Both WhiteHouse.com and Hot Teen Pussy are commercial sites. A consumer of WhiteHouse.com, for example, can have full access to the site's material by registering to pay a monthly fee of \$19.99.

The second way users may unintentionally access a sexually explicit Web site is by accidentally typing a sexually explicit Web site's URL.⁶⁴ A child wanting information about Sleeping Beauty, Cinderella, Bambi, Minnie Mouse, or Little Red Riding Hood, for example, will access sexually explicit Web sites by typing sleepingbeauty.com, cinderella.com, bambi.com, minnie.com, or littleredridinghood.com.⁶⁵ A user wanting to access the official Web site of the White House will accidentally access a sexually explicit site if the user types whitehouse.com, rather than whitehouse.gov.⁶⁶ Similarly, accidentally typing sharware.com rather than

58. See *ACLU*, 929 F. Supp. at 844; Harmon, *supra* note 33 ("Nearly all the commercial adult sites warn minors not to enter . . .").

59. *WhiteHouse.com* (visited Aug. 29, 1999) <<http://www.whitehouse.com>>.

60. *Hot Teen Pussy* (visited Aug. 29, 1999) <<http://www.hotsexpics.com/indexhotsexa.htm>>.

61. "By entering WhiteHouse.com, you agree that you are at least 18 years of age . . ." *WhiteHouse.com*, *supra* note 59. "By accepting this agreement, I certify . . . I am at least 18 years of age . . ." *Hot Teen Pussy*, *supra* note 60.

62. See H.R. REP. NO. 105-775, at 10 (1998); Tedesco, *supra* note 45, at 66 (stating that "[y]ou can use all sorts of screens to keep kids out, but the majority of sites choose not to use them").

63. See H.R. REP. NO. 105-775, at 10.

64. See *id.*

65. This is according to a search conducted in August 1999.

66. See H.R. REP. NO. 105-775, at 10.

shareware.com will also access sexually explicit material.⁶⁷

IV. THE COMMUNICATIONS DECENCY ACT

In response to the growing concern about minors' exposure to sexually explicit material on the Internet, Congress passed the CDA, which was part of the Telecommunications Act of 1996.⁶⁸ Section 223(a) prohibited knowingly transmitting any "communication which is obscene or indecent, knowing that the recipient of the communication is under [eighteen] years of age."⁶⁹ Section 223(d) prohibited knowingly sending or displaying to a person under eighteen years of age any "communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."⁷⁰ In response to the passage of the CDA, the ACLU and the publisher of the American Reporter, an electronic newspaper, each filed suit, challenging the constitutionality of these two provisions on First Amendment and Fifth Amendment grounds.⁷¹ In 1997, the U.S. Supreme Court held the CDA unconstitutional in *Reno v. ACLU*.⁷² The Supreme Court affirmed the district court's ruling solely on the basis of the First Amendment, not reaching the Fifth Amendment issue.⁷³

The Court determined that the CDA should be reviewed under strict scrutiny, which requires a compelling interest and necessary means.⁷⁴ The Court has repeatedly recognized the protection of the physical and psychological well-being of minors as a compelling interest. This includes protecting minors from material that is not obscene by adult standards.⁷⁵ Despite this compelling interest, the CDA failed constitutional analysis because the government did not demonstrate necessary means. The Supreme

67. *See id.*

68. *See id.* at 8.

69. Communications Decency Act, 47 U.S.C. § 223(a)(1)(B) (Supp. II 1996) (repealed 1997).

70. *Id.* § 223(d)(1)(B).

71. *See* H.R. REP. NO. 105-775, at 8.

72. 521 U.S. 844, 864 (1997).

73. *See id.* at 864 ("[T]he [g]overnment argues that the [d]istrict [c]ourt erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue.").

74. *See id.* at 870 ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

75. *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 743 (1996); Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. 747, 756-57 (1982); FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978); Ginsberg v. New York, 390 U.S. 629, 636-43 (1968).

Court stated: "It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults."⁷⁶ In addition, the Court stated that the CDA's burden on constitutionally protected speech could not "be justified if it could be avoided by a more carefully drafted statute."⁷⁷

One problem the Court addressed was the vagueness of the CDA's terminology. While section 233(a) prohibited "indecent" speech, section 233(d) prohibited "patently offensive" speech. The CDA did not define either term. Because of the CDA's absence of definitions and the difference in terms, the Court concluded that the CDA "will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."⁷⁸ A second problem the Court reviewed was the CDA's lack of a societal value requirement, which would allow appellate courts to apply "a national floor for socially redeeming value."⁷⁹

The CDA provided affirmative defenses to violations of the Act. Section 223(e) provided an affirmative defense if a person restricted access to the communication through "good faith, reasonable, effective, and appropriate actions."⁸⁰ These included restricting access by requiring a verified credit card, debit account, adult access code, personal identification number,⁸¹ or "any [other] method which is feasible under available technology."⁸² Because the CDA applied to commercial and noncommercial speakers, a third problem the Court addressed was the unavailability of the affirmative defenses due to the prohibitive cost of age verification mechanisms. Consequently, the CDA would curtail speech that was constitutionally protected for adults in violation of the First Amendment.⁸³

V. THE CHILD ONLINE PROTECTION ACT

In response to the Supreme Court's ruling in the first *ACLU*, Congress drafted the COPA. The COPA was part of the Omnibus Appropriations Act for Fiscal Year 1999, which President Bill Clinton signed into law on October 21, 1998.⁸⁴ The COPA would amend section 223 of the Communica-

76. *Reno*, 521 U.S. at 875 (citation omitted).

77. *Id.* at 874.

78. *Id.* at 871.

79. *Id.* at 873.

80. 47 U.S.C. § 223(e)(5)(A) (Supp. II 1996) (repealed 1997).

81. *See id.* § 223(e)(5)(B).

82. *Id.* § 223(e)(5)(A).

83. *See Reno*, 521 U.S. at 876-77.

84. *See ACLU Files Suit Challenging the Child Online Protection Act*, *supra* note 4.

tions Act of 1934⁸⁵ and would be codified at 47 U.S.C. § 231.⁸⁶ The House of Representatives Commerce Committee stated in its report that the COPA "has been carefully drafted to respond to the Supreme Court's decision in [first *ACLU* case]."⁸⁷

The COPA prohibits "knowingly and with knowledge of the character of the material . . . by means of the World Wide Web, mak[ing] any communication for commercial purposes . . . available to any minor . . . that includes any material that is harmful to minors"⁸⁸ The COPA is narrower in application than the CDA in several respects. First, the COPA only applies to Web communications.⁸⁹ Second, only communications for commercial purposes are affected.⁹⁰ Third, unlike the indecent and patently offensive standards in the CDA, the COPA applies to communications that are harmful to minors.⁹¹

Noncompliance with the COPA results in criminal and civil penalties, including fines and imprisonment.⁹² Similar to the CDA, the COPA offers affirmative good faith defenses, including "requiring use of a credit card, debit account, adult access code, or adult personal identification number; . . . accepting a digital certificate that verifies age; or . . . other reasonable measures that are feasible under available technology."⁹³

85. See H.R. REP. NO. 105-775, at 1 (1998).

86. See Plaintiffs' Complaint for Declaratory and Injunctive Relief at para. 1, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>.

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

88. 47 U.S.C.A. § 231(a)(1) (West 1998).

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.* The statute reads as follows:

(a) Requirement to restrict access. (1) Prohibited conduct. Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations. In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil Penalty. In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

93. *Id.* § 231(c)(1).

A. ACLU v. Reno: *The Second Round*

The COPA's unconstitutionality is the basis of a lawsuit filed against the government. On October 22, 1998, the ACLU, along with sixteen other plaintiffs, filed a lawsuit against Attorney General Janet Reno in the U.S. District Court for the Eastern District of Pennsylvania, alleging that the COPA is unconstitutional under the First and Fifth Amendments.⁹⁴ Specifically, the plaintiffs allege that the COPA violates the First Amendment because the Act infringes upon the protected speech of adults and older minors. Furthermore, they argue that the Act violates the Fifth Amendment because it is unconstitutionally vague.⁹⁵

On November 20, 1998, the district court granted the plaintiffs' motion for a temporary restraining order, and on February 1, 1999, the court granted the plaintiffs' motion for a preliminary injunction. In granting the preliminary injunction, the district court applied the strict scrutiny standard. The district court recognized the government's compelling interest in the protection of minors, but found that the plaintiffs had shown a likelihood of success on the merits that the COPA failed to meet the necessary means requirement.⁹⁶

In a statement issued after the ruling, the COPA's author, the COPA's cosponsor, and the chairman of the House Commerce Committee pledged their continued support of the Act: "We continue in our steadfast support of the [COPA], and we urge the Department of Justice to continue defending this law at trial or on appeal all the way to the U.S. Supreme Court."⁹⁷ The government appealed the preliminary injunction on April 2, 1999. If the government had not appealed, the COPA would have proceeded to a trial on its merits.⁹⁸

94. See *ACLU Files Suit Challenging the Child Online Protection Act*, *supra* note 4; see also Plaintiffs' Complaint for Declaratory and Injunctive Relief at para. 1, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>. The plaintiffs in the second *ACLU* case include the ACLU, A Different Light Bookstores, American Booksellers Foundation for Free Expression, ArtNet Worldwide Corporation, Blackstripe, Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

95. See *ACLU v. Reno*, No. 98-5591, 1998 WL 813423, at *1 (E.D. Pa. 1998).

96. See *ACLU v. Reno*, 31 F. Supp.2d 473, 498 (E.D. Pa. 1999).

97. John Schwartz, *Judge Halts Law to Keep Children from Web Porn*, DETROIT NEWS, Feb. 2, 1999, at 7A. (The COPA's author is Representative Michael G. Oxley; the cosponsor is Representative James C. Greenwood; and the chairman of the House Commerce Committee is Representative Thomas J. Bliley).

98. See Maria Seminerio, *DOJ Appeals: What's Next for COPA?*, ZDNET NEWS, Apr. 5, 1999, available at 1999 WL 14537366.

Despite the imposition of the preliminary injunction, some commercial pornography Web sites have already begun complying with the COPA. For example, Amateur Nude Girls requires users to pass through an age verification system before they are allowed access to the site. The site's warning page informs users that it is "getting ready to comply with the [COPA] We will be taking precautionary measures until further rulings about this law have been made."⁹⁹ Similarly, XXXCandy no longer offers users free samples of sexually explicit images. XXXCandy's warning page states:

As you may be aware, the U.S. government has recently adopted a law, commonly known as the "[COPA]," which affects the type of content accessible to minors on the Web. As a responsible industry leader, this site must respond to the conditions of the Act in such a way that will support our industry and protect our member's interests. There can be nothing on the outside portion of this site that can be construed as "material that is harmful to minors," as the Act describes the limitation. We cannot and will not post anything that is not in full compliance with the law.¹⁰⁰

B. *The COPA's Constitutional Failures*

The COPA cosponsor Rep. James C. Greenwood contends that the "COPA differs markedly from its unconstitutional predecessor, the CDA."¹⁰¹ Despite such assertions, and despite being narrower in scope than the CDA, the COPA raises constitutional problems in various respects. First, the COPA's "harmful to minors" definition is not readily adaptable to the Internet medium due to the difficulty of segregating adults and minors in cyberspace. Second, the "harmful to minors" definition is vague. The definition does not state whether online material must have value for all minors or if material only needs to have value for older minors. Furthermore, the "harmful to minors" definition does not state how the community standards and "taken as a whole" requirements would apply in the Internet medium.

Third, the COPA's affirmative defenses are economically and technologically unavailable to many of the Web sites affected by the Act. Due to the breadth of the "commercial purpose" definition, the Act encompasses many Web sites that will be economically unable to utilize the COPA's affirmative defenses. In addition, the affirmative defenses are technologically unavailable to many Web site owners due to the lack of common gateway

99. *Amateur Nude Girls* (visited Aug. 29, 1999) <<http://www.amateurnudegirls.com>>.

100. *XXXcandy* (visited Aug. 29, 1999) <<http://www.xxxcandy.com>>.

101. James Greenwood, *Children and Freedom of Speech Can Be Protected on Internet*, ALLENTOWN MORNING CALL, Feb. 23, 1999, at A15.

interface (cgi) capability for many speakers who publish via a commercial online service. The unavailability of the affirmative defenses raises a constitutional problem because without the availability of the affirmative defenses, the Act requires Web site owners to only provide material that has value for minors, thus denying adults access to material that they have a constitutional right to obtain.

A final concern with the COPA is privacy and security. Web site owners must implement age verification procedures before posting material that is harmful to minors if they want to take advantage of the COPA's affirmative defenses. However, implementing age verification procedures will cause Web site owners to lose visitors. Web users are not as likely to access material that requires inputting personal information because of users' concerns about online privacy and security. This loss of visitors will economically harm Web site owners.

1. Adapting the "Harmful to Minors" Definition to the Internet Medium

The first constitutional problem with the COPA is applying the "harmful to minors" definition to online communications. While the harmful to minors definition in and of itself is not problematic, what could prove to be problematic is adapting this definition to the Internet medium.

According to the COPA, material is harmful to minors if:

- (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, 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,¹⁰² lacks serious literary, artistic, political, or scientific value for minors.

Congress intended the harmful to minors definition to parallel the obscenity standards the Supreme Court articulated in *Miller v. California*¹⁰³ and *Ginsberg v. New York*,¹⁰⁴ thus creating a variable obscenity standard for minors.¹⁰⁵ In *Miller*, the Supreme Court articulated the obscenity standard, which the Court defined as:

- (a) [W]hether "the average person, applying contemporary commu-

102. 47 U.S.C.A. § 231(e)(6) (West 1998).

103. 413 U.S. 15 (1973).

104. 390 U.S. 629 (1968).

105. See H.R. REP. NO. 105-775, at 27 (1998).

nity standards" would find that the work, taken as a whole, appeals to the prurient interest (citations omitted); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰⁶

While obscene material is illegal to everyone under existing law,¹⁰⁷ material that is harmful to minors is constitutionally protected as to adults.¹⁰⁸ Minors, however, do not have the same constitutional rights to obtain sexually explicit material as adults. Even if material is constitutionally protected for adults because it is not obscene under adult standards, minors can be restricted from obtaining the same material if it is deemed obscene as to minors. In *Ginsberg*, the Supreme Court stated that prohibiting minors' access to material that is harmful as to minors does not invade minors' constitutionally protected speech rights.¹⁰⁹ However, in restricting minors' access to such material, the government cannot impermissibly burden adults' access to the material.¹¹⁰ For example, in *Butler v. Michigan*,¹¹¹ the U.S. Supreme Court struck down a statute that prohibited the dissemination of materials to the general public that were harmful to minors. The Court stated that the ban invaded adults' free speech rights because it "reduce[d] the adult population of Michigan to reading only what is fit for children."¹¹² Courts, however, have upheld a less restrictive access to speech. For example, the Eleventh Circuit found that requiring bookstore owners to place harmful reading material behind the counter was an acceptable burden on adults' access to speech.¹¹³

States have implemented and courts have upheld variable obscenity statutes that regulate the display and distribution of adult material to minors.¹¹⁴ In *American Booksellers v. Webb*,¹¹⁵ for example, the Eleventh Circuit upheld Georgia's variable obscenity statute, stating that "nothing in *Miller* casts any doubt on the constitutional viability of a variable standard

106. *Miller*, 413 U.S. at 24.

107. See *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989); *Miller*, 413 U.S. at 23; *Roth v. United States*, 354 U.S. 476, 485 (1957).

108. See *Fabulous Assoc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3rd Cir. 1990); *ACLU v. Johnson*, 4 F. Supp.2d 1029 (D.N.M. 1998).

109. *Ginsberg*, 390 U.S. at 636-38.

110. See *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990).

111. 352 U.S. 380 (1957).

112. *Id.* at 383; see also *Sable Comm. of Cal., Inc.*, 492 U.S. at 126.

113. See *Webb*, 919 F.2d at 1512.

114. See *Reno v. ACLU*, 521 U.S. 844, 888 (1997). In addition, courts have stated that variable obscenity and harmful to minors standards are not vague. See *Ginsberg*, 390 U.S. at 642-43; *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989).

115. 919 F.2d 1493 (11th Cir. 1990).

of obscenity for minors based upon a[n] . . . adaptation of the current Supreme Court standard for determining adult obscenity."¹¹⁶ Courts have upheld variable obscenity statutes in other states as well, including Tennessee and Pennsylvania.¹¹⁷ These state statutes are variations of the *Miller* definition of obscenity.¹¹⁸ The COPA harmful to minors standard is similar to these state variable obscenity statutes.¹¹⁹

State variable obscenity statutes prohibit bookstores from displaying to minors material that is obscene as to minors. Typically, these statutes do not intrude on adults' constitutionally protected speech rights because of

116. *Id.* at 1503. The Georgia harmful to minors statute states:

"Harmful to minors" means that quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

- (A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

GA. CODE ANN. § 16-12-102(1) (1999).

117. *See* Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 522 (Tenn. 1993). The Tennessee statute defines "harmful to minors" as:

[T]hat quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence, or sadomasochistic abuse when the matter or performance:

- (A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;
- (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
- (C) Taken as a whole lacks serious literary, artistic, political [sic] or scientific value for minors"

TENN. CODE ANN. § 39-17-901(6) (1997); *Fabulous Assoc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 781-82 (3d Cir. 1990). The Pennsylvania statute defines "harmful to minors" as:

[T]hat quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

- (i) predominantly appeals to the prurient, shameful, or morbid interest of minors; and
- (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) is utterly without redeeming social importance for minors.

18 PA. CONS. STAT. ANN. § 5903(e)(6) (West 1983).

118. *See* GA. CODE ANN. § 16-12-102(1); TENN. CODE ANN. § 39-17-901(6); 18 PA. CONS. STAT. ANN. § 5903(e)(6).

119. *See* Letter from L. Anthony Sutin, Acting Assistant Attorney General, to the Honorable Thomas Bliley, Chairman of Committee on Commerce (Oct. 5, 1998), available at *Department of Justice Letter on CDA II* (visited Sept. 1, 1999) <http://www.aclu.org/court/acluvrenoII_doj_letter.html> [hereinafter Letter].

the relative ease with which bookstore owners can segregate adult and minor consumers. Therefore, whether an analogous statute could be upheld in the Internet medium would largely depend on how difficult and expensive it would be for Web site owners to prevent minors' access to harmful material, without impermissibly intruding on adults' ability to gain access to the same material.¹²⁰ As discussed in Part V.B.3.b of this Note, segregating adult and minor Web users is not economically nor technologically feasible for many Web site owners. Consequently, although the harmful to minors definition is not constitutionally problematic in physical locations, such as bookstores, applying this definition to the Internet raises constitutional concerns. Without the ability to segregate adults and minors, which would permit a Web site owner to rely on the affirmative defenses, the COPA prevents adults from gaining access to material to which they have a constitutional right to obtain.

2. Vagueness in the "Harmful to Minors" Definition

In addition to the problem of adapting the "harmful to minors" definition to the Internet medium, the definition is unconstitutionally vague. First, it is unclear if material falls within the "harmful to minors" definition if it has value for older minors, but not younger minors. Second, the definition does not state how the relevant community standard would be determined. Third, the definition does not state what constitutes a work "taken as a whole" in the Internet medium.

A vague statute, such as the COPA, raises constitutional concerns under the due process clause of the Fifth Amendment, and can be ruled void on this ground.¹²¹ A statute is vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."¹²² One problem that occurs as a result of a vague statute is that speakers will censor their speech when they are uncertain about whether the speech is proscribed by the statute.¹²³ The vagueness of the COPA will result in Web speakers censoring their speech. For example, if a Web speaker is uncertain whether content must have value for all minors or if it only needs to have value for an older minor, the speaker will only offer content that has value for all minors. By censoring content in this way, the speaker will be certain that she will not be prosecuted under the COPA.

120. *See id.*

121. *See American Booksellers v. Webb*, 919 F.2d 1493, 1505-06 (11th Cir. 1990).

122. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

123. *See Dobeus, supra* note 32, at 638.

a. *The Definition of a "Minor"*

The first vague aspect of the "harmful to minors" standard is the definition of a minor. The COPA defines a minor as a person under seventeen years of age.¹²⁴ One concern with the COPA is that older minors will only be allowed to access material that has value to younger children. This interpretation would deny older minors access to important information that has value for older minors, but does not have value for younger minors.¹²⁵ Noting how the value of material can vary between younger and older minors, CyberPatrol's spokesperson stated: "My six-year-old son doesn't need to know how to put on a condom . . . But I'll sure want him to know when he's [thirteen]."¹²⁶ Condomania, which sells condoms and other safer sex products, is one of the plaintiffs in the second *ACLU* case. In addition to selling products, Condomania answers safer sex questions on its Web site.¹²⁷ While safer sex material may be considered harmful to a younger minor, an older minor's access to the same material could be extremely important, especially considering that half of all HIV infections worldwide occur between the ages of fifteen to nineteen, that the number of HIV-infected teenagers in the United States doubles every fourteen months,¹²⁸ and that "sexually transmitted diseases strike more children per year than polio did in [its] [eleven]-year epidemic."¹²⁹ Critics, including the second *ACLU* plaintiffs, argue that the COPA would deny older minors access to this material because of its potential harm to a younger child.¹³⁰

Despite this concern, lower courts have stated that material will not be deemed harmful to minors as long as the material is not harmful to an older minor.¹³¹ For example, the Eleventh Circuit stated in *Webb* that if material

124. See 47 U.S.C.A. § 231(e)(7) (West 1998).

125. See Plaintiffs' Complaint for Declaratory and Injunctive Relief at para. 6, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>.

126. Michael Krantz, *Censor's Sensibility*, TIME, Aug. 11, 1997, at 48.

127. See Adam Glickman, *Condomania Joins the ACLU to Fight the CDA II* (visited Aug. 31, 1999) <<http://www.condomania.com/cgi-bin/SoftCar.exe/company/releases/aclu.shtml?E+condomania>>.

128. See *id.*

129. *Facts About Pornography* (visited Aug. 31, 1999) <<http://www.helpandhope.org/facts-about-porn.htm>>.

130. See Plaintiffs' Complaint for Declaratory and Injunctive Relief at para. 6, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>.

131. See *American Booksellers v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990); *American Booksellers v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993).

has value for any reasonable minor, even a seventeen-year-old minor, the material will not be considered harmful to minors.¹³² Similarly, in addressing Tennessee's harmful to minors statute in *Davis-Kidd Booksellers v. McWherter*,¹³³ the Supreme Court of Tennessee stated: "[T]he . . . statute applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable seventeen-year-old minor Thus, it is clear that the statute . . . does not reduce older minors to reading only material fit for children."¹³⁴ If courts interpreted the COPA's harmful to minors standard in a similar manner, this would eliminate the concern about denying older minors access to beneficial materials that could be considered harmful to a younger audience. The problem with the COPA, however, is that it does not articulate how the definition should be applied. Because of this vagueness, Web site owners will not know whether the COPA will be enforced against them if they post material that arguably only has value for an older minor.¹³⁵

b. Community Standards in the Internet Medium

The second vague aspect of the harmful to minors definition is determining the relevant community standard by which the alleged harmful material will be judged.¹³⁶ The COPA states that the material will be judged by "the average person, applying contemporary community standards."¹³⁷ Determining the relevant community for purposes of Internet communications can be difficult, if not impossible. As Acting Assistant Attorney General Anthony Sutin questioned in his letter to the Commerce Committee: "Which 'contemporary community standards' would be dispositive? Those of the judicial district (or some other geographical 'community') in which the expression is 'posted'? Of the district or local community in which the jury sits? Of some 'community' in cyberspace?"¹³⁸

Applying community standards to Internet communications would be problematic if courts were to determine venue in the same way that they determine venue for obscenity in other communication mediums. In applying obscenity and harmful to minors statutes, the Supreme Court has

132. See *Webb*, 919 F.2d at 1504-05.

133. 866 S.W.2d 520 (Tenn. 1993).

134. *Id.* at 528.

135. See Plaintiffs' Complaint for Declaratory and Injunctive Relief at para. 85, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>.

136. See *id.*

137. 47 U.S.C.A. § 231(e)(6)(A) (West 1998).

138. Letter, *supra* note 119.

rejected a national standard, deferring instead to local community standards.¹³⁹ In obscenity prosecutions, venue lies in any district in which the material is generated or received. Consequently, a person may be prosecuted and convicted for obscenity in the community into which the defendant sent the material, even if the material is not obscene by the community standards of the community in which the work originated.¹⁴⁰ Applying this in the Internet medium is problematic. Unlike other communication media where a person has control over which communities receive particular material, once a Web site owner posts material on the Internet, the owner cannot prevent the content from entering a particular community.¹⁴¹ Any computer, worldwide, that is connected to the Internet has the ability to receive the material.¹⁴²

In *United States v. Thomas*,¹⁴³ the Sixth Circuit allowed an Internet bulletin board operator to be prosecuted for obscenity in Tennessee, where the communication had been received, even though the material originated in California. However, *Thomas* should not be applied to defining the relevant community for the purpose of COPA prosecutions because, in *Thomas*, the bulletin board operators knew into which communities their materials were being downloaded. Before users received access to the defendants' bulletin board communications, they were required to register for a password. Users indicated their residence on the application form. Consequently, if the defendants wanted to prevent their communications from entering any particular community, they could simply deny passwords to users living in those communities.¹⁴⁴ Many Web site owners do not require users to offer residence information before being allowed access to the site's material. Consequently, unlike the defendants in *Thomas*, Web site owners would not be able to selectively determine which communities received their material.

Because the relevant community is uncertain, Web speakers may censor content or decline to post any content, fearing that they will be prose-

139. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*, *supra* note 36, at 38-39 (statement of Jerry Berman, Executive Director, Center for Democracy and Technology).

140. See *Hamling v. United States*, 418 U.S. 87, 106 (1974); *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996).

141. See *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996).

142. See *id.* at 844, 878; Don Lloyd Cook, *Earthquakes and Aftershocks: Implications for Marketers and Advertisers in Reno v. ACLU and the Litigation of the Communications Decency Act*, 17 J. PUB. POL'Y & MARKETING 116, 117 (1998) (stating that an Internet speaker cannot limit the geographical scope of Internet speech).

143. 74 F.3d 701 (6th Cir. 1996).

144. See *id.* at 711.

cuted in the district with the least tolerant community standards.¹⁴⁵ Web speakers would not be able to alleviate the problem of being prosecuted in particularly conservative districts by not allowing the material to be downloaded in those communities because preventing downloading is not feasible. Furthermore, Web site owners may have difficulty determining what "a cross section of the nation will find harmful to minors."¹⁴⁶

Congress noted in its report accompanying the COPA that it recognized the controversy of applying community standards to Internet communications. Congress stated that in drafting the community standards language, it intended for courts not to apply a geographic standard, but rather an "adult" standard . . . that is reasonably constant among adults in America to what is suitable for minors."¹⁴⁷ While this may help to clarify the standard to be applied to the affected communications, it does not alleviate the problem associated with this portion of the COPA. The Supreme Court has never approved of a national "adult standard" for obscenity or variable obscenity statutes. In *Miller*, the Supreme Court stated that there should not and could not be a "fixed, uniform national standard."¹⁴⁸ The Court continued:

[O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all [fifty] [s]tates in a single formulation, even assuming the prerequisite consensus exists

. . . .

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.¹⁴⁹

c. *Taken as a Whole in the Internet Medium*

The third vague aspect of the harmful to minors definition is the "taken as a whole" requirement. The COPA states that the alleged harmful work "taken as a whole, [must] lack[] serious literary, artistic, political, or

145. See Cook, *supra* note 142, at 117; see also *Reno v. ACLU*, 521 U.S. 844, 877-78 (1997) ("[T]he 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.").

146. *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*, *supra* note 36, at 39 (statement of Jerry Berman, Executive Director, Center for Democracy and Technology).

147. H.R. REP. NO. 105-775, at 28 (1998).

148. *Miller v. California*, 413 U.S. 15, 30 (1973).

149. *Id.* at 30-32.

scientific value for minors.”¹⁵⁰ The taken as a whole requirement is problematic when considered in the context of Web communications. Web communications are composed of linked documents, which are comprised of numerous images and parts of text. Consequently, Web site owners would not know how to define the relevant material for purposes of considering the work as a whole.¹⁵¹ Furthermore, material often consists of isolated images or parts of text, which may be from a larger nonobscene work. “[T]he very nature of the *Miller* test requires works to be looked at as a whole, not necessarily in mere digital packets.”¹⁵² The vagueness in determining what constitutes a work taken as whole raises the same constitutional problems as the vagueness surrounding the definition of a minor and community standards.

3. The Unavailability of the Affirmative Defenses

The third constitutional problem with the COPA is that the Act's affirmative defenses are economically and technologically unavailable to many of the Web sites affected by the Act. First, due to the breadth of the commercial purpose definition, many of the Web sites encompassed within the confines of the Act are economically unable to implement the necessary age verification procedures. Second, because many speakers who publish via a commercial online service do not have cgi capability, the affirmative defenses remain technologically unavailable for many Web sites. The district court that heard the ACLU's motion for a temporary restraining order noted that “without [the availability of] affirmative defenses, [the] COPA on its face would prohibit speech which is protected as to adults.”¹⁵³

a. *Economic Unavailability of the Affirmative Defenses*

The COPA's affirmative defenses are economically unavailable to many of the Web sites encompassed by the Act due to the breadth of the COPA's “commercial purpose” definition. Unlike the CDA, the COPA only applies to Web sites engaging in communication for commercial pur-

150. 47 U.S.C.A. § 231(e)(6)(C) (West 1998).

151. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

152. Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 370 (1997).

153. *ACLU v. Reno*, No. 98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998); see also *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (“In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”).

poses.¹⁵⁴ A Web site makes a communication for commercial purposes if the site "is engaged in the business of making such communications."¹⁵⁵ The COPA further defines "engaged in the business" as "devot[ing] time, attention, or labor to [the communication], as a regular course of such [site's] trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the [site] make a profit or that the making or offering to make such communications be the [site's] sole or principal business or source of income)."¹⁵⁶

The COPA's definition of "commercial purpose" is overbroad because, in effect, the COPA affects some speech that Web site owners offer to users for free.¹⁵⁷ For example, the plaintiffs in the second *ACLU* case all provide material for free to Web users. However, many of the plaintiffs fall within the COPA's definition of operating for commercial purposes.¹⁵⁸

Web site owners, including the plaintiffs in the second *ACLU* case, can attempt to earn a profit in several ways. First, some Web site owners sell advertising on their site. For example, Salon magazine, an online magazine, sells advertising on its Web site similar to traditional print magazines and newspapers. Similarly, OBGYN.net is an advertiser-supported site, offering gynecological information. Both sites, however, allow users to access their online material for free.¹⁵⁹ Second, some Web sites, such as online bookstores and music stores, attempt to make a profit through consumer purchases. Web sites such as the online media store Amazon.com and Condomania fall within this category. However, similar to traditional stores, the Web site owners allow users to browse the online material for free.¹⁶⁰ Third, some Web sites charge their content contributors, although the site owners allow users to access the content for free. ArtNet, an online fine arts vendor, for example, sells space on its site to gallery

154. See 47 U.S.C.A. § 231(a)(1) (West 1998).

155. *Id.* § 231(e)(2)(A).

156. *Id.* § 231(e)(2)(B). Courts have determined that the phrase "engaged in the business" is constitutional and not vague. See *United States v. Skinner*, 25 F.3d 1314, 1319 (6th Cir. 1994); H.R. REP. NO. 105-775, at 25 (1998).

157. See Plaintiffs' Complaint for Declaratory and Injunctive Relief at para. 65, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at *ACLU's Original Complaint* (visited Oct. 5, 1999) <<http://techlawjournal.com/courts/copa/19981022.htm>>.

158. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

159. See Report of Dr. Donna L. Hoffman at para. 49, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_hoffman_rep.html>.

160. *Id.*

owners and artists.¹⁶¹ Fourth, some Web site owners charge users a fee to access the material posted on the Web site. ArtNet, for example, sells monthly subscriptions to its Auctions Online database.¹⁶² Web sites falling into any one of these four categories would be encompassed by the COPA's "commercial purpose" definition.

The Supreme Court has recognized the overbreadth doctrine in First Amendment facial challenges to statutes. Overbreadth occurs when a statute includes "protected First Amendment expression directly into the scope of a regulation affecting speech."¹⁶³ A statute can be declared unconstitutional on the basis of overbreadth.¹⁶⁴

Due to the breadth of the definition, the affirmative defenses are economically unavailable to many of the Web sites covered by the Act. Economic unavailability contributed heavily to the rejection of the CDA by the Supreme Court. The Supreme Court stated in the first *ACLU* case that the affirmative defenses the CDA offered would not be available to many of the sites subjected to the Act, especially noncommercial sites, because the defenses would be prohibitively expensive.¹⁶⁵ Although the COPA only applies to commercial sites, the definition of a commercial site is so broad that many of the sites encompassed by the Act offer their content for free to Web users. Consequently, implementing age verification mechanisms is not economically feasible for many of these sites. Because the affirmative defenses will not be available to many of the Web sites encompassed by the COPA, the COPA has not cured the economic problems that plagued the CDA.

One of the affirmative defenses available to Web site owners is requiring the use of a credit card to verify age. Credit card verification is feasible "either in connection with a commercial transaction in which the card is used, or by payment to a verification agency."¹⁶⁶ The cost to verify a credit card through a verification agency ranges from twenty cents to two

161. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

162. See Declaration of Ernest Johnson on behalf [of] ArtNet Wor[l]dwide Corporation at para. 28, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. 1998), available at *ACLU in Court: ACLU v. Reno II ARTNET.com Declaration* (visited Aug. 29, 1999) <http://www.aclu.org/court/acluvrenoII_artnet_dec.html>.

163. *American Booksellers v. Webb*, 919 F.2d 1493, 1499 (11th Cir. 1990).

164. See *id.* at 1505; *Dobus*, *supra* note 32, at 637 (stating that an overbroad statute is facially invalid).

165. See *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997).

166. *Id.* at 856.

dollars.¹⁶⁷ Given the number of users that access particular Web sites, this cost could become prohibitively expensive. For example, OBGYN.net has 100 thousand visitors per month and Condomania has 3,000 visitors per day.¹⁶⁸ A site, such as OBGYN.net, with 100 thousand visitors per month could spend as much as \$200,000 each month verifying credit cards.¹⁶⁹

Web site owners have two options to cover the cost of verifying a credit card. First, the site could absorb the cost itself.¹⁷⁰ Some sites can afford to do this. However, many could not. The CEO of Salon magazine and the President of A Different Light Bookstore, an online bookseller, both stated that if the COPA were enforced they might be forced to close their sites because of the prohibitive costs of complying with the Act.¹⁷¹ Similarly, the Vice President of Operations of ArtNet stated that although the Web site grossed between one million dollars to two million dollars in 1997, the site has never earned a profit.¹⁷² ArtNet receives more than two million visitors each week. The Vice President of Operations stated that "[b]ecause ArtNet.com has not earned any profits to date and receives over two million hits per week, even a nominal verification fee would put us out of business."¹⁷³

If a Web site owner did not want to absorb the verification cost itself, the second option is to charge users to gain access to the site. For sites, such as online booksellers, charging a user to access the site would be similar to a traditional bookseller charging a user to enter the store. The Supreme Court stated in the first *ACLU* case that users, "particularly casual Web browsers, would be discouraged" from accessing a site that required the user to pay a fee.¹⁷⁴ The Vice President of Operations of ArtNet echoed

167. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>; cf. *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 934 (S.D.N.Y. 1996) (stating that the cost is between sixty cents to more than one dollar).

168. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

169. See *id.*

170. See *id.*

171. See *ACLU v. Reno Round 2: Update Judge Halts Enforcement of Internet Censorship Law* (visited Aug. 28, 1999) <<http://www.aclu.org/news/n11998b.html>>.

172. See Declaration of Ernest Johnson on behalf [of] ArtNet Wor[ld]wide Corporation at para. 26, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. 1998), available at *ACLU in Court: ACLU v. Reno II ARTNET.com Declaration* (visited Aug. 29, 1999) <http://www.aclu.org/court/acluvrenoII_artnet_dec.html>.

173. *Id.* at para. 62.

174. *Reno v. ACLU*, 521 U.S. 844, 857 n.23 (1997).

this statement: "Any fee would undoubtedly deter the vast majority of our visitors from accessing our site."¹⁷⁵ An example of the detrimental effect of charging users is the experience of the online magazine Slate, which, in February 1999, abandoned its yearlong effort to charge visitors because readership declined so significantly.¹⁷⁶

The COPA also offers Web site owners the option of utilizing an adult password system to verify users' ages. To employ this option, a Web site would either have to maintain its own registration system or register with an age verification service.¹⁷⁷ If a site were to maintain its own registration system, the cost of processing user data and maintaining a database in case of a criminal investigation would be economically prohibitive for some Web sites, including Wildcat Press, which sells literature, and Hot-Wired, which is the online version of Wired magazine.¹⁷⁸

The second option under the adult password mechanism is for the Web site to register with an age verification service. Under this system, users submit information, such as a credit card number, to an age verification service, which the service verifies for validity. The user is then issued an adult password. The entire process takes between five to ten seconds.¹⁷⁹ Approximately twenty-five companies offer this service.¹⁸⁰ Adult Check[®] is the largest online age verification service, offering access to more than forty-five thousand sites.¹⁸¹ Registering with Adult Check[®] is easy and free for Web site owners.¹⁸² A user who registers with Adult Check[®] is charged

175. Declaration of Ernest Johnson on behalf [of] ArtNet Wor[ld]wide Corporation at para. 61, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. 1998), available at *ACLU in Court: ACLU v. Reno II ARTNET.com Declaration* (visited Aug. 29, 1999) <http://www.aclu.org/court/acluvrenoII_artnet_dec.html>.

176. See Greg Miller, *Law to Control Online Porn Creates Strange Bedfellows*, L.A. TIMES, Feb. 15, 1999, at A1.

177. See *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 934 (S.D.N.Y. 1996).

178. See *ACLU v. Reno*, 929 F. Supp. 824, 847 (E.D. Pa. 1996); Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

179. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*, *supra* note 36, at 52 (statement of Laith Paul Alsarraf, President and CEO of Cybernet Ventures, Inc.).

180. See *ACLU v. Reno*, 31 F. Supp.2d 473, 489 (E.D. Pa. 1999).

181. See *The Adult Check[®] System* (visited Aug. 28, 1999) <<http://www.secure.adultcheck.com/cgi-bin/apply.cgi?9999>>.

182. See *Adult Site Owners* (visited Aug. 28, 1999) <<http://www.adultcheck.com/cgi-bin/merchant.cgi?62173>> (providing instructions on how Web site owners can register with Adult Check[®]: "All you have to do is fill out the Site Application Form below with the address (full URL) of the page where you want people to enter their Adult Check[®] IDs, and the URL of the page you want people to get when they enter a valid ID#. So, in other words the URL of the warning page, and the URL of the content page.").

\$19.95 for a one year subscription. After Adult Check[®] verifies the credit card information given by the user, the user receives an identification number, which can be used to access any site registered with Adult Check[®].¹⁸³

While it may be economically feasible for Web site owners to utilize an age verification service, it is not technologically feasible because Adult Check[®] identification numbers are verified using cgi script.¹⁸⁴ As discussed later in Part V.B.3.b of this Note, many major online Internet service providers do not provide cgi capability to their subscribers. In addition, some users would be discouraged from accessing sites utilizing age verification services because they would not want to pay to access the content available on the site. Even one of the government's expert witnesses in the second *ACLU* case preliminary injunction hearing conceded during his testimony "that the number of users deterred from a site by registration requirements imposed by [the] COPA could be in the thousands."¹⁸⁵ This loss of visitors adds to the economic burdens that the COPA imposes on Web site owners.

b. Technological Unavailability of the Affirmative Defenses

In addition to being economically unavailable, the affirmative defenses are technologically unavailable to many Web site owners affected by the COPA. To utilize the affirmative defenses, a Web site can display an electronic form to request information, such as a credit card number or an adult password, from the Web site user. The information the user enters is transmitted to the Web server and is processed by a computer program, usually a cgi script. After processing the information, the Web server can grant or deny the user access to the site. The cgi script is the process Web site owners use to screen users for age.¹⁸⁶ However, not all Web site owners have access to programs such as cgi script. Speakers who publish via a commercial online service, such as America Online, can post content, but the server software cannot process cgi scripts.¹⁸⁷ Online service providers,

183. See *The Adult Check[®] System*, *supra* note 181.

184. See *Adult Site Owners*, *supra* note 182.

185. *ACLU*, 31 F. Supp.2d at 489.

186. See *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996); Expert Report of Dan Farmer, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_farmer_rep.html> ("WWW server programs . . . do not do much besides basic administrative commands and to send HTML to the users' browser. And pure HTML is limited to providing fixed, or static, content—it can't provide very flexible or dynamic content. To do this—such as creating a site that changes every time it is entered, or to process information from a user—helper programs (often called 'Common Gateway Interface,' or 'CGI' scripts or programs) are often used.").

187. See *ACLU*, 929 F. Supp. at 845-46; Expert Report of Dan Farmer, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_farmer_rep.html> ("Many ISPs (including America

collectively, have more than eighteen million subscribers.¹⁸⁸ Technologically, subscribers of these services that wish to post content online have no mechanism to screen users for age, and thus would not be able to utilize the affirmative defenses.¹⁸⁹

Congress stated that the COPA "essentially requir[es] the commercial pornographer to put sexually explicit images 'behind the counter.' The commercial pornographer is not otherwise restricted in his trade."¹⁹⁰ However, this statement is not accurate. First, although Congress may have intended for the COPA only to affect commercial pornographers, the broad language of the COPA encompasses many types of content providers. In addition, because of the costs and technological unavailability of the age verification procedures, content providers will be restricted in their trade. Implementing age verification procedures is not as simple as placing harmful material behind the counter. It is likely the unavailability of the affirmative defenses will greatly affect a court's determination that the COPA is unconstitutional. The Supreme Court suggested in the first *ACLU* case that "the constitutionality of an Internet-based 'harmful-to-minors' statute likely would depend, principally, on how difficult and expensive it would be for persons to comply with the statute without sacrificing their ability to convey protected expression to adults and to minors."¹⁹¹

4. Privacy and Security

A final concern with the COPA is that age verification procedures will deter users from accessing sites utilizing these procedures because of users' online privacy and security concerns. Age verification systems are connected with an individual's identity, meaning that individuals are required to offer personal information, such as a credit card number, name, and/or social security number, in order to obtain access to a site utilizing some form of age verification.¹⁹² One concern users have with offering this

Online) do not provide cgi capability to their content providers.").

188. See Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html>.

189. See *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1032 (D.N.M. 1998).

190. H.R. REP. NO. 105-775, at 15 (1998).

191. Letter, *supra* note 119.

192. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*, *supra* note 36, at 59 (statement of Lawrence Lessig, Professor, Harvard Law School); *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*, *supra* note 36, at 39 (statement of Jerry Berman, Executive Director, Center for Democracy and Technology) (stating that current technology requires Web users to provide personal information to utilize the COPA's affirmative defenses).

information is privacy.

As Deidre Mulligan, staff counsel for the Center for Democracy and Technology, stated in her congressional testimony in July 1999:

Today, when an individual walks into a convenience store to purchase an adult magazine, they [sic] may be asked to show some identification to prove their [sic] age. Under the COPA, an individual will be asked not only to show their [sic] identification, but also to leave a record of it and their [sic] purchase with the online store. Such systems will create records of individuals' First Amendment activities, thereby conditioning adult access to constitutionally protected speech on a disclosure of identity. This poses a Faustian choice to individuals seeking access to information—protect privacy and lose¹⁹³ access or exercise First Amendment freedoms and forego privacy.

Privacy is the primary reason why people do not use the Internet, and seventy-eight percent of Internet users stated that they would use the Internet more if their privacy were guaranteed.¹⁹⁴ Privacy is an issue even among individuals who do engage in Internet use, as eighty-seven percent of Internet users stated in a recent survey that they are concerned about threats to their online privacy.¹⁹⁵

Age verification systems invade this privacy because they prevent users from accessing certain information anonymously. Users may be deterred from accessing information about controversial and sensitive issues, such as gay and lesbian issues and safer sex or gynecological information, because they can no longer do so anonymously.¹⁹⁶ For example, the founder of PlanetOut, a Web site focusing on homosexual issues, stated that "traffic would plunge if users had to identify themselves."¹⁹⁷

There is evidence to suggest that users may not want to offer personal information to access content, even if it is not controversial or sensitive in nature. When HotWired magazine implemented a registration system requiring users to enter their name, e-mail address, and self-created pass-

193. *Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, available at 1999 WL 20010604 (statement of Deidre Mulligan, Staff Counsel, Center for Democracy and Technology).

194. See Heather Green, *A Little Privacy, Please*, BUS. WK., Mar. 16, 1998, at 98.

195. See *Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, *supra* note 193 (statement of Deidre Mulligan, Staff Counsel, Center for Democracy and Technology).

196. See *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1032 (D.N.M. 1998); Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_tro.html> (stating that many Web users will not want to offer personal information to access speech for free); Complaint, *supra* note 6, at para. 71 ("[T]he Act would require readers to provide personally identifiable information in order to access speech for free.").

197. Adam Cohen, *Cyberspeech on Trial*, TIME, Feb. 15, 1999, at 52.

word, the magazine received many complaints from the site's users.¹⁹⁸ In addition, Professor Donna Hoffman, an Internet researcher at Vanderbilt University, has done research indicating that seventy-five percent of online users refuse to register to enter a nonadult Web site.¹⁹⁹ "[I]ndividuals value their anonymity and will take steps, such as . . . refusing to register, to protect it."²⁰⁰ In general, Web users "are reluctant to provide personal information to Web sites unless" they are engaging in an online purchase.²⁰¹

A reduced audience will economically harm commercial Web sites. First, if a site sells products online, each visitor lost is a potential lost sale. Second, some commercial Web sites rely on advertising revenue, which will decrease as the site's audience decreases. Advertisers "depend on a demonstration that sites are widely available and frequently visited."²⁰²

Security is a second concern of online users.²⁰³ Some users will be deterred from entering valuable information such as credit card numbers because of security concerns. For example, a recent survey conducted by the National Consumers League found that seventy-three percent of online users do not feel secure providing credit card or financial information to online businesses, while seventy percent do not feel secure providing personal information.²⁰⁴ In addition, fifty-eight percent of online consumers "do not consider financial transactions online to be safe."²⁰⁵

Despite these concerns, most industry observers state that the Internet is secure, and routinely comment that giving a credit card to a waiter at a restaurant is more risky than giving a credit card number over the Internet.²⁰⁶ Although the Internet is a secure environment, security remains a concern for online users, and, thus, will present the same problems that occurred as a result of users' privacy concerns.

198. See *ACLU v. Reno*, 929 F. Supp. 824, 847 (E.D. Pa. 1996).

199. See Miller, *supra* note 176.

200. See *Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, *supra* note 193 (statement of Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology).

201. *ACLU v. Reno*, 31 F. Supp.2d 473, 487 (E.D. Pa. 1999).

202. *ACLU*, 929 F. Supp. at 847.

203. See Jared Sandberg, *The Electronic Mall*, NEWSWEEK, Special Issue Winter 1998, at 14.

204. See *Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, *supra* note 193 (statement of Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology).

205. *Id.*

206. See Sandberg, *supra* note 203, at 16; see also George Hostetter, *Tapping in Valley*, THE FRESNO BEE, Dec. 6, 1998, at C1, available in LEXIS, News Library, BUSDTL File ("[T]he typical Internet consumer 'has a better chance of getting your [sic] credit card number stolen by your [sic] waiter than from e-commerce,'" quoting Richard Nordstrom, marketing professor at California State University.).

VI. THE PROBLEMS INHERENT IN DRAFTING LEGISLATION TO ATTACK ONLINE PORNOGRAPHY

Even though Congress attempted to remedy the constitutional problems of the CDA, the COPA is unconstitutional. Congress's attempt at protecting children from online pornography is commendable. However, it is unlikely that legislation will be effective in achieving this goal. As Jeffrey Berman, executive director for the Center for Democracy and Technology, stated in his testimony to Congress, "[t]he global and decentralized nature of the medium and the fact that it does not allow publishers to easily discern who is seeking and requesting information are barriers to the effective implementation of laws to protect children from information online."²⁰⁷

One problem with drafting legislation of this type is that it will be ineffective in controlling much of the sexually explicit material available to minors. First, the United States "does not have jurisdiction over computers located outside of the territorial United States."²⁰⁸ Approximately forty percent of all online material originates outside the United States.²⁰⁹ Legislation, such as the CDA and the COPA, cannot reach any of this content. Moreover, minors have access to material that originates outside the United States as easily as material that originates within the United States. Second, online legislation cannot reach sites of a purely noncommercial nature because the currently available age verification procedures are economically unavailable to many of these sites. Therefore, online legislation will be ineffective at preventing minors' access to pornography that is not offered commercially. Even Congress noted that "a large quantity of information will still be available to minors who are capable of accessing these non-commercial sites on the Web and on the Internet."²¹⁰

In granting the preliminary injunction against the COPA, the court stated that because minors could obtain harmful material from foreign and noncommercial Web sites, the COPA had difficulty passing muster under the least restrictive means prong of strict scrutiny, which is the standard that the U.S. Supreme Court has applied to Internet speech.²¹¹ Congress's inability to reach foreign and noncommercial speech through legislation

207. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*, *supra* note 36, at 37-38 (statement of Jerry Berman, Executive Director, Center for Democracy and Technology).

208. Cannon, *supra* note 2, at 83.

209. See Declaration of Professor Donna L. Hoffman at para. 42, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998), available at <http://www.aclu.org/court/acluvrenoII_hoffman_dec.html>; *ACLU v. Reno*, 929 F. Supp. 824, 848 (E.D. Pa. 1996).

210. H.R. REP. NO. 105-775, at 13 (1998).

211. See *ACLU v. Reno*, 31 F. Supp.2d 473, 496 (E.D. Pa. 1999).

will continuously lead to a failed constitutional analysis because courts will not consider legislation reaching only commercial Web sites to be the least restrictive means to combat the problem of minors' access to sexually explicit speech.

In addition, the technological unavailability of the currently available age verification methods will continue to create constitutional problems for any future legislation. Without the possibility of implementing procedures that would allow Web site owners to rely on affirmative defenses, Internet speakers will be required to censor content that is constitutionally protected as to adults. This censorship is an unconstitutional solution to preventing minors' access to sexually explicit material.

VII. CONCLUSION

This Note demonstrated that Congress has not drafted legislation that can withstand constitutional scrutiny. Although the COPA is narrower than the CDA, the COPA is plagued with many of the same problems that prompted the Supreme Court to strike down the CDA as unconstitutional in 1997. First, the harmful to minors standard is not readily adaptable to the Internet medium. In addition, this standard is vague in regards to whom the material must have value as well as what constitutes community standards and taken as a whole in the Internet medium. Second, the breadth of the COPA's commercial purpose definition leaves the Act's affirmative defenses economically unavailable to many of the Web sites that fall within the confines of the Act. Furthermore, the affirmative defenses' technological unavailability is problematic, regardless of what definition Congress drafts.

The problems inherent in the COPA will lead to one of two outcomes. First, some Web speakers will censor their content in a way that reduces Internet material to what is suitable for all minors. This intrudes on adults' access to material constitutionally protected as to them, which the Supreme Court stated in the first *ACLU* opinion is an unconstitutional result.²¹² Second, some Web site owners will refuse to censor content, thus exposing themselves to prosecution under the COPA. Some Web sites, such as ArtNet, that offer valuable material to Web consumers will be driven out of business because of the cost of defending a COPA prosecution. As the Vice President of Operations of ArtNet stated:

[I]t would be contrary to our philosophy to remove from our Web site material that we firmly believe has serious artistic value. Therefore, if the Act is not enjoined, we would not censor our site, but instead would risk prosecution under the Act.

212. See *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

....

ArtNet.com could not afford to pay such significant civil damages. In fact, ArtNet.com could not afford to defend a civil action, even one that it ultimately won. We at ArtNet.com do not plan to censor the Web site. Therefore, if the Act is not enjoined, but is instead enforced against sites such as ArtNet.com, we could be driven out of business.²¹³

In effect, the COPA acts to censor material under this approach as well.

Although Congress's attempt to shield children from online pornography is commendable, Congress adopted an unconstitutional method to achieve this goal. Despite Representative James Greenwood's statements to the contrary, the COPA does not "ban[] nothing" and certainly does more than "require[] a virtual cloak to shield our minors' eyes from commercial pornography."²¹⁴

213. Declaration of Ernest Johnson on behalf [of] ArtNet Wor[l]dwide Corporation at para. 66 & 55, *ACLU v. Reno*, No. 98-CV-5591, 1998 WL 813423 (E.D. Pa. 1998), available at *ACLU in Court: ACLU v. Reno II ARTNET.com Declaration* (visited Aug. 29, 1999) <http://www.aclu.org/court/acluvrenoII_artnet_dec.html>.

214. Greenwood, *supra* note 101.