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Jacob A. Sosnay

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REGULATING MINORS' ACCESS TO PORNOGRAPHY VIA THE INTERNET: WHAT OPTIONS DO CONGRESS HAVE LEFT?

I. INTRODUCTION

The extent of the Internet's quiet takeover of contemporary society¹ is outweighed only by the sheer vastness² of the thing itself. In fact, to refer to the Internet as a thing is to misspeak; the Internet is much more, it is a life in being,³ endowed by its creators⁴ with the unique ability to spread information at the speed of light connecting millions around the globe in search of technologically enhanced enlightenment.⁵ As with most innovations that have world-altering capabilities,⁶ the Internet is not without its very own dark side.

1. See Nua Internet Services: Global Net Population Increases (available at http://www.nua.com/surveys/index.cgi?f=vs&art_id=905358729&rel=true) (accessed Oct. 1, 2004) (stating, as of February 25, 2003, approximately 580 million people worldwide have access to the Internet in some form. The United States alone accounts for twenty-nine (29) percent of world-wide consumption); see also, Measuring the Internet Economy (available at http://www.internetindicators.com/jan_2001.pdf) (accessed Oct. 1, 2004) (estimating the Internet Economy in 1998 to be valued at 301 billion dollars per year, and accounting for over 1.2 million jobs).

2. *Id.*

3. *Id.* Not only is the Internet already massive in both number of users and information stored, it is also growing at an exponential rate. Some hypothesize that at the current rate of growth a crash of the entire system is imminent.

4. See *Reno v. Am. Civil Lib. Union*, 521 U.S. 844, 849-850 (1997) ("The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called ARPANET which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war").

5. See, Making CBS Play Fair, *U.S. News & World Report*, Vol. 137, No. 11, 55 (Oct. 4, 2004) (recounting the emergence of "bloggers" and their role in disproving the reliability of certain documents used by the television program "60 Minutes II" as proof for a story).

6. The development of nuclear energy brought both positives and negatives; i.e. nuclear power plants and the hydrogen bomb, for instance; see also Russell B. Weeks, *Cyber-Zoning a Mature Domain: The Solution to Preventing Inadvertent Access to Sexually Explicit Content on the Internet?*, 8 Va. J. L. & Tech. 4, 1 (2003) (arguing that the Internet is the greatest invention since the advent of electricity. "The Internet is the printing press, radio, television, telephone, and more rolled up into one").

The Internet's ugly little sisters are the thousands of Web sites devoted to the procurement and dissemination of pornographic material.⁷ The Internet has a Red-Light District⁸ that would make Caligula⁹ blush; the citizens of Sodom and Gomorrah¹⁰ would be proud of much of what is now available at the click of a button.¹¹ That being said, living in free society entitles people to have access to such material if they so desire. There will be no argument to the contrary herein. However, there is not only a great need, but an uncompromisable duty to protect minors from, and prevent access to, this potentially harmful imagery.

Exposure to pornography at young, impressionable ages is virtually universally understood to be detrimental.¹² Studies have shown that pornographic stimulation has a negative impact similar to that of being exposed to extreme violence at such tender years.¹³ Furthermore, pornography walks hand in hand with the objectification of women perpetuating the misogynistic role of the male as the dominant master of the sexual domain.¹⁴ Considering that pornography perpetuates detrimen-

7. *Am. Lib. Assn. v. U.S.*, 201 F.Supp.2d 401, 406 (E.D. Pa. 2002).

8. See Emily Vander Wilt, *Considering Copia: A Look at Congress's Second Attempt to Regulate Indecency on the Internet*, 11 Va. J. Soc. Policy & L. 373, n. 10 (2004) (detailing estimations of an 1,800 percent increase in the number of pornographic Web sites on the Internet from 1998 – 2003, bringing the total number of pornographic web pages to somewhere in the neighborhood of 260 to 372 million).

9. Garrett Fagan, *The Online Encyclopedia of Roman Emperors*, Pennsylvania State University <http://www.roman-emperors.org/gaius.htm> (accessed Nov. 2, 2004). Caligula was also known by his proper name Gaius Caesar Augustus Germanicus (Caligula was his nickname). *Id.* Caligula is remembered for his cruelty and immoral sexual affairs. *Id.* It is believed that Caligula was fond of having incestuous relations with his sisters. Caligula even named a horse to the Roman Senate. *Id.*

10. Holy Bible, New International Version, *Genesis*, 19:24-25 (Zondervan 1994) (stating God rained sulfur on the two cities destroying the wickedness that dwelled within including all those living in the cities and all the vegetation surrounding them).

11. In an experiment, the author accessed <http://www.google.com> (a popular "search engine") and ran several searches with respect to pornography. With each search the author was able to access commercial Web sites that depicted graphic sexual acts; see also Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children From Pornography on the Internet?*, 21 John Marshall J. Computer & Info. L. 141, n. 13 (2003) (detailing extensively the ability to easily access pornographic material on the Internet both deliberately as well as inadvertently).

12. See generally Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rights-Civ. Libs. L. Rev. 1 (1985) (detailing a common understanding of pornography creating negative perspectives of the roles of adults engaging in sexual intercourse, as well as the harm caused to women as they are objectified in the process).

13. See Richard B. Felson, *Mass Media Effects on Violent Behavior*, Annual Review of Sociology, Vol. 22, pp. 103-128 (1996) (asserting that the results of some studies have shown that the effect of viewing pornography increases the likelihood that one will become violent more easily if provoked).

14. MacKinnon, *supra* n. 12, at 17-18. "The content of pornography is one thing. There, women substantively desire dispossession and cruelty What pornography does

tal images and stereotypes bastardizing the sexual relationship of men and women, Congress has a very compelling interest in preventing minors from such access to pornography.¹⁵

This Comment will discuss several recent attempts by Congress¹⁶ to regulate the accessibility of pornography to minors via the Internet. Specifically: 1. *The Communications Decency Act*¹⁷ ("CDA"); 2. *The Child Online Protection Act*¹⁸ ("COPA"); and 3. *The Child Internet Protection Act*¹⁹ ("CIPA"). Unfortunately Congress has been successful in enacting legislation capable of withstanding scrutiny under the First Amendment²⁰ of the Constitution in only one of the above listed Acts, CIPA.²¹

With respect to the CDA and COPA, Congress has not been so successful.²² In fact, what is most striking from the Supreme Court's decisions with respect to the CDA and COPA is that Congress specifically tailored the language of COPA to the Constitutional concerns that the Supreme Court had with the CDA.²³ Logic would tend to indicate that if Congress expressly addressed each concern the Supreme Court had with respect to the CDA's constitutional validity when drafting COPA – tailoring each aspect therein to each concern – COPA would not fail to surpass Constitutional scrutiny. This however, as will be discussed below, was

goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex." *Id.* ; see also *The Dangers of Pornography?, A Review of the Effects Literature*, http://www.asc.upenn.edu/usr/chunter/porn_effects.html#women (accessed Sept. 28, 2004) (stating that studies have shown that those exposed to high volumes of pornography are more likely to give lower sentences to criminals found guilty of rape).

15. See Amy Harmon, *For Parents, a New and Vexing Burden*, N.Y. Times, A21 (June 27, 1997) (reporting that of the thirty percent of Internet users that access pornography, eight percent are under seventeen years old).

16. See Ashutosh Bhagwat, *What if I want My Kids to Watch Pornography?: Protecting Children from Indecent "Speech"*, 11 Wm. & Mary Bill Rights J. 671, 671-672 (2003) (detailing a multitude of Congress' other recent attempts at regulating other forms of indecent speech over various media, including, but not limited to, restrictions on telephone services, radio and television broadcasts, and cable television broadcasts).

17. 47 U.S.C. § 223 (2005).

18. 47 U.S.C. § 231 (2005).

19. 20 U.S.C.S § 9134 (2005).

20. U.S. Const. amend. I. (stating "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

21. See *U.S. v. Am. Lib. Assn., Inc.*, 539 U.S. 194, 214 (2003) (holding that CIPA is a valid exercise of the spending power of Congress, and, since it does not induce libraries to violate the First Amendment, it is Constitutional).

22. See *Reno*, 521 U.S. at 877-878 (holding the CDA unconstitutional because its provisions were not narrowly tailored enough to satisfy strict scrutiny under the First Amendment); see also *Ashcroft v. Am. Civil Lib. Union*, 124 S. Ct. 2783, 2795 (2004) [hereinafter "*Ashcroft II*"] (holding that although COPA was not unconstitutional on its face, it was not the least restrictive means of producing the results Congress intended).

23. *Ashcroft v. Am. Civil Lib. Union*, 535 U.S. 564, 569-570 (2002) [hereinafter "*Ashcroft I*"].

not the case. As a result, Congress is essentially hanging in Limbo with respect to its ability to regulate Internet pornography and its subsequent availability to minors via the Internet.

This predicament strikes as odd considering the Supreme Court has upheld other such age restrictive legislation.²⁴ Thus, it begs the question: Why has Congress been effectively unable to similarly regulate the Internet?

Part II of this Comment will discuss the background and reasoning of the cases dealing with CIPA, the CDA and COPA respectively. The discussion of the decisions and the statutes will reveal that the Supreme Court has left little, if any, room to maneuver with respect to Congress' ability to regulate minors' access to pornography via the Internet.²⁵ However, because COPA's definitions satisfied the stringent requirements of the First Amendment, the only remaining Constitutional conundrum for Congress to overcome is implementing a system that is the "least restrictive means" available, capable of achieving Congress' stated goal in enacting COPA. Part III of this Comment suggests two alternatives to COPA's age verification requirement that would be both capable of surviving strict scrutiny under the First Amendment as well as an effective means of protecting minors from the harmful effects of exposure to pornography.

The two suggested alternatives are inspired by recent rules enacted prohibiting telemarketers from soliciting consumers telephonically, provided an individual consumer has affirmatively decided to be permanently removed from the telemarketers' list. This Comment suggests a similar system for "opting-out" of being able to access Web sites that are deemed to fall under the purview of the controlling statute. The two alternatives suggested are a National Anti-Porn Internet Protocol Registry or a National Anti-Porn Cookie. Either of these suggestions is capable of withstanding strict scrutiny under the First Amendment. They both put the onus on individual Internet users to determine for themselves whether they want to be able to access sexually explicit content available via the Internet.

24. See *Ginsberg v. N.Y.*, 390 U.S. 629, 634-635 (1968) (holding that a conviction under a New York law prohibiting the sale of material to a minor under the age of 17 was a valid restriction of free speech because, although the material being sold was not obscene to adults, the law did not bar either the stocking of the "girlie picture magazines," or the selling of said magazines to persons over 17 years old).

25. See *Ashcroft II*, 124 S.Ct. at 2795 (stating that in striking down COPA, the Court did not indicate that Congress was wholly incapable of drafting legislation designed to prevent minors from exposure to pornography via the Internet).

II. BACKGROUND

As previously discussed, Congress has recently enacted several laws that seek to resolve the problems resulting from exposure to minors of pornography via the Internet. The first to be discussed in detail is CIPA, secondly this Comment will address the CDA, and finally COPA will be analyzed.

A. THE CHILD INTERNET PROTECTION ACT

CIPA was enacted to combat the problems²⁶ inherent with the availability of Internet pornography accessible via public library Internet accessible computer terminals.²⁷ The effect of CIPA caused public libraries receiving federal funds to lose such funding in the event that the library failed to install filtering software on Internet accessible computer terminals capable of blocking out harmful, sexually explicit content.²⁸

At present, public libraries receiving federal funding obtain such funding by virtue of either of two federal programs, and in some cases, both.²⁹ The first program is the E-rate program which was established as part of the *Telecommunications Act of 1996*.³⁰ The E-rate program provides qualifying libraries with the ability to obtain Internet access at a discount rate.³¹ The second program relevant to CIPA is governed by the *Library Services and Technology Act* (hereinafter "LSTA").³² Under the LSTA, the Institute of Museum and Library Services "makes grants to state library administration agencies to 'electronically lin[k] libraries with educational, social, or information services,' 'assis[t] libraries in accessing information through electronic networks,' and 'pa[y] costs for libraries to acquire or share computer systems and telecommunications technologies.'"³³

Among those bringing suit alleging that CIPA was unconstitutional were a group of libraries, library patrons, and Web site publishers.³⁴

26. *See Am. Lib. Assn., Inc.*, 539 U.S. at 200 (stating Congress recognized that the availability of Internet pornography via public libraries' Internet accessible computers exposed minors to such content through their own searches, by virtue of adults accessing such content in close proximity to minors, or by adults printing sexually explicit materials at library printers).

27. *Id.* at 198-199.

28. *Id.* at 199.

29. *Id.*

30. 47 U.S.C. § 254(h)(1)(B) (2005).

31. *Am. Lib. Assn., Inc.*, 539 U.S. at 199.

32. 20 U.S.C. § 9101 *et seq.* (2005).

33. *See Am. Lib. Assn., Inc.*, 539 U.S. at 199 (citing 20 U.S.C. § 9101(a)(1)(B), (C), and (E)).

34. *Id.* at 201 (stating Web site publishers included the American Library Association and the Multnomah County Library in Portland, Oregon).

The suit was brought against the United States as well as the Governmental agencies and officials who administer both the E-rate program and the LSTA.³⁵ The case went to trial and the Court held that CIPA was unconstitutional.³⁶

The Court for the Eastern District of Pennsylvania enjoined the agencies charged with administering the E-rate and LSTA programs from withholding federal funding from libraries that failed to comply with the provisions of CIPA.³⁷ Specifically the District Court ruled that, "any public library that complies with CIPA's conditions will necessarily violate the First Amendment."³⁸ The District Court subjected CIPA to strict scrutiny although the First Amendment generally only requires libraries' content-based decisions about which print materials to add to their collections meet the less stringent rational basis test.³⁹

The District Court distinguished this situation from the average decision of a library to carry, or not to carry, certain print material from the library providing access to the Internet.⁴⁰ The District Court reasoned that Internet access within a public library is akin to a public forum.⁴¹ As such, analyzing Internet access via a library computer terminal as a form of public forum, CIPA fell under the purview of strict scrutiny as opposed to the usual rational basis standard, according to the District Court.⁴² Under strict scrutiny the District Court held that, although the Government had a compelling interest in preventing minors from gaining access to pornography via the Internet, CIPA's requirement that libraries install filtering software on their Internet accessible computer terminals was not narrowly tailored enough to further such interests of Congress.⁴³ The United States appealed the decision of the District Court and the Supreme Court reversed the District Court's holding.⁴⁴

In reversing the District Court, the Supreme Court rejected the view that Internet access via public library computer terminals constituted a public forum,⁴⁵ therefore, the District Court misplaced the strict scru-

35. *Id.* at 202.

36. *Id.*

37. *Id.*

38. *Am. Lib. Assn., Inc.*, 201 F.Supp.2d at 453.

39. *Id.* at 462.

40. *Am. Lib. Assn., Inc.*, 539 U.S. at 202.

41. *Id.*

42. *Id.*

43. *Am. Lib. Assn., Inc.*, 201 F.Supp.2d at 479.

44. *Am. Lib. Assn.*, 539 U.S. at 214.

45. *See id.* at 206-207 (quoting S.Rep. No. 106-141, p. 7 (1999) "A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves . . . [Internet terminals are] simply another method for making information available in a school or library.' [They are] 'no more than a technological extension of the book stack'").

tiny standard.⁴⁶

The District Court also added as another basis for striking down CIPA, the propensity of filtering software to block Internet content that is not pornographic.⁴⁷ The majority on appeal, however, rejected this argument.⁴⁸ Although filtering software's limitations may result in erroneous blockage of some material that is not pornographic, the majority opinion noted that library Internet users who encountered such erroneously blocked Web sites needed only ask that a librarian unblock such a site.⁴⁹ Further, CIPA provides authorization for librarians to "'disable' a filter altogether 'to enable access for bona fide research or other lawful purposes.'"⁵⁰ Again, the District Court found CIPA lacking in this respect as well, because there may be adults too embarrassed to request that a librarian unblock certain content.⁵¹ However, the majority, in reversing, rejected such an argument as a basis for holding CIPA unconstitutional.⁵²

The majority further rejected the claim that CIPA imposed an unconstitutional condition on the receipt of federal assistance.⁵³ Under the unconstitutional condition doctrine "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."⁵⁴ The majority rejected this argument stating that the Government is entitled to define the limits of any program it establishes by the appropriation of funds.⁵⁵ In the case at bar the Government was not denying benefits at all, it was simply making sure that the public funds it appropriated were spent for purposes authorized under the Act.⁵⁶

In sum, according to a majority of the Supreme Court, CIPA was a valid exercise of Congress' spending power⁵⁷ because the CIPA did not penalize public libraries by refusing to allocate funds in cases where li-

46. *Id.* at 208. (explaining that since libraries would be merely exercising their ordinary discretion in complying with CIPA, strict scrutiny is inapplicable and the rational basis standard should be applied).

47. *Am. Lib. Assn., Inc.*, 201 F. Supp. 2d at 449.

48. *Am. Lib. Assn., Inc.*, 539 U.S. at 209.

49. *Id.*

50. *Id.* (quoting 20 U.S.C § 9134(f)(3)).

51. *U.S. v. Am. Lib. Assn., Inc.*, 201 F. Supp. 2d at 411.

52. *Am. Lib. Assn., Inc.*, 201 F. Supp. 2d at 209 (stating "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment").

53. *Id.* at 210-211.

54. *Id.* at 210 (quoting *Bd. of Commrs. Waubaunsee Cty v. Umbehr*, 518 U.S. 668, 674 (1996)).

55. *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

56. *Id.* at 211-212. (stating "[c]ongress may certainly insist that these public funds be spent for the purposes for which they were authorized").

57. *Id.* at 214.

braries do not comply with the Act.⁵⁸ "To the extent that libraries wish to offer unfiltered access they are free to do so without federal assistance."⁵⁹

B. THE COMMUNICATIONS DECENCY ACT

The CDA was enacted as part of the *Telecommunications Act of 1996*⁶⁰ ("TA"). The TA has seven Titles.⁶¹ The TA's primary purpose was to encourage rapid deployment of new telecommunication technologies through reduced regulation.⁶² Title V of the TA contains the CDA.⁶³ The CDA was Congress' first attempt at regulating minors' access to pornography via the Internet.⁶⁴ The CDA's purpose was to prohibit the knowing transmission over the Internet of indecent or obscene content to any recipient under 18 years old.⁶⁵

Two specific provisions of the CDA were responsible for inviting the Constitutional challenge resulting in its demise. First was the "indecent transmission" provision, which provided, in relevant part:

(a)Whoever –

(1) in interstate or foreign communications –

* * *

(B) by means of telecommunications device knowingly –

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

* * *

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned no more than two years, or both.⁶⁶

The second was the "patently offensive display" provision, which provided, in relevant part:

58. See *Am. Lib. Assn., Inc.*, 201 F. Supp. 2d at 212. Refusal to fund a protected activity on its own is not analogous to imposing a penalty. *Id.*

59. *Id.*

60. *Reno*, 521 U.S. at 858.

61. *Id.* at 858.

62. *Id.* at 857 (quoting Pub. L. No. 104-104, 110 Stat. 56, 1 (1996)).

63. *Id.*

64. Bryan T. McAfee, *Ashcroft v. American Civil Liberties Union: The Latest Attempt to Protect Children from Internet Pornography*, 5 J. L. & Fam. Stud. 159, 159 (2003).

65. *Ashcroft I*, 535 U.S. at 567.

66. 47 U.S.C. § 223(a).

(d) Whoever –

(1) in interstate or foreign communications knowingly –

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, .

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both.⁶⁷

Congress qualified the above provisions by including in the CDA two affirmative defenses.⁶⁸ The first protected those who took “good faith, reasonable, effective, and appropriate actions” to restrict access by minors to the content prohibited by the statute, and the second protected those who required consumers to use one of several statutorily accepted age verification methods.⁶⁹

The CDA came before the Supreme Court in the case of *Reno v. American Civil Liberties Union* as soon as the Act was signed into law.⁷⁰ After an evidentiary hearing, a three-judge panel for the Eastern District of Pennsylvania issued a preliminary injunction prohibiting enforcement of the CDA.⁷¹ Each Judge wrote separately, but all reached the same ultimate conclusion – that the CDA was unconstitutional.⁷²

67. 47 U.S.C. § 223(d).

68. *Reno*, 521 U.S. at 860.

69. 47 U.S.C. § 223(e)(5)(A) and (B). (providing in full: (5) It is a defense to prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person has –

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number).

70. See *Reno*, 521 U.S. at 861-862 (reflecting that 20 plaintiffs filed initially, and that after a T.R.O. issued against enforcement of the CDA, 27 additional plaintiffs filed a second suit at which point the cases were consolidated).

71. *Id.* at 862.

72. *Id.* at 864. (explaining the decision by the District Court enjoined enforcement of the CDA as it pertained to the prohibitions therein that related to indecent communica-

On appeal the Government argued, to no avail as the Supreme Court in a near unanimous⁷³ decision upheld the ruling of the District Court, that the District Court erred in concluding that the CDA was violative of both the First Amendment because it was overbroad and the Fifth Amendment because it was too vague.⁷⁴

The Government first argued that the CDA was constitutionally based on three prior decisions by the Court.⁷⁵ The Court, however, systematically distinguished each of those cases from the one that was presently before it.⁷⁶

First, the Government argued that under *Ginsberg v. N.Y.*, the CDA was Constitutional. However, the Court distinguished the statute upheld in *Ginsberg* because it was decidedly narrower than the CDA, while it prevented certain sales to minors it by no means prevented an adult from purchasing material for their children.⁷⁷ Conversely under the CDA a parent's consent or even their participation in a prohibited communication could not prevent enforcement of criminality under the statute.⁷⁸ The Court further noted, the New York statute at issue in *Ginsberg* was applicable only to commercial transactions whereas the CDA contained no such limitation.⁷⁹ Also, the New York statute combined in its definition of 'harmful to minors' an additional requirement that the material also be "utterly without redeeming social importance for minors."⁸⁰ The CDA in comparison contained no such definitional requirement.⁸¹ Finally, under the New York statute a minor was defined as under the age of 17, conversely the CDA applied to all individu-

tions, but did not enjoin the Government from enforcing certain other provisions, notably the provision entitling the Government to investigate and prosecute obscenity and child pornography).

73. *Id.* at 848. Stevens, J. delivered the Court's opinion and Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined. O'Connor, J. filed an opinion which concurred in the judgment in part and dissented in part, and Rehnquist, C.J. joined O'Connor.

74. *Id.* at 864 (noting the Court reached its judgment without having to make a decision with regards to the alleged Fifth Amendment violation of the Act).

75. *Id.*; *Ginsberg*, 390 U.S. 629 (holding that a New York statute that made it illegal to sell to minors under the age of 17 material that was obscene to them but not to adults was Constitutional); See generally, *F.C.C. v. Pacifica*, 438 U.S. 726 (1978) (holding that although a radio broadcast entitled "Filthy Words" was not obscene, because of its indecent nature the F.C.C. could regulate such a broadcast as it was easily available to children); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding a zoning ordinance that kept adult movie theatres out of residential neighborhoods Constitutional).

76. *Reno*, 521 U.S. at 865-868

77. *Id.* at 865.

78. *Id.*

79. *Id.*

80. *Id.* (quoting *Ginsberg*, 390 U.S. at 646).

81. *Id.*

als under 18 years of age.⁸²

Secondly, the Government argued the CDA's Constitutional validity was established by the Court's decision in *F.C.C. v. Pacifica Foundation*. The Court again found the Government's reliance on the decision in *Pacifica*⁸³ was equally distinguishable to the case presently before it. In *Pacifica*, the F.C.C. order at issue "targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when, rather than whether, it would be permissible to air such a program in that particular media."⁸⁴ In contrast, the Court held, because the CDA's prohibitions were not limited to times, and were not dependent on any evaluation by a government agency familiar with the Internet's unique characteristics, that it was unconstitutional.⁸⁵ Furthermore, the CDA's prohibitions were punitive whereas the order issued in *Pacifica* was not.⁸⁶ To round things out, the medium at issue in *Pacifica* was one in which historically had been given very limited First Amendment protection whereas the Internet has no such historical predisposition towards regulation.⁸⁷

Finally, the Court distinguished the Government's reliance on *Renton v. Playtime Theatres, Inc.*⁸⁸ The Court held that the CDA was a content-based regulation whereas the zoning ordinance at issue in *Renton* was not.⁸⁹ The zoning ordinance "was aimed not at the content of the films being shown in the theatres, but rather at the 'secondary effects,' such as crime and deteriorating property values, that these theatres fostered: 'It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.'"⁹⁰ Although the Government argued that the CDA was simply a form of "cyber zoning"⁹¹ the Court held, because the CDA's own stated purpose was to "protect children from the *primary* effects of indecent and patently offensive speech, rather than the secondary effects of such speech,"⁹² such argument to the contrary by the Government must necessarily fail⁹³ [emphasis added].

82. *Reno*, 521 U.S. at 865-866.

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

84. *Reno*, 521 U.S. at 867.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Renton*, 475 U.S. at 41.

89. *Reno*, 521 U.S. at 867-868.

90. *Id.*

91. *Id.* at 868.

92. *Id.*

93. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that regulations which focus on a direct impact of speech are improperly analyzed under the guidelines set forth in *Renton*).

After the Court dispatched with distinguishing the above three cases from the controversy at hand with respect to the challenged provisions of the CDA, it turned to the text of the CDA itself in order to further justify its decision.⁹⁴

The Court first found problematic the fact that each of the challenged provisions of the CDA at issue used a different "linguistic form."⁹⁵ Furthermore, neither of the two "linguistic form[s]" were defined which the Court felt would provoke uncertainty among speakers as to how the "forms" both relate to each other and what each means with respect to the other.⁹⁶ This vagueness was problematic for two reasons: 1. Since the CDA was a content-based regulation of speech, such vagueness necessarily carried with it a chilling effect on free speech; and 2. The CDA, being a criminal statute, the severity of which may have the effect of causing a speaker to remain silent although his communication may arguably be lawful, was also problematic.⁹⁷

On appeal the Government argued that the CDA was not vague based on the standard established with respect to obscenity in *Miller v. California*.⁹⁸ At issue in *Miller* was a criminal conviction resulting from a commercial vendor mailing brochures that contained sexually explicit material.⁹⁹ The test established in *Miller* is, to this day, the current controlling standard defining obscenity.¹⁰⁰ The *Miller* test is as follows:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰¹

The Court rejected that the CDA complied with the requirements of *Miller*¹⁰² because the second prong of the *Miller* test requires that the applicable state law specifically define the proscribed material and the CDA failed to satisfy the test.¹⁰³ The CDA was further lacking in that the *Miller* test limits its definition to sexual conduct, but the CDA ex-

94. *Reno*, 521 U.S. at 864.

95. *Id.* at 871; 47 U.S.C. § 223(a) (using the term "indecent" while § 223(d) addresses material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual, excretory activities or organs").

96. *Reno*, 521 U.S. at 871.

97. *Id.* at 872 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)).

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

99. *Id.* at 18.

100. *Reno*, 521 U.S. at 872.

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

102. *Reno*, 521 U.S. at 873.

103. *Id.*

tended beyond sexual content including both excretory activities and organs of both sexual and excretory nature.¹⁰⁴

The second prong of the *Miller* test was particularly important to the Court because it is not subject to a contemporary community standard.¹⁰⁵ Therefore, individual courts would have to subject a non-existent national standard thus "present[ing] a greater threat of censoring speech that, in fact, fell outside [the CDA's] scope."¹⁰⁶ Due to this failure, the CDA lacked the requisite precision required by the First Amendment when a statute is a content-based regulation of speech,¹⁰⁷ and was, therefore, unconstitutional.

C. THE CHILD ONLINE PROTECTION ACT

In response to the decision in *Reno*, Congress again attempted to draft legislation that would serve the purpose¹⁰⁸ of protecting minors from exposure to sexually explicit content via the Internet.¹⁰⁹ Specifically, in response to the Court's concerns with the CDA's over-breadth, Congress limited COPA in three ways.¹¹⁰ First, unlike the CDA, which applied to the Internet as a whole, COPA only applied to content displayed on the World Wide Web.¹¹¹ Second, COPA only applied to communications made for "commercial purposes."¹¹² Finally, unlike the CDA, which sought to prohibit indecent and patently offensive communications, COPA only restricted that material which is "harmful to minors."¹¹³

Like the CDA, COPA also provided affirmative defenses to protect providers of sexually explicit content on the Internet.¹¹⁴ One could qualify for protection under the affirmative defenses provided for if he, "in good faith has restricted access by minors to material that is harmful to minors:

- (A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number;
- (B) by accepting a digital certificate that verifies age; or

104. *Id.*

105. *Id.*

106. *Id.* at 873-874.

107. *Id.*

108. Pub. L. 105-277, Tit. XIV, § 1402(1), 112 Stat. 2681-736 (1998). (stating Congress' stated goal in enacting COPA was to help parents supervise and control that content which their children, because of the Internet's ever growing widespread use, may inadvertently access thus suffering the harm that sexually explicit material can have on minors).

109. *Ashcroft I*, 535 U.S. at 569-570.

110. *Id.* at 569.

111. *Id.*

112. *Id.* at 570 (quoting 47 U.S.C. § 231(e)(2)(A)).

113. *Id.*

114. *Id.*

(C) by any other reasonable measures that are feasible under available technology.¹¹⁵

Approximately one month before COPA went into effect a group of organizations brought suit challenging the Constitutionality of COPA.¹¹⁶

1. *Ashcroft I*

COPA first came before the Supreme Court on a very limited issue.¹¹⁷ That issue was “[w]hether [COPA’s] use of ‘community standards’ to identify ‘material that is harmful to minors’¹¹⁸ violated the First Amendment.”¹¹⁹ Initially the Court for the Eastern District of Pennsylvania concluded that COPA’s challengers established a likelihood of success on the merits,¹²⁰ and thereby issued a preliminary injunction prohibiting COPA from going into effect.¹²¹ The District Court first determined that COPA fell under the purview of strict scrutiny under the First Amendment because it was a content-based regulation on speech.¹²² Under the strict scrutiny standard the District Court concluded that COPA could not be constitutionally valid because COPA was

115. 47 U.S.C. § 231(c)(1).

116. *Ashcroft I*, 535 U.S. at 571.

117. *Id.* at 566.

118. 47 U.S.C. § 231 states in relevant part:

(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 \$50,000.00, imprisoned not more than 6 months, or both.

* * *

(e) Definitions

* * *

(6) Material that is harmful to minors

The term “material that is harmful to minors” means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that –

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

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

(7) Minor

The term “minor” means any person under 17 years of age.

119. *Ashcroft I*, 535 U.S. at 566.

120. *Am. Civil Lib. Union v. Reno*, 31 F.Supp.2d 473, 498 (E.D. Pa. 1999).

121. *Id.* at 499.

122. *Id.* at 493.

not the least restrictive means available to Congress to achieve the goal of preventing minors from exposure to sexually explicit content via the Internet.¹²³

The District Court's ruling was affirmed on appeal by the U.S. Court of Appeals for the Third Circuit.¹²⁴ The Circuit Court, however, affirmed on a completely separate basis than did the District Court.¹²⁵ The Circuit Court found COPA to be substantially overbroad because of its use of "contemporary community standards" to identify content that is harmful to minors.¹²⁶ The Circuit Court reasoned that since Web publishers are unable to limit access to their Web sites based on geographic location the most puritanical community would essentially set the standard for what is deemed "harmful to minors" under COPA.¹²⁷ Due to the Circuit Court's *sua sponte* ruling that virtually ignored the reasoning of the District Court, the Supreme Court on appeal was only able to analyze COPA on a limited basis.¹²⁸

In comparing COPA to the CDA the Supreme Court recognized that COPA did not suffer from the same inherent flaws.¹²⁹ Further, the Supreme Court disagreed with the Circuit Court's fear that Web publishers would be burdened because of an inability to limit access based on geographic areas.¹³⁰ Since COPA incorporated the *Miller* test to determine whether or not something was obscene, to hold it unconstitutional on that basis would render other federal obscenity statutes unconstitutional as well.¹³¹ The majority held that COPA was not facially unconstitutional.¹³² The Court remanded the case back to the Third Circuit for further proceedings.¹³³

123. *Id.* at 497.

124. *Am. Civil Lib. Union v. Reno*, 217 F.3d 162, 173-174 (3d Cir. 2000).

125. *Ashcroft I*, 535 U.S. at 572.

126. *Id.* at 572-573.

127. *Am. Civil Lib. Union v. Reno*, 217 F.3d at 175.

128. *Ashcroft I*, 535 U.S. at 575.

129. *See id.* at 578 (stating that COPA applies to significantly less material than did the CDA, and its definition of what constitutes material that is "harmful to minors" includes within it the *Miller* obscenity test).

130. *See id.* at 579 (citing *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (noting States may choose to define obscenity offenses with respect to contemporary community standards as defined in *Miller* with nothing more, or may choose to use more precise geographic criteria)).

131. *Id.* at 584.

132. *See id.* (stating that to prevail on a facial constitutional challenge more is required to be shown than that the statute may have a small degree of over-breadth).

133. *See id.* (reemphasizing that the decision that COPA's use of community standards in its definition of material that is harmful to minors did not by itself render the statute unconstitutional. The Court reserved judgment as to whether COPA may fail to be Constitutional for a slew of other reasons including, but not limited to, whether COPA is too

2. *Ashcroft II*

On remand, the Circuit Court again found COPA to be constitutionally lacking, reaffirming the District Court's grant of preliminary injunction.¹³⁴ In a second appeal, the Supreme Court affirmed the grant of preliminary injunction by the District Court on the same grounds relied upon by the District Court,¹³⁵ and did not consider the justifications relied upon by the Circuit Court.¹³⁶

The Court held that the Government failed to meet its burden of proving that COPA's content-based regulation on speech was both a more effective and less restrictive means of achieving Congress' goal of protecting minors from exposure to sexually explicit material over the Internet than the alternatives proposed by those challenging the statute's Constitutionality.¹³⁷ Since there were several less restrictive alternatives to COPA the Court could not reverse the District Court's grant of a preliminary injunction, and instead remanded the case for a trial on the merits.¹³⁸

III. IN THE IMMORTAL WORDS OF AXL ROSE: "WHERE DO WE GO NOW, SWEET CHILD O'MINE?"

With the background accounted for, at least two things become clear: 1. Congress was successful in limiting the reach of COPA and defining its terms to achieve constitutionality, at least somewhat, under the First Amendment;¹³⁹ and 2. The Court is divided as to what the "least restrictive means" of enforcing a statute that seeks to regulate minors' access to pornography via the Internet would be.¹⁴⁰ However, where does this leave Congress, assuming that the District Court, on remand,¹⁴¹ will

vague, whether COPA would be overbroad for other reasons, or whether COPA would not survive strict scrutiny on the merits).

134. *Ashcroft II*, 124 S. Ct. at 2790.

135. *Id.* at 2791.

136. *Id.*

137. *Id.* at 2791-2792.

138. *See id.* at 2795 (stating that the holding in no way prevents the Government from proving at trial that COPA is in fact the least restrictive means of achieving Congress' stated goal). Since several years had passed from the time of the initial suit to the present technological advances may well have changed such that COPA is Constitutional, however, the record at this time did not reflect whether those changes had occurred.

139. *See Ashcroft I*, 535 U.S. at 585 (stating that since COPA's range of restriction was narrowed consistent with the obscenity definition established in *Miller* the use of community standards to achieve COPA's purpose was not "substantial enough to violate the First Amendment").

140. As evidenced by the change in attitude towards filtering software by the justices dissenting in *U.S. v. American Library Assn., Inc.* who now favor filtering software above age verification requirements. *U.S. v. American Library Assn., Inc.*, 539 U.S. 194 (2003).

141. *Ashcroft II*, 124 S. Ct. at 2795.

ultimately conclude that the Government failed to prove that age verification, as required by COPA, was the least restrictive means of achieving Congress' stated goal?¹⁴²

The Court explained in *Ashcroft II* that Congress has the ability to enact legislation to encourage parents to use Internet filtering software.¹⁴³ However, that should not be the extent of Congress' reach in this area of regulation.¹⁴⁴ Congress has both a compelling and legitimate interest in protecting minors from the effects of exposure to pornography via the Internet. As such, it owes its constituents more than just encouragement; Congress owes a viable means of protecting children. While COPA came up slightly short of the Supreme Court's expectations, Congress almost achieved its goal. They were on the right track, but stopped just short of the station.

A. NEXT STOP – THE ANTI-PORN REGISTRY/COOKIE – TWO LESS RESTRICTIVE ALTERNATIVES TO AGE VERIFICATION SOFTWARE CAPABLE OF WITHSTANDING CONSTITUTIONAL SCRUTINY

1. *An Introductory Analogy*

Interestingly, the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") have recently established rules attempting to regulate a different household intruder, Telemarketers.¹⁴⁵ The rules are known as the National Do Not Call Registry ("NDNCR").¹⁴⁶ The NDNCR is an "opt-in" program allowing consumers to choose to restrict telemarketers' access to them.¹⁴⁷ "The [NDNCR] offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive."¹⁴⁸

142. *Id.*

143. *Id.* at 2793.

144. Compare Tanessa Cabe, *Regulation of Speech on the Internet: Fourth Time's the Charm?*, 11 Fall Med. L. & Policy 50, 60-61 (2002) (positing that the U.S. should follow Europe's lead – merely encouraging through legislative incentives the use and development of filtering software); see also Council of Europe, *European Forum on Harmful and Illegal Cyber Content*, <http://www.coe.int/t/e/cyberforum/> (accessed Oct. 23, 2004).

145. *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 358 F.3d 1228, 1235 (10th Cir. 2004).

146. *Id.* (stating the NDNCR's historical roots date back to 1991 wherein Congress enacted legislation aimed at protecting consumers from telemarketing abuses).

147. *Id.* at 1232. The NDNCR provides a mechanism by which consumers give notice to telemarketers that they have no interest in receiving telephone calls for the purpose of solicitation. This mechanism prevents only commercial telemarketers, and does not apply to charitable or political organizations.

148. *Id.* at 1233. (illustrating that because a consumer can avoid "door-to-door" solicitation by placing a "No Solicitation" sign on his or her front stoop it is logical to allow consumers a similar method of avoiding telemarketers. The NDNCR is simply a "No Solicitation" sign directed at telemarketers.)

In 2003 the FTC and FCC enacted the rules that became the NDNCR.¹⁴⁹

So far, the NDNCR has withstood Constitutional scrutiny under the First Amendment.¹⁵⁰ It stands to reason that the government's worthwhile interest in protecting the personal privacy of individuals in their homes from telemarketers pales in comparison to the interest in protecting minors from the harmful effects of exposure to pornography via the Internet. This begs the question, could the Federal Government establish some kind of Anti-Porn Registry capable of withstanding Constitutional scrutiny? The answer is in the affirmative.

Unfortunately the analogy of the National Anti-Porn Internet Protocol Registry and the National Anti-Porn Cookie to the National Do Not Call List, briefly discussed above, is only skin deep. Although the National Do Not Call Registry only applies to commercial speech,¹⁵¹ it is further limited to purely commercial advertising.¹⁵² Pure commercial advertising regulations are not reviewed under strict scrutiny.¹⁵³ The proposed National Anti-Porn Internet Protocol Registry and National

149. *Id.* at 1234; *see also*, 16 C.F.R. § 310.4(b)(1)(iii)(B) (codifying the FTC rule establishing the NDNCR stateing, in relevant part:

(b) Pattern of calls.

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

* * *

(iii) Initiating any outbound telephone call to a person when:

* * *

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services . . .

The FCC rule establishing the NDNCR is codified at 47 C.F.R. § 64.1200(c)(2), it states, in relevant part:

(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(9) of this section, to:

* * *

(2) A residential subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. . .).

150. *Id.* at 1233 (stating four aspects of the NDNCR convinced the 10th Circuit Court of Appeals that it was consistent with the First Amendment's requirements: 1. The list was restrictive only of "core commercial speech;" 2. The NDNCR targeted only that speech invasive of the privacy of the home, "a personal sanctuary that enjoys a unique status under our constitutional jurisprudence;" 3. The NDNCR was an "opt-in" program placing the ultimate choice of restriction in the consumer's hands; and 4. The NDNCR materially furthered the government's stated interest).

151. *See Mainstream Marketing Services, Inc.*, 358 F.3d at 1236 (stating that the do-not-call rules established by the FCC and FTC draw a distinction between commercial and non-commercial speech).

152. *Id.*

153. *Id.* (citing *Central Hudson Gas & Elec. Co. v. Pub. Serv. Commn. of N.Y.*, 447 U.S. 557 (1980)).

Anti-Porn Cookie would, however, be subject to strict scrutiny because that content which would be regulated is not purely commercial.¹⁵⁴ This hurdle, although higher, is for the most part, already jumped by the decision in *Ashcroft I* wherein the majority found the language to satisfy strict scrutiny under the First Amendment.¹⁵⁵

2. *The National Anti-Porn Internet Protocol Registry*

Every computer linked to the Internet is identifiable by a unique sequence of numbers called an Internet Protocol ("I.P.") address.¹⁵⁶ In total, there are 4,294,967,296 possible unique I.P. address values.¹⁵⁷ Each unique I.P. is, not entirely, akin to a telephone number.¹⁵⁸ Computers are capable of linking up, or dialing in to one another for many purposes.¹⁵⁹ That each computer has a unique identifying number more than suggests that a registry equivalent to the NDNCR could be created wherein Internet content providers falling under the purview of the "harmful to minors" criteria from COPA, are required to restrict access to their sites of registered I.P. addresses.¹⁶⁰ Indeed current technology is already capable of blocking out unwanted I.P. addresses if the Web site operator has so chosen.¹⁶¹

154. See *Sable Commun. of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989) (stating that the evaluation of free speech rights of adults with respect to sexually explicit material that is not obscene is protected under the First Amendment).

155. *Ashcroft I*, 535 U.S. at 584.

156. How Stuff Works, *What is an I.P. Address?*, <http://computer.howstuffworks.com/question549.htm> (accessed Nov. 5, 2004) (illustrating that a typical I.P. address looks like this: 123.45.67.890).

157. *Id.* (stating of these more than 4 billion combinations there are several I.P. addresses that are reserved for specific purposes. For example, 0.0.0.0 is simply a default I.P. address and 255.255.255.255 is reserved for broadcasts).

158. A typical telephone number looks like this: 312-345-6789. Dialing the correct sequence of numbers on a telephone results in the ability to contact a specific person in a specific place. This is not unlike the I.P. address in which a specific number is attached to a specific computer.

159. For example computers linked together via the Internet are capable of interaction in the form of video game competition as well as file transfers between machines.

160. The author is merely suggesting a potential solution that would be less restrictive than age verification software, yet at the same time target the sites considered harmful by Congress without the use of filtering software that has a tendency to overblock content that would not ordinarily be cause for alarm. The actual technical aspects of establishing a system is best left to the computer software programmers, but surely some system could be put into place.

161. Microsoft, *HTTP Error 403.6*, <http://support.microsoft.com/default.aspx?scid=kb;en-us;306833> (accessed Nov. 1, 2004) (stating when a 403.6 error message appears a specific I.P. address has been blocked from content on a web page. The specific cause is that the Web site being accessed has been configured to accept connections from certain I.P. addresses only).

Essentially, the gist of the system would rely on an individual user accessing a federal Web site wherein they are familiarized with how to find out what their I.P. address is and then enter their I.P. address into the registry. Then Internet content providers falling under the purview of COPA's definitional language would be required to update their "blocked I.P. list" on a daily basis much like a home computer updates its anti-virus software.¹⁶² Using COPA's definitional language, already found to be constitutional under the First Amendment, as a starting point to identify what Internet content providers would be subject to the registry then coupled with the NDNCR language utilized by the FCC and FTC would create a statute that may read as follows:

___ U.S.C. § ___ Restriction of access to minors to materials commercially distributed by means of the World Wide Web that are harmful to minors

(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, *if said communication is communicated by means of any computer whose unique Internet Protocol or any successive Protocol address is registered in the National Anti-Porn Registry.*

(b) Definitions

(1) By means of the World Wide Web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person

162. Most computers today are equipped with some form of anti-virus software that automatically logs on to a central server when the computer is first connected to the Internet whereby it downloads any new virus signatures that have become a threat to computer stability.

make a profit or that the making or the offering to make the communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors *to be accessible via the World Wide Web on computers whose unique Internet Protocol or any successive Protocol address has been listed in the National Anti-Porn Registry.*

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that –

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

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

(5) Minor

The term "minor" means any person under 17 years of age.¹⁶³

3. *The National Anti-Porn Cookie*

An alternative to the National Anti-Porn Registry, and also a less restrictive means than the age-verification requirement of COPA, is a National Anti-Porn Cookie. Cookies are commonplace on the World Wide Web. An Internet cookie is "one or more pieces of information stored as text strings" on a computer.¹⁶⁴ The process of installing cookies to a particular machine is simple and often occurs without an Internet user even knowing.¹⁶⁵ A simple example of an Internet cookie

163. The language of this mock statute has been taken almost totally from the language of COPA, 47 U.S.C. § 231. Anything that is NOT in italics is copied directly from COPA.

164. *How Stuff Works, What is an Internet Cookie?*, <http://www.howstuffworks.com/question82.htm> (accessed Nov. 5, 2004).

165. *Id.* (stating an accessed web server transmits a cookie to a particular computer visiting a particular site, and the computer's web browser (Internet Explorer by Microsoft

and its corresponding functions would be a cookie for *The New York Times'* Web site.¹⁶⁶ Access to certain news stories and editorials is contingent upon a user entering some personal information for advertising purposes before being able to view news stories or editorials. The information need only be entered once because the Web site will then install a cookie on the computer that tells the Web site "this Internet user has already registered and is returning to the site."¹⁶⁷

The ability of a cookie to tell a Web site being accessed that the particular user has visited the site before is not the only function of Internet cookies, but it is the most common.¹⁶⁸ Cookies can be used for any number of purposes because they simply store data. A National Anti-Porn Cookie could easily be developed that would be able to store the data necessary to inform those Internet content providers that fall under the purview of COPA's definitional language that a particular user does not wish their computer to be able to access the Web site.¹⁶⁹ The National Anti-Porn Cookie could be downloaded to machines from a government Web site, and any Internet content provider falling under the purview of the statute's language allowing its content to be accessed by a machine with said Cookie downloaded and operating properly would be subject to the statute's penalties. A sample statute may, again using the language of COPA as a starting point, read as follows:

___ U.S.C. § ___ Restriction of access to minors to materials commercially distributed by means of the World Wide Web that are harmful to minors

(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

is the most common web browser). The next time the particular site is accessed browser sends the cookie back to the site's server which recognizes the cookie and changes the visited page accordingly. Essentially what is happening is that the cookie allows a user to personalize a particular site in that the site "remembers" who or what visited the site).

166. See *The New York Times Online*, <http://www.nytimes.com>. (including *the New York Times* is the self-described newspaper of record for the United States. Online content at the *Times'* Web site mirrors the daily coverage in the newspaper, and also allows users to access archived articles, and news stories (often times for a small fee)).

167. How Stuff Works, *supra* n. 164.

168. *Id.*

169. Again, as stated before the author merely is suggesting viable, less restrictive means of enforcing Congress' stated goal of protecting minors from the harmful effects of exposure to pornography via the Internet. The technical aspects of the suggested least restrictive means would have to be programmed by those with a better understanding of computer code technology.

months, or both, *if said communication is communicated by means of any computer which has downloaded and installed the National Anti-Porn Cookie.*

(b) Definitions

(1) By means of the World Wide Web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or the offering to make the communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors *to be accessible via the World Wide Web on computers which have downloaded and installed the National Anti-Porn Cookie.*

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that –

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

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

(5) Minor

The term "minor" means any person under 17 years of age.¹⁷⁰

4. *Will They Be Constitutional?*

COPA's ultimate Constitutional downfall was not its definition of what content fell under its purview;¹⁷¹ COPA's age verification requirements placing the onus on the Internet content providers to fix the system simply fell short of being the least restrictive means of enforcing the statute.¹⁷² Either of the above alternatives to age verification software are less restrictive and more effective than the filtering software now lauded, hypocritically so, as the holy grail of protection to minors.¹⁷³

First and foremost, the definition of what material is harmful to minors utilizing the *Miller* test has already survived a majority of the Supreme Court,¹⁷⁴ and would likely survive a third round of Supreme Court scrutiny.¹⁷⁵ The most important question is whether either of

170. The language of this mock statute has been taken almost totally from the language of COPA, 47 U.S.C. § 231. Anything that is NOT in italics is copied directly from COPA.

171. See *Ashcroft II*, 124 S. Ct. at 2795 (stating that although COPA was likely unconstitutional because age verification software was not the least restrictive means of preventing minors' access to pornography via the Internet, Congress is not without the ability to enact legislation that could further its worthy goal).

172. *Id.*

173. See *Id.* at 2796 (Stevens, J. concurring) (stating "encouraging deployment of user-based controls, such as filtering software, would serve Congress' interest in protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to the First Amendment"); *contra American Lib. Assn., Inc.*, 539 U.S. at 222 (stating that "[g]iven the quantity and ever-changing character of Web sites offering free sexually explicit material, it is inevitable that a substantial amount of such material will never be blocked. Because of this 'underblocking,' the statute will provide parents with a false sense of security without really solving the problem that motivated its enactment. Conversely, the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that 'contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.' In my opinion a statutory blunderbuss that mandates this vast amount of 'overblocking' abridges the freedom of speech protected by the First Amendment.").

174. See *Ashcroft I*, 535 U.S. at 584-585 (holding that COPA's restrictions based on a test analogous to the *Miller* obscenity test is consistent with past precedent and "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment").

175. See e.g. Warren Richey, *One Justice's Vision of Role of the Courts*, Christian Science Monitor, U.S.A. p. 1 (Nov. 16, 2004) (stating with the re-election of George W. Bush, a republican president who has stated that he would nominate judges that are akin to Justices Thomas and Scalia, coupled with the state of the Court at present, even conservative estimates indicate that at least 2 seats will be up during the next four year term meaning

these alternatives would in fact be the least restrictive means available to Congress.

Both the National Anti-Porn Registry as well as the National Anti-Porn Cookie would be less restrictive, and more effective than content filtering software. The standard established in *Ashcroft II* to determine whether a content-based restriction on speech is the least restrictive means is as follows: 1. The Court assumes that "certain protected speech may be regulated;"¹⁷⁶ 2. Then the Court asks, what is the least restrictive way that can be used to achieve Congress' stated goal?¹⁷⁷ "The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished."¹⁷⁸ When there is a challenge to a content-based speech regulation, the burden is placed on the Government to prove that the alternatives proposed will not be as effective as the regulation.¹⁷⁹

Assuming either of the mock statutes detailed above was signed into law, it is safe to say that a challenge to their constitutionality would be immediately forthcoming.¹⁸⁰ The likely argument against such a statute, as it has worked in the past, would be that the newly created I.P. Registry or Cookie is violative of the First Amendment because it is a content-based restriction on speech and is not the least restrictive means of implementing such a restriction.¹⁸¹ Such an argument must necessarily fail because, as will be discussed in detail, an opt-out program creating civil and criminal penalties will not cause content providers to "remain silent rather than communicate,"¹⁸² or place on them too heavy a burden.

that by the time another version of COPA came to the fore the likely makeup of the Court would again uphold the definitions utilized by COPA). Assuming of course that new justices, akin to Scalia and Thomas who voted to uphold the COPA's definitions, would likewise uphold said definitions).

176. *Ashcroft II*, 124 S. Ct. at 2791.

177. *Id.*

178. *Id.*

[T]he test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Id.

179. *Id.*

180. See *Ashcroft I*, 535 U.S. at 571 (stating that COPA was challenged almost immediately from its inception).

181. *Id.* at 571-572 (stating challengers argument: The statute violated adults' rights under both the First and Fifth Amendments because, first, it created an effective ban on protected speech, and second, it was not the least restrictive means of achieving the government's stated goal of protecting minors).

182. *Reno*, 521 U.S. at 872 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)).

In analyzing whether either of the above suggested alternatives would satisfy the "least restrictive means" requirement an initial principle must first be posited – "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."¹⁸³ That being said, and although individuals are expected to protect their own personal interests with respect to unwanted speech "simply by averting their eyes,"¹⁸⁴ the present regulations being suggested further a compelling interest, the interest in preventing minors' exposure and access to Internet pornography, and thus justify Congress' compelling interest and need to take affirmative action. However, "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."¹⁸⁵ Inevitably an attack on the National Anti-Porn I.P. Registry as well as the National Anti-Porn Cookie would rest on the argument that filtering software is less restrictive, therefore either of the two programs would be unconstitutional. Fortunately this argument is not sound.

The Government, in any case where the regulation imposed by Congress is content-based, must overcome the high hurdle of strict scrutiny.¹⁸⁶ In a case such as this, where the alternative to any regulation essentially amounts to the Government being hamstrung into having no ability to affirmatively regulate that which it seeks to, the hurdle is especially high. The current alternative, government encouragement of filtering software, is inherently less restrictive than any other means simply because it amounts to the Government being effectively taken out of the equation entirely.¹⁸⁷ "It is always less restrictive to do *nothing* than to do *something*."¹⁸⁸

183. *U.S. v. Playboy Ent. Group*, 529 U.S. 803, 813 (2000).

184. *Cohen*, 403 U.S. 205, 210-211 (1971).

185. *Compare Playboy Ent. Group*, 529 U.S. at 814; *with Ashcroft II*, 124 S. Ct. at 2798 (Breyer, J. dissenting) (stating "the term 'less restrictive alternative' is a comparative term. An alternative is 'less restrictive' only if it will work less First Amendment harm than the statute itself, while at the same time similarly furthering the 'compelling' interest that prompted Congress to enact the statute").

186. *Sable*, 529 U.S. at 126. (stating content-based speech restrictions are Constitutional only if they satisfy strict scrutiny); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (stating that content-based restrictions are presumptively invalid).

187. *Ashcroft II*, 124 S. Ct. at 2801-2802 (Breyer, J. dissenting) ("Conceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo . . . It is always true, by definition, that the status quo is less restrictive than a new regulatory law").

188. *Id.* at 2802.

That filtering software was found to be "at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on speech that COPA impos[ed] on adult users or Web site operators," was the non-conforming link in Congress' chain resulting in COPA's likely demise.¹⁸⁹ What makes the suggested National Anti-Porn I.P. Registry as well as the National Anti-Porn Cookie better than COPA's age verification requirement and, in the alternative, filtering software, is the ease with which such systems could be put in place without placing too heavy a burden on Internet content providers or adult users.¹⁹⁰

Both alternatives are already in use to some extent.¹⁹¹ Meaning that Internet content providers would have little to no cost involved in coming into accord with either of the alternatives.¹⁹² Furthermore, with respect to adult users, the ability to access such content is completely within their personal discretion in either of the above suggested alternative systems. There is no concern about embarrassment,¹⁹³ or the inability to verify one's age because of a lack of a credit card or debit account.¹⁹⁴ By removing age verification requirements, and placing the onus on individual home users with respect to opting out of access to sexually explicit content, there is likewise no need to be concerned that minors that have credit cards or debit accounts would be able to access Web sites falling under the purview of the above suggested statutes.¹⁹⁵

189. *Id.* at 2790.

190. See Microsoft, *supra* n. 161 (reflecting that I.P. blocking by Internet domains is already a viable technology); see also How Stuff Works, *supra* n. 164 (stating that Internet Cookies are widely used and recognized as helpful to both Internet users as well as Internet content providers).

191. See Microsoft, *supra* n. 161; see also How Stuff Works, *supra* n. 164.

192. See *Am. Civil Lib. Union v. Reno*, 31 F. Supp. 2d at 488 (recognizing that the age verification requirements would have created too heavy a burden on Internet content providers for a multitude of reasons. Several steps would be required under any of the accepted age verification means. A Web site operator would be required to set up a merchant account, retain the services of an Internet-based credit card clearing house, insert a multitude of complicated software to process user information, potentially rearrange the Web site's content, store credit card numbers or passwords in a database, and obtain a secure server to transmit consumers' credit card or other verification information. All in all, the cost of such a credit card verification system could initially cost anywhere from \$300 plus per transaction costs to thousands of dollars plus transaction costs).

193. *U.S. v. Am. Lib. Assn., Inc.*, 201 F. Supp. 2d at 411 (showing the District Court found problematic that adult patrons may be too embarrassed to ask librarians to unblock certain Web sites thus restricting their access to speech they would otherwise be entitled to access).

194. *Reno*, 521 U.S. at 856 (stating the imposition of requiring a credit card or debit account to access blocked content would create an impermissible burden on speech to those adults that do not have either a credit card or debit account).

195. *Id.* at 857.

In *Ashcroft II*, filtering software was found to be less restrictive than COPA's age verification requirements because "[the age verification requirements] impos[ed] selective restrictions at the receiving end, not universal restrictions at the source."¹⁹⁶ The posited alternatives to filtering software, the National Anti-Porn I.P. Registry and National Anti-Porn Cookie, are likewise implemented at the receiving end of the content. While there would be some minimal requirements on Internet content providers to update their software to recognize both the Cookie or the I.P. addresses, the majority of the weight is on individual home users to affirmatively state, much like a consumer utilizing the NDNCR, "I do not want access to your Web site's content."

Equally important to the personal choice to opt out of being able to access sexually explicit content that falls under the purview of the above suggested statutes, is the fact that neither the National Anti-Porn I.P. Registry, nor the National Anti-Porn Cookie, fall prey to the inevitable tendency of filtering software to be duped by savvy Internet pornographers using creative techniques to get around the filtering software's criteria (underblocking) or the inevitable tendency of filtering software to be too restrictive in its criteria (overblocking).¹⁹⁷ At present, filtering software is also unable to screen Web sites for sexually explicit images.¹⁹⁸ The above suggested alternatives would not fall prey to similar concerns because Internet content providers would be required to automatically, based on the definitions in the controlling statute, block out the I.P. addresses in the registry or computers that have downloaded the cookie. Furthermore, neither the National Anti-Porn I.P. Registry, nor the National Anti-Porn Cookie, would cost an Internet user any money whereas the average filtering software package costs approximately \$40.¹⁹⁹

The National Anti-Porn I.P. Registry as well as the National Anti-Porn Cookie, however, both have their weaknesses. Since Congress can only regulate that content which falls under its jurisdiction, internationally based Web sites with sexually explicit content will still be accessible

196. *Ashcroft II*, 124 S.Ct. at 2792.

197. Christine Peterson, *Filtering Software: Regular or Decaf*, <http://www.txla.org/pubs/tlj-1q97/filters.html> (accessed Nov. 1, 2004). Filtering software is that "which blocks, filters, or monitors Internet use." *Id.* Filtering software, in order to block out content, uses lists created by either the vendor of the software, the consumer of the software, or both. *Id.* Filtering software works in several ways. *Id.* "Filtering by phrase" is one way filtering software blocks unwanted content. *Id.* Typically a vendor of the software provides an initial list that is modifiable by the consumer once the software has been installed on the consumer's computer. *Id.* Another way in which filtering software blocks out unwanted content is by domain name. In this case the filtering software comes with a list of domain names that are automatically blocked based on the vendor's judgment. *Id.*

198. *Reno*, 521 U.S. at 855 (quoting *Reno v. Am. Civ. Lib. Union*, 929 F.Supp. at 842)

199. *Am. Civil Lib. Union v. Reno*, 31 F.Supp.2d at 492.

to minors via the Internet regardless of their home computer's status with respect to either of the suggested alternatives to filtering software.²⁰⁰ Filtering software's capabilities, however, extend beyond the reach of jurisdictional borders.²⁰¹ This fact should not be determinative of Congress' ability to regulate that material which it does have jurisdiction over. Either of the two suggested alternatives are as effective as filtering software, if not more so, because Internet content providers falling under the purview of the controlling statute will be deterred from ignoring consumers' affirmative choice to opt out of being able to access sexually explicit content due to the stiff penalties that would apply to such an abridgement. It is important to note that the alternatives suggested herein do not censor speech, they only require Internet content providers falling under the guise of either alternative to simply avoid allowing access to any person(s) affirmatively stating so.

Either of the above two suggested alternatives to filtering software are capable of withstanding strict scrutiny under the First Amendment's free speech protections. Although they are content-based restrictions, their definitional standards have been upheld by the Supreme Court.²⁰² Furthermore, although filtering software is technically less restrictive in that it maintains the status quo, to continually limit Congress' ability to regulate speech on the Internet in the way that the Supreme Court has been is detrimental to the "constructive discourse between our courts and legislatures" that "is an integral and admirable part of the constitutional design,"²⁰³ and will continue to be so until the Court one way or another lays down a hard and fast decision with respect to regulation of speech on the Internet.

IV. CONCLUSION

Congress has tried and tried and tried again to enact legislation capable of regulating minors' access to sexually explicit, harmful material accessible via the Internet. While the Court has continued to strike down virtually every content-based restriction Congress has enacted, with each new attempt by a very persistent legislature the statutes have gotten closer to acceptance by the Court as constitutionally sound. Congress attempted to cut a wide swath through the pornographic jungle that is flourishing on the Internet with the CDA. This first attempt, while constitutionally deficient provided the basis for COPA which sur-

200. *Ashcroft II*, 124 S. Ct. at 2792 (stating COPA's age verification requirements were not enforceable against internationally based Web sites, therefore, the similar language utilized in the suggested alternatives to filtering software would likewise be unenforceable).

201. *Id.*

202. *Ashcroft I*, 535 U.S. at 585.

203. *Ashcroft II*, 124 S. Ct. at 2804 (Breyer, J. dissenting).

vived strict scrutiny with respect to its definitional language establishing the limits of Congress' reach.

Although the death knell for COPA was likely rung when the Court held that the age verification requirements contained within COPA were not the least restrictive means of achieving Congress' stated goal of protecting minors from the harmful effects of exposure to sexually explicit material during their tender, impressionable years, the decision did not totally remove all hope for COPA supporters. Currently available technology gives both parents and Congress options with respect to safeguarding the nation's personal computers from access to pornography via the Internet if individual users so choose.

The status quo allows such individual users to purchase filtering software, the effectiveness of which is better than no safeguards at all. Under the recent decisions, it is not outside the realm of possibility that Congress may be able to enact other systems whereby Internet content providers are required to refuse their sites' access to users who affirmatively request to so be refused. As this Comment suggests, there are already at least two technologically feasible means to accomplish such regulation. Based on, and inspired by the NDNCR, both the National Anti-Porn I.P. Registry as well as the National Anti-Porn Cookie have the potential to be effective means in the struggle against the damaging effects that exposure to sexually explicit material has on minors.

Regulation of sexually explicit content available on the Internet has proved to be especially troublesome for both the Congress as well as the Supreme Court to get a grasp on. The near future will likely continue to perpetuate inconsistent decisions from the Court with respect to this issue. Seemingly, the technology is still in a state whereby the Court is unsure exactly as to how it should handle such sensitive issues as the regulation of material that is harmful to minors, accessible via the Internet.

As of yet the Court has not established that Congress is completely without the ability to regulate sexually explicit Internet content, although some believe the decisions of late suggest that the Court may in fact be reaching that point.²⁰⁴ On the other hand, supporters of COPA have celebrated in the fact that the Court held COPA to not be facially invalid.²⁰⁵ About all that is clear at this point in the debate is that the

204. See Ronald Patrick Reid, *Ashcroft v. American Civil Liberties Union*, 7 T.G. Jones L. Rev. 95, 110 (suggesting the Court will ultimately extend the First Amendment's protections to obscene speech nullifying Congress' ability to regulate any form of sexually explicit material available on the Internet or otherwise).

205. McAfee, *supra* n. 64, at 167.

Court has not reached a consensus on how it is going to treat regulation of speech on the Internet, and the debate will continue until they do.

Jacob A. Sosnay[†]

[†] The author is a second year, first semester law student at The John Marshall Law School in Chicago, IL. He would like to thank Professor Walter Kendall III who inspired the idea for this Comment. Drink Pepsi®.

