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CHILD ONLINE PROTECTION ACT: The Problem of Contemporary Community Standards on the World Wide Web

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Introduction

The advent of the Internet[1] into popular culture evoked the same response that occurred after the invention of newspapers, telephones, radio, and television. With each new medium, a concern over how it should be regulated followed. A primary concern always has been protecting children from material that may be harmful to them. The Child Online Protection Act (COPA) was proposed as a replacement to the Communications Decency Act of 1996 (CDA), which the Supreme Court had struck down as unconstitutional.[2]

As the first piece of proposed Internet legislation, the CDA sought to protect children from harmful sexual material online.[3] Congress defined material that is harmful to minors as:

> 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.[4]

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[1] The Internet is "an international network of interconnected computers that enables million of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." Communication Decency Act, 47 U.S.C.A.§223(a)(1)(B)(ii), (2001).

[2] Reno v. ACLU, 521 U.S. 844 (1997).

[3] *Id.*

[4] Child Online Protection Act §1403 (e)(6), (2001).

The troublesome sections of the CDA attempted to criminalize the transmission of obscene or indecent messages to a recipient under 18 years of age.[5] It also prohibited the knowing sending of a message, to an underage recipient, that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[6] The Supreme Court rejected the CDA as overbroad because it sought to prohibit both speech that is protected and unprotected by the First Amendment.[7] The Court also said the CDA failed for vagueness because the phrases 'harmful to minors' and 'contemporary community standards' are too confusing and unworkable to prohibit speech on their basis.
COPA provides for many of the same civil and criminal penalties, but sought to narrow the behavior that could be punished by asserting a list of affirmative defenses.[8] A United States Circuit Court upheld a preliminary injunction against COPA in November, 1999 for vagueness and overbreadth, the same reasons the CDA was initially rejected as an appropriate means to control content on the Internet.

Part I of this paper will focus on the constitutional standards used to determine when regulation of a specific medium is justified so that it does not violate the First Amendment. Part II then will analyze what standard should be applied to the Internet and will examine the justifications given by the Circuit Court for issuing a preliminary injunction. Part III then will argue that COPA is unconstitutional as written, and propose ways to protect the compelling government interest without implicating the First Amendment and infringing on the rights of the adult population.

I. The Unprotected

A. Congress shall make no law...Except

Though the First Amendment says "Congress shall make no law...abridging freedom of speech,"[9] the United States Supreme Court has defined several types of speech that are not protected. Examples of speech that is never protected include

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[5] Communication Decency Act § 223 (a)(1)(B)(ii) (2001).
[6] CDA § 223 (d).
[7] U.S CONST. Amend. 1 provides that Congress shall make no law...abridging freedom of speech...or press.
[8] COPA §1403 (c)sets forth three affirmative defenses. The defendant, acting in good faith, must have restricted access of harmful material to minors by a) requiring use of a credit card, debit card, access code or personal identification number, b) accepting a digital certificate that verifies age, or c) by any other reasonable measure feasibly available through technology.
[9] U.S. CONST. Amend. 1

obscenity,[10] child pornography,[11] defamation,[12] fighting words[13] and incitements of illegal activity.[14]

In *Reno v. ACLU*, the Supreme Court decided that the interest of regulating such speech outweighs the value of expression of certain ideas. In doing so, the Court developed several tests to determine whether speech falls into a particular category of unprotected speech. Most relevant to a discussion of COPA is the definition of obscenity. *Roth v. United States* defined obscenity as "material which deals with sex in a manner appealing to the prurient interest".[15] In a footnote, prurient interest is defined as "material having a tendency to excite lustful thoughts."[16]

In *Miller v. California*,[17] the Court set forth a three-prong test: "(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; (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." [18] All three of the *Miller* test prongs must be met for the material to be deemed obscene. The term "contemporary community standards", however, could have a self-censorship effect on speech, if national distributors must conform their material to the most stringent community's standards. Though this also is a problem with print and film, it becomes increasingly worrisome as it applies to the Internet community, because the Internet by its nature is available globally. Also, film and television can be edited to serve the local areas in which the work will appear and newspapers print different editions of their papers that can be edited for content, but once something is posted on the Internet, everyone with access to it views it in the same form.

B. Different Media, Different Treatment

As discussed, certain speech is not protected by the First Amendment, but some classes of protected speech can be regulated under certain circumstances. In all cases where the government seeks to control the content of protected speech, the Court requires that the proposed regulation pass the strict scrutiny test.[19] Under strict scrutiny, the regulation must serve a compelling government interest and be the least

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[10] U.S. v. Roth, 354 U.S. 476 (1957).
[11] N.Y. v. Ferber, 458 U.S. 747 (1982).
[12] N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
[13] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[14] Schneck v. United States, 249 U.S. 47 (1919).
[15] Roth, 354 U.S. at 487.
[16] *See id.* at n.20.
[17] Miller v. California, 413 U.S. 15 (1973).
[18] *Id.* at 24.
[19] Turner Broad. System v. FCC, 114 U.S. 2445 (1994).

restrictive means of achieving its goal.[20] Less rigid tests are employed in circumstances discussed later.

Despite employing the same rigid test when a statute seeks to control content, the Court treats different media differently. Print medium have the highest level of constitutional protection in *Miami Herald Publishing Co. v. Tornillo*.[21] The *Tornillo* Court struck down a Florida statute that required newspaper editors to print the replies of political candidates who had been personally attacked in a prior editorial. The Court concluded the statute intrudes on the function of editors and could chill political debate and coverage in violation of the First Amendment.[22]

The Court relied on the spectrum scarcity of over-the-air broadcasting to regulate television and radio in *Red Lion Broadcasting v. Federal Communications Commission*, where a statute required broadcasters to offer an individual who was personally attacked on the station, a reasonable opportunity to respond over the broadcaster's facilities.[23] It also required broadcasters to cover issues of public concern in a fair and equal manner.[24] The "Fairness Doctrine" that evolved in *Red Lion* however, was overturned by an FCC decision in 1987 as a violation of the First Amendment and the notion of spectrum scarcity fell as well.[25]

Broadcasting was afforded considerably less protection under *Federal Communications Commission (FCC) v. Pacifica Foundation.*[26] Though not engaging in a strict scrutiny test, the Court found the FCC could impose fines on a radio station based on indecent content. Because of broadcasting's nature of being "uniquely accessible to children, even those too young to read,"[27] the Court set forth four rationales for regulation: 1) spectrum scarcity, 2) the pervasiveness of broadcasting, 3) the inability to adequately warn the audience, and 4) broadcasting's impact on children.[28] These rationales accept the government's interest in protecting children from indecent speech as compelling enough to justify regulation.

The Government's compelling interests were extended to cable in *Denver Area Educational Telecommunications Consortium v. FCC*.[29] There, the Court upheld a statute permitting cable operators to refuse to air indecent materials on leased access channels. The spectrum scarcity rationale is less convincing when applied to cable because the technology of fiber optic cables allows a much higher number of channels than over-the-air broadcasting. Even though cable capacities are

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[20] *See* Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. 113, 115 (1996)
[21] Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241 (1974).
[22] *Id.* at 259.
[23] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
[24] *Id.*
[25] In re Syracuse Peace Council v. WTVH, 2 FCC Rcd 5043 (1987).
[26] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
[27] *Id.* at 748.
[28] *Id.* at 748-750.
[29] Denver Area Educational Telecomm. Consortium v. FCC, 116 S.Ct. 2374 (1996).

not infinite, so far cable operators have been able to add many channels to the existing systems without problems. Still, the Court determined that the invasive nature of cable justified regulation.

Though the Court afforded broadcasting and cable less protection to air indecent material, the Court allowed indecency in interstate commercial telephone calls to face no restrictions. In *Sable Communications of California, Inc. v. FCC*, the Court said the prohibition of pre-recorded sexual telephone messages was a violation of free speech rights.[30] The Court distinguished telecommunications from other media, saying "the receipt of...'dial-a-porn' requires the listener to take affirmative steps to receive the communication," so that it would be unlikely that a child would be exposed to it unwittingly.

When the Court uses the strict scrutiny test, the government frequently has a difficult time convincing the Court of a compelling government interest that justifies abridging free speech rights, because not only must the government interest be compelling, but the means must be the least restrictive. This policy is to preserve the high value the Constitution places on freedom of expression. But when the government is not as concerned with the content of the message, it can regulate public speech to minimize disruption in a public place while still protecting freedom of speech.

This test allows the government to regulate speech in public places with reasonable time, place and manner restrictions that serve important interests. If a permit or license is required, the system must serve an important government interest and there should be clear criteria and prompt determination. For instance, in *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court upheld a regulation that prohibited the distribution of flyers at the Minnesota State Fair, except at booths.[31] The Court recognized the important interest of crowd control and safety and noted that booths were available on a first-come, first-serve basis or flyers could be distributed outside the fairgrounds area.

Where time, place and manner restrictions are not applicable, the government is still allowed to regulate speech to serve an important government interest. The Court has recognized a class of expression when intermediate scrutiny is permissible to regulate speech. The intermediate scrutiny test, articulated in *U.S. v. O'Brien*, allows a government to regulate conduct that can be seen as communicative, for example flag burning or nude dancing.[32] As long as the government is not regulating the conduct for the act itself, not based on the actor's underlying message, the Court will require a substantial relation of the government means to an important government interest.

In *O'Brien*, the Court upheld a law that made it a crime to "knowingly destroy or mutilate" draft registration materials. The defendants in *O'Brien* burned

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[30] Sable Communications of Cal. v. FCC, 492 U.S. 115 (1989).
[31] Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).
[32] United States v. O'Brien, 395 U.S. 367 (1968).

their draft cards and were prosecuted under the statute. Though the defendants' actions were a form of political speech, the government argued that the cards were necessary for army administrative purposes and the Court found the government's purpose justified the regulation of such expression.[33]

The premise behind the *O'Brien* test is that government is unconcerned with the nature of the expression's content, so that the proposed regulation will not be subject to strict scrutiny. But the *O'Brien* test covers only a narrow range of expression and, to the detriment of the drafters of COPA, does not apply because the proposed regulation is content specific.

II. The Internet Standard

The dispute over Internet regulation therefore lies with the medium the Court chooses to analogize it to. The first piece of proposed Internet legislation, the CDA, was rejected under the strict scrutiny test.[34] In doing so, the Court compared the Internet to telecommunications, acknowledging that both media require the user to take affirmative steps to access indecent material. Where the telephone user has to push buttons, the computer user must type in domain names it wishes to access. It is unlikely a sexual web site would be accessed mistakenly since a user can either access a site by typing in the domain name or by conducting a search. During a search it is more likely for indecent web sites to surface, however when the site names appear as the result of a search, a short description is also given. A user, therefore, will not open a site and be surprised at its content if the user reads the web site description. The Court rejected a comparison to broadcasting, because the Internet is "not the same as turning on a radio and being taken by surprise by an indecent message."[35]

The characterization of the Internet set the framework for the rejection of COPA. The legislation was the result of five congressional findings concerning the protection of children. Congress declared that though parents should provide primary protection from harmful material on the World Wide Web ("Web"), the Web's widespread nature can make control difficult. Congress also said that protection of the physical and psychological well-being of children is a compelling government interest and there should be a national solution to the problem. Finally, Congress found that COPA would be the least restrictive means of achieving their goal and that parents, educators, and the industry should focus on efforts to protect children.[36]

The problematic sections of COPA provide that anyone who:

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[33] *Id.* at 377-378.
[34] Reno v. ACLU, 521 U.S. 844 (1997).
[35] Sable, 492 U.S. at 128.
[36] COPA §1402.

> 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.[37]

Congress defined 'harmful to minors' the same way as in the CDA, again invoking the standard 'contemporary community standards'.[38]

The section provides affirmative defenses for persons who, in good faith, have restricted use to minors (1) through requiring use of a credit card, debit card or PIN number; (2) by accepting a digital certificate that verifies age; (3) or by any reasonable means feasible under available technology.[39]

Like the CDA, the crux of the problem lies in the phrase "harmful to minors," because reliance on the meaning of this phrase can be the difference between making available to minors permissible material and criminal material. When the U.S. Circuit Court upheld the preliminary injunction barring COPA from going into effect, Senior Judge Leonard I. Garth said the one aspect of the law that concerned him most was how to interpret "contemporary community standards".[40] Since the first aspect of determining whether material is "harmful" employs a "community standard", a web site operator would not know which community's standard to adhere to. In light of the criminal penalties COPA imposes, the standard is unconstitutionally vague because it requires website operators to guess whether their content will be harmful to minors in any one area of the country, and fear prosecution based on a specific or restrictive community standard. Furthermore, the fear of not being able to assess when content may be in violation of COPA may stifle constitutionally protected speech and deprive web users of their right to see such material.

The fundamental question that remains unanswered is whether the standard would be the most restrictive standard in the United States. As Judge Garth questioned, "Are we all going to be remitted to the standards...of those residents in Utah or the Amish country?"[41] Since every community has access to the Web, such a restrictive approach would be overbroad in that it would infringe the rights of those minors who would not be harmed by such material. Furthermore, since website

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[37] COPA §1403 (a) (1).
[38] COPA §1403 (e) (6).
[39] COPA §1403 (c) (1).
[40] Duffy, Shannon .P., "Judges Question Government Role in Protecting Children on Internet", THE LEGAL INTELLIGENCER (Nov. 5, 1999).
[41] *Id.*

operators exist all over the world, enforcement would be a massive undertaking. There are jurisdictional problems with web creators who live across the globe, but whose indecent material may be available to minors in the U.S. and there is no administrative body equipped to monitor the ever-increasing number of those sites. The plethora of problems with COPA as proposed would burden website operators with a vague standard and burden the entire adult population with a law highly restrictive of their First Amendment rights.

The next problem the Circuit Court addressed was the possible chilling effect the affirmative defenses would have on adults. The judges said they feared that if adults were required to disclose a personal identification number or credit card information, they would not access indecent material, which is constitutionally protected for them.[42] The chilling would be exacerbated if adult had to pay to access such material.

The imposition of the affirmative defenses is contrary to any prior decisions upholding content-based legislation. COPA is distinguishable from the statute in *Ginsberg v. New York*[43], where the Court allowed the City to require adult magazines be sold with wrappers. COPA requires adults to take the affirmative steps of either paying for access or disclosing personal information, to view sexual material that they have a First Amendment right to view. It is impermissible to infringe adults' rights by "reducing the adult population to what is good for children,"[44] since even material that is harmful to minors is protected with respect to adults.

COPA is also distinctly different from the broadcasting case law. The primary justifications for regulation in *Pacifica* were the spectrum scarcity rationale and the invasive nature of broadcasting. There is no basis for either rationale as applied to the Internet because, there is no spectrum scarcity in the realm of the Internet and, as the *Reno* Court noted, the Internet requires users to take affirmative steps before viewing objectionable content.

Though the Court has consistently recognized the goal of protecting children from harmful material as a compelling government interest, the court appropriately rejected COPA as unconstitutionally overbroad. Since *Ginsberg* the Court has acknowledged the validity of a state's interest in protecting "the well-being of its youth."[45] Yet a strict scrutiny approach demands the statute be the least restrictive means to accomplish the state's goal. COPA is unconstitutional because it fails to be narrowly tailored to achieve the government's goal because it prohibits constitutionally protected speech as well as unprotected speech. Thus, the court correctly analogized COPA to the dial-a-porn statute in *Sable* and demanded a less restrictive approach to protect children.

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[42] *Id.*
[43] Ginsberg v. N.Y., 390 U.S. 629 (1968).
[44] Butler v. Michigan, 352 U.S. 380 (1957).
[45] *See*, Ginsberg, 390 U.S. at 639-640.

III. Implications of a Hands-Off Approach

Protecting children from harmful sexual material is a compelling government interest supported by parents, educators, librarians and many other groups. As Congress noted in its finding of facts, various groups of supporters must all play a role in order for to reach a goal.[46] Currently there are several technological advances that enable protection from explicit material.

The most popular tool for controlling content is filtering. Yet there are a variety of ways filtering can be used. The most expensive filter is "an Internet switching device that would be housed at the site of the access provider, which means it could apply content restrictions to all or some of the customers served via that site."[47] The filter then would sort out any material that individual users have chosen to block from their home access or material that local laws do not protect. The filter can be circumvented, however, by using a foreign Internet service provider (ISP).

Filtering also can be achieved through software programs which establish different categories of speech that a user can block out.[48] An adult user can "unblock" any sites they wish to view. The categories can vary, depending on the software, but include sexually explicit material, hate speech, profanity, information on drugs or alcohol and homosexuality.[49] These programs, which can be word sensitive, are over encompassing. For instance, if a user filters any site with the word "breast", the software will screen all material on "breast cancer" or "chicken breast recipes". This approach gives parents complete control and discretion but does not protect children from material viewed anywhere but their home computer.

An alternative to filtering is a self-regulating, content-based ratings system imposed by the Internet industry. The Platform for Internet Content Selection (PICS) is a proposed rating system that would provide consistent labeling standards to ISPs and individual website operators.[50] The idea is that each website would have a rating to enable a viewer to determine whether content may be inappropriate for children. Yet the system has no way of monitoring whether a child has entered a site "without permission". This system can be compared to the self-imposed ratings of the Motion Picture Association of America (MPAA) that are assigned to movies. Though this is not a particularized community standard, it gives parents a guideline with which to protect their children.

A final approach to regulating the Internet could be self-imposed or, more effectively, with government intervention. The proposal is the assignment of a particular domain address--.xxx instead of .com-- to designate sexually explicit web

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[46] COPA §1402.

[47] James J. Black, *Free Speech & The Internet: The Inevitable Move Toward Government Regulation*, 4 RICH. J.L. & TECH, 1,3 (Winter 1997)

[48] Parental Control of the Internet, www.worldvillage.com

[49] *See id.*

[50] Black, *supra* note 47, at 3.

sites.[51] This approach would eliminate even the possibility of a child stumbling upon harmful material inadvertently, as many pornographic sites use ordinary domain names hoping viewers will stumble on their sites while surfing. For example, www.whitehouse.com, an indecent site, could easily be confused as the official site of the White House, www.whitehouse.gov. Still, this method would not prevent a child from viewing the material intentionally.

Since the Internet is still in its commercialized infancy, there is no perfect technological solution. As legislators learn more about the evolving technology and the feasibility of enforcement, the Internet should be regulated. Until regulation can be achieved without compromising the First Amendment rights of the entire adult population of the U.S., however, Congress should take a hands-off approach and embrace the worldwide marketplace of ideas the First Amendment was drafted to encourage.

IV. Conclusion

The global nature of the Internet invites the establishment of cross-cultural communities to mold into one. The exchange of information and varied viewpoints makes the Internet so appealing. However, with the advantages of cross-culturalism comes a culture clash that makes a universal standard for indecency unworkable. Recognizing that most communities have the compelling interest of protecting their children from harmful material on the Web, there is an irreconcilable dichotomy that pitches individual communities against a global community of which they want to be a part of. Since there is no technology to effect the separation in a manner consistent with protecting freedom of speech, individual members of society should step forward to control what their children see, not legislators in Washington

[51] John F. McGuire, *Note: When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 761 (1999).