

1-1-1999

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Recommended Citation

Jill Jacobson, Comment, *The Child Online Protection Act: Congress's Latest Attempt to Regulate Speech on the Internet*, 40 SANTA CLARA L. REV. 221 (1999).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol40/iss1/6>

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THE CHILD ONLINE PROTECTION ACT: CONGRESS'S LATEST ATTEMPT TO REGULATE SPEECH ON THE INTERNET

Jill Jacobson*

I. INTRODUCTION

The Internet is a unique, new global communication medium of unprecedented proportions. This medium provides a low-cost, virtually instantaneous way for people to communicate with a worldwide audience in a variety of different formats.¹ "This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue."² The Internet has experienced explosive growth in recent years. "The number of U.S. homes with Internet connections has leaped from less than 6 million in 1994 to almost 39 million this year and [is] estimated [to reach] 60 million in 2003. . . ."³

This comment addresses the recent attempt by Congress to regulate speech on the Internet via the Child Online Protection Act ("COPA").⁴ The COPA purports to restrict access by minors to commercially provided sexually explicit material on the Internet. The COPA has been challenged as an unconstitutional restraint on speech, and recently a federal district court granted a motion for a preliminary injunction against its enforcement, pending a final adjudication on the merits.⁵

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1. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

2. *Id.*

3. Jon Healey, *Fiber Optics Light the Way for Rapid Growth of the Internet*, SAN JOSE MERCURY NEWS, May 4, 1999, at 4F.

4. See 47 U.S.C. § 231 (1998).

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

Case law regarding acceptable parameters for regulation of the Internet is scant, because the medium has only recently become a popular means of expression.⁶ However, in 1997, the United States Supreme Court struck down a predecessor of the COPA, the Communications Decency Act ("CDA").⁷ The COPA is Congress's response to the Court's criticisms of the CDA and represents a Congressional attempt to draft legislation more likely to pass constitutional muster.⁸ Although narrower in scope than the CDA, the COPA is a content-based restriction on speech and must survive strict scrutiny to be held constitutional.⁹ To prevail under strict scrutiny, the COPA must be a narrowly-tailored means of achieving the government's stated objective of protecting minors from harmful material on the Internet.

This comment evaluates the constitutionality of the COPA and proposes an alternate type of Internet regulation that is less likely to infringe upon individuals' rights to freedom of expression. Part II of this comment provides the pertinent background material for analyzing the COPA. Part II.A discusses the history of First Amendment jurisprudence with respect to various forms of communication media. Part II.B discusses the history of the Internet and describes the types of content that are available through this medium. Part II.C describes various means for regulating Internet content and discusses the background of both the CDA and the COPA. Part III of this comment identifies the constitutional issues raised by passage of the COPA. Part IV, divided into three sections, presents an analysis of the COPA with respect to First Amendment rights. Part IV.A compares the provisions of the COPA to those of the CDA. Part IV.B subjects the COPA to a strict scrutiny analysis, finding that it fails this test. Part IV.C compares the COPA to "adult zoning" regulations that have been upheld by the Supreme Court. Finally, Part V proposes a regulatory scheme that is distinct in nature from either the CDA or the COPA and could be en-

6. See, e.g., *supra* note 3 and accompanying text.

7. 47 U.S.C.A. § 223 (a)-(e) (West Supp. 1997) (struck down as unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997)).

8. See H.R. REP. NO. 105-775 (1998) (visited Dec. 21, 1998) <<http://www.epic.org/freespeech/censorship/hr3783-report.html>>.

9. See, e.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). For a discussion of strict scrutiny, see *infra* Part II.A.1.

acted without abridging adults' rights to receive constitutionally protected speech via the Internet.

II. BACKGROUND

A. First Amendment Rights

1. Freedom of Speech—Rights and Limitations

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ."¹⁰ Freedom of speech is the cornerstone of individual liberty and of our form of democracy.¹¹ By encouraging public discussion of competing views and ideas, the First Amendment guarantees and promotes an unfettered "free trade in ideas."¹² "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."¹³ For this reason, the U.S. Supreme Court subjects laws regulating speech to a strict scrutiny analysis,¹⁴ and deems any law regulating speech on the basis of its content presumptively invalid.¹⁵

The right to free speech, however, is not without limit.¹⁶

10. U.S. CONST. amend. I.

11. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 859 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1977). "[T]he preservation of [protected speech] . . . has been extolled by court after court in case after case as the keystone, the bulwark, the very heart of our democracy." *Id.*

12. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result). "The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.' To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen." *Id.*

13. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

14. See, e.g., *ACLU*, 929 F. Supp. at 851; *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

15. See, e.g., *ACLU*, 929 F. Supp. at 858; *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 381 (1992) ("Content-based regulations are presumptively invalid.") *Id.* at 382.

16. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words

The Supreme Court has held that in certain circumstances, the First Amendment right to freedom of speech may be superseded by a compelling government interest.¹⁷ In these cases, the Court has held that "[t]he benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights."¹⁸ Some types of speech are unprotected by the First Amendment. Examples of unprotected speech include obscenity,¹⁹ child pornography,²⁰ libel against private citizens,²¹ speech calculated to provoke a fight,²² and incitement to imminent unlawful acts.²³ Regulation of speech not in one of the unprotected categories is examined under strict scrutiny. Strict scrutiny requires that a regulation be "justified by a compelling government interest and . . . narrowly tailored to effectuate that interest."²⁴

Regulations, even if serving a compelling government objective, are unconstitutional if they are either overbroad or too vaguely worded.²⁵ An overbroad law, even if serving a legitimate end, is not constitutional because it sweeps protected speech within its ambit along with the unprotected speech that is the target of the regulation.²⁶ Vaguely worded laws are likewise unconstitutional. Vagueness in the language of a statute is a violation of due process²⁷ and the Supreme Court

that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id. (citations omitted).

17. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

18. *ACLU*, 929 F. Supp. at 851 (quoting *Elrod v. Burns*, 427 U.S. 347, 363 (1976)).

19. *See FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). "Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards." *Id.* (citation omitted); *see also Miller v. California*, 413 U.S. 15 (1973).

20. *See New York v. Ferber*, 458 U.S. 747 (1982).

21. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

22. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

23. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

24. *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1977).

25. *See Stephen C. Jacques, Comment, Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1953-54 (1997).

26. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

27. *See ACLU*, 929 F. Supp. at 860. "[A] statute which either forbids or re-

has held such statutes "void for vagueness."²⁸ "[N]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. . . ."²⁹

2. *First Amendment Rights with Respect to Communication Media*

In this era of mass communication, the Supreme Court has taken a "medium-specific" approach to determining the constitutionally appropriate level of regulation for each new form of media.³⁰ In this way, the Court "translates" the values that the Framers had in mind when they wrote the First Amendment into the context of each new medium that the Court examines.³¹ This allows the Court to preserve "constitutional fidelity" in light of new technologies that did not exist when the Constitution was written.³²

Historically, the highest level of constitutional protection has been afforded to speech conveyed through print,³³ a medium that existed at the time the Constitution was drafted.³⁴ "The Court has consistently spoken forcefully on the critical role the print medium plays in advancing a robust national debate."³⁵

However, the stringent protections for speech in the print medium are not absolute. In *Ginsberg v. New York*, the Su-

quires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

28. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.*

29. *ACLU*, 929 F. Supp. at 860 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

30. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). "We have long recognized that each medium of expression presents special First Amendment problems." *Id.*

31. *See Lawrence Lessig, Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 873 (1996).

32. *See id.*

33. *See Miami Herald Publ'g v. Tornillo*, 418 U.S. 241, 259 (1973) (White, J. concurring).

34. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-25, at 1003 (2d ed. 1988). "The First Amendment guarantee of freedom from government intrusion reigns most confidently in the realm of the print media, since newspapers and pamphlets were the most significant modes of mass communication in the world of the Framers." *Id.*

35. *Jacques, supra* note 25, at 1956 (citations omitted).

preme Court considered the constitutionality of a New York statute that prohibited the sale of materials deemed "harmful to minors" to persons under age seventeen.³⁶ The appellants were prosecuted and convicted of selling sexually explicit magazines to a sixteen-year-old boy on two separate occasions, in violation of the statute.³⁷ The Supreme Court held that although the magazines in question were not obscene for adults,³⁸ "[m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed. . . ."³⁹ The Court found that the state of New York had a compelling interest in the well-being of its children⁴⁰ and that the statutory limitations on availability of sexually explicit material to minors were justified on two grounds. First, the Court stated that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."⁴¹ The Court concluded that the legislature could properly find that "exposure to material condemned by the statute is harmful to minors"⁴² and that "parents and others . . . who have [a] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."⁴³ Second, although minors were barred from purchasing material prohibited by the statute, persons seventeen years of age and older were not barred from purchasing the same material.⁴⁴ Parents who desired to provide the prohibited material for their children could purchase it for them without violating

36. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

37. See *id.* at 631.

38. See *id.* at 634.

39. *Id.* at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)).

40. See *id.* at 639.

41. *Id.* "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither [support] nor hinder." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

42. *Ginsberg*, 390 U.S. at 641.

43. *Id.* at 639.

44. See *id.* at 634-35.

the statute.⁴⁵

At the opposite end of the constitutional spectrum from print, the broadcast media traditionally receive the least amount of First Amendment protection.⁴⁶ In *FCC v. Pacifica Foundation, Inc.*, the Supreme Court considered the issue of whether “indecent” speech conveyed via a radio broadcast is protected under the First Amendment.⁴⁷ In *Pacifica Foundation*, the speech in question consisted of a satiric monologue by comedian George Carlin, entitled “Filthy Words.”⁴⁸ In this monologue, Carlin listed and repeated “words you couldn’t say on the public . . . airwaves” in a variety of verbal contexts.⁴⁹ Respondent Pacifica Foundation, as part of a radio broadcast about contemporary society’s attitude toward language, aired the monologue at two o’clock on a weekday afternoon.⁵⁰ A man who heard the monologue while driving with his young son filed a complaint the FCC. Although the FCC did not impose formal sanctions, it issued a Declaratory Order in which it ruled that it had the power to regulate speech that was “indecent” or “patently offensive,” such as the Carlin monologue, even though such speech was not obscene.⁵¹ The FCC derived its regulatory authority from two separate statutes: “18 U.S.C. § 1464 which forbids the use of ‘any obscene, indecent, or profane language by means of radio communications,’ and 47 U.S.C. § 303(g) which requires the Commission to ‘encourage the larger and more effective use of radio in the public interest.’”⁵² The court of appeals overturned the FCC order and the FCC appealed to the Supreme Court.

In *Pacifica Foundation*, the Supreme Court first considered whether regulation of “indecent” speech was constitutionally permissible under any circumstances.⁵³ The Court concluded that offensive speech such as the Carlin monologue

45. See *id.* at 639.

46. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). “[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.” *Id.*

47. See *id.* at 744.

48. *Id.* at 751-55.

49. See *id.* at 729.

50. See *id.* at 729-30.

51. See *id.* at 731.

52. *Pacifica Found.*, 483 U.S. at 731.

53. See *id.* at 744.

"is not entitled to absolute constitutional protection under all circumstances."⁵⁴ Therefore, the court considered the context in which the offensive speech was broadcast in determining the constitutionality of the FCC's actions.⁵⁵ The Court upheld the FCC's "nuisance rationale"⁵⁶ for determining whether the broadcast of the indecent speech in question occurred in an appropriate context and held that the FCC acted within constitutional boundaries.⁵⁷ The Court gave two reasons for imposing stricter content-based regulation on broadcast media than on other forms of media:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . . Second, broadcasting is uniquely accessible to children, even those too young to read.⁵⁸

Notably, the FCC's ruling, upheld by the Court, did not prevent broadcast of the "indecent" monologue in an appropriate late-night time frame when fewer children were likely to be in the listening audience.⁵⁹

Types of communication media that fall between print and broadcast in terms of First Amendment protection are those in which the listener must take affirmative steps to re-

54. *Id.* at 747-48.

55. *See id.*

56. *See id.* at 750. "[A] nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

57. *See id.* at 750-51.

58. *Pacifica Found.*, 438 U.S. at 748-49 (citation omitted). "The difficulty is that . . . a physical separation cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children." *Id.* at 758-59 (Powell, J., concurring in part and concurring in the judgment).

59. *See id.* at 733. "[The FCC] never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." *Id.* (quoting the FCC's published opinion in 59 F.C.C.2d 892 (1976)).

ceive the speech.⁶⁰ Examples of media that receive this intermediate level of protection include telephone communications⁶¹ and cable television.⁶² In *Sable Communications of California, Inc. v. FCC*, the Supreme Court considered a federal statute that imposed a total ban on both obscene and indecent interstate commercial telephone messages.⁶³ The appellant, a commercial provider of sexually oriented, prerecorded "dial-a-porn" telephone messages, sought to enjoin the FCC and the Justice Department from enforcing the statute.⁶⁴ The Court distinguished between "obscene" and "indecent" dial-a-porn recordings, holding "obscene" recordings were not protected by the First Amendment.⁶⁵ However, the Court held that "indecent" sexual expression is protected speech and any abridgment thereof must meet strict scrutiny.⁶⁶ While the Court concluded that the government had a compelling interest in "protecting children from exposure to indecent dial-a-porn messages,"⁶⁷ it ultimately held that the statute at issue was not narrowly tailored to achieve this end.⁶⁸ The Court stated that there are less restrictive means available to limit minors' access to dial-a-porn, while still allowing adults free access.⁶⁹ Such means include requirement of payment by credit card, authorization by access code, and use of message scrambling technology, requiring use of a customer-owned descrambler, the sale of which could be restricted to adults.⁷⁰ The Court concluded that "the government may not reduce the adult population . . . to . . . only

60. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126-28 (1989).

61. See *id.*

62. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985).

63. *Sable Communications*, 492 U.S. at 115.

64. See *id.* at 117-18.

65. See *id.* at 124. "We have repeatedly held that the protection of the First Amendment does not extend to obscene speech." *Id.*

66. See *id.* at 126. "The government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*

67. *Id.* "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *Id.*

68. See *id.*

69. See *Sable Communications*, 492 U.S. at 128.

70. See *id.*

what is fit for children,"⁷¹ even in the face of the compelling interest of protecting minors.⁷²

B. *The Internet—A New Communication Medium*

1. *History of the Internet*

The nature of the Internet is difficult to define.⁷³ It is not a tangible entity, but rather a giant "network of networks,"⁷⁴ a worldwide linking of smaller computer networks to each other.⁷⁵ The Internet originated in 1969 as ARPANET, a network of linked computers, developed to enable the military, defense contractors, and universities to access and exchange information.⁷⁶ The Internet is now available to virtually anyone with access to a computer and a modem.⁷⁷ The number of Internet users is expected to grow to 200 million this year.⁷⁸

The Internet is a global communication medium that allows users to communicate almost instantaneously with other users in any part of the world.⁷⁹ No single entity controls information flow on the Internet nor is there a single centralized information storage location.⁸⁰ Indeed, "it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."⁸¹

A popular approach to information retrieval on the Internet is through searching the "World Wide Web" ("Web").⁸² Documents retrieved from the Web can be displayed in a variety of formats including "text, images, sound, animation, and moving video."⁸³ Searching for web sites by category or key word is accomplished through use of commercial "search

71. *Id.* (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

72. *See id.* at 131.

73. *See* *ACLU v. Reno*, 929 F. Supp. 824, 830-38 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1977).

74. *Id.* at 830.

75. *See id.*

76. *See id.* at 831.

77. *See id.*

78. *See id.*

79. *See* *ACLU*, 929 F. Supp. at 831.

80. *See id.* at 832.

81. *Id.*

82. *See id.* at 836.

83. *Id.*

engines.”⁸⁴ Further, any Web document may contain “links” to other Web documents, allowing users to efficiently access related information.⁸⁵ “The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.”⁸⁶ “The World Wide Web was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world.”⁸⁷

2. *Content on the Internet*

“It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.”⁸⁸ The Internet contains a vast array of content that is both commercial and non-commercial in nature.⁸⁹ Many noncommercial entities maintain web sites solely for the dissemination of information for the public’s benefit.⁹⁰ The Internet is an especially attractive means for a nonprofit organization to convey information to a potential audience of millions.⁹¹ The cost for dissemination of information via the Internet is very low relative to other forms of media.⁹² In addition, interactive content is available through e-mail, chat rooms, and newsgroups.⁹³ Interactive modes of communication allow speakers to become listeners and vice-versa, thereby blurring the traditional distinctions between these two groups.⁹⁴ The Internet is “arguably the most powerful tool for sharing information ever developed.”⁹⁵

Due to its low cost and vast audience, the Internet is an attractive means for disseminating sexually explicit material.⁹⁶ Sexually explicit material available on the Internet ranges “from the modestly titillating to the hardest core.”⁹⁷ Due to the far-ranging nature of search engine results, “[i]t is

84. *See id.* at 837.

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

86. *Id.* at 837.

87. *Id.* at 836.

88. *Id.* at 842.

89. *See id.*

90. *See id.*

91. *See ACLU*, 929 F. Supp. at 842-43.

92. *See id.* at 843.

93. *See id.*

94. *See id.* at 843-44.

95. *Urofsky v. Allen*, 995 F. Supp. 634, 638 (E.D. Va. 1998).

96. *See ACLU*, 929 F. Supp. at 844.

97. *Id.*

possible that a search engine can accidentally retrieve material of a sexual nature through an imprecise search.⁹⁸ Sexually explicit material is not the most prevalent form of content on the Web, but it is just as easy to create and access as any other form of information on the Internet.⁹⁹

A federal statute prohibiting interstate transportation of obscene material for commercial purposes has been extended to the Internet.¹⁰⁰ In *United States v. Thomas*, the Sixth Circuit Court of Appeals upheld application of the statute to proscribe commercial transmission of obscene material via the Internet.¹⁰¹ However, content-based restrictions on Internet access to nonobscene, sexually explicit material have been held unconstitutional in two recent cases in the U.S. District Court for the Eastern District of Virginia.¹⁰² In *Urofsky v. Allen*, the court held unconstitutional a Virginia statute restricting access by state employees to sexually explicit material.¹⁰³ The court held that the statute violated employees' First Amendment rights.¹⁰⁴ The statute did not survive strict scrutiny analysis because the government could not show a compelling interest¹⁰⁵ and because content-neutral alternatives existed.¹⁰⁶ Similarly, in *Mainstream Loudoun v. Board of Trustees*,¹⁰⁷ the court held unconstitutional a public library policy prohibiting library patrons from viewing sexually explicit content¹⁰⁸ via library Internet access facilities. The

98. *Id.*; see also *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web. For example, typing the word "dollhouse" or "toys" into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic web sites. These web sites offer "teasers," free sexually explicit images and animated graphic image files designed to entice a user to pay a fee to browse the whole site.

Id.

99. See *ACLU*, 31 F. Supp. 2d at 476.

100. See 18 U.S.C. § 1465 (1994).

101. *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996).

102. See *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998); *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998).

103. *Urofsky*, 995 F. Supp. 634.

104. See *id.* at 644.

105. See *id.* at 639.

106. See *id.* at 643.

107. *Mainstream Loudoun*, 24 F. Supp. 2d at 552.

108. See *id.*

court found the policy "overinclusive because, on its face, it limits the access of all patrons, adult and juvenile, to material deemed fit for juveniles."¹⁰⁹

A large percentage of Internet content, estimated at forty percent or more, originates in foreign countries.¹¹⁰ "Foreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech. . . . It is undisputed that some foreign speech that travels over the Internet is sexually explicit."¹¹¹

Access to any type of Internet "content requires a series of affirmative steps more deliberate and directed than merely turning a dial [to receive radio or television broadcasts]."¹¹² A user must have access to a computer with a modem and must enter a password to connect with the service provider.¹¹³ On the Web, the user must utilize a search engine or enter a site address to access particular information.¹¹⁴ Usually, a document's title or a description of the document will appear before a user takes the required steps to view the content of a document.¹¹⁵ "Almost all sexually explicit images are preceded by warnings as to the content. [Therefore,] 'odds are slim' that a user would come across a sexually explicit site by accident."¹¹⁶

C. Regulation of Speech on the Internet

1. Non-Statutory Regulation of Speech on the Internet

a. Content Provider-Based Regulation

In a voluntary industry attempt to restrict access by children to age-inappropriate Internet content, the World Wide Web Consortium formed a group called "Platform for Internet Content Selection" ("PICS"). The members of PICS include "a broad cross-section of companies from the computer, commu-

109. *Id.* at 563.

110. *See* *ACLU v. Reno*, 929 F. Supp. 824, 848 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997).

111. *Id.*

112. *Id.* at 845.

113. *See id.* at 844.

114. *See id.*

115. *See id.*

116. *See ACLU*, 929 F. Supp. at 844-45.

nications, and content industries, as well as trade associations and public interest groups."¹¹⁷ The goal of PICS is to develop a rating system that will allow parents to filter content on the Web.¹¹⁸ The PICS rating specifications have been agreed upon and the Internet community is beginning to develop PICS-compatible filtering products and services.¹¹⁹

Other available content provider-based restrictions include credit card verification and age verification by password.¹²⁰ Many commercial entities already use these technologies to restrict access to their sites.¹²¹ However, these methods are prohibitively expensive to noncommercial content providers.¹²² Moreover, in cyberspace there is no way to ensure that the user of a credit card or an adult password is in fact an adult.¹²³

b. *User-Based Regulation*

In addition to provider-based regulation of Internet access, user-based restriction is also available through use of commercial blocking software products. These products enable adults to filter and limit the scope of Internet access available to children.¹²⁴ Products such as Cyber Patrol and Surf Watch employ search term blocking methodologies.¹²⁵ Parents can use these products to selectively block access to desired categories such as "Violence/Profanity," "Sexual Acts," "Racism/Ethnic Impropriety," etc.¹²⁶ Cyber Patrol updates its "CyberNOT" list on a weekly basis, blocking new Web sites in the prohibited categories as they become available.¹²⁷ "The market for this type of software is growing, and there is increasing competition among software providers to provide products."¹²⁸ However, Web-savvy minors can find sites devoted to instructing them on how to circumvent blocking

117. *Id.* at 838-39.

118. *See id.*

119. *See id.* at 839; *see also* David K. Djavaherian, *Reno v. ACLU*, 13 BERKELEY TECH. L.J. 371, 383-84 (1998).

120. *See Reno v. ACLU*, 521 U.S. 844, 856 (1997).

121. *See, e.g., United States v. Thomas*, 74 F.3d 701, 705 (6th Cir. 1996).

122. *See ACLU*, 521 U.S. at 881.

123. *See ACLU*, 929 F. Supp. at 847.

124. *See id.* at 839.

125. *See Djavaherian, supra* note 119, at 386.

126. *See ACLU*, 929 F. Supp. at 840.

127. *See id.* at 840-41.

128. *Id.* at 839.

software products.¹²⁹ “Moreover, . . . seemingly innocuous search terms often lead to pornographic links. Thus, search term blocking does not provide a significant bar to minors’ access of online indecency.”¹³⁰

Additional services available from commercial online providers include “tracking and monitoring software to determine which resources a particular online user (e.g., a child) has accessed [and] children-only discussion groups that are closely monitored by adults.”¹³¹ These tools can help adults monitor and limit Internet access by children in their homes.

2. Federal Statutory Regulation of Internet Speech

a. The Communications Decency Act of 1996

The first congressional attempt to regulate Internet content was the Communications Decency Act of 1996.¹³² The CDA “prohibit[ed] the knowing transmission of obscene or indecent messages to any recipient under 18 years of age”¹³³ (the “indecent transmission provision”) and “prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age”¹³⁴ (the “patently offensive display provision”). The CDA imposed criminal penalties upon anyone who violated either of these two provisions.¹³⁵ In addition, the CDA provided two affirmative defenses to violation of the statute.¹³⁶ One defense “cover[ed] those who take ‘good faith, reasonable, effective, and appropriate actions’ to restrict access by minors to the

129. See, e.g., <<http://www.peacefire.org.html>> (visited Dec. 21, 1998). This site contains detailed instructions for disabling Cyber Patrol, Surf Watch, Cyber Sitter, and several other blocking products.

130. Djavaherian, *supra* note 119, at 386.

131. See *Plaintiffs’ Memorandum of Law in Support of Their Motion For a Temporary Restraining Order and Preliminary Injunction* at 12, *ACLU v. Reno*, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998) (No. VIC.A.98-5591) (visited Dec. 21, 1998) http://www.epic.org/free_speech/copa/tro_brief.html [hereinafter *Plaintiffs’ Mem.*].

132. The CDA embodies Title V of the Telecommunications Act of 1996, signed into law by President Clinton on February 8, 1996. 47 U.S.C.A. § 223 (a)-(e) (West Supp. 1997). For the text of pertinent portions of the CDA, see *Reno v. ACLU*, 521 U.S. 844, 859-60 (1997).

133. *Reno v. ACLU*, 521 U.S. 844, 859 (1997) (citing 47 U.S.C.A. § 223(a) (West Supp. 1997)).

134. *Id.* (citing 47 U.S.C.A. § 223(d)).

135. See *id.* at 860.

136. See *id.* at 860-61.

prohibited communications.”¹³⁷ The other defense “cover[ed] those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code.”¹³⁸

Immediately after the CDA was signed into law, a large group of plaintiffs, including the American Civil Liberties Union (“ACLU”), filed suit in federal district court, challenging the constitutionality of both the indecent transmission and the patently offensive display provisions.¹³⁹ A limited temporary restraining order was granted, followed by the convening of a three-judge panel to consider the case, as required by one of the provisions of the CDA.¹⁴⁰ After extensive fact-finding and an evidentiary hearing, the three-judge panel unanimously granted a preliminary injunction against enforcement of both challenged provisions.¹⁴¹ The U.S. Supreme Court affirmed the judgment of the district court and held the challenged provisions unconstitutional.¹⁴²

b. *Reno v. ACLU* (“ACLU I”)

In *Reno v. ACLU* (“ACLU I”), the Supreme Court considered the constitutionality of the CDA by comparison with three of its previous decisions.¹⁴³ The Court first compared the CDA to the statute upheld in *Ginsberg v. New York*,¹⁴⁴ which prohibited the sale to minors of material “harmful” to them.¹⁴⁵ The Court concluded that the statute in *Ginsberg* was narrower in scope than the CDA in four important respects.¹⁴⁶ First, the “harmful to minors” language in the *Ginsberg* statute did not prevent parents from purchasing the prohibited materials for their children if they so desired.¹⁴⁷ In contrast, under the CDA, parental consent or participation in the prohibited communications would not shield parents from

137. *Id.* (citing 47 U.S.C.A. § 223(e)(5)(A) (West Supp. 1997)).

138. *Id.* (citing 47 U.S.C.A. § 223(e)(5)(B) (West Supp. 1997)).

139. *See ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff’d* 521 U.S. 844 (1997).

140. *See id.*

141. *See id.* at 849.

142. *See ACLU*, 521 U.S. at 885.

143. *Id.* at 864.

144. *Ginsberg v. New York*, 390 U.S. 629 (1968);

145. *See ACLU*, 521 U.S. at 865; *supra* Part II.A.2.

146. *See ACLU*, 521 U.S. at 865.

147. *See id.* (citing *Ginsberg*, 390 U.S. at 639).

criminal liability.¹⁴⁸ Second, the statute in *Ginsberg* applied only to commercial transactions,¹⁴⁹ whereas the CDA did not contain such a limitation.¹⁵⁰ Third, the New York statute included a requirement that material deemed harmful to minors be “utterly without redeeming social importance for minors,”¹⁵¹ a requirement missing from the CDA.¹⁵² Fourth, the CDA applied to those under eighteen years of age, as opposed to the seventeen-year-old age restriction in *Ginsberg*.¹⁵³

The Court next considered the CDA in light of its holding in *FCC v. Pacifica Foundation*.¹⁵⁴ As with *Ginsberg*, the Court found the restriction upheld in *Pacifica* to be narrower in scope than the CDA.¹⁵⁵ First, the FCC order upheld in *Pacifica* targeted a specific “indecent” daytime radio broadcast and merely designated an appropriate alternate time frame for airing future broadcasts of that nature.¹⁵⁶ In contrast, the “CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet.”¹⁵⁷ Second, the CDA imposed criminal sanctions, whereas the FCC’s declaratory order in *Pacifica* did not.¹⁵⁸ Third, *Pacifica* concerned a broadcast medium that has historically received limited First Amendment protection.¹⁵⁹ However, the Internet is a new communication medium and has no such history of attenuated First Amendment protection.¹⁶⁰ The historical limitation on the scope of First Amendment protection for radio stems from the concern that radio listeners are a “captive audience” and cannot be adequately protected from unexpected offensive program content without such limitations.¹⁶¹ In contrast to radio, “the risk of encountering indecent material by accident [on the Internet]

148. *See id.*

149. *Id.* (citing *Ginsberg*, 390 U.S. at 647).

150. *See id.*

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

152. *See ACLU*, 521 U.S. at 865.

153. *See id.*

154. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *see supra* Part II.A.2.

155. *See ACLU*, 521 U.S. at 867.

156. *See id.*

157. *Id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *ACLU*, 521 U.S. at 867.

is remote because a series of affirmative steps is required to access specific material."¹⁶²

A third previously decided case considered by the *ACLU I* Court was *Renton v. Playtime Theatres, Inc.*¹⁶³ *Renton* concerned a local zoning ordinance that prevented adult movie theaters from locating in residential neighborhoods.¹⁶⁴ "The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the 'secondary effects'—such as crime and deteriorating property values—that these theaters fostered."¹⁶⁵ In contrast, the CDA was a blanket content-based restriction on speech, regulating the primary effects of "indecent" and "patently offensive" speech, rather than any secondary effects of such speech.¹⁶⁶ Therefore, the Court found that the "time, place, and manner" analysis used in *Renton* did not apply to the CDA.¹⁶⁷

The *ACLU I* Court proceeded to discuss the medium-specific analysis it had previously used to determine the appropriate levels of First Amendment protection afforded other communication media.¹⁶⁸ Factors such as a history of extensive government regulation, a scarcity of available frequencies at a medium's inception, and a medium's "invasive" nature are considered when attenuating First Amendment protection for a particular communication medium.¹⁶⁹ The Court found that

[t]hose factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of governmental supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as 'invasive' as radio or television.¹⁷⁰

The Court concluded that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be

162. *Id.*

163. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

164. *See id.*

165. *ACLU*, 521 U.S. at 867.

166. *See id.*

167. *See id.* (citing *Renton*, 475 U.S. at 46).

168. *See id.* at 868.

169. *See id.*

170. *Id.* at 868-69.

applied to this medium."¹⁷¹ The Court likened the Internet to other forms of media that require affirmative steps to receive content,¹⁷² such as the telephone.¹⁷³

The Court held the CDA void for vagueness because of its failure to define the terms "indecent" and "patently offensive."¹⁷⁴ In addition, the Court found that the CDA was overbroad because "[it] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"¹⁷⁵ and because the means were not narrowly tailored¹⁷⁶ to the compelling "governmental interest in protecting children from harmful materials."¹⁷⁷ The Court suggested that less restrictive means may be available in the form of "tagging" indecent material to facilitate parental control, allowing exceptions for material with artistic or educational value to minors, regulating commercial providers differently from noncommercial entities, and providing a degree of latitude with respect to parental choice.¹⁷⁸

Finally, the Court considered the two affirmative defenses provided by the CDA.¹⁷⁹ The first defense applied when a defendant "[had] taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors . . . [utilizing] any method which is feasible under available technology."¹⁸⁰ The Court found this defense unattainable because of the lack of existing technol-

171. *ACLU*, 521 U.S. at 870.

172. *See id.*

173. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989). "Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." *Id.*

174. *See ACLU*, 521 U.S. at 871-72.

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.

Id. (citations omitted).

175. *Id.* at 874.

176. *See id.* at 879. "[W]e are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all." *Id.*

177. *Id.* at 875.

178. *See id.* at 879.

179. *See id.* at 881-82.

180. 47 U.S.C.A. § 223(e)(5)(A) (West Supp. 1997).

ogy by which content providers may effectively restrict access only to minors.¹⁸¹ The second defense applied when the speaker restricted access by use of credit card verification or adult access code technologies.¹⁸² The Court concluded that although these technologies are viable, they are economically prohibitive to most noncommercial speakers¹⁸³ and therefore "place[] an unacceptably heavy burden on protected speech."¹⁸⁴

Justice O'Connor wrote a separate opinion concurring in the judgment and dissenting in part.¹⁸⁵ O'Connor considered the CDA as a type of adult "zoning" ordinance that purports to "segregate indecent material on the Internet into certain areas that minors cannot access."¹⁸⁶ She construed previous Supreme Court precedent as upholding an adult zoning law when "(i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material."¹⁸⁷ She found that the CDA did not pass muster because it violated the first part of the test by restricting adult access to protected speech.¹⁸⁸ Further, O'Connor distinguished *Ginsberg*. The statute upheld in *Ginsberg* created "a constitutionally adequate adult zone simply because, on its face, it denied access only to minors."¹⁸⁹ Since the nature of cyberspace is such that it "allows speakers and listeners to mask their identities,"¹⁹⁰ there is currently no available technology that allows for creation of a constitutional adult zone. Such a zone would limit access to minors

181. See *ACLU*, 521 U.S. at 882.

182. See 47 U.S.C.A. § 223(e)(5)(B) (West Supp. 1997).

183. See *ACLU*, 521 U.S. at 881. The Court also noted that "the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults." *Id.* at 882.

184. *Id.* at 882.

185. See *id.* at 886.

186. *Id.* "The creation of 'adult zones' is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. States have also denied minors access to speech deemed to be 'harmful to minors.'" *Id.* at 887.

187. *Id.* at 888.

188. See *id.* at 897. "Our cases make clear that a 'zoning' law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain—it interferes with the rights of adults to obtain constitutionally protected speech The First Amendment does not tolerate such interference." *Id.* at 888.

189. *ACLU*, 521 U.S. at 889.

190. *Id.* at 889-90.

while preserving First Amendment freedoms for adults.¹⁹¹

c. The Child Online Protection Act

In an attempt to remedy the constitutional defects of the CDA,¹⁹² Congress passed the Child Online Protection Act, which was signed into law in October 1998.¹⁹³ The COPA provides that any speaker who knowingly makes a communication for commercial purposes that is available to any minor and includes material that is "harmful to minors," shall be subject to criminal penalties, including a fine of up to \$50,000 and up to six months imprisonment.¹⁹⁴ Intentional violations accrue a criminal fine of up to \$50,000 for each day of violation,¹⁹⁵ and civil penalties of up to \$50,000 for each day of violation are available as well.¹⁹⁶

A speaker is considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communications . . . with the objective of earning a profit as the result of such activities."¹⁹⁷ It is not necessary, however, that the speaker actually make a profit for violation of the statute to occur.¹⁹⁸

Under the COPA, a minor is defined as any person under seventeen years of age.¹⁹⁹ Material that is "harmful to minors" is defined as anything that is obscene or that (a) the average person, applying contemporary community standards with respect to minors, would find to be designed to appeal or pander to the prurient interest; (b) describes or represents in a patently offensive manner with respect to minors, "an actual or simulated sexual act or contact . . . 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."²⁰⁰

The COPA provides affirmative defenses to entities that,

191. *See id.* at 890-92.

192. *See id.* at 882.

193. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231 (1998)).

194. *See* 47 U.S.C. at § 231(a)(1) (1998).

195. *See id.* § 231(a)(2).

196. *See id.* § 231(a)(3).

197. *Id.* § 231(e)(2)(A)-(B).

198. *See id.* § 231(e)(2)(B).

199. *See id.* § 231(e)(7).

200. 47 U.S.C. § 231(e)(6) (1998).

in good faith, restrict access to minors by (a) "requiring use of a credit card, debit account, adult access code, or adult personal identification number"; (b) "accepting a digital certificate that verifies age"; or (c) "any other reasonable measures that are feasible under available technology."²⁰¹

Immediately after enactment of the COPA, the ACLU and a variety of plaintiffs filed suit challenging the constitutionality of the Act on First and Fifth Amendment grounds, and seeking to enjoin its enforcement.²⁰² The district court judge, in *ACLU v. Reno* ("*ACLU II*"), granted a temporary restraining order,²⁰³ followed by a preliminary injunction.²⁰⁴ He stated that "plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults."²⁰⁵ The district judge also found that even though "Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards,"²⁰⁶ "it is not apparent . . . that the [government] can meet its burden to prove that COPA is the least restrictive means available to achieve [this interest]."²⁰⁷ At this time, the preliminary injunction remains in effect and the parties are preparing for a full trial to determine the constitutional merits of the COPA.²⁰⁸

III. IDENTIFICATION OF THE PROBLEM

This comment addresses the issue of whether the COPA is a constitutionally valid restraint on speech. The Internet is a widely used, inexpensive medium through which individuals may communicate information and ideas to a worldwide audience.²⁰⁹ Therefore, if the COPA is held to be constitutional, its impact on this nation's "free trade in ideas"²¹⁰ will

201. *Id.* at § 231(c).

202. *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998).

203. *Id.*

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

205. *Id.* at 495.

206. *Id.*

207. *Id.* at 497.

208. *See ACLU*, 31 F. Supp. 2d at 473.

209. *See ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997).

210. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

be significant. Internet content providers whose activities fall within the language of the COPA, but who cannot afford to implement the affirmative defenses, will be forced to self-censor their online material to avoid severe criminal penalties.²¹¹ This "chilling effect" on speech is proscribed by the First Amendment, unless narrowly tailored to achieve a compelling government interest.²¹²

In *ACLU I*, the Supreme Court held that attempts to regulate speech on the Internet should be examined under strict scrutiny.²¹³ Therefore, the COPA must survive strict scrutiny to be upheld.²¹⁴ This comment explores the question of whether the COPA is an effective and narrowly tailored means for accomplishing the government objective of protecting minors from sexually explicit material. Two factors of special consideration in this discussion are (1) the unavailability of means for Internet speakers to ascertain the identity and age of recipients,²¹⁵ and (2) the fact that a great deal of Internet content originates outside of the United States.²¹⁶ These two factors hinder government efforts to regulate the content of material reaching minors through measures such as the COPA. Alternative user-based controls will be discussed, and an entirely new form of regulation, in the form of an "adult zoning" scheme, will be proposed.²¹⁷

IV. ANALYSIS

A. *Comparison of the COPA with the CDA*

In drafting the COPA, Congress sought to remedy the constitutional defects of the CDA.²¹⁸ The COPA is narrower in scope than the CDA and was designed to address some of the criticisms of the CDA expressed in the *ACLU I* opinion.²¹⁹

211. See *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998).

212. See *id.* at *2.

213. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

214. See *ACLU*, 1998 WL 813423, at *1.

215. See *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996).

216. See *id.* at 848.

217. See *infra* Part V.

218. See H.R. REP. NO. 105-775, at 8 (1998) (visited Dec. 21, 1998) <http://www.epic.org/free_speech/censorship/hr3783-report.html>.

219. See *id.* at 6. "[The COPA] has been carefully drafted to respond to the Supreme Court's decision in *Reno v. ACLU*, . . . and the Committee believes that

First, responding to the finding that the CDA's undefined "indecent" and "patently offensive" standards were overly vague, Congress changed the content standard to "harmful to minors," and provided a definition for this standard within the statute.²²⁰ Second, responding to the Court's criticism that the CDA was overbroad, Congress limited the scope of the COPA to commercial transactions.²²¹ The COPA does not prohibit or regulate noncommercial activities on the Internet.²²² Third, responding to the Court's concern that the CDA abridged parental choice, the COPA "contains no restriction on the discretion of the parent to purchase material for their children who are under age [seventeen]."²²³ In line with restricting the scope of the COPA to commercial entities, Congress provided defenses in the forms of credit card verification and adult access codes.²²⁴ In *ACLU I*, the Court concluded that these devices are "not only technologically available but [currently are] used by commercial providers of sexually explicit material."²²⁵

Although narrower in scope than the CDA, the COPA still contains flaws that render it unconstitutional. For example, the new "harmful to minors" standard, although arguably less vague than the "indecent" and "patently offensive" standards of the CDA, still proscribes content that is protected speech for adults.²²⁶ Therefore, the COPA is a content-based regulation of protected speech and as such is presumptively invalid.²²⁷ When *ACLU II* goes to trial, the government will bear the heavy burden of showing that the COPA is narrowly tailored to effectuate a compelling governmental interest.²²⁸ This will be a formidable hurdle because to date "the

the bill strikes the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web." *Id.*

220. *See id.* at 12.

221. *See id.* at 13.

222. *See id.* at 12-13.

223. *Id.* at 14.

224. *See* H.R. REP. NO. 105-775, at 14 (1998) (visited Dec. 21, 1998) <http://www.epic.org/free_speech/censorship/hr3783-report.html>.

225. *Reno v. ACLU*, 521 U.S. 844, 881 (1997).

226. *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423, at *2 (E.D. Pa. Nov. 23, 1998). "Nonobscene sexual expression is protected by the First Amendment." *Id.*

227. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992).

228. *See ACLU*, 1998 WL 813423, at *1.

Supreme Court has never upheld a criminal ban on non-obscene communications between adults.²²⁹

Furthermore, although the COPA purports to apply only to commercial content providers, it also restricts speech by noncommercial entities that provide free content on the Web.²³⁰ Communications made "for commercial purposes," as defined in the COPA, occur "only if [a] person is engaged in the business of making such communication . . . with the objective of earning a profit as a result of such activities."²³¹ Thus, under the wording of the COPA, the definition of communication for commercial purposes involves merely attempting to earn a profit, rather than the actual commercial sale of content.²³² Many Web content providers endeavor to earn a profit while providing free online material to the public.²³³

[M]any Web publishers [like traditional newspapers and magazines] generate revenues through advertising. In addition, content providers such as online booksellers, music stores, and providers of art services allow potential customers to browse their content for free—similar to browsing in an actual book store or art gallery. Finally, some online content providers make a profit by charging their content contributors, although users may access content for free.²³⁴

To Web publishers who are earning a profit without making commercial sales over the internet, the COPA's affirmative defenses are prohibitively expensive.²³⁵ The cost for setting up a credit card or age verification system has been estimated to cost between \$20,000 and \$30,000.²³⁶ The monthly cost for a large web site with 100,000 visitors per month could be as high as \$200,000 each month.²³⁷ This cost will turn an otherwise inexpensive resource for communicating with a broad audience into an unaffordable one for many

229. *Plaintiffs' Mem.*, *supra* note 131, at 10.

230. *See id.* at 9.

231. *ACLU*, 1998 WL 813423, at *4.

232. *See Plaintiffs' Mem.*, *supra* note 131, at 9.

233. *See id.*

234. *Id.* (citations omitted).

235. *See ACLU*, 1998 WL 813423, at *3.

236. *See Plaintiffs' Mem.*, *supra* note 131, at 10.

237. *See id.*

content providers.²³⁸ The economic burden will force some content providers to close their web sites.²³⁹ The large expenditure required for setting up a verification system is unfeasible for many noncommercial web site operators who, under the COPA, will have the unpalatable choices of either shutting down their sites for fear of prosecution, facing severe criminal penalties of up to \$50,000 per day for continuing to provide constitutionally protected speech, or passing the cost of age verification onto their users.²⁴⁰ "To require users to pay the fee would be the equivalent of requiring bookstores to charge people before they could enter the store to browse through a single book, and would have a devastating impact on [content providers'] businesses, because most users would be unwilling to pay for the information."²⁴¹ As in *ACLU I*, the district court in *ACLU II* found that the likely effect of the COPA would be the self-censorship of online material by content providers.²⁴² "This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to [online content providers]."²⁴³

The COPA provides the same defenses as the CDA. The *ACLU I* Court found these defenses to be inadequate on two grounds: (1) there is no way of assuring that a credit card or password user is in fact an adult; and (2) the defenses are cost prohibitive to noncommercial web sites.²⁴⁴ The Court in *ACLU I* affirmed the district court's finding that "[i]mposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."²⁴⁵ In addition, the district court found that "[t]here is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password."²⁴⁶ Credit card or age verification re-

238. *See id.*

239. *See id.*

240. *See ACLU*, 1998 WL 813423, at *4.

241. *Plaintiffs' Mem.*, *supra* note 131, at 17.

242. *See ACLU*, 1998 WL 813423, at *3.

243. *Id.* at *3. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989)).

244. *See Reno v. ACLU*, 521 U.S. 844, 881-82 (1997).

245. *ACLU v. Reno*, 929 F. Supp. 824, 846 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

246. *Id.* at 847.

quirements prevent adults from obtaining sensitive or controversial information anonymously.²⁴⁷ "Some [content providers] communicate sensitive and personal information involving gay and lesbian issues, safer sex, and medical health. . . . [M]any users [may] be deterred from accessing their resources if they could not do so anonymously."²⁴⁸ Anonymous communication is a protected First Amendment right²⁴⁹ and the requirement of verification systems under the COPA infringes upon this right.

B. *The COPA Will Not Survive Strict Scrutiny*

Any content-based restriction on speech such as the COPA must be reviewed under a strict scrutiny analysis.²⁵⁰ Although the Supreme Court has applied a less stringent analysis to some other forms of communication media,²⁵¹ the Court in *ACLU I* held that previous decisions "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."²⁵²

Strict scrutiny requires a three-part analysis: "(1) whether the interests asserted by the state are compelling; (2) whether the limitation is necessary to further those interests; and (3) whether the limitation is narrowly drawn to achieve

247. See *Plaintiffs' Mem.*, *supra* note 131, at 11.

248. *Id.* at 20; see also *ACLU*, 929 F. Supp. at 849.

Anonymity is important to Internet users who seek to access sensitive information, such as users of the Critical Path AIDS Project's Web site, the users, particularly gay youth, of Queer Resources Directory, and users of Stop Prisoner Rape (SPR). Many members of SPR's mailing list have asked to remain anonymous due to the stigma of prisoner rape.

Id.

249. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). "[Anonymity] exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.*; see also *Fabulous Assoc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 787 (3rd Cir. 1990) (striking down adult access code requirement for accessing telephone messages which were "harmful to minors"). "[An access code requirement] imposes a burden on the exercise of the callers' First Amendment rights and chills the message services' protected speech." *Id.*; *ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down a Georgia statute which made it a crime for Internet users to falsely identify themselves online).

250. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

251. See *supra* Part II.A.2.

252. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

those interests.”²⁵³ Arguably the government has a compelling interest in protecting children from material that might be harmful to them.²⁵⁴ However, as demonstrated below, the COPA is neither necessary nor narrowly tailored to achieve this end.

First, the COPA is not a necessary limitation to further the protection of children, because obscenity and child pornography are already illegal under existing federal law.²⁵⁵ Specifically, transmission of obscenity via the Internet is already prohibited by statute.²⁵⁶ Further, there is concern that the COPA may actually hinder law enforcement efforts to curb unlawful material on the Web. In a letter addressed to Congress, the Department of Justice expressed concern that “enforcement of a new criminal prohibition such as that proposed in the COPA could require an undesirable diversion of critical investigative and prosecutorial resources that the Department currently invests in combating traffickers in hardcore child pornography, in thwarting child predators, and in prosecuting . . . commercial distributors of obscene materials.”²⁵⁷ In addition, the Department of Justice expressed an uncertainty as to “whether the COPA would have a material effect in limiting minors’ access to harmful materials,”²⁵⁸ since there are noncommercial sources such as news groups and chat rooms, as well as foreign-based web sites, that contain pornographic material but are not regulated by the COPA.²⁵⁹ Ironically, commercial purveyors of pornography, who generally already require a credit card for access, are protected under the COPA’s affirmative defenses.²⁶⁰ Noncommercial sites are also protected under the COPA, if they are not attempting to make a profit.²⁶¹ In sum, only a small subset of sites actually fall within the COPA’s ambit. Therefore, because the bulk of sexually explicit material online will not be regulated

253. *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 564-65 (E.D. Va. 1998).

254. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

255. *See Plaintiffs’ Mem.*, *supra* note 131, at 20.

256. *See United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996).

257. L. Anthony Sutin, *Department of Justice Letter Regarding COPA*, at 2 (visited Dec. 23, 1998) <http://aclu.org/court/acluvrenoII_doj_letter.html>.

258. *Id.*

259. *See id.*

260. *See Plaintiffs’ Mem.*, *supra* note 131, at 6, 16.

261. *See id.* at 12.

under the COPA, the statute will be ineffective at achieving the stated government interest of preventing minors from accessing harmful material.

The defenses of credit card and age verification will not prevent minors from accessing the prohibited material. Some minors have credit cards or have access to their parents' cards, so "verification techniques [will not] preclude minors from posing as adults."²⁶² In addition, "even when companies do attempt to obey the law, some adult verification measures can easily be thwarted. For instance, Web sites that demand proof of adult status only at their home page can easily be accessed by anyone who knows the exact address of other pages at the site."²⁶³

Second, the COPA is not narrowly drawn to achieve the government interest of protecting the well-being of children. The statute is both vague and overbroad and there are less restrictive means available. Although the statutory language of the COPA is arguably more well-defined than the language of the CDA, the COPA nevertheless contains provisions that will lead to difficulties in interpretation and enforcement. For instance, the COPA's "harmful to minors' standard fails to distinguish between material that is harmful to teenagers and material that is harmful to young children."²⁶⁴ The Court fails to identify which standard is controlling. In addition, it is not clear from the language of the COPA which "contemporary community standards" must be used to judge the harmful effects of particular Internet content.²⁶⁵ Since the Internet is a global medium, it is impossible for an online content provider to ascertain the standards of each community that could potentially access its material.²⁶⁶ In *ACLU I*, the Court stated that the CDA's "community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the

262. *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

263. Stephen Buel, *Web Porn Sites Stay Unfiltered*, SAN JOSE MERCURY NEWS, Nov. 19, 1998, at A1.

264. L. Anthony Sutin, *Department of Justice Letter Regarding COPA*, at 4 (visited Dec. 23, 1998) <http://aclu.org/court/acluvrenoII_doj_letter_.html>. "Must the material, taken as a whole, 'lack[] serious literary, artistic, political, or scientific value' for all minors, for some minors, or for the 'average' or reasonable' 16-year-old minor?" *Id.* (citations omitted).

265. *See id.*

266. *See Plaintiffs' Mem.*, *supra* note 131, at 23-24.

community most likely to be offended by the message,²⁶⁷ and concluded that the CDA was not narrowly tailored.²⁶⁸

Further, the COPA, like its predecessor the CDA, is overbroad in scope because there is no way to restrict minors' access to Internet speech without also limiting access by adults. Since there is no way to ascertain the age of a recipient of Internet content,²⁶⁹ this statute will reduce speech on the Internet to the level of what is acceptable for children. As the Supreme Court affirmed in *ACLU I*, "[r]egardless of the strength of the government's interest' in protecting children, 'the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'"²⁷⁰

The COPA is not narrowly tailored because less restrictive means are available. Less restrictive means include user-based blocking programs²⁷¹ and tracking services available through Internet Service Providers that monitor the web sites children visit.²⁷² These solutions have the added advantage of placing control of the content children may access in the hands of their parents rather than with the government. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."²⁷³

C. Analysis of the COPA as a "Zoning" Regulation

The COPA, like the CDA, attempts to create an "adult zone" on the Internet.²⁷⁴ Under Justice O'Connor's analysis in *ACLU I*, a zoning law will be upheld only if it does not restrict adult access and only if minors have no right to read the pro-

267. *ACLU*, 521 U.S. at 877-78.

268. *See id.* at 879.

269. *See Plaintiffs' Memorandum of Law in Support of Their Motion For a Temporary Restraining Order and Preliminary Injunction* at 24, *ACLU v. Reno*, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998) (No. VIC.A.98-5591) (visited Dec. 21, 1998) <http://www.epic.org/free_speech/copa/tro_brief.html>.

270. *ACLU*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)).

271. *See supra* Part II.C.1.b.

272. *See id.*

273. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

274. *See ACLU*, 521 U.S. at 886 (O'Connor, J., concurring in part and dissenting in part); *see also* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996).

hibited material in the first place.²⁷⁵ The COPA, like the CDA, restricts adult access as a consequence of the method used to restrict minors' access and therefore fails to create a constitutional adult zone. In *Ginsberg*, the statute prohibiting access of minors to "harmful" material did not restrict access to the same material by adults.²⁷⁶ This is because the statute in *Ginsberg* restricted the sale of harmful content to children, and in physical space, as opposed to cyberspace, it is easy for a vendor to ascertain whether or not he is selling to a minor.²⁷⁷ "[R]estrictions [in physical space] can be effective because most who would try to escape them (kids) can't easily escape identifying themselves as kids. . . . [I]n the process of making or not making a sale, the seller knows that it is a child to whom he is selling."²⁷⁸ In *Ginsberg*, the statute required no censorship of material by a vendor. Conversely, a content provider on the Internet has no effective way of ascertaining the age of a content recipient.²⁷⁹ "Cyberspace allows speakers and listeners to mask their identities. . . . [I]t is not currently possible to exclude persons from accessing certain messages on the basis of their identity."²⁸⁰ Since the age of individual recipients cannot be determined in cyberspace, Internet content must be self-censored in order to avoid violation of the COPA.

The Court has upheld physical space zoning regulations in cases such as *Renton*.²⁸¹ However, the difference between the adult theater zoning regulation upheld in *Renton* and the COPA is that *Renton* focused on the secondary effects, such as crime, that accompany the placing of adult theaters in particular neighborhoods,²⁸² rather than on content per se. The COPA, on the other hand, focuses directly on the content of speech. A constitutional cyberspace zoning regulation would need to address the secondary effects of Internet pornography (i.e., harm to minors) without also limiting adult access to protected speech.

The COPA is similar to the prohibition of dial-a-porn

275. See *ACLU*, 521 U.S. at 889.

276. See *Ginsberg*, 390 U.S. at 639.

277. See Lessig, *supra*, note 274, at 886.

278. *Id.*

279. *ACLU*, 521 U.S. at 889-90.

280. *Id.*

281. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

282. See *id.*

struck down in *Sable*.²⁸³ The Internet, like the telephone, "requires the listener to take affirmative steps to receive the communication."²⁸⁴ The district court in *ACLU I* found that "[c]ommunications over the Internet do not . . . appear on one's computer screen unbidden. . . . [R]eceipt of information on the Internet requires a series of affirmative steps. . . ."²⁸⁵ Further, just as it is impossible for a speaker on the telephone to see across the telephone line to determine the age of a listener, it is likewise impossible for a content provider on the Internet to ascertain the age of a content recipient on the other end of the modem. In either medium, a restriction on content that places responsibility on the speaker is an inappropriate attempt at zoning. This is because in any medium in which the age of a listener cannot be determined, a speaker would have to reduce the content to the level appropriate for children. This is what would happen under the COPA and what renders it unconstitutional. "Surely this is to burn the house to roast the pig."²⁸⁶

V. PROPOSAL

Statutes such as the COPA and the CDA attempt to regulate online speech by making Internet content providers responsible for differentiating between adult and child recipients of sexually explicit material. The problem with regulations of this type, as applied to the Internet, is that there is no way for an Internet "speaker" to know the age of the listener.²⁸⁷ Anonymity is a hallmark of Internet communications.²⁸⁸ Even if a recipient uses a credit card or adult access code, it is impossible for a content provider to know whether the recipient is an adult or merely a child posing as an adult.²⁸⁹ This makes it difficult, if not impossible, for the government to meet its burden of showing that a measure such as the COPA is an effective and narrowly tailored means of preventing minors from accessing sexually explicit material.

283. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *see supra* Part II.A.2.

284. *Id.* at 128.

285. *ACLU v. Reno*, 929 F. Supp. 824, 844-45 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997).

286. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

287. *See Reno v. ACLU*, 521 U.S. 844, 889 (1997).

288. *See ACLU*, 929 F. Supp. at 849.

289. *See ACLU*, 521 U.S. at 882.

To comply with a regulation like the COPA, Internet speakers who cannot afford the very expensive defenses offered under the Act will have to tailor messages, which are constitutionally protected speech for adults, to a level acceptable for children.²⁹⁰ This is prohibited by the First Amendment.²⁹¹

An alternative to provider-based regulation like the COPA is a user-based solution that will allow parents to block their children's access to certain types of material. The government could mandate a rating system to be applied to commercial Internet content providers. This would allow parents to block web sites that do not fit a selected profile. To effectuate this system an agreed-upon "tag" would have to be imbedded in Internet content that would identify certain sites as "harmful to minors."²⁹² A multi-tiered rating system could exist, allowing parents to decide what level of material is appropriate, based on the age and maturity of their own child. The technology for tagging already exists.²⁹³ Internet service providers could provide screening software that would allow parents to block access to sites that are rated inappropriate by the parent. Tagging is more effective than the keyword searches currently used by blocking software because the tag is a universal code instead of one of many words that might be present at a given sexually explicit site.

The Platform for Internet Content Selection (PICS) consortium is attempting to facilitate user-based regulation by developing a universal rating system for Internet sites.²⁹⁴ "When fully implemented, PICS-compatible World Wide Web browsers . . . and other Internet applications will provide parents the ability to choose from a variety of rating services, or a combination of services."²⁹⁵ PICS currently functions as a "positive" rating system.²⁹⁶ Sites that are not rated are simply not displayed.²⁹⁷

A positive rating system such as PICS can provide a con-

290. See *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998).

291. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

292. See *ACLU*, 929 F. Supp. at 847.

293. See *id.*

294. See *supra* Part II.C.1.a.

295. *ACLU*, 929 F. Supp. at 838.

296. See *id.* at 839.

297. See *id.*

stitutional "adult zone"²⁹⁸ that will circumvent several of the difficulties inherent in implementation of the COPA. First, sites blocked with respect to minors will still be accessible to adults. This prevents the "chilling" of speech that would occur if web sites had to self-censor their online material to avoid prosecution.²⁹⁹ Second, this type of scheme will not impose the financial hardship on Web providers of implementation of an expensive credit card verification or adult password system.³⁰⁰ Restriction of access will occur automatically by the software that screens for the PICS rating tag. Rated sites will be automatically excluded from minors' viewing access if they contain harmful content. Third, this system preserves user anonymity. Access is controlled by the adult user rather than by the content provider, eliminating the need for credit card verification or use of an adult access code. Finally, a great deal of sexually explicit content on the Internet originates outside of United States jurisdiction.³⁰¹ With a positive rating scheme, unrated foreign-based sites will simply not be visible to minors.

As in *Renton*,³⁰² establishment of a PICS-type "adult zone" restricts the secondary effects of speech (i.e., harm to minors) rather than the content. Instead of imposing a blanket content-based restriction on sexually explicit speech, the content is simply "zoned" to an adults-only area in cyberspace. This type of methodology enables the government to realize its objective of assisting parents with "the protection of the physical and psychological well-being of [their children] by shielding them from materials that are harmful to them."³⁰³ Parents may choose the content they feel is appropriate for their own child, while content providers will not have to face a choice between criminal prosecution or self-censorship of their online material.

The government could mandate a rating system or, preferably, could cooperate with an industry group such as PICS

298. See *supra* Part II.C.2.b.

299. See *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998).

300. See *id.* at *3.

301. See *ACLU*, 929 F. Supp. at 848.

302. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1985); see *supra* Part II.C.2.b.

303. H.R. REP. NO. 105-775, at 2 (1998) (visited Dec. 21, 1998) <http://www.epic.org/free_speech/censorship/hr3783-report.html>.

to develop appropriate standards for rating web sites. Further, unlike the COPA and the CDA, a positive rating system will pass constitutional muster because of its ability to create an adequate "adult zone."³⁰⁴ Children may be excluded from the zone, while adults are free to receive speech and participate in a "free trade in ideas"³⁰⁵ in cyberspace.

VI. CONCLUSION

The COPA, Congress's second attempt to regulate speech on the Internet, has been constitutionally challenged.³⁰⁶ The COPA purports to shield minors from harmful Internet material by imposing severe criminal penalties on commercial web sites unless they either screen for the age of recipients or reduce the content on their sites to material that is acceptable for children to view.³⁰⁷ Since it is impossible for an Internet content provider to know the age of a recipient,³⁰⁸ compliance with age screening procedures is not an effective means of preventing harm to minors.³⁰⁹ Furthermore, web site providers that cannot afford to implement the expensive screening procedures will have to self-censor their online material, causing a "chilling effect" on speech and effectively preventing adults from accessing constitutionally protected speech.³¹⁰ The COPA is not narrowly tailored to the government's interest of protecting minors and therefore violates the First Amendment. This comment proposes a less restrictive means of providing protection to minors, while preserving freedom of expression for adults on the Internet. An adult-activated method for restricting access by minors based on a universal rating system of Internet content, will enable parents to choose the type of content they want their children to view, while still allowing free access by all adults to the vast variety of online material in cyberspace.³¹¹

304. See *supra* Part II.C.2.b.

305. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

306. See *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998).

307. See *id.*

308. See *ACLU v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997).

309. See *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

310. See *ACLU*, 1998 WL 813423, at *3.

311. See *supra* Part V.
