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AN ECOLOGICAL SYSTEMS APPROACH TO REDUCE CHILDREN'S ENCOUNTERS WITH OBSCENITY ON THE INTERNET

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The undersigned, appointed by the dean of the Graduate School, have examined the dissertation entitled

AN ECOLOGICAL SYSTEMS APPROACH TO REDUCE CHILDREN'S ENCOUNTERS WITH OBSCENITY ON THE INTERNET

presented by Leo Vivara Trisnadi-Rages,

a candidate for the degree of doctor of philosophy,

and hereby certify that, in their opinion, it is worthy of acceptance.

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CONTENTS

ABBREVIATIONS

Statutes in Chapter 3

CDA	Communications Decency Act of 1996
CIPA	Children's Internet Protection Act of 2000
COPA	Child Online Protection Act of 1998
COPPA	Children's Online Privacy Protection Act of 1998
CPPA	Child Pornography Prevention Act of 1996
Dotkids	DotKids Implementation Act of 2002

Miscellaneous

ACLU	American Civil Liberties Union
ARPA	Advanced Research Project Agency
B.E.S.	bioecological systems
BBN	Bolt, Beranek & Newman
BHVPA	Brady Handgun Violence Prevention Act
BITNet	Because It's Time Network
CCIRN	Coordinating Committee on Intercontinental Research Networking
CERN	Conseil Européen pour la Recherche Nucleaire
CFR	Code of Federal Regulations
CME	Center for Media Education
CSNet	Computer Science Network

CSPP	Computer Systems Policy Project's
DARPA	Defense Advanced Research Project Agency
DOE	U.S. Department of Energy
DOJ	Department of Justice
Email	electronic mailing
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
FDA	U.S. Food and Drug Administration
FIX	Federal Internet Exchanges
FLSA	Fair Labor Standard Act
FNC	Federal Networking Council
FOPA	Firearms Owner`s Protection Act
FPHSA	Federal Public Health Service Act
FTC	Federal Trade Commission
FTP	File Transfer Protocol
GCA	Gun Control Act
GII	Global Information Infrastructure
HEPNet	High Energy Physicist Network
Html	Hypertext Mark-up Language
I.E.S.	Internet ecological systems
IAB	Internet Architecture Board
IANA	Internet Assigned Numbers Authority
ICANN	Internet Corporation For Assigned Names And Numbers

ICCC International Computer Communication Conference

ICRA Internet Content Rating Association

IEFT Internet Engineering Task Force

IEPG Internet Engineering Planning Group

IESG Internet Engineering Steering Group

IIRS International Internet Rating System

IP Internet Protocol

IPTO Information Processing Techniques Office

ICF Internet Crime Forum

IRC Internet Relay Chat

IRTF Internet Research Task Force

ISOC Internet SOCiety

ISP Internet Service Providers

LSTA Library Services and Technology Act

MFENet Magnetic Fusion Energy Network

MIT Massachusetts Institute of Technology

MUD multi-user dungeons

NCMEC National Center for Missing and Exploited Children

NCP Network Control Protcol

N.D. no date

Net Internet

NFA National Firearms Act

NHTSA National Highway Traffic Safety Administration

NII	National Information Infrastructure
NLS	oNLine System
NMDAA	National Minimum Drinking Age Act of 1984
NPL	National Physical Laboratory
NPR	National Public Radio
NRC	National Research Council
NSF	National Science Foundation
NTIA	National Communications and Information Administration
OECD	Organization for Economic Co-operation and Development
RSACi	Recreational Software Advisory Council
SEC	Security and Exchange Commission
SEOC	Sexual Exploitation of Children Act of 1977
SRI	Stanford Research Institute
TCP/IP	Transmission Control Protocol/Internet Protocol
TLD	Top Level Domain
U.K.	United Kingdom
U.S.	United States
UDP	User Datagram Protocol
UGMA	Uniform Gifts to Minors Act
URL	Uniform Resource Locator
USAC	Universal Service Administrative Company
USENET	User's Network
UTMA	Uniform Transfer to Minors Act

W3C	World Wide Web Consortium
WWW	World Wide Web

AN ECOLOGICAL SYSTEMS APPROACH TO REDUCE CHILDREN'S ENCOUNTERS WITH OBSCENITY ON THE INTERNET

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Dr. Sandra Davidson, Dissertation Supervisor

Abstract

This dissertation explores how to reduce children's encounters with obscenity on the Internet. Congress has been trying to shield children from encountering online obscenity and some of Congress' attempts failed because of unconstitutionality. The courts have been clear, however, that children have limited constitutional rights when the issue is obscenity even though they have trouble defining obscenity.

This study modified Urie Bronfenbrenner's Bioecological Systems Model and named it the Internet Ecological Systems Model to solve the problem of children's encounters with online obscenity. The ecological systems perspective is a framework for recommendations and solutions. When each environmental system from the model collaborate in effort toward a common goal, the solution becomes effective. The government, the business industry, the community at large, the school system and the family should work together in order to achieve an ecological solution at tackling the problem of children's encounters with online obscenity.

The author proposed that the government should subsidize the cost of filtering software, set the age of minor at below age 15 for future online obscenity laws shielding children, expand CIPA to increase library supervision and tax Internet access. The business industry should build safety features into Internet computers and be responsible

for consumer education. Local communities should increase skill-development programs. Law enforcement personnel, industry experts and parents should teach children about Internet safety. Congress and future researchers can use the Internet Ecological Systems Model for finding solutions to reduce the possibility of children encountering pornography and obscenity on the Internet.

PREFACE

The goal of this dissertation is to provide the federal government a model for finding solutions to reduce the possibility of children encountering obscenity on the Internet.

Chapter 1 contains the problem statement and the Internet's origins. The Internet is such a unique medium that it has been difficult to make laws restricting obscene materials on the Internet. In order to discuss legal problems related to the Internet, it is vital to understand the Internet's origin, architectural design, and standing in this society, even the courts have gone through an extensive finding of facts about Internet technology before analyzing legal cases.

Chapter 2 is wholly devoted to the conceptualization and the legal theories. The conceptualization includes the parameters of the study, definitions of terminologies, the research question, the methodology of the dissertation, and an elaboration of what this study is about. Under the umbrella of legal theories are the marketplace of ideas and the First Amendment. The discussion under First Amendment theory includes the lack-of-supervision argument, the concept of variable obscenity, student speech, consumer protection, and commercial speech.

Chapter 3 contains the legal analysis of statutes, regulations, and court cases. Traditional legal methodology, or the case-analysis method, is the method used in the examination of the federal regulations, statutes, court holdings and court dicta. The relevant law includes: the Communication Decency Act (CDA), which dealt with

indecent communications on the Internet; the Child Online Protection Act (COPA), which dealt with harmful to minors material on commercial websites; the Child Internet Protection Act (CIPA), which dealt with the enforcement of filtering technology in public libraries; the Child Pornography Prevention Act (CPPA), which dealt with virtual sexual images; the Dot Kids Implementation Act of 2002 (DotKids), which dealt with top-level domain solutions; and the Children Online Privacy Protection Act (COPPA), which dealt with profiling of children through data collection.

Chapter 4 covers recommendations for helping the federal government to reduce the possibility of children encountering obscenity on the Internet. The first part of this chapter critiques what had been proposed by previous scholars, while the second part of this chapter borrows Bronfenbrenner's ecological system perspective and elaborates on how it will help with the recommendations, and the third part of this chapter modifies Bronfenbrenner's Bioecological Systems model into the Internet Ecological Systems model.

Chapter 5 translates the recommendations from Chapter 4 into practical solutions, summarizes the main points made in all the chapters, and acknowledges the limitations of the study and plausible directions for future research.

Chapter 1

Introduction

Chapter One discusses the problem statement. The first part of this chapter examines the Internet's origins and what makes the Internet technologically so unique that it is difficult to make online laws that protect children. The second part of this chapter will explain some of the problems that can arise when children use the Internet.

The Internet

Unique Qualities of the Internet

According to the findings of the United States District Court For The Eastern District Of Pennsylvania in *American Civil Liberties Union v. Reno*,[1] the first Internet communication case, Internet users may be speakers, listeners and content providers simultaneously,

> 79. Because of the different forms of Internet communication, a user of the Internet may speak or listen interchangeably, blurring the distinction between "speakers" and "listeners" on the Internet. Chat rooms, e-mail, and newsgroups are interactive forms of communication, providing the user with the opportunity both to speak and to listen.
> 80. It follows that unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener. Once one has entered cyberspace, one may engage in the dialogue that occurs there. In the argot of [*844] the medium, the receiver can and does become the content provider, and vice-versa…
> 81. The Internet is therefore a unique and wholly new medium of worldwide human communication.[2]

[1] American Civil Liberties Union v. Reno, 929 F. Supp. 824 (1996).

[2] *Id*. at 843-844 (Findings 79, 80, 81).

Moreover, the Internet is a broadcast medium as well as a print medium, and a combination of both broadcast and print media. For example, graphics, video, audio and print, can all occur in one setting in front of the computer screen. Nicolas Negroponte called the Internet *mediumless,* saying, "the medium is not the message in a digital world. It is an embodiment of it."[3] What Negroponte was trying to say was that a broadcaster will send data known as bits through the Internet, and the same bits can be viewed from many perspectives. For example, in a diagram, chart, video, or audio—a fluid movement from one medium to the next, "which is like saying the same things in different ways."[4]

Time-sharing is an old concept that has been adopted on the Internet. It "is a method by which multiple users could share a single machine from remote locations." It is a concept where, say, with ten people, "it was not just that each person could have one-tenth of the machine, but that one person's moment of reflection could be another person's full use of the computer."[5] That is, the Internet functions in real time, yet it can transcend time and geographical space. For example, someone at 8 a.m. in the morning in Jakarta, Indonesia, can be communicating over the Internet with someone at 8 p.m. in the night in Columbia, MO, USA; in a matter of seconds, they are in a virtual space communicating. And interactivity is achieved through the invention of time-sharing.[6]

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[3] Nicholas P. Negroponte, *Being Digital* (New York: Vintage Books, 1995), 71. Negroponte is a professor of media technology at the Massachusetts Institute of Technology, he is also founding director of the Media Lab.

[4] *Id*. at 72.

[5] *Id*. at 95.

[6] *Id*. at 95.

How does the Internet allow for making connections? According to Mary Chayko, social connections "are bonds that exist primarily in a mental realm, a space that is not created solely in the imagination of one individual but requires two or more minds—'a meeting of the minds'—to make possible, to 'activate.'" This is also known as interactivity.[7] These sociomental bonds are derived from the social and mental parts.[8] Despite physical separation, the manifestation of the sociomental bond is absolutely genuine and deeply felt; the nearness exists.[9] What has happened on the Internet is a "community of the mind" where the social significance is the preeminence of social bonds invisibly created in the absence of face-to-face interaction.[10] Internet communities are created sociologically through emotional or territorial belonging of a certain group of people.[11] The media, through television, radio, books, magazines, and increasingly, the Internet, make us feel we have "gotten to know" plenty of people.[12]

What is the Internet?

It is vital to understand the significance of the medium historically and architecturally so as to understand its effect on government regulations to reduce obscenity. Even the Supreme Court understands the vitality of gathering facts on the Internet when faced with government's attempt at regulating communications and

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[7] Mary Chayko, *Connecting: How We Form Social Bonds And Communities In The Internet Age* (Albany: State University Of New York Press, 2002), 1.

[8] *Id*. at 39.

[9] *Id*. at 1,2.

[10] *Id*. at 40.

[11] *Id*. at 40.

[12] *Id*. at 2.

communication on the Internet. Justice Stevens, in delivering the opinion of the Court in *Reno v. American Civil Liberties Union*[13] (1997), says:

> The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. See 929 F. Supp. 824, 830-849 (ED Pa. 1996). The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.[14]

The District Court for the Eastern District of Pennsylvania had gathered information about the aspects of the Internet before going into conclusions of law. In the same spirit, this chapter explores the Internet as it relates to the government's role in being involved with the Internet and justifies its continual involvement in shaping the Internet. Secondly, understanding the Internet's technological architecture is important to the possibility of reducing children's encounters with obscenity on the Internet. Lastly, in in order to have a well-rounded discussion about the Internet it is necessary to know basic facts about the Internet.

Definitions

The idea of the Internet can be traced to three individuals: Marshall McLuhan, who conceptualized the idea of a global village interconnected by an electronic nervous system; Vannevar Bush, who envisioned the automated library system; and Norbert Wiener, who invented cybernetics for research on technology to extend human capabilities.[15]

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[13] Reno v. American Civil Liberties Union (*Reno v. ACLU*), 521 U.S. 844 (1997).

[14] *Id.* at 849.

According to the President of the Chicago Chapter of the Internet Society, William Slater III, the Internet is the largest network of networks in the world.[16] Slater defined the Internet as:

> A network of networks, joining many government, university and private computers together and providing an infrastructure for the use of E-mail, bulletin boards, file archives, hypertext documents, databases and other computational resources … The vast collection of computer networks which form and act as a single huge network for transport of data and messages across distances which can be anywhere from the same office to anywhere in the world."[17]

From Supreme Court dicta in *Reno v. ACLU*, another definition of the Internet is an interconnected system of computer networks linked together internationally.[18]

The technical definition of the term "Internet," according to the unanimous resolution of the Federal Networking Council (FNC), was passed on October 24, 1995, by Barry Leiner and friends:

> RESOLUTION: The Federal Networking Council (FNC) agrees that the following language reflects our definition of the term "Internet." "Internet" refers to the global information system that – (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent estensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.[19]

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[15] Living Internet, N.D. http://www.livinginternet.com/ [accessed March 24, 2005]. Marshall Mcluhan was the first person to think of the global village; he published *The Gutenberg Galaxy* in 1962. Vannevar Bush was born on March 11, 1890. Norbert Wiener was born on November 24, 1894.

[16] W. F. Slater, III., *Internet History And Growth*, ppt. presentation link, posted September, 2002. http://www.isoc.org/internet/history/ [accessed February 13, 2007].

[17] *Id.*, ppt. slide 6.

[18] *Reno v. ACLU*, 521 U.S. at 849.

[19] Barry M. Leiner *et al*., *A Brief History of the Internet*, "Histories of the Internet," published in Internet Society.org, last revised December 10, 2003. http://www.isoc.org/internet/history/brief.shtml [accessed August 4, 2004]. These authors in some ways have contributed to the creation of the Internet. The Authors Are Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff.

"Barry M. Leiner was Director of the Research Institute for Advanced Computer Science. He passed away in April, 2003."[20]

History of the Internet

Drawing on the perspectives of those who contributed to creating the Internet, Leiner et al. share their views of its origins and history, and they focus on four distinct aspects of the technology.[21] The four aspects are technological evolution, the operations and management aspect of a global operational infrastructure, the social aspect resulting in a broad community of Internauts, and the commercialization aspect.

Origin

In 1957, the Soviet Union launched the first satellite, Sputnik I, which triggered U.S. President Eisenhower to create the Advanced Research Project Agency (ARPA) to regain the technological lead in the defense race.[22] J.C.R. Licklider of MIT was appointed by ARPA to head the new Information Processing Techniques Office (IPTO) organization with a mandate to further research and to help protect the United States against a space-based nuclear attack. Licklider thought of the possibility of a country-wide communications network and influenced his successors to implement his vision.[23]

According to the contributing computer designers of the Internet, J.C. R. Licklider of the Massachusetts Institute of Technology (MIT) wrote a series of memos discussing

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[20] *Id.*

[21] *Id.*

[22] Living Internet, N.D. "Internet History – One-Page Summary." http://livinginternet.com/i/ii_summary.htm [accessed August 6, 2004].

[23] *Id.*

his "Galactic Network" concept. It was the first recorded description of the social interactions he would like to have through networking.[24] The network would allow people to access data and programs from any site. Licklider convinced his successors, Ivan Sutherland, Bob Taylor, and Lawrence G. Roberts, at the Defense Advanced Research Project Agency (DARPA), of the importance of his networking concept, which is what the Internet is like today.[25] One of his successors, Leonard Kleinrock at MIT, saw the possibility of communications using packets rather than circuits, which was a major step towards computer networking, known as packet switching theory. Coincidentally, Donald Davies and Roger Scantlebury from the United Kingdom happened to present papers on packet network concepts at the same conference with Licklider's successor, Roberts, without any of the researchers knowing about the other's work.[26] Roberts quickly put together his plan for the "ARPANET" after developing the computer network concept at DARPA.

In 1968, the Defense Advanced Research Project Agency (DARPA) contracted with Bolt, Beranek & Newman (BBN) to create "ARPANET"; ARPANET is the computer network that the U.S. government successfully launched in October 1969.[27] Through ARPANET the Internet was created for military communication through networks for defense purposes.[28] In case of war, the Internet was created such that even if

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[24] Leiner e*t al*. *A Brief History of the Internet*, Introduction.

[25] *Id.*, Origins of the Internet.

[26] *Id.*

[27] Slater, *Internet History And Growth*, ppt. slide 9.

[28] *Reno v.* ACLU, 521 U.S. at 850.

portions of the network were damaged, communication through redundant channels was possible. The ARPANET does not exist anymore. However, the Internet since then has been used for civilian networks.[29]

Beginning in September 1969, four universities, the University of California at Los Angeles, the Stanford Research Institute (SRI), the University of Utah and the University of California at Santa Barbara, were selected to host the computer networking system because of the top researchers residing in those universities.[30] The four host computers, or nodes, were connected together into the ARPANET, and thus the Internet began. A node is an "end point of a network connection. Nodes include any device attached to a network such as file servers, printers, or workstations."[31] Even at Internet's early stage, networking research incorporated both work on the underlying network and work on how to use the network, which continues to this day. The fifth node, according to Slater, was the Bolt Beranek and Newman (BBN) company added in 1970.[32] More computers were added to ARPANET, and a Host-to-Host protocol known as the Network Control Protcol (NCP) and other network software were added which then allowed applications to be developed.[33]

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[29] *Id.*

[30] Leiner *et al*., *A Brief History of the Internet*, Origins of the Internet.

[31] Glossary: An Educator's Guide To School Network, *What Is A Node?* http://fcit.coedu.usf.edu/network/glossary.htm [accessed April 2, 2005]. Infra note 80 and accompanying text.

[32] Slater, *Internet History And Growth*.

[33] Leiner e*t al*., *A Brief History of the Internet*, Origins of the Internet.

The first public demonstration of this ARPANET network technology was organized by Robert Kahn[34] in October 1972 at the International Computer Communication Conference (ICCC), and it was also in 1972 that Ray Tomlinson from BBN company introduced the electronic mail application which allowed basic email message send-and-read software.[35] Roberts extended the email utility program to list, read, file, forward, and respond to messages, and emailing became the largest network application, as it is today.

Internetting Concept

Kahn introduced the open-architecture networking program called "Internetting" at DARPA in 1972. The open architecture networking was a key feature of the Internet. In this approach, "the choice of any individual network technology was not dictated by a particular network architecture but rather could be selected freely by a provider and made to interwork with the other networks through a meta-level Internetworking Architecture."[36] The Internet was not designed for one application, but as a general infrastructure on which new applications could be conceived, such as the World Wide Web application that was made possible with the service of the Transmission Control Protocol/Internet Protocol (TCP/IP).

The Transmission Control Protocol / Internet Protocol (TCP/IP) is the basic communication language or protocol of the Internet.[37] TCP/IP connected networks of

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[34] Robert Kahn is currently President of the Corporation for National Research Initiatives.

[35] Leiner e*t al.*, *A Brief History of the Internet*, Origins of the Internet.

[36] *Id*., The Initial Internetting Concepts.

different designs from different vendors to connect into a network of networks (the Internet).[38] It runs on any communications substrate.[39] The Transmission Control Protocol (TCP)

> is responsible for verifying the correct delivery of data from client to server. Data can be lost in the intermediate network. TCP adds support to detect errors or lost data and to trigger retransmission until the data is correctly and completely received.[40]

While the Internet Protocol (IP)

> is responsible for moving packet of data from node to node. IP forwards each packet based on a four byte destination address (the IP number). The Internet authorities assign ranges of numbers to different organizations. The organizations assign groups of their numbers to departments. IP operates on gateway machines that move data from department to organization to region and then around the world.[41]

Kahn developed TCP/IP to meet the needs of an open-architecture network. Vint Cerf, then manager of the Internet program at DARPA, also contributed to the work of the TCP specification.[42] The goal was to maintain effective communication in the face of radio interference, or to withstand intermittent blackout. TCP controlled the flow of packets and recovery of lost packets. Packets are "chunks of data that are sent over wireless networks."[43] IP was for addressing and forwarding of individual packets. An alternative service called the User Datagram Protocol (UDP) was added to provide direct access to

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[37] Definition of TCP/IP on Google search, *What Is TCP/IP,* http://www.cctvconsult.com/glossary.htm [accessed March 24, 2005].

[38] Howard Gilbert, *Introduction to TCP/IP*, posted February 2, 1995, http://pclt.cis.yale.edu/pclt /comm/tcpip.htm [accessed April 2, 2005]. Gilbert is a senior programmer at Computing and Information Systems at Yale University.

[39] Slater, ppt. slides 7-8.

[40] Gilbert, *Introduction to TCP/IP*.

[41] *Id.*

[42] Slater, ppt. slide 8.

[43] Wireless Glossary, *What Is A Packet Data*? from It.com, posted October 25, 2000, http://www.itworld.com/appdev/2815/cio102500_glossary/pfindex.html [accessed April 2, 2005].

the basic service of IP.[44] On January 1, 1983, the Internet first used TCP/IP for its messaging.[45]

Maintenance of the Internet

Today, the Internet is maintained by individuals, organizations, governmental bodies, companies and just about anybody who would become a member of the Internet Society, an actual organization called Internet SOCiety, also known as ISOC, which wants to help maintain the viability and global scaling of the Internet.

ISOC is one overarching organization which manages overseeing the Internet's design by sub-organizations within itself such as the Internet Assigned Numbers Authority (IANA) which delegates the administration of most functions of the world to global regions, and the Internet Engineering Planning Group (IEPG) which assist Internet Service Providers to the global Internet.[46] There are many other important bodies that maintain Internet's functions, such as, the Internet Architecture Board (IAB), the Internet Engineering Task Force (IETF), the Internet Research Task Force (IRTF), the Internet Corporation For Assigned Names And Numbers (ICANN), the Internet Assigned Numbers Authority, the Network Solutions, the Accredited Registrars, and the National Science Foundation.[47] The Internet Society (ISOC) sets Internet standards and is the

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[44] Leiner *et al*., *A Brief History of the Internet.*

[45] Leiner *et al*., *A Brief History of the Internet*, Proving the Ideas.

[46] *All about the Internet: Infrastructure*, from Internet SOCiety.org, last updated November 24, 2006. http://www.isoc.org/internet/infrastructure/ [January 4, 2007].

[47] Living Internet, N.D., *The Internet*. http://livinginternet.com/i/iu.htm [accessed March 24, 2005].

research body of the Internet architecture.[48] ISOC facilitates and coordinates Internet initiatives specifically on development, availability and associative technologies. Its goal is to enhance the utility of the Internet on the widest scale possible. The Internet Engineering Task Force deals with developmental and technical aspects, creation, testing and implementation of the Internet standards. The standards are then considered by the Internet Engineering Steering Group (IESG), in consultation with the Internet Architecture Board. Although hierarchy or the name of an administrative body in the organizational chart may change, the functions stay the same.[49]

Key features of the Internet are its robust architecture, its speed, its universal access, its exponential growth rates, and its digital advantage over other media. Basic uses of the Internet are for computer networking, Web use, Usenet groups or user's network or virtual bulletin boards,[50] electronic mailing (e-mail), mailing lists, Internet Relay Chat (IRC) also known as chat rooms, and multi-user dungeons (MUDs) which are chat forums with multiple locations.[51]

Internet communication is based on text which is different from other forms of media such as the pen or phone where emotions can be expressed. Internet text such as emoticons (the smiley ☺, the frown ☹, etc.) or adding emphasis by bolding or

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[48] Internet Society.org, last updated January 24, 2005, http://www.isoc.org/isoc [accessed April 2, 2005].

[49] Living Internet, N.D., *Internet Management*, last updated August 26, 2006. http://www.livinginternet.com/i/iw_mgmt.htm [accessed 1/4/07]. See the organizational chart of the Internet management.

[50] *Id., The Usenet*, http://www.livinginternet.com/u/u.htm [accessed April 2, 2005].

[51] *Id., The Internet*, http://www.livinginternet.com/i/i.htm [accessed April 2, 2005].

capitalizing words (**BOLD),** or abbreviating words ("btw" meaning "by the way"), or using action words ("lol" meaning "laughing out loud") allow the flow of normal conversation.[52]

The security aspect of the Internet is that it gives anonymity at the design level, it gives confidentially and it allows encryption, which can be seen as weak points as well. Clearly, the negative aspects at the security level are that viruses, worms, and Trojan horses can spread fast through the Internet, and passwords can be stolen. According to Meriam-Websters' Collegiate Dictionary, a computer virus is

> a computer program usually hidden within another seemingly innocuous program that produces copies of itself and inserts them into other programs or files, and that usually performs a malicious action (such as destroying data).[53]

Worms are computer programs that replicate copies of themselves and often contain some functions that will interfere with the use of a computer or a program. Computer worms are different from computer viruses in that they exist as separate entities and do not attach themselves to other programs or files.[54] On the other hand, according to Joseph Lo, the Internet Relay Chat security helper, trojan horses is defined as a

> malicious, security-breaking program that is disguised as something benign. For example, you download what appears to be a movie or music file, but when you click on it, you unleash a dangerous program that erases your disk, sends your credit card numbers and

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[52] *Id., Advanced Internet—Internet Text,* http://www.livinginternet.com/i/ia_text.htm [accessed April 2, 2005].

[53] Meriam-Webster Online Dictionary, N.D., *Defintion of Virus*, http://209.161.33.50/dictionary/virus [accessed February 14, 2007].

[54] Indiana University Knowledge Base, *What Are Computer Viruses, Worms, And Trojan Horses?* posted on January 20, 2005, http://kb.indiana.edu/data/aehm.html?cust=485209.23917.30 [accessed April 2, 2005].

> passwords to a stranger, or lets that stranger hijack your computer to commit illegal … service attacks,[55]

Hacking is an advanced use. "The original definition of a hacker was a talented computer programmer that could solve almost any problem very quickly, often by innovative, unconventional means."[56] Only those who are technologically advanced know how to hack. However, a "hacker" has come to mean someone who breaks into other people's computers or creates a computer virus.

Government Intervention of the Internet

Historically, federal agencies always had an interest in the computer-networking project, what is now called the Global Information Infrastructure (GII). The reason is because financial support came through funding of private and governmental agencies, and government has influenced policy decisions in the shaping of the Internet. By the mid 1970s, computer networks sprang up wherever there was any funding. The Defense Advanced Research Project Agency (DARPA) and the Department of Defense had funded the electronic mail system, which other agencies wanted to implement, as well. Thus begin the transition to widespread infrastructure when the U.S. Department of Energy (DoE) established a network called the Magnetic Fusion Energy Network (MFENet) for its researchers in Magnetic Fusion Energy and a network called the High Energy Physicist Network (HEPNet) for its high-energy physicist researchers.[57] NASA

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[55] Joseph Lo, *Trojan Horse Attacks*, page updated February 5, 2006, from IRChelp.org Security section, http://www.irchelp.org/irchelp/security/trojan.html [January 4, 2007].

[56] Living Internet, N.D., *Hackers*, http://www.livinginternet.com/i/ia_hackers.htm [accessed April 2, 2005].

[57] Leiner *et al*., *A Brief History of the Internet,* Transition To Widespread Infrastructure.

space physicists, along with other people, established a network called Computer Science Network (CSNET) for the academic and industrial computer science community with a grant from the U.S. National Science Foundation (NSF).[58] Big private companies such as AT&T disseminated the UNIX operating system which spawned User's Network (USENET), and Fuchs and Freeman devised Because It's Time Network (BITNET),[59] which linked academic mainframe computers.[60]

As the network grew to a trans-oceanic and international level, federal agencies shared the cost of the common infrastructure and coordinated the sharing of networks. To manage interconnection of interagency networks, the government built Federal Internet Exchanges (FIX) where "the various agencies decided to connect the communities that they served at two interconnection points."[61] An interconnection point is known as a FIX. To coordinate sharing between federal agencies and international agencies, the U.S. government built the Federal Networking Council (FNC) to cooperate with Europe's agency through the Coordinating Committee on Intercontinental Research Networking (CCIRN) in order that they might coordinate Internet support of the research community worldwide.[62]

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[58] *Id.*

[59] Webopedia, *What is Bitnet,* last updated September 1, 1997. http://www.webopedia.com /term/b/bitnet.html [accessed April 3, 2005].

[60] Leiner *et al*., *A Brief History of the Internet,* Transition To Widespread Infrastructure.

[61] The Federal Networking Council, N.D. "Proposal For The Continued Interconnection Of The Federal Agency Networks, December 11, 1995 Version 1.0 Prepared On Behalf Of The FEPG For The EOWG," http://www.nitrd.gov/fnc/FEPG_proposal.html [accessed February 14, 2007].

[62] Leiner *et al.*, *A Brief History of the Internet*, Transition To Widespread Infrastructure.

The history of the Internet shows us that the Internet has been shaped by the government working alongside private enterprise, and will continue to be so in the future. Even though an MIT researcher, Kleinrock, was the first to imagine an information network through his packet switching theory, the government quickly used him to do research for it at DARPA and the Department of Energy. Around the same time, scholars from the United Kingdom (U.K.) coined the term "packet" switching. The U.K. scholars were funded by private and governmental bodies including RAND Corporation (derived from the phrase *research and development*)[63] and the National Physical Laboratory[64] (NPL) in Middlesex, England. Many Internet users share the view that the government should not have a part in regulating the Internet. However, the history of the Internet shows that government fueled the cost needed to do computer networking research from the beginning.

Commercialization of the Internet

In the early 1980s, private vendors saw a market for commercial products of Internet technology, but they lacked knowledge about how to incorporate the TCP/IP protocol into their commercial products.[65] Thus, in 1985, Dan Lynch, along with the Internet organizational board, held a three-day conference inviting the inventors and experimenters of the Internet to share information about the working progress of the TCP/IP.[66] Inventors received feedback from industry on what worked and what still did

[63] RAND Corporation, http://www.rand.org/about/index.html [accessed April 6, 2005].

[64] Robert Hobbes' Zakon, Internet Evangelist, "Hobbes' Internet Timeline V3.0," posted on July 1, 1997, http://www.bergen.org/atc/course/infotech/hit.html [accessed April 3, 2005].

[65] Leiner *et al.*, *A Brief History of the Internet*, Commercialization of the Technology.

[66] *Id.*

not work with the protocol. By the next inter-operability (interop) conference in 1988, the vendors had worked hard to make all competitors' products interoperable, and from then on interop activities continued to increase. Not only did the usual academic and governmental bodies attend the Internet Engineering Task Force (IETF) meetings to discuss new ideas for extensions of the TCP/IP protocol suite, but vendors also began attending the IETF meetings.[67]

The creators of the Internet expressed that the Internet had become a commodity service.[68] The National Science Foundation (NSF) did not allow commercial traffic on its backbone network (NSFNET), allowing educational and research use only, and so other private and competitive commercial networks sprung up to provide commercial backbone service. However, NSF did allow its smaller regional networks of the NSFNET "to seek commercial, non-academic customers, expand their facilities to serve them, and exploit the resulting economies of scale to lower subscription costs for all."[69] The idea of privatization and commercialization of the Internet in 1988 was not well accepted. Also in the same year, a National Research Council (NRC) committee commissioned by the NSF produced a report, "Towards a National Research Network," which moved then-Senator Al Gore to fund high speed networks that laid the networking foundation for the future information superhighway. Another report released in 1994 by the same committee was the blueprint for the evolution of the information superhighway and anticipated the

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[67] *Id.*

[68] *Id.* The creators of the Internet are: Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff.

[69] *Id.*

critical issues of intellectual property rights, ethics, pricing, education, architecture and regulation for the Internet.[70]

In April 1995, the NSF canceled funding on the national scale segment of the NSFNET backbone and redistributed the funds to regional networks to buy national scale Internet connectivity, which was when privatization took off.[71]

The term "commercialization" includes the development of competitive private network services and also includes the development of commercial products for networking. The recent phase of commercialization, however, has been the use of this global information infrastructure for support of commercial services such as the adoption of browsers (a program to access the WWW) and the World Wide Web application. Using the global information infrastructure, the WWW technology allows users easy access to information linked throughout the globe. The focus of new commercial products is providing sophisticated information services on top of the basic Internet data communications.

World Wide Web

Many definitions of the World Wide Web appear if one uses the phrase as a search term on search engines. One of the definitions found in an Internet glossary describes the World Wide Web or the WWW as:

> The incredibly huge collection of HTML documents existing on servers connected to the Internet. These documents use hyperlinks to connect to other documents, other servers, or to programs on either the local computer or the server, creating a big tangle of information that has become known as the "World Wide Web." … Note: The "World

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[70] *Id.*

[71] *Id.*

> Wide Web" and the "Internet" and not synonymous. The World Wide Web is part of the Internet, but the Internet is much more than the World Wide Web.[72]

This definition differentiates the World Wide Web from the Internet because technically the World Wide Web is an application which runs within the Internet, while the Internet is the overarching network. However, sometimes the term "Internet" is misused by both scholars and the public in general to mean the World Wide Web.

In general, the World Wide Web (WWW) is an application that has to do with hyperlinks and hypertexts (defined below). According to a University of California-Davis glossary, it allows access "to documents that in turn provide hyperlinks to other documents, multimedia files, and sites," and it is "a graphical interface for the Internet."[73]

Hypertext and Hyperlinks

Hypertext, hyperlinks and Hypertext Mark-up Language (HTML) are computer jargon related to the World Wide Web application. "Hypertexts" refers to texts that are written in a computer language called HTML, and "hyperlinks" refers to the ability for documents to be linked to one another through the computer. These hypertext documents are stored on a computer (the "server") and are transmitted through the Internet when requested by another computer (the "client").[74] According to Netcraft Ltd., they received responses from 105, 244,649 websites during their December 2006 Web Server Survey, meaning there are now over 100 million websites running on the WWW, "in percentage

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[72] Glossary, Dale Co. S.P. *What is the World Wide Web*? last updated August 12, 2004, http://www.daleco.biz/help/dictionary.html [February 14, 2007].

[73] Glossary, University of California—Davis. *What is the World Wide Web*, last updated August 2, 2004. http://iet.ucdavis.edu/glossary/ [accessed August 12, 2004].

[74] Glossary, Avkids, *What is the HTML*, http://wings.avkids.com/spit/glossary.html [accessed August 12, 2004].

terms, the Web grew by 41.5 percent this year … but still trails the record performance from 2000 … of the dot-com boom … from 10 million to nearly 26 million sites, a one-year increase of 160 percent."[75]

History of the World Wide Web

This is the timeline of the origins of the World Wide Web (WWW) to its present time: In 1945, Vannevar Bush, Director of the Office of Scientific Research and Development, wrote an article[76] about a photo-electrical and mechanical device called Memex which could make and follow links between documents on microfiche.[77] In 1960, Doug Engelbart from Stanford Research Institute invented the computer mouse for the purpose of his "oNLine System" (NLS), which did hypertext browsing, editing, email, and so on. In 1965, Ted Nelson, a graduate student from Harvard, coined the word "Hypertext" from his conference paper.[78]

The WWW originated with an organization located in Switzerland known as Conseil Européen pour la Recherche Nucleaire (CERN), a meeting place for physicists where a lot of collaboration on complex physics, engineering, and information handling occurred.[79] The rapid growth of the collaboration projects required a faster method for the

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[75] Netcraft LTD. Web Server Survey, "December 2006 Web Server Survey," http://news.netcraft.com/archives/web_server_survey.html [1/4/07].

[76] Vannevar Bush, "As We May Think." *The Atlantic Monthly,* published July 1945, Volume 176, No. 1; 101-108. posted on the Atlantic Monthly.com. http://www.theatlantic.com/doc/194507/bush [accessed February 14, 2007].

[77] R. Cailliau, "A Little History Of The World Wide Web," (1995). posted on the World Wide Web Consortium. http://www.w3.org/history.html [accessed August 6, 2004].

[78] Internet Pioneers, "Ted Nelson," N.D., http://www.ibiblio.org/pioneers/nelson.html [accessed April 3, 2005].

geographical dispersion of information. Thus, Tim Berners-Lee, then a graduate student from the Massachussetts Institute of Technology (MIT) and his supervisor worked on the task of creating geographically dispersing documents through hypertext language.

In 1980, Berners-Lee wrote a program which allowed links to be made between arbitrary nodes.[80] (A node is a processing location; it can be a computer or some other device, such as a printer. Every node has a unique network address.)[81] These nodes had a title, a type and bidirectional-typed links. Berners-Lee later wrote an information management proposal.[82] There were two goals to his project: one was to provide a huge amount of storage space for information such as notes, databases, and computer documentation; the second was to adopt a standard for Internet communication, which involved developing the Hypertext Mark-up Language (HTML) for formatting online documents.[83] In 1990, Berners-Lee created the global hypertext system program and named it the "World Wide Web." Researchers such as Robert Cailliau, Nicola Pellow and Bernd Pollermann extended and further developed a newer and faster version of the WWW program.[84]

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[79] Introduction to the Core of Information Technology, "History of WWW," N.D. From the HyperLearning Center at George Mason University. http://cs.gmu.edu/cne/itcore/internet/www/www.html [accessed February 14, 2007].

[80] Cailliau, "A Little History Of The World Wide Web."

[81] Webopedia.com, *What Is Node?* posted May 16, 1998. http://www.webopedia.com/term/n/node.html [accessed March 24, 2005]. supra note 30 and accompanying text.

[82] Cailliau, "A Little History of the World Wide Web."

[83] Introduction to the Core of Information Technology, "History of WWW."

[84] Cailliau, "A Little History of the World Wide Web."

Ever since 1990, the WWW program has become universalized through conferences and demonstrations; it was marketed to companies and institutions, many of which adopted the program. In 1991, the WWW was released on central machines, and files were made available on the net via File Transfer Protocol (FTP). The WWW continued to gain popularity. Lots of presentations and demonstrations occurred internationally in several countries within the next year, 1992. In April 30, 1993, CERN directors declared that the WWW technology could be freely usable by anyone with no fees being payable to CERN because it wanted academia and businesses to use the same language and code.

Many WWW servers (computers which provide services to other machines asuch as email, file transfer, and web services),[85] were created and their information encoded in HTML. As the Web grew, the World Wide Web Consortium (W3C) was formed. The W3C is an organization that maintains the daily functions of the Web, develops new tools and software to enhance it, and makes important decisions on the future direction of the Web. It, too, like the Internet SOCiety organization, has members from governmental bodies, individuals from all over the world, organizations and academia.

Information Superhighway

The Clinton-Gore Administration pushed for using information technology for America's economic growth. Clinton and Gore were mainly responsible for pressing federal agencies and the government to use the Internet, thus opening up the American government to the American citizens in a more timely, efficient, and cost-effective way,

[85] Google search on "Define: Servers," http://persons.marlboro.edu/~ewood/networks/glossary.htm [accessed April 5, 2005].

according to Al Gore.[86] The first official White House government website was launched October 1994, and titled *Welcome to the White House,* and on July 17, 1996. President Clinton ordered "all federal agencies to fully utilize information technology to make the information of the agency easily accessible to the public."[87]

Al Gore became the point man in the Clinton Administration's effort to build a national information highway, much as his father, former Senator Albert Gore, was a principal architect of the interstate highway system a generation or more earlier.[88] On June 24, 1986, then-Senator Albert Gore (D-TN) introduced the bill called Supercomputer Network Study Act of 1986 (S. 2594), and on March 21, 1999, Gore delivered a speech at the International Telecommunications Union about his "Information Highway" idea. According to wife, Tipper Gore, her husband

> coined the phrase "information superhighway" to describe how this exciting new medium would one day transport us all. Since then, we have seen the Internet and World Wide Web revolutionize the way people interact, learn, and communicate.[89]

The Information Superhighway was a top priority for the Clinton Administration.[90] The Clinton administration saw that the Internet technology can be put to use to benefit economic growth for America's future.[91] Internet technology would give

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[86] "The Clinton White House Agenda," N.D. About.Com, http://usgovinfo.about.com/library /weekly/aa012201a.htm [accessed September 2, 2004].

[87] *Id.*

[88] Gromov, G. (1995-2003). "History of Internet and WWW: The Roads and Crossroads of Internet History." Netzero, Inc. http://www.netvalley.com/intval1.html [accessed August 13, 2004].

[89] Gromov, 1995-2003.

[90] Darlene Fladager, N.D. "Contents," http://www.ibiblio.org/darlene/tech/contents.html [accessed August 16, 2004].

America a competitive advantage in global trade and Internet technology would help move manufacturing to global markets.[92] Internet technology could also benefit other areas in the United States such as the defense system, the energy system and the transportation system.[93]

According to then-President Clinton and Vice President Gore:

> The Federal government spends billions of dollars collecting and processing information (e.g. economic data, environmental data, and technical information) … Many potential users either do not know that it exists or do not know how to access it … Using new computer and networking technology to make this information more available to the taxpayers who paid for it, consistent Federal information policies designed [will] ensure that Federal information is made available at a fair price to as many users as possible while encouraging growth of the information industry.[94]

The railroad system in America in the nineteenth century had an impact on U.S. economic and social development, and Clinton and Gore used the railroad as an analogy to the introduction of an efficient, high-speed communication system in the 21st Century which can develop new business opportunities. The "information superhighway" became a complex project, and the more technical term for it was the National Information Infrastructure (NII). The NII is,

> a nationwide assembly of systems that integrates five essential components -- communications networks, computers and information appliances, information, applications, and people -- using a wide variety of technologies to create a whole new way of learning, working, and interacting with others.[95]

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] W. Clinton (President) And A. Gore, Jr. (Vice President), "Technology for America's Economic Growth, A New Direction to Build Economic Strength," (February 22, 1993), pp. 17. From the White House Office of the Press Secretary. http://www.itsdocs.fhwa.dot.gov/jpodocs/briefing/5q701!.pdf [accessed September 3, 2004].

[95] *What Is The NII?* "Perspectives on Competition and Deployment of the NII, A Joint Report By CSPP And The Information Technology Industry Council," (December 1994). Technology CEO Council,

Thirteen leading American computer companies[96] expressed willingness to work with the government to develop the National Information Infrastructure (NII) to have a lead in the global economy.[97] "We believe the creation of a national information infrastructure must be a national priority, and we are willing to work in partnership with the government to see that it gets done," said John Sculley, chief executive officer of Apple Computer and chairman of Computer Systems Policy Project (CSPP).[98] The CSPP was formed in 1989 to bridge industry positions on trade and technology policy issues. On January 12, 1993, computer industry CEOs provided the Clinton Administration with a vision for the NII.[99]

In sum, technology is an attraction to the government, various academic groups, and the public. The characteristics of the Internet combined together with politics (how the government wants to put technology to use for economic growth) affect the operations of society.

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http://www.cspp.org/index.php?option=com_content&task=view&id=219&Itemid=160 [accessed April 6, 2005].

[96] The Thirteen Computer Companies in the Technology CEO Council are: Apple, AT&T, Compaq, Control Data Systems, Cray Research, Data General, Digital Equipment, Hewlett-Packard, IBM, Silicon Graphics, Sun Microsystems, Tandem, And Unisys.

[97] Jenny Carter, Washington D.C. Press Release by the Computer Systems Policy Project (CSPP), "Computer Industry Ceos Provide Administration With Vision And Recommendations For A National Information Infrastructure," (January 12, 1993). http://tools.org/EI/ICEIMT/1993/0006.html [accessed February 14, 2007].

[98] *Id.*

[99] *Id.*

Problem Statement

One important group that the Internet attracts is children—cyberkids. Many more children and teenagers are going online every year.[100] There are several issues of concern about children on the Internet, such as the advertisements of medical drugs, marketing to children, privacy issues, children giving stock market and legal advice, child modeling sites, social network websites, and predatory issues. The federal government and the international community are also concerned about children going online.[101] For example, several countries have met to discuss online marketing directed to children.[102]

Cyberkids

The Pew Internet & American Life Project, along with polling-partner Princeton Survey Research Associates, compiled a report on teenagers and their parents to explore how they have incorporated Internet tools into their lives.[103] The survey was conducted in late 2000 using a phone interview to sample some 754 youths ages 12 to 17 who go online as well as an equal number of their parents, 87 percent of whom go online.[104] The survey showed that 73 percent of youths between ages of 12 and 17 used the Internet.

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[100] According to the NCMEC in 1994,"Every year more and more children of all ages go online to study, have fun, and communicate with the world at large. Just as the numbers of kids online have grown, so have the dangers they face," originally cited by NetSmartz.com, http://www.ala.org/ala/oif/foryoungpeople/youngpeopleparents/especiallyyoungpeople.htm [accessed March 30, 2007].

[101] The OECD Committee On Consumer Policy, 55th Session, September 3-4,1998. "Online Advertising And Marketing Directed Toward Children," Dsti/Cp(99)1/Final, Organization For Economic Co-Operation And Development, France (1999).

[102] *Id*.

[103] Amanda Lenhart, Lee Rainie, and Oliver Lewis. "Teenage Life Online: The Rise of the Instant-Message Generation and The Internet's Impact On Friendships and Family Relationships," (June 21, 2001). Pew Internet & American Life Project, http://www.pewinternet.org/report_display.asp?r=36 [accessed April 11, 2005] and http://www.pewinternet.org/pdfs/PIP_Teens_Report.pdf [accessed March 30, 2007].

[104] Lenhart e*t al*., 2, 3.

Some 13 million teenagers (74 percent of online teens) used instant messages to talk with friends and to do serious kinds of communication, such as those concerning boy-girl relationships, or to counter boredom.

The Pew report stated that many teens played with their online identities and used different screen names and email accounts to manage their communications and the information that came to them. For instance,

> 56% had more that one email address or screen name. Around 33% had given fake information about themselves in an email or instant message. Some 15% of online teens and 25% of older boys online had lied about their age to access a website – an act that often is used to gain access to pornography sites.[105]

While many parents said that they had enforced time limits, teens reported they were unaware of those limits, and most teens were unaware that parents tracked the websites that they had visited.[106] A majority of parents, 57 percent, were worried that strangers would contact their children, and their worries were justified because 60 percent of teens reported getting instant messages or email from strangers.[107] However, 52 percent of the teens surveyed were not worried about strangers online and only 23 percent expressed a level of concern.[108]

Some of the activities teens engage in are educational, informal learning, playing games, browsing, and corresponding with friends or pen-pals by email, electronic bulletin boards, and chat rooms.[109] The activities that most attract them involve communicating

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[105] *Id*., 4.

[106] *Id.*, 5.

[107] *Id.*, 5.

[108] *Id.*, 5.

with their peers. Anyone, including relatives, retailers, or strangers, can contact teenagers through email and instant messages. The Federal Bureau of Investigation (FBI) and the Department of Justice (DOJ) have confirmed that online services and bulletin boards are quickly becoming the most powerful resources used by predators to identify and contact children.[110]

Children are technologically savvy. They adapt to new technology quickly. A 2001 study showed that one favorite activity among children is being involved in chat rooms. "Chat Wise, Street Wise" is a paper prepared by a sub-group of the Internet Crime Forum (IRC) which identified problems with children in chat rooms and the risk involved.[111] The IRC subgroup sampled children from the United States and United Kingdom to study technicalities for the traceability of the user and the privacy aspects of logging in on the server, user, and client end. At the conclusion of the study, the IRC sub-group recommended that Internet Service Providers (ISPs), chat service providers and legislators should be more committed to finding solutions,[112] that various sectors from the Information Technology industry, educators, and awareness programs should keep up with the changing environment, and that children should use these chats more carefully.[113]

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[109] "Privacy Online: A Report To Congress." Federal Trade Commission, June 1998. http://www.ftc.gov/reports/privacy3/toc.html [accessed June 1, 2001].

[110] "Privacy Online." Infra note 110.

[111] "Chat Wise, Street Wise – Children And Internet Chat Services." A Paper Prepared By The Internet Crime Forum Irc Sub-Group, [March 2001], http://www.internetcrimeforum.org.uk/chatwise_streetwise.html [accessed April 9, 2005].

[112] *Id.*, 4.

[113] *Id.*, 40.

Although legislators, parents, scholars and other groups are concerned with the level of involvement of children in online activities, the Internet is not the most popular medium parents and children used in the year 2000. A study by the Annenberg Public Policy Center in 2000 showed that television was still the most popular medium amongst children and their parents.[114] The medium that concerned parents the most was television at 46 percent, followed by the Internet at 32 percent. Startlingly, parents' supervision of the Internet appeared to be the lowest when compared to television, music, and video games. The survey profiled media ownership as well as attitudes of parents and their children, while also tracking parental awareness, knowledge, and use of various public policies designed to regulate those media.[115]

The Federal Trade Commission (FTC) also found that children comprise a large segment of online consumers. A common trend since the eighties is that children as young as 4 and 5 have been shopping at stores alone.[116] McNeal reported that by the age of 5, more than half (54 percent) went to a store on their own, and by the age of seven 90 percent went shopping alone. As they get older, they visit a wider variety of shops.[117] Youths become aware of new products and brands. Gardner cited a study that showed 4 to 12 year olds were directly responsible for $170 billion in spending, their own money or

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[114] Emory H. Woodard, IV., and Natalia Gridina, "Media in the Home 2000: The Fifth Annual Survey of Parents and Children." Annenberg Public Policy Center, Survey Series No. 7, http://www.annenbergpublicpolicycenter.org/ 02_reports_releases/report_2000.htm [accessed April 9, 2005]. Kathleen Hall Jamieson directed this study.

[115] *Id.*, 3. Samples were drawn through random-digit dialing.

[116] James U. McNeal, *Kids as Customers: A Handbook of Marketing to Children*, (New York: Lexington Books,1992).

[117] James U. McNeal, *Children as consumers: insights and implications*, (Lexington, Mass.: Lexington Books, 1987).

money spent on their behalf, and indirectly responsible for at least twice that amount, children influencing parents' choices.[118] It should not be a surprise then that children would continue to become sophisticated shoppers even on the Internet.

Cyberkids, their use of the Internet poses difficulties. Use of the Internet by chidren leads to a myriad of problems. These problems are diverse, having one element in common: children on the Internet.

Regulation of marketing and advertising of medical devices, drugs, and biologics on the Internet is still unsettled. The medical industry has said, "no new regulations are necessary for [the] FDA."[119] The challenge for the industry is how to legally promote medical products on the Internet and not fall under deceptive or unfair practices, and, secondly, not to involve or confuse children. The U.S. Food and Drug Administration (FDA) in the U.S. has been discouraging the act on buying drugs from Canada or from any illegitimate Websites the reason being the drugs may be counterfeit and potentially dangerous.[120] "In August 2004, the FDA announced the filing of a consent decree that stopped Rx Depot and Rx of Canada from facilitating the illegal importation of drugs. A judge found that the defendants' actions posed a public health threat."[121] The Ryan Haight Internet Pharmacy Consumer Protection Act of 2005 had been proposed after a

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[118] Elizabeth Gardner, "Understanding The Net's Toughest Customer," *Internet World* 6, No.3: (2000) 66-75. Gardner cited a study by James Mcneal at Texas A & M University but no original citations provided.

[119] Peter S. Reichertz, "Understanding Government Regulation of the Marketing and Advertising of Medical Devices, Drugs, And Biologics: The Challenges of the Internet," *Food Drug L.J.* 52, no. 3, (1997): 303-308.

[120] Michelle Meadows, "Use Caution Buying Medical Products Online," FDA Consumer Magazine, January-February (2000-2005), http://www.fda.gov/fdac/features/2005/105_buy.html [accessed January 2, 2007].

[121] *Id.*

teenager died from consuming prescription drugs purchased from a Website, and the Act regulates U.S. Websites selling medical drugs. These websites must have specific disclosures and they must "clearly identify the business, physician, and pharmacist associated with the website and the states where the person is authorized by law to prescribe or dispense prescription drugs."[122] The FDA has not stated a position on the proposed legislation.

On another note, children may type general search terms such as "Playmate" and receive many "Playboy" websites and pornographic websites in the search-results display. Playboy Enterprises, Inc. in 1999 had filed a motion for injunctive relief against Netscape and Excite, claiming that their use of Playboy's trademarks in their website search engines was a deliberate attempt to divert customers away from Playboy's actual website and Playboy's endorsed websites. Also, Playboy claimed the defendants were using Playboy's trademarks in banner advertisements to gain Playboy's customers.[123]

> Plaintiff contends that defendants are infringing and diluting its trademarks (1) by marketing and selling the group of over 450 words, including "playboy" and "playmate," to advertisers, (2) by programming the banner ads to run in response [**4] to the search terms "playboy" and "playmate" (i.e., "keying"), and (3) by actually displaying the banner ad on the search results page. As a result, plaintiff contends, Internet users are diverted from plaintiff's official web site and web sites sponsored or approved by plaintiff, which generally will be listed as search results, to other adult entertainment web sites.[124]

While this Court case is not directly about generic term disputes, it presents the question of who protects children from inadvertently accessing such adult websites?

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[122] Congressman Tom Davis' Website: Virginia's 11th District. "Davis and Waxman Introduce 'Ryan Haight Act' To Fight Growing Problem of Illegal Sales of Prescription Drugs Over Internet," (February 16, 2005). http://tomdavis.house.gov/cgi-data/news/files/153.shtml [accessed 1/2/07].

[123] *Playboy Enterprises, Inc. v. Netscape Communications Corp*. and *Playboy Enterprises, Inc., v. Excite, Inc*., 55 F. Supp. 2d 1070 (1999). The United States District Court for the Central District of California on June 24, 1999, held that Netscape Communications Corporation and Excite Inc. use of the terms "playboy" and "playmate" did not constitute federal trademark infringement or federal trademark dilution.

[124] *Id.* at 1072.

Depending on the word(s) the child typed, the results would either direct the child to an acceptable or unacceptable range of websites. For instance, typing "Pokemon" may give a spectrum of children's games, toy stores and the like, while typing 'Barbie' may give a whole spectrum of games and other adult versions or parodies of the term 'barbie.'[125]

Some websites purposefully market themselves for children to access and view pornography. An innocent search of "dolls" or "toys" bring up 40 percent sex-related hits.[126] Even the United States District Court For The Eastern District of Pennsylvania noted that children with minimal knowledge of a computer may type a few simple words and be able to access sexual images and content over the WWW.[127]

Laws have been one step behind technology in the areas of children giving stock exchange and legal advice. Jonathan Lebed was a 12-year-old boy who began stock market trading with his father's capital of $8000 and progressed to manipulating the stock market by giving financial predictions.[128] The dilemma that the Security and Exchange Commission (SEC) faced was that the perpetrator was under 18 years of age. The U.S. Code does not define the age of a 'member' or when a person is allowed to be a

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[125] When "Barbie" is typed onto Google Search, these websites came up: Mattel Barbie Dolls, http://www.barbie.com/; a body image site, http://www.adiosbarbie.com/; the visible barbie project, http://www.trygve.com/visible_barbie.html; barbie bondage site, http://www.aracnet.com/~shi/joy-of-plastic/index.html (August 3, 2002).

[126] Brooke A. Marshall, "Who Should Be Allowed To Teach Our Children About Sex? Protecting Children From The Dangers of Cyberporn By Analyzing The Child Online Protection Act As A Regulation On Commercial Speech," 22 T.M. Cooley L. Rev. 369, 391 (2005).

[127] *ACLU v. Reno*, 31 F.Supp. 2d 473 at 476; David C. Bissette, Psy.D., "Internet Pornography Statistics: 2003, Healthymind.Com," (2004) http://healthymind.com/s-port-stats.html [accessed December 1, 2005]. Children 12 to 17 year olds are the largest consumers of cyberporn, and they are seeing porn without their parents' consent.

[128] Michael Lewis, "The Financial Revolt," *Next: The Future Just Happened,* (Norton & Company, New York: NY) 2001, 25-84.

member of the stock exchange services,[129] the SEC never faced an age-of-minor issue until this Internet occurrence. So the SEC assumed 18 years to be the age when one becomes an adult age and did not take him to court.

Similarly, Marcus Arnold, a 15-year-old boy, was a leading expert in the field of law on AskMe.com.[130] Adults preferred his legal advice because it was simple and straight to the point; he was ranked number ten out of the hundreds of actual lawyers on AskMe.com.[131] However, legal advice is just information, and there is a surplus of free information on the Internet. "The Internet had arrived at an embarrassing moment for the law,"[132] said Michael Lewis, the author of *Next: The Future Just Happened*, because children were using the anonymity trait of the Internet to do grown-up things online.

One effective way to reach kids has been through online games. Marketers have frequently combined the appeal of online games with exposure to mascots and brand names so that children may remember brands or products for purposes of brand loyalty.[133] Elizabeth Gardner of *Internet World* says that banner ads may be boring to kids, but they love to play games with animated characters.[134] In fact, one of the Center

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[129] 15 U.S.C. Chapter 2B § 78c. (A) (3)(A) and (3)(B): "The term "member" when used with respect to a national securities exchange that means any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker …" From the U.S. Code Online via GPO Access [wais.access.gpo.gov] [Laws in effect as of January 20, 2004] [Document not affected by Public Laws enacted between January 20, 2004 and December 23, 2004] [CITE: 15USC78c] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+15USC78c accessed January 2, 2007].

[130] Lewis, "Pyramids And Pancakes," *Next,* 90-91.

[131] *Id.*, 93.

[132] *Id.*, 101.

[133] *Id.*.

for Media Education (CME) studies' (2000) focused on investigating Web marketers' use of endorsers or "spokescharacters." CME found Web marketers' use of endorsements was misleading and resulted in unfair and deceptive marketing practices. The CME suggested that laws need to protect children from endorsement advertising on children's infomercials and "spokes characters"[135] because children's personal information is being collected without their parent's knowledge. Traditionally children have been shielded from direct marketing, but it is harder to control direct marketing on the Internet.

In June 1996, the FTC conducted a workshop to explore privacy concerns raised by the online collection of personal information and special concerns of children.[136] The workshop considered alternatives to address those concerns, including industry self-regulation, technology-based solutions, consumer and business education, and government regulation.

In June 1997, a second workshop delved more deeply into issues of identifying potential consumer-protection issues related to online marketing and commercial transactions, providing a public forum for the exchange of ideas and presentation of research and technology, and for encouraging effective self-regulation.[137] At the FTC workshop, marketers expressed that they do benefit from this information-rich medium. Through their commercial websites, they collect personal information explicitly through

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[134] Gardner, "Understanding The Net's Toughest Customer," *Internet World,* 2000.

[135] *Id.*

[136] "The Federal Trade Commission's Bureau of Consumer Protection, *Workshop on Consumer Privacy on the Global Information Infrastructure*, (June 4-5, 1996). posted November 8, 1999. http://www.ftc.gov/bcp/privacy/wkshp96/privacy.htm [accessed August 3, 2002].

[137] "Consumers' and Children's Privacy Online, Computer Databases, and Unsolicited E-Mail: To Be Explored At FTC Privacy Week," June 10-13, 1997, http://www.ftc.gov/bcp/privacy/wkshp97/ [Accessed February 14, 2007].

online surveys, forms, and contests, and implicitly through the use of "cookies." The FTC's 1997 workshop showed that consumers would continue to distrust online companies and that electronic commerce might not reach its full potential unless privacy protections are implemented.

During the 1990s, President Bill Clinton and Vice President Al Gore considered privacy as one of the legal issues that needed to be explored.[138] As acknowledged by Clinton and Gore in July 1st, 1997, the global information infrastructure can diminish people's privacy if not handled properly. The Clinton Administration encouraged industry self-regulation,[139] while simultaneously giving freedom to private sector companies "to do business with each other on the Internet under whatever terms and conditions they agree upon."[140] (See the "uniform commercial code" for the conditions.[141])

The Organization for Economic Co-operation and Development (OECD) is an international community of several member countries, such as the United Kingdom (U.K.), United States (U.S.), Australia, Sweden, Belgium and the Nordic countries, that

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[138] President William J. Clinton And Vice President Albert Gore, Jr. "A Framework For Global Electronic Commerce," (July 1, 1997), Washington, D.C., http://usinfo.state.gov/journals/itgic/1097/ijge/gj-12.htm [accessed February 14, 2007].

[139] Collaborated work from the U.S. Dept. of Commerce, "Privacy And The NII: Safeguarding Telecommunications-Related Personal Information," (October, 1995). The National Telecommunications and Information Administration (NTIA), http://www.ntia.doc.gov/ntiahome/privwhitepaper.html [accessed April 12, 2005].

[140] Clinton And Gore, "A Framework For Global Electronic Commerce;" 'Uniform Commercial Code' For Electronic Commerce.

[141] Cornell Law School, "Uniform Commercial Code - Article 9," January 23, 2003. The conditions are for: the sales of goods, leases of goods, banknotes and drafts, auctions and liquidations, transactions involving letters of credit, storage and bailment of goods, security interests and financial assets, and transactions scured by security interests, http://www.law.cornell.edu/ucc/ucc.table.html [accessed January 2, 2007] and *What is Uniform Commercial Code*, http://en.wikipedia.org/wiki/Uniform_Commercial_Code [accessed January 2, 2007].

are involved in developing policy. Its Committee on Consumer Policy conducted a forum since 1998 titled, "Online Advertising and Marketing Directed Toward Children."[142]

The Nordic countries, such as Finland, Iceland, Norway and Sweden, have no consistent position or joint recommendations on marketing on the Internet, even though they all agree something should be done. For instance, they all agree that children and young persons should not be offered rewards for participating in activities on the Internet and should not be encouraged to buy goods or do contracts via the Internet, nor should minors be encouraged to give information about themselves. Also, site operators should allow parents to limit access to materials and not use hyperlinks to websites containing unsuitable materials. Entertainment features such as games should not be combined with or interrupted by advertising features, and the marketing should be suitable to that age group. The United Kingdom in 1998 also has not clear answers concerning advertising to children online. An interesting note is that the United Kingdom considers advertising to be transactions.[143]

Interestingly, most OECD member countries have come to the same conclusion: that children are incapable of discerning what is advertising and what is not advertising and that a child's developmental process has not reached its potential to discriminate about commercial information and misleading practices. Overall, the OECD Forum

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[142] The OECD Committee On Consumer Policy, 55th Session, September 3-4,1998. "Online Advertising and Marketing Directed Toward Children," Dsti/Cp(99)1/Final, Organization For Economic Co-Operation and Development, France (1999), http://72.14.203.104/search?q=cache:yA8RqMAns7AJ:www.olis.oecd.org/olis/1999doc.nsf/c707a7b4806fa95dc125685d005300b6/8cb2ff4d9a8e4e87c125673c005bb410/%24FILE/03E93598.DOC+%22online+advertising+and+marketing+directed+toward+children%22+1998&hl=en&gl=us&ct=clnk&cd=1&client=firefox-a [accessed January 3, 2007].

[143] The OECD, "Online Advertising And Marketing Directed Toward Children."

Session was an open discussion of what governments have found about online advertising and marketing directed towards children. One main shortcoming in all of this was that OECD member countries never did define "online advertising" or " online marketing."

Indeed, the Internet has had an impact on the rights of children both in positive and negative ways.[144] The Internet has made positive impact on children's rights through organizations that combat the abuses of children on the Internet.[145] Also, the technology enables the interactivity of children and youths from different countries and backgrounds to empower them to advocate for their own rights.

The United States seems to be one of the most ambitious nations when it comes to protecting children online. One of its administrative body, the Federal Trade Commission (FTC), has done much research and work that has provided supporting evidence that industry self-regulation does not work and that government needs to intervene. In 1998, the FTC convinced Congress to pass legislation to protect children's privacy against misleading marketing.[146] The Children's Online Privacy Protection Act is the outcome of FTC's work on protecting children's privacy (for more details see Chapter 3 on COPPA).

The niche marketing in the child-supermodel online business is profitable but may be considered dangerous for children. The Jon Bennett Ramsey false killer publicity opened the door for discussion of online modeling websites, some of which can be considered "soft porn." Soft porn is children posing "in sexually provocative attire" for

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[144] Steven Hick and Edward Halpin, "Children's Rights and the Internet," 575 Annals 56 (2001). The Authors took the definition of Children's Rights from the United Nations Convention on the Rights of the Child.

[145] Organizations such as: http://www.cyberangels.org/, http://www.nemec.org, www.pollyklaas.org/, www.safekids.org/ and many more on Google search.

[146] "Privacy Online."

entertainment purposes.[147] Webe Web Corporation of Fort Lauderdale, Florida, has operated the childsupermodel.com site since the early 90s,[148] along with many other Websites, e.g. lilamber.com.[149] The way the business runs is that parents submit images of their children to Webe Web. Each child is given his/her own gallery of images, Webe Web designs webpages with photographs, and the site charges about $20 a month to members.[150] The parents are paid a percentage according to the popularity of the site. An unnamed representative from the "childsupermodel.com" explained that the company would not recruit child models without parental consent; rather, it is the parents who choose to have their children work as child models.[151] However, MSNBC announced on December 6, 2006, that Jeff Pierson, the photographer for Webe Web Corporation, and Marc Evan Greenberg and Jeffrey Robert Libman, the owners of the company, were indicted and charged in Birmingham, Alabama, during the first week of December 2006 for interstate trafficking of preteen and teen images in interstate commerce on dozens of Websites operated by the company.[152] An FBI investigation began when a mother complained she signed a contract with the company, thinking she was answering a decent advertisement for preteen modeling. She and her 12-year-old daughter, both who remain

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[147] Samuel Thorne, "Webe Web Fashion Models," Summer, 2004. English 1A Class Paper, College of the Redwoods, http://www.crstudent.com/School/Preteen.htm [accessed December 5, 2006].

[148] Eric Gillin, The Black Table, "Why Does Childsupermodels.Com Exist, Anyway?" [telephone interview] http://www.blacktable.com/gillin031001.htm [accessed November 11, 2006].

[149] Blueline Radio, "lilamber," http://www.bluelineradio.com/lilamber806.html [accessed January 2, 2007].

[150] Mike Brunker, "Feds Crack Down on Teen, Preteen 'Model' Sites: Florida's Firm's Owners Face Child Porn Charges for Provocative Photos of Kids," page 2, posted December 6, 2006 MSNBC.com. http://www.msnbc.msn.com/id/15977010/page/2/ [accessed January 3, 2007].

[151] Gillin, [telephone interview], middle section.

[152] Brunker, page 1, http://www.msnbc.msn.com/id/15977010/ [accessed January 3, 2007].

anonymous, were scared to leave the studio during the second photo session because Jeff Pierson had flashed a handgun prior to the photoshoot, and so the girl was forced to do what she was told to do.[153] The damage has been done, the mother says; since the photo session, the girl is afraid of being alone around men and cried when a male doctor examined her.[154]

On the other hand, teenage models between 14 and 17 years old have always been used to pose in suggestive clothes for magazine clothing catalogs, so the question is, is it different if their images are used on the Internet? The difference is that children posing in skimpy clothes on the Internet poses suggestively, while the children posing in magazine catalogs are posing for the purpose of selling the clothes, not themselves.

Kiddy porn law does not describe what child pornography really means. The law only says that people will be punished when they distribute pictures of minors in sexually explicit poses,

> Participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct.[155]

According to U.S. Attorney Alice H. Martin, soft porn is like "[the] lewd has met lucrative, and [the] exploitation of a child's innocence equals profits."[156] Most borderline online pornography is not actual kiddy porn but soft porn.

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[153] The mother was not allowed to be in the same room during the photo session, but she came to visit the girl when Pierson left the room briefly only to see her daughter in a thong and a halter top.

[154] *Id.*

[155] Title 18 § 2251.

[156] Brunker, "Feds crack down on teen, preteen 'model' sites," page 1.

Popular web-based social-network software such as Friendster, Orkut, and Myspace are subject-domain-independent-user models, also known as *person models,*[157] feature self-descriptive personal profiles. Even though teenagers below the age of 18 years old are not allowed to enter Myspace sites, anybody can sign in using an older age. According to Danah Boyd, one concern is that even though a person might have a good profile, one could be hanging out with people with R-rated profiles.[158] Internet security experts have warned about MySpace and recommended safety tips for parents such as keeping computers in family rooms, checking computer files and logging onto Myspace and similar websites.[159]

Wall Street sees MySpace as a big business with 70 million users around the globe and a total of 100 million users as of August 2006.[160] The more members join, the more friends are attracted to join, and the company did not have to do any marketing. Many advertisers are cautious about investing unless the website is deemed to be safe. Already some campaigners are calling the website a pedophile's playground.[161] Rupert

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[157] Hugo Liu And Pattie Maes, "Interest Map: Harvesting Social Network Profiles For Recommendations," MIT Media Laboratory, paper presented in Workshop: Beyond Personalization 2005 IUI'05, January 9, 2005, San Diego, California, USA. http://ambient.media.mit.edu/assets/_pubs/BP2005-hugo-interestmap.pdf, Page 1. [accessed February 14, 2007].

[158] Bobbie Johnson, "Newly Asked Questions: Can Murdoch Make Money From Those Myspace Users?" *The Guardian (London)*, April 6, 2006, Technology, 2.

[159] Tim Mcnulty, "Be Safe In Myspace," *Pittsburg Post-Gazette (Pennsylvannia),* January 15, 2006, Local, A-14.

[160] Stephen Foley in New York and Saeed Shah, "Murdoch Amble Pays Off As Myspace Takes Over; Business Analysis," *The Independent (London)*, August 11, 2006, Business, 50.

[161] *Id.*

Murdoch, the owner of MySpace, had already purged 200,000 "objectionable" user profiles by April 2006, which is small compared to the number of registered users.[162]

Parents can use social-network websites to their benefit.[163] Parents can see what their kids and their kids' friends are doing by joining MySpace using fictitious names and ages. "The most common problem is teen girls posting photos or videos of themselves in sexually explicit positions. For the boys, it's pictures of themselves drinking alcohol and using drugs," said Parker Stech, a 20-year-old who is the founder of SafeSpacers whose business focuses on monitoring MySpace for parents clueless about teen lingo.[164]

A report by the National Center for Missing and Exploited Children showed that youths have been victimized online through various sexual approaches.[165] The report showed that harassment, which includes plain old hostility, threats, and maliciousness, needs to be given attention as well.[166] The people who have been harrassed often do not feel safe from anonymous communications or from closeness with people.

Any channels of communication provided to children can always be in turn used by pedophiles, because pedophiles will use available channels to reach children, through message boards, interactive Web sites, emails, discussion groups, and games. For example, in 2004 the Phoenix Public Library rescinded a disabling policy after sexual

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[162] Bobbie Johnson, "Newly Asked Questions: Can Murdoch Make Money From Those Myspace Users?," *The Guardian (London),* April 6, 2006, Technology, 2.

[163] See myspaceforparents.com. See also Simone Sebastian, "The Internet: Myspace Not Their Space Any Longer", *The San Francisco Chronicle (California)*, September 30, 2006, Bay Area, B1.

[164] *Id.*

[165] David Finkelhor, Kimberly J. Mitchell, and Janis Wolak, *Online Victimization: A Report On The Nation's Youth,* (June 2000), Crimes Against Children Center, National Center For Missing and Exploited Children, 13.

[166] *Id.,* 24.

exploiter Charlton Glenn Ward admitted to downloading "kiddy porn" from its library computer.[167] He molested an 18-month-old baby in the public library after viewing too much porn. He grabbed the baby away from the babysitter and rushed her to the men's bathroom to molest her. Officials tracked his cached Internet visitations and found Ward viewed too much pornography and used library computer terminals frequently for just that purpose. The public was furious. More and more citizens are pushing state legislators for filters on state library Internet terminals, and legislators are leaning toward more legislation.[168]

Similarly, in Des Moines, a group pushed for more Internet filters in 2005 after a homeless sex offender, James Effler Jr., molested 20-month old toddler in a Des Moines public library restroom after having viewed pornography numerous times on different occasions in that library.[169]

These are just two examples of molestation cases that happened in relation to patron's frequency of viewing online pornography in public libraries. According to Dan Kleinman, founder of the Chatham, N.J.-based Plan 2 Succeed citizens group, which

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[167] Blocking Library Porn Raises Risks," *The Arizona Republic,* August 28, 2004, Id: Pho89431071 http://localsearch.azcentral.com/sp?keywords=glenn+ward+porn [accessed May 2, 2006]; "David Burt: 65 Percent Of Libraries Now Filtering Internet [Fs]," Politech, 13 Jan 2005 [accessed May 2, 2006].

[168] "Groups Push Internet Filters After Library Sex Offender Incident," *The Des Moines Register*, Monday, November 21, 2005, Bc Cycle, State And Regional Section. http://www.desmoinesregister.com [accessed May 2, 2006] and http://proxy.mul.missouri.edu:2084/universe/document?_m=1cc02b5e99edd99f6dc46faa242e0a5e&_docnum=1&wchp=dGLbVtz-zSkVA&_md5=1688effdf354a67cab79240517062dfb [accessed January 3, 2007]; Emily Gurnon, "Library To Filter Online Porn: Ramsey County Acts After Weighing Access vs. Problems," *Pioneer Press (St. Paul, Minn)*, March 17, 2006; "Corvallis Citizens Group Presses For Internet Filters In Children's Section Of Library," *Corvallis Gazette-Times* Tuesday, August 10, 2004, Bc Cycle, wired by *The Associated Press State & Local Wire*. From Lexis-Nexus, Http://Web.Lexis-Nexis.Com/Universe/Document?_M=2ad4da48c0121e1e5311000746c05f28&_Docnum=2&Wchp=Dglzvz-Zskvb&_Md5=49eafb6da80ad28226fd550efbbe64a4 [accessed May 2, 2006].

[169] "Groups Push Internet Filters After Library Sex Offender Incident," *The Des Moines Register*, November 21, 2005.

seeks to filter library computers, saying, "It's reoccurring in these communities. It's not frequent, but reoccurring."[170] Similar cases are occurring all over the country, and will continue to do so as long as the government has not tightened its reigns in the area of online pornography.

According to Congressional findings, "pedophiles might 'whet their own sexual appetites' with pornographic images,"[171] and, "additionally, child pornography 'stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies.'"[172]

Congress has always pointed out that pornographic materials impair the psychological and moral development of children because pornography does not provide children "with a normal sexual perspective."[173] According to Solicitor General Olson, state courts and the Supreme Court have always accepted this compelling argument, saying:

> Courts of Appeals and state courts have consistently upheld state display laws on the ground that they further the government's compelling interest in shielding minors from material that would impair their psychological and moral development, without imposing

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[170] Dan Kleinman quoted in "Groups push Internet filters after library sex offender incident," *The Des Moines Register*, November 21, 2005; To see more articles concerning libraries and pornography, go to http://www.plan2succeed.org/publications.html [accessed February 15, 2007]; See also, fn 153: "Groups push Internet filters after library sex offender incident," *The Des Moines Register*, November 21, 2005.

[171] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002), quoting Congressional Findings, Notes (3), (4) and (10)(B) Following § 2251.

[172] *Free Speech Coalition v. Reno*, No. C 97-0281 SC, 1997 U.S. Dist. LEXIS 12212 at 2, quoting Sen. Rep. Note 12.

[173] Brief Amici Curiae of the Society for the Scientific Study of Sexuality, the Institute for Advanced Study of Human Sexuality, the Sexual Health Network, The American Board of Sexology, the National Coalition Against Censorship, and the First Amendment Project, On Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *John Ashcroft v. American Civil Liberties Union*, No. 00-1293, September 20, 2001. http://www.fepproject.org/courtbriefs/ashcroft.html [accessed December 4, 2006].

> an unreasonable burden on adults who seek access to such material. COPA is constitutional for the same reason."[174]
>
> This Court (the Supreme Court) has repeatedly recognized … that exposure to such material harms the psychological and moral development of minors, *Reno v. ACLU,* 521 U.S. at 869; *Sable*, 492 U.S. at 126; *Ginsberg*, 390 U.S. at 639-640, and the record before Congress contains ample evidence confirming that conclusion. See H. Rep. 775, at 11. Further proof is not required (Olson, 2001).[175]

Dan Kleinman is the founder of the Chatham, N.J.-based "Plan 2 Succeed" citizens group, which seeks to have filters installed on library computers. Although Kleinman "couldn't provide proof that offenders who become aroused by viewing pornographic material at libraries victimize women and children, he cited testimony in Congress about how pornography is addictive and triggers primal sexual urges."[176]

According to Brooke Marshall (2005), inferences from psychological studies of child development and pornography studies with adults show that "a young boy may carry with him attitudes of objectification of women, unrealistic views of sex, and a blurred vision of personal boundaries.[177] A young girl may harbor feelings of inadequacy, sexual pressure, and the same lack of personal boundaries."[178] And, "like any traumatic incident, there is a chance that it could damage their mental and moral development."[179]

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[174] Theodore B. Olson, Solicitor General, Reply Brief For The Petitioner On Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *Ashcroft v. American Civil Liberties Union*, No. 00-1293, October 2001. http://supreme.lp.findlaw.com/supreme_court/briefs/00-1293/00-1293.mer.rep.html [Accessed December 4, 2006].

[175] Olson at note 2.

[176] Dan Kleinman quoted in "Groups push Internet filters after library sex offender incident," *The Des Moines Register*, November 21, 2005—supra notes 153-155 and text.

[177] Bruce Watson and Shyla Rae Welch, "Just Harmless Fun: Understanding the Impact of Pornography," *Enough is Enough*, (2000), 1-20. www.protectkids.com/effects/justharmlessfun.pdf [accessed February 15, 2007].

A scientific study published in the *Journal of Pediatrics* (2007) showed that most adolescents do not want exposure to online pornography.[180] Authors Wolak, Mitchell and Finkelhor performed a nationally representative sample of 1,500 Internet youths aged 10 to 17 through a telephone survey between March and June 2005.[181] Most of the teenagers had come from upper SES families and were mainly whites.

Some 42 percent of youth Internet users had been exposed to online pornography in 2004.[182] Of the 42 percent, 66 percent reported unwanted exposure.[183] Unwanted exposure were higher for teens who have been harassed or sexually solicited online or interpersonally victimized offline, and youth who scored borderline or significant in the Child Behavior Checklist subscale for depression.[184] The wanted exposure to online pornography was mostly from teenage boys and rates of wanted exposure increased with age.[185] More than one third (38 percent) of male Internet users 16 to 17 years of age had visited X-rated sites.[186] Wanted exposure to online pornography was associated to file-

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[178] Brooke A. Marshall, "Who Should Be Allowed To Teach Our Children About Sex? Protecting Children From The Dangers Of Cyberporn By Analyzing The Child Online Protection Act As A Regulation On Commercial Speech," 22 T.M. Cooley L. Rev. 369, 390 (2005).

[179] Marshall, 390.

[180] Janis Wolak, Kimberly Mitchell and David Finkelhor. "Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users," Journal of Pediatrics 119, (2007), 247-257. This information is current as of February 9, 2007.

[181] Wolak *et al.*, 247.

[182] *Id.*, 247.

[183] *Id.*

[184] *Id.*

[185] *Id.*, 254.

[186] *Id.*

sharing programs using the Internet at friends' homes,[187] and youth who scored borderline or significant in the Child Behavior Checklist subscale for rule-breaking.[188] The study suggested that depression and delinquent behavior were associated to online sexual compulsion, "which could impair [youths'] ability to meet daily obligations and to develop healthy relationships with peers."[189]

What makes pornography on the Internet different than pornography outside of the Internet lies in the unique qualities of the Internet and its architectural background. According to the Committee for Computer Science and Telecommunications Board:

> Although some such material is comparable to sexually explicit videos and print media that are easily available in hotels, video rental stores, and newsstands, other sexually explicit material on the Internet is more extreme than that which is easily available through non-Internet media. Furthermore, even the most graphic of these images can find their way onto children's computer screens without being actively sought, which makes this medium different from most other media.[190]

Children and online pornography is a major problem area that baffles highly educated people in the legal system in the sense that they cannot solve the issue. Some youths have expressed that they do not want to be exposed to online pornography,[191] and it is the mission of this study to reduce children's encounters with online obscenity.

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[187] *Id.*, 254, 255.

[188] *Id.*, 247.

[189] *Id.*, 255.

[190] National Research Council, the Committee for Computer Science and Telecommunications Board, *Youth, Pornography and Internet,* (Washington, D.C.: National Academy Press, 2002), 21.

[191] See Wolak, supra notes 165, 166, 180-189.

Chapter 2

Theoretical Framework

This dissertation is an attempt to find solutions to reduce the possibility of children encountering obscenity on the Internet. The research question is: How can the federal government find solutions to reduce the possibility of children encountering obscenity on the Internet?

A definition of the terms in this question might help clarify the research question: federal government, solutions, children, encounter, obscenity, and Internet.

1. *The federal government*: The federal government includes the Congress, the U.S. Attorney General, the federal District and appellate courts, and the U.S. Supreme Court. The specific governmental body will be mentioned when relevant to the specific statute or law examined. Federal court dicta & statutes will be examined as a whole but by no means for coding purposes, e.g. counting the number of times a court says something. This study does not analyze upon state cases, or state statutes on obscenity laws.

2. *Solutions*: Solutions are laws, informal or formal policies, and rules that help government reduce the possibility of children encountering obscenity on the Internet. This study will cover six statutes enacted by Congress concerning online child protection. These specific laws are the Communications Decency Act (CDA) enacted in 1996, the Child Online Protection Act (COPA) enacted in 1998, the Children's Internet Protection Act (CIPA) enacted in 2000, the Children's Online Privacy Protection Act (COPPA) enacted in 1998, the Child Pornography Prevention Act (CPPA) enacted in 1996, and the

Dot Kids Implementation and Efficiency Act (Dot kids) enacted in 2002. The laws cover pornography, privacy relating to pornography and domain name issue. Indecent language, indecent images, obscene materials are covered by CDA, COPA, CIPA; privacy which may lead to pornography are covered by COPPA, obscene computer images are covered by CPPA, and the domain-name issues are covered by DotKids.

In this study, an ecological-systems approach provides a model for finding solutions. An ecological-systems approach can literally be visualized as layers of Russian dolls, with the layers consisting of the legal system as the outer-most layer, known as the macrosystem; the technological system, the business industry, and the school board system comprise the next inner layer, known as the exosystem; the community and the family comprise the next inner layer, known as the mesosystem; and, finally, the individual child is the core, known as the microsystem. Urie Bronfenbrenner, theorist, explained that the several environmental factors interact with the child and influences the child. (For more details on Ecological-Systems, see Chapter 4)

3. *Children*: For the purposes of this study, to determine whether a person is a child is by his or her age. Each statute or law defines its own age of a minor. For the CDA, the age of a minor is set at below 18; for the COPA, at below 17; for the CIPA, below 17; for the CPPA, at below 18; for the COPPA, at below 13; and for DotKids, at below 13. For other laws such as drinking, driving, military entrance, child labor, marriage, and sexual activity, Congress has also set specific ages for when a person is not a minor and can therefore do these activities. These will be discussed in Chapter 3. For the reasons found in Chapter 3, this dissertation recommends the age-of-a-minor to be set at below 15.

4. *Encountering*: Encountering is the exposure through hearing and watching (audio, visual and textual depictions) of obscene materials on the Internet through any device that carries internet communications, e.g. computers, palm pilots, and/or cell phones. The emphasis is not on the devices but on the exposure.

Children may encounter obscene materials through software applications running on the Internet such as newsgroups/Usenet groups, instant messaging, chatting, electronic mails, and the World Wide Web. In chat rooms, electronic mails, newsgroups, and instant messaging, obscene materials may be transmitted in the form of a hyperlink in a message, or presented as a graphical image with or without audio within the message. On the World Wide Web, children may encounter obscenity on Web sites through the use of search engines and sometimes on unsolicited pop-up windows through use of Web browsers.

5. *Internet:* The Internet, as mentioned in the previous chapter, is a network of networks "which form and act as a single huge network for transport of data and messages across distances which can be anywhere from the same office to anywhere in the world."[192] The setting for this dissertation takes place on the Internet. This study will use the term "Internet" instead of "World Wide Web" because Congress has used the term "Internet" when shaping most relevant children's laws. The Internet is the whole medium whereas

[192] Slater, ppt. slide 6.
Web sites and Web pages: Includes any Web sites or Web pages that children visit that have obscene materials are considered to be obscene and therefore inappropriate.
World Wide Web: The WWW is an application (what kind) that runs on the Internet. Some chat rooms run on the WWW. Obscene images are posted on a Web page or as a pop-up window or as a hyperlink in instant messages. Legitimate commercial pornography Web sites will be included as well.
Search Engines: Includes any search engines that children would type in a keyword or keywords such as "breast" or "white house" or "Barbie." The search engines would then give a list of sources in connection to the keyword(s).

the World Wide Web is a software application. Pornography can be accessed through the various ways described below:

> Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium--known to its users as "cyberspace"--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.[193]

The Internet's architecture is open source[194] and decentralized.

6. *Obscenity:* The variable obscenity section of this chapter will explain the complexity of the obscenity issue and the lack of supervision section of this chapter will explain the concept of indecency. These two sections will give the Court's and administrative government's stand on the definitions of "obscenity," and "indecency." Attempts by a few legal professionals to define "obscenity," "indecency," and "pornography" will be covered. This dissertation is influenced by the laws and statutes that has relied on the courts' understanding of "obscenity," "indecency," and "pornography" which makes the discussion more applicable to real-life situation, and does not attempt to define these terms.

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[193] *Reno v. ACLU,* 521 U.S. 844, 850-851.

[194] "The Open Source Definition," OpenSource.org (2007). http://www.opensource.org/docs/definition.php [January 4, 2007]. Definition of Open Source: Open source doesn't just mean access to the source code. The distribution terms of open-source software must comply with the criteria.

Methodology

Legal methodology is *sui generis,*[195] meaning that it is unique in its form of analysis; pure legal methodology cannot be categorized under the social science qualitative research paradigm. The legal framework is founded in the principle known as "stare decisis," according to Black's Law Dictionary,

> *stare decisis* is 'to stand by things decided;' the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points follow earlier judicial decisions when the same points arise again in litigation.[196]

Once a case has been decided, the following similar situations should be decided the same way; this is known as the doctrine of precedent – that old law applies to new situations.

Some precedents are binding; some are merely persuasive, depending on jurisdictional considerations. Principles can be distilled from precedents. This doctrine of precedent applies to the Internet aw well: that established rules and regulations from previous broadcast technologies, such as the radio, and the television applies to the Internet. The federal government will enforce old law on the Internet. The Federal Trade Commission, a federal agency, says on its website, "If you're thinking about advertising

[195] Bryan A. Garner, chief editor, *Blacks Law Dictionary*, (Thomson-West Group, St. Paul: MN), (8th ed., 2004), 1475; *Sui generis:* is of its own kind or class; unique or peculiar.

[196] Garner, 1443.

on the Internet, remember that many of the same rules that apply to other forms of advertising apply to electronic marketing."[197]

No one can truly understand a court decision unless he or she understands the historical context of previous cases leading up to the decision, and considers the social context at the time of the decision such as important environmental, economic or political considerations of the time, when applicable. One should also consider cases from other jurisdictions that have influenced the decision as well as looking at binding precedents. Take the example of *Miller v. California*, a case where obscene pamphlets were mass mailed out publicly, violating California's statute prohibiting distribution of obscene materials.[198] The Supreme Court in 1973 took into account the historical-social context of the *Miller* case, which included the Vietnam War, the Nixon era, unrest, and changing sexual mores.

Stare decisis dictates that cases may not be looked at in isolation. In the examination of cases in this dissertation, the approach takes into account the fact that courts have to consider many factors in economics, politics, society, and technology known as the social-historical context of protecting children against obscenity. Examples of these factors are the various media outlets; the computer-savvy children; the movement towards open-software; and the dynamic cultural norms. After considering the surrounding cases in the specific area of law, the legal question of the case and the

[197] "Advertising and Marketing on the Internet: Rules of the Road," Federal Trade Commission—Facts for Businesses, (September 2000), http://www.ftc.gov/bcp/conline/pubs/buspubs/ruleroad.htm [accessed April 13, 2005].

[198] Miller v. California, 413 U.S. 15 (1973). Infra notes 329-333, variable obscenity section.

contexts at the time of the case, the court then makes a decision, often having to loosen the reigns of ideology from previous cases to accommodate changes in the era.

Similarly, the interrelatedness of statutes cannot be dismissed. First, statutes are often a response to court criticisms of Congress' earlier attempts. For example, the Communications Decency Act (1996) was Congress' first attempt at tackling indecent communications on the Internet, and the Communications Decency Act II (1998) was Congress' second attempt and a response to the Supreme Court's criticisms of the Communications Decency Act.[199] Second, the language from statutes may be replicated in different jurisdictions. For example, statutory language ("prohibition of advocacy of violent overthrow of government") is identical in *Gitlow v. New York*[200] case and in *Dennis v. United States.*[201] Third, scholars have written model statutes, uniform laws, or restatements of laws that have been adopted successfully in some states. Uniform laws on child support and commercial codes are examples of model statutes. Fourth, the federal government can compel every state to adopt certain statutes or forfeit federal funding; this is known as "federalization." For example, Megan's Law was inspired by a 7-year-old New Jersey girl who was molested and killed by a "known child molester who moved across the street from a family, … New Jersey passed Megan's law in 1994," and Congress passed Megan's Law in 1996, different states have different forms of Megan's

[199] CDA2 is also known as the COPA. CDA2 was introduced in the 105th Congress as S. 1482. To see the legislative history of CDA2, go to http://www.cdt.org/speech/copa/copa.php [accessed January 8, 2007].

[200] Gitlow v. New York, 268 U.S. 652 (1925).

[201] Dennis v. United States, 341 U.S. 494 (1951).

Law.[202] Thus, outright duplication of statutes and the use of similar language amongst statutes are common.

Legal methodology is linear. It is linear because of the progression in time from point A to point B and up to the current point. Courts can even do a loop by changing their minds on certain holdings. In the area of obscenity standards and definitions, the outstanding cases chronologically were: point A, the *Hicklin*[203] case (1868) → point B, the *Ulysses*[204] case (1934) → point C, the *Roth*[205] case (1957) → and onwards up to the *Miller*[206] case (1973). The U.S. Supreme Court's *Miller* case became the binding precedent for obscenity. Since 1973, the *Miller* case has been applied to various obscenity cases. The U.S. Supreme Court has cited these prior decisions in Internet obscenity cases.

Legal Research

Gillmor and Dennis said that the two approaches to legal research for mass communication students are traditional legal research, which involves examining law materials, and empirical and behavioral legal research which employs the methods of

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[202] Charles Montaldo, "History of Megan's Law," About.com, http://crime.about.com/od/sex/a/megans_law.htm [accessed January 8, 2007].

[203] Regina v. Hicklin, (1868 L. R. 3 Q. B. 360), passed from England. Infra notes 329-333.

[204] United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y 1933), aff'd United States v. One Book Entitled Ulysses by James Joyce, 72 F2d 705 (2nd Cir. 1934). Judge Woolsey found the book not obscene and did not use the Hicklin test.

[205] Roth v. United States, 354 U.S. 476 (1957). Infra notes 335-337, 354.

[206] Miller v. California, 413 U.S. 15 (1973). Infra notes 349-358.

social science while recognizing the unique circumstances and problems of law.[207] This study will use the traditional legal research approach.

There are two important law sources: primary and secondary. Amy Sloan, a law professor, said, "primary authority is the term used to describe rules of law."[208] The two types of primary authority are mandatory and persuasive. Primary mandatory is "authority that the court is obligated to follow."[209] Primary persuasive is a rule that the Court finds persuasive "if the issue before the court has not been clearly resolved by mandatory authority."[210] Courts base assumptions in part on the facts of the case at hand, but also in part on their understanding of human nature and the power of words. Secondary analysis on the other hand, provides analysis of the law and can be used to get an overview of a legal issue. Secondary sources provide commentary on the law. Even though not binding and not cited as frequently as primary sources, they are excellent research tools. One function of secondary sources is to collect authorities from a variety of jurisdictions, hence providing explanations of complex concepts. Some examples of secondary sources in the law field are legal encyclopedias, legal periodicals, treatises, restatements of the law, uniform laws and model acts. Secondary sources in the non-law fields are newspapers, magazines, journal articles, studies from different fields, and studies conducted by private sectors. Researching non-legal materials comes only after

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[207] Donald M. Gillmor and Everette Dennis, "Legal Research in Mass Communication," in *Research Methods in Mass Communication*, Guido H. Stempel III and Bruce H. Westley, eds., (Englewood Cliffs, NJ: Prentice Hall, 1989), 332.

[208] Amy E. Sloan, *Basic Legal Research,* (New York: Aspen Law and Business, 2000), 4.

[209] Sloan, 5.

[210] *Id.*

analyzing primary authority. Non-legal materials help researchers discern underlying premises and the facts.[211] This study will analyze primary authority and use secondary sources to help with the analysis when necessary.

Legal research is one of experiential learning; and learning the skill of legal research can only be achieved by doing.[212] The researcher can start anywhere in the process because there are no established series of steps that must be followed to uncover a question: the starting, middle, and ending points may vary with different projects.[213] Legal research can be described as an art;[214] each person has his or her own approach to legal research, depending on the researcher's goals.[215]

Gillmor and Dennis said, "traditional legal research involves an exhaustive examination of legal materials in a law library setting."[216] Gillmor and Dennis state that legal research requires the legal researcher to set down a proposition, gather "evidence to support its plausibility, and that evidence may come from opinions of the court, dissenting opinions, legislative histories, constitutional interpretation, and legal commentaries."[217] Legal research includes:

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[211] *Id*., 21-23.

[212] *Id*., preface and 6.

[213] *Id*., 6.

[214] Sarah E. Redfield, *Thinking Like a Lawyer: An Educator's Guide to Legal Analysis and Research* (Durham, NC: Carolina Academic Press, 2002), 113.

[215] *Id.*

[216] Gillmor and Dennis, "Legal Research in Mass Communication," (1989), 332.

[217] *Id.*, 335.

> Clarifying the law through analysis of procedures, precedent, and doctrine, reforming old laws and creating new ones; providing a better understanding of how law operates in society; and furnishing materials for legal education.[218]

For researchers in disciplines such as communications law, it is necessary for the researcher to understand a communication law problem in the context of law having its origins in a legal setting.[219]

Gillmor and Dennis said that "traditional legal methodologies, … are qualitative, their outcomes sometimes inexplicable, even unique—but not always."[220] However, what Christina Kunz *et al.* and Sloan, scholars in the law field, mean when they say "legal methods" is the ways in which one can retrieve and analyze legal materials.[221] For instance, Amy Sloan categorized different types of law and ways of retrieving each type of law.[222] Likewise Sarah Redfield, an education scholar, considers the purpose of methodologies to be "accessing legal materials."[223] Even Gillmor and Dennis used the concept of "tools of legal research."[224] Legal tools are for retrieval of the law and the secondary sources such as federal court opinions, state court opinions, statutes regulations and commentaries on the law. Legal tools could be specific electronic

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[218] *Id.*, 334; Donald M. Gillmor and Everette E. Dennis, "Legal Research and Judicial Communication," in *Political Communication,* Steven H. Chaffee, ed., Sage Annual Reviews of Communication Research (Beverly Hills, CA: Sage Publishing Co., 1975) 283-305.

[219] Gillmor and Dennis, "Legal Research in Mass Communication," (1989), 332.

[220] *Id.*, 345.

[221] Sloan (2000), 9; Christina L. Kunz, et al., *The Process of Legal Research: Successful Strategies,* 3rd ed., (Boston: Little, Brown, 1992).

[222] Sloan, 19, 21-323.

[223] Redfield, 114.

[224] Gillmor and Dennis, "Legal Research in Mass Communication," (1989), 335.

databases such as Lexis or Westlaw, or the Internet and print sources such as the *Media Law Reporter, United States Law Week* and *Government Printing Office* publications.[225] Most print sources are also electronically available through the Internet, which "speeds up traditional processes of legal research and performs some tasks that would be time-consuming,"[226] according to Gillmor and Dennis. In general, legal tools are for retrieval and legal method is for analysis.

Using Legal Research in Other Disciplines

According to Kunz et al., one disadvantage of legal research is that the "law provides only one perspective" to "any particular problem." Thus, she emphasized the importance of drawing from non-legal information in resolving "legal" problems.[227]

Even though this study is not based in the education field, one can glean from Redfield's idea that the two different fields of law and non-law can come together to fill a void in thinking. According to Redfield, who wrote *Thinking Like A Lawyer*, it is important for both people trained in education and in law "to come together to learn," and Redfield encouraged non-law professionals to "fill a void that presently exists to be able to advise and counsel in order to cross the divide in thinking."[228] Educators and lawyers are able to learn different theories and to observe different service contexts. Some people in the political science field are able to use traditional legal research and to tweak it towards positivism (legal realism):

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[225] *Id.*, 335, 336.

[226] *Id.*, 336.

[227] Kunz *et al.*, 451.

[228] Redfield, ix.

> The application of social science methods to the study of mass communication law and other legal problems is of relatively recent origin, and there is a paucity to literature. The new approach is an outgrowth of scholarly trends in jurisprudence and political science away from natural law toward positivism (legal realism, political jurisprudence, and judicial behavioralism).[229]

By not confining themselves to the strictness of the traditional legal methodology, the political science researchers are able to focus on advancing contemporary life settings.[230] For instance, political science scholars have shown that elections and politics do affect the law.

The multidisciplinary approach of legal and social research is of recent origin. Gillmor and Dennis presented six models of legal and social research:

1. to clarify the law and offer explanations through an analysis of procedures, precedents, and doctrines;
2. to reform old laws and suggest new laws;
3. to give greater understanding of how the law operates in society;
4. to research social effects of false and deceptive advertising and how the Courts and regulations have not been able to deal with the problem;
5. to analyze the political and social processes that shape our communication laws;
6. to furnish materials for legal and journalistic education in mass communication[231]

Mass communication researchers have been interested primarily in six areas of law.[232] First, torts; second, criminal law; third, personal property; fourth constitutional law; fifth legal procedure; and sixth, administrative law.[233] This dissertation's primary interest is in the area of constitutional law.

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[229] Gillmor and Dennis, 345.

[230] *Id.*, 346.

[231] *Id*., 341-342.

[232] *Id*., 332.

[233] *Id*.

An example of an interdisciplinary non-law and law dissertation is Samuel J. Friedman's "*Web advertising targeted to children: Prospects for regulating and establishing policy.*"[234] He explored Websites targeting children by describing them qualitatively, analyzed decency laws and gave recommendations.

"From any vantage point," says Redfield, "it has become crucial for educators, community leaders, and advocates for children and schools to understand the basics of legal analysis."[235] At the same time, "almost every research project in the broad areas of communications involves economic, political or social as well as legal problems, and in many cases it is impossible to separate the strictly legal from other aspects."[236]

This study explores six major statutes and laws altogether using legal methodology. They are the Communications Decency Act (CDA) enacted in 1996, the Child Online Protection Act (COPA) enacted in 1998, the Children's Internet Protection Act (CIPA) enacted in 2000, the Children's Online Privacy Protection Act (COPPA) enacted in 1998, the Child Pornography Prevention Act (CPPA) enacted in 1996, and the Dot Kids Implementation and Efficiency Act (Dot kids) enacted in 2002. Legal analysis is conducted through the examination of the primary sources of law. Primary sources in the study may include court opinions, legislative records, U.S. statutes, and the Code of Federal Regulations. Secondary sources such as law reviews, legal news, legal briefs, law reports, commentaries about the law, and articles from other disciplines will be used when applicable. Such information will be used to "apply existing law to fact situations,"

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[234] Samuel J. Friedman, *Web advertising targeted to children: Prospects for regulating and establishing policy,* (Ed.D. Thesis, Columbia University Teachers College, 1999).

[235] Redfield, xii.

[236] Gillmor and Dennis, "Legal Research in Mass Communication," (1989), 333.

so that one can "understand not only the law of a problem but also the perspectives of other pertinent disciplines such as the social sciences."[237]

Legal Theories

"Marketplace of Ideas" Theory

The "marketplace of ideas" theory is the power of a thought "to get itself accepted in the competition of the market."[238] In the words of Justice Oliver Wendell Holmes:

> To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[239]

The marketplace of ideas theory assumes that rational decisions emerge from consideration of all facts and all sides of arguments, from hearing all sides of the question and considering all alternatives. People have the right to receive ideas.

The marketplace of ideas theory encompasses theories of the First Amendment, student speech, commercial speech, variable obscenity and consumer protection, which will be explored below.

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[237] Kunz *et al.*, 441.

[238] Abrams v. United States, 250 U.S. 616 (1919).

[239] *Abrams* at 630 (Justice Holmes, dissenting).

First Amendment Theory

The theory of the First Amendment explains when expression should be free and when expression should be restricted.[240] Explaining expression sounds easy enough considering the First Amendment was written as part of the Bill of Rights in 1791 with these words:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[241]

However, ambiguity lies in the range of speakers, the expression itself, and the circumstances that such a theory should encompass.[242] Some people argued that the meaning of the First Amendment when it was drafted was to block prior censorship and prosecution for seditious libel; others argued that it was intended to prohibit only prior censorship.[243] The meaning of the First Amendment is determined through interpretation by the U.S. Supreme Court because nobody knows exactly what guarantees of freedom of expression meant to the persons who drafted it.[244] From the standpoint of the law, whatever the Supreme Court of the United States says the First Amendment is, that is what it means even though people might disagree about its interpretation.[245]

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[240] Kent R. Middleton, Bill F. Chamberlin and Matthew D. Bunker, *The Law of Public Communication*, 4th ed., (New York: Longman, 1997), 25.

[241] U.S. Const, amend. I.

[242] Middleton, *The Law of Public Communication,* 25.

[243] Don R. Pember, *Mass Media Law*, (Boston: Mc Graw Hill, 2001), 46.

[244] Pember, 46.

[245] Pember, 42.

Five important strategies govern First Amendment theory which guides judges in determining the definition of freedom of expression.[246] These are absolutist theory, ad hoc balancing theory, preferred position balancing theory, Meiklejohnian theory and access theory.

First, absolutist theory declares that what is written as "no law shall abridge" means absolutely no law. Justices Hugo Black and William Douglas subscribed to this position.[247] According to Don Pember, a media law professor, the absolutist theory received little support "because it fails to acknowledge that other important human rights often conflict with freedom of speech and press."[248]

Second, the ad hoc balancing theory sprang from the understanding that human rights are in conflict, and when conflict occurs, it is the court's responsibility to balance freedom of expression with other values.[249] The meaning of free speech is determined on a case-by-case basis, and the scales are erected anew each time.[250] Ad hoc balancing leads to uncertainty because it leaves its final determination to the personal biases of the judges.[251]

Third, preferred-position balancing theory places the burden of proof on the government or on the state that wants to limit free speech and press in order to protect

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[246] *Id.*

[247] *Id.*

[248] *Id.*, 43.

[249] *Id.*

[250] *Id.*

[251] *Id.*, 44.

other interests.[252] The government "must prove to the Court that its censorship is justified and is not a violation of the First Amendment,"[253] according to Pember. By placing the burden on government, citizens are not forced to convince the court that they had a constitutional right to speak or publish. This theory of preferred position balancing is more used than any other theory.

Fourth, Meiklejohnian theory comes from the philosopher Alexander Meiklejohn who in the 1940s looked at the First Amendment in a pragmatic manner.[254] He argued that the primary value of the First Amendment is a means to an end where the end is successful self-government and that the only reason that freedom of speech and press are protected is so that the U.S. system of democracy can function.[255]

Fifth, access theory came about in the mid 1960s from the idea that every individual should have the right to express views in the public press and not just a few wealthy individuals who control the media.[256] If the press will not voluntarily open up access to average citizens, then the government should force the mass media to provide this access. The First Amendment does not give government the right to force the media to publish the views of a citizen.[257] However, the Federal Communications Commission

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[252] *Id.*

[253] *Id.*, 44.

[254] *Id.*

[255] *Id*.

[256] *Id.*, 45.

[257] Miami Herald v. Tornillo, 418 U.S. 241 (1974). The Supreme Court unanimously rejected the idea that access should be given to citizens because what goes into a newspaper and the decisions of content, layout and choice of public issues must be made by the editors.

justified the application of the Fairness Doctrine[258] and other rules that force broadcasters to carry certain programs and to let the people have a right to view or to hear programs reflecting a diverse range of ideas.[259]

The scope of the First Amendment extends to various forms of expressions and people. These are political and social expression, and commercial and sexual expression, by adults, government employees, students, and corporations.[260] The First Amendment also covers a range of issues such as prior restraints; time, place, manner restrictions; privacy; obscenity; hate speech; libel; copyright; freedom of information; advertising and telecommunications.[261]

Often, there is an inverse relationship between adults' First Amendment rights and protection of children, although in some cases technology might not make that an inverse relationship. Adult's First Amendment rights are a vital part of why the laws protecting children on the Internet keep getting overturned or remanded. Without trying to balance adult's First Amendment rights, laws can be as restrictive as can be and still be acceptable to society. Technological solutions are also affected by adult's First Amendment rights because the purpose of the technical solutions, *i.e.*, filters and rating system, are to maintain adults' freedom while prohibiting children from certain speech.

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[258] Merriam-Webster's Dictionary of Law 1996, Answers.com, http://www.answers.com/topic/fairness-doctrine [accessed April 12, 2005]; Definition of Fairness Doctrine: A doctrine requiring broadcasters to provide an opportunity for response to personal attacks aired by the broadcaster and esp. for the airing of conflicting viewpoints on controversial issues.

[259] Pember, 45, 46.

[260] Middleton *et al*., *The Law of Public Communication,* 43-57.

[261] Pember, iv-viii.

Thus, the reason it is hard to reduce the possibility of children encountering obscenity on the Internet is because the government has to consider balancing adults' First Amendment rights while protecting children.

Commercial Speech Doctrine

The commercial speech doctrine is a constitutional doctrine protecting private companies from consumers, other companies or governmental bodies. Commercial speech is speech that takes the form of advertising or public relations. The First Amendment protects "commercial speech" as long as an advertisement does "no more than propose a commercial transaction;" illegal business practices are not protected.[262] The protected commercial speech must promote a lawful product in service, must be true and not be misleading. Likewise, if the government sees the need to regulate advertising, it must stay within the bounds of constitutionality in that it must have a legitimate regulatory interest in limiting advertisement. Also, limiting the ads must directly advance the government's regulatory interest, see *44 Liquormart, Inc. v. Rhode Island* .[263]

The Court in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council* (1976) decided that advertising provides a service to the consumer and warrants protection under the First Amendment.[264] The Court held that Virginia state may not ban lawful advertising of drugs unless the advertising is unlawful or misleading.[265]

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[262] American Academy of Advertising, Advertising and Government Panel. "Advertising and government regulation: A Report by the Advertising and Government Panel of the American Academy of Advertising," Report No. 79-106, (Cambridge: Marketing Science Institute, 1979).

[263] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[264] Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[265] *Id.*

In 1980 in the *Central Hudson Gas and Electric Corp. v. Public Service Commission*,[266] a Rhode Island local community wanted to ban electricity advertisements, even ads that asked people in the state to conserve electricity. The Court protected Commercial speech in the *Central Hudson* case by the balancing of governmental regulations and advertising. The Court outlined a test for when governmental regulations are legitimate: (1) if the advertising is not misleading and the activity is lawful, then (2) the Court checks for substantial government interest in the regulation, (3) if there is substantial government interest, the Court asks whether the regulation directly advances that interest, and (4) whether the regulation is not more extensive than necessary.[267]

The test that the courts would be using on Internet commercial speech issues is most likely the *Central Hudson* test or *Virginia Board of Pharmacy* precedent. Also, if website operators will not abide by the Rules of the Road for marketing,[268] which is to apply laws for business conduct to the Internet setting, then the Federal Trade Commission will prosecute. The goal of most government action is to protect consumers; while the courts usually will balance out consumer protection versus the interests of the business enterprise.

On the Internet, however, the questions are whether regulatory schemes are subject to the same analyses as those designed for other types of speech and whether the

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[266] Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).

[267] *Id.*, 561-566.

[268] Federal Trade Commission, "Advertising and Marketing on the Internet: Rules of the Road," Facts for Businesses, http://www.ftc.gov/bcp/conline/pubs/buspubs/ruleroad.htm [January 10, 2007].

Internet have the same protections as do other media such as print and broadcast.[269] These puzzling questions posed by legal scholars and the courts are based on the premise that the Internet differs fundamentally from traditional forms of mass media because the Internet "is capable of maintaining an unlimited array of information and exists without institutionalized editorial constraint."[270] Justice Scalia asked during an oral argument regarding indecent communications on the Internet whether it is possible that a statute is "unconstitutional today, or was unconstitutional two years ago, but will be constitutional next week? … Or next year or in two years?"[271] Historically, "each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems,"[272] according to Justice Blackmun in 1975. Justice Jackson said in 1949,[273] "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method,"[274] but in the case of the Internet, it has not been fully assessed yet.

Student Speech

Students have certain rights that have been decided by the Supreme Court such as concerning access to books, religious expression, political views and journalistic expressions. Students in public schools may enjoy First Amendment rights of having

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[269] Madeleine Schachter, *Law of Internet Speech,* 2nd ed., (Durham: Carolina Academic Press, 2002), 87.

[270] *Id.*, 88.

[271] *Id.*, 90; Oral argument for *Reno v. ACLU*, 521 U.S. 844 (1997) available at 1997 WL 136253 at 49 (Mar. 19, 1997).

[272] *Id.*, 88; Southeastern Promotions, LTD. v. Conrad, 420 U.S. 546, 557 (1975).

[273] Kovacs v. Cooper*,* 336 U.S. 77, 97 (1949).

[274] *Id.*, 88; Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

access to questionable books in their schools' libraries if the books are already on the library shelves. A school board may not censor books after they have been shelved, but are allowed not to order questionable books in the first place. The *Board Of Education v. Pico,* 457 U.S. 853 (1982), sets the precedent for cases about books in public school libraries. In *Pico*, a school board thought some books in public school libraries needed to be censored, so the board created a book committee comprised of four parents and four faculty members to advise the board on which books were to be removed. But the board did not take the advice of the committee.[275] Instead, the board members administered their own judgment in removing the nine books that were censored. Parents in a New York public school challenged the school board's decision to remove the controversial books from the school library. The legal question was: May the Board of Education remove certain library books based on content and do so without violating the First Amendment freedom of speech of children?

In *Pico*, the Supreme Court found that students' First Amendment rights were "directly and sharply implicated by the removal of books from the shelves of school libraries"[276] and that "the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students."[277] According to the Supreme Court, school officials may not remove books from school libraries in order to deny students access to ideas just because they dislike the ideas contained in those books. However, school officials may not have to buy books

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[275] Board Of Education v. Pico*,* 457 U.S. 853 (1982).

[276] *Id.*, 866.

[277] *Id.*, 868.

they disliked in the first place. But once books are on the shelves, they may not be removed unless for reasons other than disliking the ideas in the books.

However, the Supreme Court was divided 5 to 4. Justice Brandeis, along with Justices Marshall, Stevens, Blackmun, and White, agreed the Board should not be allowed to censor books they do not like. Brandeis, speaking for the Court, said:

> (1) local school boards have broad discretion in the management of school affairs, but this discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment,
> (2) the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library,
> (3) local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books.[278]

On the other hand, the dissenters believed that each state should have authority over students' education and that the closest representative of the state was the local school boards. The federal government cannot possibly monitor every public school in the nation, indeed the dissenters believed that local School Boards are responsible for providing the best educational environment for local students. For now, students enjoy First Amendment rights not to have books removed from school libraries simply because the school board disagrees with the content of books.

On the topic of religion, the Courts take seriously matters of religion in schools. The topic of argument for most school and religion cases is found in the First Amendment provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... ."[279] The first clause in the First Amendment is also known as the "Establishment Clause." According to the Free

[278] *Id.*, summary.

[279] U.S. Const., amend. I.

Republic website, "it allows no law, it forbids not only the establishment of religion by the government, it also forbids even laws respecting an establishment of religion."[280]

For instance, in *Lee v. Weisman*, when an invited guest speaker at a high school graduation ceremony performed a prayer, the school was sued. The Supreme Court voted 5-4 that schools may not sponsor a religious performance in graduation ceremonies either directly or through an invited guest.[281] The Court reasoned that the Establishment Clause forbids government from coercing people into participating in a religious activity. Forcing students to choose between attending a graduation ceremony containing religious elements with which they disagree or avoiding the offending practices by not attending their graduation ceremony was inherently coercive and unlawful. Students have a say not to be coerced to participate in or to watch religious activities.

Another case involving an Establishment Clause violation was decided by a Pennsylvania Court in *Abington School District v. Schempp*.[282] Pennsylvania law stated that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."[283] The legal question was whether the states' mandating religious activity violated the Establishment Clause. The Court held that devotional readings in public

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[280] Kerberos (author), a commentary on the Establishment Clause, Free Republic.com, posted November 21, 2003. http://freerepublic.com/focus/f-news/1026753/posts [accessed March 18, 2005].

[281] Lee v. Weisman, 505 U.S. 577 (1992) at 586, 587.

[282] Abington School District v. Schempp, 374 U.S. 203 (1963).

[283] The Commonwealth of Pennsylvania by law, 24 Pa. Stat. § 15-1516, as amended, Pub. Law 1928 (Supp. 1960) Dec. 17, 1959. Quoted in *Abington School District* at 205.

schools constitute an impermissible religious exercise by government and that devotional exercises violated the Establishment Clause. The State may not draft or conduct religious prayers in schools filled with captive audiences of children, the Court said.

In *Board of Education of Westside Community Schools v. Mergens*, the school required that a faculty member be in charge of each student organization.[284] Students wanted to form a Christian group, but school officials did not provide a faculty member to participate in such activity.[285] A student, Bridget Mergens, sued on account of the school's violation of the Equal Access Act passed by Congress in 1984.[286] The Act permitted religious and political clubs to be formed as long as the clubs were student-led without faculty or outside adults' involvement. The Supreme Court questioned whether the Equal Access Act was a violation of the Establishment Clause, specifically the requirement which said schools permitting non-curriculum related clubs must also permit religious clubs.[287] The Court ruled that the Act was neutrally written on secular and religious speech and thus not a violation of the Establishment Clause. In summary, students are allowed to create student religious groups after class hours as long as non-students do not participate. Students have freedom to express their religious beliefs. Other students having differing beliefs are welcome to create a counter religious group.

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[284] Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) at 231.

[285] *Id.*, 232.

[286] Equal Access Act, Pub. L. 98-377, title VIII, Sec. 802, 98 Stat. 1302, August 11, 1984, posted November 13, 2000. http://www.usdoj.gov/crt/cor/byagency/ed4071.htm [accessed April 9, 2005].

[287] Religious Liberty, a commentary on the *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), posted March 16, 2005, First Amendment Schools.org, http://www.firstamendmentschools.org/freedoms/case.aspx?id=497&SearchString=mergens [accessed March 16, 2005].

Another case, involved Louisiana's "Creationism Act," which forbids pedagogy on the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science."[288] The Supreme Court found that the Act does not require the teaching of either theory unless the other is taught. The Court held the Louisiana "Creation Act" in violation of the Establishment Clause of the First Amendment because:

> under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom.[289]

Public schools do not need to revise curriculum in order to accommodate students' religious beliefs.

In summary, students have these rights: First, to express their own religious beliefs (in *Board of Education of Westside Community Schools v. Mergens*);[290] second, not be forced to watch religious rituals (in *Lee v. Weisman*, *1992*);[291] and third, not to have states decide how students should learn through religious prayers or religious philosophies. The Constitution does not allow states to promote religious beliefs. The courts do not accept State laws enforcing philosophical and religious beliefs.

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[288] Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act (Creationism Act), La. Rev. Stat. Ann. §§ 17:286.1-17:286.7 (West 1982); Religious Liberty, a commentary on *Edwards v. Aguillard*, 482 U.S. 578 (1987), posted March 16, 2005, First Amendment Schools.org, http://www.firstamendmentschools.org/freedoms /case.aspx?id=464&SearchString=Edwards_v._Aguillard [accessed March 16, 2005].

[289] Edwards v. Aguillard, 482 U.S. 578 (1987) at 589.

[290] *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

[291] *Lee v. Weisman*, 505 U.S. 577 (1992).

In terms of students' political views, *Tinker v. Des Moines School District*[292] is a landmark Supreme Court case. Three public school students, John Tinker, age 15, Mary Beth Tinker, age 13, and their friend Christopher Eckhardt, age 16, made symbolic political statements against the Vietnam War by wearing black armbands. After becoming aware of Tinker's armband display, the school made a policy against wearing black armbands. Despite the school's policy, the Tinkers and their friend wore black armbands to school during December 1965 and, consequently, were asked to leave school.

The Tinker's father filed suit against school officials for making an unconstitutional policy. The father also asked the district court for an injunction against the school regulation preventing the kids from wearing the black armbands. At the trial court level, Tinker did not win because the court stated that wearing armbands is disruptive to daily school activities. The court of appeals was equally divided and so affirmed the district court's opinion. Finally, at the Supreme Court level, Tinker won.

The Supreme Court answered questions of whether First Amendment rights extend to symbolic speech by students in public schools and in what circumstances that symbolic speech is protected. The Court decided that symbolic speech is protected as long as the speech does not interfere with the appropriate school discipline and collide with the rights of other students, which became the *Tinker* two-part test. Justice Fortas, speaking for the Court, said,

> There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let

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[292] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

> alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.[293]

Justice Black dissented, saying that:

> While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion.[294]

Citing *Cantwell v. Connecticut,*[295] Justice Black argued that while the First Amendment give the freedom to believe and the freedom to act, the freedom to believe is absolute but the freedom to act cannot be absolute because of the nature of things and the need to remain under regulation for the protection of society.

The *Tinker* decision means that school officials have lesser control over student speech related to politics or political ideas. Also, *Tinker* is a lesson in democracy because the Supreme Court showed that students are citizens, too; their voices count.

While students have the right to political speech, students do not have rights to vulgar or obscene speech in school. As far as vulgar speech is concerned, schools have the right to reprove student speech according to the school policy, according to *Bethel School District v. Fraser*.[296] The Court said that the First Amendment protects political speech as in *Tinker,* but not obscene speech since the purpose of public high schools is not to promote obscene and lewd speech but for education.

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[293] *Tinker* at 737.

[294] *Tinker* at 517.

[295] Cantwell v. Connecticut, 310 U.S. 296 (1940) at 303-304.

[296] Bethel School District v. Fraser, 478 U.S. 675 (1986).

When it comes to student journalism, the landmark Court case for censoring high-school newspapers is *Hazelwood School District v. Kuhlmeier* from St. Louis County, Missouri.[297] Students in a journalism class filed a lawsuit against their school district because their high school principal, Robert Eugene Reynolds, took two pages out of the school newspaper the day before publication. The students found out after circulation that two full pages had been taken out. The principle was concerned about two articles: the first addressed the teen pregnancy issue, and the second addressed the effect of divorce on a student. However, other articles within the two pages that were not of concern had been taken out as well. Students fought all the way to the Supreme Court for their First Amendment rights. The legal question is whether a student publication is a public forum for student expression. The Court reversed the decision of the appeals court, saying that the students' First Amendment rights were not violated. The newspaper is not a public forum and "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns"[298] While courts around the nation had been giving more freedom to student publications, the Supreme Court's *Hazelwood* decision limited that freedom.

Hazelwood School District v. Kuhlmeier is arguably disturbing to high school journalism because, first, it cuts back on First Amendment protections in public high

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[297] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

[298] "Diagram of How the Case Moved Through the Court System," a commentary on *Hazelwood*, in Landmark Supreme Court Cases.org, http://www.landmarkcases.org/hazelwood/diagram.html [accessed March 16, 2005].

schools. This limitation applies only to public high schools with school-sponsored student publications.

When there is a First Amendment issue concerning school children, the courts will usually spell out what children's rights are. From the above cases, the courts will usually limit children's rights when an expression will limit another students' rights.[299]

Lack of Supervision

In *Federal Communications Commission v. Pacifica*,[300] Pacifica aired a private tape of George Carlin's "Seven Dirty Words" on a public radio. A father and son happened to tune into the radio station and heard the radio show. The father filed a complaint with the Federal Communications Commission (FCC) challenging that even though it might have been a private tape the FCC should have authority over its own airwaves.[301] The FCC got a tape recording of George Carlin's "Seven Dirty Words" and filed a declaratory order holding that Pacifica "could have been the subject of administrative sanctions."[302] The declaratory order was a warning that the FCC would take away license privileges if Pacifica Foundation aired indecency again.[303]

The case went up the Supreme Court, which reversed the Appeals Court decision to limit the FCC's authority over deciding indecency matters. The legal issue here is, can patently offensive speech on public radio be regulated for content? The Supreme Court

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[299] See *Tinker,* supra notes 290-292.

[300] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978).

[301] *Id.*

[302] 56 F. C. C. 2d 94, 99; at 730.

[303] *Pacifica*, at 737, 738.

held that the broadcast media enjoy less First Amendment protection than other media because, first, the broadcast media have a pervasive presence.[304] Justice Stevens, who wrote the opinion of the Court, argued that while a person may be able to hang up on an indecent telephone call, a person may not be able to switch off a broadcast radio because one does not know what is coming up next. Second, the indecent material reaches not only the public but also the private home of the individual. Third, radio broadcasts are accessible to children,[305] that is, the ease with which children can access the broadcast medium makes indecent speech an issue, not that the indecent speech itself is an issue. The Supreme Court allowed the FCC to set "safe harbor" times for in order to protect children effectively while allowing adults to the exposure of indecency.

Pacifica was a 5-4 decision. The majority favored the regulation of indecency, saying:

> broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. [*750] Id., at 640 and 639. n28 The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.[306]

One main point of the dissenters was that the Court has chosen a time, place, and manner regulation for speech that has nothing to do with "fighting words" or obscenity

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[304] *Id.* at 749.

[305] *Id.* at 749, 750; Saunders, 2003.

[306] *Pacifica,* 438 U.S. at 749, 750.

and that the Court should have chosen a sliding scale of permissible indecent speech.[307] The second point was that the listener could have switched off the radio just as easily as he/she had turned it on.[308] The third point was that this was an issue of whether the FCC should have made the declaratory order in the first place; the dissenters said that the FCC did not have the power to make the declaratory order because this case was not a matter of obscenity and because indecency is broader than obscenity.[309]

FCC v. Pacifica sets the precedent for the lack of supervision debate. Government supervision of children won over adults freedom of speech rights. Other cases showing lack of supervision are *Young v. American Mini Theatres, Inc.,*[310] about whether a zoning ordinance concerning movie theatres containing sexually explicit adult content and those that do not, was unconstitutional,[311] and *Renton v. Playtime Theatres, Inc.*,[312] about whether a city's zoning laws attempting to restrict adult movie theatres and bookstores in residential neighborhoods was unconstitutional.[313]

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[307] *Pacifica,* 438 U.S. at 763, 764 (Justice Brennan, joined by Justice Marshall, dissenting).

[308] *Pacifica,* 438 U.S. at 765, 766 (Justice Brennan, joined by Justice Marshall, dissenting) saying: "Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button."

[309] *Pacifica,* 438 U.S. at 767 (Justice Brennan, joined by Justice Marshall, dissenting) saying: "Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them."

[310] Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

[311] *Id.*

[312] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[313] "Judge Hears Summary Judgment Arguments in Loudoun Library Case," Tech Law Journal, http://www.techlawjournal.com/censor/80928.htm [accessed January 26, 2007].

The recent development on the indecency standard occurred in 2006. The FCC issued an "Omnibus Order" in March 2006 when it decided several indecency cases from 300,000 consumer complaints received between 2002 and 2005.[314] The FCC's standard for determining whether material is patently offensive as measured by contemporary community standards for the broadcast medium[315] is:

> (1) the explicitness or graphic nature of the description;
> (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and
> (3) whether the material panders to, titillates, or shocks the audience.[316]

According to the Media Institute, the FCC's indecency standard is a subjective approach that produces inconsistent results[317] because the FCC examines on a case-by-case situation and each indecency case may have a different mix of patently offensive factors.[318]

The case before the Second Circuit is *Fox Television v. FCC*,[319] where twenty free-speech organizations challenged the constitutionality of the new FCC indecency

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[314] David Fiske, "FCC Releases Orders Resolving Numerous Broadcast Television Indecency Complaints," FCC News, For Immediate Release, March 15, 2006. wsj.com/public/resources/documents/fcc-statement-20060315.pdf [accessed January 27, 2007].

[315] Sandy Davidson, University of Missouri, Communication Law class discussion, January-April 2006.

[316] Marlene H. Dortch, "In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices Of Apparent Liability And Memorandum Opinion And Order (Omnibus Order)," March 15, 2006, Page 5, FCC-06-17a1.pdf. Standards adopted from *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8-23.

[317] Patrick D. Maines and Richard T. Kaplar, "In Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 And March 8, 2005, Comments of the Media Institute," September 21, 2006. Page 3, www.fcc.gov/DA06-1739/mi.pdf [accessed January 27, 2007].

[318] Marlene H. Dortch, Omnibus Order, 5, 6.

[319] Fox Television Stations v. Federal Communications Commission, 06-1760-ag (L), 06-2570-ag (Con), United States Court of Appeals for the Second Circuit, Legal Brief, November 30, 2006. http://www.fepproject.org/courtbriefs/FoxvFCC.pdf [accessed January 27, 2007].

standards on airwaves.[320] In the legal brief, the free speech groups claimed that the FCC standards are broad and inconsistent.[321] For examples: on March 15, 2006, the FCC decided on CBS's television program, "Without a Trace," that the scene was highly sexually explicit even without nudity, and each station were charged $32, 500 for the aired episode.[322] Also on March 15, 2006, the FCC charged CBS's Super Bowl halftime show on February 1, 2004 with Janet Jackson's "Wardrobe Malfunction" with high fines.[323] The Second Circuit on September 7, 2006 granted the FCC motion for sixty days to reconsider its rulings.[324] In response on November 6, 2006, the FCC vacated Section III B of the *Omnibus Order* and decided that Fox's airing of Nicole Richie's statement at "The 2003 Billboard Music Awards" was "indecent and profane,"[325] but the FCC reversed itself that a term spoken on CBS's "The Early Show" was not indecent.[326] The FCC has reversed itself concerning Bono's use of the "F-word" in a live broadcast of the 2003 Golden Globe Awards. The FCC's earlier decision ruled that Bono's term was not

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[320] *Id.*

[321] *Id.*, 42: "The First Amendment Project's (FAP) … clients are several independent, nonprofit broadcast content- providers that are threatened by the ambiguities and inconsistencies in the FCC's policies and whose ability to report on issues of local and national significance is thus compromised." *Id.*, 44: "The National Federation of Community Broadcasters (NFCB) represent[ing] over 200 community-oriented radio stations across the United States claimed FCC standard are borad and inconsistent."

[322] Sandra Davidson, "What is *&^%$+#! Indecency?" University of Missouri Communications Law Class Notes, August-December 2006.

[323] Sandy Davidson, "What is *&^%$+#! Indecency?"

[324] "Commission Issues Order on Remand Addressing Earlier Broadcast Television Indecency Decisions (Recent FCC Decisions)," FCC 06-166, Page 4, II No. 10, http://www.fcc.gov/headlines2006.html [accessed 1/28/07].

[325] *Id.*, FCC 06-166. IV. Ordering Clauses No. 79. Nicole Richie's statement as an award presenter was considered indecent and profane.

[326] *Id.*, FCC 06-166. IV. Ordering Clauses No. 80. The term, "bullsh**ter," was not indecent.

indecent because it was a fleeting use of the term and it was in a non-sexual context, but the FCC later reversed its decision.[327]

The central argument for government intervention is because parents cannot fully supervise their children. Some parents have full-time jobs, others are single parents; low income and poorly educated parents are more likely to leave their children home alone. Generally, most parents simply cannot monitor every single moment of their children's activities.

When children are in school, the school has to supervise them; the school acts as a parent in place of the parents in a doctrine known as *in loco parentis*. If it is a public school, then the local, state, and federal governments indirectly act as a parent; if it is a private school, then the private organization is wholly responsible to act as a parent and the government power is limited. Unless children are home-schooled, parents entrust children to the care, custody and supervision of school.

To reiterate, youths of single-parents, or youths with both parents working full-time or of low-income parents are more likely suffer from lack of supervision, according to several studies.[328] The American economy does not make room for both loving parents to stay home with children. Sometimes, it is just not feasible to have a stay-at-home parent; to have a moderate standard of living often requires two working parents.

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[327] Ernest Miller, "Bono Says 'F— ' on TV; FCC says 'OK,'" posted on October 9, 2005, LawMeme, http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1249 [accessed February 4, 2007].

[328] "A Response to Youth At Risk," *1998 Report to Congress: Juvenile Mentoring Program*, OJJD Report, December 1998. http://www.ncjrs.org/html/ojjdp/173424/chap1.html (accessed March 24, 2005). The report quoted these studies: Buckhalt, Halpin, Noel, & Meadows, 1992; Carnegie Council on Adolescent Development, 1992; Dornbusch et al., 1985; Richardson et al., 1989; Stanton, 1979; Van Nelson, Thompson, Rice, & Cooley, 1991.

Justice Breyer in *United States v. Playboy Entertainment, Inc.*,[329] even though in a dissenting opinion, acknowledges that because of the lack of direct parental supervision, governmental regulations act in place of parental supervision.

> These laws, all act in the absence of direct parental supervision.
> This legislative objective is perfectly legitimate. Where over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week, and where children may spend afternoons and evenings watching television outside of the home with friends, § 505 offers independent protection for a large number of families.[330]

In *Playboy Entertainment,* government law required cable television operators who provided channels primarily dedicated to sexually oriented programming to fully scramble or otherwise fully block those channels, or to do "time channel," that is, limit transmission to hours when children were unlikely to be viewing.[331]

Parental supervision is "an enduring American tradition" according to a Sixth Court of Appeals.[332] The Supreme Court has long recognized the parental role in care, custody and supervision of youth which is protected through the Fourteenth Amendment.[333] The first section of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

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[329] United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

[330] *Id.* at 842.

[331] Telecommunications Act, 47 U.S.C. §§ 505, 561 (1996).

[332] *Doe v. Irwin*, 615 F.2d 1162, 1167 (6th Cir.1980) quoted in Kelly Rodden, "The Children's Internet Protection Act In Public Schools: The Government Stepping On Parents' Toes?" 71 Fordham L. Rev. 2141.

[333] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972); Parham v. J. R., 442 U.S. 584 (1979) from *Irwin,* 615 F.2d at 1167.

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[334]

The Supreme Court has also defined parental rights in several ways:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. *Pierce v. Society of Sisters*, 268 U.S. at 535;
>
> 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 supply nor hinder. *Pierce v. Society of Sisters*, supra.
>
> And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. *Prince v. Massachusetts*, supra, 321 U.S. at 166;
>
> The duty to prepare the child for "additional obligations," referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. *Wisconsin v. Yoder*, supra, 406 U.S. at 232, 233.[335]

In *Meyer v. Nebraska*,[336] according to a Nebraska state statute, languages other than English were prohibited from being taught to students under the eighth grade.[337] The teacher who taught German to a 10 year old was the plaintiff who filed the suit.[338] The Nebraska statute was written during the days of immigration in the 1900s to encourage children of German and other descent to speak the national language, which is English, rather than be taught their mother tongue. In fact, the legal question the Supreme Court faced was:

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[334] U.S. Const., amend. XIV.

[335] *Irwin*, 615 F.2d at 1167.

[336] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[337] *Id.*, at 397; Nebraska Laws 1919, c. 249, approved April 9, 1919: "An act relating to the teaching of foreign languages in the State of Nebraska."

[338] *Meyer*, 262 U.S. at 396.

> Whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment… [and] while this Court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[339]

Although the Court recognized that states have an interest in improving the quality of citizens through uniform language, the Court held that parents have certain fundamental rights which must be respected and that these Constitutional rights extend to all those who speak in other languages and all who speak in English, and the Court also held that it is the parent's duty to educate the child—states cannot compel what is to be the child's education.[340] The Court overturned the decision of the Nebraska Supreme Court affirming a conviction for infraction of a statute against teaching of foreign languages to young children in schools.[341] *Meyer* showed that parental nurture exceeds states' arbitrary policing power.

Some parents feel they are capable of taking care of their children. They want sole responsibility over their children and do not want states acting as parents, even if parents might not be able to supervise at all times. Moreover, laws protecting children interfere with adults' First Amendment rights, the argument being that the burden is placed on adults' freedom unnecessarily. These parents believe that government should not

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[339] *Meyer*, 262 U.S. at 399.

[340] *Meyer*, 262 U.S. at 402, 403.

[341] *Meyer*, 262 U.S. at 403.

interfere on issues of how to raise children—that the states should stay out of private lives and that parents are capable of raising their own children.

The lack of full-time parental supervision raises the question of who will oversee the child when the parents are unavailable. Some parents have relied on the government to take responsibility in place of direct parental supervision. Without parents watching over children during a broadcast program such as a television program, a radio talk show, an Internet website, or while reading print magazines or comics, the concern is that children can be exposed to media messages that are inappropriate for their development. Therefore, the need arises for some kind of regulations. Laws against indecency are set by the government as a minimal standard of protection. Balancing First Amendment rights of adults and protection of children is a debate that will not be solved easily because of conflicting interests between the two groups, interests which the government and the courts are trying to balance.

Variable Obscenity

The concept of variable obscenity says that material that may not be offensive to adults may be considered obscene for children. There is low tolerance for exposing children to obscenity. It has been difficult to find an obscenity standard that would satisfy unwilling adults, adults, and children. Variable obscenity is a concept that allows flexibility of standards for different groups of peoples. Without differing standards, adults cannot enjoy their First Amendment rights. Still, some adults and First Amendment activists complain that the protection of children places burden on adults' freedom. The truth is that there is not a perfect standard that will satisfy everyone. Variable obscenity, even though not perfect, is a reasonable standard currently used by the Supreme Court.

Children get the protection they need, unwilling adults may exercise their freedom by not choosing to be exposed to unwanted materials and thus have self-protection, while willing adults get to enjoy their freedom.

The concept of variable obscenity was developed by William Lockhart and Robert McClure. They wrote in a law journal article:[342]

> Variable obscenity … furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.[343]

According to Justice Stewart, adults and children do not share the same First Amendment freedom.[344] In order to receive First Amendment freedom and guarantees, one must first possess full capacity for individual choice, which a child does not possess, so a child's freedom of speech should be limited and not be made equivalent to adults' freedom of speech.[345] Following Justice Stewart's line of thinking, children would be incapable of exercising their volition on the Internet. To a certain extent, children may need protection from the unknown rather than be given rights which they cannot fully use. In his concurring opinion in *Tinker*, Justice Stewart stated:

> Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York*, 390

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[342] *Ginsberg v. New York,* 390 U.S. 629, 635 (1968), Note 4. It states: "The concept of variable obscenity is developed in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960)."

[343] William B. Lockhart & Robert C. McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 77 (1960) at 85.

[344] *Tinker*, 393 U.S. at 649-650 (Justice Stewart, concurring).

[345] *Id.*

> U.S. 629. I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child--like someone in a captive audience--is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.[346]

Although technically every citizen has First Amendment rights, the rights of minors can be limited. The courts have been dealing with the obscenity issue since the 1800s, and definitions have continued to be modified. Below is a chronology of obscenity and variable obscenity precedents.

Beginning with the English case of *Regina v. Hicklin*,[347] the United States used the old obscenity standard from Britain; *Hicklin* based its obscenity test on how obscenity affected the most susceptible persons, children and abnormal adults. The Supreme Court rejected the *Hicklin* standard in *Roth v. United States*[348] in order to remove the most susceptible person as the measure of obscenity. Instead, *Roth* uses the "average" person standard in order to allow First Amendment protection based on the allegedly obscene material's effect on the general population.[349] In *Roth*, the obscenity test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[350] In *Prince v. Massachusetts*,[351] the Supreme Court found that the government's interest in protecting children overrode parents' interests of having their children sell religious materials.

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[346] *Id.* at 649-650. (Justice Stewart concurring).

[347] Regina v. Hicklin, England, LR 3 (1868) or 1868 L. R. 3 Q. 360.

[348] Roth v. United States, 354 U.S. 476 (1957).

[349] Saunders, 127.

[350] *Roth*, 354 U.S. at 489.

[351] Prince v. Massachusetts, 321 U.S. 158 (1944).

In 1964, Justice Stewart in *Jacobellis v. Ohio*[352] said of obscenity that "I know it when I see it."[353] Obscenity was a term that had been difficult for judges to define. Throughout the years, courts continued to tweak obscenity definitions.

Another obscenity case was *Mishkin v. New York*[354] in 1966. *Mishkin* was important because it allowed differing standards for different materials. Justice Brennan said:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group[355]

In 1968 in *Ginsberg v. New York*,[356] the Supreme Court addressed whether a New York statute prohibiting the sale of obscene materials to minors under 17 was constitutional.[357] Ginsberg argued that the New York Penal Law was impermissibly vague, that "harmful to minors" meant obscenity, and that the term "knowingly" concerned knowing the true age of minors.[358] Ginsberg, a merchant, had sold magazines

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[352] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[353] *Id*. at 197 (Justice Stewart–concurring).

[354] Mishkin v. New York, 383 U.S. 502 (1966).

[355] *Mishkin*, 383 U.S. at 508.

[356] Ginsberg v. New York, 390 U.S. 629 (1968).

[357] New York Penal Law § 484-h; *Ginsberg*, 390 U.S. at 634-635.

[358] New York Penal Law § 484-h subsections (f) and (g) as enacted by L. 1965, c.327; *Ginsberg*, 390 U.S. 646.
The New York Panel Law on obscenity and harmful to minors materials is differently worded and has moved to New York Penal Law § 235.20. as of January 2007. The new law is,
6. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

in New York containing obscenity to minors which he claimed was an "honest mistake" because he did not accertain the age of the minors. *New York's* "harmful to minors" standard to determine what was obscene to minors was:

> (f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
> (iii) is utterly without redeeming social importance for minors.
>
> (g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
> (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and
> (ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.[359]

The New York Court of Appeals supported the state's interest in protecting children by applying variable obscenity to the *Ginsberg* case:

> Material 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 or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.[360]

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.
New York Penal Law § 235.20,
http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS [accessed March 2, 2007].

[359] *Ginsberg,* 390 U.S. at 646; Exposing Minors to Harmful Materials, New York Panel Law § 484-h as enacted by L. 1965, c.327, subsections (1)(f) and (1)(g).

[360] *Ginsberg*, 390 U.S. at 636.

The Supreme Court affirmed the high court of New York that the New York statute definitions of "obscenity" or "knowingly" in prohibiting the sale of obscene materials to minors was constitutional because Ginsberg had not shown he made "a reasonable bona fide attempt to ascertain the true age of such minor" in order to be acquitted on grounds of "honest mistake."[361] Thus, the Supreme Court recognized government responsibility to protect children when it upheld a New York law prohibiting the pornographic sale of materials to minors under the age of 17, but allowed adults the rights to the material.

Several years later in 1973, a major obscenity case known as *Miller v. California*[362] set the precedent for determining obscenity standard. The *Miller* test is:

> a. whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
> b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> c. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[363]
>
> Under section b., a state legislature could include:
> 1) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and
> 2) patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.[364]

Miller had mass mailed unsolicited advertising brochures containing unwholesome pictures and drawings, and it was a misdemeanor to knowingly distribute obscene materials in California.[365] Miller was tried before a California jury that was

[361] *Ginsberg*, 390 U.S. at 645.

[362] Miller v. California, 413 U.S. 15 (1973).

[363] *Id.* at 24.

[364] *Id.* at 25.

instructed to apply contemporary community standards of the state in determining whether the materials were obscene under the state statute.

> As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of Memoirs. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."[366]

The Supreme Court addressed what the standard for determining obscenity should be. The Court justices never had a concensus on the obscenity issue since the time of *Roth v. United States*[367] in 1957, the Court's first major obscenity case. Justice Burger in *Roth* cleverly answered the obscenity-standard question by giving responsibility to the states to determine the obscenity standard.[368] There would be no national obscenity standard but only local community standards of obscenity. Justice Berger said:

> [O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists … To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.[369]

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[365] *Id.* at 16; A misdemeanor, by knowingly distributing obscene matter, California Penal Code § 311.2 (a). It provides that: ""Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

[366] *Id.* at 30, 31.

[367] Roth v. United States, 354 U.S. 476 (1957).

[368] *Miller,* at 30.

[369] *Miller* at 30.

In applying the *Miller* standard, there may be less protection for book sellers when local community standards are conservative. On the other hand, there may be more protection for the book if the book is evaluated as a whole (see Part A of the *Miller* test).[370] Seductive materials may be spared under Part C if they contain serious or artistic value, such as a book on artistic nude paintings. Part C of the *Miller* test was restated in *Pope v. Illinois* to change the *average* person standard to the *reasonable* person standard,[371] the logic being that in some communities an average person may have an unreasonable view on what is or is not obscene. A reasonable person would be more lenient than an average person in some locales.

Shortly after *Miller,* in 1977, Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977,[372] also known as the Sexual Exploitation of Children Act of 1977 (SEOC).[373] The law prohibited the use of children to produce commercial pornography. According to Mary Leary, the Director of the National Center for Prosecution of Child Abuse in Alexandria, Virginia, "failing to address the non-commercial trading of pornography and non-obscene pornography, SEOC proved largely ineffectual."[374]

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[370] Part A of the *Miller* test: (a) whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest.

[371] Pope v. Illinois, 481 U.S. 497 (1987).

[372] The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2251. http://www.law.cornell.edu/uscode/18/usc_sec_18_00002251----000-notes.html [accessed February 2, 2007].

[373] The Sexual Exploitation of Children Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977). Same as previous footnote.

[374] Mary G. Leary, "Protecting Children from Child Pornography and the Internet: Where Are We Now?" 1, no. 4 (2004), Child Sexual Exploitation Update, National District Attorneys Association,

In 1990 in *Osborne v. Ohio*,[375] the United States Supreme Court decided that states have the constitutional power to ban lewd exhibitions of nude minors when the minor is not a child or a ward of the defendant. Specifically, Osborne was convicted of viewing photographs of four male minors who were not his children and were posing in sexually explicit positions.[376] The U.S. Supreme Court held that the Ohio law[377] banning lewd exhibitions of nude minors was constitutional and not overbroad, and reversed and remanded the case because of pretrial errors.[378]

In relation to the *Osborne v. Ohio* case, back in 1969 in *Stanley v. Georgia*,[379] the Supreme Court had reversed the Georgia Supreme Court's decision and held that people have the First and Fourteenth Amendment right to the mere private possession of obscene materials in the privacy of their own homes.[380] Justice Marshall said:

> But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.[381]

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http://www.ndaa.org/publications/newsletters/child_sexual_exploitation_update_volume_1_number_4_2004.html [accessed 2/2/07].

[375] Osborne v. Ohio, 495 U.S. 103 (1990).

[376] *Osborne*, 495 U.S. 107.

[377] Sex Offenses Chapter, Ohio Rev. Code Ann. § 2907.01-2907.35 (1975).

[378] *Id.,* at 125, 126. Justice White saying, "We reverse his conviction and remand for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements of § 2907.323(A)(3)."

[379] Stanley v. Georgia, 394 U.S. 557 (1969).

[380] Stanley v. Georgia Transcript of Oral Argument before the Supreme Court, available at http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/Stanleyoral.html [accessed 1/30/07].

[381] *Stanley*, 394 U.S. at 565.

The Court decided that the Georgia law's justification that obscenity would poison the mind of its viewers was inadequate.[382] The Court made a comparison in the differences in its decisions between *Osborne* and *Stanley*:

> In Stanley, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. 394 U.S., at 565. We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Id., at 566. The difference here is obvious: the State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.[383]

Some generalizations can be made from the Court's decisions on obscenity. For example, possession of adult pornography by adults is acceptable while possession of child pornography by adults is prohibited. Overall, the Court has struggled with its decisions on obscenity, as marked by the above court cases.

However, applying the already ambiguous obscenity definition to the Internet situation has proved even more troubling. In 1996, in an attempt to regulate indecency on the Internet, Congress borrowed part of the *Miller* obscenity test for the Communications Decency Act. The legal brief of Apollo Media Corporation in October 1996 in the case of *Reno v. ACLU* states in part, that:

> It [the CDA] prohibits unknowable kinds and quantities of speech ("indecent") not defined by the statute; the government's proposed definition of the forbidden speech, borrowed from a committee report, was in turn borrowed from the FCC's definition used to regulate government licensees in a very different medium (broadcast); and the FCC's definition in turn borrowed one part of the three-part test for "obscene" matter established

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[382] Osborne v. Ohio, 495 U.S. 103, 108 (1990); Justice White saying, "In Stanley, we struck down a Georgia law outlawing the private possession of obscene material. We recognized that the statute impinged upon Stanley's right to receive information in the privacy of his home, and we found Georgia's justifications for its law inadequate. *Id*., at 564-568."

[383] *Id.* at 109.

> by *Miller v. California*, 413 U.S. 15 (1973). At each step in the construction of this censorship structure, the CDA's unconstitutionality has been compounded.[384]

Judge Buckwalter, of the United States District Court for the Eastern District of Pennsylvania, said in February 1996 that Congress' definition of Internet indecency was not clear:

> Where I do feel that the plaintiffs have raised serious, substantial, difficult and doubtful questions is in their argument that the CDA is unconstitutionally vague in the use of the undefined term, "indecent." Sec. 223(a)(1)(B)(ii). This strikes me as being serious because the undefined word "indecent", standing alone, would leave reasonable people perplexed in evaluating what is or is not prohibited by the statute. It is a substantial question because this word alone is the basis for a criminal felony prosecution" (1996 U.S. Dist. LEXIS 1617, at 6) and "it is, of course, impossible to define conduct with mathematical certainty, but on the other hand, it seems to me that due process, particularly in the arena of criminal statutes, requires more than one vague, undefined word, "indecent."[385]

Similarly in the COPA statute, defining online obscenity was difficult for Congress. In response to the COPA statute in *Ashcroft v. ACLU* (2002), Justice Thomas explained the difficulty in defining obscenity through a historical point of view:

> Obscene speech, for example, has long been held to fall outside the purview of the First Amendment. [***781] See, *e.g., Roth* v. *United States*, 354 U.S. 476, 484-485, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). But this Court struggled in the past to define obscenity in a manner that did not impose an impermissible burden on protected speech. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 704, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968) (Harlan, J., concurring in part and dissenting in part) (referring to the "intractable obscenity problem"); see also *Miller* v. *California*, 413 U.S. at 20-23 (reviewing "the somewhat tortured history of this Court's obscenity decisions"). The difficulty resulted from the belief that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Id.,* at 22-23.[386]

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[384] "Reno v. ACLU: Brief of ApolloMedia Corporation and BALIF as Amici Curiae, In Support of Affirmance," No. 95-511, Apollo Media Corporation. posted at Annoy.com. http://annoy.com/history/doc.html?DocumentID=100214 [accessed January 4, 2006].

[385] American Civil Liberties Union v. Reno, No. 96-963, 1996 U.S. Dist. LEXIS 1617, at 9.

[386] *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 574 (2002).

Since the Internet's existence, the courts have been troubled in defining obscenity for this medium that is architecturally decentralized. The findings of United States District Court for the Eastern District of Pennsylvania showed that:

> No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.[387]

Judge Dalzell of the U.S. District Court for the Eastern District of Pennsylvania expressed that Congress has not fixed a legal meaning to "pornography" in the Communications Decency Act.[388] He said:

> The Government argues that this case is really about pornography on the Internet. Apart from hardcore and child pornography, however, the word pornography does not have a fixed legal meaning. When I use the word pornography in my analysis below, I refer to for-profit purveyors of sexually explicit, "adult" material similar to that at issue in Sable. See 492 U.S. at 118. Pornography is normally either obscene or indecent, as Justice Scalia noted in his concurrence in Sable. Id. at 132. I would avoid using such an imprecise (and overbroad) word, but I feel compelled to do so here, since Congress undoubtedly had such material in mind when it passed the CDA. See S. Rep. No. 230, 104th Cong., 2d Sess. 187-91 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 200-05 [hereinafter Senate Report]. Moreover, the Government has defended the Act before this court by arguing that the Act could be constitutionally applied to such material.[389]

The Committee for Computer Science and Telecommunications Board, in 2002, examined ways to solve the pornography problem on the Internet. The Committee chose the term "sexually explicit material" to describe online material that would be harmful to children:

> Recognizing these ambiguities, the committee chose to use the term "sexually explicit material," which is material--textual, visual, or aural--that depicts sexual behavior or acts, or that exposes the reproductive organs of the human body. Sexually explicit material

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[387] *American Civil Liberties Union v. Reno,* 929 F. Supp. 824*,* 838 (finding 46) (1996).

[388] *ACLU v. Reno,* 929 F. Supp. at 866.

[389] *Id.*, District Judge Dalzell speaking.

> may be used for many purposes--education, art, entertainment, science, personal sexual gratification or fantasy, and so on. From common usage, "pornography" might be seen as material that is intended to create sexual arousal or desire, and usually involving sexually explicit material.[390]

The Committee defined "pornography" as "sexually explicit material, which is material—textual, visual, or aural—that depicts sexual behavior or acts, or that exposes the reproductive organs of the human body."[391] The Committee found another problem: To deem material as "inappropriate sexually explicit material" raises the question of "inappropriate by whose definition."[392] The Committee found that parents have a broad spectrum of opinions, values and agendas about "pornography."[393]

The Eastern District Court of Pennsylvania in *ACLU v. Reno* discussed sexually explicit Internet material:

> 82. The parties agree that sexually explicit material exists on the Internet. Such material includes text, pictures, and chat, and includes bulletin boards, newsgroups, and the other forms of Internet communication, and extends from the modestly titillating to the hardest-core.
>
> 84. Sexually explicit material is created, named, and posted in the same manner as material that is not sexually explicit. It is possible that a search engine can accidentally retrieve material of a sexual nature through an imprecise search, as demonstrated at the hearing.
>
> 86. Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a potential worldwide audience.[394]

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[390] National Research Council, The Committee for Computer Science and Telecommunications Board, *Youth, Pornography, and the Internet,* (Washington, D.C.: National Academy Press, 2002), 21.

[391] *Id.*

[392] *Id.*

[393] *Id.*, 25-30.

[394] *ACLU v. Reno,* 929 F. Supp. 844 (findings, 82, 84, 86).

Mike Godwin, a lawyer for the Electronic Freedom Foundation with a background in journalism, defined the terms "indecency," "obscenity," and "pornography."[395] Godwin defined "indecency" as "content that … has been regulated only in two special areas of federal jurisdiction—broadcasting and so-called dial-a-porn services. … [I]n those contexts, 'indecency' normally means 'patently offensive' sexual content or profane language."[396] To define obscenity, Godwin adhered to the three-part *Miller* test. In Godwin's own words, he summarized the *Miller* obscenity test as, first, there must be an existing state statute, second, there must be an application of community standards, and third, the obscene material must have "serious literary, artistic, scientific, political, or other social value" to be legal.[397] Godwin defined pornography as "material that presents sexual content of some sort, with the intent of being arousing. … [S]uch material is presumptively legal under the First Amendment."[398] He added, "to be illegal, pornography either must be found to be 'obscene' or 'child pornography.'"[399]

Hilden, a reporter for Findlaw Legal news and commentary, remarked that obscenity does not equate to pornography, saying, "first, while obscenity is illegal, pornography is not, when viewed by adults."[400] According to Kevin W. Saunders, a legal

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[395] Mike, Godwin (1998). "A Bad Spin and a Cyberporn Primer," Cyber Rights: Defending Free Speech in the Digital Age (Times Books, New York: NY) pp. 201-205.

[396] *Id.,* 203.

[397] *Id.*, 202.

[398] *Id.*, 201.

[399] *Id*.

[400] Julie Hilden, "A Recent Supreme Court Decision Allowing the Government to Force Public Libraries to Filter Users' Internet Access Is Less Significant Than It Might At First Appear," *Findlaw Legal News and Commentary*, July 1, 2003, Tuesday, http://writ.news.findlaw.com/hilden/20030701.html [accessed February 16, 2007].

scholar, pornographic material may not necessarily be obscene even though pornography has sexual content.[401] To be obscene, material has to be sexual in content, plus material must fail meet the requirements of the *Miller v. California* test.[402]

The Supreme Court delineated a tight test through the *Miller* test,[403] saying there should be no national obscenity laws. Part b of *Miller* asks:

> b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;[404]

States must set their own state standards, however, states' definitions of obscenity must be within the tightly drawn definition of Part b of the *Miller* test. In *U.S. v. Thomas*,[405] the Court rejected an argument for a cyberspace community standard stating that the obscene nature of the materials should be measured by Memphis, Tennessee standards.[406] According to the Sixth Circuit Court of Appeals:

> Thus, under the facts of this case, there is no need for this court to adopt a new definition of "community" for use in obscenity prosecutions involving electronic bulletin boards.[407]

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[401] Kevin W. Saunders, *Saving Our Children From the First Amendment,* (New York: New York University Press, 2003), 128-129.

[402] Miller v. California, 413 U.S. 15 (1973).

[403] *Miller*, supra notes 363, 364.

[404] *Miller* at Part b.

[405] United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).

[406] *Id.* at 712.

[407] *Id.* at 712.

In America, the concept of variable obscenity and the concept of obscenity have been determined by the Court. Through time, the Court changed its opinion of obscenity to accommodate changes in society. Obscenity has always been defined according to the Court on a case-by-case basis. It is hard to determine what the Court will say of obscenity in the next decades.

Conclusion

"Pornography" for the purposes of this study includes indecent materials, obscene materials, and sexually explicit materials. The terms "indecency" and "pornography" are included in relation to obscenity, even though these terms have not been well-defined by the federal government for over 100 years, because some of the statutes analyzed in this study have used these terms. Congress has used the term "pornography" as the umbrella term for indecency and obscenity, and most times Congress has used the terms loosely, whether individually or together. The courts have difficulty analyzing "indecency," "pornography," and "obscenity" because of the terms' ambiguity. Even though "indecency" and "pornography" are not the focus of this study and have no concrete definitions, they must be acknowledged because statutes and courts have sometimes used the terms in relation to obscenity.

Chapter 3

Legal Analysis

Chapter Three will analyze four federal statutes protecting children from online obscenity; they are the Communications Decency Act (1996), the Child Online Protection Act (1998), the Child Pornography Prevention Act (1996), and the Children's Internet Protection Act (2000). These federal statutes have been brought up to the U.S. Supreme Court for review. Chapter Three will also examine the Children's Online Privacy Protection Act (1998) and the DotKids Implementation Act (2002), both of which have become law.

Communications Decency Act

The Communications Decency Act of 1996[408] (CDA) was a small amendment to the Telecommunications Act of 1996,[409] and was signed into law by the former President Clinton on February 8, 1996.[410] The CDA was one of the first attempts at regulating the Internet by the U.S. federal government. The government tried to regulate any communication over the Internet, personal and commercial, that is indecent and patently offensive, using the justification that children need protection from such communication.[411] According to the Center for Democracy and Technology, the CDA would prohibit "classic fiction such as the 'Catcher in the Rye' and 'Ulysees,' the 'seven

[408] Communications Decency Act, 47 U.S.C. § 223 (A)-(H) (1996). Communications Decency Act of 1996, also known as ``Telecommunications Act Of 1996", Cited From Communications Act Of 1934 (47 U.S.C. 151 et Seq.

[409] Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56, 133-135; Title V.

[410] *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 827 (1996).

[411] *Id*.

dirty words,' and other materials which, although offensive to some, enjoy the full protection of the First Amendment if published in a newspaper, magazine, or a book, or in the public square."[412] One of the plaintiffs, Apollo Media Corporation, stated in a brief that the CDA did not define the forbidden speech, "indecency," that it was borrowed from one thing after another[413] and, therefore, "at each step in the construction of this censorship structure, the CDA's unconstitutionality has been compounded."[414]

According to the Supreme Court in *Reno v. ACLU* in 1997, indecency is "undefined."[415] The CDA statute[416] uses the term *indecent* or *indecency* in relation to "initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass an other person"[417] and "initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is

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[412] "An Overview of the Communications Decency Act (CDA)," N.D., Center For Democracy And Technology.org. http://www.cdt.org/speech/cda/ [accessed August 3, 2002].

[413] "Reno V. ACLU: Brief of Apollomedia Corporation And BALIF As Amici Curiae, In Support Of Affirmance," No. 95-511. Apollo Media Corporation, annoy.Com, http://annoy.com/history/doc.html?documentid=100214 [accessed January 4, 2006].
It quoted, "It [The CDA] Prohibits Unknowable Kinds And Quantities Of Speech ("Indecent") Not Defined By The Statute; The Government's Proposed Definition Of The Forbidden Speech, Borrowed From A Committee Report, Was In Turn Borrowed From The FCC's Definition Used To Regulate Government Licensees In A Very Different Medium (Broadcast); And The FCC's Definition In Turn Borrowed One Part Of The Three-Part Test For "Obscene" Matter Established By Miller V. California, 413 U.S. 15 (1973)."

[414] *Id*.

[415] Reno v. American Civil Liberties Union, 521 U.S. 844, 877 (1997). Justice Stevens, delivering the Court's opinion, said: "its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value."

[416] Full legislative history of the CDA statute can be found at http://www.cdt.org/speech/cda/cda.shtml [accessed May19, 2006].

[417] 47 U.S.C. § 223 (a)(1)(A)(ii) (Supp. 1997), "Indecent."

obscene or indecent knowing that the recipient of the communication is under 18 years of age."[418] "Patently offensive" is also "undefined"[419] according to the Supreme Court. However, the statute states that "indecency" is "in terms patently offensive as measured by contemporary community standards."[420] According to the statute, minors is defined as "under 18 years of age,"[421] and the Internet is defined as, "the international computer network of both Federal and non-Federal interoperable packet switched data networks."[422] The Supreme Court defined the Internet as "an international network of interconnected computers."[423] Although communication or communications is not clearly defined in the CDA statute ("telecommunications device,"[424] and "in interstate of foreign communications"[425]), the Supreme Court defined methods of Internet communications as: "Those most relevant to this case are electronic mail ('e-mail'), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat

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[418] 47 U.S.C. § 223 (a)(1)(B)(ii), "transmission of … indecent …"

[419] *Id.*

[420] 47 U.S.C. § 223 (a)(2)(d)(B) or § 223(d)(B).

[421] 47 U.S.C. § 223(D)(1)(A), "A specific person … under 18 years of age," and 47 U.S.C. § (A)(1)(B)(Ii), "the recipient of the communication is under 18 years of age regard less of whether the maker of such communication placed the call or initiated the communication."

[422] 47 U.S.C. § 230 (F)(1) and (F)(2), "(1) INTERNET. The term 'Internet' means the international computer network of both federal and non-federal interoperable packet switched data networks."(2) Interactive computer service. The term 'interactive computer service' means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions."

[423] *Reno v. ACLU*, 521 U.S. at 849.

[424] 47 U.S.C. § 223 (a)(1)(A).

[425] 47 U.S.C. § 223 (a)(1).

rooms,' and the 'World Wide Web.' All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images."[426]

The United States District for the Eastern District of Pennsylvania, *ACLU v. Reno*, No. 96-963, 1996 U.S. Dist. LEXIS 1617, (E.D. Pa. Feb. 15, 1996)

According to the one-judge-panel court ruling, Judge Buckwalter granted plaintiffs' motion for a temporary restraining order against enforcement on parts of the statute with the "indecent" phrase and "patently offensive" phrase.[427] It was alarming for the judge to encounter a statute that baffled reasonable, thinking people. He said,

> This strikes me as being serious because the undefined word 'indecent,' standing alone, would leave reasonable people perplexed in evaluating what is or is not prohibited by the statute. It is a substantial question because this word alone is the basis for a criminal felony prosecution.[428]

The government had argued that "indecent" and "patently offensive" had meant the same thing;[429] thus, even though the judge did not think "patently offensive" alone was

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[426] *Reno v. ACLU*, 521 U.S. at 851. Justice Stevens said: "Anyone with access to the internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." all of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium--known to its users as "cyberspace"--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."

[427] 47 U.S.C. Sec. 223(a)(1)(B) (as amended by the Telecommunications Act of 1996, Sec. 502), and 47 U.S.C. Sec. 223(d).

[428] *American Civil Liberties Union v. Reno*, No. 96-963, 1996 U.S. Dist. LEXIS 1617, at 6 (Feb. 15, 1996).

[429] *Id.* at 8. Judge Buckwalter said: "defendant seems to argue that an indecent communication means the same as a communication that in context, depicts or describes, 'in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. . . .'"

unconstitutionally vague, the "patently offensive" phrase was also enjoined.[430] The government received a temporary restraining order from enforcing the criminal provisions of the CDA on the day the CDA went into effect,[431] until determination by the district court panel of three judges of the application for a preliminary injunction.

The United States District Court for the Eastern District of Pennsylvania, *ACLU v. Reno*, 929 F. Supp. 824, 1996 U.S. Dist. LEXIS 7919, (E.D. Pa. 1996)

According to the procedure in this three-judge district court hearing,[432] the court is to decide based on the extensive record of evidence, in this case the Internet technology, so as to understand what the injunctive relief is all about besides the statute.[433] After reviewing the CDA, each judge gave his own opinion but concluded the same, that the CDA is unconstitutional.

Judge Sloviter acknowledged that a compelling government interest justified some of the material in the CDA statute but that the statute was not narrowly tailored[434] because the "tagging" affirmative defense of the CDA was not technologically and economically feasible for most Internet content providers.[435] Also, the government's

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[430] *Id.* at 8. Judge Buckwalter said: "while I do not believe the patently offensive provision of § 223(d)(1), quoted above, is unconstitutionally vague, I do not see how that applies to the undefined use of the word 'indecent' in § 223(a)(1)(b)(ii). Depending on who is making the judgment, indecent could include a whole range of conduct not encompassed by 'patently offensive.'"

[431] *Id.*; the CDA was enacted on February 15, 1996 and the temporary restraining order was granted the same day.

[432] *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 858, (1996), Note 1 of Judge Buckwalter's Opinion; 47 U.S.C. § 561(a) and 28 U.S.C. § 2284.

[433] *Id.*

[434] *Id.* at 857.

[435] *Id.* at 856.

"tagging" proposal is purely hypothetical, because "a tagging scheme [is] a string of characters [that] would be imbedded in all arguably indecent or patently offensive material,"[436] and

> that tagging alone does nothing to prevent children from accessing potentially indecent material, because it depends upon the cooperation of third parties to block the material on which the tags are embedded. Yet these third parties, over which the content providers have no control, are not subject to the CDA.[437]

Judge Sloviter also rejected government's argument that the statute applies only to commercial pornographers.[438]

Judge Buckwalter argued against the government's rationale that the Court should trust the discretion of prosecuting attorneys in matters of what material constitutes indecency or obscenity saying that trusting the discretion of attorneys is exactly what due process does not allow.[439] He also stated that there was no statutory basis for the government's argument that the CDA applied only to pornographic materials because obscenity takes account of "works of serious literary, artistic, political or scientific value," while the definition of indecency does not.[440] He also found the terms "patently offensive" and "in context"[441] vague and said that the CDA's criminal enforcement are

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[436] *Id.* at 856.

[437] *Id.*

[438] *Id.* at 852-855.

[439] *Id.* at 864.

[440] *Id.* at 863. Judge Buckwalter said: "to exclude works of serious literary, artistic, political or scientific value, and therefore the government's suggestion that it will not be used to prosecute publishers of such material is without foundation in the law itself."

severe enough[442] that the CDA would violate the constitutional principle of "simple fairness"[443] and violate the First and the Fifth Amendments.[444]

Judge Dalzell reviewed the history of "indecency" and did not find a definition. Rather, he found that the government borrowed the Supreme Court's decision of *FCC v. Pacifica* for the context of indecency:[445]

> the Supreme Court established the rough outline from which the FCC fashioned its three-part definition. For the first two parts of the test, the Supreme Court emphasized the "importance [**154] of context" in examining arguably indecent material. Id. at 747 n.25. "Context" in the Pacifica opinion includes consideration of both the particular medium from which the material originates and the particular community that receives the material. Id. at 746 (assuming that the Carlin monologue "would be protected in other contexts"); id. at 748-51 (discussing the attributes of broadcast); see also Information Providers' Coalition, 928 F.2d at 876 (discussing the "content/context dichotomy"). Second, the opinion limits its discussion to "patently offensive sexual and excretory language", Pacifica, 438 U.S. at 747, and this type of content has remained the FCC's touchstone. See, e.g., Alliance for Community Media, 56 F.3d at 112.[446]

Judge Dalzell viewed the Internet as a "participatory marketplace of mass speech"[447]; therefore there is "no technologically feasible way to limit geographical scope of [one's] speech."[448] He agreed that the government has a compelling interest to protect children on the Internet but not from indecency because "we should expect [indecent] speech to occur in a medium in which citizens from all walks of life have a voice."[449]

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[441] 47 U.S.C. § 223(d)(1).

[442] *ACLU v. Reno*, 929 F. Supp. 864.

[443] *Id.* at 861.

[444] *Id.*

[445] *Id.* at 868.

[446] *Id.* at 868.

[447] *Id.* at 881.

[448] *Id.* at 878.

The three-judge panel of the Eastern District of Pennsylvania ordered a preliminary injunction because the CDA was too broad, which violated the First Amendment, and the CDA was vague, which violated the Fifth Amendment.

The three-judge panel on June 11, 1996, granted a preliminary injunction from enforcement on the CDA because the plaintiffs had shown probability of eventual success, irreparable harm,[450] and that sections of the CDA are unconstitutional on their face.[451]

The United States Supreme Court, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)

A year later, the government appealed to the Supreme Court in *Reno v. American Civil Liberties Union* arguing that the District Court erred in its judgment that the CDA violated the First Amendment due to overbreadth and the Fifth Amendment due to vagueness.[452] However, the Supreme Court affirmed the District Court's decision that the CDA was unconstitutional as it abridged freedom of speech protected by the First Amendment. The Court examined the constitutionality of the CDA statute which criminalized Internet speech that is "indecent" and "patently offensive." The government claimed that the CDA statute left ample alternative channels of communication other than the Internet medium for such speech, but the Supreme Court rejected this argument because the government did not explain why there was no other less restrictive alternative

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[449] *Id.* at 882.

[450] *Id.* at 849.

[451] *Id.* at 883; 47 U.S.C. §§ 223(a)(1)(B), 223(a)(2), Sec 223(d)(1) and 223(d)(2). These sections generally describe the terms "indecent," and "patently offensive."

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

to protect minors other than prohibiting indecent speech overall on the Internet.[453] The CDA statute attempted to regulate speech on the basis of content; therefore, "time, place, and manner" analysis was inapplicable.[454]

The Supreme Court rejected "knowledge" of a person being under 18 and the "specific person" requirement in the CDA because the Supreme Court says "most Internet fora – including chat rooms, newsgroups, mail exploders, and the Web – are open to all comers."[455] Thus, broad powers of censorship is untenable. Besides, how can the Internet users determine who is under 18? Since there is no method of knowing who is under 18 and who is above 18, even the strongest reading of the "specific person" requirement cannot save the statute.[456]

The government argued that senders of indecent communications should "tag" their messages and thereby apply "good faith action"[457] so the user-ends could block communications with screening software.[458] Tagging materials is like putting a note on the web page to indicate that it contains indecent materials.[459] However, the Supreme Court rejected this argument because screening software did not exist at the time of the

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[453] *Id.* at 879.

[454] *Id.* at 868.

[455] *Id.* at 880.

[456] *Id.* at 880.

[457] 47 U.S.C. § 223(E)(5).

[458] *Reno v. ACLU*, 521 U.S. at 881.

[459] *Reno v. ACLU*, 521 U.S. at 862, "By "Tagging" Their Material In A Manner That Would Allow Potential Readers To Screen Out Unwanted Transmissions."

case, and even if it did, the software would not guarantee whether the recipient would actually block the material.[460]

The Court rejected the government's argument on age-verification technology. Age verification meant verifying the age of the Internet user. First, the government did not prove that age-verification would significantly reduce the CDA's burden on adult speech. Second, age-verification technology was not economically feasible for non-commercial speakers, according to the District Court's findings,[461] because at the time of the trial, credit card verification was widely unavailable to Internet Content Providers.[462] Third, there was no evidence that even if such technology existed that it would be effective to block minor's access.[463]

The government argued that it had a significant interest on the Internet's expansion and that if "indecent" and "patently offensive" speech were not regulated, then such speech would drive people away from the Internet.[464] The Supreme Court rejected such an argument because the expansion of the Internet contradicts the contention.[465] Rather, the government regulation would interfere with the "free exchange of ideas" in the Internet medium.[466]

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[460] *Id.* at 881.

[461] 47 U.S.C. Sec. 223(B)(5); 929 F. Supp. at 847 (Finding 107).

[462] *Reno v. ACLU*, at 521 U.S. 857.

[463] *Id.* at 856.

[464] *Id.* at 885.

[465] *Id*.

[466] *Id*.

The CDA had adopted part of the three-part *Miller* test[467] for its "indecent" and "patently offensive" tests. First, the CDA took the "patently offensive" phrase without using the whole second prong of the *Miller* test,[468] thereby, taking things out of context.[469] Second, the Court said: "the *Miller* definition is limited to 'sexual conduct,' whereas the CDA extends also to include (1) 'excretory activities' as well as (2) 'organs' of both a sexual and excretory nature."[470]

The government, in order to justify the CDA's ban of indecent communication on the Internet, said that the Supreme Court upheld the ban of indecent speech on radio broadcasts in *Federal Communication Commission v. Pacifica.*[471] The Supreme Court argued that it had upheld the FCC's declaratory order in the *Pacifica* holding that the broadcast of a recording "could have been the subject of administrative sanctions,"[472] but the Court did not state that the broadcast monologue was "patently offensive" and "indecent." Also, the Supreme Court stated that *Pacifica* was different than the CDA in that the declaratory order applied to a medium, the radio, which had "received the most limited First Amendment protection"[473] but there was no comparable history about the

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[467] *Miller v. California*, 413 U.S. 15 (1973); supra notes 349-358.

[468] *Miller* at 24. The second prong of the *Miller* test is: "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

[469] *Reno v. ACLU*, 521 U.S. at 873. The Supreme Court said the applicable state law is an important aspect to the meaning of "patently offensive."

[470] *Id.*

[471] Federal Communication Commission v. Pacifica, 438 U.S. 726 (1978).

[472] *Reno v. ACLU*, 521 U.S. at 866; *Pacifica*, 438 U.S. at 730.

[473] *Pacifica*, 438 U.S. at 748.

Internet medium.[474] With the radio, nothing could warn the listener about unexpected program content; however, with the Internet, "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material," according to District Court findings.[475]

The Court also compared the CDA to the case in *Renton v. Playtime Theatres, Inc.*[476] In *Renton,* the Supreme Court had upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. The Supreme Court argued that ordinance was aimed at the "secondary effects," such as crime and declining property values, that these theatres fostered, and not to regulate "offensive" speech or the content of films shown in theatres.[477] According to the Court, since the purpose of the CDA was to protect children from the primary effects of "indecent and patently offensive" speech rather than the secondary effects of such speech, that makes the CDA a content-based, blanket restriction on speech, and thus, the CDA cannot be "properly analyzed as a form of time, place, and manner regulation."[478] If the purpose of the CDA was to protect children from the primary effects of "indecent" and "patently offensive" speech, it was not similar to the *Renton* case because the Supreme Court in *Renton* protected from the secondary effects

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[474] *Reno v. ACLU,* 521 U.S. at 866.

[475] *Id.* at 867.

[476] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[477] 521 U.S. at 867; 475 U.S. at 49.

[478] *Renton*, 475 U.S. at 46.

of obscene speech. Moreover, the CDA attempted to zone the entire cyberspace, while *Renton* zoned only a limited space.[479]

Next, the Court compared the New York statute in *Ginsberg v. New York*[480] to the CDA statute. The Court said the CDA could not be likened to *Ginsberg* for the following reasons: first, the New York statute in *Ginsberg* gave room for parents to purchase the banned materials for their children but the CDA did not give room for parents' consent in the participation of the banned communication;[481] second, the New York statute applied to commercial transactions but the CDA applied to all transactions;[482] third, the New York statute defined materials harmful to children with the requirement that they be "utterly without redeeming social importance for minors" but the CDA did not define "indecent" and did not provide any requirement for "patently offensive" material;[483] and fourth, the New York statute defined minors as under age 17, while the CDA defined minors as under age 18.[484]

The Supreme Court held that communications over the Internet which might be deemed "indecent"[485]or "patently offensive"[486] for minors defined to be under age 18

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[479] *Reno v. ACLU*, 521 U.S. at 868.

[480] Ginsberg v. New York, 390 U.S. 629 (1968).

[481] *Reno v. ACLU,* 521 U.S. at 865.

[482] *Id.*

[483] *Id*.

[484] *Id*. at 866.

[485] *ACLU v. Reno*, 929 F. Supp. at 859, "prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age," 47 U.S.C. A. § 223(A) (Supp. 1997).

infringed upon First Amendment rights and the Due Process Clause of the Fifth Amendment.[487] The Supreme Court affirmed the District Court's judgment that the CDA statute abridged "the freedom of speech" protected by the First Amendment.[488] Justice O'Connor concurred and dissented in part. She saw the CDA as a legitimate governmental attempt to zone the Internet. She believed there is a fundamental difference between cyberspace communications and geographical transactions that partly legitimized the CDA statute.[489] The Supreme Court has upheld adult zoning laws in the past where minors have no privilege of access, for example, an identification card is needed to enter a tavern. These zoning laws were effective because the minor could be identified in person. However, in cyberspace the minor remains anonymous.

Justice O'Connor said that when the technology allows for effectively distinguishing adults and children, then enacting zoning laws on the Internet could be a solution. Until then, she would agree with the Court that the CDA statute was unconstitutional because its zoning law did not pass constitutional muster.

The CDA is related to this dissertation in that the U.S. government wanted to regulate all communication on the Internet: one big problem is that Internet communication is not limited to America. The protection of children was the central reason why the CDA came into being. Congress' motivation for the CDA was the fear

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[486] *ACLU V. Reno,* 929 F. Supp. at 860, "prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age," 47 U.S.C. § 223(D).

[487] *Id.* at 827. these two provision are found in section 502 of the CDA which amend 47 U.S.C. §§ 223(A) and (D).

[488] U.S. Const., amend. I. provides: "Congress shall make no law … abridging the freedom of speech."

[489] *Reno v. ACLU*, 521 U.S. at 889, 890.

that children will be exposed to unwholesome matters over the Internet. Because the Internet is unregulated, the exposure can be extremely harmful. The CDA had set the age of minor to be under 18 years old. Although the government did not know how to best define indecency on the Internet, the CDA was its first attempt at regulating child obscenity online. The CDA was Congress' attempt at solving the problem of the indecent materials over the Internet. The high Court believed that the CDA would have chilled communication and the CDA would have been a bad policy.

Child Online Protection Act (COPA)

In the Communication Decency Act (CDA), Congress wanted a law that prohibited all types of indecent communication over the Internet and the Supreme Court ruled that the term "indecent" was too vague and would diminish freedom of speech.[490] Congress then designed another statute called the Child Online Protection Act (COPA) in 1998 following after the footsteps of the CDA.[491] The COPA prohibits all 'harmful to minor' communication publicly available on the Web 'for commercial purposes.'[492] This statute has gone up to the Appellate Court twice more and the Supreme Court twice. The Supreme Court remanded the case back to the District Court for further findings as of 2006.

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[490] *Id.*

[491] Title XIV-Child Online Protection §§ 1401, 1403, 231. *Original Statute*, COPA Commission.org. http://www.copacommission.org/commission/original.shtml [accessed August 3, 2002].

[492] Plaintiffs' Memorandum of Law In Support of Their Motion For A Temporary Restraining Order and Preliminary Injunction, Civ. Act. No. 98-Cv-5591 Epic.Org, http://www.epic.org/free_speech/copa/tro_brief.html [accessed February 23, 2007].

The COPA differs from the CDA in several ways. First, the COPA set its parameters at the World Wide Web[493] instead of the Internet[494] as in the CDA. Second, COPA targeted just commercial communication,[495] whereas the CDA targeted all communication.[496] The offending phrase in the COPA was "harmful to minors" and "contemporary community standard,"[497] while in the CDA, "indecent" and "patently offensive."[498] The COPA threatened heavy penalty to violators at $50,000 each violation and/or for 6 months of imprisonment,[499] while the CDA did not specify the fine but would imprison violators not more than 2 years.[500]

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[493] Center For Democracy and Technology, "Child Online Protection Act of 1998," http://www.cdt.org/legislation/105th/speech/copa.html [accessed May 8, 2006]. 47 U.S.C. § 231(e)(1) provides: "by means of the world wide web.—the term 'by means of the world wide web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the internet, using hypertext transfer protocol or any successor protocol."

[494] Electronic Privacy Information Center, "Void! Declared Unconstitutional By The U.S. Supreme Court," http://www.epic.org/free_speech/cda/cda.html [accessed May 8, 2006]. 47 U.S.C. § 223(D)(B) "…uses any interactive computer service to display in a manner…"

[495] 47 U.S.C. Sec. 231(E)(2)(A).

[496] 47 U.S.C. § 223(A) provides: "Whoever in interstate or foreign communications … makes, creates, or solicits, and ... initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication …"

[497] 47 U.S.C. § 231(A)(1) provides: "includes any material that is harmful to minors" and § 231 (E)(6)(A) "the average person, applying contemporary community standards."

[498] 47 U.S.C. § 223(A)(Ii) "…which is obscene, lewd, lascivious, filthy, or indecent…" and 47 U.S.C. § 223(D) "in context, depicts or describes, in terms patently offensive."

[499] 47 U.S.C. § 231 (1); 31 F. Supp. 2d 473 at 477. It stated: "shall be fined not more than $ 50,000, imprisoned not more than 6 months, or both."

[500] CDA, 47 U.S.C. § 223(D)(2) provides: "…shall be fined under title 18, united states code, or imprisoned not more than two years, or both."
COPA, 47 U.S.C. § 231(A) provides: "...shall be fined not more than $50,000, imprisoned not more than 6 months, or both…," (A)(1) provides: "whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation," (A)(2) provides: "whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation."

The COPA and the CDA's similarities are in their affirmative defenses that included age-verification tools such as credit cards, debit cards, and adult access codes, and adult personal identification numbers.[501] The COPA's affirmative defenses included the digital certificate[502] or any reasonable measure feasible under technology for age verification technology.[503] In summary, the COPA prohibited any communication that is harmful to minors if the communication is made for a commercial purpose on the World Wide Web.

The COPA's definitions are as follow: "material that is harmful to minors" means "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene,"[504] a minor is defined as "any person under 17 years of age,"[505] and obscenity is defined as,

> (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

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[501] CDA: 47 U.S.C. § 223(E)(5)(B): "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."
COPA: 47 U.S.C. § 231(C): "(C) AFFIRMATIVE DEFENSE.-(1) defense.-it is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors-(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology."

[502] 47 U.S.C. § 231(e)(2)(B)(c)(B) provides: "A digital certificate is an electronic "credit card" that establishes your credentials when doing business or other transactions on the Web. It is issued by a certification authority (CA). It contains your name, a serial number, expiration dates, a copy of the certificate holder's public key (used for encrypting and decrypting messages and digital signatures), and the digital signature of the certificate-issuing authority so that a recipient can verify that the certificate is real." http://www.sec-1.com/glossary/d.html [accessed February 7, 2007].

[503] 47 U.S.C. § 231(e)(2)(B)(c)(C).

[504] 47 U.S.C. § 231 (E)(6).

[505] 47 U.S.C. § 231 (E)(7).

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."[506]

The United States District Court for the Eastern District of Pennsylvania, *ACLU v. Reno,* 31 F. Supp. 2d 473, (E.D. Pa. 1999)

The American Civil Liberties Union (ACLU) asked for a preliminary injunction against the COPA on the grounds that the COPA is unconstitutional on its face for violating First Amendment rights of adults. For a preliminary injunction to be approved, the plaintiffs must prove first, a likelihood of success on the merit; second, irreparable harm; third, threatened injury to the plaintiffs as opposed to injury to the defendants;[507] and fourth, that the public interest weighed in favor of the plaintiffs.[508] The district court applied the strict scrutiny test[509] because the COPA was considered a content-based regulation, the COPA was not narrowly tailored and was not the least restrictive means.[510] The district court concluded that plaintiff's fear of facing criminal penalties is reasonable given the breadth of the statute, it was clear to the court that plaintiffs would suffer irreparable harm.[511] In the context of an unconstitutional law the harm to the

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[506] 47 U.S.C. §§ 231 (E)(6)(A), Sec. 231 (E)(6)(B), and Sec. 231 (E)(6)(C).

[507] Preliminary Injunction, Standard Law School Center For Internet and Society Website, http://cyberlaw.stanford.edu/packets/vol_3_no_2/003557.shtml [accessed May 10, 2006]. Quote: "Weighing The Potential Harm To The Plaintiffs Against The Harm To The Defendants and The State."

[508] *American Civil Liberties Union v. Reno,* No. 98-5591, 31 F. Supp. 2d 473, 481 (1999).

[509] *ACLU v. Reno,* 31 F. Supp. 2d 473, at 492-493. Strict scrutiny test: is "the highest level of judicial review, [and is] when a "fundamental" constitutional right is infringed or when the government action involves the use of a "suspect classification" such as race or national origin." To pass strict scrutiny, there must be a compelling government interest, the statute must be narrowly tailored, and the statute must be the least restrictive means for achieving that interest. http://en.wikipedia.org/wiki/Strict_scrutiny [accessed February 7, 2007].

[510] *Id.* at 496.

plaintiffs far outweighs the interest to the defendant, "while the public certainly has an interest in protecting minors, the public interest is not served by the enforcement of an unconstitutional law."[512] The District Court granted the preliminary injunction.

The United States Court Of Appeals For The Third Circuit, *American Civil Liberties Union v. Reno,* 217 F.3d 162, (3d Cir. Pa. 2000)

The government challenged the District Court's issuance of a preliminary injunction which prevented the enforcement of the COPA.[513] The Third Circuit Court of Appeals repeated the preliminary injunction test, using a different rationale to come to the same conclusion that the COPA is unconstitutional.[514] When reviewing the likelihood of success on the merits prong of the preliminary injunction test, the Third Circuit said the COPA's "contemporary community standards"[515] would force people to abide by the most puritan community standard which would be overreaching burden on speech.[516] The COPA's community standard to identify patently offensive material on the Internet adopted the CDA definition of "community standard," which meant any communication available to a nationwide audience that would be judged by the standards of the

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[511] *Id.* at 497.

[512] *Id.* at 498.

[513] *ACLU v. Reno,* 217 F.3d 162, 165 (2000).

[514] Martha Mccarthy, "The Continuing Saga Of Internet Censorship: The Child Online Protection Act." 2005 BYU Educ. & L. J. 83, 88.

[515] *ACLU v. Reno,* 217 F.3d 162 (2000), at 177. Quote: "Our Concern with COPA's adoption of *Miller*'s "contemporary community standards" test by which to determine … by restricting their publications to meet the more stringent standards of less liberal communities, adults whose constitutional rights permit them to view such materials would be unconstitutionally deprived of those rights. Thus, this result imposes an overreaching burden and restriction …"

[516] *Id.* at 175; *Ashcroft v. ACLU*, 535 U.S. 564, 577 (2002).

community most likely to be offended by the message.[517] What is "harmful to minors" is not consistent from one community to another. The Appellate Court affirmed the District Court's order that the COPA is unconstitutional on its merits and granted the preliminary injunction.[518]

The United States Supreme Court, *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002)

The Supreme Court granted the U.S. Attorney General's petition for certiorari to review the Court of Appeals' decision that the COPA violates the First Amendment because it relies on contemporary community standards to identify material that is harmful to minors. On May 13, 2002, Justice Thomas, who delivered the opinion of the Court, said that COPA does not suffer from the same flaw as the CDA because the COPA has a more narrowed focus. The COPA applied to communications for commercial purposes. The COPA defined "harmful to minors" in a way that parallelled the *Miller* definition of obscenity unlike the CDA.[519] However, the Supreme Court did not decide on the constitutionality of the COPA or whether the District Court correctly concluded that the statute would not survive strict scrutiny, but, rather, the Court found that COPA's reliance on "community standards" did not in itself make the law unconstitutional.[520] The Court remanded the case, ordering the Third Circuit to re-examine the COPA as "to

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[517] *Reno v. ACLU*, 521 U.S. at 877-878.

[518] *ACLU v. Reno,* 217 F.3d at 181.

[519] *Ashcroft v. ACLU,* 535 U.S. 564 at 578: "COPA, By Contrast, Does Not Appear To Suffer From The Same Flaw Because It Applies To Significantly Less Material Than Did The CDA And Defines The Harmful-To-Minors Material Restricted By The Statute In A Manner Parallel To The *Miller* Definition Of Obscenity."

[520] *Id.* at 585.

whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis."[521]

The United States Court of Appeals For The Third Circuit, *American Civil Liberties Union v. Ashcroft,* 322 F.3d 240, (3d Cir. Pa. 2003)

The Third Circuit did an independent analysis of issues addressed by the District Court in accordance with the order from the Supreme Court.[522] The Third Circuit used the strict scrutiny test on the COPA and found there was a compelling interest in protecting harmful material online,[523] however, the statute was not narrowly tailored enough and did not pass the strict scrutiny test.[524] First, the Third Circuit said the phrase "taking the material as a whole,"[525] for the "harmful to minors" material definition was not specified as to whether a whole material is a "a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites."[526] The age range of minors was too broad[527] so that Web publishers must guess minors' ages.[528]

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[521] *Id*.

[522] American Civil Liberties Union v. Ashcroft, 322 F.3d 240, 250 (3d Cir. Pa. 2003).

[523] *Id.* at 251.

[524] *Id*. at 251.

[525] *Id.* at 252.

[526] *Id.* at 252.

[527] *Id.* at 254. "The term "minor," as congress has drafted it, thus applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen. in abiding by this definition, web publishers who seek to determine whether their web sites will run afoul of COPA cannot tell which of these "minors" should be considered in deciding the particular content of their internet postings. instead, they must guess at which minor should be considered in determining whether the content of their web site has "serious . . . value for [those] minors." 47 U.S.C. § 231(E)(6)(C). Likewise, if they try to comply with COPA's "harmful to minors" definition, they must guess at the potential audience of minors and their ages so that the publishers

Also "commercial purposes" imposed content restrictions on commercial, non-obscene speakers.[529] "Affirmative defenses" such as credit cards, adult personal identification numbers or access codes, and digital certificates would be an economic harm due to loss of traffic to Web publishers.[530] The COPA did not use the least restrictive means to reach the compelling interest in protecting minors because the District Court found that filtering technology although imperfect, "may be at least as successful as the COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that the COPA imposes on adult users."[531] Thus, the Third Circuit held that the District Court did not abuse its discretion by granting the preliminary injunction because the statute was indeed vague and overbroad. The government appealed again to the Supreme Court.[532]

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can refrain from posting material that will trigger the prurient interest, or be patently offensive with respect to those minors who may be deemed to have such interests."

[528] *Id.* at 253-255.

[529] *Id.* at 256. " 'for commercial purposes' does not narrow the reach of COPA sufficiently. Instead, COPA's definitions subject too wide a range of web publishers to potential liability,' and, "Moreover, the definition of 'commercial purposes' further expands COPA's reach beyond those enterprises that sell services or goods to consumers, including those persons who sell advertising space on their otherwise non-commercial web sites. *See Reno II*, 31 F. Supp. 2d at 487 (Finding of Fact P 33). Thus, the 'engaged in the business' definition would encompass both the commercial pornographer who profits from his or her online traffic, as well as the web publisher who provides free content on his or her web site and seeks advertising revenue, perhaps only to defray the cost of maintaining the web site."

[530] *Id.* at 259.

[531] *Id.* at 261, 262; Reno II, 31 F. Supp. 2d at 497 (Finding of Fact P 65).

[532] *Id.* at 265.

The United States Supreme Court, *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656 (2004)

The Supreme Court decision in the COPA on June 29, 2004 was a 5-4 decision. Justice Kennedy in writing for the Court was joined by Justices Stevens, Souter, Thomas, and Ginsburg. They, like the District Court, also concluded that the COPA is not the least restrictive method compared to filtering software to solve the harmful to minor material.[533] The District Court found that 40 percent of pornography originated from overseas;[534] making online pornography illegal will not solve the problem because the source can move offshore. Because the United States does not have jurisdiction over popular pornographic Websites in other countries, the Supreme Court thought the way to tackle international pornography is through the use of filtering software. Because filters screen at the user end, it is not a prior restraint on the originating end. The Supreme Court even quoted the conclusion of the COPA Commission, a government appointed-committee created by Congress to research about child online protections, that age-verification technologies are not as effective as filtering technology; yet the government in COPA did not heed its research conclusions.[535] Most important to the Supreme Court,

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[533] *Ashcroft v. ACLU*, 542 U.S. 656, at 667. The Supreme Court said that the District Court for the Eastern District of Pennsylvania found that: "Filters are less restrictive than COPA."

[534] *Id.* The Supreme Court said that the District Court for the Eastern District of Pennsylvania found that: "filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the web from America. The district court noted in its fact findings that one witness estimated that 40% of harmful-to-minors content comes from overseas. *Id.*, At 484."

[535] *Id.* at 668. The Supreme Court said: "that filtering software may well be more effective than COPA is confirmed by the findings of the Commission On Child Online Protection, A Blue-Ribbon Commission Created By Congress In COPA Itself. Congress directed the Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. Note Following 47 U.S.C. § 231. It unambiguously found that filters are more effective than age-verification

filtering technology is the least restrictive means in fulfilling the compelling interest in protecting minors without chilling too much First Amendment freedom.

The injunction was upheld, pending a full trial on its merits because the harm of removing the injunction far outweighs the benefit: speakers might censor themselves rather than face prosecution; the effectiveness of filtering software is still a matter of factual dispute; the District Court might be able to gather current facts on technology in light of the changed legal landscape,[536] and, the majority of the Court noted, Congress may pass further legislation to prevent minors from gaining access to harmful materials.[537]

Justice Breyer dissented, joined by Justice O'Connor and the Chief Justice;[538] he analyzed the COPA using strict scrutiny and argued that it passed constitutional muster. He said that the statute covered a little more than *Miller* by adding the term "minor."[539] The COPA does not censor the material it covers but rather requires providers to restrict minors' access by verifying age.[540] According to Justice Breyer, choosing filtering

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requirements. See Commission On Child Online Protection (COPA), Report To Congress, at 19-21, 23-25, 27 (Oct. 20, 2000) (Assigning A Score For "Effectiveness" Of 7.4 for Server-Based Filters and 6.5 for Client-Based Filters, as compared To 5.9 for Independent Adult-ID Verification, and 5.5 For Credit Card Verification)."

[536] *Ashcroft v. ACLU*, 542 U.S. at 672.

[537] Sue Ann Mota, "Protecting Minors From Sexually Explicit Materials On The Net: COPA Likely Violates The First Amendment According To The Supreme," 7 Tul. J. Tech. & Intell. Prop. 95, 103-104 (2005).

[538] *Ashcroft v. ACLU*, 542 U.S. at 677-691 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

[539] *Id.* at 679 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting). Justice Breyer said: "The only significant difference between the present statute and *Miller*'s definition consists of the addition of the words "with respect to minors," 47 § 231(E)(6)(A), and "For Minors," 47 § 231(E)(6)(C). But the addition of these words to a definition that would otherwise cover only obscenity expands the statute's scope only slightly."

software as the least restrictive means is similar to choosing the status quo because "despite the availability of filtering software, children were still being exposed to harmful material on the Internet."[541] He pointed out that "filtering is faulty,"[542] filtering costs money, filtering depends upon parents who are mostly in the workforce with about 5 million children left alone at home without supervision,[543] and that filtering lacks precision.[544] Justice Breyer concluded that the COPA is constitutional with minor burdens that adults wishing to view material may overcome at modest cost.[545] He felt strongly, expressing that, "after eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What proceedings? … What remains to be litigated?"[546]

Justice Scalia also dissented, saying the Court and Justice Breyer erred in subjecting the COPA to strict scrutiny.[547] Although he agreed with Justice Breyer's conclusion that the COPA is constitutional, he would totally ban commercial pornography altogether since banning commercial pornography would be constitutional under First Amendment, saying:

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[540] *Id.* at 682.

[541] *Id.* at 684.

[542] *Id.* at 685.

[543] *Id.* at 685.

[544] *Id.* at 685, 686.

[545] *Id.* at 689.

[546] *Id.*

[547] *Id.* at 676.

> Nothing In The First Amendment Entitles The Type Of Material Covered By COPA To That Exacting Standard Of Review. 'We Have Recognized That Commercial Entities Which Engage In 'The Sordid Business Of Pandering' By 'Deliberately Emphasiz[Ing] The Sexually Provocative Aspects Of [Their Nonobscene Products], In Order To Catch The Salaciously Disposed,' Engage In Constitutionally Unprotected Behavior.' *United States* V. *Playboy Entertainment Group, Inc.,* 529 U.S. 803, 831, … There Is No Doubt That The Commercial Pornography Covered By COPA Fits This Description. The Statute Applies Only To A Person Who, "As A Regular Course Of Such Person's Trade Or Business, With The Objective Of Earning A Profit," 47 U.S.C. § 231(E)(2)(B) [47 USCS § 231(E)(2)(B)], And "With Knowledge Of The Character Of The Material," § 231(A)(1), Communicates Material That Depicts Certain Specified Sexual Acts And That "Is Designed To Appeal To, Or Is Designed To Pander To, The Prurient Interest," § 231(E)(6)(A). Since This Business Could, Consistent With The First Amendment, Be Banned Entirely, COPA's Lesser Restrictions Raise No Constitutional Concern.[548]

Is the Supreme Court just buying time by sending the case back to the District Court? Are the dissents in the COPA 2004 a very unpopular Supreme Court opinion? Nevertheless, the back-and-forth court cases on the COPA demonstrate that there is hope in legislation for obscenity.

The United States District Court for the Northern District of California, *Gonzales v. Google, Inc*., 2006 U.S. Dist. LEXIS 13412 (N.D. Cal. March 17, 2006)

After the 2004 COPA Supreme Court decision to remand the case back to the District Court for ""further evidence" as to the "relative restrictiveness and effectiveness of alternatives to the statute,"[549] the government got ready for another round of battle. United States Attorney General Alberto R. Gonzales subpoenaed[550] Google, Inc., ("Google") in aid of the case of *ACLU v. Gonzales* pending in the Eastern District of Pennsylvania.[551] The U.S. Department of Justice had subpoenaed major search engine

[548] *Id.* at 676 (Scalia, J., dissenting).

[549] Gonzales v. Google, Inc., No. CV 06-8006MISC JW, 2006 U.S. Dist. LEXIS 13412 at 14-15 (N.D. Cal. Mar. 17, 2006). Quote from *Ashcroft v. ACLU*, 542 U.S. at 689 (Breyer, J., dissenting).

[550] Government Subpoena of Google, Inc., http://www.google.com/press/images/ruling_20060317.pdf [accessed May 18, 2006].

companies such as AOL, Microsoft, Yahoo!, and Google to surrender search queries and URLs in their databases.[552] The Department of Justice did not disclose what the purpose of the information was except that it would use the information for a test set.[553] The government wanted two months worth of search queries, that is, search words, strings, and sentences that Internet users typed into search engines, and also wanted URLs.[554] All the other companies relented without questions, but Google not without a fight.[555]

Google argued that the subpoena demanded Google's valuable trade secrets.[556] Google claimed the subpoena imposed an undue burden on Google.[557] First, that it would require about a week's worth of engineering time.[558] Second, that wanting collaborated material is unrealistic.[559] Third, that the production of the requested material would cause a chilling effect on Google's business and user trust.[560] Fourth, that the data is not useful for any study.[561]

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[551] *Gonzales v. Google, Inc*., 2006 U.S. Dist. LEXIS 13412, at 1.

[552] *Id.* at 5.

[553] *Id.* at 5, Judge Ware said: "Apparently, in preparing its defense, the Government initiated a study designed to somehow test the effectiveness of blocking and filtering software."
Id. at 15, Judge Ware said: "Based on the Government's statement that this information is to act as a 'test set for the study' (Reply at 3:20) and a general statement that the purpose of the study is to 'evaluate the effectiveness of content filtering software,' (Reply at 3:2-5)").

[554] 2006 U.S. Dist. LEXIS 13412 at 7, "Before the court is a motion to compel google to comply with the modified subpoena, namely, for a sample of 50,000 urls from Google's search index and 5,000 search queries entered by google's users from google's query log."

[555] *Id.* at 6.

[556] Google's Opposition To The Government's Motion To Compel, Hearing March 13, 2006, 9 a.m., Case No. 5:06-mc-80006-JW, at 9.

[557] *Id.* at 16.

[558] *Id.* at 16.

[559] *Id.* at 17.

Judge Wade tried to balance proprietary interests versus the government's compelling interest, and he thought that it would be fair for the government to receive a fraction of Google's information—enough to complete its study.[562] The government did not get the URL lists because Judge Wade was reluctant to make Google vulnerable to exposing its trade secrets.[563] On March 17, 2006, Google published its victory on its site, claiming that the Court's decision compelling it to submit 50,000 URLs was a small fraction compared to the subpoenaed amount.[564]

The United States District Court for the Eastern District of Pennsylvania, *American Civil Liberties Union v. Gonzales*, No. 98-5591, 2007 U.S. Dist. LEXIS 20008 (March 22, 2007)

On March 22, 2007, the COPA was permanently enjoined from enforcement by a District Court decision in *ACLU v. Gonzales.*[565] Judge Reed presented extensive findings of fact that the filtering software is superior to other age-verfication methods for limiting

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[560] *Id.* at 18.

[561] *Google,* 2006 U.S. Dist. LEXIS 13412 at 14. Judge Ware said: "The government's disclosure only describes its methodology for a study to categorize the urls in Google's search index, and does not disclose a study regarding the effectiveness of filtering software. Absent any explanation of how the "aggregate properties" of material on the Internet is germane to the underlying litigation, the government's disclosure as to its planned categorization study is not particularly helpful in determining whether the sample of Google's search index sought is reasonably calculated to lead to admissible evidence in the underlying litigation.")

[562] *Google*, 2006 U.S. Dist. LEXIS 13412 at 38. Judge Ware said: "As expressed in this order, the court's concerns with certain aspects of the government's subpoena have been mitigated by the reduced scope the government's present requests."

[563] *Google*, 2006 U.S. Dist. LEXIS 13412 at 33. "As trade secret or confidential business information, Google's production of a list of URLs to the Government shall be protected by protective order."

[564] Nicole Wong, Associate General Counsel For Google Inc., "Judge Tells Doj "No" On Search Queries," posted March 17, 2006, 6.00 P.M. http://googleblog.blogspot.com/2006/03/judge-tells-doj-no-on-search-queries.html [accessed May 19, 2006] quoting, "This is a clear victory for our users and for our company, and Judge Ware's decision regarding search queries is especially important."

[565] ACLU v. Gonzales, No. 98-5591, 2007 U.S. Dist. LEXIS 20008 (March 22, 2007).

obscene online materials.[566] He argued that at approximately 50 percent of sexually explicit materials come from overseas[567] and therefore outside the reach of COPA law.

Judge Reed acknowledged that: "This court, along with a broad spectrum of the population across the country yearn for a solution which would protect children from such material with 100 percent effectiveness."[568] However, because the COPA abridged the First and Fifth Amendment rights of plaintiffs, Judge Reed concluded:

> (1) COPA is not narrowly tailored to the compelling interest of Congress;
> (2) defendant has failed to meet his burden of showing that COPA is the least restrictive and most effective alternative in achieving the compelling interest; and
> (3) COPA is impermissibly vague and overbroad[569]

In summary, the COPA legislation is the federal government's second attempt at regulating Internet. Congress had a narrower statute that regulated "harmful to minors" material on commercial Websites. However, the courts found that Congress still did not use the least restrictive means, through the use of age-verification technology, to solve the problem of online obscenity that children may encounter. It is understood that children may encounter pornographic materials on the Internet. Children were defined as under age 17. The courts instead pointed to filtering software as a more restrictive means than age-verfication technology such as the credit cards, adult personal identifcation

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[566] *Id.* at 38-61 (findings 67 to 121).

[567] *Id.* at 36.

[568] *Id.* at 130.

[569] *Id.* at 131, 132.

numbers and digital certifications. David Sobel, EPIC's Legal Counsel, said that making children the excuse for ill-conceived censorship schemes is poor public policy.[570]

Children's Internet Protection Act (CIPA)

Children's Internet Protection Act was first introduced as the "Internet School Filtering Act"[571] in 1998 by Senator McCain along with Senators Murray, Lieberman and Coats.[572] President Clinton signed CIPA into law on December 21, 2000.[573] CIPA is the statute that compelled federally funded public libraries to install filtering software on Internet terminals so that children may not encounter harmful materials in public libraries. The American Library Association alleged that CIPA forces libraries to violate their patrons' First Amendment rights, but the Supreme Court disagreed. Instead, the Court said CIPA was not unconstitutional and its filtering software did not place a huge burden on speech. In fact, the Supreme Court has referred to filters as the best solution to combat online pornography in *Ashcroft v. ACLU,* June 29, 2004 case.

A filter, also known as filtering or screening or blocking software, is a computer software that when installed into a computer can sift Web sites by keywords, images, and audio. Private companies make filtering software as a consumer product. Consumers can

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[570] David Sobel, Electronic Frontier Foundation, http://www.eff.org/legal/cases/aclu_v_reno_ii/html/19981022_plaintiffs_pressrel.html [accessed February 28, 2006].

[571] 105th Congress.

[572] Internet School Filtering Act (ISFA), 144 Cong Rec S 8161, 105th Congress, 2nd Session, Wednesday, July 15, 1998. The Internet School Filtering Act (ISFA) introduced earlier had been developed into a bill known as the Children's Internet Protection Act (CIPA), 106th Congress. A bill for "Children's Internet Protection Act" (CIPA), 106th Congress 2nd Session H.R.4600, http://www.securitymanagement.com/library/hr4600.pdf [accessed 4/10/02].

[573] *Id.*

set the filter according to their needs. Most consumer filters are targeted toward parents and institutions to filter keywords, images and audio that may be harmful to children. Specifically, filtering software are supposed to filter pornographic images that might appear on the screen but they are not always accurate. The filter is to compute what Web image is about to appear on the computer screen and should block such images from appearing on the computer screen. In the event that a website is blocked, a blank page or a note appears on the computer screen stating that Internet access to the website is blocked.

According to how blocking software works, the administrators may allow minors access to certain websites by typing the Uniform Resource Locator into the list of exceptions in the filter program. However, this may be cumbersome for the administrators in the long run. The law allows the discretion of school administrators to see value in what is artistic or scientific work and to judge the value of the material as a whole. For example, paintings of nude women, whether to handpick websites to be included or excluded in the filtering program. According to the statute, each public library should have Internet safety policies that explain how they filter out materials that are obscene, or related to child pornography, or "material that is harmful to minors during the use of such computers by a minor."[574]

CIPA is not totally restrictive. The Act takes into account "disabling during adult use." For instance, "an administrator, supervisor, or other authority may disable the technology, during use by an adult, to enable unfiltered access for bona fide research or

[574] Children's Internet Protection Act, H.R.4600 (A)(A)(1)(B)(I), Page 3.

other lawful purposes."[575] One overlooked benefit of filtering software is the ability to cater to individual needs. Adults in the public school or library may use unfiltered technology when a person of administrative authority disables the filter for lawful adult use or for research purposes.[576]

As good as it sounds, in reality the installation of and uninstallation of the filtering software every time an adult wants to use the computer for Internet access can be cumbersome. Congress acknowledged that filtering is "an imperfect help" that "will not fully solve the problem." Although mandatory, Senator Coats acknowledged that it is "a tool by which [parents] can protect their children."[577] Many administrators have found filtering to be an imperfect help, "in a recent survey of public schools sponsored by San Diego-based Internet and e-mail filter maker St. Bernard Software Inc., many school administrators said they lack the resources to block porn, hate sites and other harmful content."[578]

Commentaries were submitted to Congress in protest against CIPA.[579] John T. Benson, a Superintendent of Public Instruction for Wisconsin state, said indirectly that

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[575] Children's Internet Protection Act, H.R.4600 (A)(A)(1)(C)(Ii).

[576] *Id.*

[577] *Id.*, Senator Coats said at the closing of the speech.

[578] Mark Baard, "Libraries to Comply with Antiporn Law or Lose Federal Funding," posted July 8, 2004, SearchSecurity.com, http://searchsecurity.techtarget.com/originalContent/0,289142,sid14_gci991888,00.html [accessed February 8, 2007].

[579] James S. Tyre, A Fax to Senator Mccain, "Re: S.97, Secure Computing Corporation (Smartfilter)," June 21, 1999 [last accessed March 31, 2002], http://censorware.net/essays/990621_mccain_smartfilter.html; John T. Benson, Superintendent of Public Instruction, "Wisconsin E-Rate – Letter To Senator Mccain On

the government gives content criteria through "the arbitrary nature of a software program."[580] In studies of blocking software, Censorware.org found that many products are flawed solutions and do not serve the purpose of filtering obscene materials, for example, the *SmartFilter* invented by Secure Computing Corporation and similar products.[581] The American Civil Liberties Union said that blocking software is a wrong solution for public libraries because the blocking software solution "gives librarians, educators and parents with a false sense of security when providing minors with Internet access."[582]

The Library Services and Technology Act (LSTA) is part of the CIPA that governs the e-rate program or the federal program[583] "by which schools and libraries may apply to receive 20 percent to 90 percent discounts off of telecommunications, Internet access, internal connections and basic maintenance on internal connections."[584] A library may not receive the e-rate or the LSTA unless it has: "a policy of Internet safety for minors that includes the operation of a technology protection measure . . . that protects against access" by all persons to "visual depictions" that constitute "obscenity" or "child

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Filtering Issue," March 12, 1998, http://www.dpi,state.wi.us/dpi/dlcl/pld/mccain.html [accessed April 10, 2002].

[580] *Id.* at 41.

[581] The Censorware Project, http://censorware.net/ [accessed February 15, 2007].

[582] "Censorship In A Box: Why Blocking Software is Wrong For Public Libraries," in Introduction Section, (September 16, 2002), ACLU website, http://www.aclu.org/privacy/speech/14915pub20020916.html [accessed April 20, 2007].

[583] Wikipedia.Com, "LSTA CIPA Compliance Information," http://statelibrary.dcr.state.nc.us/lsta/compliance06.pdf [accessed May 2, 2006].

[584] E-Rate Program Assistance, Alabama State Department Of Education, http://erate.alsde.edu/ [accessed 5/2/06].

pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors."[585] "Technology protection measure" is defined as: "a specific technology that blocks or filters Internet access to material covered by" the CIPA.[586] As discussed before, the CIPA also permits the library to "disable" the filter in order "to enable access for bona fide research or other lawful purposes."[587]

The e-rate program of the CIPA provides discounts to purchase equipments and services such as computers to help to public libraries and public schools systems. The federal funds are significant for some states. It is the pivotal point for closing the haves and have-nots in Internet access, an educational tool that one cannot do without in today's information and technology-driven nation. The amount of funds is determined by the Universal Service Administrative Company (USAC), an independent, not-for-profit corporation designated as the administrator of the federal Universal Service Fund by the Federal Communications Commission (FCC) USAC administers.[588] For example, the e-rate provided the state of Alabama $21.2 million in 2002, $31.35 million in 2003, and $22.2 million in 2004.[589] To forfeit such an amount would hurt the ability for libraries and schools to provide good service to the students and other learners.

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[585] Library Services and Technology Act (LSTA), 20 U.S.C. §§ 9134(F)(1)(A)(I) and (B)(I); 47 U.S.C. §§ 254(H)(6)(B)(I) and (C)(I).

[586] Library Services and Technology Act (LSTA), 47 U.S.C. § 254(H)(7)(I).

[587] Library Services and Technology Act (LSTA), 20 U.S.C. § 9134(F)(3); 47 U.S.C. § 254(H)(6)(D).

[588] Universal Service Administrative Company (USAC), http://www.universalservice.org/about/universal-service/ [accessed May 2, 2006].

[589] E-Rate Program Assistance, Alabama State Department of Education. http://erate.alsde.edu/ [accessed May 2, 2006].

The CIPA defines "minors" as individuals below 17 years old.[590] Under the definition of "material" are any forms of communication and any forms of material, "whether graphic, audio, visual, written, or a combined display of materials," and also "an actual or simulated sexual act or sexual contact" or "normal or perverted sexual act" and "lewd exhibition of the genitals."[591] In determining whether the material lacks serious literary, artistic, political or scientific value," the materials are "taken as a whole." Harmful to minors is defined as:

> any picture, image, graphic image file, or other visual depiction that –
> (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
> (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
> (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[592]

The term, "obscene," is borrowed from 18 U.S.C. § 1460, which says, "Possession with intent to sell, and sale, of obscene matter on Federal property." Child pornography is borrowed from 18 U.S.C. § 2256, which says,

> (8) any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

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[590] Children's Internet Protection Act, H.R.4600 (C)(D) and § 1721(C) (Codified at 47 U.S.C. § 254(H)(7)(D)).

[591] Children's Internet Protection Act, H.R.4600 (C)(G), H.R.4600 (C)(H).

[592] American Library Association v. United States, 201 F. Supp. 2d 401, note 2, (May 31, 2002), cites to Children's Internet Protection Act § 1721(C) (Codified at 47 U.S.C. § 254(H)(7)(G)).

The United States District Court for the Eastern District of Pennsylvania, *American Library Association v. United States*, 201 F. Supp. 2d 401 (May 31, 2002)

In the case of *American Library Association v. United States*,[593] the United States District Court for the Eastern District of Pennsylvania consisting of Chief Circuit Judge Becker, and District Court Judges Fullam and Bartle, likened the library to a public forum and decided the CIPA was a content-based restriction; both public forum and content-based restrictions require the strict scrutiny test.[594] Under the strict scrutiny, the court agreed unanimously that keeping children away from pornography is a compelling state interest. But, the Court found that the CIPA was not narrowly tailored to serve the governmental purpose because it found ways other than screening software such as setting up cubicles, having an on/off switch on computers for filters, and having a library staff patrolling around the library computer terminals. The court said that asking a librarian to turn off the filter "'[does] not cure the constitutional deficiencies in public libraries' use of Internet filters."[595] The court struck the CIPA down on grounds that it made librarians rob patrons' First Amendment rights and its filtering software technology is not advanced enough to capture only the "harmful to minor" materials. The court said the CIPA is facially invalid under the First Amendment and permanently enjoined parts of the statute

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[593] American Library Association v. United States, 201 F. Supp. 2d 401 (May 31, 2002). A 200 page court decision.

[594] Strict Scrutiny test: supra note 509.

[595] *ALA v. US*, 201 F. Supp. 2d 401 at 411.

which contains the "severability" clause[596] and the library's participation in the e-rate program.[597]

The United States Supreme Court, *United States v. American Library Association,* 539 U.S. 194 (June 23, 2003)

The Supreme Court acknowledged that Congress has "a wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives,"[598] but Congress may not do so if the conditions caused the recipient to engage in unconstitutional activities.[599] Thus the Supreme Court in United States v. American Library Association[600] asked whether compliance with the CIPA's conditions necessarily cause public libraries to violate the First Amendment. To answer the legal question, the Supreme Court examined public libraries' role in society. The Supreme Court explained that a public library's societal role is to fulfull cultural enrichment and facilitate learning[601] rather than providing a public forum for Internet access.[602] Thus, public

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[596] *Id.* at 495, Note 37: "CIPA § 1712(a)(2) contains a provision titled "Separability," which is codified in the Library Services and Technology Act, 20 U.S.C. § 9134(f)(6), and provides: "If any provision of this subsection is held invalid, the remainder of this subsection shall not be affected thereby."

[597] *Id.* at 412, 413. The District Court for the Eastern District of Pennsylvania said: "Section 1721(b) of CIPA imposes conditions on a library's participation in the E-rate program. A library "having one or more computers with Internet access may not receive services at discount rates," CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(A)(i)), unless the library certifies that it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are - (I) obscene; (II) child pornography; or (III) harmful to minors," and that it is "enforcing the operation of such technology protection measure during any use of such computers by minors." CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(B)).

[598] United States v. American Library Association, 539 U.S. 194, 203 (June 23, 2003).

[599] *Id.*

[600] *US v. ALA,* 539 U.S. 194 (2003).

[601] *Id.* at 203, 204.

libraries cannot be considered a "traditional" nor a "designated" public forum because "the doctrines surrounding traditional public forums may not be extended to situations where such history is lacking"[603] and "to create such a [designated public] forum, the government must make an affirmative choice to open up its property for use as a public forum."[604] The Supreme Court reasoned that:

> Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves. Rather, a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. The fact that a library reviews and affirmatively chooses to acquire every book in its collection, but does not review every Web site that it makes available, is not a constitutionally relevant distinction.[605]

If the library is treated as a public forum, then the Court has to analyze the case with the strict scrutiny test. By doing away with the public forum reasoning, the Supreme Court is freeing CIPA from the rigid strict scrutiny test.

Also, the Supreme Court said Congress did not impose an unconstitutional condition on public libraries that receive E-rate and LSTA by requiring them to install filtering software on public library computers to filter the Internet from obscenity and materials harmful to minors because CIPA is a valid exercise of Congress' spending power.[606] The Court said public libraries are not free of conditions which their benefactors attach to the use of donated funds.[607] In other words, "the First Amendment

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[602] *Id.* at 205, 206.

[603] *Id.* at 205-207.

[604] *Id.* at 206.

[605] *Id.* at syllabus and 1.

[606] *Id.* at 214.

[607] *Id.* at 213.

does not prohibit Congress from forcing public libraries - as a condition of receiving federal funding - to use software filters to control what patrons access online via library computers."[608]

Public libraries had always excluded pornographic materials from their collections and Congress could do a similar limitation on its Internet-assistance programs.[609] The law did not "distort the usual functioning of public libraries,"[610] because the function of public libraries is not to provide everything people want but to select within public libraries' budget an educational array of books the libraries think is important to the public.[611] The Court believes that it is the responsibility of public libraries to "separate the gold from the garbage."[612]

The Supreme Court argued against the lower court's decision that filtering software suffers from underblocking or overblocking saying that filtering software cannot:

> 1) accurately collect Web pages that potentially fall into a blocked category (e.g., pornography); (2) review and categorize Web pages that they have collected; and (3) engage in regular re-review of Web pages that they have previously reviewed. These failures spring from constraints on the technology of automated classification.[613]

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[608] Julie Hilden, "A Recent Supreme Court Decision Allowing the Government to Force Public Libraries to Filter Users' Internet Access is Less Significant Than It Might at First Appear," Findlaw's Legal Commentary, July 1, 2003, [accessed January 12, 2003].

[609] *US v. ALA,* at 208: "Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion."

[610] *Id.* at 213.

[611] *Id.* at 204.

[612] *Id.* at 204 citing F. Drury, Book Selection xi (1930).

[613] *ALA v. US,* 201 F. Supp. 2d 401, 408.

Instead, the Supreme Court said that the ease at which of disabling filtering software dispels the concern of "over-blocking" access to constitutionally protected speech.[614]

The Supreme Court reversed the judgment of the District Court for the Eastern District of Pennsylvania.[615] According to the Supreme Court,

> Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power.[616]

The Court concluded that CIPA's filtering software did not violate the Constitution, it did not affect the usual functioning of public libraries, and it did not impose an unconstitutional condition upon the receipt of federal funding.

According to Justice Kennedy's concurring opinion, if there should be any problems with the CIPA, it would be that filtering software does not have the capacity to block or unblock specific sites or to enable or disable the filter. If an adult user's speech is burdened in some other way, it would be legally analyzed for an as-applied challenge, rather than a facial challenge as in this case.[617]

Justice Breyer, concurring in judgment, reached the same conclusion but used a heightened scrutiny analysis which required proper fit to examine the statute.[618] The proper fit approach "supplements the [strict scrutiny] with an approach that is more

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[614] *US v. ALA*, 539 U.S. at 208-109.

[615] *Id.* at 214. The Supreme Court said: "Therefore, the judgment of the District Court for the Eastern District of Pennsylvania is reversed."

[616] *Id.*

[617] *Id.* at 215.

[618] *Id.* at 217. Breyer, J. concurring.

flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue."[619] He concluded that the harm caused by the Act's legitimate objective to library patrons is a comparatively small burden given that they are allowed the chance to disable "overblocked" Web sites.[620]

The CIPA Supreme Court decision raised awareness that the government has power over federally funded institutes. The government triumphed in forcing federally funded public libraries to install filtering software on Internet terminals because the method of protecting children placed only a small burden on adults of having to click "unblock sites." The Library Journal 2005 Budget Report surveyed 424 libraries and showed filtering trends that in 1998, 14 percent of libraries filtered the Internet; in 2000, 24 percent; in 2002, 43 percent; and after CIPA's Supreme Court decision, in 2004, 65 percent.[621] It also reported that 59.5 percent of all public libraries are filtering prior to the sampling in January 2005.[622] The larger libraries serving a greater number of people tend to apply for the federal e-rate discount.[623] Of libraries serving more than 100,000 patrons, 62 percent complied with CIPA and of libraries serving more than 500,000 patrons, 85 percent complied with CIPA.[624] Only 44 percent of the smaller libraries (those serving

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[619] *Id.* at 218.

[620] *Id.* at 219, 220.

[621] Norman Oder, "Budget Report 2005--Tipping Point," January 15, 2005, Library Report.Com, http://www.libraryjournal.com/article/ca491143.html [accessed May 2, 2006].

[622] "David Burt: 65 Percent Of Libraries Now Filtering Internet [Fs]," Politech: [Politech]. Email Subject: Public Library Filter Use Increases To 65% After CIPA, Date: Thu, 13 Jan 2005 10:55:54 -0600, From: Burt,David<David_Burt_At_Securecomputing.Com> To: Declan Mccullagh <Declan_At_Well.Com>, http://seclists.org/politech/2005/Jan/0028.html [accessed February 8, 2007].

[623] *Id.*

less than 10,000 patrons) applied for the e-rate discount, showing that smaller libraries might not choose to comply with CIPA given limited savings.[625]

In relation to this dissertation, Congress enacted CIPA to protect children from encountering obscenity from the Internet in public libraries. The Supreme Court affirmed Congress' power over federally funded institutions. In CIPA, anything that is "harmful to minors" is considered obscene. Minors are people under 17 years of age. Children may encounter harmful materials from a public library's Internet computer terminal. Children may be a passer-by and see pornographic images on someone else's computer terminal screen or access it themselves. CIPA statute gives a practical solution through public libraries' use of filtering software as a technical solution to the legal problem of children's encounter with online pornography. CIPA makes good policy because the Supreme Court could not say that the statute was unconstitutional.

Child Pornography Prevention Act (CPPA)

The Child Pornography Prevention Act[626] (CPPA) was signed into law in 1996 by President Bill Clinton. CPPA, also known as the "Virtual Porn Act," expanded the idea of federal child pornography law from not just images of actual children but to computer-generated images that was advertised to be, promoted to be and appeared to be of children.[627]

Child pornography is defined as, "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made

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[624] *Id.*

[625] *Id.*

[626] Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2252-2256.

[627] Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(D).

or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that such an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . ."[628]

"Sexually Explicit Conduct" is defined as "actual or simulated,

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (B) bestiality;
> (C) masturbation;
> (D) sadistic or masochistic abuse; or
> (E) lascivious exhibition of the genitals or pubic area of any person."[629]

Congress' objective was to reduce the possibility of children encountering virtual child pornography on computer technology because Congress believed that such material would wreak harms on the "physical, psychological, emotional, and mental health"[630] of children. Specifically, Congress foresaw that the advancement in computer technology could alter children's images or photographs to produce child pornography.[631]

Congress' rationale for shaping CPPA the way it did was because virtual child pornographic materials may whet pedophiles' appetites[632] for even more materials[633] and

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[628] 18 U.S.C. § 2256(8); *Free Speech Coalition v. Reno*, No. C 97-0281 SC, 1997 U.S. Dist. LEXIS 12212, at 4, 5.

[629] 18 U.S.C. § 2256(2); *Free Speech Coalition v. Reno,* 1997 U.S. Dist. LEXIS 12212, at 5.

[630] *Free Speech Coalition v. Reno*, 1997 U.S. Dist. LEXIS 12212, at 2; S. Rep. No. 104-358.

[631] *Id.* at 2.

virtual child pornographic materials can lure children into sexual favors when children are exposed to such materials, that is, the materials are used "as a device to break down the resistance and inhibitions of their victims or targets of molestation."[634]

In summary, Congress believed virtual child pornography might harm a child's mind if he/she sees it by molding the child's mind into doing such a thing,[635] increasing the ease of exploitation,[636] whetting pedophile's appetites,[637] and increasing the child-pornography industry.[638]

CPPA causes economic disadvantage to film-makers, book writers, distributors, publishers, producers, and anyone in the distribution chain. For example, no U.S. distributors took on the movie "Lolita" for two years for fear of the penalties of CPPA because the movie portrayed a minor named Lolita involved in sexually explicit conduct.[639] Distributors and producers who were not conducting illegal activity were

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[632] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002), quoting Congressional Findings, Notes (3), (4) and (10)(B) Following § 2251.

[633] *Free Speech Coalition v. Reno*, 1997 U.S. Dist. LEXIS 12212, at 2. "Additionally, child pornography 'stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies.' Sen. Rep. At 12."

[634] *Id.* at 2, 3.

[635] *Id.* at 3. ""[A] Child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Congressional Findings, Note (3) Following § 2251."

[636] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002). The Supreme Court states: "Under these rationales, harm flows from the content of the images, not from the means of their production." *Id.* Note (6)(A).

[637] *Id.* at 241. The Supreme Court stating: "Furthermore, pedophiles might 'whet their own sexual appetites' with the pornographic images," Congressional Findings, Note (3) Following § 2251.

[638] *Id*. The Supreme Court stating: "Thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Id*. Notes (4), (10)(B).

afraid to distribute or produce even legal materials because the heavy penalties could drive film producers to bankruptcy and/or be incarcerated. For example, the producers of "Lolita" went into bankruptcy since for a few years no U.S. distributors were willing to channel the movie.[640] Lawyers were involved in the film-cutting process.[641] The Free Speech Coalition, representing the movie industry, claimed that law-abiding citizens and film-makers had been frightened since passage of CPPA and that there are many movies that involve minors and young-looking adults. Would film-makers be prosecuted for producing films with youthful-looking adults engaging in sexual activity?

The second group of people to be affected by CPPA is children. In CPPA, children or minors are defined to be under age 18.[642] The U.S. District Court for the Northern District of California quoted Congressional findings about how children can be affected by pornography and how pedophiles use pornography to lure children:

> Additionally, child pornography "stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies." Sen. Rep. at 12. [*3] Child pornography is also used by child molesters and pedophiles "as a device to break down the resistance and inhibitions of their victims or targets of molestation, especially when these are children." Id. at 13. "A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity." Id.[643]

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[639] Bob Van Voris, "Lawyers were forced to cut scenes from lolita because of vagueness in obscenity laws: a first amendment lawyer played censor to the classic," August 17, 1998, Monday, http://www.ishipress.com/loli-cut.htm [accessed February 9, 2007].

[640] Joan Dean, "The Politics of American Distribution," www.iol.ie/~galfilm/filmwest/34vlad.htm [accessed May 1, 2006].

[641] Bob Van Voris, "Lawyers were forced to cut scenes from Lolita because of vagueness in obscenity laws."

[642] 18 U.S.C. § 2256(1).

[643] *Free Speech Coalition v. Reno,* 1997 U.S. Dist. LEXIS 12212, at 2-3.

The CPPA set the age of minors to be under 18,[644] but how one determines the actual age of a person is a mystery. The "appears to be" language does not go well with the age of a minor.

The third group of people to be affected by CPPA are adults, potential buyers and possessors of movies. The Free Speech Coalition alleged that the prohibitions in 18 U.S.C. Sec. 2256(8)(B) and in 2256(8)(D) were void for vagueness.

> (B) such visual depiction is, or ***appears to be***, of a minor engaging in sexually explicit conduct;
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that ***conveys the impression*** that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .[645]

Specifically, the phrases "appears to be" of a minor in Sec. 2256(8)(B) and "any sexually explicit images that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" in Sec. 2256(8)(D) within the definition of child pornography were overly broad.

The United States District Court for the Northern District of California, *Free Speech Coalition v. Reno*, No. C 97-0281 SC, 1997 U.S. Dist. LEXIS 12212

The Free Speech Coalition, the plaintiff, claimed the statutory language of CPPA was vague and thus unconstitutional. The United States District Court for the Northern District of California granted summary judgment in *Free Speech Coalition v. Janet Reno*.[646] The plaintiff alleged that certain provisions in the statute were "vague,

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[644] *Id.* at 14. Judge Samuel Conti said: "Any ambiguity regarding whether a particular person depicted in a particular work appears to be over the age of eighteen can be resolved by examining whether the work was marketed and advertised as child pornography."

[645] 18 U.S.C. § 2256(8); *Free Speech Coalition v. Reno*, at 4, 5.

[646] *Free Speech Coalition v. Reno*.

overbroad, and constitute content-specific regulations and prior restraints on free speech."[647] Unfortunately for the plaintiff, Judge Samuel Conti, a Nixon appointee, gave his stringent opinion and concluded that the CPPA is constitutionally written because it had passed the content-regulation test of the strict scrutiny. First, the content-regulation strict scrutiny test requires a compelling government interest in restricting speech, and the District Court found that child pornography issue of protection of children is an important government interest.[648] Second, the District Court said the CPPA is narrowly tailored because it regulated the narrowest range of material, that is, virtual child pornography, and provides an explicit definition of prohibited conduct.[649] Third, the court said that Congress had allowed other alternative means of communication as long as communication was not actual or virtual child pornography.[650] The court favored the government's position in wanting to control pedophiles.[651]

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[647] *Free Speech Coalition v. Reno,* at 2.

[648] *Free Speech Coalition v. Reno,* at 13. *New York v. Ferber*, 458 U.S. 747, 756-757 (1982); See Also Sen. Rep. at 9 (there is a "compelling governmental interest [in prohibiting] all forms of child pornography.")

[649] *Free Speech Coalition v. Reno*, at 14: "…that the goal of the CPPA is to prevent the digital manipulation of images to create child pornography even when no children were actually used in the production of the material, the CPPA meets that goal by regulating the narrowest range of materials that might fall within the targeted category and including an explicit definition of the prohibited conduct."

[650] *Id.* at 17: "Defendants contend that 'plaintiffs are free to communicate any substantive message they desire, through any medium they desire, as long as they are not depicting actual or computer-generated children engaged in sexually explicit conduct.' Defs.' Mem. In Supp. of Mot. for Summ. Judg. at 20. The Court finds this argument persuasive."

[651] *Id.* at 23. Judge Samuel Conti decreed: "it is hereby ordered, adjudged, and decreed that judgment be entered in favor of defendants and against plaintiffs."

The Ninth Circuit Court of Appeal, *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. Cal. 1999)

The Free Speech Coalition appealed to the Ninth Circuit Court of Appeals, arguing that the lower court was wrong in deciding that the CPPA was content-neutral, that "it is so vague a person of ordinary intelligence cannot understand what is prohibited."[652] The Free Speech Coalition also claimed that the affirmative defenses were unconstitutional, stating:

> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
> (2) each such person was an adult at the time the material was produced; and
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.[653]

The Ninth Circuit in *Free Speech Coalition v. Reno*[654] ruled that the First Amendment prohibits Congress from enacting a statute that criminalizes the creation of child images engaged in sexually explicit conduct. The Ninth Circuit also said the District Court erred in finding a compelling state interest because of "the devastating secondary effect that sexually explicit materials involving the images of children have on society, and on the well being of children, [that it] merits the regulation of such images."[655] The Ninth Circuit argued that there is no state compelling interest "when no actual children are

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[652] *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1087 (9th Cir. Cal. 1999).

[653] *Id.* at 1090. Child Pornography Prevention Act, 18 U.S.C. § 2252A(C), provides an affirmative defense For Violations of the Act.

[654] *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. Cal. 1999).

[655] *Id.* at 1091.

involved in the illicit images either by production or depiction,"[656] and when the Act "attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts."[657] The Ninth Circuit Court of Appeals held that the "appears to be [of a minor]" and "conveys the impression" are unconstitutionally vague and overbroad.

The First, Fourth, Fifth, and Eleventh, Circuit Courts agreed with the dissent by Judge Warren Ferguson in the Ninth Circuit on CPPA, that the majority in the Ninth Circuit failed to consider Congress' new justification "that computer-imaging technology is making it increasingly difficult in criminal cases for the government 'to meet its burden of proving that a pornographic image is of a real child.' S. Rep. No. 104-358, at 20."[658]

The United States Supreme Court, *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002)

On April 16, 2002, the Supreme Court sided with the Ninth Circuit Court's decision that the provisions saying, "appears to be of a minor engaging in sexually explicit conduct"[659] and "conveys the impression that the material contains a visual depiction of a minor engaging in sexually explicit conduct"[660] are overbroad and unconstitutional.[661] The court dismissed the overbreadth claim because it was "highly

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[656] *Id.* at 1095.

[657] *Id.* at 1095.

[658] *Id.* at 1100.

[659] Child Pornography Prevention Act, 18 U.S.C. Sec.2256(8)(B).

[660] *Id.*, 18 U.S.C. Sec.2256(8)(D).

[661] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 243 (2002). The dicta states: "Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The district court disagreed and granted summary judgment to the government."

unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,' will be treated as 'criminal contraband.'"[662] CPPA also mentioned the use of computer technology to morph actual images of children, but this part of the law still stands.

The Supreme Court did not accept the government's argument in second-guessing what pedophiles intentions' are or what pedophiles are capable of doing with computerized pornographic materials depicting children.[663]

The Supreme Court answered the plaintiff's allegations by applying precedents set in *Miller* and *Ferber* to CPPA provisions. In short, the legal question was "whether CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*."[664]

The bottom line is that the Supreme Court does not agree that computer-generated images of children engaging in sexual activity can be considered child pornography because no actual children are involved in the process. According to the Court, the prohibited categories of speech are: "defamation, incitement, obscenity, and pornography produced with real children."[665] CPPA prohibits virtual child pornography, but the Court is saying that virtual child pornography is not an unprohibited category of speech.[666]

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[662] App. To Pet. For Cert. 62a-63a.

[663] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 253.

[664] *Id.* at 240.

[665] *Id.* at 246.

[666] *Id.* at 246.

The government argued that it could be difficult for prosecutors to prove that pornography was created using real children instead of being virtual pornography.[667] Instead, the Supreme Court reasoned that illegal use of actual children in child pornography would be driven out of the market if computerized images of non-existent children in virtual child pornography would suffice.[668]

The Supreme Court examined the CPPA under the *Miller* definition of obscenity and the *Ferber's* definition of child pornography. Under the *Miller v. California*[669] definition of obscenity, the material, taken as a whole, "(1) appeals to the prurient interest; (2) is patently offensive in light of community standards; and (3) lacks serious literary, artistic, political, or scientific value."[670] The CPPA disregards whether materials appeal to the prurient interest because any depiction of sexual activity is included. The Supreme Court concluded that the CPPA applies to all materials, such as pictures in a psychology manual, movies depicting the horrors of sexual abuse, and books that describe teenage love. The Court gave specific examples such as William Shakespeare's *Romeo and Juliet*, Juliet being 13 years old,[671] contemporary films that portray teenage sex, such as "Traffic," the teenager being a 16 year old, and in "American Beauty"

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[667] *Id.* at 254. The Supreme Court states: "Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children."

[668] *Id.* at 254. The Supreme Court states: "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."

[669] Miller v. California, 413 U.S. 15 (1973).

[670] *Miller* at 24.

[671] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 246, 247. Juliet being 13 years old.

several teenagers below 18.[672] The Supreme Court opined that works that "explore themes within the wide sweep of the statute's prohibitions"[673] have literary, artistic and social value. Just because films or literature "contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value."[674] CPPA does not look at the work as a whole; therefore, CPPA does not fit under the *Miller* definition of obscenity because *Miller* requires work as a whole,[675] because taking the part of the work in isolation may be offensive,[676] and "because it lacks the required links between its prohibitions and the affront to community standards prohibited by the definition of obscenity."[677] However, the Court did not explain what it meant by the "affront to community standards."[678]

Federal child pornography law is spelled out in *New York v. Ferber,*[679] where child pornography involved actual children in the production of sexually explicit material. Because of the State's interest in protecting children from being exploited in the

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[672] *Id.* at 247, 248.

[673] *Id.* at 248.

[674] *Id*.

[675] *Id.* at 248: "Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole."

[676] *Id.* at 248: "Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive."

[677] *Id.* at 249.

[678] *Id.* at 249: "or this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity."

[679] New York v. Ferber, 458 U.S. 747 (1982).

production process,[680] the *Ferber* precedent bans child pornography. The government argued that CPPA, like *Ferber*, bans production of child pornography without regard to whether the works have value or content.[681] So the government was not trying to regulate the content of pornography but the production of pornography. The Supreme Court argued that *Ferber* cannot be applied to CPPA because of three reasons. First, the Supreme Court in *Ferber* prohibited distribution as well as production of child pornography because distribution and production were "intrinsically related" to sexual abuse of actual children, and the economic gain in the production of child pornography is related to the State's interest in closing the distribution of child pornography.[682] Second, the Supreme Court says that no children were victims in virtual productions, and no crime was committed in virtual productions; thus, virtual child pornography is not related to the sexual abuse of children as were the materials in *Ferber*.[683] Third, the government said that child pornography can rarely be valuable speech. The Supreme Court decided that *Ferber* gave an acceptable alternative means of expression rather than the exploitation of real children: "If it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative."[684] Therefore, the Court decided that *Ferber* makes a distinction between actual and virtual, and provides an

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[680] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 240.

[681] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 249: "The production of the work, not its content, was the target of the statute."

[682] *Id.* at 249.

[683] *New York v. Ferber,* 458 U.S. at 759; *Ashcroft v. Free Speech Coalition,* 535 U.S. at 250.

[684] *New York v. Ferber,* 458 U.S. at 763; *Ashcroft v. Free Speech Coalition,* 535 U.S. at 251.

alternative. However, the CPPA eliminates the distinction between actual and virtual, making even the alternative a crime.[685]

The punishment for the first offense under CPPA is up to 15 years imprisonment,[686] and a repeat offense is "not less than 5 years and not more than 30 years in prison."[687] The punishment was so severe that Justice Kennedy reasoned that "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."[688]

Children were defined as being under age 18.[689] Even though the age of a minor is not the legal question at hand in the CPPA, the Supreme Court said that the age of a minor written in CPPA as under age 18 is too high considering the fact that the legal age of consent to sexual relations tends to be 16 or younger, and the legal age of marriage in most states is 16:

> Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 U.S.C. § 2256(1). This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. See § 2243(a) (age of consent in the federal maritime and territorial jurisdiction is 16); U.S. National Survey of State Laws 384-388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, Sexuality, Gender, and the Law 1021-1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.[690]

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[685] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 250, 251.

[686] 18 U.S.C. § 2252A(B)(1).

[687] 18 U.S.C. § 2252A(B)(1); *Id.* at 244.

[688] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 244.

[689] 18 U.S.C. § 2256(1).

[690] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 247.

The CPPA did not pass constitutional muster. It was an unprecedented attempt to extend *Miller* and *Ferber* to prohibit production of realistic computerized images of minors without actually using real minors or labeling a production to be virtual child pornography. The Supreme Court concluded that the "appears to be" language[691] and "conveys the impression" language[692] are overbroad and unconstitutional. Having reached this conclusion, the Supreme Court did not see the need to address the vagueness of the statutory language.[693] The Supreme Court decision means that a film is acceptable when it uses youthful-looking adults to infer that these are minors having sex.

Some other Justices did not agree totally with the opinion of the Court. Chief Justice Rehnquist stated that statutes are not normally deemed unconstitutional on their face "where there were a substantial number of situations to which it might be validly applied. This case is no different."[694] The government has legitimate concern.[695]

On the question of overbreadth, Justice O'Connor with whom Justice Rehnquist and Justice Scalia joined in part said,

> the basis for this [overbreadth] holding is unclear. Respondents provide no examples of films or other materials that are wholly computer-generated and contained images that

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[691] 18 U.S.C. § 2256(8)(B): "'any visual depiction . . . of sexually explicit conduct' where 'such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct.'"

[692] 18 U.S.C. § 2256(8)(D): "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

[693] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 258.

[694] *Id.* at 268.

[695] *Id.* at 272.

> 'appear to be, of a minor engaging in sexually explicit conduct,'[696] but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.[697]

Likewise, Chief Justice Rehnquist wrote separately, clarifying that "serious First Amendment concerns would arise were the Government ever to prosecute someone for simple distribution or possession of a film with literary or artistic value … The Child Pornography Prevention Act of 1996 need not be construed to reach such materials."[698] Also on the issue of overbreadth, the "convey the impression"[699] phrase referred to a narrow class of images CPPA intended to prohibit:[700]

> only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer generated images virtually indistinguishable from real minors engaged in sexually explicit conduct. The mere possession of materials containing only suggestive depictions of youthful looking adult actors need not be so included.[701]

Justice O'Connor said the issue of the "appears to be" vagueness is exaggerated because "This Court has never required 'mathematical certainty' or 'meticulous specificity' from the language of a statute."[702] Justice O'Connor said that youthful-adult porn is not related to virtual-child porn within the "appears to be … of a minor"

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[696] 18 U.S.C. § 2256(8)(B).

[697] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 265, 266.

[698] *Id.* at 268.

[699] 18 U.S.C. § 2256(8)(D).

[700] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 273.

[701] *Id.* at 273 (Rehnquist, C.J., dissenting).

[702] *Id.* at 265.

language.[703] She described youthful-adult porn as "pornographic images of adults that look like children," while virtual-child porn is "pornographic images of children created wholly on a computer, without using any actual children."[704] She agreed that the Court should strike down the "appears to be" language as overbroad when youthful-adults were used in the making of virtual child pornography, but not when when actual children or when computerized images of children were used.[705]

Moreover, Chief Justice Rehnquist considered "the definition of 'sexually explicit conduct' quite explicit. It makes clear that the statute only reaches 'visual depictions'"[706] and has a narrow reading. He also said, "… I think the [sexually explicit conduct] definition[707] reaches only the sort of 'hard core of child pornography' that we found without protection in *Ferber.*"[708] According to Chief Justice Rehnquist, "the chill felt by the Court, has apparently never been felt by those who actually make movies,"[709] in response to the Court's dicta that, "few legitimate movie producers … would risk distributing images in or near the uncertain reach of this law."[710]

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[703] *Id.* at 260.

[704] *Id.*

[705] *Id.*

[706] *Id.* at 268.

[707] 18 U.S.C. § 2256(8). Sexually Explicit Conduct: "As Actual or Simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) Bestiality; (C) Masturbation; (D) Sadistic or masochistic abuse; Or (E) Lascivious exhibition of the genitals or pubic area of any person."

[708] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 269.

[709] *Id.* at 271.

[710] *Id.* at 271; Ante at 6.

In Justice Thomas's concurring opinion, he said that a virtual child pornography law would be appropriate when technology advances to a certain point and that only government regulation could handle the situation. In Thomas' words,

> Technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.
>
> But if technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children.[711]

Justice Thomas opined that the government may have a compelling interest in a virtual child pornography law if technology has reached a point where computer images are indistinguishable from images of real children. The law would have to be narrowly tailored.[712]

The morphing provision in the CPPA statute still stands, meaning that it is illegal to morph images of real children for pornographic ends.[713] Respondents did not challenge the morphing provision, and the Court did not consider it.[714] The Court said:

> Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.[715]

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[711] *Id.* at 259. (Thomas, J., concurring).

[712] *Id.* at 259.

[713] *Id.* at 242.

[714] *Id.* at 242.

According to wikipedia, morphing is "a special effect in motion pictures and animations that changes one image into another through a seamless transition."[716] Morphing can be achieved by computer software to create a more realistic transition than the old-fashioned cross-fading technique on film.[717]

In the CPPA, Congress is concerned about images of children that have already been transformed so that nobody has seen the transformation occur. People are left with the transformed end result. Congress' argument is that the images are morphed so well that one cannot differentiate whether the original image started out with a child or if the image was totally computer-generated.[718] One could argue that Congress has a legitimate reason to ban all computer-generated images of people that appear to look like children because it is difficult to differentiate what is a morphed image of a child, which is illegal, and what is a wholly computer-generated image, or even what is a computer-morphed image of an adult who appears to be a child, which is legal. So as part of the justification for the CPPA, Congress argued that both computer-generated images of people that appear to look like children and images using real children need to be regulated.[719]

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[715] *Id.* at 242; Christopher James-Diwan, "Child Pornography, Technology and the Internet: New Technology is Putting Our First Amendment Protection to the Test," N.D., http://gsulaw.gsu.edu/lawand/papers/fa03/james-diwan/#91 [accessed March 4, 2007].

[716] Morphing, N.D., http://en.wikipedia.org/wiki/Morphing [accessed February 11, 2007].

[717] *Id.*

[718] *Id.* at 242. "Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See id. note (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography."

The Supreme Court was not persuaded by the argument that prosecutors would have to prove whether the image was morphed and whether the image originally was a child or an adult and prosecutors would have difficulty proving so. The Court said:

> The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. … The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. … (*256) So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution.[720]

In summary, the production of computer-imaging of materials is made through computer software. The material can then be distributed by means of video reproduction or through the Internet. The Supreme Court knows that in the Internet era distribution on computers is instantaneous and free. People may encounter virtual child pornography through seeing and hearing the unwanted material on the Internet because the Internet is a broadcast medium through which films could be channeled. Congress addressed computer-generated photography or video of child pornography in the CPPA under the "appears to be" language of the CPPA statute. The Supreme Court also addressed computer-generated photography or video of child pornography by applying the *Ferber*

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[719] *Id.* at 254. "Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images."

[720] *Id.* at 255, 256.

test to the CPPA. However, the Supreme Court concluded that the CPPA's computer-generated pornography cannot be compared to the *Ferber* precedent because the *Ferber* case does not include virtual pornography. The government did not want children to encounter computer-generated child pornography and maybe suffer sexual exploitation after viewing such materials. But the Supreme Court struck down Congress' attempt to ban wholly computer-generated pornography.

Children's Online Privacy Protection Act (COPPA)

The purpose of the Children's Online Privacy Protection Act (COPPA) is "to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personally identifiable information from and about children on the Internet."[721] Specifically, Congress designed COPPA to regulate the collection of children's personal information gained through children's online participation in a commercial Web site.[722] Web operators are limited to collect information, if they must, to information that is "reasonably necessary" for the activity. In order to provide privacy protections to children, Web operators are to use caution in collecting children's personal identifiers. Web operators that target children must abide FTC policies and must cooperate with parents and industry.

COPPA was enacted on October 21, 1998. Section 6502 of the Act required the FTC to enforce the rules governing the online collection of personal information from

[721] Children's Online Privacy Protection Rule (COPPA): Final Rule. 16 CFR Part 312. RIN 3084-AA84. Federal Register Vol. 64, No. 212/Wednesday, November 3, 1999/ Rules and Regulations. Part III. FTC. Page 59890.

[722] *COPPA*, 16 CFR 312. Statement of Basis and Purpose.

children under 13 within one year of the date of enactment. The final rule on COPPA was published November 3, 1999, and the Rule became effective April 21, 2000.[723]

As in every law, COPPA has its own definitions. A child is defined to be an "individual under the age of 13."[724] Collection is defined to be "the direct or passive gathering of any personal information from a child by any means."[725] The definition of Internet was broad to account for future advancement in technologies. It included "networks parallel to or supplementary to the Internet … and Intranets."[726] Online contact information means "an email address or any other substantially similar identifier that permits direct contact with a person online."[727] An operator means "any person who operates a Web site located on the Internet or an online service" and who collects or maintains personal information or who pays for collection and maintenance of it. The definition of third party is a person who is neither supporting the internal operations of the Web site nor an operator with respect to the collection of personal information.[728] However, "because third parties are not operators, they are not responsible for carrying out the provisions of the Rule."[729] The definition of "parent" accounts for legal guardians

[723] *COPPA*, 16 CFR 312. II. The Rule. The FTC addressed every comment on the proposed rule and the accompanying analyses to the public's comments are included in the federal register whether the comments became part of the rule or not.

[724] 16 CFR Section 312.2:1

[725] 16 CFR Section 312.2:2

[726] 16 CFR Section 312.2: 4. FTC Adopts the Definition From A Commenter.

[727] 16 CFR Section 312.2: 5. FTC Adopts the Definition from a Commenter.

[728] 16 CFR Section 312.2: 9.

[729] 16 CFR Section 312.2: 9.

such as the school, grandparents, and parents in the non-traditional family setting.[730] Personal information includes "name, address, phone number, email address, [a photograph of the individual], and other types of information that could be used to locate an individual either online or offline."[731] The definition of "obtaining verifiable parental consent" involves making any reasonable effort to contact the parent before personal information is collected from a child.[732] A Web site or online service directed to children is determined by the site's "subject matter, visual or audio content, age of models, language or other characteristics of the Web site or online service."[733] The FTC expects people to understand what "actual knowledge [of a child's age]" means but did not give clear definitions.[734] The FTC said,

> Although the Rule doesn't define the term "actual knowledge," it indicates that a Web site operator is considered to have actual knowledge of a user's age if the site asks for -- and receives -- information from the user from which age can be determined. For example, actual knowledge of age exists when an operator learns a child's age by asking for date of birth on a Web site's registration page. But FTC staff attorneys say Web sites asking indirect questions that may elicit age information may be thought to have actual knowledge, too. For example, actual knowledge of age may be gleaned from the answers to "age identifying" questions like, "What grade are you in?" or "What type of school do you go to: (a) elementary; (b) middle; (c) high school; (d) college.[735]

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[730] 16 CFR Section 312.2: 7. "The Commission received two comments regarding this definition, both of which sought additional guidance concerning the rule's application in non-traditional family situations. the commission believes that the proposed definition is sufficiently flexible to account for a variety of family structures and situations, including situations where a child is being raised by grandparents, foster parents, or other adults who have legal custody."

[731] 16 CFR Section 312.2: 8. [..] Part of the Text Inserted.

[732] 16 CFR Section 312.2: 10.

[733] 16 CFR Section 312.2: 11.

[734] "The Children's Online Privacy Protection Rule: Not Just For Kids' Sites," FTC Business Alert, http://www.ftc.gov/bcp/conline/pubs/alerts/coppabizalrt.htm [accessed May 26, 2006].

[735] "The Children's Online Privacy Protection Rule: Not Just For Kids' Sites," FTC Business Alert, http://www.ftc.gov/bcp/conline/pubs/alerts/coppabizalrt.htm [accessed May 26, 2006], http://www.ftc.gov/privacy/privacyinitiatives/childrens.html [accessed May 26, 2006].

The core principle underlying a consent-based system, the FTC said, is what was noted in National Public Radio's (NPR) comment that held that an operator's notice should be "clearly and understandably written."[736] The "reasonable consumer" standard still applies in this instance because consent forms are written for parents so that a reasonable parent can read and understand them.[737] The notice should also "be complete, contain no unrelated, confusing, or contradictory materials."[738]

All commercial Websites or online services directed to children must comply with the COPPA rules.[739] According to the FTC,

> in determining whether a commercial website or online service is directed to children, the Commission will consider its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child oriented activities and incentives.[740]

The District Court for the Western District of Pennsylvania has given guidelines for determining what is a commercial or a passive or an interactive Website in *Zippo Mfg. Co. v. Zippo Dot Com, Inc*.[741] A commercial website is one "where a defendant clearly

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[736] 16 CFR 312.4(A).

[737] 16 CFR 312.4(A) at Note 91. "Because the notices required by the act are intended for parents, the Commission will look at whether they are written such that a reasonable parent can read and comprehend them."

[738] 64 FR at 22754.

[739] 16 CFR 312.2. Page 59912. "*Website or online service directed to children* means a commercial website or online service, or portion thereof, that is targeted to children."

[740] 16 CFR 312.2

does business over the Internet;"[742] "a passive Web site [is one] that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction;"[743] an interactive website is "the middle ground is occupied by interactive Web sites where a user can exchange information with the host computer, in these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[744] The online services such as games and activities where websites account for reciprocity are considered interactive websites according to the court. If a website allows kids to do commercial transactions, according to the *Zippo* case, such websites would be considered a purely commercial website.

The FTC makes clear that tricky placement of a privacy policy or parental notice is not allowed. The privacy policy link, or the parental consent form link, must be "clear and prominent" on the screen.[745] This means that a long Web page that requires scrolling down or hiding the hyperlink or shadowing the link in any way would constitute a violation of the Rule. According to the FTC, placing links at the bottom of the page with a small hyperlink and tiny fonts is unclear.[746] The notices must be placed in a "clear and

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[741] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). "This sliding scale is consistent with well developed personal jurisdiction principles. at one end of the spectrum are situations where a defendant clearly does business over the Internet ..."

[742] *Zippo,* at 1124.

[743] *Id.*

[744] *Id.*

[745] 16 CFR 312.4(B)

[746] *Id.*

prominent place and manner on the homepage or online service."[747] It means that the link must stand out and be noticeable to the site's visitors through the use of a larger font against a contrasting background.[748]

Protecting children's personal identifiers is the essence of the law, and asking for parental consent is a requirement of the law. The FTC has a rule that allows schools to stand in as parents or as intermediaries between Web site and parents in the notice and consent process.[749] Some common ways that Web operators may contact parents for consent are through fax, telephone, email, and postal mail. Parents also have the right to review information collected about their children.[750] Upon request, Web operators must provide a description of the specific types of personal information collected from children by the operator, such as the extracurricular activities, hobbies, telephone numbers, email addresses and other kinds of personal information collected.[751]

The COPPA Rule in actuality empowers parents to tell Web operators to stop collecting more children's information and to tell Web operators to delete the information they have collected at any time.[752] Parents are given the sole power to change their minds whenever they want to. If, however, the Web operator wants to withdraw its service from the child due to deprivation from collection or maintenance of information, by law the

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[747] *Id.*

[748] *Id.*

[749] FTC Site, "New Rule Will Protect Privacy of Children Online," released October 20, 1999. http://www.ftc.gov/opa/1999/9910/childfinal.htm [accessed July 28, 2002].

[750] 16 CFR 312.6

[751] 16 CFR 312.6(1)

[752] 16 CFR 312.6(A)(2)

Web operator is free to discontinue engaging in services for the child. The parent cannot then protest the discontinuance of Web service to the child because it is clearly written in COPPA that Web operators are not obligated to continue their service if they feel children's personal information is a necessity.[753]

According to the FTC, certain exceptions to obtaining prior parental consent are acceptable when the exceptions will facilitate operators' compliance of the law and will facilitate the safety needs of the child.[754] Undoubtedly, at first the parents' or child's information needs to be collected in order to ask the parent for consent to collect the child's personal information.[755] Alternatively, the operator may correspond with a child on a one-time basis, responding to a specific request from the child. However, the FTC states that collection of information is permissible as long as the information is deleted by the operator from its records.[756] So long as the operator makes "no further use of the information" and so long as the information is for the "sole purpose of protecting the child's safety," the operator is allowed to collect the contact information if "such information [is] not used for any other purpose, to the extent reasonably necessary."[757] The purpose of the exception is to maintain a balance between the safety needs of the child and the operator's need to collect information without prior parental consent.

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[753] 16 CFR 312.6(C)

[754] 16 CFR 312.5(C) In II. The Rule.

[755] 16 CFR 312.5(C)(1)

[756] 16 CFR 312.5(C)(1)(2)

[757] 16 CFR 312.5(C)(3)(4)

The safe-harbor program allows the industry to self-regulate with the FTC's approval instead of using the COPPA Rule.[758] The Rule provides a leeway for an industry to impose its own self-regulatory rules on the condition that it is in compliance with the COPPA guidelines and it provides the same or greater protections for children's personal information.[759] The advantage of the safe-harbor program is that it allows the company to make rules that reflect their company's values. As long as they follow the safe harbor, they will be in compliance with the Rule.[760] Most companies prefer to abide by the COPPA Rule instead of making self-regulatory policies.

The FTC has recognized that it is a challenge to determine who is a parent and who is a child on the Internet. In the rulemaking proceeding leading up to the adoption of the COPPA Rule, evidence was submitted that the digital signature certificate was under-going development which could offer more reliable electronic verification at a reasonable cost. Yet, this new technology has not matured. Therefore, the Commission adopted a "sliding scale" of permissible verification mechanisms, depending upon how the child's information was to be used.[761] The sliding-scale mechanism of the COPPA allows for delayed response between the parent and the Web operator when obtaining parental consent through email from the parent. The sliding scale even suggests additional steps to give assurance that it is the parent submitting the consent, such as:

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[758] 16 CFR 312.10(A)

[759] 16 CFR 312.10(B)(1)

[760] *Id.*

[761] Privacy Initiatives, Laws and Rules, COPPA of 1998, http://www.ftc.gov/privacy/privacyinitiatives/childrens_lr.html [accessed May 26, 2006].

> sending a delayed confirmatory e-mail to the parent after receiving consent or obtaining a postal address or telephone number from the parent and confirming the parent's consent by letter or telephone call … . More reliable methods of obtaining verifiable parental consent … include using a print-and-send form that can be faxed or mailed back to the website operator; requiring a parent to use a credit card in connection with a transaction; having a parent call a toll-free telephone number staffed by trained personnel; using a digital certificate that uses public key technology; and using e-mail accompanied by a PIN or password obtained through one of the above methods.[762]

The sliding-scale of the COPPA was to be phased out on April 21, 2002,[763] but it was extended until April 21, 2005, for an affordable and more accurate technology to replace less accurate technology, since technology had not advanced enough to toss out the sliding-scale mechanism.[764] Since the digital certificate has not surfaced enough for the average consumer to use, the FTC decided to make the sliding-scale mechanism its permanent verification method thereafter March 15, 2006.[765]

The FTC prosecuted about eleven companies under the COPPA rule since its enactment in April 2000. Each company varied in its methods of violations depending on its website and on what exact personal identifiers it used. Companies either violated COPPA by not asking for parental consent when collecting personal information from children and/or targeted children under thirteen for their personal identifiers.

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[762] Billing Code 6750-01P.

[763] David Medine, "Re: Children's Online Privacy Protection Rule Amendment - Comment P994504," Response To Mr. Donald Clark, November 19, 2001, posted on Online Privacy Alliance.org, http://www.privacyalliance.org/news/11192001.shtml [accessed July 29, 2002].

[764] Sliding Scale of COPPA, FTC.gov, http://www.ftc.gov/os/2005/04/050420coppafinalrule.pdf [accessed May 26, 2006].

[765] [Billing Code 6750-01P], 16 CFR Part 312, Children's Online Privacy Protection Act, "Action: Retention of Rule Without Modification," FTC.gov, http://www.ftc.gov/os/2006/03/P054505COPPARuleRetention.pdf [accessed 2/12/07].

Looksmart,[766] *and BigMailBox,*[767] had to each pay $ 35,000 in penalties for violating COPPA. On April 22, 2002, COPPA's second anniversary, the Ohio Art Company, *Etch-A-Sketch,*[768] settled for $35,000 for violating FTC's COPPA rule for collecting personal information from children on its Web site without first obtaining parental consent. *LisaFrank*[769] and *Monarch Services & GirlsLife*[770] had to pay $30,000 in COPPA fines.[771] *LisaFrank* was brought to the FTC's attention by the Children's Advertising Review Unit (CARU) when the site did not make the necessary changes urged by the CARU. The LisaFrank Web site (www.lisafrank.com) asked girls to register before they could access areas of the site, all this without parental consent.[772] Also, "Lisafrank.com's privacy policy falsely claimed that the site required parental consent for children 13 and younger and that parents would be required to fill in a registration form agreeing to the collection practices."[773]

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[766] United States of America v. Looksmart, Ltd. (East. Dist. Of VA), http://www.ftc.gov/os/2001/04/looksmartorder.pdf [February 26, 2006].

[767] United States of America v. Bigmailbox.Com, Inc., et Al. (East. Dist. Of VA), http://www.ftc.gov/os/2001/04/bigmailboxcmp.pdf [February 26, 2006].

[768] Richard Keyt, "Etch A Sketch Draws $35, 000 Penalty For Violating The Children's Online Privacy Protection Act," Keyt Law: Business, Internet, E-Commerce & Domain Name Law, http://www.keytlaw.com/ftc/actions/ftc020422.htm [January 17, 2006].

[769] United States of America v. Lisa Frank, Inc., http://www.ftc.gov/opa/2001/10/lisafrank.htm [accessed February 26, 2006].

[770] United States of America v. Girls' Life, Inc. (Dist. Of MD), http://www.ftc.gov/os/2001/04/girlslifecmp.pdf [accessed February 26, 2006].

[771] COPPA fines, "Top News," posted April 28, 2003, EPIC.org, http://www.epic.org/privacy/kids/ [accessed February 16, 2007].

[772] "Web Site Targeting Girls Settles FTC Privacy Charges," Released October 2, 2001, (FTC File No. 012-3050) (Civil Action No. 01-1516-A) http://www.ftc.gov/opa/2001/10/lisafrank.htm [accessed February 26, 2006].

[773] *Id.*

In *Hersheys,*[774] the Kidztown portion of the Hershey's Website has collected personal information targeting children under age 13 and its other general-audience sites also collected personal information of children under age 13.[775] Hersheys violated the COPPA because it had actual knowledge that the visitors were under the age of 13 on their general audience Web sites and yet proceeded to collect the information. Hersheys was charged $85,000 for COPPA violations.

Mrs. Fields[776] website operated birthday club Web pages and stated that "only children twelve years old or younger may participate."[777] Children had to provide personal information about themselves (first and last names, street addresses, email addresses, phone numbers, and dates of birth, via an online form), and it collected personal information from over 84,000 children.[778] Thus, the company violated COPPA because it did not obtain verifiable parental consent, did not provide parents a means to review personal information collection from their children, and failed to provide on its Web site what information it collected from children because its privacy policy was not presented in a clear or understandable way. Mrs. Fields was charged with $100,000.

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[774] United States of America v. Hershey Foods Corporation (Middle District of Pennsylvania), http://www.ftc.gov/os/2003/02/hersheycmp.htm [accessed February 21, 2006].

[775] "FTC Receives Largest COPPA Civil Penalties to Date in Settlements with Mrs. Fields Cookies and Hershey Foods," Released February 27, 2003, (Civil Action No. 4:CV03-350 Hershey) (Civil Action No. 2:03 CV205 JTG - Mrs. Fields), http://www.ftc.gov/opa/2003/02/hersheyfield.htm [accessed February 20, 2006].

[776] United States of America v. Mrs. Fields Famous Brands, Inc., Mrs. Fields' Holding Company, Inc., and Mrs. Fields' Original Cookies, Inc. (District of Utah, Central Division), http://www.ftc.gov/os/2003/02/mrsfieldscmp.htm [accessed February 20, 2006].

[777] *Id.*

[778] *Id.*

In *UMG Recordings,*[779] the company had "collected birth date information through its online registration processes, and thus had actual knowledge that they were collecting and maintaining personal information from thousands of children under the age of 13. In addition ... [the company] failed to post clear and complete privacy notices or to provide adequate direct notices to parents of what personal information they sought to collect from children."[780] UMG Recordings was charged with $400,000 in COPPA violations.[781]

After the COPPA had been in place for a year, a study by the Anneberg Policy Center led by Joseph Turow revealed that the average reading time for privacy policy pages from those sites took about nine and a half minutes. Specifically it took nine and a half minutes for a college student experienced about privacy issues to search for lawful statements in the privacy policy page, showing the difficulty in understanding the privacy policy page.[782] According to the privacy policy links that Turow found, children under age 13 were the highest percentage of visitors of websites targeting children.[783] Turow showed that 38 percent of the websites that collected children's personal information did not tell parents their rights to view their children's information.[784] Half of those sites did

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[779] United States of America v. UMG Recordings, Inc., A Corporation, Defendant., United States District Court For The Central District Of California, Western Division, Civil Action No. CV-04-1050 JFW (Ex) http://www.ftc.gov/os/caselist/umgrecordings/umgrecordings.htm [accessed February 20, 2006].

[780] http://www.ftc.gov/opa/2004/02/bonziumg.htm [accessed February 20, 2006].

[781] *Id.*

[782] *Id*.

[783] Joseph, Turow, "Privacy Policies On Children's Websites: Do They Play By The Rules?" *Annenberg Public Policy Center of the University of Pennsylvania,* March 2001.

[784] Turow.

not state that parents have the rights to say that no further information would be collected from their children.

It is questionable whether Web companies really want parents to comprehend privacy policies. Stephen Bergerson examined the unprecedented ability of online technology to gather personal information discreetly and found that most consumers do not trust companies' intentions or ability to keep personal information confidential regardless of what their privacy policies say.[785] Consequently, some people are on either end of the marketing rights or the privacy rights spectrum and the debate will be left to Congress to resolve.[786]

COPPA empowers parents to act on their children's behalf because COPPA is about control of information and obscenity as it relates to privacy. With COPPA, the least responsible parent or the uninvolved parent can still at least have minimal input to know what their children are up to. COPPA is a restraining factor to making children vulnerable for data exploitation. For example, anyone can buy a database of children's information and can get children's pictures and other types of "personal identifiers" and involve children in complicated matters or dangerous situations. In relation to obscenity, COPPA cuts down on database collection of personal identifiers, thereby cutting down data exploitation such as selling profiles to other businesses, including other Internet predation such as harassing children or building a love relationship with children.

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[785] Stephen R. Bergerson, "Electronic Commerce in the 21st Century: Article E-Commerce Privacy and the Black Hole Of Cyberspace," 27 Wm. Mitchell L. Rev. 1527 (2001).

[786] *Id.*

COPPA has not been challenged in court as of 2007. Americans value their privacy and have been concerned about the issue of invasion of privacy. Scholars, parents and children have been enjoying the fruit of the law. According to the Center for Democracy, the COPPA Rule is "the first effort by a federal agency to implement rules specifically for the Internet environment" and has been well received by the Internet community.[787] COPPA is the test bed for government intervention in protecting children in the online environment. In many ways, COPPA is the test bed for whether government intervention can be successful in the e-commerce environment. The COPPA Rule has so far led to a logical framework that protects children's privacy, addresses parents' concerns, and provides businesses with clarity as to their obligations.[788] According to the Center for Digital Technology, "the successful implementation and enforcement of the COPPA will have an impact on the future of privacy protections, free speech, and commerce on the Internet."[789]

According to the Electronic Privacy Information Center (EPIC), "COPPA has improved children's privacy and safety on the Web,"[790] and "all indications are that

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[787] Center for Democracy and Technology, "Analysis of Rules Implementing the Children's Online Privacy Protection Act," posted July 30, 2002, http://www.cdt.org/privacy/cdtanalysisofftc.shtml [accessed July 29, 2002].

[788] Privacy activists, privacy organizations and the public send in comments.

[789] Center for Democracy and Technology, "Analysis of Rules Implementing the Children's Online Privacy Protection Act," posted July 30, 2002, http://www.cdt.org/privacy/cdtanalysisofftc.shtml [accessed July 29, 2002].

[790] EPIC Comments to FTC on COPPA, posted June 27, 2005, "In the Matter of COPPA Rule Review 2005, Project No. P054505," http://www.epic.org/privacy/kids/ftc_coppa_62705.html [accessed February 20, 2006].

COPPA and its implementing rule provide an important tool in protecting the privacy and safety of children using the Internet."[791]

In summary, all commercial Websites on the Internet must comply with COPPA Rule. The Federal Trade Commission, an administrative government agency, enforces the COPPA. Children are defined to be under 13 years of age. The COPPA Rule does not block obscene sites but it prevents the use of children's information for obscene solicitations. As noted in the Rule's Statement of Basis and Purpose, "the record shows that disclosures to third parties are among the most sensitive and potentially risky uses of children's personal information."[792] One way children may encounter pornography is by being contacted through the use of their personal information. Through the COPPA, the government is able to control database collection by compelling Websites to ask for parental permission using credit card verification. COPPA is a policy that the business industry, parents, and Internet community can accept and work with.

Dot Kids Implementation and Efficiency Act of 2002

In the past, the Internet Corporation For Assigned Names And Numbers (ICANN) has considered the dotkids top level domain as a possibility for providing a safe haven for children.[793] A top level domain (TLD) is "the first level of an Internet site address,"[794] for

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[791] *Id*.

[792] [Billing Code 6750-01P].

[793] ICANN: Internet Corporation For Assigned Names And Numbers. ICANN Is Responsible For Assigning "Internet Protocol (IP) Address Space Allocation, Protocol Identifier Assignment, Generic (GTLD) And Country Code (CCTLD) Top-Level Domain Name System Management, And Root Server System Management Functions" internationally. http://www.icann.org/new.html [accessed December 9, 2006].

[794] Google search, http://webmaster.lycos.co.uk/glossary/T/ [accessed February 12, 2007].

example: .com, .net., and .org. According to ICANN, the .kids TLD may require a more complex model to set up as opposed to .com, .net., and .org TLDs, which would require companies to invest in software development and registrars, and this could prove to be a technical difficulty.[795]

Back in 2000, ICANN reviewed four applicants who requested to buy the .kids TLD. These applicants were Blueberry Hill Communications, Inc., DotKids, Inc., ICM Registry, Inc., and KIDS Domains, Inc.[796] The abysmal number of applicants (only four) for the .kids TLD, supposedly to be available to registrants worldwide, showed a lack of interest in the domain.

Applicants proposed a wide variety of ways of achieving a TLD that is appropriate for children, but the difficulty lies in proposing a sound business and technical method in effectively restricting content in a .kids TLD. According to ICANN, "the DotKids[,Inc.] proposal calls for a rating system of content stored in domains under the .kids TLD. [Its] Ratings would be stored in the registry."[797] ".KIDS domain[,Inc.] suggests auditing mechanisms to determine if content registered under the .kids TLD meets the established policy… [and] also proposes working with content filtering companies, but does not provide details of how filtering would work in this context."[798]

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[795] "Dotkids, Inc.," Summary of Application of Dotkids, Inc., at B. 4, ICANN.org, http://www.icann.org/tlds/report/kids2.html [accessed December 9, 2006].

[796] C. Restricted Content Group, Threshold Review, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group (9 November 2000)," ICANN, http://www.icann.org/tlds/report/report-iiib1c-09nov00.htm [accessed December 9, 2006].

[797] "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group (9 November 2000)," *Meeting Unmet Needs, Enhancement of Utility of the DNS and Proof of Concept*, November 10, 2000, http://www.icann.org/tlds/report/report-iiib1c-09nov00.htm [accessed February 11, 2007].

While "Neither Blueberry Hill[,Inc.] nor ICM Registry[,Inc.] proposes any business or technical methods to effectively restrict content for a .kids TLD."[799]

In light of the public interest and governmental interest in protecting children, ICANN said that "one would expect a content-restrictive TLD for children to set forth not only a clear, widely-accepted definition of what is inappropriate, but also to define a decision-making process that commands the support of a wide spectrum of interested parties."[800] But the absence of a clear global definition of what is inappropriate for children, compounded by the divergence of cultural, religious, and communal differences, gives great trouble to conceptualizing a content-restrictive TLD appropriate for children.[801] Given the difficult definitional issues for a .kids TLD and the limitations of the existing technology, applicants' proposals lack the conceptual strength to meet the need the .kids TLD is supposed to serve.[802] In ICANN's words,

> The concept of a content-restricted TLD presents difficult definitional issues: Who is a "kid"? What content is "appropriate"? And who decides? Given the international reach of the Internet, the complexity of these definitional issues is compounded by many diverse cultures and a variety of community and individual views on the answers.[803]

The evaluation team of ICANN did not recommend selecting a .kids domain in 2000 because of the inadequacies of the proposed business and technical measures.

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[798] *Id*.

[799] *Id*.

[800] *Id*.

[801] *Id*.

[802] *Id.*

[803] *Id.*

In 2002, despite ICANN's evaluations of the lack of vigor and effectiveness of the .kids TLD, several Congressman decided that it was time to have a .kids TLD. Their rationale for a .kids domain was that since computer software has not totally solved the problem of pornography on the World Wide Web, a pornography-free domain would provide ample space for children to surf safely. In bill H.R. 3833, the Dot Kids Implementation and Efficiency Act of 2002 was introduced in the House of Representatives on March 4, 2002.[804] Congress passed this bill for the creation of a second level Internet domain (www.kids.us) that would be a safe haven "for children under the age of 13."[805] A second-level domain is "a domain that is directly below a top-level domain (TLD)."[806] For example, the ".kids" in the given Uniform Resource Locator (cyberspace.kids.us) is the second-level domain of the ".us" TLD. Within the same year, President George Bush, after signing the Act into law on December 4, 2002, compared the "Dot Kids" Internet domain to the children's section of a library where parents will know for certain that their children are safe.[807]

The registry, NeuStar, Inc., the company in charge of the administration and maintenance of the domain, will work with the National Communications and Information Administration (NTIA) "to manage the U.S. country code Internet

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[804] Dot Kids Implementation and Efficiency Act of 2002, (Introduced In House) HR 3833 IH, 107TH Congress 2d Session, http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3833: [accessed April 20, 2005].

[805] HR 3833 IH § 2(a)(6), 107TH Congress 2d Session (March 4, 2002), http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3833: [accessed February 17, 2007].

[806] Google search, *What is Second-level Domain?* http://en.wikipedia.org/wiki/Second-level_domain [accessed February 11, 2007].

[807] "President Bush Signs Child Internet Safety Legislation," *Remarks by the President at Bill Signing of the Dot Kids Implementation and Efficiency Act of 2002, The Roosevelt Room*, December 4, 2002, 10:58 a.m., http://www.whitehouse.gov/kids/connection/20021204-1.html [accessed February 16, 2007].

domain."[808] NeuStar's business and technical methods are different from prior ICANN's applicants because its proposal was shaped by the Act. NeuStar prohibits hyperlinks that take browsers to domains other than .kids.us. All hyperlinks must stay within the .kids.us domain, and the Act prohibits "multiuser" interactive services.[809] Also, "mature content, pornography, inappropriate language, violence, hate speech, drugs, alcohol, tobacco, gambling, and weapons" are not permitted.[810] The Act is quite content-restrictive, but since the .kids.us domain is not ubiquitous, that is, it will mainly serve U.S. users, the law should not raise worldwide concern. By not allowing linking to other non .kids.us registries, the world of .kids.us is quite small.

NeuStar's removal of objectionable material is guided by three levels: Materials categorized at Level 1 will be removed immediately without notification of the website owners.[811] Level 1 materials depict mature content, pornography, violence, criminal activity, inappropriate language, hyperlinks to materials in Level 1 and interactive communications.[812] Materials categorized at level 2 will be removed after four hours of notification with additional reviews. Level 2 materials are hate speech, drugs, weapons, gambling, alcohol, tobacco, and hyperlinks to Level 2 or Level 3 content.[813] Materials

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[808] "Congressional Budget Office Cost Estimate," H.R. 3833, Dot Kids Implementation and Efficiency Act of 2002, Congressional Budget Office, posted April 23, 2002, http://www.cbo.gov/showdoc.cfm?index=3375&sequence=0 [accessed April 20, 2005].

[809] Kids.us Content Policy (Restrictions), powerpoint slides, Neustar Inc., http://www.kids.us/policy_overview_files/v3_document.htm [accessed December 8, 2006].

[810] *Id.*

[811] *Id.*

[812] Level 1, Content Restrictions of kids.us, http://www.kids.us/content_policy/content.html#guidelines © 2003 [accessed December 8, 2006].

categorized at Level 3 will be removed after twelve hours of notification.[814] Level 3 materials are hyperlinks to acceptable content.[815]

At the panel discussion for the .kids.us Internet domain held on July 14, 2004, Congressman John Shimkus said, "really the intent [of the law] is to extend the playground"[816] for kids on the Internet. The playground has its foundations laid but will have achieved its goal when more participating registries get involved, thereby expanding the world within the domain.

Unless deliberately seeking for the .kids.us domain, the public may not be aware that such a domain exists. People need to know that the domain is specific to the United States only (.kids.us). Because people do not regularly use the .us TLD, they people may not be aware that .kids is registered under the .us TLD.

The DotKids domain is indeed a small part of virtual space with only about sixteen websites as of July 2004. Website operators are uninterested in investing in a domain that requires $250 in annual membership if they cannot earn a profit. According to Perry Aftab, an Internet privacy specialist, small companies that target children will not earn anything in the .kids domain because they need some kind of personal

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[813] Level 2, Content Restrictions to kids.us, http://www.kids.us/content_policy/content.html#guidelines © 2003 [accessed December 8, 2006].

[814] *Id.*

[815] Level 3, Content Policy of kids.us., http://www.kids.us/content_policy/content.html#guidelines [accessed December 12, 2006].

[816] Congressman Shimkus, Panel 1 Transcript, "The Kids.Us Internet Domain: Developing A Safe Place on the Internet For Children Forum," Wednesday, July 14, 2004 9:00 A.M., United States Department of Commerce Herbert C. Hoover Building, Room 4803, http://www.ntia.doc.gov/forums/kidsus/07142004panel1.htm [accessed December 12, 2006].

information in order to effectively advertise to their targets.[817] Rather, just like when COPPA was enacted, only big companies such as Disney would survive in this domain. Supporters of this law face the challenge of recruiting more participants to the domain.[818]

Finally, critics have said that the law would be ineffective at protecting older children from harmful material online because the material in DotKids seems to suit younger children while the law covers a wide age range. Alan Davidson, associate director of the Washington-based Center for Democracy and Technology, told the AP that material suitable for a 12-year-old may not be right for a younger child. "If the material is restricted for the youngest children, he added, older kids [will not] be interested."[819]

Indeed, a year after the domain's activation, Congressman Shimkus realized that the law was meant to protect children 4 to 9 years old, even though the legislation says 13 and under. Shimkus said:

> But I think we have to continue to identify where our markets is and what niche is it that we want to get to. And I think that niche is, now for me it's going to be, four through nine, four through ten, even though legislation says 13 and under.[820]

Shimkus said this because of his 11-year-old son who feels limited within the boundaries of the domain.

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[817] Corey Murray, "Crunch Time Nears For 'Kids.Us' Web Domain," September 1, 2003, http://www.eschoolnews.com/news/showstory.cfm?articleid=4607 [accessed December 8, 2006].

[818] Congressman Shimkus, Panel 1 Transcript, "The Kids.Us Internet Domain."

[819] Author Unknown, "Bush Signs on Dot-Kids Line," December 6, 2002, The Comic Book Legal Defense Fund, http://www.cbldf.org/articles/archives/000075.shtml [accessed December 8, 2006].

[820] Congressman Shimkus, Panel 1 Transcript, "The Kids.Us Internet Domain."

For the four years since the Act's enactment in 2002, there has not been any First Amendment challenge against it. Such a small discrete section of virtual space does not affect other e-commerce functions or adult's rights. According to Elliot Noss, president of Canadian address seller Tucows Inc., "kids.us has 'absolutely zero' probability of achieving that ubiquity and is nothing more than 'an exercise in making politicians who don't understand the medium feel good.'"[821]

In summary, the Dotkids Act is the government' attempt to protect children from encountering online obscenity. The Dotkids domain provides a safe little cyberspace for younger children to surf within. Children is defined as below 13 years of age.

Age of A Minor

In this section, the researcher will explore the age requirements for specific categories of activities. In this dissertation, there is a threshold age of "minor" for each online law protecting children. The explicit exploration of minor's ages for the different categories will help in understanding the government's way of setting the age of minors in online laws protecting children.

The age of a minor is significant in the eyes of the law because the definition of a minor is based on age. Different lawful activities have different age requirements. For example, what is lawful and unlawful in a certain activity, such as sexual activity, labor, military recruitment, drinking, voting, driving, and possessing handguns, is determined by age.

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[821] David Mcguire, "Economics of Kid-Friendly Domain Questioned," December 12, 2002, Washingtonpost.com, http://www.washingtonpost.com/ac2/wp-dyn/A44122-2002Dec12?language=printer [accessed February 11, 2007].

If a state code and a federal code exist for the same issue, states are allowed to set stricter regulations than the threshold set out by the federal government but are not allowed to set looser regulations than the federal threshold. The regulation set out by the federal government becomes the minimum standard. The state codes for the fifty states can be found at this website: http://www.law.cornell.edu/topics/state_statutes.html

Child Labor

Once a person is age 18, there are no federal child labor rules, but prior to age 18, the Fair Labor Standard Act (FLSA) governs employment.[822] The federal government sets the minimum employment age at 14 for most non-agriculture work.[823] However, a youth may at any time work by babysitting, housecleaning, delivering newspapers, performing in broadcast productions, gathering evergreens and making wreaths, and working for their parents' businesses as long as the work is not hazardous or mining or manufacturing.[824]

Oppressive child labor is defined as labor by one who is under the age of 16.[825] "Oppressive child labor" is labor done by a minor who is hired by an employer in hazardous work conditions other than those defined by the Secretary of Labor. Minors age 14 to 16 who are not working in mines or manufacturing and are working on jobs as defined by the Secretary are permitted to work as long as the job does not interfere with

[822] Fair Labor Standard Act, "Child Labor Introduction," Elaws – FLSA – Child Labor Rules, http://www.dol.gov/elaws/esa/flsa/cl/default.htm [accessed February 5, 2007].

[823] Fair Labor Standards Act Advisor, "What is the Youngest Age at Which A Person Can be Employed?" Elaws – FLSA – Child Labor Rules. http://www.dol.gov/elaws/faq/esa/flsa/026.htm [accessed February 5, 2007].

[824] Fair Labor Standard Act, "Child Labor Introduction."

[825] 29 U.S.C. § 203 (l)(1).

their schooling or health.[826] While age 16 to 18 is still in the oppressive-child-labor age group, the employer may provide information or evidence that the job is not detrimental to health for children.[827] Most employers would rather wait until minors have reached 18 than to hassle with strict laws governing employing a minor.[828]

Minors are thought to be young in health and naïve. They need to be protected from hazardous conditions. Adults may choose to put their lives in danger as some work require sacrifice, but a minor cannot choose to do dangerous work because the labor laws prohibit such work. All states have child labor rules. If states rules differ from federal rules, whichever provides greater protection for the young worker applies.

Military

The age for enlisting in the U.S. military is between 17and 35.[829] Age 18 and above do not need written parental consent. 17 year olds must get parents' signed consent. Different arm-forces have different age ranges. Most recruitment drives focus advertising efforts on getting teenagers to choose the military as a career path, something which can mean life or death. The irony is that the permissible age for military service is 17, a job that is dangerous and which could mean life or death, yet most laws concerning

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[826] 29 U.S.C. Sec. 203 (l)(2).

[827] 29 U.S.C. Sec. 203 (l)(3).

[828] "Employment or Use of Minor Persons," 21 U.S.C. Sec. 861. in certain jobs such as drug operations or controlled substances is illegal. Here minors are defined as less than 18 years old.

[829] US Military, "Enlisted Careers—General Enlistment Requirements," N.D., armedforcescareers.com, http://armedforcescareers.com/enlistmentrequirements.html#military-scholarships [accessed July 5, 2006].

labor are set at 18.[830] These young adults are perfect for the job because they are healthy and their characters can be molded.

The Uniform Transfer to Minors Act and the Uniform Gifts to Minors Act (UGMA), concerning parents who died in the military leaving unsettled inheritance, defines the age of majority to be either 18 or 21 and sometimes even 25 depending on the state UGMA law.[831]

Federal Gun Laws

According to the Second Amendment, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[832] The federal gun laws are the National Firearms Act (1934), the Gun Control Act (1968), the Firearms Owner`s Protection Act (1986), the Brady Handgun Violence Prevention Act (1993), and the 1994 Omnibus Crime Control Act.[833] In summary, "an individual 21 years of age or older may acquire a handgun from a dealer federally licensed to sell firearms in the individual`s state of residence," while "an

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[830] 10 U.S.C. § 505a: "The secretary concerned may accept original enlistments in the regular army, regular navy, regular air force, regular marine corps, or regular coast guard, as the case may be, of qualified, effective, and able-bodied persons who are not less than seventeen years of age nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."

[831] Investment, "Uniform Gifts to Minors Act-UGMA," Investopedia.com, http://www.answers.com/topic/uniform-gifts-to-minors-act [accessed February 17, 2007].

[832] U.S. Const., amend. II.

[833] Brady Handgun Violence Prevention Act (1993), P.L. No. 103-159, 107 Stat. 1536 (1993), codified as amended at 18 U.S.C. § 921; Firearms Owner's Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, 18 U.S.C. § 921 (1986); Gun Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 225 (codified as 18 U.S.C. §§ 921-29 (1982)); National Firearms Act of 1934, 26 U.S.C. §§ 5801-5872.

individual 18 years of age or older may purchase a rifle or shotgun from a federally licensed dealer in any state."[834] States or local jurisdictions may impose stricter laws.

Alcohol Consumption

21 years old is the national drinking age, according to the National Minimum Drinking Age Act of 1984.[835] The law prohibits persons under 21 to purchase or be found in public possession of alcohol.[836] Moreover, most states have laws prohibiting consumption of intoxicating beverages for people under the age of 21.[837]

Voting Age

Voting age for most states is age 18. Most states require that the voter resides in that state for voter eligibility and that the voter have not been convicted for a felony.[838]

Bicycling

A federal law which governs society is the bicycling safety law. The Administrator of the National Highway Traffic Safety Administration may give grants to individual states to educate individuals under the age of 16 and their families on the importance of wearing helmets in order to improve bicycle safety.[839]

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[834] "A Citizen's Guide to Federal Firearms Laws," posted 2006, National Rifle Association of America—Institute for Legislative Action, http://www.nraila.org/gunlaws/federalgunlaws.aspx?id=60 [accessed March10, 2005].

[835] National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158.

[836] Alex Koroknay-Palicz, "Legislative Analysis of the National Minimum Drinking Age," N.D., National Youth Rights Association, http://www.youthrights.org/legana.shtml [accessed February 16, 2007].

[837] "Drinking Age and Alcohol Laws for all 50 States," National Youth Rights Association, http://www.youthrights.org/dastatelist.html [accessed February 24, 2004].

[838] State-by-state voting age can be found at http://www.youthrights.org/votingage.shtml [accessed February 11, 2007].

[839] Bicycling Safety Law, 86 U.S.C. § 6001.

Smoking

An attempt was made to improve the standard of living for young citizens by regulating retailers who carry cigarette packs. Congress passed a smoking law effective in 2003, known as the Synar Amendment or the Federal Public Health Service Act,[840] which requires states to pass and enforce laws that prohibit the sale of tobacco to individuals under 18 years of age.[841] The law aimed to reduce youth smoking and to reduce health issues associated with smoking.[842] The Center for Substance Abuse Prevention oversees the implementation of the Synar Amendment.[843] All fifty states set a minimum age of at least 18. According to the Center for Disease Control and Prevention, "Each day in the United States, approximately 4,000 young people between the ages of 12 and 17 years initiate cigarette smoking and an estimated 1,140 young people become daily cigarette smokers."[844] Even though legislation prevents retailers from selling cigarettes to minors, minors can use older social peers to buy their cigarettes, steal from parents or retailers, or buy from vending machines.

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[840] Federal Public Health Service Act, Title XIX § 1926.

[841] "Tobacco Sales to Minors," November 2006, California Dept. of Alcohol and Drug Programs, Program Services Division, http://www.adp.cahwnet.gov/factsheets/tobacco_sales_to_minors_(synar_amendment).pdf [accessed February 16, 2007].

[842] Raymond C. Scheppach, National Tobacco Settlement Legislation, http://72.14.203.104/search?q=cache:4sqhrCC85mkJ:www.senate.gov/~commerce/hearings/319sch.pdf+significance+of+synar+amendment+tobacco&hl=en&ct=clnk&cd=5&gl=us&client=firefox-a [accessed February 11, 2007].

[843] "Synar Amendment: Protecting the Nation's Youth from Nicotine Addiction," N.D., Tobacco/SYNAR, Center for Substance Abuse, http://prevention.samhsa.gov/tobacco/ [accessed February 11, 2007].

[844] Tobacco Information and Prevention Source (TIPS), "Youth and Tobacco Use: Current Estimates, Fact Sheet, December 2006," Posted January 5, 2007, Department of Health and Human Services, Center for Disease Control and Prevention (CDC.gov), http://www.cdc.gov/tobacco/research_data/youth/Youth_Factsheet.htm [accessed February 17, 2007].

Driving

There is no federal driving age. In most states, the average driving age is 16. However, Hawaii sets the minimum at age 15, Idaho at age 15, Georgia at age 18, Montana at age 15, New Jersey at age 17, New Mexico at age 15, South Carolina at age 15, and South Dakota at age 14.[845]

Sexual Activity

According to the National Center for Missing and Exploited Children (NCMEC), the usual sex abuse case is one of an adult having an affair with a youth, sometimes through luring, and other times through compliance of the minor.[846] In 1977, Congress passed the Protection of Children Against Sexual Exploitation Act.[847] It criminalized knowingly using a minor younger than age 16 to engage in sexually explicit conduct to produce a visual depiction.[848] The federal government makes offense adults having sexual engagement with a "minor." Sexual exploitation of minors is illegal.[849] In 1984, Congress passed the Child Protection Act, raising the threshold age from 16 to 18.[850]

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[845] State by state minimum driving age rules can be found at http://golocalnet.com/drivingage/ [accessed February 24, 2004].

[846] National Center for Missing and Exploited Children, http://www.missingkids.com [accessed 2/11/07].

[847] The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251. http://www.law.cornell.edu/uscode/18/usc_sec_18_00002251----000-notes.html [accessed February 2, 2007]. Supra notes 372-374.

[848] Sue Ann Mota, "The U.S. Supreme Court Addresses the Child Pornography Prevention Act and Child Online Protection Act in Ashcroft v. Free Speech Coalition and Ashcroft v. American Civil Liberties Union," 55 Fed. Comm. L.J. 85, 87 (2002).

[849] 18 U.S.C. § 2252.

[850] Sue Ann Mota, 55 Fed. Comm. L.J. at 87; Child Protection Act, 18 U.S.C. § 2256 (1984).

Having the intent to engage in sexual activity is enough to constitute illegal activity, for the law says anyone who crosses another state with the intent to have sex with teenagers below the age of 16, specifically ages 12 to 15, shall be imprisoned for up to 15 years not more and/or fined.[851] Likewise,

> any person, parent, or guardian who employs, uses, persuades, induces, entices, or coerces minors to engage in sexual acts … shall be punished not less than 15 years and not more than 30 years for the first violation, and longer incarceration period for those who have been convicted once, twice or more.[852]

In most states, sexual intercourse between a male and a female usually age 14 to 16 with female consent is permitted. However, even if the female below the threshold state age has consented, her consent is invalid. A defendant who has sex with such a female is guilty, even if he believed that she was over the stated age.[853]

Marriage Age

Generally, for any U.S. citizen to get married without parental consent, he or she has to be 18 years old, with few exceptions. Some states vary from such law, for example: the state of Mississippi (males age 17; females age 15), Nebraska (males and females age 19), and Puerto Rico (males and females age 21).[854] States also differ in age with parental consent for marriage. For example, in California and Mississippi there are no age limits, but in most states, marriage with parental consent ranges between age 16

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[851] 18 U.S.C. § 2243: "Whoever, in the special maritime and territorial jurisdiction of the united states or in a federal prison, knowingly engages in a sexual act with another minor or ward shall be fined or imprisoned for not more than 15 years or both … minors 12 to 15 or has not attained age 16."

[852] 18 U.S.C. § 2251.

[853] W.E. Shipley, Annotation, Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape, 8 A.L.R.3d 1100 (1966) (collecting cases from various jurisdictions).

[854] Marriage Statutes, http://www.law.cornell.edu/topics/Table_Marriage.htm [accessed 2/24/2004].

and 18, even if one of the parties is younger.[855] Missouri law allows a minor marriage with parental consent at age 15.[856] Some states recognize common-law marriages that were entered before certain dates.[857] The duration of marriage license validity vary in every state from 20 days in South Dakota to 1 year in Arizona, Nebraska, and Nevada.)[858]

Curfew Ordinances

The New Orleans Curfews ordinances define minors to be between the ages of 10 to 16,[859] the Boston Curfews defines minors as under 16.[860] Of the 200 largest cities in America, New Orleans is the only city with an 8:00 p.m. curfew affecting children up to 16 years old. The only other cities with curfews earlier than 10:00 p.m. affecting this age group are: Detroit, Michigan (9:00 p.m.); Hartford, Connecticut (9:30 p.m.); and

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[855] *Id.*

[856] *Id.*

[857] Marriage Statutes, (gg), http://www.law.cornell.edu/topics/Table_Marriage.htm [accessed 2/24/2004]. No common-law marriages can be entered into, but the common-law marriages below are recognized:
Georgia- entered into prior to January 1, 1997 are recognized,
Idaho- entered into prior to January 1, 1997 are recognized,
Indiana- entered into prior to January 1, 1958 are recognized,
Ohio- entered into prior to October 10, 1991 are recognized,
Oklahoma - entered into prior to November 1, 1998 are recognized, current situation unclear,
Pennsylvania- entered into prior to September 17, 2003 (see PNC Bank Corp. v. W.C.A. B., 831 A.2d 1269 (Pa. Cmwlth. 2003) or possibly January 1, 2005 (see 2004 House Bill No. 2719) are recognized."

[858] *Id.*

[859] New Orleans Curfews, LA, Code, § 54-414 (1995). Curfew for persons under 17 years of age, http://www.youthrights.org/curfewnews.php [accessed February 5, 2007].

[860] See Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 102-07 tbl.1.114 (1996) [hereinafter Sourcebook] (describing the specific regulations in curfew laws for 200 American cities with populations over 100,000).] See also http://www.youthrights.org/curfew.shtml [accessed February 24, 2004] and http://www.youthrights.org/curfewnews.php [accessed February 5, 2007].

Montgomery, Alabama (9:00 p.m.).[861] A few cities have similar curfew parameters for younger children, usually 14 and under.[862]

In conclusion to the age of minor discussion, the federal government has clearly defined the ages for labor (age 14), driving (age 16), voting and legal responsibilities (age 18), drinking and handguns (age 21).

However, the basis of how a "minor" is defined by the federal government is unclear. Most of the ages have been decided according to category. Therefore, a minor can be an adult depending on the activity. Over time, culture and social norms play a huge part in the acceptance of these ages. In fact, the age-required regulations have revolved around the needs of society. For example, people who are farmers need their children to help with driving tractors or trucks, so federal law sets a low age exception on farm children. In the U.S. society, the legal driving age is around the age of 16. The government did not explain why it chose certain age thresholds for certain age-related laws.

The chronological age of the child does matter depending on which developmental stage he/she is in, whether psychologically, morally, mentally, socially, or spiritually. For example, Hetherington (1992) argued that the age of a child matters in divorce situations. When a younger child is faced with parental divorce, the child has more self-condemning feelings of contributing to the break-up, but when an older child is faced with parental divorce, the older child has less feelings of contributing to the break-

[861] *Id.*

[862] *Id.*

up.[863] Similarly, this author would argue that in viewing online pornography, depending on which developmental stage the child is in, the chronological age of the child does matter. It is significant to review the threshold age for each regulation attempting to protect children from online pornography and to review the threshold age for smoking, drinking, voting, military, labor, gun, marriage and sexual activity regulations because Congress sets different ages for different laws.

Summary

Comparison and Contrast of Statutes

This dissertation explored regulations attempting to protect children from online pornography and privacy as it relates to pornography. These regulations covered ages 13, 17, and 18.

All the statutes and regulations mentioned above (CDA, COPA, CPPA, CIPA COPPA and DotKids) seek to protect children from obscene and indecent materials that are harmful to minors and privacy as it relates to obscenity. The method in which each law tackles the obscenity issue is what makes each law unique. Obscene materials defined by these laws range from vague indecency to child pornography materials.

The CDA, Congress' first attempt, prohibited indecency on the Internet by a complete ban on indecent communication to minors below 18 years old. Congress' second attempt, the COPA, prohibited "harmful to minors" material on commercial Web sites to minors below 17 years of age, which is a narrower subject, age, and parameter.

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[863] E. Mavis Hetherington, **"**Coping with marital transitions: a family systems perspective," and "Summary and Discussion," In E. Mavis Hetherington and W. Glenn Clingempeel, eds., in collaboration with Edward R. Anderson, James E. Deal, Margaret Stanley Hagan, E. Ann Hollier, and Marjorie S. Linder; with commentary by Eleanor E. Maccoby. Serial no. 227 *Monographs of the Society For Research in Child Development* 57, no. 2-3 (1992), 1-14, 200-206.

The CPPA affecting filmmakers and the movie industry, attempted to ban "virtual" pornography to minors below 18.

The method to tackle the obscenity problem for the CDA, the COPA, and the CPPA relies upon the strength of its own legal mandate. In other words, there is no particular incentive except for the ban. Also, the CDA, the COPA and the CPPA set high monetary damages to discourage the transmission of online pornography. These three statutes have been struck down by the Supreme Court.

The CIPA seeks to tackle online obscenity from an educational setting to protect minors below 17 from "harmful to minors" material. The law affects the way public libraries are run, and it hangs upon the strength of filtering software to eliminate online pornography. The Supreme Court has upheld this statute. It became law in 2003.

In the CDA, the Supreme Court said the definition of a minor was set too high, at below 18 years old, for protecting children from exposure to indecency on the Internet. In the COPA in 2003, the Third Circuit Court of Appeals in *ACLU v. Ashcroft* said that the age range for "minors" is too wide. The Third Circuit said the way Congress drafted the term "minor" would refer to an infant and materials for a 16-year-old would not have the same value for a 3-year-old,[864] and that Web publishers cannot tell which "minors" should be considered in deciding particular content of Internet postings that would be deemed "harmful to minors."[865]

Regulations with a direct prohibition on "harmful to minors" material or online pornography showed that Congress drafted minors' age around 17 and 18 years old (see

[864] *ACLU v. Ashcroft*, 322 F.3d 240 at 253, 254.

[865] *Id.* at 254.

CDA, COPA, CIPA and CPPA). Past sexual exploitation laws defined minors as under age 16. Then in 1984, Congress raised the threshold age for adults engaging in sexual activities, defining a minor below age 18.[866]

The COPPA Rule protects the privacy of minors through restricting collection of personal information by providing a guideline to online businesses as to their obligations. COPPA is very different in nature compared to the other laws such as CIPA, COPA, or CPPA because it impacts "privacy protections, free speech, and commerce on the Internet."[867] It sets the age of a minor at below 13. The COPPA has not been challenged since it became law in April 2000.

The DotKids Act protects minors below 13 from online pornography via the second-level domain (.kids.us).[868] The DotKids has not been challenged since it became law in December 2002.

The government gives no explanation as to its choice of threshold ages for each online statute protecting children.

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[866] 18 U.S.C. §§ 2243-2256.

[867] Center For Democracy and Technology, "Analysis Of Rules Implementing The Children's Online Privacy Protection Act," posted July 30, 2002, http://www.cdt.org/privacy/cdtanalysisofftc.shtml [accessed July 29, 2002].

[868] .kids.us resides within the United States only. The .kids within the .us is the second-level domain.

Chapter 4

Recommendations

In protecting children from online pornography, Congress can choose one of four things: First, Congress can choose the status quo, the government can continue to combat online obscenity with existing current laws (CIPA and COPPA). Second, Congress can abolish regulation, which is a libertarian's paradise. Third, Congress can take a wait-and-see approach, postpone Internet regulation until it has reached its full potential.[869] Fourth, regulation, Congress can choose to increase regulation in the attempt to reduce children encountering obscenity on the Internet.

Since Congress is committed to protecting children from encountering obscenity on the Internet, this chapter will explore different ways to solve the problem. Part I critiques the different recommendations, such as constitutional amendments, legal mandates, and regulations enforcing technical aids such as filters, ratings, and a top-level domain. Part II introduces the author's recommendation through the ecological systems perspective and its significance to solve the governmental issue at hand. Part III explains the author's version of the adapted ecological systems model and how to use the model to make recommendations.

[869] Internet Tax Freedom Act, H.R. 4328; 47 U.S.C. §151 (2001). The Internet Tax moratorium was given another deadline because Congress wanted to encourage e-commerce first and because Congress could not decide what to do with Internet taxes. "Plain English" Summary of the Internet Tax Freedom Act Approved as H.R. 4328 by Congress on October 20, 1998; Public Law 105-277 on October 21, 1998.

Critique

It is no wonder that protecting children has always been hard because "the U.S. Constitution was not drafted with children in mind.[870]" Indeed, freedom of expression will often collide with safeguarding children's welfare, and the guiding principles to resolve this conflict will not always be clear.[871] Yet, the government and conservative citizen groups would argue that "the protection of children trumps the First Amendment rights of adults,"[872] and that protecting the community from obscene and other detrimental materials which corrupts society is more important than free speech concerns. McCarthy stated that rather than having one core value trump or negate the other, variable obscenity,[873] which means that adults may receive more freedom than children, will help encourage free expression while simultaneously protecting children by balancing both interests.[874] However, McCarthy acknowledged that the task of finding a balance is difficult.

Patrick M. Garry thought that the First Amendment creates the problem of Internet communication.[875] Garry suggested that if the First Amendment can be altered, then that would solve many communication problems, including obscenity and

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[870] Martha Mccarthy, "The Continuing Saga of Internet Censorship: The Child Online Protection Act," BYU Educ. & L. J. 83, 93 (2005).

[871] *Id.*

[872] Mccarthy, 94.

[873] Supra notes 342-407, pages 75-88 of this dissertation.

[874] McCarthy, 94.

[875] Patrick M. Garry, "Confronting the Changed Circumstances of Free Speech in a Media Society," 33 Cap. U.L. Rev. 551, 564 (2005).

inappropriate language that one does not want to hear.[876] Garry said, "When the Supreme Court developed its current free speech doctrines, largely during the period from the 1950s to the 1980s, most of the controversies involved dissident political speech."[877] The Court did not consider the listener in free speech doctrines because there was no need at that time, but since speech is a process of communication and communication is a two-way street, Garry said that "for the courts to focus their First Amendment doctrines strictly on the speaker or the sheer volume of speech is to ignore the whole other side of the equation."[878] According to Garry, the Internet current free speech doctrines do not shield citizens; instead, "the marketplace model has turned the First Amendment primarily into a shield for one kind of speech – the offensive and degrading output of the entertainment industry." Garry proposed a Constitutional Amendment to the First Amendment by adding, the right not to listen. It:

> will not overrule the right of speech. It will not shut down speech or silence speakers. It will simply give listeners some individual control amidst the growing tide of speech that washes in on them every day of their lives.[879]

Garry thought that by adding the right not to listen, children and unwilling adults could block pop-up Internet advertisements that interrupt a child's research, block off invitations to a sexual chat line, and block off unsolicited emails containing sexually explicit materials.[880] Garry said,

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[876] *Id.*

[877] *Id.* at 554.

[878] *Id.* at 562.

[879] *Id.*

[880] *Id.* at 554.

> It is a right made necessary by the realities of the information world. It is a right that seeks to expand the power of control possessed by all the individuals who have been rendered increasingly passive by the overwhelming weight and pervasiveness of the modern media.[881]

Garry's constitutional amendment of the right not to listen will address online speech forced upon a person, such as pop-up advertisements and unsolicited emails. But on most other speech on the Internet that is found in blogs, usernets, personal and commercial websites, one is not usually coerced to listen or to read. Prosecuting people under the right not to listen is hard because some Websites disappear quickly and it is almost impossible to control the destination of speech on the Internet. Garry is actually weakening the First Amendment by giving Congress more power to regulate certain speech. The First Amendment says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[882]

Congress may use the right not to listen as an excuse to regulate media outlets, *e.g.* unwanted political advertisements. Garry's proposal would limit private entities and speakers from certain activities.

Jared Chrislip is more concerned about Congress being successful in achieving its goal in the obscenity legislative process than the actual details of the law.[883] He proposed to adapt the legislative approach and decisions made in the Clean Air Act (CAA).[884] In

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[881] *Id.* at 562.

[882] U.S. Const., amend. I.

[883] Jared Chrislip, "Filtering the Internet Like A Smokestack: How the Children's Internet Protection Act Suggests A New Internet Regulation Analogy," 5 J. High Tech. L. 261 (2005).

the CAA approach, Congress outlined the goal, made a flexible plan of action, created a governing body called the Environmental Protection Agency (the EPA) and delegated the EPA to reach Congress' goals and objectives. Congress gave the EPA a flexible amount of funding. With the issue of online protection of children, Congress should leave the project of protecting children from online obscenity to an adjudicatory governmental body and check the body's progress annually.

In fact, Congress had assigned the Computer Science and Telecommunication Board the task of finding solutions to protect children from pornography and other inappropriate Internet content.[885] One of the approaches that has been adapted from the outcome of the project is the dotkids domain; however, there is still no straight-forward answer to the issue of protecting children from online obscenity. Congress can further create an adjudicatory governmental body specifically to tackle the protection of kids from pornography and other inappropriate Internet content issues and give the adjudicatory body prosecuting powers.

Todd Nist categorized four ways in which children view harmful materials on the Internet:[886] first, through the materials sent by online commercial dealers; second, through online images that predators send or predators' direct contact with children online; third, through the intentional access of harmful materials by children; and fourth, through accidental access of harmful materials by children.[887] As for the harmful

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[884] *Id.*

[885] National Research Council, the Committee for Computer Science and Telecommunications Board, *Youth, Pornography and the Internet,* (Washington, D.C.: National Academy Press, 2002).

[886] Todd A. Nist, "Finding The Right Approach: A Constitutional Alternative For Shielding Kids From Harmful Materials Online," 65 Ohio St. L.J. 451 (2004).

materials sent by commercial dealers and predators, Nist proposed that Congress mandate similarly-written statutes like the Ohio House Bill 8.[888] The Ohio House Bill 8 compelled senders to send materials to an identifiable recipient;[889] thus, the sender must know who or what age the recipient is, and this will address the sending of harmful materials issue by attacking the age-verification problem. As for the harmful materials intentionally and accidentally accessed by children, Nist proposed the enforcement of traditional zoning laws in cyberspace in conjunction with top-level domain zones.[890] Because the child access issues cannot be easily solved as it would require separating pornographic materials from the rest of the online world, Nist would require users to log onto the Internet with an identification and password, by "physically checking identification."[891] Nist's identification system would be supported by the creation of an adult .xxx domain that would parallel zoning laws found in *Renton*.[892] Children would be screened out through a screening mechanism and the use of passwords and identification system to ensure that minors do not have access to the adult .xxx domain.[893] Nist argued that his

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[887] Nist, 486, 487.

[888] Nist at 469, quoting the Ohio Rev. Code Ann. § 2907.01(J)(1) (Anderson 2002). Nist found that the Ohio House Bill 8 had been struck down by the Ohio Supreme Court, however, Nist proposes for Congress only to copy the part where sending materials to an idenitifiable recipient is concerned.

[889] Nist, 469.

[890] *Id.*

[891] *Id.* at 489.

[892] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Nist, 489, 490.

[893] Nist, 484.

zoning requirement would not be a content-based restriction on free speech, but rather a time, place, and manner restriction on speech.[894]

Todd Nist's proposal that Congress adopt the Ohio House Bill 8—that senders could be prosecuted for sending materials to an identifiable recipient who is a minor—has value. Such a statute would certainly make online commercial operators residing in the United States less careless of what they might be sending to minors. However, Nist's proposal of creating zoning laws that would allow only adults into the adult .xxx domain might be more harmful to minors than helpful. Minors who intentionally seek out harmful materials online may be savvy enough to get around the password system and the screening mechanism system to get into the adult .xxx domain.[895] The .xxx domain could act as a lure for children who could then intentionally browse that domain.

Brooke Marshall suggested that commercial pornography should be considered commercial speech.[896] He argued that the Court in *Ashcroft v. ACLU*[897] should have

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[894] Time, place, manner restriction test on speech: 1) important government interest 2) the regulation is unrelated to the suppression of speech 3) regulation is narrow tailored 4) regulation leaves ample alternatives for speech, from http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/timeplacemannertest.html [accessed January 21, 2007].

[895] There are many articles showing that children are technologically savvy. A few examples are: www.thecharacter.com/financial/The%20most%20**technologically**%20**savvy**%20**Kids**.pdf [accessed April 5, 2007], www.hindu.com/2006/04/05/stories/2006040506320200.htm [accessed April 5, 2007], www.education.uconn.edu/conferences/medialit/assets/2007brochure.pdf [accessed April 5, 2007] and John C. Beck and Mitchell Wade, "The Generation Lap: Video Games Put the Young Way Ahead," January 2, 2005, The Boston Globe, http://www.boston.com/ae/games/articles/2005/01/02/the_generation_lap?pg=full [accessed April 5, 2007].

[896] Brooke A. Marshall, "Who Should Be Allowed To Teach Our Children About Sex? Protecting Children From The Dangers of Cyberporn By Analyzing The Child Online Protection Act As A Regulation On Commercial Speech," 22 T.M. Cooley L. Rev. 369, 392 (2005).

[897] Ashcroft v. ACLU, 535 U.S. 564 (2002).

applied the *Central Hudson*[898]test for commercial speech in the Child Online Protection Act (COPA) instead of applying the strict scrutiny test for pure free speech.[899] When cyberporn is treated as commercial speech, then the COPA statute will pass the *Central Hudson* test and the COPA can be law. Marshall believed when the COPA is law, it will protect children and benefit society.[900]

In justifying that cyberporn is commercial speech, Marshall argued that commercial speech is "communication … that involves only the commercial interests of the speaker and the audience."[901] In this case, the speaker is the Web porn operator, and that most online porn is for commercial purposes; online pornography is a $57 billion industry that will become an empire if not controlled by government.[902] These commercial entities possess the ability to determine the accuracy and lawfulness of their speech. Advertising is commercial speech, and cyberporn contains advertisements through the use of "teasers" or pop-up screens that are the equivalent of a local strip club giving free sneak peeks or a cigarette company giving out free samples in order to entice people to buy a pack or a carton.[903]

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[898] Central Hudson Gas and Electric v. Public Service Commission of New York, 447 U.S. 557 (1980). See Chapter 2-Commercial Speech for details.

[899] Marshall, 394.

[900] *Id.* at 405.

[901] *Id.* at 392.

[902] *Id.* at 392; See David C. Bissette, "Internet Pornography Statistics: 2003," posted 2004, HealthyMind.com, at http://healthymind.com/s-port-stats.html [accessed December 1, 2005].

[903] Marshall, 393; Legal precedents supporting cyberporn as commercial speech are: Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989), Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), and Edenfield v. Fane, 507 U.S. 761 (1993).

Marshall's proposal has its limitations. It expects the Court to change its interpretation of the COPA statute. The proposal is also problematic because it does not account for non-commercial pornography. Non-commercial pornography can be distributed to lure adults and children into commercial pornography. While commercial pornography may be readily accessible and people like the reliability, the unregulated pornography may be more hard-core and difficult to prosecute.

Todd Anten criticized the Supreme Court's assumption in the Children's Internet Protection Act (CIPA) decision[904] that the removal of a filter is quick and easy.[905] Anten argued that Phoenix spent $175,000 to create four positions, including an "Internet specialist" librarian to monitor filter technology and to fix wrongly blocked sites, indicating that there are logistic consequences in the removal and the installation of the filter.[906] Since the removal and reinstallation of filters requires a network specialist and is not as simple as the Supreme Court suspects, Todd Anten's solution to the issue of removing non-removable filters is to have a filter-free computer or computer with a removable filter within a reasonable distance.[907] A non-removable filter is a filter that the library will not turn off or is difficult to disable. Anten's other alternative to non-removable filters is to let librarians decide on Internet content for children and adults by

[904] United States v. American Library Association, 539 U.S. 194 (2003).

[905] Todd Anten, "Note: 'Please Disable the Entire Filter:' Why Non-Removable Filters on Public Library Computers Violate the First Amendment," 11 Tex. J. on C.L. & C.R. 65, 96 (2005). Anten quoting the Supreme Court: " 'Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled' (plurality) 539 U.S. 194 at 209; 'without significant delay'(Kennedy, J., concurrence) 539 U.S. 194 at 214; 'need only ask a librarian' (Breyer concurrence) 539 U.S. 194 at 219."

[906] Anten, 95, 96.

[907] *Id.* at 96.

catching hackers, looking over patron's shoulders, having printers print all materials face-up,[908] hiring more librarians for monitoring purposes,[909] and moving computer monitors closer to librarians.[910]

Anten saw his solution as practical, something which Congress can mandate and the Court can support. However, Anten's proposal places liability on libraries by having them be the judge of "Internet viewing in a particular community."[911] Libraries would act as Congress' hands extended to prohibit illegal viewing and decide what is criminal. But librarians are not trained to catch hackers or to detect those who do illegal Internet activities. It should be the job of the Federal Bureau of Investigation or other policing body to catch hackers and purveyors of pornography. Anten's proposal to have filter-free computers might also not work because the library could be liable if child pornography is downloaded onto library hardware. As for printing materials face up and moving computer monitors closer to librarians, it might intimidate people from printing and viewing online pornography, which could be a practical solution to limit use of library computers for online pornography.

Tim Gerlach proposed that filters installed at the national Internet Service Provider's servers could block inappropriate content and provide protection for the whole

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[908] *Id.* at 97,98.

[909] *Id.* at 97.

[910] *Id.*

[911] Anten, 97, 98.

country.[912] The argument he makes is that people should not be forced to read everything that exists on the Internet; each nation should be in control of its laws.[913] According to Gerlach, the national Internet Service Providers will hold the responsibility when they will become "the governmental agency in charge of maintaining the nation's 'e-borders' by keeping the filters up-to-date and in compliance with the nation's laws."[914] The Internet Service Providers will be free to assume that if websites violate a foreign nation's laws, then that nation's filters will block access to the inappropriate website; if that nation does not block access, then the publisher should assume that the content is legal.[915] Gerlach said that governments have to some degree lost control of their borders, and creating firewalls around each nation will re-establish borders, which Gerlach called "e-borders," to regain control of nations' laws and thus protect their citizens.[916]

Gerlach's argument has value because Internet communities consist of people from all over the world, not just from the United States. It is true that there is no way to control Internet content and that one nation's laws cannot be imposed onto another nation. Following this line of thinking, the best way to protect a nation's own interest is to decide as a country what is and what is not acceptable and then to put a firewall around the nation. Gerlach's approach is equivalent to the great Internet firewall of China.

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[912] Tim Gerlach, "Using Internet Content Filters To Create E-Borders To Aid In International Choice Of Law And Jurisdiction," 26 Whittier L. Rev. 899 (2005).

[913] Gerlach, 912.

[914] Gerlach, note 98.

[915] Gerlach, 913.

[916] Gerlach, 912.

A firewall around the nation is a weak solution as far as citizens getting around the firewall. Those who are technically skilled may hack around the system. The government should acknowledge this if it decides to control Internet content. Moreover, the national Internet Service Providers can become a monopolizing controlling entity which could be a potential danger in the long run. Gerlach's recommendation of a firewall around the nation may not fly with Americans because this nation has enjoyed civil liberties.

On the other hand, having the states regulate online pornography is a bad idea according to John Spence.[917] For example, Pennsylvania's legislation for combating online pornography and obscenity has shown not to work.[918] Specifically, Pennsylvania's Internet Child Pornography Act involved the state courts and businesses within the states while affecting actors outside of the state as well.[919] Spence's article served as a good example for what should not be tried as a recommendation, that is, Pennsylvania's experience should serve as a learning experience for other states in regulating online pornography and obscenity. According to Spence, "while child pornography itself is obviously not 'commerce,' Pennsylvania's method of combating it focused on the very heart of online commerce itself-the ISPs and Web site owners."[920] To prosecute a person

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[917] John Spence, "Pennsylvania and Pornography: CDT v. Pappert Offers A New Approach to Criminal Liability Online," 23 J. Marshall J. Computer & Info. L. 411, 442 (2005).

[918] *Id.*

[919] Spence, 417. Pennsylvania's Internet Child Pornography Act, 18 Pa.C.S.A. §§ 7621-7630, requires an Internet Service Provider (ISP) to disable access to child pornography that is "residing on or accessible through its service in a manner accessible to persons located within this Commonwealth within five business days of when the Internet service provider is notified by the Attorney General... ."

[920] Spence, 442.

from another state who violated Pennsylvania's law is problematic because the customers "[are assigned an IP number] by the order upon which they logged on to the Internet,"[921] which is not an identification number. Internet Service Providers and Website owners are not able to tell their customers' access points. Internet Service Providers and Website owners that reside in Pennsylvania have no choice but to do massive overblocking to abide by the criminal law.[922] State-level filtering created conflicts between federal laws, state laws, the constitution, the industry, and users. The district court in Pennsylvania found it hard to regulate interstate online commerce.[923]

Furthermore, every state has its own obscenity laws. Each state applies state obscenity laws to the Internet medium. What Spence is saying is that when a state alone tries to tackle Internet pornography, it is an impossible task.[924] Spence proposed that the first step towards an effective and rational Internet policy is to stop passing new laws.[925] Indeed, he suggested increased cooperation among various law enforcement agencies, the government, and the industry to police the Internet for pornography.[926] Spence said each

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[921] *Id.* at 443.

[922] *Id.* at 443-445; Pennsylvania's ISPs do Internet Protocol filtering and Domain Name Server filtering which leads to overblocking. IP filter is: "The IP filter, embodying the present invention, is a communications device designed to provide public network or Internet access to nodes of private networks, advantageously without requiring the private nodes on such networks to register public Internet addresses." http://www.freepatentsonline.com/6128298.html [accessed February 17, 2007]
DNS filter is: Domain Name System filter, the dnsproxy … runs on a firewall, or on a trusted host just inside the firewall. The program receives (or intercepts) DNS queries and forwards them to an appropriate internal or external 'realm' for processing." http://www.cheswick.com/ches/papers/dnsproxy.html [accessed February 16, 2007].

[923] In *the* District Court of Pennsylvania, *Center for Democracy & Technology et al. v. Pappert,*

[924] Spence, 446, 447.

[925] Spence, 451.

[926] Spence, 452.

law enforcement agency should be in charge of an operation so that the same work does not overlap and thus inefficient.[927] John Spence believes that solving the problem of online material that is harmful to minors has to be a collaborative method.

Filtering is another solution that has been considered by Congress and scholars. Benjamin Edelman was a technology analyst at Harvard Law School's Berkman Center for Internet & Society. His research to reverse-engineer a leading filtering software product manufactured by N2H2, Inc. was stalled, according to Betsy Bernfeld.[928] Edelman sued N2H2, but the district court of Massachusetts dismissed the case in *Edelman v. N2H2*, *Inc.*[929] because the court claimed that Edelman did not specify the exact dimensions of his research or what the full content of his publication would be and N2H2, Inc.'s proprietary confidentiality far outweighed whatever constitutional interests Edelman had.[930] The American Civil Liberties Union thought that the court decision permitted the loss of "a golden opportunity to support valuable research on filters that could lead to their improvement,"[931] so that libraries and parents could assess the effectiveness of filtering software.

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[927] *Id.* at 447.

[928] Betsy A. Bernfeld, "Free Speech and Sex on the Internet: Court Clips COPA's Wings, but Filtering may Still Fly, Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004)," 6 Wyo. L. Rev. 223, 238 (2006).

[929] United States District Court, District of Massachusetts. Civil Action No. 02-CV-11503-RGS, Memorandum and Order on Defendant's Motion to Dismiss, April 7, 2003. More on history of the case, see http://cyber.law.harvard.edu/people/edelman/edelman-v-n2h2/ [accessed October 19, 2006].

[930] *Id*. Page 3.

[931] Bernfeld, 252; Benjamin Edelman v. N2H2, Inc. (D. Mass. 2003), Complaint for Declaratory and Injunctive Relief at 1, http://www.aclu.org/Files/OpenFile.cfm?id=13619 [accessed November 19, 2005].

Bernfeld raised an interesting issue on filtering as Congress' and the courts' solution to protecting children. The judicial system was not consistent when the Supreme Court compelled public libraries to use filtering software or forgo federal funding in *United States v. American Library Association* (2003), yet the trial court in Massachusetts did not allow research on filtering software in *Edelman v. N2H2* (2003). Despite the courts' contradiction, the American Library Association had called for a full disclosure of what sites filtering companies are blocking, who is deciding what is filtered and what criteria are being used. The ALA findings of fact showed that filtering companies are not following legal definitions of "harmful to minors" and "obscenity."[932]

Most parents may not be aware that filtering software screens for pornographic text only and not screen pornographic images.[933] Current screening software has not been able to quantify amount of skin exposure, or whether an image is arousing or not. Content-based image filtering is still at its infancy, and no company has truly tackled screening images effectively.[934]

So not only is filtering inadequate because it does not screen pornographic images, but also the filtering companies do not abide by the legal definitions of "harmful to minors" and "obscenity." Protecting minors from online obscenity is the ultimate reason for compelling the use of filtering software in public libraries. No wonder the use

[932] Press Release, American Library Association, ALA Denounces Supreme Court Ruling on Children's Internet Protection Act, June 23, 2003, http://www.ala.org/Template.cfm?%20Section=news&template=/ContentManagement/ContentDisplay.cfm&ContentID=36161 [accessed January 16, 2007].

[933] Sandy Davidson, University of Missouri Communications Law Class, January-May, 2006.

[934] http://www.evisionglobal.com/business/eVe_content_filtering.pdf [accessed June 23, 2006].

of computer terminals for online pornography in public libraries is getting more prevalent.[935]

Frank Valverde proposed that the Recreational Software Advisory Council (RSACi)[936] rating system that was used in the United States and in the United Kingdom also be used internationally.[937] Valerde's International Internet Rating System (IIRS) would compel all search engines and browsers to use the same rating standards which are already in use by large companies.[938] He argued that the international rating standard will be flexible; each nation will create country ratings within the international rating standard and customize the rating levels to suit their cultures. Thus, the extent of pornography and indecency will be determined by each country's standards.[939]

The international rating system is no different than the existing rating system which is available internationally.[940] The Internet Content Rating Association (ICRA) is a free rating system that parents can download so Valverde is not proposing anything new. His argument does not show that the international rating system will be flexible because

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[935] "Groups push Internet filters after library sex offender incident," November 21, 2005, *The Des Moines Register*, The Associated Press State & Local Wire, Des Moines, Iowa. http://proxy.mul.missouri.edu:2084/universe/document?_m=1cc02b5e99edd99f6dc46faa242e0a5e&_docnum=1&wchp=dGLbVtz-zSkVA&_md5=1688effdf354a67cab79240517062dfb [accessed January 3, 2007].

[936] RSACi: the Recreational Software Advisory Council no longer exists. In 1999, it was "folded into" a new organization, the Internet Content Rating Association (ICRA). The original aims of RSACi was to protect children from potentially harmful content while preserving free speech on the Internet. For more on RSACi and ICRA, see http://www.rsac.org/ [accessed January 19, 2007].

[937] Frank Valverde, "The International Internet Rating System: Global Protection for Children, Business, and Industry," 20 N.Y.L. Sch. J. Int'l & Comp. L. 559 (2000).

[938] Valverde, 560.

[939] Valverde, 571.

[940] The Internet Content Rating Association (ICRA), http://www.icra.org/icraplus/howitworks/ [January 19, 2007].

people within a given nation may still have diverse interests and opinions that cannot be contained by the rating system imposed by the country. Also, ratings actually do not block anything without filtering software.

Kevin Saunders proposed a legal mandate that all Internet communications, such as emails, bulletin board messages, chat messages, Webpages, or any content for that matter,[941] must be tagged with the Platform for Internet Content Selection.[942] Specifically, the default setting on all Web messages would be set at the most conservative rating, that is, materials unfit for minors, to avoid negligently sending adult materials. Internet publishers would then have to specifically change the default setting that would allow minors to view material.[943] Parents would have the choice whether to grant their children more freedom by setting ratings liberally, or whether to grant their children less freedom by setting ratings conservatively on their home computers.

Saunders' admitted that his proposed idea would place responsibility on Internet publishers to rate their material using the Platform for Internet Content Selection tags, and simultaneously place responsibility on parents to configure the software provided through their personal computers to block unwanted materials.[944] Further, but his proposal would burden all adults and children alike, even on daily business operations.

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[941] Kevin W. Saunders, *Saving Our Children from the First Amendment,* (New York: New York University Press, 2003).

[942] Platform for Internet Content Selection (PICS): "enables labels (metadata) to be associated with Internet content. It was originally designed to help parents and teachers control what children access on the Internet, but it also facilitates other uses for labels, including code signing and privacy. The PICS platform is one on which other rating services and filtering software have been built," http://www.w3.org/PICS/ [accessed February 17, 2007].

[943] Saunders, *Saving Our Children from the First Amendment*.

[944] Saunders, 174.

Moreover, the child is short-changed and cannot enjoy educational or philosophical discussions. Internet content would likely be conservative just to be on the safe side of the law.

Mandatory PICS tags implementation upon every single email message imposes on people's time and money. Each person could make many messages a day, and a city can produce thousands of messages within an hour, so there will be either a back-log or a bottle-neck at the rating company. When time is wasted, money is wasted. The economy will be affected if employees and employers have to spend time rating Internet communications. Moreover, nobody has the time to rate every Internet conversation. It is not realistic for people to spend time in the process of sending to and waiting to hear from the rating company to generate a label for every message. Voluntary tagging should not be a problem but mandatory tagging will be burdensome on everyone. Furthermore, a mandatory PICS tag implementation will impose upon the privacy rights of American citizens and will not be tolerated. No government should be able to control private communications and rate them according to obscene standards.

Balsley proposed a legal mandate known as the Adult Meta-Tag Act to tackle pornography on the World Wide Web.[945] The Act would require websites with any sexual content to label their meta-tags. A meta-tag is a description or documentation on the HTML source page that is not shown to the public.[946] Balsley argued that child

[945] Richard H. Balsley, "Tagging: A Proposed Framework For Constitutional Regulation Of Sexually Explicit Material Available Via The World Wide Web," 24 Temp. J. Sci. Tech. & Envtl. L. 93 (2005).

[946] "There are several kinds of meta tags, but the most important for search engine indexing are the *keywords* meta tag and the *description* meta tag. The keywords meta tag lists the words or phrases that best describe the contents of the page. The description meta tag includes a brief one- or two-sentence description of the page," last updated May 5 2001, from searchWebServices.com,

pornography is on one end of the illegal spectrum, foul language and violence fall outside of the compelling government interest and is on the other end of the legal spectrum. Sexually explicit content, being in-between the two ends of the spectrum, would balance the protection of children and the protection of First Amendment rights of adults.[947] According to Balsley's line of thought, the Act would only require a single category of speech: sexually explicit content.[948] He defined sexually explicit content as,

> A) any image or visual representation of unclothed human genitalia or unclothed female nipples that when viewed in context with the other representations available on that Web page lacks serious literary, artistic, political, or scientific value; or (B) a description or representation of any kind that depicts, describes, or represents, an actual or simulated act of masturbation, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or breasts, that when viewed in context with the other representations available on that Web page lacks serious literary, artistic, political, or scientific value.[949]

Balsley defined a minor as below 17 years old.[950]

The Adult Meta-Tag Act, besides a few technical differences, is similar to Valverde's international rating system with the difference that Balsley's proposal has the government enforcement of the meta-tagging system. The legal mandate would burden all compliant Web site operators, Website hosting services, and anyone who creates Internet content.[951] The online pornography industry recruit some of their customers

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http://searchwebservices.techtarget.com/sDefinition/0,,sid26_gci542231,00.html [accessed January 20, 2007].

[947] Balsley, 112.

[948] Balsley, 112.

[949] Balsley, 114, 115.

[950] *Id.* at 115.

[951] *Id.* at 110.

through accidental searches, but labeling sites with metatags as containing sexually explicit content is going to make such websites obvious. Secondly, Balsley did not state who would do the tedious and discrete work of analyzing and labeling meta-tags. There are billions of Web pages on the Internet, so it is unrealistic for the Adult Meta-Tag Act to come to fruition. The weakness of this proposal is that children with few computer skills can easily enable or disable meta-tags. It takes a self-controlled person not to disable a tag when he or she has the skill to do so. Lastly, the sexually explicit definition covers a wide range of content that might chill speech.

According to Lawrence Lessig, cyberspace zoning can be implemented through age-verification methods, digital certificate systems, and identity applications.[952] Age verification includes credit card verification, password, email verification, and idenitification verification (by fax or by phone).[953] The digital certificate method is where individuals get a digital ID instead of their true identity.[954] An identity application is the logging of a user ID and a password.[955] With the age-verification technique, Lessig argued, individuals give their identity away to get constitutional protected speech, yet organizations are tempted to sell consumer profiles for unsolicited emails.[956] Thus, there

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[952] Lawrence Lessig, Jack N. and Lillian R. Berkman, Congressional Testimony before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives, September 11,1998. Lexis, Federal Document Clearing House.

[953] *Id.*

[954] *Id.*

[955] *Id.*

[956] Lawrence Lessig, Harvard Law School Professor. Congressional Testimony September 11, 1998, House Commerce Telecommunications, Trade and Consumer Protection Inappropriate Materials on the Internet, http://www.lessig.org/content/articles/works/CDA2QD1.PDF [accessed February 17, 2007].

are advantages and disadvantages to an age-verification method to reducing children's encounters with online obscenity.

Lessig has made a good point that the age verification technology is not safe because adults and children are submitting personal profiles to private companies and the information becomes theirs. Considering that private companies may sell the personal information they collected makes the age verification method an imperfect but reasonable solution. Additionally, the District Court for the Eastern District of Pennsylvania in *ACLU v. Reno* has found that commercial pornographic sites that charge their users have actually assigned passwords as a method of age verification.[957] It is possible for pornographic sites to sell the personal information.

Next, Congress has enacted a law known as the DotKids Implementation Act of 2002 that created a second-level domain, kids.us, for children to safely surf the Internet. Maureen Browne said the dotkids domain law,[958] does not legally meet the goal of protecting minors from harmful materials online because it is a content-based restriction, it is not narrowly tailored, it is not the least restrictive means, it cannot be justified as a medium-based regulation, and it is thus unconstitutional.[959] Browne argued that another attempt at an anti-obscenity statute will not succeed. Instead, Browne proposed that efforts not relating to legal mandates would be more effective in solving the issue of protecting children from online obscenity. Specifically, she advocates:

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[957] *Reno v. ACLU,* 521 U.S. 844 at 855, 856; *ACLU v. Reno,* 929 F. Supp. 824 at 845 (findings 90 and 93).

[958] DotKids Implementation Act of 2002, H.R. 3833, effective December 4, 2002.

[959] Maureen E. Browne, "Play It Again Uncle Sam: Another Attempt By Congress To Regulate Internet Content. How Will They Fare This Time?" 12 Commlaw Conspectus 79 (2004).

> funding educational and social initiatives that teach children and parents about the inherent dangers of the Internet, [having] advertising campaigns to promote public awareness of new technologies available to protect children on the Internet … encouraging private sector initiatives that block or filter harmful material … increase funding for law enforcement efforts to aggressively enforce anti-obscenity laws.[960]

Despite Browne's criticism that the dotkids law is unconstitutional, the law had not been challenged as of December 2006. The domain has provided a safe haven for minors. Browne's proposed solution has societal value because she emphasized direct educational and social initiatives to the parents and children. However, raising funding for social programs could be a problem.

According to Donald Eastlake, a co-writer about the problems of mandatory labeling when he worked in the Internet Engineering Task Force, there are several issues involving with the dotkids Internet domain.[961] First, philosophically, each country has different laws about nudity.[962] Second, culturally, there are more cultures than countries and communities within that culture, and each culture has its own ideas about what age children become adults.[963] Third, Eastlake said that a domain such as .xxx is coercion of speech, thus limiting free speech.[964] Pornography website operators should not be forced to enter their website into a .xxx top level domain. The same idea applies to a .kids domain. Fourth, technically, the technique of having a dot .xxx or a .kids domain is not

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[960] *Id*. at 99.

[961] Problems with Dot Kids Domain [Donald Eastlake, "Problems with Dot .xxx Domain," Chapter 13, *Technical, Business, and Legal Dimensions of Protecting Children From Pornography,* http://books.nap.edu/html/protecting_children/ch13.html (accessed April 20, 2005).

[962] *Id.*

[963] *Id.*

[964] *Id*.

difficult. The problem is with labeling the content of speech of each websites. The Internet is not technically structured to determine the value of each websites.[965] Fifth, architecturally, the Internet is hierarchical with top-level domains and sub-zone levels serving different functions.[966] Even if the domain level is adjusted for content, the user can still go to the inappropriate content using alternative computer network routes.[967] According to Eastlake, the malleable nature of the Internet is like one who strolls through the park, an activity that is noncommercial, spontaneous, and unorganized. Compelling people to label content that one finds objectionable is like asking people to wear a bright yellow star.[968]

It is true that a pornographic (.xxx) domain would chill free speech and even harm children. As for a kids domain, children are already limited in free speech rights in terms of obscenity,[969] and a kids domain should not chill adults' speech.

Kate Reder proposed to reduce unintended exposure of harmful materials to children, such as pop-up advertisements and acquisition of pornography though misspelling domain names. Reder proposes voluntary self-regulation of the online

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[965] *Id.*

[966] Sub-zone level: "A partition of a domain that was delegated. It is represented as a child of the parent node. It always ends with the name of its parent, for example, engineering.cisco.com. is a subzone of cisco.com," Cisco Glossary, http://www.cisco.com/en/US/products/sw/netmgtsw/ps1982/products_user_guide_chapter09186a00800ade6c.html [accessed March 2, 2007].

[967] Eastlake.

[968] *Id.*

[969] Supra Notes 326-330, Chapter 2, Variable Obscenity, Page 81-82.

pornography industry using the .xxx suffix.[970] Reder argued that other online industries successfully operate under "best practice guidelines," which are none other than industry policies, and that the online pornography industry could imitate industry policies. Reder said the online pornography industry has avoided adopting industry policies, thus making itself full of fraud and e-commerce abuses. It has a "high risk" label because of credit-card chargebacks, penalties, and high fees.[971] Reder proposed that the online pornography industry should adopt a "best practice guideline," and each website should receive a top level domain .xxx suffix as a reward of a sign of good quality business that does not steal credit cards numbers or do spam.[972]

Reder said the implementation of the .xxx suffix will serve as a reward to pornography web operators for their adoption of a "best practice guideline." Reder also said that the "best practice guideline" would have the effect of increasing consumer trust of online pornographic websites. However, the association of a .xxx with a quality pornographic website may not be what the pornography industry wants. Reder admitted that her proposal does not account for the bad pornography operators that do not comply to "best practice guidelines." But Reder contends her proposal can be balanced by good, abiding pornography websites.[973] The weak point of her proposal is that she does not address non .xxx pornographic websites. Children should be shielded from non .xxx websites as well as the .xxx websites.

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[970] Kate Reder, "Should Congress Try, Try, and Try Again, or Does the International Problem of Regulating Internet Pornography Require An International Solution?" 6 N.C. J.L. & Tech. 139 (2004).

[971] *Id.* at 149.

[972] *Id.* at 150.

[973] Reder, 151.

Indeed, Jennifer Phillips said that a .xxx TLD will not work to benefit children, adults, nor the porn industry because the adult entertainment industry needs protection from cyberpiracy and domain name disputes.[974] In 2000, ICM Registry (ICM), a private company, proposed to buy a .xxx top level domain. ICM's business proposal included an elevated registration fee to prevent cybersquatters and typosquatters from amassing many names.[975] Phillips argued that ICM's high registration fee prevents legitimate domain name holders from registering variations of their names for self-protection.[976] Additionally, Phillips said that cyberpirates of pornography domain names "don't hijack domain names to flood the Internet with porn, they do it to extort money."[977]

The three problems that would come out of the .xxx TLD are: cybersquatting, where someone registers a domain name ahead of time in hopes of exhorting money from another site; typosquatting, where instead of collegegirl.xxx, typosquatters would buy misspelled domain names in hopes of exhorting money from another site, *e.g.* collgegirl.xxx; and generic domain name disputes, such as bunnies.xxx because "no one holds the rights to the name" as "federal law does not allow generic terms to be trademarked."[978] Of relevance to this study, Phillips commented that the .xxx domain would do little to protect children from exposure to pornography because migration to the

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[974] Jennifer D. Phillips, "The Seamy Side of the Seamy Side: Potential Danger of Cyberpiracy in the Proposed ".XXX" Top Level Domain," 7 N.C. J.L. & Tech. 233 (2005).

[975] *Id.* at 255.

[976] Phillips, 256.

[977] *Id.* at 253.

[978] *Id.* at 256.

domain would be totally voluntary.[979] Second, if a company decides to register with a .xxx, there is no mechanism to prevent it from keeping its .com domain name.[980] In other words, a company may have a .xxx and a .com, thus increasing the number of pornographic websites. From this perspective, the .xxx domain will do very little to limit pornography on the rest of the Internet.[981]

The company that would own the .xxx domain would benefit financially, while children and unwilling adults would be unprotected and the porn industry would suffer financially. Children who intentionally access the adult domain may type misspelled domain names in the search and easily access websites with derivatives of the misspelled domain names.

Similarly, Steven E. Merlis said that the top-level domain (TLD) system would not work because there are too many websites on the Internet.[982] Websites change content from time to time. A TLD would chill website owners' constitutional rights, especially rights of those who place borderline indecent materials, such as naked paintings on the Web or who might not want to include their websites in a domain containing hard-core pornography and therefore "be restrained in how they use their websites to express themselves."[983] Also, limited government intervention would mean limited prosecuting power against people who post inappropriate materials in a

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[979] *Id.* at 259.

[980] *Id.* at 260.

[981] *Id.*

[982] Steven E. Merlis, "Preserving Internet Expression While Protecting Our Children: Solutions Following Ashcroft v. ACLU," 4 Nw. J. Tech. & Intell. Prop. 117, 130 (2005).

[983] Merlis, 131.

domain.[984] Other levels of environment must join to achieve the goal of protecting children. As Merlis said, "it appears that actors outside of Congress will need to pursue the goal of protecting children from indecent content on the Internet."[985] Merlis said that "filtering technology should be the major method for protecting children from indecent material, while a number of other methods should serve as complements,"[986] such as a mixture of filtering and cyberzoning[987] when cyberzoning is coupled with an adjudicatory body that acts as an enforcement mechanism.[988]

In summary, this section has examined different suggestions of what may work and what may not work as technical and legal solutions for the issue of protecting children from online pornography. Each recommendation has its advantages and disadvantages. Some of the legal recommendations focused on correcting the court's analyses and some proposed new statutes, while the technical recommendations range from top-level domains, ratings, and zoning to filtering. In this section, most recommendations suggested placing the responsibility of protecting children from online obscenity on the business industry, but the extent to which the industry would help reduce children's encounters with online pornography is unknown. Proposing solutions to the problem of reducing children's encounters with online obscenity is a difficult task. In

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[984] *Id.* at 130.

[985] Merlis, 125.

[986] Merlis, 129.

[987] *Id.* at 125, 126.

[988] *Id.* at 130.

the next section, the author will propose her recommendation for the possibility of reducing children's encounters with online pornography.

Ecological Systems Perspective

From the previous section, the critique of recommendations has shown that scholars have not provided a framework for solving the problem of protection of children from online pornography. Rather, they have provided solutions to directly tackle the problem. In this section, the author will provide a framework known as the ecological systems perspective to approach the issue. The framework will set the stage for proposing various solutions.

It is the thesis of this study to propose the ecological system perspective as a model from which solutions from layers of environmental systems can be suggested for the possibility of reducing children's encounters with online pornography. This study uses a child-development approach to the issue of possibly reducing children's exposure to pornography on the Internet because, first, the ecological systems perspective takes account of the child and therefore Congress is compelled to consider child development when making legislation. Second, other social science theories do not take account of the legal, technological, societal, community and individual factors. This study explores these factors in a way that makes sense of the processes that affect the child. Third, in this study, the ecological system model is modified to apply to the Internet. Fourth, the ecological systems theory shows how the introduction of a new technology affects the U.S. legal system, the society, the school, the community, the family and the child.

The ecological systems approach is embedded in the developmental science

paradigm[989] in the behavioral sciences. The ecological systems perspective evolved from a dissatisfaction in the earlier environmentalist approaches about child and adolescent development with the definition of "*environment* as any and all external focuses that shape the individual's development," as defined by behaviorists John Watson and B.F. Skinner.[990] The ecological systems theory, also an environmentalist approach, provides a detailed analysis of environmental contexts in which child development takes place.[991] The difference between earlier environmentalist approaches and Urie Bronfenbrenner's ecological systems approach is that previous approaches are mechanistic, looking at the environments as affecting development, while Bronfenbrenner's approach realizes that "a person's biologically influenced characteristics interact with environmental forces to shape development."[992]

Bronfenbrenner, the father of the ecological systems theory, coined the structure of the external systems that affect the family and the degree of explicitness in which the external environment exert their influence.[993] The stronger the interconnectedness between one environmental influence to the next environmental influence, the more influence it would exert on the child. Bronfenbrenner also showed that the individual interacts with the environment, and the environment interacts with the individual, and the

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[989] Urie Bronfenbrenner, "Ecology of the Family as a Context for Human Development: Research Perspectives," *Developmental Psychology* 22, no. 6 (1986): 723.

[990] David R. Shaffer, *Developmental Psychology: Childhood and Adolescence, 5th ed.,* (Pacific Grove: Brooks/Cole Publishing Company, 1999), 63.

[991] *Id.*

[992] Urie Bronfenbrenner, "The Bioecological Model From A Life Course Perspective: Reflections of A Participant Observer," in *Examining Lives in Context,* P. Moen, G. H. Elder, Jr. and K. Luscher, eds., (Washington, D.C.: American Psychological Association, 1995), 599-618.

[993] Bronfenbrenner, "Ecology of the Family as a Context for Human Development," 1986, 723.

different layers of environmental systems fluidly influence each other. What makes Bronfenbrenner's ecological systems perspective unique is that there is interaction between the environment and the individual, and that each layer of the environmental system is a contributing factor in the development of the individual child.

Bronfenbrenner did not ignore the biological aspect of the child in his Ecological Systems Model. Bronfenbrenner said that "it is probably more accurate to describe this perspective as a bio-ecological theory."[994] Biological affects can range from physical disabilities to IQ levels. The main point is that the heredity factor influenced the biological aspect of the individual, causing individual difference. Besides the known fact that the layers of environment affect the child, the child's mental and physical being also affects whatever he/she is doing, in terms of examination scores, likelihood of doing crime, ability to adapt to host families, and so forth. For example, a child with criminal parents may likely commit juvenile crime no matter how good their adopted parents were or how long they have been adopted.[995] Another article by Bronfenbrenner and Ceci gave hope to the situation, saying, "by enhancing proximal processes and environments, it is possible to increase the extent of actualized genetic potentials for developmental competence."[996] In other words, manipulation of the environment for good influence can positively affect the child.

Despite the emphasis on the biological aspect of Bronfenbrenner's ecological system, this dissertation would benefit mostly from the ecology of the environmental

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[994] Bronfenbrenner, "The Bioecological Model From A Life Course Perspective," (1995): 599-618.

[995] Bronfenbrenner, "Ecology of the Family as a Context for Human Development," (1986): 726.

[996] Urie Bronfenbrenner and Stephen J. Ceci, "Nature-Nuture Reconceptualized in Developmental Perspective: A Bioecological Model," *Psychological Review* 101, no. 4, (1994), 568, abstract.

context and its importance in shedding light on the ecology of protecting children from online pornography, with the child being the central focus. According to Bronfenbrenner,

> We know much more about children than about the environments in which they live or the processes through which these environments affect the course of development, as a result, our ability to address public policy concerns … is … limited."[997]

Because the ecological system is dynamic, it "enables understanding of the relationship and interrelatedness of such abstract concepts as culture and ideology to the practical realities of caring for very young children."[998]

Bronfenbrenner acknowledged that the Internet is one of the media channels children and youth go to watch teenage and adult models that,

> continue to emphasize commercialism, sexuality, substance abuse, and violence. The end result is a lack of positive adult models for internalizing standards of behavior and longer-term goals of achievement, and thereby an increasing number of autonomous peer groups bereft of adult guidance.[999]

In the words of Bronfenbrenner, "Most families are doing the best they can under difficult circumstances; what we should try to do is to change the circumstances, not the families."[1000] The circumstances are the environmental contexts in which people live and Bronfenbrenner suggested to make a change in each layer of the ecological system.

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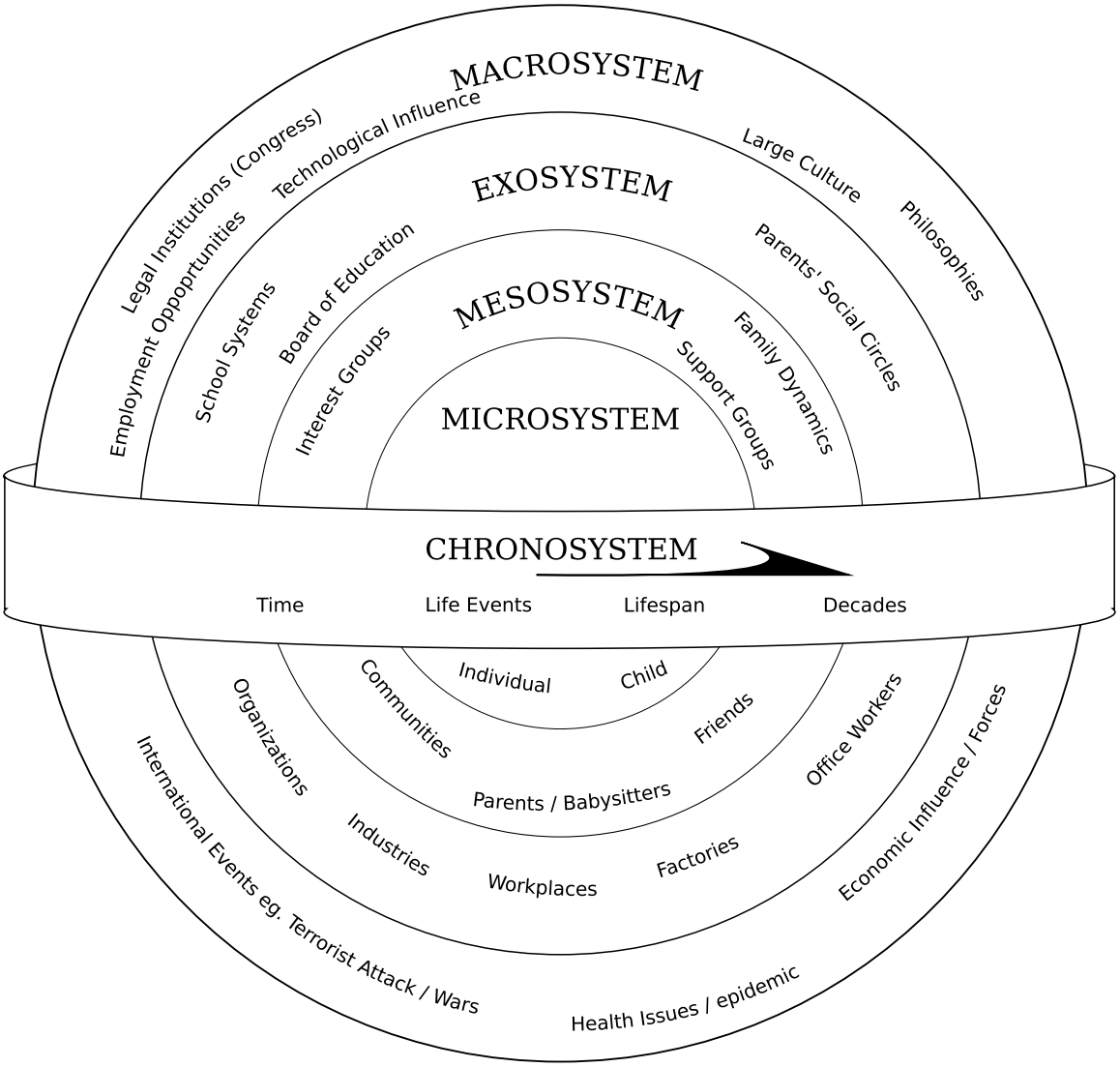
[997] Urie Bronfenbrenner, "Contexts of Child Rearing: Problems and Prospects," *American Psychologist* 34, no. 10, (October 1979): 844.

[998] Program Planning for Infants and Toddlers, pp. 4, http://www.surestart.gov.uk/_doc/P0000286.rtf [accessed September 11, 2006].

[999] Urie Bronfenbrenner, "Growing Chaos in the Lives of Children Youth and Families: How Can We Turn It Around?" 1999, http://parenthood.library.wisc.edu/Bronfenbrenner/Bronfenbrenner.html [accessed May 5, 2005].

[1000] Bronfenbrenner, "Contexts of Child Rearing," (1979): 849.

The Bioecological Systems Model shows four concentric circles, the macrosystem, the exosystem, the mesosystem, and the microsystem. The chronosystem is part of the Bioecological Systems Model but some versions of the Bioecological Systems Model do not feature the chronosystem in the diagram. To be comprehensive, the author has included the chronosystem in the diagram.



Bioecological Systems Model

Based on Urie Bronfenbrenner, 1979

Chronosystem

Traditionally in developmental science, the passage of time has been treated as synonymous with chronological age; however, in the mid 1970s, developmental science research began to take into account changes over time not only within the person but also in the environment, and it has analyzed the dynamics between these two processes.[1001] The term "chronosystem" is an overview of "the influence[s] on the person's developmental changes (and continuities) over time in the environments in which the person is living."[1002]

The influences over time in the chronosystem can be considered normative or non-normative. Normative influences are typical influences on human development that would affect large groups of people.[1003] Normative age-graded influences "are biological & environmental influences that affect most people at the same age," such as school entry, puberty and retirement.[1004] Normative historical-graded influences are "historical events that affect people of a cohort such as the Great Depression and the Vietnam

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[1001] Bronfenbrenner, "Ecology of the Family as a Context for Human Development," 724.

[1002] *Id*., taken from Urie Bronfenbrenner, "Recent Advances in Research on the Ecology of Human Development," in *Development as Action in Context: Problem Behavior and Normal Youth Development,* R. K. Silbereisen, K. Eyferth, and G. Rudinger, eds., (Heidelberg and New York: Springer-Verlag, 1986a) 287-309.

[1003] Kahaema Byer and Yan Tong, HDFS 363, "Adolescence through Old Age," Exam 1 Review Session, February 20, 2005. http://distance.education.wisc.edu/hdfs363/powerpoint/review01.ppt [accessed February 1, 2007].

[1004] Ethel Cantu, "Introduction to Lifespan Developmental Psychology," based on *Development Across the Life Span*, by Robert Feldman (Prentice-Hall), http://blue.utb.edu/ecantu/Psyc%202314/Notes/feldman1.htm [accessed February 1, 2007].

War."[1005] Normative, sociocultural-graded influences affect most people of a culture or social class, such as socio-economic status and religious rites of passage, *e.g.*, the Jewish Bar Mitzvah.[1006] On the other hand, a non-normative influence could be a typical event that occurs at an unusual time in a person's life, such as death at a young age.[1007] Alternatively, a non-normative influence can be an unpredictable or atypical event that occurs in an individual, such as a severe illness, winning a lottery, a divorce or an accident.[1008]

Both normative and non-normative influences occur over a life span and can influence development indirectly by affecting family processes, or can influence development directly. A chronosystem study is the examination of "cumulative effects of an entire sequence of developmental transitions over an extended period of the person's life … [This might include] the impact of personal and historical life events on family processes and on their developmental outcomes."[1009] Bronfenbrenner's explanation of unpredictable non-normative influences is simplistic, and one can argue that the non-normative examples provided can come under normative influences as well.

Macrosystem

Macrosystem is the outer-most layer of Bronfenbrenner's model. It consists of

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[1005] *Id.*

[1006] *Id*.

[1007] *Id*.

[1008] *Id.*; Bronfenbrenner, "Ecology of the Family," 724.

[1009] *Id*.

cultural values, laws, customs, and resources.[1010] The macrosystem is a broad, overarching ideology that consists of cultures, subcultures and social classes.[1011] These ideologies dictate how children should be treated, taught, and live. These values can differ across social classes, across subcultures and even cultures,[1012] and can they influence the experiences children have in their other environmental layers such as the exosystem (school boards) and the mesosystem (schools, neighbors, and the local dental office). According to Laura Berk, this "broad social climate of society – its values and programs that support and protect children's development," has a pervasive impact on daily lives.[1013]

There are some subcultures in America with beliefs and customs that differ from those of the larger culture.[1014] Some Americans value independence and privacy, while some value the autonomous family, while some value the tradition of extended-family households. The values and practices of different groups either help protect their members from further poverty or worsen their standard of living.

Attempts to help children and youths have been difficult to realize because help involves a complex set of political and economic forces.[1015] According to Laura E. Berk,

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[1010] Laura E. Berk, *Infants and Children: Prenatal through Middle Childhood,* (Boston: Allyn and Bacon, 2002), 29.

[1011] Shaffer, 65.

[1012] *Id.*

[1013] Berk, 74.

[1014] *Id*., 81.

[1015] Berk, 82.

> the priority that the macrosystem gives to children's needs affects the support they receive at inner levels of the environment. For example, in countries that require high-quality standards for child care and workplace benefits for employed parents, children are more likely to have favorable experiences in their immediate settings.[1016]

This means that the legal system, our American cultural values, and our priorities as a nation affect other environmental factors that affect the individual child, such as the way a community functions and the way Web companies function.

Exosystem

The exosystem is the next environmental system within the Bioecological Systems Model. The mass media, the parents' work and social circles, the business industry, the factories, the organizations, and the school boards are a few examples of the environments existing in the exosystem layer.[1017]The business industry of concern in this study are the computer, electronics, software, technological manufacturers, the Internet Service providers such as the telephone and cable companies, the Web companies that exist purely on the Internet such as Web search engines and Web retailers, and any other organizations or businesses that would be related to protection of children from online obscenity.

The exosystem includes parent's world of work, play, and friendship. The way parents live their lives is a setting that children seldom enter into or have limited access to but is another important aspect for the psychological development of children.[1018] Exosystem support may be informal, but research has shown that the breakdown in

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[1016] *Id*, 29.

[1017] Shaffer, 64, see chart.

[1018] Bronfenbrenner, "Ecology of the Family," 723.

exosystem activities produces a negative impact.[1019] Families who are socially isolated or who are affected by unemployment showed increased rates of conflict and child abuse.[1020]

Socio-economic status is a major source of variation in parenting style in the United States and other Western nations.[1021] Children of higher socio-economic status parents do better in school and attain higher levels of education.[1022] Also, because of economic changes over the past thirty years in the United States, the poverty rate has increased.[1023] The constant stresses that accompany poverty weaken the family system.[1024] Examples are joblessness, divorce, and adolescent parenthood.

Breakdown in the exosystem through lack of support groups for the families, such as few community-based ties, lack of neighborhood support, or a factory closing in the community that results in a decline in the school's revenue,[1025] can all affect the psychology of the child.

Mesosystem

The family is the principal context in which the child develops, but it is one of several contexts in which human development takes place. Also, events at home can influence a child's progress, and vice versa. In other words, Bronfenbrenner said, "the

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[1019] Berk, 29.

[1020] *Id.*

[1021] Berk, 76.

[1022] *Id.*, 77.

[1023] *Id*.

[1024] *Id*.

[1025] Shaffer, 65.

processes operating in different settings are not independent of each other."[1026] According to Berk, research indicates that

> child abuse and neglect are greatest where residents are dissatisfied with their community, describing it as a socially isolated place to live. In contrast, when family ties to the community are strong—as indicated by regular church attendance and frequent contact with friends and relatives—family stress and child adjustment problems are reduced.[1027]

Informal social controls, such as adults keeping an eye on children's play and intervening in antisocial behavior, prevent children from becoming involved in antisocial activities. Lack of neighborhood organization combined with little parental involvement encourages high antisocial activities.[1028]

Schools are complex social systems that affect many aspects of development. Regular contact between families and teachers supports development at all ages.[1029] Parental involvement in schools is common among higher socio-economic status parents whose backgrounds and values are similar to the teachers'.[1030] In contrast, low socio-economic status parents and ethnic parents are less likely to feel comfortable about being involved in schools.

The mesosystem includes but is not limited to schools, families, religious organizations, dental or doctor's offices, peers, day care centers and neighborhood play

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[1026] Bronfenbrenner, "Ecology of the Family," 723.

[1027] Berk, 78.

[1028] *Id.*, 79.

[1029] *Id.*

[1030] *Id.*

areas.[1031]

Microsystem

The microsystem is the innermost level of the environment[1032] and "refers to the activities and interactions that occur in the person's immediate surroundings."[1033] Individuals are influenced by the people surrounding them. For infants, their microsystem is limited to their care-takers. For children, their microsystem may be the day care, preschool classes, youth groups, and neighborhood playmates.[1034] The activities in the microsystem may center around the toys the individual child plays with.

The biological part of the individual also determines the extent of environmental influence. According to David Shaffer, children's "own biologically and socially influenced characteristics—their habits, temperaments, physical characteristics, and capabilities—influence the behavior of companions as well."[1035] For example, a difficult child may alienate his or her parents or create friction in his or her parents' relationship.[1036] As example, a difficult child who struggles against his or her parents will wear the parents out.[1037]

[1031] Shaffer, 64, see chart.

[1032] Berk, 28.

[1033] Shaffer, 63.

[1034] *Id*.

[1035] *Id*.

[1036] Shaffer, 63 from J. Belsky, K. Rosenberger and K. Crnic, "Material personality, marital quality, social support, and infant temperament: Their Significance for Mother-Infant Attachment in Human Families," in *Motherhood in Human and Nonhuman Primates,* C. Pryce, R. Martin and D. Skuse, eds., (Basel, Switzerland: Kruger, 1995), 115-124.

[1037] *Id.*

Third parties may also affect interactions between two individuals in a microsystem.[1038] For example, happily married mothers who have close relationship with their husbands tend to interact more patiently and sensitively to their infants than do mothers who experience marital tension and who feel they are raising children on their own.[1039] According to Hetherington and Clingempeel, an environmental event may have different impacts depending on age.[1040] For example, a younger child may have guilty feelings of contributing to parents' divorce, versus a teenager who may not blame her/himself for the divorce.[1041] Thus, depending on the external environmental factor on the chronological age of the child, the impact would vary in intensity. For example, a very young child viewing online pornography may be made developmentally dysfunctioned by the impact of the pornographic images versus an older teenager who may be less developmentally affected by the same images.

On another note, the ecological system takes into account individual differences through hereditary or biological aspects of the child that affect responses to certain stimuli. For example, crimimality is a hereditary trait just as high IQ is a genetic trait.[1042] Parents that have shown to have high intellectual levels have children that tend to have

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[1038] Shaffer, 63; Berk, 28.

[1039] Shaffer, 63.

[1040] E. Mavis Hetherington, **"**Coping with marital transitions: a family systems perspective," and "Summary and Discussion," In E. Mavis Hetherington, W. Glenn Clingempeel; in collaboration with Edward R. Anderson, James E. Deal, Margaret Stanley Hagan, E. Ann Hollier, and Marjorie S. Linder; with commentary by Eleanor E. Maccoby, Serial no. 227, *Monographs of the Society For Research in Child Development* 57, no. 2-3, (1992): 1-14, 200-206.

[1041] *Id.*

[1042] Bronfenbrenner, "Ecology of the Family as a Context for Human Development," (1986): 726.

high intellectual levels as well.[1043] The Internet is yet another venue where individual differences are expressed.

Discussion

For communities in undeveloped societies, the bioecological system may have a slight degree of difference. As an example, their legal systems (macrosystem) may consist of a village head who decides everything. Their workforce (exosystem) may be a group of women who are hunters instead of an industrious workplace like those in established nations, and their immediate family (mesosystem) may consist of many extended families as opposed to the nuclear family.

Nevertheless, somewhere in the chronology of time and space for some societies, the Internet happened as a non-normative event affecting all environments. However, the Internet has not become a reality for some communities in undeveloped societies. The Internet is a phenomenon that has not affected change in their environment. The fact remains that the Internet happened somewhere in time, and few communities are untouched. The solutions from the modified Bioecological Systems Model, however, may not apply to communities that do not have yet Internet access.

The Internet has made unparalleled changes in the lives of not just Americans where the Internet originated, but, also everyone else all over the world. People in the workplace, in most towns, and in most homes use the Internet. Society has to adapt to new technology. The Internet is bigger than children's real-world daily experiences because the Internet is global and has real-world consequences. On the other hand, the

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[1043] *Id.*

Internet can serve as a toy for baby-sitting purposes. The Internet can function as a whole world of environments for the child, providing support groups, friendship, values from the Internet culture, or education. The individual child uses the Internet, interacts with it, and exposes himself/herself to audio, text and images on the Internet.

Using Bronfenbrenner's ecological systems approach as the way to solve the issue of reducing children's encounters with obscenity on the Internet has its limitations. First, there is no way to know to what extent the Internet may influence each environmental system. Second, Bronfenbrenner's theory has no predictive power that can be tested in order to get a concrete result. Nevertheless, the theory makes individuals pay attention to how each environmental factor may interact with influence the other.

No one else, so far as the author can determine, has yet applied the ecological systems perspective in respect to the Internet phenomenon, and no one else has considered the Internet's influence through an ecological systems approach. In the context of a combined-effort solution to the problem, all sectors need to work together to create a better ecological structure. For example, when the (macrosystem) legal system is effective and passes improved laws that actually help society, then this better legal system would positively affect the inner-layer of the ecological systems. For example, the online companies and other organizations which reside in the exosystem could operate more effectively and positively, and that would then affect communities, support groups, families and schools which reside in the mesosystem positively, and it could directly affect the child as well. The mesosystem would, in turn, positively affect the child and his/her Internet experience (microsystem).

People from other disciplines who study one of the external factors and the child

are able to adapt Bronfenbrenner's model for their own research. Some examples of adaptions of Bronfenbrenner's Bioecological Systems Model are: The Classroom System-Child as Target;[1044] Systems Model of Human Behavior;[1045] and the College of Education Model from the University of Memphis.[1046] This dissertation adapts Bronfenbrenner's Bioecological Systems Model to the problem of protecting children from online pornography.

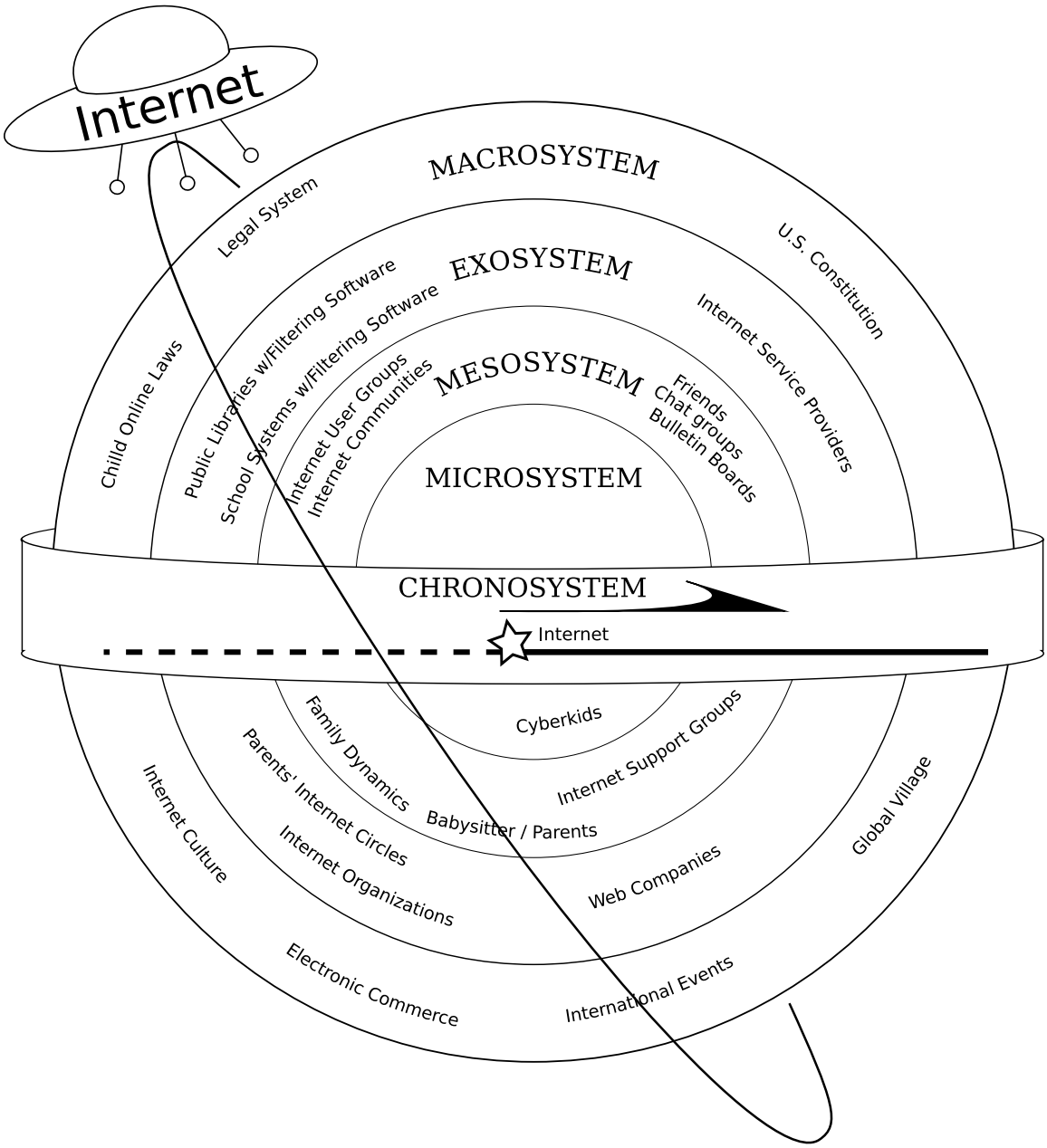
Internet Ecological Systems Perspective

The adapted model in this study will be called as the Internet Ecological Systems Model. The Internet Ecological Systems Model can help one visualize the Internet's standing in our human ecological system. Instead of looking strictly from one perspective, such as the economic perspective, the Internet Ecological Systems Model helps to keep all efforts to solve Internet issues in a holistic perspective. Lastly, the Internet Ecological Systems Model paves a way for researchers to find specific solutions. The Internet Ecological Systems Model is by no means a methodology; rather, it is a process of solving the ecological issue of reducing children's encounters with obscenity on the Internet. The Internet Ecological Systems Model is not the solution but a conceptual framework from which solutions can be made.

[1044] Nicole A. Sage, "Urie Bronfenbrenner 1917-current," The Psi Café-the Psychology Resource Site, http://www.psy.pdx.edu/PsiCafe/KeyTheorists/Bronfenbrenner.htm, and http://www.psy.pdx.edu/PsiCafe/Overheads/ClassSys-ChildTarget.htm, posted April 10, 2005 [accessed December 28, 2006].

[1045] W. Huitt, "Urie Bronfenbrenner 1917-current," The Psi Café-the Psychology Resource Site, http://www.psy.pdx.edu/PsiCafe/Overheads/SysModBeh.htm last updated April 10, 2005, [accessed December 28, 2006].

[1046] "College of Education: Model," the University of Memphis, http://coe.memphis.edu/model/model_default.asp [accessed May 5, 2005].



Internet Ecological Systems Model

Adapted from Urie Bronfenbrenner, 1979

The chronosystem consists of environmental transitions that happen in an individual's life that are either expected (normative) or unexpected (non-normative). The Internet, being a non-normative event, occurred within the chronosystem across humanity for those who happened to live to experience the Internet during the last three decades of the twentieth Century and for future generations who will experience it.

According to Bronfenbrenner's Bioecological Systems Model, the macrosystem consists of cultures, technological influences, economic influences, and legal institutions. The Internet is a technological influence that has influenced the whole world and thus could be categorized within the macrosystem as well as in the chronosystem.

Indeed, the Internet is a worldwide technological influence that was created by businesses, engineers and computer experts. Within the exosystem, companies, school systems, organizations and parents' social circles are using the Internet as part of their normal functioning. Thus the Internet is made manifest in the exosystem.

In the mesosystem such as in communities, in homes, and in various interest groups, the Internet is becoming a common tool that people use for communication. Many Americans have Internet access from their homes. Some people belong to specific Internet interest groups. Thus the Internet is evident in the mesosystem level.

The Internet is not only a phenomenon that started in 1969. It also changes the individual because individuals at the microsystem level interact with the Internet. For that reason, the Internet cannot be categorized within an environmental layer within the Internet Ecological Systems Model because the Internet is infused into all the levels of the environment. Rather, the Internet is in every layer of the ecological systems. The

model depicts the Internet as orbiting around the chronosystem, the macrosystem, the exosystem, the mesosystem, and the microsystem.

In this section, a walk through of the Internet Ecological System Model at each layer of ecological system will be presented to suggest recommendations for reducing children's encounter with pornography on the Internet. There are two ways to use the Internet Ecological Systems Model, namely, first, to give one recommendation and show how it affects all the layers of environment; and second, to give one solution for each layer of environment and see how each would affect the microsystem directly without considering how it would affect the other layers will be considered.

The Chronosystem of the Internet Ecological Systems Model

Changes in technology over the past three decades have greatly influenced American society. Society has to live with the new technology and accommodate the necessary changes that come along with it. President Clinton's agenda was to use the Internet as the information superhighway for economic growth and to influence commercial practices, norms and laws, the culture and subcultures, and daily community functions caused social changes.[1047]

An example of the change in technology is the access issue where the rich have access to the Internet while the poor have none, where wealthy neighborhoods get cable to their houses while the poorer neighborhoods do not get cable to their houses. Most moderate-size cities in the U.S. have public libraries with computer terminals that provide Internet access. However a few people, the have-nots, may still find the Internet foreign. Other examples of causes from the changes in technology include the fact that new

[1047] Supra notes 86-99, pages 19 to 22 of this dissertation.

cultures are built on the Internet, *i.e.* Net culture, Net communities, Net groups, and the public schools incorporate the Internet as part of their curriculum. In such instances, online pornography should not be a problem to those who do not have Internet access or who live in communities that do not provide Internet access.

The Macrosystem of the Internet Ecological Systems Model

In the adapted model, the legal system, the bigger culture and electronic commerce would reside within the macrosystem. For the purpose of recommendations, the legal system is most important component out of the macrosystem. The legal system has an overarching power to control other spheres of society. For example, the federal government can provide grants, can command laws, and can create more governing bodies. First and foremost, the government needs to raise enough funds to be able to support all the different social and technological programs it intends to do. The question is how to raise funds. It would not be out of the question in this study to recommend for Congress to implement taxes on computers to raise government funds for executing projects to protect children from online pornography.

Furthermore, Congress can mandate free download of filtering software to all computers with Internet access. The government could subsidize the cost of filtering software. It is the contention of this study that every new computer should be equipped with filtering software. According to a *Journal of Pediatrics* study published in February 2007 by Wolak, Mitchell, and Finkelhor, filtering and blocking software reduced the odds of exposure to online pornography.[1048]

[1048] Janis Wolak, Kimberly Mitchell and David Finkelhor. "Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users," *Journal of Pediatrics* 119, (2007): 255. This information is current as of February 9, 2007. See Note 165-174, Chapter 1, Page 39, 40.

According to Hetherington, "the impacts of environmental changes also depend upon another chronological variable – the age of the child."[1049] The younger the child is, the stronger the impact. Also, the Supreme Court knows that the younger the minor depicted to engage in sexual activity, the more severe the obscenity is, as opposed to an older adolescent or young adult depicted as engaging in sexual activity:

> While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.[1050]

There is all the more reason to protect children from online pornography; an online sexual environment would not be a positive environmental context for children.

There is a set age-of-minor for several legislations such as child labor, military entrance, drinking, driving, voting, gun acquisition, bicycle safety, marriage and sexual activity. But for purposes of setting an age that would protect minors from encountering obscenity on the Internet, marriage and sexual-activity regulations seem most relevant. The lowest state law for marriage with parental consent is age 15 in Missouri. Other states have granted lower than 15 with no limits as long as the parents consented, such as California and Mississippi. Without parental consent, the marriage age is set at 18 in over 40 states. In terms of sexual activity, no adults may legally cross a state line to another state to have sexual relations with minors below age 16.[1051]

[1049] David Shaffer, *Developmental Psychology,* 63. From E. Mavis Hetherington, **"**Coping with marital transitions: a family systems perspective," and "Summary and Discussion," 1-14, 200-206.

[1050] *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 at 240.

[1051] 18 U.S.C. § 2251.

Most teenagers enter pubescence between ages 12 and 14. Universal changes such as physical and psychological changes, as well as transitional stages in the school system, occur in the child around the age of 4 or 5 and then around the age of 12 or 13. Entrance into kindergarten starts at about age 5, and entrance into junior school starts at about age 12. Below age 5, the child would be considered a toddler and then a preschooler. Above age 12 or 13, the child would be considered a teenager or an adolescent.

In the Child's Pornography Prevention Act of 1996 court ruling, the Supreme Court said that setting the age of a minor at below 18 is too high considering the fact that the legal age of consent to sexual relations tends to be 16 or younger, and the legal age of marriage in most states is 16.[1052] Justice Kennedy, delivering the Court's opinion, said:

> Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 U.S.C. § 2256(1). This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. See § 2243(a) (age of consent in the federal maritime and territorial jurisdiction is 16); U.S. National Survey of State Laws 384-388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, Sexuality, Gender, and the Law 1021-1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.[1053]

Encountering online obscenity is different from marriage or actual sexual activity, of course, and is also different from entering various levels in schools. But Congress should set a lower age threshold to protect children from encountering online obscenity than the states' marriage age and regulations concerning illegal sexual activities with minors. The author has considered entrance levels, pubescent age, court decisions, and

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[1052] *Ashcroft v. Free Speech Coalition,* 535 U.S. at 247.

[1053] *Id.*

laws concerning marriage and sexual activity. This dissertation recommends that Congress set the age of a minor on future legislations protecting children from online obscenity at below 15 in light of the considerations above.

Congress could also do more social research to get a social aspect on setting the age of minors in laws protecting children from online pornography. To recommend that Congress should set an agenda to increase social research on the age of minor in order to make statutes protecting children from online pornography is almost belated.

The Children's Internet Protection Act (CIPA) can be expanded beyond the e-rate provision so that Congress may spend money to provide library personnel. In this way, children who access the Internet without parental supervision in public libraries could be supervised by library staffs.

Lastly, Congress can imitate some gun laws that compel manufacturers to put safety features into shot guns.[1054] Congress can shape future statutes that compel the business industry to put safety features into computers with Internet access.

The Exosystem of the Internet Ecological Systems Model

At the second layer of the model, the exosystem, consists of the business industry, organizations and school systems. Specifically under the Internet Ecological Systems Model, the technical industry and Web operators may be challenged to take on some responsibility for reducing the possibility of children encountering online pornography.

[1054] (Four states have enacted laws requiring safety features in guns, there is no federal law that regulate guns. Teret and Culross, 2002). "Strategies to Reduce Gun Violence: Strengthening Policies that Restrict Youth Access to Guns," *Children, Youth, and Gun Violence: Issues and Ideas*, The Future of Children.org. http://www.futureofchildren.org/information2847/information_show.htm?doc_id=154539 [accessed January 31, 2007]. See also, The Legal Action Project, "Unsafe Gun Design," Brady Center, http://www.gunlawsuits.org/reform/design.php [accessed February 17, 2007]. According to the Brady Center, safety features in guns are indictors signaling when a gun has a round in its firing chamber and 'grip safety' mechanisms.

The challenge would be to come up with a product that would be desirable for parents to buy. Companies can create a market niche by serving kids only. Industry cooperation can create a more knowledgeable and discriminating group of parents and children consumers.[1055]

In the context of this study, the specific business industry of concern is associated with technology and children. Within this business industry are computer manufacturers, electronic manufacturers, software manufacturers, Internet Service Providers, cable companies, telephone companies, and web companies. These businesses should be responsible for consumer education.[1056] Since businesses know more about their products and services than anyone else, they have at their disposal some of the most powerful communication mix: advertising, selling, packaging, and public relations; their teaching assignments would be education on the nature, use and benefits of their products and services.[1057] Businesses should educate consumers about general Internet safety issues and about specific electronic commerce safety issues. With greater responsibility on the business side, there would be greater accountability for their products and services, and with greater responsibility on the business side and more sophistication on the consumer side, there would be fewer legal damages and a move towards betterment of society.[1058]

[1055] Gunter & Furnham, (1998): 182.

[1056] James U. McNeal, *Kids as Customers: A Handbook of Marketing to Children*, (New York: Lexington Books, 1992).

[1057] *Id.*

[1058] Barrie Gunter and Adrian Furnham, *Children as consumers : a psychological analysis of the young people's market,* (New York: Routledge, 1998).

Consumers, retailers and the government can co-exist peacefully and so that there is no room for ignorance on the consumers' part.

In the exosystem, this study recommends that computer manufacturers should assemble computers specifically designed for children so that they may be safe on the Internet. Internet Service Providers and Web search engines should create child-friendly browsers and Internet access.

The Mesosystem of the Internet Ecological Systems Model

The third layer of the ecological system model is the mesosystem. Physical communities such as schools, cities, neighborhoods, family settings, and local organizations have adjusted to the Internet. Students are taught how to use the Internet to do research, patrons of community libraries can use the Internet for daily tasks, and families have adapted the Internet into their homes.

A second important Internet influence is that the Internet communities are created by choice. In a geographical community, children would go through the routine of life and meet people from school, church, sports and intramural activities, which may or may not be by choice. But in a virtual community, people may interact with others that they may not otherwise meet. Internet communities are created because people have the same interests, activities and opinions. Internet communities exist by choice. The number of Internet communities is as vast as whatever interests, activities, and opinions are out there. People want to belong to Internet communities by choice. For example, through a webblog that describes how to fix a leaky faucet, one can encounter a lawyer from another state and people from Europe that one might not normally encounter without the Internet.

On the other hand, the breakdown in the mesosystem can be functionally destructive to the growing child. This example is shown through the 2005 Minnesota shootings at the Red Lake High School where the 16-year-old orphan Jeff Weise killed nine people and wounded fourteen others.[1059] Weise chose to be part of an Internet community that accepted his fascination with Adolf Hitler, he created a murder-suicide animation and called himself "todesengel" (Angel of Death in German).[1060] In school he secluded himself by not interacting with other students. He considered the Internet as his safe haven.[1061] On the Internet, traits of dangerous behavior can be observed and can serve as warning signs.

Legal precedent has shown the importance of community values.[1062] The Supreme Court believes in local communities having their own set of standards because each local community has its own structure and is more effective in meeting its own needs. However, this may be hard to apply since Internet communities consist of people from all over the world.

For the purposes of this study, the greater the support from the mesosystem and/or the guardians of the child, the better the Internet experience for the child. A key environmental factor in this system is the community at large and groups within the

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[1059] "Student Killed 9 Before Turning Pistol to Himself," *CNN.com*, posted March 23, 2005, Wednesday, http://www.cnn.com/2005/US/03/22/school.shooting/index.html [accessed February 18, 2007].

[1060] Martiga Lohn, "Shooter's Web Chatter shows Hitler Obsession, School Woes," *The Associated Press & Local Wire,* March 24, 2005, Thursday, http://web.lexis-nexis.com/universe /document?_m=5dcaf58e34318b1286ada4bc1f29e660&_docnum=1&wchp=dGLbVtz-zSkVb&_md5=6b78568c7ee121e02387e42a658a8f19, [accessed April 8, 2005].

[1061] *Id.*

[1062] *Miller*, 413 U.S. at 30; *Ginsberg*, 390 U.S. at 646.

community. The community includes the city, school systems, city libraries, and religious organizations. The child may use the Internet not only at home but also at schools, at public libraries, and at Internet cafes.

As a proposed recommendation at the mesosystem level, the organizations in this layer of environment and the communities need to be made aware of their responsibility towards the children's Internet experience. The communities and organizations can be made aware through public service announcements, web sites devoted to the topic to raise awareness in the appropriate institutions, an integrated communications program with mass advertising, and special mailings directed to teachers, schools and non-profit organizations. These non-profit organizations would include properly funded advocate and support groups, also known as watch-dog groups. Federal funds should host these awareness and educational programs. Each city should receive federal funds and city funds to set up community programs to educate parents, teachers, children, and public librarians. This recommendation is a sociological proposition that involves the legal approach and the social approach to protection of children from online obscenity.

Implementation of community involvement should include setting up some community programs, community outreach, and community skills development. Community buildings are public forums where the public can be educated and can share ideas.

Volunteer teachers from the industry need to do rotation to each city. According to Wolak, "Internet safety presentation by law enforcement personnel"[1063] reduced the

[1063] Wolak at 247.

risk of unwanted exposure to online pornography. Religious organizations may also work with the city to organize classes.

School systems in each city need to agree upon Internet policies in schools and Internet supervisory standards. Each school board should have open meetings for public input; in that way, local community standards instead of a national standard would be implemented.

Parental education is paramount. For raising children in the Internet era, parents must be educated about the Internet and learn to develop skills using the Internet. More parents in America need to become Internet savvy.[1064] There would be fewer debates about the right type of filtering if parents would understand how the Internet and computers function. A Parents' Community Commons can be created for this purpose.

This study also recommends that the computer should be put in the family room.

The Microsystem of the Internet Ecological Systems Model

The microsystem is at the core of the model – it is the actual child. For the intents and purposes of this study, increasing the supportive links between the environmental factors and the Internet phenomenon will enhance the overall impact on the child's development. The goal is for the child to have positive Internet experiences (by not encountering online pornography), and this can be done by changing some key environmental factors concerning the Internet. This dissertation is not trying to manipulate developmental traits in the child, the goal is to reduce, if not eliminate, children's encounters with online porn.

[1064] Larry Magid, "Online Safety Guidelines for Parents," N.D., http://www.safekids.com/parent_guidelines.htm [accessed February 17, 2007]. Larry Magid encourages parents to talk with their children. Another of his articles displayed parents' ways of talking to their children about acceptable Internet access and behavior.

Translating the biological aspect of the child to the Internet, the child's biological factor affects the way he/she browses the Internet and uses the Internet for whatever purposes. For example, a child with physical disabilities may not be as savvy on surfing the Internet as a child without physical disabilities; a child with higher IQ may go for more educational materials on the Internet than a child with a lower IQ level; children with parents who commit crime may themselves be more likely to commit Internet crimes, and so on.[1065] The purpose of this dissertation is, through the Internet Ecological Systems Model, to enhance the child's Internet experience, despite individual differences in heredity, through increasing interconnections between the child and other environmental factors that may directly affect the child (in the mesosystem) or that may indirectly affect the child (in the outer layer of environments such as in the macrosystem and the exosystem).

Thus, as a recommendation at the microsystem level for the Internet Ecological Systems Model, people at all other environmental levels need to be aware of the biological part of the child.

First, structure the child's the environment for an optimal Internet experience despite genetic factors. For children with physical disabilities, people at the macrosystem level (legislators and Congress) should find out what the most common physical disabilities for children are and then apply findings to the child's Internet experience. Likewise, people at the exosystem level (the industry) can create technology that would enable children with disabilities to Internet access and to browse with ease. For children

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[1065] Bronfenbrenner, "Ecology of the Family," (1986): 726.

who are slower at grasping concepts, people at the mesosystem level (parents, neighbors, relatives) can guide children through their Internet experience.

Second, warn children about online pornography. According to the American Civil Liberties Union, critical thinking skills are far more important than installing filtering software in computers.[1066] Minors should be taught critical thinking skills.[1067] Minors should be taught to be careful about relying on inaccurate information online, and submitting private information online. Another way to teach minors discretion is to hold seminars in schools and public libraries on using the Internet. ACLU also suggested that schools and libraries should make content-neutral rules about how minors should use the Internet.[1068] According to Michael Lewis, author of *Next: The Future Just Happened*, children adapt to new technologies faster than adults do.[1069]

Parents and guardians should educate children that viewing online pornography is unhealthy for their mental, psychological and physical development. Talking to children about online pornography is crucial. Teachers, whether school teachers or religious-school teachers, are also influential people in children's lives. Teachers can steer children away from online pornography by informing children of the organizational punishment they would receive if they visited pornographic websites and also by busying them with a world full of appropriate websites they can visit. Children learn about morality from what

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[1066] American Civil Liberties Union, http://www.aclu.org/issues/cyber/box.html [last accessed April 3, 2002].

[1067] "Critical Thinking and Problem Solving Skills," http://falcon.jmu.edu/~ramseyil/critical.htm [accessed February 18, 2007].

[1068] *Id.*

[1069] Michael M. Lewis, *Next: The Future Just Happened,* (New York: W.W. Norton, 2001).

they see and not what they hear, so parents, guardians and teachers should appropriately lead them to right attitudes and behaviors when they are young.

Third, one can use other operating system (for example, Linux and Macintosh) instead of Windows operating system to reduce the amount of computer viruses and unsolicited commercial email also known as spam. Because these operating systems have not yet been overwhelmed by spam and viruses, they are effective in reducing spam that carries viruses and pornography.[1070] According to Satchell and Peeling,

> There are about 60,000 viruses known for Windows, 40 or so for the Macintosh, about 5 for commercial Unix versions, and perhaps 40 for Linux. Most of the Windows viruses are not important, but many hundreds have caused widespread damage. Two or three of the Macintosh viruses were widespread enough to be of importance. None of the Unix or Linux viruses became widespread - most were confined to the laboratory.[1071]

Because Linux does not have as many security problems as Windows does, it indirectly reduces the amount of unwanted pornography one encounters.[1072] Linux operating system is updated frequently by people all over the world because it is open software.[1073] The Windows operating system known as Microsoft Vista promises that it will provide better parental controls.[1074] Vista 2007 can set time limits on computer or Internet usage,

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[1070] Senator Charles E. Schumer of New York, "Schumer, Christian Coalition Team Up To Crack Down On Email Spam Pornography," (Press Release June 12, 2003), http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01782.html [accessed March 15, 2007].

[1071] Julian Satchell and Nic Peeling, "Analysis of the Impact of Open Source Software," (Technical Report For UK Government, October 2001), http://www.govtalk.gov.uk/documents/QinetiQ_OSS_rep.pdf [accessed March 14, 2007].

[1072] *Id.*

[1073] Open software: "Open source denotes that the origins of a product are publicly accessible in part or in whole," http://en.wikipedia.org/wiki/Open_software [accessed March 14, 2007].

monitor activities, and block or allow certain programs, websites, and games.[1075] Time will tell whether Vista is a robust operating system for filtering out online pornography.

Conclusion

This chapter has proffered solutions to help reduce children's encountering of Internet pornography. This chapter has critiqued recommendations from scholars, the author's proposal to approach the issue by using Bronfenbrenner's ecological systems perspective, and the author's recommendations through the Internet Ecological Systems Model.

Among scholars' recommendations are adding to the U.S. constitution the right to listen, mandating ratings, mandating tagging of Internet communications, adopting the adult top-level domain and imitating good statutory language. Another suggestion is that the Court should re-evaluate its decisions in the Child Online Protection Act. On the other hand, some scholars do not recommend the adult top-level domain and do not recommend age-verfication technologies. One scholar even recommended that only the federal government and not states have pornography laws.

The author proposes to view the problem of children's encounters with online pornography through Bronfenbrenner's ecological systems perspective. Bronfenbrenner's ecological systems perspective explains that environments affect development. His Bioecological Systems Model depicted four concentric circles, one within another, with each circle representing an environmental system—the macrosystem, the exosystem, the

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[1074] Windows, Parental Controls, http://www.microsoft.com/windows/products/windowsvista/features/details/parentalcontrols.mspx [accessed February 2, 2007].

[1075] *Id.*

mesosystem and the microsystem. The macrosystem represents the larger culture, the legal system, the economic influences, and the technological influences. The exosystem represents the business industry, the parents' social circles, the workforce, the school systems and the Board of Education. The mesosystem represents the communities, the support groups, the interest groups, the neighborhood associations, the family, and the babysitter. The microsystem represents the individual child. The circular band wrapping all the concentric circles is the chronosystem. The chronosystem represents a person's life transitions or a society's transitions in time.

The Internet Ecological Systems Model adapted from Bronfenbrenner's Bioecological Systems Model is an approach that can shed light on the issue of children's encountering Internet pornography. When the factors in each environmental system interact by working together toward the same goal, the solution to children's encounters with online pornography will be effective. Most of the recommendations made above are based on manipulating the factors in each layer of the ecological system so that there will be fewer children's encounters with online pornography.

Chapter 5

Conclusion

Summary

Shielding children from the pervasiveness of indecency, obscenity and pornography on the Internet had been a difficult policy issue for the government to handle. Vague definitions in statutes, abridging adults' constitutional rights, and lack of any good solutions to tackle online obscenity within statutes all contributed to failed legislations. Congress wanted to shield children on the Internet because all sorts of indecency, obscenity and pornography exist there. The problem is heightened because the Internet medium itself cannot differentiate who is a child. Children and youths are being bombarded with wanted and unwanted exposure to online pornography when browsing the Internet. Unfortunately, pornography is one of the subject matters that will always exist on the Internet. The goal of this dissertation has been to find ways to reduce children's encounters with obscenity on the Internet. Legislators, lobbyists and children's advocacy organizations may find this report helpful for shaping future policy and law.

The Internet's architectural design is unique because it was created for military purposes so that if a bomb hit one of its nodes, the Internet would not cease to exist. The Internet would be robust enough that information would continue to flow through other computer network paths. The commercialization of the Internet in the 1980s allowed businesses and citizens to take advantage of this decentralized medium for e-commerce purposes and personal use.

The Internet contains a lot of adult information, and children being online complicates the situation. For example, a teenager had bought a prescription medical drug online and died from consuming the false drug. Also, some children intentionally penetrate into adult career zones through anonymity on the Internet. Other children gave legal advice and played with the stock market exchange. The law in the area of online legal advising did not specify who cannot give online legal advice, and the law in the area of the stock market did not assign an age when a person could begin doing stock exchanges. For younger children, online companies have begun relationship-marketing through online games and online mascots so that children may grow up to be brand-loyal customers. Also, a function of the Internet that youths have taken advantage of is the online communities such as usegroups, including interest groups, social groups, activity groups, and geographical groups.

Myspace.com is an example of social network software where youths share intimate details of their lives and contact information. Social network software has become a danger zone in terms of getting minors' information online and developing relationships with minors offline. Even though social network software is geared to people who are older than 18, teenage boys have bought and sold various illegal drugs, and their online pictures have depicted them with alcoholic beverages. On the other hand, teenage girls on social network software often post provocative online images of themselves wearing few clothes.

Child modeling websites are another major concern. Child modeling websites either recruit children or parents chose to enroll their children for a modeling career while young. However, some child modeling websites sell pictures of children for the business

of "soft porn," either with or without parental consent. Soft porn can neither be categorized as child pornography nor normal pornography—it is children wearing sexy and skimpy clothing and posing sensually. Unfortunately, pornographic information that exists on the Internet cannot be easily eradicated. The Internet technology itself cannot eliminate what information is added onto its network; other forces such as governmental intervention is required in order to get rid of unwanted information.

Children encounter all kinds of issues and people on the Internet, but the major area of concern in this dissertation is online obscenity. Even toddlers as young as 18 months have been molested in public libraries by people who have viewed too much online pornography within these public libraries.

Protecting children from online obscenity is complicated because of conflicting interests within society. Important topics related to online obscenity are the First Amendment, the speech of students, the lack of supervision of children and the doctrine of variable obscenity. First Amendment theory centers on the fact that adults have constitutional rights, but their rights are threatened by censorship in society's quest to protect children from harmful materials. As for student speech, students' expression is generally limited. For instance, there can be no public display of religious ceremonies in schools so that students' religious beliefs may be respected. Students may express political views on school grounds through the Supreme Court decision in *Tinker* so long as they do not interfere with school discipline or collide with the rights of other students. In *Tinker,* students were permitted to wear protest armbands because wearing black armbands was a form of symbolic speech and symbolic speech is protected by the First Amendment. The journalistic rights of student, however, are limited in school-sponsored

student publications. In the *Hazelwood* case, the Court said student newspapers are not a public forum for student expression. Through the *Pico* case, students generally enjoy the right to peruse library books that are already shelved.

The lack-of-supervision argument centers on the fact that many parents do not have the resources or time to keep their children away from indecent materials. The government became justified in intervening on parents' behalf by monitoring indecency, such as in radio and television, outside of the safe-harbor hours. The Supreme Court upheld indecency rules in a case involving a George Carlin monologue. But, obscenity has been an ongoing, troubling issue for the courts in part because the courts arguably have not been able to define obscenity adequately. One settled issue is that adults enjoy more constitutional rights than children when it comes to viewing obscenity. This concept called "variable obscenity" applies to print magazines and broadcast as well as to the Internet.

In general, these topics of First Amendment, student speech, lack of supervision of children and variable obscenity showed that the government needs to strike a balance between protecting children and maintaining adults' constitutional rights.

To identify what Congress has done about protection of children from online obscenity, this dissertation analyzed the six most relevant laws and statutes and relevant court cases that explained why some of the legislation failed.

The Communications Decency Act of 1996 (CDA) was Congress' first attempt to regulate Internet communications from indecency; however, the Supreme Court quickly struck the CDA down as vague and overbroad.

The Children's Online Protection Act (COPA) of 1998 prohibited commercial websites from carrying materials that were harmful to minors. COPA was the government's second attempt at regulating speech that is inappropriate for children but is narrower in scope than the CDA. For example, the COPA aimed at communication produced by commercial websites while the CDA had aimed at all communication produced on the Internet—from business and personal websites. "Harmful to minors" material was to be defined by community standards. The Act has been before the Supreme Court twice in 2002 and 2004, and was remanded back to the District Court for the Eastern District of Pennsylvania.

The Children's Internet Protection Act (CIPA) enacted in 2000, when challenged, actually won at the Supreme Court level. The Court favored Congress' solution that state-funded institutions should install filtering software on their computer terminals in order that children may not encounter online pornographic materials in public schools and libraries.

On the other hand, the Child Pornography Prevention Act of 1996 (CPPA) failed in its attempt to regulate the film industry's portrayal of youthful-looking images to censor all computer-generated images that appear to be of children engaging in sexual acts. However, its morphing provision still stands; it is illegal to morph images of children to create pornography.

The Children Online Privacy Protection Act of 1998 (COPPA) limits online companies collection of personal information from children, which limits the sale of children's profiles and thus limits the dangers of making children vulnerable to online pedophiles and other offline dangers.

The Dotkids Implementation and Efficiency Act of 2002 (dotkids) created a dotkids second-level domain[1076] known as kids.us which is operated by Neustar, Inc. There are a limited number of websites within the domain. All hyperlinks from the domain connect to webpages within the domain, meaning that children cannot go outside of the dotkids domain unless children deliberately type in a Uniform Resource Locator, the address of a resource on the Internet. President Bush said it is just like a children's section of the library but for children safely to surf the Internet.

This dissertation examined the age-of-minor topic because Congress has set different ages for different statutes, even within the protection of children from online obscenity legislation. The age-of-minor section examined the age of "minors" in different laws such as child labor, military entry, consumption of alcoholic beverages, smoking, bicycling safety, acquiring guns, driving, voting, marriage and sexual activity.

There is no clear reason why Congress does not have one set age for all the laws for when a minor becomes a legal adult. One general assumption is that laws have revolved around the needs of society. The ages assigned to individual laws have served the needs and purposes of the various subject matters. An employer may not hire a person below 16 on a hazardous labor work but no federal child labor rules apply to persons 18 and above. A person may enter the military at age 17 with parental consent and at age 18 and above without parental consent. The federal drinking age is 21 and the federal smoking age is 18. A person age 21 and older may acquire a handgun, while a person age 18 and older may acquire a rifle or a shotgun. The driving age is set by the states, and

[1076] Second-level domain is the second root term after the top-level domain, so in kids.us, the 'kids.' is the second-level domain.

state laws vary in setting minors' age from 14 to 18. The federal voting age is set at 18. Marriage laws are set by the states, and the lowest marriage age is 15 years old. In relation to sexual activity, most laws have varied in describing minors from 16 to 18 years old.

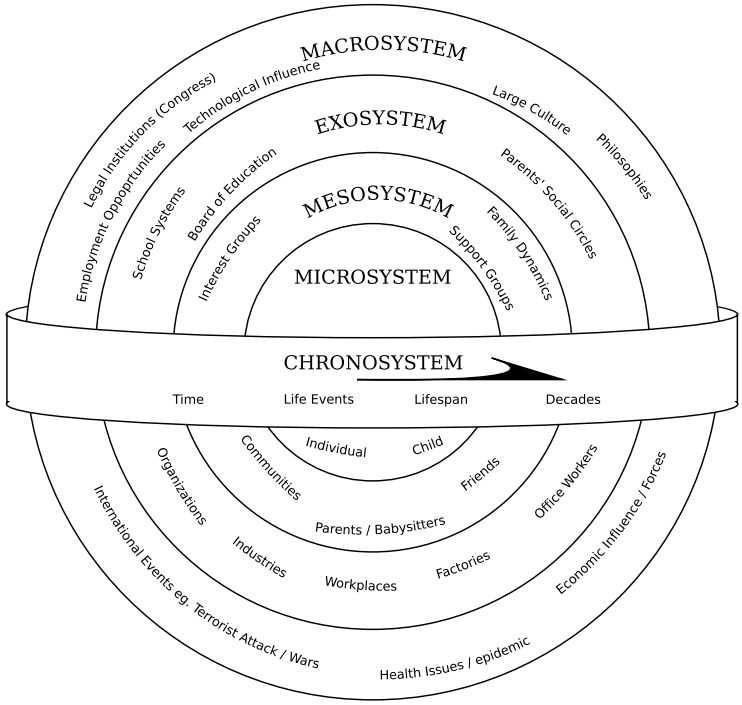
Congress set the ages for protecting children from online obscenity for the Communications Decency Act at below 18 years old; for the Child Online Protection Act at below 17 years old; for the Children's Internet Protection Act at below 17 years old; and for the Child Pornography Prevention Act at below 18 years old. Legislations that are indirectly related to online obscenity such as the Dot Kids set minors age at below 13 years old as did the Children's Online Privacy Protection Act. This dissertation has recommended setting the age of a child on future legislations protecting children from online obscenity at below 15.

As of January 2007, the CIPA, COPPA Rule and Dot Kids are examples of successful legislation. Despite the three laws, pornography still prevails. A more strategic approach is vital to reduce children's encounters with online pornography.

Legal scholars have proposed various solutions to solve the problem of protecting children from online obscenity. Patrick M. Garry proposed a right not to listen to be added to the U.S. Constitution in order to accommodate technological advances. Kevin Saunders proposed mandating all communications be tagged with the Platform for Internet Content rating, and Richard Balsley proposed all communications to be metatagged through his Adult Meta-Tag Act. Frank Valverde proposed an International Internet Rating System which is none other than the Internet Content Rating Association's ratings which could be downloaded freely online. Todd Nist proposed

imitating a part of Ohio's attempted statutory language that said that Internet materials could only be sent to an identifiable recipient, thus, the sender must know who or what age the recipient is, which will address the sending of harmful materials issue by attacking the age-verification problem. On the other hand, John Spence said that the states should not be legislating online pornography laws because it is hard to prosecute people from other states. Brooke Marshall said that the Court should have analyzed COPA with the *Central Hudson* test for commercial speech so that COPA could have become law. Similarly, Todd Anten criticized the Court's statement in the CIPA that the removal of filters was quick and easy. Instead, Anten proposed libraries have a filter-free computer or a computer with a removal filter. Anten also proposed librarians monitor patrons more closely, printing materials face up and moving computers closer to librarians. Lawrence Lessig testified that the age-verification technology would tempt businesses to sell consumer profiles. Kate Reder said that the pornography industry could adopt a "best practice guideline" and be awarded an .xxx suffix for their websites. Conversely, Jennifer Phillips said the .xxx would not protect children from online pornography as migration to the domain would be voluntary. Instead, Phillips said the .xxx domain would cause cyberpiracy and domain name disputes. Finally, Maureen Browne said the dotkids domain as a solution to protect children from online pornography is not helpful because the law is not narrowly tailored and is a content-based regulation. However, the dotkids law has not been challenged as of January 2007. The spectrum of critiques and recommendations demonstrate that protecting children from online obscenity really is a challenge for legal scholars and the government.

All in all, there needs to be some kind of approach that synthesizes some of the recommendations. The author proposes Urie Bronfenbrenner's bioecological systems approach as a strategic approach to reduce children's encounters with online obscenity.



Bioecological Systems Model
Based on Urie Bronfenbrenner, 1979

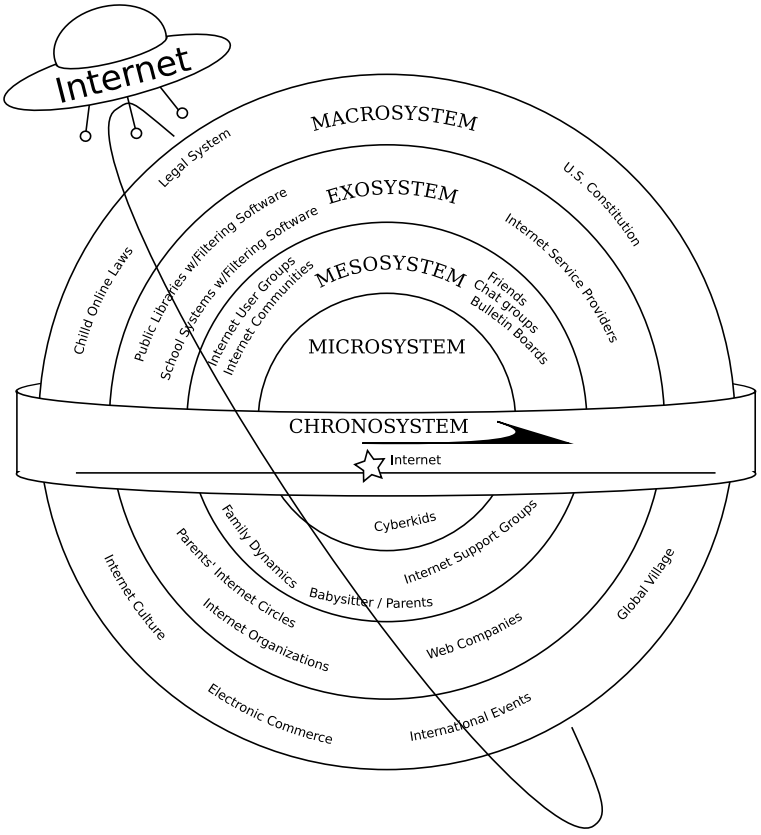
Bronfenbrenner's Bioecological Systems Model provides an explanation of how each environmental layer affects the other inner layers and in turn affects the individual child. The Bioecological Systems Model shows four concentric circles with one of the circles around the other four. The model represents the environmental systems within the human ecology. The band surrounding all the other layers is the chronosystem. The chronosystem consists of an individual's life or across a group of people transitions such as school entrance and puberty. However, there could be non-normative events

(unpredictable events) that happen within individuals such as an accident, or winning a lottery, or within a society such as the Vietnam war or an epidemic. The outermost layer of the centric circles is the macrosystem, consisting of the bigger culture, philosophies, the legal system, international events, technological influences and economic influences. The Internet could also be categorized within the macrosystem. The second layer within is the exosystem, consisting of school systems, boards of education, parents' social circles, workplaces, industries, organizations and factories. The third layer within is the mesosystem consisting of interest groups, communities, families, babysitters and parents. The innermost layer is the microsystem, consisting of the individual child.

A good solution requires a good approach. Next, the modified bioecological systems approach could give Congress the right perspective for online protection of children. The Internet Ecological Systems approach is a strong approach for Congress to adopt in order to reduce children's encounters with online obscenity. When the different factors in each layer of the Internet Ecological Systems Model serve the same goal, the recommendations from the model becomes effective to tackle children's encounters with online obscenity. According to the COPA Commission, a combination of public education, consumer empowerment, increased enforcement of laws, and industry action are needed to address protect children from inappropriate content online. This dissertation recommends the same combination but with the addition of community involvement and parental involvement. An effective solution involves a combination of laws, industry effort, law enforcement, community programs, and parental or guardian involvement.

The author adapted Bronfenbrenner's Bioecological Systems Model for the purpose of recommending to Congress a possible way for reducing children's encounters

with online obscenity. The modified model is called the Internet Ecological Systems Model.



Internet Ecological Systems Model
Adapted from Urie Bronfenbrenner, 1979

Within the Internet Ecological Systems Model, the Internet can be seen as starting sometime in the few decades before the twenty-first Century. The Internet was created in 1969 within the chronosystem timeline, the environmental layer which consists of events in a person's life or a society, showing that some people live to experience the Internet and some will get to experience it. Within the macrosystem of the Internet Ecological Systems Model, which consists of the legal system, the technological influence, and the bigger culture, the government is one entity that can contribute to reducing children's

encounters with online obscenity. The Internet is also a technological influence making the world a global village. Within the exosystem, which is the environmental system consisting of companies, the workforce and the school systems, companies that have Internet access may have a faster communication advantage and an economic advantage. Some businesses strictly do electronic commerce. School systems with Internet access give their students a research advantage. Within the mesosystem consisting of communities, families and various interest groups, the Internet has created many virtual communities that would not have existed in real-space communities, such as "how to fix faucets" groups and many other specialized groups. Also, as a function of Internet communities, friendships that would otherwise be non-existent actually exist: two people from different countries and career backgrounds may be friends through a common interest. In the microsystem, the individual child or the individual youth may actively use the Internet for communication, games, or research. The Internet exists in every layer of environmental systems of the Internet Ecological Systems Model. Thus, the Internet Ecological Systems Model depicts the Internet as orbiting around the ecological systems.

Recommendations through the Internet Ecological Systems Model are as follow:

In the legal system, the macrosystem, legislators could imitate other laws to mandate safety features on the Internet. For example, some state gun laws require gun manufacturers to build safety features into guns. Likewise, Congress could require computer, electronics and software manufacturers to put safety features to computers and to Internet access.

Furthermore, this study recommends that Congress set the age of minors at below 15 for future online laws shielding children from encountering online obscenity.

Congress should also expand the Children's Internet Protection Act (CIPA) beyond the e-rate provision by increasing federal funding to provide for more library personnel to supervise children that come to libraries without parents.

More importantly, the government should make all filtering software available freely online for people to download by covering the cost. Filtering is an important tool that can reduce children's encounters with online obscenity, so the government should make filters its top priority.

Within the same legal system, the government can reduce children's encounters with online obscenity by taxing computers with Internet access. Congress could assign an adjudicatory body to set the standards for taxation. The tax would be no different than road taxes or city taxes. For example, there could be different rates for computers for institutional use or personal use, and existing computers that access the Internet could be taxed according to the same rates as new computers. The Internet tax could go toward government funding of better law enforcement, hiring research bodies, and engineering bodies, and implementing social and community programs that have been suggested under the Internet Ecological Systems Model.

In the business industry, the exosystem, businesses should focus on making child-friendly computers which may be a plug-and-play type of Internet computers with filtering built-in. For example, companies should create more child-friendly Internet computers, that is, computers that are specifically for children and are equipped with only the Internet and not many other programs. These Internet computers could have child-friendly web search engines and could automatically block inappropriate websites. Also, the computers could feature choices from several Internet Service Providers for the

parent, the child, and the guest users to log onto the Internet. Children may use the service of one Internet Service Provider while parents may use another Internet Service Provider, and other guests may use the service of yet another. Customized Internet Service Providers may have already filtered inappropriate materials for children.

Businesses should also educate consumers about general Internet safety issues and about specific electronic commerce safety issues. For example, Web companies can educate people on how to make e-commerce transactions, on how to choose different filtering software products, and on how to avoid harmful spyware and viruses.

In the community and neighborhood settings, the mesosystem, each city should receive federal funds and city funds to raise awareness for community involvement and to set up community programs in order to educate parents, teachers, children, and public librarians. For example, religious organizations and non-profit organizations should also work with communities to educate parents and children about Internet safety. In addition, volunteer law enforcement personnel and people from the industry could participate in Internet safety presentations.[1077] Law enforcement personnel and industry experts should visit each city and talk to citizens about Internet safety. The school system in each city needs to come up with local community Internet-supervision standards. Lastly, each community should use a government building such as the city hall or the school or the library for Internet educational classes and Internet skills development.

As for the individual child, the microsystem, children's Internet experience may be optimized despite individual differences in genetic make-up of children. For children

[1077] Janis Wolak, Kimberly Mitchell and David Finkelhor. "Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users," *Journal of Pediatrics* 119, (2007): 247. "This information is current as of February 9, 2007."

with physical disabilities, the business industry can create suitable hardware such as special keyboards or special mouse or special software for easy Internet browsing purposes. For instance, software can be made for children that use the touchpad and the tap of one finger. That way, children may not accidentally click into websites they did not intend to see. For children who are slower at grasping concepts, parents and overseers need to keep them from falling into the trap of being exposed to online pornography on the Internet by being at their side to guide them through their Internet experiences.

Next, parents and guardians must make every effort to deter children from online pornography. They must warn children to be prudent about pornography. Adults can effectively educate some children about pornography simply by talking with the children about online pornography. Parents and guardians should correct children who are caught going to pornographic websites. Teachers should emphasize good websites and offer children a long list of appropriate websites to access. Most importantly, youths should be taught how to use filtering and blocking software because "youth[s] who used filtering and blocking software had lower odds of wanted exposure," according to a February 2007 *Journal of Pediatrics* study.[1078] The individual may use other operating systems such as Linux and Macintosh rather than Windows. Because these operating systems have not yet been overwhelmed by spam and viruses,[1079] they are effective in reducing spam that carries viruses and pornography.[1080] Lastly, the recommendations from the

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[1078] *Id.* at 247.

[1079] Julian Satchell and Nic Peeling, "Analysis of the Impact of Open Source Software," (Technical Report For UK Government, October 2001), http://www.govtalk.gov.uk/documents/QinetiQ_OSS_rep.pdf [accessed March 14, 2007].

macrosystem, exosystem, and mesosystem need to function together in order to effectively reduce children's overall encounters with online pornography.

Knowing what each sector in each environmental system is to serve, each sector should work together toward the common goal. Having strong interactions between the different factors in each layer of the bioecological system can help make a more unified approach, resulting in a workable solution. Without interactions between the different factors in each layer of the bioecological system, there could, of course, be no unified approach.

Limitations and Directions

Finally, there are limitations to this study. Bronfenbrenner's ecological systems theory has no predictive power that can be tested in order to get concrete results; it is a description of how different environments affect the child and affect each other. Bronfenbrenner's Bioecological Systems Model does not specify to what extent each factor in each environmental system affects the other factors in other environmental systems. It is a limitation of this study that the effect of the factors in each environmental system is not measured against the other factors in other environmental systems, but at the same time, it is outside the scope of this study to specify to what extent each factor in each environmental system affects the other factors in other environmental systems. The point of this study is to use the model as a way of solving the problem of children encountering online obscenity. The Internet Ecological Systems approach is one strategy

[1080] Senator Charles E. Schumer of New York, "Schumer, Christian Coalition Team Up To Crack Down On Email Spam Pornography," (Press Release June 12, 2003), http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01782.html [accessed March 15, 2007].

that Congress can adapt for a collaborated effort from the business industry, the school systems and the watch-dog organizations for an effective outcome.

The issue of protecting children from online pornography is complex. Realistically, it is impossible to propound quick and easy solutions. In addition, the recommendations in this dissertation have not been as yet tested. Solutions that this dissertation proposes from the Internet Ecological Systems Model are not comprehensive and final; other researchers in the future may use this model to help them derive their own solutions.

Future researchers can use the Internet Ecological Systems Model as a way to put the complex issue of reducing children's encounters with online obscenity into perspective. It is easier to solve the problem of reducing children's encounters with online obscenity once environmental influences are categorized. A way to further the study is that researchers can test the Internet's influence at each environmental system layer of the model. Furthermore, researchers can use the model to quantify the supportive connections between Web operators, communities, and children to measure the effectiveness of industry contributions and community outreaches on the protection of children from online obscenity.

The Internet Ecological Systems approach should be important to Congress because awareness of the different environmental layers that affect one another can help Congress frame recommendations for the United States. An effective approach comes from a collaboration of efforts among the different environmental system sectors on what the goal is and the means to achieve the goal. Congress needs to make laws that consider the individual child's interaction with the Internet but laws should not limit minors'

constitutional rights more than necessary. Congress needs to consider what the industry is capable of manufacturing in order that children would be safer online. Likewise, Congress can work closely with law enforcement agencies in solving matters of inappropriate online and offline behavior. Further, Congress can fund state social programs by mandating that states have minimal Internet-safety programs. The states can in turn assign their Board of Education and communities to perform different community service programs regarding Internet safety and may choose to set higher standards than the federal standard.

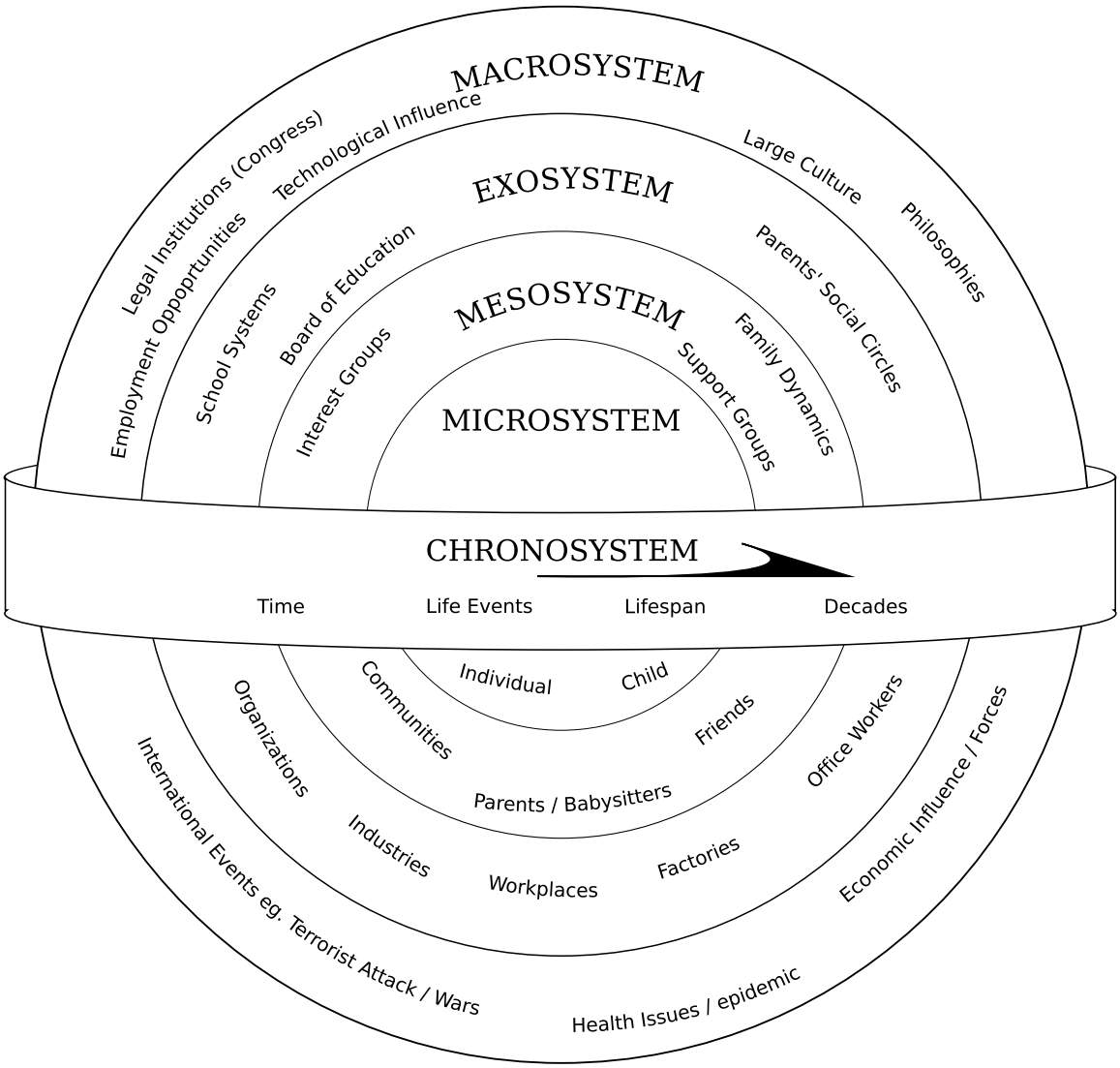
Good social programs are expensive, and they must compete for a fair share of a country's economic resources.[1081] Americans are less likely than Europeans to be unified on issues of child and family policy.[1082] Most Americans are reluctant to pay for social programs. Children can easily remain unrecognized in the process of lobbying for industry policies or laws or community programs that would protect children from encountering online obscenity, since they cannot vote or speak out to protect their own interests the way adult citizens can. Instead, they must rely on the good will of others to become an important priority.[1083]

[1081] Laura E. Berk, *Infants and Children: Prenatal Through Middle Childhood,* 4th ed., (Boston: Allyn and Bacon, 2002).

[1082] *Id.*

[1083] Berk, *Infants and Children,* 82.

APPENDIX



Bioecological Systems Model

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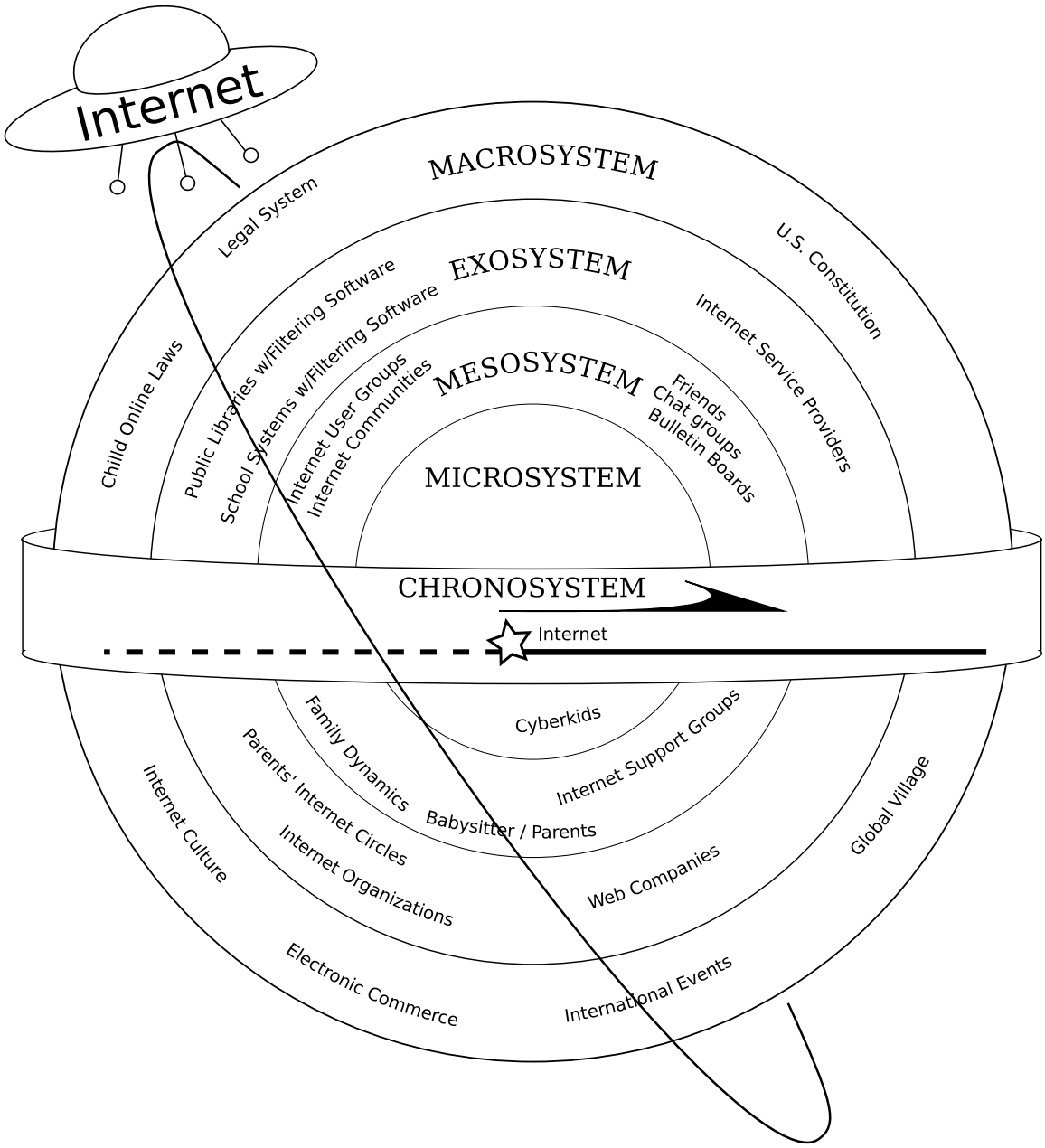

Internet Ecological Systems Model

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Strict Scrutiny Test: see footnote 509.

Time, Place, Manner Test: see footnote 895.

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CHILD ONLINE PROTECTION ACT

SEC. 1401. SHORT TITLE.

This title may be cited as the "Child Online Protection Act".

SEC. 1402. CONGRESSIONAL FINDINGS.

The Congress finds that—

(1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the Internet.

SEC. 1403. REQUIREMENT TO RESTRICT ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF THE WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

Part I of title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

[In what will be codified as 47 U.S.C. Sec. 231, COPA provides that:]

"SEC. 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

"(a) REQUIREMENT TO RESTRICT ACCESS.—

"(1) PROHIBITED CONDUCT.—Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide

Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

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

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

"(b) INAPPLICABILITY OF CARRIERS AND OTHER SERVICE PROVIDERS.—For purposes of subsection (a), a person shall not be considered to make any communication for commercial purposes to the extent that such person is—

"(1) a telecommunications carrier engaged in the provision of a telecommunications service;

"(2) a person engaged in the business of providing an Internet access service;

"(3) a person engaged in the business of providing an Internet information location tool; or

"(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 shall not constitute such selection or alteration of the content of the communication.

"(c) AFFIRMATIVE DEFENSE.—

"(1) DEFENSE.—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

"(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

"(B) by accepting a digital certificate that verifies age; or

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

"(2) PROTECTION FOR USE OF DEFENSES.—No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

"(d) PRIVACY PROTECTION REQUIREMENTS.—

"(1) DISCLOSURE OF INFORMATION LIMITED.—A person making a communication described in subsection (a)—

"(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

"(i) the individual concerned, if the individual is an adult; or

"(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

"(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

"(2) EXCEPTIONS.—A person making a communication described in subsection (a) may disclose such information if the disclosure is—

"(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

"(B) made pursuant to a court order authorizing such disclosure.

"(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

"(1) BY MEANS OF THE WORLD WIDE WEB.—The term 'by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

"(2) COMMERCIAL PURPOSES; ENGAGED IN THE BUSINESS.—

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

"(B) ENGAGED IN THE BUSINESS.—The term 'engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

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

"(4) INTERNET ACCESS SERVICE.—The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services

offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

"(5) INTERNET INFORMATION LOCATION TOOL.—The term 'Internet information location tool' means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.

"(6) MATERIAL THAT IS HARMFUL TO MINORS.—The term 'material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is ob-scene or that—

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

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

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

"(7) MINOR.—The term 'minor' means any person under 17 years of age.".

SEC. 1404. NOTICE REQUIREMENT.

(a) NOTICE.—Section 230 of the Communications Act of 1934 (47 U.S.C. 230) is amended—

(1) in subsection (d)(1), by inserting "or 231" after "section 223";

(2) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(3) by inserting after subsection (c) the following new subsection:

"(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE.—A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.".

(b) CONFORMING AMENDMENT.—Section 223(h)(2) of the Communications Act of 1934 (47 U.S.C. 223(h)(2)) is amended by striking "230(e)(2)" and inserting "230(f)(2)".

SEC. 1405. STUDY BY COMMISSION ON ONLINE CHILD PROTECTION.

(a) ESTABLISHMENT.—There is hereby established a temporary Commission to be known as the Commission on Online Child Protection (in this section referred to as the "Commission") for the purpose of conducting a study under this section regarding methods to help reduce access by minors to material that is harmful to minors on the Internet.

(b) MEMBERSHIP.—The Commission shall be composed of 19 members, as follows:

(1) INDUSTRY MEMBERS.—The Commission shall include—

(A) 2 members who are engaged in the business of providing Internet filtering or blocking services or software;

(B) 2 members who are engaged in the business of providing Internet access services;

(C) 2 members who are engaged in the business of providing labeling or ratings services;

(D) 2 members who are engaged in the business of providing Internet portal or search services;

(E) 2 members who are engaged in the business of providing domain name registration services;

(F) 2 members who are academic experts in the field of technology; and

(G) 4 members who are engaged in the business of making content available over the Internet. Of the members of the Commission by reason of each subparagraph of this paragraph, an equal number shall be appointed by the Speaker of the House of Representatives and by the Majority Leader of the Senate.

(2) EX OFFICIO MEMBERS.—The Commission shall include the following officials:

(A) The Assistant Secretary (or the Assistant Secretary's designee).

(B) The Attorney General (or the Attorney General's designee).

(C) The Chairman of the Federal Trade Commission (or the Chairman's designee).

(c) STUDY.—

(1) IN GENERAL.—The Commission shall conduct a study to identify technological or other methods that—

(A) will help reduce access by minors to material that is harmful to minors on the Internet; and

(B) may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 (as added by this title). Any methods so identified shall be used as the basis for making legislative recommendations to the Congress under subsection (d)(3).

(2) SPECIFIC METHODS.—In carrying out the study, the Commission shall identify and analyze various technological tools and methods for protecting minors from material that is harmful to minors, which shall include (without limitation)—

(A) a common resource for parents to use to help protect minors (such as a "one-click-away" resource);

(B) filtering or blocking software or services;

(C) labeling or rating systems;

(D) age verification systems;

(E) the establishment of a domain name for posting of any material that is harmful to minors; and

(F) any other existing or proposed technologies or methods for reducing access by minors to such material.

(3) ANALYSIS.—In analyzing technologies and other methods identified pursuant to paragraph (2), the Commission shall examine—

(A) the cost of such technologies and methods;

(B) the effects of such technologies and methods on law enforcement entities;

(C) the effects of such technologies and methods on privacy;

(D) the extent to which material that is harmful to minors is globally distributed and the effect of such technologies and methods on such distribution;

(E) the accessibility of such technologies and methods to parents; and

(F) such other factors and issues as the Commission considers relevant and appropriate.

(d) REPORT.—Not later than 1 year after the enactment of this Act, the Commission shall submit a report to the Congress containing the results of the study under this section, which shall include—

(1) a description of the technologies and methods identified by the study and the results of the analysis of each such technology and method;

(2) the conclusions and recommendations of the Commission regarding each such technology or method;

(3) recommendations for legislative or administrative actions to implement the conclusions of the committee; and

(4) a description of the technologies or methods identified by the study that may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 (as added by this title).

(e) STAFF AND RESOURCES.—The Assistant Secretary for Communication and Information of the Department of Commerce shall provide to the Commission such staff and resources as the Assistant Secretary determines necessary for the Commission to perform its duty efficiently and in accordance with this section.

(f) TERMINATION.—The Commission shall terminate 30 days after the submission of the report under subsection (d).

(g) INAPPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

SEC. 1406. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect 30 days after the date of enactment of this Act.

CHILD PORNOGRAPHY PREVENTION ACT

P.L. 104-208 MAKING OMNIBUS CONSOLIDATED APPROPRIATIONS FOR FISCAL YEAR 1997

H.R. 3610 (H. Rept. 104-863)

SEC. 121. This section may be cited as the `Child Pornography Prevention Act of 1996'.

Subsection 1. Findings
Congress finds that--

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;
(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;
(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children `having fun' participating in such activity;
(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;
(5) new photographic and computer imagining technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;
(6) computers and computer imaging technology can be used to--

(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;
(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and
(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;
(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether

the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;
(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;
(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and
(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;
(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and
(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;
(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and
(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

Subsection 2. Definitions

Section 2256 of title 18, United States Code, is amended--

(1) in paragraph (5), by inserting before the semicolon the following: `, and data stored on computer disk or by electronic means which is capable of conversion into a visual image';
(2) in paragraph (6), by striking `and';
(3) in paragraph (7), by striking the period and inserting a semicolon; and
(4) by adding at the end the following new paragraphs:
`(8) `child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
`(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

`(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
`(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
`(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and
`(9) `identifiable minor'--
`(A) means a person--
`(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or
`(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
`(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
`(B) shall not be construed to require proof of the actual identity of the identifiable minor.'.

Subsection 3. Prohibited Activities Relating to Material Constituting or Containing Child Pornography

(a) IN GENERAL- Chapter 110 of title 18, United States Code, is amended by adding after section 2252 the following:

`Sec. 2252A. Certain activities relating to material constituting or containing child pornography
`(a) Any person who--
`(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;
`(2) knowingly receives or distributes--
`(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
`(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;
`(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;
`(4) either--
`(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or
`(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
`(5) either--
`(A) in the special maritime and territorial jurisdiction of the United

States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography; or

`(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

`(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

`(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

`(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that--

`(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

`(2) each such person was an adult at the time the material was produced; and

`(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.'.

(b) TECHNICAL AMENDMENT- The table of sections for chapter 110 of title 18, United States Code, is amended by adding after the item relating to section 2252 the following:

`2252A. Certain activities relating to material constituting or containing child pornography.'.

Subsection 4. Penalties for Sexual Exploitation of Children.

Section 2251(d) of title 18, United States Code, is amended to read as follows:

`(d) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, or both, but if such person has one prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 30 years, but if such person has 2 or more prior convictions under this chapter or chapter 109A, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 30 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title.

Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for

life.'.

Subsection 5. Material Involving Sexual Exploitation of Minors

Section 2252 of title 18, United States Code, is amended by striking subsection (b) and inserting the following:

`(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of
subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.
`(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.'.

Subsection 6. Privacy Protection Act Amendments

Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended --

(1) in subsection (a)(1), by inserting before the parenthesis at the end the following: `, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, or 2252A of title 18, United States Code'; and
(2) in subsection (b)(1), by inserting before the parenthesis at the end the following: `, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, or 2252A of title 18, United States Code'.

Subsection 7. Amber Hagerman Child Protection Act of 1996

(a) SHORT TITLE- This section may be cited as the `Amber Hagerman Child Protection Act of 1996'.

(b) AGGRAVATED SEXUAL ABUSE OF A MINOR- Section 2241(c) of title 18, United States Code, is amended to read as follows:

`(c) WITH CHILDREN- Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than that person), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be

sentenced to life in prison.'.

(c) SEXUAL ABUSE OF A MINOR- Section 2243(a) of title 18, United States Code, is amended by inserting `crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or' after `Whoever'.

Subsection 8. Severability

If any provision of this Act, including any provision or section of the definition of the term child pornography, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, including any other provision or section of the definition of the term child pornography, the amendments made by this Act, and the application of such to any other person or circumstance shall not be affected thereby.

Child Pornography Prevention Act, Declan McCullagh's politechbot.com, http://www.politechbot.com/docs/cppa.text.html [accessed February 21, 2007].

CHILDREN'S INTERNET PROTECTION ACT

SEC. 1701. SHORT TITLE.
This title may be cited as the ``Children's Internet Protection Act".
SEC. 1702. DISCLAIMERS.
(a) **DISCLAIMER REGARDING CONTENT.--**Nothing in this title or the amendments made by this title shall be construed to prohibit a local educational agency, elementary or secondary school, or library from blocking access on the Internet on computers owned or operated by that agency, school, or library to any content other than content covered by this title or the amendments made by this title.
(b) **DISCLAIMER REGARDING PRIVACY.--**Nothing in this title or the amendments made by this title shall be construed to require the tracking of Internet use by any identifiable minor or adult user.
SEC. 1703. STUDY OF TECHNOLOGY PROTECTION MEASURES.
(a) **IN GENERAL.--**Not later than 18 months after the date of the enactment of this Act, the National Telecommunications and Information Administration shall initiate a notice and comment proceeding for purposes of--
(1) evaluating whether or not currently available technology protection measures, including commercial Internet blocking and filtering software, adequately addresses the needs of educational institutions;
(2) making recommendations on how to foster the development of measures that meet such needs; and
(3) evaluating the development and effectiveness of local Internet safety policies that are currently in operation after community input.
(b) **DEFINITIONS.--**In this section:
(1) **TECHNOLOGY PROTECTION MEASURE.--**The term ``technology protection measure" means a specific technology that blocks or filters Internet access to visual depictions that are--
(A) obscene, as that term is defined in section 1460 of title 18, United States Code;
(B) child pornography, as that term is defined in section 2256 of title 18, United States Code; or
(C) harmful to minors.
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(2) **HARMFUL TO MINORS.--**The term ``harmful to minors" means any picture, image, graphic image file, or other visual depiction that--
(A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
(B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
(C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.
(3) **SEXUAL ACT; SEXUAL CONTACT.--**The terms ``sexual act" and ``sexual contact" have the meanings given such terms in section 2246 of title 18, United States Code.
Subtitle A--Federal Funding for Educational Institution Computers
SEC. 1711. LIMITATION ON AVAILABILITY OF CERTAIN FUNDS FOR SCHOOLS.
Title III of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6801 et seq.) is amended by adding at the end the following:
``PART F--LIMITATION ON AVAILABILITY OF CERTAIN FUNDS FOR SCHOOLS
``SEC. 3601. LIMITATION ON AVAILABILITY OF CERTAIN FUNDS FOR

SCHOOLS.
``(a) **INTERNET SAFETY**.--
``(1) **IN GENERAL**.--No funds made available under this title to a local educational agency for an elementary or secondary school that does not receive services at discount rates under section 254(h)(5) of the Communications Act of 1934, as added by section 1721 of Children's Internet Protection Act, may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet, for such school unless the school, school board, local educational agency, or other authority with responsibility for administration of such school both--
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``(A)(i) has in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene;
``(II) child pornography; or
``(III) harmful to minors; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and
``(B)(i) has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene; or
``(II) child pornography; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers.
``(2) **TIMING AND APPLICABILITY OF IMPLEMENTATION**.--
``(A) **IN GENERAL**.--The local educational agency with responsibility for a school covered by paragraph (1) shall certify the compliance of such school with the requirements of paragraph (1) as part of the application process for the next program funding year under this Act following the effective date of this section, and for each subsequent program funding year thereafter.
``(B) **PROCESS**.--
``(i) **SCHOOLS WITH INTERNET SAFETY POLICIES AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A local educational agency with responsibility for a school covered by paragraph (1) that has in place an Internet safety policy meeting the requirements of paragraph (1) shall certify its compliance with paragraph (1) during each annual program application cycle under this Act.
``(ii) **SCHOOLS WITHOUT INTERNET SAFETY POLICIES AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A local educational agency with responsibility for a school covered by paragraph (1) that does not have in place an Internet safety policy meeting the requirements of paragraph (1)--
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``(I) for the first program year after the effective date of this section in which the local educational agency is applying for funds for such school under this Act, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy that meets such requirements; and
``(II) for the second program year after the effective date of this section in which the local educational agency is applying for funds for such school under this Act, shall certify that such school is in compliance with such requirements.
Any school covered by paragraph (1) for which the local educational agency concerned is unable to certify compliance with such requirements in such second program year shall be ineligible for all funding under this title for such second program year and all subsequent program years until such time as such school comes into compliance with such requirements.
``(iii) **WAIVERS**.--Any school subject to a certification under clause (ii)(II) for which

the local educational agency concerned cannot make the certification otherwise required by that clause may seek a waiver of that clause if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by that clause. The local educational agency concerned shall notify the Secretary of the applicability of that clause to the school. Such notice shall certify that the school will be brought into compliance with the requirements in paragraph (1) before the start of the third program year after the effective date of this section in which the school is applying for funds under this title.

``(3) **DISABLING DURING CERTAIN USE**.--An administrator, supervisor, or person authorized by the responsible authority under paragraph (1) may disable the technology protection measure concerned to enable access for bona fide research or other lawful purposes.

``(4) **NONCOMPLIANCE**.--

``(A) **USE OF GENERAL EDUCATION PROVISIONS ACT REMEDIES**.--Whenever the Secretary has reason to believe that any recipient of funds under this title is failing to comply substantially with the requirements of this subsection, the Secretary may--

``(i) withhold further payments to the recipient under this title,

``(ii) issue a complaint to compel compliance of the recipient through a cease and desist order, or

``(iii) enter into a compliance agreement with a recipient to bring it into compliance with such requirements,

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in same manner as the Secretary is authorized to take such actions under sections 455, 456, and 457, respectively, of the General Education Provisions Act (20 U.S.C. 1234d).

``(B) **RECOVERY OF FUNDS PROHIBITED**.--The actions authorized by subparagraph (A) are the exclusive remedies available with respect to the failure of a school to comply substantially with a provision of this subsection, and the Secretary shall not seek a recovery of funds from the recipient for such failure.

``(C) **RECOMMENCEMENT OF PAYMENTS**.--Whenever the Secretary determines (whether by certification or other appropriate evidence) that a recipient of funds who is subject to the withholding of payments under subparagraph (A)(i) has cured the failure providing the basis for the withholding of payments, the Secretary shall cease the withholding of payments to the recipient under that subparagraph.

``(5) **DEFINITIONS**.--In this section:

``(A) **COMPUTER**.--The term `computer' includes any hardware, software, or other technology attached or connected to, installed in, or otherwise used in connection with a computer.

``(B) **ACCESS TO INTERNET**.--A computer shall be considered to have access to the Internet if such computer is equipped with a modem or is connected to a computer network which has access to the Internet.

``(C) **ACQUISITION OR OPERATION**.--A elementary or secondary school shall be considered to have received funds under this title for the acquisition or operation of any computer if such funds are used in any manner, directly or indirectly--

``(i) to purchase, lease, or otherwise acquire or obtain the use of such computer; or

``(ii) to obtain services, supplies, software, or other actions or materials to support, or in connection with, the operation of such computer.

``(D) **MINOR**.--The term `minor' means an individual who has not attained the age of 17.

``(E) **CHILD PORNOGRAPHY**.--The term `child pornography' has the meaning given such term in section 2256 of title 18, United States Code.

``(F) **HARMFUL TO MINORS**.--The term `harmful to minors' means any picture, image, graphic image file, or other visual depiction that--

``(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

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``(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
``(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.
``(G) **OBSCENE**.--The term `obscene' has the meaning given such term in section 1460 of title 18, United States Code.
``(H) **SEXUAL ACT; SEXUAL CONTACT**.--The terms `sexual act' and `sexual contact' have the meanings given such terms in section 2246 of title 18, United States Code.
``(b) **EFFECTIVE DATE**.--This section shall take effect 120 days after the date of the enactment of the Children's Internet Protection Act.
``(c) **SEPARABILITY**.--If any provision of this section is held invalid, the remainder of this section shall not be affected thereby.".
SEC. 1712. LIMITATION ON AVAILABILITY OF CERTAIN FUNDS FOR LIBRARIES.
(a) **AMENDMENT**.--Section 224 of the Museum and Library Services Act (20 U.S.C. 9134(b)) is amended--
(1) in subsection (b)--
(A) by redesignating paragraph (6) as paragraph (7); and
(B) by inserting after paragraph (5) the following new paragraph:
``(6) provide assurances that the State will comply with subsection (f); and"; and
(2) by adding at the end the following new subsection:
``(f) **INTERNET SAFETY**.--
``(1) **IN GENERAL**.--No funds made available under this Act for a library described in section 213(2)(A) or (B) that does not receive services at discount rates under section 254(h)(6) of the Communications Act of 1934, as added by section 1721 of this Children's Internet Protection Act, may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet, for such library unless--
``(A) such library--
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``(i) has in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene;
``(II) child pornography; or
``(III) harmful to minors; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and
``(B) such library--
``(i) has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene; or
``(II) child pornography; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers.
``(2) **ACCESS TO OTHER MATERIALS**.--Nothing in this subsection shall be construed to prohibit a library from limiting Internet access to or otherwise protecting against materials other than those referred to in subclauses (I), (II), and (III) of paragraph (1)(A)(i).
``(3) **DISABLING DURING CERTAIN USE**.--An administrator, supervisor, or other authority may disable a technology protection measure under paragraph (1) to

enable access for bona fide research or other lawful purposes.
``(4) **TIMING AND APPLICABILITY OF IMPLEMENTATION**.--
``(A) **IN GENERAL**.--A library covered by paragraph (1) shall certify the compliance of such library with the requirements of paragraph (1) as part of the application process for the next program funding year under this Act following the effective date of this subsection, and for each subsequent program funding year thereafter.
``(B) **PROCESS**.--
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``(i) **LIBRARIES WITH INTERNET SAFETY POLICIES AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A library covered by paragraph (1) that has in place an Internet safety policy meeting the requirements of paragraph (1) shall certify its compliance with paragraph (1) during each annual program application cycle under this Act.
``(ii) **LIBRARIES WITHOUT INTERNET SAFETY POLICIES AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A library covered by paragraph (1) that does not have in place an Internet safety policy meeting the requirements of paragraph (1)--
``(I) for the first program year after the effective date of this subsection in which the library applies for funds under this Act, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy that meets such requirements; and
``(II) for the second program year after the effective date of this subsection in which the library applies for funds under this Act, shall certify that such library is in compliance with such requirements.
Any library covered by paragraph (1) that is unable to certify compliance with such requirements in such second program year shall be ineligible for all funding under this Act for such second program year and all subsequent program years until such time as such library comes into compliance with such requirements.
``(iii) **WAIVERS**.--Any library subject to a certification under clause (ii)(II) that cannot make the certification otherwise required by that clause may seek a waiver of that clause if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by that clause. The library shall notify the Director of the Institute of Museum and Library Services of the applicability of that clause to the library. Such notice shall certify that the library will comply with the requirements in paragraph (1) before the start of the third program year after the effective date of this subsection for which the library is applying for funds under this Act.
``(5) **NONCOMPLIANCE**.--
``(A) **USE OF GENERAL EDUCATION PROVISIONS ACT REMEDIES**.--Whenever the Director of the Institute of Museum and Library Services has reason to believe that any recipient of funds this Act is failing to comply substantially with the requirements of this subsection, the Director may--
``(i) withhold further payments to the recipient under this Act,
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``(ii) issue a complaint to compel compliance of the recipient through a cease and desist order, or
``(iii) enter into a compliance agreement with a recipient to bring it into compliance with such requirements.
``(B) **RECOVERY OF FUNDS PROHIBITED**.--The actions authorized by subparagraph (A) are the exclusive remedies available with respect to the failure of a library to comply substantially with a provision of this subsection, and the Director shall not seek a recovery of funds from the recipient for such failure.
``(C) **RECOMMENCEMENT OF PAYMENTS**.--Whenever the Director determines (whether by certification or other appropriate evidence) that a recipient of funds who is subject to the withholding of payments under subparagraph (A)(i) has cured

the failure providing the basis for the withholding of payments, the Director shall cease the withholding of payments to the recipient under that subparagraph.
``(6) **SEPARABILITY**.--If any provision of this subsection is held invalid, the remainder of this subsection shall not be affected thereby.
``(7) **DEFINITIONS**.--In this section:
``(A) **CHILD PORNOGRAPHY**.--The term `child pornography' has the meaning given such term in section 2256 of title 18, United States Code.
``(B) **HARMFUL TO MINORS**.--The term `harmful to minors' means any picture, image, graphic image file, or other visual depiction that--
``(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
``(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
``(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.
``(C) **MINOR**.--The term `minor' means an individual who has not attained the age of 17.
``(D) **OBSCENE**.--The term `obscene' has the meaning given such term in section 1460 of title 18, United States Code.
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``(E) **SEXUAL ACT; SEXUAL CONTACT**.--The terms `sexual act' and `sexual contact' have the meanings given such terms in section 2246 of title 18, United States Code.".
(b) **EFFECTIVE DATE**.--The amendment made by this section shall take effect 120 days after the date of the enactment of this Act.
Subtitle B--Universal Service Discounts
SEC. 1721. REQUIREMENT FOR SCHOOLS AND LIBRARIES TO ENFORCE INTERNET SAFETY POLICIES WITH TECHNOLOGY PROTECTION MEASURES FOR COMPUTERS WITH INTERNET ACCESS AS CONDITION OF UNIVERSAL SERVICE DISCOUNTS.
(a) **SCHOOLS**.--Section 254(h) of the Communications Act of 1934 (47 U.S.C. 254(h)) is amended--
(1) by redesignating paragraph (5) as paragraph (7); and
(2) by inserting after paragraph (4) the following new paragraph (5):
``(5) **REQUIREMENTS FOR CERTAIN SCHOOLS WITH COMPUTERS HAVING INTERNET ACCESS**.--
``(A) **INTERNET SAFETY**.--
``(i) **IN GENERAL**.--Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school--
``(I) submits to the Commission the certifications described in subparagraphs (B) and (C);
``(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (l); and
``(III) ensures the use of such computers in accordance with the certifications.
``(ii) **APPLICABILITY**.--The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.
``(iii) **PUBLIC NOTICE; HEARING**.--An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and
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hold at least 1 public hearing or meeting to address the proposed Internet safety policy. In

the case of an elementary or secondary school other than an elementary or secondary school as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801), the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.
``(B) **CERTIFICATION WITH RESPECT TO MINORS**.--A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--
``(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene;
``(II) child pornography; or
``(III) harmful to minors; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.
``(C) **CERTIFICATION WITH RESPECT TO ADULTS**.--A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--
``(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene; or
``(II) child pornography; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers.
``(D) **DISABLING DURING ADULT USE**.--An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.
``(E) **TIMING OF IMPLEMENTATION**.--
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``(i) **IN GENERAL**.--Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--
``(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and
``(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.
``(ii) **PROCESS**.--
``(I) **SCHOOLS WITH INTERNET SAFETY POLICY AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.
``(II) **SCHOOLS WITHOUT INTERNET SAFETY POLICY AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B)

and (C)--
``(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and
``(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).
Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.
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``(III) **WAIVERS**.--Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.
``(F) **NONCOMPLIANCE**.--
``(i) **FAILURE TO SUBMIT CERTIFICATION**.--Any school that knowingly failsto comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.
``(ii) **FAILURE TO COMPLY WITH CERTIFICATION**.--Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.
``(iii) **REMEDY OF NONCOMPLIANCE**.--
``(I) **FAILURE TO SUBMIT**.--A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.
``(II) **FAILURE TO COMPLY**.--A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.".
(b) **LIBRARIES**.--Such section 254(h) is further amended by inserting after paragraph (5), as amended by subsection (a) of this section, the following new paragraph:
``(6) **REQUIREMENTS FOR CERTAIN LIBRARIES WITH COMPUTERS HAVING INTERNET ACCESS**.--
``(A) **INTERNET SAFETY**.--
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``(i) **IN GENERAL**.--Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library--
``(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

``(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (l); and
``(III) ensures the use of such computers in accordance with the certifications.
``(ii) **APPLICABILITY**.--The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.
``(iii) **PUBLIC NOTICE; HEARING**.--A library described in clause (i) shall provide reasonable public notice and hold at least 1 public hearing or meeting to address the proposed Internet safety policy.
``(B) **CERTIFICATION WITH RESPECT TO MINORS**.--A certification under this subparagraph is a certification that the library--
``(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene;
``(II) child pornography; or
``(III) harmful to minors; and
``(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.
``(C) **CERTIFICATION WITH RESPECT TO ADULTS**.--A certification under this paragraph is a certification that the library--
``(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--
``(I) obscene; or
``(II) child pornography; and
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``(ii) is enforcing the operation of such technology protection measure during any use of such computers.
``(D) **DISABLING DURING ADULT USE**.--An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.
``(E) **TIMING OF IMPLEMENTATION**.--
``(i) **IN GENERAL**.--Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--
``(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and
``(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.
``(ii) **PROCESS**.--
``(I) **LIBRARIES WITH INTERNET SAFETY POLICY AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.
``(II) **LIBRARIES WITHOUT INTERNET SAFETY POLICY AND TECHNOLOGY PROTECTION MEASURES IN PLACE**.--A library covered by

clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--
``(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and
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``(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).
Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.
``(III) **WAIVERS**.--Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.
``(F) **NONCOMPLIANCE**.--
``(i) **FAILURE TO SUBMIT CERTIFICATION**.--Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.
``(ii) **FAILURE TO COMPLY WITH CERTIFICATION**.--Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.
``(iii) **REMEDY OF NONCOMPLIANCE**.--
``(I) **FAILURE TO SUBMIT**.--A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.
``(II) **FAILURE TO COMPLY**.--A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.".
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(c) **DEFINITIONS**.--Paragraph (7) of such section, as redesignated by subsection (a)(1) of this section, is amended by adding at the end the following:
``(D) **MINOR**.--The term `minor' means any individual who has not attained the age of 17 years.
``(E) **OBSCENE**.--The term `obscene' has the meaning given such term in section 1460 of title 18, United States Code.
``(F) **CHILD PORNOGRAPHY**.--The term `child pornography' has the meaning given such term in section 2256 of title 18, United States Code.
``(G) **HARMFUL TO MINORS**.--The term `harmful to minors' means any picture,

image, graphic image file, or other visual depiction that--
``(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
``(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
``(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.
``(H) **SEXUAL ACT; SEXUAL CONTACT**.--The terms `sexual act' and `sexual contact' have the meanings given such terms in section 2246 of title 18, United States Code.
``(I) **TECHNOLOGY PROTECTION MEASURE**.--The term `technology protection measure' means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.".
(d) **CONFORMING AMENDMENT**.--Paragraph (4) of such section is amended by striking ``paragraph (5)(A)'' and inserting ``paragraph (7)(A)''.
(e) **SEPARABILITY**.--If any provision of paragraph (5) or (6) of section 254(h) of the Communications Act of 1934, as amended by this section, or the application thereof to any person or circumstance is held invalid, the remainder of such paragraph and the application of such paragraph to other persons or circumstances shall not be affected thereby.
(f) **REGULATIONS**.--
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(1) **REQUIREMENT**.--The Federal Communications Commission shall prescribe regulations for purposes of administering the provisions of paragraphs (5) and (6) of section 254(h) of the Communications Act of 1934, as amended by this section.
(2) **DEADLINE**.--Notwithstanding any other provision of law, the Commission shall prescribe regulations under paragraph (1) so as to ensure that such regulations take effect 120 days after the date of the enactment of this Act.
(g) **AVAILABILITY OF CERTAIN FUNDS FOR ACQUISITION OF TECHNOLOGY PROTECTION MEASURES.**
(1) **IN GENERAL**.--Notwithstanding any other provision of law, funds available under section 3134 or part A of title VI of the Elementary and Secondary Education Act of 1965, or under section 231 of the Library Services and Technology Act, may be used for the purchase or acquisition of technology protection measures that are necessary to meet the requirements of this title and the amendments made by this title. No other sources of funds for the purchase or acquisition of such measures are authorized by this title, or the amendments made by this title.
(2) **TECHNOLOGY PROTECTION MEASURE DEFINED**.--In this section, the term ``technology protection measure'' has the meaning given that term in section 1703.
(h) **EFFECTIVE DATE**.--The amendments made by this section shall take effect 120 days after the date of the enactment of this Act.
Subtitle C--Neighborhood Children's Internet Protection
SEC. 1731. SHORT TITLE.
This subtitle may be cited as the ``Neighborhood Children's Internet Protection Act''.
SEC. 1732. INTERNET SAFETY POLICY REQUIRED.
Section 254 of the Communications Act of 1934 (47 U.S.C. 254) is amended by adding at the end the following:
``(l) **INTERNET SAFETY POLICY REQUIREMENT FOR SCHOOLS AND LIBRARIES**.--
``(1) **IN GENERAL**.--In carrying out its responsibilities under subsection (h), each school or library to which subsection (h) applies shall--
``(A) adopt and implement an Internet safety policy that addresses--
``(i) access by minors to inappropriate matter on the Internet and World Wide Web;

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``(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;
``(iii) unauthorized access, including so-called `hacking', and other unlawful activities by minors online;
``(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and
``(v) measures designed to restrict minors' access to materials harmful to minors; and
``(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.
``(2) **LOCAL DETERMINATION OF CONTENT**.--A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may--
``(A) establish criteria for making such determination;
``(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or
``(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B).
``(3) **AVAILABILITY FOR REVIEW**.--Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.
``(4) **EFFECTIVE DATE**.--This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after the date of the enactment of the Children's Internet Protection Act.".
SEC. 1733. IMPLEMENTING REGULATIONS.
Not later than 120 days after the date of enactment of this Act, the Federal Communications Commission shall prescribe regulations for purposes of section 254(l) of the Communications Act of 1934, as added by section 1732 of this Act.
Subtitle D--Expedited Review
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SEC. 1741. EXPEDITED REVIEW.
(a) **THREE-JUDGE DISTRICT COURT HEARING**.--Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.
(b) **APPELLATE REVIEW**.--Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

Children's Internet Protection Act, www.ifea.net/**cipa**.pdf [accessed February 21, 2007].

CHILDREN'S ONLINE PRIVACY PROTECTION ACT

SEC. 1301. SHORT TITLE.

This title may be cited as the "Children's Online Privacy Protection Act of 1998".

SEC. 1302. DEFINITIONS.

In this title:

(1) CHILD.—The term "child" means an individual under the age of 13.

(2) OPERATOR.—The term "operator"—

(A) means any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, involving commerce—

(i) among the several States or with 1 or more foreign nations;

(ii) in any territory of the United States or in the District of Columbia, or between any such territory and—

(I) another such territory; or

(II) any State or foreign nation; or

(iii) between the District of Columbia and any State, territory, or foreign nation; but

(B) does not include any nonprofit entity that would otherwise be exempt from coverage under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

(3) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(4) DISCLOSURE.—The term "disclosure" means, with respect to personal information—

(A) the release of personal information collected from a child in identifiable form by an operator for any purpose, except where such information is provided to a person other than the operator who provides support for the internal operations of the website and does not disclose or use that information for any other purpose; and

(B) making personal information collected from a child by a website or online service directed to children or with actual knowledge that such information was collected from a child, publicly available in identifiable form, by any means including by a public posting, through the Internet, or through—

(i) a home page of a website;

(ii) a pen pal service;

(iii) an electronic mail service;

(iv) a message board; or

(v) a chat room.

(5) FEDERAL AGENCY.—The term "Federal agency" means an agency, as that term is defined in section 551(1) of title 5, United States Code.

(6) INTERNET.—The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/ Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(7) PARENT.—The term "parent" includes a legal guardian.

(8) PERSONAL INFORMATION.—The term "personal information" means individually identifiable information about an individual collected online, including—

(A) a first and last name;

(B) a home or other physical address including street name and name of a city or town;

(C) an e-mail address;

(D) a telephone number;

(E) a Social Security number;

(F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual; or

(G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.

(9) VERIFIABLE PARENTAL CONSENT.—The term "verifiable parental consent" means any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child.

(10) WEBSITE OR ONLINE SERVICE DIRECTED TO CHILDREN.—

(A) IN GENERAL.—The term "website or online service directed to children" means—

(i) a commercial website or online service that is targeted to children; or

(ii) that portion of a commercial website or online service that is targeted to children.

(B) LIMITATION.—A commercial website or online service, or a portion of a commercial website or online service, shall not be deemed directed to children solely for referring or linking to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link.

(11) PERSON.—The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

(12) ONLINE CONTACT INFORMATION.—The term "online contact information" means an e-mail address or an-other substantially similar identifier that permits direct contact with a person online.

SEC. 1303. REGULATION OF UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN CONNECTION WITH THE COLLECTION AND USE OF PERSONAL INFORMATION FROM AND ABOUT CHILDREN ON THE INTERNET.

(a) ACTS PROHIBITED.—

(1) IN GENERAL.—It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under subsection (b).

(2) DISCLOSURE TO PARENT PROTECTED.—Notwithstanding paragraph (1), neither an operator of such a website or online service nor the operator's agent shall be held to be liable under any Federal or State law for any disclosure made in good faith and following reasonable procedures in responding to a request for disclosure of per-sonal information under subsection (b)(1)(B)(iii) to the parent of a child.

(b) REGULATIONS.—

(1) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the Commission shall promulgate under section 553 of title 5, United States Code, regulations that—

(A) require the operator of any website or online service directed to children that collects personal information from children or the operator of a website or online service that has actual knowledge that it is collecting personal information from a child—

(i) to provide notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practices for such information; and

(ii) to obtain verifiable parental consent for the collection, use, or disclosure of personal information from children;

(B) require the operator to provide, upon request of a parent under this subparagraph whose child has provided personal information to that website or online service, upon proper identification of that parent, to such par-ent—

(i) a description of the specific types of personal information collected from the child by that operator;

(ii) the opportunity at any time to refuse to permit the operator's further use or maintenance in retrievable form, or future online collection, of personal information from that child; and

(iii) notwithstanding any other provision of law, a means that is reasonable under the circumstances for the parent to obtain any personal information collected from that child;

(C) prohibit conditioning a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and

(D) require the operator of such a website or online service to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

(2) WHEN CONSENT NOT REQUIRED.—The regulations shall provide that verifiable parental consent under paragraph (1)(A)(ii) is not required in the case of—

(A) online contact information collected from a child that is used only to respond directly on a one-time basis to a specific request from the child and is not used to recontact the child and is not maintained in retrievable form by the operator;

(B) a request for the name or online contact information of a parent or child that is used for the sole purpose of obtaining parental consent or providing notice under this section and where such information is not maintained in retrievable form by the operator if parental consent is not obtained after a reasonable time;

(C) online contact information collected from a child that is used only to respond more than once directly to a specific request from the child and is not used to recontact the child beyond the scope of that request—

(i) if, before any additional response after the initial response to the child, the operator uses reasonable efforts to provide a parent notice of the online contact information collected from the child, the purposes for which it is to be used, and an opportunity for the parent to request that the operator make no further use of the information and that it not be maintained in retrievable form; or

(ii) without notice to the parent in such circumstances as the Commission may determine are appropriate, taking into consideration the benefits to the child of access to information and services, and risks to the security and privacy of the child, in regulations promulgated under this subsection;

(D) the name of the child and online contact information (to the extent reasonably necessary to protect the safety of a child participant on the site)—

(i) used only for the purpose of protecting such safety;

(ii) not used to recontact the child or for any other purpose; and

(iii) not disclosed on the site, if the operator uses reasonable efforts to provide a parent notice of the name and online contact information collected from the child, the purposes for which it is to be used, and an opportunity for the parent to request that the operator make no further use of the information and that it not be maintained in retrievable form; or

(E) the collection, use, or dissemination of such information by the operator of such a website or online service necessary—

(i) to protect the security or integrity of its website;

(ii) to take precautions against liability;

(iii) to respond to judicial process; or

(iv) to the extent permitted under other provisions of law, to provide information to law enforcement agencies or for an investigation on a matter related to public safety. 1815

(3) TERMINATION OF SERVICE.—The regulations shall permit the operator of a website or an online service to terminate service provided to a child whose parent has refused, under the regulations prescribed under paragraph (1)(B)(ii), to permit the operator's further use or maintenance in retrievable form, or future online collection, of personal information from that child.

(c) ENFORCEMENT.—Subject to sections 1304 and 1306, a violation of a regulation prescribed under subsection (a) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(d) INCONSISTENT STATE LAW.—No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this title that is inconsistent with the treatment of those activities or actions under this section.

SEC. 1304. SAFE HARBORS.

(a) GUIDELINES.—An operator may satisfy the requirements of regulations issued under section 1303(b) by following a set of self-regulatory guidelines, issued by representatives of the marketing or online industries, or by other persons, approved under subsection (b).

(b) INCENTIVES.—

(1) SELF-REGULATORY INCENTIVES.—In prescribing regulations under section 1303, the Commission shall provide incentives for self-regulation by operators to implement the protections afforded children under the regulatory requirements described in subsection (b) of that section.

(2) DEEMED COMPLIANCE.—Such incentives shall include provisions for ensuring that a person will be deemed to be in compliance with the requirements of the regulations under section 1303 if that person complies with guidelines that, after notice and comment, are approved by the Commission upon making a determination that the guidelines meet the requirements of the regulations issued under section 1303.

(3) EXPEDITED RESPONSE TO REQUESTS.—The Commission shall act upon requests for safe harbor treatment within 180 days of the filing of the request, and shall set forth in writing its conclusions with regard to such requests.

(c) APPEALS.—Final action by the Commission on a request for approval of guidelines, or the failure to act within 180 days on a request for approval of guidelines, submitted under subsection (b) may be appealed to a district court of the United States of appropriate jurisdiction as provided for in section 706 of title 5, United States Code.

SEC. 1305. ACTIONS BY STATES.

(a) IN GENERAL.—

(1) CIVIL ACTIONS.—In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by the engagement of any person in a practice that violates any regulation of the Commission prescribed under section 1303(b), the State, as parens patriae, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction to—

(A) enjoin that practice;

(B) enforce compliance with the regulation;

(C) obtain damage, restitution, or other compensation on behalf of residents of the State; or

(D) obtain such other relief as the court may consider to be appropriate.

(2) NOTICE.—

(A) IN GENERAL.—Before filing an action under paragraph (1), the attorney general of the State involved shall provide to the Commission—

(i) written notice of that action; and

(ii) a copy of the complaint for that action.

(B) EXEMPTION.—

(i) IN GENERAL.—Subparagraph (A) shall not apply with respect to the filing of an action by an attorney general of a State under this subsection, if the attorney general determines that it is not feasible to provide the notice described in that subparagraph before the filing of the action.

(ii) NOTIFICATION.—In an action described in clause (i), the attorney general of a State shall provide notice and a copy of the complaint to the Commission at the same time as the attorney general files the action.

(b) INTERVENTION.—

(1) IN GENERAL.—On receiving notice under subsection (a)(2), the Commission shall have the right to intervene in the action that is the subject of the notice.

(2) EFFECT OF INTERVENTION.—If the Commission intervenes in an action under subsection (a), it shall have the right—

(A) to be heard with respect to any matter that arises in that action; and

(B) to file a petition for appeal.

(3) AMICUS CURIAE.—Upon application to the court, a person whose self-regulatory guidelines have been approved by the Commission and are relied upon as a defense by any defendant to a proceeding under this section may file amicus curiae in that proceeding.

(c) CONSTRUCTION.—For purposes of bringing any civil action under subsection (a), nothing in this title shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State to—

(1) conduct investigations;

(2) administer oaths or affirmations; or

(3) compel the attendance of witnesses or the production of documentary and other evidence.

(d) ACTIONS BY THE COMMISSION.—In any case in which an action is instituted by or on behalf of the Commission for violation of any regulation prescribed under section 1303, no State may, during the pendency of that action, institute an action under subsection (a) against any defendant named in the complaint in that action for violation of that regulation.

(e) VENUE; SERVICE OF PROCESS.—

(1) VENUE.—Any action brought under subsection (a) may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

(2) SERVICE OF PROCESS.—In an action brought under subsection (a), process may be served in any district in which the defendant—

(A) is an inhabitant; or

(B) may be found.

SEC. 1306. ADMINISTRATION AND APPLICABILITY OF ACT.

(a) IN GENERAL.—Except as otherwise provided, this title shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(b) PROVISIONS.—Compliance with the requirements imposed under this title shall be enforced under—(1) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act (12 U.S.C. 601 et seq. and 611 et seq.), by the Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Direc- tors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act (12 U.S.C. 1751 et seq.) by the National Credit Union Administration Board with respect to any Federal credit union;

(4) part A of subtitle VII of title 49, United States Code, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act (7 U.S.C. 226, 227)), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.) by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association.

(c) EXERCISE OF CERTAIN POWERS.—For the purpose of the exercise by any agency referred to in subsection (a) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title, any other authority conferred on it by law.

(d) ACTIONS BY THE COMMISSION.—The Commission shall prevent any person from violating a rule of the Commission under section 1303 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part

of this title. Any entity that violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this title.

(e) EFFECT ON OTHER LAWS.—Nothing contained in the Act shall be construed to limit the authority of the Commission under any other provisions of law.

SEC. 1307. REVIEW.

Not later than 5 years after the effective date of the regulations initially issued under section 1303, the Commission shall—

(1) review the implementation of this title, including the effect of the implementation of this title on practices relating to the collection and disclosure of information relating to children, children's ability to obtain access to information of their choice online, and on the availability of websites directed to children; and

(2) prepare and submit to Congress a report on the results of the review under paragraph (1).

SEC. 1308. EFFECTIVE DATE. Sections 1303(a), 1305, and 1306 of this title take effect on the later of—

(1) the date that is 18 months after the date of enactment of this Act; or

(2) the date on which the Commission rules on the first application filed for safe harbor treatment under section 1304 if the Commission does not rule on the first such application within one year after the date of enactment of this Act, but in no case later than the date that is 30 months after the date of enactment of this Act.

Children's Online Privacy Protection Act, FTC, http://www.ftc.gov/ogc/coppa1.htm and www.ftc.gov/os/1999/10/64fr59888.pdf [accessed February 21, 2007].

COMMUNICATIONS DECENCY ACT

Enacted by the U.S. Congress on February 1, 1996

SECTION 1. SHORT TITLE; REFERENCES.

(a) Short Title.--This Act may be cited as the ``Telecommunications Act of 1996".

(b) References.--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

....

TITLE V--OBSCENITY AND VIOLENCE

Subtitle A--Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

This title may be cited as the ``Communications Decency Act of 1996".

SEC. 502. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended--

(1) by striking subsection (a) and inserting in lieu thereof:

``(a) Whoever--

``(1) in interstate or foreign communications--

``(A) by means of a telecommunications device knowingly--

``(i) makes, creates, or solicits, and

``(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

``(B) by means of a telecommunications device knowingly--

``(i) makes, creates, or solicits, and

``(ii) initiates the transmission of,

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

``(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

``(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

``(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication

ensues, solely to harass any person at the called number or who receives the communication; or

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

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both."; and

(2) by adding at the end the following new subsections:

``(d) Whoever--

``(1) in interstate or foreign communications knowingly--

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

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

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

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

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

``(e) In addition to any other defenses available by law:

``(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

``(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

``(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

``(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

``(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person--

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

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

``(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize

such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

``(f)(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

``(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: Provided, however, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

``(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

``(h) For purposes of this section--

``(1) The use of the term `telecommunications device' in this section--

``(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

``(B) does not include an interactive computer service.

``(2) The term `interactive computer service' has the meaning provided in section 230(e)(2).

``(3) The term `access software' means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

``(A) filter, screen, allow, or disallow content;

``(B) pick, choose, analyze, or digest content; or

``(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

``(4) The term `institution of higher education' has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).

``(5) The term `library' means a library eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).".

SEC. 503. OBSCENE PROGRAMMING ON CABLE TELEVISION.

Section 639 (47 U.S.C. 559) is amended by striking ``not more than $10,000" and inserting ``under title 18, United States Code,".

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S. C. 551 et seq.) is amended by adding at the end the following:

``SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

``(a) Subscriber Request.--Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

``(b) Definition.--As used in this section, the term `scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) Requirement.--Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

``SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

``(a) Requirement.--In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor s
otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

``(b) Implementation.--Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

``(c) Definition.--As used in this section, the term `scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

(b) Effective Date.--The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

SEC. 506. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) Public, Educational, and Governmental Channels.--Section 611(e) (47 U.S.C. 531(e)) is amended by inserting before the period the following: ``, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity".

(b) Cable Channels for Commercial Use.--Section 612(c)(2) (47 U.S.C. 532(c)(2)) is amended by striking ``an operator" and inserting ``a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and".

SEC. 507. CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

(a) Importation or Transportation.--Section 1462 of title 18, United States Code, is amended--

(1) in the first undesignated paragraph, by inserting ``or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)" after ``carrier"; and

(2) in the second undesignated paragraph--

(A) by inserting ``or receives," after ``takes";

(B) by inserting ``or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)" after ``common carrier"; and

(C) by inserting ``or importation" after ``carriage".

(b) Transportation for Purposes of Sale or Distribution.--The first undesignated paragraph of section 1465 of title 18, United States Code, is amended--

(1) by striking ``transports in" and inserting ``transports or travels in, or uses a facility or means of,";

(2) by inserting ``or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce" after

``foreign commerce'' the first place it appears;

(3) by striking ``, or knowingly travels in'' and all that follows through ``obscene material in interstate or foreign commerce,'' and inserting ``of''.

(c) Interpretation.--The amendments made by this section are clarifying and shall not be interpreted to limit or repeal any prohibition contained in sections 1462 and 1465 of title 18, United States Code, before such amendment, under the rule established in United States v. Alpers, 338 U.S. 680 (1950).

SEC. 508. COERCION AND ENTICEMENT OF MINORS.

Section 2422 of title 18, United States Code, is amended--

(1) by inserting ``(a)'' before ``Whoever knowingly''; and

(2) by adding at the end the following:

``(b) Whoever, using any facility or means of interstate or foreign commerce, including the mail, or within the special maritime and territorial jurisdiction of the United States, knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.''.

SEC. 509. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

``SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

``(a) Findings.--The Congress finds the following:

``(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

``(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

``(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

``(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

``(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

``(b) Policy.--It is the policy of the United States--

``(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

``(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

``(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

``(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

``(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

``(c) Protection for `Good Samaritan' Blocking and Screening of Offensive Material.--

``(1) Treatment of publisher or speaker.--No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

``(2) Civil liability.--No provider or user of an interactive computer service shall be held liable on account of--

``(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

``(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

``(d) Effect on Other Laws.--

``(1) No effect on criminal law.--Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

``(2) No effect on intellectual property law.--Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

``(3) State law.--Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

``(4) No effect on communications privacy law.--Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

``(e) Definitions.--As used in this section:

``(1) Internet.--The term `Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

``(2) Interactive computer service.--The term `interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

``(3) Information content provider.--The term `information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

``(4) Access software provider.--The term `access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

``(A) filter, screen, allow, or disallow content;

``(B) pick, choose, analyze, or digest content; or

``(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.".

Subtitle Bviolence

SEC. 551. PARENTAL CHOICE IN TELEVISION PROGRAMMING.

(a) Findings.--The Congress makes the following findings:

(1) Television influences children's perception of the values and behavior that are common and acceptable in society.

(2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming has established a

uniquely pervasive presence in the lives of American children.

(3) The average American child is exposed to 25 hours of television each week and some children are exposed to as much as 11 hours of television a day.

(4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior.

(5) Children in the United States are, on average, exposed to an estimated 8,000 murders and 100,000 acts of violence on television by the time the child completes elementary school.

(6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children.

(7) Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children.

(8) There is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children.

(9) Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.

(b) Establishment of Television Rating Code.--

(1) Amendment.--Section 303 (47 U.S.C. 303) is amended by adding at the end the following:

``(w) Prescribe--

``(1) on the basis of recommendations from an advisory committee established by the Commission in accordance with section 551(b)(2) of the Telecommunications Act of 1996, guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, provided that nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content; and

``(2) with respect to any video programming that has been rated, and in consultation with the television industry, rules requiring distributors of such video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children.".

(2) Advisory committee requirements.--In establishing an advisory committee for purposes of the amendment made by paragraph (1) of this subsection, the Commission shall--

(A) ensure that such committee is composed of parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee;

(B) provide to the committee such staff and resources as may be necessary to permit it to perform its functions efficiently and promptly; and

(C) require the committee to submit a final report of its recommendations within one year after the date of the appointment of the initial members.

(c) Requirement for Manufacture of Televisions That Block Programs.--Section 303 (47 U.S.C. 303), as amended by subsection (a), is further amended by adding at the end the following:

``(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a

feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4).".

(d) Shipping of Televisions That Block Programs.--

(1) Regulations.--Section 330 (47 U.S.C. 330) is amended--

(A) by redesignating subsection (c) as subsection (d); and

(B) by adding after subsection (b) the following new subsection (c):

``(c)(1) Except as provided in paragraph (2), no person shall ship in interstate commerce or manufacture in the United States any apparatus described in section 303(x) of this Act except in accordance with rules prescribed by the Commission pursuant to the authority granted by that section.

``(2) This subsection shall not apply to carriers transporting apparatus referred to in paragraph (1) without trading in it.

``(3) The rules prescribed by the Commission under this subsection shall provide for the oversight by the Commission of the adoption of standards by industry for blocking technology. Such rules shall require that all such apparatus be able to receive the rating signals which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and blocking specifications established by industry under the supervision of the Commission.

``(4) As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that blocking service continues to be available to consumers. If the Commission determines that an alternative blocking technology exists that--

``(A) enables parents to block programming based on identifying programs without ratings,

``(B) is available to consumers at a cost which is comparable to the cost of technology that allows parents to block programming based on common ratings, and

``(C) will allow parents to block a broad range of programs on a multichannel system as effectively and as easily as technology that allows parents to block programming based on common ratings,

the Commission shall amend the rules prescribed pursuant to section 303(x) to require that the apparatus described in such section be equipped with either the blocking technology described in such section or the alternative blocking technology described in this paragraph.".

(2) Conforming amendment.--Section 330(d), as redesignated by subsection (d)(1)(A), is amended by striking ``section 303(s), and section 303(u)" and inserting in lieu thereof ``and sections 303(s), 303(u), and 303(x)".

(e) Applicability and Effective Dates.--

(1) Applicability of rating provision.--The amendment made by subsection (b) of this section shall take effect 1 year after the date of enactment of this Act, but only if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have not, by such date--

(A) established voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission; and

(B) agreed voluntarily to broadcast signals that contain ratings of such programming.

(2) Effective date of manufacturing provision.--In prescribing regulations to implement the amendment made by subsection (c), the Federal Communications Commission shall, after consultation with the television manufacturing industry, specify the effective date for the applicability of the requirement to the apparatus covered by such amendment, which date shall not be less than two years after the date of enactment of this Act.

SEC. 552. TECHNOLOGY FUND.

It is the policy of the United States to encourage broadcast television, cable, satellite, syndication, other video programming distributors, and relevant related industries (in consultation with appropriate public interest groups and interested individuals from the private sector) to--

(1) establish a technology fund to encourage television and electronics equipment manufacturers to facilitate the development of technology which would empower parents to block programming they deem inappropriate for their children and to encourage the availability thereof to low income parents;

(2) report to the viewing public on the status of the development of affordable, easy to use blocking technology; and

(3) establish and promote effective procedures, standards, systems, advisories, or other mechanisms for ensuring that users have easy and complete access to the information necessary to effectively utilize blocking technology and to encourage the availability thereof to low income parents.

Subtitle C--Judicial Review

SEC. 561. EXPEDITED REVIEW.

(a) Three-Judge District Court Hearing.--Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) Appellate Review.--Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

Full text of the CDA can be found online at the Electronic Privacy Information Center, “Void! Declared Unconstitutional by the U.S. Supreme Court,” http://www.epic.org/free_speech/CDA/cda.html [accessed5/8/06].

Full text of the CDA can be found online at the Center for Democracy and Technology, http://www.cdt.org/speech/cda/951221cda.html [accessed 5/19/06]

DOT KIDS IMPLEMENTATION AND EFFICIENCY ACT OF 2002

[[Page 116 STAT. 2766]]

Public Law 107-317
107th Congress

An Act

To facilitate the creation of a new, <<NOTE: Dec. 4, 2002 - [H.R. 3833]>> second-level Internet domain within the United States country code domain that will be a haven for material that promotes positive experiences for children and families using the Internet, provides a safe online environment for children, and helps to prevent children from being exposed to harmful material on the Internet, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress <<NOTE: Dot Kids Implementation and Efficiency Act of 2002.>> assembled,

SECTION 1. <<NOTE: 47 USC 901 note.>> SHORT TITLE.

This Act may be cited as the ``Dot Kids Implementation and Efficiency Act of 2002".

SEC. 2. <<NOTE: 47 USC 941 note.>> FINDINGS AND PURPOSES.

(a) Findings.--The Congress finds that--

(1) the World Wide Web presents a stimulating and entertaining opportunity for children to learn, grow, and develop educationally and intellectually;

(2) Internet technology also makes available an extensive amount of information that is harmful to children, as studies indicate that a significant portion of all material available on the Internet is related to pornography;

(3) young children, when trying to use the World Wide Web for positive purposes, are often presented--either mistakenly or intentionally--with material that is inappropriate for their age, which can be extremely frustrating for children, parents, and educators;

(4) exposure of children to material that is inappropriate for them, including pornography, can distort the education and development of the Nation's youth and represents a serious harm to American families that can lead to a host of other problems for children, including inappropriate use of chat rooms, physical molestation, harassment, and legal and financial difficulties;

(5) young boys and girls, older teens, troubled youth,

frequent Internet users, chat room participants, online risk takers, and those who communicate online with strangers are at greater risk for receiving unwanted sexual solicitation on the Internet;

(6) studies have shown that 19 percent of youth (ages 10 to 17) who used the Internet regularly were the targets of unwanted sexual solicitation, but less than 10 percent of the solicitations were reported to the police;

(7) children who come across illegal content should report it to the congressionally authorized CyberTipline, an online

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mechanism developed by the National Center for Missing and Exploited Children, for citizens to report sexual crimes against children;

(8) the CyberTipline has received more than 64,400 reports, including reports of child pornography, online enticement for sexual acts, child molestation (outside the family), and child prostitution;

(9) although the computer software and hardware industries, and other related industries, have developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, to date such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

(10) the creation of a ``green-light'' area within the United States country code Internet domain, that will contain only content that is appropriate for children under the age of 13, is analogous to the creation of a children's section within a library and will promote the positive experiences of children and families in the United States; and

(11) while custody, care, and nurture of the child reside first with the parent, the protection of the physical and psychological well-being of minors by shielding them from material that is harmful to them is a compelling governmental interest.

(b) Purposes.--The purposes of this Act are--

(1) to facilitate the creation of a second-level domain within the United States country code Internet domain for the location of material that is suitable for minors and not harmful to minors; and

(2) to ensure that the National Telecommunications and Information Administration oversees the creation of such a second-level domain and ensures the effective and efficient establishment and operation of the new domain.

SEC. 3. NTIA AUTHORITY.

Section 103(b)(3) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 902(b)(3)) is amended--

(1) in subparagraph (A), by striking ``and'' at the end;

(2) in subparagraph (B), by striking the period at the end

and inserting ``; and''; and

(3) by adding at the end the following new subparagraph:

``(C) shall assign to the NTIA responsibility for providing for the establishment, and overseeing operation, of a second-level Internet domain within the United States country code domain in accordance with section 157.''.

SEC. 4. CHILD-FRIENDLY SECOND-LEVEL INTERNET DOMAIN.

The National Telecommunications and Information Administration Organization Act (47 U.S.C. 901 et seq.) is amended in part C by adding at the end the following new section:

``SEC. 157. <<NOTE: 47 USC 941.>> CHILD-FRIENDLY SECOND-LEVEL INTERNET DOMAIN.

``(a) Responsibilities.--The NTIA shall require the registry selected to operate and maintain the United States country code Internet domain to establish, operate, and maintain a second-level domain within the United States country code domain that provides

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access only to material that is suitable for minors and not harmful to minors (in this section referred to as the `new domain').

``(b) Conditions of Contracts.--

``(1) Initial registry.--The NTIA shall not exercise any option periods under any contract between the NTIA and the initial registry to operate and maintain the United States country code Internet domain unless the initial registry agrees, during the 90-day period beginning upon the date of the enactment of the Dot Kids Implementation and Efficiency Act of 2002, to carry out, and to operate the new domain in accordance with, the requirements under subsection (c). Nothing in this subsection shall be construed to prevent the initial registry of the United States country code Internet domain from participating in the NTIA's process for selecting a successor registry or to prevent the NTIA from awarding, to the initial registry, the contract to be successor registry subject to the requirements of paragraph (2).

``(2) Successor registries.--The NTIA shall not enter into any contract for operating and maintaining the United States country code Internet domain with any successor registry unless such registry enters into an agreement with the NTIA, during the 90-day period after selection of such registry, that provides for the registry to carry out, and the new domain to operate in accordance with, the requirements under subsection (c).

``(c) Requirements of New Domain.--The registry and new domain shall be subject to the following requirements:

``(1) Written content standards for the new domain, except that the NTIA shall not have any authority to establish such standards.

``(2) Written agreements with each registrar for the new

domain that require that use of the new domain is in accordance with the standards and requirements of the registry.

``(3) Written agreements with registrars, which shall require registrars to enter into written agreements with registrants, to use the new domain in accordance with the standards and requirements of the registry.

``(4) Rules and procedures for enforcement and oversight that minimize the possibility that the new domain provides access to content that is not in accordance with the standards and requirements of the registry.

``(5) A process for removing from the new domain any content that is not in accordance with the standards and requirements of the registry.

``(6) A process to provide registrants to the new domain with an opportunity for a prompt, expeditious, and impartial dispute resolution process regarding any material of the registrant excluded from the new domain.

``(7) Continuous and uninterrupted service for the new domain during any transition to a new registry selected to operate and maintain new domain or the United States country code domain.

``(8) Procedures and mechanisms to promote the accuracy of contact information submitted by registrants and retained by registrars in the new domain.

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``(9) Operationality of the new domain not later than one year after the date of the enactment of the Dot Kids Implementation and Efficiency Act of 2002.

``(10) Written agreements with registrars, which shall require registrars to enter into written agreements with registrants, to prohibit two-way and multiuser interactive services in the new domain, unless the registrant certifies to the registrar that such service will be offered in compliance with the content standards established pursuant to paragraph (1) and is designed to reduce the risk of exploitation of minors using such two-way and multiuser interactive services.

``(11) Written agreements with registrars, which shall require registrars to enter into written agreements with registrants, to prohibit hyperlinks in the new domain that take new domain users outside of the new domain.

``(12) Any other action that the NTIA considers necessary to establish, operate, or maintain the new domain in accordance with the purposes of this section.

``(d) Option Periods for Initial Registry.--The NTIA shall grant the initial registry the option periods available under the contract between the NTIA and the initial registry to operate and maintain the United States country code Internet domain if, and may not grant such option periods unless, the NTIA finds that the initial registry has satisfactorily performed its obligations under this Act and under the contract. Nothing in this section shall preempt or alter the NTIA's authority to terminate such contract for the operation of the United States country code Internet domain for cause or for convenience.

``(e) Treatment of Registry and Other Entities.--

``(1) In general.--Only to the extent that such entities carry out functions under this section, the following entities are deemed to be interactive computer services for purposes of section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)):

``(A) The registry that operates and maintains the new domain.

``(B) Any entity that contracts with such registry to carry out functions to ensure that content accessed through the new domain complies with the limitations applicable to the new domain.

``(C) Any registrar for the registry of the new domain that is operating in compliance with its agreement with the registry.

``(2) Savings provision.--Nothing in paragraph (1) shall be construed to affect the applicability of any other provision of title II of the Communications Act of 1934 to the entities covered by subparagraph (A), (B), or (C) of paragraph (1).

``(f) Education.--The NTIA shall carry out a program to publicize the availability of the new domain and to educate the parents of minors regarding the process for utilizing the new domain in combination and coordination with hardware and software technologies that provide for filtering or blocking. <<NOTE: Deadline.>> The program under this subsection shall be commenced not later than 30 days after the date that the new domain first becomes operational and accessible by the public.

``(g) Coordination With Federal Government.--The registry selected to operate and maintain the new domain shall--

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``(1) consult with appropriate agencies of the Federal Government regarding procedures and actions to prevent minors and families who use the new domain from being targeted by adults and other children for predatory behavior, exploitation, or illegal actions; and

``(2) based upon the consultations conducted pursuant to paragraph (1), establish such procedures and take such actions as the registry may deem necessary to prevent such targeting.

The <<NOTE: Deadline.>> consultations, procedures, and actions required under this subsection shall be commenced not later than 30 days after the date that the new domain first becomes operational and accessible by the public.

``(h) Compliance <<NOTE: Deadline.>> Report.--The registry shall prepare, on an annual basis, a report on the registry's monitoring and enforcement procedures for the new domain. The registry shall submit each such report, setting forth the results of the review of its monitoring and enforcement procedures for the new domain, to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

``(i) Suspension of New Domain.--If the NTIA finds, pursuant to its own review or upon a good faith petition by the registry, that the new domain is not serving its intended purpose, the NTIA shall instruct the registry to suspend operation of the new domain until such time as the NTIA determines that the new domain can be operated as intended.

``(j) Definitions.--For purposes of this section, the following definitions shall apply:

``(1) Harmful to minors.--The term `harmful to minors' means, with respect to material, that--

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

``(B) the material 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, the material lacks serious, literary, artistic, political, or scientific value for minors.

``(2) Minor.--The term `minor' means any person under 13 years of age.

``(3) Registry.--The term `registry' means the registry selected to operate and maintain the United States country code Internet domain.

``(4) Successor registry.--The term `successor registry' means any entity that enters into a contract with the NTIA to operate and maintain the United States country code Internet domain that covers any period after the termination or expiration of the contract to operate and maintain the United States country code Internet domain, and any option periods under such contract, that was signed on October 26, 2001.

``(5) Suitable for minors.--The term `suitable for minors' means, with respect to material, that it--

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``(A) is not psychologically or intellectually inappropriate for minors; and

``(B) serves--

``(i) the educational, informational, intellectual, or cognitive needs of minors; or

``(ii) the social, emotional, or entertainment needs of minors.''.

Approved December 4, 2002.

From Thomas.gov, GPO, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ317.107 [accessed February 23, 2007].

VITA

Leo Vivara Trisnadi-Rages was born in 1975 in Jakarta, Indonesia. She grew up in Singapore between 4 to 12 years old where she attended elementary school. She went to a private Christian boarding school called All Saints' College in Bathurst, NSW, Australia, between Grades 7 to 11. For high school, she attended Coquitlam College in Vancouver, British Columbia, Canada. She went to the Edward R. Murrow School of Communication at Washington State University, U.S.A., for her undergraduate degree in Fall 1994. Vivara was the Journal Coordinator for *The Western Journal of Black Studies* at Washington State University between May 1998 and August 2000. She graduated with a Bachelor's degree in Communication with an Advertising degree emphasis in May 1998 and continued on at Washington State University for her Master's degree. She graduated with a Master's degree in Communication in August 2000. While in the Master's program, her research focus was in the area of advertising. She went to the Missouri School of Journalism at University of Missouri-Columbia in Fall 2000 for her doctoral program. Her doctoral research focus is in the area of communication law with emphasis on Internet law. Her research interests are in consumer advocacy and protection of children online.