PROBLEMS WITH GOVERNMENT REGULATION OF THE INTERNET: ADJUSTING THE COURT'S LEVEL OF FIRST AMENDMENT SCRUTINY

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I. INTRODUCTION

The Internet is a precarious place to tread; those seeking to venture out into the World Wide Web need to watch where they step. Recently, adults and children using search engines to locate information on subjects, such as "kids on the net," "Oklahoma tornadoes," or "child car seats," were taken against their will to pornographic sites where they were exposed to lurid, graphic sexual images.[1] Once there, they were trapped without means of escape.[2] When they tried to exit the sites using their Internet browser's "back" and "close" buttons, they were instead transported to additional pornographic sites.[3] Each attempt to escape trapped them even further into a web of sexually explicit images.[4]

The broadcasters of the pornography were able to accomplish these "kidnappings" by making exact copies of more than twenty-five million legitimate web pages.[5] Their copies included the site's embedded text that enables search engines to locate the site based on its subject matter.[6] The pornographers then

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1. *See* Federal Trade Comm'n News Release, *FTC Halts Internet Highjacking Scam* (visited Sept. 23, 2000) <http://www.ftc.gov/opa/1999/9909/atariz.htm>.
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See* Complaint for Permanent Injunction and Other Equitable Relief at para. 17, Federal Trade Comm'n v. Carlos Pereira (E.D. Va., Alexandria Div. Sept. 22, 1999) (visited Sept. 23, 2000) <http://www.ftc.gov/os/1999/9909/atarizfcomplaint.htm>. This highjacking of web pages is accomplished by making unauthorized copies of legitimate web pages and posting them onto computer servers that contain "spider" software used by search engines. *See id.* at para. 17. The copies contain not only the images and text of the

inserted a hidden line of software code which automatically and almost instantly redirected web-surfers to sexually explicit sites.[7] When Internet users searched for topics such as children's songs, books, recipes, and popular movies, the search engine located and brought up a list of related sites that included the copycat sites.[8] Believing the phony sites to be legitimate, users unwittingly clicked on the listings and were transported to web sites containing pornographic images.[9] Once there, users were trapped, because the offenders had disabled their "back" and "close" buttons on the web browser. Normally, the "back" button allows the user to return to the previously visited page, and the "X" button at the top right corner of the Internet browser allows the user to exit the browser program entirely.[10] However, the offender had altered the function of those buttons so that clicking on them sent users to additional pornographic sites.[11] This type of reprogramming is referred to as "mousetrapping."[12] The offenders were able to override the users' attempts to exit the offensive sites, making the viewing of pornography unavoidable.[13]

Being trapped and forced to view something offensive can be distressing enough for adults. However, when children are forced to view pornography, it can be harmful to their natural sexual development, resulting in distorted beliefs about human sexuality.[14] The threat of exposure to pornography is not the only problem

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originals, but they also contain the original metatags, which summarize the contents of the web page and are used by search engines to compare sites to the user's search request. *See id.* at paras. 14, 17. Thus, when the unauthorized copy is posted onto the server, the search engine indexes the copy along with the original page. *See id.* at para. 18.

7. *See id.* at para. 19. Once the unauthorized copy is made, a hidden line of software code, called "javascript," is inserted into the web page. This javascript automatically redirects the user to a pornographic site. The user never sees the original web page or the unauthorized copy—only the adult site. *See id.*

8. *See id.* at para. 18.

9. *See supra* note 1.

10. *See supra* note 6, at para. 20.

11. *See* Complaint for Permanent Injunction and Other Equitable Relief, *supra* note 6, at para. 3.

12. Margaret Mannix, *'Pagejacked' Into Pornoland*, U.S. NEWS ONLINE, Oct. 4, 1999 (visited Oct. 9, 2000) <http://www.usnews.com/usnews/issue/991004/nycu/antibiotic.brf.htm>.

13. *See* Complaint for Permanent Injunction and Other Equitable Relief, *supra* note 6, at para. 20.

14. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI., AND TRANSP., 106TH CONG., REPORT ON S. 97, CHILDREN'S INTERNET PROTECTION ACT (1st. Sess. 1999) (reporting the harms that may occur to children as a result of viewing pornography):

> Natural sexual development occurs gradually, throughout childhood. Exposure of children to pornography distorts this natural development by shaping sexual perspective through premature exposure to sexual information and imagery. The result is a set of distorted beliefs about human sexuality. These shared distorted beliefs include: that pathological behavior is normal, is common, hurts no one, and is socially acceptable, that the female body is for male entertainment, that sex is not about intimacy, and that sex is the basis of self esteem.

Id. at 3–4 (statement of Mary Anne Layden, Ph.D., Director of Education, Center for Cognitive Therapy, Univ. of Pa., Comm. on Commerce, Sci., and Transp.).

associated with allowing children unrestricted access to the Internet.[15] Children may be lured into sexual activity by pedophiles, who often use the Internet to hide their identities, enabling them to stalk children anonymously through chatrooms and e-mail.[16]

Children generally gain access to the Internet in three places: in the home, at school, or in a library.[17] In the home, parents are responsible for monitoring their children's use of the Internet.[18] The Supreme Court has held that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[19] The problem arises when parents place their children in the care of the public school system. When children are at school, most parents are not in a position to supervise their children's Internet access, and are thus forced to rely on school officials to do so. The Supreme Court acknowledges that parents have a legitimate expectation that schools will protect their children from exposure to sexually explicit material.[20] In addition, the Supreme Court has long held that the government has a compelling interest in protecting children, both physically and psychologically, from the harmful effects of pornography.[21] This is true even when the material would not be obscene with respect to adults.[22]

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15. *See id.* at 4.

16. *See id.*:

> [A]n increasingly disturbing trend is that of highly organized and technologically sophisticated groups of pedophiles who utilize advanced technology to trade in child pornography and to sexually exploit and abuse children.
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> In 1996, the San Francisco Chronicle reported on police efforts to break up an international ring of pedophiles operating through an on-line chatroom known as the "Orchid Club." This case underscores both the technological sophistication of such activities and the unique challenge of protecting children who may explore a global communications medium. "The case appears to be the first incident where pornography on the Internet has been linked to an incident of child molestation that was transmitted on-line. Prosecutors said members produced and traded child pornography involving victims as young as five years old, swapped stories of having sex with minors and in one instance chatted online while two suspects molested a 10-year-old girl."

Id. (quoting *Child Porn Ring on Internet*, S.F. CHRON., July 17, 1996).

17. *See Children's Internet Protection Act: Hearing on S. 97 Before the Senate Comm. on Commerce, Sci., and Transp.*, 106th Cong. (Mar. 4, 1999) (statement of Senator John McCain, Chairman of the Senate Comm. on Commerce, Sci., and Transp.).

18. *See id.*

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

20. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) ("[Our cases] recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."); *see also* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1539–46 (7th Cir. 1996) (holding that schools acting in loco parentis may protect the children in their charge from certain types of expression).

21. *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological

The Internet provides easy access to pornography for everyone, including children. Students often use the computers in public schools and libraries to purposely seek out and download pornography, and even students who do not seek it out can be unwittingly "mousetrapped" into viewing lurid, sexually explicit material.[23] The United States Congress has struggled with the issue of how to provide schools with the necessary tools to protect the students in their charge from intentional or unwitting exposure to pornography. However, with regard to protecting children from pornography on the Internet, there exists a contravening interest which may trump the rights of both government and parents: it is the right to freedom of speech, recognized by the Supreme Court as a fundamental personal right.[24] In considering any regulation of the Internet, a legislative body must determine whether the government action interferes with the rights of citizens to send information and with children's rights to receive it. If it does interfere, the Supreme Court will find the law an unconstitutional abridgement of the right to disseminate and receive speech under the First Amendment.

This Note will discuss three major topics in relation to protecting children from pornography on the Internet. Part II of this Note discusses the Communications Decency Act and its invalidation by the Supreme Court in *Reno v. ACLU* ("*Reno I*").[25] Part II continues by discussing Congress' subsequent drafting of the Child Online Protection Act, which attempted to amend those provisions of the Communications Decency Act struck down by the Court. The new Act was challenged in *ACLU v. Reno* ("*Reno II*")[26] and was struck down by both the trial court and the Third Circuit Court of Appeals.[27]

Part III analyzes the differences between broadcast media and print media and discusses how the "pagejacking" and "mousetrapping" Internet scams described above are more analogous to problems encountered in broadcast media

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well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.") (citations omitted).

22. *See Ginsberg*, 390 U.S. at 640 (upholding a New York ban on sale of sexually explicit material to minors where the material was not held to be obscene with respect to adults).

23. *See generally Children's Internet Protection Act: Hearing on S. 97 Before the Senate Comm. on Commerce, Sci., and Transp.*, 106th Cong. (Mar. 4, 1999). "The [American Center for Law and Justice] has . . . received calls from distressed parents whose children have logged on a public library computer, only to be confronted with a pornographic website accessed by the previous user." *Id.* (statement of Jay Alan Sekulow, Esq., Chief Counsel, The American Center for Law and Justice). "Five A-level students used their school's computers to download hardcore pornography from the Internet." *Id.* (statement of Senator John McCain, Chairman, Senate Comm. on Commerce, Sci., and Transp.).

24. *See* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) ("Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.").

25. 521 U.S. 844 (1997).

26. 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3rd Cir. 2000).

27. *See* ACLU v. Reno, 217 F.3d 162 (3rd Cir. 2000).

than those encountered in printed works. This Note suggests that the outcome of *Reno I* would have been different had the Court analyzed the facts based on the premise that information on the Internet is broadcast media, rather than print media. This Note argues that the proper standard to apply to Internet regulation is the intermediate scrutiny used by the Supreme Court in First Amendment cases involving broadcast media, not the strict scrutiny employed in print media cases.

Part IV discusses the Children's Internet Protection Act. This legislation represents a new approach by Congress in its attempt to protect children from pornography on the Internet. This Act focuses on the *receivers* of information (the children in public schools that receive federal funding), whereas the prior Acts attempted to limit the *senders'* expression with criminal sanctions if they did not take reasonable steps to keep it out of the hands of children. The Children's Internet Protection Act appears to have remedied the constitutional deficiencies the Supreme Court found in *Reno I*. The Act should survive any constitutional challenges for three reasons: (1) the Act only allows the school districts to do what they are already constitutionally allowed to do in keeping certain materials from their students; (2) the Act should be reviewed according to the medium level of scrutiny of broadcast media cases rather than the strict scrutiny applied to print media cases; and (3) the Children's Internet Protection Act does not suffer from the problem of being overbroad, as did the prior Acts, because it focuses its attention on the receiver of transmission, rather than on the sender. It does not prevent anyone from distributing pornography on the Internet, but only narrowly limits those who receive it under specific circumscribed circumstances, in public schools and libraries. As a result, the infringement on protected speech will not be as widespread as that of the prior Acts.

II. CONGRESS' ATTEMPTS TO REGULATE SENDERS

A. Reno v. ACLU *and the Communications Decency Act*

Congress has addressed the problem of child access to Internet pornography in two ways—by regulating transmission of pornographic material over the Internet[28] and by regulating receipt of that information.[29] In an attempt to protect children from exposure to sexually explicit material, Congress passed the Communications Decency Act in 1996 ("CDA").[30] Two provisions in particular sought to protect children from harmful material on the Internet.[31] One made it a crime to knowingly transmit "obscene or indecent" messages to anyone under

28. *See* Child Online Protection Act, 47 U.S.C. § 231 (Supp. 1998); Communications Decency Act, 47 U.S.C. § 609 (Supp. 1996). Both make it a crime to knowingly transmit pornography to minors.

29. *See* Children's Internet Protection Act, S. 97, 106th Cong. (1999). This Act requires public schools and libraries to install filtering technology on their computers so that children will not receive pornographic images. *See infra* Part IV.

30. Pub. L. No. 104-104, 110 Stat. 56 (1996).

31. *See* 47 U.S.C. §§ 223(a)(B)(ii), 223(d) (Supp. 1997).

eighteen years of age.[32] The other prohibited one from knowingly sending or displaying material which offensively depicted or described sexual or excretory activities or organs to anyone under eighteen.[33] These provisions were challenged as an abridgement of First Amendment-protected free speech in *Reno I*.[34] The American Civil Liberties Union filed suit in the United States District Court for the Eastern District of Pennsylvania.[35] The court issued a preliminary injunction to enjoin enforcement of the Act, and the government appealed.[36] The Supreme Court struck down the challenged provisions, holding that although the government has an interest in protecting children from harmful materials, the statute was overbroad and too vague, and it was not carefully tailored to accomplish the government interest.[37] The Court based its analysis on the premise that the Internet, as a non-invasive medium, had none of the characteristics of broadcast media and therefore deserved the level of protection afforded print media.[38] The court did not

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32. 47 U.S.C. § 223(a) (Supp. 1997). The Act provides in pertinent part:

> (a)Whoever —
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> . . .
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> (B) by means of a telecommunications device knowingly —
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> . . .
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> (ii) initiates the transmission of,
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> 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;
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> shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

33. 47 U.S.C. § 223(d) (Supp. 1997). The Act provides:

> (d) Whoever—
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> . . .
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> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
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> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
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> 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;
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> . . .
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> shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

34. 521 U.S. 844 (1997).

35. *See id.* at 844.

36. *See id.*

37. *See id.* at 874 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.").

38. *See id.* at 868. The court stated:

specifically consider scenarios such as "pagenapping" and "mousetrapping" in its determination that the Internet should be categorized as print media rather than broadcast media.[39]

In determining the level of scrutiny to apply, the Court reviewed Internet communications and compared them to traditional communications media.[40] The Court stated that users seldom encounter sexually explicit material accidentally, because document titles and/or descriptions appear on the screen before the documents themselves, and almost all sexually explicit sites contain warnings about the sites' contents, enabling the user to decide whether or not to access the documents.[41] Therefore, the Court believed it was not likely that a user would access a sexually explicit site by accident.[42] The Court went on to say that the Internet differs from radio and television in that receipt of information on the Internet requires the user to take deliberate, affirmative steps, unlike the mere turning of a dial required for TV and radio.[43] The Court further stated that a child must have some degree of sophistication and ability to read in order to use the Internet unattended.[44] In fact, the Court specifically noted that the trial court held there was little risk in accidentally encountering indecent material on the Internet, because the user had to take affirmative steps to access the information.[45]

The Court was not persuaded by the government's argument that the Internet resembled broadcast media. Broadcast media is more highly regulated than other forms of speech.[46] Factors the Court has considered in determining the level of scrutiny to apply to the broadcast medium include: (1) the history of extensive government regulation of broadcast media; (2) scarcity of available frequencies; and (3) broadcast media's "invasive" nature.[47] In *Reno I*, the Court

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> [S]ome of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers. In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception and its "invasive" nature. Those factors are not present in cyberspace.

Id. (citations omitted).

39. *See* discussion *infra* Part III.

40. *See Reno I*, 521 U.S. at 865–70.

41. *See id.* at 854.

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.* at 869.

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

47. *See Reno I*, 521 U.S. at 868 ("Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers. In these cases, the Court relied on the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its 'invasive' nature.") (citations omitted).

concluded that these "broadcast" factors were not present in cyberspace.[48] There was no history of government supervision and regulation of the Internet which compared to that of the broadcast industry.[49] Further, the Court held that the Internet did not "invade" the home the way television and radio did.[50] Unwelcome Internet communications did not accidentally appear on the user's screen, and pornographic sites were preceded by warnings describing the sites' content.[51] Finally, the Court held that the Internet was not a "scarce" commodity.[52] Therefore, it could not be compared to broadcast media.[53] Under this analysis, the CDA was subject to strict scrutiny, a test reserved for the highest level of speech communication—print media.[54]

Applying strict scrutiny, the Court admitted that the government had an interest in protecting children from harmful materials.[55] Despite this interest, the Court noted, "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."[56] The differences in linguistic form were problematic for the Court. One provision of the CDA prohibited "indecent" material,[57] while the other prohibited material that "in context" was "patently offensive as measured by contemporary community standards."[58] In the absence of definitions for these terms, it was unlikely that the CDA had been carefully tailored to the government's stated goal of protecting children from harmful materials.[59] This vagueness, said the Court, created a "chilling effect" on free speech by threatening violators with criminal penalties, attaching a stigma to the speaker, and suppressing speech which was arguably lawful.[60] In rejecting the government's argument that the statute was no more vague than the obscenity standard set forth in *Miller v. California*,[61] the Court noted that the statute failed to

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48. *See id.*
49. *See id.* at 868–69.
50. *See id.* at 869.
51. *See id.*
52. *See id.* at 870.
53. *See Reno I*, 521 U.S. at 870.
54. *See* Vickie S. Byrd, Note, Reno v. ACLU—*A Lesson in Juridical Impropriety*, 42 HOW. L.J. 365, 369 (1999) ("Speech communicated by way of the print medium functions as the 'paradigmatic speech' against which all other forms of communication are measured. Historically, the more distinguishable a particular medium is from print, the less First Amendment protection it enjoys.").
55. *See Reno I*, 521 U.S. at 875 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials.").
56. *Id.* (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74–75 (1983)).
57. 47 U.S.C. § 223(a)(1)(B)(ii) (Supp. II 1997); *see also Reno I*, 521 U.S. at 859 n.35. The Court stated, "'Indecent' does not benefit from any textual embellishment at all. 'Patently offensive' is qualified only to the extent that it involves 'sexual or excretory activities or organs' taken 'in context' and 'measured by contemporary community standards.'" *Id.* at 871.
58. 47 U.S.C. § 223(d)(1)(B) (Supp. 1996).
59. *See Reno I*, 521 U.S. at 871.
60. *See id.* at 871–72.
61. 413 U.S. 15 (1973). The *Miller* test for obscenity is as follows:

satisfy a critical requirement of the *Miller* test: that the prohibited material be "specifically defined by the applicable state law."[62] This provision may have reduced the vagueness inherent in the "patently offensive" terminology.[63] In addition, the other two prongs of *Miller*'s three-part test—that the material appeal to the "prurient" interest, and that it "lac[k] serious literary, artistic, political, or scientific value"—were missing from the statute.[64] The Court believed these two prongs were critical to limiting the broad provisions contained in the CDA.[65]

In its final analysis under strict scrutiny, the Court noted that the government had not met its burden to explain why less restrictive alternatives would not have been as effective as the CDA.[66] Other methods were available and had been discussed, such as requiring indecent material to be "tagged" so it could be filtered, making exceptions for material with artistic or educational value, or providing different types of regulation for various areas of the Internet.[67] The

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> (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.

Id. at 24 (citations omitted).

62. *Reno I*, 521 U.S. at 873 (quoting *Miller*, 413 U.S. at 24).

63. *See id.* at 873.

64. *See id.*

65. *See id.*:

> Each of *Miller's* additional two prongs—(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it "lac[k] serious literary, artistic, political, or scientific value"—critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the "patently offensive" and "prurient interest" criteria, it is not judged by contemporary community standards. This "societal value" requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.

Id. at 873 (citing Pope v. Illinois, 481 U.S. 497, 500 (1987)).

66. *See Reno I* at 878 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so.").

67. *See id.* In assessing the requirement of less restrictive alternatives, the Court wrote:

> The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently than others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA,

government failed to prove that these methods were not as effective as the statute.[68]

The Court acknowledged that the statute was, to some extent, a victim of technology.[69] At the time the Court made its decision, there was no effective method of determining the age of a user who accessed material through vehicles such as e-mail or chat rooms,[70] and it was cost-prohibitive for noncommercial (and some commercial) speakers to verify that they were communicating with adults.[71] Focusing on the right of expression in the sender, the Court believed the statute's limitations would diminish a significant amount of adult speech on the Internet.[72]

Due to the above analyses, the Court struck down the provisions of the CDA which prohibited knowingly transmitting pornography to minors.[73] Concerned with overstepping the bounds of judicial power and infringing on the duties of the legislative department, the Court refused to strike only the offending language of the statute, and instead required Congress to draft a completely new bill.[74]

B. The Child Online Protection Act

Congress attempted to address the Supreme Court's concerns in *Reno I* by drafting the Child Online Protection Act ("COPA").[75] Like the CDA, this Act also focused on the sender. Congress specifically tailored COPA to meet the requirements set forth by the Court in *Reno I*.[76] Among other things, Congress narrowed the law by limiting it to commercial use and changing the proscribed

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> we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

Id.

68. *See id.*

69. *See id.* at 876.

70. *See id.*

71. *See id.* at 877.

72. *See id.*

73. *See id.* at 882, 885.

74. *See id.* at 884 n.49. The Court stated:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." In part because of these separation-of-powers concerns, we have held that a severability clause is "an aid merely; not an inexorable command."

Id. (citations omitted).

75. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

76. *See* H.R. Rep. No. 105-775, at 5 (1998) (stating that the Act "has been carefully drafted to respond to the Supreme Court's decision in *Reno v. ACLU* [117 S. Ct. 2329 (1997)]") (emphasis added).

language from "indecent" to "harmful to minors."[77] A definition of obscenity that is "harmful to minors" had passed constitutional muster in *Ginsberg v. New York*,[78] a case regarding the sale to minors of magazines containing pictures of nude women.

The Court in *Reno I* had identified four differences between the CDA's use of the "indecent" and "patently offensive" standards[79] and the *Ginsberg* "harmful to minors" standard. First, in *Ginsberg*, parents were not proscribed from purchasing prohibited materials for their children, but the CDA appeared to bar *anyone* from transmitting these materials to children, even parents.[80] Second, the statute in *Ginsberg* was limited to commercial transactions.[81] Third, the "harmful to minors" standard made an exception for material with literary, artistic, political, or scientific value, while such an exception was not made under the CDA.[82] Finally, the statute in *Ginsberg* defined a minor as someone under seventeen years of age, while the CDA applied to all persons under eighteen years of age.[83]

Congress addressed each of these concerns in drafting the COPA.[84] First, the COPA did not restrict parents' ability to purchase prohibited materials for their children.[85] Second, the COPA was limited to those "engaged in the business of the commercial distribution of material that is harmful to minors."[86] In this section of the Act, the drafting Committee struck the term "obscene matter" and replaced it with the term "harmful to minors."[87] Third, the COPA provided a three-prong test to determine the harmfulness of material to minors.[88] This language in the COPA mirrored that of the *Miller* obscenity test, with the exception that Congress tailored the first prong toward the prurient interests of *minors* and specifically defined the second prong rather than leaving the definition of proscribed material to the States.[89] The third prong of this test provided that the material must "lack serious

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77. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI. AND TRANSP., 106TH CONG., REPORT ON S. 1482, CHILD ONLINE PROTECTION ACT at 6 (Comm. Print 1998).

78. 390 U.S. 629 (1968).

79. *See Reno I*, 521 U.S. 844, 865 (1997)..

80. *See id.*

81. *See Ginsberg*, 390 U.S. at 633.

82. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI. AND TRANSP., 106TH CONG., REPORT ON S. 1482, CHILD ONLINE PROTECTION ACT at 6 (Comm. Print 1998).

83. *See id.*

84. *See id.* at 6–7.

85. *See id.* at 6.

86. *Id.*

87. *See id.*

88. *See id.* at 7.

89. *See id.* The Child Online Protection Act makes it unlawful to knowingly make "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." Pub. L. No. 105-277, 112 Stat. 2681 (1998). Section 231(e) defines "harmful to minors" as follows:

> Any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is

literary, artistic, political, or scientific value," in order to be harmful to minors.[90] Finally, the COPA defined a minor as a person under the age of seventeen.[91] With these changes implemented, Congress passed the COPA in 1998.[92]

The ACLU challenged the new statute in *Reno II*.[93] The United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction against enforcement of the portions of the COPA dealing with commercial distribution of material harmful to minors over the Internet.[94] In doing so, the district court applied strict scrutiny as the standard of review for the Internet, noting the *Reno I* Court's rejection of the lower level of scrutiny applied to broadcast media.[95] The district court found a compelling government interest in shielding minors from obscene materials.[96] However, the court stated that given the record before the court, the government would likely be unable to meet its burden to show that it had used the least restrictive means to achieve its goal.[97] The court provided at least one example of a less restrictive alternative, the blocking and filtering technology,[98] noting that the purpose of such technology is to shield minors, not burden senders.[99] The government appealed this ruling, and the Third Circuit Court of Appeals reviewed the trial court's decision.[100]

> 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.

Pub. L. No. 105-277, 112 Stat. 2681 (1998).

90. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI. AND TRANSP., 106TH CONG., REPORT ON S. 1482, CHILD ONLINE PROTECTION ACT at 7 (Comm. Print 1998).

91. *See id.* at 6.

92. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

93. 31 F. Supp. 2d 473 (E.D. Pa. 1999).

94. *See id.* at 498–99.

95. *See id.* at 493.

96. *See id.* at 495.

97. *See id.* at 497.

98. *See id.*

99. *Reno II*, 31 F. Supp. 2d at 497. The district court considered whether to grant a preliminary injunction against enforcement of the statute. In its discussion of the requirement that the plaintiffs must show a likelihood of succeeding on the merits, the court stated the following:

> On the record to date, it is not apparent to this Court that the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to this material. Of course, the final determination must await trial on the merits. The plaintiffs suggest that an example of a more efficacious and less restrictive means to *shield minors* from harmful materials is to rely upon filtering and blocking technology . . . . The record before the Court reveals that blocking or filtering technology may be at least as successful

III. COMMUNICATIONS MEDIA

A. Distinctions Between Broadcast and Print Media

Due to the unique concerns that arise with various communications media, the Supreme Court has attached differing levels of First Amendment protection to each mode of expression.[101] For example, the print medium, traditionally given the highest level of First Amendment protection, has emerged as the "paradigmatic speech" against which all other communications media are measured.[102] At the other end of the spectrum, the broadcast medium has been

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> as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web-site *operators*.

Id. (emphasis added). The district court foreshadowed the shift from focus on the sender to focus on the receiver, which Congress later attempted in the Children's Internet Protection Act. *See id.*; Children's Internet Protection Act, S.97, 106th Cong. (1999).

100. *See* ACLU v. Reno, 217 F.3d 162 (3d. Cir. 2000). In this opinion, filed June 22, 2000, the court of appeals in large part disregarded the lower court's analysis. The court stated:

> The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute. Hence we base our opinion entirely on the basis of the likely unconstitutionality of this clause, even though the District Court relied on numerous other grounds.

Id. at 173–74.

The court's reasoning centered on the concept that a publisher on the Internet sends information to numberless geographic locations and that information so published becomes part of a single body of knowledge accessible by all web visitors. *See id.* at 169. Existing technology does not allow web publishers to prevent their sites' content from entering any geographic community, nor can a web publisher modify the content of its site so as to restrict different geographic communities to access only certain portions of its site. *See id.* Because of the peculiar geography-free nature of cyberspace, a "community standards" test would require every web communication to abide by the most restrictive community standards where a potential viewer might gain access. Thus, to avoid liability under COPA, web publishers would either need to severely censor their publications or engage in expensive shielding systems which might restrict access or chill the publication enterprise. *See id.* at 175.

101. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (noting that the FCC has the power to regulate broadcast media); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (noting that differences between the various media justify different levels of First Amendment Protection). *See also* Byrd, *supra* note 54, at 368. The United States Supreme Court has developed a "medium-specific approach" in evaluating government regulation of communications media. *See id.* This approach enables the Court to determine whether the government interests outweigh First Amendment free speech concerns by first examining the technology and characteristics of the medium. *See id.*

102. *See* Byrd, *supra* note 54, at 369.

given the lowest level of First Amendment protection.[103] When measured against printed speech, the Court has found that the broadcast medium involves a scarce resource of frequencies, which, if made available to all who wish to use them, would result in a "cacophony of competing voices, none of which could be clearly and predictably heard."[104] Heavy government regulation of radio is necessary, therefore, to reduce the chaos of too many broadcasters using too few frequencies.[105] Likewise, comparing telephone communications to broadcast media reveals that telephones are neither as pervasive as radio and television broadcasts nor as accessible to children, and therefore are entitled to a higher level of First Amendment protection.[106] The development of new communications media brings with it unique free speech concerns and a need for the courts to apply new First Amendment standards.[107]

B. Classifying the Internet

Over the last few years, the Internet has expanded dramatically, connecting more than twenty-nine million computers in more than 250 countries.[108] Internet communication has emerged as the primary mode of communication for the new millennium.[109] It is growing at a rate of forty to fifty percent annually,[110] and it is estimated that there are sixty-two million people using the Internet in the United States.[111] Not only does this "dynamic, multifaceted

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103. *See* FCC v. Pacifica Found., 438 U.S. at 748 (holding that broadcast media must be regulated because prior warnings cannot protect the listener or viewer from obscene or offensive sounds or images). "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748–49.

104. Red Lion Broad. Co. v. FCC, 395 U.S. at 376. Before government regulation of broadcast media, the private sector controlled access to frequencies. *See id.* at 375–76. Because of the resulting chaos, national radio conferences were held, and it was determined that the federal government should regulate the radio frequencies, making them available only to those who would serve the public interest. *See id.* at 375 & n.4.

105. *See id.*

106. *See* Byrd, *supra* note 54, at 370–71.

107. *See Red Lion Broad. Co.*, 395 U.S. at 386:

> [D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them. . . . For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use . . . so long as the restrictions are reasonable and applied without discrimination.

Id. at 386–87 (footnote and citation omitted).

108. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI., AND TRANSP., *supra* note 14, at 1.

109. *See* Byrd, *supra* note 54, at 372.

110. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI., AND TRANSP., *supra* note 14, at 1. "There has been a dramatic expansion in Internet connections over the last several years, with more than a [thirteen]-fold increase in the Internet host computer count between 1994 and 1998." *Id.*

111. *See id.*

category of communication"[112] provide a vehicle for traditional modes of communication, it also expands communication, making the Internet "as diverse as human thought."[113] When presented with the unique characteristics of the Internet in *Reno I,* the Supreme Court concluded that prior case law did not provide any precedent for applying First Amendment protection to this medium.[114] The Court, therefore, had to determine the level of First Amendment protection to be given to the Internet.[115]

The Court began by comparing the Internet to broadcast media,[116] which, of all the communications media, traditionally has received the least protection under the First Amendment.[117] The Court set forth three factors that distinguished broadcast media from other forms of speech: (1) the history of extensive government regulation of the broadcast medium; (2) the scarcity of available frequencies at its inception; and (3) the invasiveness of the broadcast medium.[118] After examining these factors and applying them to the Internet, the Court concluded that "[t]hose factors are not present in cyberspace."[119] The Internet had neither been subjected to extensive regulation nor had suffered from a scarcity of frequencies.[120] The Court also concluded that the Internet was not as "invasive" as broadcast media, citing the district court's findings that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[121] The district court had also found that warnings about the content of a site almost always precede sexually explicit images, and that it would be unlikely that a user would accidently encounter a sexually explicit site without first receiving a warning as to the site's contents.[122]

The Court then drew an analogy between the Internet and telephone communications, holding that, unlike broadcasting, a telephone "requires the listener to take affirmative steps to receive the communication, [and that] placing a telephone call . . . is not the same as turning on a radio and being taken by surprise by an indecent message."[123] Ultimately, the Court held that the Internet was distinguishable from broadcast media.[124]

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112. *Reno I*, 521 U.S. 844, 870 (1997).

113. *Id.* "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Id.*

114. *See id.*

115. *See id.*

116. *See id.* at 868–69.

117. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

118. *See Reno I*, 521 U.S. at 868.

119. *Id.*

120. *See id.* at 845.

121. *Id.* at 869.

122. *See id.*

123. *Id.* at 870 (citation omitted).

124. *See id.* at 870.

The Third Circuit also provided an overview of the Internet.[125] There the court concentrated on the geographic breadth and width of the Internet. The court doubted that a web site publisher could modify the content of its site to restrict its material to comply with the various community standards of vastly different geographic communities. The court noted that existing technology does not permit material published over the Web to be restricted to particular states or jurisdictions.[126] In this analysis of the Internet, the court focused on the fact that the Web is available for voluntary users to access material in any geographical location.

This analysis in both courts is incorrect in light of recent developments in the Internet. As the "mousetrapping" and "pagejacking" scams illustrate,[127] the Internet seems to be a much more invasive medium than either court acknowledged. Pornographers are able to "invade" an individual's home, forcing their wares on unsuspecting consumers who have taken *no* affirmative steps to access the information.[128] In fact, the odds are fairly high that a sexually explicit image will appear unbidden on an individual's computer screen since more than twenty-five million web pages have been highjacked,[129] and there have been "numerous instances" of people being exposed unwillingly to sexually explicit material through the "pagejacking" and "mousetrapping" scams.[130] Furthermore, users receive no warnings as to the content of these sites.[131] Therefore, not only are receivers coming across sexually explicit images by *accident*, but they are being taken there by *force*.[132] Thus, the present state of the Internet does not support the Court's finding that warnings precede nearly all sexually explicit images, or that a consumer has a slim chance of being exposed to sexually explicit images by accident. Instead, an Internet user can simply turn on her computer and be "taken by surprise by an indecent message,"[133] just as she can by radio or television. It is

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125. *See* ACLU v. Reno, 217 F. 3d 162, 168 (3rd Cir. 2000).

126. *See id.* at 169.

127. *See supra* notes 1–7 and accompanying text.

128. *See* Federal Trade Commission News Release, *FTC Halts Internet Highjacking Scam* (visited Sept. 23, 2000) <http://www.ftc.gov/opa/1999/9909/atariz.htm>. "These operators high-jacked Web sites, 'kidnapped' consumers and held them captive . . . [and] exposed surfers, including children, to the seamiest sort of material and incapacitated their computers so they couldn't escape." *Id.*

129. *See* Complaint for Permanent Injunction and Other Equitable Relief at 3, Federal Trade Commission v. Carlos Pereira (visited Sept. 23, 2000) <http://www.ftc.gov/os/1999/9909/atarizifcomplaint.htm>.

130. *See id.* at 4. After the defendants tricked Internet users into visiting pornographic sites, they prevented them from exiting the sites by changing the function of users' Internet browsers. By doing this, they forced users to view additional pornographic sites when they attempted to exit defendants' web sites. *See id.* at para. 20.

131. *See id.* at para 19.

132. *See id.* at para 20; *supra* note 7 and accompanying text.

133. *Reno I*, 521 U.S. 844, 859 (1997). In distinguishing the Internet from broadcast media and analogizing it to telephone communications, the Court stated that "the dial-it medium requires the listener to take affirmative steps to receive the communication . . . . Placing a telephone call . . . is not the same as turning on a radio and being taken by

not necessary for her to take any affirmative steps to access pornography, and in fact, she may be compelled to view pornographic sites against her will.[134] This problem demonstrates that the Internet may be even *more* invasive than television or radio.

In *FCC v. Pacifica Foundation*,[135] the Court considered another factor which justifies "special treatment of indecent broadcasting."[136] The Court noted that television and radio broadcasting are "uniquely accessible to children," including those who are too young to read.[137] The Court held that "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."[138]

In this day and age, children's use of the Internet is directly analogous to their interface with broadcast media. The number of children using the Internet is on the rise. Of the 86,000 public schools in the United States, eighty-nine percent are connected to the Internet.[139] Children may also gain access to the Internet through the public library, where they may log onto a computer only to be confronted with sexually explicit material accessed by the previous user.[140] A child, accessing a seemingly innocent site, can also be hijacked to a pornographic site and trapped there.[141] This highly accessible medium also acts as a vehicle for many of the traditional communications media. For example, users may transmit and receive printed works, but they may also broadcast and receive audio transmissions and video images and engage in interactive, real-time dialogue.[142] Because both audio and visual images may be broadcast over the Internet, it should not be given more First Amendment protection than traditional forms of broadcast media, such as radio and television. In other words, the Internet looks and sounds like television and radio, except that without regulation, a child looking for Sesame Street on the Internet could easily wind up trapped on Bourbon Street instead.

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surprise by an indecent message." *Id.* (citation omitted). The "mousetrapping" and "pagenapping" phenomena dispel this characterization of the Internet.

134. *See supra* Part I.

135. 438 U.S. 726 (1978).

136. *Id.* at 750.

137. *Id.* at 749 ("Although [a] written message might have been incomprehensible to a first grader, [a] broadcast could have enlarged a child's vocabulary in an instant.").

138. *Id.* at 750. The Court explained that the concerns recognized in *Ginsberg* were 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." *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 639–40 (1968)).

139. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI. AND TRANSP., *supra* note 14, at 3.

140. *See Children's Internet Protection Act: Hearing on S. 97*, *supra* note 23 and accompanying text.

141. *See supra* notes 1–7 and accompanying text.

142. *See Reno I*, 521 U.S. 844, 851 (1997).

IV. THE CHILDREN'S INTERNET PROTECTION ACT

Congress recently took another approach to regulating children's access to pornography on the Internet by drafting the Children's Internet Protection Act ("CIPA").[143] This legislation requires public schools and libraries to provide certification to the Federal Communications Commission ("FCC") that they are utilizing technology to block or filter pornographic material on computers used by children in order to receive universal service assistance.[144] By concentrating on the receiver rather than the sender, this approach appears to solve the constitutional issues which led the Court to strike the CDA in *Reno I*.[145] In addition, this Act avoids the likelihood of challenge that the COPA in *Reno II* is now facing. CIPA does not attempt to limit what people say; rather, it limits reception of certain materials in limited situations. If passed, the proposed Act will amend section 254 of the Communications Act of 1934 by providing that in order for an elementary or secondary school to receive universal service assistance, it must certify that it has selected and installed technology to filter or block material deemed harmful to minors on all computers with Internet access.[146] Similarly, in order to receive federal funding, a public library with more than one computer must certify that it uses the technology on one or more of its computers with Internet access intended for public use.[147] The Act requires a library to notify the FCC within ten days after it ceases use of filtering or blocking technology.[148] The CIPA is currently making its way through both the Senate and the House of Representatives.[149]

This legislation, if passed, should not run afoul of the Supreme Court's First Amendment precedents. The Court has recognized previously the constitutionality of limiting access to certain materials in public schools.[150] For

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143. S. 97, 106th Cong. (1999).

144. *See id.* Universal service assistance is federal funding for telecommunications expenses. *See* STAFF OF SENATE COMM. ON COMMERCE, SCI., AND TRANSP., *supra* note 14, at 8.

145. 521 U.S. 844 (1997).

146. *See* Children's Internet Protection Act, S. 97, 106th Cong. § 2(A), (B) (1999).

147. *See id.* § 3(A). However, if a library has only one public use computer, it is sufficient for that library to certify that it has implemented an effective method of keeping minors from accessing harmful material on the Internet. *Id.* § 3(B). In addition, if a library with only one computer acquires another computer with Internet access intended for public use, it must certify, within ten days after the computer is made available to the public, that it has installed and uses the filtering technology on that computer. *Id.* § 5(B).

148. *See id.* § 5(A).

149. S. 97, 106th Cong. (1999); H.R. 543, 106th Cong. (1999). These two bills are currently on the Congressional calendar for a vote in both the Senate and the House.

150. *See* Board of Educ. v. Pico, 457 U.S. 853, 869–70 (1982); Virgil v. School Bd. of Columbia County, 677 F.Supp. 1547, 1552 (M.D. Fla. 1988) ("The Court in *Kuhlmeier* held that educators may limit both the 'style and content' of curricular materials if their action is reasonably related to legitimate pedagogical concerns.") (citing Hazelwood Sch. Dist. v. Kuhlmeier, 108 S.Ct. 562, 569–71 (1988)).

example, schools already have the authority to filter, and even remove, harmful materials from their libraries and curricula.[151]

In terms of defining indecent material, the current legislation is narrower than the CDA or the COPA, both of which require the interpretation to be measured by "contemporary community standards."[152] The CIPA, on the other hand, gives authority to the schools, school boards, and libraries to determine which materials are harmful to children and in need of being filtered.[153] This appears to be a proper exercise of an institution's discretionary authority, as the Supreme Court has held that the role of determining inappropriateness of speech properly rests with the school board.[154]

A. School Districts' Ability to Regulate Free Speech

The First Amendment guarantees to the people of the United States the right to disseminate information and ideas,[155] which necessarily encompasses the right to receive them.[156] With certain limitations, children also enjoy the right to freedom of expression.[157] For example, in *Tinker v. Des Moines School District*,[158] the Supreme Court upheld the rights of students under the First Amendment to wear armbands to school as a protest against the Vietnam War.[159] While the Court in *Tinker* noted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[160] the Court noted in *Bethel School*

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151. *See Pico*, 457 U.S. at 869–70 (1982).

152. *See* 47 U.S.C. § 223(d)(1)(B) (Supp. 1996); 47 U.S.C. § 231(e)(6) (Supp. 1998).

153. S. 97, 106th Cong. § 7 (1999).

154. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (upholding school's authority to prohibit indecent speech at school assembly).

155. *See* U.S. CONST. amend. I. The First Amendment states: "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." *Id.*

156. *See* Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (citing Martin v. Struthers, 319 U.S. 141, 143 (1943)). If people were not free to receive information, there would be no purpose in having free speech, because the passing on of information would not be accomplished. *See id.* at 867. In addition, a person needs to receive information in order to formulate his own ideas and disseminate those ideas to others. *See id.*

157. *See id.* at 868. Just as access to ideas contributes to adults' ability to engage in meaningful free speech, it helps prepare students for adult membership in our society. *See id.* But the school environment must be taken into consideration in determining the First Amendment rights of students. *See id.* (citing Tinker v. Des Moines Sch. Dist. 393 U.S. 503, 506 (1969)). Students cannot be punished for expressing their personal views while they are at school unless the expression will substantially interfere with education or other students' rights. *See* Tinker v. Des Moines Sch. Dist., 393 U.S. at 509, 512–13.

158. 393 U.S. 503 (1969).

159. *See id.*

160. *Id.* at 506.

District v. Fraser[161] that the rights of students in public schools do not mirror those of adults.[162]

Courts have restricted the rights of children as compared to those of adults in other settings as well. Consider the case of *Ginsberg v. New York*,[163] which involved the conviction of a store owner who violated a New York statute prohibiting the sale of obscene materials to children under seventeen years of age.[164] The defendant alleged that freedom of expression should not depend on whether the citizen is an adult or a minor.[165] Although the material was not obscene by adult standards, and therefore, was constitutionally protected, the Court noted that simply because certain material is protected for adults under the First Amendment, it is not necessarily protected for distribution to children as well.[166] Accordingly, a state may uphold the community's values by restricting the distribution of certain materials to adults only.[167] Thus, it is constitutionally permissible for a state to restrict the rights of children as compared to those of adults in some contexts, such as the distribution of pornographic magazines.

When courts determine the appropriateness of a particular expression in an educational setting, they often consider the intrusiveness of the speech on the rights of other students as well as the interference it may have on education.[168] Offensive language is a form of speech not likely to be upheld in a school setting, because it may offend other students and may disrupt the educational process.[169] As Judge Newman stated in his concurring opinion in *Thomas v. Board of Education*,[170] "[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[171]

Public schools play an important role in preparing children for participation in society by imparting to students the values on which society is

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161. 478 U.S. 675 (1986).

162. *See id.* at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340–42 (1985)).

163. 390 U.S. 629 (1968).

164. *See id.* at 631.

165. *See id.* at 636.

166. *See id.*; *see also Bethel Sch. Dist.*, 478 U.S. at 682 (holding that although the use of offensive language may be protected when an adult is making a political statement, the same latitude is not granted to children in a public school).

167. *See Bethel Sch. Dist.*, 478 U.S. at 684.

168. *See id.* at 680.

169. *See, e.g., id.* (upholding school district's suspension of student for giving an "offensively lewd and indecent speech" at an assembly); Virgil v. School Bd. of Columbia County, 862 F.2d 1517, 1523 (11th Cir. 1989) (upholding school board's right to remove a textbook from an elective high school class because it objected to the vulgar and sexual references contained in the book).

170. 607 F.2d 1043 (2d Cir. 1979).

171. *Id.* at 1057 (Newman, J., concurring); *see also* Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (upholding students' rights to wear armbands at school in protest of the Vietnam War); Cohen v. California, 403 U.S. 15 (1971) (upholding rights of draft protestor to use offensive language to express his viewpoint by wearing a jacket in public which bore the words, "Fuck the Draft").

based.[172] The state has a recognized interest in protecting children from exposure to vulgar or offensive language, and the determination of what constitutes inappropriate speech is a proper role of the school board.[173] In particular, where the curriculum is implicated, schools have been given more control over expression than they have in other school activities.[174] For example, *Virgil v. School Board of Columbia County*[175] involved a challenge to a school board's decision to remove curricular materials due to their sexual content and vulgarity.[176] The Eleventh Circuit relied on the test established by the Supreme Court in *Hazelwood School District v. Kuhlmeier*.[177] The Court created the test to determine the appropriateness of regulating expression and held that regulation of expression that was part of the school curriculum was permissible as long as it was "reasonably related to legitimate pedagogical concerns."[178]

Applying the test to the *Virgil* case, the Eleventh Circuit identified two factors that it considered significant in its analysis.[179] One factor concerned the stipulated reasons for the Board's removal of the books.[180] The parties agreed that the Board was motivated by the explicit sexuality and vulgarity contained in those books.[181] The other factor the Court relied on was the fact that the Board's

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172. *See* Ambach v. Norwick, 441 U.S. 68, 76–77 (1979). It is appropriate that the State use the public schools to teach the fundamental values of society to the future citizens of the United States in order to maintain our democratic system. *See* Board of Educ. v. Pico, 457 U.S. 853, 876 (1982) (Blackmun, J. concurring in part and concurring in the judgment); *see also Bethel Sch. Dist.*, 478 U.S. at 681–84 (recognizing that public schools play a central role in transmitting societal values in order to prepare students for citizenship).

173. *See Bethel Sch. Dist.*, 478 U.S. at 683 (citing FCC v. Pacifica Found., 438 U.S. 726, 745 (1978)).

174. *See Virgil*, 862 F.2d at 1520 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–271 (1988)).

175. 862 F.2d 1517 (11th Cir. 1989).

176. *See id.* at 1518–19. The materials involved were contained in a Humanities book and included LYSISTRATA, written by Aristophanes and THE MILLER'S TALE, written by Chaucer. *See id.*

177. 484 U.S. 260 (1988) (upholding authority of high school principal to remove two pages from a school-sponsored student newspaper because the articles contained mature subject matter that was determined to be inappropriate for the intended audience). In *Kuhlmeier*, the Court stated: "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

178. *Virgil*, 862 F.2d at 1521 (citing *Kuhlmeier*, 484 U.S. at 273). The Court in *Kuhlmeier* decided not to apply the more stringent *Tinker* standard, which holds that schools may not prohibit student expression unless they can show that there would be a material and substantial interference with the educational process. *See Kuhlmeier*, 484 U.S. at 271.

179. *See Virgil*, 862 F.2d at 1522.

180. *See id.*

181. *See id.* at 1523–25. Schools may take action such as this because they are given authority to consider the emotional maturity of the intended audience when making a

decisions were based on matters of curriculum.[182] The banned materials were contained in a textbook used in a humanities class.[183] Pointing out that the particular course was an elective (not a required) course, plaintiffs argued that the decision was not governed by the *Hazelwood* test.[184] The court rejected that argument, holding that a school's "curriculum" includes not only the required courses, but also the electives.[185] Accordingly, the court held it constitutionally licit for a school to limit its students' access to sexually explicit and vulgar materials.[186]

The Supreme Court has also recognized the right of local school boards to limit the materials available to their students in school libraries. For example, in *Board of Education v. Pico*,[187] the Court recognized the right of local school boards to remove books from the library if they were "pervasively vulgar" or lacked "educational suitability."[188]

In the constitutional analysis, the question of whether obscene material is delivered by truck or computer should make no difference. Material deemed to be obscene, vulgar, or educationally unsuitable is not cleansed because it is accessed through the computer. As long as school boards merely screen the recipients rather than try to limit the senders, there seems to be no constitutional violation.

B. The Children's Internet Protection Act Under Intermediate Scrutiny

If it is passed, the CIPA will likely be challenged as an abridgement of free speech under the First Amendment. Because the challenge will involve a claim against government action, the Court will have to determine whether the legislation is an unconstitutional infringement of citizens' rights. In doing so, the Court will have to determine the level of scrutiny to apply to the Act based on the Internet's characterization as either broadcast or print media. As discussed in Part III, the Internet should be characterized as broadcast media.[189] Thus, the Court should apply an intermediate level of scrutiny to the Act.[190] The Court will likely recognize that the government has a compelling interest in protecting children in schools and libraries from accessing sexually explicit material on the Internet.[191] In addition, the CIPA should be read as being narrowly tailored to accomplish this interest. It is specifically directed at children receiving material in schools and

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determination of the appropriateness of certain materials, especially those that contain sex and vulgar language. *See Virgil*, 862 F.2d at 1523 (citing *Kuhlmeier*, 484 U.S. at 272).

182. *See Virgil*, 862 F.2d at 1522.

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.* at 1523.

187. 457 U.S. 853 (1982).

188. *Id.* at 871.

189. *See supra* Part III.

190. *See supra* Part III.

191. *See Reno I*, 521 U.S. 844, 859 (1997). "We agreed [in *Sable*] that 'there is a compelling interest in protecting the physical and psychological well-being of minors' which extended to shielding them from indecent messages that are not obscene by adult standards . . . ." *Id.* (quoting Sable Communications v. FCC, 492 U.S. 115, 126 (1989)).

public libraries,[192] whereas the prior Acts were directed at senders of information.[193] As such, the CIPA is less likely to run afoul of the constitutional proscriptions against chilling speech that the Court noted in *Reno I*[194] and may reiterate in *Reno II*.

C. The Children's Internet Protection Act's Ability to Solve Overbreadth Problems

The CIPA is much more narrow than either the CDA or the COPA because it regulates the receipt of information, rather than the dissemination of information.[195] As a result, few speakers will be impeded. The CIPA is limited to a narrow set of circumstances—it is only applicable in schools or libraries, and it is only applicable to children under the care of elementary and secondary schools, or in public libraries.[196] Therefore, it permits pornographers to freely disseminate as much sexually explicit material as they wish. It simply blocks children from receiving the information in schools and libraries. Because the CIPA is more narrowly drawn than the prior Acts, it should not be susceptible to an overbreadth challenge. Because the CIPA focuses on the recipient rather than the sender, the Court is not likely to posit less restrictive means to lighten the burden on Internet users wishing to broadcast sexually explicit material as it did in *Reno I*.[197] In that case, the Court suggested that the speaker might "tag" the material in order to protect children.[198] It seems that no such suggestion could arise when the law only restricts reception.

V. CONCLUSION

The "mousetrapping" and "pagejacking" problems exhibit the broadcast characteristics inherent in the Internet.[199] It is often impossible to avoid the images one encounters in this medium.[200] Thus, it is appropriate to characterize the Internet in a manner similar to television and radio because of its invasive element.[201] As is the case with broadcast media, users often do not receive warnings before being confronted with images. In some respects, the Internet can be even more invasive than the traditional forms of broadcast. A person can simply turn off the television or the radio, or change the channel. However, with the Internet, once a user is "mousetrapped," he or she is unable to escape, and any attempts to escape draw the victim further into the trap.[202]

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192. *See* Children's Internet Protection Act, S. 97, 106th Cong. § (a)(1) (1999).
193. *See supra* notes 33, 89 and accompanying text.
194. *See supra* notes 59–66 and accompanying text.
195. *See supra* Part I.
196. *See* S. 97, 106th Cong. § (a)(1) and (3).
197. *See supra* note 67 and accompanying text.
198. *See id.*
199. *See supra* Part III.B.
200. *See supra* Part I.
201. *See supra* Part III.B.
202. *See supra* Part I.

In addition, children have easy access to the Internet, and they often encounter pornographic materials without taking affirmative steps to do so.[203] Children at school or in the public library may be "mousetrapped" into viewing harmful material, or they may simply log onto a computer only to be bombarded with sexually explicit images accessed by the previous user.[204] Additionally, children do not have to be literate to be barraged with pornography. They only need to know how to click a mouse.

Congress has attempted through three legislative acts to address the problem of child access to pornography. Two of the Acts, the CDA and the COPA, focused their regulatory action on *senders* of information, imposing criminal sanctions for knowingly transmitting obscene material to minors.[205] The CIPA, on the other hand, focuses on the *receivers* of information, withholding funds from those schools and libraries who fail to install and use filtering or blocking technology on computers accessed by children.[206]

The Court in *Reno I* held that the CDA was overbroad and vague. However, if the Court had analyzed the case under the premise that the Internet is broadcast media, and therefore that the statute deserved an intermediate level of scrutiny, it likely would have upheld the CDA. The burden on the state would have been much easier to meet under that analysis, because the government would simply need to show that it had an important interest and that there was a sufficient means-ends connection between the statute and the goal of protecting children.

The COPA has not yet been reviewed by the Supreme Court. When the Court reviews the constitutionality of that Act, this Note contends that it should scrutinize the COPA under an intermediate standard, the standard applicable to broadcast media, rather than under strict scrutiny. The government interest in protecting children is well settled.[207] The COPA also has a narrower scope in the type of communication it restricts. It regulates only commercial use of the Internet,

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203. *See supra* note 23.

204. *See supra* Part I.

205. *See supra* Part II.

206. *See supra* Part IV.

207. *See* FCC v. Pacifica, 438 U.S. 726, 749 (1978). The Court has recognized that the government has a compelling interest in protecting children from indecent material in the schools. *See Reno II*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999). In addition, the *Pacifica* Court noted:

> 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* . . . 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.

438 U.S. at 749.

and it mirrors the definition of the "harmful to minors" language already approved in *Miller*.[208]

Finally, the CIPA should be upheld against a constitutional challenge. First, the Act simply permits school districts to do what they are already constitutionally allowed to do—restrict obscene, vulgar, or sexually explicit books and materials from their libraries based on a determination that they are harmful to children.[209] The government has a duty to impart to children the values important to society, and the courts have traditionally left the determination of what is harmful to children to the school districts.[210]

Second, if the Supreme Court bases its analysis on the premise that the Internet is broadcast media, the Court should apply a level of scrutiny lower than the strict scrutiny applied in *Reno I*. Under this new analysis, the Act should survive the constitutional attack, because the government can establish its important interest in protecting children in government-supported schools from access to obscene, vulgar, or sexually explicit materials.[211]

Even if the Court applied strict scrutiny, the government can show a compelling interest in protecting children from pornography. In addition, the Act appears to be more closely tailored to the government interest than the two prior Acts, which concentrated their efforts on the senders of information. By focusing on the receiver, rather than the sender, the CIPA cures the overbreadth problems associated with the CDA. The CIPA applies in a narrow set of circumstances (in schools and libraries). It also applies to a narrow group of people: children under the care of schools and in public libraries. Thus, it is likely that the Act will be upheld against a constitutional challenge analyzed under either intermediate scrutiny or strict scrutiny.

208. *See supra* notes 89–90 and accompanying text.
209. *See supra* Part IV.
210. *See supra* Part IV.A.
211. *See supra* Part IV.A.