

Protecting Children from Online Pornography

Almost everyone who uses or studies the Internet can agree that online pornography is a problem. There are currently over 100,000 pornographic Web sites accessible for free and another 400,000 for-pay sites.¹ Tens of thousands of these Web sites contain child pornography and other illegal imagery.² The magnitude of online pornography appears only to be increasing in both the number of Web sites and the types of taboo material displayed.

Most disturbingly, unlike pornographic magazines, movies, and adult book stores, online pornography is easily accessible to children. Without even searching it out, pornographic material is present in pop-up ads, e-mails, bulletin boards, chat rooms, and can be accidentally found on mistyped or innocuously named Web addresses.³ Regulating pornography online is extremely difficult because the architecture of the Web is set up so that users can access information stored in computers all over the world and almost anyone can create a Web site without significant barriers.

To date, Congress has tried three times to regulate children's access to online pornography. The first two laws, the Communications Decency Act and the Children Online Protection Act, were declared unconstitutional for violating the First Amendment and were never enacted. The final law, the Children's Internet Protection Act, was

¹ Dick Thornburgh and Herbert S. Lin, *Youth, Pornography, and the Internet* (National Academy Press: Washington D.C., 2002), pp.71-74. Online. Available: http://www.nap.edu/html/youth_Internet/ch3.html. Accessed: April 22, 2003.

² Gregory K. Laughlin, "Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries," *Drake Law Review* (2003). Online. Available: www.lexis-nexis.com/universe. Accessed: April 22, 2003.

³ For example, typing in www.whitehouse.com instead of www.whitehouse.gov, will bring you to a pornographic Web site.

declared unconstitutional by a lower court and was recently argued in front of the Supreme Court.⁴ Protecting children from online pornography without violating First Amendment rights is clearly a difficult task.

This article examines Congress's attempts to regulate children's access to online pornography for the purpose of better understanding the balance needed between protecting children and protecting free speech. The lessons learned from these failed laws will help us evaluate other policy options—two of which are discussed in this article—and will help to create more effective and constitutionally-sound policies.

The Scope of the Problem

Since the World Wide Web emerged in the early-1990s, pornography has become increasingly prevalent online. The online pornography industry generates an estimated \$1 billion in revenue, and it is estimated that it will grow to between \$5 and \$7 billion by 2007.⁵ The driving force behind this growth is the desire of many online pornographers to make a profit. According to Robert MacMillan, a technology reporter for The Washington Post, pornography was the first sector to post real profits online.⁶ Online pornographers reach a large audience with minimal costs to produce content and create

⁴ As of April 27, 2003, the Supreme Court had not decided if the Children's Internet Protection Act is constitutional.

⁵ Thornburgh and Lin, *Youth, Pornography, and the Internet*, p. 71 (online).

⁶ Robert MacMillan, "Primer: Children, The Internet and Pornography," *Washingtonpost.com*, March 5, 2003. Online. Available: www.washingtonpost.com/ac2/wp-dyn/A39748-2002May31?language=printer. Accessed: April 22, 2003

Web sites. Even Yahoo has turned to selling “hard-core” pornography to bring in extra income.⁷

Besides the profit incentive, there are other reasons why pornography is proliferating online. The ease of creating a Web site allows anyone to be their own publisher. As such, more people are experimenting at producing their own Web sites. In the case of pornography, the anonymity of the Web further reduces the reservations of some pornographers to participate.

This anonymity also serves to create an incentive to experiment with pornographic content. People feel freer to push the limits of pornographic content in a hope to capture a new market and create a niche. Consequently, online pornography is perhaps more obscene and illicit than traditional pornographic content found in magazines and movies.

Online pornography is easy to access. It is found in pop-up ads, discussion boards, chat rooms, and in misleading domain names. Often times, pornographic Web sites display sexually explicit material on the first page, accessible to anyone who visits the Web site. One survey of adult-oriented commercial sites found that about 74 percent displayed adult content on the first page.⁸ This same study found that almost two-thirds of the adult-oriented Web sites did not include any notice indicating the content of the site and a quarter of the Web sites made it difficult for the user to leave the site by automatically opening up new pornographic windows. Only three percent verified the age

⁷ Michael Singer, “Yahoo’s Search for Profit Leads to Pornography,” *Silicon Valley.Internet* (April 11, 2001). Online. Available: <http://siliconvalley.Internet.com/news/article/php/740771>. Accessed: April 23, 2003.

⁸ Thornburgh and Lin, *Youth, Pornography, and the Internet*, p. 78 (online).

of the user on the first page of the site; most sites allow the user to preview additional content without verifying the user's age or charging the user.⁹

According to the National Telecommunications and Information Administration, children and teenagers make up a large proportion of Internet users, with 65 percent of 10 to 13 year olds online and 75 percent of 14 to 17 year olds online.¹⁰ Many of these children are exposed to sexually explicit material. A Kaiser Family Foundations survey taken in 2001 found that 31 percent of minors with computers at home reported seeing a pornographic Web site.¹¹ Another Kaiser Family Foundation study found that among 15 to 17 year olds online, 70 percent said they have accidentally come across pornography.¹² However, not all children accidentally find pornography: teenagers prove to be a good market for pornographic Web sites. One study found that 16 percent of intentional visitors to pornographic Web sites in February 2002 were under 17 years old.¹³ Another study found the rate of children intentionally visiting pornographic Web sites at between 20 and 30 percent.¹⁴

This intent of this article is to discuss how to protect children from online pornography effectively and without violating First Amendment rights and is not to analyze in detail whether pornography is harmful to children. However, it is important to note that the relationship between pornography and children has been historically thought

⁹ Ibid.

¹⁰ National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet, Executive Summary* (2002). Online. Available: www.ntia.doc.gov/ntiahome/dn/html/execsum.htm. Accessed: April 22, 2003.

¹¹ Thornburgh and Lin, *Youth, Pornography, and the Internet*, p. 136 (online).

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

of as harmful. The Supreme Court has repeatedly asserted the belief that the nation has a compelling interest to protect children from exposure to sexually explicit material.¹⁵ Mary Ann Layden, the Director of Education at the Center for Cognitive Therapy, recently confirmed the Supreme Court's historical rulings in testimony to a Senate Committee, claiming that the result of children's exposure to pornography

is a set of distorted beliefs about human sexuality. These shared distorted beliefs include: pathological behavior is normal, is common, hurts no one, and is socially acceptable, the female body is for male entertainment, sex is not about intimacy and sex is the basis of self-esteem.¹⁶

These detrimental effects, however, are usually associated with children who are exposed to pornography on a regular basis. Yet most children with Internet experience do not accidentally come across pornography on a frequent basis and most teenagers that run across pornography report not being very disturbed by the experience.¹⁷ Younger children, on the other hand, tend to be more disturbed by the experience of seeing pornography.¹⁸ Regardless of how the children feel, many parents are upset that they cannot control their child's exposure to pornography online and demand government intervention.

¹⁵ See Supreme Court cases *New York v. Ferber* (1982), *FCC v. Pacifica Found* (1978), and *Ginsberg v. New York* (1968).

¹⁶ Testimony of Mary Anne Layden, Ph.D., Director of Education, Center for Cognitive Therapy, University of Pennsylvania, as cited in *Children's Internet Protection Act*, Senate Report No. 106-141 (1999).

¹⁷ Thornburgh and Lin, *Youth, Pornography, and the Internet*, p. 139 (online).

¹⁸ *Ibid.*

Legal Regulations

The United States has laws protecting minors (under 18 years of age) from pornographic books, films, magazines, and retail products in stores.¹⁹ In general, these laws work well at limiting the ability of children to view pornography. For example, children cannot buy any type of pornographic material, and are not allowed into movies rated NC-17 (No Children under 17) and adult book stores. These laws are easy to enforce since, historically, consumers of pornography must physically go to the store or movie and show proof of age.

It is a much bigger challenge, however, for Congress to create enforceable pornography laws on the Internet. The basic architecture of the World Wide Web (“Web”) is set up in such a way that users can access information stored in computers all over the world without leaving home. Almost any one who wants to provide or distribute information can do so without any significant barriers. In addition, there are no limitations governing domain names of pornography Web sites.²⁰ For example, by accidentally typing in “www.whitehouse.com” instead of “www.whitehouse.gov,” a user would unintentionally be exposed to obscene images. These innocuous domain names make it difficult to determine, without viewing every Web site, the content of sites.

Congress’s task is further impeded by the inability to differentiate and confirm the age of users. In addition, legal standards applied to U.S. Web sites do not apply to Web

¹⁹ *Ginsberg v. New York* (1968) and *Miller v. California* (1973) are the seminal Supreme Court cases that established that the state has a legitimate interest in prohibiting pornography and broadly limited minors’ access to obscene material.

²⁰ Namita Mani, “Judicial Scrutiny of Congressional Attempts to Protect Children From the Internet’s Harms: Will Internet Filtering Technology Provide the Answer Congress Has Been Looking For?” *Boston University Journal of Science and Technology Law* (Winter 2003). Online. Available: www.lexis-nexis.com/universe. Accessed: April 23, 2003.

sites based in another country. Since pornography is produced in all areas of the world, children can still view Web sites provided by other nations. The Internet is clearly an environment that is very difficult to regulate.²¹

The “C-Laws”

Despite the difficulty in regulating the Internet, Congress has been relentless in its attempts.²² Over the past seven years, Congress passed three major laws regulating minors’ access to pornography on the Internet: the 1996 Communications Decency Act (CDA), the 1998 Children Online Protection Act (COPA), and the 2000 Children’s Internet Protection Act (CIPA).²³ These three laws—often referred to as the “C-laws”—all failed judicial review for abridging First Amendment free speech rights. The Supreme Court is currently deciding the fate of CIPA, which was previously declared unconstitutional by a district court.

Although the C-laws were never enacted, it is important to take a closer look at how each act approached the goal of regulating minors’ access to online pornography. Analyzing these cases will allow us to better understand the tension between protecting children from online pornography and protecting constitutional rights. Any policy proposals suggested in this paper or elsewhere must be able to survive the same scrutiny as the C-laws in order to be legal and effective.

²¹ Mani, “Judicial Scrutiny of Congressional Attempts,” (online).

²² Some observers have commented that Congress’s eagerness to regulate online pornography reflects the frustration government officials have felt about unsuccessful prior proposals to regulate the Internet. Protecting children from pornography is a politically popular appeal that provides the necessary public support needed to pass Internet regulation laws.

²³ Mani, “Judicial Scrutiny of Congressional Attempts,” (online).

Communications Decency Act: Regulating Indecent Internet Communications

The Communications Decency Act (CDA) was passed as part of the Telecommunication Act of 1996. The CDA criminalized the knowing transmission of “obscene” or “indecent” communications to children under 18 years of age. The Act banned sending or displaying any message to children that “depicts or describes, in terms patently offensive, as measured by contemporary community standards, sexual or excretory activities or organs.”²⁴ Under the CDA, online pornography providers had to take “good faith, reasonable, effective and appropriate” efforts to prevent children from accessing their Web sites, including requiring proof of age of all users prior to accessing the pornographic material.²⁵ Violating the CDA, by engaging in speech considered indecent or patently offensive in a place where minors could view or hear it, could result in up to two years in jail and a fine of up to \$250,000.²⁶

In *Reno v. American Civil Liberties Union (ACLU)* the Supreme Court struck down parts of the CDA, including the prohibition on public displays of pornography, for violating the First Amendment’s free speech rights.²⁷ In a 9-0 decision, the Court ruled that the CDA’s method of protecting children infringed on the ability of adults to provide and access constitutionally protected content on the Internet.²⁸

²⁴ Federal Communications Commission, *Telecommunications Act* (1996), Section 502, p. 96. Online. Available: <http://www.fcc.gov/Reports/tcom1996.pdf>. Accessed: April 23, 2003.

²⁵ Ibid.

²⁶ MacMillan, “Primer: Children, The Internet and Pornography” (online).

²⁷ Supreme Court of the United States, *Reno v. ACLU: Syllabus*, No. 96-511 (Decided: June 26, 1997). Online. Available: www2.epic.org/cda/cda_decision.html. Accessed: April 25, 2003.

²⁸ The National Academies, *Policy and Regulation*, Online. Available: www4.nas.edu/onpi/Webextra.nsf. Accessed: April 22, 2003.

The Court stated that the CDA differed from previous precedents that established minors' free speech rights—as set forth in *Ginsberg v. New York*, *FCC v. Pacifica Foundation*, and *Renton v. Playtime Theatres*—in many ways. Most importantly, the CDA did not allow parents to consent to their children's use of restricted materials, did not limit the restrictions to commercial transactions, and also failed to provide any definition of “indecent.”²⁹

Children Online Protection Act: Regulating Commercial Pornographic Web Sites

In an attempt to reconcile the Supreme Court's criticism of the CDA, former Senator Dan Coats and Representative Michael Oxley sponsored the Children Online Protect Act (COPA) in 1998.³⁰ Like the CDA, COPA prohibited the knowing transmission of material to minors considered “harmful” according to “contemporary community standards.”³¹ However, COPA applied only to material displayed on the World Wide Web for commercial purposes. COPA also required Web site providers to verify proof of age before granting users access to pornographic material. Providers could determine age through the use of a credit card, debit account, adult access code, or adult personal identification number, and could also accept digital certificates that verify age.³²

The ACLU and a diverse group of opponents challenged the constitutionality of COPA. A district court decided that protecting children from exposure to harmful material is a compelling government interest but that COPA was not the “least restrictive means” of protecting them. Furthermore, the district court found that using

²⁹ *Reno v. ACLU: Syllabus*, No. 96-511 (online).

³⁰ MacMillan, “Primer: Children, The Internet and Pornography” (online).

³¹ Mani, “Judicial Scrutiny of Congressional Attempts,” (online).

³² *Ibid.*

“contemporary community standards” was a difficult measurement tool of harmful material. The judges overturned COPA because it restricted free speech for adults and suggested that filtering or blocking technology on computers would be less restrictive than placing the burden on Web site providers.

The case was appealed to the Court of Appeals for the Third Circuit which concurred with the district court on the ruling. Specifically, the Court of Appeals said that the use of “contemporary community standards” to determine harmful content was too broad in scope and would require all Web site providers to comply with the most restrictive community standards. The case then was appealed to the Supreme Court (*Ashcroft v. ACLU*), which declared the issue regarding “community standards” to be constitutional but agreed to continue the injunction on COPA.³³ The case was then sent back to the Federal Appeals Court.

On March 6, 2003, the United States Court of Appeals for the Third Circuit, in its final and lasting determination, declared COPA unconstitutional.³⁴ In its opinion, the majority stated that the law made it too difficult for adults to view material protected by the First Amendment, including non-pornographic sites. In addition, the screening method required to verify proof of age would unfairly require adults to identify themselves. The court also ruled that “commercial purposes” was not fully defined and did not address what level of profitability was required to be “commercial.” Finally, the

³³ Ibid.

³⁴ United States Court of Appeals for the Third Circuit, *Precedential: American Civil Liberties Union v. Ashcroft*, No. 99-1324, (March 6, 2003). Online. Available: <http://news.findlaw.com/hdocs/docs/aclu/acluasherft30603opn.pdf>. Accessed: April 24, 2003.

court criticized COPA's restrictions on minors for not making distinctions between the appropriate viewing content of a five-year old and of a teenager.³⁵

The lesson learned from the CDA and COPA is that policies that aim to restrict the supply-side of pornography will face many challenges. Besides the infeasibility of monitoring all Web site providers, especially providers overseas, these restrictions also are burdensome to adults and violate free speech laws. Policies that aim to protect children must only restrict children, the targeted group, and not all Internet users.

Children's Internet Protection Act: Introducing Filters to Libraries

Congress enacted the Children's Internet Protection (CIPA) in 2000. CIPA requires public libraries that receive federal assistance in the form of discount rates for educational purposes or Library Services and Technology grants³⁶ to install a "technology protection measure" (i.e. filtering software) on all Internet-connected computers to protect against access by all persons to visual depictions that are "obscene" and "harmful to minors."³⁷ CIPA is much different than the CDA and COPA because it is not a criminal law and does not regulate Web site providers. Instead, CIPA focuses on censoring Internet users from pornography using filters.

³⁵ Ibid.

³⁶ Discount rates or "E-rates" are given to libraries to provide Internet access, especially in low-income areas. Library Services and Technology Act (LSTA) funds are used to buy computers for Internet access or to pay for Internet access.

³⁷ *United States, et al. v. American Library Assn., Inc., et al.*, No. 02-361, Docket. Online. Available: www.supremecourtus.gov/docket/02-361.htm. Accessed: January 26, 2003.

There are three types of filters used in libraries.³⁸ First, some filtering programs search for key words that might signify a Web site is harmful and either blocks just that word from the Web site or blocks the entire Web site from the user's view. The second type of filter is more sophisticated and uses algorithmic functions to find inappropriate content. These programs will search for patterns or combinations of words to determine if a Web site is inappropriate. The third filter blocks sites based on a company's assessment of each Web site's content. These companies look over Web sites and decide what should be blocked and filters out these Web sites on a subscription basis.

The American Library Association (ALA) and the ACLU filed suit along with ten other plaintiffs, opposing CIPA on grounds that it induces public libraries to violate the First Amendment. Filters, they claim, are imperfect and over-block constitutionally protected material. Yet the question over whether CIPA is constitutional is less clear than it was with the CDA and COPA.

U.S. government lawyers claim that libraries are not induced to violate adults' First Amendment rights because libraries can choose not to install filters. In addition, they argue that filtering software can be used without violating First Amendment rights because adult library patrons can ask for the filters to be removed from their computers. Libraries can also set the filtering software at different strengths so that a teenager can view more material than a child and so that libraries can be more sensitive to their community standards. The government lawyers have repeatedly compared the censorship

³⁸ Class lecture by Gary Chapman, Professor, at the Lyndon B. Johnson School of Public Affairs, Austin, Texas, March 17, 2003.

of Internet content in libraries to the decision of almost all libraries not to include pornographic books in their library collection.

The ALA counters these arguments, arguing that libraries are induced to violate free speech laws because they are dependent on federal funds and therefore are left with no choice but to install filters. The federal funds, the ALA argues, are vital to the livelihood of libraries. Since 1999, these government subsidies totaled over \$1 billion and currently pay for 90 percent of libraries' technology costs.³⁹

In addition not to having a legitimate choice to install filters, libraries do not have a choice of what computers to install filters on. CIPA mandates that filtering programs are installed on all computers, regardless of whether children use them or not. The ALA argues that filtering computers used by adults restricts their access to constitutionally protected material and therefore is a violation of their First Amendment rights. While adults can ask for the filter to be removed, CIPA requires that librarians first determine whether they have a "bona fide research" purpose for accessing the site being filtered. Adults, the ALA argues, should not need a reason to access legal material.⁴⁰ Furthermore, adults must identify themselves to librarians in order for the filter to be removed, which the ALA claims is facially unconstitutional.

Most importantly, the ALA stresses that filters are imperfect and both over-block and under-block material. The filtering software under-blocks material that is harmful to children, allowing children to view sexually explicit Web sites, pop-up ads, and e-mails. It also over-blocks material that is educational and most importantly, legal, because of the

³⁹ American Library Association, *CIPA Merits Brief* (2002). Online. Available: www.ala.org/cipa/meritsbrief/pdf. Accessed: April 22, 2003.

⁴⁰ *Ibid.*

method of many filtering systems to search for letters, words, or combinations of letters and words, without looking at substance. For example, on some filters, “SuperBowl XXX” is blocked, as well as information regarding the Mars Explorer (spells “sex”: Mars Explorer). Some filters block vital health information, including material related to breast cancer or sexual identity. In fact, the CIPA legal challenge began when a 13 year old girl went to her public library to access Web sites about gay and lesbian issues and could not gain access to any of these Web sites due to the library’s filter.⁴¹

The ALA further cites empirical evidence regarding the problems of over-blocking. Ben Edelman, a Harvard University student who tested the effectiveness of several filtering programs, testified on his results to the U.S. District Court of Eastern Pennsylvania. With four different filtering systems, he enabled only the “adult-nudity-sex” categories for each product, and used an automatic system that determined whether legitimate educational, scientific, and political pages in Yahoo’s directory were labeled as indecent material and were therefore blocked. He found that these filters blocked 6,777 different Web pages that were not indecent for children.⁴²

The U.S. District Court for the Eastern District of Pennsylvania overturned CIPA in April of 2002 for violating the First Amendment, agreeing with the ALA that

it is currently impossible, given the Internet’s size, rate of growth, rate of change and architecture, and give the state of the art automated classification systems, to

⁴¹ “On the Docket: U.S. v. American Library Association, et al.,” *Medill School of Journalism*. Online. Available: <http://journalism.medill.northwestern.edu/docket/>. Accessed: January 26, 2003.

⁴² Declan McCullagh, “Full Assault on Filter Software,” *Wired*, April 3, 2002. Online. Available: www.wired.com/news/politics/0,1283,51501,00.html. Accessed: April 22, 2003.

develop a filter that neither under-blocks nor over-blocks a substantial amount of speech.⁴³

The court also ruled that there are less restrictive alternatives that could be used to protect children from the Internet and that the ability of libraries to remove the filter for adults does not cure the constitutional violation.⁴⁴ The Supreme Court heard oral arguments on March 5, 2003, and is expected to make a decision this summer.

Unfortunately, with CIPA, Congress did not adequately learn the vital lesson from the failed CDA and COPA: effective and legal policies must only restrict children, the targeted group, and not adults. In addition, CIPA introduced new constitutional problems into the legal battle because the filters also over-block constitutionally protected material for children.

Based on the history of these C-laws and the ruling of the District Court, it is unlikely that CIPA will pass strict scrutiny by the Supreme Court. However, it is possible. In *NEA v. Finley* (1998), the court upheld in an 8-1 vote the constitutionality of a law requiring the National Endowment of the Arts to follow “general standards of decency and respect” when handing out federal grants.⁴⁵ Although the Supreme Court interprets the First Amendment strictly, it appears that the judges are more relaxed on their views of speech when the laws are tied to federal funding, as is the case with CIPA.

⁴³ Brian Krebs, “Justice Dept. Seeks High Court Review in ‘Net Filtering Case,’” *Washingtonpost.com*, June 20, 2002. Online. Available: www.washingtonpost.com/ac2/wp-dyn/A19122-2002June20?language=printer. Accessed: April 22, 2003.

⁴⁴ Nancy Willard, *The Constitutionality and Advisability of the Use of Commercial Filtering Software in U.S. Public Schools*, Center for Advanced Technology in Education (June 17, 2002). Online. Available: <http://netizen.uoregon.edu>. Accessed: April 22, 2003.

⁴⁵ David Grogan, “CIPA Trial Closes; Decision Due in May,” *American Booksellers Association* (April 9, 2002). Online. Available: <http://news.bookWeb.org/freexpression/397.html>. Accessed: April 22, 2003.

The Future of Filters

What will the CIPA Supreme Court decision mean for the future of filters? If the court upholds CIPA, filters will be the required mechanism to protect children at libraries that want federal funding. Until new technology (and corresponding legislation) comes around, filters will, by law, be the most widely used mechanism to shield children from online pornography in public places. If the court rules that CIPA is unconstitutional, federally funded libraries will not be required to use filters. However, this does not necessarily mean that libraries would discard filters.

According to the American Library Association, seven percent of libraries used filters on all computers prior to CIPA⁴⁶ but many more libraries used filters on just children's computers. A Library Journal survey of 355 libraries found that almost all filtered children's computers while half also filtered adult computers.⁴⁷ In an attempt to form a compromise between civil libertarians, concerned about protecting First Amendment rights, and CIPA advocates, many libraries have stated that they will continue to use filters on their computers, but will only do so on children's terminals.⁴⁸ It appears that despite problems with filters, they are still the technology of choice. Because filters are here to stay, at least for a while, and because filters are used in more places than just libraries, including schools and at home, it is important to take a closer look at this technology.

⁴⁶ American Library Association, *CIPA Merits Brief* (online).

⁴⁷ Brian Krebs, "Libraries Breathe Easy After Court Ruling On Internet Filters," *Washingtonpost.com* (June 3, 2002). Online. Available: www.washingtonpost.com/ac2/wp-dyn/A51465-2002Jun3?language=printer. Accessed: April 22, 2002.

⁴⁸ Lisa M. Bowman, "Court Overturns Library Filtering Rules," *CNet.com* (May 31, 2002). Online. Available: <http://news.com.com/2100-1023-929577.html>. Accessed: April 23, 2003.

Additional Problems with Filters

The compromise solution of many libraries and other public forums that provide the Internet, is to continue using filters, but only on children's computers. This is a compromise that many find workable: either adults have an area, presumably out of sight from children, where they can use computers without filters, or children can only use computers with filters set up in a children's area. By allowing adults to browse the Web without restrictions, the key problem of CIPA is solved. However, many problems still exist with this model.

Because filters are imperfect and over-block, children are denied rights to view protected material, including medical research, gay and lesbian Web sites, and positive, non-harmful Web sites regarding relationships and sex. This problem is compounded by the inability of most filters to distinguish between appropriate material for little kids and for older teens and the inability of filters to differentiate between geographically different definitions of appropriate content. U.S. District Judge Harvey Bartle III, points that, "There may be a different definition of pornography in New York than in Greenville, South Carolina," suggesting that defining off-limits sites will be problematic if nationwide, one-size-fits-all definitions are used.⁴⁹

The type of filter used will also be a consideration in how effective filters will be. The use of site-blocking filters—a filtering system by which a company looks at every

⁴⁹ Declan McCullagh, "Full Assault on Filter Software" (online).

Web site and decides what should be blocked—raises a very important question: who decides what is and is not blocked? What standards do they use?

Many site-blocking companies are secretive about the standards they use in deciding to block sites and do not release the list of sites that are blocked.⁵⁰ Further, Internet users are often not informed that these sites even exist when browsing the Web. As such, there is no public accountability on the part of these filtering companies.

The secrecy in the filtering process poses serious risks to First Amendment rights. A couple of filtering companies have been accused of blocking sites based on political and religious beliefs. One company blocked the National Organization of Women's Web site and any Web site that discussed homosexuality.⁵¹ Without mandated transparency into the decision-making process of blocking sites, users will be blocked from Web sites without even realizing what they are being blocked from. Furthermore, blocking decisions are not often made by professional educators or librarians, those most in touch with free speech rights and the appropriate level of censorship for children.⁵²

Finally, the use of filters may give parents a false sense of security. As already discussed, filters are imperfect. In addition to over-blocking material, they also under-blocks material. Filters will not always prevent children from viewing pornographic

⁵⁰ Nancy Willard, *The Constitutionality and Advisability of the Use of Commercial Filtering Software in U.S. Public Schools* (online).

⁵¹ Class lecture by Gary Chapman, Professor, at the Lyndon B. Johnson School of Public Affairs, Austin, Texas, March 17, 2003.

⁵² Willard, *The Constitutionality and Advisability of the Use of Commercial Filtering Software in U.S. Public Schools* (online).

material. Parents must be aware of this and not use filters as a Web baby-sitter, as often the filtering industry encourages them to do.⁵³

Policy Options

Of the rights granted in the Constitution, First Amendment rights are perhaps the most treasured. Laws regulating the providers of pornographic Web sites, as set up under CDA and COPA, violate these rights. Laws regulating Internet consumers through filters, as set up under CIPA, most likely violate the First Amendment as well. Policies that aim to protect children must still respect our fundamental rights.

While filters remain an option for protecting children without violating the rights of adults, there are still clear drawbacks to using them, as detailed in the previous section. There are, however, other options to protect children currently being used that may be less restricting than CIPA. Two of these options, rating systems and adding a new children's domain, are described below. There are, however, many civil libertarians including past Supreme Court Justices, who do not believe that there can be any balance in constraining First Amendment rights for the protection of children. This point of view—the “do nothing” policy—is also discussed below.

⁵³ Filtering companies market heavily to parents with promises that their filters will watch their children surf the Web, so that parents are free to be productive elsewhere. For example, the names of two filtering companies are “Cyber Sitter,” and “Net Nanny.”

Rating Systems

A rating system is similar to a filtering system, in that its purpose is to shield children from inappropriate content on the Web. Yet while filtering systems are run by companies that use key word filtering, algorithmic filtering, or site-blocking programs, rating systems are dependent on individual content providers to rate their own Web sites using a standard scale.

The concept is also similar to movie ratings except that unlike the movie-rating system, there can be no central body rating every site—the Web is much too vast. Instead, Web sites are self-rated using “PICS,” the Platform for Internet Content Selection, an Internet protocol. PICS uses informational codes to define the type of content on a Web site and acts as the common language for an Internet rating systems. Content providers need only to consult a PICS directory to rate Web sites in a sophisticated manner. Since the PICS codes are very precise, consumers can choose to filter Web sites meeting very precise content ratings. There are 22 companies that have joined the PICS effort and created rating systems.⁵⁴ *SafeSurf* and *RSACi* are currently the two most prominent rating systems. And Microsoft’s Web browser now has *Content Advisor*, which blocks Web sites using rules of the PICS-compliant rating system.⁵⁵

The benefits of rating systems is that they decentralize the rating process to all content providers, reducing the chance for one or two big companies to impose their standards on all Web sites. However, the drawback to this decentralized system is that

⁵⁴ Safe Surf, *Frequently Asked Questions*, Online. Available: <http://www.safesurf.com/ssfaq.htm>. Accessed: April 27, 2003.

⁵⁵ Jonathan Weinberg, “Rating the Net” (1997) *Wayne State University Law School*. Online. Available: <http://www.law.wayne.edu/weinberg/rating.htm>. Accessed: April 23, 2003.

rating systems are dependent on content providers to not only rate their current Web material, but all of their older Web site content, as well. For people who use the Web on a daily basis, rating content could take a long time and this may discourage many Web site providers from participating.

Since adults have the option to filter themselves based on ratings, it is unlikely that a rating system could be challenged for adult First Amendment violations. However, like with any type of filtering or censoring system, some argue that a ratings system has the potential to violate children's First Amendment rights. Schools and libraries can still limit the Web sites that children can view by adding more PICS codes to the filter. This, however, is a problem with the school officials or librarians, who choose to increase the amount filtered, and not with the rating program itself.

Filters based on Web site ratings may censor out less unnecessary sites than the filters that currently exist. Since each Web site would be evaluated and rated rather than a random search program that blocks sites based on certain words or combinations of words, it is more likely that rating would be more precise. The PICS code is four digits long, with each digit carrying meaning. For example, a PICS code of 0001 is interpreted as "General Information (the first two zeros) with No Adult Themes (the third '0') with the mildest degree of 1." If the site contained a mild expletive (e.g. "crap"), the third digit would increase to '1' to signify profanity with a degree of 1.⁵⁶

⁵⁶ Examples given on Safe Surf, *Frequently Asked Questions*, Online.

Relying on ratings means that ratings must be fairly accurate and consistent across the Web.⁵⁷ With hundreds of thousands of different people rating sites out of many different countries, this may be infeasible. While PICS guidelines exist, there will always be room for subjective interpretations in a self-rating system. Further, there can be no assurance raters do not intentionally use the wrong PICS codes with the intention of tricking children into viewing inappropriate material. However, rating systems, while imperfect, do not violate free speech and have the potential, if used on a larger scale, to filter on a very specific and detailed scale.

.Kids Domain Name

Last December, President George Bush signed into law the Dot Kids Implementation and Efficiency Act of 2002.⁵⁸ This Act creates a new second-level domain for the United States' Web domain, *.kids.us*, which only allows Web content appropriate for children 13 year and younger. The new domain, which will be functional at the end of 2003, will be strictly monitored and regulated by NeuStar, the manager of the United States' domain *.us*. Parents, librarians, and teachers will be able to filter children's material by only allowing them to browse *.kids.us* Web sites.

In the past, top level domain name suffixes, including *.edu*, *.gov*, *.com*, and *.net*, were regulated by the Department of Commerce. Now, besides educational and governmental domain names (*.edu* and *.gov*), Web site providers can generally register

⁵⁷ Tanessa Cabe, "Regulation of Speech on the Internet: Fourth Time's The Charm?" *Media Law and Policy* (Fall 2002). Online. Available: [Web.lexis-nexis.com/universe](http://web.lexis-nexis.com/universe). Accessed: April 22, 2003.

⁵⁸ The White House, *President Bush Signs Children's Internet Safety Act* (December 2002), Online. Available: <http://www.whitehouse.gov/news/releases/2002/12/20021204-1.html>. Accessed: April 27, 2003.

for any domain name.⁵⁹ A children's domain, because of its restrictions, cannot be similarly unregulated and decentralized.

As such, for the two years leading up to the signing of the Act, Congressional members fought bitterly with the private sector over management and regulation issues. Congressional members and the private sector disagreed on whether the government should oversee this new domain and whether it should be implemented through a central agency. Congressional members advocated for a *.kids.us* domain managed by a central registrar responsible for ensuring that all *.kids.us* Web sites are appropriate. The private sector, however, started creating the infrastructure of a *.kids* domain as well and did not want the government to interfere. The result is that there will be two new domains, the government's *.kids.us* and the private sector's *.kids*, which is run by Kids Domain Incorporated along with New.Net.⁶⁰

Congress also faced resistance from the Children Online Protection Act Commission, a congressional blue-ribbon panel charged with finding ways to protect children online, and the Internet Corporation for Assigned Names and Numbers (ICANN), a government-contracted agency responsible for managing the global Domain Name System (DNS).⁶¹ The Commission declined to recommend a new children's domain name claiming that it understood the appeal of such a system but believed that the approach raised too many issues for children's privacy. In addition, they noted that

⁵⁹ Class lecture by Gary Chapman, Professor, at the Lyndon B. Johnson School of Public Affairs, Austin, Texas, March 17, 2003.

⁶⁰ Kids Domain, Incorporated, *About Us*. Online. Available: http://www.kidsdomains.org/kidsdomains/new/about_us.htm. Accessed: April 27, 2003.

⁶¹ David McGuire, "Lawmakers Spur ICANN On 'KIDS'," *Newsbytes* (July 24, 2001). Online. Available: http://www.kidsdomains.org/kidsdomains/new/Press_Room/hr2417icannspur.htm. Accessed: April 27, 2003.

the international nature of the domain system would make it very difficult to implement *.kids.us*, since material constituted as harmful to children varies from country to country.

There are both benefits and drawbacks to using a domain system to protect children from pornography. This type of system is less likely to face the same free speech issues as other filters because adults are not restricted from any Web sites and only children 13 and younger would be restricted (compared to 18 years of younger with CIPA regulations). This type of system is also more effective than current filtering systems at ensuring children do not accidentally stumble upon pornographic material. Since all of the *.kids* and *.kids.us* Web sites will be regulated and monitored, this system is unlikely to under-block material.

Yet, there is the possibility that this system could over-block, depending on the standards used in deciding what type of content is allowed on the domain's Web sites. The government will assign an independent board to oversee the *.kids.us* domain to determine the sorts of content allowable.⁶² It will be up to this board to balance children's free speech with the need to protect them from what may be harmful material. This will be a very difficult task when it comes to deciding, for example, what type of books can be read on a *.kids.us* Web sites. However, it is unlikely that it will be as difficult to determine whether material is pornographic to a 13 year old or younger child.

Advocates of a *.kids* domain claim that it avoids most of the free speech concerns that arise with the alternate possibility of segregating pornographic material by creating a

⁶² McGuire, "Law Makers Spur ICANN" (online).

.xxx or a .sex domain.⁶³ It is easier, advocates argue, to decide what is safe for children than to decide what is pornographic for society at large. Segregating pornographic material through a new domain would violate the First Amendment rights of adults.⁶⁴ In addition, ensuring that all pornographic material is located in a separate domain, and is *only* registered in that separate domain, would be logistically infeasible.

Overall, establishing a children's domain may be one of the better option for protecting children from online pornography without violating adult's free speech rights. However, the success of this policy will also be determined on how well the domain's regulators also protect children's free speech rights.

Conclusion

There is no easy way to protect children from online pornography without restricting adults' rights to free speech. Congress's three attempts have exemplified this difficult balance. Policies that aim to protect children must use the least restricting methods to ensure that free speech rights are not violated. Congress should therefore continue its support for a new children's domain since it does not restrict the rights of adults to view protected content.

However, Congress must ensure that the managers of a new children's domain are careful to also protect children's rights in deciding appropriate content. This will require a working definition of obscenity that is flexible to geographic location and over time, and also to the age of children to be censored. It will require transparency in the decision-

⁶³ Ibid.

⁶⁴ David McGuire, "Porn Panel Mulls Internet 'Red Light District'," *Newsbytes* (June 13, 2000). Online. Available: <http://www.computeruser.com/news/00/06/13/news13.html>. Accessed: April 27, 2003.

making process of what is to be censored and an ability for parents, librarians, and teachers to contribute in the decision-making process.

In the meantime, content providers should be encouraged to use PICS to rate their Web sites. If enough providers participate in the rating system, self-regulation may become a sufficient method to protect children and Congress will no longer need to interfere. A rating system can also help better distinguish appropriate material for a children's domain.

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