The U.S. Supreme Court Addresses the Child Pornography Prevention Act and Child Online Protection Act in *Ashcroft v. Free Speech Coalition* and *Ashcroft v. American Civil Liberties Union*

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"Congress shall make no law . . . abridging the freedom of speech."[1]

I. INTRODUCTION

A very difficult issue facing the United States is applying First Amendment rights in cyberspace. With the motive of protecting children, the government has attempted regulation in this area concerning virtual child pornography and minors accessing pornographic materials online.

Finding that "the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or

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1. U.S. CONST. amend. I.

psychological harm, or both, to the children involved,"[2] Congress passed the Child Pornography Prevention Act of 1996 ("CPPA").[3] The CPPA expanded the federal ban on child pornography from pornographic images made using actual children to include computer-generated images appearing to be children engaged in sexually explicit conduct.[4] On April 16, 2002, in *Ashcroft v. Free Speech Coalition*, the U.S. Supreme Court struck down sections of the CPPA as overbroad and unconstitutional.[5]

Finding that minors have access to harmful materials through the widespread availability of the Internet,[6] Congress in 1998 enacted the Child Online Protection Act ("COPA")[7] to restrict access by minors to harmful materials sold on the World Wide Web. This section was carefully drafted[8] to respond to a 1997 U.S. Supreme Court decision, *Reno v. American Civil Liberties Union* ("ACLU"),[9] that struck down as unconstitutional provisions of the Communications Decency Act ("CDA"),[10] which was enacted by Congress in 1996 to limit the exposure of children to sexually explicit materials online. On May 13, 2002, in *Ashcroft v. ACLU*, the U.S. Supreme Court upheld sections of COPA as not unconstitutionally overbroad, but the Court expressed no view as to whether other provisions are overbroad, whether the statute is vague, or whether COPA survives strict scrutiny.[11]

Both the CPPA and the COPA were statutes intended by Congress to protect minors. The CPPA was intended to protect minors from the harmful effects of virtual child pornography. The COPA was intended to protect

2. S. REP. NO. 104-358, at 2 (1996). Congress further found that where children are used in the production of child pornography, it could hurt the children involved in future years. Further, child pornography is often used to seduce other children into sexual activity. Visual depictions of children engaged in sexual activities stimulate a pedophile, and the danger to children who are seduced is just as great whether visual depictions involving an actual child or computer-generated images are used. Thus, there is a compelling governmental interest for prohibiting both actual photography of children engaged in sexually explicit conduct as well as computer-generated images which are virtually indistinguishable. *Id*.

3. 18 U.S.C. § 2256 (2000).

4. *Id*.

5. 122 S. Ct. 1389 (2002). *See infra* notes 48-66 and accompanying text.

6. H.R. REP. NO. 105-775, at 2 (1998). Congress found that while custody, care, and nurture of children first resides with parents, such availability frustrates parental control. Further, until that time, there had been no national solution to the problem of minors accessing harmful materials on the World Wide Web. *Id.*

7. 47 U.S.C. § 231 (2000).

8. H. R. REP. NO. 105-775, at 5.

9. 521 U.S. 844 (1997).

10. Communications Decency Act, title V, § 502, 110 Stat. 133 (1996) (current version at 47 U.S.C. § 223 (2000)).

11. 122 S. Ct. 1700 (2002). *See infra* notes 90-99 and accompanying text.

minors from pornography currently available commercially on the World Wide Web. Neither statute currently is being enforced, despite their laudable motives to protect children. This Article will examine both statutes and both U.S. Supreme Court decisions. It also will predict the future of COPA and will recommend further congressional action to protect minors from the harmful effects of both virtual and real child pornography, and from accessing pornography on the Web.

II. CPPA AND *ASHCROFT V. FREE SPEECH COALITION*

Congress has repeatedly enacted legislation banning sexual exploitation of children. Finding that child pornography was both highly organized and profitable, and exploited children,[12] Congress in 1977 passed the Protecting of Children Against Sexual Exploitation Act.[13] This Act criminalized knowingly using a minor younger than age sixteen to engage in sexually explicit conduct to produce a visual depiction.[14] In 1984, Congress passed the Child Protection Act,[15] which expanded the 1977 Act and did away with the previous Act's requirement that the prohibited material be considered obscene under *Miller v. California.*[16] The 1984 Act also raised the minor's age from sixteen to eighteen and included not-for-profit trafficking.[17] This law was again amended in 1986 by the Child Sexual Abuse and Pornography Act, which banned the production and use of advertisements for child pornography and created civil liability for personal injuries to children from the production of child pornography.[18]

The Child Protection and Obscenity Enforcement Act of 1988 made it unlawful to use a computer to transport, distribute, or receive child pornography.[19] The Child Protection Restoration and Penalties Enhancement Act of 1990 prohibits the knowing possession of visual depictions of a minor in sexually explicit conduct.[20] In 1994, Congress again amended federal law concerning child pornography to allow

12. S. REP. NO. 95-438 at 5 (1977).

13. 18 U.S.C. §§ 2251-2253 (2000).

14. Sections 2251-52 have withstood constitutional challenges. United States v. Reedy, 845 F.2d 239 (10th Cir. 1988). Only one person, however, was convicted under the Act's prohibition on using children to produce a visual depiction. 1986 ATT'Y GEN. COMM'N ON PORNOGRAPHY FINAL REP. 604.

15. 18 U.S.C. §§ 2251-2253 (2000).

16. 413 U.S. 15 (1973).

17. 18 U.S.C. § 2256(1). *See* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (2000).

18. *Id*. §§ 2251, 2255.

19. *Id*. § 2252.

20. *Id*. § 2251.

restitution to victims.[21] All of the above federal legislation criminalized the use of actual children in the production of child pornography.

Changes in technology often leave the legal system struggling to keep up. In 1996, Congress passed the CPPA to ban computer-generated images of child pornography.[22] The CPPA bans sexually explicit depictions, including any photograph, film, video or computer-generated image or picture, that appear to be minors,[23] and visual depictions that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that they contain sexually explicit depictions of minors.[24] "Sexually explicit" is defined as "actual or simulated sexual intercourse, . . . bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area."[25] There is an affirmative defense if an actual adult was used in production, and the material was not promoted, described, or distributed in such a way as to give the impression that it contained a visual depiction of a minor engaged in sexually explicit conduct.[26]

The CPPA's constitutionality was immediately challenged by plaintiffs including the Free Speech Coalition, which is a trade association that defends First Amendment rights against censorship, the publisher of a book dedicated to the education and expression of nudism, and individual artists whose works include nude and erotic photographs and paintings. Finding that the plaintiffs had standing, the district court in *Free Speech Coalition v. Reno* found that the CPPA was not an improper prior restraint of speech because it is content neutral and clearly advances important and compelling governmental interests.[27] The court further held that the CPPA is not overbroad, because it specifies only materials that do not use adults, and is not unconstitutionally vague, as it clearly and specifically defines the prohibited conduct and gives sufficient guidance to a person of reasonable

21. *Id*. § 2259.

22. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (2000). Other countries have attempted to lead with this issue as well. Great Britain amended its Protection of Children Act to cover pseudo-photographs created by a computer and Canada has banned visual representations that show a person under eighteen depicted as engaged in sexual activity. United States v. Hilton, 167 F.3d 61, 65 n.1 (1st Cir. 1999) (citing Criminal Justice and Public Order Act, 1994, c. 33 (Eng.); R.S.C ch. C-46, § 163.1(1)(a)(i)(1998) (Can.)).

23. 18 U.S.C. § 2256.

24. *Id*. § 2256(8)(D).

25. *Id*. § 2256(2).

26. *Id*. § 2252A(c).

27. Free Speech Coalition v. Reno, 25 Media L. Rep. (BNA) 2305, 2307, 2310 (1998).

intelligence as to what it prohibits.[28] The government was granted summary judgment.[29]

In 1999, a majority of the Court of Appeals for the Ninth Circuit, while reversing the district court's ruling on the Act itself, affirmed the parties' standing to challenge the constitutionality of the CPPA's language "appears to be [a minor]" and "conveys the impression."[30] Reviewing the constitutionality of the statute itself de novo, the Ninth Circuit ruled that the First Amendment prohibits Congress from enacting a statute that criminalizes the generation of images of children engaged in explicit sexual conduct, and that the district court erred in finding a compelling state interest served by the statute, because actual children were not involved.[31] The appeals court held that the language "appears to be [a minor]"[32] and "conveys the impression," as found in the CPPA,[33] are unconstitutionally vague and overbroad.[34]

The Ninth Circuit dissent in *Free Speech Coalition v. Reno* would have found the CPPA constitutional.[35] The dissent stated that the majority improperly suggested that preventing harm to depicted children is the only legitimate justification for banning child pornography.[36] The U.S. Supreme Court endorsed other justifications relied on by Congress when it passed the CPPA.[37] According to the dissent, new justifications could be relied upon, as long as they advance the goal of protecting children.[38] The dissent also disagreed that the CPPA is unconstitutionally vague, as key phrases are defined.[39]

28. *Id.* at 2309-10.

29. *Id.* at 2310.

30. Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999).

31. *Id.* at 1086, 1092. The court stated that factual studies that would show a link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist. *Id.* at 1093.

32. 18 U.S.C. § 2256(8)(B) (2000).

33. *Id*. § 2256(8)(D).

34. *Free Speech Coalition*, 198 F.3d at 1097.

35. *Id*. at 1098.

36. *Id.*

37. *Id.* at 1099 (citing Osborne v. Ohio, 495 U.S. 103, 110-11 (1990)).

38. *Id*. Further, the dissent notes that the majority ignores the fact that child pornography has little or no social value, and that virtual child pornography should be treated no differently, as it is not valued speech. *Id.* at 1100.

39. *Id.* at 1103.

The First,[40] Eleventh,[41] Fourth,[42] and Fifth[43] Circuit Courts agreed with the dissent in the Ninth Circuit. In 1999, before the Ninth Circuit's decision, the First Circuit in *United States v. Hilton* held that the CPPA survives constitutional challenge as it is neither vague, nor a substantial infringement on protected expression.[44] After the Ninth Circuit's decision, the Eleventh Circuit upheld a conviction under the CPPA, affirming a district court's decision that the statute is constitutional.[45] In 2000, the Fourth Circuit also concluded that the CPPA passed constitutional muster, affirming a district court's decision.[46] In 2001, the Fifth Circuit confirmed a defendant's sentence and conviction, finding that virtual child pornography, like "real" child pornography, is not entitled to First Amendment protection, and that the CPPA is not overbroad.[47]

40. United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

41. United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).

42. United States v. Mento, 231 F.3d 912 (4th Cir. 2000).

43. United States v. Fox, 248 F.3d 394 (5th Cir. 2001).

44. *Hilton*, 167 F.3d at 65. In 1997, a federal grand jury indicted defendant Hilton for criminal possession of computer disks containing three or more images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court granted the defendant's motion to dismiss the indictment, finding the language "appears to be a minor" was overbroad and vague. United States v. Hilton, 999 F. Supp. 131, 137 (D. Me. 1998). On appeal, the First Circuit reversed, finding no reason to strike down the CPPA as unconstitutionally vague. *Hilton*, 167 F.3d at 76.

45. *Acheson*, 195 F.3d at 648. The defendant pled guilty to knowingly receiving visual depictions of minors engaged in sexually explicit conduct that had been transported in interstate commerce. More than 500 images of child pornography were found on his computer. *Id.* The Eleventh Circuit found the CPPA was neither overbroad nor impermissibly vague. *Id.* at 652.

46. *Mento*, 231 F.3d at 915. The defendant pled guilty to possessing child pornography after a search of his computer, external drives, and disks yielded more than 100 images of naked prepubescent children in sexually explicit situations, including being engaged in overt sexual acts with adults and other children. One image, according to the caption, involved a five-year-old. *Id.* While stating that "the First Amendment is the bedrock upon which our political system is founded," the court noted that "Congress may regulate protected speech to promote a compelling governmental interest." *Id.* at 918, 920. Since Congress found that pornography involving those who *appear* to be minors has the same effects on child molesters as pornography involving *actual* minors, the government's interest in banning this material is equally as compelling. *Id.* at 921. Finding the CPPA to be "bold and innovative in its attempt to combat the sexual exploitation of minors," the Fourth Circuit held the CPPA does not offend the First Amendment. *Id.* at 923.

47. *Fox*, 248 F.3d at 404. The defendant was indicted for knowingly receiving child pornography, as defined under 18 U.S.C. § 2256(8). The defendant's motion to dismiss was denied, and a jury convicted him. *Fox*, 248 F.3d at 398. The defendant appealed both the conviction and the sentence, which were both affirmed by the Fifth Circuit. *Id*. at 411. The Fifth Circuit joined the First, Fourth, and Eleventh Circuits, and respectfully disagreed with the Ninth Circuit. *Id.* at 401, 403.

On April 16, 2002, the U.S. Supreme Court in *Ashcroft v. Free Speech Coalition* agreed with the Ninth Circuit's majority opinion.[48] In an opinion authored by Justice Kennedy, and joined by Justices Stevens, Souter, Ginsburg, and Breyer, the majority of the Court found the provisions "appears to be [a minor]" and "conveys the impression [it depicts a minor]" were overbroad and unconstitutional.[49]

In 1973, the U.S. Supreme Court in *Miller v. California* set the standard for material that may be banned as obscene.[50] In 1982, the Court in *New York v. Ferber* held that pornography involving minors may be prohibited regardless of whether the images are obscene under the *Miller* test due to the compelling governmental interest in protecting against the sexual exploitation of children.[51] The Court in *Free Speech Coalition* addressed the CPPA's constitutionality where it prohibits speech that may not rise to the definition of obscene under *Miller*, nor technically be child pornography under *Ferber*, because live children are not used in the production process.[52] While recognizing that free speech has limits and certain categories of speech are not protected, including defamation, incitement, obscenity, and pornography produced with real children, the Court did not expand these categories to include virtual child pornography.[53]

Justice Kennedy observed that sexual abuse of a child is a most serious crime,[54] but Congress has passed laws to protect children from abuse.[55] Speaking from the position of a daughter who lost her father due to

48. 122 S. Ct. 1389 (2002).

49. *Id.* at 1405-06. The Court did not address whether the provisions found in 18 U.S.C. § 2256(8)(B) and (D) were also overbroad. *Id.* 18 U.S.C. § 2256(8)(C), involving computer morphing, was also not challenged and so was not considered by the Court. *Id.* at 1397.

50. 413 U.S. 15 (1973). The three-prong Miller test asks:

> (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).

51. 458 U.S. 747 (1982).

52. *Free Speech Coalition*, 122 S. Ct. at 1397.

53. *Id.* at 1399.

54. *Id.*

55. *See* 18 U.S.C. § 2241(c) (2000). That states in pertinent part:

> Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years

a crime, this Author observes that there is little comfort in prosecuting the wrongdoers after the fact; prevention is a much better option. The CPPA attempted to prevent crimes perpetrated against children by restricting access to materials that could incite such crimes. Justice Kennedy further observed that the CPPA's penalties are severe.[56] Countless literary works such as Shakespeare's *Romeo and Juliet*, and movies, such as *Traffic* and *American Beauty*, involve scenes of teenage sexuality. Justice Kennedy also stated that if virtual child pornography images were identical to pornography using real children, the latter would be driven from the market by the indistinguishable substitutes, as few pornographers would risk prosecution by abusing real children.[57]

Justice Thomas concurred in the judgment, but found the government's prosecution rationale persuasive.[58] Instead of stating that pornographers would flock to virtual child pornography, Justice Thomas asserted that persons who possess and disseminate images of real children could avoid prosecution by claiming that the images are nearly indistinguishable from virtual child pornography.[59] Justice Thomas also observed that a more complete affirmative defense would be one way to save the statute's constitutionality.[60]

Justice O'Connor concurred with the judgment in part and dissented in part.[61] She agreed that the CPPA's ban on youthful-adult pornography appeared to violate the First Amendment.[62] Chief Justice Rehnquist and Justice Scalia joined Justice O'Connor's dissent in finding the CPPA's

> but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

Id. To the extent that this statute deters crime, the Court is correct in stating that this act protects children.

56. *Free Speech Coalition*, 122 S. Ct. at 1398. While a first offender may be imprisoned for up to fifteen years, and a repeat offender faces five to thirty years (18 U.S.C. § 2252A(b)(1)) this is not relevant to the overbreadth of the language found by the Court in subsections B and D of the CPPA.

57. *Free Speech Coalition*, 122 S. Ct. at 1404, 1406.

58. *Id.* at 1406.

59. *Id.* Justice Thomas noted that the government has no case where the defendant has been acquitted on this defense. *Id.*

60. *Id.*

61. *Id.* at 1407.

62. *Id.* at 1410. Justice O'Connor agrees with the majority that this portion of the statute is overbroad, and that the CPPA's "conveys the impression" language should be struck down. *Id.* at 1407.

prohibition of virtual child pornography overbroad.[63] Justice O'Connor would take a narrower approach than the majority and strike the "appears to be" provision only as it applies to youthful-adult pornography.[64]

Chief Justice Rehnquist and Justice Scalia, dissenting, would uphold the CPPA in its entirety and they find a compelling interest in doing so.[65] Chief Justice Rehnquist would be loath to construe a statute as banning film portrayals of Shakespeare. In fact, Congress explicitly instructed that such a reading of the CPPA is unwarranted.[66]

Thus, the U.S. Supreme Court has struck down provisions of the CPPA as unconstitutionally overbroad. Currently, virtual child pornography is not banned, although child pornography that is created using real children is.

III. COPA AND *ASHCROFT V. AMERICAN CIVIL LIBERTIES UNION*

The CDA,[67] a part of the 1996 Telecommunications Act,[68] was Congress's first attempt to limit the exposure of children to sexually explicit materials online.[69]

The CDA as enacted stated that anyone who, "by means of a telecommunications device[,] knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene . . . or indecent," knowing that the recipient of the communication is younger than the age of eighteen, is subject to criminal penalties of imprisonment of no more than two years, or a fine, or both.[70] Subsection (d) of the CDA criminalized knowingly using an interactive computer service to send, or display in a manner available to others, any image or "communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activity or organs."[71]

The CDA provided three safe harbors: There was no violation for access or connection of providers who also do not create content; there was

63. *Id.* at 1408. Justice O'Connor believes that a ban on virtual child pornography passes strict scrutiny due to a compelling governmental interest in protecting children. *Id*. She further believes that such a ban is not unconstitutionally vague. *Id*.

64. *Id.* at 1410.

65. *Id.* at 1414.

66. *Id.* at 1412. Justice Scalia did not join in this portion of the dissent involving legislative history. *Id.* at 1412 n.2.

67. 47 U.S.C. § 223 (Supp. V 2000).

68. 47 U.S.C. § 151 *et seq.* (Supp. V 2000).

69. 141 CONG. REC. 15501 (1995).

70. 47 U.S.C. § 223(a) (Supp. V 2000).

71. *Id*. § 223(d).

no violation for employers for an employee's conduct outside the scope of employment; there was no violation for those who made a good faith effort to restrict access to minors or for those who have restricted access to minors by such means as a verified credit card, debit account, adult access code or identification number.[72]

When the CDA was signed into law on February 8, 1996, members of various groups and individuals associated with the computer and/or communications industries or those who publish or post materials on the Internet filed suit against Attorney General Janet Reno and the U.S. Department of Justice.[73] Shortly thereafter, the American Library Association and others filed suit, and these cases were consolidated for all matters relating to the preliminary injunction.[74] After an evidentiary hearing, the district court granted a temporary restraining order, finding the "indecency" provision of the CDA to be unconstitutionally vague.[75]

A three-judge panel was appointed pursuant to the CDA,[76] and the panel concluded as a matter of law that the plaintiffs established a reasonable probability of eventual success in proving subsections (a) and (d) of the CDA unconstitutional. The plaintiffs showed irreparable injury and a preliminary injunction was granted.[77]

The government appealed directly to the U.S. Supreme Court. In its June 26, 1997 decision, the Supreme Court held that the CDA's "indecent transmission" and "patently offensive display" provisions violated the First Amendment's protection of free speech,[78] thus affirming the district court.

72. *Id*. § 223(e).

73. ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996). The plaintiffs were the American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh d/b/a Justice on Campus; Brock Meeks d/b/a Cyberwire Dispatch; John Trover d/b/a The Safer Sex Page; Jonathan Wallace d/b/a The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. *Id*.

74. *Id*. at 828.

75. *Id*. at 827.

76. 47 U.S.C. § 223 note (2000).

77. ACLU v. Reno, 929 F. Supp. at 879.

78. Reno v. ACLU, 521 U.S. 844 (1997). *See* Sue Ann Mota, *Neither Dead nor Forgotten: The Past, Present, and Future of the Communications Decency Act in Light of* Reno v. ACLU, COMPUTER L. REV. & TECH. J. 1 (Winter 1998).

Congress carefully drafted a response[79] to the Court's decision in *Reno v. ACLU* by passing the COPA, which prohibits the sale of pornographic materials on the World Wide Web to minors.[80] Unlike the CDA, COPA applies only to material placed on the Web, covers only communications made for commercial purposes, and restricts only material that is harmful to minors.[81] Drawing on the obscenity test developed by the Court in *Miller v. California*, COPA uses contemporary community standards.[82] COPA was to go into effect on November 29, 1998, but on October 22, 1998, plaintiffs, including the American Civil Liberties Union, Web site operators, and content providers, filed a suit to challenge the constitutionality of COPA and sought injunctive relief from its enforcement.[83] A temporary restraining order was issued on November 20, 1998, and after five days of testimony in January 1999, the district court granted a preliminary injunction.[84] In doing so, the district court concluded, "This Court and many parents and grandparents would like to see the efforts of Congress to protect children from harmful materials on the Internet to ultimately succeed and the will of the majority of citizens in this country to be realized through the enforcement of an act of Congress."[85]

79. H.R. REP. No. 105-775, at 5 (1998). Congress found that the market for pornography has flourished on the Internet. At the time of the hearings, there were approximately 28,000 adult sites promoting pornography on the Internet, generating close to $925 million in annual revenues. In addition, a national effort is under way to connect every school and library to the Internet; 95% of all schools were estimated to have Internet access by 2000. In 1996, estimates stated that nearly half of all material on the Web was not suitable for children. Further, minors often stumble on this material by mistake, due to mistyping and "copycat URLs." Exposure to this sexually explicit material harms children. *Id.*

80. *See* 47 U.S.C. § 231 (Supp. V 2000).

81. *Id*. § 231(a)(1).

82. *See* Miller v. California, 413 U.S. 15 (1973). COPA defines material that is harmful to minors at 47 U.S.C. § 231(e)(6). *See* 47 U.S.C. § 231 (Supp V. 2000).

83. ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999). The plaintiffs claimed that COPA was invalid under the First Amendment for burdening the constitutionally protected speech of adults and minors, and was unconstitutionally vague under the First and Fifth Amendments. *Id.* at 477.

84. *Id*. The plaintiffs proved the requirements to obtain a preliminary injunction:

> (1) a likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the preliminary injunction issues [to the plaintiffs] than if the preliminary injunction does not issue; and (4) that the public interest, if any, weighs in favor of plaintiffs.

Id. at 481 (citing Pappan Enters. v. Hardees's Food Sys., 143 F.3d 800, 803 (3d Cir. 1998)). Either affirmative defense—the credit card option or the age verification system—would impose significant burdens on Web publishers. *Id.* at 489-90, 495.

85. *Id*. at 498.

In affirming the District Court's injunction in 2000,[86] the Third Circuit Court of Appeals also approved the District Court's statement that "sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[87]

Two possible ways to limit the interpretation of COPA would be to assign a narrow meaning to the language of the statute or delete the portion of the statute that is unconstitutional.[88] The Third Circuit, however, stated that striking "contemporary community standards" was not likely to salvage the statute's constitutionality, as the standard is an integral part of the statute.[89] Thus, the preliminary injunction stands.

The U.S. Supreme Court decided one narrow question: whether COPA's use of "community standards" to identify material that is harmful to minors violates the First Amendment. A divided Court ruled on May 13, 2002, that it does not.[90] Justice Thomas, joined by Justices O'Connor, Scalia, and Breyer, and Chief Justice Rehnquist, held that COPA's reliance on community standards does not, by itself, render the statute overbroad, but they did not address whether COPA was overbroad for other reasons, whether it was unconstitutionally vague, or if it would survive strict scrutiny.[91] Since the government did not ask that the injunction be lifted, it was not.[92]

In a concurring opinion, Justice O'Connor agreed that even if obscenity is defined by community standards, COPA is not overbroad. She noted that a national standard is allowed under prior precedent.[93] In her opinion, a national standard is not only constitutional, but also reasonable.[94]

In a separate concurring opinion, Justice Breyer also agreed that COPA's reliance on community standards does not render the statute overbroad and that applying the same national standard does not violate the

86. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

87. *Id.* at 181. Although the Third Circuit calls Congress's attempt to protect minors from harmful material on the Web laudable, the court holds that COPA "is more likely than not to be found unconstitutional as overbroad on the merits." *Id.*

88. *Id.* at 177.

89. *Id.* at 179.

90. Ashcroft v. ACLU, 122 S. Ct. 1700, 1703 (2002).

91. *Id.* at 1713.

92. *Id.* Further, even if COPA does employ a community standards test, this would still not render the statute unconstitutionally overbroad. COPA applies to significantly less material than did the CDA. *See* 47 U.S.C. § 223(a) (Supp. V 2000). The CDA defines the harmful-to-minors material in a manner parallel to the *Miller* definition of obscenity. *See* Miller v. California, 413 U.S. 15 (1973).

93. Ashcroft v. ACLU, 122 S. Ct. at 1714.

94. *Id.* at 1715.

First Amendment.[95] Justice Kennedy, joined by Justices Souter and Ginsburg, concurred in the judgment, but stated that the Court of Appeals should analyze the other issues before determining the constitutionality of COPA.[96]

Justice Stevens dissented, stating that while COPA is a "substantial improvement" over the CDA,[97] he would affirm the decision of the Court of Appeals.[98]

Pending further analysis in the Court of Appeals, the preliminary injunction stands against COPA.[99]

IV. CONCLUSION

Congress has made numerous attempts to protect minors from accessing harmful materials online and from virtual child pornography, including the CDA,[100] the CPPA,[101] and COPA.[102] While some may disagree,[103] Congress should be encouraged to refine statutes that fulfill the compelling government interest in protecting minors while still passing constitutionality.[104]

Due to the deleterious effects virtual child pornography has on children, this Author agrees with Chief Justice Rehnquist's dissent in *Ashcroft v. Free Speech Coalition*,[105] as well as the First,[106] Fourth,[107] Fifth,[108] and Eleventh Circuit,[109] and the dissent in the Ninth Circuit,[110] that the CPPA is constitutional. This Author would have extended First Amendment exemption not only to child pornography involving actual

95. *Id.*

96. *Id.* at 1717.

97. *Id.* at 1723.

98. *Id.* at 1728.

99. *Id.* at 1702. The decision by the Court of Appeals was vacated, and the case was remanded. *Id.*

100. 47 U.S.C. § 223(a) (Supp. V 2000).

101. 18 U.S.C. § 2256 (2000).

102. 47 U.S.C. § 231 (Supp. V 2000).

103. Johanna M. Roodenburg, *Son of CDA: The Constitutionality of the Child Online Protection Act of 1998*, 6 COMM. L. & POL'Y 227 (2001).

104. *See supra* notes 85, 87 and accompanying text.

105. *See supra* notes 65, 66 and accompanying text. *See generally* Matthew K. Wegner, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081 (2001).

106. United States v. Hylton, 167 F.3d 61 (1st Cir. 1999).

107. United States v. Mento, 231 F.3d 912 (4th Cir. 2000).

108. United States v. Fox, 248 F.3d 394 (5th Cir. 2001).

109. United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).

110. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999) (Ferguson, J., dissenting); *see also supra* notes 35-39 and accompanying text.

minors under the *Ferber* test,[111] but also to virtually created child pornography, which is nearly indistinguishable. Nonetheless, since the U.S. Supreme Court has struck down the provision of COPA stating "appear to be [minors]" and "convey the impression of minors" as overbroad, Congress is encouraged to redraft this provision with language that will pass constitutional muster under *Ferber*. Congress may consider striking the "youthful-adult" provision found unconstitutional by Justice O'Connor.[112] Additionally, Congress should develop a more complete affirmative defense, as suggested in Justice Thomas's concurrence.[113]

With respect to minors accessing obscene materials on the Web, if aspects of COPA are found unconstitutional after further scrutiny by the Third Circuit, and the injunction against COPA is not lifted,[114] this Author recommends that Congress redraft, for a third time, legislation attempting to protect minors. Perhaps Congress should use a national standard as suggested by Justice O'Connor in *Ashcroft v. ACLU*.[115] In the meantime, alternative solutions,[116] including user-based regulation,[117] such as a rating system[118] and filtering,[119] should be used.

While this Author is a staunch defender of First Amendment rights, this Author also acknowledges the compelling governmental interest in protecting minors from virtual child pornography and accessing pornographic materials online. This Author advocates extending exceptions to the First Amendment in these areas.

111. New York v. Ferber, 458 U.S. 747 (1982).

112. *See supra* notes 48-49 and accompanying text.

113. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1406 (2002).

114. *See* Ashcroft v. ACLU, 122 S. Ct. 1700, 1702 (2002).

115. *See supra* notes 93-94 and accompanying text. *See generally* Scott Winstead, *The Application of the "Contemporary Community Standard" to Internet Pornography: Some Thoughts and Suggestions*, 3 LOY. INTELL. PROP. & HIGH TECH. J. 28 (Winter 2000).

116. *See generally* William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 CATH. U. L. REV. 245 (2001).

117. *See generally* Anthony Nilcoli, *Least Restrictive Means: A Clear Path for User-Based Regulation of Minors' Access to Indecent Material on the Internet*, 27 J. LEGIS. 225 (2001).

118. *See generally* Tim Specht, *Untangling the World Wide Web: Restricting Children's Access to Adult Materials While Preserving the Freedoms of Adults*, 21 N. ILL. U. L. REV. 411 (2001).

119. *See generally* Sahara Stone, *Child Online Protection Act: The Problem of Contemporary Community Standards on the World Wide Web*, 9 MEDIA L. & POL'Y 1 (2001).