UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v. Civ. No. 98-CV-5591

JANET RENO, in her official capacity as

ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

Brief of The Association of American Publishers, Inc.; The American Society of Newspaper Editors; BiblioBytes, Inc.; The Center For Democracy and Technology; The Comic Book Legal Defense Fund; The Commercial Internet Exchange Association; The Computer and Communications Industry Association; The Freedom To Read Foundation; Interactive Digital Software Association; The Internet Alliance; Magazine Publishers of America; The National Association of College Stores; The National Association of Recording Merchandisers; The Newspaper Association of America; People For the American Way Foundation; The Periodical and Book Association of America, Inc.; PSINet Inc.; The Publishers Marketing Association; The Recording Industry Association of America; and The Society of Professional Journalists,

as Amici Curiae, in Support of Plaintiffs

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INTEREST OF THE AMICI

This brief amici curiae is submitted on behalf of a spectrum of businesses, trade associations and public interest organizations, listed in the appendix, that share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communication suitable for both children and adults. Amici variously constitute and represent:

- authors, publishers, editors and distributors of textual, audio and audio-visual material ranging from books, magazines, newspapers, newsletters and comic books through sound recordings and

video games;

- educators and librarians whose students and patrons desire access to the widest possible range of informative material;

- Internet and online service providers through which the public obtains access to the Internet and the ability to navigate through it;

- software developers and technology concerns who, responding to the market's demands, have been developing ever-more-effective means for parents to protect impressionable minors from exposure to age-inappropriate materials; and

- public interest organizations reflecting parental and community concerns that potentially well-intentioned, but nonetheless broadly censorious, government regulation of the Internet not smother this medium in its infancy.

Amici every day work in myriad ways to fulfill the Supreme Court's vision of the Internet as a "dynamic, multifaceted category of communication," ACLU v. Reno, 521 U.S. 844, &151;, 117 S. Ct. 2329, 2344 (1997) ("CDA"), which this Court has described as "the most participatory form of mass speech yet developed" and "a far more speech-enhancing medium than print, the village green, or the mails." CDA, 929 F. Supp. 824, 882-83 (E.D. Pa. 1996). Through their World Wide Web sites, the varied communications entities represented and whose speech is facilitated by amici are affording the American public access to more information and entertainment, faster and more cheaply than ever before. The functions of publishers' catalogs, magazine and newspaper kiosks, book and record stores, indeed, entire libraries, are captured in such Web sites.

In addition, amici in the Internet/online service provider industry have built dynamic, two-way communications networks that permit users to send and receive information of their choice, thereby enhancing the uniquely user-controlled and interactive quality of this medium. They are investing in ever-faster networks and are expanding the array of rich multimedia applications available to consumers.

At the same time, amici have been working to support the development of user-controlled technologies that afford the least restrictive means by which to protect minors from material on the Internet deemed harmful to them, while ensuring that children have rich, educational, and entertaining experiences on the Internet. This effort is fully in line with the Supreme Court’s recognition, articulated in response to a constitutional challenge to the Communications Decency Act of 1996 ("CDA") in which many of amici were instrumental, that these user-control tools offer the promise of a speech-rich, yet minors-protective, Internet environment without need for government regulation.

All of these efforts reflect just the beginning of the Internet’s promise as a speech-enhancing medium.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress' first effort at regulating speech on the Internet was the CDA, which criminalized speech over the Internet that was "patently offensive" or "indecent" for minors. In the legal challenge to the CDA, in which many of amici served as plaintiffs, first a three-judge panel of this Court, and then the United States Supreme Court, found the CDA to be facially unconstitutional. The CDA's vice, these courts reasoned, lay not in its interest in protecting minors, which was legitimate, but in its inevitable consequence: "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have the constitutional right to receive and to address to

one another." CDA, 117 S. Ct. at 2346.

Central to this Court's and the Supreme Court's rulings were the unique attributes of the Internet, which make it fundamentally different from any medium preceding it — its ability to support a spontaneous and cost-free "never-ending worldwide conversation," in which each participant, irrespective of his or her means, has a voice. See CDA, 929 F. Supp. at 865 n.9, 882-83. The Supreme Court in CDA contrasted the Internet from the broadcast medium, insofar as "the 'odds are slim' that [an Internet] user would enter a sexually-explicit site by accident." See 117 S. Ct. at 2336 (citing, CDA, 929 F. Supp. at 844-45). The Court also importantly determined that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." 117 S. Ct. at 2336, 2347.

Since the CDA litigation, the efficacy of user-control tools has become ever more apparent. Nonetheless, Congress has determined to re-regulate purportedly "harmful to minors" speech on the Internet, and once again to punish offenders criminally. This new legislation — the Child Online Protection Act ("COPA") — threatens once again to turn the Internet into a medium whose level of discourse would be reduced to that "suitable for a sand box."

COPA traces much the same path as the CDA and suffers from many of the same crippling constitutional flaws, insofar as it:

- targets a potentially broad category of speech that is entirely lawful as to adults, but is "harmful to minors";
- criminalizes the offer of such speech by a potentially large number of Internet speakers, unless it is rendered inaccessible to minors;
- presupposes that credit card and age-verification techniques adopted by Congress as affirmative defenses impose no burden on speech, when, in fact, they will discourage readers of controversial or potentially controversial material and burden many would-be speakers; and
- disregards the steadily-developing state of user-empowerment technology as the preferred, less restrictive and more effective alternative to overbroad government regulation.

Amici draw no comfort from the purported narrowing of COPA as targeting only "commercial pornographers." Faced with potential criminal penalties for guessing wrong as to what a local federal prosecutor might believe is "harmful to minors" in a given community, [1] and faced with impracticable affirmative defenses to such prosecution in the form of age-verification techniques that misapprehend both the state of technology and the realities of Internet commerce, amici's constituents engaged in providing speech fora for adults will be faced with the constitutionally-impermissible dilemma of risking prosecution or engaging in self-censorship. Under such a regime, frank and provocative discussions, whether generated by "affairs of state," public health issues such as AIDS and abortion, readings from and critiques of classical and modern fiction, reviews of sound recordings and motion pictures, reader, viewer and listener reactions to lite rary, music, and television fare dealing in some manner with the topic of sex or sexual relationships, to name a few, may well fall in the category of speech that is viewed as too risky and thus be forsaken for other, "safer" speech.

Rather than being so threatened, the enterprises represented by, and whose Internet speech is facilitated and encouraged by, amici, are constitutionally entitled to participate fully in the growth and development of the Internet. Indeed, amici are active and eager participants in the evolution of both the

commerce and the technology that will enable the Internet to fulfill its promise. On a daily basis, amici explore new techniques and business models for unleashing the vast potential of this medium. COPA threatens to impede this exploration by adopting "rules of the road" that invite the cleansing from central Internet speech sites of speech arguably not suitable for minors.

That a particular speaker may publish for "commercial purposes" does not diminish his or its First Amendment freedom. This nation's free-speech tradition is fulfilled no less robustly by the Philadelphia Inquirer than a not-for-profit newspaper or newsletter; no less by Time Warner's Cable News Network than C-SPAN; no less by Barnes & Noble than a public library. The CDA litigation reaffirmed that the ability of the Internet to achieve its potential as a speech medium is dependent upon the diversity of the speech it protects and fosters. Because COPA threatens a meaningful contraction of such speech, this Court should strike down COPA as unconstitutional on its face.

In this brief, amici make the following points:

1. Because COPA regulates constitutionally-protected speech based on its content, it, like the CDA, requires strict constitutional scrutiny. That is true even though Congress was purportedly acting to protect children, because the First Amendment does not permit legislators to prohibit adult access to speech that it believes is inappropriate for children. Nor does it matter that Congress, in enacting COPA, purports to have more narrowly limited the scope of the speech regulated and did exempt at least some forms of non-commercial expression over the Internet.
2. The government's reliance upon COPA's affirmative defenses does not satisfy the Government's obligation to demonstrate that COPA serves a compelling governmental interest in the least restrictive way. The affirmative defenses contained in COPA, which essentially would require many speakers on the Web to create "adults-only" zones for their speech, do not mitigate — rather, they contribute to — the substantial burdens imposed on speakers and recipients of constitutionally-protected speech.
3. COPA is neither effective, nor the least restrictive means for protecting children from "harmful" content on the Web. As the Department of Justice cogently recognized prior to its defense of this lawsuit, it is questionable "whether the COPA would have a material effect in limiting minors' access to harmful materials[, given the] thousands of news groups and Internet relay chat channels on which anyone can access pornography, and children would still be able to obtain ready access to pornography from a myriad of overseas [W]eb sites." Department of Justice, Oct. 5, 1998, Letter ("DOJ Ltr.") at 3.
4. Neither is COPA the least restrictive means for furthering Congress' purported interest in protecting children from age-inappropriate material on the Internet. A diverse array of user-control technologies are widely available today, offering parents who voluntarily choose to use them means for restricting their children's access to material on the Internet, according to the specific values of the family. In addition, substantial resources have been devoted toward educating children to "click away" from "harmful" material. Many private-sector initiatives also have been undertaken to assist parents and children to safely navigate the Web and to create "kid-friendly" content zones, as well as to work with law enforcement to guard the safety of children who use the Internet.

ARGUMENT

I. COPA IS FACIALLY INVALID

A. The Constitutional Framework

Certain fundamental First Amendment principles should guide the Court's consideration of the constitutionality of COPA. First, there can be no dispute that COPA is a content-based regulation of protected speech. While there are disputes among the parties about the breadth of the speech regulated and the number of speakers affected, it is undeniable that Congress, in enacting COPA, expressly restricted the distribution of a category of speech, defined by its content, that is constitutionally protected for adults.

Such a law is presumptively invalid, subject to the strictest, "most exacting" scrutiny, and cannot be upheld absent a showing by the government that the statute will, in fact, directly and materially advance a compelling government interest and is narrowly tailored to effectuate that interest in the least speech-restrictive manner. See CDA, 117 S. Ct. at 2341, 2344. Indeed, as a content-based restriction providing for criminal penalties, COPA is particularly suspect under the First Amendment. Id. at 2344-45.

It does not matter that the interest asserted to justify the law is protection of minors, or that at least some minors have no constitutional right to receive the expression at issue. The Supreme Court has long recognized that the government cannot, in the interest of protecting minors from speech deemed harmful to them, restrict adults' access to non-obscene speech, and thereby reduce the level of adult discourse to that appropriate for children. CDA, 117 S. Ct. at 2346; Butler v. Michigan, 352 U.S. 380, 383 (1957) ("[s]urely [to do so] is to burn the house to roast the pig"); see also Sable Communs. of Cal., Inc. v. FCC, 492 U.S. 115, 126, 131 (1989); Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 74-75 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

Moreover, the fact that a speaker may operate for profit, or make a profit from the sale of speech, in no way limits the First Amendment protection to which the speaker or the speech is entitled. As the Supreme Court made clear in Burstyn v. Wilson, "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. 495, 501 (1952); see also Smith v. California, 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination [of speech] takes place under commercial auspices.").

B. COPA, No Different Than The CDA, Is Void On Its Face.

There are essentially two substantive differences between COPA and the CDA: the standard for determining speech covered by the law (COPA is directed to speech "harmful to minors," while the CDA was directed to "indecent" and "patently offensive" speech); and the Internet speakers and fora at which the law is directed (the CDA applied to all manner of Internet speech, wherever originating, while COPA is limited to speech for "commercial purposes" communicated on the Web). These distinctions do not save COPA from the same fatal infirmity as the CDA: in the interest of restricting minors' access to certain speech, it suppresses adult access to a potentially significant body of constitutionally-protected materials.

The parties here disagree about the extent to which the differences between the CDA and COPA actually narrow the scope of the latter statute. The Government argues for a narrower interpretation than the plaintiffs. It may be that this and other courts will ultimately adopt as definitive a very narrow construction, in view of the statute's text and legislative history and the direct impact of this law on the exercise of First Amendment rights. But even if that were to occur, COPA would still be unconstitutional, because, like the CDA, it restricts the offer of, and adult access to, constitutionally-protected speech, when there are far more effective and less restrictive ways to protect children.

At present, of course, no definitive narrowing construction has been adopted by any court. Indeed, even were this Court to narrowly construe the statute, such an interpretation would not be binding on other courts or on prosecutors around the country, leaving amici legitimately concerned that COPA may be applied in a manner that sweeps far more broadly than the government here suggests. These concerns are heightened by the fact that the Department of Justice has itself previously adopted a conflicting interpretation. Thus, while it argues that COPA's "harmful to minors" standard is clear and unambiguous and covers only such speech as is lacking in value to the oldest minor, here a sixteen-year old (see Gov. Motion to Dismiss at 16; Gov. TRO Mem. at 27), this assertion is directly at odds with the Department of Justice's pre-enactment appraisal of the "harmful to minors" standard as "[a]mong the more confusing or troubling ambiguities" in the statute . DOJ Ltr. at 4-6 (listing a series of interpretive issues viewed by the Government as constitutionally-problematic). [2]

Similarly, the government now asserts that the "commercial purposes" requirement of COPA is so narrow in scope as to be applicable solely to commercial pornographers. See Gov. Motion to Dismiss at 33-51. But again, the government's interpretation is far from clear; indeed, it is once more inconsistent with the Department of Justice's pre-enactment appraisal of the language as one of the more "confusing or troubling ambiguities" in the statute. See DOJ Ltr. at 6.

That the Department of Justice itself could, in so short a space of time, so radically alter its interpretations of the law gives amici concern that, in the hands of the nearly one hundred United States Attorneys across the nation, this law will be susceptible to widely-varying interpretation. As Judge Sloviter made clear in CDA, "the First Amendment should not be interpreted to entrust the protection it affords to the judgment of prosecutors. Prosecutors come and go. Even federal judges are limited to life tenure. The First Amendment remains to give protection to future generations as well." CDA, 929 F. Supp. at 857.

II. COPA's AFFIRMATIVE DEFENSES IMPOSE CONSTITUTIONALLY UNACCEPTABLE BURDENS ON SPEECH.

The Government argues that COPA imposes no serious limitation on the distribution of protected speech because the affirmative defenses allow the distribution of that speech under certain defined circumstances. As we show, the government's assertion is simply wrong. While COPA does not impose a flat ban on "harmful-to-minors" expression on the Internet, it does substantially burden the distribution and receipt of that category of protected speech. Under strict constitutional scrutiny, it is clear that COPA is invalid because — as we discuss in Point III below — there are other far more effective and less restrictive means of furthering the government's asserted interest in protecting children from Internet content deemed harmful to them.

As an initial matter, the affirmative defenses provided by COPA are essentially identical to those contained in the CDA, which were found by this Court and by the Supreme Court to be insufficient to save the statute from facial invalidity. In this regard, this Court found that: "imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material"; and "the burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." CDA, 929 F. Supp. at 846, 847. Based on these findings, this Court concluded:

> [M]any speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. Such a choice, forced by [the terms of the Act] .

. ., strikes at the heart of speech of adults as well as minors.

CDA, 929 F. Supp. at 855.

Although the government here contends that the Supreme Court drew a sharp distinction between the feasibility of the affirmative defenses for commercial versus non-commercial entities, the Supreme Court in fact cited with approval findings of this Court acknowledging the impracticability of such defenses for many commercial Web sites, particularly in view of the prevalence of Web sites that provide content free of charge:

> There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited. . . . Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.

CDA, 117 S. Ct. at 2337.

Amici can attest that these realities have not changed. Requiring credit card or age-verification screening for access to all potentially "harmful-to-minors" material on covered Web sites would severely burden expression for two basic reasons.

A. The Burden on Users

First, would-be recipients of information will be deterred by pre-access screening requirements. Numerous surveys have documented Web users' overwhelming concern with privacy. [3] It is the experience of many amici and the Internet industry in general that many Web users will leave a site if required to register. Responding to this concern, the commercial entities that comprise many of amici's constituents have in recent years enhanced and refined their models for doing business on the Web, and the model that is becoming prevalent is the advertiser-supported site that can be accessed by users free of charge. While most sites devoted exclusively to "pornography" do require credit cards or adult verification, advertiser-supported sites are an important part of the array of options available for those seeking a more diverse array of content.

Were advertiser-supported Web sites to employ the adult verification schemes required by COPA, they would likely alienate many users. By effectively forcing users of the Web to register with the sites they choose to access, implementation of the affirmative defenses will require individuals to disclose personal information (e.g., name, address, social security number, credit card) to a third party prior to being afforded access to constitutionally-protected speech. Reliance on such systems will create records of individuals' First Amendment activities — records that will be available for use and misuse regardless of statutory provisions seeking to protect them. Conditioning adults' access to constitutionally-protected speech on the disclosure of one’s identity raises troubling First Amendment and privacy issues. The defenses pose a Faustian choice to individuals seeking access to information — protect privacy and forgo access to information, or exercise First Amendment freedoms a nd forgo privacy. See CDA, 929 F. Supp. at 847 ("adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password").

As the Third Circuit concluded in holding unconstitutional a law requiring adults to obtain access codes or other identification numbers in order to place a call to a telephone message service:

> [T]he First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions. . . . [It is enough to invalidate a law where it is shown that] access codes will chill the exercise of some users' right to hear protected communications.

Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 785-86 (3d Cir. 1990) (citations omitted). [4]

Finally, in addition to the burden on individual privacy, such a requirement impermissibly prejudices users of the Web who lack credit cards. See CDA, 929 F. Supp. at 846 ("Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material.").

B. The Burden on Speakers

The burden is equally severe if viewed from the perspective of the operators of Web sites. As an initial matter, the affirmative defenses provide little comfort in that they do not immunize speakers from prosecution under the Act, but only provide affirmative defenses — on which the speaker will bear the burden of proof — to be asserted following prosecution. As such, they are unlikely to curb the Act's severe chilling effect. See Speiser v. Randall, 357 U.S. 513, 526 (1958) ("The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . .."); CDA, 929 F. Supp. at 856 ("Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. . . . A successful defense to a criminal prosecution would be small solace indeed.").

Moreover, compliance with the affirmative defenses will result in the stigmatization of speech by forcing Web sites to create "adults only" zones, which are widely associated with pornographic materials. See H.R. Rep. No. 105-775, at 26 (1998) ("Credit card verification is commonly used today in both the dial-a-porn and Internet context and it should be easy to use and implement for commercial entities that sell pornography on the Web."). Indeed, as the government's own expert makes clear, the adult-check system advocated by the government is used in connection with pornographic Web sites. See Report of Laith Alsarraf at 9 ("Adult Check is used mostly by adult entertainment Web sites, which often contain sexually explicit materials that may be unsuitable for minors."). The affirmative defenses thus essentially require Internet purveyors of speech for "commercial purposes" whose sites contain some degree of sexually-frank content to create "adults-only" zones, thereby stigmatizi ng the speech by equating it with pornography. See Shea v. Reno, 930 F. Supp. 916, 943 (S.D.N.Y. 1996)(finding it burdensome for commercial and non-commercial content providers of non-pornographic content, as well as users wishing to access such material, to associate with adult verification services, which are identified with pornographic materials and users of same), aff'd, 117 S. Ct. 2501 (1997). [5]

Finally, Web sites, particularly many created and maintained by amici, are increasingly employing interactive technology, which permits visitors to communicate with one another in discussion groups and chat rooms, as well as by electronic mail. To the extent that the law applies to these features of Web sites, it causes additional burdens. While the employment of interactive

technology greatly enhances the First Amendment value of the Internet by permitting listeners to seamlessly transform into speakers and speakers into listeners, implementation of one or more of the verification schemes envisioned by the Government will bring such technological strides to a halt.

For one, employment of verification schemes in interactive environments such as chat rooms will destroy the promise of such media of communication by fundamentally interfering with the spontaneity and flow of dialogue that occurs within them. Further, those who sponsor such fora on their Web sites (as do many of the entities represented by amici), faced with the costly and difficult prospect of monitoring the speech occurring on them and the concomitant risk of prosecution under the Act for allowing ill-defined "harmful to minors" speech to transpire, will necessarily think twice about offering such fora.

These profound shortcomings of COPA's affirmative defenses leave amici's speech sponsors, representative of many other Internet speakers, with two equally untenable alternatives: (1) offer speech that is unquestionably constitutionally protected as to adults but which may be construed as "harmful to minors," and thereby risk criminal prosecution and civil penalties under the COPA; or (2) suppress such speech by self-censorship, thereby denying adults access to constitutionally-protected material. Requiring amici's constituents to face this dilemma is violative of fundamental First Amendment principles.

III. COPA IS UNCONSTITUTIONAL BECAUSE LESS RESTRICTIVE MEANS EXIST THAT ARE MORE NARROWLY TAILORED AND MORE EFFECTIVE.

COPA is unconstitutional because there are less restrictive measures Congress could have relied upon that would have been both more narrowly tailored in their impact on protected speech and more effective in preventing minors from accessing "harmful" material on the Internet. Specifically, any interest on the part of the government in insulating minors from certain speech on the Internet can be furthered far more effectively and far less intrusively by permitting parents to determine for themselves the content to which their children should have access. In addition to avoiding a criminal statute imposing content-based restrictions on speech, deference to parental control in this area would further the important public interest in placing the ultimate responsibility of child-rearing in the hands of parents. See H.R. Rep. No. 105-775, at 2 (1998) (noting Congressional finding in connection with COPA that "custody, care, and nurture of the child resides first with the parent") (emp hasis added); see also Fabulous, 896 F. 2d at 788 (noting that "our society has traditionally placed" decisions concerning child rearing "on the shoulders of the parent"). Indeed, in view of the availability and effectiveness of user-control technology, the development and enhancement of which is proceeding at a rapid rate, it is questionable whether the government's interest in regulating speech in this area can be deemed compelling at all.

A. A Significant and Growing Number of Technological Tools Exist That Enable Parents To Determine To Which Materials Their Children Should Have Access.

In striking down the CDA, this Court reviewed and relied upon the rapid development of a variety of technologies that enable parents and others to control minors' access to material deemed to be inappropriate for them. As the Supreme Court noted, "the evidence indicates that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material that parents may believe is inappropriate for their children will soon be available." CDA, 117 S. Ct. at 2336. The technological means for parental control anticipated by the Supreme Court have in fact been realized and, indeed, continue to be refined at a rapid rate. As of

September 1998, AT&T Labs Research had identified more than thirty-five products enabling parents to control minors' access to material on the Internet. [6] An understanding of the scope and diversity of these technologies makes plain the unconstitutionality of COPA.

As detailed below, parents or guardians desiring to shield minors from material on the Internet have available to them a wide variety of options, based on, among other things, the level of control sought to be exercised and the types of content sought to be restricted. User-control options include (but are by no means limited to):

- **Filtering and blocking software**: This technology enables parents to install software on the family computer that blocks access to sites deemed by the parents to be inappropriate for their children. Parents can choose from a wide variety of filtering approaches to find a system that suits their family needs. [7] The filtering software products on the market today offer a high degree of customizability to suit the individual preferences of each family. For example, parents have the ability to adjust settings according to the age of their children, the time of day their children most often use the Internet, and the number of family members that share the same terminal. [8]

- **Filtered Internet Service Providers ("ISP")**: Parents who prefer not to install software on their computers can select an "ISP" that pre-screens content before it reaches the home computer. The Mayberry USA ISP, for example, provides nationwide filtered Internet service that blocks sites deemed pornographic even if specifically requested by a user. [9] Similarly, amicus PSINet offers "PSIChoice," a filtering service that enables other ISPs to offer filtered Internet service at the network level.

- **Filtered Internet Browsers and Search Engines:** Search engines today provide customers with the option of screening out undesired content. When a search result produces a site identified as inappropriate, this site will be blocked or suppressed. Many filtered search engines and browsers are available free of charge, and can often be found as companions to popular search engines. Kids CyberHighway, for example, functions as an attachment to the Microsoft Internet Explorer. The AltaVista search engine offers an advertising-revenue supported "Search Service." AOL provides a search engine, "NetFind Kids Only," that links only to sites considered safe for children. [10]

- **Self-Contained Online Communities**: To ensure that their children access only a limited number of pre-approved sites, parents can employ products such as Bonus.com, the Supersite for Kids, Disney's Daily Blast, EdView's SmartZone, and Click & Browse Jr. [11] These products use editorial guidelines to limit children's Internet exposure to educational and enriching Web sites.

- **"Greenspaces" — Child-Oriented Internet Sites:** Parents who prefer to guide their children to child-oriented sites without actually imposing technological barriers to other sites can choose from child-appropriate sites compiled by libraries and educators, such as "Kids Connect Favorite Web Sites" selected by school librarians for K-12 students, or the American Library Association's "700+" list of more than seven hundred child-friendly Web sites. [12]

- **Supervisory and Monitoring Tools**: Technology is available today that enables parents to monitor their children's use of the Internet, as well as to restrict their use by time of day and when a parent is present. [13]

These and many other user-control options provide effective methods by which to insulate children from content parents may deem inappropriate. Moreover, these user-control tools are widely available across the entire United States. A number of amici, among other Internet-related companies, have joined together to promote the nationwide availability of these tools, and have formed "America Links Up," a forum through which parents and others can obtain information in order to ascertain which user-control tools best suit their individual needs. [14]

These efforts have proven successful. Today, each of the major Internet and online services providers make available filtering technology at minimum cost. [15] Indeed, more than fourteen million Internet-connected households currently enjoy access to filtering capability through America Online alone. Moreover, several leading manufacturers of personal computers bundle filtering software with their computers. [16] Indeed, under a provision of COPA not challenged here, Internet service providers are obligated to inform users of the availability of blocking and filtering tools. Thus, user-based controls now provide parents and guardians effective and affordable means for supervising minors' access to material on the Internet.

B.User-Based Controls Provide More Narrowly Tailored Means of Furthering The Government's Purported Interest in Enacting COPA.

As compared to the content-based restrictions on speech imposed by COPA, user-based control tools, along with public education on Internet use, provide far more narrowly tailored means of furthering the government's asserted interest in protecting children from assertedly harmful materials on the Internet. While protecting minors, user-based controls allow adults to access freely, and speakers to publish freely, constitutionally-protected material, without the burdens of adult identification and without fear of criminal sanctions for disseminating speech that might, in some community, be deemed "harmful to minors." Moreover, the diversity and flexibility of user-based controls further the important public policy of affording parents the ability to determine — based on their own family's values, as well as on the specific ages and needs of their children — the Internet content to which their children should have access. [17]

C. User-Based Controls Provide More Effective Means of Furthering The Government's Stated Interest.

In view of the wide availability of sexual material on foreign-based Web sites, as well as other limits on COPA's scope, COPA will not advance the government's stated interest in preventing minors from gaining access to assertedly harmful material on the Web in a "direct and material" way. User-based controls, in contrast, have a far wider reach, and thus provide a far more effective means of furthering the government's stated interest.

User-based controls have the ability to block minors' access to Internet speech originating outside of the United States, which this Court in CDA found to be as high as forty percent. See CDA, 929 F. Supp. at 848. Were COPA to take effect, the percentage of sexual content on the Internet originating abroad would likely increase as foreign content providers seek to fill the void in Internet content left by COPA. [18] User-based controls, in contrast, have the ability to effectively block and filter content originating abroad, as well as within the United States. In addition, user-based controls extend to material outside the scope of the "commercial purposes" requirement, as well as to material disseminated over all parts of the Internet, including chat groups, news groups, and electronic mail.

Without support, the government argues that user controls cannot keep pace with the growth of

Internet publication and will fail to identify certain "harmful" Web sites. To date, the marketplace has put tremendous resources into the creation of user-control technology — surveying millions of Web sites, building up a base of surveyed sites, and developing increasingly sophisticated tools. The collective experiences of amici indicate that the number and sophistication of parental control tools will continue to grow.

Amici believe that user-based controls, on balance, will provide a far greater measure of protection for children than will COPA. While it is true that user-based screening will not prevent all minors from gaining access to all "harmful" materials on the Web, for the above reasons, this approach is far superior to the content-based restrictions on speech imposed by COPA.

D. Congress Adopted COPA Without Adequately Considering These Less Restrictive and More Narrowly Tailored Means.

Congress did not create the detailed factual record constitutionally required to support its claim that COPA is the most narrowly tailored means to achieve its intended ends. The Senate held no hearings on COPA, and the House Commerce Committee conducted only a single hearing, mere weeks before the passage of COPA, as part of an Omnibus appropriations bill. The House Commerce Committee's lone panel of non-Congressional witnesses did not include a single technology expert or provide any basis for a detailed examination of the variety of user-control technologies currently available. [19]

The Commission on Online Child Protection, created by Congress as part of COPA, is further evidence of Congress' failure to create a detailed factual record as it is required to do. The Commission is tasked to "identify technological or other methods, if any, to help reduce access by minors to material that is harmful to minors on the Internet" (see COPA § 5(c)), including parental resources, blocking and filtering software, labeling and rating, as well as age verification systems — the very less restrictive measures that Congress was required to investigate prior to enacting COPA, but did not. Absent such a factual record, COPA's burdens on constitutionally-protected speech are wholly improper, particularly where, as here, less restrictive, more narrowly tailored, and more effective measures to achieve Congress' stated ends are available.

CONCLUSION

For the foregoing reasons, amici respectfully submit that COPA is an unwarranted restraint on free speech and should be declared facially unconstitutional.

Dated: January 11, 1999 Respectfully submitted,
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FOOTNOTES

1 COPA provides criminal penalties of up to six months imprisonment, as well as civil penalties of up to $150,000 for each day of violation, see COPA § 231(a).

2 Moreover, as the Supreme Court noted in distinguishing the state harmful-to-minors law upheld in Ginsberg v. New York, 390 U.S. 629 (1968), from the CDA, under both the CDA and COPA, "neither the parents' consent — nor even their participation — in the communication would avoid the application of the statute." CDA, 117 S. Ct. at 2341. The same infirmity condemns COPA.

3 See Online Insecurity, Bus. Wk., Mar. 16, 1998 (available online at http://www.businessweek.com/1998/11/b3569107.htm). According to this Business Week/Harris Poll, 78 percent of respondents would be more likely to use the Internet if the privacy of their personal information was protected. "Worries about protecting personal information on the net ranked as the top reason people are staying off the Web — above cost, ease of use, and annoying marketing messages." See also Louis Harris and Associates, E-Commerce and Privacy: What Net Users Want (1998) (Executive summary available online at http://idt.net/~pab/) ("81% of Net users and 79% of Net users who buy products and services on the Net are concerned about threats to personal privacy while online.").

4 See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 754 (1996) ("written notice requirement[s] will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel"); Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission, 693 F. Supp. 332, 338 (E.D. Pa. 1989) (access codes impose a self-identification process, which carries with it "the societal opprobrium associated with dial-a-porn messages and the probable undesirability of having one's name and address at the disposal of message providers and other third parties"), aff'd, 896 F.2d 780 (3d Cir. 1990).

5 Indeed, the Department of Justice has itself recognized the constitutional problems in applying a harmful-to-minors standard to "the unique media of the Internet," in view of the inherent difficulty in segregating "adult speech" in the context of the "dynamic, interactive nature of the Internet." See DOJ Ltr. at 3.

6 Lorrie Faith Cranor et al., Technology Inventory: A Catalog of Tools that Support Parents' Ability to Choose Online Content Appropriate for Their Children (last modified Sept. 1998) http://www.research.att.com/projects/tech4kids .

7 Blocking and filtering products use a variety of methods to identify potentially objectionable sites. For example, Cyberpatrol (http://www.learningco.com), CYBERsitter (http://www.cybersitter.com), and Cyber Snoop (http: //www.pearsw.com) ask information specialists, parents, and teachers to classify and rate sites. Other systems, such as GuardiaNet (http://www.guardianet.net) and NetFilter (http://www.netfilter.com), identity harmful material by searching online content and web site addresses for keywords such as "sex" or "breast". Surfwatch (http://www.surfwatch.com) and NetNanny (http://www.netnanny.com) are examples of filtering programs that use a combination of third party rating and keyword screening. Filtering programs typically p rovide means for obtaining updates to their classifications. For example, CyberPatrol's and Surfwatch's list of objectionable sites are updated daily

and these additions can be downloaded from their web sites. These filtering companies face tremendous market-based incentives to keep pace with ever-changing Internet content.

8 For example, CyberPatrol provides a time management function that allows parents to control the time of day that children are able to access the Internet, as well as controlling the total number of hours per day or week spent online. SmartFilter (http://www.smartfilter.com) allows parents to track the sites that their children have visited. CYBERsitter and Surfwatch allow parents to edit the list of blocked sites according to their own judgment.

9 See http://www.mayberry.net. America Online's "Parental Controls" also provides children with age-appropriate Internet accounts that screen out objectionable material and block access to chat and e-mail functions. Additionally, N2H2 sells a popular filtering product, "Bess", to ISPs, who in turn provide the option of filtered access to their customers. See http://www.aol.com;http://www.N2H2.com.

10 See http://www.att.net, http://www.altavista.digital.com; http://www.aol.com/netfind/kids/home.html.

11See http://www.bonus.com; http://www.disney.com; http://www.edview.com; http://www.netwavelink.com/.

12 See http://www.ala.org/ICONN/kcfavorites.html; http://www.ala.org/parentspage/greatsites.

13 In addition to CyberPatrol and SmartFilter, a variety of products allow parents to simply monitor their children's Internet usage without necessarily blocking access. For example, Mail Gear (http://www.urlabs.com)allows parents to track, approve and archive e-mail communications using reporting and logging tools. Net-Rated (http://www.netrated.com) provides time control, pass-word protection, and activity log functions. WebChaperone (http://www.webchaperone.com/) offers a "Recent Web Pages" command that tells parents which sites their children have visited and how often.

14 See http://www.americanlinksup.org.

15 Daniel J. Weitzner, Center for Democracy and Technology, Internet Family Empowerment White Paper, (last modified July 16, 1997) http://www.cdt.org/speech/empower.html .

16 Id.

17 In this regard, amici note the important distinction between parental employment of user-based control tools versus mandatory imposition of such technology by a public institution for purposes of restricting the materials to which their patrons may have access. While user-based tools provide a range of easy-to-use and affordable options for parents and guardians to tailor and supervise their minors' access to different types of content on the Internet, such tools pose constitutional and policy problems when mandated by government institutions, such as public libraries, which serve broad and diverse communities. See, e.g., Mainstream Loudoun v. Loudoun County Pub. Library, 2 F. Supp.2d 783 (E.D. Va. 1998) (public library policy mandating use of blocking software at all times by all patrons to exclude specified content on publicly available Internet-access terminals held unconstitutional).

18 Amici note that it is also simple technically for content providers in the United States to electronically transfer their publications to foreign servers.

19 See Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing

Before the House Subcomm. on Telecommun., Trade, and Consumer Protection (Sept. 11, 1998) (available online at http://www.com.notes.house.gov/cchear/Hearings.nsf).