Protecting Children from Harmful Materials on the Internet: The US Experience (A Discussion on the First Amendment and Internet)*

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I. Introduction

State and federal governments have long struggled to implement statutes that regulate children's access to harmful materials on the information highway. However, it is not easy for the government to provide substantial protection for children on the internet while protecting the First Amendment rights of all Americans. The tension between these critical interests has produced consecutive legislative debates and several Supreme Court decisions.

Although there are several forms of expression that can be harmful to minors this paper focuses exclusively on obscene and pornographic materials.

When creating a regulation attempting to control children's ability to access materials on the Internet, applying "cliché" standards to this new medium creates several difficulties and unsatisfactory results. In fact, the genuine and rapidly developing character of the internet prevents Congress from generating lawful and rational solutions related to children protection.

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The paper will first explore the application of the First Amendment to the governmental efforts to control access on to the internet obscenity and pornography as harmful materials to children. This part will briefly examine, *the Communications Decency Act (CDA), the Child Pornography Prevention Act (CPPA), the Child Online Protection Act (COPA), the Children's Internet Protection Act (CIPA)* and the Supreme Court's reactions over them. Part II of this paper will analyze the general scope of the problem that both Congress and the Supreme Court seek to solve and will discuss whether filtering, a recently displayed remedy, is a constitutional and effective solution for this problem.

II. Attemps by Congress to Protect Children and the Supreme Court's Balancing of First Amendment Rights

After the 1990's, Congress attempted to regulate harmful material on the internet to protect children. But, many of these attempts have not lived long.

A. Communications Decency Act (CDA)

As part of the Telecommunications Act[1] of 1996, the Communications Decency Act[2] (DCA) was Congress' first attempt to limit minors' access to harmful pornographic materials on the highway. One of the provisions of the Act criminalized knowingly transmitting "obscene or indecent" messages to any person less than eighteen years of age[3]. The other one prohibited reads as, "knowingly sending or displaying to a person less than eighteen years of age any message that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs[4]." Plaintiffs filed two separate suits challenging the two provisions of the statute which are known as the "indecent transmission" provision and "patently offensive display" provision[5]. After the cases were consolidated and a preliminary injunction was granted by the district court, the government appealed directly to the Supreme Court[6].

The Court found these provisions violating the First Amendment since they were "content-based restriction on speech and

1 47 U.S.C. § 151.
2 47 U.S.C. § 223.
3 47 U.S.C. § 223(a)(1)(B)(ii).
4 47 U.S.C. § 223(d).
5 Reno v. American Civil Liberties Union (ACLU), 521 U.S. 844, 858 (1997).
6 Id. at 844.

(could) not be properly analyzed as a form of time, place and manner regulation[7]." The majority of the Justices concluded that the CDA "lacked the precision that the First Amendment requires" in order to regulate the content of speech[8]. According to Court, the vagueness of the regulation raised special First Amendment concerns because of its chilling effect[9]. "The interest in protecting the children from harmful materials does not justify an unnecessarily broad" restriction of speech oriented to adults[10]. Evaluating the CDA under the strict scrutiny analysis, the Court stated that, the measures were not narrowly tailored to serve a compelling governmental interest because less restrictive means to protect minors from access to harmful materials were available[11].

B. The Child Pornography Prevention Act (CPPA)

Congress also passed the Child Pornography Prevention Act[12] (CPPA) in 1996. The criminal statute expanded the federal prohibition on child pornography to both pornographic images made using actual children[13] and visual depictions of children that appear to include minors[14] and the ones that are advertised, promoted, presented, described or distributed in such a manner that conveys the impression that they contain sexually explicit depictions of minors[15].

Plaintiffs, a group called "the Free Speech Coalition" and others, sought to test the constitutionality of CPPA by asserting that the legislation abridged the freedom of speech. They alleged that the "appears to be" and "conveys the impression" provisions in the Act are overbroad and vague under the First Amendment of the Constitution. The District Court disagreed and granted the Government summary judgment.[16] The decision was appealed to the Ninth Circuit Court of Appeals, which reversed the lower court reasoning that "the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts." The court held the two provisions unconstitutionally vague and overbroad because

7 Id. at 868.
8 Id. at 874.
9 Id. at 871-872.
10 Id. at 875.
11 Id. at. 881-882.
12 18 U.S.C. § 2251.
13 18 U.S.C. § 2256 (8) (A).
14 18 U.S.C.. 2256 (8) (B).
15 18 U.S.C. 2256 (8) (D).
16 See Ashcroft v. The Free Speech Coalition, 535 U.S. 234, 243 (2002).

the prohibited images do not include real children[17]. The Supreme Court found the challenged part of the law to be inconsistent[18] with the requirements of *Miller v. California*[19], which mandates, among other things, that materials involving adults must appeal to the "prurient" interest before they can be criminalized[20]. The Court held that, the statute was beyond the *Ferber*[21] test and could not be considered as a child pornography statute[22]. Thus, the Court did not include virtual child pornography on its unprotected speech list consisting of obscenity, defamation, incitement and child pornography using actual children[23].

C. Child Online Protection Act (COPA)

In response to *Reno v. ACLU*, as a second attempt to make the Internet safe for children, Congress enacted the Child Online Protection Act[24] (COPA). Applying to only World Wide Web, COPA was designed more narrowly than the CDA. In addition to this it was limited to the communications for commercial purposes. COPA criminalized knowingly posting "for commercial purposes of World Wide Web content that is harmful to minors.[25]" The term material that is "harmful to minors" was defined as; "any communication … that the average person, applying contemporary community standards, taking the material as a whole and with respect to minors is designed to appeal to … the prurient interest; depicts … in a manner patently offensive with respect to minors, … sexual act or sexual contract … taken as a whole, lacks serious literary, artistic, political or scientific value for minors[26]."

Plaintiffs, internet content providers and civil liberties groups filed a lawsuit and district court granted a preliminary injunction. The district court reasoned that the plaintiffs "were likely to prevail on their argument that there were less restrictive alternatives of the statute[27]." The Government appealed the district court decision. The Court of Appeals justified the injunction by stating a different

17 The Free Speech Coalition v. Reno, 198.F.3d. 1083, 1086, 1097 (1999).
18 535 U.S. at 258.
19 Miller v. California, 413 U.S. 15 (1972).
20 Id. at 24.
21 New York v. Ferber, 458 U.S. 747 (1982).
22 Ashcroft v. The Free Speech Coalition, 535 U.S. at 249-257.
23 Id. at 240.
24 47 U.S.C. § 231 (1997).
25 47 U.S.C. § 231 (a) (1).
26 47 U.S.C. § 231 (e) (6).
27 American Civil Liberties Union v. Reno, 31 F.Supp. 2nd 473, 497 (E.D. Pa. 1999).

reason. The Third Circuit stated that the "community standards" language made the law unconstitutionally overbroad[28]. The Supreme Court of the United States reversed the decision, holding that "the community standards language did not, standing alone, make the statute unconstitutionally overbroad[29] [30]." However, the Court also recognized that COPA might be unconstitutional for other reasons. On remand, the Third Circuit once more affirmed[31] the district court's injunction on the enforcement of COPA -but this time- focusing on the argument that that the statute was not narrowly tailored and was the least restrictive means available to obtain the government's goal of protecting children from the harmful materials[32].

On June 29, 2004, by a vote of 5-4, Supreme Court upheld the injunction against the enforcement of COPA[33]. The Court held that the government did not demonstrate COPA is the least restrictive method of protecting minors from harmful or indecent material. Referring to its earlier decision, *United States v. Playboy Entertainment Group*[34], the Court subjected the statute to strict scrutiny and decided that the injunction should remain in effect since this was a content based prohibition, which means the government bears the burden of proving that it is the least restrictive way to protect children from harmful speech[35]. Court found filters "less restrictive" than the challenged statute's restriction[36]. The court also reasoned that, since the technology had developed "more and better alternatives [might] exist when the District Court [had] entered its fact findings[37]." The Court, on the other hand noted that Congress might pass other statutes to prevent children from harmful materials on the internet[38].

Joined by Chief Justice Rehnquist and Justice O'Connor, Justice Breyer dissented from the Court's decision. Applying strict scrutiny, Breyer found COPA narrowly tailored to a compelling in-

28 217 F.3d 162, 166 (2000).
29 Ashcroft v. ACLU, 535 U.S. 564 (2002).
30 Although eight Justices concurred opinion, only five of them joined in the particular holding that COPA's reliance on contemporary community standards does not render the statute substantially overbroad.
31 ACLU v. Ashcroft, 322 F. 3d 240 (2003).
32 Id. at 266-271.
33 Ashcroft v. ACLU, 124 S. Ct. 2783, 2795 (2004).
34 United States v. Playboy Entertainment Group, 529 U.S. 803 (2000).
35 Ashcroft v. ACLU 124 S. Ct. at 2794.
36 Id. at 2792.
37 Id. at 2794.
38 Id. at 2795.

terest and that it is the least restrictive means available to further that interest[39]. Justice Scalia, on the other hand, contended that, the Court erred in applying COPA strict scrutiny standard. He wrote in his dissenting opinion that COPA's lesser restrictions were not unconstitutional since it regulated commercial pornography[40].

D. Children's Internet Protection Act (CIPA)

By enacting the Children's Internet Protection Act[41] (CIPA) of 2000, Congress preferred to regulate the receivers' conditions instead of prohibiting transmission of the sexually explicit materials by criminal sanctions. To prevent minors, CIPA requires public schools and public libraries that receive federal technology funds or federal discounts on Internet access to install software including filters for blocking images that are "obscene", "child pornography" or "harmful to minors" Congress offered two forms of federal assistance for public libraries seeking to obtain funds and discounts. If the libraries don't choose to comply with the provisions they will no longer receive the noticed funds and discounts[42]. According to the law, a supervisor, an administrator or a supervised person "may disable the filter to enable access for bona fide research or other purposes.[43]"

In fact, with CIPA, having lost its initial round of constitutional review, the government asked the Court to rescue its latest effort to protect children, but this time with a different approach. CIPA was challenged by a group of libraries, library associations, library patrons and web publishers. Applying the strict scrutiny and describing internet access as a "designated public forum" the federal panel held that the use of technology protection measures was not constitutional because it was not narrowly tailored to government's interest in protecting the children.[44] The Court also determined that the Congress exceeded its authority under the Spending Clause[45].

The Justice Department appealed the District Court's decision to the Supreme Court and the high court ruled 6-3 that CIPA did not violate the First Amendment[46]. The Court rejected the idea

39 Id. at 2798-2799 (Breyer, J., dissenting).
40 Id. at 2797 (Scalia, J., dissenting).
41 47 U.S.C. § 254 (2004).
42 47 U.S.C. § 254 (f) (1).
43 47 U.S.C. § 254 (h) (6) (D).
44 American Library Association v. United States, 201 F. Supp. 2d 401, 407. (E.D. Pa.2002).
45 Id. at 453.
46 United States v. American Library Association, 539 U.S. 194, 214.

that internet access in public libraries was a "traditional" or even a "designated" public forum[47]. The majority of the Justices concluded that there was no need to apply the strict scrutiny standard to internet access. According to the Court, "in deciding not to collect pornographic material from the internet a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision.[48]" The Court emphasized that CIPA was not a penalizing or mandatory statute for the libraries that didn't choose to use filters[49].

II. The Problem and Critisism of Current Approach: Filtering

A. Analysis of the Problem:

There are currently approximately one billion people using internet[50]. Like the physical world, the medium of cyberspace "is entitled to the protection of the First Amendment[51]." Since it is borderless, the range of content available on the internet "is as diverse as the human thought.[52]" "Because of the pervasiveness of the internet and the immediacy of its power to communicate with ideas[53]", legislators have tried to limit internet speech in the name of the children protection. Inevitably, these efforts have the spillover effect of restricting adults' access to such content[54].

Since the U.S Constitution "was not drafted with children in mind", it has always been burdensome to interpret constitutional standards to the issues related with children[55]. When we take into consideration of the Supreme Court decisions mentioned above, it may be firstly noted that the Supreme Court has focused mainly on the spillover effect on adults' rights. Although minors don't have the rights on the same description of the adults', they shouldn't be threatened as having fundamentally different rights from adults. In

47 Id. at 205.
48 Id. at 207.
49 Id. at 213.
50 See http://www.internetworldstats.com/stats.htm, (last visited November 19, 2005).
51 John E. Nowak, Ronald D. Rotunda, Constitutional Law, 7th ed., 2004, St Paul Minn: Thomson /West, 1407.
52 521 U.S. at 852.
53 Jamin B. Raskin, We the Students: Supreme Court Decisions For and About Students, 2nd ed, 2003, Washington, D.C.: CQ Press, 67.
54 Dawn C. Nunziato, Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech, 79. Chi.-Kent L. Rev.121, 122, (2004).
55 Martha McCarthy, The Continuing Saga of Internet Censorship: The Child Online Protection Act, 2005 B.Y.U. Educ. & L.J. 83, 93 (2005).

fact, minors should be treated according to their age grades among themselves when a legislative or judicial conduct is implemented with respect to them[56]. This condition becomes a more sensitive issue above all when it is subjected to internet speech.

Besides these arguments, when materials are restricted for children, the spillover that burdens adult access to lawful materials may sometimes be too heavy a First Amendment price to pay for protection of children. If Congress insists on enacting regulations similar to CDA and COPA, than it can be inferred that the real goal of the legislators is not to protect children; it is, in fact, to restrict adults' free speech by taking the advantage of child protection privilege.

Although the Constitution of the United Sates is oriented to protect nearly all kind of expressions in order to ensure the dissemination of ideas, there are limits to First Amendment protection and only a few categories of expression fall outside of the scope of protected speech. The Supreme Court has recognized, "incitement of imminent lawless activity[57]", obscenity, and fighting words as categories of speech that do not enjoy First Amendment protection[58]. There are two potential ways that pornography can lack First Amendment protection. First, Congress can regulate any pornographic material that meets the standard for obscenity[59]. Additionally, Congress can regulate types of pornography that do not reach the obscenity standard for adults but are still considered harmful to minors, because such material falls outside the scope of minors' First Amendment freedoms[60].

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56 See Amitai Etzioni, On Protecting Children From Speech, 79 Chi.-Kent L. Rev. 3, 42-53 (2004); See Martha McCarthy, supra note 55, at 97-100.

57 Raskin, supra note 53, at 12.

58 Brandenburg v. Ohio 395 U.S. 444 (1969) (incitement of imminent lawless activity); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

59 After determining a standard for obscenity in Roth v. United States, 354 U.S. 4.76 (1957), the Supreme Court determined the current standard for obscenity in Miller v. California, 413 U.S. 15. According to this standard, the government may regulate expressive material that depicts or describes sexual conduct if (1) an average person who applies contemporary community standards would find that the material, taken as a whole, appeals to the prurient interest in sex; (2) the material portrays sexual conduct in a patently offensive way; and (3) the material does not have serious literary, artistic, political, or scientific value. Id. at 24. Any material that falls under this standard is outside the scope of the First Amendment and can be regulated.

60 Ginsberg v. New York, 390 U.S. 629, 638 (1968) (finding that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .'"

Under the First Amendment, courts imply distinctive standards when they are analyzing the regulations over free speech. While content neutral restrictions based on time, place or manner of the speech need only rational basis to survive, content based regulations of expression entail strict scrutiny to be deemed as valid. The Court will hold the regulation of the content of the speech only if it is narrowly tailored to further a compelling governmental interest and there is no less restrictive alternative[61].

Applying the Miller standard modified in light of Ginsberg and analyzing the current standards in the adult community to determine what is appropriate or inappropriate material for minors, the Supreme Court has permitted certain regulations that limit the ability of minors to access harmful materials and activities. However, CDA, CPPA and COPA decisions indicate that this standard brings out fundamental problems when attempting to regulate expressive material on the "internet". Consequently, the Court didn't evaluate the internet speech regulations regarding internet speech in the same context with other media[62]. Although Congress tries to implement the scope and extent of the First Amendment rights determined by the Court, it doesn't pass many of the exams regarding this subject. When the current decisions of Court are examined it seems to be that the Court is sympathetic to indirect, incentive regulatory goals for protecting children from harmful materials but "is quite reluctant to allow direct regulative of content[63]".

It can be inferred from CDA and COPA that certain denial of the access to speech on the internet is not permissible, even as to minors, when more narrowly tailored restrictions are available. Since the internet technology is developing rapidly there will always be "less restrictive alternatives" thus there will be more "narrowly tailored restrictions" available whenever the courts examine

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(quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

61 "The Government may, … regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable Communications of California, Inc.v. F.C.C, 492 U.S 109, 126; Ginsberg v. New York, 390 U.S. at 639-640; New York v. Ferber, 458 U.S. at 756-757.

62 "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them." (Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969))

63 Daniel A. Farber, The First Amendment, 2nd ed., 2003 New York: Foundation Press, 230.

a restrictive statute subjected to strict scrutiny. Consequently, in the light of the precedent, the future legislations of the Congress protecting children will likely be unconstitutional if it continues to limit the speech with direct, criminal statutes. Furthermore, the complex and dynamic character of internet breaks of the "constructive discourse between [the] courts and the legislatures[64]".

B. New Approach-New Discussions

After trying to regulate pornography on the internet directly and losing the battles in the federal courts, Congress has already taken a different approach and tried to regulate it indirectly. It used its spending power as an incentive for public libraries to comply with its wishes[65].

It is now well established that the First Amendment does not merely protect the right to speak and publish, but also the right to receive information spoken or published by others[66].

Although children do not have the same rights as adults, it is not easy to agree with the idea that CIPA did not violate First Amendment free speech clause before the fact that filters still block information that a child has a constitutional right to receive. The Court should have examined the constitutionality of the Act's restrictions under strict scrutiny standards even though it describes the internet access in public libraries as a non-public forum. According to the Court, "[i]n deciding not to collect pornographic material from internet, a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision[67]". However, since the Court itself realized that filters may block constitutionally protected speech erroneously; it shouldn't have evaluated the Act as "narrowly tailored to further a compelling

64 Being discontent with the majorities opinion Justice Breyer asked in his dissenting opinion "…what was happened to the 'constructive discourse between our courts and our legislatures' that is integral and admirable part of the constitutional design" Ashcroft v. ACLU, 124 S. Ct. at 2804 (Breyer, J., dissenting).

65 Mitchell P. Goldstein, Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet, 21 J. Marshall J. Computer&Info.L.141, 178-179, (2003).

66 Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 867 ("The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom") Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("The Constitution protects the right to receive information and ideas."); Martin v. Struthers, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press . . . necessarily protects the right to receive it.").

67 United States v. American Library Association, 539 U.S. 194 at 207.

state interest". In an information era, the interest of minors' in receiving information should come before the interest of governmental protection from harmful materials. But, as a result the Court didn't consider this "balancing test" *in United States v. American Library Associations.*

According to CIPA, certain speech may be prohibited to the minors under age of seventeen. This age is equal to or higher than the legal age for marriage in many States, as well as the age which young persons may choice to engage in sexual activities[68]. Even though it may be less restrictive than what was proposed in COPA, a child's search for information on, "breast cancer" or "depression" may be blocked as result of the artificial intelligence used to filter. But beyond this, filters have an especially serious impact on searches for sexual impact[69]. A wisely made search by a sixteen year old girl or a boy will likely be censored by filters because of its key words, "safe sex." Therefore adolescents and older minors should be distinguished from the other stages of childhood[70] in protective regulatory process in order the secure their First Amendment rights.

Using filtering methods in order to protect children is not a rational solution for many reasons. First, under current technology, filtering programs are ineffective in screening out harmful materials. As it is mentioned above, most importantly, despite ongoing developments, recent studies show that filters still censor constitutionally protected speech[71].

Forcing libraries to install filtering software, by either government mandate or intimidation, impedes the libraries' to determine what materials to acquire.[72] Public libraries and public schools that

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68 James Magee, Freedom of Expression, Westport, Conn: Greenwood Press, 295, (2002).

69 See The Henry Kaiser Family Foundation, See No Evil: How Internet Filters Affect the Search for Online Healt Information available at http:// www. kaisernetwork.org/health_cast/uploaded_files/Internet _Filtering_exec_summ. pdf (last visited Nov.13, 2005).

70 See Etzioni, supra note 56 at. 42-48; Colin MacLeod, A Liberal Theory of Freedom of Expression For Chidren, 79 Ci-Kent L. 55, 77 (2004).

71 See The Henry Kaiser Family Foundation; For supporting ideas of using filters in public libraries see Gregory K. Laughlin, Sex, Lie and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries, 51 Drake L. Rev. 213, 272-282, (2003).

72 See Jonathan P. Vallace, Purchase of Blocking Software By Public Libraries is Unconstitutional, available at http://www.spectacle.org/cs/library.html (last visited Nov. 22, 2005).

have chosen to install filter systems are left to the discretion of software companies, in determining what can and cannot be censored[73].

Taking into consideration the international character of the internet some commentators suggest that the international community make it in pornography site operator's best interest to adopt best practice guidelines. Once they have adopted these guide lines, the operators will be given the suffix .xxx for their web addresses. Consumers' understanding that they can choose between sites that will protect their privacy and financial information, and those that will not, will demand better commercial practices from sites they frequent[74]. However this is not a realistic expectation in the short run since many of the foreign countries have not been prepared for this issue yet. Furthermore, it is not easy to convince the porno industry to adopt such standards. According to another proposal children protection can be ensured by creating a separate x-rated internet domain (e.g. xxx) that could be accessed only with software purchased with verification of age. Using this "internet zoning method", materials harmful to children would not be removed; instead, can be placed in "a secluded location, off in the back, where children cannot go[75]".

After facing the criticisms of filtering, as a further effort, the Congress enacted the Dot Kids Implementation and Efficiency Act[76] of 2002. The Dot Kids Act is subjected to facilitate the creation of a second-level domain within the United States country code internet domain for the location of material that "is suitable for minors and not harmful to minors" and "to ensure the effective and efficient establishment and operation of the new domain[77]." The Act defines "minors", as children under thirteen[78]. In effect, it mandates the creation of a single domain name under which anyone may register a higher-level domain name and create a Web site associated with

73 James Magee, supra note 68, at 295.

74 Parry Aftab, White Paper, Thinking Outside the "Porn" Box, Seperating the Sexual Content Debate from Issues Relating to Marketing, Commercial Practises, and Child Exploitation at www.wiredsafety.org/resources/pdf/xxx_ white paper.pdf (last visited November 18, 2005).

75 Todd A. Nist, Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online, 65 Ohio St. L.J. 451, 485 (2004); For similar proposals see also: David F. Norden, Filtering Out Protection: The Law, The Library, and Our Legacies, 53 Case W. Res L. Rev. 767, 812-814.

76 Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, pmbl., 116 Stat. 2766, 2766 (codified at 47 U.S.C. § 941).

77 Id. § 2 (b) (1) (2).

78 Id. § 2 157 (j) (2).

it. The operator of the Web site must abide by certain rules designed to ensure that the site is child-friendly[79]. According to some commentators, the Act serves to "build an entirely new web space-set apart and dedicated solely to content appropriate for children[80]"

The events of the last several years have shown that Congress can not use the law alone to solve the complications caused by technology[81]. While participation is optional, self regulation should be encouraged. Congress could establish a mandatory rating system. Some authors propose that a ".porn" domain could be established similar to the new ".kids" domain[82].

Congress should try to find other alternatives which are not mandatory and don't carry the risk of chilling children and adult's protected speech. But, currently, the only way to completely prevent children from access to harmful material is "to ban all speech" and the First Amendment definitely prohibits this solution. The battle here -between the porn industry and government- is like a "cat and mouse" game. In this "international" game the Legislator should consider the other side's power and invite both parents and foreign countries to a permanent partnership. Since the responsibility in this issue, "lies first and foremost on parents"[83], Congress should respect this responsibility rather than acting in its own initiative. Thus it should use its resources to help parents solve the problem.

III. Conclusion

Since the issue of protecting children online is complex, it requires complex solutions with parents, teachers and libraries rather than insufficient mandatory solutions that restrict unlawfully the First Amendment rights of adults and children.

After failing in *Reno v. ACLU* and *Ashcroft v. ACLU* tests and succeeding in United States v. American Library Association, Congress will likely follow the "technique" that it used in CIPA. In fact,

79 Id. § 2 157 (c).

80 Alice G. McAfee, Creating Kid-Friendly Webspace: A PlayGround Model For Internet Regulation, 82 Tex. L. Rev. 201, 225 (2003).

81 Goldstein, supra note 65, at 206.

82 Sue Ann Mota, Protecting Minors From Sexually Explicit Materials On the Net: COPA Likely Violates The First Amendment According To the Supreme Court, 7 Tul. J. Tech & Intell. Pop.95, 111, (2003).

83 Sue Ann Mota, at. 111; Whitney A. Kaiser, The Use Of Internet Filters In Public Schools: Double Click On the Constitution, 34 Colum. J.L. & Soc. Probs. 49, 76 (2000); Johanna M. Roodenburg, "Son of CDA": The Constitutionality of the Child Online Protection Act of 1998; 6. Comm. L. & Pol'y 227, 255 (2001).

this means that Congress tries to do indirectly what it cannot do directly. Since the filters may still block information that a child has a constitutional right to receive, like its predecessors CIPA unconstitutionally chill protected speech.

In a balancing test we believe that the benefits of First Amendment protection overpower the cost of it. Thus, the Congress will have to change its method in respect to this test. Since the parental interest comes before the one that government's have, it should give legislative priority to encourage and support the parents in their sensitive struggle for protecting children.